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# OFFICIAL TRANSCRIPT PROCEEDINGS BEFORE

THE SUPREME COURT OF THE UNITED STATES

**DKT/CASE NO.** 85-1581

**TITLE** RICHARD SGLORIO, Petitioner V. UNITED STATES

**PLACE** Washington, D. C.

**DATE** February 24, 1987

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IN THE SUPREME COURT OF THE UNITED STATES

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RICHARD SOLORIO, :  
Petitioner, :  
v. : No. 85-1581  
UNITED STATES, :  
-----x

Washington, D.C.

Tuesday, February 24, 1987

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:13 a.m.

APPEARANCES:

RIBERT W. BRUCE, JR., ESQ., Lieutenant Commander, United States Coast Guard, Washington, D.C.; on behalf of the petitioner.

EUGENE R. FIDELL, ESQ., Washington, D.C.; American Civil Liberties Union as amicus curiae supporting petitioner.

CHARLES FRIED, ESQ., Solicitor General, Department of Justice, Washington, D.C.; on behalf of the respondent.

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P R O C E E D I N G S

CHIEF JUSTICE REHNQUIST: We will hear arguments first this morning in No. 85-1581, Solorio against the United States.

Mr. Bruce, you may proceed whenever you're ready.

ORAL ARGUMENT OF ROBERT W. BRUCE, JR., ESQ.,  
ON BEHALF OF THE PETITIONERS

MR. BRUCE: Mr. Chief Justice, and may it please the Court:

The question presented in this case is whether the offenses committed by the petitioner, off base and off duty in Juno, Alaska, are subject to court martial jurisdiction.

The Court of Military Appeals decision in this case should be reversed for two reasons, which I'd like to discuss.

First, the facts of this case do not establish a service connection.

Second, the Court of Military Appeals found that there was court martial jurisdiction in this case because it employed an erroneous and deficient service connection test.

This Court has recognized that the special needs of the military justify a unique military justice

1 system. But it has also recognized that court martial  
2 jurisdiction should be limited to the least possible  
3 power adequate to the end proposed.

4 In this Court's O'Callahan and Relford  
5 decisions it has limited court martial jurisdiction by  
6 requiring that a service connection be established  
7 before a service member can be tried for civilian type  
8 offenses committed off base.

9 This purpose of this service connection  
10 requirement is to balance the interests of the service  
11 member in the greater protections of a civilian trial  
12 against the military interest in trying the case at a  
13 court martial.

14 The criteria --

15 QUESTION: We're speaking only now of the  
16 alleged Alaska offense, are we not?

17 MR. BRUCE: That's correct, Justice Blackmun.

18 QUESTION: Not the New York ones.

19 MR. BRUCE: Not the New York offense.

20 QUESTION: Had the Alaska authorities  
21 indicated any interest in prosecution?

22 MR. BRUCE: The Alaska -- the Alaska  
23 authorities have given a tentative deferral of the  
24 prosecution to the Coast Guard.

25 But there were also indications of interest on

1 the part of Alaska in the record. In the record it  
2 indicated that Alaska was continuing to investigate  
3 allegations of charges against others daughters of  
4 civilians in the community there.

5 And there was also a message from the Coast  
6 Guard that indicated that the State of Alaska had  
7 previously, and fairly recently previously, prosecuted  
8 Coast Guardsmen for similar offenses.

9 QUESTION: But these particular victims and  
10 their fathers are no longer there?

11 MR. BRUCE: That's correct, Justice Blackmun.

12 The criteria that are relevant to the  
13 balancing test have been limited so that the infinite  
14 permutations of possibly relevant factors will not cause  
15 confusion about the proper limits of court martial  
16 jurisdiction.

17 And the outcome of the balancing tests depends  
18 on the facts in each case.

19 In this case there's no military interest that  
20 outweighs the petitioner's interest in the greater  
21 protections of a civilian trial.

22 Now the limits on court martial jurisdiction  
23 are not based solely on the facts, the fact that court  
24 martials do not give service members all of the  
25 protections they would receive in a civilian trial.

1           The military justice system was created to  
2 serve a fundamentally different purpose than the purpose  
3 of civilian courts. The military justice system is a  
4 tool for maintaining discipline in the military.

5           And another reason for limiting court martial  
6 jurisdiction is the historic disapproval of trying  
7 ordinary crimes at court martial.

8           QUESTION: Well, you say historic  
9 disapproval. I mean, O'Callahan, decided, what, '68,  
10 '69, was a departure from virtually a century of  
11 precedent. There was no disapproval prior to O'Callahan.

12           MR. BRUCE: Well, the O'Callahan decision  
13 basically goes through the history, especially at the  
14 time of the founding of this country, and also the  
15 history of our English ancestors, and basically states  
16 that there has been a disapproval of generally trying  
17 civilian type offenses by court martial.

18           QUESTION: Well, certainly not in this  
19 country. Look at all the cases that O'Callahan  
20 impliedly overruled from this Court.

21           MR. BRUCE: Well, that -- it did perhaps  
22 impliedly overturn these decisions. But it was part of  
23 a --

24           QUESTION: Well, then where do you get your  
25 historic disapproval from in this country?

1 MR. BRUCE: Well, even after the founding of  
2 this country, O'Callahan seems to indicate that there  
3 was a period of time when in this country most ordinary  
4 offenses were not tried by court martial.

5 And certain for a court martial -- to try to  
6 court martial a dependent or a military contractor for  
7 an ordinary type of crime would be disapproved.

8 QUESTION: Disapproved by whom and when?

9 MR. BRUCE: Well, it would be disapproved by  
10 this Court. This Court has decided --

11 QUESTION: Before O'Callahan?

12 MR. BRUCE: As I say, I believe that the  
13 founding fathers had a -- and the history of our  
14 ancestors in England indicate --

15 QUESTION: Well, do you think then the early  
16 cases from this Court didn't properly reflect this view  
17 of the founding fathers?

18 MR. BRUCE: I don't think the early decisions  
19 of this Court directly addressed this particular issue.

20 QUESTION: I think your statement, there's a  
21 historic disapproval in this country, simply isn't  
22 supported by those early cases.

23 I mean, O'Callahan was a sharp departure from  
24 the precedents of this Court, I think.

25 MR. BRUCE: Well, it was an extension, I



1 believe, of some cases that had started to limit  
2 jurisdiction over people like military contractors and  
3 dependents.

4 The Court of Military Appeals did not apply  
5 this Court's Relford service connection analysis in this  
6 case.

7 It totally ignored, or unjustifiable minimized  
8 petitioner's interest in the greater protections of a  
9 civilian trial.

10 But even so, if the Court of Military Appeals  
11 had applied the Relford criteria, it would have found  
12 that the service connection question here isn't even  
13 close.

14 The facts of this case simply do not show a  
15 significant impact from these offenses on the Coast  
16 Guard.

17 The petitioner in this case is an enlisted man  
18 in the Coast Guard. At a court martial convened at the  
19 Coast Guard base on Governor's Island, he was charged  
20 with 21 specifications alleging sexual molestation of  
21 four girls.

22 Fourteen of the specifications alleged  
23 offenses against two of the victims committed off base  
24 and off duty in Juno, Alaska.

25 These are the offenses that the trial judge

1 dismissed for lack of a service connection.

2 The seven remaining specifications alleged  
3 offenses against two different victims on base at  
4 Governor's Island. Jurisdiction over these offenses has  
5 never been contested.

6 All of the victims are the daughters of Coast  
7 Guardsmen. The government has tried to establish a  
8 service connection in this case by asserting every  
9 imaginable impact on the Coast Guard that could possibly  
10 result from the effect of these offenses on the victims  
11 and their fathers.

12 Factually, however, the government was unable  
13 to prove any significant or direct impact on the Coast  
14 Guard at trial.

15 As the trial judge properly found, any impact  
16 was remote or indirect, and any military interest in  
17 these offenses could be adequately vindicated in a  
18 civilian trial.

19 When make-weight arguments concerning  
20 nondispositive factors are stripped away from the Court  
21 of Military Appeals' decision, it's clear that it's  
22 based entirely on the dependent status of the victims.

23 The Court of Military Appeals did discuss two  
24 other factors that are unrelated to the dependent status  
25 of the victims, that is, the pendency of other court

1 martial charges, and the difficulties that the State of  
2 Alaska might face in prosecuting the petitioner.

3 These are simply make-weight arguments,  
4 however. They have nothing to do with the impact of  
5 these offenses on the Coast Guard.

6 And factors such as these are too easily  
7 manipulated and too far removed from the real interests  
8 that should be balanced to be helpful in setting clear  
9 limits on court martial jurisdiction.

10 Because of the dependent status of the  
11 victims, the Court of Military Appeals also discussed  
12 the nature of the offenses and the age of the victims.

13 It found that these offenses made the fathers  
14 less effective and unwilling to serve with the  
15 petitioner in the future.

16 From this it inferred that their units would  
17 suffer some loss of morale. This overstated and rather  
18 unlikely loss of morale is really the only direct --  
19 arguably direct impact on the Coast Guard that the Court  
20 of Military Appeals discussed.

21 Other impacts --

22 QUESTION: Mr. Bruce, could you give me  
23 another example, the one that you would consider the  
24 closest, where a threshold question of whether the Court  
25 has jurisdiction over the matter is to be determined

1 on the basis of, what do we have, 21 factors, and I  
2 assume that they're not exhausted?

3 Is there a comparable area of the law where  
4 we've gotten ourselves into that kind of a fix, that you  
5 don't even know what court is supposed to dispose of the  
6 matter until you engage in the kind of balancing test  
7 that you're talking about?

8 MR. BRUCE: Offhand, Justice Scalia, I can't  
9 think of one. But that doesn't mean that there aren't  
10 others.

11 Another problem with this inference that --  
12 based on the impact of these offenses on the victims and  
13 the fathers, is that these kind of inferences can be  
14 drawn from any serious offense against a dependent  
15 victim.

16 Therefore, holding that these kind of factors  
17 are significant is tantamount to holding that the  
18 dependent status of the victim by itself is sufficient  
19 to establish a service connection.

20 But basically, whether or not the Court of  
21 Military Appeals' decision is viewed as resting entirely  
22 on the dependent status of the victims, or other  
23 factors, it should be reversed because it relied on an  
24 erroneous service connection test that did not require  
25 proof of a military interest, or that that military

1 interest outweighed the petitioner's interest in a  
2 civilian trial.

3 The Court of Military Appeals' decision  
4 glossed over the fact that the trial judge applied all  
5 of the Relford criteria in this case, and didn't find a  
6 single one that supported service connection.

7 QUESTION: (Inaudible) speaks of the military  
8 interest in so many words?

9 MR. BRUCE: Well, I think O'Callahan and  
10 Relford, and also this Court's Schlesinger decision, all  
11 imply that there's a balancing here between the  
12 military's interest in prosecuting a case, and the  
13 service member's interest in trial at a civilian court.

14 QUESTION: But they don't -- they don't really  
15 say that, do they?

16 MR. BRUCE: Justice White, that's my reading  
17 of the cases.

18 QUESTION: Do you find the words, military  
19 interest, in the O'Callahan?

20 MR. BRUCE: No, sir, I think the closest --

21 QUESTION: Or the word, balance?

22 MR. BRUCE: I think the closest that comes to  
23 that is perhaps language in Schlesinger that basically  
24 summarizes the service connection test, when it  
25 indicates that there should be a unique military

1 interest that can't be adequately vindicated in a  
2 civilian court.

3 Now, admittedly, that's just a summarization.  
4 It's a kind of a shorthand, and doesn't take in all of  
5 the factors that have to go into the test.

6 But I think it indicates that that's where the  
7 good -- the crisis comes.

8 QUESTION: So you don't -- I take it you're  
9 not urging that there must be some finding that military  
10 discipline will be disturbed, or interfered with?

11 MR. BRUCE: I think that's one of the main  
12 justifications --

13 QUESTION: But not essential?

14 MR. BRUCE: Well, the other one would be  
15 something that affected a-

16 QUESTION: Well, is it essential or not?  
17 That's my question.

18 MR. BRUCE: No, sir. The other thing that  
19 would --

20 QUESTION: Well, that's all I really asked.

21 MR. BRUCE: Yes, sir. The other thing that  
22 would trigger it would be an impact on the mission of  
23 the military. I think something that affected  
24 discipline or the mission of the military would justify  
25 court martial jurisdiction.

1                   The --

2                   QUESTION: Well, is that just a restatement of  
3 the service connected language in O'Callahan, or is that  
4 a narrowing or a broadening of O'Callahan?

5                   MR. BRUCE: I intended it to be just a  
6 restatement of the language in O'Callahan.

7                   QUESTION: (Inaudible) offenses had occurred  
8 on the base, would there be court martial jurisdiction?

9                   MR. BRUCE: I believe that under the Relford  
10 decision, if they had occurred on a military base, there  
11 would be court martial jurisdiction.

12                   QUESTION: Even though the victims were the  
13 same?

14                   MR. BRUCE: That's correct, Your Honor.

15                   QUESTION: And -- all right.

16                   QUESTION: What if the victims were not  
17 related to military personnel? Is the base factor alone  
18 enough? I mean, I thought the base factor was just one  
19 of the 12.

20                   MR. BRUCE: I think that the Relford decision  
21 has indicated that a crime of violence or that violates  
22 property on a military base may be sufficient to justify  
23 service connection.

24                   QUESTION: May or is?

25                   MR. BRUCE: Is, excuse me, Justice White.

1           The service connection analysis applied by the  
2 Court of Military Appeals is not bound by the result  
3 that this Court's service connection -- this Court's  
4 Relford service connection analysis requires.

5           Rather, it seems that any military interest is  
6 sufficient to outweigh the petitioner's interest in a  
7 civilian trial.

8           The Court of Military Appeals seems to have  
9 embraced the position of one writer who suggested that  
10 the imagination of the prosecutor was the only  
11 limitation on court martial jurisdiction now.

12           The Court of Military Appeals service  
13 connection analysis is so flexible, it's meaningless.  
14 It permits military courts to base jurisdiction on any  
15 single factor or combination of factors, tangible or  
16 intangible, proven or presumed.

17           It invites the confusion that this Court has  
18 eliminated by its remarkably clear Relford decision.

19           The Court of Military Appeals analysis doesn't  
20 set any limits --

21           QUESTION: (Inaudible) divided up argument  
22 with the amicus, but is either you or the amicus going  
23 to address the portion of the Solicitor General's brief  
24 that urges that if we agree with you, that the factors  
25 in Relford were not met, that we should overrule Relford



1 and O'Callahan?

2 MR. BRUCE: Yes, sir.

3 QUESTION: Because if the amicus is not going  
4 to address that, I'd like to talk to you about it.

5 MR. BRUCE: Justice Scalia, I believe Mr.  
6 Fidell is going to address that point.

7 The Court of Military Appeals analysis doesn't  
8 set any limits on the factors that can be considered.  
9 It sets the law of service connection back to the time  
10 before the Relford decision when there was concern that  
11 the infinite permutations of possibly relevant factors  
12 would cause confusion about the proper limits of court  
13 martial jurisdiction.

14 This Court's Relford decision is especially  
15 clear and helpful. It sets out an analytic framework  
16 based on definite criteria.

17 Those Relford criteria should be the  
18 touchstone for any service connection analysis. Even  
19 accepting for argument's sake that those criteria are  
20 not exhaustive, that doesn't justify the Court of  
21 Military Appeals ignoring the Relford criteria and  
22 deciding the service connection question in this case  
23 solely on the basis of a few other factors.

24 If there are no other questions, I'd like to  
25 reserve the remainder of my time.

1 CHIEF JUSTICE REHNQUIST: Thank you Mr. Bruce.

2 We'll hear now from you, Mr. Fidell.

3 ORAL ARGUMENT OF EUGENE R. FIDELL, ESQ.,  
4 AMICUS CURIAE ON BEHALF OF THE PETITIONER

5 MR. FIDELL: Mr. Chief Justice, and may it  
6 please the Court:

7 First, if I may respond briefly to a question  
8 that Justice Blackmun raised during Commander Bruce's  
9 presentation.

10 On page 67 of the Joint Appendix there is a  
11 stipulation that indicates that if the Coast Guard were  
12 to determine that the court martial were without  
13 jurisdiction to prosecute the Alaska offenses, the  
14 district attorney's office would reconsider its decision  
15 not to prosecute.

16 So that there's no sense in this case that the  
17 state has washed its hands of the matter. It's simply  
18 waiting to see the outcome.

19 There are, we submit, no reasons to reconsider  
20 the O'Callahan and Relford cases.

21 There are three possibilities that might lead  
22 the Court, as a conceptual matter, to reconsider one of  
23 its prior decisions.

24 One would be, for example, if it proved that  
25 the historic data on which an earlier decision had been

1 predicated were incorrect or incomplete. The government  
2 has pointed to nothing in this case that cast doubts on  
3 the historical materials that were presented earlier.

4 And we know of nothing we can add to what was  
5 before the Court when O'Callahan was decided.

6 A second factor that might lead the Court to  
7 reconsider a prior determination would be if the test  
8 had proved to be unworkable. But that also is not the  
9 case with respect to the O'Callahan and Relford  
10 decisions.k

11 The O'Callahan and Relford decisions, though  
12 they've generated some decisions, some decisional law,  
13 in the military, and in the Article III courts, have not  
14 presented a substantial problem.

15 QUESTION: Well, one reason to reconsider  
16 O'Callahan would be if we simply felt it was wrong as a  
17 matter of constitutional law.

18 And of course those questions are always open.

19 MR. FIDELL: That question obviously is always  
20 on the table, Mr. Chief Justice.

21 And yet I would submit that the decision is  
22 not wrong, and certainly not so clearly wrong that it  
23 would lead the Court to overturn a precedent that has --

24 QUESTION: It has to be clearly wrong, rather  
25 than just wrong, before we overrule it?

1 MR. FIDELL: I think it should be very clearly  
2 wrong. But be that as it may, I don't think this is  
3 clearly wrong. I don't think it was wrong at all, in  
4 fact.

5 I think the Court was on good wrong. And I  
6 frankly think that subsequent history has proven the  
7 Court's judgment to have been a profoundly wise matter.

8 QUESTION: Mr. Fidell, you say that it hasn't  
9 created any decision problems. The briefs all address  
10 the problem of drug offenses. And I gather than the  
11 Court of Military Appeals has taken the position that  
12 drug offenses are automatically related, wherever they  
13 occur, and so forth; is that right?

14 MR. FIDELL: Not quite, Justice Scalia. The  
15 position of the Court of Military Appeals with respect  
16 to drug offenses -- which obviously are not this case;  
17 there's nothing in the record about drug offenses,  
18 effect of drug use on the performance of duty and so on,  
19 so it's not really an appropriate vehicle to get into  
20 that, and I think there will be an appropriate vehicle.

21 But the position of the Court of Military  
22 Appeals has varied over the years, basically, as I read  
23 the precedents, as the membership of the court has  
24 changed.

25 For some time there was a per se rule in the

1 Beaker case, and that was overruled in 1976. There was  
2 a subsequent rule.

3 At the moment the rule is not a 100 percent  
4 any drug case, there's a service connection.

5 QUESTION: Not at the moment, but it has been?

6 MR. FIDELL: For awhile, but that was departed  
7 from.

8 QUESTION: Well, here's my problem with it.  
9 O'Callahan and Relford being constitutional decisions,  
10 every case has to decide the jurisdictional question on  
11 the basis of a rational line, is it -- does it so much  
12 affect the military and so forth.

13 That's a very difficult process, and it's very  
14 fact bound. Now, if we said that it isn't a matter of  
15 constitutional law, that it's up to the Congress, if  
16 Congress doesn't want all of this stuff in the military  
17 courts, they can take it out and they can adopt a clear  
18 line that says, all drug offenses will be tried -- by  
19 military personnel will be tried in military courts.

20 One cannot arrive at any clear lines by  
21 constitutional interpretation on a question of  
22 jurisdiction that, to the extent possible, ought to be  
23 clear.

24 MR. FIDELL: Well, if Congress had taken the  
25 matter in hand, it might be a different question. But

1 they haven't taken it in hand, and it wasn't appropriate  
2 in fact -- it's not appropriate, I think --

3 QUESTION: Well, they couldn't take it in  
4 hand, once we tell -- once we tell them it's a  
5 constitutional point.

6 MR. FIDELL: Yes, that's correct. But I would  
7 quarrel with the assumption that there has been a  
8 substantial problem in terms of understanding the  
9 parameters of what the O'Callahan decision and the  
10 Relford decision say.

11 QUESTION: I don't know what I would do with a  
12 particular drug offense. And I think it to be very  
13 difficult to say, as a constitutional matter, whether  
14 all drug offenses are in or out. It seems to me a hard  
15 point.

16 MR. FIDELL: Well, but it's a point that the  
17 Court of Military Appeals, and the other military  
18 courts, have been grappling with. The law grows.

19 The military courts are in this sense no  
20 different from any other court under the Constitution,  
21 that it grows as a decisional matter, and with  
22 increasing experience, and as more is learned, for  
23 example, about the science and the toxicological aspects  
24 of drug use -- all of which I feel somewhat  
25 uncomfortable about discussing in this case, because

1 this is not a drug case, and I don't think this should  
2 be -- okay, I think we understand one another.

3 QUESTION: (Inaudible) about the forgery and  
4 fraud cases?

5 MR. FIDELL: You're think, I think, Justice  
6 White, of the Lockwood case. And the problem with the  
7 Lockwood was, a chain of events that began on case, and  
8 had to do with the larceny of a wallet on base, and the  
9 larceny and use of a government identification card.

10 So far, we have no problem with what the Court  
11 of Military Appeals did in that case. It's what they  
12 said in that case that gives us a lot of trouble. And  
13 that, I think, was where the train went off the tracks  
14 in terms of the O'Callahan and Relford analysis.

15 That was the beginning of the substantial  
16 confusion as to what O'Callahan and Relford said.

17 Indeed, I don't think there was confusion, and  
18 I don't think there's confusion now. It takes only a  
19 page and a half, in the manual for courts martial, for  
20 the President to furnish a restatement of the law of  
21 service connection.

22 It's not a confusing area. It was pretty much  
23 established by 1970, particularly as regards the  
24 specific narrow issue in this case, which is, is it  
25 enough that the victim happened to be a dependent.

1 QUESTION: Well, you could restate the law of  
2 torts in, you know, a couple of lines.

3 (Laughter.)

4 QUESTION: That doesn't make it clear, does it?

5 MR. FIDELL: I'd need more time.

6 (Laughter.)

7 QUESTION: (Inaudible) anything that a  
8 reasonable man wouldn't do.

9 (Laughter.)

10 MR. FIDELL: But the problem -- the problem,  
11 Justice Scalia, it might be my last clear chance.

12 (Laughter.)

13 MR. FIDELL: I'd like to point out that there  
14 are some anomalies that flow from the decision of the  
15 Court of Military Appeals. For example, how can it be  
16 -- and I'm referring here to the notion of the nonbase  
17 base -- how can it be that the less base the Coast Guard  
18 has in Juno, the greater the district commander's  
19 responsibility for his personnel?

20 That's an irrational outcome.

21 Or why should it make a difference to look,  
22 for example, at the danger to morale, why should it make  
23 a difference for purposes of military jurisdiction,  
24 whether or not the victim is a dependent of a member of  
25 the Coast Guard or a dependent of a member of the Navy?



1                   Many towns are both Navy towns and Coast Guard  
2 towns.

3                   Or why should it make a difference if the  
4 victim was a dependent of a member of the Coast Guard,  
5 but assigned to some other unit where the morale issue  
6 wouldn't take place.

7                   And indeed, I'd like to draw the Court's  
8 attention to another point in the Joint Appendix. There  
9 was testimony on page 101:

10                   Would the reputation of the Coast Guard be  
11 enhanced if the Coast Guard turned the individual who is  
12 charged over to the Alaska state authorities?

13                   And the answer from a government witness was,  
14 I think it would, yes.

15                   And that's the answer to the problem. If you  
16 have a concern that people in the Coast Guard are going  
17 to feel angry that their -- let's call them shipmates,  
18 even though they work in a federal building -- are going  
19 to escape punishment, that would be one thing.

20                   But there's no issue of that here. What  
21 people, according to that witness, want, is they want to  
22 make sure that the Coast Guard is going to assist the  
23 local authorities who have primarily jurisdiction for  
24 law and order in the community.

25                   That's where these offenses in Juno took

1 place. And the only problem was that if somebody misled  
2 the district attorney in thinking there might be court  
3 martial jurisdiction here and that maybe he wouldn't  
4 have to prosecute this case, a disservice was done to  
5 that district attorney.

6 And it's a disservice that's easily remedied.

7 I would like to, if I have a moment, comment  
8 briefly on the Bouie and Marks issue, only to suggest  
9 that Solorio was deprived of two things of value by the  
10 decision of the Court of Military Appeals.

11 Number one, he was deprived of a complete  
12 defense to the court martial, because the Court of  
13 Military Appeals changed the rules on him.

14 Number two, because the U.S. and Alaska are  
15 separate sovereigns, the punishment is additive; it is  
16 cumulative.

17 The consequence is that the net punishment for  
18 which Solorio was exposed -- is exposed -- has been  
19 increased on him. And that is a black letter violation  
20 of ex post facto analysis.

21 I would also comment that there's no notion  
22 here about reliance interests being frustrated.  
23 Reliance plays no role, in our submission, on this  
24 issue.

25 Suppose, for example, an accused was ignorant

1 -- subjectively ignorant -- of what the punishment was  
2 for a particular offense.

3 CHIEF JUSTICE REHNQUIST: You're now using up  
4 your colleague's rebuttal.

5 MR. FIDELL: Thank you, Chief Justice  
6 Rehnquist.

7 And then his offense was committed, and  
8 thereafter the legislature changed the penalty. Can  
9 there be any question but that that violates the ex post  
10 facto clause?

11 Thank you.

12 CHIEF JUSTICE REHNQUIST: Thank you, Mr.  
13 Fidell.

14 We'll hear now from you, General Fried.

15 ORAL ARGUMENT OF CHARLES FRIED, ESQ.,

16 ON BEHALF OF THE UNITED STATES

17 MR. FRIED: In this case -- thank you, Mr.  
18 Chief Justice, and may it please the Court:

19 In this case, petitioner was convicted of  
20 preying sexually on the young daughters of fellow  
21 servicemen, on and off base in Alaska and New York.

22 The Coast Guard Court of Military Review and  
23 the Court of Military Appeals found that such charges  
24 were sufficiently service connected to justify trial by  
25 the military authorities.

1 QUESTION: The military judge, however, found  
2 otherwise?

3 MR. FRIED: That is correct, Justice Blackmun.

4 QUESTION: Was it on base in Alaska?

5 MR. FRIED: In Alaska it was off base --

6 QUESTION: Off base in Alaska; on base in New  
7 York.

8 MR. FRIED: -- in New York, the offenses were  
9 on base.

10 QUESTION: But the New York offenses are not  
11 at issue here?

12 MR. FRIED: They are not at issue here.

13 They are relevant to our consideration,  
14 Justice Blackmun, because one of the reasons that it is  
15 appropriate to have -- to have military trial here is so  
16 that the whole set -- the whole set of offenses can be  
17 disposed of in one proceeding.

18 The power of Congress to prohibit and to  
19 provide for court martial jurisdiction of such offenses  
20 is the power in the Constitution to make rules for the  
21 government and regulation of the law and naval forces.

22 The exception, in the Fifth Amendment grand  
23 jury clause, for cases arising in the land or naval  
24 forces, is not so much a grant of authority as an  
25 acknowledgement that that congressional authority was

1 there in Article I of the Constitution.

2           Until O'Callahan, it was quite clear, and was  
3 restated many times -- in the Reid v. Covert case, in  
4 Toth v. Quarles, in Kinsella v. Singleton -- that, and I  
5 quote here from Singleton, the test for jurisdiction is  
6 one of status, whether the accused can be regarded as  
7 falling within the term, land or naval forces. That is  
8 the language of Article I.

9           O'Callahan added to this test an additional  
10 requirement: the the crime be service connected, in  
11 what this Court characterized as a clear break with the  
12 past.

13           Taking this case at its narrowest, we ask the  
14 Court to affirm the judgment that the tendency of such  
15 crimes is sufficiently poisonous of military morale, and  
16 for the indispensable relations of trust which should  
17 obtain between service members, that they satisfy the  
18 O'Callahan test, and are indeed service connected.

19           We submit that taking the paraphrase, the  
20 expansion of O'Callahan, in Councilman in the 1974 term,  
21 gauging the impact of an offense on military discipline  
22 and effectiveness, that the O'Callahan test is amply  
23 satisfied here.

24           The argumentation by petitioner and amici have  
25 taken us far afield from this simple truth about this

1 case. Particularly, they make rather heavy weather of  
2 the Relford decision and its 21 criteria.

3 And I think they miss the point about what  
4 Relford represented in the law when Relford came along  
5 after the shock to the system which O'Callahan  
6 represented.

7 Relford was decided two terms after  
8 O'Callahan, and performed the signal and the clarifying  
9 service of laying down a categorical per se rule: all  
10 offenses by service members on base, the serious  
11 offenses, are subject to court martial jurisdiction.

12 So what you had there was a per se categorical  
13 rule. That's the principal effect of Relford.

14 Now in order to justify and to explain that  
15 rule, and further to give guidance because the Relford  
16 Court said that that per se rule marked an area, perhaps  
17 not the limit, in order to give further guidance, the  
18 Court did lay down, in addition, 21 factors.

19 What petitioner and amici due is to overlook  
20 the fact that Relford laid down a categorical per se  
21 rule of the sort we seek here.

22 And to suggest that each case requires the  
23 courts to solve a system of equations in 21 unknowns  
24 before they have jurisdiction, that it seems to me turns  
25 Relford on its head.

1           We urge, first of all, that on its individual  
2 facts, and second, as a categorical matter, that this  
3 case and cases like it, which involve serious  
4 deprivations against military defendants by members of  
5 the Armed Services be admitted within the limits set out  
6 by Relford, and that this be done by a per se rule such  
7 as Relford itself set out.

8           First of all, it should be noted that in  
9 Relford the status of the victims as persons connected  
10 to the Armed Forces -- there was a military defendant  
11 there -- was specifically mentioned by the court.

12           Second, it would be, we think, an anomaly to  
13 be concerned for the integrity of the topographical  
14 limits of the command, and to overlook the fact that the  
15 integrity of a command is after all an integrity of an  
16 organization of people.

17           But there is, as Justice Scalia has pointed  
18 during the petitioner's argument, the looming problem of  
19 off base drug offenses.

20           This is not a drug case, to be sure. But the  
21 issue is, has the Court of Military Appeals Trotter  
22 decision in 1980, which creates again a categorical rule  
23 for off base drug offenses, with very little exception,  
24 is that an improper understanding of this Court's  
25 jurisprudence?

1           If it is, then the very successful approach to  
2 drug offenses which the military has had is cast in  
3 doubt by the kind of procedure, by this complex  
4 eschewing of any kind of categorical approach which the  
5 petitioners urge on the Court today.

6           Finally, we urge that the Court fulfill the  
7 work of Relford by returning the law to what it was when  
8 it was announced in such landmark decisions as Reid v.  
9 Covert, Toth v. Quarles, Kinsella against Singleton, and  
10 throughout the whole history of our Constitution, which  
11 is that service -- that membership in the service was a  
12 sufficient condition for court martial jurisdiction.

13           QUESTION: You want to go back, then, to the  
14 old status argument?

15           MR. FRIED: We do indeed, Justice Blackmun.  
16 We think that returning to the status argument as it was  
17 announced in cases like Reid and Toth and Kinsella,  
18 which were, after all, greatly concerned with the civil  
19 liberties issues which concern the petitioners, going  
20 back to that rule would be no violent unsettling of the  
21 law at all.

22           It was O'Callahan --

23           QUESTION: It would merely overrule  
24 O'Callahan, and with it Relford, of course.

25



1 MR. FRIED: It would overrule O'Callahan.  
2 Relford started a process of narrowing O'Callahan, and  
3 it did so in a very substantial way. Because it set  
4 down that per se categorical rule for all on base  
5 offenses by service members.

6 And the point about O'Callahan is that if we  
7 pull this one thread, which we think is a bad thread in  
8 the fabric, it would require no unravelling of the  
9 fabric of the law.

10 There has been only one decision since  
11 O'Callahan in which this Court once again considered the  
12 service connection decision, and that was Relford, which  
13 was a considerable narrowing -- I would say taming -- of  
14 O'Callahan itself.

15 And indeed --

16 QUESTION: General Fried, before you go  
17 further on the constitutional point, let's assume we  
18 stand by Relford.

19 I don't understand why you think it affects  
20 military discipline or morale if -- let's say I'm an  
21 officer on a base, and I learn that another officer or  
22 enlisted man for that matter is a child molester.

23 Now I can understand how that might affect  
24 military discipline or morale. But I don't know why it  
25 would affect it any more if I found out that, moreover,

1 the child that this officer or enlisted man molested,  
2 was a military child; not on the base -- somewhere else.

3 Why would that have any incremental affect  
4 whatever upon the morale of the unit? I mean, the fact  
5 that you have a child molester in the unit, I can  
6 understand.

7 But what difference does it make that the  
8 child is the child of another serviceman?

9 MR. FRIED: It seems to me, Justice Scalia, to  
10 make an enormous difference. Because we are talking  
11 about the esprit and the sense of comradeship which is  
12 supposed to obtain within the military services.

13 So preying upon dependents of your fellow  
14 service members, in addition to being a pretty  
15 deplorable offense, is an offense to the relation of  
16 trust and comradeship which is supposed to obtain within  
17 the military services, and is an indispensable condition  
18 of the kind of morale and trust which is supposed to  
19 obtain among people who serve on ships together, whose  
20 lives depend on the exact performance of duty.

21 It seems to me that that comradeship is an  
22 important factor; not an irrelevance. And was so judge  
23 to be by the Court of Military Appeals.

24 That's the best answer I can offer to you. It  
25 was thought to be a powerful one by the courts below.

1 QUESTION: So he's a thief, but he doesn't  
2 steal from his comrades. That's enough?

3 MR. FRIED: Stealing from his comrades does  
4 aggravate the offense, and does indeed implicate the  
5 concerns of the military, is the argument we are  
6 submitting; that is correct, Justice Scalia.

7 It should be noted, and it's a matter of very  
8 great importance, that the O'Callahan decision, on its  
9 own terms, is by now at least obsolete.

10 O'Callahan was tried -- although the case was  
11 decided in the '69 -- '68 term, O'Callahan had been  
12 tried in 1956 under the 1950 Uniform Code of Military  
13 Justice.

14 That code has been twice revised since  
15 O'Callahan was tried, and important changes have  
16 occurred in 1969 and again, in 1983.

17 The most important of these changes were,  
18 first of all, to remove, both organizationally and in  
19 terms of evaluation, the military judge and the defense  
20 counsel from the command and from the designation by the  
21 convening authority.

22 They no -- the convening authority no longer  
23 picks the military judge, as he did in O'Callahan's  
24 time; no longer picks the defense counsel. That has  
25 been taken out of their hands.

1                   Furthermore --

2                   QUESTION: What if they change back? Do we  
3 then change our constitutional interpretation once  
4 again, and go back to O'Callahan?

5                   MR. FRIED: I would think not. I would think  
6 not. However, the -- what O'Callahan did indeed depend  
7 on was a description of the military justice system  
8 which simply is not a correct description of the  
9 military justice system as it now obtains.

10                   It may be, Justice Scalia, that if the rule we  
11 propose, which is the pre-O'Callahan rule, of status  
12 only, were to be reinstated, aspects of the military  
13 justice system would be subject to review, not on  
14 jurisdictional grounds, but on due process grounds.

15                   Indeed, the question of command influence,  
16 which has been very significantly address by both  
17 Congress and regulation since O'Callahan has been tried,  
18 are issues which have been brought to this Court, and  
19 which as recently as yesterday, the Court denied  
20 certiorari in cases raising that issue.

21                   So it's not as if the O'Callahan concerns  
22 might not be addressed. We suggest that they are not  
23 appropriately addressed in terms of a jurisdictional  
24 line.

25                   In fact, the very best example, the very best

1 testimony for the current state of military justice, the  
2 independence and the zeal of the defense function, has  
3 been the defense of this case in the courts below and in  
4 this Court, both in the oral and written presentations.

5 It seems to us that a system which nurtures  
6 such a system of advocacy against the extensions of its  
7 own authority cannot be fairly described, in Justice  
8 Douglass' mysterious term, as responding to the age-old  
9 manifest destiny of retributive justice.

10 It seems to me that we have seen exemplified  
11 here is a system of justice pure and simple, and that  
12 the congressional determination of what the jurisdiction  
13 of that system of justice is, the congressional  
14 determination and the determination of this Court, up  
15 until O'Callahan, should be the determination that  
16 spells the limit of when that system of justice has  
17 power over a member of the Armed Forces.

18 If there are no further questions, I thank the  
19 Court.

20 QUESTION: Did you intend to address at all  
21 the ex post facto argument?

22 MR. FRIED: Well, the ex post facto argument  
23 troubles us a great deal, because it does not seem to us  
24 to be properly here.

25 The Court of Military -- Coast Guard Court of

1 Military Review determined that there was service  
2 connection in this case, and did so according to what I  
3 would call the intermediate ground which we ask from  
4 this Court; that is to say, the categorical rule of  
5 dependency status.

6 There was no ex post facto objection raised in  
7 the Court of Military Appeal from that objection, and  
8 therefore, it seems to us that the issue is not properly  
9 here; it was waived.

10 And we have not been able to discover in the  
11 petitioner's argumentation any response to this point.

12 Thank you.

13 CHIEF JUSTICE REHNQUIST: Thank you, General  
14 Fried.

15 Mr. Bruce, you have two minutes remaining.

16 REBUTTAL ARGUMENT OF ROBERT W. BRUCE, JR., ESQ.,  
17 ON BEHALF OF THE PETITIONER?

18 MR. BRUCE: First of all, I'd like to address  
19 the suggestion that there should be a per se rule, that  
20 any offense against a dependent should be service  
21 connected.

22 I believe it was in the case of Toth v.  
23 Quarles that this Court pointed out that the purpose of  
24 the military is to fight wars, and that other things  
25 that it does tend to detract from that.

1           And I would say that if all of the offenses  
2 against dependents are held to be service connected,  
3 that's going to seriously detract from the military's  
4 primary purpose of fighting wars.

5           I mean, you can obviously think of cases that  
6 are even further removed from military interest and  
7 discipline, or its military --

8           QUESTION: Well, that's a good policy  
9 argument, but that can be made to the Congress.

10           We wouldn't be saying, you know, that it must  
11 be done this way; we'd just be saying that it can be, as  
12 a constitutional matter, it's permissible.

13           Now if Congress agrees with you that the  
14 military should expend its energies on something else,  
15 it takes a stroke of the pen.

16           MR. BRUCE: Well, Justice Scalia, I think it's  
17 really a constitutional issue. I mean, obviously, there  
18 are limits on Congress' authority to expand court  
19 martial jurisdiction.

20           QUESTION: The argument you're making isn't a  
21 constitutional one. You mean as a constitutional  
22 matter, the military should spend most of its energies  
23 fighting war?

24           MR. BRUCE: That's correct. But there are  
25 constitutional arguments to be made. And I believe that

1 this Court would be evading its duty if it deferred to  
2 the military courts when they exceed court martial  
3 jurisdiction in a particular case.

4 Thank you very much.

5 CHIEF JUSTICE REHNQUIST: Thank you, Mr.  
6 Bruce.

7 The case is submitted.

8 (Whereupon, at 11:00 a.m., the case in the  
9 above-entitled matter was submitted.)  
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#85-1581 - RICHARD SOLORIO, Petitioner V. UNITED STATES

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