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When Soldiers Are Defendants

In whose court do they belong?  
The *Solorio* decision changes the rules

While celebrating at a local bar located outside Fort Blank, Sergeant Smith is involved in a fight that leaves two civilians badly beaten. Smith is arrested and taken to the local civilian jail. He retains a local civilian attorney who calls the district attorney with the question, "Who is going to prosecute my client?" A year ago the answer would probably have been: "the local DA." Now, the answer is not so simple. In *Solorio v. United States*, 107 S.Ct 2924 (1987), the U.S. Supreme Court expanded court-martial subject matter jurisdiction and made prosecution by military authorities a viable alternative for otherwise "civilian" offenses.

On its face, the *Solorio* decision is of little, if any, interest to civilian practitioners in criminal justice. The ramifications of this major shift in jurisdiction, however, will no doubt be felt not only by military prosecutors, but also civilian prosecutors, defense counsel, and investigative agencies. Although it is early to assess the full impact of this decision, a number of local prosecutors and defense counsel have already begun to realize its practical implications.

**Limits on military jurisdiction**

In *O'Callahan v. Parker*, 395 U.S. 258 (1969), the Supreme Court ruled that the military's jurisdiction was limited to those offenses which were "service-connected." In *O'Callahan*, the accused had been tried by court-martial for various offenses arising out of his attempted rape of a young civilian girl in a Honolulu hotel while on leave. Writing for a majority of five members, Justice Douglas noted an historical distrust for military jurisdiction and that it should therefore be limited to the least extent necessary, i.e., those offenses which are service connected. The underlying constitutional rationale for this limitation was that military criminal trials did not provide the traditional Fifth Amendment right to indictment by grand jury and the Sixth Amendment right to a trial by jury. The charged offenses, said the Court, were of the type typically prosecuted in civilian courts and the civilian courts were open and

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BY DAVID A. SCHLUETER
testing and indicated that service connection over the [court-martial] jurisdiction issue.” 395 U.S. at 284. His observation was prophetic.

Faced with some of these permutations, the Supreme Court again addressed the issue of military subject matter jurisdiction in Relford v. Commandant, 401 U.S. 355 (1971), and still later in Schlesinger v. Councilman, 420 U.S. 738 (1975). In Relford, the Court listed 21 factors that should be considered in determining whether a particular offense was “service connected” and therefore within the subject matter jurisdiction of the military courts. But, four years later in Schlesinger, the Court seemed to abandon the 21-factor test and indicated that service connection was largely gauged by balancing military and civilian interests in the prosecution of the offense.

These decisions did little to settle the often hotly contested issue of subject matter jurisdiction. In the intervening years the military courts themselves shifted positions from a liberal reading of the service connection requirement, to a strict reading, and most recently back to a broader perspective. These shifts were most apparent in drug related cases, where the Court of Military Appeals finally held that virtually every drug offense committed by servicemembers, whether committed on or off a military installation, would fall within the subject matter jurisdiction of military courts. United States v. Trottier, 9 M.J. 337 (C.M.A. 1980).

Although no recent hard data has been collected, it has been generally assumed that many minor offenses committed by servicemembers in the civilian community were never prosecuted. In some instances, civilian prosecutors simply were unable, or unwilling, due to budget or time constraints, to actively pursue prosecution of military offenders. On the other hand, if the military decided to prosecute, under military case law the military prosecutor was required to allege and prove the service connection requirement in every offense. Frequently, either the trial or appellate courts would conclude that no subject matter jurisdiction existed. Needless to say, many viewed the service connection requirement as a troublesome barrier, based largely on a distrust of a justice system that had since matured and generally paralleled federal criminal practice.

**Service connection no longer required**

The service connection requirement was finally abandoned and O'Callahan overruled in Solisio v. United States, 107 S.Ct. 2924 (1987). While assigned to a Coast Guard unit in Juneau, Alaska, the accused committed numerous acts of sexual abuse against two minor daughters of other Coast Guard members. The crimes were not discovered, however, until after he had been transferred to Governors Island, New York, where he committed additional acts of sexual abuse on other daughters of Coast Guardsmen. On a defense motion to dismiss for lack of jurisdiction, the military judge concluded that the Alaska offenses were not service connected, but the New York offenses were since they had been committed in government quarters. On a government appeal of that ruling, the Coast Guard Court of Military Review held that there was sufficient service connection over the Alaska offenses. 21 M.J. 512 (C.G.C.M.R. 1985). The United States Court of Military Appeals affirmed, noting that “sex offenses against young children... have a continuing effect on the victims and their families and ultimately on the morale of any military unit or organization to which the family member is assigned.” 21 M.J. 251, 256 (C.M.A. 1986). The court also considered the benefits to both the accused and the government from trying the Alaska and New York offenses at the same trial, the adverse impact of returning some of the victims to Alaska to testify at any civilian trial, and the civilian prosecutor’s interest in trying the accused.

On certiorari review, the Supreme Court affirmed. Writing for five members of the Court, Chief Justice Rehnquist stated that jurisdiction of a court-martial depends solely on the defendant’s status as a member of the armed forces, not service connection. In overruling O'Callahan, the Court noted that the case had departed from the longstanding precedent that status of the accused as a servicemember was the key, and that the historical reasoning in O'Callahan for limiting jurisdiction was based upon a less-than-accurate reading of history. Instead, said the Court, there was overwhelming support of Justice Harlan’s dissent in O'Callahan that the plain language in Article 1, §8, cl 14 gave Congress plenary power to determine the extent of military jurisdiction. Comparing that power to Congress’ broad commerce clause powers, the Court noted that in military affairs it has deferred to Congress in a variety of contexts where the individual constitutional rights of servicemembers were implicated. See, e.g. Goldman v. Weinberger, 475 U.S. ___ (1986) (military restriction on servicemember’s free exercise of religion); Rosker v. Goldberg, 453 U.S. 57 (1981) (restriction on assignments for female servicemembers).

In dissent, Justice Marshall disagreed with the majority’s historical analysis and noted that it had completely ignored the underlying rationale of O'Callahan—that court-martial deny servicemembers the rights to indictment by grand jury and a jury trial. Justice Marshall recognized that application of the Relford factors was difficult, time-consuming and required narrow lines, but that it was necessary because “[t]he trial of any person before a court-martial encompasses a deliberate decision to withhold procedural protections guaranteed by the Constitution.” 107 S.Ct at 2941. In applying the Relford factors to this case, Justice Marshall concluded that there was no service connec-
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consider a variety of substantive, procedural and evidentiary factors which may make it more feasible or advantageous to prosecute in a military proceeding. It is certainly beyond the scope of this article to compare civilian and military criminal trials in depth. But the point can be made by briefly discussing several key procedural and evidentiary rules.

Substantive considerations

In assessing the feasibility of a military prosecution it is important to note that almost all of the common law offenses are proscribed under the punitive articles of the Uniform Code of Military Justice, Articles 77 to 134; 10 U.S.C. §§ 877 to 934, and apply without regard to where the offense was committed. Thus, in the opening scenario, Sergeant Smith could be prosecuted in a military court for the typical assault offenses or for a variety of other offenses related to disorderly conduct and public intoxication as a violation of Article 134—the General Article. If there is no specific punitive article proscribing the offense, Article 134 permits the military to prosecute a servicemember for noncapital federal crimes and offenses. That same provision would permit prosecution for a state offense under the Assimilative Crimes Act, 18 U.S.C. §13, if the charged offense occurred at a location within the exclusive or concurrent jurisdiction of the United States and if there were no federal statute preempting application of the state provision. Williams v. United States, 327 U.S. 711 (1946). Article 134 could also serve as a basis of prosecuting a state crime which either is to the prejudice of good order and discipline of the armed services or is conduct which brings discredit upon the armed forces. Again, this assumes that no punitive article in the U.C.M.J. already proscribes the same conduct. See e.g., United States v. Irvin, 21 M.J. 184 (C.M.A. 1986) (discussion of applicability of various provisions of Article 134 to state statute covering child abuse). In short, in many instances a military prosecution may provide the prosecutor with a broader range of choices from the military, federal, or...
state penal codes.

It is also important to consider the differences in both the sentence limitations and probable sentence in the military and civilian courts. While it would be incorrect to assume that a sentence imposed by a court-martial would always be heavier than that imposed in a civilian court, certain conduct in the military is likely to result in a heavier sentence. For example, drug offenses almost always result in at least nonjudicial punishment, and in some military commands, any drug use or possession, including marijuana, results in criminal charges. See generally United States v. Trottier, 9 M.J. 337 (C.M.A. 1980) (discussion of the serious threat posed by drug use in the military). For the sake of comparison, wrongful use of marijuana (less than 30 grams) could result in a maximum punishment of a dishonorable discharge and confinement for two years. If more than 30 grams of marijuana is involved, the maximum permissible confinement is increased to five years.

Procedural considerations


To the extent that timeliness is a consideration in deciding who should prosecute a servicemember, it should be noted that the military criminal justice system generally processes cases in a short period of time because the requirements of military readiness and operations can ill afford long and drawn-out proceedings. The requirement of expeditious handling of military charges is exemplified in speedy trial rules.

Like the federal system and most jurisdictions, military prosecutors are bound by several speedy trial rules which may be triggered not only by Sixth Amendment rules, see Barker v. Wingo, 407 U.S. 514 (1972), but also by statutory and executive directives. For example, under the 1984 Manual for Courts-Martial, servicemembers must be tried with 120 days of the date that charges are preferred. More stringent rules apply if the servicemember has been placed in pretrial confinement.

A second important procedural consideration involves discovery and production of witnesses. The military has very broad discovery rules that provide for not only liberal discovery by the defense, but also reciprocal discovery by the defense and notice by the defense of the insanity and alibi defenses. The 1984 Manual for Courts-Martial also contains a reverse Jencks Act disclosure requirement. The Jencks Act requires disclosure of pretrial statements made by a prosecution witness after that witness has testified. 18 U.S.C. 3500. The military rule on the other hand requires disclosure of previous statements made by both prosecution and defense witnesses. R.C.M. 914. This obviously presents an additional avenue of prosecution discovery not otherwise found in many jurisdictions.

Many military prosecutions result in some type of negotiated plea agreement which is later subjected to close scrutiny at the time the defendant enters his plea of guilty before the military judge. The military courts have recognized the value of negotiated pleas, and in recent years, have permitted the defendant greater leeway in striking a plea bargain with the government. For example, a common provision in a military pretrial agreement is the defendant’s waiver of various suppression motions. For the defendant’s part, the most common benefit bargained for is a reduced sentence. And, where a victim has suffered monetary losses, a plea agreement might include the defendant’s promise to make restitution.

It is important to emphasize that not all offenses, whether committed in the civilian or military community, necessarily result in a trial. Minor offenses, for example, are most often dealt with through nonjudicial punishment imposed by the servicemember’s commander. See Article 15, U.C.M.J., 10 U.S.C. 815. However, unless the servicemember is assigned to a vessel, he has the right to refuse such punishment and demand a trial by court-martial. Because of that right to demand trial, in the past many commanders refrained from offering nonjudicial punishment for minor offenses committed in the civilian community unless there was some service connection which would, if necessary, support a trial if one was demanded. Now that the service connection requirement has been abrogated, it seems likely that more minor offenses committed within the civilian community will result in nonjudicial punishment.

Repeated acts of misconduct may warrant one of several types of administrative discharge from the armed services. Indeed, one ground for an administrative discharge is that the servicemember has been convicted in a civilian court of a felony offense.

Finally, although principles of double jeopardy will bar trials for the same offense in both a federal court and a military court, because they are of the same sovereign, Abbate v. United States, 359 U.S. 187 (1959), in theory a servicemember may be prosecuted for the same offense in both a state and military court. However, the armed services generally discourage such double punishment and a successful prosecution of a servicemember in state proceedings will normally preclude further military prosecution. See, e.g., Army Reg. 27-10, Chapter 4. But failure to follow those regulations will probably not be considered jurisdictional error. United States v. Stallard, 14 M.J. 933 (A.C.M.R. 1982).
Evidence rules

In addition to examining military criminal procedural rules, civilian prosecutors should weigh military evidentiary rules which may make it more likely that the court will consider certain evidence. Again, only selected evidentiary rules are discussed here to make the point that sometimes a difference in the military rules may be important to consider in determining who will try a servicemember.

Like many of the procedural rules of courts-martial, the military evidentiary rules closely parallel the military Rules of Evidence. Since 1980, the admissibility of evidence in military criminal trials has been governed by the Military Rules of Evidence. Many of those rules are verbatim renditions of the federal counterpart with two major exceptions. First, instead of setting out rules regarding presumptions in what is Article III of the Federal Rules, the military counterpart includes detailed rules governing the admissibility of evidence resulting from search and seizures, statements by the accused, and eyewitness identification. Second, the Military Rules of Evidence, unlike the federal version, delineate detailed rules governing evidentiary privileges. Despite the similarity with the federal rules, there are key differences which may be important factors in deciding who should prosecute a servicemember. For example, Military Rule of Evidence 803(6) specifically treats laboratory reports and other law enforcement instruments as exceptions to the hearsay rule. United States v. Holmes, 23 M.J. 565 (A.C.M.R. 1986) (laboratory report). And Military Rule of Evidence 803(8) also permits introduction of similar instruments. The federal rules contain no such specific exceptions and federal case law generally blocks the admissibility of those documents. See generally, United States v. Oates, 560 F.2d 45 (2d Cir. 1977).

Like the federal evidentiary rules, the Military Rules of Evidence also contain a residual hearsay exception in Rules 803(24) and 804(5). Those provisions have been used in child abuse cases where the child victim has made statements implicating the servicemember-parent. In United States v. Rousseau, 21 M.J. 960 (A.C.M.R. 1986), the court noted that "military society has a compelling interest in protecting the welfare of a soldier’s family. For that reason, the residual exceptions are particularly well suited to [the hearsay problems arising in intrafamily offenses]."

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The Supreme Court’s decision in Solorio v. United States is significant for several reasons. First, by abandoning the O’Callahan service connection requirement for determining subject matter jurisdiction, the Court has signaled a growing deference for Congress’ decisions on what offenses may be prosecuted in the military criminal justice system. It also presents new options for both civilian and military prosecutors. In effect, the decision creates concurrent jurisdiction between military and civilian prosecutors over servicemen who have committed offenses in the civilian community.

For the civilian prosecutor this means that in deciding whether to proceed with criminal charges against a servicemember a number of procedural and evidentiary factors should be considered. In any given case, one or more of these factors may make military prosecution under Solorio a viable alternative.

If a servicemember ends up being tried in a military court, defense counsel may find him or herself working within the military criminal justice system. Thus, for both prosecutors and defense counsel, the Supreme Court’s decision in Solorio is bound to affect civilian criminal justice in many jurisdictions—especially those in proximity to military installations.

Multiple Defendants

(Continued from page 9)

may be willing to stipulate to such matters to enable a particular defendant to receive a less severe sentence in return for a guilty plea. Even more important, codefendants’ sentences vary dramatically under the guidelines depending on whether they are characterized as an “organizer,” a “supervisor,” a “minimal participant” or a “minor participant” in the criminal activity. This itself creates a likely conflict of interest for counsel representing codefendants, who must make a case for a particular client’s lesser culpability, thereby exposing another client to the obvious conclusion that he was the “organizer” or “supervisor.”

In addition to the many factual determinations that differentiate codefendants under the sentencing guidelines, judges are given discretion to depart from the guidelines when they find “aggravating or mitigating circumstances of a kind, or to a degree, that was not adequately taken into consideration by the Sentencing Commission in formulating the guidelines.” 18 U.S.C. § 3553 (b). Thus defense counsel may often find it appropriate to argue that a particular client’s case is sufficiently unusual to justify a departure. An attorney making such an argument must not be constrained in saying that the defendant in question is worthy of different treatment from similarly situated defendants. For more information on the impact of the federal sentencing guidelines, see the article, “Better Do Your Homework,” by Donald A. Purdy, Jr. and Michael Goldsmith on page 2.