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Expansion of military courts-martial jurisdiction: Solorio and beyond

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EXPANSION OF MILITARY COURTS-MARTIAL JURISDICTION: SOLORIO AND BEYOND

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INTRODUCTION

At the heart of any court-martial lies the requirement of jurisdiction - the power of a court to try and determine a case and to render a valid judgement. The courts, in referring to the nature of courts-martial, often label them as "creatures of statute,"[1] a phrase which sets the appropriate tone for any discussion of courts-martial jurisdiction.

Two of the numerous constitutional questions about which the Constitution itself tells us very little are the extent to which persons who are not active duty members of the armed forces may be subjected to trial by courts-martial, and for what offenses. Recent Supreme Court decisions have addressed these questions, but the question as to the outer limits of courts-martial jurisdiction remains unanswered. Although the Constitution does not clearly answer these questions, an understanding of the constitutional basis for courts-martial is necessary.

The U. S. Constitution, Article I, Section 8, clause 14, provides that Congress has the power "To make rules for the Government and Regulation of the land and naval Forces". This power is augmented by the "necessary and proper" clause which gives Congress the power to enact all legislation necessary to exercise the powers specifically granted to it.[2] It was pursuant

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[1] McClaughry v. Deming, 186 U.S. 49 (1902).

[2] U.S. Const. Art.1, Sec.8, cl.18.

to these grants of power that Congress enacted the Uniform Code of Military Justice, which defines the classes of individuals subject to that Code and therefore subject to trial by courts-martial.[3]

The powers vested in Congress by Clauses 14 and 18 of Article I, Section 8, are not unlimited, however. Any action Congress takes in the exercise of its enumerated powers must also conform to the limitations set in the Constitution itself, and any action taken by Congress which oversteps these limitations is void.[4] Foremost among these constitutional limitations is that of the doctrine of separation of powers. As noted by the Supreme Court, the Framers of the Constitution saw the accumulation of all governmental powers in the same hands as tyranny.[5] For this reason the Constitution vests governmental powers in three distinct, yet interdependent, branches. This separation, and the checks and balances which result, is "a self-executing safeguard against the encroachment or aggrandizement of one branch at the expense of the other."[6]

The Constitutional status of courts-martial, however, is significantly different from that of an Article III Federal

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[3] 18 U.S.C. 801-940.

[4] Marbury v. Madison, 5 U.S. (1 Cranch) 137, (1803).

[5] Northern Pipeline Construction Co. v. Marathon Pipe Line Co., 458 U.S. 50 (1982).

[6] Buckley v. Valeo, 424 U.S. 1, 122 (1976).

court. Courts-martial are "legislative" or "Article I" courts.[7] Thus, they derive their power, not from the provisions of Article III, but from the Congressional power "to make Rules for the Government and Regulation of the land and naval Forces" and conferred by Article I, Section 8, clause 14 of the Constitution.[8]

Courts-martial are not an arm of the judicial branch of government established by Article III, but an arm of the executive branch.[9] The executive power of the Federal Government is vested in the office of the President, who, as the Commander in Chief of the Armed Forces of the United States, is statutorily empowered to convene courts-martial. The President has delegated this power to the service secretaries and certain military officers inferior in the chain of command.[10]

By creating Article I courts, Congress may constitutionally confer judicial powers upon the executive branch in execution of the powers expressly granted it by the Constitution. In doing so, Congress must keep the constitutional scheme in mind. To give Article I, Section 8, clause 14 its natural reading,

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[7] Gosa v. Mayden, 413 U.S. 665, 686 (1973); Parisi v. Davidson, 405 U.S. 34, 40-41 (1972). Since 1949, numerous bills have been introduced in Congress proposing that the Court of Military Appeals be made an Article III court. All of these attempts have failed. A similar bill currently pending in Congress is also predicted to fail.

[8] Palmore v. United States, 411 U.S. 389, 404 (1973).

[9] Winthrop, Military Law and Precedents 49 (1920 Reprint).

[10] U.S. Const. Art. II, Sec. 1-2; UCMJ Articles 22, 23, 24 (10 U.S.C. 822, 823, 824).

Congress must restrict courts-martial to the exercise of "the least possible power adequate to the end proposed."[11] The reason for this is obvious, "as any expansion of courts-martial jurisdiction necessarily encroaches on the jurisdiction of the federal courts set up under Article III of the Constitution".[12] As the Supreme Court has pointed out in Reid v. Covert,[13] under the Constitutional scheme, civilian courts are the normal repositories of the power to try persons for offenses against the United States; military tribunals exercise a very limited and extraordinary jurisdiction intended to be a very narrow exception to the preferred method of trial in civilian courts.[14]

The most obvious litmus test for military jurisdiction, which the Supreme Court adopted early on, is a "status" test. Taking its lead from the Constitution's express grants of power to Congress and the President to govern, administer, and command "the land and naval forces," and the Fifth Amendment's exclusion of "cases arising in the land or naval forces" from the indictment and jury trial guarantees, the Supreme Court first focused on an individual's military status, or the lack of such status, in determining whether courts-martial have proper jurisdiction. Notwithstanding Congressional extensions of

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

[12] Id. at 15.

[13] 354 U.S. 1 (1857).

[14] Id. at 21.

jurisdiction in certain cases over ex-servicemen and civilians, the Supreme Court has narrowly construed the class of individuals subject to the Uniform Code of Military Justice in peacetime to those persons who can fairly be termed "members of the land and naval forces". In doing so, the Court has held the following exercises of jurisdiction unconstitutional: the court-martial of an honorably discharged serviceman who has severed all connection with the service;[15] the court-martial, pursuant to a status of forces agreement, of dependents accompanying service persons overseas;[16] and the court-martial of civilian employees of the military establishment serving overseas.[17] In each of these cases the Court focused on the jurisdictional question in terms of membership in the armed forces. As none of the accused in those cases was a member of the armed forces, the Court concluded that the purported extension of courts-martial jurisdiction over them was impermissible.

As these cases involved defendants who were unquestionably civilians, with no ties to the military establishment, it was quite natural for the Court to focus on membership vel non in the armed forces as the litmus test of military jurisdiction. The adoption of this status test, while providing a clear, workable rule concerning one group of persons brought under military

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[15] United States ex rel. Toth v. Quarles, supra note 11.

[16] Reid v. Covert, 354 U.S. 1 (1857); Kinsella v. United States ex rel. Singleton, 361 U.S. 234 (1960).

[17] Grisham v. Hagen, 361 U.S. 278 (1960); McElroy v. United States ex rel. Guaglidardo, 361 U.S. 281 (1960).

jurisdiction pursuant to Articles 2 and 3 of the Code, served to confuse the issue with respect to others. While the Court may make it clear that civilians may not be courts-martialed in peacetime, it hasn't provided a clear definition of who is a "civilian." While it is clear that active duty members of the armed forces are not civilians, what about retirees and reservists? Equally unclear is the jurisdiction over discharged servicemembers. While Toth held the courts-martial jurisdiction over discharged servicemembers unconstitutional,[18] the current validity of that holding is questionable and will be the subject of further discussion.

In the area of subject matter jurisdiction, we have recently seen the United States Supreme Court in Solorio v. United States,[19] overrule the landmark case of O'Callahan v. Parker,[20] which permitted only offenses which were "service connected" to be tried by courts-martial. This significant expansion of subject matter jurisdiction, coupled with the uncertain limitations on personal jurisdiction continues to leave open the question as to the outer limits of courts-martial jurisdiction. The expansive effect of the Solorio decision does not stop with the issue of service connection.

While Solorio may resolve numerous issues regarding service

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[18] See supra note 11.

[19] Solorio v. United States, 483 U.S. ____, 107 S. Ct. 2924 (1987).

[20] O'Callahan v. Parker, 395 U.S. 258 (1969).

connection, it raises many new questions. Does Solorio have retroactive application? Does the Court's reliance on the "status" of the accused as the basis for courts-martial jurisdiction entirely eliminate the issue of subject matter jurisdiction? Does the "status" test expand jurisdiction beyond that which existed prior to O'Callahan, or does it simply return courts-martial jurisdiction to pre O'Callahan status? What are the classes of persons who have "status" as members of the land and naval forces? With over five and a half million people who may be considered to have some "status" as members of the land and naval forces, and therefore subject to courts-martial jurisdiction,[21] what are the ramifications of this expansion? Does Solorio go too far in expanding jurisdiction and, if so, what should be done about it? This paper will explore and analyze these issues in an attempt to predict the outer limits of courts-martial jurisdiction as well as make recommendations for the proper control of this expanding jurisdiction and assess its impact.

PURPOSE

Pursuant to the powers granted it by the Constitution,

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[21] Figures obtained from the office of the Assistant Secretary of Defense for Manpower and Reserve Affairs show the following numbers of personnel in each category as of the end of fiscal year 1987: Active Duty - 2,163,582; Reserve - 1,675,834; and Retired - 1,762,810 (includes Fleet Reserve and Fleet Marine Corps Reserve).

Congress established the Uniform Code of Military Justice to "provide a single, unified, consolidated and codified system of criminal law and judicial procedure equally applicable to all of the armed forces of the United States."[22] It was Congress' aim in establishing the Code that there be uniformity in substance and uniformity in interpretation and construction.[23] The Code was to balance maximum military performance and maximum justice within the armed forces.[24]

The United States Court of Appeals for the District of Columbia Circuit recognized that the reason Congress established a separate system of justice for the military was grounded on the rationale that the world wide deployment of large numbers of military personnel with unique disciplinary requirements mandated a flexible and separate jurisprudence capable of operating in times of peace or conflict.[25]

It is important to keep in mind the congressional purpose and aims in establishing the Code in 1950 when analyzing the current statutes, court decisions and practices of each of the armed services.

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[22] See enacting clause of Pub. L. No. 506, 81st Cong., 2d Sess. (May 5, 1950), 64 Stat. 108 (1950), 50 U.S.C. 551-736.

[23] See House Report of Pub. L. No. 506, 81st Cong., 2d Sess. (May 5, 1950), 64 Stat. 108 (1950).

[24] Id.

[25] Curry v. Secretary of the Army, 595 F.2d 873, 877 (D.C. Cir. 1979).

HISTORICAL BACKGROUND

An accurate understanding of the history of courts-martial jurisdiction is essential in determining the proper limits of courts-martial today. The Supreme Court has blamed the "less than accurate" reading of the history of courts-martial jurisdiction as the underlying cause of uncertainty concerning it's jurisdictional limits.[26]

The history of our military law is older than the nation itself; older than our Constitution. The provisions of our original Articles of War were taken directly from the British system in order to provide a justice and discipline system for our military. The British rules were adopted by the Continental Congress in the first American Articles of War of 1775, where the different courts-martial (General, Regimental, and detachment or Garrison courts) were distinguished, and their composition and jurisdiction defined.[27] John Adams presented these Articles to the Continental Congress "with the least energy," expecting them to be changed substantially or rejected totally.[28] Adams later wrote:

"There was extant, I observed, one system of Articles of War which had carried two empires to the head of mankind,

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[26] Solorio v. United States, supra note 19.

[27] Winthrop, supra note 9.

[28] Ansell, Military Justice, 5 Cornell L.Q., Nov. 1919, at 4.

> the Roman and the British; for the British Articles of War are only a literal translation of the Roman. It would be in vain for us to seek in our own invention or the records of warlike nations for a more complete system of military discipline. I was, therefore, for reporting the British Articles of War totidem verbis ... So undigested were the notions of liberty prevalent among the majority of the members most zealously attached to the public cause that to this day I scarcely know how it was possible that these articles should have been carried."[29]

After adoption by the Continental Congress, the provisions were modified and enlarged in the succeeding Articles of 1776 and 1786.[30] At the time of the Constitution, that instrument authorized Congress to provide for the government of the army and to institute courts-martial, but by the operation of the Act of September 29, 1789, the Articles continued in existence as previously established. Not only did these Articles adopt the language verbatim from the British Articles, but the language remained virtually unchanged with respect to jurisdiction until the enactment of the Uniform Code of Military Justice in 1950.[31]

The O'Callahan Court found support for its opinion limiting courts-martial jurisdiction to offenses which were service

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[29] Id. at 3-4.

[30] Winthrop, supra note 9.

[31] UCMJ, ch 169, 64 Stat. 108 (1950).

connected in the law of England prior to the American Revolution, and in American history. The Court referred to the abuses of courts-martial power as "an important grievance of the parliamentary forces in the English constitutional crises of the 17th Century," finally resulting in Parliament's, and not the Crown's, holding the power to define courts-martial jurisdiction.[32] Justice Douglas, in writing for the Court in O'Callahan, insisted that the 17th Century conflict was not merely a struggle over which organ of government had jurisdiction, but "involved substantive disapproval of the general use of military courts for trial of ordinary crimes."[33] He acknowledged that the Mutiny Act of 1720 allowed courts-martial for common law felonies, but treated the Act as an exception to the British rule "at the time of the American Revolution that a soldier could not be tried by courts-martial for a civilian offense committed in Britain."[34]

For centuries prior to the first Mutiny Act of 1689, the Crown, by special commission, empowered the leaders of the armies with martial law. As noted by one historian,

> "[W]e find very terrible powers of summary justice granted to the constable. In 1462 Edward IV empowers him to proceed in all crimes of treason 'summarily and plainly, without noise or show or judgement on simple inspection of

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[32] O'Callahan, supra note 20 at 268.

[33] Id.

[34] Id. at 269.

fact. . . ." They show something like a contempt for law--the constable is to exercise powers of almost unlimited extent, all statutes, ordinances, acts and restrictions to the contrary notwithstanding."[35]

In 1627, Parliament objected, inter alia, to the conduct of Charles I in issuing commissions for courts-martial law against soldiers and mariners in time of peace, and adopted the Petition of Rights of 1627. Charles I agreed to their demands and revoked the commissions. However, after the Restoration, both Charles II and James II published articles of war for governing their troops, and in 1688, the Articles of War of James II provided for the courts-martial of soldiers for common law crimes.[36]

With the coming of the English Revolution and William and Mary to the throne, the authority to control the Army was securely vested in Parliament by the Crown's acceptance of the Bill of Rights. Under the Act, courts-martial jurisdiction was limited to only three offenses.[37] Later, in section 46 of the Mutiny Act of 1720, Parliament authorized the courts-martialing of soldiers in Britain for common law felonies, if within eight days, the civilian authorities did not demand the turnover of the accused soldier to them for trial. A year later, that section was changed so that courts-martial jurisdiction did not include

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[35] Winthrop, supra note 9 at 46-47.

[36] Articles of War of James II, reprinted in Winthrop, supra note 9.

[37] Id. at 18-19.

common law offenses committed in Britain. The action of Parliament suggests nothing conclusive. The continuing changes to the Mutiny Acts suggests that Parliament determined the limits of jurisdiction based upon what was expedient at the time, and the later restriction of jurisdictional limits merely reflected that the broader limits were no longer considered necessary.

There was clearly a dispute over which organ of government had jurisdiction over the Army; and further, there was a disapproval of military law, in that it was arbitrary and alien to established legal principles.

The United States Supreme Court most recently has held that the authority to try servicemembers for civilian crimes is found in the "general article" of the 1776 Articles of War,[38] adopted from the British Rules, which states that:

> "All crimes not capital, and all disorders and neglects which officers and soldiers may be guilty of, to the prejudice of good order and military discipline, though not mentioned in the above articles of war, are to be taken cognizance of by a general or regimental court-martial, according to the nature and degree of the offence, and be punished at their discretion."[39]

This same provision, however, was interpreted by the O'Callahan Court as limiting courts-martial jurisdiction to

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[38] Solorio v. United States, supra note 19.

[39] American Articles of War of 1776, Section XVIII, Article 5, reprinted in Winthrop, supra note 9.

crimes that had a direct impact on military discipline.[40]

The ambiguity of the historical precedents and limitations on courts-martial jurisdiction contained in the Constitution have since been the subject of much debate in the Congress and in the courts.

SUBJECT MATTER JURISDICTION

Since the American Revolution, the military has been given broad discretion in dealing with its personnel in matters relating to military justice.[41] The Supreme Court of the United States, as early as 1863, recognized the importance of the military's exercise of jurisdiction over its personnel and, consequently, the Court traditionally has refrained from involvement in cases where the military establishment has dealt with its own personnel.[42] The system of military justice in the

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[40] O'Callahan v. Parker, supra note 20. While courts-martial subject matter jurisdiction is limited to those offenses specifically enumerated in the UCMJ, Article 134, UCMJ, (the general article) extends subject matter jurisdiction to all disorders and neglects to the prejudice of good order and discipline in the armed forces, all conduct of a nature to bring discredit upon the armed forces, and crimes and offenses not capital. The term "crimes and offenses not capital" includes those acts or omissions, not made punishable by another article under the UCMJ which are denounced as noncapital crimes or offenses which violate Federal law, including law made applicable through the Federal Assimilative Crimes Act. (Paragraph 60(c)(1), Manual for Courts-Martial, 1984).

[41] See Warren, The Bill of Rights and the Military, 37 N.Y.U.L.Rev. 181 at 187 (1962).

[42] Ex parte Vallandigham, 68 U.S. (1 Wall) 243 (1863).

United States has been based upon the understanding that Article I, Section 8, clause 14 and the exceptions in the fifth amendment empowered Congress to establish rules for discipline for members "in the land and naval forces". Military status had long been recognized as the jurisdictional test and it had been held that "to say that military jurisdiction 'defies definition in terms of military status' is to defy unambiguous language of Article 1, section 8, clause 14."[43]

Recent history with regard to subject-matter jurisdiction for courts-martial starts with the year 1969, when the Supreme Court decided O'Callahan v. Parker. The facts in the O'Callahan case are significant.[44] In July 1956, O'Callahan was stationed at Fort Shafter, Hawaii. One evening that July, O'Callahan and a friend, both dressed in civilian clothes, left the post and went into Honolulu. After a few drinks at a Honolulu hotel bar, O'Callahan entered the residential section of the hotel and broke into the room of a 14-year-old girl. O'Callahan attempted to rape the young girl, who resisted and screamed for help. O'Callahan then fled the room and was apprehended by a hotel security guard who released him to the Honolulu police. Upon learning that O'Callahan was a service member, the police returned him to military authorities. He was subsequently tried and convicted by a general court-martial and sentenced to a

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[43] Kinsella v. United States ex rel. Singleton, supra note 16.

[44] Supra note 20.

dishonorable discharge, 10 years confinement at hard labor, and forfeiture of all pay and allowances.

While serving confinement, O'Callahan filed a petition for a writ of habeas corpus in the United States District Court for the Middle District of Pennsylvania alleging that the court-martial did not have jurisdiction to try him for nonmilitary offenses committed off post while on an evening pass. The district court denied relief on the ground that the accused previously had petitioned the federal district court in Massachusetts and had received an unfavorable ruling.[45] The United States Court of Appeals for the Third Circuit affirmed the decision of the lower court.[46]

On appeal of the circuit court's decision, the Supreme Court granted certiorari on the following question:

> Does a court-martial, held under the Articles of War, have jurisdiction to try a member of the Armed Forces who is charged with 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, thus depriving him of his constitutional rights to indictment by a grand jury and trial by a petit jury in a civilian court?[47]

The Supreme Court, in a five-to-three decision, denied the

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[45] United States ex rel. O'Callahan v. Parker, 256 F.Supp. 679 (M.D. Pa. 1966).

[46] United States ex rel. O'Callahan v. Parker, 390 F.2d 360 (3d Cir. 1968).

[47] O'Callahan v. Parker, supra note 20 at 261.

court-martial jurisdiction, holding that the offenses for which O'Callahan was charged were not service connected and reversed the decision of the lower courts. Justice Douglas, in writing for the majority, sharply criticized military courts as being "singularly inept at dealing with the nice subtleties of constitutional law."[48] Courts-martial, he opined, are primarily instruments of discipline rather than justice. The Court noted that military justice does not afford an accused the right to a trial by jury or the right to indictment by a grand jury; rights which are guaranteed by the United States Constitution 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."[49] Courts-martial, being a "specialized part of the overall mechanism by which military discipline is preserved,"[50] were, in the Court's view, not fora which should have unlimited federal jurisdiction. Rather, their jurisdiction should afford "the least possible power adequate to the end proposed."[51] In military law cases, the least possible jurisdictional power necessary to fulfill the function of maintaining good order and discipline in the land and naval forces was, in the Court's view, the power to try cases that were service connected. Although service connection was not exhaustively defined in

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[48] Id. at 265.

[49] Id. at 261.

[50] Id. at 265.

[51] Id. quoting Toth v. Quarles, 350 U.S. 11, 22-23 (1955).

O'Callahan, it was noted that courts-martial jurisdiction existed in cases where there was a "flouting of military authority, the security of a military post, or the integrity of military property."[52]

Justice Douglas noted that O'Callahan was off post, off duty, and dressed in civilian clothing at the time of the offense. He also pointed out that the offenses were perpetrated against a civilian victim and were of no military significance, having been committed during peacetime "within our territorial limits, not in the occupied zone of a foreign country."[53]

In following Justice Black's observation in United States ex rel. Toth v. Quarles[54] that "[f]ree countries of the world have tried to restrict military tribunals to the narrowest jurisdiction deemed absolutely essential to maintaining discipline among the troops in active service . . .",[55] Justice Douglas advanced historical arguments that trying soldiers charged with civilian offenses in military courts was unpopular with the American colonists. Justice Douglas stated that the Continental Congress, in passing the Articles of War, intended that specific enumerated crimes were expected to be tried in civilian courts.[56] Unfortunately, he recognized that the

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[52] Id. at 274.

[53] Id. at 273-4.

[54] 350 U.S. 11 (1955).

[55] Id. at 22.

[56] 395 U.S. at 270-271.

application of the intent of the Continental Congress was not followed consistently. Nevertheless, Justice Douglas stated that some court-martial convictions were set aside on review where the charges failed to state a military offense, but did state a civilian offense.[57]

Justice Douglas also noted that, during the Civil War, Congress passed a law making certain civil offenses triable by courts-martial, "in time of war, insurrection, or rebellion."[58] Additionally, he cited provisions in the Articles of War, revised in 1916, and the extension of military jurisdiction to capital crimes committed by persons subject to military law in the Uniform Code of Military Justice of 1950, to support the argument that, historically, Americans were suspicious of trying military personnel who had committed civilian offenses.

In dissent, Justice Harlan, joined by Justices Stewart and White, argued that Congress has been granted the power to determine the "appropriate subject-matter jurisdiction of courts-

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[57] Id. In an appendix to the Government's brief over 100 instances where military punishment was recorded for non-military crimes tried between 1775 and 1815 was listed. Justice Douglas asserted that "[i]n almost every case summarized, it appears that some special military interest existed." He referred to crimes which were peculiarly military: "prosecutions for abusing military position"; crimes involving officers; and courts-martial held in wartime between 1773 and 1783, as having military significance. He disqualified the rest of the cases which did not fall into one of the above categories by saying there were not sufficient facts presented to decide, or "perhaps" the case fell into the category designated as "abusing military position." Justice Douglas' approach to discredit the Government's list falls short of being persuasive.

[58] Id.

martial"[59] and not the courts. The dissent further noted the inconsistencies in the majority opinion and pointed out the weaknesses in the historical arguments relied upon to support the majority opinion. While opining that the English Constitution and the pertinent United States history tended to support the position of the dissent, Justice Harlan argued that such examples were hardly conclusive or persuasive authority for supporting the holding of the majority.[60]

The Supreme Court provided specific guidelines when it further developed the service-connection rule in Relford v. Commandant.[61] Although the Relford case was tried over five years prior to O'Callahan, the Supreme Court granted certiorari, limited to the scope and retroactivity of the O'Callahan decision.[62] In Relford, the accused was in civilian clothes and on leave when he forced his way into two automobiles on a military installation and kidnapped and raped his victims. In upholding courts-martial jurisdiction over the offenses, and finding Relford's conduct to be "obviously service connected,"[63] the Court established the now well-known and often-cited twelve Relford factors:

1. Whether the accused was properly away from his base when

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[59] Id. at 276

[60] Id.

[61] 401 U.S. 355 (1971).

[62] Id. at 359.

[63] Id. at 369.

the offense was committed;

2. Whether the offense was committed off base;
3. Whether the offense was committed within an area not within military control;
4. Whether it was committed within the territorial United States and not in an occupied foreign zone;
5. Whether it was committed during time of peace and without reference to the war-making power;
6 Whether it was unrelated to the accused's military duties;
7. Whether the victim was engaged in a military duty;
8. Whether the offense was among the crimes normally processed in the civilian courts, and there is no indication of unavailability of civil courts to try them;
9. Whether it was unrelated to military authority and involved no flouting of military authority;
10. Whether it involved a threat to a military post;
11. Whether there was any violation of military property; and
12. Whether the offense was normally civilian, and not military in nature.[64]

Although there are some purely military offenses for which jurisdiction will always vest, such as missing movement, unauthorized absences, and the flouting of military orders and

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[64] Id. at 365.

authority,[65] the Court decided, in most cases, to apply these jurisdictional factors on a case-by-case, ad hoc, basis.[66] The Court noted that this ad hoc approach "leaves outer boundaries undetermined."[67] The decisions of the Court of Military Appeals and the United States Supreme Court since O'Callahan and Relford have attempted to better define these outer boundaries.

Since the O'Callahan decision, the former Chief Judge of the United States Court of Military Appeals, Robinson O. Everett, has been critical of the Supreme Court's limitations on courts-martial jurisdiction. He observed that "the majority opinion in O'Callahan must be viewed as a triumph of abstract concept over practical realities."[68]

Despite widespread criticism, the limits of courts-martial jurisdiction were not significantly pressed again until the 1980 case of United States v Trottier.[69] Airman Trottier was tried by a general court-martial for selling marijuana and LSD at an off-base location in Oxon Hill, Maryland.[70] The court in Trottier favorably cited United States v. Beeker,[71] stating that "use or

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[65] Id. at 364.

[66] Id. at 365.

[67] Id. at 369.

[68] Everett, O'Callahan v. Parker - Milestone or Millstone in Military Justice?, 1969 Duke L.J. 853.

[69] 9 M.J. 337 (CMA 1980).

[70] Id. at 338.

[71] Id., citing United States v. Beeker, 40 C.M.R. 275 (1969).

possession of marijuana and narcotics, whether on or off post, 'has singular military significance which carries the act outside the limitation on military jurisdiction set out in the O'Callahan case.'"[72] Referencing the war powers clause of the Constitution,[73] the court acknowledged that the Constitution was a flexible instrument, capable of accommodating society's changing needs. The Trottier court extended courts-martial jurisdiction to most drug cases regardless of whether the offense occurred on or off a military installation.[74] The court carved out two narrow exceptions to universal jurisdiction in drug cases; use of marijuana by a servicemember while on a lengthy period of leave away from the military community, and the off-base sale of a small amount of drugs to a civilian for the civilian's personal use.

In 1981, the Court of Military Appeals further expanded jurisdiction in United States v. Lockwood,[75] This case involved the question of courts-martial jurisdiction over larceny and forgery charges which, although initiated on base, were consummated in a civilian jurisdiction. Airman Basic Roger Lockwood stole a military identification card on base, then used the card to fraudulently obtain an off-base loan, giving rise to

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[72] Id. at 340.

[73] U.S. Const. Art.I, sec. 8, cl. 14.

[74] 9 M.J. 350-353.

[75] 15 M.J. 1 (C.M.A. 1983).

the contested larceny and forgery charges.[76] The Court of Military Appeals concluded that courts-martial jurisdiction attached to the off-base crimes because they were part of "a course of conduct which began on base" and impacted on "the morale, reputation, and integrity of the base itself."[77] The court further stated that:

> "{Service connection} turns in major part on gauging the impact of an offense on military discipline and effectiveness, and determining whether the military interest in deterring the offense is distinct from and greater than that of civilian society, and on whether the distinct military interest can be vindicated adequately in civilian courts. These are matters of judgement that often turn on the precise set of facts in which the offense has occurred."[78]

The Lockwood court reexamined Justice Douglas' negative comments in O'Callahan concerning the problems and abuses of military courts, and noted that these problems had been significantly curtailed by the Uniform Code of Military Justice and by passage of the Military Justice Act of 1968. The court put forth that there should be periodic reexaminations of service connection in light of changes in the military mission

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[76] Id. at 3.

[77] Id. at 10.

[78] Id. at 4, quoting Schlesinger v. Councilman, 420 U.S. 738, 756 (1975).

and the impact of off-base offenses on the ability to perform these missions.[79]

In 1987 the case of Solorio v. United States[80] gave the Court the opportunity to reexamine service connection and better define the limits of courts-martial jurisdiction. Like O'Callahan, an understanding of the facts of this case is necessary to appreciate the impact of this decision. Solorio was an active duty Coast Guard yeoman first class petty officer stationed in Juneau, Alaska when he sexually abused two young daughters of fellow Coast Guardsmen over a two year period. He was subsequently transferred by the Coast Guard to Governors Island, New York. After his transfer, Coast Guard authorities learned of his prior acts in Alaska and also found that he had committed similar sexual offenses in New York after his transfer. The Governors Island Commander convened a general court-martial to try Petty Officer Solorio for the offenses committed in both Alaska and New York. Fourteen specifications arose from the alleged off-base misconduct in Juneau, Alaska, and seven specifications arose from alleged subsequent misconduct at Governors Island, New York. As there is no "post" or "base" where Coast Guard personnel live and work in Juneau, most Coast Guard personnel stationed there reside in the civilian community. The Alaska offenses were committed in the accused's privately owned home, and the fathers of the victims in Alaska were active

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[79] Id. at 10.

[80] Supra note 19.

duty members of the same Coast Guard unit as the accused. The victims of the New York offenses were also daughters of fellow Coast Guardsmen but the offenses were committed in government quarters on the Governors Island base.

The trial judge in Solorio granted a defense motion to dismiss the Alaska offenses on the ground that the court lacked subject matter jurisdiction, citing the decisions in O'Callahan and Relford.[81] The Government appealed this dismissal to the United States Coast Guard Court of Military Review, which reversed the decision of the trial court and ordered the charges reinstated.[82]

In reviewing the subsequent conviction, the United States Court of Military Appeals affirmed the Court of Military Review, concluding that the Alaska offenses were service connected within the meaning of O'Callahan and Relford.[83] The court took an expansive ad hoc approach in holding that courts-martial jurisdiction attached to the Alaska offenses. Although the court cited several of the Relford factors, the decision was based on the modern concern of the effect of crimes on their victims. The court reasoned that "sex offenses against young children . . . have a continuing effect on the victims and their families and ultimately on the morale of any military unit or organization to

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[81] United States v. Solorio, 21 M.J. 512 (C.G.C.M.R. 1985).

[82] Id.

[83] United States v. Solorio, 21 M.J. 256 (CMA 1986).

which the family member is assigned."[84] The court considered the issue of prosecution of the Alaska offenses in a civilian court and found such prosecution to be unlikely. The victims and their families had been transferred a great distance from Alaska and the state of Alaska had agreed to defer prosecution to the military. The court noted that the likelihood of rehabilitation would be small if two trials were pending as a result of separating on-base and off-base offenses. Where related on-base and off-base offenses are involved, there is "a military interest in having all of the offenses tried by court-martial so that they can be disposed of without delay, and this . . . helps provide a basis for finding service connection for the off-base offenses."[85] By considering the Relford factors, the continuing effects of the offenses, the improbability of civilian prosecution, and the appropriateness of joining related offenses together at one trial, the court concluded that service connection did exist.

The Supreme Court subsequently granted certiorari to review the decision of the Court of Military Appeals and affirmed in a six to three decision. The Supreme Court did not base it's decision on an analysis of whether the offenses were service connected, but rather, overruled O'Callahan, and revived the traditional jurisdictional test by holding that "[t]he jurisdiction of a court-martial depends solely on the accused's

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[84] Id.

[85] Id. at 257.

status as a member of the Armed Forces, and not on the 'service connection' of the offense charged."[86]

In overruling the landmark case of O'Callahan, the Court sharply criticized the O'Callahan Court's representation of the history of courts-martial jurisdiction as being "less than accurate". The O'Callahan court had taken the position that

> "[i]t was . . . the rule in Britain at the time of the American Revolution that a soldier could not be tried for a civilian offense committed in Britain; instead military officers were required to use their energies and office to insure that the accused soldier would be tried before a civil court."[87]

In writing for the majority in Solorio, Chief Justice Rehnquist pointed out that the above position was not the sole statement in the British Articles of War bearing on courts-martial jurisdiction over civilian offenses. Chief Justice Rehnquist cited Section XIV, Article XVI of the British Articles of War which states that all officers and soldiers who:

> "shall maliciously destroy any Property whatsoever belonging to any of Our Subjects, unless by Order of the then Commander in Chief of Our Forces, to annoy Rebels or other Enemies in Arms against Us, he or they that shall be found

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[86] Solorio v. United States, see supra note 19. While the offense no longer has to be service connected, it must be specifically delineated in one of the articles of the UCMJ or incorporated under Article 134, UCMJ as a crime or offense not capital. (See supra note 40.)

[87] Supra note 20 at 269.

guilty of offending herein shall (besides such Penalties as they are liable to by law) be punished according to the Nature and Degree of the Offence, by the Judgement of a Regimental or General Court Martial."[88]

Holding that this provision gives military tribunals jurisdiction over offenses punishable under civil law, the Chief Justice pointed out that the O'Callahan Court "erred in suggesting that, at the time of the American Revolution, military tribunals in England were available 'only where ordinary civil courts were unavailable.'"[89] Justice Douglas' statement in O'Callahan that early American practice supports the majority opinion is without substance. He drew support for his statement from the Articles of War of 1776, enacted by the Continental Congress: the works of Colonel Winthrop, a noted military law historian; and the late date of 1916, when specific civilian offenses were first made punishable in peacetime courts-martial.[90] An examination of his authorities leads to an opposite conclusion.

Section X, article 1 of the 1776 Articles of War, to which Justice Douglas referred, only required the accused soldier to be delivered to the civil magistrate for a civilian offense after a request had been made for his delivery. The section immediately preceding section X, article 1 assists in determining what course of action must be taken by an Army commander, when no such

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[88] Solorio v. United States, see supra note 19.

[89] Id.

[90] O'Callahan, supra note 20 at 271-272.

request for delivery of the accused is received from the civilian authorities. That section requires all commanding officers to insure disciplinary action is taken against his officers and men for various military and civilian type offenses; and should he fail to see that justice is done, then he must stand courts-martial for the crime committed by his subordinate. In those cases where the civilian authorities did not request delivery of the accused, the commander would be in personal jeopardy if he did not take courts-martial action. In civilian type crimes, he would charge the accused under the general article, which allowed punishment for "[a]ll crimes not capital. . . ."[91] Surely an article requiring cooperation and delivery of an accused to civil authorities upon application did not limit courts-martial jurisdiction when the civil application was not forthcoming. Historical evidence indicates that civilian offenses were tried by courts-martial.

Pointing to the confusion created by the O'Callahan decision in attempting to determine if an offense is service connected, along with the "doubtful foundations of O'Callahan"[92], Chief Justice Rehnquist reaffirmed that "judicial deference . . . is at its apogee when legislative action under the congressional authority to raise and support armies and make rules and

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[91] Brief for Respondent at 35-52, O'Callahan v. Parker, supra note 20.

[92] Id.

regulations for their governance is challenged."[93]

In holding that the plain meaning of Article I, Section 8, Clause 14, of the Constitution supports the military status test, which had been the standard prior to O'Callahan, the Court held "that the requirements of the Constitution are not violated where . . . a court-martial is convened to try a serviceman who was a member of the armed services at the time of the offense charged."[94]

This holding leaves open two important questions with respect to courts-martial jurisdiction: Does Solorio entirely eliminate the issue of subject matter jurisdiction?; and, Does this holding effectively overrule Toth by allowing the courts-martial of a discharged servicemember for crimes committed while on active duty?

As indicated earlier, courts-martial subject matter jurisdiction is limited to those offenses specifically delineated under the UCMJ. This subject matter jurisdiction includes the broad range of offenses which may be brought under the "general article", Article 134. Under this article, offenses involving disorders and neglects to the prejudice of good order and discipline in the armed forces, offenses involving conduct of a nature to bring discredit upon the armed forces, and crimes and

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[93] Id. quoting Goldman v. Weinberger, 475 U.S. 503 (1986); Rostker v. Goldberg, 453 U.S. 57 (1981).

[94] Id.

offenses not capital[95] may be tried by courts-martial. Subject to these limitations, the Solorio Court eliminated the issue of subject matter jurisdiction. To what extent the military authorities will exercise this expanded authority remains to be seen. A cautious, reasonable, and conservative approach by the military may well avoid the possibility of Federal Court or Congressional intervention in limiting this authority.

While the Solorio Court did not specifically overrule Toth, its concluding language might suggest that result. The strict interpretation of the Solorio holding, however, should not be readily applied, absent extraordinary circumstances, without risking limiting intervention by the Federal Courts or Congress.

PERSONAL JURISDICTION

To be valid, a courts-martial must have personal jurisdiction over the accused. That is, the accused must have been subject to the Uniform Code of Military Justice. Personal jurisdiction is a question of "status."[96] This "status" test has been reinforced by the Solorio decision. The accused must possess the legal status of a servicemember, or a person otherwise subject to the Code, before personal jurisdiction may

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[95] See supra note 40, and Para. 60(c)(1), Manual for Courts-Martial 1984.

[96] United States ex rel. Toth v. Quarles, supra note 11.

attach. Article 2 of the Uniform Code of Military Justice[97] delineates those persons who are subject to the Code and, therefore, triable by courts-martial. While it is obvious that active duty members of the armed forces are subject to courts-martial jurisdiction, numerous arguments have been made regarding the constitutionality of subjecting other classes of individuals listed in Article 2 to trial by court-martial. The United States Supreme Court has held that a "civilian" cannot be tried by

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[97] 10 U.S.C. 802 states, in part: "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 on inactive-duty training, but in the case of members of the Army National Guard of the United States or the Air National Guard of the United States only when in Federal service.

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

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

(6) Members of the Fleet Reserve and Fleet Marine 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 organizations, when assigned to and serving with the armed forces.

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

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

. . . "

courts-martial in peacetime.[98] When and under what circumstances would an accused be found to be a "civilian" and thus beyond the jurisdiction of a courts-martial in time of peace? Persons retired from the armed forces, reserve personnel not on active duty, and persons discharged from active service fall into categories which may appear to classify them as civilians, but there are numerous legal arguments to the contrary. A close examination of each of these categories of individuals is necessary to better understand their role with respect to the military establishment, and whether it is "necessary and proper" for such a person to be subject to the jurisdiction of courts-martial.

RETIRED PERSONNEL

Article 2(a) of the Uniform Code of Military Justice subjects to the Code, and therefore to trial by courts-martial, three categories of personnel who may be considered as "retired" from active military service. Those categories are:

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

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

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[98] See United States ex rel. Toth v. Quarles, supra note 11; Reid v. Covert, Kinsella v. United States ex rel. Singleton, supra note 16; Gresham v. Hagen, and McElroy v. United States ex rel. Guaglidardo, supra note 17.

(6) Members of the Fleet Reserve and Fleet Marine Corps Reserve."[99]

The potential practical significance of these provisions are great, perhaps even greater than Congress could have thought when this provision was first adopted. The number of individuals in these categories who may be subject to courts-martial jurisdiction totaled 1,762,810 as of October 1, 1987.[100]

Retired personnel may be placed in one of three general categories: retired regulars; retired reserve; and members of the Fleet Reserve or Fleet Marine Corps Reserve.

Retired Regulars

Since August 3, 1861, there have been in effect at all times, without interruption, statutes which expressly subject to military law and trial by courts-martial retired officers of the regular components of the Armed Forces of the United States who are entitled to receive pay.[101] Such statutes have been held to be constitutional.[102] Since 1861 few retired personnel have been brought to courts-martial and the subject, therefore, has not gained much attention.

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[99] Article 2, UCMJ, 10 U.S.C. 802.

[100] Based on information obtained from the office of the Assistant Secretary of Defense for Manpower and Reserve Affairs as of the end of FY-87. See also supra note 21.

[101] Act of August 3, 1861, ch 42, 12 Stat. 287. (See also Winthrop at 746-747.).

[102] Hooper v. Hartman, 163 F.Supp. 437 (S.D. Cal. 1958).

Colonel Winthrop, while expressing some doubts about jurisdiction over civilians, stated "[t]hat retired officers are a part of the army and so triable by court-martial - a fact indeed never admitting of question - is adjudged in Tyler v. U.S., 16 Ct. Cl., 223."[103]

The year 1916, however, marked the first time the issue of courts-martial jurisdiction received significant attention by the President and the Congress. When Congress revised the Articles of War as part of a comprehensive reorganization of the military establishment, a Senate rider eliminated the authority to subject retired regular officers to the jurisdiction of courts-martial. President Wilson was so concerned with the rider that he vetoed the entire bill,[104] including the appropriations, thus forcing Congress to restore the jurisdictional provisions. President Wilson's veto message contains the most persuasive argument for subjecting retired officers to the Code.[105] He started with the argument that officers on the retired list had always been subjected to the Articles of War. They were declared by statute to be a part of the regular Army, were permitted to wear the uniform, were subject to recall by the President in time of war or national emergency, and were, therefore, to be distinguished

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[103] Winthrop, supra note 9 at 87. The Court of Claims decision in Tyler was later affirmed by the Supreme Court, holding that officers on the retired list still remained in the service. (United States v. Tyler, 105 U.S. 244, 245-246 (1882)).

[104] H.R. 16460, 64th Cong., 2d Sess. (1916).

[105] See 53 Cong. Rec. 12844-45 (1916); See also United States v. Hooper, 26 C.M.R. 417 (1958).

from "mere pensioners, from whom no further military service is expected." He continued:

> "It thus appears that both the legislative and judicial branches have drawn a sharp distinction in status between retired officers, who are regarded and governed at all times as an effective reserve of skilled and experienced officers and a potential source of military strength, and mere pensioners, from whom no further military service is expected. Officers on the retired list of the Army are officers of the Army, members of the Military Establishment distinguished by their long service, and, as such, examples of discipline to the officers and men in the active Army. Moreover, they wear the uniform of the Army, their education and service hold them out as persons especially qualified in military matters to represent the spirit of the Military Establishment, and they are subjected to active duty in time of national emergency by the mere order of the Commander in Chief. . . . So long as Congress sees fit to make the retired personnel a part of the Army of the United States, the constitutionality of the proposed exemption of such personnel from all liability under the Articles of War is a matter of serious doubt, leaving the President, as it does, without any means sanctioned by statute of exercising over the personnel thus exempted the power of command vested in him by the Constitution."[106]

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[106] Id.

The last time the United States Army brought a retired servicemember to a court-martial under this congressional authority was in 1931 in the case of Major Kearney.[107] Major Kearney was a retired regular Army officer who was arrested one evening in a San Francisco hotel room for being excessively drunk and having an unauthorized lady in his room. After his arrest, the civilian authorities decided not to pursue any criminal charges. The Army, however, referred his case to a general court-martial, charging him with a violation of Article of War 95 (conduct unbecoming an officer and a gentleman). He was convicted and sentenced to be dismissed from the service. Although the Board of Review approved only the lesser included offense of "conduct of a nature to bring discredit on the service", it upheld the punishment of dismissal from the service.[108] Upon transmitting the record of trial to the President, the Secretary of War recommended that the proceedings be disapproved because, in his mind, "it establishes one of the most dangerous precedents that has confronted the Army in its many years of jurisprudence . . . extend[ing] the general court-martial system to retired officers to practically the same extent that it does to active officers."[109] In December 1931, President Hoover disapproved the proceeding, including the sentence.

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[107] See Bishop, Court-Martial Jurisdiction over Military-Civilian Hybrids: Retired Regulars, Reservists, and Discharged Prisoner, 112 U. Pa. L.Rev. 317 (1964).

[108] 3 J.A.G.D. Board of Review 63 (1931).

[109] Quoted in Bishop, supra note 107 at 339.

Since the case of Major Kearney, neither the Army nor Air Force has courts-martialed a retired officer or enlisted person.[110] Studies have been undertaken to determine the necessity of continuing court-martial jurisdiction over retired personnel and have seriously questioned its continuing viability. One such group reported that

> "[g]ood order and discipline in the armed forces are not benefited by continuing jurisdiction over retired members unless they are on active duty . . . . The Committee considers jurisdiction over retired members unnecessary and recommends amendment to Article 2, Uniform Code of Military Justice, to eliminate that jurisdiction."[111]

The United States Navy, however, has not followed the practices of the other services. In 1957, Rear Admiral Shelden G. Hooper, who had retired in 1948, was tried by general court-martial for committing various act of sodomy near his home in Coronado, California, some of which involved enlisted members of the Navy and Marine Corps. Admiral Hooper was convicted and sentenced to be dismissed from the service and to forfeit all of his pay and allowances.[112]

Before his case was reviewed by the Court of Military

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[110] See generally Bishop, supra note 107. Additional research has found no such cases.

[111] Committee on the Uniform Code of Military Justice, Good Order and Discipline in the Army, Report to Honorable Wilber M. Brucker, Secretary of the Army, 175 (1960).

[112] United States v. Hooper, 26 C.M.R. 417 (1958).

Appeals, Admiral Hooper petitioned the U.S. District Court for the Southern District of California for injunctive relief and for the convening of a three-judge court to rule on the constitutionality of Article 2(4) of the Code. Not having exhausted his military appellate remedies, the district court denied relief, concluding that Article 2(4) "appears to be constitutional without doubt, to the extent that no substantial issue of its unconstitutionality is sufficiently presented as to require the convening" of a three-judge court.[113] This was upheld by the Ninth Circuit Court of Appeals.[114]

On appeal to the Court of Military Appeals, Rear Admiral Hooper contended that jurisdiction cannot attach over retired officers absent an order returning that officer to active duty.[115] By statute, however, such an order could not be given unless it was issued by the Secretary of the Navy, in time of war or national emergency declared by the President, or with the officer's consent.[116] The court dismissed this argument, relying on the plain language of Article 2(4),and pointing out that an officer recalled to active duty from the retired list would be subject to the Code by virtue of Article 2(1), and not Article

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[113] Hooper v. Hartman, 163 F. Supp. 437 (S.D. Cal. 1958).

[114] Hooper v. Hartman, 274 F.2d 429 (9th Cir. 1959).

[115] United States v. Hooper, supra note 112.

[116] 10 U.S.C. 6481.

2(4).[117] Rear Admiral Hooper also argued that if Article 2(4) of the Code is considered without reference to other provisions, it would seem to permit a military commander to snatch a retired regular off the streets and thrust him before a court-martial.[118] The court avoided discussing the merits of this argument but observed that this was not the case here since the accused appeared voluntarily at the court-martial. In finding jurisdiction, the Court of Military Appeals held that "a retired member of a regular component of the armed forces entitled to receive pay is a part of the 'land or naval forces' within the meaning of the Fifth Amendment to the Constitution."[119]

After finally exhausting his military remedies, Rear Admiral Hooper unsuccessfully presented his argument to the Court of Claims in 1961 that the termination of his pay was unconstitutional since the court-martial which ordered the forfeiture of his pay did not have jurisdiction over him.[120]

Rear Admiral Hooper's petition for a writ of certiorari was denied by the Supreme Court in 1964.[121] While the Supreme Court has not recently directly addressed the amenability of retired

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[117] Supra note 112 at 421. Currently the Navy prohibits the recall of a retiree to active duty solely for the purpose of trial by courts-martial. (Paragraph 0116(c)(5), Manual of the Judge Advocate General of the Navy.)

[118] Id. at 422.

[119] Id., citing United States v. Tyler, 105 U.S. 244 (1882); and Runkle v. United States, 19 Ct. Cl. 396 (1886).

[120] Hooper v. United States, 326 F.2d 982 (Ct. Cl. 1964).

[121] Hooper v. United States, 377 U.S. 977 (1964).

military personnel to trial by court-martial, it quoted with favor in 1981 the holding in United States v. Tyler that a retired officer remains a member of the Army and continues to be subject to the Uniform Code of Military Justice and therefore may forfeit his retired pay if court-martialed.[122]

The next Navy case involving a retired officer was that of Lieutenant Commander Chambers, who was also charged with sodomy, but unlike Rear Admiral Hooper, the acts occurred while the accused was still on active duty.[123] In a petition for a writ of habeas corpus, the federal district court for the Northern District of California concluded that "a retired officer entitled to receive pay is not so divorced from the military as to be considered a mere civilian" and reasoned:

> "Where a retired officer has manifested his unfitness for a return to full time military service, and has failed to maintain proper qualifications in conformity with military ethics and standards, it is not unreasonable to assume that the Navy may choose to terminate his status. Undoubtedly, such may be done by Presidential Order. Allen v. United States, 1950, 91 F. Supp. 933, 117 Ct. Cl. 385
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> We believe that court-martial hearing for the purpose of

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[122] McCarty v. McCarty, 453 U.S. 210, 222 (1981). The McCarty Court, in dealing with the issue of whether retired military pay is subject to community property laws, pointed out that such pay is for the continued services of the retiree, not past services, since retirees remain subject to recall to active duty and are subject to trial by courts-martial.

[123] See Bishop, supra, note 107.

discharging a retired member is also reasonably related to the Navy's legitimate interest, based upon its concern for discipline, in the fitness and qualifications of its retired officers. Therefore, we conclude that the Navy may proceed with the court-martial herein for the purpose of imposing proper and necessary discipline."[124]

The district court in Chambers confused the distinctions between administrative separations, which are not in theory supposed to be punishment and courts-martial, which are designed to punish. The court also failed to consider the impediments on administratively separating a retiree.

The next, and most recent, exercise of military jurisdiction by the Navy over retired regulars was the case of Senior Chief Radioman Michael H. Allen in 1987.[125] Senior Chief Allen retired from the Navy in 1980 and was subsequently employed by the United States Government as a reproduction clerk at the U.S. Naval Telecommunications Center, Cubi Point in the Philippines. After a lengthy investigation, Senior Chief Allen was apprehended in the Philippines and brought to San Diego where he was tried and

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[124] Chambers v. Russell, 192 F. Supp. 425, 428 (N.D. Cal. 1961).

[125] San Diego Tribune, page B-1, April 3, 1987. The Navy previously attempted to try a retired enlisted man and a member of the Fleet Reserve by court-martial in 1956. The U.S. District Court for the Western District of Washington granted a writ of habeas corpus in both cases since the Navy improperly recalled them to active duty to stand trial. United States ex rel. Boscola v. Bledsoe, and United States ex rel. Smith v. Thomas, 152 F. Supp. 343 (W.D. Wash. 1956, affirmed, 245 F.2d 955 (9th Cir. 1957).

convicted by a general court-martial of, inter alia, copying and removing classified information, in violation of written orders issued by the Chief of Naval Operations, conspiracy and espionage.

While the accused challenged the jurisdiction of the court to try him, this issue is still on appeal, awaiting action by the Navy-Marine Corps Court of Military Review. Although there are admittedly only a few cases on record that address the issue of courts-martial jurisdiction over a retired regular officer, this is the first case where a retired enlisted person was actually tried and convicted by a court-martial. Also at issue is the applicability of written orders issued by superior officers to retirees.[126]

Retired Reserves

Reserve personnel may generally be placed on the retired list after serving a total of 20 years of combined service in either a reserve or active duty capacity.[127] Under Article 2(5) of the Uniform Code of Military Justice, retired reserve personnel **may** only be subjected to the Code if they are receiving

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[126] As of this writing, plans were being finalized by Navy officials to apprehend another retired enlisted person working as a civil servant in the Philippines for offenses similar to those in Allen, and bring that servicemember to San Francisco for the purpose of exercising courts-martial jurisdiction over him.

[127] See generally Title 10 U.S. Code chapter 11.

hospitalization from an armed force.[128]

The qualification on the statute authorizing court-martial jurisdiction over retired reservists is based on the need of the military commander of a military medical treatment facility to have authority over those persons under his or her control.[129] The history of this provision does not address the need to have some level of control over retired reservists the same as that over retired regulars. The rationale of maintaining courts-martial jurisdiction over retired regulars is ignored when examining the history and rationale of exercising courts-martial jurisdiction over retired reservists.

A retired member of a regular component of an armed force, who by statute is always subject to courts-martial jurisdiction,[130] may be involuntarily recalled to active duty by the Secretary of the armed force concerned in time of war or national emergency.[131] A retired reserve member may also be recalled to active duty without his consent, but only if the Secretary of the armed force concerned, with the approval of the

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[128] Prior to the UCMJ, the Navy had jurisdiction over retired reservists who were placed on the same retired list as regulars. The Code, consistent with its stated purpose, standardized jurisdiction over such personnel by virtually abolishing it in all three services. See S. Rep. No. 486, 81st Cong., 1st Sess. 7 (1949); H.R. Rep. No. 491, 81st Cong., 1st Sess. 10.

[129] See Snedeker, Military Justice Under the Code, 128 (1953).

[130] UCMJ Art. 2(a)(2)(4), 10 U.S.C. 802 (a)(2)(4).

[131] 10 U.S.C. 6481-6482 (A retired regular officer may also be recalled to active duty with his consent.).

Secretary of Defense, determines that there are not enough qualified reserve personnel in an active status or in the inactive National Guard in the required category who are readily available.[132]

While the authority exists to exercise courts-martial jurisdiction over retired reserve personnel in very limited circumstances, this power has never been exercised.[133]

Fleet Reserve

The Navy and Marine Corps have established a unique category of "retired" personnel called members of the Fleet Reserve and Fleet Marine Corps Reserve, respectively. Active duty enlisted personnel from the Navy and Marine Corps are generally transferred from the active roles to the Fleet Reserve or Fleet Marine Corps Reserve, upon their request, after serving at least 20, but not more than 30 years of active duty.[134] Active duty enlisted members of the Navy and Marine Corps are normally ineligible to be placed on the retired list after serving 20 years of active duty as are their Army and Air Force counterparts,[135] but rather are placed in the Fleet Reserve or Fleet Marine Corps Reserve until they have served a total of 30 years of service at which time they will be transferred to the

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[132] 10 U.S.C. 672, 675.

[133] Research in this area has revealed no such cases.

[134] 10 U.S.C. 6330.

[135] Id.

retired list.[136]

A member of the Fleet Reserve or Fleet Marine Corps Reserve may be involuntarily recalled to active duty by competent authority not only in time of war or national emergency, but at any other time as may be authorized by law.[137] Additionally, such an individual may be involuntarily ordered to perform not more than two months' active duty for training in any four year period.[138]

The first case where a Fleet Reserve member was brought before a court-martial was in 1947 when Chief Motor Machinist Mate Joseph Pasela was tried and convicted by a general court-martial for bribery and conduct prejudicial to good order and discipline in the armed forces.[139]

The accused in this case had been transferred to the Fleet Reserve in 1939 after having served 20 years active duty in the Navy. In 1940 he was recalled to active service, where he remained for five years before being again released to inactive service in the Fleet Reserve. He was then employed as a civil servant at the Naval Submarine Base in New London, Connecticut.

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[136] 10 U.S.C. 1031.

[137] 10 U.S.C. 6485.

[138] Id. Prior to 1977, Members of the Fleet Reserve and Fleet Marine Corps Reserve were required to undergo a complete physical examination at least once each four years. Failure to be so examined could result in that member forfeiting any pay which may be due. (Pub.L. 95-79, see 1977 U.S. Code Cong. and Adm. News, p. 531.).

[139] United States ex rel. Pasela v. Fenno, 76 F. Supp. 203 (D. Conn. 1947).

During this employment, he was accused of the theft of government property and was tried and convicted of that offense in the United States District Court for the District of Connecticut. His sentence of one year and a day imprisonment and a fine of $1800.00 was suspended, and he was placed on probation for three years. In July 1947, the accused was recalled to active duty for the purpose of trying him by general court-martial for charges which grew out of the same set of circumstances involved in the crime of theft of which Pasela was convicted in the U.S. District Court.[140]

After his court-martial conviction, but before sentencing, the accused was held in the custody of the Commanding Officer of the Naval Submarine Base in New London. While being held, Pasela filed for a writ of habeas corpus, claiming that, inter alia, he was a civilian and therefore not subject to courts-martial jurisdiction. The petition was initially granted, but after a hearing, was dismissed.[141] In affirming the district court on appeal, the Second Circuit Court of Appeals upheld the jurisdiction of the court-martial, finding that:

> "The Fleet Reserve is so constituted that it falls reasonably and readily within the phrase 'naval forces' in the Fifth Amendment. Its membership is composed of trained

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[140] The general court-martial charges in Pasela included bribery and conduct prejudicial to good order and discipline. These charges required proof of elements different from the proof required to prove theft and were, therefore, separate and distinct, thereby avoiding the question of double jeopardy.

[141] Id.

personnel who are paid on the basis of their length of service and remain subject to call to active duty. While keeping Fleet Reservists on such pay, Congress has, to be sure, also allowed them to accept employment in civilian capacities. But this need not, and does not, materially diminish their obligations as members of the Fleet Reserve. . . . The government at the same time obtains the benefit of having a trained body of men subject to recall to active duty when needed. To exclude Fleet Reservists while in this status from a classification within the 'naval forces' would be, we think, to construe the broad terms of the Fifth Amendment much too narrowly."[142]

The second, and only other, time an individual in this category has been subjected to courts-martial was the general court-martial of Gunnery Sergeant Clifford Overton in 1984. After serving approximately 22 years of active duty in the Marine Corps, the accused was transferred to the Fleet Marine Corps Reserve. While in this status, he was employed as a civilian employee of the United States Government at the Naval Station, Subic Bay, in the Republic of the Philippines. After being apprehended for the theft of government property from the Navy Exchange at the Naval Station in Subic Bay, permission was obtained from the Secretary of the Navy to try the accused at a

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[142] United States ex rel. Pasela v. Fenno, 167 F.2d 593 (2d Cir. 1948).

courts-martial.[143] Before the trial began, the accused successfully petitioned the Court of Military Appeals for an order to cease and desist from his further prosecution. The order was later vacated and the accused was tried and convicted of larceny and conspiracy despite his vigorous objections to jurisdiction at trial. He was sentenced to a dishonorable discharge and to forfeit all pay and allowances.

On appeal to the U.S. Navy-Marine Corps Court of Military Review, Overton claimed that Article 2(a)(6) of the Uniform Code of Military Justice was an unconstitutional extension of courts-martial jurisdiction. In holding that Article 2(a)(6) did not violate the separation of powers doctrine as an unwarranted extension of courts-martial jurisdiction, the court found that there was direct and substantial connection between the accused and the Marine Corps which continued to make him part of the "land and naval forces" which could be regulated by courts-martial under Congress' constitutional power.[144]

The Court of Military Appeals affirmed the Navy-Marine Corps Court of Military Review in July 1987. While noting that Congress' grant of jurisdiction over Fleet Marine Corps Reservists and retirees in general is neither novel nor arbitrary, the court pointed out that some civilian and military

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[143] Section 0116(c) of the Manual of the Judge Advocate General of the Navy requires the approval of the Secretary of the Navy prior to exercising court-martial jurisdiction over a retiree or member of the Fleet Reserve or Fleet Marine Corps Reserve.

[144] United States v. Overton, 20 M.J. 998 (N.M.C.M.R. 1985).

leaders have "expressed doubt with the wisdom of this judgement."[145]

Overton later petitioned the Supreme Court for a writ of certiorari on the issue of the constitutionality of Article 2(a)(6) of the Uniform Code of Military Justice. His petition was denied on December 7, 1987,[146] thus leaving alone Congress' grant of courts-martial jurisdiction over members of the Fleet Marine Corps Reserve.

RESERVE PERSONNEL

Reserve personnel are members of one of the following reserve components of the armed forces:

The Army National Guard of the United States,

The Army Reserve,

The Naval Reserve,

The Marine Corps Reserve,

The Air National Guard of the United States,

The Air Force Reserve,or

The Coast Guard Reserve.[147]

The stated purpose of these reserve components is

"to provide trained units and qualified persons available

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[145] United States v. Overton, 24 M.J. 309, 311 (C.M.A. 1987).

[146] Overton v. United States, ____U.S.____; 98 L.Ed 2d 485 (1987).

[147] 10 U.S.C. 261.

for active duty in the armed forces, in time of war or national emergency and at such other times as the national security requires, to fill the needs of the armed forces whenever, during, and after the period needed to procure and train additional units and qualified persons to achieve the planned mobilization, more units and persons are needed than are in the regular components."[148]

Reservists are subject to courts-martial jurisdiction while serving on active duty[149] or during periods of inactive duty for training,[150] but members of a state's National Guard are subject to courts-martial jurisdiction only while on active duty for training.[151]

All of the services agree that courts-martial jurisdiction over reservists exists while they are on active duty. The Army and the Air Force, however, as a matter of policy, exercise courts-martial jurisdiction under Article 2(a)(3), UCMJ only in situations where the reservist is using expensive or dangerous equipment.[152] The Navy, Coast Guard, and Marines may apply Article 2(a)(3), UCMJ in all situations involving reserve

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[148] 10 U.S.C. 262.

[149] Article 2(a)(1), U.C.M.J.

[150] Art. 2(a)(3), U.C.M.J., but members of the Army National Guard of the United States or the Air National Guard of the United States are subject to the Code during periods of inactive duty for training only when in Federal service.

[151] 10 U.S.C. 511.

[152] United States v. Abernathy , 48 C.M.R. 205, 206 (C.G.C.M.R. 1974).

training.[153]

In those instances where courts-martial jurisdiction is being exercised, the prosecution must establish that (1) the individual was actually on active or inactive duty training; (2) the training was performed pursuant to written orders; (3) the orders stated that the individual was subject to the U.C.M.J.; and (4) the individual voluntarily accepted those orders.[154] In the past, if the government intended to prosecute a reservist on inactive duty training, it had to do so during a drill period where the foregoing elements were met.[155] If the reservist's period of active, or inactive, duty was interrupted, jurisdiction would be lost. In United States v. Caputo,[156] the accused, a Naval reservist, committed an offense while on a two-week period of active duty for training. Upon completion of his training and release from that period of active duty, the government processed charges against him. When the accused reported for his next regularly scheduled inactive duty training, he was advised of his rights, informed of the charges, and placed in pretrial confinement. Although it found no constitutional deficiency in Article 2(a)(3), U.C.M.J., the Court of Military Appeals relied

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[153] Id. See also Duncan v. Usher, 23 M.J. 29 (C.M.A. 1986); United States v. Caputo, 18 M.J. 259 (C.M.A. 1984); United States v. Schuering, 36 C.M.R. 480 (1966).

[154] United States v. Abernathy, supra note 151.

[155] Wallace v. Chafee, 451 F.2d 1374 (9th Cir. 1972); United States v. Schuering, 36 C.M.R. 450 (1966).

[156] 18 M.J. 259 (C.M.A. 1984).

in part on the 1969 Manual for the proposition that once a reservist's period of active duty training or inactive duty training ends, and jurisdiction which the government might have had over offenses within that period is interrupted, jurisdiction may be saved only by several recognized exceptions, but is not revived by a reentry into an active status.

The court also suggested that if the government had acted with a view toward trial during the accused's two-week active duty training, that his subsequent release would not have terminated jurisdiction.[157] Noting some practical problems of extending active duty training or inactive duty training status, the court commented that Congress might wish to consider amending the UCMJ to provide for ordering a "reservist to active duty for purposes of court-martial."[158]

In 1986 Congress amended both Articles 2 and 3, UCMJ.[159] A reservist may now be ordered to active duty involuntarily for purposes of nonjudicial punishment,[160] an Article 32 investigation,[161] or trial by courts-martial[162] for offenses committed while on a previous period of active duty or inactive

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[157] Id.

[158] Id. at 267.

[159] Pub. L. 99-661, See 1986 U.S. Code Cong. and Adm. News, p. 6413.

[160] Art. 2(d)(1)(C), UCMJ.

[161] Art. 2(d)(1)(A), UCMJ.

[162] Art. 2(d)(1)(B), UCMJ.

duty training.[163] A member of a regular or reserve component remains subject to court-martial jurisdiction after leaving active duty for offenses committed prior to such termination of active duty if the member retains military status in a reserve component without having been discharged from all obligations of military service.[164] Such a person may not be tried by court-martial for an offense committed while not on active duty or inactive duty for training.

DISCHARGED PERSONNEL

As a general rule, once a service person is "discharged", courts-martial jurisdiction over that person ceases, since his status as a "member of the land and naval forces" no longer exists. The expiration of an individual's enlistment, however, does not automatically terminate jurisdiction.[165] Article 2(a)(1), UCMJ specifically provides that servicemembers remain subject to the Code while "awaiting discharge after expiration of their terms of enlistment." An original term of enlistment may be adjusted for a variety of reasons including making up lost time for an unauthorized absence. Even after such adjustments

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[163] Art. 2(d)(2), UCMJ. The changes also apply to members of the National Guard when in Federal Service.

[164] Art. 3(d), UCMJ This assumes that the member is still a member of the armed forces.

[165] United States v. Klunk, 11 C.M.R. 92 (1953); United States v. Douse, 12 M.J. 473 (C.M.A. 1982); R.C.M. 202(c)(1).

are made, courts-martial jurisdiction normally continues past the time of the scheduled separation until a discharge certificate or its equivalent is delivered or until the Government fails to act within a reasonable time after the person objects to continued retention. The Manual for Courts-Martial provides for courts-martial jurisdiction to continue past the scheduled expiration date if, prior to discharge, action is initiated to try the servicemember.[166] Action with a view to trial includes apprehension, arrest, confinement, or filing of charges.[167] The Court of Military Appeals has held that if after the expiration of an enlistment the servicemember demands discharge and no action is taken by the government within a reasonable time to try him, jurisdiction may not vest.[168]

As a general rule, actual delivery of the discharge certificate normally terminates the status of a servicemember.[169]

It is common practice to discharge a servicemember at the expiration of a period of enlistment, or earlier, and then immediately re-enlist him. Under what was known as the Ginyard

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[166] R.C.M. 202(c).

[167] United States v. Brown, 11 M.J. 769 (N.M.C.M.R. 1981); United States v. Hardy, 14 M.J. 402 (C.M.A. 1982); United States v. Weise, 7 M.J. 993 (A.C.M.R. 1979); United States v. Beard, 7 M.J. 452 (C.M.A. 1979); United States v. Wheeley, 2 M.J. 220 (C.M.A. 1979); United States v. Morrison, 22 M.J. 743 (N.M.C.M.R. 1986); and United States v. Fitzpatrick, 14 M.J. 394 (C.M.A. 1983).

[168] United States v. Hutchings, 4 M.J. 190 (C.M.A. 1982).

[169] United States v. Howard, 20 M.J. 353 (C.M.A. 1985).

rule,[170] any discharge terminated jurisdiction and when a servicemember was discharged and immediately reenlisted, jurisdiction did not exist for offenses committed during the prior enlistment. In 1982 the Court of Military Appeals overruled the Ginyard rule.[171] Now, if a servicemember is discharged solely for purposes of re-enlisting, and there is no interruption in his military status, jurisdiction will not lapse for offenses committed during the prior enlistment.[172] If there is an intervening period where the servicemember had no "status", then the prosecution must rely on one of the other exceptions.

Article 3, UCMJ, and Rule for Courts-Martial 202, and the discussion that follows, provide several exceptions to the discharge rule. The discharge of a servicemember will not bar jurisdiction over him if he is on active duty at the time of trial and the offense he committed, prior to that discharge, is not triable in any civilian court and is punishable by five or more years confinement at hard labor. The servicemember must possess military status at the time of trial. The Supreme Court in Toth v. Quarles[173] ruled that Article 3(a), UCMJ was unconstitutional to the extent that it attempts to provide for jurisdiction over individuals who were servicemembers at the time

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[170] United States v. Ginyard, 37 C.M.R. 132 (1967).

[171] 13 M.J. 308 (C.M.A. 1982).

[172] See United States v. Moore, 22 M.J. 523 (N.M.C.M.R. 1986).

[173] 350 U.S. 11 (1955).

of the offense but are civilians at the time of trial.

As a practical matter, an actual interruption of active duty precludes jurisdiction because most offenses which authorize more than five years confinement are also civilian offenses and are triable in a state or federal court. Purely military offenses generally do not meet the five-year confinement requirement. This new exception, however, would have significant affect in a case like that of United States v. Wheeler.[174] In Wheeler, the accused committed a murder while on active duty and stationed in Germany, just before he was sent back to the United States and transferred to the inactive reserves. With no extraterritorial jurisdiction, this offense could not be tried in the United States civilian courts.

Article 3(b), UCMJ also provides for jurisdiction over an individual who has been discharged but obtained that discharge fraudulently. This provision further states that if convicted for the fraudulent discharge, the individual may also be tried for any offenses committed prior to the discharge.

Courts-martial jurisdiction also exists over servicemembers who have deserted and were later able to obtain a discharge.[175] The discharge does not relieve the servicemember of accountability for the offense of desertion.[176]

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[174] 28 C.M.R. 212 (1959) (Note: Because the accused feared the possibility of extradition to Germany, he volunteered to be recalled to active duty and stand trial by court-martial.).

[175] Art. 3(b) UCMJ.

[176] See United States v. Huff, 22 C.M.R. 37 (1956).

Additionally, a servicemember convicted by courts-martial who receives a sentence which includes a punitive discharge and confinement may receive delivery of that discharge while serving the confinement portion of the sentence. Article 2(a)(7), UCMJ provides, in effect, that the discharge will not relieve that individual of courts-martial jurisdiction if, while in custody, he commits an offense. This provision has been deemed valid by both the Court of Military Appeals[177] and the federal courts.[178]

RAMIFICATIONS OF RECENT DECISIONS

ANALYSIS AND RATIONALE

Most recently, the Supreme Court has established that the issue of "status" is solely determinative of courts-martial jurisdiction. If an individual has the requisite status; that is, the person can be considered to be a member of the "land and naval forces", then he can be tried by court-martial for any offense under the Code without regard to service connection. In overruling the O'Callahan service connection requirement, the Supreme Court has given courts-martial unlimited authority to try any offense under the Code as long as the accused has the

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[177] Peelbes v.Froehlke, 46 C.M.R. 266 (1973); United States v. Ragan, 33 C.M.R. 331 (1963).

[178] Ragan v. Cox, 320 F.2d 815 (10th Cir. 1963).

requisite status and the offense is cognizable under the UCMJ.

With respect to subject matter jurisdiction, the Solorio decision returns courts-martial jurisdiction to pre O'Callahan status. Under the pre O'Callahan jurisdictional rules the military did not exercise jurisdiction over all non-service connected offenses. Initially, jurisdiction was exercised only in those situations where it was determined necessary by the military commander to ensure good order and discipline. The decades just prior to O'Callahan, however, showed an increasing tendency for military authorities to exercise a greater degree of subject matter jurisdiction. This increased exercise of military jurisdiction was often with the active concurrence of the civilian authorities.[179] After the O'Callahan decision, the military justice system responded immediately by dropping an unreported and unknown number of prosecutions for non-service connected offenses, and numerous convictions under initial review were reversed.[180]

It is unlikely, however, that, as a result of Solorio, the military will respond as dramatically as it did to the decision in O'Callahan. While the broad authority granted by the Solorio decision could significantly increase the military's exercise of courts-martial jurisdiction over non-service connected offenses, a more reasoned, conservative approach can be expected. An

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[179] See generally, Birnbaum and Fowler, Military Appellate Decisions Following O'Callahan v. Parker, 38 Fordham L.Rev. 673 (1970).

[180] Id.

informal memo from the Navy's Office of the Judge Advocate General suggests that "for policy reasons, jurisdiction should not be asserted in some cases".[181] While the "policy reasons" were not defined, a primary consideration must be the adverse appearance which may be created by exercising too great a degree of jurisdiction. Such a practice, if viewed as an abuse, could prompt Congressional or judicial limitations on the exercise of courts-martial jurisdiction. Another factor, which could support such a "policy reason" is that of the military setting a precedent with the civilian authorities that all offenses committed by servicemembers will be tried by courts-martial, and therefore civilian authorities may be reluctant to prosecute when they may feel the military will exercise jurisdiction. The military, on the other hand, may not see the exercise of courts-martial jurisdiction in all cases necessary to ensure good order and discipline.

The military authorities must use a reasoned approach in the decision whether to exercise jurisdiction. Of primary concern is the needs of the military to ensure good order and discipline. If the exercise of courts-martial jurisdiction will not promote good order and discipline, then alternatives should be explored.

With respect to in personam jurisdiction, the literal

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[181] Office of the Judge Advocate General of the Navy informal memorandum dated July 1987.

reading of the last sentence of the Solorio holding[182] does more than just simply return courts-martial jurisdiction to pre O'Callahan status. The last sentence, if read literally, returns courts-martial jurisdiction to the pre Toth era, permitting the military to exercise jurisdiction over discharged servicemembers.

In showing "particular deference to the determinations of Congress"[183] in establishing those categories of persons subject to the Uniform Code of Military Justice, the Supreme Court and the lower courts have been reluctant to find the provisions of Article 2, UCMJ, conferring jurisdiction over certain individuals, unconstitutional. Owing to the importance of maintaining an effective military to insure national security, it has been held that Congress' power to make rules for the land and naval forces must be especially broad.[184] Such interpretations and rulings have not only enabled Congress to broaden the scope of courts-martial jurisdiction, but courts have even suggested areas in which the expansion should occur.[185]

When addressing Congress' grant of courts-martial authority over certain classes of individuals, and whether this grant is

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[182] "We therefore hold that the requirements of the Constitution are not violated where, as here, a court-martial is convened to try a serviceman who was a member of the armed services at the time of the offense charged." (Emphasis added.) Solorio v. United States, supra note 19.

[183] Middendorf v. Henry, 425 U.S. 25, 43 (1976); Schlesinger v. Counselman, 420 U.S. 738, 757-8 (1975).

[184] Curry v. Secretary of the Army, 595 F.2d 873 (D.C. Cir. 1979).

[185] See e.g. United States v. Caputo, 18 M.J. 259 (C.M.A. 1984).

"the least possible power adequate to the end proposed,"[186] the courts have reasoned that, in addition to active duty personnel, retirees and reservists make up a pool of available manpower that can be called upon to serve our country in time of war or national emergency and, therefore, must be subject to military control. The century old holding of the Supreme Court that the normal repositories of the power to try persons for offenses against the United States are the civilian courts and that courts-martial jurisdiction should be exercised in only very limited and extraordinary situations as a very narrow exception to the preferred method of trial in civilian courts has more recently given way to the judiciary's deference to Congress.[187] In an exercise of maximum deference, the U.S. District Court for the District of Columbia stated that "it is plainly for Congress to decide which categories of retired members of the Armed Forces should be subject to the Code."[188]

It was Congress' own intent at the time the Uniform Code of Military Justice was established that the Code provide uniformity in substance and uniformity in interpretation and construction.[189] While Congress has decided which classes of persons should be subject to the Uniform Code of Military Justice, and at what times, it is difficult to follow their

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[186] United States ex rel. Toth v. Quarles, supra note 11.

[187] Reid v. Covert, supra note 13.

[188] Taussig v. McNamara, 219 F. Supp. 757 (D.C. 1963).

[189] See supra note 23.

reasoning. Regular retirees, including those retired due to a permanent physical disability,[190] are subject to the Code at all times because, it has been reasoned, they are subject to recall to active duty without their consent in time of war or national emergency. It is doubtful, however, that a person in this category who was retired under a full physical disability would be recalled to active duty to perform service in time of war, yet this person remains subject to the Code. Retired reserves are also subject to involuntary recall to active duty in time of war or national emergency, but they are only subject to the Code while receiving hospitalization from an armed force. As previously discussed, this limitation is based on the military hospital commander's need to have control over those he is treating. While the commander of the military hospital is responsible for enforcing discipline over those members of the military who are receiving treatment in the facility he commands, he has no similar authority over civilians or dependents receiving treatment in time of peace. No consideration is given to the fact that retired reserves, like retired regulars, form a pool of available manpower which can be called upon when needed. If there is such a concern that a retired reserve should be subject to the code while receiving hospitalization from an armed force, why is there not equal concern when that individual enters a military enclave for purposes of shopping at the exchange store

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[190] No distinction is made in Article 2 of the Code between those retired for length of service and those retired due to a permanent physical disability under 10 U.S.C. Chapter 61.

and commissary, patronizing one of the service clubs, or for some other reason? A retired reserve's unlawful conduct in one of these situations can be just as detrimental to good order and discipline in the armed forces as such conduct would be in a military hospital, especially if such conduct occurred outside the territorial jurisdiction of the United States. Members of the reserve components of the armed forces are subject to the Code only while on active duty, active duty for training, or inactive duty training, yet they, too, make up part of the pool of available manpower to be called upon in time of war or national emergency. If the rationale for retaining courts-martial jurisdiction at all times over retired regulars is that they are a part of a pool of available manpower to be called upon in time of war or national emergency, then why aren't the other components of this pool equally subject to courts-martial jurisdiction? The Army and the Air Force, as a matter of policy, exercise courts-martial jurisdiction over reservists under Article 2(a)(3) of the Code only in situations where the reservist is using expensive or dangerous equipment. The Navy, Marine Corps and Coast Guard apply Article 2(a)(3) in all situations involving reserve training.[191] Since reservists form the probable first group of individuals to be recalled to active duty in time of war or national emergency, it would seem to make sense that they, more than the other groups, should be subject to

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[191] See United States v. Abernathy, 48 C.M.R. 205, 206 (C.G.C.M.R. 1974) and United States v. Caputo, supra note 185.

the Code at all times.

The aim of Congress to have uniformity in substance and uniformity in interpretation and construction has not been fulfilled. Why, then, is there such an inconsistent application of courts-martial jurisdiction to these groups of individuals as Justice Douglas observed in O'Callahan? With respect to exercising jurisdiction over reservists and retired reservists the answer is most probably related to the strong lobbying efforts in Congress on the part of various reserve organizations.[192] It was the Senate, after hearing testimony from these groups, that recommended against court-martial jurisdiction over reservists unless they were using dangerous or expensive equipment, reasoning that there was no need to exercise courts-martial jurisdiction over them unless personal safety or the loss of expensive government equipment was at issue.[193]

We have seen the Supreme Court, the lower courts, and even the President of the United States, define the status of a retiree as a member of the armed forces who receives pay, not as a mere pensioner but, for continued services. If this is true, then it should follow that a retiree who is administratively removed from this pool of available manpower should not be eligible to receive pay for continued services. This is not the case. In what is referred to as the "Tower Amendment", retirees,

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[192] See Bishop, supra note 107.

[193] See S. Rep. No. 486, 81st Cong., 1st Sess. 4-5, 1949; See also H.R. 2498, 81st Cong., 1st Sess. 567, 1949; and Bishop, supra note 107.

and those servicemembers eligible for retirement, are entitled to receive retirement pay based upon the highest pay grade successfully held, notwithstanding the fact that they may be administratively discharged, and therefore ineligible to be recalled to active duty.[194] The pay received by a person in this category can hardly be considered as pay for future services, but is more related to the pay received by a pensioner. The Tower Amendment permits the forfeiture of retired pay and benefits if the servicemember is awarded a punitive discharge as part of a courts-martial sentence. However, if an enlisted person serving in a higher pay grade, eligible for retirement, is sentenced by a courts-martial to be reduced to the lowest pay grade, but is not awarded a punitive discharge, that person would be retired at the lowest pay grade but entitled to receive retired pay at the highest pay grade successfully held. If subsequently recalled to active duty, it would be in the lowest pay grade. It is not consistent to regard his retirement pay as pay for future services when the future services are performed in a pay grade substantially lower than that for which he was paid on retirement. The Tower Amendment has, therefore, seriously weakened the position that retirement pay represents pay for future services.

The fact that courts-martial jurisdiction currently exists over retirees, and that Solorio has eliminated the service

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[194] See 10 U.S.C. 1186(b)(1); 10 U.S.C. 1401a(f); Pub.L. 96-513, Title I, Sec. 110, Dec. 12, 1980, 94 Stat. 2874. See also 1980 U.S. Code Cong., & Ad. News, p. 6333.

connection requirement, several hypothetical situations could provide interesting results. Is a retiree subject to the military grooming and haircut standards? Are retirees bound to comply with all lawful general regulations issued by flag or general officers in command?[195] Such an order could include patronizing a business establishment that has been placed "off limits" by the Armed Forces Disciplinary Control Review Board. While the current state of the law provides that a retiree could be tried by courts-martial for a violation of one of these offenses, such an exercise of jurisdiction is not consistent with "restricting military tribunals to the narrowest jurisdiction deemed absolutely essential to maintaining discipline among the troops in active service."[196] Wouldn't this be the same as "snatching off the streets" a retiree for a minor civilian offense as suggested in Hooper?[197]

It is clear that the original intent of Congress to provide uniformity in substance and uniformity in interpretation and construction has failed. Congress' rationale in granting jurisdiction over various classes of individuals, and the application by the various armed services of these grants of

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[195] Article 92, UCMJ, requires all persons subject to the Code to obey all lawful general orders and regulations. Knowledge of the order or regulation is not an element of the offense which needs to be alleged or proved. (See paragraph 16, Manual for Courts-Martial, 1984)

[196] United States ex rel. Toth v. Quarles, supra note 11.

[197] While Admiral Hooper's offense was quite serious, he argued that the broad grant of jurisdiction over retirees could be extended to include minor offenses.

jurisdiction is not consistent. The time has come to take a new look at the question of exercising jurisdiction over retirees and reservists and whether or not the effect of Solorio should be modified by Congressional action or implementing regulations by the armed forces.

Retroactivity of Solorio

While the Supreme Court made it clear that any offense under the Code could be tried by courts-martial without regard to service connection if the accused has the proper status, it left unsettled the question of the application of Solorio to persons who committed offenses prior to Solorio which may not have withstood the test of "service-connection." The fact that certiorari was denied the following day in three cases which were being held in abeyance by the Supreme Court pending the decision in Solorio, as they dealt with challenges to courts-martial jurisdiction over off-base offenses similar to those offenses committed by Solorio, is indicative that the ruling in Solorio is retroactive.[198] However, the retroactive effect of Solorio is

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[198] Puskaric v. United States, ____U.S.____, 97 L.Ed. 2d 762 (1987); Jenkins v. United States, Id.; Abell v. United States, Id. (No. 86-953) Note also that the Navy-Marine Corps Court of Military Review recently affirmed the case of United States v. McNamara, No. 86-3714 (N.M.C.M.R. 13 July 1987), by applying Solorio to find subject matter jurisdiction. In United States v. Starks, ____M.J.____, A.C.M.R. 86-01434 (July 1987), the Army Court of Military Review concluded that Solorio had retroactive application.

still an open question with the Court of Military Appeals.[199]

It would make sense that since Solorio neither impacts on whether an offense was committed nor increases the punishment available for offenses previously committed, it should be retroactively applied. In comparison, O'Callahan was not retroactively applied.[200] The Supreme Court determined the retroactivity of O'Callahan by applying the criteria announced in Stovall v. Denno:[201] (a) the purpose to be served by the new standards, (b) the extent of the reliance by law enforcement authorities on the old standards, and (c) the effect on the administration of justice of a retroactive application of the new standards. The Supreme Court found that the rule in O'Callahan did not remedy a defect in the truth-determining process, that there was extensive and justifiable reliance by the military authorities on the old standard and they acted appropriately based on that standard, and that applying O'Callahan would adversely affect the administration of justice by creating havoc. Solorio does not remedy a defect in the truth-determining process, military authorities have continually asserted the greatest possible jurisdiction over offenses committed by a servicemember, and a servicemember's reliance on O'Callahan to

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[199] A discussion with the Honorable Walter Cox, Associate Justice, Court of Military Appeals, on March 30, 1988, revealed that his court has not yet had to deal with this issue and this issue may be difficult to decide.

[200] Gosa v. Mayden, supra note 7.

[201] 388 U.S. 293, 297 (1966).

commit an offense which is a crime under the Code but which he perceives as not "service-connected" is neither justifiable nor appropriate, and there is no adverse effect on the administration of justice in applying Solorio retroactively. Therefore, using the analysis of Gosa, retroactive effect would not cause the same impact as O'Callahan.

Solorio, however, argued in his petition to the Supreme Court that applying a more expansive subject matter jurisdiction test to him than had been announced previously violated his rights under the due process clause of the Fifth Amendment. As this argument was first raised on appeal to the Supreme Court and he failed to offer any explanation as to why he failed to raise the issue before the Court of Military Appeals, the Supreme Court declined to consider the claim.

The argument remains that the due process clause of the Fifth Amendment imposes the same restrictions on the courts that the ex post facto clause of the Constitution imposes on Congress. Arguably, because Congress could not by statute have retroactively expanded courts-martial jurisdiction to reach an accused's commission of offenses not service-connected prior to the decision in Solorio, the Supreme Court can not achieve this result through its decision in Solorio. The crux of the issue is whether applying the rule in Solorio would be a retroactive application of an unforeseeable judicial expansion of the substantive scope of a criminal statute. To be prohibited and a violation of an accused's due process rights, it must reach

conduct that the accused could not have reasonably believed was criminal at the time he engaged in that conduct.[202] The decision in Solorio does not change the elements of any offense under the Code so as to deny the accused fair warning of the crime prohibited.

Service connection is unrelated to whether a crime has been committed or not. A servicemember is on notice that the Uniform Code of Military Justice makes certain conduct criminal. The fact that under the O'Callahan and Relford factors the military lacked subject matter jurisdiction over the offense did not make his conduct any less criminal, nor did it change the fact that personal jurisdiction over the servicemember existed. For a servicemember to state that he engaged in conduct which was criminal but in a manner which he perceived to preclude trial by courts-martial because the service connection factors did not exist is not justifiable reliance, nor has the servicemember been deprived of any defense to the particular offense. It appears, therefore, that the holding in Solorio should be applied retroactively.

EFFECTS ON THE SYSTEM

It is too early at this time to assess the full impact on the criminal justice system of the Solorio decision and the

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[202] See Bouie v. City of Columbia, 378 U.S. 347 (1964); Marks v. United States, 430 U.S. 188 (1977).

Court's seeming tolerance of Congress' expansion of courts-martial jurisdiction.[203]

The services and the United States Court of Military Appeals are currently studying the impact and preparing for what could result in a significant increase in caseload. For the first time in over 30 years the Court of Military Appeals has appointed a special committee to examine the court's role and recommend changes as a result of the Solorio decision.[204] In addition to examining how the court can better adapt to the Supreme Court's expansion of courts-martial subject matter jurisdiction, the committee will also assess the impact on the Court of Military Appeals of the recent congressional enactments expanding jurisdiction over reservists in certain situations. Concerned about the potential increase in the number of courts-martial cases, and the time and expense involved in the prosecution of these cases, the services have begun documenting those cases which, prior to Solorio, would not be "service connected".[205] This impact assessment is considered necessary for the services to plan future manpower and resource requirements.

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[203] Attempts to obtain statistical data from the offices of the Judge Advocates General of the armed services were unsuccessful. Although all of the services indicated they were monitoring the effects of the Solorio decision, meaningful data and conclusions could not be obtained at this time.

[204] Navy Times, p. 51, November 16, 1987. The last time such a committee was formed to examine the court's role was shortly after the Court of Military Appeals was established.

[205] Commander, Naval Legal Service Command, Alexandria, Virginia message 312230Z July 1987.

The Pasela case suggests a problem of double jeopardy which is magnified by the decision in Solorio. While the facts in Pasela demonstrate that the civilian and military prosecutions involved different offenses, the expansive effect of Solorio raises new questions. Fortunately, a "Memorandum of Understanding Between the Department of Justice and the Department of Defense Relating to the Investigation and Prosecution of Certain Crimes, August 1984"[206] requires close coordination between those two departments to eliminate the possibility of double jeopardy. With respect to the prosecution of the same offense by separate sovereigns, local memoranda similar to that between the Departments of Justice and Defense would seem appropriate.[207]

Benefits and Burdens

At first, it may appear that any expansion of courts-martial jurisdiction works only an advantage on the civilian criminal justice system and both a benefit and a burden on the military establishment. By subjecting more individuals to the Uniform Code of Military Justice, the civilian criminal justice system may well feel able to defer most prosecutions to the military unless they have some significant overriding interest in

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[206] See appendix 3, Manual for Courts-Martial, 1984.

[207] The Navy has a policy not to prosecute a case which has been adjudicated in a civilian court without first obtaining the permission of the Secretary of the Navy. (Paragraph 0116, Manual of the Judge Advocate General of the Navy.)

prosecuting the case. With jail overcrowding, unmanageable court dockets, limited personnel resources and tight budgets for expenses related to trial and witnesses, civilian authorities may view this expansion of courts-martial jurisdiction as a partial answer to their problems. Civilian authorities may reason that if they refuse to prosecute a member of the military, the military will try the offense by courts-martial. The military authorities, however, may decide that it is not in their best interests to exercise jurisdiction.

The services may view this expansion of jurisdiction as a victory in giving the military commander greater authority over those servicemembers under his control. The authority may be necessary to ensure good order and discipline within the unit and to maintain a high state of morale and readiness. But along with this benefit comes its burdens. The money, manpower and facilities saved by the civilian system, should they refuse to prosecute, would be absorbed by the military establishment if the military commander determined that trial by courts-martial was appropriate. Does the military really want to prosecute all members of the land and naval forces for all offenses? A military unit preparing to deploy overseas on a ship or begin extended field maneuvers may not want to be burdened with the prosecution of a marginal performing servicemember charged with a "civilian" offense. The commander of such a military unit, in considering these factors, may find it in the best interest of good order and discipline not to take on this additional

prosecution burden when the civilian authorities could prosecute the case. The military could then resort to administrative discharge proceedings to remove him from the military rolls.

A benefit/burden analysis cannot be confined to the two separate criminal justice systems. The analysis must also consider the impact on society as a whole.

The range of punishments which may be imposed by courts-martial are extremely limited when compared to that of a civilian criminal court. Punishments imposed by courts-martial fall into four general categories: punitive discharge, confinement or restraint, forfeitures or fine, and reduction in pay grade.[208] Unlike civilian criminal courts, courts-martial may not suspend a sentence, order restitution, order probation, or commit an individual to a mental institution. The military is ill equipped to provide the necessary correctional programs which are available in the civilian community.

THE LIMITS OF EXPANSION

While the Court in Toth would "restrict military tribunals to the narrowest jurisdiction deemed absolutely essential to maintaining discipline among the troops in active service", we have more recently seen the Supreme Court give particular deference to those acts of Congress which establish the categories of persons subject to the Code. While the rationale

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[208] R.C.M. 1003

for exercising jurisdiction over certain groups of individuals is difficult to follow, courts have held that Congress' power to make these determinations is especially broad.[209]

With the Court's apparent "hands off" approach in interfering with Congress' grants of courts-martial jurisdiction pursuant to Article I, the Court has left the determination for any expansion up to Congress. It is doubtful, absent a clear showing of abuse, that the Court will restrict Congress' determinations of what is necessary.

The Needs of the Services

It is vitally important to maintain a separate system of justice for the military in order to maintain good order and discipline to provide for an effective fighting force. This system of justice must be efficient and effective, but not unnecessarily overburdened. The military services must be able to exercise jurisdiction over those offenses and those persons it deems necessary in order to ensure good order and discipline. The original aim of Congress in establishing the Uniform Code of Military Justice to provide for uniformity is a noble one. Unfortunately, the rationale of Congress in determining which individuals should be subject to the Code, and the application of the jurisdictional grants by the various branches of the armed services is anything but uniform. The time has come to take a

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[209] See Curry v. Secretary of the Army, supra note 25; Taussig v. McNamara, 219 F. Supp. 757 (D.C. 1963).

new look at the advisability of exercising jurisdiction over the various classes of individuals in an effort to provide uniformity in rationale, construction and application. It is also appropriate to examine the effects of the Solorio decision to determine if limiting legislation or regulations should be implemented.

While the Supreme Court has granted broad discretionary powers to the military in the exercise of courts-martial jurisdiction, the full exercise of these powers is not necessary to ensure good order and discipline.

Retired regulars, retired reserves, and reserve personnel all fulfill a vital role in our national defense. As members of our nation's pool of inactive duty manpower resources they must be monitored to ensure they are ready and fit to be called upon to serve their country in time of war or national emergency. Those who, by reason of their misconduct, are no longer fit to so serve should be removed from this pool. If that misconduct is detrimental to good order and discipline in the armed forces, then prosecution by courts-martial is necessary to serve the needs of the military. If, on the other hand, the misconduct had no adverse effect on good order and discipline, then administrative proceedings should be held to determine the continued fitness of that person to serve in our nation's pool of available resources.

Under current laws and regulations, reserve personnel may be discharged administratively if they are no longer suited for

military service.[210] Once discharged, they would be entitled to no further compensation from the United States based on their service, unless for disabilities incurred while on active duty.[211] Retired personnel, however, may be administratively discharged but, as a result of the Tower Amendment, would continue to receive retired pay. If they are removed from the rolls by sentence of a court-martial, however, they would forfeit their right to receive retired pay.[212] If retired pay is truly compensation for future services, then that provision of the Tower Amendment which effectively gives the retiree a vested interest in his retired pay, unless punitively discharged by order of a courts-martial, should be repealed. Since all retirees may not be recalled to active duty, it appears that retired pay is not solely compensation for future services but a combination of compensation for future services and a pension. Either way, if military authorities want to take away the pay of a retiree for reason of misconduct, an administrative discharge is ineffective, and, the military would normally have to resort to a trial by courts-martial.[213] The Tower Amendment, therefore, forces the military authorities to impose criminal sanctions against a retiree to achieve this end, when administrative

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[210] 10 U.S.C. 1162.

[211] Id.

[212] Note that 5 U.S.C. 8312 provides for the termination of retired pay if an individual is convicted of certain serious offenses against the United States.

[213] But see Id.

proceedings may be more appropriate.

In order to cure these inequities, the provisions of the Tower Amendment which were previously discussed should be amended. The military services need the ability to exercise courts-martial jurisdiction over all classes of persons considered to be members of the land and naval forces. This includes retired regulars as well as retired reserves and reserve personnel. With respect to these individuals, however, jurisdiction should be limited to those offenses which are detrimental to good order and discipline. The twelve criteria cited under Relford, to assist in determining if service connection exists, would be helpful in determining if the conduct was of a nature to be detrimental to good order and discipline in the armed forces, and should be used for this purpose. If the misconduct by one of these persons not on active duty does not meet the criteria cited under Relford, then other action, short or trial by courts-martial, may be appropriate.

With respect to subject matter jurisdiction, the holding in Solorio gives the military the necessary flexibility to exercise jurisdiction over those offenses deemed necessary to prosecute in order to maintain good order and discipline in the armed forces without the cumbersome burden of proving service connection. The broad latitude granted in Solorio, however, must be exercised only for the active forces and not applied to retired or reserve personnel.

Future Expansion

Not only has the Court shown great deference to the enactments of Congress relating to courts-martial jurisdiction, but the Court has shown its willingness to expand this jurisdiction even further.

The last sentence in Solorio, which states: "We therefore hold that the requirements of the Constitution are not violated where as here, a court-martial is convened to try a serviceman who was a member of the armed services at the time of the offenses charged."(emphasis added) indicates a willingness to overrule United States ex rel. Toth v. Quarles,[214] which held that "court-martial jurisdiction cannot be extended to reach any person not a member of the Armed Forces at the time of both the offense and the trial. Thus, Discharged soldiers cannot be court-martialed for offenses committed while in the service."[215] It appears that if presented with this question, the Supreme Court would overrule Toth and conclude that there is in personam jurisdiction.

The Supreme Court appears unlikely to oppose expansion of courts-martial jurisdiction over reservists or retired reservists. The rationale for expanding jurisdiction to these individuals at all times is certainly consistent with the Court's previous holdings with respect to retired personnel. It appears unlikely, however, that Congress will expand jurisdiction in this

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[214] Supra note 11.

[215] Id.

area over the strong objections of the powerful lobbyists representing the various reserve groups.

CONCLUSION

Solorio has made the issue of subject matter jurisdiction before courts-martial virtually moot for all offenses occurring on or after June 25, 1987. The question of retroactivity will linger until this issue is ultimately determined. One of the most significant questions left unanswered is when and under what circumstances would an accused be found to be a "civilian" and thus beyond the jurisdiction of a courts-martial in time of peace. This issue seems destined to become the subject of increased litigation, and should become the subject of Congressional enactments.

The expansive effect of Solorio raises significant questions of double jeopardy. While the Department of Defense currently has a memorandum of understanding relating to the prosecution of offenses with the Department of Justice to prevent such an issue, similar memoranda of understanding should be established on a local level with the cognizant civilian prosecutorial authorities to work out the issues of double prosecution.

The Code provisions relating to personal jurisdiction are neither uniform nor equal in substance, interpretation and application as originally intended by Congress. The justification for exercising jurisdiction over regular retirees

is not applied when considering reservists or retired reservists. The exercise of jurisdiction by the various services is far from uniform. The Army and Air Force find it unnecessary to exercise court-martial jurisdiction over retirees, and only exercise jurisdiction over reservists if they are working with expensive or dangerous equipment. The Navy, Marine Corps, and Coast Guard, on the other hand, exercise jurisdiction over these groups.

The case of United States v. Allen will give the review courts an opportunity to address, for the first time, the exercise of jurisdiction over a retired enlisted person. Also at issue is the applicability of written orders and regulations over retirees.

While the Supreme Court has left the determination to Congress to decide which groups of personnel should be subject to the Uniform Code of Military Justice, Congress has abandoned its original aim of uniformity. Subjecting regular retirees to the Code for even the most unrelated offense to the military, while disregarding the reservist or retired reserve who may commit a serious offense against the military while on a military reservation does not meet the overall needs of the military services to maintain good order and discipline nor is its application uniform.

If it is perceived that servicemembers are being tried for minor "civilian" offenses and, therefore, in the words of Justice Marshall in his Solorio dissent, being "deprived of procedural protections constitutionally mandated in trials for purely

civilian offenses,"[216] Congress may decide to pass legislation limiting jurisdiction to service connected offenses.

A more logical approach would be for Congress to undertake a comprehensive review of the needs of the military establishment and pass uniform legislation to meet these special needs. Authority should be granted to provide for the discharge and forfeiture of the retired pay of retirees who commit gross acts of misconduct which are prejudicial to good order and discipline in the armed forces, so as not to force the military services to resort to trial by court-martial to attain the goal of removing that individual from the rolls of the service with a corresponding loss of pay.

While some may view Solorio as a conclusion to the issue of subject matter jurisdiction, the question as to the outer limits of courts-martial jurisdiction in general remains an open question.

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[216] Solorio v. United States, supra note 19.

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