10-1986

Solorio v. United States

Lewis F. Powell Jr.

ccc 06/06/86

Grant

Court unduly expanded subject matter juris. of court-martials.

PRELIMINARY MEMORANDUM

June 12, 1986, Conference
List 1, Sheet 2

No. 85-1581-CMY

Cert to Ct.Mil.App.
(Everett, CJ)

RICHARD SOLORIO (protests expansion of military court's jurisdiction)

v.

UNITED STATES

Federal/Civil

Timely

1. SUMMARY: Petr contends that Ct.Mil.App. has expanded the court-martial subject matter jurisdiction beyond the limits of O'Callahan v. Parker, 395 U.S. 258 (1969), and Redford v. Commandant, 401 U.S. 355 (1971), and that retroactive application of this new expansion violates his rights to due process.

Ct.Mil.App. has expanded juris based on "recent developments in society," not based on this Ct's precedences.

Grant. Cabell

2. FACTS AND DECISION BELOW: Petr was living in Juneau, Alaska, while serving in the Coast Guard. After an unrelated transfer to Governors Island in New York, petr was charged with fourteen specifications in connection with acts with two minor children of Coast Guard parents while in Juneau. The children were neighbors and friends of petr's children. The acts occurred within petr's privately owned home in Juneau 11 miles from the Federal Office Building where he worked. (There is no base or enclave in Juneau for Coast Guard personnel.) Petr also faced seven similar, but unrelated specifications for acts in New York.

After hearing evidence and argument, the trial judge dismissed the fourteen Juneau specifications under Relford v. Commandant. The judge found:

> "--[Petr] was properly absent from his unit at the time of each [offense in Juneau].
>
> "--Each offense ... occurred away from any military base at the accused's resident in the civilian community.
>
> "--Each offense ... occurred in a place not under military control.
>
> "--[T]here was no connection between the accused's military duties and the alleged offenses.
>
> "--The victims were not service members and were not involved in military duties or military supported or sponsored activities at the time of any of the alleged offenses.
>
> "--Civilian courts are present [in Alaska] and available to adjudicate the offenses. While the State of Alaska has presently deferred prosecution in light of this proceeding, the State has not waived prosecution, nor declined to prosecute.
>
> "--Accused was not in uniform and in no way flouted military authority at the time of the alleged offenses.

> "--None of the alleged offenses posed a threat to any military installation ... [or] resulted in any violation of military property.
>
> "--All the alleged offenses are of the type traditionally prosecuted by civilian courts and are specifically of the type the Coast Guard has recently consented to have civilian courts prosecute Coast Guard members for in Alaska.
>
> "... There has been no demonstrated impact of the offenses on morale, discipline, the reputation or the integrity of the Coast Guard in Juneau .... The impact apparent in this case, that is, on the parents and the victims themselves is not different than that which would be produced by a civilian perpetrator.
>
> "... There has been no showing of diminished morale, discipline, or effectiveness within the military community in Juneau, Alaska. As to the effect of the alleged incidents toward the Coast Guard within the civilian community, there has been speculation by military personnel, but little more ...."

The Court of Military Review concluded that the trial judge had erred in basing his assessment of the impact on the Juneau command solely on the observed effect after departure of all parties, and that the relevant inquiry would be the impact of the offenses on morale and discipline at Governors Island, where the accused is now stationed and living on base. The court also disagreed with the trial court's finding that the parents were no more affected than if the perpetrator had been a civilian: "Such a conclusion overlooked the possible unique and distinct effect from the discovery by the fathers that a fellow Coast Guardsman may have committed volative offense" and the "natural expectation" that the Coast Guard "would take appropriate action to vindicate the outrage felt from such a grievous breach of faith by one shipmate towards another." The court held that there was "service connection" and therefore jurisdiction as a matter of

law. The dissent argued that a remand for further factual findings (e.g., effect at Governors Island) was necessary.

The Ct.Mil.App. found that the Ct.Mil.Rev. had probably intruded upon the military judge's factfinding power, and that precedents involving offbase sex offenses against civilian dependents of military personnel "would point to a different conclusion" than a finding of jurisdiction, Petition 8a, but nevertheless affirmed.

Relying on "later developments in the military community and in the society at large," and on "an increase in the concern of victims of crimes," Ct.Mil.App. decided to expand jurisdiction to include the present offenses. The court noted that the girls were receiving counseling after the offense, and that the parents also suffered psychological and financial harm ("except to the extent that, as military dependents, the victims were entitled to medical care at government expense").

Ct.Mil.App. noted that petr had been transferred from Juneau before the discovery of the offenses, but opined that "if this [transfer] had not occurred, it obviously would have been difficult--if not impossible--for the victim's fathers to continue to serve in the District Office with him." Id., at 11a. The court also speculated that future assignments for petr "would be greatly limited" because of the animus felt towards sex offenders. Finally, the court speculated that there might be lessened interest of civilian authorities in prosecution due to the military transfers of the victims and the accused away from Alaska, and benefits to petr, the victims, and the Coast Guard from try-

ing the Juneau offenses together with similar offenses allegedly committed at Governor's Island.

3. CONTENTIONS: Appellate defense divisions from the Navy-Marine Corps, the Army, and the Coast Guard have submitted separate filings in support of granting the petition. Because of the substantial similarity of the basic claims, the various arguments are treated in this memo as "petr's" contentions.

Petr first argues the Ct.Mil.App. has departed from O'Callahan and Relford. The Court in O'Callahan recognized that military jurisdiction deprives citizens of the fundamental protections of the Bill of Rights and Article III, and must be limited "to the least possible power adequate to the end proposed." 395 U.S., at 265, quoting Toth v. Quarles, 350 U.S. 11, 23 (1955). O'Callahan held that the service status of the offender was necessary but not sufficient for court-martial jurisdiction. 395 U.S., at 267. There must also be a showing that the offense is "service-connected". Id., at 272. Petr contends that under the factors applied in O'Callahan, i.e., petr's proper absence from the base, the commission of the offense off base, the civilian status of the victim, the absence of military control over the location of the offenses, and the availability of civilian courts to prosecute, id., at 273, there is no military jurisdiction.

Petr alleges that the present case similarly fails under the traditional application of the factors outlined in O'Callahan's successor, Relford v. Commandant, 401 U.S. 355 (1971). In Relford, the Court applied the service-connection test to a corporal who committed, on base, offenses against ci-

vilian females who were related to servicemen. Petr argues that in finding jurisdiction, Ct.Mil.App. ignored the detailed findings of fact by the trial judge, who made specific inquiries into the Relford factors.

Petr contends that beyond this rewriting of the record, Ct.Mil.App. has erred more significantly by relying on the "continuing effect" of the offenses on the victims and the military as its basis for jurisdiction. Basing jurisdiction on the psychological effect on the victim and the attendant impact on the military, petr argues, would justify courts martial hearing cases on many crimes, including any violent crime against a service dependent. Moreover, the military is affected whenever a servicemember commits an offense, if only because the military is deprived of his services while he is prosecuted and serving sentence, and because it casts the military in a bad light when the defendant is a serviceman. This expansive reach of court-martial jurisdiction is incompatible with the detailed inquiries of Relford and O'Callahan, and the cases' reluctance to confer jurisdiction except to the least possible measure adequate to the end to be served.

Petr also argues that Ct.Mil.App. has erred in suggesting that developments in the military and society since O'Callahan and Relford justify re-examining the cases applying that law. Society's increased concern for the victims of crime is no reason to deprive a serviceman of the constitutional protections of a civilian trial when jurisdiction is otherwise wanting. Moreover, there is no indication that the civilian justice

system is any less interested in or any less capable of protecting the rights of victims than the military justice system. Certainly here the Coast Guard has been completely satisfied with the treatment of similar cases by Alaskan courts. As the Ct.Mil.App. pointed out, Congress and state legislatures have made changes in civilian criminal systems to protect more fully the rights of victims. 21 M.J. 251, 254-155. Alaska has stated only that it will defer prosecution.

Petr also contends that this case is not a rogue decision. The Ct.Mil.App. has steadily increased the jurisdiction of courts-martial. Until 1980, the military courts found a lack of jurisdiction in a significant number of military cases involving off-post offenses including the use, sale, and transfer of drugs, sex violations, and property crimes. See Army Brief 7. In 1980, however, a divided Ct.Mil.App., in United States v. Trottier, 9 M.J. 337, 350, held that "almost every involvement of service personnel with the commerce in drugs is 'service connected.'" Three years later, the court held it had jurisdiction over off-post larcenies committed with a stolen military ID card, even though the result was not consistent with its precedents. United States v. Lockwood, 15 M.J. 1, 10. Recently, the court held that it had military jurisdiction in any offense committed by servicemen overseas. United States v. Holman, 19 M.J. 784 (A.C.M.R. 1984), aff'd, 21 M.J. 149 (C.M.A. 1985). In the present case, Ct.Mil.App. has gone beyond even these cases and found military jurisdiction based on the "concern for victims of crimes." 21 M.J., at 254.

Petr also argues that retroactive application of the new jursidiction, even if the jurisdiction is warranted, denies him Due Process. As Ct.Mil.App. admitted, its precedents "point the other way." Petr therefore had, at the time of the offense, an expectation that he was guaranteed indictment by grand jury and trial by petit jury.

Resp SG first contends that the case is on interlocutory appeal. Although petr subsequently has been convicted and sentenced, the sentence has not been upheld by "the convening authority." The SG also contends that the trial on the merits has produced additional facts that are relevant to the issue of jurisdiction. The SG acknowledges that if Ct.Mil.App. declines to hear this second appeal, the Court cannot grant certiorari (certiorari not available to courts of military review), but contends that the Ct.Mil.App. is "sensitive" to this fact, and that collateral attack in federal habeas is still available.

On the merits, the SG uses a rationale mentioned by the Court of Military Review but not relied upon by Ct.Mil.App.: there is no military base in Alaska for Coast Guard personnel and their families. A result contrary to Ct.Mil.App.'s would unreasonably restrict the ability of the Juneau commander to protect military personnel and their dependents. It is "immaterial" in the "unusual circumstances" of this case that the child abuse occurred in petr's home.

The SG also argues that Ct.Mil.App. was correct in relying on the effect on service families. Enlisted personnel must

feel secure about the safety of their families in order to carry out their missions while away from home.

Finally, the SG notes that the Alaska child abuse charges did not stand alone, but petr was also charged with committing similar offenses against other military dependents at Governors Island. The charges thus presented a pattern of behavior that posed a real threat to families near petr.

4. DISCUSSION: On the issue of retroactivity, it appears that the decision, although part of a trend within Ct.Mil.App. towards more expansive court-martial jurisdiction, was not foreseeable. The primary area of expansion involved illegal drugs. See Murray v. Haldeman, 16 M.J. 74 (C.M.A. 1983); United States v. Trottier, 9 M.J. 337 (C.M.A. 1980). When the offenses occurred, petr still was guaranteed indictment by grand jury and trial by petit jury of peers.

Petr is correct in arguing that the case erodes O'Callahan and Relford by finding court-martial jurisdiction based on a "new development" based on "concern for victims of crime." Ct.Mil.App. had found service connection based upon the "continuing effect on the victims and their families 'which ultimately impacts' on the morale of any military unit." Petition 10a, 12a. It is difficult to see how the limits of such an approach fit within the boundaries drawn by this Court.

The SG's counter arguments are not convincing. The SG attempts to characterize this case as unique, noting the fact that there is no military base in Alaska, but the Ct.Mil.App.'s opinion does not rely on any unusual facts. It is true that

Relford adopted "an ad hoc approach to cases where a trial by court-martial is challenged." 401 U.S., at 365-366. But despite the SG's attempts the opinion from Ct.Mil.App. simply does not bear out the characterization of this case as one that is squarely bottomed on unusual facts. As the language in the preceding paragraph shows, the Ct.Mil.App's opinion is not confined by any particularly abnormal circumstances. In fact, Ct.Mil.App's concerns about "continuing effect" would justify court-martial jurisdiction after any violent crime had been committed by a serviceman upon service dependents, even though that result is clearly beyond the contemplation of this Court in Relford and O'Callahan.

Nor do I find the SG's "discipline and effectiveness" arguments convincing. See Schlesinger v. Councilman, 420 U.S. 738 (1975) (court must gauge "the impact of an offense on military discipline and effectiveness, ... whether the military interest in deterring the offense is distinct from and greater than that of civilian society, and ... whether the distinct military interest can be vindicated adequately in civilian courts"). Setting aside Ct.Mil.App.'s strained counter-factual argument here ("had [Solorio's transfer prior to the discovery of the offenses] not occurred, it obviously would have been difficult ... for the victims' fathers to continue to serve in the District Office with him"), the court's rationale here again reaches far beyond Relford and O'Callahan. It proves too much to say that officers and enlisted personnel "must feel secure about the safety of their families in order to carry out their responsibilities while

away from home." This reasoning would extend court-martial jurisdiction to breaking and entering an off-base home by another serviceman.

Despite the arguments of the SG and the Ct.Mil.App, it does not seem relevant that there were other, similar charges pending (where court martial jurisdiction was presumably proper). Nothing in Relford or O'Callahan remotely suggests that the presence of jurisdiction over some charges confers jurisdiction over "similar" charges arising from actions at a different time and place. The two cases seem to point the other way, with their emphasis on assuring that, as far as possible, servicemen retain their constitutional right to grand-jury indictment and trial by petit jury. Court-martial precedent also provides little or no support for this "super pendent jurisdiction." See United States v. Shockly, 18 C.M.A. 610 (1969), dismissing off-post charges even though similar service-connected charges existed.

Finally, although the case is interlocutory, the jurisdictional issue is not subject to further challenge in the military courts, or to alteration by those courts. If Ct.Mil.App. declines to exercise discretionary review on petr's appeal from his subsequent, recent conviction, this Court cannot hear the case. Therefore it appears that this is a case where "intermediate" review is proper because the question of jurisdiction has been finally decided, and later review of the jurisdictional issue may be frustrated despite the ultimate outcome of the case. Cox Broadcasting Corp. v. Cohn, 420 U.S. 469, 481 (1975).

5. RECOMMENDATION: I recommend granting the petition

on the jurisdictional question and on the accompanying retroactivity question.

The SG has filed a response.

June 6, 1986 Chinnis Opinion in petition

June 12, 1986

Court .....
Argued ....., *19*...
Submitted ....., *19*...

Voted on....., *19*...
Assigned ....., *19*...
Announced ....., *19*...

No. 85-1581

SOLORIO

vs.

UNITED STATES

Grant

	HOLD FOR	CERT.		JURISDICTIONAL STATEMENT				MERITS		MOTION		ABSENT	NOT VOTING
		G	D	N	POST	DIS	AFF	REV	AFF	G	D		
Burger, Ch. J.		✓											
Brennan, J.		✓											
White, J.		✓											
Marshall, J.			✓										
Blackmun, J.			✓										
Powell, J.		✓											
Rehnquist, J.			✓										
Stevens, J.		✓	✓										
O'Connor, J.		✓											

February 4, 1987

SOLORIO GINA-POW

85-1581 Solorio v. United States(U.S. Court of Military Appeals)

MEMO TO FILE:

This case presents a straightforward question of jurisdiction as between military and civilian court. In addition, a due process claim is argued rather weakly.

Petitioner was a petty officer in the Coast Guard serving in Juneau, Alaska. There was no military "base" or "enclave", and Coast Guard personnel live and work in the city and reside in the civilian community. Petitioner was charged with sexually abusing the 10-year old daughter of his next door neighbor, ——— Johnson, a Coast Guard enlisted man. Petitioner also had a young daughter, and the two girls often played together. The alleged offense by petitioner occurred in his own residence over a period of two years.

Following petitioner's transfer to Governors Island in New York, and after he was charged with similar offenses there, petitioner was charged with sexual abuse in violation of the Uniform Code of Military Justice. This case involves only Alaska charges. Petitioner

alleged that the military court lacked jurisdiction because the offenses were not "service connected" under this court's decisions in O'CAllahan v. Parker, 395 U.S. 258 and Relford v. Commandant, 401 U.S. 355.

The Trial Judge (I assume the Military Judge Advocate) granted petitioner's motion to dismiss for want of jurisdiction. He concluded that the Alaska offenses were not sufficiently "service connected" to be triable in a military criminal justice system. On appeal, the Coast Guard Court of Military Review reversed, and reinstated the Alaska charges. The Trial Judge had found a number of facts with respect to the absence of any connection between the offenses and the Coast Guard of Military Service. The Court of Military Appeals apparently accepted these facts, but concluded that the crimes were sufficiently serviced connected to justify prosecution by a Court Martial. It found that "sex offenses against young children [in the military] ... have a continuing effect on the victims and their families and ultimately on the morale of any military unit or organization to which the family member is assigned." The court identified a number of factors that it believed relevant to its decision.

In O'Callahan v. Parker, decided in 1969, this court announced a new law in this area by holding that a court martial may not exercise jurisdiction over service personnel unless, on the facts of the case, the offense has a sufficient impact on military interests to be service connected. The opinion was written by Douglas, and joined by Warren, Black, Brennan and Marshall. Harlan wrote a strong - and on its face quite persuasive - dissent, in which Stewart and White joined. Justices Reed and Clark had retired, and Justice Fortas had resigned.

dissent by Harlan

In Relford v. Commandant (1971), this Court reaffirmed O'Callahan and narrowed the focus to three unrelated inquiries: "(1) the impact of an offense on military discipline and effectiveness, ... (2) whether the military interest in deterring the offense is distinct from and greater than that of civilian society, and ... (3) whether the distinct military interests can be vindicated adequately in civil courts. See also Schlesinger v. Councilman (1975), and more recently our opinion in Goldman v. Weinberger that involved the wearing by a Jewish serviceman of a yarmulke.

The three inquiries

Although the SG finds, contrary to the findings of the TC, that the facts in this case show an adequate

"service connection", the SG's primary argument - at least as I read the brief - is that we should overrule O'Callahan and Relford. O'Callahan has been cited a number of times since its decision, and I think it doubtful that a majority here would be disposed to overrule it despite the arguments made by Harlan in his quite interesting dissent in which he reviewed English history.

It is true, as Harlan emphasized, that the Constitution vests open-end authority on Congress to make rules for the "government and regulation" of our military forces. This authority prompts Harlan to argue and conclude that the jurisdiction conferred on military courts by Congress is not limited to "service connected" offenses, and that this Court should leave it to Congress to determine the jurisdiction of military courts.

If the issue were presented here for the first time, I would find it a close one. Normally, where - as in this case - the offense violates state criminal law as well as the common law, and is committed off-base, I would think the civilian courts are better qualified to try the case and apply state law than a military court. In this case, however, it is true that petitioner had left Alaska and

that the New York courts probably would have had little interest in sending him back to Alaska, particularly since he had committed similar offenses in New York. It also certainly is true that where the offense is committed on the child of another service member (in this case a "friend"), the effect on morale may be adverse. But if the military had turned petitioner over to the civilian courts promptly, there is no reason to doubt that he would have been prosecuted under Alaska law.

In sum, I would like my clerk - in a brief cert memo - to indicate whether there is any basis for overruling O'Callahan in light of what the Court subsequently has written. Secondly, I would like my clerk's view as to whether O'Callahan properly must be read as controlling. If the answer to the first of these questions is "no", and the answer to the second is "yes", the memo can be quite brief.

LFP, JR.

adl 02/11/87

File

Reviewed 2/12 - Ct usual Andy has written a thoroughly reasoned. He would Reverse Pet. contend mil. court had no juris. to try him because her alleged crime (sexual abuse of a service man daughter) was not" Service Connected".

The Military Ct/appeals disagreed.

56 urges to overrule O'Callahan

The leading cases are O'Callahan v. Parker & Relford v. Commandant (D 3) There rejected the "status" rule under

BENCH MEMORANDUM

which all offenses by Service persons were tried in Military Courts. The Court was persuaded that

To: Mr. Justice Powell February 11, 1987

From: Andy the Military Court did not ~~provide~~ provide customary provisions to protect rights of accused (e.g. no jury trial) & ~~no~~ unanimous vote not required.

Re: No. 85-1581, Solorio v. United States

Oral Argument: Tuesday, February 24, 1987

Cert to the U.S. Ct. Military Appeals (Everett, C.J.)

QUESTION PRESENTED

This case involves the jurisdictional boundary between civilian courts and military courts martial. The questions presented are: (1) did the court below erroneously conclude that petitioner's crimes were "service connected," and thus could be prosecuted in military court; (2) should the case

that established the limitations on military jurisdiction, O'Callahan v. Parker, 395 U.S. 258 (1969), be overruled.

I. BACKGROUND

Petitioner Richard Solorio was a Coast Guard member stationed in Juneau, Alaska. There is no military base in Juneau, so Solorio and the other 300 Coast Guard personnel lived in private homes in the civilian community. Petr's children were friendly with the daughters of two other servicemen, and the girls often came to the Solorio house to play. It was during these visits that petr sexually molested the girls, who at the time were between the ages of 10 and 12. The abuse took place over a two-year period.

In June 1984 Solorio was reassigned to the Coast Guard base at Governor's Island, New York. (The fathers of the victims also were transferred, but not to New York.) There petr molested the daughters of two other servicemen. Petr finally was arrested, and during the investigation the crimes in Alaska came to light for the first time. The Coast Guard commander in New York convened a court martial, and petr was charged with 21 specifications including indecent assault and attempted rape. Fourteen of these charges related to the Juneau incidents, the remaining seven involved the New York crimes.

Solorio moved to dismiss the 14 counts alleging offenses in Alaska, arguing that the military court had no jurisdiction to consider these offenses. At the hearing on

this motion, the arguments focused on two cases, O'Callahan v. Parker, supra, and Relford v. Commandant, 401 U.S. 355 (1971). In O'Callahan, the Court held that not all crimes committed by a serviceman could be tried by a court martial. Instead, said the Court, the crime must somehow be "service connected" before the accused could be denied the greater protections afforded to civilian defendants. Two years later in Relford, the Court attempted to define the concept of "service connected" more precisely, identifying 12 critical factors and 9 additional considerations that courts should address in deciding whether military jurisdiction was proper. See 401 U.S., at 365, 367-369 (a list of the factors and considerations is attached to this memo).

The military trial judge granted Solorio's motion to dismiss, concluding that the evidence was insufficient to show a connection between the Coast Guard's interest in prosecution and the Alaska offenses. The judge made a series of factual findings that were tied to the Relford factors. The most significant findings were: (i) the crimes took place away from a military base and while Solorio was off-duty; (ii) the Alaska civilian courts were available to prosecute the offense; (iii) the crimes did not have any impact on "morale, discipline, the reputation or the integrity of the Coast Guard in Juneau, the personnel assigned there, [or] on military operations or missions"; (iv) there was little evidence that the allegations concerning Solorio were know to the civilian community in Juneau, or that the

Coast Guard's relations with the community had suffered; (v) although the crimes had affected the work performance of the victims' fathers, the impact on the Coast Guard itself was negligible. See J.A. 195-200; Petn 62a-63a.

The Coast Guard Court of Military Review reversed and reinstated the charges, finding that the trial judge's analysis was flawed in several respects. For example, the court held that it was error to look only at the effect of the offenses on the military and civilian community in Juneau. It also was necessary to look at the impact of the charges on the Coast Guard personnel in New York, since this was where petr currently was based. The court also rejected the trial judge's finding that the Alaska state court system was available to try the case. The court held that in comparison to the military, the civilian courts had a lower incentive to prosecute petr because both he and the victims had moved from the state. See Petn 32a-34a.

The Military Review Court then reevaluated the evidence, and concluded that the crimes were service connected. The court examined the Relford considerations and found that Solorio's crimes had interfered with the Coast Guard's commander's responsibility to maintain order and discipline over those in his command. See Relford, 401 U.S., at 367 (consideration (b)). The court also emphasized that the victims were the dependents of servicemen, and that petr had violated the trust that must exist between shipmates.

Solorio appealed, but the U.S. Court of Military Appeals (USCMA) affirmed. The court acknowledged that "our precedents involving offbase sex offenses against civilian dependents of military personnel would point to a different conclusion." Petn 8a (citations omitted). It indicated, however, that more recent cases concerning the service connection doctrine required a reexamination of that precedent "in light of more recent conditions and experience." Id., at 9a.

The USCMA gave little indication what these recent conditions were, except to note that society was becoming increasingly concerned with the rights of victims. The court then went on to find that these sex offenses had a continuing adverse affect on both the victims' families and on the military unit to which they are assigned. The USCMA noted that the victims' fathers had become less effective on the job, and that the need for family counseling placed an emotional and financial strain on the servicemen. The court also found that it would be more efficient to try all charges in New York before a court martial (where jurisdiction on the New York crimes was conceded), rather than try some in New York and the rest in Alaska.

Solorio was court martialed in New York in February 1986. He was convicted on 8 of the 14 counts arising from the Alaska incidents, and 4 of the 7 New York charges.

II. DISCUSSION

Petr claims that the decision below has expanded court-martial jurisdiction beyond the limits allowed by this Court's precedent. The SG makes two arguments in response. First, he claims that the USCMA holding is in fact consistent with O'Callahan and Relford. Second, if this Court determines that the crimes were not service connected, the SG asks that O'Callahan be overruled.

SG says overrule O'Callahan

A. Is the Decision Below Consistent with Precedent?

Solorio persuasively argues that the lower courts have misconstrued the "service connected" requirement of O'Callahan. He points out that the trial judge examined nearly all of the factors and considerations set forth in Relford, and found as a matter of fact that none of these criteria for military jurisdiction had been satisfied. Petr argues that the appeals courts largely ignored this analysis, choosing instead to adopt a more flexible approach that largely eviscerates this Court's decisions. He also asserts that this case is part of a conscious trend in recent USCMA cases to increase the military's jurisdiction.

USCMA did not follow precedents

The SG does not deny that the USCMA failed to follow this Court's precedents precisely. He nevertheless claims that the decision below is correct, because the USCMA gave great weight to several facts that demonstrate an overwhelming military interest in prosecuting the offense. First, the SG points out the victims were the dependent daughters of Coast Guard personnel. The evidence showed that when the

victims' fathers learned of the crimes their job performance was adversely affected, and they became more suspicious of their coworkers. These problems made the fathers less useful to the military, and thus Coast Guard had a direct interest in ensuring that Solorio was prosecuted. An attack on a serviceman's dependents also affects the rest of the military unit. Crimes such as child abuse could cause the victim's father to seek revenge against the perpetrator, thus threatening the morale and discipline that is essential in any military setting. Consequently, the SG argues that crimes against military dependents should be considered service connected as a matter of law.

Second, the SG claims that there is a direct relationship between petr's crimes and the Coast Guard's commander's interest in running the Alaska installation. The trial judge found that the crimes had only an indirect impact on the military, in part because the offenses occurred off base in a private home. But the commander is responsible for the conduct and order of those under his control regardless of their location. Indeed, it may be more necessary for the commander to have authority over crimes when there is no military base, since the Coast Guard's good reputation among the civilians depends in part on its willingness to discipline its own members. Thus, it is argued, the mere fact that a crime was committed off-base should not be decisive in determining whether an event is service connected.

There is merit to these claims, but neither is compelling. The Relford Court found it "significant" that the victims in that case were relatives of servicemen, but apparently did not include this point in the list of factors and considerations that affect jurisdiction. See 401 U.S. 366-369 (but cf. consideration (f)). Moreover, the dependency status of the victims seems relevant to the Coast Guard only to the extent that it affected the fathers' work performance. The trial court found that the effect on the military was remote, and although the appellate courts disagreed with this conclusion, the factual basis for their disagreement is unclear. Thus while there is a relationship between a crime against a dependent and the military interest, nothing in the precedent or logic suggests that it is entitled to the presumptive weight that the SG suggests.

The second argument also is not terribly persuasive. Despite the SG's claim that the military commander has the same interest in the offense regardless of where it occurs both O'Callahan and Relford hold that the situs of the crime is critical. Even though the commander is generally responsible for the conduct of his men, this argument is too broad because it would make every crime committed by a serviceman subject to court martial. This view was squarely rejected in O'Callahan. Also, there is little evidence that the crimes in this particular case had an adverse impact on the morale of other servicemen in Juneau, or on the civilian community. The trial judge found that no one at the Coast

Guard Station even learned of the charges until after petr and the victims were transferred.

The SG's next claim is that the unusual procedural posture of this case makes it service related. Here Solorio also was charged with similar crimes in New York, and it is undisputed that he was subject to a court martial there. It was more efficient to try all offenses in the same proceeding, thus ensuring that justice was done quickly, so that the victims will be spared the ordeal of testifying twice.

This argument makes sense as a matter of policy, but I am not sure that it makes the crimes service connected. It always will be more efficient to try a soldier who is charged with both a military and a civilian offense in the same court martial, but nothing in the case law suggests that administrative convenience is a sufficient basis for military jurisdiction. It also is not clear that that it would have been more efficient to prosecute the charges together in this case. The New York and Alaska crimes involve separate victims and separate evidence, and thus each victim would have to testify only once even if the charges were prosecuted separately. The victims and their families also had to travel to testify no matter where the trial was held. So even if the USCMA was correct in considering the efficiency advantage of a court martial, I question the conclusion that it weighed heavily in the government's favor here.

Finally, the SG argues that the Alaska civilian courts had a diminished interest in prosecuting Solorio. In

Relford, the Court noted that one of the considerations supporting court-martial jurisdiction was the inability of civilian courts to vindicate a distinct military interests. 401 U.S., at 368. The SG notes that in this case the Alaska prosecutor deferred to the military, suggesting that it had little interest in prosecuting a Coast Guardsman who had been transferred. The SG points out that if this Court were to find that petr was entitled to a civilian trial, there is no guarantee that petr would be retried in Alaska, or even that the victims would return to that State to testify. Since the Coast Guard plainly has an interest in seeing that petr is prosecuted, it is argued, the State's reluctance to do so favors affirming the decision below.

Again, there is merit to this argument, but not as much as the SG suggests. Alaska has not said it will not prosecute, it simply has stated that it will defer. Indeed, during the New York trial, the parties stipulated as to the expected testimony of an Alaska District Attorney, who would have stated that "[s]hould the Coast Guard determine, however, that the court martial is without jurisdiction to prosecute this case, [Alaska] would reconsider its decision not to prosecute." J.A. at 67.

To summarize: the SG makes several arguments as to how the Alaska offenses are service related within the meaning of O'Callahan. The best argument is that the victims were dependents of servicemen, and that the crime therefore affected their father's military performance. In other re-

The best of SG's arguments

spects, however, the SG fails to show how the crimes had a bearing on any military interest that would justify extending jurisdiction, particularly since there was no direct impact on the Coast Guard itself. Because the trial judge found that none of the other Relford factors were present, it seems that the USCMA erred in finding court martial jurisdiction.

B. Should O'Callahan be Overruled?

The SG claims that O'Callahan marked an abrupt and unwarranted change from prior law. Before that decision, the test for jurisdiction appears to have been the status of the defendant: if he was a "serviceman," he could be court martialed regardless of the offense. See Kinsella v. United States ex rel. Singleton, 361 U.S. 234, 240-241 (1960); see also Gosa v. Mayden, 413 U.S. 665, 672 (1973) (plurality opinion) (O'Callahan was a "clear break with the past"). The SG asserts that this prior test was clearly supported by the Constitution; Article I, Section 8, Clause 14 provides that Congress has the power to "make regulations for the Government and Regulation of the land and naval forces." See also O'Callahan, 395 U.S., at 275 (Harlan, J., dissenting). He now argues that the service-connected test should be overruled and that court should again defer to Congressional judgment about which offenses are subject to a court martial. The SG advances three arguments for his view: recent developments have undermined the O'Callahan rationale;

Prior to O'Callahan the test was "status" of the D

the service-connected test is unworkable; and O'Callahan is inconsistent with the deference owed to Congress.

1. Recent Developments. The Court's primary reason for limiting military jurisdiction in O'Callahan was that court martials do not adequately protect the rights of the accused. The Court noted, for example, that the officer who convened the Court martial had enormous influence over the disposition of the case, because he was allowed to appoint the presiding officer, the members of the panel, and the defense counsel. See 395 U.S., at 264. The presiding officer was not a neutral party, and often had direct command over the court-martial panel. Moreover, the O'Callahan Court was troubled by the great disparity between the civilian and military rules of procedure, evidence, and discovery. See, e.g., id., at 264 n. 4 ("in a court martial, the access of the defense to compulsory process [depends] on the approval of the prosecution"). Finally, this Court concluded that court martials are "singularly inept in dealing with the nice subtleties of constitutional law." Id., at 265.

The SG asserts that these conditions no longer exist, because over the last few years the military has altered its procedures. The convening officer has much less influence over the trial now than in the past, and the members of the tribunal are far more independent. The trial is no longer conducted by a presiding officer, but by a military judge selected by the Judge Advocate General. The SG claims that the military judge now has virtually the same degree of im-

The rationale of O'Callahan - unfair

Changes since O'Callahan are insf.

Trial now is conducted by a "military judge"

partiality as his civilian counterparts. In addition, defense counsel is now chosen according to procedures set forth by regulation, and in some cases is removed from the convening officer's chain of command. Finally, the Manual for Courts Martial expressly prohibits any attempt to influence or intimidate the members of the court.

The SG also claims that the rules of procedure and discovery have changed. The military judge now has sole responsibility for controlling the scope of discovery, not the prosecutor. The Military Rules of Procedure also have been revised to bring them more in line with the federal civilian rules. In addition, the defendant now is entitled to a pretrial investigation that allows him to preview the government's case and cross-examine witnesses before trial. Finally, the SG asserts that the military judges now have greater experience in resolving constitutional questions, making the difference in protections afforded by the military and civilian courts negligible. See Schlesinger v. Councilman, 420 U.S. 738, 758 (1975) (LFP for the Court) (assuming that military court system will vindicate serviceman's constitutional rights).

These are appealing arguments, because they suggest that there would be little substantive harm in abandoning the O'Callahan test. But even if the details have changed, the underlying rationale for that decision remains: a serviceman still is denied significant rights in a court martial that he would be granted in a civilian trial. Most

significantly, a serviceman has no right to a grand jury indictment or a trial by jury. The denial of the latter right is especially troubling, because the court martial panel that decides defendant's guilt is not analogous to a jury. The convening officer still has great discretion in choosing the members, who invariably are of a higher rank than the accused. More importantly, there is no requirement that the panel reach a unanimous verdict; a 2/3 vote is all that is needed, even for non-capital murder. See Brief Amicus Curiae of U.S. Army, Defense App. Div., at 16-17 and n.29.

This is not to suggest that these differences make all military trials fundamentally unfair. As the SG points out, if a serviceman was tried for a misdemeanor in a State civilian court, he still would not necessarily be tried before a jury. But the basic differences between the military and civilian courts that were recognized by O'Callahan still strike me as significant. So while I might conclude as an original matter that the service-connected test is not constitutionally compelled, I also cannot conclude that the rationale of O'Callahan has been so fully undermined that it now should be overruled.

2. An "unworkable" rule. Even though the O'Callahan rationale is basically sound, the Court still would be justified in overruling that decision if experience had shown that the service-connected standard was unworkable or unduly burdensome on military courts. The SG claims that in fact

the test has led to great confusion and inconsistent results. For example, the SG cites a military case decided shortly after O'Callahan was announced, involving a serviceman's use of drugs. At that time the military court decided that the crime was sufficiently service-related to sustain court-martial jurisdiction; several years later in another case, however, the same court held that the off-base use of drugs did not meet the O'Callahan test. The court subsequently reversed its position again, so that now virtually all drug offenses are subject to court martial. SG Brief at 42 (citing cases). Moreover, the SG claims that disputes over jurisdiction consume a disproportionate amount of resources. During one 2-year period, for example, roughly 12% of the cases prosecuted by the Air Force involved jurisdiction questions.

I have no doubt that the O'Callahan test is difficult to apply at times. But I do not agree that the SG has shown that the service-connected requirement is "unworkable." The example involving drug offenses is unpersuasive -- all that the SG has shown is that "drug cases" do not always receive identical treatment. But O'Callahan clearly contemplates that the existence of jurisdiction will turn on the facts of each case, so it should not be surprising that not all drug cases are tried in the same forum. It would be more indicative of confusion if the SG could show that two cases with similar facts were tried in different forums. Moreover, the SG has not cited any scholarly literature or USCMA cases

that have demonstrated how the test is flawed. In short, without more evidence of chaos in the lower military courts, I am not convinced that O'Callahan has been so burdensome that it should be overruled.

3. Deference to the Military. The SG's final claim is that Congress and the military are in a much better position to decide which crimes should be subject to a court martial, and thus this Court should remove the limitations on this authority imposed by O'Callahan. They cite a series of this Court's cases in which we have emphasized the importance of deferring to military judgment in matters involving the special needs of the service. See, e.g., Goldman v. Weinberger, 106 S. Ct. 1310 (1986) (the "yarmulke" opinion, in which you joined); Rostker v. Goldberg, 453 U.S. 57, 64-65 (1981) ("in perhaps no other area has the Court accorded Congress greater deference"); Schlesinger v. Councilman, supra.

Defense argument

This argument is largely true, but it has two flaws. First, O'Callahan involved a judgment on how best to protect the trial rights of servicemen. Whether this decision was correct as a matter of constitutional interpretation is not a question that requires deference to military expertise. Second, Congress has not demonstrated a burning desire to give the military courts more latitude. In fact, in 1983 Congress extended this Court's jurisdiction to allow consideration of appeals from the military courts. See 10 U.S.C. (Supp. III) §867(h)(1). This extension seems inconsistent

with the notion that the military should have more freedom to resolve its own cases.

III. SUMMARY AND CONCLUSION

I am sympathetic to the military's position, because intuitively it seems that an attack on a serviceman's child is sufficient to support court martial jurisdiction. The trial court reasonably applied the service-connected test, however, and concluded that the impact on the Coast Guard was insignificant. Although USCMA either disregarded or reversed some of these findings, its opinion as a whole appears to expand military jurisdiction beyond the limits established by this Court. I therefore recommend that the decision below be reversed.

I also recommend that the Court not overrule O'Callahan. There have been changes in military law and procedure since that case was decided, but there remain important differences between the rights afforded to defendants in civilian and military trials. Given this, the service-connected test is a reasonable method for balancing the needs of the military against the rights of the accused. The SG has not presented any compelling reason to think that the O'Callahan creates such problems that it should be overruled.

Too many!

APPENDIX

Relford suggested that the following factors should be considered in determining whether a military court has jurisdiction:

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 U.S. territorial limits.

5. Its commission in peacetime and its being unrelated to authority stemming from the war power.

6. The absence of any military connection between the defendant's military duty 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.

The Court also ruled that there are 9 other considerations that may affect the jurisdiction issue.

a) The interest of the military in the security of persons and property on the military enclave.

b) The responsibility of the military commander for maintenance of order in his command, and his authority to maintain that order.

c) The adverse impact of a crime committed on a military base on security, morale, discipline, and reputation of the base, and the impact on the personnel and upon the military operation.

d) Congress' power under Article I, §8, Cl. 14 "to make rules for the government and regulation of the land and naval forces."

e) The possibility that civilian courts will have less interest, concern, and capacity to vindicate the military interest.

f) The presence of factors such as geographical and military relationships that have important significance in favor of service connection.

g) Historically, whether the crime against a person by one associated with the post was subject to the General Article.

h) Whether the crime is a purely military offense that has no counterpart in civilian criminal law.

i) The inability to draw meaningful lines between the military post's military and non-military areas, or between a serviceman's duty and off-duty activities.

Full

Notes 2/21

85-1581 Solorio v. U.S. (U.S. Mil. Ct. Appls)

Included to Reverse (after argument & reveading of Harlan's dissent. 7 Ll now Aff'm)

O'Callahan (1969) held that before a serviceman may be tried in a Mil. Ct. the crime must be "service connected"

Harlan dissent joined by BRW

The Court below held that crime in Alaska & off-base was service connected.

Relford v. Commandant applied O'Callahan & identified a no. of factors relevant to "service connected":

Did not reconsider O'Callahan — merely applied it.

Applying them in this case, the imp. Qs were:

1. Did crime occur "off-base"?
2. Was service "off-duty"?
3. Did the crime have any effect on military mission or duties?
4. Did it affect morale or discipline
5. Do civilian courts qualified to try the offender as charged

Here sexual harassment of a minor.

JG emphasizes improvements in military court compositions & procedures that tend to assure a fair trial. These are not insignificant

But still no jury trial; nor must verdict be unanimous.

My opinion has changed after more careful consideration

Tentative view: not prepared to overrule O'Callahan & Relford

Andy

85-1581 SOLORIO v. UNITED STATES Argued 2/24/86

Military Courts v. Court

Bruce (Petro)

The CJ noted that O'Callahan overruled numerous cases.

"Service connection" here is remote.

Nino commented that the Military considers all drug offenses to be "service connected". Counsel answered that he doesn't think there is a general rule.

Fidell (also for Petro) (ACLU)

O'Callahan / Relford have resulted in little confusion.

Argues as violation of ex post facto

Fried (SG - argues. afterwards)

The U.C.M.J. offense is relevant because a Military Court can consider both cases together.

Prior to O'Callahan, the test was "status". That case in effect overruled numerous prior decisions.

Urges reversal of O'Callahan

"Membership" in the Service is the sole test. This is the "status" test

Relford limited O'Callahan - ~~[illegible]~~ a 'narrowing' of O'Callahan.

Freed (cont.)

Important changes since Callahan
- thus the description of Military Justice
in O'Callahan no longer applies.

Aff- 5 to overrule
1 on Relford
3 Reverse

No. 85-1581 . Solorio v. United States / Conf. 2/27/87

The Chief Justice Affirm

Facts are important

~~Challenge military~~

Began with Court. ~~&~~ + this should end case as Harlan made clear.

O'Callahan is an aberration, & should be overruled. If ~~no~~ there is ~~a~~ not a Court for over-ruling it, would apply Relford factors & affirm

Justice Brennan Reverse

Would not over-rule either cases.

The "Service connection" standard is appropriate.

Trial court found no ev. that crimes had an impact on military discipline.

Presumption that off-base ~~of~~ of

Justice White Affirm

O'Callahan in a sport.

Even if we do not overrule it, will still affirm.

Justice Marshall Reverse

Agree with WJB

Justice Blackmun Reverse

When he wrote Relford – HAB was "constrained" by O'Callahan

~~3/6~~

Justice Powell Aff'm (Harlan's dissent was correct)

I would overrule O'Callahan. Apart from all else its "service connected" test – not defined in O'Callahan – is a fact specific test that breeds ~~litigation~~ litigation.

HAB's Relford opinion helped

The Constitution empowers Congress to do make rules for the "Regulation" of armed Services.

O'Callahan ignored a Century of history & numerous prior decisions.

Most of procedural objections have now been removed.

JUSTICE STEVENS Aff'm

Need not overrule O'Callahan

Can aff'm on Relford factors

JUSTICE O'CONNOR Aff'm

Harlan's dissent should control

Congress has authority to ~~~~ make

Could Overrule O'Callahan

If not, aff'm on Relford

JUSTICE SCALIA Aff'm

O'Callahan should be overruled

both articles on their face.
ifferent standards might in
able in considering vague-
which govern the conduct
rces, the Court saw in the
o "countervailing military
the twisting of established
rder to hold inviolate these
nder current constitutional
appellee's conviction under
the joint consideration of
ges under Arts. 133 and 134
possibility" that appellee's
udiced, so that a new trial

this Court pursuant to
et the case for oral argu-
leration of the question of
g on the merits. 414 U. S.

des in pertinent part that "[a]ny
Court from an interlocutory or final
court of the United States, . . .
onstitutional in any civil action,
nited States or any of its agencies,
, as such officer or employee, is a
ismiss or affirm, appellee urged a
ecause the attorneys who filed and
ot attorneys of record and because
ed to comply with Rule 33.3 (c)
not admitted to the Bar of this
t, rather than by certificate. Ap-
at 28 U. S. C. § 1252 was not
e courts of appeals, but only from
consideration of the jurisdictional
merits. Appellee now renews his
ects in appellants' filing of their

I

This Court has long recognized that the military is, by necessity, a specialized society separate from civilian society. We have also recognized that the military has, again by necessity, developed laws and traditions of its own during its long history. The differences between the military and civilian communities result from the fact that "it is the primary business of armies and navies to fight or be ready to fight wars should the occasion arise." *United States ex rel. Toth* v. *Quarles*, 350 U. S. 11, 17 (1955). In *In re Grimley*, 137 U. S. 147, 153 (1890), the Court ob-

notice of appeal should be treated as a failure to file a timely notice of appeal, and that the appeal must accordingly be dismissed. See, *e. g., Territo* v. *United States*, 358 U. S. 279 (1959); *Department of Banking* v. *Pink*, 317 U. S. 264, 268 (1942). He also urges that the question whether an appeal may be taken to this Court from the Court of Appeals under 28 U. S. C. § 1252 presents a question of first impression.

We hold that "any court of the United States," as used in § 1252, includes the courts of appeals. The Reviser's Note for § 1252 states that the "term 'any court of the United States' includes the courts of appeals . . . ." The definitional section of Title 28, 28 U. S. C. § 451, provides: "As used in this title: The term 'court of the United States' includes the Supreme Court of the United States, courts of appeals, district courts . . . ." Our reading of § 1252 is further supported by that section's legislative history. Section 1252 was originally enacted as § 2 of the Act of August 24, 1937, c. 754, 50 Stat. 751. Section 5 of that same Act defined "any court of the United States" to include any "circuit court of appeals." We also find no merit in appellee's contention that the asserted defects in appellants' notice of appeal deprive this Court of jurisdiction. As appellants note, appellee makes no claim that he did not have actual notice of the filing of the notice of appeal. Assuming that there was technical noncompliance with Rule 33 of this Court for the reasons urged by appellee, that noncompliance does not deprive this Court of jurisdiction. *Cf. Taglianetti* v. *United States*, 394 U. S. 316 n. 1 (1969); *Heflin* v. *United States*, 358 U. S. 415, 418 n. 7 (1959).

served: "An army is not a deliberative body. It is the executive arm. Its law is that of obedience. No question can be left open as to the right to command in the officer, or the duty of obedience in the soldier." More recently we noted that "[t]he military constitutes a specialized community governed by a separate discipline from that of the civilian," *Orloff* v. *Willoughby*, 345 U. S. 83, 94 (1953), and that "the rights of men in the armed forces must perforce be conditioned to meet certain overriding demands of discipline and duty . . . ." *Burns* v. *Wilson*, 346 U. S. 137, 140 (1953) (plurality opinion). We have also recognized that a military officer holds a particular position of responsibility and command in the Armed Forces:

> "The President's commission . . . recites that 'reposing special trust and confidence in the patriotism, valor, fidelity and abilities' of the appointee he is named to the specified rank during the pleasure of the President." *Orloff* v. *Willoughby*, *supra*, at 91.

Just as military society has been a society apart from civilian society, so "[m]ilitary law . . . is a jurisprudence which exists separate and apart from the law which governs in our federal judicial establishment." *Burns* v. *Wilson*, *supra*, at 140. And to maintain the discipline essential to perform its mission effectively, the military has developed what "may not unfitly be called the customary military law" or "general usage of the military service." *Martin* v. *Mott*, 12 Wheat. 19, 35 (1827). As the opinion in *Martin* v. *Mott* demonstrates, the Court has approved the enforcement of those military customs and usages by courts-martial from the early days of this Nation:

> ". . . Courts Martial, when duly organized, are bound to execute their duties, and regulate their modes of proceeding, in the absence of positive enactments.

> Upon any other principle, C
> left without any adequate
> authority confided to them:
> be framed a positive code t
> variety of incidents applic
> 35–36.

An examination of the British
tary law shows that the military
contained the forebears of Arts.
similar language. The Article
(1642) provided that "[a]ll ot
offenses, not mentioned in thes
ished according to the general c
One of the British Articles of W
able "all Disorders or Neglects
good Order and Military Disci
mentioned in the other artic
articles provided:

> "Whatsoever Commissio
> victed before a General C
> in a scandalous infamous
> coming the Character of a
> shall be discharged from

In 1775 the Continental C
article, along with 68 others
army.[13] The following year it
gress that "the committee on
the rules and articles of war;
five, consisting of John Adam

[11] Section XX, Art. III, of the B
W. Winthrop, Military Law and Pr
[12] Section XV, Art. XXIII, of the
Winthrop, *supra*, at 945.
[13] Article XLVII of the American
throp, *supra*, at 957.

Cite Jan Horbaly - 7

Justice Marshall
Justice Blackmun
Justice Powell
Justice Stevens
Justice O'Connor
Justice Scalia

L.F.P.

From: **The Chief Justice**

Circulated: 4/3/87

Recirculated: _____

1st DRAFT

SUPREME COURT OF THE UNITED STATES

Joan

No. 85-1581

RICHARD SOLORIO, PETITIONER *v.*
UNITED STATES

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

[April —, 1987]

CHIEF JUSTICE REHNQUIST delivered the opinion of the Court.

This case presents the question whether the jurisdiction of a court-martial convened pursuant to the Uniform Code of Military Justice (U. C. M. J.) to try a member of the armed forces depends on the "service connection" of the offense charged. We hold that it does not, and overrule our earlier decision in *O'Callahan* v. *Parker*, 395 U. S. 258 (1969).

While petitioner Richard Solorio was on active duty in the Seventeenth Coast Guard District in Juneau, Alaska, he sexually abused two young daughters of fellow Coast Guardsmen. Petitioner engaged in this abuse over a two-year period until he was transferred by the Coast Guard to Governors Island, New York. Coast Guard authorities learned of the Alaska crimes only after petitioner's transfer, and investigation revealed that he had later committed similar sexual abuse offenses while stationed in New York. The Governors Island commander convened a general court-martial to try petitioner for crimes alleged to have occurred in Alaska and New York.

There is no "base" or "post" where Coast Guard personnel live and work in Juneau. Consequently, nearly all Coast Guard military personnel reside in the civilian community. Petitioner's Alaska offenses were committed in his privately owned home, and the fathers of the ten-to-twelve-year-old

victims in Alaska were active duty members of the Coast Guard assigned to the same command as petitioner. Petitioner's New York offenses also involved daughters of fellow Coast Guardsmen, but were committed in government quarters on the Governors Island base.

After the general court-martial was convened in New York, petitioner moved to dismiss the charges for crimes committed in Alaska on the ground that the court lacked jurisdiction under this Court's decisions in *O'Callahan* v. *Parker*, 395 U. S. 258 (1969), and *Relford* v. *Commandant*, 401 U. S. 355 (1971).[1] Ruling that the Alaska offenses were not sufficiently "service connected" to be tried in the military criminal justice system, the court-martial judge granted the motion to dismiss. The Government appealed the dismissal of the charges to the United States Coast Guard Court of Military Review, which reversed the trial judge's order and reinstated the charges. *United States* v. *Solorio*, 21 M. J. 512 (1985).

The United States Court of Military Appeals affirmed the Court of Military Review, concluding that the Alaska offenses were service connected within the meaning of *O'Callahan* and *Relford*. *United States* v. *Solorio*, 21 M. J. 251 (1986). Stating that "not every off-base offense against a servicemember's dependent is service-connected," the court reasoned that "sex offenses against young children . . . have a continuing effect on the victims and their families and ultimately on the morale of any military unit or organization to which the family member is assigned." *Id.*, at 256. In reaching its holding, the court also weighed a number of

[1] Petitioner was charged with fourteen specifications alleging indecent liberties, lascivious acts, and indecent assault in violation of Article 134, U. C. M. J., 10 U. S. C. § 934, six specifications alleging assault in violation of U. C. M. J. Art. 128, 10 U. S. C. § 928, and one specification alleging attempted rape in violation of U. C. M. J. Art. 80, 10 U. S. C. § 880. The specifications alleged to have occurred in Alaska included all of the Article 128 and Article 80 specifications and seven of the Article 134 specifications.

other factors, including: the interest of Alaska civilian officials in prosecuting petitioner; the hardship on the victims, who had moved from Alaska, that would result if they were called to testify both at a civilian trial in Alaska and at the military proceeding in New York; and the benefits to petitioner and the Coast Guard from trying the Alaska and New York offenses together.[2] This court subsequently granted certiorari, 28 U. S. C. § 1259(3), to review the decision of the Court of Military Appeals. We now affirm.

The Constitution grants to Congress the power "[t]o make Rules for the Government and Regulation of the land and naval Forces." U. S. Const. art. I, § 8, cl. 14. Exercising this authority, Congress has empowered courts-martial to try servicemen for the crimes proscribed by the U. C. M. J. Art. 2, U. C. M. J., 10 U. S. C. §§ 802, 817. The Alaska offenses with which petitioner was charged are each described in the U. C. M. J. See n. 1, *supra*. Thus it is not disputed that the court-martial convened in New York possessed the statutory authority to try petitioner on the Alaska child abuse specifications.

In an unbroken line of decisions from 1866 to 1960, this Court interpreted the Constitution as conditioning the proper exercise of court-martial jurisdiction over an offense on one factor: the military status of the accused. *Gosa* v. *Mayden*, 413 U. S. 665, 673 (1973) (plurality opinion); see *Kinsella* v. *Singleton*, 361 U. S. 234, 240–241, 243 (1960); *Reid* v. *Covert*, 354 U. S. 1, 22–23 (1957) (plurality opinion); *Grafton* v. *United States*, 206 U. S. 333, 348 (1907); *Johnson* v. *Sayre*, 158 U. S. 109, 114 (1895); *Smith* v. *Whitney*, 116 U. S. 167,

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[2] Following the decision of the Court of Military Appeals, petitioner unsuccessfully sought a stay from that Court and from Chief Justice Burger. The court-martial reconvened and petitioner was convicted of eight of the fourteen specifications alleging offenses committed in Alaska and four of the seven specifications alleging offenses committed in New York. These convictions are currently under review by the convening authority pursuant to U. C. M. J., Art. 60, 10 U. S. C. § 860.

183–185 (1886); *Coleman* v. *Tennessee*, 7 Otto 509, 513–514 (1879); *Ex parte Milligan*, 4 Wall. 2, 123 (1866); cf. *Toth* v. *Quarles*, 350 U. S. 11, 15 (1955); *Kahn* v. *Anderson*, 255 U. S. 1, 6–9 (1921); *Givens* v. *Zerbst*, 255 U. S. 11, 20–21 (1921). This view was premised on what the Court described as the "natural meaning" of Art. I, § 8, cl. 14, as well as the Fifth Amendment's exception for "cases arising in the land or naval forces." *Reid* v. *Covert*, *supra*, at 19; *Toth* v. *Quarles*, *supra*, at 15. As explained in *Kinsella* v. *Singleton*, *supra*:

> "The 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.' . . . Without contradiction, the materials . . . show that military jurisdiction has always been based on the 'status' of the accused, rather than on the nature of the offense. To say that military jurisdiction 'defies definition in terms of military "status"' is to defy the unambiguous language of Art. I, § 8, cl. 14, as well as the historical background thereof and the precedents with reference thereto." 361 U. S., at 240–241, 243 (emphasis in original).

Implicit in the military status test was the principle that determinations concerning the scope of court-martial jurisdiction over offenses committed by servicemen was a matter reserved for Congress:

> "[T]he 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 agencies which must determine the precise balance to be struck in this adjustment. The Framers expressly entrusted that task to Congress." *Burns* v. *Wilson*, 346 137, 140 (1953) (plurality opinion).

See also *Coleman* v. *Tennessee*, *supra*, at 514 (1878); Warren, The Bill of Rights and the Military, 37 N. Y. U. L. Rev. 181, 187 (1962).[3]

In 1969, the Court in *O'Callahan* v. *Parker* departed from the military status test and announced the "new constitutional principle" that a military tribunal may not try a serviceman charged with a crime that has no service connection. See *Gosa* v. *Mayden*, *supra*, at 673. Applying this principle, the *O'Callahan* Court held that a serviceman's off-base sexual assault on a civilian with no connection with the military could not be tried by court-martial. On reexamination of *O'Callahan*, we have decided that the service connection test announced in that decision should be abandoned.

The constitutional grant of power to Congress to regulate the armed forces, Art. I, § 8, cl. 14, 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. On its face there is no indication that the grant of power in clause 14 was any less plenary than the grants of other authority to Congress in the same section. Whatever doubts there might be about the extent of Congress' power under clause 14 to make rules for the "Government and Regulation of the land and naval Forces," that power surely embraces the authority to regulate the conduct of persons who are actually members of the armed services. As noted by Justice Harlan in his *O'Callahan* dissent, there is no evidence in the debates over the adoption of the Con-

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[3] One pre-1969 decision of this Court suggests that the constitutional power of Congress to authorize trial by court-martial must be limited to "the least possible power adequate to the end proposed." *Toth* v. *Quarles*, 350 U. S. 11, 23 (1955) (emphasis deleted). Broadly read, this dictum applies to determinations concerning Congress' authority over the courts-martial of servicemen for crimes committed while they were servicemen. Yet the Court in *Toth* v. *Quarles* was addressing only the question whether an ex-serviceman may be tried by court-martial for crimes committed while serving in the Air Force. Thus, the dictum may be also interpreted as limited to that context.

stitution that the Framers intended the language of clause 14 to be accorded anything other than its plain meaning.[1] Alexander Hamilton described these powers of Congress "essential to the common defense" as follows:

> "These powers ought to exist without limitation because it is impossible to foresee or define the extent or variety of national exigencies, or the correspondent extent and variety of the means which may be necessary to satisfy them.
>
> . . . . . .
>
> Are fleets and armies and revenues necessary for this purpose [common safety]? The government of the Union must be empowered to pass all laws and to make regulations which have relation to them." The Federalist No. 23.

The *O'Callahan* Court's historical foundation for its holding rests on the view that "[b]oth in England prior to the American Revolution and in our own national history military trial of soldiers committing civilian offenses has been viewed with suspicion." 395 U. S., at 268. According to the Court, the historical evidence demonstrates that, during the late 17th and 18th centuries in England as well as the early years of this country, courts-martial did not have authority to try soldiers for civilian offenses. The Court began with a review of the 17th century struggle in England between Parliament and the Crown over control of the scope of court-martial jurisdiction. As stated by the Court, this conflict was resolved when William and Mary accepted the Bill of Rights in 1689, which granted Parliament exclusive authority to define the jurisdiction of military tribunals. See 395 U. S., at 268. The Court correctly observed that Parliament, wary of

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[1] See *O'Callahan*, 395 U. S., at 277 (Harlan, J., dissenting); 2 M. Farrand, The Records of the Federal Convention of 1787, 329–330 (1911); 5 J. Elliot, Debates on the Adoption of the Federal Constitution in the Convention Held in Philadelphia in 1787, 443, 545 (1876).

abuses of military power, exercised its new authority sparingly.[5] Indeed, a statute enacted by Parliament in 1689 provided for court-martial only for the crimes of sedition, mutiny, and desertion, and exempted members of militia from its scope. Mutiny Act of 1689, 1 W & M, Sess. 2, c. 4.

The *O'Callahan* Court's representation of English history following the Military Act of 1689, however, is less than accurate. In particular, the Court posited that "[i]t was . . . the rule in Britain at the time of the American Revolution that a soldier could not be tried for a civilian offense committed in Britain; instead military officers were required to use their energies and office to insure that the accused soldier would be tried before a civil court." 395 U. S., at 269. In making this statement, the Court was apparently referring to Section XI, Article I of the British Articles of War in effect at the time of the Revolution.[6] This Article provided:

> "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 Our Subjects, . . . the Commanding Officer and Officers of every Regiment, Troop, or Party to which the . . . accused shall belong are hereby required upon application duly made by or in behalf of the Party or Parties injured, to use . . . utmost Endeavors to deliver over the accused

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[5] See, *e. g.*, 1 W. Winthrop, Military Law and Precedents 8–9 (2d ed. 1896) (hereinafter Winthrop); G. Nelson & J. Westbrook, Court-Martial Jurisdiction Over Servicemen for "Civilian" Offenses: An Analysis of *O'Callahan* v. *Parker*, 54 Minn. L. Rev. 1, 7–11 (1969) (hereinafter Nelson & Westbrook).

[6] There is some confusion among historians and legal scholars about which version of the British Articles of War were "in effect" at the time of the American Revolution. Some cite to the Articles of War of 1765 and others to the Articles of War of 1774. Compare, *e. g.*, 2 Winthrop 1448, with J. Horbaly, Court-Martial Jurisdiction 34 (1986) (hereinafter Horbaly). For present purposes, however, the two versions of the Articles contain only stylistic differences. In the interest of simplicity, we will refer to the 1774 Articles.

> . . . to the Civil Magistrate." British Articles of War of 1774, reprinted in G. Davis, A Treatise on the Military Law of the United States 581, 589 (3d ed. 1915) (hereinafter Davis).

This provision, however, is not the sole statement in the Articles bearing on court-martial jurisdiction over civilian offenses. Specifically, Section XIV, Article XVI provided that all officers and soldiers who

> "shall maliciously destroy any Property whatsoever belonging to any of our Subjects, unless by order of the then Commander in Chief of Our Forces, to annoy Rebels or other Enemies in Arms against Us, that he or they shall be found guilty of offending herein shall (besides such Penalties as they are liable to by law) be punished according to the Nature and Degree of the Offence [*sic*], by the Judgment of a Regimental or General Court Martial." Davis 593.

Under this provision, military tribunals had jurisdiction over offenses punishable under civil law. Nelson & Westbrook 11. Accordingly, the *O'Callahan* Court erred in suggesting that, at the time of the American Revolution, military tribunals in England "were available only where ordinary civil courts were not." 395 U. S., at 269, and n. 11.

The history of early American practice furnishes even less support to *O'Callahan*'s historical thesis. The American Articles of War of 1776, which were based on the British Articles, contained a provision similar to Section XI, Article I of the British Articles, requiring commanding officers to deliver over to civil magistrates any officer or soldier accused of "a capital crime, . . . having used violence, or . . . any offense against the persons or property of the good people of the United States" upon application by or on behalf of an injured party. American Articles of War of 1776, Section IX, Article I, reprinted in 2 Winthrop 1490. It has been postulated that American courts-martial had jurisdiction over the crimes

described in this provision where no application for a civilian trial was made by or on behalf of the injured civilian.[7] Indeed, American military records reflect trials by court-martial during the late 18th century for offenses against civilians and punishable under civil law, such as theft and assault.[8]

The authority to try soldiers for civilian crimes may be found in the much-disputed "general article" of the 1776 Articles of War, which allowed court-martial jurisdiction over "[a]ll 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, Section XVIII, Article 5, reprinted in 2 Winthrop 1503. Some authorities, such as those cited by the *O'Callahan* Court, interpreted this language as limiting court-martial jurisdiction to crimes that had a direct impact on military discipline.[9] Several others, however, have interpreted the language as encompassing all noncapital crimes proscribed by the civil law.[10] Even W. Winthrop, the authority relied on

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[7] See Nelson & Westbrook 14; cf. Duke & Vogel, The Constitution and the Standing Army: Another Problem with Court-Martial Jurisdiction, 13 Vand. L. Rev. 435, 445–446 (1960) (hereinafter Duke & Vogel).

[8] See *O'Callahan*, 395 U. S., at 278, n. 3 (Harlan, J., dissenting); see also J. Bishop, Justice under Fire 81–82 (1974) (hereinafter Bishop); Nelson & Westbrook 15; Comment, *O'Callahan* and Its Progeny: A Survey of Their Impact on the Jurisdiction of Courts-Martial, 15 Vill. L. Rev. 712, 719, n. 38 (1970) (hereinafter Comment).

[9] See 2 Winthrop 1123; Duke & Vogel 446–447.

[10] See, *e. g.*, *Grafton* v. *United States*, 206 U. S. 333, 348 (1907); Hearings before the Senate Committee on Military Affairs, Appendix to S. Rep. No. 130, 64th Cong., 1st Sess. 25, 91 (statement of Brigadier General Enoch Crowder).

George Washington also seems to have held this view. When informed of the decision of a military court that a complaint by a civilian against a member of the military should be redressed only in a civilian court, he stated in a General Order dated February 24, 1779:

"All the improper treatment of an inhabitant by an officer or soldier being destructive of good order and discipline as well as subversive of the rights of society is as much a breach of the military, as civil law and as punishable

most extensively by the majority in *O'Callahan*, recognized that military authorities read the general article to include crimes "committed upon or against *civilians*. . . at or near a military camp or post." 2 Winthrop 1124, 1126, n. 1.

We think the history of court-martial jurisdiction in England and in this country during the 17th and 18th centuries is far too ambiguous to justify the restriction on the plain language of clause 14 which *O'Callahan* imported into it.[11] There is no doubt that the English practice during this period shows a strong desire in that country to transfer from the Crown to Parliament the control of the scope of court-martial jurisdiction. And it is equally true that Parliament was chary in granting jurisdiction to courts-martial, although not as chary as the *O'Callahan* opinion suggests. But reading clause 14 consistently with its plain language does not disserve that concern; Congress, and not the Executive, was given the authority to make rules for the regulation of the armed forces.

The *O'Callahan* Court cryptically stated that "the 17th century conflict over the proper role of courts-martial and the enforcement of the domestic, criminal law was not, however, merely a dispute over what organ of government had juris-

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by the one as the other." 14 Writings of Washington 140–141 (George Washington Bicentennial ed. 1936).

[11] The history of court-martial jurisdiction after the adoption of the Constitution also provides little support for *O'Callahan*. For example, in 1800, Congress enacted Articles for the Better Government of the Navy, which provided that "[a]ll offences [*sic*] committed by persons belonging to the navy while on the shore, shall be punished in the same manner as if they had been committed at sea." Act of April 23, 1800, ch. 33, art. XVII, 2 Stat. 47. Among the offenses punishable if committed at sea were murder, embezzlement, and theft. In addition, the Act also provided that "[i]f any person in the navy shall, when on shore, plunder, abuse, or maltreat any inhabitant, or injure his property in any way, he shall suffer such punishment as the court martial shall adjudge." Art. XXVII, 2 Stat. 48. This broad grant of jurisdiction to naval courts-martial would suggest that limitations on the power of other military tribunals during this period were the result of legislative choice rather than want of constitutional power.

diction. It also involved substantive disapproval of the general use of military courts for trial of ordinary crimes." 395 U. S. at, 268. But such disapproval in England at the time of William and Mary hardly proves that the Framers of the Constitution, contrary to the plenary language in which they conferred the power on Congress, meant to freeze court-martial usage at a particular time in such a way that Congress might not change it. The unqualified language of clause 14 suggests that whatever these concerns, they were met by the vesting in Congress, rather than the Executive, authority to make rules for the government of the military.[12]

Given the dearth of historical support for the *O'Callahan* holding, there is overwhelming force to Justice Harlan's reasoning that the plain language of the Constitution, as interpreted by numerous decisions of this Court preceding

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[12] See, *e. g.*, *O'Callahan*, 395 U. S., at 277 (Harlan, J., dissenting); 1 W. Crosskey, Politics and the Constitution 413–414, 424–426 (1953) (hereinafter Crosskey); Comment 718; but cf. Horbaly, Court Martial Jurisdiction 45–56 (1986).

The only other basis for saying that the Framers intended the words of Art. I, § 8. cl. 14 to be narrowly construed is the suggestion that the Framers "could hardly have been unaware of Blackstone's strong condemnation of criminal justice administered under military procedures." Duke & Vogel 449. In his Commentaries, Blackstone wrote:

"When the nation was engaged in war . . . more rigorous methods were put in use for the raising of armies, and the due regulation and discipline of the soldiery; which are to be looked upon only as temporary excrescences bred out of the distemper of the state, and not as any part of the permanent and perpetual laws of the Kingdom. For martial law, which is built on no settled principles, but is entirely arbitrary in it's [*sic*] decisions, is . . . something indulged in rather than allowed as a law. The necessity of order and discipline in an army is the only thing which can give it countenance; and therefore it ought not to be permitted in time of peace, when the King's courts are open to all persons to receive justice according to the laws of the land." 1 Blackstone, Commentaries *413.

Although we do not doubt that Blackstone's views on military law were known to the Framers, see Crosskey 411–412, 424–425, we are not persuaded that their relevance is sufficiently compelling to overcome the unqualified language of Art. I, § 8, cl. 14.

O'Callahan, should be controlling on the subject of court-martial jurisdiction. 395 U. S., at 275–278 Harlan, J., dissenting); cf. *Monell* v. *Department of Social Services*, 436 U. S. 658, 696 (1978) ("[W]e ought not 'disregard the implications of an exercise of judicial authority assumed to be proper for [100] years'"), quoting *Brown Shoe Co.* v. *United States*, 370 U. S. 294, 307 (1962).

Decisions of this Court after *O'Callahan* have also emphasized that Congress has primary responsibility for the delicate task of balancing the rights of servicemen against the needs of the military. As we recently reiterated, "'[j]udicial deference is at its apogee when legislative action under the congressional authority to raise and support armies and make rules and regulations for their governance is challenged.'" *Goldman* v. *Weinberger*, 475 U. S. ——, —— (1986), quoting *Rostker* v. *Goldberg*, 453 U. S. 57, 70 (1981). Since *O'Callahan*, we have adhered to this principle of deference in a variety of contexts where, as here, the constitutional rights of servicemen were implicated. See, *e. g.*, *Goldman* v. *Weinberger*, *supra*, at —— (free exercise of religion); *Chappell* v. *Wallace*, 462 U. S. 296, 300–305 (1983) (racial discrimination); *Rostker* v. *Goldberg*, *supra*, at 64–66, 70–71 (sex discrimination); *Brown* v. *Glines*, 444 U. S. 348, 357, 360 (1980) (free expression); *Middendorf* v. *Henry*, 425 U. S. 25, 43 (1976) (right to counsel in summary court-martial proceedings); *Schlesinger* v. *Councilman*, 420 U. S. 738, 753 (1975) (availability of injunctive relief from an impending court-martial); *Parker* v. *Levy*, 417 U. S. 733, 756 (1974) (due process rights and freedom of expression).

The notion that civil courts are "ill-equipped" to establish policies regarding matters of military concern is substantiated by experience under the service-connection approach. *Chappell* v. *Wallace*, 462 U. S., at 305. In his *O'Callahan* dissent, Justice Harlan forecasted that "the infinite permutations of possibly relevant factors are bound to create confusion and proliferate litigation over the [court-martial] juris-

diction issue." 395 U. S., at 284. In fact, within two years after *O'Callahan*, this Court found it necessary to expound on the meaning of the decision, enumerating a myriad of factors for courts to weigh in determining whether an offense is service connected. *Relford, supra.* Yet the service connection approach, even as elucidated in *Relford*, has proved confusing and difficult for military courts to apply.[13]

Since *O'Callahan* and *Relford*, military courts have identified numerous categories of offenses requiring specialized analysis of the service connection requirement. For example, the courts have highlighted subtle distinctions among offenses committed on a military base, offenses committed off-base, offenses arising from events occurring both on and off a base, and offenses committed on or near the boundaries of a base.[14] Much time and energy has also been expended in litigation over other jurisdictional factors, such as the status of the victim of the crime, and the results are difficult to reconcile.[15] The confusion created by the complexity of the service

[13] See Cooper, *O'Callahan* Revisited: Severing the Service Connection, 76 Mil. L. Rev. 165, 186–187 (1977) (hereinafter Cooper); 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, 9–35 (1985) (hereinafter Tomes); cf. *United States* v. *Alef*, 3 M. J. 414, 416, n. 4. (C. M. A. 1977); *United States* v. *McCarthy*, 2 M. J. 26, 29, n. 1 (C. M. A. 1976).

[14] See, *e. g.*, *United States* v. *Garries*, 19 M. J. 845 (A. F. C. M. R. 1985) (serviceman's on-post murder of wife held service connected), aff'd, 22 M. J. 288 (1985), cert. denied, 479 U. S. —— (1986); *United States* v. *Williamson*, 19 M. J. 617 (A. C. M. R. 1984) (serviceman's off-post sexual offense involving young girl held service connected); *United States* v. *Mauck*, 17 M. J. 1033 (A. C. M. R.) (variety of offenses committed fifteen feet from arsenal boundary held service connected), petition for review denied, 19 M. J. 106 (C. M. A. 1984); *United States* v. *Scott*, 15 M. J. 589 (A. C. M. R. 1983) (serviceman's off-post murder of another serviceman held service connected where crime had its basis in on-post conduct of participants).

[15] Compare *United States* v. *Wilson*, 2 M. J. 24 (C. M. A. 1976) (off-post robbery and assault of a fellow servicemen held not service connected), and *United States* v. *Tucker*, 1 M. J. 463 (C. M. A. 1976) (off-post concealment

connection requirement, however, is perhaps best illustrated in the area of off-base drug offenses.[16] Soon after *O'Callahan*, the Court of Military Appeals held that drug offenses were of such "special military importance" that their trial by court-martial was unaffected by the decision. *United States* v. *Beeker*, 18 U. S. C. M. A. 563, 565, 40 C. M. R. 275, 277 (1969). Nevertheless, the court has changed its position on the issue no less than two times since *Beeker*, each time basing its decision on *O'Callahan* and *Relford*.[17]

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of property stolen from fellow serviceman on-post held not to be service connected), with *United States* v. *Lockwood*, 15 M. J. 1 (C. M. A. 1983) (on-post larceny of fellow serviceman's wallet and use of identification cards in it to obtain loan from an off-post business establishment held service connected), and *United States* v. *Shorte*, 18 M. J. 518 (A. F. C. M. R. 1984) (off-post felonious assault committed against fellow serviceman held not service connected).

[16] See Cooper 172–182; Tomes 13–31.

[17] Seven years after *United States* v. *Beeker*, the Court of Military Appeals expressly renounced that decision, holding that *O'Callahan* and *Relford* mandated the conclusion that off-base drug offenses by a serviceman could not be tried by court-martial. See *United States* v. *McCarthy*, 2 M. J. 26, 29 (C. M. A. 1976); *United States* v. *Williams*, 2 M. J. 81, 82 (C. M. A. 1976); see also *United States* v. *Conn*, 6 M. J. 351, 353 (C. M. A. 1979); *United States* v. *Alef*, 3 M. J. 414, 415–418 (C. M. A. 1977). Reversing its position again in 1980, the Court of Military Appeals decided that such a restrictive approach was not required under this Court's decisions. *United States* v. *Trottier*, 9 M. J. 337, 340–351 (1980). The court therefore held that "the gravity and immediacy of the threat to military personnel and installations posed by drug traffic and . . . abuse convince us that very few drug involvements of a service person will not be 'service connected.'" *Id.*, at 351.

United States v. *Trottier*, however, has not settled the confusion in this area. In *Trottier*, the court identified the following exception to its general rule: "[I]t would not appear that use of marijuana by a serviceperson on a lengthy period of leave away from the military community would have such an effect on the military as to warrant the invocation of a claim of special military interest and significance adequate to support court-martial jurisdiction under *O'Callahan*." *Id.*, at 350, n. 28. Since *Trottier*, at least two lower military court decisions have found court-martial jurisdiction over offenses arguably falling within this exception. See *United States* v.

When considered together with the doubtful foundations of *O'Callahan*, the confusion wrought by the decision leads us to conclude that we should read clause 14 in accord with the plain meaning of its language as we did in the many years before *O'Callahan* was decided. That case's novel approach to court-martial jurisdiction must bow "to the lessons of experience and the force of better reasoning." *Burnet* v. *Coronado*, 285 U. S. 393, 406–408 (1932) (Brandeis, J., dissenting). We therefore hold 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.[11]

Affirmed.

Lange, 11 M. J. 884 (A. F. C. M. R. 1981), petition for review denied, 12 M. J. 318 (C. M. A. 1981) (off-post use of marijuana during six-day leave held sufficient to establish service connection); *United States* v. *Brace*, 11 M. J. 794 (A. F. C. M. R.), petition for review denied, 12 M. J. 109 (C. M. A. 1981) (off-post use of marijuana during six-day leave 275 miles from post held sufficient to establish service connection); see also Horbaly 534–535.

[11] Petitioner argues that the Court of Military Appeals' decision should be reversed because it applies a more expansive subject-matter jurisdiction test to him than had previously been announced. According to petitioner, the exercise of court-martial jurisdiction over him violates his rights under the Due Process Clause of the Fifth Amendment. Our review of the record in this case, however, reveals that petitioner did not raise his due process claim in the Court of Military Appeals. The Court of Military Review, which reinstated the Alaska charges against petitioner, held that military courts had jurisdiction over petitioner's Alaska offenses. Petitioner therefore had an opportunity to raise his due process challenge in the proceedings before the Court of Military Appeals. He has not offered any explanation for his failure to do so. In fact, petitioner, in his reply brief and at oral argument, did not contest the Government's suggestion that he inexcusably failed to raise his due process claim earlier in the proceedings. See Reply Brief of Petitioner 16–19; Tr. of Oral Arg. 36–39. We therefore decline to consider the claim. See, *e. g.*, *Berkemer* v. *McCarty*, 468 U. S. 420, 443 (1984); *Delta Air Lines* v. *August*, 450 U. S. 346, 362 (1981); *United States* v. *Lovasco*, 431 U. S. 783, 788, n. 7 (1977).

April 4, 1987

85-1581 Solorio v. United States

Dear Chief:

Please join me in your excellent opinion.

I was particularly interested in your reexamination of English history.

Sincerely,

The Chief Justice

lfp/ss

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE SANDRA DAY O'CONNOR

April 6, 1987

No. 85-1581 Solorio v. United States

Dear Chief,

Please join me. I enjoyed the history lesson.

Sincerely,

Sandra

The Chief Justice

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE ANTONIN SCALIA

April 7, 1987

Re: No. 85-1581 - Richard Solorio v. United States

Dear Chief:

I would be pleased to join your opinion in the above case.

Sincerely,

The Chief Justice

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE BYRON R. WHITE

April 8, 1987

85-1581 - Solorio v. United States

Dear Chief,

Please join me.

Sincerely yours,

Byron

The Chief Justice

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

April 8, 1987

Re: No. 85-1581 - Solorio v. United States

Dear Chief:

In due course I will circulate a dissent in this one.

Sincerely,

T.M.

The Chief Justice

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

June 18, 1987

Re: No. 85-1581 - Richard Solorio v. United States

Dear Thurgood:

Please join me.

Sincerely,

Bill

Justice Marshall
Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

June 19, 1987

Re: No. 85-1581, Solorio v. United States

Dear Thurgood:

Would you please note that I join your dissenting opinion except the last paragraph thereof.

Sincerely,

HAB.

Justice Marshall

cc: The Conference

85-1581 Solorio v. United States (Andy)

CJ for the Court 3/9/87
1st draft 4/3/87
2nd draft 4/14/87
3rd draft 6/23/87
Joined by LFP 4/4/87
SOC 4/6/87
AS 4/7/87
BRW 4/8/87
TM dissenting
1st draft 6/15/87
2nd draft 6/22/87
Joined by WJB 6/18/87
HAB joins all except last paragraph 6/19/87
JPS concurring in the judgment
1st draft 4/14/87