

# The Death of Military Justice

WILLIAM J. GREGOR

Buried within the National Defense Authorization Act for Fiscal Year 2011 was a provision offered by Mr. Patrick Murphy of Pennsylvania to repeal Section 654 of Title 10 US Code, the so-called “Don’t Ask, Don’t Tell Policy.”<sup>1</sup> Advocates and the American media see the repeal as a minor matter limited to admitting open homosexuals to military service. On December 19, 2010, the Senate voted to end the “Don’t Ask, Don’t Tell Policy.” This is precedent setting in that neither the House of Representatives nor the Senate held hearings to assess the impact of Section 654’s rescindment in its entirety. Unfortunately, despite its title, “Policy Concerning Homosexuality in the Armed Forces,” the section contains important military policy that extends well beyond the narrow issue of homosexual eligibility for military service. The repeal of those provisions will radically change the American system of military justice and discipline. Congress failed to wait on the Department of Defense’s report regarding the repeal of Section 654. Thus, the report will have no power to mitigate the effects, because to restore or retain portions of Section 654 is to argue against the repeal and reveal that its repeal is improvident. With the repeal, the US military services will enter a litigious period of indiscipline.

To understand why repealing Section 654 will radically alter the system of military justice and discipline, it is first necessary to examine the Section 654 findings. The findings were not only drawn from the testimony presented in the hearings before the House Armed Services Committee in 1993 but also from appellate and Supreme Court rulings on matters of military law. Congress appended the findings to ensure that the policy enacted in 1993 would withstand constitutional challenge and based the findings on Congress’s exclusive constitutional power to make rules for the government and regulation of the land and naval forces. Repealing those findings

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# Report Documentation Page

Form Approved  
OMB No. 0704-0188

Public reporting burden for the collection of information is estimated to average 1 hour per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Send comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden, to Washington Headquarters Services, Directorate for Information Operations and Reports, 1215 Jefferson Davis Highway, Suite 1204, Arlington VA 22202-4302. Respondents should be aware that notwithstanding any other provision of law, no person shall be subject to a penalty for failing to comply with a collection of information if it does not display a currently valid OMB control number.

1. REPORT DATE <b>2010</b>		2. REPORT TYPE		3. DATES COVERED <b>00-00-2010 to 00-00-2010</b>	
4. TITLE AND SUBTITLE <b>The Death of Military Justice</b>				5a. CONTRACT NUMBER	
				5b. GRANT NUMBER	
				5c. PROGRAM ELEMENT NUMBER	
6. AUTHOR(S)				5d. PROJECT NUMBER	
				5e. TASK NUMBER	
				5f. WORK UNIT NUMBER	
7. PERFORMING ORGANIZATION NAME(S) AND ADDRESS(ES) <b>U.S. Army War College, Parameters, 122 Forbes Avenue, Carlisle, PA, 17013</b>				8. PERFORMING ORGANIZATION REPORT NUMBER	
9. SPONSORING/MONITORING AGENCY NAME(S) AND ADDRESS(ES)				10. SPONSOR/MONITOR'S ACRONYM(S)	
				11. SPONSOR/MONITOR'S REPORT NUMBER(S)	
12. DISTRIBUTION/AVAILABILITY STATEMENT <b>Approved for public release; distribution unlimited</b>					
13. SUPPLEMENTARY NOTES					
14. ABSTRACT					
15. SUBJECT TERMS					
16. SECURITY CLASSIFICATION OF:			17. LIMITATION OF ABSTRACT	18. NUMBER OF PAGES	19a. NAME OF RESPONSIBLE PERSON
a. REPORT <b>unclassified</b>	b. ABSTRACT <b>unclassified</b>	c. THIS PAGE <b>unclassified</b>			

will mean that military courts will no longer be able to rely on those legal precedents as guides for the governance of the armed forces. Because those findings describe the principles that have governed the order and discipline of the military since the US civil war, the meaning of good order will be erased. That is why those findings need to be carefully reviewed.

There are fifteen findings listed in Section 654, among which only two, 13 and 15, directly refer to the issue of homosexuality. Finding 12 refers to living conditions during deployments and can be reasonably connected to 13 and 15. Two findings, 1 and 3, merely restate the power granted to Congress in Article I, Section 8, Clause 14 to regulate the armed forces. The repeal will have no effect on those powers. Five findings discuss in general terms military service. Finding 4 states the primary purpose of the armed forces; Finding 5 recognizes the need for personal sacrifice; the need for good order and discipline is recalled in Finding 6; and Finding 7 cites the importance of cohesion to military effectiveness. The remaining six findings, 2, 8, 9, 10, 11, and 14, are key, because they define the principles that underlie the established system of military justice and order. Absent these principles, most, if not all, policy regarding selection, retention, and discipline are subject to legal challenge or reinterpretation.<sup>2</sup>

The significance of the six key findings cannot be overstated. They have been the subject of various military policy debates throughout the history of the United States.<sup>3</sup> Consequently, these six findings represent a clear contemporary exercise of congressional authority and a clear definition of the military order the Congress intends. First among them is Finding 8, which has two parts. Finding 8 states that military life is fundamentally different from civilian life; the military exists as a specialized society, and one that has not only its own rules but also restrictions on personal behavior that would be intolerable in civilian society. In other words, rights and privileges enjoyed by the citizens of the United States can be and are denied to members of the military. Many of the restrictions are justified in terms of the need for civilian control or the maintenance of military efficiency; however, it is important to observe that neither Congress nor the military, when acting under authority granted by Congress, needs to prove that the restrictions are necessary or effective. Many Americans might believe the separate character of military society is obvious, but that conclusion is not at all obvious. The organizations of European armed forces differ greatly from that of the United States, and some nations have no equivalent to the Uniformed Code of Military Justice (UCMJ).<sup>4</sup> Removing this finding does not create major changes in military order but does open a wide variety of challenges to the current order, a topic that will be addressed later in this article.

The finding that the military is a separate society possessing its own rules does not define the extent of those rules, although Congress did specify

how far those rules extend. Findings 9 and 10 bind the servicemember to the standards of conduct of the armed forces for 24 hours each day beginning the moment an individual enters military status and at all places—on or off base and on or off duty. These findings embrace the position taken by the US Supreme Court in *Solorio v. United States*

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(1987). In that case, the Supreme Court overturned a previous Supreme Court decision, *O’Callahan v. Parker* (1969), stating that military status alone makes the servicemember subject to military jurisdiction.<sup>5</sup> The decision in *O’Callahan* had restricted military jurisdiction to only offenses that were service connected and made the maintenance of discipline particularly difficult in the post-Vietnam period.<sup>6</sup> *O’Callahan’s* effect on discipline will be discussed later in greater deal. More than 23 years since *O’Callahan* was overturned, few, if any, active officers recall how difficult it was to adhere to the jurisdictional rules and still maintain discipline. The Congress, if it intends to maintain military discipline in the manner it has come to expect, would be well-advised to rethink the repeal of this finding.

Last among the key findings, but at the top of the list, is the declaration in Finding 2 that there is no right to serve. The declaration is a condition for the announcement in Finding 14 that the armed forces need to maintain personnel policies that exclude persons whose presence in the armed forces would create an unacceptable risk to good order and discipline. Read strictly in the context of Section 654’s title, the finding appears directed at justifying the exclusion of homosexuals. Yet it pertains to all military selection criteria based on any personal behaviors, from a servicemember’s misdemeanor arrest record to a sleepwalking disorder. A survey of military selection criteria over the course of the last century reveals frequent efforts to expand eligibility and broaden waiver policies with little evidence that those who benefited from the changes proved suitable for military service.<sup>7</sup> The finding is important, because it permits the military to define selection policies for classes of persons without having to demonstrate that a particular person in the class is not suitable for military service. For example, the military does not permit 16-year-olds to enlist even though the United States once permitted them to and, clearly, not all the 16-year-old enlistees served poorly.<sup>8</sup> This example is not intended to suggest that the military services will be beset by challenges to underage enlistment rules. Rather the example illustrates that enlistment and commissioning eligibility standards, even those that are seemingly obvious, have been held constitutionally lawful without a showing of evidence that those persons denied access to military service would prove

unfit or unsuitable. Thus, the military can exclude persons based on criteria that apply to a class of persons without being discriminatory.

A review of the preceding discussion of the Section 654 findings reveals three dimensions defining what the Congress has declared as essential elements of military order and discipline. First, the military constitutes a specialized society characterized by its own rules, many of which restrict personal behavior. Second, persons who join the armed forces are subject to those rules 24 hours each day beginning when that person enters military status, and the standards of the UCMJ apply at all times and in all places. Lastly, the Congress may exclude anyone from military service, especially those who represent a risk to the standards of conduct or performance. Those who have championed the lifting of the ban on homosexuals have argued that none of these dimensions is required to establish an effective military organization. Many foreign nations' militaries are simply not organized in this manner. Thus, the proponents for rescinding Section 654 can argue that its rescindment will have no effect on good order and discipline. But, the US military has already tested that proposition; the results were indiscipline and disorder. In *O'Callahan*, the US Supreme Court ruled that military status alone was not sufficient to establish military jurisdiction over an offense. In *Solorio*, the Supreme Court overturned the *O'Callahan* ruling, which constitutes the substance of Findings 9 and 10. Consequently, the period when the *O'Callahan* ruling applied, June 2, 1969, to June 24, 1987, provides a record of the impact of eliminating military status as a basis for military jurisdiction. That period also contains a record of challenges to military rules and provides a good indicator of the difficulties the military services will face as they try to preserve good order.

The details of the military crimes charged in the cases of Sergeant James F. O'Callahan and Richard Solorio contain important similarities. SGT O'Callahan was stationed at Fort Shaftner, Hawaii, in July 1956. On the night of July 20, 1956, SGT O'Callahan, while on an evening pass in Honolulu and wearing civilian clothes, broke into a hotel room, assaulted a young girl, and attempted to rape her. The city police apprehended him and on learning that he was in the armed forces turned him over to military authorities. He was charged accordingly with violation of Articles 80, 130, and 134 of the UCMJ, tried by court-martial, convicted on all counts, and sentenced. The Army Board of Military Review and the US Court of Military Appeals affirmed his sentence and a US District Court denied his petition for a writ of habeas corpus. Subsequently, the US Supreme Court accepted his petition and overturned his military conviction on the grounds that the military lacked jurisdiction.<sup>9</sup> Much of the court's reasoning in the *O'Callahan* case is not relevant to the discussion here. Writing for the court, Justice William O. Douglas observed that military courts did not provide the constitutional

protections offered by civilian courts. He further argued that because British law (prior to the American Revolution) prohibited court-martialing soldiers who committed crimes recognized by civilian courts. US servicemembers were entitled to the same protection under the US Constitution.<sup>10</sup> Hence, a servicemember is only subject to the provisions of UCMJ if the offense is service connected or occurred where there was no US civilian court. Justice Harlan, in the dissenting opinion, observed that the Constitution granted to Congress exclusive power to govern the armed forces and, in his reading of the law, had made military status alone sufficient to establish jurisdiction.<sup>11</sup> The Supreme Court's ruling in *Solorio* cites Justice Harlan's dissent.

The case of Petty Officer Richard Solorio, heard February 24, 1987, also involves sexual assault occurring off post in a civilian area. PO Solorio was on active duty in the Seventeenth Coast Guard District in Juneau, Alaska, when he sexually abused two daughters of a fellow coastguardsman. Coast Guard authorities learned of the Alaska crimes only after he was transferred to Governors Island, New York, where investigation into the charges revealed that he had also committed similar acts there. The Governors Island commander convened a general court-martial to try the alleged crimes in both Alaska and New York. The military trial judge in charge of the court-martial dismissed the charges from Alaska, ruling the charges were not sufficiently service connected. The US Coast Guard Court of Military Review reversed the trial judge's order; the US Court of Military Appeals affirmed the Court of Military Review's reasoning that there was sufficient service connection, even though the victims were civilian and the crimes were not committed on post.<sup>12</sup> Subsequently, the US Supreme Court heard the case.

By applying some tortured reasoning, both courts of military review, concluded Solorio's offenses were service connected. The Supreme Court justices unanimously agreed that the military had jurisdiction but four justices found no need to overturn *O'Callahan*. The court majority, however, observed that the Court in *O'Callahan* had departed from the military status test and announced a "new constitutional principle" that a military tribunal may not try a servicemember charged with a crime that has no service connection.<sup>13</sup> In *Solorio*, the court majority determined the *O'Callahan* decision had neither paid sufficient deference to Clause 14 in Article I of the US Constitution nor proper attention to the statutory evolution of US military law. Thus, the *Solorio* Court found Congress had firmly established in law that military status was sufficient to determine military jurisdiction.<sup>14</sup> The immediate effect of the *Solorio* decision was the end of a jumble of arcane rules that every commander had to apply to sort out jurisdiction. The *Solorio* opinion cited the numerous categories of offenses requiring special analysis and the resulting confusion those rules created among the courts. Given that

the findings in *Solorio* are found in Section 654, the Congress, by rescinding it, affirmatively removes military status as the sole basis for jurisdiction. It returns the military to the *O'Callahan* rules with one important exception; it eliminates, or at least brings into question, the merits of military legal precedents. Military courts will have no legal history to guide their decisions.

As was the case in 1969, servicemembers will challenge aspects of the UCMJ and military regulations. The *O'Callahan* decision essentially divided a servicemember into two persons, a civilian when not involved in actions that were service related and a servicemember subject to UCMJ and military regulations. Thus, some challenges will assert a servicemember's right as a citizen to engage in certain conduct; some challenges will deny the military's right to regulate particular behavior. If those challenges fail, the servicemember will argue the military does not have the jurisdiction to take notice of the behavior and, therefore, is powerless to enforce the rules it has made. Even more important will be the decisions made by individual commanders about whether they have the authority to investigate alleged offenses or make rules within their units. This will be a problem that will vex superior and subordinate commanders alike, and perhaps even Congress. Many commanders may simply look the other way. The perfect example of this problem is the political and military reaction to the Tailhook 91 incident in 1991.

A number of people will recall the coarser details of the Tailhook 91 incident. The Tailhook Association held its 35th Annual Symposium at the Las Vegas Hilton Hotel from September 5 through 7, 1991. Initially started in 1956 to reunite naval aviators, the annual Tailhook Symposium eventually expanded to include a number of professional development activities that received official support from the Department of the Navy. The symposiums were well-known for their general rowdiness and wild parties to which Tailhook 91 was no exception. On Saturday night, September 7, 1991, a gauntlet of drunken officers assaulted Lieutenant Paula Coughlin in the hotel's third-floor hallway. Her report of the incident ultimately led to a criminal investigation and congressional hearings on gender discrimination in the military.<sup>15</sup> The incident occurred after the decision in *Solorio*, thus, there was no problem establishing military jurisdiction. Under *O'Callahan* rules, her personal complaint would not have posed any jurisdictional problems because her assailants were also Navy officers; however, it is doubtful the Navy could have investigated reports from civilian women who were also assaulted given that the offenses occurred in a civilian location and the assailants were on leave or off duty. More importantly, it is unclear if the Navy would have had any jurisdiction over offenses to other provisions of UCMJ. The DOD Inspector General's report criticizes the Naval Investigative Service's (NIS) failure to investigate information concerning

indecent exposure (Article 134) and conduct unbecoming an officer (Article 133).<sup>16</sup> There might have been a civil criminal code against indecent exposure, but it would not have been under a general article for all disorders and neglects to the prejudice of good order and discipline in the armed forces. Certainly, there is not a civilian equivalent for conduct unbecoming an officer. Thus, the Inspector General's complaint that offenses against Articles 133 and 134 were neglected would have been meaningless under *O'Callahan* rules. It would have been completely irrelevant had *Parker v. Levy* (1974) been decided differently.

*Parker* was decided on June 19, 1974, and was an attack on Articles 133 and 134 of UCMJ. In that case, the petitioning officer was Captain Howard Levy, a physician, whose duty it was to train Special Forces medics for service in Vietnam. He refused to train the medics because it violated his medical ethics. CPT Levy believed that "special forces personnel are liars and thieves and killers of peasants and murderers of women and children." He made public statements to enlisted personnel that it was wrong for the United States to be involved in the Vietnam War and encouraged colored (sic) soldiers to refuse to fight in Vietnam. He was tried and convicted of violating Article 90, disobeying a lawful order, and Articles 133 and 134. The US Third Circuit Court of Appeals reversed the convictions on Articles 133 and 134, holding that those articles were unconstitutionally vague. The Court of Appeals held that, as measured by contemporary standards of vagueness applicable to statutes and ordinances governing civilians, the general articles do not pass constitutional muster. The Court concluded that, because the violation involved speech protected by the First Amendment, the petitioner would have standing to challenge both articles.<sup>17</sup> Had the decision of the Third Circuit Court prevailed in 1974, there would have been no need for the Navy to concern itself with conduct unbecoming an officer at Tailhook 91.

Fortunately, a five-member majority of the Supreme Court reversed the Court of Appeals. Justice Rehnquist, writing for the Court, cited numerous precedents that recognized the military as "a specialized society separate from civilian society." He also stated, "We have also recognized that the military has, again by necessity, developed laws and traditions of its own during its long history."<sup>18</sup> Addressing the Court of Appeals' concern for Dr. Levy's right to free speech, Justice Rehnquist wrote:

While the members of the military are not excluded from the protection granted by the First Amendment, the different character of the military community and of the military mission requires a different application of those protections. The fundamental necessity for obedience, and the consequent necessity for imposition of discipline, may render permissible within the military that which would be constitutionally impermissible outside it.<sup>19</sup>

Thus, *Parker* limited the effect of *O'Callahan* but recognized that the servicemember did share some of the First Amendment protections enjoyed by civilians. Nevertheless, the needs of the military community to maintain order permitted restrictions that would be otherwise prohibited in civil society. Unfortunately, if the text in *Parker* is compared with Section 654 Finding 8, it is obvious that rescinding Section 654 overturns the *Parker* ruling.

Even more disturbing is the similarity between the actions of CPT Levy and those of Major Malik Nadal Hasan. Like CPT Levy, MAJ Hasan was a physician whose duty it was to prepare medical personnel for service in Iraq, rather than Vietnam. Like CPT Levy, he objected to US involvement in a war he disagreed with and voiced those objections during his medical presentations. Unlike CPT Levy, MAJ Hasan's superiors did not prefer court-martial charges against him. He was advanced to the rank of major and assigned to duty at Fort Hood with subsequent duty in Iraq or Afghanistan. At Fort Hood, he murdered 13 servicemembers and wounded 29 others. In the aftermath of the shootings, everyone, including Secretary of Defense Robert Gates, wondered why MAJ Hasan had not been disciplined or separated. In November 2009, Secretary Gates created an independent review of the Fort Hood events led by former Secretary of the Army Togo West and retired Admiral Vern Clark. Their task was to determine whether policies or procedural weaknesses make the military more vulnerable to attack. Unsurprisingly, the report concluded that the policies were generally adequate but that several officers failed to comply with them when taking actions regarding MAJ Hasan. The report noted that some medical officers based their evaluations solely on MAJ Hasan's academic performance. His evaluation should have included observations of his total performance as an officer, academic and nonacademic.<sup>20</sup> That recommendation is certainly consistent with current military law. Current law does not separate the servicemember into two persons—a private citizen and a public active duty officer. Unfortunately, since Section 654 was rescinded, the military will not have authority to assess an officer's conduct if it does not occur in his or her place of duty. Servicemembers will assert that behaviors, including speech, that occur outside the duty place are beyond military jurisdiction. The rules are likely to resemble those found on US public universities where academic authorities are not permitted to assess conduct not directly related to the classroom. Consequently, the military will revisit the manifold challenges to discipline and good order occasioned by the *O'Callahan* decision in 1969.

While it is impossible to predict which rules will ultimately be challenged, it is certain that military restrictions on personal behavior will be attacked first. The most frequently ruled upon category of military offenses

in the *O'Callahan* period involved the use of illegal drugs. There is no doubt that a servicemember in California will avail himself of the local right to obtain and use medical marijuana. He will also assert that the command lacks the authority, absent probable cause, to require him to provide a urine specimen. Following *O'Callahan*, the US Military Court of Appeals ruled in *United States v. Beeker* that “the use or possession of marihuana was service connected because the use or possession . . . of marihuana and narcotics has a special military significance since their use has ‘disastrous effects on the health, morale and fitness for duty of persons in the armed forces.’”<sup>21</sup> Not all federal courts, however, agreed with that ruling and the Court of Military Appeals renounced the decision seven years later, holding that *O'Callahan* and *Relford v. Commandant*<sup>22</sup> mandated the conclusion that off base drug offenses committed by a servicemember could not be tried by court-martial.<sup>23</sup> Likewise, the military can expect manifold challenges to rules governing sexual conduct and fraternization. In 1997, when First Lieutenant Kelly Flynn was charged by the Air Force for having a sexual affair with a junior enlistee’s civilian husband and disobeying an order to end it, many members of Congress found the Air Force’s position out of touch with reality.<sup>24</sup> The same reaction occurred in December 2009, when members of Congress learned that Major General Tony Cucolo had published a general order promising to punish any female servicemember who became pregnant and the male servicemember who was responsible for the pregnancy. Though the order was consistent with long-standing military practice that a servicemember cannot render himself or others unfit for their duties, feminists in Congress, criticized the policy as being contrary to the basic rights of individual servicemembers.<sup>25</sup> There is no doubt that following the rescission of Section 654 many servicemembers will claim their individual rights are protected from military rules.

Article 64 of the American Articles of War of 1874 states, “The officers and soldiers . . . mustered and in the pay of the United States shall, at all times in all places, be governed by the articles of war, and shall be subject to be tried by courts-martial.”<sup>26</sup> Those words differ little from the words in Finding 9, Section 654 of the US Code. That rule has continuously governed military discipline since 1874, with the painful exception of the *O'Callahan* period, 1969 to 1987. Justice Douglas’s attempt to impose a new constitutional principle on military law proved unworkable. Nevertheless, some members of Congress now want to set aside US military precedent and follow foreign military practice, making servicemembers only “sometime soldiers.” It is not possible here to assess the prospects for maintaining military discipline in this ill-defined new order. What the three major military cases discussed in this article show is that in no case did more than five Supreme Court Justices agree on a legal position. In the cases that

upheld military jurisdiction and limitations on servicemembers' constitutional rights, the Court relied on the Congress' authority to govern the armed forces and define the principles upon which military order and discipline are based. Rescinding Section 654 sets aside those principles without defining new rules to take their place. It is, therefore, not idle speculation that the armed forces is about to enter a period of confusion and disorder.

#### NOTES

1. *Amendment to HR 5136: National Defense Authorization Act for Fiscal Year 2011*, H. Amdt. 672, 111th Cong., 2d sess., offered by Rep. Patrick Murphy of Pennsylvania, daily ed. (27 May 2010): H 4055-60, H 4062-63, <http://thomas.loc.gov/cgi-bin/query/R?r111:FLD001:H54055-H54060,H54062-H54063>.

2. Sec. 654, 10 USC.

3. Joseph W. Bishop, Jr., *Justice Under Fire* (New York: Charterhouse, 1974). The extent of military jurisdiction and the soldier's enjoyment of constitutional rights has been the subject of debate since the ratification of the Constitution. Many of the arguments are found in judicial opinions and law review articles.

4. The German Grundgesetz, Basic Law, was written to avoid German militarism and leaves only petty military offenses such as absence without leave to military authorities.

5. *Solorio v. United States*, 485 US at 435.

6. *O'Callahan v. Parker*, 395 US at 272-273.

7. Janice H. Lawrence and Peter F. Ramsberger, *Low-Aptitude Men in the Military: Who Profits, Who Pays?* (New York, NY: Praeger Publishers, 1991). The most conspicuous example of using the armed forces to advance social objectives was Project 100,000. In September 1963, President John Kennedy established a Task Force on Manpower Conservation because, in the previous year, one-third of all 18-year-old men reporting for draft examinations had been judged unfit for service. Subsequently, Secretary of Defense Robert S. McNamara in furtherance of President Lyndon Johnson's War on Poverty created Project 100,000 which allowed low aptitude men to join the armed forces. These recruits were referred to as New Standards Men. Although their performance varied by Service, generally they were disciplined more often and left the service earlier than the normal enlistee.

8. William Winthrop, *Military Law and Precedents*, 2d ed. (Washington, DC: Government Printing Office, 1920), 542. Sec. 116, Rev. Sts. as amended in 1984 provided for enlistments between age 16 and 30.

9. *O'Callahan*, 395 US at 258.

10. *Ibid.*, 269-74.

11. *Ibid.*, 275-84.

12. *Solorio*, 483 US at 436-38.

13. *Ibid.*, 440.

14. *Ibid.*, 441.

15. Department of Defense, Office of Inspector General, "Tailhook 91: Part 1-Review of the Navy Investigations" (September 1992), 4-6 <http://www.mith2.umd.edu/WomensStudies/GenderIssues/SexualHarassment/tailhook-91> (accessed 28 September 2008).

16. *Ibid.*, 11.

17. *Parker v. Levy*, 417 US 733 (1974), <http://supreme.justia.com/us/417/733/> (8 September 2010).

18. *Ibid.*, 743.

19. *Ibid.*, 758.

20. Report of the DOD Independent Review, *Protecting the Force: Lessons from Fort Hood* (Washington: Department of Defense, January 2010).

21. Colonel Mayo L. Mashburn, "Military Jurisdiction," *Air University Review* (May-June 1971), <http://www.airpower.maxwell.af.mil/airchronicles/aureview/1971/may-jun/Mashburn.html> (accessed 8 September 2010).

22. *Relford v. Commandant*, 401 US 355 (1971) This case tried to establish rules for determining jurisdiction. The Court provided 12 rules to guide decision making, page 401 US 365. <http://supreme.justia.com/us/401/355/case.html> (accessed October 5, 2010).

23. *Solorio*, 483 US at 435 n.17.

24. Elaine Sciolino, "Affair Grounds Career: Air Force Pilot Facing Court-Martial, Contends Military is Overreacting," *Kansas City Star*, (11 May 1997), A-15.

25. Michael Gisick, Leo Shane, III and Teri Weaver, "Senators Lead Calls for Revoking Pregnancy Policy," *Stars and Stripes* (23 December 2009), <http://www.stripes.com/articleprint.asp?section=104&article=66832> (accessed 23 May 2010).

26. William Winthrop, *Military Law and Precedents*, 2d ed. (Washington, DC: Government Printing Office, 1920), 991.