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Be All You Can Be (Without the Protection of the Constitution)

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INTRODUCTION

Why is the Constitution of the United States so exceptional? Well, the difference is so small that it almost escapes you—but it's so great it tells you the whole story in just three words: We the people. In those other constitutions, the Government tells the people of those countries what they're allowed to do. In our Constitution, we the people tell the Government what it can do, and it can only do those things listed in that document and no others. Virtually every other revolution in history has just exchanged one set of rulers for another set of rulers. Our revolution is the first to say the people are the masters and government is their servant. . . . Because here in America, we the people are in charge.

Just three words: We the people—Those are the kids on Christmas day looking out from a frozen sentry post on the 38th Parallel in Korea or aboard an aircraft carrier in the Mediterranean. A million miles from home but doing their duty.¹

Despite the generous inclusion by President Reagan of the many soldiers, sailors, airmen, and marines in the concept of “the people” of this republic, it is not altogether clear whether one whose status has changed from ordinary “citizen” to “a member of the armed forces” can legitimately claim any of the constitutional protections of citizenship until he or she is no longer a member of the armed forces. In the course of this nation’s history the Supreme Court has denied some or all of the protection of the Constitution to many groups of people, including African-Americans,² women,³ Native Ameri-

¹ Address Before a Joint Session of Congress on the State of the Union, 1 PUB. PAPERS OF THE PRESIDENTS OF THE UNITED STATES, RONALD REAGAN 1987 60 (Jan. 27, 1987).
² Dred Scott v. Sanford, 60 U.S. 393, 407 (1857) (‘[People of African descent] had no rights which the white man was bound to respect . . . [and they] might justly and lawfully be reduced to slavery . . . .’).
³ Muller v. Oregon, 208 U.S. 412 (1908) (“[H]istory discloses that woman has always
cans, Americans of Japanese ancestry, aliens, and more recently to members of the armed forces.

Just six months after President Reagan spoke the words quoted above, the Court overturned a precedent of nearly twenty years and held, in Solorio v. United States, that a member of the armed forces could be tried by a court-martial for virtually any offense without regard to the impact the alleged offense may, or may not, have had on the military or the ability of that service member to function in the military. While the decision may seem fairly innocuous at first blush, this article will demonstrate that the judicial mindset demonstrated by the Solorio holding is ill-conceived from the point of view of the soldier who is the accused at a court-martial. Moreover, the Supreme Court has demonstrated a judicial myopia which threatens the very form of government conceived by the framers of the Constitution. The decision perpetuates legal class distinctions which should not play a part in a democracy or in the administration of criminal justice and it paves the way for the creation of a “warrior class” with fewer rights in criminal proceedings.

The Solorio decision should be of particular concern to members of the African-American, Hispanic, Native American, and poor communities in this country. This nation’s military forces are now composed exclusively of volunteers. However, because of the high levels of unemployment which plague the youth of many minority communities, a strong argument can be made that we still have a poor person’s draft. As a result, African-Americans, who make up only 12% of the American population, represent over 20% of the nation’s Armed Forces. Of the

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4. Elk v. Wilkins, 112 U.S. 94, 100 (1884) (despite the passage of the fourteenth amendment, Native Americans who were born in the United States “were never deemed citizens of the United States, except under explicit provisions of treaty or statute . . . declaring . . . [individuals or tribes] to be . . . [or eligible to] become citizens . . . [with] satisfactory proof of fitness for civilized life . . .”).

5. Korematsu v. United States, 323 U.S. 214, 217 (1944) (“[W]e are unable to conclude that it was beyond the war power of Congress and the Executive to exclude those of Japanese ancestry from the West Coast war area . . ..”).

6. Chae Chan Ping v. United States, (also known as The Chinese Exclusion Case), 130 U.S. 581, 603 (1889) (“These [Chinese] laborers are not citizens of the United States; they are aliens. That the government of the United States . . . can exclude aliens from its territory is a proposition which we do not think open to controversy. Jurisdiction over its own territory to that extent is an incident of every independent nation.”).


8. Throughout this article I will use the term soldier interchangeably with the term “member of the armed forces.” However, the reader should keep in mind the fact that the laws relating to the military that I discuss herein are equally applicable to the officers and enlisted personnel of the Army, Navy, Marine Corps, Coast Guard, and Air Force. See 10 U.S.C. §§ 101(4) and 802(a)(1).

troops recently deployed to the Persian Gulf during operation Desert Storm 104,000, or 25%, were Black and nearly 30% of the ground troops were Black. The inequity of these numbers seems more pronounced when we remember that in the same year of the deployment of military forces to the Persian Gulf the President vetoed a major piece of civil rights legislation. Later, while troops were at risk in the Gulf, the Vice President and the Secretary of the Air Force played golf at an all-white country club.

Even without the immediate threat of loss of life, poor and minority communities should still be alarmed at the recent extension of court-martial jurisdiction. The history of military law reveals that the court-martial is more a tool of military discipline than of democratic justice. The American court-martial has made great advances since the founding of the nation. However, it falls short of what we demand of civilian courts when they deprive a person of liberty. Through Solorio, the Supreme Court has raised the status of courts-martial to that of a civilian criminal trial. In doing so, it has undermined the significance of civilian courts in the lives of soldiers. Members of the armed forces have less reason to believe that civilian courts have any power to protect their rights. Indeed they may question whether military authority is at all subject to civilian rule. As long as social conditions persist which make enlistment in the military the most attractive prospect for a class of young men and women, the Solorio decision creates a separate system of criminal discipline to which this class is peculiarly susceptible.

THE DEVELOPMENT OF AMERICAN MILITARY LAW AND THE EVOLUTION OF THE CONCEPT OF SERVICE-CONNECTION

The Constitution confers certain powers upon the Congress and others on the President. The exact relationship between the two political branches in executing their national defense responsibilities has been the subject of frequent debate. The Constitution gives Congress the

10. Isabel Wilkerson, War in the Gulf: The Troops, N.Y. Times, Jan. 25, 1991, at A1, col. 2. According to Department of Defense data, as of January 3, 1991, the Army troops deployed in Operation Desert Storm were composed of 29.8% African-Americans, 4.2% Hispanic Americans, 1.0% Asian Americans, and 0.5% Native Americans. See also Taylor, Volunteer Army Facing First Big Test in Gulf War, San Francisco Chronicle, Feb. 9, 1991, at A11.


12. Quayle Plays Golf at All-White Club, N.Y. Times, Dec. 29, 1990, at A9, col. 1. The Vice President's spokesperson said that he was unaware of the controversy surrounding the club. After being informed by the press, the Vice President left the country club. However, Secretary Donald B. Rice, a member of the club, continued to play.

13. In one of the Supreme Court's earliest examinations of the relationship of the war powers of the Congress and the executive branch, it observed that, while the Congress has the power to declare war:

If a war be made by a foreign nation, the President is not only authorized but bound to resist force by force. He does not initiate the war, but is bound to accept the challenge without waiting for any special legislative authority. And
power and the responsibility: to define and punish offenses against the
law of nations,\textsuperscript{14} to declare war,\textsuperscript{15} to raise and support armies,\textsuperscript{16} to
provide for and maintain a navy,\textsuperscript{17} to make rules for the government
and regulation of the land and naval forces,\textsuperscript{18} to provide for calling forth
the militia,\textsuperscript{19} to provide for organizing, arming, and disciplining the
militia,\textsuperscript{20} and to make all laws which shall be necessary and proper to
execute these powers.\textsuperscript{21}

The Constitution designates the President as the Commander in
Chief of the armed forces of the United States\textsuperscript{22} and, when called into
the actual service of the United States, the militia of the several states.\textsuperscript{23}
With the advice and consent of the Senate, the President is authorized
to appoint the officers of the federal armed forces.\textsuperscript{24} However, through
appropriate legislation, this authority may be vested in the President
alone or the head of the responsible cabinet office.\textsuperscript{25}

The Constitution gives the Judiciary no specific authority over the
military. However, the courts have decided cases on several occasions
which involve the interpretation of the limits of the war powers of the
political branches.\textsuperscript{26}

The first legislation of the Continental Congress, which extensively
dealt with discipline in the military, was passed in 1775\textsuperscript{27} when the
Continental Army was composed of a relatively small number of vol-
unteers.\textsuperscript{28} Recognizing the need for a means of disciplining the troops
whether the hostile party be a foreign invader, or States organized in rebellion,
it is none the less a war.

\textit{The Prize Cases}, 67 U.S. 635 (1863). \textit{See also} Abraham Sofaer, \textit{The War Powers Reso-

15. U.S. CONST. art. I, § 8, cl. 11.
18. U.S. CONST. art. I, § 8, cl. 14. This also includes the Army, Navy, Marine Corps,
23. \textit{Id.}
25. \textit{Id.} \textit{See}, e.g., 10 U.S.C. § 593(a).
26. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952) (the President's
powers as Commander in Chief do not authorize the seizure of private property
without statutory authority); Trop v. Dulles, 356 U.S. 86 (1958) (Congress does not
have the authority to strip a native-born citizen of United States citizenship as
punishment for deserting the armed forces in a time of war).
27. \textit{Il JOURNALS OF THE CONTINENTAL CONGRESS 1775, 111, June 30, 1775 (1905).}
28. On June 15th [1775] George Washington was appointed "to command all the
Continental Forces;" on July 4, 1775, it was announced in general orders that
the "troops of the United Provinces of North America" were taken over by
Congress. The army then numbered not more than 14,500 men, including
perhaps the newly organized train of artillery which had been authorized in
April by the [Provincial Congress of Massachusetts]. There existed also a
coastguard which had been raised to defend the sea-board....

\textsc{Charles Knowles Bolton, The Private Soldier Under Washington} 19 (1902)
(reprinted 1964) (footnotes omitted).
swiftly, and without the required formalities of civilian justice, the Continental Congress adopted, without significant change, the existing British Articles of War\textsuperscript{29} as the American Articles of War\textsuperscript{30} The British Articles of War, in turn, can be traced to the seventeenth-century military codes of King Gustavus Adolphus of Sweden.\textsuperscript{31} Both the British Articles of War and the military codes of King Gustavus Adolphus were rules that were adopted in societies having a strict caste system. They were rooted in the political theories of feudal states and courts of chivalry. The system of ranking and regulating people in the military only served to reinforce the existing social strata which were based on wealth and inherited assignments of nobility.\textsuperscript{32}

The American Articles of War were significantly amended on several occasions through 1948.\textsuperscript{33} However, none of these amendments substantially varied from the foundation laid by the 1775 Articles, which were not substantially different in nature from the military codes promulgated by Gustavus Adolphus in 1621.

While the Continental Congress adopted substantial portions of the British Articles of War, the Congress' incorporation was not done in total blindness and without significant exception. The Continental Congress recognized that its soldiers were also citizens, and therefore, they too were a part of the movement toward greater independence then under-

\begin{itemize}
\item 30. The American Articles of War of 1775, reprinted id., app. IX, at 953.
\item 31. Gustavus Adolphus' fame as perhaps the greatest leader in the revolutionary development of warfare in the seventeenth century overshadows his more permanent contribution to the development of modern armies, that of a disciplinary code which gives meaning to command and control. Gustavus' Articles of War of 1621 "inaugurated the history of modern military justice." They, in effect, formalized recognition of the "four moral virtues necessary to any army: order, discipline, obedience, and justice." Gustavus Adolphus was not only a great soldier, but a true military genius whose Articles of War of 1621 are the foundation upon which is structured military justice today.
\item 32. General S.T. Ansell, a major influence in the development of our current system of military discipline, wrote at the beginning of this century that:
\begin{quote}
the existing system of Military Justice is un-American, having come to us by inheritance and rather witterless adoption out of a system of government which we regard as fundamentally intolerable . . . belonging . . . to an age when armies were but bodies of armed retainers and bands of mercenaries . . . a system arising out of and regulated by the mere power of Military Command rather than Law.
\end{quote}
\item 33. The Articles of War underwent major amendment in 1776, 1786, 1806, 1874, 1916, 1920, and 1948. Among the significant changes were the reduction of the number of members required to convene a general court-martial, changes in the designation of officers empowered to convene courts-martial, and the addition of a field officer court-martial, precursor of the summary court-martial. Schlueter, supra note 31, at 145–55.
\end{itemize}
way in the Colonies. As part of the concept of popular sovereignty, they had whatever rights all other citizens were seeking, to the extent possible in military service. For example, religious practice was prescribed by the British Articles of War. By comparison, religious freedom was recognized in the American Articles of War. Additionally, some attempt was made to limit the cruelty of punishments meted out by courts-martial. The adoption of the British Articles was later questioned by at least one acknowledged patriot, John Adams. He could not understand why a nation which was committing itself to individual

34. All Officers and Soldiers, not having just Impediment, shall diligently frequent Divine Service and Sermon . . . such [of them] as willfully absent themselves, or, being present, behave indecently or irreverently, shall [be punished by court-martial; and] whatsoever Officer or Soldier shall presume to speak against any known Article of the Christian Faith, shall be delivered to the Civil Magistrate, to be proceeded against according to Law.


35. "It is earnestly recommended to all officers and soldiers, diligently to attend divine services . . . ." Id. at app. IX, art. II, at 953 (quoting The American Articles of War of 1775) (emphasis added).

Ironically, despite this conscious effort to rid the military of enforced religious practices, the federal courts were called upon to rule, nearly two hundred years later, that the armed forces’ service academies could not force their students to attend chapel service in the name of military discipline. Anderson v. Laird, 466 F.2d 283 (1972), cert. denied, 409 U.S. 1076 (1972). However, the Supreme Court later ruled that the military can forbid the wearing of religious attire in the name of military discipline. Goldman v. Weinberger, 475 U.S. 503 (1986).

36. [N]o persons shall be sentenced by a court-martial to suffer death, except in the cases expressly mentioned in the foregoing articles; nor shall any punishment be inflicted at the discretion of a court-martial, other than degrading, cashiering, drumming out of the army, whipping not exceeding thirty-nine lashes, fine not exceeding two months pay of the offender, imprisonment not exceeding one month.

American Articles of War of 1775, Winthrop, supra note 29, at 957, art. LI. Winthrop observed that the colonists felt a need to limit military punishments because:

[the disrepute into [which flogging] has fallen is in great part due to the fact that formerly, in the British service, it was carried to a brutal and perilous extreme. “Five hundred lashes” was a not uncommon sentence; one thousand were imposed in repeated recorded cases; and fifteen hundred and even two thousand were sometimes reached. The execution of such sentences, while savage in its cruelty to the subject was demoralizing to those who inflicted and witnessed it.

Id. at 439.

37. John Adams, responsible for their hasty adoption by our Continental Congress to meet an emergency, said of them: “There was extant, I observed, one system of Articles of War which had carried two empires to the head of mankind, the Roman and the British; for the British Articles of War are only a literal translation of the Roman. . . . 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 those articles should have been carried. . . .”

Ansell, supra note 32, at 3-4.
freedoms and liberties would subject its citizens who served to protect those freedoms to the tyranny that it was seeking to unshackle.

In the early part of the twentieth-century Brigadier General Samuel T. Ansell, the acting Judge Advocate General of the Army, proposed a drastic change to the existing Articles of War. General Ansell had sought, unsuccessfully, to make the administration of discipline in the army more uniform throughout the service and subject to a centralized reviewing authority at the highest level of command in Army Headquarters. During the time of his service, General Ansell observed, and was critical of, many practices in the Army. Among his criticisms were the lack of formal appeal of court-martial convictions and an absence of a centralized corps of legally trained officers with the authority to seek correction or modification of court-martial judgments in an effort to bring uniformity to the decisions made in the field. While these concepts were radical at the time, they would become commonplace notions in military law within four decades.

During World War II, the nation witnessed its largest military mobilization in history. More than 16 million men and women volunteered for, or were conscripted into, active military service. By the end of the War, tens of thousands of citizens were deprived of their liberty through the military’s system of discipline. The returning soldier-citizens told many tales of drastic measures taken at courts-martial. Not only were defendants convicted of seemingly minor offenses and sentenced to extremely harsh punishments, but those convicted were receiving different punishments from their counterparts in the same or different command units. The factual truth behind these stories was no more

40. Id. at 16–17.
42. Long before they had a chance to fight for democracy, scores of American soldiers—officers as well as enlisted men—were executed by a vicious, undemocratic court-martial system. Forty-eight thousand men who once wore the uniform of the United States Army or Navy are today serving sentences imposed by a jury not of their peers, but of judges with superior rank. . . . While the Negro GI was the likeliest victim of our outmoded and unjust military courts, men and women of all races and religions suffered under the system. Adam Clayton Powell, The Rape of Justice by Court Martial, reprinted in 92 CONG. REC. APP. A3381 (1946).
43. At another post, three Negro Soldiers have recently been Court Martialed and sent to prison for Five years, for telling a Major that they were not physically fit for a heavy laboring detail to which they had been assigned. Yet, these men had all before been recommended by the Medical Authorities for discharges because of their physical conditions. . . . On or about 20 January five other men who are in the same category as the above three were told by a Major when they protested that they could not do pick and shovel work, “If I had you Niggers in my section of the country, I’d make you work.” Then
important than the great ire they inspired in the nation and in Congress. Sensing the political urgency of changing the existing system, the Department of the Navy and the Department of War both attempted to redraft their regulations and encouraged Congress to amend the Articles of War and the Articles for the Governance of the Navy. However, the events of the day overtook both of these efforts. With the passage of the National Security Act of 1947, the Department of the Navy and the Department of War were merged into the Department of Defense. All of the armed forces, except the Coast Guard, were then brought under a single cabinet level department. Congress then undertook the development of legislation which would provide for the uniform administration of discipline in all branches of the armed forces. The result of this effort was monumental. The Uniform Code of Military Justice (U.C.M.J.) was without precedent in the modern world. It was the first significant change in the administration of military discipline in the American armed forces since 1775 when the Continental Congress adopted what were essentially the military codes of King Gustavus Adolphus.

Among the major changes brought about by the adoption of the U.C.M.J. was, as conveyed in its title, uniformity among the several services. For the first time in the nation's history the procedural and substantive law of military discipline was going to be the same in all of the military services. In addition, the U.C.M.J. created a centralized review panel in each of the armed forces which had jurisdiction to hear the appeals of defendants whose sentences had reached certain jurisdictional thresholds. However, the most significant change in military discipline brought about by the U.C.M.J. was the creation of the Court

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44. There are those who maintain that most of these reports were without substance and that the administration of discipline in the armed forces was fair. See, e.g., Schlueter, supra note 31, at 158 n.114.


of Military Appeals. The Court of Military Appeals was originally created as a three member panel of civilian judges having jurisdiction to hear mandatory appeals in cases involving the death penalty, the conviction of a flag or general officer, or in cases where the Judge Advocate General of one of the armed forces had certified a question for review. The Court could also grant discretionary appeals in cases where one of the armed forces' Boards of Review had rendered a final decision. In many respects, the enactment of the U.C.M.J. represented the adoption of many of the reforms first urged by General Ansell forty years earlier.

Through the U.C.M.J., Congress subjected all active-duty military personnel, reservists undergoing training, service academy cadets and midshipmen, discharged military personnel serving court-martial sentences, and prisoners of war to court-martial jurisdiction. In addition, Congress subjected military retirees, civilian contractors, and the dependents of military personnel to court-martial jurisdiction. The formal extension of court-martial jurisdiction over civilians sparked the earliest challenges to the U.C.M.J. before the Supreme Court.

**COURTS-MARTIAL JURISDICTION CHALLENGES IN THE COURTS**

In the 1955 term, the Supreme Court considered its first major case construing an article of the U.C.M.J. In *Toth v. Quarrles*, the Supreme Court was confronted with the court-martial of a former Air Force enlisted man who had been honorably discharged prior to the institution of court-martial proceedings. After he was discharged and working in Pittsburgh as a steel worker, military authorities seized Toth and forcibly took him to Korea. He was then charged with a murder and a conspiracy to commit murder that had taken place during the time when he was previously on active duty and stationed in Korea. His sister filed a petition for a writ of habeas corpus seeking his return to the United States and release from military custody. In 1989 Congress amended the U.C.M.J. to create two additional seats on the Court of Military Appeals to bring total active membership to five. Defense Authorization Act, Pub. L. No. 101-189 § 1301(c) (1989). There were apparently several factors which favored this change. Among them was a recent history of instability in the membership on the Court due to retirements, illness, or resignations. H.R. CON. REP. No. 101-331, 657, reprinted in 1989 U.S. CODE CONG. & ADMIN. NEWS 838, 1114.

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52. This was not the first time that the law provided that individuals who were not members of the armed forces would be subject to court-martial jurisdiction. Article 63 of the Articles of War provided that "[a]ll retainers to the camp, and all persons serving with the armies of the United States in the field, though not enlisted soldiers, are to be subject to orders, according to the rules and discipline of war." Rev. Stat. of the United States, § 1342 (1878 2d ed.).


54. The U.C.M.J. was not the Congress' first extension of court-martial jurisdiction over legally discharged veterans. The Articles of War had a similar provision in the 19th century. See generally WINTERFORD, supra note 29, at 92.

55. The writ was initially issued by the District Court. Toth v. Talbott, 114 F. Supp. 468 (D.D.C. 1953). However, the Circuit Court reversed. Toth v. Talbott, 215 F.2d 22 (D.C. Cir. 1954).
The government argued that it had jurisdiction to seize and court-martial Toth pursuant to article 3(a) of the U.C.M.J. which provided that court-martial jurisdiction could be exercised over:

any person charged with having committed, while in a status in which he was subject to this code, an offense against this code, punishable by confinement of five years or more and for which the person cannot be tried in the courts of the United States or any state or territory thereof or of the District of Columbia.\footnote{56}  

The Supreme Court rejected this argument and ruled that such an extension of court-martial jurisdiction was unconstitutional.\footnote{57} In the Court's opinion, neither Congress nor the President could constitutionally exercise their war powers to try by court-martial a civilian residing in the United States in peacetime.\footnote{58} The Court concluded that this exercise of military power "encroached on the jurisdiction of federal courts set up under article III of the Constitution where persons on trial are surrounded with more constitutional safeguards than in military tribunals."\footnote{59}  

Further, the Court emphasized the functional and constitutional differences between judicial courts and military tribunals. Among these differences were the independence of the judiciary, the right to trial by jury, and the right to grand jury indictment before a criminal prosecution. The Court went on to state, in frequently quoted language, that it found:

[N]othing in the history or constitutional treatment of military tribunals which entitles them to rank along with article III courts as adjudicators of guilt or innocence . . . unlike courts, it is the primary business of armies and navies to fight or be ready to fight wars should the occasion arise. But the trial of soldiers to maintain discipline is merely incidental to an army's primary fighting function. To the extent that those responsible for performance of this primary function are diverted from it by the necessity of trying cases the basic fighting purpose of armies is not served. And conceding to military personnel that high degree of honesty and sense of justice which nearly all of them undoubtedly have, it still remains true that military tribunals have not been and probably never can be constituted in such a way that they can have the same kind of qualifications that the Constitution has deemed the essential to the fair trial of civilians in federal courts.\footnote{60}  

The language of Toth set the stage for all of the Court's future handling of court-martial jurisdiction, up to Solorio.\footnote{66}  

Also in the 1955 term, the Supreme Court, in two cases, first examined the authority of Congress to authorize the trial by court-martial of civilian dependents of members of the armed forces. In Kinsella v. Krue-
The wife of a U.S. Army colonel was tried by general court-martial for the murder of her husband in Japan, and in *Reid v. Covert*, the wife of an Air Force sergeant was tried by general court-martial for his murder while he was stationed in England. Both of these cases were tried as capital offenses. The Army and the Air Force asserted court-martial jurisdiction over the women under article 2(11) of the U.C.M.J. which provided that those subject to court-martial jurisdiction included “all persons serving with, employed by, or accompanying the armed forces without the continental limits of the United States and without [certain United States] territories . . .”

Writing for a five member majority, Justice Clark reasoned that Congress has the authority to provide for the criminal trials of American citizens in foreign countries through a system of territorial or consular courts established under article I of the Constitution. Therefore, the Court had no need to examine Congress’ war powers in these cases. Three dissenting members of the Court made known their disagreement with the majority but, noting the press of business during the closing days of the Court’s term, promised to file written dissents during the next term. Justice Frankfurter recognized the “[g]rave issues affecting the status of American civilians throughout the world” which were raised in these cases and also reserved a full expression of his views until the following term.

On November 5, 1956 the Court ordered a rehearing in both *Covert* and *Krueger* and on rehearing the Court overruled both earlier decisions. The Court observed that the cases dealt with basic constitutional

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63. In neither case was the defendant actually sentenced to death. Mrs. Covert was sentenced to confinement at hard labor for life, 351 U.S. at 488, as was Mrs. Smith. *Id.* at 472. However, Mrs. Covert’s conviction was overturned by the Court of Military Appeals on non-jurisdictional grounds, 6 C.M.A. 46 (1955), and she was awaiting retrial in Washington, D.C. at the time of the Supreme Court’s action. The petition for a writ of habeas corpus was filed on Mrs. Smith’s behalf by her father, Walter Krueger. *Krueger*, 351 U.S. at 472.
64. 50 U.S.C. § 552(11) (1952) (emphasis added).
65. Having determined that one in the circumstances of Mrs. Smith [or Mrs. Covert] may be tried before a legislative court established by Congress, we have no need to examine the power of Congress “To make Rules for the Government and Regulation of the land and naval Forces” under article I of the Constitution. If it is reasonable and consonant with due process for Congress to employ the existing system of courts-martial for this purpose, the enactment must be sustained. *Krueger*, 351 U.S. at 476 (citation omitted).
66. *Id.* at 485 (Warren, C.J., and Black and Douglas, JJ., dissenting).
67. *Id.* at 483.
68. Reid v. Covert, 352 U.S. 901 (1956). During the 1956 term the Court underwent significant personnel changes. Justice William Brennan joined the Court in 1956, replacing Justice Sherman Minton, who retired that same year. Justice Charles Whittaker joined the court in 1957, replacing Justice Stanley Reed. However, Justice Brennan did not participate in the decision to rehear *Covert* and *Krueger*. *Id.* at 902. Justice Whittaker did not participate in the decision. Reid v. Covert, 354 U.S. 1, 41 (1957).
issues which called into question the role the military should play in our
democratic system.\textsuperscript{70} By permitting the military to extend its jurisdiction
to civilians accompanying members of the armed forces overseas, Congress would encroach on the jurisdiction of the civilian courts established under article III of the Constitution.\textsuperscript{71} Such interference with article III courts would undermine the Constitution’s safeguards in the criminal process and render those safeguards ineffective.\textsuperscript{72}

Explaining the Constitution’s role as a barrier to government arbitrariness, the Court asserted that its protection does not stop at the nation’s borders. Thus, even in establishing legislative courts, Congress does not have the power to deprive citizens of the rights the Constitution provides in a criminal prosecution. Since the acts committed by Mrs. Covert and Mrs. Smith were crimes as contemplated in the sixth amendment to the Constitution, they were both entitled to the protection and procedural safeguards provided by the Constitution. These protections include the right to a grand jury indictment, the right to a trial by jury, and the right to be tried before a judge who was a member of an independent judiciary. Finally, Congress’ authority to make rules for the government and regulation of the armed forces under the Constitution, given its plain meaning, indicates that the term “land and naval forces” includes only members of the armed forces, not wives, dependents, and other civilians accompanying service members. Therefore, the Court ruled, any attempt by military courts to try civilians in this manner is inconsistent with the Constitution.

In 1960 the Supreme Court again confronted the constitutionality of the jurisdictional provisions of the U.C.M.J. In \textit{Kinsella v. Singleton},\textsuperscript{73} the mother of a woman who had been convicted by a court-martial of killing her child while living with her husband, an American soldier stationed in post-war Germany, sought her release from a federal prison. This case differed from \textit{Krueger} and \textit{Covert}, the government argued, in that it concerned the jurisdiction of courts-martial over a civilian dependent who had been charged with the non-capital offense of manslaughter in peacetime.\textsuperscript{74}

The Solicitor General argued that \textit{Krueger} and \textit{Covert} dealt only with capital offenses and that a military commander needed to control the lives of civilian dependents living on his base in order to more effectively control his troops.\textsuperscript{75} The government also argued that historical prece-

\textsuperscript{70.} \textit{Id.} at 3.
\textsuperscript{71.} \textit{Id.}
\textsuperscript{72.} \textit{Id.}
\textsuperscript{73.} 361 U.S. 234 (1960).
\textsuperscript{74.} \textit{Singleton} was a companion case with three others which involved the jurisdiction of courts-martial over civilian employees of the military who accompany the military outside of the United States for both capital, Grisham v. Hagan, 361 U.S. 278 (1960) (capital murder) and non-capital offenses, McElroy v. Guagliardo, 361 U.S. 281 (1960) (conspiracy and larceny from the military by a civilian accountant); Wilson v. Bohlender, 361 U.S. 287 (1960) (sodomy committed by a civilian employee with members of the military).
\textsuperscript{75.} [The government] submits that such necessities are controlling in the case of civilian dependents charged with noncapital crimes. It points out that such dependents affect the military community as a whole; that they have, in fact, been permitted to enjoy their residence in such communities on the represen-
dent supported its position that the trial by court-martial of civilian dependents was not unconstitutional. In denying the government's jurisdictional claim in non-capital cases, the Court rejected the historical analysis proffered by the government and questioned the actual impact on the discipline of the troops of depriving a military commander court-martial jurisdiction over civilian dependents. The Court further noted that the historical data relied on by the government dealt with a military during the Revolutionary War or during the wars with the Native American nations during the expansion of the United States' western frontier and not with an army which was operating essentially in a time of peace.

The Court did not consider the issue of the jurisdiction of courts-

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76. Its legal theory is based on historical materials which it asserts indicate a well-established practice of court-martial jurisdiction over civilians accompanying the armed forces, during Colonial days as well as the formative period of our Constitution. From this it concludes that civilian dependents may be included as a necessary and proper incident to the congressional power “To make Rules for the Government and Regulation of the land and naval Forces,” as granted in Clause 14. **Singleton, 361 U.S. at 238.**

77. Furthermore, we are not convinced that a critical impact upon discipline will result, as claimed by the Government (even if anyone deemed this a relevant consideration), if noncapital offenses are given the same treatment as capital ones by virtue of the second Covert case. The same necessities claimed here were found present in the second Covert case (see the dissent there) and were rejected by the Court. Even if the necessity for court-martial jurisdiction be relevant in cases involving deprivation of the constitutional rights of civilian dependents, which we seriously question, we doubt that the existence of the small number of noncapital cases now admitted by the Government in its brief here, when spread over the world-wide coverage of military installations, would of itself bring on such a crisis. **Id. at 239.**

78. Furthermore, those trials during the Revolutionary Period, on which it is claimed that court-martial jurisdiction rests, were all during a period of war, and hence are inapplicable here.” **Guagliardo, 361 U.S. at 284.**

79. To be sure, the 1872 opinion of the Attorney General, dealing with civilians serving with troops in the building of defensive earthworks to protect against threatened Indian uprisings, is entitled to some weight. However, like the other examples of frontier activities based on the legal concept of the troops' being “in the field,” they are inapposite here. They were in time of “hostilities” with Indian tribes or were in “territories” governed by entirely different considerations.” **Id. at 285–86.**
martial again until its 1968-1969 term. In June 1969 the Supreme Court ruled that in order for a court-martial to have jurisdiction to try a current active member of the armed forces for an offense, the offense charged must have some connection to the military service. In *O'Callahan v. Parker*, an army sergeant stationed in the Territory of Hawaii visited the city of Honolulu while on an evening pass from Fort Shafter, Oahu. After drinking in the bar of a hotel, Sergeant O'Callahan broke into a room occupied by a young girl and assaulted and attempted to rape her. While fleeing from this crime, he was apprehended by a hotel security guard and turned over to Honolulu city police officers. When the civilian police learned that he was an active-duty soldier, he was delivered to military authorities. O'Callahan was charged with attempted rape, housebreaking, and assault with intent to rape in violation of articles 80, 130, and 134 of the U.C.M.J. He was tried by a general court-martial, convicted and sentenced to ten years' confinement at hard labor, forfeiture of all military pay and allowances, and a dishonorable discharge from the army. While imprisoned pursuant to this conviction, O'Callahan filed a petition for a writ of habeas corpus, which was denied by the district court and the circuit court. The Supreme Court granted certiorari to determine whether the court-martial had jurisdiction to try O'Callahan for the offenses.

Writing for a five member majority, Justice Douglas first acknowledged "that the exigencies of military discipline require the existence of a special system of military courts in which not all of the specific procedural protection deemed essential in Art. III trials need apply." Justice Douglas then determined that at stake in the case were a soldier's civil rights to a trial by jury in a civilian court as guaranteed by the sixth amendment and article III of the Constitution. He reiterated, with emphasis, an observation from *Toth v. Quarles* that Congress' power to authorize a trial by court-martial should be limited to "the least possible power adequate to the end proposed . . . [because] courts-martial as an institution are singularly inept in dealing with the nice subtleties of constitutional law."

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83. U.S. *ex rel* *O'Callahan v. Parker*, 390 F.2d 360 (3rd Cir. 1968).
84. The Supreme Court granted certiorari on the following question:

Does a court-martial, held under the Articles of War, Tit. 10, U.S.C. § 801 et seq., 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 grand jury and trial by a petit jury in a civilian court?"

86. *Id.* at 262.
88. This last observation by Justice Douglas was nearly totally insensitive to the great strides that the military discipline system had taken since enactment of the Uniform Code of Military Justice. It was seen as a personal attack on those who labored to make the military system work with what is known as "military due process." *Id.*
The Court then noted that, at the time of his crimes, O’Callahan was properly absent from Fort Shafter, there was no connection between his crimes and his military duties, his victim was not performing any service related to the armed forces, and the crimes were committed in a time of peace. Moreover, the then Territory of Hawaii was not under military governance, and therefore its civilian courts were open and capable of trying the case against O’Callahan. The Court found that, under these circumstances, O’Callahan could not have been tried by court-martial for these crimes.89

Soon after its decision in O’Callahan, the Court took the opportunity to further explain the basis of court-martial jurisdiction in Relford v. Commandant, U.S. Disciplinary Barracks.90 Relford was a serviceman stationed in New Jersey in 1961. He had been convicted of the abduction and rapes of two relatives of other servicemen. While serving his sentence in Fort Leavenworth, Relford sought relief from the article III courts in the form of a writ of habeas corpus. His petition was dismissed by the district court as well as the circuit court.91 The Supreme Court granted certiorari on the issue of the retroactivity of O’Callahan. In ultimately rejecting Relford’s petition for habeas corpus, the Court gave form to twelve criteria previously touched upon by the O’Callahan Court for determining whether a member of the armed forces has committed a crime that is service-connected. They are: (1) the member’s absence from the base; (2) the commission of the crime away from the base; (3) the commission of the crime at a place not under military control; (4) the commission of the crime within the territorial limits of the United States; (5) the commission of the crime in a time of peace and its lack of relation to the war powers; (6) the absence of any connection between the crime and the member’s military duties; (7) the absence of any relation between the victim and the performance of military duties; (8) the availability of civilian courts to try the crime; (9) the absence of the flouting of military authority; (10) the absence of any threat to a military reservation; (11) the absence of any damage to military property;

at 265. In response, many supporters of the military system criticized the O’Callahan decision, not because of its ultimate holding, but because of the venom in Justice Douglas’ language.

I have served as Chief Judge of [the Court of Military Appeals] since its creation by Congress as the Supreme Court for the military justice system. I have seen instances of arbitrary power that could not be reconciled with our concepts of impartial justice. Some of the abuses in individual cases were corrected; others were not, but all of the instances of abuse were alien to the system, just as instances of injustice resulting from arbitrary and venal judges and lawyers in the civilian community are alien to the principles of justice in civilian law.


89. O’Callahan, 395 U.S. at 273. In addition to criticizing the reasoning of Justice Douglas’ opinion, the Court’s dissenters and many commentators predicted that there would be a great deal of confusion and litigation concerning the issue of “service-connection” (“The Court does not explain the scope of the ‘service-connected’ crimes as to which court-martial jurisdiction is appropriate, but it appears that jurisdiction may extend to ‘nonmilitary’ offenses in appropriate circumstances.”). Id. at 283 (Harlan, J., dissenting).

90. 401 U.S. 355 (1971).

and (12) the crime being among those traditionally prosecuted in civilian courts. The facts showed that Relford was not absent from the base when the crime was committed, that one of the victims was performing a duty relating to the military, and that the security of two women on a military post was threatened. Thus, here, the military tribunal properly exercised jurisdiction.

O'Callahan and Relford marked a new era in the trial of courts-martial. Although earlier courts-martial had been primarily, but not exclusively concerned with military-related offenses, after O'Callahan and Relford, courts-martial were specifically restricted to "service-connected" cases. Much confusion developed in the military appellate courts surrounding the issue of service connection. However, there soon developed a jurisprudence which gave some predictability to the outcome of contested service connection issues. By 1987 it was clear that any offense occurring on a military reservation was per se service-connected and most offenses that had any effect on the military were considered service-connected.

SOLORIO AND ITS IMPACT

In 1987 the Supreme Court confronted the issue of court-martial jurisdiction once again. In Solorio v. United States the Court considered the case of a Coast Guardsman who had been charged with sexually molesting the daughters of several other members of the Coast Guard. While he was stationed on Governor's Island New York, it was learned that Solorio had assaulted the daughter of a fellow Coast Guardsman while both were stationed at the Thirteenth Coast Guard District Headquarters in Juneau, Alaska. Further investigation revealed that Solorio had committed similar offenses while at Governor's Island. The Alaskan offenses actually took place in the civilian community, although the victims were the children of active-duty military personnel. At his military trial Solorio challenged the jurisdiction of the court-martial over the Alaskan offenses, claiming that they were not service-connected under the principles established in O'Callahan and Relford. The military judge dismissed the Alaskan offenses, and the Government appealed his ruling. The Coast Guard Court of Military Review and the Court

93. Id. at 366.
94. Military commanders, who exercise prosecutorial discretion in the system of military discipline, are primarily concerned with the execution of their assigned duties. Therefore, if left to their natural inclinations, they would probably devote most of their prosecutorial resources to offenses which have a direct impact on the ability of their command to perform. However, principles of Constitutional protection should not be left to the good will and clear understanding of those not primarily charged with their oversight.
95. Relford, 401 U.S. at 369.
99. Id. at 512, 512-13.
100. Id. at 512.
of Military Appeals both held that the Alaskan offenses were service-connected. Solorio successfully petitioned for review by the Supreme Court to determine, *inter alia*, whether a court-martial may "find that [an] offense committed by [a] service member off-base at [a] place where there is no military post or enclave is service-connected simply because of [the] victim's civilian dependent status."\(^{102}\)

In affirming the military Appellate Courts, the Supreme Court held that, not only were the Alaskan offenses within the jurisdiction of a court-martial, but any conduct committed by any active-duty member of the armed forces, in any location, can constitutionally be made the subject of court-martial jurisdiction.\(^{103}\) The only test for court-martial jurisdiction, the Court held, was the status of the accused. Chief Justice Rehnquist, a longtime critic of the *O'Callahan* and *Relford* decisions, authored the Court's opinion in *Solorio*. His reasoning was based on his disagreement with the *O'Callahan* Court's analysis of the historical precedents of American courts-martial and his interpretation of the plain language of the Constitution.\(^{104}\) In a concurring opinion, Justice Stevens termed the overruling of *O'Callahan* and *Relford* both "unnecessary" and "unwise."\(^{105}\) He noted that, in his opinion, Solorio's Alaskan offenses were service-connected and, considering that the government had not requested that *O'Callahan* necessarily be reconsidered "[t]he fact that any five Members of the Court have the power to reconsider settled precedents at random, does not make that practice legitimate."\(^{106}\) However, four justices agreed with Justice Rehnquist and the door was closed to jurisdictional defenses based on *O'Callahan* and *Relford*.\(^{107}\)

**CURRENT PRACTICE UNDER THE U.C.M.J.**

At first glance, most of the public, as well as members of the bar who are not familiar with the system of discipline in the military, would probably think that courts-martial concern themselves primarily with

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103. This case presents the question whether the jurisdiction of a court-martial convened pursuant to the Uniform Code of Military Justice (UCMJ) to try a member of the Armed Forces depends on the "service connection" of the offense charged. We hold that it does not, and overrule our earlier decision in *O'Callahan* v. Parker.
104. "[T]he history of court-martial jurisdiction in England and in this country during the 17th and 18th centuries is far too ambiguous to justify the restriction of Clause 14 which O'Callahan imported to it." *Id.* at 445 (citation omitted).
105. *Id.* at 451 (Stevens, J., concurring).
106. *Id.* at 452.
107. On March 29, 1988 Representative Patricia Schroeder introduced the Court-Martial Jurisdiction Act of 1988. The proposed legislation would have limited court-martial jurisdiction to those acts which: (1) occur in time of war, (2) take place on military property, (3) take place outside of the United States and are not otherwise triable by the courts of the United States, and (4) petty offenses or the offense is service-connected, including all drug offenses. H.R. 4282, 100th Cong., 2d Sess., 134 CONG. Rsc. H1298 (1988). The bill was referred to the Committee on Armed Services, where it died in the face of strong opposition from the Department of Defense. Letter from Pat Schroeder to Keith M. Harrison (Nov. 28, 1990).
soldiers who have gone AWOL or disobeyed the orders of someone superior in rank. Because of the portrayal of military life in popular culture, the public may believe that those miscreants suffer such punishments as "losing their stripes," spending a weekend peeling potatoes, or, in extreme cases, getting "kicked out" of the military. While it is true that the military discipline system does indeed punish those who have committed the minor offenses just noted, the cases discussed in the previous section make clear, courts-martial are also empowered to try the cases of those who stand accused of serious crimes such as conspiracy, espionage, homicide, rape, arson, or any non-capital offense enumerated in the Federal Criminal Code. Far exceeding the notion that a convicted soldier would merely spend a weekend peeling potatoes, courts-martial are empowered to impose punishments which can include long periods of confinement at hard labor, monetary fines, forfeiture of future earnings, punitive discharge from the military, and, in some cases, the death penalty. Even when one is expelled from the military as a result of receiving a punitive discharge from a court-martial, the effects on one's future employment opportunities are significant.

The U.C.M.J. provides a military commander with four possible fora in which to punish an offending soldier. The least severe punishment, is non-judicial punishment pursuant to article 15 of the U.C.M.J.

108. AWOL, or absence without leave, is one of several "absence" offenses punishable under articles 85, 86, and 87 of the Uniform Code of Military Justice. 10 U.S.C. §§ 885, 886, and 887 (1988).


110. I use the term "minor" only to reflect how many outside of the military may characterize these offenses. However, I do not wish to be placed in the position of questioning the need of one in the military chain-of-command to expect loyalty from those who are subordinate in rank, or to expect that they will be at their assigned place of duty.


117. MANUAL FOR COURTS-MARTIAL, UNITED STATES 1984 [hereinafter M.C.M.], Rule for Courts-Martial 1003(b)(8).

118. Id., Rule for Courts-Martial 1003(b)(3).

119. Id., Rule for Courts-Martial 1003(b)(2) and (5).

120. Id., Rule for Courts-Martial 1003(b)(10).

121. Id., Rule for Courts-Martial 1003(b)(11).

122. The discharge that a soldier receives can impact future ability to obtain employment and entitlement benefits based on veteran status, as well as create a social stigma for the veteran. See, e.g., Charles Sandel, Other-Than-Honorable Military Administrative Discharges: Time for Confrontation, 21 SAN DIEGO L. REV. 839 (1984).


124. 10 U.S.C. § 815 (1988). In the Army and the Air Force this punishment is referred to simply as an article 15. In the Navy and Coast Guard the procedure is known
This is by far the most commonly used form of punishment under the U.C.M.J.\textsuperscript{125} Military commanders are encouraged to use this form of punishment to correct relatively minor infractions of discipline.\textsuperscript{126} When using this form of punishment, the commander is authorized to exact fines, restrict liberty, imprison, or reduce the rank of the offending soldier.\textsuperscript{127} In most instances, an individual punished pursuant to article 15 has the right to refuse to submit to such punishment, in which case the commander must decide whether to drop the matter or to refer it to a superior forum. However, individuals who are assigned to a vessel do not have the right to refuse punishment under article 15.\textsuperscript{128}

The forum immediately superior to the non-judicial punishment forum is the summary court-martial.\textsuperscript{129} The summary court-martial consists of a single commissioned officer who is simultaneously the finder of law and fact, the presenter of the government's case, and the legal assistant to the accused. The summary court-martial only has jurisdiction to try the cases of enlisted members of the armed forces who have been accused of non-capital offenses. A summary court-martial may impose a punishment of confinement at hard labor for one month, hard labor without confinement for forty-five days, restriction to specified geographic limits for two months, or forfeiture of two-thirds of one month's military pay.\textsuperscript{130} Although they are the most frequently used non-administrative tools of military discipline, and although convictions before them can result in a loss of liberty, neither non-judicial punishment under article 15 nor summary court-martial are considered "criminal proceedings." This is because the accused does not have the inviolate right to counsel and the accused has the right, except when assigned to a vessel, to refuse trial by these procedures.\textsuperscript{131}

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\textsuperscript{125} As Captain's Mast. In the Marine Corps the procedure is known as Office Hours. David A. Schlueter, Military Criminal Justice: Practice and Procedure, 78 (2d ed. 1987).

\textsuperscript{126} In Fiscal Year 1988 the Army imposed punishment pursuant to article 15 in 91,915 cases for a rate of 118.5 cases per 1000 of its active-duty population. Annual Report on Military Justice, 28 M.J. CXVII, CLXIII. The Navy and Marine Corps imposed punishment pursuant to article 15 in 59,457 cases for a rate of 74.0 cases per 1000 of their active-duty population. \textit{id.} at CLXXVII. The Air Force imposed punishment pursuant to article 15 in 17,658 cases for a rate of 30.4 cases per 1000 of its active-duty population. \textit{id.} at CLXXXVIII. The Coast Guard imposed punishment pursuant to article 15 in 1763 cases for a rate of 47.4 cases per 1000 of its active-duty population. \textit{id.} at CXCVII. Overall, in Fiscal Year 1988, the Armed Forces imposed punishment pursuant to article 15 on 8\% of its active-duty population.

\textsuperscript{127} M.C.M., supra note 117, at Part V 1(e).

\textsuperscript{128} 10 U.S.C. § 815(b) (1988).


\textsuperscript{130} M.C.M., supra note 117, Rule for Courts-Martial 1301(d)(1).

\textsuperscript{131} Middendorf v. Henry, 425 U.S. 25, 34 (1976). However, this right can be something of a "Hobson's choice" to a young inexperienced soldier who may not fully comprehend such things as his or her presumption of innocence, the prosecution's
The two tools of military discipline provided by the U.C.M.J. that are considered criminal proceedings by the Supreme Court are the special court-martial and the general court-martial. The special court-martial must usually consist of a military judge and at least three court members. A military judge, unlike the judge of an article III court, is not appointed with the advice and consent of the Senate for tenure during good behavior. A military judge of a special court-martial can be any commissioned officer of the armed forces who is also a member of the bar and certified for service as a military judge of the Judge Advocate General of her service. Since the special court-martial, as all courts-martial, is an ad hoc tribunal, the military judge does not have a permanent assignment to the bench. In addition, as is the case with all commissioned officers in the military, a military judge in the armed forces is subject to dismissal by the President. Further, a military judge who is performing duties as the judge of a general court-martial may only do so when such assignment is her primary duty.

132. 10 U.S.C. §§ 819 and 818 (1988). In Fiscal Year 1988 the Army imposed punishment using special courts-martial in 11027 cases and using general courts-martial in 1560 cases. Annual Report on Military Justice, 28 M.J. CXVII, CLXII. The Navy and Marine Corps imposed punishment using special courts-martial in 5614 cases and using general courts-martial in 832 cases. Id. at CLXXVI. The Air Force imposed punishment using special courts-martial in 756 cases and using general courts-martial in 847 cases. Id. at CLXXXVII. The Coast Guard imposed punishment using special courts-martial in 24 cases and using general courts-martial in 12 cases. Id. at CXCVI.

133. In cases in which the special court-martial does not adjudge a bad-conduct discharge, a military judge need not be assigned to the trial. However, even where a military judge is not assigned to the trial, a special court-martial may adjudge a bad-conduct discharge as part of its punishment if a military judge could not be assigned because of physical conditions or military exigencies. 10 U.S.C. § 819 (1988).

134. In the original Uniform Code of Military Justice the individual who occupied this position was referred to as the "law officer." 50 U.S.C. § 551(12) (1948) (Supp. IV 1951). In 1968 the U.C.M.J. underwent significant changes. See Military Justice Act of 1968, Pub. L. No. 90-632 (1968). Among these changes was the re-titling of the law officer to military judge.


136. A court-martial is brought into existence by a proper convening order which directs the military judge to hear any case(s) brought before her at a given command. It ceases to exist when the matters brought before it pursuant to that convening order are disposed of. Winthrop, supra note 29, at 49.

137. "It is well-established law that military officers serve at the pleasure of the President and have no constitutional right to be promoted or retained . . . ." Pauls v. Secretary of the Air Force, 457 F.2d 294, 297 (1st Cir. 1972).

138. 10 U.S.C. § 826(c) (1988). See also United States v. Beckermann, 27 M.J. 334 (C.M.A. 1989). This is only one of several safeguards designed to ensure the independence of military lawyers and judges operating under the Uniform Code of Military Justice. In theory adverse personnel actions are not to be taken against lawyers and judges who are acting in accord with their roles under the Code. See, e.g., 10 U.S.C. § 826(c) ("neither the convening authority nor any member of his staff shall prepare or review any report concerning the effectiveness, fitness, or efficiency of
The members of the court-martial are frequently described as the equivalent of jurors in a civilian criminal prosecution.\(^{139}\) However, while members of a court-martial are the finders of fact\(^ {140}\) in the proceedings, they are not intended to be peers of the accused nor are they intended to represent a cross-section of the community. In fact, court-members are selected by the convening authority based on his determination of their fitness to serve when considering such factors as their military rank and service history.\(^ {141}\) The military judge\(^ {142}\) and individual members of a court-martial are subject to challenge at trial for cause.\(^ {143}\) To a limited extent, court-martial members are subject to peremptory challenge.\(^ {144}\)

Upon reaching a guilty verdict, a special court-martial may impose a bad conduct discharge, confinement at hard labor for six months, hard labor without confinement for three months, and forfeiture of two-thirds pay per month for six months. However, a bad-conduct discharge may not be imposed if either a military judge was not assigned to preside at the court-martial or the defendant was not represented by an attorney qualified to practice under the U.C.M.J.\(^ {145}\) Therefore, it is possible for a soldier to be convicted at a court-martial and subsequently be jailed for up to six months without the benefit of counsel or a judge presiding over his trial.

Prior to referring a charge to a general court-martial, a commanding officer is required to direct an investigation into the validity of the...
charge. The officer investigating the charge need not be trained in the law. However, the commanding officer must obtain advice from his primary legal advisor as to the sufficiency of the evidence. If the legal advisor does not believe that there is sufficient credible evidence to refer the charge to a general court-martial, the commanding officer is bound by that determination. The accused, or anyone suspected of involvement in the investigated crime, has the right to be present at the investigation, with counsel, and the right to ask questions of the witnesses appearing before the investigating officer. The accused also has the right to call his own witnesses to testify before the investigating officer. This procedure has been compared to the civilian grand jury process. However, since a federal civilian criminal trial can only proceed if the grand jury hands up a true bill or indictment, the differences between a general court-martial and a federal civilian criminal trial seem more obvious than do the similarities. A general court-martial may impose any punishment authorized under the U.C.M.J., including the penalty of death.

At a special court-martial, both the verdict and the sentence are arrived at by a two-thirds majority vote of the court-martial members who are present at the time the vote is taken. At a general court-martial, the verdict and sentence are also arrived at by two-thirds majority vote except when the sentence exceeds ten years confinement at hard labor or the death penalty. In those cases, the decision must be arrived at by a three-fourths majority vote. In the case of the death penalty, the decision must be unanimous. Except in the case of capital offenses, an accused may waive his right to trial by court-martial members and request a trial before a military judge alone. In such a case the military judge would also bear the responsibility of sentencing the accused. Additionally, an accused may plead guilty, waive trial on the merits, and request sentencing either by court members or by the military judge alone. Also, as in civilian practice, plea bargaining plays a substantial role in the military discipline system.

One major difference between the military discipline system and civilian criminal justice system is the placement of prosecutorial discretion in the system. In civilian practice typically, the chief elected, or politically appointed, prosecuting attorney in any jurisdiction has dis-
cretion as to whether to proceed to trial in any given case. The exercise of such a decision can be judged by the electorate in a later election. Typically, such a person is legally trained and has some amount of legal experience prior to assuming his position. However, in the military system, as must be the case to maintain the strict discipline required in a martial community, the decision to punish a subordinate is entirely in the hands of a commanding officer.\footnote{162} Acting within the framework of the U.C.M.J., a commanding officer will determine whether charges are referred to a court-martial. In fact, the verdict and sentence of a court-martial are purely advisory opinions to be considered by the commanding officer who convened the court-martial. Even though the commanding officer does not have the authority to increase the severity of the sentence, nor may she change a finding of not guilty to a finding of guilty, she is free to reduce a sentence and to reverse a finding of guilty.\footnote{163}

In addition to the tools available to the Commander in Chief and his military subordinates under the U.C.M.J. to govern and regulate troops, there are a multitude of administrative devices available to accomplish many of the same ends. These include administrative discharges, denial of re-enlistment privileges, and career advancement delays.\footnote{164} Soldiers may have no recourse to the courts when they feel they have been denied fair treatment in administrative decisions. In Chappell v. Wallace,\footnote{165} several sailors serving on board a U.S. Navy ship brought actions against their military superiors seeking damages, declaratory judgment, and injunctive relief. They alleged that their constitutional rights had been violated because of their race, in that their superiors had "failed to assign them desirable duties, threatened them, gave them low performance evaluations, and imposed penalties of unusual severity."\footnote{166} The Supreme Court relied on the special factors present in the relationship that exists between a member of the armed forces and his military superiors and held that article III courts do not have the authority to remedy such wrongs. It noted that "the habit of immediate compliance with military procedures and orders must be virtually reflex with no time for debate or reflection."\footnote{167} Therefore, the civilian courts must not interfere with that special relationship, because it is "at the heart of the necessarily unique structure of the Military Establishment."\footnote{168} The Court indicated that the Framers of the Constitution, anticipating such claims, explicitly granted Congress plenary power "to make rules for the Government and regulation of the land and naval forces."\footnote{169} Based on this grant of authority, the Court reasoned that Congress has plenary "con-
control over rights, duties, and responsibilities in the framework of the Military Establishment, including regulations, procedures, and remedies related to military discipline . . . “170 The Court further concluded that the judicial system is incompetent to deal with such sensitive matters and that military personnel may avail themselves of the procedures and remedies created by Congress in Art. 138 of the U.C.M.J.171 In addition, the Board for Correction of Naval Records provides that the aggrieved military member “may correct any military record . . . when [the Secretary of the Navy acting through the Board] considers it necessary to correct an error or remove an injustice.”172 The Board’s decision is also subject to judicial review to determine whether the decision is arbitrary, capricious, or was not based on substantial evidence. The Court was concerned about the disruption in the relationship between the military personnel and their superiors if they were allowed to sue their superiors in court.

THE THREAT TO INDIVIDUAL RIGHTS UNDER THE CURRENT MILITARY JUSTICE SYSTEM

In addition to the denial of the full array of constitutional protections in the criminal process, soldiers are also subject to judicially sanctioned physical and psychological abuse and neglect at the hands of their military superiors without recourse to the civilian courts. This is based primarily on a decision interpreting the Federal Torts Claim Act.173 In Feres v. United States,174 the Supreme Court held that Congress had not intended to allow soldiers to sue the government, or their military superiors, for the admittedly negligent conduct of their commanding officers.175 This decision has been extended to cover the knowing administration of hallucinogenic drugs to soldiers during government experimentation.176 Likewise soldiers who are ordered to expose themselves to hazardous levels of radiation are without judicial recourse.177 This line of cases was reinforced during the same term that the Solorio decision was rendered.178 More recently, a district court relied on these cases when it ruled that it was without authority to prevent the military from administering untested drugs to soldiers during Operation Desert Storm.179

170. Chappell, 462 U.S. at 301.
171. A soldier “who believes himself wronged by his commanding officer, and who, upon due application to that commanding officer, is refused redress, may complain to any superior commissioned officer . . . The officer exercising general court-martial jurisdiction shall examine into the complaint and take proper measures for redressing the wrong complained of . . . “ 10 U.S.C. § 938 (1988).
175. Id. at 146.
177. Gaspard v. United States, 713 F.2d 1097 (5th Cir. 1983).
179. “[U]sing unapproved drugs to protect troops facing possible exposure to chemical and biological weapons is not research on involuntary human subjects within the meaning of . . . the Department of Defense Authorization Act of 1985. . . . [U]sing
As a result of the Supreme Court's action in this area, we are now faced with a system which has the potential to involuntarily induct young men into the military where, upon entrance, they would be deprived of their constitutional rights as criminal defendants and their civil rights as citizens. The Court has given Congress and the executive branch carte blanche to set qualifications based on gender, sexual orientation, or religious beliefs in determining who among our citizens shall be allowed or forced to enter the armed forces. In our history, of course, white military commanders and politicians have also determined that African-Americans were unfit for military service.

The inequities of our past methods of drafting citizens are numerous. During the Civil War a person who was called up in the draft could pay a bounty and be relieved of military service. During the war in Indochina, Americans who were fortunate enough to be accepted by a college, and who could afford to pay the required tuition or, who professed a desire for religious training, could avoid the draft. On the other hand, young men who were not from affluent families, who could not get a position in their state national guard, and who chose not to leave the country because of a sense of patriotism, were drafted. In the

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80. There is no active military draft at this time. However, the Military Selective Service Act provides the mechanism for reinstating the draft on short notice. 50 App. U.S.C. § 460(h) (1988).


82. The military services can refuse to enlist an applicant who has declared a sexual orientation that is homosexual, without any evidence of homosexual conduct by the applicant. Ben-Shalom v. Marsh, 881 F.2d 454 (7th Cir. 1989), cert. denied, Ben-Shalom v. Stone, 110 S.Ct. 1296 (1990). But cf. Watkins v. United States Army, 875 F.2d 699 (9th Cir. 1989), cert. denied, United States Army v. Watkins, 111 S.Ct. 384 (1990), (the Army is estopped from denying reenlistment to an individual who, although admitting his homosexuality during 20 years of military service, was repeatedly permitted to reenlist.)


84. In the original militias of colonial America every available man—white or black, freedman or slave—was to help defend the domestic order against Indian uprisings, European transgressors, and other threats to peace. However, colonial leaders soon realized that domestic order was constantly threatened by the possibility of slave revolts. Persuaded by the fear that free black militiamen might support such insurrections and a related apprehension about training slaves in the use of arms, the American colonies developed a policy of excluding blacks from military service.

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86. Unquestionably, certain elements of society made greater sacrifices than others during the war. A Harvard graduating class sent two of its members to Vietnam out of some 1,500 draft age males, while a working-class part of Boston with a total population of 35,000 of all ages and both sexes, lost twenty-five of its sons killed in action. Deferments were available to those able to enroll in colleges or professional schools, join the National Guard or reserve,
early years of the conflict in Indochina prior to public outcry, the casualty rates were highest among soldiers who were from impoverished backgrounds or whose skins were darker than their comrades.

Even though we now have an "all volunteer" army, it is clear from the advertising campaigns conducted by the Department of Defense that the military is targeting a certain socio-economic level by focusing their attention on the financial and economic benefits of serving in the armed forces. This campaign has escalated while other methods of financing a higher education are quickly vanishing. In fact, in order to be eligible to gain many educational benefits, young men must prove that they have registered with the Selective Service System.¹⁸⁷ The concern that our military forces are disproportionately populated by minorities and the less affluent in our society was again brought to the forefront of public debate during the deployment of U.S. armed forces to the Persian Gulf in August, 1990, when the father of a marine facing deployment wrote a letter to the President and observed that:

[n]one of the young men [ordered to the middle east with my son] . . . are likely to be invited to serve on the board of directors of a savings and loan association, as your son Neil [Bush] was. And none of them have parents well enough connected to call or write a general to insure that their child stays out of harm's way, as Vice President Quayle's parents did for him during the Vietnam War.¹⁸⁸

It is true that the U.C.M.J. has many more procedural protections than the original American Articles of War. However, in light of the history of this nation's military system over the past 215 years, one must seriously question whether America has progressed any further than

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¹⁸⁷. "An individual . . . who . . . is or was required to register under section 3 of the Military Selective Service Act; and . . . is not so registered . . . shall be ineligible for appointment to a position in an Executive agency." 5 U.S.C. § 3328 (1988) (citation omitted). "The Secretary [of Labor] shall insure that each individual participating in any program . . . or receiving any assistance or benefit . . . [from the Department of Labor] has not violated section 3 of the Military Selective Service Act by not presenting and submitting to registration as required by such section." 29 U.S.C. § 1504 (1988) (citation omitted). "A student applicant must certify on the application [for an educational loan] that if required under section 3 of the Military Selective Service Act to present himself for and submit to registration under such section, he has presented himself and submitted to registration under such section." 42 C.F.R. § 60.7 (1990).

King Gustavus Adolphus when he instituted military codes to control the rabble among his armies and to reinforce the privileges of the high ranking officers who, in civil life, were the nobility of his time.

The impact of the \textit{Solorio} decision is readily apparent when one considers Justice Marshall’s reasonable extension of the decision to other areas of government action.\textsuperscript{189} Imagine that two people are engaged in the manufacture of military supplies as partners. One partner is a full time employee of the Internal Revenue Service and the other is serving on active duty in the armed forces. Further suppose that they knowingly sell defective equipment to the military and fail to accurately report their income on their tax returns. After the Court’s decision in \textit{Solorio}, the soldier-partner could be tried by court-martial for both defrauding the military and income tax evasion. On the other hand, it is inconceivable that Congress has the power under the sixteenth amendment\textsuperscript{190} to set up a criminal court system, outside of article III courts, to hear the cases of Internal Revenue Service employees accused of violating the criminal law. Nor does Congress have the power to institute special criminal courts, without petit juries, for the trial of letter carriers, patent attorneys, or interstate truck drivers. Yet the Court in \textit{Solorio} bases its ruling on the same plenary power granted Congress to establish a postal system, protect intellectual property, and regulate interstate commerce as to make rules for discipline of the armed forces.\textsuperscript{191} The difficulty in applying the plain language of the Constitution seems to be the Court’s interpretation of that same language in different settings. For example, Justice Scalia once observed that “[h]ad the power to make rules for the military not been spelled out, it would in any event have been provided by the Necessary and Proper Clause, as is, for example, the power to make rules for the government and regulation of the Postal Service.”\textsuperscript{192} However, it is hard to see any member of the Court upholding a criminal prosecution of a letter carrier or postal clerk in a special Postal Service Court.

\begin{footnotes}
\item[189.] Unless Congress acts to avoid the consequences of this case, every member of our Armed Forces, whose active duty members number in the millions, can now be subjected to court-martial jurisdiction—without grand jury indictment or trial by jury—for any offense, from tax fraud to passing a bad check, regardless of its lack of relation to “military discipline, morale and fitness.”


\item[190.] “The Congress shall have power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several States, and without regard to any census or enumeration.” U.S. Const. amend. XVI.

\item[191.] The constitutional grant of power to Congress to regulate the Armed Forces, Art. I, § 8, cl. 14, appears in the same section as do the provisions granting Congress authority, inter alia, to regulate commerce among the several States, to coin money, and to declare war. On its face there is no indication that the grant of power in Clause 14 was any less plenary than the grants of other authority to Congress in the same section. Whatever doubts there might be about the extent of Congress’ power under Clause 14 to make rules for the “Government and Regulation of the land and naval Forces,” that power surely embraces the authority to regulate the conduct of persons who are actually members of the armed services.

\textit{Solorio}, 483 U.S. at 441.

\item[192.] United States v. Stanley, 483 U.S. 669, 682 n.5 (citation omitted).
\end{footnotes}
It would also seem fundamentally unfair to give the government a method of avoiding the mandate of the Bill of Rights by choosing which forum it will use to prosecute a criminal case, article III courts or courts-martial. However, in recent years the government has chosen, on at least one occasion, to prosecute an active-duty member of the military, who was charged with espionage against the United States arising out of his duties in the military, in federal district court.\(^{193}\) In another case, it has chosen to prosecute a retired member of the military, who was charged with espionage activities against the United States arising out of his duties as a civilian government employee, in a court-martial.\(^{194}\) These disparities exist despite the existence of an agreement between the Department of Justice and the Department of Defense which supposedly restricts such abuses of discretion.\(^{195}\)

The deliberative processes involved in the adjudication of criminal guilt or innocence often appear to be burdensome luxuries to those who rule or control non-democratic institutions. Indeed, even in our own civilian society the ideals which form the very bedrock of our system of individual protections are often referred to with derision as “legal technicalities.” These technicalities, however, are among the principles that every member of the armed forces has sworn to uphold, protect, and defend, possibly with her life. While the U.C.M.J. certainly provides more procedural safeguards than the Articles of War, the Court’s ruling on court-martial jurisdiction in *Solorio* is not premised on the continued vitality of the Code.

Although the Supreme Court has held that Congress’ authority is plenary in regulating immigration,\(^{196}\) once illegal aliens arrive in this country, they are accorded greater rights than military personnel.\(^{197}\) The Court has recognized that “once an alien gains admission to our country and begins to develop the ties that go with permanent residence his constitutional status changes accordingly.”\(^{198}\) For even a non-citizen, who has illegally gained entry into this country, can properly claim the protection of the Bill of Rights in any criminal prosecution.\(^{199}\) This would


\(^{195}\) M.C.M., *supra* note 117, at App. III.

\(^{196}\) “The power of the government to exclude foreigners from the country whenever, in its judgment, the public interests require such exclusion, has been asserted in repeated instances, and never denied by the executive or legislative departments.” *Chae Chan Ping v. United States*, 130 U.S. 581, 606 (1889).


\(^{198}\) The fourth amendment’s “applicability is not limited to domestic vessels or to our citizens; once we subject foreign vessels or aliens to criminal prosecution, they are entitled to the equal protection of all our laws, including the Fourth Amendment.”
seem to undermine any attempt by Congress to reward non-citizens for service in the United States military by accelerating their path to citizenship.\textsuperscript{200}

**THE CURRENT SCOPE OF COURT-MARTIAL JURISDICTION POSES DANGERS TO OUR FORM OF GOVERNMENT**

The Supreme Court's ruling in *Solorio* also undermines this nation's form of government in three significant ways: it diminishes the control of the states over local criminal matters; it diminishes recognition of federal laws and treaties as superior to military orders; and it upsets the balance of power between the executive branch and the other branches of government.

In *Solorio* the Supreme Court expressed a concern that civilian courts would interfere with military operations if they were allowed to carry out their traditional roles.\textsuperscript{201} The Court's argument seems to be that if state authorities are allowed to detain, try, and punish soldiers who commit local crimes then the military will have lost the services of those soldiers until the end of the state's investigation, trial, or punishment. This reasoning is faulty on two counts. First, the military may choose to discipline the soldiers with a vigor equivalent to that which would be exercised by the state authorities. However, the soldiers still would be of no service to the military since they would be undergoing punishment pursuant to court-martial sentence.\textsuperscript{202} On the other hand, if the military is allowed to prevent the state from punishing soldiers who break local laws, and it chooses to punish them in a less vigorous manner, then the states will have the same complaint with federal authorities that the revolutionary colonies had with George III. The colonists justified their break with Great Britain partly due to military abuses and a denial of the opportunity to punish the King's troops for criminal misdeeds in the colonies.\textsuperscript{203}

\textsuperscript{200} United States v. Cadena, 585 F.2d 1252, 1262 (5th Cir. 1978). \textit{But see} United States v. Verdugo-Urquidez, 110 S.Ct. 1056 (1990) (the Court states that the fourth amendment is not implicated when law enforcement agents of the United States search the foreign residence of a foreign national in a manner which would violate the fourth amendment if undertaken in the United States). For insight on the approach that the courts have taken to non-citizens and Constitutional protection, see T. Alexander Aleinikoff, *Citizens, Aliens, Membership and the Constitution*, 7 CONSTITUTIONAL COMMENTARY 9 (1990).


\textsuperscript{202} An argument could be made that by punishing the soldiers by means of a court-martial, the military is achieving general deterrence among the rest of the troops. However, the same general deterrence is achieved by letting it be known that the military will not shield its personnel from the enforcement of state law.

\textsuperscript{203} The Declaration of Independence asks the world to note that the King:

\begin{quote}
has made Judges dependent on his Will alone, for the tenure of their offices, and the amount and payment of their salaries . . . . He has kept among us, in times of peace, Standing Armies without the Consent of our legislatures. He has affected to render the Military independent of and superior to the Civil
\end{quote}
Finally, the Framers of the Constitution sought to prevent the full power over the military from being vested in a single branch of government. For this reason the states are authorized to maintain the militia and the federal control of the military is divided between the President and Congress. Under our current system of military discipline, convictions of a court-martial are considered federal criminal convictions. If the military is to have jurisdiction to try all crimes committed by members of the armed forces, then the President’s control of the military can surpass that of Congress. For example, consider the events of the Iran-Contra Affair, which came to public knowledge just months before the Solorio decision.\textsuperscript{204} It is apparent that the President’s advisors, many of whom were also active-duty and retired military officers, could have conspired to violate a law enacted by Congress and avoided liability to the civilian government by having jeopardy attach in court-martial proceedings. There is evidence that the military community was more sympathetic to the position of the individuals involved in that matter. The Judge Advocate General of the Navy advised the Secretary of the Navy that a retired naval officer convicted of destroying public records should not suffer the statutory loss of his office and retired pay, which is automatic on such a conviction, because “the type of office held by a retired naval officer is not the same as that contemplated by” the statute.\textsuperscript{205} However, General Counsel of the General Accounting Office, on behalf of the Comptroller General, disagreed. He stated that “[i]n the final analysis . . . it is impossible to avoid the conclusion that there is serious doubt that a retired regular officer . . . continues to be entitled to retired pay” after such a conviction.\textsuperscript{206}

CONCLUSION

The first casualty in the name of national defense should not be this country’s identity as a nation. The Supreme Court has told those who guard its doors that they may not seek protection within. Even though these people, who are mostly young and disproportionately poor and people of color, are our fellow citizens, the government is permitted to abuse them in a manner which would be unacceptable in any other context. They are required to live under a system which severely abridges the same Constitutional rights that they defend with their lives.

There appears to be no sound military necessity which requires soldiers to give up their right to be tried in civilian criminal courts for crimes which do not affect the armed forces. If the subject matter jurisdiction of courts-martial is to remain as unlimited as the status test

\textsuperscript{204} See, e.g., What Did They Know and When?, U.S. NEWS & WORLD REPORT, Dec. 8, 1986, at 16.
\textsuperscript{205} Memorandum from Rear Admiral E.D. Stumbaugh to the Secretary of the Navy (June 30, 1989).
\textsuperscript{206} Letter from James F. Hinchman, General Counsel U.S. General Accounting Office, to Lawrence L. Lamade, General Counsel, Department of the Navy (July 31, 1989).
given by the Court in Solorio, the Congress, and the people of this nation, should be wary of needlessly depriving justice to the guardians of freedom by their failure to act.

The Congress should also deny the Commander in Chief the ability to have his military subordinates avoid the authority of civil law through the preemptive use of courts-martial. We may not be able to imagine our current civilian and military leaders taking advantage of this system. However, this is a weakness available for exploitation.

To avoid the possibility of an unjust and non-democratic system, the Supreme Court should reconsider its holding in Solorio at the earliest opportunity. In the meantime, Congress should enact legislation limiting the subject matter jurisdiction of courts-martial to matters which directly affect the military.