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This We'll Defend: Expanding UCMJ Article 2 Subject Matter Jurisdiction as a Response to Nonconsensual Distribution of Illicit Photographs

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THIS WE'LL DEFEND: EXPANDING UCMJ ARTICLE 2 SUBJECT MATTER JURISDICTION AS A RESPONSE TO NONCONSENSUAL DISTRIBUTION OF ILLICIT PHOTOGRAPHS

Nicholas Karp*

ABSTRACT

In March 2017, it was revealed that current and former armed service members shared thousands of nude photos of their female counterparts over social media. Although some of these photos were taken with the women's consent, almost none of them were distributed with the women's consent.

Victims have little legal recourse. Military law is silent on the matter of nonconsensual distribution. Federal civilian law speaks only to interstate stalking, domestic violence, and harassment, while only thirty-four states have revenge porn laws that sufficiently criminalize nonconsensual distribution of illicit photographs. Further complicating matters, the perpetrator's military status as active duty, reservist, or National Guardsman at the time of the crime determines which remaining punitive remedies are available to the victim, if any.

Under the current legal framework, two recent developments in U.S. military policy risk opening female service members to additional exposure. First, in 2015, the Department of Defense opened all combat roles to women. Second, and concurrently, the Department began downscaling the military to a smaller, more flexible force increasingly supplemented by its reserve and National Guard (non active-duty) forces. In light of these developments, the current state of the law poses an unacceptable risk that the growing number of female service members will be subjected to the dual horrors of seeing lewd photos of themselves plastered across the internet, and of seeing the perpetrator walk freely. This Note argues for expanding Article 2 subject matter jurisdiction of the Uniform Code of Military Justice to include all currently contracted members of the U.S. military—active duty, reservist, and guard—in order to bring peace of mind to those female service members willing to fight for peace abroad.

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TABLE OF CONTENTS

INTRODUCTION.....	560
I. THE ROAD TO REFORM.....	561
A. <i>The Scandal</i>	561
B. <i>The Subject Matter Jurisdiction</i>	563
1. The Statutes	563
2. Randall and the Sister Cases (<i>Phillips</i> and <i>Fry</i>)	565
3. The <i>Solorio</i> Standard	567
C. <i>Setting the Stage for Change</i>	570
II. CURRENT STATE OF THE LAW.....	571
III. REFORM.....	575
CONCLUSION	579

INTRODUCTION

“Hundreds of Marines Investigated for Sharing Photos of Naked Colleagues.” This was the headline published by The War Horse, a non-profit news organization headed by Marine Veteran Thomas Brennan, in March 2017.¹ At first, the nonconsensual sharing of nude photos over social media appeared to be an isolated instance of misconduct by some bad-apple Marines: disrespectful, shameful, and immoral, but surely not indicative of any large-scale maltreatment of female service members by their male counterparts. The ensuing investigations proved otherwise, though. Within a matter of days, the sharing of nude photos of female service members was revealed to be far more than merely isolated misconduct. The nonconsensual distribution of illicit photographs is a cancer that not only implicates the military’s foundational values of camaraderie and honor, but also sheds light on the need to change how the armed forces holds its members accountable to the law; specifically, by reforming the subject matter jurisdiction of Article 2 of the Uniform Code of Military Justice (UCMJ) to cover particular conduct of reservists and National Guardsmen.

This Note contains three parts. Part I discusses the events which brought the need for reform to the fore, considers longstanding statutory roadblocks to reform and explores how courts and critics have historically navigated them, and explains why current developments in national military policy have made conditions ripe for

1. Thomas Brennan, *Hundreds of Marines Investigated for Sharing Photos of Naked Colleagues*, REVEAL (Mar. 4, 2017), <https://www.revealnews.org/blog/hundreds-of-marines-investigated-for-sharing-photos-of-naked-colleagues>; see also Leo Shane III & Jeff Schogol, *Prosecuting Marines Over Nude Photo Scandal Could be Difficult*, MILITARY TIMES (Mar. 10, 2017), <https://www.militarytimes.com/news/pentagon-congress/2017/03/10/prosecuting-marines-over-nude-photo-scandal-could-be-difficult/>.

reform. Part II addresses the current status of military, federal, and state law as they specifically apply to nonconsensual distribution of illicit photographs. Part III offers two proposed solutions to the problem: one from the judicial perspective and one from the legislative perspective. This Note concludes by emphasizing that these solutions are not the best—or only—options; they are merely a starting point.

I. THE ROAD TO REFORM

A. *The Scandal*

In January 2017, Brennan reported to Marine Corps leadership that lewd photos of female Marines were being shared by current and former Marines over a private Facebook group entitled “Marines United.”² At the time of reporting, the group boasted over 30,000 members—all male.³ Initially organized as a suicide prevention and support network for veterans, the group later shifted its focus to facilitating acts of revenge porn.⁴ What started as a trickle turned into a tidal wave, as nude photos of female Marines flooded the “Marines United” Facebook page.⁵

The page became a wellspring of salacious content, which soon spilled over. Hundreds—if not thousands—of photographs were uploaded to an external folder and then shared for members to access with ease.⁶

Occasionally, bounties were offered for nude pictures of specific female Marines.⁷ These women were identified by their full name, rank, and military duty station.⁸ In some cases, the photographs were taken with the victim’s knowledge and consent; in likely many

2. Andrea Gonzales-Ramirez, *The Navy & The Marines Have Made Revenge Porn Illegal—Here’s Why*, REFINERY29 (May 12, 2017), <http://www.refinery29.com/2017/04/150816/navy-marines-revenge-porn-scandal-explained>; see also Elliot McLaughlin & AnneClaire Stapleton, *Secret Marines Group is Still Sharing Nude Photos Amid Scandal*, CNN (Mar. 9, 2017), <http://www.cnn.com/2017/03/08/politics/marines-united-photos-investigation/index.html>.

3. Gonzales-Ramirez, *supra* note 2.

4. Jared Keller, *The Rise And Fall (And Rise) Of ‘Marines United,’* TASK AND PURPOSE (Mar. 16, 2017), <https://taskandpurpose.com/rise-fall-rise-marines-united>.

5. Elliot Ackerman, *Inside the Nude Photo Scandal that Rocked the Marine Corps*, ESQUIRE (July 10, 2017), <http://www.esquire.com/news-politics/a55981/marines-nude-photo-scandal/>.

6. *Id.*

7. Jack Murphy, *Marines United 2: A Scandal Rebooted*, SOFREP (Mar. 9, 2017), <https://sofrep.com/76668/marines-united-2-a-scandal-rebooted/>.

8. Gonzales-Ramirez, *supra* note 2.

more cases, they were distributed without the victim's knowledge and consent.⁹

Brennan's January 2017 report forced the "Marines United" Facebook page to be shut down.¹⁰ Nonconsensual distribution of naked photos of female service members, however, was not unique to current and former Marines. Investigations following the "Marines United" 1.0 scandal revealed activity of military personnel on the website titled "Anon-IB".¹¹ There, it was discovered that scores of male service members from all branches of the military shared and exchanged comments about nude photos of female service members.¹²

The revelation of widespread misconduct shocked military leadership. It also caused severe headaches for those tasked with handling the situation. At the time the "Marines United" scandal broke, the UCMJ made it clear that any service member who "knowingly photographs, videotapes, films, or records by any means the private area of another person, without that other person's consent" has committed a crime.¹³ Two issues quickly emerged: first, stealing private photos and sharing them online was not specified as a crime under either military or federal law. This loophole prompted the House to pass legislation to make the non-consensual distribution of illicit photos a crime both under the UCMJ and federal law.¹⁴ The second issue confronting military leaders has not yet been addressed: a large number of individuals sharing the nude photos were either reservists or National Guardsmen. The subject matter jurisdiction of the UCMJ, however, only reaches the actions of Reserve and National Guard service members under limited circumstances.

9. Ackerman, *supra* note 5.

10. Paula Mooney, *MU2.0: Facebook Group Photos Now in Pornhub, Dropbox Videos*, INQUISITR (Mar. 9, 2017), <https://www.inquisitr.com/4047059/mu2-0-marines-united-2-0-facebook-group-photos-now-in-pornhub-dropbox-videos/>.

11. David Martin, *Marines Nude Photo Scandal Expands to All Branches of Military*, CBS NEWS (Mar. 10, 2017), <https://www.cbsnews.com/news/marines-nude-photo-scandal-expands-to-military-wide-explicit-message-board/>.

12. *Id.*

13. Shane III & Schogol, *supra* note 1.

14. Michael Macagnone, *House Passes Bill Targeting Marine Nude Photo Scandal*, LAW360 (May 24, 2017), <https://www.law360.com/articles/927241/house-passes-bill-targeting-marine-nude-photo-scandal>.

B. *The Subject Matter Jurisdiction*

Subject matter jurisdiction over service members in the Reserve components and the National Guard is governed by the UCMJ (concurrent with the U.S. Code and common law).

Article 2 of the UCMJ (10 U.S.C. § 802) defines who falls under the purview of the UCMJ. In relevant portion, it states:

(a) The following persons are subject to this chapter: . . . (3) Members of a reserve component while on *inactive-duty* training, but in the case of the Army National Guard of the United States or the Air National Guard of the United States *only when in Federal service*. . .¹⁵

Under Article 2(a)(3), members of a reserve component are subject to the UCMJ during inactive duty training.¹⁶ Meanwhile, members of the National Guard are subject to the UCMJ only when called to federal service. The difference between “inactive duty” and “federal service” is significant. While members of reserve components fall exclusively under the control of the federal government, members of the National Guard serve both the state and federal governments. So, while members of reserve components answer to the UCMJ whenever they engage in any military-related obligation, members of the National Guard may not answer to the UCMJ under identical conditions. It is therefore necessary to locate exactly when a member of the National Guard is called to federal service for purposes of Article 2 of the UCMJ. In order to make this determination, we look to Title 10 and Title 32 of the U.S. Code.

1. The Statutes

Title 10 allows the president to activate members of reserve components and to federalize National Guard forces.¹⁷ This means that under Title 10, members of both reserve components and National Guard are considered to have active duty status.¹⁸ As defined

15. 10 U.S.C. § 802(a) (2018).

16. Robert E. Reed, *Procedures and Issues Relating to the Court-Martial of Reservists*, 32 A.F. L. REV. 331, 332 (1990). Prior to 1986, the UCMJ applied to reservists only while serving on active duty. *Id.*

17. See NAT'L GUARD ASS'N, NGAUS FACT SHEET 3 (May 3, 2006), <http://www.nationalguard.mil/About-the-Guard/Army-National-Guard/Resources/News/ARNG-Media/FileId/137011/>.

18. See 10 U.S.C. § 12406 (2018); 10 U.S.C. § 12301 (2018).

by Title 10, active duty status “means full-time duty in the active military service of the United States. Such term includes full-time training duty, annual training duty, and attendance, while in the active military service, at a school designated as a service school. . . .”¹⁹ Confusingly, active duty in this context does not mean the same thing as “full-time National Guard duty.”²⁰ Instead, as defined by Title 10, National Guard members are only considered on active duty status pursuant to section 12301(d) of the same Title, or section 502(f) of Title 32, if they are also performing Active Guard and Reserve duty.²¹

Title 32, on the other hand, allows the governor, “with the approval of the President . . . to order a [National Guard] member to duty for operational Homeland Defense activities”²² In this capacity, members of the National Guard are placed in full-time duty status under the control of their State while being federally funded.²³ This raises the question of whether members of the National Guard can be considered federalized under Title 32—even if they are not serving on active duty as defined by Title 10. That possibility was previously foreclosed by the U.S. Supreme Court, finding that members of the National Guard can “never” be considered federalized.²⁴ Recent developments in the case law, however, cast doubt on whether that interpretation of Title 32 remains a hard-and-fast rule.²⁵

19. *Id.* § 101(d)(1).

20. *Id.* (“The term ‘full-time National Guard duty’ means training or other duty, other than inactive duty, performed by a member of the Army National Guard of the United States or the Air National Guard of the United States in the member’s status as a member of the National Guard of a State or territory, the Commonwealth of Puerto Rico, or the District of Columbia . . .”).

21. *Id.* §101(b)(16) (“‘[A]ctive Guard and Reserve Duty’ means active duty performed by a member of a reserve component. . .or full-time National Guard duty performed by a member of the National Guard pursuant to an order to full-time National Guard duty, for a period of 180 consecutive days or more . . .”).

22. NGAUS FACT SHEET, *supra* note 17 (“The term ‘Homeland Defense activity’ means an activity undertaken for the military protection of the territory or domestic population of the U.S. . . . or other asset of the U.S. determined by the Secretary of Defense as being critical to national security . . .”) (quoting 32 U.S.C. § 901 (2006)).

23. *Id.*

24. James P. Pottorff, Jr., *Solorio v. United States: The Supreme Court Reverses Direction on Jurisdiction over Military Offenders in Civilian Communities*, J. KAN. B. ASS’N, Oct. 1988, at 29, 31–32 (“National Guard soldiers and airmen are not subject to the UCMJ when they are performing duties in state service under title 32, United States Code. Typically, National Guard training is conducted in state service under title 32, and not in federal service under title 10. The controlling factor is the authority listed on the orders directing individual training.”).

25. See T. Scott Randall, *Application of Article 2(c) of the UCMJ to Title 32 Soldiers*, 2013 ARMY LAW. 29, 31.

2. Randall and the Sister Cases (*Phillips* and *Fry*)

The most relevant cases to this analysis are *United States v. Phillips* and *United States v. Fry*. In *Phillips*, an Air Force reservist was granted one-day travel-time to drive to Wright-Patterson Air Force Base in Ohio.²⁶ Over the course of that one day trip, the reservist consumed marijuana, for which she tested positive the following week.²⁷ The court applied Article 2's four-part test to determine that Phillips—a reservist—was on active duty and thus eligible for court-martial, finding that she was a “person serving with an armed force who: (1) submit[ted] voluntarily to military authority, (2) me[t] the minimum competency and age standards, (3) receive[d] military pay or allowances, and (4) perform[ed] military duties”²⁸

In *Fry*, a Marine appealed from a conviction by court-martial of being absent without leave, possessing child pornography, and fraudulently enlisting.²⁹ The Marine argued that because he was subject to a limited conservatorship at the time of enlistment, his subsequent enlistment in the Marine Corps was void.³⁰ Despite this, the court found that it had jurisdiction over the case under Article 2(c) of the UCMJ.³¹ Here, the court looked at the opening clause of Article 2(c), “[n]otwithstanding any other provision of law,”³² and found the language indicative of congressional intent to preempt or supersede all state or federal law regarding this particular provision.³³

T. Scott Randall explores the possible ramifications of both *Phillips* and *Fry* in his article, “Application of Article 2(c) of the UCMJ to Title 32 soldiers.” Here, Randall uses the hypothetical of a Title 32 duty Texas National Guardsman who commits an act of disrespect towards a Title 10 officer to show how Article 2 may still apply in a Title 32 setting.

Randall first lays out the basic legal framework, being that Title 32 Texas military forces are subject to the Texas Code of Military Justice (TCMJ), rather than the UCMJ.³⁴ And because the TCMJ strictly limits offenses to those involving Texas military forces, the offense of disrespect toward a superior commissioned officer un-

26. *United States v. Phillips*, 56 M.J. 843, 844–45 (A.F. Ct. Crim. App. 2002), *aff'd*, 58 M.J. 217 (C.A.A.F. 2003).

27. *Id.* at 845.

28. *Id.* at 846.

29. *United States v. Fry*, 70 M.J. 465, 467 (C.A.A.F. 2012).

30. *See id.* at 468.

31. *Id.* at 472.

32. *Id.* at 468–69.

33. *Id.* at 469.

34. *See Randall, supra* note 25, at 29.

der the TCMJ applies only to those cases where both the inferior and superior officers are members of the Texas National Guard. “Therefore,” Randall explains, a “Texas National Guard Officer serving . . . in a Title 32 status cannot be charged with disrespect towards a superior commissioned officer under the TCMJ for conduct towards a superior Title 10 officer.”³⁵ Nor does the UCMJ appear to solve the problem; UCMJ jurisdiction does not typically attach to soldiers serving under Title 32.³⁶

The problem confronted by Randall parallels the problem at issue in this Note: both disrespect to a Title 10 superior officer by a Title 32 soldier and non-consensual distribution of illicit photographs of service members are military offenses, largely non-cognizable under both federal and state law, providing no apparent legal recourse for the victim. Fortunately—for Randall’s purposes and ours—an answer may lie with *Phillips’s* and *Fry’s* treatment of Article 2(c) of the UCMJ. According to Randall:

[t]he recent decision in *United States v. Fry* raises the question as to whether the . . . interpretation of the broad language found in Article 2(c) would cover a National Guard Soldier serving in a full-time National Guard status under Title 32. . . Applying the analysis developed in *United States v. Phillips* regarding Article 2(c), the UCMJ would apply to the Texas National Guard AGR serving [at a military school] under Title 32.³⁷

Randall explains that the preliminary issue in applying Article 2(c) of the UCMJ is whether the accused was serving with an armed force. Looking to *Phillips’s* interpretation of what it means to serve with an armed force, a colorable argument can be made that Randall’s hypothetical Texas National Guard soldier fits that mold. “Once this threshold question is satisfied,” Randall writes, “the four-prong analysis set forth in Article 2(c) applies.”³⁸ And, applying Article 2(c)’s four-prong test, Randall concludes that the inferior officer’s service clearly falls under the purview of Article 2(c), despite the fact that such service is in a Title 32 status.³⁹

Overall, the takeaway from Randall’s argument is not that a Title 32 duty National Guardsman *definitively* falls under the purview of Article 2 of the UCMJ, despite his forceful conclusion. It is that the decisions in *Phillips* and *Fry* provide a framework from which we could argue that Title 32 duty National Guardsmen can, and per-

35. *Id.* at 31.

36. *Id.* at 29. Though, as Randall notes, “there is no express prohibition in the UCMJ to such application when the Soldier is performing full time National Guard duty under Title 32.” *Id.* at 31.

37. *Id.*

38. *Id.*

39. *Id.*

haps should, answer to Article 2 of the UCMJ. More importantly, Randall's argument itself provides a sound starting point from which a more comprehensive reform can be developed—at least from the perspective of statutory interpretation. That said, we will return to *Phillips, Fry*, and Randall's argument later. Before we are able to explore the consequences these cases *may* have on the federal duty status of a National Guardsman under Title 32, we should first to turn to other cases with very real effects on the UCMJ's subject matter jurisdiction.

3. The *Solorio* Standard

The most significant case in Article 2 jurisprudence is the Supreme Court's 1987 decision in *Solorio v. United States*.⁴⁰ Richard Solorio was enlisted in the Coast Guard when he was charged under the UCMJ with acts of sexual abuse with the underage daughters of fellow Coast Guardsmen.⁴¹ Solorio committed some of these acts at his private residence—not on-base.⁴² While the military judge “granted Solorio's motion to dismiss for lack of subject matter jurisdiction those offenses that occurred off-base,” the Court ruled that Solorio could in fact be tried by court-martial because he committed the crimes—either civilian or service-based—while on active duty status.⁴³

Prior to *Solorio*, the controlling decision affecting the UCMJ's subject matter jurisdiction was *O'Callahan v. Parker*.⁴⁴ There, the disposition of the Court reflected the language of its observation in *Reid v. Covert* that “every extension of military jurisdiction is an encroachment on the jurisdiction of the civilian courts, and, more important, acts as a deprivation of the right to jury trial and other treasured constitutional protections.”⁴⁵ The Court held that court-martial jurisdiction was limited to crimes that are service-connected—thus limiting the scope of the UCMJ's subject matter jurisdiction that had been in effect for over fifty years.⁴⁶

40. 483 U.S. 435.

41. *Id.* at 437.

42. *Id.*

43. *Id.* at 450–51; *see also* Pottorff, Jr., *supra* note 24, at 29, 32.

44. 395 U.S. 258 (1969).

45. *Reid v. Covert*, 354 U.S. 1, 21 (1957) (cited with approval in *O'Callahan*, 395 U.S. at 272).

46. *O'Callahan*, 395 U.S. at 272; *see also* Fred K. Morrison, *Court-Marital Jurisdiction: The Effect of O'Callahan v. Parker*, 11 WM. & MARY L. REV. 508 (1969). A driving theory behind the Court's decision in *O'Callahan v. Parker* was a concern with preserving the constitutional rights of the accused—being that “civilian courts, in time of peace, with their rights to jury trials, and other safeguards, can and should handle” all non-military related offenses. *See id.*

Holding that the standard for court-martial jurisdiction under Article 2 of the UCMJ “depends solely on the accused’s status as a member of the Armed Forces, and not on the ‘service connection’ of the offense charged,”⁴⁷ the Court in *Solorio* finally returned jurisdiction to the UCMJ, giving prosecutors the power to try offenses committed by members of the Armed Forces off-base.⁴⁸

But what does “status as a member of the Armed Forces” mean for reserve and National Guard members? *Solorio* does not provide a clear answer. Fortunately, a line of cases interpreting *Solorio* provide some contour to an otherwise amorphous doctrine.

The first of these cases, *United States v. Chodara*, makes it clear that the offense must have been committed while the reservist was on active duty.⁴⁹ Following closely on *Chodara*’s heels, *United States v. Cline* holds that jurisdiction attaches at 00:01 hours (12:01 A.M.) of the effective date of the orders to active duty.⁵⁰ And as we saw with *Phillips*, a reservist may be under the purview of Article 2 outside the parameters of her orders—if Article 2’s four part test is satisfied (the person is serving with an armed force and “(1) submitted voluntarily to military authority; (2) met the minimum age and mental qualifications; (3) received pay and allowances; and (4) performed military duties . . .”).⁵¹

Gray areas still exist, however. *United States v. Morse* holds that offenses committed as part of the accused’s official duties may be subject to court-martial jurisdiction even when the accused is no longer on active duty.⁵² There, a reservist falsified travel vouchers after completing travel for an active duty tour.⁵³ The court found that even though the reservist’s active duty travel was complete, his active duty tour was not complete until the travel forms were

at 512 (citing NAT’L SEC. DIV., AM. LEGION, REPORT ON THE UNIFORM CODE OF MILITARY JUSTICE). “The effect of the Court’s decision,” Morrison writes, “was that a court-martial has no jurisdiction that to try a member of the armed forces charged with a crime cognizable in a civilian court and not ‘service-connected,’ committed while on leave, during peacetime, off-post, within the territorial limits of the United States.” *Id.* at 513.

47. *Solorio*, 483 U.S. at 435.

48. See Pottorff, Jr., *supra* note 24, at 29.

49. 29 M.J. 943 (A.C.M.R. 1990); see also *Subject Matter Jurisdiction Over Reservists/National Guard*, GONZALEZ & WADDINGTON, <http://www.ucmjdefense.com/resources/military-extraterritorial-jurisdiction-act-meja/jurisdiction-over-the-offense/subject-matter-jurisdiction-over-reservistsnational-guard.html> (last visited Dec. 6, 2018).

50. 29 M.J. 83 (C.M.A. 1989); see also *Subject Matter Jurisdiction Over Reservists/National Guard*, *supra* note 49.

51. *Subject Matter Jurisdiction Over Reservists/National Guard*, *supra* note 49 (citing *United States v. Phillips*, 58 M.J. 217 (C.A.A.F. 2003)).

52. No. ACM 33566, 2000 WL 1663459 (A.F. Ct. Crim. App. Oct. 4, 2000); see also *Subject Matter Jurisdiction Over Reservists/National Guard*, *supra* note 49.

53. *Morse*, 2000 WL 1663459, at *1.

signed—so Article 2 still attached to his conduct.⁵⁴ Perhaps even more interesting for our purposes is *United States v. Dimuccio*, which holds that a National Guard superior officer performing Title 32 duties has no jurisdiction over an inferior officer, if that inferior officer is performing Title 10 duties.⁵⁵

Independent of the doctrine's lack of clarity, *Solorio* presents a number of constitutional concerns—the same ones that fueled the decision under *O'Callahan*. Military courts are courts of limited jurisdiction.⁵⁶ They afford defendants neither Fifth Amendment grand jury indictment nor Sixth Amendment jury trial protections.⁵⁷ So, does *Solorio* do a constitutional disservice to service members that commit civilian crimes? The *Solorio* majority apparently did not think so. Title 10 mandates that service members are entitled to (1) preliminary investigations, (2) the right to examine the government's evidence and witnesses, and (3) a court-martial panel of at least three when the possible sentence will not exceed six months and a jury of at least five when the sentence is greater than six months.⁵⁸

Whether these protections actually preserve the constitutional rights of military defendants who commit civilian crimes is up for debate. We will revisit these concerns with an eye towards expanding Article 2's subject matter jurisdiction—especially in light of a military that is both transitioning from reliance on active duty forces to reserve and National Guard components⁵⁹—and, as of 2016, incorporating women into all available combat roles.⁶⁰

54. *Id.* at *5; *see also Jurisdiction Over the Reserve Component*, GONZALEZ & WADDINGTON, <http://www.ucmjdefense.com/resources/military-extraterritorial-jurisdiction-act-meja/jurisdiction-over-the-reserve-component.html> (last visited Dec. 6, 2018).

55. 61 M.J. 588 (A.F. Ct. Crim. App. 2005); *see also Subject Matter Jurisdiction Over Reservists/National Guard*, *supra* note 49. Note: this is the converse of the situation offered by T. Scott Randall, who argued that a Title 32 inferior officer could be held liable for disrespectful conduct towards a Title 10 superior officer where the Title 32 soldier satisfies Article 2's four-part test. *See* Randall, *supra* note 25, at 31.

56. *See, e.g.*, Pottorff, *supra* note 24, at 30.

57. *Id.*

58. 10 U.S.C. §§ 831–835 (2018); *id.* § 816.

59. *See* Mark Thompson, *No Strategic Reservation*, TIME (Apr. 19, 2013), <http://nation.time.com/2013/04/19/verbal-attacks-on-strategic-reserve/> (“Ever since the post-9/11 wars put pressure on the U.S. Army for more troops, its reserve forces have effectively become part of the operational Army, and not confined to their traditional role as a so called ‘strategic reserve’ [T]he bottom line is striking: by making the reserves part of the operational forces to wage those wars, the nation essentially more than doubled the size of its operational Army from 480,000 on 9/11 to 1.1 million today Now the reserves want to make that change permanent.”).

60. Women are eligible to apply for up to 220,000 open positions in the military, including combat and elite units like the Army Rangers and Navy SEALs. This would more than double the number of women serving in the military, from 205,000 today. *See* Thom Patterson, *Get Ready for More US Women in Combat*, CNN (Nov. 16, 2016), <http://www.cnn.com/2016/11/10/us/women-combat-us-military/index.html>.

C. *Setting the Stage for Change*

The implications of *Solorio*'s "service member-status" holding are significant for two reasons: (1) America's standing armed forces are transitioning to leaner, cheaper, and more flexible forces consisting of reserve units,⁶¹ and (2) women are now eligible to serve in all combat roles.⁶² With these facts in mind, we can start to unravel the issues at hand.

First, The *Solorio* case and its progeny suggest that Article 2 jurisdiction is triggered if an individual commits an offense while an active member of the armed forces. What does it mean to be on active duty? As we discussed earlier, this means different things for reservists and for National Guardsmen. Reservists are considered on active duty when operating under Title 10. And under Title 10, reservists may be considered active duty status when operating in his or her official active duty, whether an active duty tour has technically yet to start (*Phillips*) or whether it is technically at an end (*Morse*). So too can National Guardsmen be considered active duty status under Title 10. Whether they can be considered active duty status while operating under Title 32 is less clear. On the one hand, the *Phillips*, *Fry*, and *Caputo* cases seem to suggest that room for interpretation exists for whether Article 2 attaches to National Guardsmen so long as Article 2's four-part test is satisfied. The *Dimuccio* case, however, shrinks that room for interpretation—at least, as it applies to circumstances in which a hypothetical Title 32 Officer reprimands a Title 10 (lower) officer. And while *Phillips*, *Fry*, and *Caputo* present interesting lessons in legal interpretation, they alone are not sufficient to support the reforms necessary to solve the problem at hand.

Second, the move towards incorporating more reserve units across all branches of the armed forces means that a greater proportion of the military will consist of both reserve and National Guard members.

And third—because all combat roles are now open to women—it is not unreasonable to expect a greater proportion of those reserve forces to consist of women than before.

Therefore, in order to protect female service members from enduring the harassment and shame of the recent photo scandal (and all other crimes, broadly), two reforms should be explored: (1) comprehensive change in the UCMJ's approach to punishing the distribution of illicit, personal photographs, and (2) compre-

61. See Thompson, *supra* note 59.

62. See Patterson, *supra* note 60.

hensive change in Article 2 subject matter jurisdiction, allowing it to attach to National Guardsmen operating under Title 32 in certain circumstances. The first of these has already been addressed by policy makers, but it is worth revisiting. The second issue—addressing the structural limitations of the UCMJ's subject matter jurisdiction—is what this Note seeks to address.

II. CURRENT STATE OF THE LAW

When looking at the current state of law covering the nonconsensual distribution of illicit photographs, there are three broad categories to consider. First, there is the common law, as seen in *Solorio* and subsequent decisions that deal with the status of a member of the Armed Forces for the purpose of UCMJ Article 2 subject matter jurisdiction. Second, there is the UCMJ itself. Third, there is civilian law, including both federal and state provisions.

We have already examined *Solorio*, its constitutional concerns, and its ramifications for Article 2 subject matter jurisdiction. It bears repeating that the *Solorio* standard is concerned with the accused's status in the Armed Forces—and not with the service-connected nexus of the crime previously established by *O'Callahan*.⁶³ As a result, *Solorio* substantially expanded Article 2's subject matter jurisdiction. But, as we saw with the decisions that followed, what it means to be “a member of the Armed Forces” is an exceptionally narrow inquiry. As a practical matter, being a member of the Armed Forces means being on active duty, as it is understood in a traditional Title 10 context. So even though *Solorio* has returned to courts martial a large degree of power, the ability to try reservists and national guardsmen not currently serving under Title 10 duty is not part of that power.

There is another problem. Even if *Solorio* gave courts martial the power to try reservists and National Guardsmen accused of distributing illicit photographs, the UCMJ itself is ill-equipped to handle these cases. This is because the UCMJ currently constrains military prosecutors to two provisions when trying cases of nonconsensual distribution of illicit photographs: Article 120c and Article 134.⁶⁴ Article 120c, entitled “Other Sexual Misconduct,” suffers from an issue of tailoring. Rather than addressing the nonconsensual distribution of private photos that initially are taken with consent, Article 120c only applies to knowingly photographing, videotaping,

63. See *Solorio v. United States*, 483 U.S. 435, 442–46 (1987) (overruling *O'Callahan* and rejecting its historical analysis).

64. 10 U.S.C. § 920c (2018); *id.* § 934.

filming or recording by any means the private area of another person, without that person's consent.⁶⁵

Article 134 suffers from a different problem: covering actions that prejudice good order and bring discredit to the service, it is actually broad enough to encapsulate the nonconsensual distribution of illicit photographs. But because of the novelty of the nude photo sharing issue (especially over social media) and the privacy concerns it presents (especially given the newly increased role of women in the military), this type of conduct has not been treated as a crime in the past.⁶⁶ This is a problem for prosecutors, because nonconsensual distribution cases rely on fact-dependent evidence, rather than mere persuasion of a military judge.⁶⁷ Without clear, relevant statutory language to point to and without precedent to rely on, prosecutors would be overwhelmed: scrambling to bring a number of these cases to justice.

Recognizing the shortfalls of the traditional protections of Articles 120c and 134 in sexual misconduct cases, and under intense pressure from Congress following the nude photo scandal, the Department of the Navy introduced Article 1168, entitled "Nonconsensual Distribution or Broadcasting of an Image," to its Code of Regulations.⁶⁸ As its name suggests, Article 1168 makes the distribution of intimate photos with the intent to humiliate or harass conduct worthy of administrative or punitive measures.⁶⁹ But Article 1168 applies only to the Navy, not to the other branches of the armed forces.

Civilian federal and state law does not provide military prosecutors much recourse, either. 18 U.S.C. § 2261 bans interstate stalking, domestic violence, and harassment.⁷⁰ But, like Article 120c and Article 134, this section of the U.S. Code is arguably either too narrow or too broad a provision to provide prosecutors with an adequate basis to try these cases. Additionally, federal law would only be applicable where the crime crosses state lines—an additional element that military prosecutors largely lack the resources to prove.

Meanwhile, only thirty-four states currently have "revenge-porn" laws (laws prohibiting the nonconsensual distribution of another's personal, illicit photographs) sufficient to adequately cover the

65. *Id.* § 920c; see also Shane III & Schogol, *supra* note 1.

66. See Shane III & Schogol, *supra* note 1.

67. James Laporta & Rory Laverty, *Why Marines Might Get Away with Sharing Nude Photos*, DAILY BEAST (Mar. 15, 2017), <https://www.thedailybeast.com/why-marines-might-get-away-with-sharing-nude-photos>.

68. *Navy Updates Policy on Wrongful Distribution of Intimate Images*, NAVY.MIL (May 16, 2017, 11:34 AM), http://www.navy.mil/submit/display.asp?story_id=100486.

69. *Id.*

70. Laporta & Laverty, *supra* note 67.

nonconsensual distribution of illicit photographs here.⁷¹ Where there are no revenge-porn laws on the books, prosecutors are forced to try cases using laws against distributing obscene material, and trespassing.⁷² This is especially problematic when service members travel across state lines between civilian and active duty assignments. For example, North Carolina is home to Camp Lejeune—the largest Marine Corps base on the East Coast—and also treats revenge-porn as a felony.⁷³ South Carolina, on the other hand, has no such law on the books.⁷⁴ A Marine Corps reservist, therefore, could act with impunity in distributing illicit photographs of their sister-in-arms while living in South Carolina (or any other state unprepared or unwilling to prosecute those crimes) and escape punishment when serving on an active duty assignment in North Carolina. As long as the perpetrator committed the crime prior to active duty status, the UCMJ has no jurisdiction under Article 2.

Fortunately, there have been positive movements in both the UCMJ and civilian federal law in the months following the nude photo scandal. In April 2017, House Armed Services Committee member Jackie Speier (D-Calif.) noted the structural deficiencies in both Article 120c and Article 134 of the UCMJ, as well as the lack of a comprehensive federal civilian statute to cover the non-consensual distribution of illicit photos.⁷⁵ “That is why,” Speier explained, “a federal law is needed to provide a single, clear articulation of the elements of this crime to ensure that Americans in every part of the country—civilian and military—are protected if they are subjected to this heinous abuse.”⁷⁶ The result of this call to action was that the “Protecting the Rights of Individuals Against Technological Exploitation Act”—the PRIVATE Act—was passed unanimously in the House in May 2017.⁷⁷

The PRIVATE Act makes it a crime for service members to “knowingly and wrongfully” distribute or broadcast “an intimate visual image” of a person who is identifiable either by the image or comments about the image, and who has not given explicit consent

71. *Id.*

72. *Id.*

73. *Id.*; N.C. GEN. STAT. § 14-190.5A (2015).

74. Laporta & Lavery, *supra* note 67.

75. Christina Marcos, *House Passes Bill in Wake of Marine Nude-Photo Scandal*, THE HILL (May 24, 2017), <http://thehill.com/blogs/floor-action/house/334961-house-passes-bill-in-response-to-marine-nude-photo-scandal>.

76. *Id.*

77. Macagnone, *supra* note 14.

for the image to be shared.⁷⁸ Further, the PRIVATE Act states that anyone found in violation of the rules against nonconsensual distribution could be punished as directed by a court-martial, giving military prosecutors the necessary jurisdictional teeth to try these cases under the UCMJ.⁷⁹ It also addresses the potentially fatal flaws of under/over-inclusiveness that characterize Articles 120c and 134 by laying out specific elements of the crime to be charged and clarifying the requisite intent.⁸⁰ As of this writing, the bill still needs to pass the Senate and obtain the president's signature before becoming law.⁸¹

While the PRIVATE Act would be a major step towards filling the gaps in the UCMJ and federal statutory schemes as they pertain to the nonconsensual distribution of illicit photos, it would only solve half of the problem. The other half, as discussed earlier, is a structural limitation of the UCMJ itself, particularly Article 2. Article 2, as influenced by the *Solorio* decision, limits the UCMJ's subject matter jurisdiction to cover the conduct of service members engaged in active duty only.⁸² Reservists not operating under Title 10 and National Guardsmen operating under Title 32 or civilian duty are not covered by the UCMJ⁸³ (although we saw some room for interpretation regarding Title 32).⁸⁴ Now that there is a chance that the PRIVATE Act will establish a specific statutory scheme for prosecuting nonconsensual distribution of illicit photos, action needs to be taken to address the fact that more of our military will (a) consist of reserve components and (b) consist of female service members. Specifically, Article 2 subject matter jurisdiction must expand to include service members, under contract with the armed forces, but not currently on active duty. Failure to do so would render the PRIVATE Act largely impotent, undermine the efforts of policy makers and activists to make our military safer and more effective, and put a substantial amount of our nation's fighting women at risk.

78. Daniella Silva, *House Passes Bill to Ban Nonconsensual Nude Photo Sharing in Military*, NBCNEWS (May 24, 2017), <https://www.nbcnews.com/news/us-news/house-unanimously-passes-bill-ban-nonconsensual-nude-photo-sharing-military-n764361>.

79. *Id.*

80. *Id.*

81. *See H.R. 2052-PRIVATE ACT*, CONGRESS.GOV (May 25, 2017), <https://www.congress.gov/bill/115th-congress/house-bill/2052> (last visited Dec. 6, 2018) (indicating that the bill was referred to the Senate Committee on Armed Services on May 25, 2017, and no action has been taken since).

82. *Solorio v. United States*, 483 U.S. 435, 450–51 (1987).

83. 10 U.S.C. § 802(a) (2018); *id.* § 101(d)(1).

84. *See* Randall, *supra* note 25, at 31.

III. REFORM

There are two conceivable solutions to this problem. First, courts could adopt an interpretation of Article 2(c)'s four-part test that would apply to both reservists operating under Title 10 duty and National Guardsmen operating under Title 32. This would bring a large swath of soldiers not currently covered by Article 2's subject matter jurisdiction under the purview of the UCMJ, making them answerable to the provisions of PRIVATE. The second option involves expanding—by congressional amendment—the subject matter jurisdiction of Article 2 to apply, under certain circumstances, to all reservists and Guardsmen currently serving out their contracts, regardless of whether they are operating under Title 10 or 32 duty.

First, as we saw in his hypothetical about a Title 32 National Guard officer being held liable under the UCMJ for disrespecting a superior Title 10 officer, T. Scott Randall believes that adopting a broader interpretation of Article 2's four-part test is well within the realm of possibility.⁸⁵ In coming to his conclusion, Randall looked primarily to *United States v Fry*. Randall observed that the *Fry* court “spent a considerable amount of time discussing the first clause of Article 2(c)” and whether its “broad language . . . would cover a National Guard Soldier serving in a full-time National Guard status under Title 32.”⁸⁶ “The court’s analysis of the ‘[n]otwithstanding any other provision of law’ provision,” Randall notes, “was decisive in reaching the conclusion that it was not bound by” state law.⁸⁷ Randall further argues that the *Fry* court’s interpretation of the “‘notwithstanding’ clause was a clear expression of congressional intent that all state and federal law is preempted or superseded with respect to Article 2(c)” and that “this would presumably include any prohibition in applying the UCMJ to Title 32 Soldiers serving in a full-time National Guard status”—so long as Article 2(c)'s four factors were fulfilled.⁸⁸

Although such an interpretation is appealing for its clarity, there are some problems. The first is an issue of line drawing; if courts were to take such an expansive position on the interpretation of Article 2's “notwithstanding” clause, it would render the differenti-

85. *See id.*

86. *Id.*

87. *Id.*

88. *Id.*; *see also* *United States v. Phillips*, 56 M.J. 843, 846 (A.F. Ct. Crim. App. 2002) (“Article 2(c) extends jurisdiction to persons serving with an armed force who: (1) submitted voluntarily to military authority; (2) met the mental competence and minimum age qualifications . . . ; (3) received military pay or allowances; and (4) performed military duties.”), *aff'd*, 58 M.J. 217 (C.A.A.F. 2003).

ation between Title 32 and Title 10 duty pointless. Any time a National Guardsmen were called to Title 32 duty, for purposes of Article 2, he or she would be treated as if they were on active duty under Title 10. This brings up far more complex concerns of federalism, since National Guardsmen on Title 32 duty are under the control of the state, not the federal government. Practically speaking, such an interpretation would not change the fact that the governor maintains control over Title 32 Guardsmen.⁸⁹ But then we are presented with the issue of a governor exercising commander in chief powers, while the soldiers utilized in that capacity are removed from the state courts' subject matter jurisdiction.

This would put governors in the difficult position of having to ask Title 32 Guardsmen to help faithfully execute the laws of the state—laws which would not protect the soldiers if they were charged with a crime during the course of their duty. Second, any time a Title 32 Guardsman were to commit a newsworthy crime against a civilian, there may be widespread frustration with the fact that it is a panel of military judges, and not a jury of the soldier's peers, deciding his or her fate. Worse still, this proposed remedy would do nothing to encourage the creation of a nonconsensual distribution statute at the state level, or indeed any other statutory reform aimed at addressing the dual trends of increased participation of reserve soldiers and women in our military. Because Title 32 Guardsmen would be treated under the law as Title 10 reservists, it is not unreasonable to assume that the resource-strapped states would leave such reformatory matters to the federal government. It is also not unreasonable to think that the states would choose not to enforce such provisions even if they were on the books—finding instead that the benefits of National Guard enlistment outweigh vindication of the victims.

But the biggest problem with this idea—and most relevant for our purposes—is that such an interpretation of Article 2 only gets us seventy-five percent of the way to a comprehensive solution. Because if courts were to interpret Article 2(c)'s four-part test as applying to both reservists operating under Title 10 duty and National Guardsmen operating under Title 32, presumably this would not include those soldiers who are currently serving their contract with the armed forces but not engaged in any sort of military duties. That is, all reservists and National Guardsmen not operating under Title 10 (or, as argued above, Title 32) would still not be covered by Article 2 of the UCMJ. That being the case, we are left with a UCMJ whose subject matter jurisdiction would cover more individ-

89. 32 U.S.C. § 328 (2018).

uals than it currently does under the *Solorio* line of cases, but would not even cover the nonconsensual distribution of illicit photographs committed by many of the “Marines United” members. Such investigations and prosecutions would be left to the state, instead, which, as we just discussed, likely would not occur even if the state had a nonconsensual distribution law on the books. The upshot here is that even with the potential benefits accompanying expanded UCMJ subject matter jurisdiction, we still largely end up in the same position where we started.

The second option for reform—a congressional amendment expanding the subject matter of Article 2—is not merely wishful thinking. In 1986, Congress amended Article 2 of the UCMJ to reflect the armed forces status-standard of the *Solorio* decision.⁹⁰ The more difficult component of this reform would be the move away from *Solorio*'s bright line standard and determining both which crimes and circumstances should apply for purposes of Article 2 subject matter jurisdiction. That is ultimately outside the scope of this Note. What this Note hopes to show, though, is that the foundation for such a reform is sound, particularly as it pertains to the nonconsensual distribution of illicit photographs of fellow service members. There are two reasons for this.

First, there are fewer concerns over the lack of Fifth and Sixth Amendment protections for part-time service members brought into military court than full-time civilians. Like their active duty counterparts, Guardsmen and reservists alike are contracted members of the armed forces. From a theoretical perspective, opening up part-time service members to liability under court-martial simply extends the logic of *Solorio*'s return to status-based subject matter jurisdiction from *O'Callahan*'s service-connected subject matter jurisdiction. Not only that, but service members are entitled by law to (1) preliminary investigations, (2) the right to examine the government's evidence and witnesses, and (3) a court-martial panel of at least three when the sentence will not exceed six months and a

90. See MANUAL FOR THE COURTS-MARTIAL, UNITED STATES A21-10 (1987), https://www.loc.gov/frd/Military_Law/pdf/MCM_1984-change3.pdf (“1986 Amendment: [P]aragraph (5) was added to reflect amendments to Articles 2 and 3 of the UCMJ contained in the ‘Military Justice Amendments of 1986,’ tit. VIII, § 804, National Defense Authorization Act for fiscal year 1987, Pub. L. No. 99-661, ___ Stat. ____, ____ (1986), which, among other things, preserves the exercise of jurisdiction over reservists for offenses committed in a duty status, notwithstanding their release from duty status, if they have time remaining on their military obligation. The legislation also provides express statutory authority to order reservists, including members of the National Guard of the United States and the Air National Guard of the United States who commit offenses while serving on duty under Title 10 of the United States Code, to active duty for disciplinary action, including the service of any punishment imposed.”).

jury of at least five when the possible sentence is greater than six months, under Article 2 of the UCMJ.⁹¹

Practically speaking, the men and women of the reserve components do not cease to be soldiers just because they are not deployed or serving on active duty status under Title 10. Not only do they represent their respective branches, whether deployed or stateside, for the entirety of their contract (some would say that they represent their branch for the rest of their lives), but more to the point, their conduct reflects upon each of their brothers and sisters in arms. And it was exactly this distribution of accountability that made the 2017 nude photo scandal so stomach-churning for so many members of the armed forces.⁹² Accordingly, there is strong extralegal support for the argument that reservists should be held to the same standards as their active duty brethren for the specific crimes enumerated under the UCMJ.

There are, of course, complicated legal and political issues associated with this position, some of which were enumerated earlier in this section. The biggest issue here is the idea of depriving reservists of their civilian status once they sign their contract, totally removing their recourse to civilian laws and protections. But that is not what this position presupposes. Instead, under these circumstances, the UCMJ would only be expanded to include (1) discrete crimes (such as consensual distribution of illicit photographs); (2) occurring under certain circumstances (when those photographs are of a fellow soldier currently serving out his or her contract); (3) that are of significance towards serving out a military contract with honor; and (4) may otherwise go unpunished in civilian courts. Any crimes not specifically enumerated under the UCMJ would remain outside military jurisdiction. Whether additional acts of misconduct should fit the criteria above and be included in the UCMJ would be a decision left to Congress. For illustrative purposes, however, a list might include both non-physical acts of domestic violence or abuse between amorous service members and non-sexual harassment of a fellow service member that rises to the level of requiring a protective order.

91. 10 U.S.C. §§ 831–835 (2018); *id.* § 816.

92. See, e.g., *US Marines Get Social Media Tips After Nude Photos Scandal*, BBC (Mar. 20, 2017), <https://www.bbc.com/news/technology-39326669> (quoting Marine General Robert Neller as saying that “Marines . . . must avoid actions online that threaten the morale, operational readiness and security, or public standing of their units, or that compromise our core values . . .”); *Lawmakers Decry Degrading Marine Corps Nude Photo Scandal*, CBS NEWS (Mar. 6, 2017), <https://www.cbsnews.com/news/marine-corps-rocked-by-nude-photo-scandal> (quoting Marine Corps Sergeant Major Ronald L. Green as saying that “[N]o person should be treated this way. [Nonconsensual distribution of illicit photographs] is inconsistent with our core values, and it impedes our ability to perform our mission.”).

Second, and related to the concern over lack of Fifth and Sixth Amendment protections, is the concern that such an amendment might overwhelm military courts. Dealing with a far greater case load than they could handle, the worry is that military courts would pass the costs to the defendants in the form of hasty trials and harsh sentences. But not all crimes must be punishable by courts martial, and not all crimes should warrant harsh sentences. The Manual for Courts-Martial empowers commanding officers to render administrative punishments for minor offenses without resorting to a court-martial.⁹³ Specifically, the Manual enables commanding officers to investigate the facts of the incident, make a determination as to whether the offense is minor (and thus not requiring a court-martial), and conduct a hearing for the accused.⁹⁴

In the case of nonconsensual distribution, therefore, administrative punishment might be an appropriate response for first-time offenders. Administrative punishments in this instance could, for example, range from reassignment to a different unit, to a change in one's occupation specialty, to a demotion of rank altogether. And because administrative punishment does not infringe upon the defendant's liberty interests, we have less cause to worry about their diminished Fifth and Sixth Amendment protections. Not only that, but because administrative hearings are extralegal in nature and can be conducted outside of a military court room, we do not have to worry about overloading the courts martial system in the process of adjudicating acts of misconduct such as nonconsensual distribution of illicit photographs.

CONCLUSION

In the end, whether this particular reform is the best of all possible solutions is not of the utmost importance; it is one of many potential solutions. Rather, the purpose of this Note is to call attention to the problem itself and foster debate about how we want to proceed as a nation. Our military is not only among the highest regarded and most trusted institutions in America, but it is one of the most visible ways we present ourselves to the world. As we increasingly turn to our reserve forces to help maintain our commitments world-wide, and as our reserve forces increasingly turn to women to play a larger role in that mission, it is critical that we

93. See JOINT SERV. COMM. ON MILITARY JUSTICE, MANUAL FOR COURTS-MARTIAL UNITED STATES V 1(d)(3)(e) (2016), <https://jsc.defense.gov/Portals/99/Documents/MCM2016.pdf?ver=2016-12-08-181411-957>.

94. *Id.*

take every effort to protect our warrior women while they risk their lives to protect us.