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Solorio, v. United States: A Return to the Unrestrained Subject Matter Jurisdiction of Military Courts

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NOTES

Solorio v. United States: A Return To The Unrestrained Subject Matter Jurisdiction Of Military Courts

As the *U.S.S. America* returns to Norfolk, Virginia after a six-month deployment to the Indian Ocean, a weary sailor from Nebraska anxiously awaits the opportunity to visit home. Once home, the sailor relaxes in an environment free of the stress and strain of military life. While at home, the sailor and several friends steal a car and are apprehended by the local police. According to a recent United States Supreme Court pronouncement in *Solorio v. United States*,[1] the sailor may be subjected to the jurisdiction of a military court for the crime.[2]

The *Solorio* decision overruled the eighteen-year-old test enunciated in *O'Callahan v. Parker*[3] for determining a military court's subject matter jurisdiction. The *O'Callahan* Court established the requirement that a crime committed by a servicemember must have a service connection before a military court's jurisdiction would attach.[4] In the example above, the crime—car theft—would not have an adverse impact on military discipline and therefore would have had no service connection under the *O'Callahan* standard. The *Solorio* Court replaced this service connection test with the requirement that the alleged perpetrator merely be a member of the armed services at the time of the alleged offense,[5] thus widening the reach of military courts' jurisdiction. This expansion of jurisdiction is a return to the pre-*O'Callahan* standard.

This Note focuses on the scope of military courts-martial jurisdiction, recognizing that state courts have concurrent jurisdiction in many of these cases. The Note contends that the differing results in *Solorio* and *O'Callahan* can be understood in light of the changed circumstances affecting the judicial deference

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

2. Under the authority of Article I of the United States Constitution, Congress enacted the Uniform Code of Military Justice, ch. 169, 64 Stat. 108 (1950)(codified as amended at 10 U.S.C. § 801-940 (1982)), and created a military courts-martial system independent of the federal judiciary created under Article III. A court-martial administers military law, with crimes and sanctions delineated by the Uniform Code of Military Justice. Note, *Service Connection and Drug-Related Offenses: The Military Courts' Ever-Expanding Jurisdiction*, 54 GEO. WASH. L. REV. 118, 120 (1985).

3. 395 U.S. 258 (1969). In *O'Callahan*, a service member assaulted and attempted to rape a young girl while he was off base on an evening pass. *Id.* at 259-60. *O'Callahan* was the first time the Supreme Court addressed the issue of the subject matter jurisdiction of a military court-martial. From this case emerged a line of decisions restricting the personal jurisdiction of military courts-martial. The Supreme Court had narrowed the reach of court-martial jurisdiction to persons who were members of the military both at the time of the offense and of the trial. *See* McElroy v. United States *ex rel.* Guagliardo, 361 U.S. 281 (1960) (no jurisdiction over civilian employees); Kinsella v. United States *ex rel.* Singleton, 361 U.S. 234 (1960) (no jurisdiction over dependents of military personnel); United States *ex rel.* Toth v. Quarles, 350 U.S. 11 (1955) (no jurisdiction over discharged soldier).

4. *O'Callahan*, 395 U.S. at 272.

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

the Court accords to congressional authority.[6] It will examine and contrast the three factors that support application of judicial deference: the uniqueness of the military community, the efficacy of military justice, and the constitutional authority. Finally, the Note will discuss the effect of the ruling on servicemember rights and the issue of retroactivity of the *Solorio* decision.

In early 1985 a Coast Guard investigation revealed that Richard Solorio, an active duty Coast Guardsman, while stationed in Alaska, sexually abused two young daughters of a fellow Coast Guardsman. Solorio committed the crimes off base, and discovery of the abuse occurred after Solorio transferred to New York.[7] A subsequent investigation revealed that Solorio had committed similar offenses in government housing at his new duty station. The military court charged Solorio with fourteen offenses, including rape and assault.[8] At his court martial, Solorio moved to have the Alaskan charges dismissed for lack of subject matter jurisdiction.[9] The court-martial judge ruled that the Alaskan charges were not service connected, thereby precluding court-martial jurisdiction. The Government appealed, and the United States Coast Guard Court of Military Review reinstated the charges upon finding that the crime's potential impact on servicemember morale provided a service connection.[10] The United States Court of Military Appeals subsequently affirmed the finding of jurisdiction.[11] The United States Supreme Court granted certiorari and held that there was jurisdiction.[12] Rather than applying the service connection test to find jurisdiction, as did Justice Stevens,[13] the majority rejected the test altogether.[14]

The Supreme Court considered the case an opportune one to eliminate the confusion generated by judicial attempts at identifying a crime's service connec-

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6. In this Note, judicial deference refers to the Supreme Court's reluctance to interfere in areas in which the Constitution has empowered Congress to act.

7. United States v. Solorio, 21 M.J. 512, 514 (C.G.C.M.R. 1985), *aff'd*, 21 M.J. 251 (C.M.A. 1986), *aff'd*, 107 S. Ct. 2924 (1987).

8. *Solorio*, 21 M.J. at 514-15. Solorio was charged with indecent liberties, lascivious acts, indecent assault, assault, and attempted rape for acts committed in Alaska and New York under articles 80, 128, and 134 of the Uniform Code of Military Justice, 10 U.S.C. §§ 880, 928, 934 (1982). *See Solorio*, 107 S. Ct. at 2926 n.1.

9. Solorio objected to the military court's jurisdiction, because he claimed that the crimes lacked a service connection under the set of factors listed in Relford v. Commandant, United States Disciplinary Barracks, Fort Leavenworth, 401 U.S. 355 (1971). *See Solorio*, 107 S. Ct. at 2924-25. For a discussion of the *Relford* factors, see text accompanying notes 39-43.

10. *Solorio*, 21 M.J. at 521-22. The Coast Guard Court of Military Review found that the court-martial judge erred in analyzing the effect on the Alaskan command after both Solorio and the victim's family had transferred. *Id.* The court reasoned that the proper approach in determining a service connection is the effect the crime "would have had if discovered at the time the fathers and the accused were assigned together . . . ." *Id.* at 519.

11. *Solorio*, 21 M.J. at 258. The Court of Military Appeals found a sufficient "service connection" because the alleged crimes ultimately affected "the morale of any military unit or organization to which the [victim's] family member is assigned." *Id.* at 256.

12. *Solorio*, 107 S. Ct. at 2931-32.

13. *Id.* at 2933 (Stevens, J., concurring).

14. *Id.* at 2927. The dissent in *Solorio* held fast to the *O'Callahan* analysis, arguing that servicemember rights to fifth and sixth amendment protection should serve to limit a military court's jurisdiction. *Id.* at 2935 (Marshall, J., dissenting). Additionally, the dissent objected to the expansion of jurisdiction to include offenses such as tax fraud that have no relation to military discipline. *Id.* at 2941.

tion.[15] In rejecting the service connection test, the *Solorio* Court developed two separate lines of reasoning. First, the Court found ambiguous the historical reach of subject matter jurisdiction in early American courts-martial.[16] The Court identified two passages from the British Articles of War of 1774. The first required a civilian trial for soldiers accused of offenses against civilians and property, and the second required a court-martial for similar offenses.[17] The Court characterizes the *O'Callahan* Court's reliance on the former passage as "less than accurate" in light of the contradictory passage which it precedes.[18] Second, the Court noted that the Constitution empowers Congress to make laws regulating the military.[19] Because there existed no clear historical restraint on jurisdiction and in light of the "clear" language of the Constitution, the Court opted to defer[20] to congressional authority in balancing the rights of servicemembers against the needs of the military.[21] Thus, the Court reinstituted the "military status" test for court-martial jurisdiction. Because Solorio was in the Coast Guard, he was subject to the military court's jurisdiction.

During the middle ages, the use of military commanders as civilian judges blurred any distinction between civilian and military jurisdiction.[22] The origins of the court-martial can be traced to fifteenth-century Germany.[23] The court-martial in the United States developed along the lines of the British Articles of War existing in 1776.[24] However, the extent of early American court-martial

15. *Id.* at 2931-32; *see* Relford v. Commandant, United States Disciplinary Barracks, Fort Leavenworth, 401 U.S. 355, 365 (1971) (listing 21 relevant factors that courts could use in assessing jurisdiction); *see also* Cooper, O'Callahan *Revisited: Severing the Service Connection*, 76 MIL. L. REV. 165, 187 (1977) (concluding that net results of the Court of Military Appeals' applications of the service connection test were not well reasoned or logical). *Compare* United States v. Avila, 24 M.J. 501 (A.F.C.M.R. 1987) (servicemember's ex-wife's daughter's assault by another servicemember held not service connected) *with* United States v. Brenton, 24 M.J. 562 (A.F.C.M.R. 1987) (servicemember's daughter's assault by another servicemember held service connected).

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

17. *Id.* at 2929 (citing British Articles of War of 1774, *reprinted in* C. DAVIS, MILITARY LAW OF THE UNITED STATES (3d ed. 1915)).

18. *Id.* at 2928.

19. *Id.* The Constitution states Congress shall have 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.

20. The doctrine of deference or "military necessity" was recognized in Alexander Hamilton's THE FEDERALIST NO. 23. *See* O'Neil, *The Tenth Charles L. Decker Lecture in Administrative and Civil Law: Civil Liberty and Military Necessity—Some Preliminary Thoughts on* Goldman v. Weinberger, 113 MIL. L. REV. 31, 42-43 (1986).

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

22. J. SNEDEKER, A BRIEF HISTORY OF COURTS-MARTIAL 4 (1954).

23. *See id.* at 7. The use of military tribunals has been traced to the armies of Rome, although no written codes then existed. *Id.* at 3.

24. *See* Duke & Vogel, *The Constitution and the Standing Army: Another Problem of Court-Martial Jurisdiction*, 13 VAND. L. REV. 435, 445 (1960). The American Continental Congress incorporated into the American Articles of War a provision almost identical to one in the British Articles. *Id.* The Court in *Solorio*, however, pointed out the confusion surrounding which version of the British Articles of War was in effect in 1776. *Solorio*, 107 S. Ct. at 2929 n.6. The American Articles of War enacted in 1776 provided:

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

jurisdiction over military personnel who committed civilian crimes has been the subject of scholarly debate.[25] In a long line of dicta, the United States Supreme Court stated that court-martial jurisdiction over servicemembers depended solely on the military status of the accused.[26] As early as 1907, the Court stated that "the jurisdiction of general courts-martial extends to all crimes, not capital, committed against public law by any officer or soldier . . . ."[27] This position was reiterated in 1960 when the Court stated that the "test for jurisdiction . . . is one of status."[28] Thus, prior to *O'Callahan*, the Court had assumed that a military court's subject matter jurisdiction over servicemembers had no bounds.

In 1969 the Supreme Court for the first time directly addressed the issue of a military court's subject matter jurisdiction in *O'Callahan v. Parker*.[29] O'Callahan, an Army sergeant, attacked a young girl in an off-base hotel and a military court sentenced him to ten years' imprisonment.[30] O'Callahan filed a petition for writ of habeas corpus alleging that the court-martial jurisdiction did not extend to "nonmilitary offenses committed off-post while on evening pass."[31] The Court agreed with O'Callahan and established the service connection test as the basis for a military court's jurisdiction.[32]

The Supreme Court premised the *O'Callahan* decision on three factors. First, the Court found an historical "suspicion" of military tribunals trying soldiers who committed civilian crimes.[33] Second, the Court emphasized that Congress' constitutional role[34] in making rules governing the military must be harmonized with principles of individual liberty expressed in the Bill of Rights.[35] Third, the *O'Callahan* Court criticized the military justice system as

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American Articles of War of 1776, § 10, art. 1, *reprinted in* W. WINTHROP, MILITARY LAW AND PRECEDENTS, app. 10, at 964 (1920).

25. *Solorio*, 107 S. Ct. at 2928-29; *see also* Nelson & Westbrook, *Court-Martial Jurisdiction Over Servicemen for "Civilian" Offenses: An Analysis of* O'Callahan v. Parker, 54 MINN. L. REV. 1, 18 (1969) ("At best, the relevant historical evidence does not provide clear guidance."). This debate has also affected the interpretation of "original intent" regarding whether the Bill of Rights applied to the military. *See infra* note 35.

26. *See* Kinsella v. Singleton, 361 U.S. 234 (1960) (test is one of status for court-martial jurisdiction); *Ex parte* Quirin, 317 U.S. 1 (1942) (crimes traditionally triable by jury at common law subject to court-martial jurisdiction); Smith v. Whitney, 116 U.S. 167, 183 (1886) (any act which brings "disgrace and reproach" upon the military is subject to court-martial); *see also* Gosa v. Mayden, 413 U.S. 665, 673 (1973) ("*O'Callahan* did not expressly overrule any prior decision, it did announce a new constitutional principle . . . ."); Nelson & Westbrook, *supra* note 25, at 23-24.

27. Grafton v. United States, 206 U.S. 333, 348 (1907).

28. Kinsella v. Singleton, 361 U.S. 234, 240-41 (1960).

29. 395 U.S. 258 (1969). One commentator criticized the Court for the timing of the decision, stating that the result would probably have been different if the case had been decided in the next term. At the time of the decision, Justice Fortas had resigned from the Court and Chief Justice Warren, who joined the majority in *O'Callahan*, had announced his retirement. Additionally, the judicial writings of then Circuit Judge Warren Burger were leaning toward the minority position. *See* Everett, O'Callahan v. Parker—*Milestone or Millstone in Military Justice*, 1969 DUKE L.J. 853, 859-60.

30. *O'Callahan*, 395 U.S. at 260-61.

31. *Id.* at 261.

32. *Id.* at 272.

33. *Id.* at 268.

34. *See supra* note 19.

35. *O'Callahan*, 395 U.S. at 273. For conflicting historical interpretations of the pertinence of the Bill of Rights to servicemembers, compare Weiner, *Courts-Martial and the Bill of Rights: The*

being nothing more than an implement of discipline.[36] In light of this analysis, the *O'Callahan* Court sought to protect the servicemember's constitutional right to both a grand jury indictment and jury trial, neither of which existed in the military justice system. Thus, the Court restricted the subject matter jurisdiction of military courts by requiring the crime to have a service connection.[37] In *O'Callahan*, the Court found no "flouting of military authority" in the crime and therefore no service connection.[38]

Within two years of *O'Callahan*, the Supreme Court refined its definition of the service connection test. In *Relford v. Commandant, United States Disciplinary Barracks, Fort Leavenworth*,[39] the Court enunciated twenty-one factors germane to the issue of service connection.[40] Factors such as nonmilitary victims and off-base offenses weighed against finding a service connection.[41] Conversely, crimes that impacted troop morale or discipline weighed toward a service connection.[42] The twenty-one factors, although not exclusive, gave form to the ad hoc approach that had been used by the *O'Callahan* Court in establishing the service connection test.[43]

Initially, the military courts narrowly applied the service connection test and *Relford* factors[44] in an effort to limit court-martial jurisdiction.[45] Eventually, however, the military courts began to expand court-martial jurisdiction by carving out exceptions to the *O'Callahan* test.[46] The exceptions developed for crimes, such as petty offenses, in which the right to a grand jury indictment or trial by jury did not exist.[47] A major expansion of court-martial jurisdiction occurred in 1980 when the Court of Military Appeals in *United States v. Trottier*[48] reconsidered precedent that had rejected military jurisdiction over servicemember drug cases.[49] The *Trottier* court found a service connection

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Original Practice II, 72 HARV. L. REV. 266, 301-02 (1958) (contending that founding fathers did not intend for the Bill of Rights to be applied to the military) with Henderson, *Courts-Martial and the Constitution: The Original Understanding*, 71 HARV. L. REV. 293, 324 (1957) ("original intent" that Bill of Rights be applied to the military).

36. *O'Callahan*, 395 U.S. at 266; *see infra* text accompanying notes 72-74.

37. *O'Callahan*, 395 U.S. at 272-74.

38. *Id.* at 274.

39. 401 U.S. 355 (1971).

40. *Id.* at 365, 367-69; *see* Spak, *Military Justice: The Oxymoron of the 1980's*, 20 CAL. W.L. REV. 436, 451 (1984) (first 12 factors indicate nonservice-connected offenses and the last 9 were additional considerations in determining the presence of service connection).

41. *Relford*, 401 U.S. at 365.

42. *Id.* at 367.

43. *Id.* at 365-66.

44. *See, e.g.*, United States v. Conn, 6 M.J. 351 (C.M.A. 1979) (no service connection when off-duty military policeman used drugs in the presence of subordinates while off-base); United States v. Heflund, 2 M.J. 11 (C.M.A. 1976) (military status of the victim not enough to create service connection); United States v. McCarthy, 2 M.J. 26 (C.M.A. 1976) (not all drug offenses were service connected).

45. Spak, *supra* note 40, at 453.

46. *See* Cooper, *supra* note 15, at 167-72 (*O'Callahan* had no application for crimes committed overseas, on-post, or crimes of a petty nature).

47. Cooper, *supra* note 15, at 172.

48. 9 M.J. 337 (C.M.A. 1980).

49. United States v. Conn, 6 M.J. 351 (C.M.A. 1979) (use of drugs by a military officer in the presence of subordinates not service connected); United States v. McCarthy, 2 M.J. 26 (C.M.A.

emanating from drug abuse by reasoning that drugs presented a serious problem affecting military discipline.[50] The expansion of military jurisdiction continued when one military court held that the act of forgery created a service connection because the military victim was exposed to possible inconvenience.[51] The flexibility of the *Relford* factors, evidenced by courts finding service connections in crimes affecting military discipline or service reputation, greatly expanded military jurisdiction.[52] Thus, by the time the *Solorio* case came before the Supreme Court, the service connection barrier to court-martial jurisdiction had been significantly eroded.[53]

The differences in the Court's approach toward court-martial subject matter jurisdiction in *O'Callahan* and *Solorio* can best be analyzed, in light of the doctrine of judicial deference, by a comparative analysis of the two opinions. This analysis reveals that the eradication of factors present at the time of *O'Callahan* that mitigated against judicial deference lead directly to the result in *Solorio*.

Judicial deference in the context of military subject matter jurisdiction springs from three main sources: the recognition of the uniqueness of the military community, the efficacy of the military justice system, and the United States Constitution. The first source, the uniqueness of the military, is derived from the high disciplinary standards that constrain military personnel.[54] The second source, the efficacy of the military system, is founded on the perception of the military as being a capable arbiter of servicemember rights.[55] The third source, the constitutional basis of judicial deference, is explicitly addressed in *Solorio*. The Supreme Court found congressional authority to regulate the military in the "unqualified" language of the Constitution.[56]

The Court has consistently recognized the uniqueness of military life.[57] Military personnel are subject to a strict regimen so that discipline will be effective in combat situations.[58] This demanding level of discipline is generally ab-

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1976) (drug offense not per se "service connected"); *see also* Schlueter, *Court-Martial Jurisdiction: An Expansion of the Least Possible Power*, 73 J. CRIM. L. & CRIMINOLOGY 74, 91-93 (1982).

50. *Trottier*, 9 M.J. at 345-48. The court stated that "almost every involvement of service personnel with the commerce in drugs is 'service connected.' " *Id.* at 350.

51. United States v. Lockwood, 15 M.J. 1, 9 (C.M.A. 1983).

52. Spak, *supra* note 40, at 454.

53. As an example of the weakening of the service connection test, compare United States v. Conn, 6 M.J. 351 (C.M.A. 1979) (no service connection when officer used drugs in presence of subordinates while off-base) with United States v. Trottier, 9 M.J. 337 (C.M.A. 1980) (almost any involvement with drugs is service connected).

54. *See, e.g.*, Parker v. Levy, 417 U.S. 733, 743 (1974) ("military is by necessity a specialized society separate from civilian society"). *See generally* Zillman & Imwinkelried, *Constitutional Rights and Military Necessity: Reflections on the Society Apart*, 51 NOTRE DAME L. REV. 396, 401 (1976) (status created by military membership "creat[es] rights and duties unknown in the civilian world").

55. *See, e.g.*, United States *ex rel.* Toth v. Quarles, 350 U.S. 11, 18 (1955) (military personnel are "especially competent" to adjudicate infractions of military rules).

56. *Solorio*, 107 S. Ct. at 2930; *see supra* note 19 for pertinent constitutional language.

57. *See* Brown v. Glines, 444 U.S. 348, 360 (1980); Parker v. Levy, 417 U.S. 733, 743 (1974).

58. Schlesinger v. Councilman, 420 U.S. 738, 757 (1975) ("To prepare for and perform its vital role [of fighting wars], the military must insist upon a respect for duty and a discipline without counterpart in civilian life.").

sent in civilian life.[59] In addition to discipline, the servicemember may be required to participate in the "distinctively military activity" of combat.[60] Although these recognized differences existed at the time of both *O'Callahan* and *Solorio*, the societal perception of the separation of civilian and military life changed during the period between the two decisions.

The Supreme Court announced the *O'Callahan* decision during a period of American history that found young men subject to conscriptive service and called upon to serve in combat.[61] The great influx of civilian men involuntarily drawn into the service produced a military population more expectant of civilian than military justice.[62] The professional soldier cadré of the Army was being supplemented by drafted civilians at the rate of 316,000 per year in the years preceding *O'Callahan*.[63] Additionally, at the time of the decision, the military sought to bring itself into closer conformity with mainstream civilian culture.[64] Thus, there existed a paradoxical situation in which the military, because of the draft and its own initiative, was moving closer to "civilian" society at a time when antiwar sentiments were high. The *O'Callahan* Court paralleled this civilianization of the military by extending to servicemembers those rights enjoyed by the civilian community.[65] However, by 1987, the factors that had led to this closure between the two societies had disappeared.

In the early 1980s the military urged a return to traditional discipline.[66] This return to stricter discipline came at a time when the draft had been discon-

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59. *Id.* Several occupations, such as law enforcement and fire fighting, require members to be subjected to life-threatening situations. These occupations are distinguishable from the military in that refusal to follow command instruction does not involve criminal sanctions. For example, article 92 of the Uniform Code of Military Justice reads: "Any person subject to this chapter who—(1) violates or fails to obey any lawful general order or regulation . . . shall be punished as a court-martial may direct." 10 U.S.C. § 892 (1982).

60. Hirschhorn, *The Separate Community: Military Uniqueness and Servicemen's Constitutional Rights*, 62 N.C.L. REV. 177, 220 (1984).

61. In the period 1966-69, an average of 316,000 men were drafted each year. Amacher, Miller, Pauly, Tollison & Willett, *The Economics of the Military Draft*, in THE MILITARY DRAFT 365 (M. Anderson ed. 1982). During that same time period, 38,530 servicemembers died as a result of enemy action. U.S. DEPT. OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES, table 549 (1987).

62. *Cf.* W. GENEROUS, SWORDS AND SCALES 29 (1973). The large influx of draftees into the military produced a similar situation. Senator James P. Kem of Missouri stated in 1948 that "if Congress had time to reinstate the Selective Service system, it had time to pass legislation to revise the Articles of War." *Id.* Therefore, if Congress was to staff the services with draftees, it should provide a system of justice familiar to the new recruits. *Id.*

63. *See supra* note 61.

64. E. ZUMWALT, ON WATCH 197 (1976). For example, the United States Navy, under the leadership of Admiral Zumwalt, instituted a series of changes in the areas of Navy uniforms, personal appearance, and "demeaning and abrasive" regulations. *Id.* at 182-96, 530-32; *see also* Zillman & Imwinkelried, *supra* note 54, at 400 (the military showed increasing signs of "creeping civilianism" in the areas of Officer Training Programs, recruiting psychology, and salary levels).

65. Specifically, *O'Callahan* was concerned with the rights to indictment by a grand jury and a trial by peers. These were the "constitutional stakes" the Court sought to protect. *O'Callahan*, 395 U.S. at 262.

66. *See* Bowling, *A Return to Military Smartness and Discipline*, PROCEEDINGS, June 1981, at 48 (recognizing that the political climate was "propitious" for reinstatement of traditional discipline); *see also* Paolantonio, *Not In My Navy*, PROCEEDINGS, Aug. 1982, at 41 (Navy adopted a "get-tough" policy with drug abusers abandoning the past "bleeding liberal heart" approach).

tinued.[67] The elimination of the draft produced, at least theoretically, a recruit predisposed to the military lifestyle.[68] The combination of a volunteer military with the fading antimilitary sentiments restored the "credibility"[69] of the military as a distinct social group. The distinction between military and civilian societies had grown stronger by the time of the *Solorio* decision.

The *Solorio* Court recognized the difference in the two societies by focusing on military discipline.[70] The effect of a civil court's intrusion upon military authority concerned the Court.[71] Thus, a shift in focus from the effect of jurisdiction on servicemember rights in *O'Callahan* to the effect of jurisdiction on military discipline in *Solorio* mirrors the shift in the military away from civilian standards.

A second source of judicial deference to congressional authority in regulating the military emanates from the efficacy of the military court system in providing justice. The need for "special regulations" and an "exclusive system of military justice" is a derivative of the uniqueness of the military society.[72] The *O'Callahan* Court was broadly critical of military courts. Specifically, the Court criticized a court-martial's lack of jury by peers, the questionable objectivity of the presiding judge, and the military tribunal's inability to handle the "subtleties of constitutional law."[73] Justice Douglas described the court-martial as an "instrument of discipline, not justice."[74] At the same time, Congress identified similar problems in the military judicial system. Led by Senator Sam Ervin, Congress approved the Military Justice Act of 1968,[75] which became effective sixty days after the *O'Callahan* decision was issued.[76] The Act corrected some of the deficiencies cited by the *O'Callahan* Court.[77]

The *Solorio* Court's approach to identifying the proper judicial forum for

67. Although the draft has been discontinued, young men between the ages of 18 and 26 have been required to register with the selective service system since 1980. *See* Proclamation No. 4771, 3 C.F.R. § 82 (1981), *reprinted in* 50 U.S.C. app. § 453 (1987).

68. *Cf.* Zillman & Imwinkelried, *supra* note 54, at 397 (educated draftees, a Vietnam conflict "phenomenon," were shocked by military practices).

69. *See* President Reagan, State of the Union Address (Jan. 25, 1984), *reprinted in* ADMINISTRATION OF RONALD REAGAN 1984, Book 1, 87, 88.

70. *Solorio*, 107 S. Ct. at 2931. The Court quoted Chappell v. Wallace, 462 U.S. 296, 305 (1983) (quoting Warren, *The Bill of Rights and the Military*, 37 N.Y.U. L. REV. 181, 187 (1962), which had stated that civilian courts are " 'ill equipped to determine the impact upon discipline that any particular intrusion upon military authority might have' ").

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

72. Chappell v. Wallace, 462 U.S. 296, 300 (1983).

73. *O'Callahan*, 395 U.S. at 263-66.

74. *Id.* at 266 (quoting Glasser, *Justice and Captain Levy*, 12 COLUM. F. 46, 49 (1969)).

75. Pub. L. No. 90-632, 82 Stat. 1335 (1968).

76. W. GENEROUS, *supra* note 62, at 185-98. The resort to "judicial activism" is normally reserved for areas in which the legislature has been slow to act. In *O'Callahan*, the concept of judicial activism appears inapplicable, because Congress acted by passing the Military Justice Act of 1968. Nelson & Westbrook, *supra* note 25, at 60.

77. The Military Justice Act of 1968 affected six major areas of military law: counsel, military judges, procedures, command influence, summary courts-martial, and postconviction procedures. *See* Kaczynski, *From* O'Callahan *to* Chappell: *The Burger Court and the Military*, 18 U. RICH. L. REV. 235, 279-82 (1984). *See generally* Quinn, *Some Comparisons Between Courts-Martial and Civilian Practice*, 15 UCLA L. REV. 1240 (1968) (while military courts were civilianizing, civilian courts were adopting some of the procedural safeguards already employed by the military).

adjudicating cases involving military personnel stood in stark contrast to that used in *O'Callahan*. Although the *Solorio* Court did not specifically address the efficacy of military courts, a certain judicial deference can be found by negative implication. The Court spoke of the civil courts' ineffectiveness in adjudicating matters of "military concern."[78] One explanation offered was that the judiciary is not trained to address problems peculiar to the military.[79] The *Solorio* Court's silence as to the efficacy of military justice provides at least tacit approval of the effectiveness of military courts in guaranteeing the rights of servicemembers.

The primary factor distinguishing *Solorio* and *O'Callahan* is the interpretation the Supreme Court accorded the Constitution in each case. The *O'Callahan* Court, suspicious of military justice, sought to protect servicemember rights.[80] The Supreme Court decided *O'Callahan* in an era of civil strife and social upheaval.[81] This concern for individual liberties was reflected in the Court's "increasing awareness and recognition of the important constitutional values embodied in the Fifth and Sixth Amendments."[82] The *O'Callahan* Court premised its decision on a restrictive historical view of military jurisdiction and on its general pronouncement that the military is "singularly inept" at resolving constitutional issues.[83]

Unlike *O'Callahan*, the *Solorio* Court did not focus on constitutional rights, but rather on the proper overseer of such rights. The Court found specific guidance in the Constitution, which empowers Congress "[t]o make Rules for the Government and Regulation of the land and naval Forces . . . ."[84] The *Solorio* Court found the "plain meaning" of the Constitution applicable, thereby allowing military court jurisdiction to attach to all crimes committed by servicemembers and expunging the service connection requirement.[85] The Court did not address the requirements of the fifth and sixth amendments. Instead, Chief Justice Rehnquist indicated that the responsibility for balancing servicemember rights with military requirements rested with Congress.[86] Finding only an ambiguous history of court-martial jurisdiction, the Court concluded

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

79. Warren, *supra* note 70, at 187; *see also* United States *ex rel.* Toth v. Quarles, 350 U.S. 11, 18 (1955) ("military personnel . . . may be especially competent to try soldiers for infractions of military rules").

80. *See supra* notes 33-38 and accompanying text.

81. Kaczynski, *supra* note 77, at 276-78; *see also* S. AMBROSE, RISE TO GLOBALISM 298-99 (3d ed. 1983) (street riots and persistent racism in the 1960s made American foreign policy suspect and led to an "examination of all aspects of American life").

82. Gosa v. Mayden, 413 U.S. 665, 674 (1973). The Warren Court, which decided *O'Callahan*, in many ways mirrored the social consciousness of the 1960s and used judicial activism to "reshape constitutional law in an evolving society." Schwartz, *Earl Warren As A Judge*, 12 HASTINGS CONST. L.Q. 179, 179 (1985). On the other hand, the Burger and Rehnquist Courts have reflected a more conservative era and acted to limit the scope of some of the Warren Court's decisions. Arnella, *Rethinking the Functions of Criminal Procedure: The Warren and Burger Courts' Competing Ideologies*, 72 GEO. L.J. 185, 192-94 (1983).

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

84. U.S. CONST. art. I, § 8, cl. 14.

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

86. *Id.* at 2931. Chief Justice Rehnquist had long advocated the repeal of the service connection test. *See, e.g.*, Gosa v. Mayden, 413 U.S. 665, 692 (1973) (Rehnquist, J., concurring) ("*O'Callahan*, was, in my opinion, wrongly decided, and I would overrule it . . . .").

that any restriction of the plain language of the Constitution was unjustified.[87]

The differences in constitutional approach between *O'Callahan* and *Solorio* illustrate the changed attitudes of the Court and help explain the result in *Solorio*. The *Solorio* Court shifted the focus of inquiry from the infirmities of the military system to those of the civil courts.[88] This shift in focus changed the emphasis from protection of servicemember rights to preservation of the military justice system.[89] Additionally, the factors existing in 1969, such as social unrest and the large conscripted military, which tended to de-emphasize the doctrine of judicial deference, had declined in importance by the time of the *Solorio* decision.

The increasing breadth of military courts' subject matter jurisdiction effected by the *Solorio* decision is not, however, an evisceration of servicemember rights. Although the "constitutional stakes"[90] of fifth and sixth amendment rights that the *O'Callahan* Court found central were not addressed in *Solorio*, several factors exist which mitigate the impact of the decision on individual rights. First, the loss of a grand jury in the wake of *Solorio* is somewhat illusory. The Supreme Court has yet to overrule *Hurtado v. California*,[91] which held that the fourteenth amendment does not require a grand jury indictment as a matter of due process. Thus, a servicemember or civilian in a state court may not be assured of indictment by a grand jury.[92] Second, although a servicemember may have had access to a jury trial under *O'Callahan* if the crime was not service connected or if he is tried in a state court, the use of a jury may have exposed him to local prejudices against the military.[93]

Further, the deference to congressional authority represents an abdication of the Supreme Court's role in reviewing cases that involve servicemember rights. Rather than routinely decreeing judicial deference, the dissent in *Goldman v. Weinberger*[94] urged that there should be a "rational foundation" for

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

88. *Id.* at 2931. The Court stated that civil courts are "ill-equipped" to determine the effect that civil intrusion upon military authority will have on military discipline. *Id.*

89. *Compare O'Callahan*, 395 U.S. at 261-62 (the fifth and sixth amendment rights are the "constitutional stakes in the present litigation"), *with Solorio*, 107 S. Ct. at 2932 ("confusion created by the complexity" of the service connection test has caused much time and energy to be expended on litigation).

90. *O'Callahan*, 395 U.S. at 262.

91. 110 U.S. 516 (1884) (fourteenth amendment due process does not require indictment by grand jury).

92. Everett, *supra* note 29, at 864-65.

93. Everett, *supra* note 29, at 865. In his article Robinson Everett—the current Chief Judge on the Court of Military Appeals— illustrates the point by stating that a servicemember is probably not a native of the community where he is to be tried. Additionally, the residents of the community may harbor resentments about the military presence in their community. This is especially true when there is a small community adjacent to a large military base. *Cf.* R. EVERETT, MILITARY JUSTICE IN THE ARMED FORCES OF THE UNITED STATES 5-6 (1956) (military court-martial panel more aware of the pressures affecting a servicemember than a civilian jury); Wilkinson, *The Narrowing Scope of Court-Martial Jurisdiction:* O'Callahan v. Parker, 9 WASHBURN L.J. 193, 207-08 (1970) (servicemember peers logically are other servicemembers). *But see* Note, *Service-Connection and Drug-Related Offenses: The Military Courts' Ever-Expanding Jurisdiction*, 54 GEO. WASH. L. REV. 118, 122-25 (1985) (lack of jury trial for servicemembers is a serious constitutional deprivation).

94. 106 S. Ct. 1310 (1986).

applying the principle of deference.[95] Without a critical analysis of the need for deference, the servicemember must rely on the "vagaries of military control."[96]

Recognition of the principle of judicial deference places a premium on military exigencies and subordinates individual rights. The Supreme Court applied the doctrine of judicial deference in several cases prior to *Solorio*. These included cases that involved free speech,[97] religious freedom,[98] and sex discrimination.[99] The *Solorio* decision has reinforced the Court's propensity for deference and presents a large obstacle for future cases involving the vindication of servicemember rights.

It seems unlikely that retroactive application of *Solorio* will resurrect many foregone court-martials. The courts are not faced with the same problems as those presented when the Supreme Court denied retroactivity in *O'Callahan*.[100] The *O'Callahan* decision narrowed jurisdiction and opened the door to appeals for courts-martial that had involved civilian crimes.[101] Additionally, by the time of the *Solorio* decision, the military courts were giving broad application to the service connection test. Thus, cases the military would be most interested in prosecuting, those affecting military discipline, would have previously satisfied the service connection test.

The military courts have had two opportunities to rule on the retroactive application of *Solorio*. The Army Court of Military Review allowed retroactive application in *United States v. Starks*,[102] decided thirty-four days after the *Solorio* decision. The *Starks* court reasoned that the new status test was "a new rule for the conduct of criminal prosecutions" and therefore retroactivity applied to "all cases, state or federal, pending on direct review or not yet final . . . ."[103] Two days before *Starks*, the highest military court, the Court of Mili-

95. *Id.* at 1321 (Brennan, J., dissenting).

96. *Solorio*, 107 S. Ct. at 2941 (Marshall, J., dissenting).

97. Parker v. Levy, 417 U.S. 733 (1974) (court-martial involving a military doctor who told black servicemembers that they should refuse to serve in Vietnam).

98. Goldman v. Weinberger, 475 U.S. 503 (1986) (Air Force officer brought suit claiming that an Air Force regulation forbidding the wearing of headgear indoors infringed on his first amendment freedom to exercise religion by wearing a yarmulke).

99. Rostker v. Goldberg, 453 U.S. 57 (1981) (suit challenged the military Selective Service Act which authorized only males to register).

100. In Gosa v. Mayden, 413 U.S. 665 (1973), the court, rejecting retroactivity, stated that retroactive application of *O'Callahan* would "result in adjustments and controversy over back pay, veterans' benefits, retirement pay, pensions, and other matters." *Id.* at 683.

101. A prime example of the wide doors that would have been opened if *O'Callahan* had been applied retroactively is the companion case to *Gosa*—Flemings v. Chafee, 330 F. Supp. 193 (E.D.N.Y. 1971), *aff'd*, 458 F.2d 544 (2d Cir. 1972), *rev'd sub nom.* Gosa v. Mayden 413 U.S. 665 (1973). In *Flemings* a sailor during World War II stole a car while on an unauthorized absence and was court-martialed. In 1970, after *O'Callahan*, the ex-sailor attempted to have the court-martial overturned and the United States District Court for the Eastern District of New York retroactively applied *O'Callahan*'s service connection test. Flemings v. Chafee, 330 F. Supp. 193 (E.D.N.Y. 1971). The Supreme Court in *Gosa* rejected retroactive application of *O'Callahan*, citing controversies over "back pay, veterans' benefits, retirement pay, pensions and other matters" that would develop if convictions failed for lack of jurisdiction. *Gosa*, 413 U.S. at 683.

102. 24 M.J. 857 (A.C.M.R. 1987). Although it allowed retroactive application, the court hedged its decision by also finding a service connection. *Id.* at 859.

103. *Id.*

tary Appeals, found a service connection in *United States v. Overton*.[104] The *Overton* court only mentioned in a note that the same result would have issued by applying *Solorio*.[105]

Although retroactive application of *Solorio* would not create serious problems in increasing the military court's caseload, the expanded jurisdiction will clearly do so.[106] The increased jurisdictional reach provides the military with the capability to pursue servicemembers for a wide spectrum of crimes, including tax evasion.[107] However, this capability will have to be balanced against the concomitant increases in military court congestion, lawyer caseload, and court expense.

Differences in the social and political landscape over the past twenty years have influenced the factors underlying judicial deference to the subject matter jurisdiction of military tribunals. The restricted military jurisdiction resulting from *O'Callahan* was a response to the times. With *Solorio*, the Court has returned to a "hands off"[108] approach to the military justice system. By cloaking all servicemember crimes with court-martial jurisdiction, the Court has left military justice to the military system. The resultant effect on servicemember rights will depend on both the efficacy of the military courts in carrying out justice and congressional oversight of the process. The judicial mechanism that Justice Douglas described as "singularly inept" at safeguarding constitutional freedoms[109] has had its grasp enlarged by *Solorio*.

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104. 24 M.J. 309 (C.M.A. 1987).

105. *Id.* at 312.

106. Although there is disagreement as to the effect on military caseload that *Solorio* will create, the decision may induce civilian law enforcement officials to turn over cases to the military. Navy Times, July 6, 1987, at 30, col. 1.

107. R. EVERETT, *supra* note 93, at 68-69.

108. Warren, *supra* note 70, at 187.

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