1988

When Soldiers Are Defendants

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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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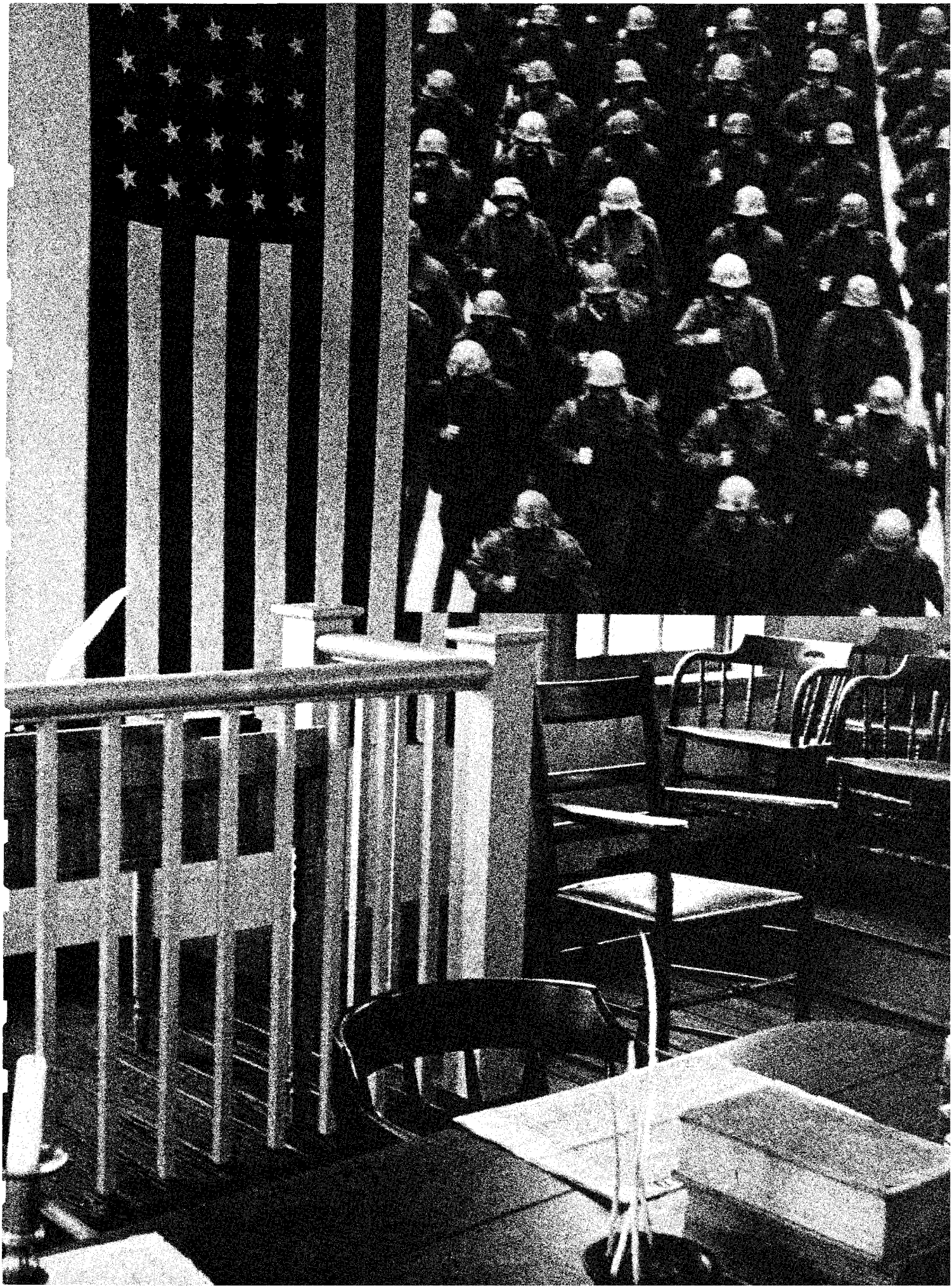

operating. In dissent, Justice Harlan predicted that "infinite permutations of possibly relevant factors are bound to create confusion and proliferate litigation over the [court-martial] jurisdiction issue." 395 U.S. at 284. His observation was prophetic.

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.

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Service connection no longer required

The service connection requirement was finally abandoned and *O'Callahan* overruled in *Solorio 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 long-standing 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 courts-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-

tion over the off-base Alaska offenses. Finally, he noted that the majority's abandonment of the service connection requirement reflected "contempt, both for the members of our armed forces and for the constitutional safeguards intended to protect us all." 107 S.Ct at 2941.

Constitutional implications

In abandoning the service connection requirement, the Court has certainly simplified the process of determining whether a court-martial has jurisdiction over the offense. Now, virtually every "civilian" offense may be tried in a military court if the defendant has military "status." This assumes that Congress will not otherwise limit such jurisdiction by indicating that certain offenses are not triable in courts-martial. To date, the legislative trend has been to *add* to the list of those offenses which are cognizable in military courts. For example, in 1986, the court added the offense of espionage to the Uniform Code of Military Justice. Article 106a, U.C.M.J., 10 U.S.C. 906a. Even absent specific legislative changes, Article 134 of the U.C.M.J. (the general article) is usually available as a source for prosecution of "civilian" offenses which have not otherwise been written into the U.C.M.J. *Parker v. Levy*, 417 U.S. 733 (1974).

It is important to note that in *Solorio* the Supreme Court did not address the constitutionality of any particular aspect of the court-martial process. Although it might be argued that the Court implicity blessed this worldwide system of criminal justice, it is probably safer to conclude that the Court only decided the narrower question of whether the service connection requirement was constitutionally required. That means that various aspects of the military criminal system are still subject to constitutional scrutiny. Given the Court's recent deferential review of congressional actions in this area, it seems doubtful that the Court would dismantle parts of the system—as long as Congress had any rational basis for determining that a particular procedural protection otherwise available in civilian trials was not feasible in military practice.

Finally, the full impact of *Solorio* may reach beyond subject matter jurisdiction questions. For example, its reaffirmation of Congress' virtually unlimited powers in determining what offenses are triable in military courts might be extended to its determinations of *who* is subject to military criminal prosecution. This would be particularly important in assessing the constitutionality of U.C.M.J. provisions which attempt to extend jurisdictions over civilian employees, discharged servicemembers and reservists. In the past those provisions were read narrowly by the Court because of the same constitutional rationale which undergirded the service connection rule—the lack of grand jury indictment and jury trial. *See, e.g., Toth v. Quarles*, 350 U.S. 11 (1955) (no jurisdiction over discharged servicemember for offenses committed while on active duty).

Ironically, just months before the court decided *Solorio*, Congress amended Articles 2 and 3 of the U.C.M.J. to permit the government to order a reservist to active duty for purpose of nonjudicial punishment, an Article 32 Investigation (a procedure similar in function to the grand jury), or a court-martial. Further, termination of a period of active duty or inactive duty for training (i.e., weekend drills) will not terminate jurisdiction over the reservist. In light of *Solorio*, these most recent legislative expansions of jurisdiction will probably withstand constitutional scrutiny. Although this statutory change is not as dramatic as the impact of *Solorio*, it nonetheless demonstrates a trend to expand court-martial jurisdiction. And that, in turn, will affect how civilian prosecutors and defense attorneys approach cases involving servicemembers who have committed offenses in the civilian community.

Solorio in practice

The *Solorio* decision expands the concurrent jurisdiction between both the military and the state and federal authorities which in many instances is already reflected in current formal or informal agreements. Those agreements should now be reviewed and assessed in light of *Solorio*. Rather than establishing standardized agreements on a nationwide basis, the armed services have generally permitted individual military installations or commands to negotiate such agreements with local prosecutors. One county prosecutor, for instance, in reponse to *Solorio* is now holding weekly meetings with a military prosecutor from a nearby major Army installation to determine responsibility for prosecuting servicemembers who have committed offenses in the civilian community.

When there is concurrent jurisdiction in both civilian and military courts, the issue of priority of prosecution is largely a question of comity. As one might imagine, the negotiations between state, federal, and military prosecutors about where a particular case should be tried may become a delicate matter. Military prosecutors may become concerned that even with the expansion of military jurisdiction, they will only inherit those cases which are considered by civilian prosecutors to be "losers" or otherwise insignificant. Civilian prosecutors, on the other hand, who are accountable to a civilian populace are generally not anxious to relinquish control over major cases which have the public's eye. Although the defendant cannot choose which forum will try him, defense counsel could theoretically affect the question of forum through attractive offers of plea bargaining in one forum or the other. Thus, in some instances an alert defense attorney can influence the question of where a particular servicemember will be prosecuted. This means of course that civilian counsel will have to acquire some working knowledge of military justice procedures or policies.

In deciding the issue of forum, it is especially incumbent upon civilian and military prosecutors to con-

(Continued on page 36)

defendants may provide information exposing the defendant to a higher guideline range sentence than was faced based on the information known to the government at the time the deal was struck. A defendant who inculpates himself, cooperates for a time, and then backs out or is unable to deliver the cooperation sought by the government, faces the greatest danger of significantly increased exposure. This situation is comparable to the defendant who has no one to cooperate against, but who participated in more substantial or additional criminal conduct beyond that known to the government at the agreement stage.

Under such circumstances, what is the incentive to a defendant to reveal additional facts? What protection does a defendant have against increasing the exposure faced, other than the normal protections against proffered information being used directly to incriminate? Could an agreement be structured so that the additional incriminating information is only revealed in the proffer context, unless it is needed to manifest cooperation? How can a plea agreement be structured that allows for subsequent inclusion of information relevant to guideline application that is not known at the time of the plea agreement, such as the applicability of specific offense characteristics or adjustments, the Criminal History calculation, or the applicability of the career offender or criminal livelihood provisions?

The nature and structure of plea agreements may have to be modified to retain incentives to plead guilty, to reveal all facts of criminal wrongdoing, and to cooperate without risking exposure to added penalties. Towards this end, agreements may have to be structured that accomplish the following: leave for subsequent resolution disputed or undetermined factors or information; establish a limitation on exposure given known facts or specified unknown ones (possibly through a cap or agreement on the offense level or guideline range); allow a specific sentence bargain; or agree to the applicability of certain enhancements or adjustments based on undisputed sentencing facts.

Obviously, the parties may want to attempt to have some or all of the presentence report completed before the plea agreement. Any incentives relevant to an agreement may often be more effectively structured. At the conclusion of the guideline application process, the judge can choose a point within the range, giving reasons for this choice only if the maximum exceeds the minimum by 24 months, or otherwise departs from the range. Throughout the calculation of the appropriate guideline range, relevant factors, which were not adequately considered during the calculations and are not explicitly excluded from consideration by the guidelines, may be evaluated by the judge.

Ultimately, the guidelines must be applied, and relevant issues litigated, in light of the sentencing goals expressed by the Comprehensive Crime Control Act of 1984: deterring crime, incapacitating the offender, providing just punishment, and rehabilitating the offender. Practitioners face a new system of guideline sentencing that purports to be more rational, structured and orderly than prior law. Survival under the system will require a thorough knowledge of the changed system before traditional litigation skills may be effectively used. **CJ**

Solorio

(*Continued from page 17*)

sider 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, *infra*, 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

A contemporary court-martial closely approximates procedures used in federal criminal trials. In 1984, the President of the United States promulgated an updated Manual for Courts-Martial which now sets out "Rules for Courts-Martial" (R.C.M.). The terminology may seem foreign, but those familiar with the system will attest to the fact that it is an efficient and well-run worldwide system of criminal justice. Cook, "Courts-Martial: The Third System in American Criminal Law," 1978 *S. Ill. U. L. J.* 1.

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 proferred. 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 prosecution 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 Federal 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 Stated 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 servicemembers 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.