MILITARY CRIMINAL JURISDICTION IN THE UNITED STATES

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INTRODUCTION

Throughout American history members of the military have committed criminal acts. The United States Congress has enacted codes of military criminal law to deal with the military wrongdoer. Like most criminal codes, prior "articles of war" or "rules for the governance of the navy" and the present Uniform Code of Military Justice have both defined the substantive offences that may be punished and set up procedures for investigating and adjudicating offences under the codes.

The American military is currently governed by The Uniform Code of Military Justice ("UCMJ"), a statute of some 150 articles enacted in 1950.[1] As the "Uniform" suggests, the UCMJ governs criminal prosecutions in all military services (army, navy, air force, marines, coast guard). The UCMJ statute passed by the Congress is supplemented by the Manual for Courts-Martial ("MCM") which elaborates on codal provisions. The MCM is officially an Executive Order of the President of the United States.[2] In practice, civilian and uniformed members of the military departments are the major drafters of the MCM. In addition to the MCM, individual services may also draft regulations to further spell out Codal and MCM provisions.

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1. 10 USC § 801 et seq.
2. Exec Order No 12473, 49 Fed Reg 17152 (1984).

The UCMJ authorises a system of courts-martial (the military trial courts) and reviewing courts. Each service has a Court of Military Review, typically composed of military legal officers.[3] The UCMJ also created the Court of Military Appeals ("COMA") to be the highest military appeals court.[4] The COMA is composed of three judges appointed for 15 year terms from civilian life. Until recently, COMA review was the final review of a military conviction. Any further challenge to a military conviction would take place in a federal civilian court typically in the form of a petition for habeas corpus challenging the legality of the military confinement. Through the habeas corpus process, a court martial conviction might eventually be reviewed by the United States Supreme Court. In 1983 Congress amended the UCMJ to allow the Supreme Court to review a decision of the Court of Military Appeals in much the same fashion as the Supreme Court exercises discretionary review over a decision from a Federal Court of Appeals or a State Supreme Court.[5]

The debates over the enactment of the UCMJ in 1950 reflected the continuing tensions over the role of criminal law and procedure in the military. There are two broad views of the role of military criminal law. The first views military criminal law and the court-martial as an integral part of the military command structure. The criminal justice system is judged by how well it supports command objectives of order, discipline and obedience. The key figure is the military line officer. The second view sees the military criminal justice system as basically analogous to civilian criminal law systems. The goal of the system is to do justice both to the individual accused and to all members of the military. The key figure is the military judge. The judge is typically a law trained military officer. While the judge is loyal to the military command structure, he or she has a different mission than to sustain command prerogatives.

The enactment of the UCMJ reflected a considerable victory for the second, civilianising, view of military justice. The massive infusion of civilians into the military during World War II subjected more people than ever before to the military justice system. Many veterans returned

3. UCMJ Art 66, 10 USC § 866.
4. UCMJ Art 67, 10 USC § 867.
5. Pub 98-210.

home with a dislike of existing military criminal law. GIs had a taste of summary, arbitrary and command centred criminal law for four years and did not like it. After World War II, their elected representatives revised the military criminal code in the direction of the civilian criminal system. The creation of a civilian Court of Military Appeals as the "Supreme Court of the Military" reflected the triumph of the civilianisers. The new Code and Court of Military Appeals set the stage for the development of one crucial area of military criminal jurisprudence, the scope of court-martial jurisdiction.

JURISDICTION UNDER THE UCMJ

Articles 2 and 3 of the UCMJ set out Congress' view of the proper scope of military criminal jurisdiction. Its current, amended, version appears below.[6] The significant category of persons subject to the

6. 10 USC § 802 Art 2 Persons subject to this chapter.
   (a) The following persons are subject to this chapter:
      (1) Members of a regular component of the armed forces, including those awaiting discharge after expiration of their terms of enlistment; volunteers from the time of their muster or acceptance into the armed forces; inductees from the time of their actual induction into the armed forces; and other persons lawfully called or ordered into, or to duty in or for training in, the armed forces, from the dates when they are required by the terms of the call or order to obey it.
      (2) Cadets, aviation cadets, and midshipmen.
      (3) Members of a reserve component while they are on inactive duty training authorised by written orders which are voluntarily accepted by them and which specify that they are subject to this chapter.
      (4) Retired members of a regular component of the armed forces who are entitled to pay.
      (5) Retired members of a reserve component who are receiving hospitalisation from an armed force.
      (6) Members of the Fleet Reserve and Fleet Marine Corps Reserve.
      (7) Persons in custody of the armed forces serving a sentence imposed by a court-martial.
      (8) Members of the National Oceanic and Atmospheric Administration, Public Health Service, and other organisations, when assigned to and serving with the armed forces.
      (9) Prisoners of war in custody of the armed forces.
      (10) In time of war, persons serving with or accompanying an armed force in the field.
      (11) Subject to any treaty or agreement to which the United States is or may be a party or to any accepted rule of international law, persons serving with, employed by, or accompanying the armed forces outside the United States and outside the Canal Zone, the Commonwealth of Puerto Rico, Guam, and the Virgin Islands.

UCMJ are the "members of a regular component of the armed forces."[7] These are the uniformed officers and enlisted personnel serving full time in an armed force. Until *O'Callahan v Parker*[8] (*"O'Callahan"*) in 1969, most students of military law assumed that by subjecting active

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

(b) The voluntary enlistment of any person who has the capacity to understand the significance of enlisting in the armed forces shall be valid for purposes of jurisdiction under subsection (a) [of this section] and a change of status from civilian to member of the armed forces shall be effective upon the taking of the oath of enlistment.

(c) Notwithstanding any other provision of law, a person serving with an armed force who

(1) submitted voluntarily to military authority;

(2) met the mental competency and minimum age qualifications of sections 504 and 505 of this title at the time of voluntary submission to military authority;

(3) received military pay or allowances; and

(4) performed military duties;

is subject to this chapter until such person's active service has been terminated in accordance with law or regulations promulgated by the Secretary concerned.

10 USC § 803 Art 3 Jurisdiction to try certain personnel.

(a) Subject to section 843 of this title (article 43), no person charged with having committed, while in a status in which he was subject to this chapter, an offense against this chapter, punishable by confinement for five years or more and for which the person cannot be tried in the courts of the United States of a State, a Territory, or the District of Columbia, may be relieved from amenability to trial by court-martial by reason of the termination of that status.

(b) Each person discharged from the armed forces who is later charged with having fraudulently obtained his discharge is, subject to section 843 of this title (article 43), subject to trial by court-martial on that charge and is after apprehension subject to this chapter while in the custody of the armed forces for that trial. Upon conviction of that charge he is subject to trial by court-martial for all offenses under this chapter committed before the fraudulent discharge.

(c) No person who has deserted from the armed forces may be relieved from amenability to the jurisdiction of this chapter by virtue of a separation from any later period of service.

7. 10 USC § 802 Art 2(a)(1).

8. 395 US 258 (1969).

duty soldiers and sailors to military courts-martial Congress was clearly acting within its constitutional power to make rules for the regulation of the armed services.

The other jurisdictional provisions gave rise to a series of United States Supreme Court cases that examined the reach of military jurisdiction to persons with a more limited connection to the military. Defendants challenged Congress' assertion of jurisdiction under the UCMJ as being in violation of the Constitution of the United States. In essence, each of the cases questioned whether a civilian could be subject to military criminal prosecution.

The pre-UCMJ case of *Billings v Truesdell* [9] ("*Billings*") served to introduce the issue of military reach over civilians. The case involved a conscripted civilian claiming to be a conscientious objector. He refused to complete his pre-induction processing by taking the oath of enlistment. Military officials seized Billings and ordered him to stand trial by court-martial for disobeying military orders. Billings sought the aid of the federal civilian courts through a habeas corpus petition.

The Court agreed with Billings that the military lacked jurisdiction over him. Until Billings took the final affirmative act that made him a member of the military, he remained a civilian and free of court martial jurisdiction. He could be punished criminally for refusal to be inducted, but the punishment would be imposed by a federal civilian court, not a military court martial.

The Court in *Billings* claimed to be simply interpreting a federal statute rather than asserting a constitutional principle that forbade trial by courts-martial. Nevertheless, the case suggested the Supreme Court's discomfort with excessive assertion of military criminal jurisdiction. A decade later, under a new military criminal code, the Court would express itself far more plainly.

The Court began to weigh the UCMJ's jurisdictional provisions against the Constitution in *United States of America Ex Rel Toth v Quarles*[10] ("*Toth*"). Toth was charged with a murder committed while he was an airman in Korea. Had he been arrested immediately after the crime, the case would have received little attention beyond his immediate military unit. However, Toth had received an honorable discharge

9. 321 US 542 (1944).
10. 350 US 11 (1950).

and had been working at a civilian job in the United States for five months when he was seized by military police and returned to Korea to face a court-martial. The military asserted jurisdiction under UCMJ Article 3(a).[11] The Section authorised court martial jurisdiction over former service personnel for a serious offence that could not be prosecuted in the United States. In essence, the article sought to reach cases in which an offender appeared likely to avoid any punishment for a serious criminal offence. Yet, the prospect of military police reaching into the civilian community was disturbing enough to persuade the Supreme Court to review Toth's petition for habeas corpus. Justice Black supported Toth's contention that Article 3(a) was not authorised by the Constitutional grant of power to Congress "to make rules for the Government and Regulation of the land and naval forces." As Justice Black observed: "[T]he power ... would seem to restrict court-martial jurisdiction to persons who are actually members or part of the armed forces.... [A]ny expansion of court-martial jurisdiction like that in the 1950 Act necessarily encroaches on the jurisdiction of federal courts set up under Article 3 of the Constitution where persons on trial are surrounded with more constitutional safeguards than in military tribunals."[12]

Justice Black continued to narrow military jurisdiction in *Reid v Covert*[13] ("*Covert*"). *Covert* was the consolidation of two cases with very similar facts. The defendants were wives of servicemen who were living with their husbands on United States military facilities abroad. Each defendant was tried and convicted by a military tribunal for murdering her husband. In the preceding term, the Court had validated military jurisdiction over the defendants.[14] The decision in these cases was 5-3 with Justice Frankfurter reserving decision until a later date. Two justices from the majority retired in the interim to be replaced by

11. At the time, UCMJ Art 3(a), 50 USC § 553 provided in the relevant part:
> [A]ny person charged with having committed, while in a status in which he was subject to this code, an offense against this code, punishable by confinement of five years or more and for which the person cannot be tried in the courts of the United States or any State or Territory thereof or of the District of Columbia, shall not be relieved from amenability to trial by courts-martial by reason of the termination of said status.

12. Supra n 10, 15.
13. 354 US 1 (1957).
14. *Kinsella v Krueger* 351 US 470 (1956) and *Reid v Covert* 351 US 487 (1956).

Justice Brennan who joined the majority in *Covert* and Justice Whittaker who took no part in the decision. So, in fact, only Justice Harlan changed his position upon rehearing. However, as noted below, Justice Harlan concurred only in the narrow case of a capital offence.

Military jurisdiction was asserted under UCMJ Article 2(11) authorising jurisdiction over "persons ... accompanying the armed forces outside the United States." Justice Black again rejected military jurisdiction. Instead of focusing on the Constitutional grant of powers to Congress, he emphasised the protection of jury trial granted in Article III and the Fifth and Sixth Amendments.[15] These protections were not provided in the court-martial. Justice Black then returned to Article I, section 8's grant of power to Congress over the "land and naval Forces." He found it "inconceivable" that the defendants could have been tried by court-martial if the offences were committed in the United States.[16] The Constitution gave them no less protection overseas.

Justice Black then turned to the fundamentals of constitutional theory and American history that opposed court-martial of the defendants. His comments deserve quotation at length:

> The tradition of keeping the military subordinate to civilian authority may not be so strong in the minds of this generation as it was in the minds of those who wrote the Constitution. The idea that the relatives of soldiers could be denied a jury trial in a court of law and instead be tried by court-martial under the guise of regulating the armed forces would have seemed incredible to those men, in whose lifetime the right of the military to try *soldiers* for any offenses in time of peace had only been grudgingly conceded. The Founders envisioned the army as a necessary institution, but one dangerous to liberty if not confined within its essential bounds....[17]

> Traditionally, military justice has been a rough form of justice emphasising summary procedures, speedy convictions and stern penalties with a view to maintaining obedience and fighting fitness in the ranks. Because of its very nature and purpose the military must place great emphasis on discipline and efficiency. Correspondingly, there has always been less emphasis in the military on protecting the rights of the individual than in civilian society and in civilian courts.

15. Fifth Amendment: "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger,...".
Sixth Amendment: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed...".
16. Supra n 13, 20.
17. Ibid, 23-24 (footnote omitted and emphasis in original).

> Courts-martial are typically ad hoc bodies appointed by a military officer from among his subordinates. They have always been subject to varying degrees of "command influence". In essence, these tribunals are simply executive tribunals whose personnel are in the executive chain of command.... Conceding to military personnel that high degree of honesty and sense of justice which nearly all of them undoubtedly have, the members of a court-martial, in the nature of things, do not and cannot have the independence of jurors drawn from the general public or of civilian judges.[18]

> [W]e cannot consider this encroachment a slight one. Throughout history many transgressions by the military have been called "slight" and have been justified as "reasonable" in light of the "uniqueness" of the times. We cannot close our eyes to the fact that today the peoples of many nations are ruled by the military. We should not break faith with this Nation's tradition of keeping military power subservient to civilian authority, a tradition which we believe is firmly embodied in the Constitution. The country has remained true to that faith for almost one hundred seventy years. Perhaps no group in the nation has been truer than military men themselves. Unlike the soldiers of many other nations, they have been content to perform their military duties in defense of the Nation in every period of need and to perform those duties well without attempting to usurp power which is not theirs under our system of constitutional government.[19]

Justice Black's opinion did not command a majority of the Court. Justices Frankfurter and Harlan concurred in the result (freeing Mrs Covert and Mrs Smith from military jurisdiction) on the narrow issue of the trial of civilian dependents for capital crimes in time of peace.[20] Two justices dissented in *Covert*, both of whom had upheld the military's jurisdiction the preceding term. Justice Clark felt that logistics required that the military have jurisdiction over all persons on military installations abroad:

> In their actual day-to-day living they [civilians on base] are a part of the same unique communities [as members of the military], and the same legal considerations should apply to all. There is no reason for according to one class a different treatment.... The effect of such a double standard on discipline, efficiency, and morale can be easily seen.[21]

Also, Justice Clark found the alternatives to court-martial sorely lacking. He noted the difficulty of running an Article III Federal Court case in a foreign country where the Court would have no power to

18. Ibid, 35-36 (footnotes omitted).
19. Ibid, 40.
20. Ibid, 45, 77.
21. Ibid, 85.

compel appearances of non-American persons. An even less desirable alternative was to turn offenders over to local governments for prosecution.[22] Finally, Justice Clark rejected the notion that any distinction could be made between capital and other cases.[23]

A trio of cases decided together expanded the *Covert* precedent. *Kinsella v United States Ex Rel Singleton*[24] ("*Kinsella*") invalidated court-martial jurisdiction over civilian dependents for non-capital offences. *Grisham v Hagan*[25] ("*Grisham*") held unconstitutional Article 2(11)'s grant of jurisdiction over capital offences committed by civilian employees "accompanying the armed forces" in foreign countries in peacetime. *McElroy v United States Ex Rel Guagliardo*[26] ("*Guagliardo*") applied the same rule to non-capital crimes. Justice Clark, author of the majority opinions in all three cases, adhered to his dissenting position in *Covert* that no distinction could be made between capital and non-capital offences.[26] Thus, Justice Clark found that the *Covert* precedent compelled denial of military jurisdiction in each of the cases.[27]

LIMITING THE JURISDICTION: *O'CALLAHAN*

In the decade from *Kinsella*, *Grisham*, and *Guagliardo* to *O'Callahan* the Supreme Court withdrew from the resolution of court-martial jurisdiction. A series of Court of Military Appeals and federal civilian court cases addressed such other jurisdictional questions as jurisdiction over retirees,[28] jurisdiction over a prior enlistment,[29] jurisdiction over

22. Ibid, 87-89.
23. Ibid, 89.
24. 361 US 234 (1960).
25. 361 US 278 (1960).
26. 361 US 281 (1960).
27. Supra n 24, 246.
28. *Hooper v United States* 326 F 2d 982 (Ct Cl 1964). Plaintiff was convicted by a court martial for committing homosexual acts in a private residence after his retirement from active service. As a result, his pension was discontinued. The court held that the Navy could constitutionally assert jurisdiction via Art 2(4) of the UCMJ ("The following persons are subject to this chapter: [inter alia] Retired members of a regular component of the armed forces who are entitled to pay").
29. *Ginvard v United States* 37 CMR 132 (1967). Service person who is discharged and re-enlists can not be tried by the military for an offence committed prior to discharge unless the offence falls into Art 3(a) jurisdiction.

military prisoners,[30] jurisdiction over members released from active duty but not discharged,[31] jurisdiction over military reservists,[32] and jurisdiction over civilians accompanying an armed force in time of hostilities.[33]

None of the cases suggested that the Supreme Court was about to make a major limitation on court-martial jurisdiction over the core group subject to the UCMJ, active duty service personnel. That issue was reached in *O'Callahan*.[34]

Sergeant O'Callahan was convicted by court-martial of housebreaking, assault and attempt to rape. The crime took place when O'Callahan was on pass from his unit and occurred in a Honolulu hotel room. O'Callahan was first apprehended by civilian police who turned him over to the Army upon learning of his military status. O'Callahan's court-martial conviction was reviewed and sustained by all levels of the military review process. From prison, O'Callahan sought habeas corpus relief from the federal civilian courts. The case eventually reached the Supreme Court on the issue of whether the military had jurisdiction to try O'Callahan for the "commission of a crime cognizable in a civilian court and having no military significance, alleged to have been committed off-post and while on leave."[35] The Constitutional focus was again on the lack of a right to indictment by a grand jury and trial by a petit jury guaranteed in the Fifth and Sixth Amendments.

30. *Simcox v Madigan* 298 F 2d 742 (9th Cir 1962): Art 2(7) 10 USC § 802 giving the military jurisdiction over "[p]ersons in custody of the armed forces serving a sentence imposed by court-martial" held constitutional.
31. *United States v Wheeler* 28 CMR 212 (1959). If a person commits an offence while under Art 2 jurisdiction, his subsequent removal to inactive status does not render him unamenable to jurisdiction under Art 3(a).
32. *United States v Schuering* 36 CMR 480 (1966). To attach court-martial jurisdiction to a reservist, proceedings must be instituted while reservist is on training duty.
33. *United States v Averette* (1970) 41 CMR 363: To establish jurisdiction under Art 2(10) (military jurisdiction "[i]n time of war, [over] persons serving with or accompanying an armed force in the field"), war must have been declared formally by Congress. *Latney v Ignatius* 416 F 2d 821 (DC Cir 1969): In the wake of *O'Callahan*, the court decided that a civilian worker on an oil tanker delivering oil to the Navy could not be subjected to military jurisdiction under Art 2(10).
34. Supra n 8.
35. Ibid, 261 quoting *O'Callahan v Parker* 393 US 822 (1968).

Justice Douglas, writing for six members of the Court, agreed with O'Callahan's contention that the military lacked jurisdiction to court-martial him. He began with a return to *Toth* and *Covert* and their suspicion of the court-martial as an instrument of criminal justice. Justice Douglas concluded: "A court-martial is not yet an independent instrument of justice but remains to a significant degree a specialised part of the overall mechanism by which military discipline is preserved."[36] While conceding the need for "specialised military courts" as an element of "an effective national defense establishment," Justice Douglas cautioned the need for a narrow jurisdiction.[37] Military courts-martial "as an institution are singularly inept in dealing with the nice subtleties of constitutional law."[38] Further, "[a] civilian trial...is held in an atmosphere conducive to the protection of individual rights, while a military trial is marked by the age-old manifest destiny of retributive justice."[39]

Justice Douglas found the *Toth* and *Covert* cases to stand for the proposition "that court-martial jurisdiction cannot be extended to reach any person not a member of the Armed Forces at the times of both the offenses and the trial."[40] However, those precedents did not establish the corollary that courts-martial have "unlimited jurisdiction over soldiers, regardless of the nature of the offenses charged."[41] Military status was merely the beginning of the inquiry. Justice Douglas looked to British and United States history and found a tradition that "viewed with suspicion" the military trial of soldiers who committed civilian offences.[42] This lead to the conclusion that "the crime to be under military jurisdiction must be service connected" in order to allow court-martial jurisdiction.[43] A contrary holding would allow too broad a scope to the constitutional exception for "cases arising in the land or naval forces".

Having created a "service connection" test for court-martial jurisdiction, the Court still had to apply it. All factors in Sergeant O'Callahan's case argued against military jurisdiction. He was not on mili-

36. Ibid, 265 (footnote omitted).
37. Ibid.
38. Ibid.
39. Ibid, 266 (footnote omitted).
40. Ibid, 267.
41. Ibid.
42. Ibid, 268.
43. Ibid, 272.

tary property. He was properly absent from base. There was "no connection not even the remotest one between his military duties and the crimes in question."[44] The victim had no relation to the military. The offence took place in peacetime and the civilian courts were perfectly able to try O'Callahan. Finally, the offences "did not involve any question of the flouting of military authority, the security of a military post, or the integrity of military property."[45] As a consequence, only the civilian courts had the jurisdiction to try O'Callahan.

Justice Harlan, joined by Justices Stewart and White, dissented. They found the Constitution and Supreme Court precedents "clearly" sustained court-martial jurisdiction. Justice Douglas' opinion was "largely one-sided" and relied on "wholly inconclusive historical data."[46] Ample precedent supported the view that military status alone was sufficient to allow court-martial jurisdiction.

The dissenters also argued that as a matter of policy, Congress' choice to extend court-martial jurisdiction to "civilian crimes" committed by military personnel was a reasonable one:

> The United States has a vital interest in creating and maintaining an armed force of honest, upright, and well-disciplined persons, and in preserving the reputation, morale, and integrity of the military services. Furthermore, because its personnel must, perforce, live and work in close proximity to one another, the military has an obligation to protect each of its members from the misconduct of fellow servicemen. The commission of offenses against the civil order manifests qualities of attitude and character equally destructive of military order and safety ... A soldier's misconduct directed against civilians, moreover, brings discredit upon the service of which he is a member ... The Government, thus, has a proper concern in keeping its own house in order, by deterring members of the armed forces from engaging in criminal misconduct on or off the base, and by rehabilitating offenders to return them to useful military service.
>
> The exercise of military jurisdiction is also responsive to other practical needs of the armed forces. A soldier detained by the civil authorities pending trial, or subsequently imprisoned, is to that extent rendered useless to the service. Even if he is released on bail or recognizance, or ultimately placed on probation, the civil authorities may require him to remain within the jurisdiction, thus making him unavailable for transfer with the rest of his unit or as the service otherwise requires.
>
> In contrast, a person awaiting trial by court-martial may simply be restricted to limits, and may "participate in all military duties and activities of his organization while under such restriction."[47]

44. Ibid, 273.
45. Ibid, 274 (footnote omitted).
46. Ibid, 274.
47. Ibid, 281-283 (citation and footnotes omitted).

Lastly, Justice Harlan complained about the imprecision of the majority's "service connection" test. He found "the infinite permutations of possibly relevant factors are bound to create confusion and proliferate litigation over the jurisdictional issue in each instance."[48] The dissenters concluded: "Absolutely nothing in the language, history, or logic of the Constitution justifies this uneasy state of affairs which the Court has today created."[49]

The *O'Callahan* opinion, issued 2 June 1969, is the product of a particular era in Court and American history. Several historical factors are noteworthy. First, the case was decided near the end of the Earl Warren Supreme Court. For a decade and a half that Court had engaged in remaking criminal procedure in the civilian sector. Typically, Warren Court criminal cases held that the United States Constitution's protections of the criminal accused applied to state court criminal proceedings as well as those in federal court.[50] To many of the Justices the court-martial system no doubt looked like one more criminal law system that was not sufficiently sensitive to defendants' constitutional rights.

Secondly, the decision reflected the 1950 UCMJ and did not take into account the considerable Codal amendments enacted by Congress in 1968.[51] The 1968 UCMJ amendments were the most significant statutory change in military criminal law between the UCMJ in 1950 and the present. A major change was to create the military judge to serve as the presiding officer at the more serious courts-martial.[52] The judge, while a military legal officer, was largely removed from command control. The judge's presence has been a major civilianising influence on the court-martial and has undercut allegations that the court-martial in its essence is a staff function of the commander. Justice

48. Ibid, 284.
49. Ibid.
50. See, for example, *Miranda v Arizona* 384 US 436 (1966): A criminal defendant has certain protections accorded by the Fifth Amendment. The Court established procedures which must be followed with respect to any person in custody. These procedures include notification of the right to remain silent and the right to have an attorney present during questioning; *Gideon v Wainwright* 372 US 335 (1963): An indigent criminal defendant has the constitutional right to have an attorney appointed by the court to represent him; *Mapp v Ohio* 367 US 643 (1961): All evidence obtained by illegal searches and seizures is inadmissible in a criminal trial.
51. Pub Law 90-632 (1968).
52. Ibid, § 20.

Douglas' *O'Callahan* opinion was written too early to observe this considerable change in the nature of the court-martial.

Lastly, the opinion was written at the height of United States participation in the Vietnam War and at a time when sentiment against that participation was shared by a considerable portion of the population. An unpopular military, sustained by an unpopular conscription, was an attractive target for judicial rage. While Justice Douglas wrote about a rascally sergeant in the peacetime army of the mid-1950s, his focus may have been on young and reluctant (if not rebellious) conscripts forced to fight the nations's most unpopular war.[53] This helps explain both the result of the case and the remarkably derogatory comments about military justice: "not yet an independent instrument of justice,"[54] "threat to liberty,"[55] "singularly inept in dealing with the nice subtleties of constitutional law,"[56] "age-old manifest destiny of retributive justice."[57]

THE IMPACT OF *O'CALLAHAN*

The *O'Callahan* decision hit the military legal community as the military lawyers were adjusting to the 1968 Amendments to the UCMJ. The Court of Military Appeals initially reacted with a curious decision, *US v Borys*,[58] that virtually rejected the authority of the Supreme Court. Shortly, however, COMA accepted the *O'Callahan* precedent and turned to the job of defining just what "service connection" meant. In general, COMA attempted to sustain court-martial jurisdiction if a colourable argument could be made to distinguish the case from *O'Callahan*, the prototype of the case with no "service connection." Early decisions preserved court-martial jurisdiction crimes committed overseas by service personnel.[59] Here, the COMA observed, trial by

53. Justice Douglas in *O'Callahan* quoted an article about Army Captain Howard Levy's court-martial for counselling enlistees to avoid Vietnam service: "military law has always been and continues to be primarily an instrument of discipline, not justice." supra n 8, 266 quoting Glasser "Justice and Captain Levy" 12 Columbia Forum 46, 49 (1969). Levy's court-martial conviction was sustained by the Supreme Court in *Parker v Levy* 417 US 733 (1974).
54. Supra n 8, 265.
55. Ibid.
56. Ibid.
57. Ibid, 266 (footnote omitted).
58. 40 CMR 259 (1969).
59. *United States v Easter* 41 CMR 68 (1969); *United States v Ortiz* 42 CMR 213 (1970); *Priest v Koch* 41 CMR 293 (1970); *United States v Keaton* 41 CMR 64 (1969).

civilian authorities in lieu of court-martial would mean trial by German or Japanese or Turkish or Philippine courts that were not bound to apply United States Constitutional protections regarding grand jury indictment and jury trial.

The United States Supreme Court shortly provided a second blanket exception to *O'Callahan,* the crime committed on the military installation. The case was *Relford v Commandant, US Disciplinary Barracks*[60] ("*Relford*"). Corporal Relford was convicted of kidnapping and rape on Fort Dix, New Jersey. The victims were the wife and sister of fellow servicemen. One was employed at the post exchange. At the time of the offence, Relford was off duty and in civilian clothes. Relford argued that *O'Callahan* required that his crime be of a distinctly military nature, "one involving a level of conduct required only of servicemen and, because of the special needs of the military, one demanding military disciplinary action," in order to allow court-martial jurisdiction.[61] Kidnapping and rape were civilian crimes capable of adjudication in the New Jersey state courts.

Justice Blackmun, writing for a unanimous Supreme Court, disagreed. After reviewing *O'Callahan*, he summarised 12 factors that were present in *O'Callahan* and all of which argued against trial by court-martial.[62] Justice Blackmun viewed the 12 factors as indicating *O'Callahan* "chose to take an ad hoc approach to cases where trial by

60. 401 US 355 (1971).
61. Ibid, 363.
62. Ibid, 365. Blackmun J listed the following:
    1. The serviceman's proper absence from the base.
    2. The crime's commission away from the base.
    3. Its commission at a place not under military control.
    4. Its commission within our territorial limits and not in an occupied zone of a foreign country.
    5. Its commission in peacetime and its being unrelated to authority stemming from the war power.
    6. The absence of any connection between the defendant's military duties and the crime.
    7. The victim's not being engaged in the performance of any duty relating to the military.
    8. The presence and availability of a civilian court in which the case can be prosecuted.
    9. The absence of any flouting of military authority.
    10. The absence of any threat to a military post.
    11. The absence of any violation of military property.
    12. The offence being among those traditionally prosecuted in civilian courts.

court-martial is challenged."[63] While *O'Callahan* fell on the "civilian trial" side of all factors, *Relford* was more evenly balanced. Relford could point to:

(1) the crimes' commission in the United States;
(2) the lack of connection between the crimes and Relford's military duties;
(3) the availability of civilian court prosecution;
(4) the lack of damage to military property; and
(5) the crimes being familiar civilian ones as favouring civilian prosecution and precluding a court-martial.

Five factors argued for court-martial jurisdiction. They were:

(1) Relford was not absent from the base;
(2) the crimes were committed on the base;
(3) the base was under military control;
(4) the victim's performance of duty related to the military (employment in the post exchange); and
(5) the threat to a military post.

Two factors were imprecise:

(1) the commission of the offences in peacetime and their being unrelated to authority stemming from the war power; and
(2) the absence of any flouting of military authority.[64]

Rather than count numbers, Justice Blackmun shifted his attention to the significance of the commission of the offences "on-post." The on-post offences threatened several military objectives. The Court stressed among other concerns:

(1) "The essential and obvious interest of the military in the security of persons and of property on the military enclave.";
(2) "The responsibility of the military commander for maintenance of order in his command and his authority to maintain that order.";
(3) "The impact and adverse effect that a crime committed against a person or property on a military base, thus

63. Ibid, 365-366.
64. Ibid, 366-367.

violating the base's very security, has upon morale, discipline, reputation and integrity of the base itself, upon its personnel and upon the military operation and the military mission.";

(4) "The distinct possibility that civil courts, particularly non-federal courts, will have less than complete interest, concern, and capacity for all the cases that vindicate the military's disciplinary authority within its own community."; and

(5) "Our inability appropriately and meaningfully to draw any line between a post's strictly military areas and its non-military areas, or between a serviceman-defendant's on-duty and off-duty activities and hours on post."[65]

The opinion concluded by holding "that when a serviceman is charged with an offense committed within or at the geographical boundary of a military post and violative of the security of a person or property there, that offense may be tried by a court-martial."[66] By this test Relford was properly tried by court-martial.

Although decided only two years later, the tone of *Relford* is far different from that of *O'Callahan*. Though *O'Callahan* is given approving citation, *Relford* is devoid of cheap shots at the military justice system or great worry over the deprivation of constitutional rights to service personnel. If either concern weighed heavily in the Court's mind, it should have encouraged application of *O'Callahan* and trial in civilian court. Rather, the Court's opinion gave primary weight to the military interests involved and a recognition of their legitimacy. Justice Blackmun was correct that *Relford* did not provide clear guidelines in resolving further jurisdictional questions. But it did preserve court-martial jurisdiction for one category of offences and suggested that "service connection" could be found for traditionally civilian crimes under the proper circumstances.

After *Relford*, the Supreme Court generally withdrew from deciding the further contours of service connection.[67] The COMA became the

65. Ibid, 366-369.
66. Ibid, 369.
67. The Court held that Art 76 of the UCMJ ("[T]he proceedings, findings, and sentences of courts-martial as ... reviewed ... as required by this chapter ... are final and conclusive ... [A]ll action ... pursuant to those proceedings [is] binding

prime interpreter of "service connection." A crucial category of cases involved the use and transfer of drugs by military personnel. The COMA position shifted.[68] Eventually, the Court determined that almost any drug involvement by a service person was service connected because of the harmful consequences to military readiness.[69] The COMA also decided a variety of jurisdictional cases that did not involve the *O'Callahan* service connection.[70]

on all ... courts ... of the United States.") and its legislative history do not limit collateral attack to habeas corpus. Also, the Court held that to invoke federal court jurisdiction a defendant must allege injury beyond that resulting directly from the institution of criminal proceedings (defendant had obtained an injunction in federal court barring any proceedings in a court-martial): *Schlesinger v Councilman* 420 US 738 (1975) ("*Councilman*"). Another case involved the retroactivity of the *O'Callahan* decision. Four Justices held that *O'Callahan* should not be applied retroactively and thus upheld military jurisdiction. One other Justice voted to uphold the court-martial conviction on other grounds: *Gosa v Mayden* 413 US 665 (1973).

68. Following the *O'Callahan* decision, COMA held that drug offences had a "special military significance" and therefore were subject to military jurisdiction: *United States v Beeker* 40 CMR 275, 277 (1969). In 1976, COMA reversed itself and held that the military could not prosecute off-base drug offenders: *United States v McCarthy* 2 MJ 26, 29, n 1 (CMA 1976). COMA returned to its position in *Beeker* in 1980. The Court found that drugs presented such a threat to the military that "very few drug involvements of a service person will not be 'service connected'.": *United States v Trottier* 9 MJ 337, 340-351 (1980) ("*Trottier*"). (The content of this footnote is paraphrased from *Solorio v United States* 483 US 435, 450-451 (1987) and n 17.)

69. *Trottier* ibid. But see *United States v Baridraux* 22 MJ 60 (1986): Defendant was on terminal leave at a trailer park in a civilian community not proximate to a military installation. The Court held that "there were insufficient interests in the military community to warrant court-martial jurisdiction over this offense."

70. *United States v Cole* 24 MJ 18 (CMA 1987): Court-martial jurisdiction exists over a reservist accused of fraudulent separation; *Duncan v Usher* 23 MJ 29 (CMA 1986): Upon release from active duty a reservist was no longer amenable to court-martial jurisdiction for offences committed during active duty. This outcome was not affected by the fact that the defendant, at the time of trial, was again on active duty; *United States v Caputo* 18 MJ 259 (CMA 1984): Personal jurisdiction of the military terminated upon reservist's removal from active duty; *United States v Clardy* 13 MJ 308 (CMA 1982): Court-martial jurisdiction is not interrupted when servicemember is discharged for the sole purpose of reenlistment and his military status does not change; *United States v Pearson* 13 MJ 140 (CMA 1982): Court-martial jurisdiction exists over national guardsperson even though the state did not consent; *United States v Self* 13 MJ 132 (CMA 1982): Where national guardsperson has been questioned and appraised of charges, military jurisdiction attaches and survives the subsequent expiration of the term of active duty; *United States v Douse* 12 MJ 473 (CMA 1982): Military jurisdiction exists over a service

SOLORIO: THE OVER-RULING OF *O'CALLAHAN*

In *United States v Lockwood* decided by the COMA in 1983, Chief Judge Everett suggested that *O'Callahan* had become a doubtful precedent.[71] Three years later the COMA decided *United States v Solorio*[72] (*"Solorio"*). The defendant was convicted of sexual offences with the minor female children of fellow Coast Guards. The charges arose from incidents at Juneau, Alaska and at Governors Island. The offences at Governors Island occurred on government property and Solorio did not challenge the military's jurisdiction over those incidents. The offences in Juneau took place off post at a time when Solorio was properly absent from military duties. Despite these facts, the COMA sustained court-martial jurisdiction. The Court generally noted the tendency of the law toward greater attention toward the rights of victims. From this the Court suggested that the offence would have a continuing impact on the serviceman-father of the victim. Additionally, the crime would effect other members of the unit. Those factors when added to doubts about the feasibility of a civilian court prosecution in Alaska[73] and the value of handling all offences in one trial[74] provided sufficient "service connection" to sustain a court-martial.

person who is awaiting discharge after expiration of the term of enlistment; *Wickham v Hall* 12 MJ 145 (CMA 1981): Person accused of obtaining a fraudulent discharge is amenable to military jurisdiction; *United States v Hudson* 5 MJ 413 (CMA 1978): Restriction of national guardsperson on active duty to company area was sufficient to attach military jurisdiction and sustain guardsperson's active duty status indefinitely.

71. 15 MJ 1 (CMA 1983). Everett CJ seemed to question the mechanics of determining "service connection." At 5 he found that opinions following *O'Callahan*, specifically *Relford* supra n 60, and *Councilman* supra n 67, "suggests that the enumeration of 'factors' in *Relford* [interpreting *O'Callahan*] was never intended to provide an exhaustive checklist and that the presence of service connection is not to be determined in a rigid and mechanical fashion".
72. 21 MJ 251 (CMA 1986).
73. Ibid, 257. The defendant had been transferred out of Alaska as had the families of at least two of the victims. The Court cited the difficulty Alaska would have getting the victims to return to Alaska to testify and the decreased incentive to prosecute given the facts that the accused and witnesses were so far removed from the forum.
74. Ibid 257-258. The Court cited rehabilitative advantages in one trial, efficiency, and victims' interests (if two trials were held, the Alaskan victims might have had to also testify at Governors Island).

In 1983, Congress granted the United States Supreme Court the power of direct review over decisions of the Court of Military Appeals.[75] *Solorio* was the initial case in which the Court exercised the power. On 25 June 1987, the Supreme Court sustained court-martial jurisdiction.[76] The Court's decision took the further step that COMA could not. It overruled *O'Callahan*.

Justice Rehnquist's legal analysis began with the constitutional grant to Congress of the power "to make rules for the Government and Regulation of the land and naval forces." Congress in the UCMJ had clearly authorised jurisdiction based on military status alone. A consistent line of Supreme Court cases until *O'Callahan* had recognised the "military status only" rule.[77]

Justice Rehnquist proceeded to re-examine *O'Callahan*'s reliance on British and early American precedents to support a limited court-martial jurisdiction over soldiers charged with civilian crimes. At best, he found the evidence "far too ambiguous to justify the restriction on the plain language of clause 14 which O'Callahan imported into it."[78]

Justice Rehnquist then placed the "service connection" litigation in the context of judicial review of other military activities. In other contexts, the Court had "emphasised that Congress has primary responsibility for the delicate task of balancing the rights of servicemen against the needs of the military."[79] In a series of cases the Court has

75. (US) Military Justice Act 1983, Public Law 98-209.
76. *United States v Solorio* 483 US 435 (1987).
77. Ibid, 439-440.
78. Ibid, 445 (footnote omitted). Rehnquist J disagreed with the *O'Callahan* Court's historical interpretation. He agreed that the English Parliament through 1689 used its power to define the jurisdiction of military courts sparingly. However, Rehnquist J felt that the British Articles of War did not, as the *O'Callahan* Court claimed, establish 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.": ibid, 442 quoting *O'Callahan* supra n 8, 269. Post-revolutionary history supported the *O'Callahan* position even less, according to the *Solorio* majority. Military records disclose courts-martial in the late 18th Century for offences against civilians and punishable by civil laws: ibid, 444. The "much disputed" Section XVIII, Art 5 of the American Articles of War of 1776 (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") was not sufficiently clear to overcome the "plain language" of cl 14: ibid, 444-445.
79. Ibid, 447.

rejected service personnel's claims of violation of constitutional rights with references to the need for deference to Congressional military decisions. The Court has also recognised that the military is a "separate society" governed by somewhat different constitutional standards than would apply in civilian life.[80]

Justice Rehnquist concluded his opinion by noting the correctness of Justice Harlan's prediction in his *O'Callahan* dissent. *O'Callahan* had created confusion. Justice Rehnquist summarised: "Since *O'Callahan* and *Relford* military courts have identified numerous categories of offenses requiring specialised analysis of the service connection requirement. For example, the courts have highlighted subtle distinctions among offenses committed on a military base, offences 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. 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."[81]

O'Callahan's "novel approach to court-martial jurisdiction" was overruled.[82] The majority opinion held "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."[83]

Only five Justices joined the majority opinion. Justice Stevens concurred in the judgment but stated that the "unnecessary overruling of precedent is most unwise."[84] He found the COMA opinion clearly

80. *Goldman v Weinberger* 475 US 503 (1986): The First Amendment does not bar the enforcement of an Air Force regulation to prohibit an Orthodox Jew from wearing a yarmulke; *Chappell v Wallace* 462 US 296 (1983): Enlisted personnel may not sue superior officer for alleged racial discrimination; *Rostker v Goldberg* 453 US 57 (1981): Selective service registration of men only does not violate the equal protection component of the Fifth Amendment; *Brown v Glines* 444 US 348 (1980): Air Force regulation requiring all petitions be approved by commanders before circulation does not violate the First Amendment; *Middendorf v Henry* 425 US 25 (1976): A summary court-martial conducted without counsel present does not violate the Sixth Amendment; *Parker v Levy* 417 US 733 (1974): Articles of the UCMJ allowing punishment for "conduct unbecoming an officer and gentleman" and "all disorders...to the prejudice of good order and discipline in the armed forces" are not unconstitutionally vague.
81. Supra n 76, 449 (footnotes omitted).
82. Ibid, 450.
83. Ibid, 450-451 (footnotes omitted).
84. Ibid, 451.

established that there was service connection for the *Solorio* prosecution. That was sufficient to decide the case. In fact, the United States in its brief had only asked for reconsideration of *O'Callahan* if the Court found no service connection on the *Solorio* facts.[85]

Justices Marshall and Brennan, both members of the *O'Callahan* majority, and Justice Blackmun, author of *Relford*, dissented. In language harking back to that of Justice Douglas, the dissenters observed the majority "disregards constitutional language and principles of stare decisis in its singleminded determination to subject members of our armed forces to the unrestrained control of the military in the area of criminal justice."[86] The majority's first error was in assuming that the only constitutional provision of relevance was the grant of power in Article 1, Section 8, Clause 14 to Congress to make rules governing the Armed Forces. In fact, *O'Callahan* was based in great part on violations of the Fifth and Sixth Amendments. Any exception to the application of the jury trial rights of those amendments needed to come from the Fifth Amendment's exception for "cases arising in the land or naval forces." That exception did not grant immunity from the Constitution for mere military status.[87]

The dissent then argued that Justice Rehnquist had misconstrued the historical background of military jurisdiction. The emphasis should not be on Clause 14, but instead on the Framer's intent with respect to the Fifth and Sixth Amendments.[88]

The dissent next argued that the facts of *Solorio* opposed military jurisdiction. In the dissent's view: "Petitioner's offenses did not detract from the performance of his military duties. He committed these crimes while properly absent from his unit, and there was no connection between his assigned duties and his crimes. Nor did petitioner's crimes threaten people or areas under military control... Moreover, the crimes caused no measurable interference with military relationships. Though the victims were dependents of Coast Guard members, the court-

85. Ibid, 452 in footnote.
86. Ibid, 452.
87. Ibid, 452-455.
88. Ibid, 458. Marshall J viewed *O'Callahan*'s interpetation of the historical background requiring a "service connection" rather than "status" as the test for military jurisdiction as the correct reading of the evidence: ibid, 457. He did not feel that *O'Callahan* had substantially changed military jurisdiction. He pointed out the fact that the UCMJ, passed in 1950, was Congress' first attempt to confer military jurisdiction over the crimes of murder and rape in peacetime: ibid, 461.

martial judge found that there was only *de minimis* military interaction between petitioner and the fathers of the victims..."[89] Military appellate courts had impermissibly reassessed the facts to find a greater impact on the victims and the military community than the trial judge had found. The dissentients granted that service connection could be a factually difficult determination. But the "[d]enial of these [constitutional] protections is a very serious matter."[90] Further, the court-martial judge below had shown that careful factfinding as to "service connection" was well within the capacity of military jurists.[91]

The concluding section of the dissent attacked the "blatant disregard" for the *O'Callahan* precedent and for stare decisis in general. To the dissenters, *Solorio* stood for the proposition that "members of the Armed Forces may be subjected virtually without limit to the vagaries of military control." The decision reflected "contempt, both for the members of our armed forces and for the constitutional safeguards intended to protect us all."[92]

The fragility of the *Solorio* majority might suggest that a change of Court membership will revive *O'Callahan*. On closer examination, the prospect seems unlikely. Since the *Solorio* decision, Justice Kennedy has joined the Court as the final nominee of President Reagan. Justice Kennedy's reputation on the federal appellate bench indicated that he was a conservative jurist. In the few military cases on which he sat, he supported the position of the military.[93] Further, the *Solorio* dissenters

89. Ibid, 462.
90. Ibid, 466.
91. Ibid.
92. Ibid, 467.
93. Kennedy J, without exception, supported the government's interests in all six cases involving the military that he heard while on the Ninth Circuit Court of Appeals. (It should be noted that all these cases were unanimous decisions.) Of the six cases, Kennedy J authored two, the more significant of which was *Beller v Middendorf* 632 F 2d 788 (9th Cir 1980). *Beller* involved a constitutional challenge to Naval regulations regarding the dismissal of homosexuals. The regulation required homosexuals be processed for discharge subject to recommendations of retention from the discharge board or the Secretary of the Navy's discretionary retention. Kennedy J noted that, in light of the Supreme Court's recognition that certain private decisions were constitutionally protected (for example, abortion), homosexual activity *might* be immune to government regulation: ibid, 810. However, he concluded:

> In view of the importance of the military's role, the special need for discipline and order in the service, the potential for difficulties arising out of possible close confinement aboard ships or

(Justices Brennan, Marshall, and Blackmun) are among the senior Justices in age and years of Court service. Quite possibly, all three will leave the Court by death or retirement during the next four years. This will give President Bush the power to appoint their successors. The reach of military court-martial jurisdiction over active duty service personnel is not likely to be a "litmus test" issue for new judicial appointments. However, President Bush's Court appointees are likely to be cautious about overturning precedent, generally respectful of Congress' power over the military, and restrained in their willingness to expand the coverage of the Bill of Rights. All factors would argue for upholding *Solorio* and viewing *O'Callahan* as a temporary deviation from a two-century-old rule that military status alone is sufficient to provide court-martial jurisdiction.

Since *Solorio*, the COMA has examined a few jurisdictional cases. *US v Overton*[94] considered court-martial jurisdiction over a reserve member. A crime on the Subic Bay naval installation in the Philippines against United States property provided service connection even under the *O'Callahan* precedents. The Court stated in a footnote that the same result would be reached if *Solorio* was retroactive, a question, at that time, undecided.[95] Sex offences with the dependent children of a fellow service person (a virtual repeat of the *Solorio* facts) were also found

> bases for long periods of time, and the possible benefit to recruiting efforts ... we conclude that at the present time the regulation represents a reasonable effort to accommodate the needs of the Government with the interests of the individual: ibid, 812.

The other case Kennedy J authored held that the Secretary of Labor's decision to forego enforcement action of the Vietnam Era Veterans' Readjustment Assistance Act was immune from judicial review: *Clementson v Brock* 806 F 2d 1402 (9th Cir 1986). The four other military cases Kennedy J participated in were *Moore v Johnson* 582 F 2d 1228 (9th Cir 1978) upholding Government discretion in changing the location of persons receiving domiciliary care at Veterans' Administration facilities; *United States v Newell* 578 F 2d 827 (9th Cir 1978) upholding use of information discovered by military interrogation in civilian trial; *Mossbauer v United States* 541 F 2d 823 (9th Cir 1976) denying overtime payment to civilian employee for time spent travelling on base; *United States v Reiser* 532 F 2d 673 (9th Cir 1976) denying Equal Protection challenge to the Selective Service Act's application only to men.

94. 24 MJ 309 (1987).
95. Ibid, 312 in footnote.

service connected in *US v Huitt*,[96] but the COMA avoided ruling on whether *Solorio* would be applied retroactively.

The COMA finally addressed retroactivity fifteen months after *Solorio* in *US v Avila*[97] ("*Avila*"). The off-base sex offences with the serviceman's own stepdaughter would have challenged the *Relford* Supreme Court. The COMA found service connection under the old *O'Callahan* and *Relford* tests and held that *Solorio* was to be applied retroactively.

THE JURISDICTION UNDER THE UCMJ POST-*SOLORIO*

The twentieth anniversary of the *O'Callahan* decision passed quietly in June 1989. The law of court-martial jurisdiction appears to have stabilised. *Solorio* appears on solid ground within the Supreme Court. The COMA retroactivity ruling in *Avila* has removed one of the remaining questions of the *Solorio* decision. Other jurisdictional questions will doubtless arise from time to time, but the contours of the area seem settled. The Congress, which could amend the jurisdictional articles, has shown no inclination to restore the *O'Callahan* precedent by legislative action. No doubt any such proposal would be strongly opposed by the uniformed services and the civilian leaders of the Department of Defense.

In some ways *Solorio* is a mark of respect for the evolution of the military justice system over the last two decades. Military criminal law has become less and less like the system suggested in Justice Douglas' *O'Callahan* opinion. While the court-martial remains different from proceedings in state or federal courts, it is clearly a "justice system". The military judge has become the neutral magistrate protecting both the rights of the accused and the rights of the government as envisioned by the drafters of the 1968 legislation. Some services have also removed the defence lawyers from involvement in the chain of command. An independent defence counsel service,[98] coupled with the right to

96. 25 MJ 136 (1987).
97. 27 MJ 62 (1988).
98. See T D S Howell "The Establishment of the US Army Trial Defense Service" 100 Mil L Rev 4 (1983) for a description of the evolution of the Army's separate trial defence service.

retain civilian counsel[99] and the presence of a new defence counsel on appeal, provides competent and independent representation.

It is probably correct to say that the guilty accused may have more ability for delay and confusion in a civilian criminal trial than in a military court-martial. Objective observers of criminal law hardly regard this as desirable. Also, it is hard to make a case that civilian justice scores over the court-martial as an accurate finder of fact and adjudicator of guilt or innocence. These developments thus weaken the *O'Callahan* premise that large injustice is done to service personnel by subjecting them to an unconstitutional court martial.

The time between *O'Callahan* and *Solorio* also reflects changes in the military community from the late 1960s to the present. *O'Callahan* was decided during wartime and during a period of military conscription. The Vietnam War and military conscription both ended in the United States in the early 1970s. A more conservative Supreme Court since 1969 has given great deference to Congressional and executive branch decisions about military policy. While the Constitutional protections of the Bill of Rights have relevance to the military, the Court is willing to let Congress treat the military differently upon some showing of the reasons why different treatment is appropriate. Lower federal courts continue to occasionally overturn military actions on constitutional grounds. However, the Supreme Court since the mid-1970s has been virtually unanimous in sustaining military decisions against constitutional challenge.[100]

Court-martial jurisdiction also has implications for the debate over the nature of the military in contemporary American society. Eminent military sociologists have explored the tendency of the military to move towards an "occupational" model and away from an "institutional" model.[101] The works of Morris Janowitz and Charles Moskos explore these trends.[102] In oversimplified fashion, the "occupational"

99. 10 USC § 832.
100. Supra n 79.
101. C C Moskos "From Institution to Occupation: Trends in Military Organisation" 4 Armed Forces and Society 41 (Fall 1977).
102. See C C Moskos (ed) *Public Opinion and the Military Establishment* (California: Sage Publications, 1971); M Janowitz *The Last Half-Century: Societal Change and Politics in America* (Chicago: University of Chicago Press, 1978); M Janowitz *Political Conflict: Essays in Political Sociology* (Chicago: Quadrangle Books, 1970).

model views the military as another job. The "institutional" model insists that there is a distinct military calling and status that make the business of arms different from civilian occupations. Trends since the end of World War II have generally pushed the military towards the "occupational" model. Among factors noted are: the importance of salary in recruiting members into the military, the comparability of many military jobs with those in the civilian sector, the tendency toward married soldiers and off-post living, the weighing of the benefits of military life against the standards of the civilian world, and to some extent the downplaying of special attributes of patriotism to the soldier or sailor.

The triumph of "occupationalism" was clearly the end of conscription in the Nixon Administration. The end of conscription removed military distinctness (the only job that the nation can compel you to do), forced the military to be a competitor for labour (with a significant increase in entry level wages and certain concessions to job attractiveness), and removed the actual or implied sense of classlessness that service in the military had offered. The draft took both the sons of privilege and poverty. The all volunteer army has had little appeal to the middle and upper classes.

Within this framework *O'Callahan* is an "occupational" case. *O'Callahan* implies the service person is distinct in only those uniquely military aspects of the job. Off-duty and off-post, he or she should be a "civilian" at least in amenability to the criminal law. *Solorio* is a victory for "institutionalism", albeit within a very much civilianised system of court-martial justice. Military status by itself is significant. There is "something about a soldier." *Solorio* removes the need for weighing the factors that may decide the legal issue of "service connection."

Solorio, of course, does not *compel* trial by court-martial of all service personnel defendants. Nor does it preclude trial in state or federal civilian court where authorised. In practice, crimes in the civilian community committed by service personnel require a cooperative effort between military and local law enforcement officials at the police and prosecution levels. Each authority may have distinctive needs and desires. Often the overburdened local law enforcement officials will gladly give up their jurisdiction over the crimes of service personnel, particularly where a minimal impact on local interests is present (for example, service personnel assaulting each other in a

civilian bar). Similarly, the military may be willing to cede its jurisdiction to the civilian courts where civilian values are harmed and the seriousness of the crime may suggest the defendant is no longer a useful member of the military (for example, the murder or rape of a civilian in the civilian community). *Solorio* does nothing to prevent these working relationships. It only removes any doubts about whether the military may actually have power to convict and punish an offender.