WHERE THE PERSONAL JURISDICTION ENDS: A BRIGHT-LINE RULE FOR DETERMINING WHEN THE MILITARY LOSES *IN PERSONAM* JURISDICTION

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The Founders envisioned the army as a necessary institution, but one dangerous to liberty if not confined within its essential bounds.[1]

I. Introduction

The Court of Appeals for the Armed Forces (CAAF) has struggled with personal jurisdiction for over thirty years. As it most recently acknowledged in *United States v. Christensen*, "the [Uniform Code of Military Justice (UCMJ)] does not state when a servicemember's discharge from the armed forces becomes effective for jurisdictional purposes, and thus does not specifically address when a servicemember is no longer subject to being court-martialed."[2] In fact, it is often difficult to determine the exact moment when *in personam* court-martial jurisdiction ends.[3] The CAAF recognizes as black-letter law that a court-martial loses jurisdiction upon a Soldier's discharge absent some specific "saving

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[1] Reid v. Covert, 354 U.S. 1, 23-24 (1957).

[2] United States v. Christensen, 78 M.J. 1, 4 (C.A.A.F. 2018).

[3] *See id.* at 6 (Maggs, J., concurring) ("In many cases, however, determining when a discharge has occurred is difficult.").

circumstance or statutory authorization."[4] The court has relied on two statutes, 10 U.S.C. §§ 1168(a) and 1169 (2012), to guide its judge-made law in this area.[5] This reliance led to the creation of a three-part test that determines when personal jurisdiction over a service member ends.[6] The court requires (1) "delivery of a valid discharge certificate"; (2) "a final accounting of pay"; and (3) the undergoing of a "clearing process required under appropriate service regulations."[7]

The stakes for correctly articulating the law on this issue are high. After *Christensen*, CAAFlog—a military-justice blog—identified personal jurisdiction as the number four Military Justice Story of 2018 in its annual ranking of headline-making cases, illustrating the intense discussion it generated among the military's legal practitioners.[8] Valid military discharges serve as the line of demarcation from military to civilian status.[9] Since the UCMJ does not define this point exactly, practitioners need clear guidance before expending the significant resources involved in prosecuting and defending a court-martial of an individual whom the military no longer has jurisdiction to prosecute. Nothing less than an individual's liberty is at stake. The CAAF's three-part test has proved challenging for the field as evidenced by the court's frequent foray into this area of the law.[10] This article offers a simple solution: personal jurisdiction ends at 2400 on the date of a valid, approved discharge certificate.

This article consists of four substantive parts. Part II reviews the history and foundation of court-martial jurisdiction, providing a framework for an analysis of the CAAF's law on personal jurisdiction. This portion of the article begins with an overview of military jurisdiction before analyzing the Due Process Clause of the Fifth Amendment and Article I's Make Rules Clause. Both of these constitutional components

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[4] *Id*. at 4 (quoting United States v. Howard, 20 M.J. 353, 354 (C.M.A. 1985)).
[5] *See* United States v. King, 27 M.J. 327, 329 (C.M.A. 1989) (citing §§ 1168(a) and 1169).
[6] *See id*. ("We read these statutes as generally requiring that three elements be satisfied to accomplish an early discharge.").
[7] *Id*.
[8] Zachary D. Spilman, *Top Ten Military Justice Stories of 2018 - #4: A New Paradigm for Discharge from Active Duty*, CAAFLOG (Jan. 2, 2019), http://www.caaflog.com/category/year-in-review/top-ten-stories-of-2018/ (characterizing *Christensen* as a "dramatic reversal").
[9] *See* discussion *infra* Part II.
[10] *See* discussion *infra* Part III.

are featured prominently in any understanding of a court-martial's reach. Part II also discusses the relevant Supreme Court precedents, discussing why these decisions underscore a more narrow view of a court-martial's jurisdiction.[11] Ultimately, this section provides the constitutional backdrop of the CAAF's law on court-martial jurisdiction.

Part III analyzes the development of the CAAF's jurisprudence on when personal jurisdiction ends, starting with the court's landmark decision in 1985.[12] This Part analyzes *Howard* and its progeny, focusing on the court's reasoning and analysis of *in personam* jurisdiction. This section also examines the CAAF's most recent retreat from its test in *United States v. Nettles* in 2015 and *Christensen* in 2018.[13] Notably, this article does not address when the military loses *in personam* jurisdiction as a result of court-martial punishment, desertion, or fraudulent separation. These specific areas of personal jurisdiction have spawned their own jurisprudence. Rather, this article focuses on a service member's discharge prior to their expiration of term of service (ETS).[14]

Part IV provides a critical analysis of the CAAF's current three-part test. The test, based on sections 1168(a) and 1169, has proved difficult in practice for the court to apply—as the CAAF seemingly acknowledged in *Nettles* and *Christensen*.[15] Part IV critiques each part of the test,

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[11] *See* discussion *infra* Part II. *See generally* Kinsella v. United States *ex rel.* Singleton, 361 U.S. 234 (1960); Reid v. Covert, 354 U.S. 1 (1957); United States *ex rel.* Toth v. Quarles, 350 U.S. 11 (1955).

[12] *See* United States v. Howard, 20 M.J. 353, 354 (C.M.A. 1985) ("Discharges are governed by 10 U.S.C. § 1168(a).").

[13] *See* United States v. Christensen, 78 M.J. 1, 4-5 (C.A.A.F. 2018) (noting that §§ 1168(a) and 1169 serve as guidance and are not binding); United States v. Nettles, 74 M.J. at 291 ("[W]e decline to employ the 10 U.S.C. § 1168(a) framework here.").

[14] Although cases involving court-martial sentences do occasionally implicate the CAAF's three-part test. In *United States v. Watson*, 69 M.J. 415 (C.A.A.F. 2011), the CAAF reversed the Army Court of Criminal Appeals (ACCA), finding the accused had received a valid administrative discharge. This discharge remitted her dismissal, which had not been executed when Human Resources Command approved the administrative discharge. *See id.* at 416 (citing *Steele v. Van Riper*, 50 M.J. 89, 91-92 (C.A.A.F. 1999)) ("A post-trial administrative discharge operates to remit the unexecuted punitive discharge portion of an adjudged court-martial sentence."). The court did apply its three-part test, noting the only issue was "whether the Army issued Appellant a valid discharge certificate." *See id.* at 417.

[15] *See* discussion *infra* Part III.C.

concluding that the CAAF's reliance on personnel statutes is misplaced and inconsistent with the legislative history and purposes of sections 1168(a) and 1169.[16] Overall, the current jurisprudence fails to provide straightforward guidance to the field, and the *Nettles* "reason or policy" gloss fails to adequately address the shortcomings of the test.[17] Consequently, a wholesale change is necessary.

Part V proposes a solution: personal jurisdiction for active-duty service members ends at 2400 on the date of a valid discharge certificate. This bright-line rule construes personal jurisdiction narrowly and provides a workable test for practitioners in the field. The CAAF should acknowledge that *Howard* was a "wrong turn" in its jurisprudence and chart a new way forward.[18] Part V advocates for a simple approach that is not dependent on delivery of a Department of Defense (DD) Form 214, military finance, or clearing a military post—the three elements of the current test. Without the action of Congress or the Service Secretaries, the CAAF should modify the three-part test. The court's case law on valid discharges is robust enough to weed out possible hitches, including fraud, reenlistments, and other potential pitfalls that might stymie a bright-line rule.[19] This article's proposed test would provide judge advocates and commanders the guidance they crave and will eliminate the many issues they face in determining the precise reach of a court-martial.

II. A Limited Court: The Scope of Court-Martial Jurisdiction

A. An Overview of Court-Martial Jurisdiction

Courts-martial are a limited criminal court for service members.[20] Section 8, Article I, of the U.S. Constitution authorizes Congress to regulate the armed forces, which it did in the form of the UCMJ.[21] The

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[16] *See* discussion *infra* Part IV.

[17] *See Nettles*, 74 M.J. at 291 (finding that the requirements of § 1168(a) are not binding).

[18] *See* discussion *infra* Part III.C.

[19] *See* discussion *infra* Part V.

[20] *See* DAVID A. SCHLUETER, MILITARY CRIMINAL JUSTICE: PRACTICE AND PROCEDURE § 4-2(A), at 201 (9th ed. 2015) ("Courts-martial are solely disciplinary, or penal, in nature.").

[21] *Id.* § 4-1, at 201 ("Congress, with its constitutional mandate, has provided 'jurisdiction' articles in the [UCMJ].").

UCMJ serves as the subject-matter jurisdiction for military tribunals—the laws Soldiers must follow while serving.[22] The UCMJ is not geographically specific; courts-martial have worldwide jurisdiction for offenses service members commit.[23] This feature is critically important since the military's criminal code serves as a disciplinary tool for commanders whose units deploy worldwide in defense of the Nation.[24]

As a "creature of statute," courts-martial depend upon certain jurisdictional hooks to function—none more important than personal jurisdiction.[25] *In personam* jurisdiction boils down to status: is the individual a Soldier or a civilian?[26] For the majority of cases, the answer is clear. At the margins, however, questions can, and do, arise. Jurisdiction attaches once an individual joins the military and transitions from civilian to Soldier.[27] This article does not address jurisdictional inception, which has its own unique jurisprudence from the CAAF.[28] Likewise, wartime operations have raised interesting questions regarding jurisdiction over "persons serving with or accompanying an armed force in the field"; for example, civilian contractors on the battlefield.[29] This article does not tackle that matter.

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[22] FRANCIS A. GILLIGAN & FREDRIC I. LEDERER, COURT-MARTIAL PROCEDURE § 2-31.00, at 2-39-40 (4th ed. 2015) ("The test for subject matter jurisdiction in the armed forces today may be simply stated: a service member may be tried for any offense criminalized by the Uniform Code of Military Justice.").

[23] SCHLUETER, *supra* note 20, § 4-2(A), at 201 (noting "the [UCMJ] applies in all places").

[24] *See* Curry v. Sec'y of Army, 595 F.2d 873, 880 (D.C. Cir. 1979) ("The provisions of the UCMJ with respect to court-martial proceedings represent a congressional attempt to accommodate the interests of justice, on the one hand, with the demands for an efficient, well-disciplined military, on the other."); *see also* GILLIGAN & LEDERER, *supra* note 22, § 1-30.00, at 1-5-9 (discussing discipline versus justice in the context of the military-justice system).

[25] *See* SCHLUETER, *supra* note 20, § 4-2(B)-(C), at 201-02 (citing McClaughry v. Deming, 186 U.S. 49 (1902)) (discussing court-martial jurisdiction).

[26] *Id.* § 4-4, at 206 (citing Toth v. Quarles, 350 U.S. 11 (1955)) ("Personal jurisdiction is a question of 'status.'").

[27] *Id.* § 4-5(A)(1), at 207 ("A change of status, from civilian to service member, occurs when an individual enters military service.").

[28] *See id.* § 4-5, at 207-15 (discussing the variety of ways in which a civilian can become a service member).

[29] *See id.* § 4-7, at 220-25 (citing UCMJ art. 2(a)(10) (2016)) (analyzing the limited circumstances when courts-martial have jurisdiction over civilians); Major Aimee M. Bateman, *A Military Practitioner's Guide to the Military Extraterritorial Jurisdiction Act in Contingency Operations*, ARMY LAW., Dec.

Rather, this article focuses on the termination of jurisdiction. This inquiry requires a particular focus since numerous categories of armed-forces personnel exist. The generally accepted rule is that a discharge severs jurisdiction and changes a Soldier's status to that of a civilian.[30] The military courts have carved out different jurisdictional rules for continuing jurisdiction,[31] reenlistments,[32] fraudulent discharges,[33] deserters,[34] retirees,[35] and sentenced prisoners.[36] However, this article cannot delve into the intricacies and nuances of each of those unique categories, including the rather complex jurisdictional web for National Guard and Reserve Component Soldiers.[37] It will certainly touch on those topics when relevant (and, in particular, when case law implicates the specific issue analyzed in this article). This article, however, addresses the best legal test to determine when personal jurisdiction ends for the "early discharge" of an active-duty service member.[38]

2012 at 4, 4-6 (discussing the prosecution of Department of Defense (DoD) civilian contractors under the Military Extraterritorial Jurisdiction Act of 2000).

[30] GILLIGAN & LEDERER, *supra* note 22, § 2-22.10(b)(1), at 2-15 ("Status as an active-duty servicemember, and hence court-martial jurisdiction over such persons, ordinarily terminates with the delivery of a valid discharge certificate or separation order.").

[31] *See* SCHLUETER, *supra* note 20, § 4-8(B), at 226-27 (discussing the nuances of continuing jurisdiction); Martin H. Sitler, *The Court-Martial Cornerstone: Recent Developments in Jurisdiction*, ARMY LAW., Apr. 2000, at 2, 6-8 ("Although an exception to the general rule that a discharge terminates jurisdiction, the concept of continuing jurisdiction applies to a limited situation—post-conviction to sentence execution.").

[32] *See* SCHLUETER, *supra* note 20, § 4-8(D)(2), at 230-31 (discussing reenlistment discharges).

[33] *See* GILLIGAN & LEDERER, *supra* note 22, § 2-22.10(c)(3), at 2-23-24 (noting that a "fraudulently obtained discharge or separation is not a bar to court-martial jurisdiction").

[34] *See id.* § 2-22.10(c)(4), at 2-24-25 (discussing Article 3(c) of the UCMJ).

[35] *See id.* § 2-22.30, at 2-28-33 (discussing jurisdiction over retired personnel).

[36] *See id.* § 2-22.10(c)(2), at 2-23 (explaining that jurisdiction exists over service members sentenced to a discharge as a result of a court-martial conviction).

[37] *See* Tyler J. Harder, *Recent Developments in Jurisdiction: Is This the Dawn of the Year of Jurisdiction?*, ARMY LAW., Apr. 2001, at 2, 7 ("The jurisdictional relationship between the active component, the reserve component, and the National Guard is confusing for many and sometimes can be difficult to apply.").

[38] *See* United States v. Harmon, 63 M.J. 98, 101 (C.A.A.F. 2006) (emphasis added) (citing United States v. King, 27 M.J. 327, 329 (C.M.A. 1989)) ("To effectuate an *early discharge*, there must be: (1) a delivery of a valid discharge

B. Discharges: Winthrop, DD Form 214s, and the Army's Regulations

The military's highest appellate court recognizes as black letter law "that *in personam* jurisdiction over a military person is lost upon his discharge from the service, absent some saving circumstance or statutory authorization."[39] The nuance of "upon his discharge" created a complex maze of case law that resulted in more questions than answers.[40] William Winthrop, the illustrious legal scholar on military law, dedicated a few pages of his famous *Military Law and Precedents* to discharges, through analysis of the Fourth Article of the Articles of War—the military code that served as a precursor to the UCMJ.[41] The Fourth Article commanded that:

> No enlisted man, duly sworn, shall be discharged from the service without a discharge in writing, signed by a field officer of the regiment to which he belongs, or by the commanding officer when no field officer is present; and no discharge shall be given to any enlisted man before his term of service has expired, except by order of the President, the Secretary of War, the commanding officer of a department, or by sentence of a general court-martial.[42]

Winthrop recognized discharges as "the act of the United States through its official representative," noting that "there should be a delivery to the soldier of the written form in order to give effect to the discharge."[43] Winthrop acknowledged that a service member "shall receive an instrument of discharge in writing, signed by a commanding or other

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certificate; (2) a final accounting of pay; and (3) the undergoing of a 'clearing' process as required under appropriate service regulations to separate the member from military service.").

[39] United States v. Howard, 20 M.J. 353, 354 (C.M.A. 1985).

[40] *See* SCHLUETER, *supra* note 20, § 4-8(D), at 230-36 (discussing the exceptions to the general rule for when personal jurisdiction terminates).

[41] William Winthrop, Military Law and Precedents 547-52 (2d ed. 1920).

[42] *Id.* at 547.

[43] *Id*. at 548.

specified officer."[44] This requirement arguably persists to this day in the form of the DD Form 214.[45]

Each Soldier discharged from the service will receive a DD Form 214.[46] Army Regulation (AR) 635-5, *Separation Documents*, governs how to complete the DD Form 214 while AR 635-200, *Active Duty Enlisted Administrative Separations*, dictates how they are issued for enlisted personnel.[47] Army Regulation 635-200 provides that—with a few limited exceptions—"[t]he discharge of a Soldier ... is effective at 2400 on the date of notice of discharge to the Soldier."[48] Army Regulation 600-8-24, *Officer Transfers and Discharges*, governs officer discharges, but does not specify an exact time when discharges become effective.[49] Importantly, AR 635-200 points out that notice to the Soldier of the discharge may be either actual or constructive.[50]

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[44] *Id*.

[45] *See* Dep't of Defense, Form 214, Certificate of Release or Discharge from Active Duty (1 Aug. 2009); DoD Forms Management Program, Certificate of Release or Discharge from Active Duty, EXECUTIVE SERVICES DIRECTORATE, https://www.esd.whs.mil/Directives/forms/dd0001_0499/ (last visited Mar. 14, 2019) (noting that it is a controlled form). It is important to note that officers can receive a DD Form 256A when the characterization of service is honorable; however, "[a] DD Form 214 ... will be furnished as prescribed in AR 635-5 to an officer who is separated from [Active Duty (AD)] after completing 90 calendar days of continuous AD." U.S. DEP'T OF ARMY, REG. 600-8-24, OFFICER TRANSFERS AND DISCHARGES para. 1-22 (12 Apr. 2006) (RAR 13 Sept. 2011) [hereinafter AR 600-8-24] (discussing the types of discharges for officers); *see also* U.S. DEP'T OF ARMY, REG. 135-175, SEPARATION OF OFFICERS para. 1-7, 4-1(d) (29 Nov. 2017) [hereinafter AR 135-175] (discussing discharges for Reserve and National Guard Soldiers).

[46] U.S. DEP'T OF ARMY, REG. 635-200, ACTIVE DUTY ENLISTED ADMINISTRATIVE SEPARATIONS para. 3-1 (19 Dec. 2016) [hereinafter AR 635-200] ("Section 1168, Title 10, United States Code provides that a discharge certificate or certificate of release from active duty will be given to each Soldier of the Army upon discharge from the Service or release from AD.").

[47] *Id*. at para. 3-2 (citing U.S. DEP'T OF ARMY, REG. 635-5, SEPARATION DOCUMENTS (15 Sept. 2000) [hereinafter AR 635-5]) ("Instructions for the completion of the various types of discharge certificates are in AR 635-5. The issuance of discharge certificates is governed by this regulation.").

[48] *Id*. at para. 1-29(a)(1)-(2), (c).

[49] *See* AR 600-8-24, *supra* note 45, para. 1-22 (noting the separate characterizations for an officer's service).

[50] AR 635-200, *supra* note 46, para. 1-29(d) (noting that notice may be either actual or constructive).

Similarly, Winthrop explained that the Fourth Article required delivery of the discharge certificate to the service member, acknowledging that notice could be either personal or constructive.[51] He even distinguished between the types of discharges.[52] He recognized a distinction between discharge by sentence of a court-martial and discharge by order of a military official.[53] The former manifesting a punitive separation from the military while the latter reflected the end of a service member's contract.[54] This article focuses on the latter, but acknowledges *supra* Part II.A that punitive discharges have spawned their own jurisprudence from the military's courts.[55]

In today's armed services, a service member's discharge manifests itself most prominently in the form of the DD Form 214.[56] Winthrop concluded that a "discharge is ... final in detaching the recipient absolutely from the army under the enlistment to which it relates, and, so far, from military jurisdiction and control, and, (thus far also,) remanding him to the status and capacity of a civilian."[57] Thus, a legally effective discharge determines when the military loses personal jurisdiction over a service member.[58]

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[51] WINTHROP, *supra* note 41, at 548.
[52] *Id*. at 549.
[53] *Id*.
[54] *Id*.
[55] *See* discussion *supra* Part.II.A; *see also* Marty Sitler, *The Top Ten Jurisdiction Hits of the 1998 Term: New Developments in Jurisdiction*, ARMY LAW., Apr. 1999, at 2, 6 (discussing United States v. Keels, 48 M.J. 431 (C.A.A.F. 1998)). Sitler notes the holding in *Keels:* that the publication of the court-martial sentence alone does not terminate personal jurisdiction while the appeals process is still pending; rather, the CAAF applied the three-part test to determine the accused was still subject to court-martial jurisdiction. *Id.*
[56] *See* discussion *supra* Part II.B.
[57] WINTHROP, *supra* note 41, at 550.
[58] It is worth noting that there is no "unconditional right to be discharged" upon a Soldier's expiration of her ETS. Smith v. Vanderbush, 47 M.J. 56, 57 (C.A.A.F. 1997) ("As a general matter, members of the armed forces do not have an unconditional right to be discharged upon their ETS."). The military has the authority to retain a Soldier past her ETS. *See id*. at 57-58 (recognizing the military's authority to retain a Soldier past her ETS as a "longstanding feature of military law"). Winthrop acknowledged as much, and the CAAF has held that military status does not end on the date of a Soldier's ETS. *See* United States v. Poole, 30 M.J. 149, 151 (C.M.A. 1990) (holding "that jurisdiction to court-martial a servicemember exists despite delay—even unreasonable delay—

C. The Anchor of Personal Jurisdiction: The Fifth Amendment

Personal jurisdiction reflects a court's inherent power.[59] With respect to courts-martial, this power must be circumspect since the Founders established Article III tribunals to serve the primary judicial role in American society.[60] Article III tribunals contain the full panoply of bill-of-rights protections, something applied differently in courts-martial.[61] Any jurisprudential test that implicates the dividing line between military and civilian status must respect that reality. The following two Parts provide an overview of the foundational law on court-martial jurisdiction, starting with the Due Process Clause of the Fifth Amendment and concluding with the Make Rules Clause of Article I.

The Fifth Amendment commands that "[n]o person shall ... be deprived of life, liberty, or property, without due process of law."[62] This clause constrains a court's power to exercise its authority—or jurisdiction—over an individual.[63] The Due Process Clause "sets the floor for personal jurisdiction, but statutes and other sources provide the

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by the Government in discharging that person at the end of an enlistment"); WINTHROP, *supra* note 41, at 90 (noting that Soldiers may be brought to trial if the command withheld their discharge). The military, therefore, has the ability to exercise court-martial jurisdiction over a service member as long as she occupies the proper status. *See Vanderbush*, 47 M.J. at 58 ("Court-martial jurisdiction exists to try a person as long as that person occupies a status as a person subject to the code." The court is quoting the Rule for Courts-Martial (RCM) 202 discussion.).

[59] *See* SCHLUETER, *supra* note 20, at § 4-1 ("At the very heart of any court-martial lies the requirement of jurisdiction—the power of a court to try and determine a case and to render a valid judgment."); *see also* SUZANNA SHERRY & JAY TIDMARSH, ESSENTIALS CIVIL PROCEDURE 137 (Vicki Been et al. eds., 2007) ("Personal jurisdiction concerns the scope of a court's power to issue a *judgment* that binds a party and is enforceable against that party anywhere in the country.").

[60] *See* United States *ex rel*. Toth v. Quarles, 350 U.S. 11, 19-22 (1955) (emphasizing the importance of "Bill of Rights safeguards" for civilians).

[61] *See* Parker v. Levy, 417 U.S. 733, 758 (1974) (noting that First Amendment protections require "a different application" in the military context).

[62] U.S. CONST. amend. V.

[63] SHERRY & TIDMARSH, *supra* note 59, at 137-38 (discussing the Due Process Clause's limits on a court exercising jurisdiction).

implementation."[64] This central idea "that a court does not have unlimited authority over every person predates the adoption of either the Fifth Amendment or the Fourteenth Amendment."[65] It finds its origins in English common law.[66] As a result, the Supreme Court's "personal jurisdiction jurisprudence has always been anchored in due process."[67]

The Fifth Amendment Grand Jury Indictment Clause specifically excepts cases "arising in the land or naval forces."[68] Consequently, a military court cannot reach beyond its legitimate authority without running afoul of the Constitution's requirement to secure an indictment. This manifests as a prohibition against subjecting civilians to courts-martial absent very specific circumstances.[69] As a result the line of demarcation between military and civilian implicates legitimate constitutional concerns.[70] These concerns should inform the CAAF's three-part test for determining when a court-martial no longer has *in personam* jurisdiction over a service member. The Fifth Amendment is the floor from which the court should begin when determining the line between military and civilian.

D. The Make Rules Clause and Its Relationship to Personal Jurisdiction

The Make Rules Clause of the Constitution grants Congress the power "[t]o make Rules for the Government and Regulation of the land and naval Forces."[71] This Article I authority permits Congress to pass laws that regulate the armed forces. In the last seventy years, the Supreme Court has "carefully policed the constitutional boundaries of military

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[64] *Id*.
[65] *Id*. at 138.
[66] *See id*. (discussing *in personam* jurisdiction's rich history).
[67] *Id*.
[68] U.S. CONST. amend. V.
[69] *See* United States *ex rel.* Toth v. Quarles, 350 U.S. 11, 22 (1955) ("It is impossible to think that the discipline of the Army is going to be disrupted, its morale impaired, or its orderly processes disturbed, by giving ex-servicemen the benefit of a civilian court trial when they are actually civilians.").
[70] *See* Smith v. Vanderbush, 47 M.J. 56, 59 (C.A.A.F. 1997) (citing *Toth*, 350 U.S. at 23) ("Both the Supreme Court of the United States and this Court have recognized the sensitivity of constitutional and statutory concerns relating to court-martial jurisdiction over civilians.").
[71] U.S. CONST. art. I, § 8, cl. 14.

jurisdiction."[72] The Court has insisted that the military does not have the power to subject civilians to a court-martial except under particular conditions.[73] Moreover, the Court has consistently acknowledged that military jurisdiction must be limited in scope and constrained to its "essential bounds."[74]

The CAAF has recognized the importance of this distinction as well—notably in *Smith v. Vanderbush* in 1997.[75] There, the court rejected the government's invitation to subject a Soldier to continuing jurisdiction after his discharge, and ruled that the military did not have jurisdiction over him.[76] The court acknowledged the constitutional issues concerning the military exercising jurisdiction over civilians and noted "[a] lawful discharge from military service normally terminates the constitutional and statutory power of a court-martial to try such a person."[77] He also recognized the Make Rules Clause did not permit the concept of continuing jurisdiction.[78] Here, the CAAF acknowledged the necessary boundaries and limitations of court-martial jurisdiction.

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[72] Brief for the Petitioner at 12, Larrabee v. United States, *cert. denied*, 139 S.Ct. 1164 (2019) [hereinafter Brief for the Petitioner].

[73] *See Toth*, 350 U.S. at 23 (holding that "the scope of the constitutional power of Congress to authorize trial by court-martial presents another instance calling for limitation to '*the least possible power adequate to the end proposed*'")); *see also* Bateman, *supra* note 29, at 4-35 (discussing the prosecution of Dod civilian contractors under the Military Extraterritorial Jurisdiction Act of 2000).

[74] *See* Reid v. Covert, 354 U.S. 1, 23-24 (1957) (discussing the importance of keeping the military subject to civilian control); Brief for the Petitioner, *supra* note 74, at 12 (noting the critical relationship between a military member's status and the Make Rules Clause).

[75] *See* Smith v. Vanderbush, 47 M.J. 56, 59 (C.A.A.F. 1997) (discussing court-martial jurisdiction generally); *see also* United States v. Watson, 69 M.J. 416 (C.A.A.F. 2011) (citing *Vanderbush*, 47 M.J. at 59) ("[W]e review the laws and regulations governing enlistment and separation with sensitivity to the distinction between military and civilian status."). For a full discussion of *Vanderbush*, see Amy Frisk, *The Long Arm of Military Justice: Court-Martial Jurisdiction and the Limits of Power*, ARMY LAW., Apr. 1997, at 5, 6-8 (discussing *Vanderbush*'s implications for practitioners).

[76] *Vanderbush*, 47 M.J. at 61 ("[W]e decline to extend the concept of 'continuing jurisdiction.'").

[77] *Id*. at 59 – The cite to Vanderbush is correct but it looks like this comes from a block quote of Reid, 46 MJ at 238, rather than a cite of Toth (citing *Toth*, 350 U.S. at 20) (discussing the constitutional implications of military jurisdiction).

[78] *Id*. (noting that the *Toth* court "does not authorize extending the concept of continuing jurisdiction").

Personal jurisdiction for the military is a question of status—is the individual a Soldier or a civilian?[79] In 1960, in *Kinsella v. United States ex rel. Singleton*, the Court held the Constitution prevents the military from subjecting a civilian dependent to a court-martial for non-capital offenses.[80] The Court boiled the issue down to "one of *status*, namely, whether the accused in the court-martial proceeding is a person who can be regarded as falling within the term 'land and naval Forces'" of the Make Rules clause.[81] It concluded the Make Rules Clause, when interpreted alongside the Necessary and Proper Clause, did not permit Congress to subject civilian dependents to a court-martial.[82] Justice Clark, writing for the majority, excluded civilians from the power and authority of military courts.[83]

Similarly, three years earlier, in *Reid v. Covert*, the Supreme Court limited the jurisdiction of military courts over civilian dependents in peacetime.[84] In *Reid*, two service members' wives who killed their husbands were subsequently convicted at general courts-martial.[85] The Court reversed their convictions, reasoning, among other things, that the Make Rules Clause did not extend to civilian dependents.[86] Justice Black noted:

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[79] *See* Kinsella v. United States *ex rel.* Singleton, 361 U.S. 234, 240-41 (1960) (defining the test for military jurisdiction).

[80] *Id.* at 249 ("We therefore hold that Mrs. Dial is protected by the specific provisions of Article III and the *Fifth* and *Sixth Amendments* and that her prosecution and conviction by court-martial are not constitutionally permissible.").

[81] *Id.* at 240-41. This is not a total prohibition, however, as civilians can be subject to court-martial under particular circumstances.

[82] *Id.* at 248 ("We are therefore constrained to say that since this Court has said that the Necessary and Proper Clause cannot expand Clause 14 so as to include prosecution of civilian dependents for capital crimes, it cannot expand Clause 14 to include prosecution of them for noncapital offenses.").

[83] *Id.* (noting Congress does not have the authority to permit the military to subject civilians to court-martial).

[84] *See* Reid v. Covert, 354 U.S. 1, 5 (1957) (holding that Mrs. Smith and Mrs. Covert "could not constitutionally be tried by military authorities").

[85] *Id.* at 3-5 (describing the offenses of Mrs. Smith and Mrs. Covert).

[86] *Id.* at 19 ("But if the language of [the Make Rules Clause] is given its natural meaning, the power granted does not extend to civilians.").

> By way of contrast the jurisdiction of military tribunals is a very limited and extraordinary jurisdiction derived from the cryptic language in Art. I, § 8, and, at most, was intended to be only a narrow exception to the normal and preferred method of trial in courts of law. Every extension of military jurisdiction is an encroachment on the jurisdiction of the civil courts, and, more important, acts as a deprivation of the right to jury trial and of other treasured constitutional protections.[87]

Reid reflected the Court's concern that any broad construction of military jurisdiction could encroach on the "treasured constitutional protections"[88] of civilian courts. The Court noted the dividing line between Soldier and civilian must account for the fact that, as Justice Black poignantly acknowledged, "[s]light encroachments create new boundaries from which legions of power can seek new territory to capture."[89]

In *United States ex rel. Toth v. Quarles*, 350 U.S. 11 (1955), the Supreme Court famously circumscribed military jurisdiction.[90] The Court invalidated a statute that permitted the military to try former service members for offenses committed while the Soldier served on active duty.[91] The Court found that Congress did not have the power under Article I of the Constitution to subject discharged service members to trial by court-martial.[92] Justice Black, the majority's author, recognized the "dangers lurking in military trials which were sought to be avoided by the Bill of Rights and Article III of our Constitution."[93] He reasoned that free countries "restrict military tribunals to the narrowest jurisdiction deemed

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[87] *Id*. at 21.
[88] *Id*.
[89] *Id*. at 39 (arguing against any expansion of court-martial jurisdiction over civilians).
[90] *See* United States ex rel. Toth v. Quarles, 350 U.S. 11, 14 (1955) ("It has never been intimated by this Court, however, that Article I military jurisdiction could be extended to civilian ex-soldiers who had severed all relationship with the military and its institutions.").
[91] *Id*. at 13 (invalidating the 1950 Act of Congress).
[92] *Id*. at 23 ("We hold that Congress cannot subject civilians like Toth to trial by court-martial.").
[93] *Id*. at 22.

absolutely essential."[94] *Toth* stands for the importance of limiting the scope of military jurisdiction.[95]

The *Toth* Court also emphasized the safeguards afforded civilians in Article III courts compared to military tribunals.[96]

> None of the other reasons suggested by the Government are sufficient to justify a broad construction of the constitutional grant of power to Congress to regulate the armed forces. That provision itself does not empower Congress to deprive people of trials under Bill of Rights safeguards, and we are not willing to hold that power to circumvent those safeguards should be inferred through the Necessary and Proper Clause.[97]

The Court's concerns here reflect the danger in tacking too close to the wind. Congress does not have the constitutional authority to subject civilians to a court-martial (absent certain circumstances). Since Congress has not specified the exact point at which a Soldier becomes a civilian, the CAAF has done so in judicial opinions. Based on the Court's constrained view of military jurisdiction, the CAAF's test should be neither broad nor far-reaching. Rather, its jurisprudence should identify a single point of time when jurisdiction severs, preventing court-martial jurisdiction from lingering over Soldiers and implicating the constitutional concerns discussed here.

III. Personal Jurisdiction at the CAAF: A Winding Road

This Part analyzes the CAAF's current three-part test for determining when *in personam* jurisdiction ends before scrutinizing the most recent cases—*Nettles* and *Christensen*—and discussing their implications for the current state of the law. It charts the CAAF's development of the test with a focus on the most important historical cases, highlighting the significant concurrences and dissents as necessary.

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[94] *Id*.
[95] *See id*. at 23 (noting that court-martial power must be limited).
[96] *See id*. at 19-20 (discussing the differences between military and civilian courts).
[97] *Id*. at 21-22.

A. The United States Court of Military Appeals (CMA) Development of the Three-Part Test

Howard proved a watershed moment in the CMA's (the precursor to the CAAF and a three-judge court) jurisprudence on personal jurisdiction.[98] The issue before the court was whether the military judge at trial correctly ruled that personal jurisdiction over a service member was lost upon delivery of a valid discharge certificate.[99] The court began its opinion by recognizing—as discussed *supra* Part II.B—"*in personam* jurisdiction over a military person [is] lost upon his discharge from the service, absent some saving circumstance or statutory authorization."[100] The court acknowledged a "[d]ischarge is effective upon delivery of the discharge certificate."[101] Judge Cox—who authored the opinion—recognized this rule reflected years of precedent and cited Winthrop's *Military Law and Precedents* as authority.[102]

Prior to *Howard*, the CMA decided *United States v. Scott*, affirming "the armed services have long interpreted discharge statutes to mean that an individual is no longer a member of the armed forces after he receives notice that he has been validly separated."[103] In that case, the court based its argument on its interpretation of 10 U.S.C. § 8811 (1956),[104] which provided that "[a] discharge certificate shall be given to each lawfully inducted or enlisted member of the Air Force upon his discharge."[105] The court ultimately recognized the key provision of this statute and those that

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[98] United States v. Howard, 20 M.J. 353, 354 (C.M.A. 1985) (turning to 10 U.S.C. § 1168(a) to determine the requirements of personal jurisdiction); *see* Major Wendy Cox, *Personal Jurisdiction: What Does It Mean for Pay to be "Ready for Delivery" in Accordance with 10 U.S.C. § 1168(a)?*, ARMY LAW., Nov. 2009, at 26, 28-29 (discussing *Howard* and noting that "later courts would interpret exactly what the three elements of 10 U.S.C. § 1168(a) mean").

[99] *Howard*, 20 M.J. at 353.

[100] *Id.* at 354.

[101] *Id.* (citing United States v. Scott, 29 C.M.R. 462 (C.M.A. 1960)).

[102] *Id.* (citing WINTHROP, *supra* note 41, at 548).

[103] Scott, 29 C.M.R. at 464.

[104] Act of Aug. 10, 1956, ch. 1041, 70A Stat. 544, *repealed by* Act of Jan. 2, 1968, 81 Stat. 757, 758.

[105] *See Scott*, 29 C.M.R. at 463 (analyzing the statute).

preceded it was delivery of the discharge certificate to the Soldier.[106] The act of delivery, the court reasoned, severed the Soldier's military status.[107]

The *Howard* court pointed to § 1168(a)—a personnel statute—to determine a service member's discharge date for the purposes of personal jurisdiction.[108] That statute stated:

> A member of an armed force may not be discharged or rleeased [sic] from active duty until his discharge certificate or certificate of release from active duty, respectively, and his final pay or a substantial part of that pay, are ready for delivery to him or his next of kin or legal representative.[109]

Interestingly, the government had urged the CMA "to permit the Secretary of the Army, by regulation, to establish the moment of discharge."[110] But, the CMA rejected the government's proposal and relied on § 1168(a)'s language instead.[111] The court's pivot likely reflected a desire to anchor its decision in a congressional statute rather than an Army regulation. Winthrop had done the same in his analysis of the Fourth Article of the Articles of War, and, as Judge Cox acknowledged, its rule was "based on a long line of historical service precedents…constru[ing] the provisions of the existing congressional statutes."[112]

It is worth noting here that the *Howard* court could have affirmed the military judge's finding that no jurisdiction existed and reversed the Army

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[106] *Id.* ("This statute and its predecessors have long been construed to separate a member of the armed services upon delivery to him of the discharge certificate or other valid notice of the ending of his status.").

[107] *Id.* at 464 ("[W]e conclude that one's military service, with the concomitant jurisdiction to try him by court-martial, ends with the delivery to him of a valid discharge certificate.").

[108] *See Howard*, 20 M.J. at 354 ("Discharges are governed by 10 U.S.C. § 1168(a).").

[109] *Id.*

[110] *See id*. (noting that the court respectfully declined the government's invitation); *see also Scott*, 29 C.M.R. at 465 (Latimer, J., dissenting) (arguing that the Secretary of the Air Force is authorized to set the effective time of the separation orders).

[111] *Howard*, 20 M.J. at 354.

[112] *Id.*; *see* WINTHROP, *supra* note 41, at 547-52 (analyzing the Fourth Article of War).

Court of Military Review without necessarily relying on § 1168(a).[113] In this case, the accused had received his DD Form 214 on the day he was due to depart his military base.[114] The local Criminal Investigative Division (CID) detachment had notified the command later that same day the Soldier was under investigation, prompting the commander to revoke the accused's already delivered DD Form 214.[115] Under long-standing precedent, the delivery of the DD Form 214 effectuated the discharge of the Soldier from the Army.[116] Yet, the *Howard* court took a different approach to reach the same result, relying on § 1168(a), which mandated not only delivery of a discharge certificate but also "final pay or a substantial part of that pay" to the service member (or family representative) to effectuate the discharge.[117] Since the accused had also picked up his pay when he received his DD Form 214, the *Howard* court found no jurisdiction to subject him to a general court-martial.[118] This move ultimately laid the groundwork for the CMA's announcement of a new three-part test in *United States v. King*, 27 M.J. 327 (C.M.A. 1989), four years later.[119]

Judge Sullivan authored the opinion in *King* for the CMA.[120] The issue before the court was whether a court-martial had personal jurisdiction to try the accused for the offense of desertion.[121] The case involved an accused who received a discharge certificate as part of his "request for an early reenlistment."[122] After the accused heard he had been discharged, he refused to complete the reenlistment ceremony and

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[113] *See Howard*, 20 M.J. at 353 (discussing the case's procedural posture).
[114] *Id*.
[115] *Id*. at 354.
[116] *Id.* (citing United States v. Scott, 29 C.M.R. 462 (C.M.A. 1960)) ("Discharge is effective upon delivery of the discharge certificate.").
[117] *See id*. (discussing 10 U.S.C. § 1168(a)'s requirements).
[118] *Id.* at 353, 355.
[119] *See* United States v. King, 27 M.J. 327, 329 (C.M.A. 1989) ("We read these statutes as generally requiring that three elements be satisfied to accomplish an early discharge."); Cox, *supra* note 100, at 29-30 (noting that *King* "established the theoretical framework that is still used to determine whether a military court has personal jurisdiction over an accused").
[120] *Id*. at 327.
[121] *King*, 27 M.J. at 327-28 (stating the granted issue as follows: "Whether the Navy-Marine Corps Court of Military Review erred in finding personal jurisdiction to try appellant for desertion").
[122] *Id*. at 328.

departed his military base.[123] The CMA recognized that "'a discharge effected for the sole purpose of facilitating re-enlistment lacks the purpose of permitting a return to civilian life.'"[124] The court had previously reasoned that a discharge completed with the express purpose of effecting a reenlistment is different from a discharge at the end of a Soldier's term of service.[125] The *King* court held "that no valid discharge occurred under the facts of this case."[126] This could (and, as this author argues, should) have ended the appellate court's inquiry into whether personal jurisdiction existed.[127]

However, much like the *Howard* court, the *King* court announced "Congress has spoken as to what constitutes a valid discharge."[128] It then cited both §§ 1168(a) and 1169.[129] In *Howard*, the CMA had relied on § 1168(a), but the court's reliance on § 1169 was new.[130] Section 1169 provides that:

> No regular enlisted member of an armed force may be discharged before his term of service expires, except—(1) as prescribed by the Secretary concerned; (2) by sentence of a general or special court-martial; or (3) as otherwise provided by law.[131]

The CMA found that these two statutes required three elements be met before the Army lost court-martial jurisdiction: (1) the valid delivery of a discharge certificate; (2) a final accounting of pay and allowances; and (3) compliance with a service's clearing regulations.[132] Judge Sullivan noted

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[123] *Id*. ("Upon hearing [that he was discharged], appellant refused to complete the [re-enlistment] ceremony.").
[124] *Id*. (quoting United States v. Johnson, 20 C.M.R. 36, 40 (C.M.A. 1955)).
[125] *Id*. (citing United States v. Clardy, 13 M.J. 308 (C.M.A. 1982)).
[126] *Id*.
[127] *See* WINTHROP, *supra* note 41, at 550 (noting a discharge can be revoked when the product of "falsehood or fraud").
[128] *See King*, 27 M.J. at 329 (discussing 10 U.S.C. § 1168(a)).
[129] *Id*.
[130] *See id*. (citing § 1168(a)) ("A member of an armed force may not be discharged or released from active duty until his discharge certificate or certificate of release from active duty, respectively, and his final pay or a substantial part of that pay, are ready for delivery to him or his next of kin or legal representative.").
[131] 10 U.S.C. § 1169 (2012).
[132] *King*, 27 M.J. at 329 (discussing the three-part test).

that since the service member did not complete parts two and three of the test, the physical transfer of a discharge certificate to the accused was not enough to sever jurisdiction.[133]

The *King* court's reliance on §§ 1168(a) and 1169 was unnecessary. The accused's discharge through reenlistment did not separate him from the military based on the court's own precedent.[134] Chief Judge Everett's concurrence reflected his own apparent discomfort with this shift: "I do not, however, reach the question of the effect on continued court-martial jurisdiction from a failure to comply with the provisions of 10 U.S.C. §§ 1168(a) and 1169."[135] This qualification arguably indicated that Chief Judge Everett's doubt about the wisdom of relying on these statutes to determine jurisdiction. Judge Sullivan and Judge Cox (who was a part of the majority in *King* and authored *Howard*) set a new precedent for the court on determining when the military loses personal jurisdiction over a service member.

B. The Three-Part Test in Action: *United States v. Hart*

In 1994, the CMA would become the CAAF (a five-member court), and the new court found itself confronting personal jurisdiction in a number of cases.[136] One case worth particular study and attention came in 2008: *United States v. Hart*.[137] Here, the accused had received a valid DD Form 214 but not his final separation pay.[138] Two days after his "effective date of separation," the command revoked his DD Form 214 and "directed

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[133] *Id*. ("The mere physical transfer of the discharge certificate to appellant was not 'delivery' of the discharge as required by law, and, accordingly, court-martial jurisdiction was not lost.").

[134] *See id*. at 328 (quoting United States v. Johnson, 20 C.M.R. 36, 40 (1955)) (noting that "'a discharge effected for the sole purpose of facilitating re-enlistment lacks the purpose of permitting a return to civilian life'").

[135] *Id*. at 330 (Everett, C.J., concurring).

[136] *History*, UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES, https://www.armfor.uscourts.gov/about.htm (last visited Nov. 28 2018) ("In 1994, Congress gave the Court its current designation, the United States Court of Appeals for the Armed Forces.").

[137] United States v. Hart, 66 M.J. 273 (C.A.A.F. 2008); *see* Cox, *supra* note 100, at 32-33 (discussing *Hart*); Nicholas F. Lancaster, *New Developments in Sixth Amendment Confrontation and Jurisdiction*, ARMY LAW., Feb. 2009, at 18, 26-28 (discussing *Hart*).

[138] *Hart*, 66 M.J. at 273.

the finance office not to take any further action in calculating [his] final pay."[139] The command then preferred charges based on a number of drug offenses the accused had allegedly committed.[140]

The *Hart* court split three to two with Judge Erdmann writing the majority in which Judge Baker and Judge Ryan joined.[141] Chief Judge Effron dissented, joined by Judge Stucky.[142] The majority first recognized as black letter law that a Soldier's discharge severs personal jurisdiction.[143] It then relied on §§ 1168(a) and 1169, which it emphasized it had done "for nearly twenty years."[144] The majority cited both *King* and *Howard* for that claim.[145] Consequently, the *Hart* majority applied the three-part test to determine when personal jurisdiction ends.[146]

The only element of the three-part test at issue in *Hart* was the accused's final accounting of pay and allowances—since he had received a valid DD Form 214 and cleared post.[147] At the trial level, the military judge dove into the Defense Finance and Accounting System's (DFAS) manual and procedures, concluding DFAS "had not yet started" certain "calculations, reconciliations, and authorizations" necessary to calculate the service member's final pay.[148] The majority affirmed the trial judge's determination that the service member's final accounting of pay and allowances were not ready for delivery.[149] As a result, Judge Erdmann held "Hart was not effectively discharged and remained subject to court-martial jurisdiction."[150]

Chief Judge Effron's dissent argued personal jurisdiction did not exist in this case.[151] He pointed to the effective date and delivery of the DD

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[139] *Id*. at 273-74.
[140] *Id*. at 273.
[141] *Id*.
[142] *Id*. at 277 (Effron, C.J., dissenting).
[143] *Id*. at 275.
[144] *See id*. at 275-76 (analyzing both 10 U.S.C. §§ 1168(a) and 1169).
[145] *See id*. at 275 (citing five precedential cases for support of its proposition).
[146] *Id.* at 276.
[147] *See id*. (noting the lower court rulings "hinge on the determination that there was no final accounting of pay").
[148] *Id*. at 274, 277.
[149] *Id*. at 277.
[150] *Id*.
[151] *Id*. (Effron, C.J., dissenting).

Form 214 to Hart in support of his conclusion.[152] The dissent questioned the merit of determining personal jurisdiction based on "a personnel management statute designed to protect servicemembers and their families from the adverse financial consequences of premature separation."[153] Chief Judge Effron worried about the uncertainty the majority opinion created with respect to the effective date of a discharge document.[154] Notably, the dissent distinguished *King*, finding that "the unsettled state of the record require[d] consideration of multiple factors."[155] Finally, Chief Judge Effron argued the court's previous reliance on §§ 1168(a) and 1169 created a "general practice" not a rule.[156]

Hart exposed one of the perils in the majority's reliance on *King*'s three-part test. The *King* test had broadened the scope of court-martial jurisdiction by attaching it to §§ 1168(a) and 1169. The court had strayed from its foundational rule that delivery of a valid discharge certificate severed jurisdiction.[157] Hart had received a valid discharge certificate, but the military subjected him to a court-martial based on DFAS not having his pay ready for delivery.[158] A bureaucratic task had saved jurisdiction for the military and permitted the exercise of its Article I court-martial power.

The military court's jurisprudential history on personal jurisdiction has always been attached to the point of discharge.[159] And Congress does address discharges in both §§ 1168(a) and 1169.[160] But without a clear delineation in the UCMJ for "when a servicemember's discharge from the armed forces becomes effective for jurisdictional purposes," the court must draw a line that is fair, just, workable, and untethered to

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[152] *Id*. at 277-78 (Effron, C.J., dissenting) ("Hart's discharge severed his connection with the armed forces, and terminated his status as a person subject to the Uniform Code of Military Justice (UCMJ).").
[153] *Id*. at 278 (Effron, C.J., dissenting).
[154] *See id*. at 279 (Effron, C.J., dissenting) ("The majority opinion would eliminate the ability of servicemembers and the government to rely on the certainty provided by the effective date set forth in a discharge document.").
[155] *Id*. at 280 (Effron, C.J., dissenting).
[156] *See id*. (Effron, C.J., dissenting) (defining *generally* according to the Merriam-Webster's Collegiate Dictionary).
[157] *See* discussion *supra* Part II.A-B.
[158] *See Hart*, 66 M.J. at 277 (concluding that the accused's failure to receive his final pay meant he was subject to court-martial jurisdiction).
[159] *See* discussion *supra* Part II.B.
[160] *See* discussion *infra* Part IV.A.

congressional statutes that do not speak specifically to court-martial jurisdiction.[161] The next two cases arguably demonstrate the CAAF's struggle to do just that.

C. The CAAF's Retreat from the Three-Part Test in *Nettles* and *Christensen*

The military's highest appellate court started to change course on its personal-jurisdiction jurisprudence in 2015. That year, the CAAF decided *Nettles*—which involved a reservist—and began the court's retreat from the three-part test.[162] Critically, the CAAF found the test was not binding when it went against "reason or policy"—a new gloss on the *King* framework.[163] Then in 2018, the court went even further with *Christensen*, demonstrating its reluctance to continue to apply the three-part test.[164] There, the court encountered another case involving a delay in the delivery of a Soldier's final accounting of pay, but it distinguished *Hart* and held the Army had lost *in personam* jurisdiction.[165]

Judge Stucky delivered the court's opinion in *Nettles*, concluding the Air Force did not retain court-martial jurisdiction over a reservist.[166] The reservist served in the Individual Ready Reserve (IRR).[167] He had been passed over for promotion twice and received notification in March of 2012 that he would be discharged on October 1, 2012.[168] In May of that year, however, the Secretary of the Air Force recalled him to active duty and the command preferred charges.[169] The accused continued to oscillate between periods of active service for his court-martial and service in the IRR.[170] His court-martial eventually convened from January to February

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[161] United States v. Christensen, 78 M.J. 1, 4 (C.A.A.F. 2018).
[162] United States v. Nettles, 74 M.J. 289, 291 (C.A.A.F. 2015) ("[W]e decline to employ the 10 U.S.C. § 1168(a) framework here.").
[163] *See id*. (noting that the §§ 1168(a) and 1169 framework are not binding).
[164] *See Christensen*, 78 M.J. at 4-5 (noting that §§ 1168 and 1169 serve as guidance and are not binding).
[165] *See id*. at 2-3, 5-6 (distinguishing *Hart* and analogizing to *Nettles*).
[166] *Nettles*, 74 M.J. at 293 (concluding that the court-martial did not have jurisdiction over appellant at either his arraignment or trial).
[167] *Id*. at 290.
[168] *Id*.
[169] *Id*.
[170] *Id.*

of 2013 where a panel convicted him.[171] At trial and on appeal, he argued the court lacked *in personam* jurisdiction over him.[172] The military judge and the Air Force Court of Criminal Appeals disagreed, but the CAAF reversed his conviction, concluding the court lacked jurisdiction to try him.[173]

The court applied the three-part test for jurisdiction, noting the only missing element for the accused was "delivery" of his discharge certificate.[174] After reviewing the court's rich delivery jurisprudence, the CAAF concluded that these precedents would lead to the conclusion the Air Force retained personal jurisdiction over the accused.[175] The court, however, declined to follow that precedent or employ the §§ 1168(a) and 1169 framework.[176] Rather, Judge Stucky drew a distinction between a reservist serving in the IRR and an active-duty Soldier, finding the delivery jurisprudence "has been created for active duty personnel" and the prior statutory framework serves only as "guidance."[177]

He then introduced a meta-inquiry into the court's personal-jurisdiction jurisprudence, noting "[the framework's] demands are not binding when we find that they go against reason or policy."[178] This "reason or policy" gloss marked the most significant and critical turning point in the CAAF's jurisprudence on *in personam* jurisdiction since *Howard*.[179] It transformed the CAAF's test on personal jurisdiction, altering it by introducing a discretionary threshold question. Judge Stucky—who had joined Chief Judge Effron's dissent in *Hart*—employed reasoning here that eroded the very foundation of the court's precedent.

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[171] *Id*.
[172] *Id*.
[173] *Id*. at 293.
[174] *Id*. at 290-91 (recognizing the only missing element as delivery).
[175] *See id*. at 291 (discussing the CAAF's case law on delivery of a discharge certificate).
[176] *Id*.
[177] *See id*. (noting that the discharge and delivery cases were for active-duty personnel).
[178] *See id*. (finding that "reason or policy" counseled against employing the statutory framework to determine jurisdiction).
[179] *See id*. (citing United States v. Howard, 20 M.J. 353, 354 (C.M.A. 1985)) ("The overarching interest implicated by the law of personal jurisdiction, and especially discharge jurisprudence, is the need—of both service member and service—to know with certainty and finality what the person's military status is and when that status changes.").

The CAAF could have decided *Nettles* by simply drawing a distinction on the basis of the accused's status—reservist versus active-duty. Judge Stucky anchored the *Nettles* decision in 10 U.S.C. § 14505 (2012),[180] holding that "in cases where the accused is not on active duty pursuant to an administrative hold on the date the self-executing order sets for a reservist's discharge, he is not subject to court-martial jurisdiction."[181] With a congressional statute on point to answer when the military lost personal jurisdiction, Judge Stucky did not need to conduct any additional analysis.[182] Why, then, did the court emphasize that the statutory framework is only guidance and can be tossed when it cuts against reason or policy?

Arguably, in response to the previous holdings of *King* and *Hart*, Judge Stucky added this new gloss to prevent unjust results. The court chose to modify its personal-jurisdiction jurisprudence and go further than it needed because of its dissatisfaction with the current state of the law. The court's announcement that the three-part framework is not binding but rather guidance reflected a deep discontent with the reliance on the statutory framework—the foundation of the three-part test; a dissatisfaction that Judge Stucky sought to cure with a new gloss.

The court used this reason-or-policy gloss to reach, arguably, the right result, but at the expense of clarity to trial counsel, defense counsel, and military judges. Ironically, Judge Stucky's opinion highlighted the importance of certainty to military-justice practitioners:

> [Military status] is important for the armed forces both abstractly and concretely: abstractly, because certainty of status indicates who actually *is* in the service and subject to the [UCMJ], and concretely, because such certainty provides clear guideposts for prosecutors and

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[180] 10 U.S.C. § 14505 (2012) ("[A] captain on the reserve active-status list ... who has failed of selection for promotion to the next higher grade for the second time ... shall be separated ... not later than the first day of the seventh month after the month in which the President approves the report of the board which considered the officer for the second time.").

[181] *Nettles*, 74 M.J. at 293.

[182] *See id*. at 292 ("Instead, we think it more appropriate to apply the statute that actually discharged Appellant: 10 U.S.C. § 14505 (2012)").

> commanders when taking actions with a view towards litigation.[183]

Unfortunately, an additional inquiry simply imparts more discretion and ambiguity into practice. Since *Howard*, the court's jurisprudence on this matter has become more convoluted. *In personam* issues only occur at the margins in litigation with typically complex facts; a succinct rule would enable military-justice leaders to advise commanders with confidence as this article advocates for *infra* Part V.

Christensen marked another step away from the three-part test as the court confronted an issue Chief Judge Effron aptly predicted in his dissent in *Hart*.[184] In *Christensen*, a military judge sitting alone convicted the accused of sexual assault.[185] The CAAF granted review of a single issue: Whether the court-martial had jurisdiction over the accused.[186] Similar to *Hart*, the case hinged on a single part of the three-part framework—the accused's final accounting of pay and allowances.[187] Here, the accused had received a valid DD Form 214 and had cleared Fort Stewart, Georgia.[188] Based on a criminal investigation, the chief of justice—the title of the chief prosecutor on a military installation—had contacted DFAS to stop his final accounting of pay and allowances.[189] The military judge concluded that since all three parts of the *Hart* test were not met, the military could exercise jurisdiction over the accused.[190]

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[183] *Id*. at 291.

[184] *See* United States v. Hart, 66 M.J. 273, 279 (C.A.A.F. 2008) (Effron, C.J., dissenting) (noting the "significant potential for delays and mistakes"). In fact, in a footnote, the majority responded directly to Chief Judge Effron's dissent, recognizing that this case did "not involve any delay in the processing of Hart's separation pay." *Id*. at 275 n.5.

[185] United States v. Christensen, 78 M.J. 1, 2 (C.A.A.F. 2018).

[186] *Id*.

[187] *See id*. at 4 ("[T]he *DuBay* military judge focused solely on the 'final accounting of pay.'").

[188] *Id*. at 2-3.

[189] *Id*. at 3.

[190] *Id*. at 4 (noting that the military judge "found that there was no final accounting of pay, and thus there was personal jurisdiction over Appellant").

The CAAF reversed with reasoning that continued to erode the framework the court had relied on for decades.[191] It noted explicitly that both §§ 1168(a) and 1169 "serve as *guidance*—not as *prerequisites*—when it comes to determining whether a discharge has been effectuated for jurisdictional purposes," echoing *Nettles*.[192] The CAAF then found the accused's final accounting of pay and allowances was "not accomplished within a reasonable time frame" and pointed to *Nettles*' reason-or-policy gloss to conclude the court-martial did not have personal jurisdiction over the accused.[193]

Judge Maggs's concurrence in which Judge Ryan joined revealed the court's internal struggle with personal jurisdiction.[194] He noted that the current framework the CAAF has created leaves counsel and judges "with insufficient guidance" and acknowledged "that the Court may have made a wrong turn in *Howard*."[195] Interestingly, Judge Maggs proposed a separate test.[196] First, he would ask whether "an existing statute or regulation specifies when a discharge has occurred."[197] If there is no statute or regulation on point, then he proposed resorting to the three-part test.[198] He argued that AR 635-200, paragraph 1-29(c), would have answered the question in *Christensen*.[199] The regulation provides that a discharge "is effective at 2400 on the date of notice of discharge to the

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[191] *See id*. (quoting United States v. Nettles, 74 M.J. 289, 291 (C.A.A.F. 2015)) ("Importantly, however, we have explicitly held that this guidance 'is not binding when we find that [it] go[es] against reason or policy.'").

[192] *See id*. at 5-6 (emphasis in original) (citing *Nettles*, 74 M.J. at 291) (qualifying the court's reliance on the statutory framework).

[193] *See id*. (drawing a distinction from *Hart* based on the time frame it took DFAS to account for the accused's final pay).

[194] *Id*. at 6-7 (Maggs, J., concurring).

[195] *Id*. at 6 (Maggs, J., concurring).

[196] *Id*. (Maggs, J., concurring) ("[W]e should reconsider our approach for determining when a service member has been discharged for the purposes of terminating court-martial jurisdiction.").

[197] *Id*. (Maggs, J., concurring).

[198] *Id*. (Maggs, J., concurring) ("In a case in which no specific statute or regulation exists, or in the case that the Court concludes that the applicable regulation is invalid, then, and only then, would we need to turn to the judicially created three-part test and considerations of 'reason or policy.'").

[199] *Id*. at 7 (Maggs, J., concurring) ("Only if this regulation were somehow invalid would we need to resort to our judicially created three-part test and its exception.").

Soldier."[200] Although AR 635-200 involves administrative separations, Judge Maggs's test would use its authority as a military regulation to identify when a Soldier is no longer a member of the armed forces and, consequently, no longer subject to court-martial jurisdiction.

This author disagrees with permitting a regulation to dictate the contours of court-martial jurisdiction. First, the CAAF has always been reluctant to permit Service Secretaries through regulations to determine the end of personal jurisdiction for court-martial purposes.[201] Second, it could be dangerous to cede that level of authority to an agency head. Military regulations certainly qualify as law and obligate service members to adhere to their strictures.[202] But that authority is not without bounds.[203] Military courts must have the authority to outline the limits of their own criminal jurisdiction and "to say what the law is."[204]

The other difficulty in depending on statutes, as Judge Maggs proposed, is that it focuses the analysis on the same sources and materials the CAAF currently uses in its three-part test. In most cases, the CAAF will be left with the same statutory framework it has been struggling with for decades in the challenging cases that reach its docket. This reliance can work in specific, limited cases, such as *Nettles*, when there is a statute directly on point. Otherwise, however, it will continue to leave the field with little certainty. A bright-line rule as proposed *infra* Part V would answer the question outright and prevent ambiguity.

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[200] *Id*. (Maggs, J., concurring), *citing* AR 635-200, *supra* note 47, para. 1-29(c); *see* discussion *supra* Part II.B.

[201] *See* United States v. Howard, 20 M.J. 353, 354 (C.M.A. 1985) (declining to permit the Secretary of the Army to specify the "moment of discharge").

[202] *See* Standard Oil Co. of Cal. v. Johnson, 316 U.S. 481, 484 (1942) ("War Department regulations have the force of law."); United States v. Eliason, 41 U.S. (16 Pet.) 291, 302 (1842) ("[R]ules and orders publicly promulged [sic] through [the Secretary of War] must be received as the acts of the executive, and as such, be binding upon all within the sphere of his legal constitutional authority.").

[203] *See* Burns v. Wilson, 346 U.S. 137, 142 (1953) ("We have held before that [a decision of a military tribunal] does not displace the civil courts' jurisdiction over an application for habeas corpus from the military prisoner.").

[204] *See* Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is.").

Since Congress has chosen not to specify the precise bounds of court-martial jurisdiction, the CAAF must fill the gap. Congress does have the authority to specify the moment of discharge for personal-jurisdiction purposes in accordance with the Make Rules Clause and Fifth Amendment of the Constitution but has not done so.[205] *Nettles* and *Christensen* illustrate that the current framework is failing to achieve certainty and predictability for the field because it is ambiguous and unworkable.

IV. The CAAF's Three-Part Test: Ambiguous and Unworkable

A. A Misplaced Reliance on 10 U.S.C. §§ 1168(a) and 1169

Howard has now dictated over thirty years of personal-jurisdiction jurisprudence at the CAAF. The reliance Judge Cox placed on §§ 1168(a) and 1169—whether intentionally or not—has created a progeny of precedent that can be difficult to decipher. Part IV.A explains why the military judiciary should no longer rely on those statutes to inform when the armed services lose *in personam* jurisdiction over a Soldier.

By charting the legislative history of both §§ 1168(a) and 1169, this article seeks to highlight the role Congress sought for these statutes in the military. Section 1168(a) first appeared in the Servicemen's Readjustment Act (SRA) of 1944.[206] The SRA's explicit purpose was "[t]o provide Federal Government aid for the readjustment in civilian life of returning World War II veterans."[207] The bill sought to ease the transition for returning veterans to civilian life.[208] Congress marketed the bill as a "comprehensive program" for veterans, focused on their medical, education, training, financial, and employment needs.[209] President

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[205] *See* discussion *supra* Part II.C-D.

[206] *See* United States v. Hart, 66 M.J. 273, 278 (C.A.A.F. 2008) (Effron, C.J., dissenting) (citing Servicemen's Readjustment Act of 1944, Pub L. No. 346, § 104, 58 Stat. 284, 285 (1944)) ("The pertinent legislation originated in World War II as part of the Servicemen's Readjustment Act of 1944.").

[207] Servicemen's Readjustment Act at ch. 268.

[208] *See The G.I. Bill of Rights: An Analysis of the Servicemen's Readjustment Act of 1944*, SOC. SECURITY BULLETIN, (Soc. Sec. Admin., Washington, D.C.) July 1944, at 3 ("A comprehensive program to aid returning veterans ... in a speedy readjustment to civilian life.") [hereinafter SOCIAL SECURITY BULLETIN].

[209] *See id*. at 3-5 (discussing the various benefits available to returning veterans).

Franklin D. Roosevelt signed the law, nicknamed the "G.I. Bill of Rights," on June 22, 1944.[210]

Section 1168(a)'s language could be found in section 104 of the SRA.[211] Section 104 sought to preserve the rights of veterans returning from World War II.[212] The first sentence of section 104 provided that "[n]o person shall be discharged or released from active duty in the armed forces until his certificate of discharge or release from active duty and final pay, or a substantial portion thereof, are ready for delivery to him or to his next of kin or legal representative."[213] This text tracks closely with today's § 1168(a); specifically, the requirement for a final accounting of pay before discharge. The remainder of section 104 reads as follows:

> [A]nd no person shall be discharged or released from active service on account of disability until and unless he has executed a claim for compensation, pension, or hospitalization, to be filed with the Veterans' Administration or has signed a statement that he has had explained to him the right to file such claim: *Provided*, That this section shall not preclude immediate transfer to a veterans' facility for necessary hospital care, nor preclude the discharge of any person who refuses to sign such claim or statement: *And provided further*, That refusal or failure to file a claim shall be without prejudice to any right the veteran may subsequently assert.[214]

As the entire text makes clear, section 104 sought to ensure service members received the compensation and disability benefits they had earned during their service prior to separation.

Section 104's language regarding discharges cannot be read in isolation; the statute sought to protect the rights of service members returning from war. For example, the previous section of the SRA, section

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[210] *Id*. at 3.

[211] *Compare* 10 U.S.C. § 1168(a) (2012) (discussing discharges from the military), *with* Servicemen's Readjustment Act § 104 (discussing discharges from the military).

[212] *See* SOCIAL SECURITY BULLETIN, *supra* note 210, at 3-5 (discussing the "G.I. Bill of Rights").

[213] Servicemen's Readjustment Act § 104.

[214] *Id*.

103, placed Veterans' Affairs officials at military installations for the purpose of advising Soldiers on disability claims.[215] While the subsequent section, section 105, forbid the military from requiring a Soldier to sign any statement detailing "the origin, incurrence, or aggravation of any disease or injury."[216]

Congress codified section 104 of the SRA at 10 U.S.C. § 1168(a) in 1962.[217] The current statute provides that:

> A member of an armed force may not be discharged or released from active duty until his discharge certificate or certificate of release from active duty, respectively, and his final pay or a substantial part of that pay, are ready for delivery to him or his next of kin or legal representative.[218]

Notably, today's statute uses the word *may* in "[a] member ... *may* not be discharged."[219] Section 104 of the SRA used the word *shall*.[220] At first blush, § 1168(a) appears to impose a duty on the government. Under the Mandatory–Permissive canon of semantic interpretation, however, *may* is permissive, defined in *Black's Law Dictionary* as "has discretion to; is permitted to ... possibly will."[221] Even if Congress had used *shall*,

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[215] *Id*. § 103 ("The Administrator of Veterans' Affairs shall have authority to place officials and employees designated by him in such Army and Navy installations as may be deemed advisable for the purpose of adjudicating disability claims of, and giving aid and advice to, members of the Army and Navy who are about to be discharged or released from active service.").

[216] *Id*. § 105 (providing protections for service members during separation).

[217] *See* United States v. Hart, 66 M.J. 273, 278 (C.A.A.F. 2008) (Effron, C.J., dissenting) (citing Servicemen's Readjustment Act § 104) (noting that § 104 of the SRA was re-codified in 1962).

[218] 10 U.S.C. § 1168(a) (2012); *see also* AR 635-200, *supra* note 46, at para. 1-5(f) ("10 USC 1168 stipulates that a discharge certificate or certificate of release from active duty must be given to each Soldier discharged or released from active duty.").

[219] § 1168(a) (emphasis added).

[220] Servicemen's Readjustment Act § 104 ("[A]nd no person shall be discharged or released from active service ...").

[221] Antonin Scalia & Bryan A. Garner, Reading Law: The Interpretation of Legal Texts 112 (2012) ("The traditional, commonly repeated rule is that *shall* is mandatory and *may* is permissive."); Bryan A. Garner, Garner's Dictionary of Legal Usage 568 (3d ed. 2011) (defining *may*).

Supreme Court precedent would likely construe *shall* as *may*.[222] Consequently, under this textual canon of statutory interpretation, § 1168(a) does not impose a compulsory duty on the government but arguably serves as a "precatory suggestion."[223]

This textual understanding of § 1168(a) is a critical revelation. The CAAF placed significant weight on the statute to help define the exact point of discharge for service members with respect to court-martial jurisdiction.[224] Section 1168(a), however, serves to protect service members from hardship upon separation.[225] This important congressional aim should not influence the dividing jurisdictional line for Soldiers. Armed with this understanding, it makes little sense that a Soldier should remain subject to personal jurisdiction when the government fails to follow the precise prescriptions of § 1168(a).[226] It makes even less sense when the government can use its own neglect (e.g., failure to direct a final accounting of a Soldier's pay and allowances) to court-martial a Soldier

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[222] *See* Railroad Co. v. Hecht, 95 U.S. 168, 170 (1877) ("As against the government, the word 'shall,' when used in statutes, is to be construed as 'may,' unless a contrary intention is manifest."); *see also* SCALIA & GARNER, *supra* note 223, at 112-15 (discussing the distinction between mandatory and permissive words); GARNER, *supra* note 223, at 568 (noting that *may* can mean *shall* "[b]ut no drafter who means must should consciously use *may* ... [and] drafters' oversights should not be allowed to change the essential meanings of basic words").

[223] *See* Scott v. United States, 436 U.S. 128, 145-46 (1978) (Brennan, J., dissenting) ("In a linguistic *tour de force* the Court converts the mandatory language that the interception 'shall be conducted' to a precatory suggestion."); SCALIA & GARNER, *supra* note 223, at 114 ("*Shall* may be treated as a 'precatory suggestion.'").

[224] *See* United States v. Hart, 66 M.J. 273, 275 (C.A.A.F. 2008) ("The UCMJ itself does not define the exact point in time when discharge occurs, but for nearly twenty years, this court has turned to 10 U.S.C. 1168(a) and 1169 (2000), a personnel statute, for guidance as to what is required to effectuate discharge.").

[225] *See id*. at 278 (Effron, C.J., dissenting) (citing United States v. Keels, 48 M.J. 431, 432 (C.A.A.F. 1998)) ("Section 1168 is a personnel management statute designed to protect service members and their families from the adverse financial consequences of premature separation.").

[226] *See id*. at 279 (Effron, C.J., dissenting) ("If the government fails in its obligation to provide a departing service member with an important benefit for transition to civilian life, the error may be remedied by completing the required paperwork and making the requisite payment to the service member.").

who had received a valid DD 214 as it did in *Hart*.[227] The CAAF's reliance on § 1168(a) has produced problematic results as epitomized in its struggle with the three-part test in *Nettles* and *Christensen*.[228]

Section 1168(a) does not address nor alter the meaning of a DD 214—the document that explicitly transforms an individual's status from military to civilian. The statute requires a "discharge certificate or certificate of release" and "final pay or a substantial part of that pay" prior to discharge from the armed services.[229] A natural reading indicates the military should have both requirements completed prior to discharging a service member. In fact, army regulations and policies require a valid discharge certificate and a final accounting of pay prior to discharge.[230] The onus, therefore, falls on the government to prepare the discharge paperwork and the service member's final pay prior to discharge. It does not follow that the government's failure to comply with these procedures should serve as a bulwark against the Soldier's discharge, subjecting him or her to court-martial jurisdiction.

Section 1168(a) serves as a shield. It requires the armed services to ensure a Soldier receives the benefits he or she earned. Congress never intended § 1168(a) to serve as a sword, subjecting Soldiers who had received a valid DD Form 214 to court-martial jurisdiction based upon the government's failure to follow its own statute. The DD Form 214 or discharge orders represent the official act of the United States through its representative, marking the transformation from Soldier to civilian.[231] This statute does not alter that fact nor, arguably, did Congress intend such a result. A plain reading of § 1168(a) demonstrates Congress did not want Soldiers separated without their pay. It would be odd indeed if Congress intended for DD Forms 214 to be found *ex post* invalid for failure to comply with the statute.

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[227] *See id*. (Effron, C.J., dissenting) ("Although [Defense Finance Accounting Service (DFAS)] undoubtedly endeavors to accomplish these myriad tasks in a timely fashion, there is a significant potential for delays and mistakes, as reflected in the lengthy record of the finance proceedings set forth in the present case.").

[228] *See* discussion *supra* Part III.C.

[229] 10 U.S.C. § 1168(a) (2012).

[230] *See* discussion *supra* Part II.B and *infra* Part IV.C.

[231] *See* discussion *supra* Part II.B.

Section 1169, in relevant part, provides that "[n]o regular enlisted member of an armed force may be discharged before his term of service expires, except (1) as prescribed by the Secretary concerned ... or (3) as otherwise provided by law."[232] This statute seeks uniformity in how the services discharge service members from their ranks prior to the expiration of the Soldier's ETS. It permits Secretaries to prescribe procedures to follow when discharging Soldiers.[233] Importantly, the CAAF points to this statute for the third and final element of its three-part test.[234] It does not, however, alter the meaning or purpose of a DD Form 214.

The CAAF has similarly critiqued the role of the statutory framework in defining the boundaries of personal jurisdiction.[235] Chief Judge Effron's dissent in *Hart* noted that "Section 1168 is a personnel management statute designed to protect service members and their families from the adverse financial consequences of premature separation."[236] He argued that it "d[id] not address jurisdiction ... nor require the government to revoke a discharge."[237] Then-Judge Effron, ten years earlier in *United States v. Keels*, argued that § 1168(a) served "to protect service members from premature separation."[238] These statutes protect Soldiers by ensuring the government provides benefits to the member or the member's Family.[239]

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[232] 10 U.S.C. § 1169 (2012).

[233] *See* AR 635-200, *supra* note 46, para. 1-5(g) ("10 USC 1169 confers broad authority on the Secretary of the Army to order separation of a regular Army (RA) Soldier prior to ETS.").

[234] *See* United States v. King, 27 M.J. 327, 329 (C.M.A. 1989) (citing § 1169) ("Third, appellant must undergo the 'clearing' process required under appropriate service regulations to separate him from military service.").

[235] *See* United States v. Hart, 66 M.J. 273, 277-80 (C.A.A.F. 2008) (Effron, C.J., dissenting) (chronicling the limitations of employing the statutory framework to determine personal jurisdiction).

[236] *Id*. at 278 (Effron, C.J., dissenting).

[237] *Id*. at 279 (Effron, C.J., dissenting).

[238] *See* United States v. Keels, 48 M.J. 431, 432 (C.A.A.F. 1998) (discussing both § 1168(a) and Article 71). The CAAF applied the three-part test in *Keels*. *Id*. at 431-33.

[239] *See id*. at 432 ("Section 1168 ensures that a member will not be separated from the service, thereby depriving the member and the member's family of pay and benefits such as medical care, until both the formal discharge certificate and a substantial part of any pay due are ready for delivery.").

The CAAF should not have relied on these statutes for its personal-jurisdiction jurisprudence without a clear command from Congress to do so. Under the CAAF's precedent prior to *Howard*, delivery of a valid discharge certificate separated a Soldier from the armed forces and ended court-martial jurisdiction.[240] The Presumption Against Change in Common Law canon cautions against an interpretation of a statute that would alter the law without clear direction from Congress.[241] This canon of interpretation commands that "[a] statute will be construed to alter the common law only when that disposition is clear."[242] Here, Congress has not specifically spoken to personal jurisdiction in these statutes—as the CAAF has acknowledged.[243] Yet, the court's reliance on §§ 1168(a) and 1169 arguably alter the military's common-law–like rule.[244] Certainly, discharge statutes and court-martial jurisdiction have been intertwined since Winthrop, but the staple of that jurisprudence is that *in personam* jurisdiction ends upon delivery of a valid DD Form 214.[245] The court should not alter that foundation without express congressional intent.

In sum, the CAAF should not rely on personnel-management statutes for the critical determination of when a court-martial loses jurisdiction over service members.[246] Congress never intended such a result.[247] A Soldier who received a valid DD Form 214 and is then court-martialed raises constitutional due-process concerns that the court can avoid with a more precise test to determine the outer limit of jurisdiction.[248] Moreover, the services can resolve many of the issues §§ 1168(a) and 1169 sought to address by simply issuing a DD Form 214 after a Soldier clears post and

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[240] *See* United States v. Scott, 29 C.M.R. 462, 464 (C.M.A. 1960) (noting that delivery of a valid discharge severed jurisdiction); GILLIGAN & LEDERER, *supra* note 22, § 2-22.10(b)(1), at 2-15 (noting that jurisdiction "ordinarily terminates with the delivery of a valid discharge certificate or separation order").

[241] *See* SCALIA & GARNER, *supra* note 223, at 318-19 ("A fair construction ordinarily disfavors implied change.").

[242] *Id*.

[243] *See* discussion *supra* Part.III.B-C, Part IV.A.

[244] *See Hart*, 66 M.J. at 275-77 (discussing the three-part test).

[245] *See Scott*, 29 C.M.R. at 464 (noting that delivery of a valid discharge severed jurisdiction); GILLIGAN & LEDERER, *supra* note 22, § 2-22.10(b)(1), at 2-15 (noting that jurisdiction "ordinarily terminates with the delivery of a valid discharge certificate or separation order").

[246] *See Hart*, 66 M.J. at 279 (Effron, C.J., dissenting) ("Section 1168 does not address jurisdiction under the UCMJ.").

[247] *See id*. at 278 (Effron, C.J., dissenting) ("The pertinent legislation originated in World War II as part of the Servicemen's Readjustment Act of 1944.").

[248] *See* discussion *supra* Part.II.C-D.

her pay is ready. Even if those tasks are insurmountable, military courts should not permit commanders to use these statutes as a veritable clawback provision of a Soldier's contract.

B. Delivery of a Discharge Certificate and Livery of Seisin

The first part of the CAAF's three-part test requires the delivery of a valid discharge certificate.[249] The delivery portion of this inquiry typically focuses on the commander's intent and the actual physical receipt of the discharge certificate.[250] The CAAF has had to confront both interrelated concepts, generating a flurry of judicial opinions.[251] This Part argues that the physical receipt portion of this inquiry no longer makes sense in the modern-day military.

As discussed *supra* Part III.C, the CAAF walked back the physical-delivery component of its test in *Nettles*, "declin[ing] to apply the physical delivery rule to the reserve components."[252] In support of this distinction the court reasoned that "[t]he law has generally moved beyond imbuing formalistic acts with such significance, and we should not require what amounts to livery of seisin to effectuate a discharge."[253] This reasoning makes sense, and it is not clear why it should only apply to reserve personnel with self-executing orders.[254] This analysis could just as easily apply to an active-duty Soldier.

The requirement to physically deliver a DD Form 214 is an outdated and legally antiquated concept. The DD Form 214 reflects the commander's official action through its representative—irrespective of delivery to the Soldier. Bryan A. Garner defines *livery of seisin* as "the ceremonial procedure at common law by which a grantor conveyed land

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[249] *See* discussion *supra* Part.III.

[250] *See* United States v. Nettles, 74 M.J. 289, 291 (C.A.A.F. 2015) ("First, no delivery can be effective if it is contrary to expressed command intent... . Next, it is strongly suggested that 'delivery' means actual physical receipt.").

[251] *See id*. ("The delivery requirement has generated its own body of jurisprudence ...").

[252] *Id*. at 292.

[253] *Id*.

[254] *See id*. ("Accordingly, in cases of reserve personnel with self-executing discharge orders issued pursuant to statute, it is the effective date of those orders that determines the existence of personal jurisdiction—not physical receipt of a piece of paper.").

to a grantee."[255] That historical legal concept has "ceased to be generally employed."[256] Similarly, the effective moment of discharge for a Soldier should not depend on the physical delivery of the DD Form 214.

Unfortunately, the CAAF's delivery jurisprudence makes it difficult to apply without running afoul of precedent.[257] The important and relevant concept, however, is the command's intent, which could arguably subsume the delivery concept. The CAAF has even recognized as much in a number of its personal-jurisdiction cases. For example, *United States v. Harmon* focused on the commander's intent with respect to the accused's discharge.[258] In that case, the CAAF found the Soldier's discharge became effective at 2359 hours on the date of his discharge certificate.[259] The command placed a legal hold on him prior to that time, which would permit jurisdiction to continue, voiding the discharge document.[260] The issue in the case centered on the fact that a personnel clerk delivered the discharge certificate to the accused the morning of his discharge date before the command had placed a hold on him.[261] Under longstanding precedent, defense claimed that delivery of the discharge certificate terminated jurisdiction.[262]

Judge Crawford, writing for a majority, disagreed that delivery ended the military's jurisdiction.[263] He reasoned that the command intended to discharge the Soldier at 2359, not "some arbitrary point in time when a

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[255] GARNER, *supra* note 223, at 550 (defining *livery of seisin*).

[256] *See id*. (quoting JOSHUA WILLIAMS, PRINCIPLES OF THE LAW OF REAL PROPERTY 100 (2006)) (describing the history of livery of seisin).

[257] *See Nettles*, 74 M.J. at 291 ("Were we to apply the above analysis to the current case ... the result would be clear. The command did not intend for the discharge to take effect.").

[258] *See* United States v. Harmon, 63 M.J. 98, 102 (C.A.A.F. 2006) (pointing out that a crucial consideration is the commander's intent).

[259] *Id*. at 103 (affirming the military judge's ruling).

[260] *Id*. ("Prior to 2359 hours on May 17, 2001, the command placed a legal hold on Appellant. As a result, *in personam* jurisdiction over Appellant was never lost.").

[261] *Id*. at 100 (noting the separations clerk gave the accused his DD Form 214 at 0900).

[262] *See id*. at 101 (citing Smith v. Vanderbush, 47 M.J. 56, 58 (C.A.A.F. 1997)) ("Delivery of a valid discharge can operate as a termination of court-martial *in personam* jurisdiction.").

[263] *Id*. at 102 (reasoning that the DD Form 214 was not yet effective when delivered).

personnel clerk decided to deliver the copies of the DD Form 214."[264] The court essentially concluded the commander's intent matters in determining the effective time of discharge.[265] The time placed on the DD 214 matters even if it is in the middle of the night; it reflects the commander's decision as to the exact moment the Soldier leaves the military. This echoes their prior ruling in 2000, in *United States v. Melanson*, where the court acknowledged:

> Even if a discharge certificate and separation orders are delivered to a member earlier in the day as an administrative convenience for the unit or the service member, the discharge is not effective upon such a delivery unless it is clear that it was intended to be effective at the earlier time.[266]

The court also pointed to the 1994 case of *United States v. Batchelder* to support this claim, where the CAAF found that a personnel clerk's early delivery of a discharge certificate did not "accelerate the discharge event."[267] Thus, the pertinent and relevant inquiry for the validity of a DD Form 214 is the commander's intent, not delivery.

C. Finance Woes

The second part of the CAAF's test requires the delivery of a final accounting of pay and allowances—the part at issue in *Hart* and

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[264] Id.

[265] *See id.* at 101 (citing United States v. Batchelder, 41 M.J. 337, 339 (C.A.A.F. 1974)) ("[T]he discharge authority must have intended the discharge to take effect.").

[266] United States v. Melanson, 53 M.J. 1, 2 (C.A.A.F. 2000) (noting that pursuant to army regulation, discharges normally take effect at 2400 on the date of discharge). For a full discussion of the Army Court of Criminal Appeals' (ACCA's) ruling in *Melanson*, see Sitler, *supra* note 31, at 4-6 ("*Melanson* highlights that the clearing process for an accused stationed overseas may be broader than outprocessing from the local unit; a clearing from the armed forces, in this case repatriation, may be necessary. *Melanson* also reinforces the three prerequisites necessary to satisfy a discharge."). For a full discussion of the CAAF's ruling in *Melanson*, see Harder, *supra* note 37, at 4-6 (focusing on the effective time of the discharge).

[267] Batchelder, 41 M.J. at 339 (noting the command's specified time was the effective time of the discharge).

Christensen.[268] Although the CAAF walked back this requirement in *Christensen*, it is worth articulating some of the limitations of this element as well. Most prominently, this portion of the test poses a significant challenge because it requires commanders and military-justice practitioners to understand and apply the DFAS's complex regulations and procedures uniformly.[269]

Since a service member's final paycheck reflects payment for services rendered, it should not permit the military to maintain court-martial jurisdiction over him or her prior to disbursement.[270] This final pay reflects a Soldier's entitlement. Three of the four military branches have different timeframes for issuing a Soldier's final paycheck (the Air Force and Navy are the same).[271] The DFAS specifies the Army's policy as follows:

> Regular pay is suspended during the month of separation to ensure that no overpayment exists. On the member's Date of Separation (DOS), the servicing finance office will have a payment sent to the member's bank account using the EFT process. From DOS through the next 20 days, the member's pay account will be monitored and additional pay action will be made for the final pay computation as required. Post separation pay audits are conducted regularly and may identify residual payments that are due to the member. If this occurs, DFAS (or in limited instances, the member's servicing finance officer)

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[268] *See* United States v. Christensen, 78 M.J. 1, 4 (C.A.A.F. 2018) (noting "the *DuBay* military judge focused solely on the 'final accounting of pay'"); United States v. Hart, 66 M.J. 273, 274 (C.A.A.F. 2008) ("We agree with the military judge and the United States Air Force Court of Criminal Appeals which concluded that Hart's final pay, or a substantial potion thereof, was not ready for delivery.").

[269] *See* Cox, *supra* note 100, at 30-31 ("Without an understanding of [finance's Standard Operating Procedures (SOPs)], trying to apply the case law interpreting 10 U.S.C. § 1168(a) to a particular case is pointless.").

[270] *See* Barker v. Kansas, 503 U.S. 594, 605 (1992) (holding that "military retirement benefits are to be considered deferred pay for past services").

[271] *Online Customer Service, Separations Pay*, DEFENSE FINANCE AND ACCOUNTING SERVICE (Mar. 18, 2015), https://corpweb1.dfas.mil/askDFAS/welcome.action (follow "Ask Military Pay" hyperlink; then follow "Separations Pay" hyperlink) [hereinafter DFAS] (listing the branches separate timeframes for determining a Soldier's final pay).

> will pay the residual payments via paper check to the address that the service member provided during separation processing.[272]

With respect to the Army, the final paycheck is made on the service member's date of separation.[273] Therefore, the final pay and discharge date should coincide for a service member in the vast majority of separations.

The policy, however, does note that "[f]rom DOS through the next 20 days, the member's pay account will be monitored and additional pay action will be made for the final pay computation as required."[274] With this statement, the DFAS acknowledges that potential adjustments in pay may become necessary post-separation. The DFAS also reveals it conducts post-separation pay audits to determine if residual payments to the Soldier need to be made.[275] This policy strives to ensure service members receive a proper final accounting of pay and allowances, but, under the CAAF's current test, a post-separation pay audit could arguably subject the Soldier to court-martial jurisdiction. That result is at odds with protecting service members from financial hardship and paying them for services rendered.[276]

The CAAF's three-part test has transformed this requirement into a jurisdictional hook that can hold a service member on active-duty and subject him to a court-martial.[277] Yet, "[j]urisdiction to punish rarely, if ever, rests upon such illogical and fortuitous contingencies."[278] That proposition certainly applies here and cautions against a test that stakes

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[272] *Id*.
[273] *Id.*
[274] *Id*.
[275] *Id*.
[276] *See* discussion *supra* Part IV.A.
[277] The CAAF reversed the trial judge's ruling in *Christensen*, finding the court-martial lacked *in personam* jurisdiction, despite the government arguing that *Hart* and the court's three-part test established that the military never lost personal jurisdiction over the accused. *See* United States v. Christensen, 78 M.J. 1, 12 (C.A.A.F. 2018) ("[T]he Government cites our decision in *Hart* as binding precedent and latches onto the argument that Appellant's discharge was not effectuated because a final accounting of pay had not been conducted.").
[278] United States *ex rel*. Hirshberg v. Cooke, 336 U.S. 210, 214 (1949), *superseded by statute*, 10 U.S.C. § 803(a) (1950), *as recognized in* United States v. Hennis, 75 M.J. 796, 807-10 (C.A.A.F. 2016).

court-martial jurisdiction on the DFAS's policy and bureaucracy. The DFAS operates under regulatory considerations that differ significantly from what the CAAF should base *in personam* court-martial jurisdiction upon.

D. Clearing Post: A Bureaucratic Requirement

The CAAF's final element requires the accused to comply with a service's clearing regulations before jurisdiction severs.[279] The CAAF has yet to address this element in a judicial opinion.[280] However, after its holdings in *Christensen* and *Nettles*, it appears unlikely the court would subject an accused to court-martial jurisdiction for a *de minimus* regulatory violation.[281] For example, what if an accused had failed to have his clearing papers stamped at the on-post library? Would jurisdiction remain? The purpose of a service's clearing regulations is to ensure the orderly departure of Soldiers.[282] It should not be a basis (nor was it ever intended) to serve as another prong on which to base *in personam* jurisdiction.

A Soldier's compliance or lack thereof with the clearing procedures articulated in AR 600-8-101, *Personnel Readiness Processing*, should not implicate whether a court-martial retains personal jurisdiction.[283] Chapter 3 of AR 600-8-101 discusses the Army's out-processing program and provides a series of procedures installations must follow when clearing a Soldier.[284] The regulation makes clear the Army should not publish

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[279] *See* United States v. King, 27 M.J. 327, 329 (C.M.A. 1989) (citing 10 U.S.C. § 1169 (2012)) ("Third, appellant must undergo the 'clearing' process required under appropriate service regulations to separate him from military service.").

[280] Zachary D. Spilman, *Opinion Analysis: CAAF Applies a Reason-and-Policy Standard to Determine the Existence of Court-Martial Jurisdiction, in United States v. Christensen*, CAAFLOG (July 11, 2018), http://www.caaflog.com/2018/07/11/opinion-analysis-caaf-applies-a-reason-and-policy-standard-to-determine-the-existence-of-court-martial-jurisdiction-in-united-states-v-christensen/#more-39463 ("That's a repudiation of two parts of the three-part test from *Hart*; the only part that remains (for now) is the completion of the clearing process that is required under service regulations.").

[281] *See* discussion *supra* Part III.C.

[282] *See* U.S. DEP'T OF ARMY, REG. 600-8-101, PERSONNEL READINESS PROCESSING para. 1-5a(2)(b) (6 Mar. 2018) [hereinafter AR 600-8-101] ("Ensures the proper processing of Soldiers ... from active duty status to another status ... .").

[283] *See id*. ch. 3 (discussing out-processing requirements).

[284] *Id*.

separation orders until the Soldier meets all clearance requirements.[285] Interestingly, AR 600-8-101 emphasizes that "[t]he servicing military pay office will not clear Soldiers until all clearance requirements ... are met."[286] Thus, a Soldier must clear post to receive her final pay, and then the Army may issue a DD Form 214.[287] The failure to follow these tasks should not extend personal jurisdiction over the service member, however.

The CAAF has infused multiple bureaucratic control measures into its personal-jurisdiction jurisprudence and created a web of rules to determine whether a Soldier remains subject to court-martial jurisdiction. These internal Army processes are meant to ensure the orderly departure of Soldiers. The delivery of the discharge certificate, the final accounting of pay and allowances, and the clearing of post, all operate to separate a Soldier in a certain manner. If the procedures are followed correctly, the Soldier receives her DD Form 214 afterward.

Commanders almost certainly strive to follow the procedures articulated and discussed here, but *in personam* issues arise at the margins. When those issues manifest, the answer should not be a scrub of the government's actions to determine where it failed in order to subject the Soldier to court-martial jurisdiction. The bureaucracy places an onus on the Soldier and the government to comply, but either's failure to comply should not affect criminal jurisdiction.

V. Proposal: A Bright-Line Rule for Personal Jurisdiction

This article proposes a simple, bright-line rule to determine where the personal jurisdiction ends. Judge Maggs recognized that *Howard* was a "wrong turn" in *Christensen*.[288] As a result, the CAAF should acknowledge that the court should not have relied on §§ 1168(a) and 1169

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[285] *See id*. para. 3-4(m) ("Before any Soldier signs out and departs, a final check will be made to ensure that the Soldier has out-processed properly.").

[286] *Id*. para. 3-2(g).

[287] *See* DFAS, *supra* note 273 ("On the member's Date of Separation (DOS), the servicing finance office will have a payment sent to the member's bank account using the EFT process.").

[288] *See* United States v. Christensen, 78 M.J. 1, 6 (C.A.A.F. 2018) (Maggs, J., concurring) ("These considerations suggest that the Court may have made a wrong turn in *Howard* and that we should reconsider our approach for determining when a service member has been discharged for the purposes of terminating court-martial jurisdiction.").

to determine when personal jurisdiction ends.[289] Even at that time, it did not make sound jurisprudential sense to anchor *in personam* jurisdiction to those statutes. A bright-line rule will provide clarity to the field and avoid costly litigation in the future. The CAAF will need the right case to change course, but it should certainly be something it looks for in a future term's review.[290]

A. What to Do with *Howard*

The threshold issue the CAAF will face is whether to overrule its prior precedent.[291] An appellate court does not take the drastic action of flouting *stare decisis* lightly.[292] Here, however, the CAAF can likely avoid overruling *Howard* and its progeny. As the court recognized most recently in *Christensen*, the statutory framework serves as guidance.[293] Consequently, the court can announce a standard—as proposed *infra* Part V.B—that marks a clear departure from the formalities of the three-part test.

In determining whether to disturb precedent, the CAAF considers "'whether the prior decision is unworkable or poorly reasoned; any intervening events; the reasonable expectations of service members; and the risk of undermining public confidence in the law.'"[294] The court requires a "'special justification'" to reject prior case law.[295] Here, the court's reliance on the statutory framework has proved unworkable and,

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[289] *See* United States v. Howard, 20 M.J. 353, 354 (C.M.A. 1985) (turning to § 1168(a) to determine the requirements of personal jurisdiction).

[290] The CAAF can grant petitions for review "on good cause" shown. *See* COURT OF APPEALS FOR THE ARMED FORCES, RULES OF PRACTICE AND PROCEDURE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES r. 4(a)(3) (22 June 2017) (defining the court's jurisdiction).

[291] *See Christensen*, 78 M.J. at 7 (Maggs, J., concurring) ("I leave reconsideration of the Court's long-standing approach to determining when a discharge occurs for the purposes of terminating court-martial jurisdiction for another case.").

[292] *See* GARNER, *supra* note 223, at 841 (defining *stare decisis* as "the doctrine of precedent, under which it is necessary to follow earlier judicial decisions when the same points arise again in litigation").

[293] *See Christensen*, 78 M.J. at 5 (noting the statutory framework "serve[s] as *guidance*—not as *prerequisites*—when it comes to determining whether a discharge has been effectuated for jurisdictional purposes").

[294] United States v. Blanks, 77 M.J. 239, 242 (C.A.A.F. 2018) (quoting United States v. Quick, 74 M.J. 332, 336 (C.A.A.F. 2015)).

[295] *Id.* (quoting Kimble v. Marvel Ent., LLC, 135 S. Ct. 2401, 2409 (2015)).

consequently, hurt practitioners' ability to apply the law uniformly.[296] Fortunately, *Howard* did not rely on Supreme Court precedent or another foundational CAAF case when articulating its rule.[297] The challenges associated with the court's three-part test counsel against continuing with the status quo. As a result, the CAAF should announce a bright-line rule that charts a new way forward for determining when personal jurisdiction over a service member ends.

B. The Bright-Line Rule

This article proposes the following rule: A court-martial loses jurisdiction at 2400 on the effective date of the discharge certificate (e.g., DD Form 214).[298] This simple approach will resolve the majority of jurisdictional questions practitioners and trial judges face. This rule focuses on the DD Form 214 itself, emphasizing the supremacy of the document. Here, a valid DD Form 214 severs jurisdiction. As William Winthrop noted, the discharge certificate is an official act of the United States through its representative—the commander.[299] This rule anchors jurisdiction in a tangible and official document.

The history of *in personam* jurisdiction for the military reveals a reliance on statutes to determine the point of discharge.[300] The precedent prior to *Howard* relied on the delivery of a discharge certificate to terminate jurisdiction.[301] This black-letter law has been a linchpin in personal-jurisdiction jurisprudence for decades and continues to this day as part one of the three-part test.[302] This article's bright-line rule acknowledges the importance of that foundational concept with an important caveat—no delivery requirement.

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[296] *See* discussion *supra* Part IV.
[297] *See* discussion *supra* Part III.A.
[298] Although this bright-line rule reflects paragraph 1-29(a)(1)-(2) and (c) of AR 635-200, its authority does not derive from § 1168(a) but rather the black-letter law that has defined jurisdiction since Winthrop. *See* AR 635-200, *supra* note 46, para. 1-29(a)(1)-(2), (c); discussion *supra* Part II-III.
[299] WINTHROP, *supra* note 41, at 548.
[300] *See* discussion *supra* Part III.A (discussing *Howard* and *Scott*).
[301] *Id.*
[302] *See* discussion *supra* Part III.B-C.

This rule rejects the requirement for physical delivery of the DD Form 214 to effectuate the discharge as an atavistic approach to the law.[303] As Judge Stucky recognized in *Nettles*, there is a rich jurisprudential history at the CAAF regarding the physical delivery of a discharge certificate.[304] In fact, Judge Stucky acknowledged that those cases would have resulted in a finding against the accused in *Nettles* since the military never delivered his discharge paperwork to him.[305] However, he discounted that outdated approach, analogizing it to the property concept of livery of seisin.[306] From a policy perspective, physical delivery should not affect the validity of the discharge certificate. The document stands alone as an official act of the United States.[307] The effective date of the discharge is an objective inquiry, not a subjective one—it should not be based on whether the military delivered the document and the Soldier had actual or constructive knowledge of it.[308]

Under this article's proposed rule, the validity of the DD Form 214 becomes the key question practitioners and courts will have to confront. Fortunately, the CAAF has already answered many of the common issues commanders and military-justice leaders face with such a task.[309] For example, a DD Form 214 produced through fraud would not sever court-martial jurisdiction for a service member.[310]

Another facet of the validity analysis is the commander's intent.[311] Military courts have addressed this issue before, analyzing whether the command took affirmative measures to void the DD Form 214 prior to its

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[303] *See* discussion *supra* Part IV.B.

[304] *See* United States v. Nettles, 74 M.J. 289, 291 (C.A.A.F. 2015) (discussing the CAAF's case law on delivery of a discharge certificate).

[305] *See id*. (noting that the discharge and delivery cases were for active-duty personnel).

[306] *See id*. at 292 (discussing livery of seisin).

[307] *See* discussion *supra* Part II.B.

[308] *See* discussion *supra* Part II.B.

[309] *See* discussion *supra* Part II.A.

[310] *See* GILLIGAN & LEDERER, *supra* note 22, § 2-22.10(c)(3), at 2-23-24 (noting a "fraudulently obtained discharge or separation is not a bar to court-martial jurisdiction").

[311] *See* United States v. Harmon, 63 M.J. 98, 102 (C.A.A.F. 2006) (pointing out that a crucial consideration is the commander's intent).

effective date, for example.[312] Commanders and practitioners can rely on the CAAF's robust case law when these matters arise. In actuality, commander's intent should only matter in rare circumstances with respect to a DD Form 214. The default proposition is that the document is valid and reflects the commander's intent to discharge a Soldier.[313] Certainly, there are exceptions that will apply which would void a discharge certificate. For example, if the commander manifests his or her intent to keep a Soldier on active duty in accordance with an approved method, such as placing a legal hold on him or her, then that could void a DD Form 214.[314]

A primary benefit of this rule is the limited litigation costs associated with determining the validity of a single document. In *United States v. Williams*, the accused received his discharge certificate on the same day his commander placed a valid legal hold on his separation.[315] In this circumstance, "appellant's discharge was properly rescinded and the military had *in personam* jurisdiction."[316] This case illustrates the relative ease with which judges can resolve these issues without a more difficult deep-dive into, for example, pay issues.[317] Thus, the legal foundation and case law already exists to support this article's proposed bright-line rule.

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[312] *See id*. ("Prior to 2359 hours on May 17, 2001, the command placed a legal hold on Appellant. As a result, *in personam* jurisdiction over Appellant was never lost.").

[313] *See* discussion *supra* Part II.B (discussing DD Forms 214).

[314] *See Harmon*, 63 M.J. at 103 ("Prior to 2359 hours on May 17, 2001, the command placed a legal hold on Appellant. As a result, *in personam* jurisdiction over Appellant was never lost."). The crux of the issue in these scenarios will be when the command placed that legal hold (e.g., administrative flag)—before or after the effective date of the DD Form 214. This inquiry (when contested) would certainly involve pre-trial litigation that a military judge would have to resolve in order to find personal jurisdiction over the accused. The fact-finding inquiry would likely involve testimony or sworn statements from the commander and S-1 personnel on the procedures followed for generating the DD Form 214.

[315] United States v. Williams, 53 M.J. 316, 317 (C.A.A.F. 2000); *see* Harder, *supra* note 37, at 6 (discussing *Williams*); Sitler, *supra* note 31, at 6 (noting "*Williams* stresses that the commander's intent to discharge is an important fact to consider when determining the validity of a discharge certificate").

[316] *Williams*, 53 M.J. at 317.

[317] *See* United States v. Hart, 66 M.J. 273, 279 (C.A.A.F. 2008) (Effron, C.J., dissenting) ("Although DFAS undoubtedly endeavors to accomplish these myriad tasks in a timely fashion, there is a significant potential for delays and

C. If There Is No Valid Discharge Certificate, Is There a Congressional Statute on Point?

Another important sub-inquiry of this rule will need to occur in situations when the command never produced a discharge document. In those cases, the CAAF should first look to whether there is a congressional statute that required the service member's discharge. This is a laser-focused review of any congressional statute that speaks specifically to a mandatory discharge of a Soldier. As discussed *supra* Part IV.A, §§ 1168(a) and 1169 do not meet this standard.[318] In contrast, § 14505 would suffice.[319] As the *Nettles* majority recognized, the provisions of § 14505 discharged the reservist prior to jurisdiction attaching for his court-martial.[320] In that case, it is immaterial that the accused did not have a valid discharge certificate because a congressional statute mandated his discharge.[321] In specific instances where Congress has spoken to the discharge, such as § 14505, then the requirement for a certificate is of no matter.

A potential concern with this inquiry is the commander's intent. In *Nettles*, for example, Judge Stucky noted the accused would not have been discharged since it was contrary to the commander's intent and the command never delivered the discharge certificate.[322] Under this inquiry, however, *Nettles*-like facts would not matter. Section 14505's requirements trump the commander's intent. In fact, the CAAF essentially reached the same conclusion in *Nettles*, declining to apply the three-part test in favor of a specific statute.[323] Similarly, Judge Maggs's proposed test from his concurrence in *Christensen* would first ask whether a statute

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mistakes, as reflected in the lengthy record of the finance proceedings set forth in the present case.").

[318] *See* discussion *supra* Part IV.A.

[319] *See* United States v. Nettles, 74 M.J. 289, 292 (C.A.A.F. 2015) ("Instead, we think it more appropriate to apply the statute that actually discharged Appellant: 10 U.S.C. § 14505 (2012).").

[320] *Id*. at 293.

[321] *See* 10 U.S.C. § 14505 (2012) ("[A] captain on the reserve active-status list ... who has failed of selection for promotion to the next higher grade for the second time ... shall be separated ... not later than the first day of the seventh month after the month in which the President approves the report of the board which considered the officer for the second time.").

[322] *See Nettles*, 74 M.J. at 291 (recognizing that applying the traditional framework would result in a finding for the government).

[323] *See id*. ("[W]e decline to employ the 10 U.S.C. § 1168(a) framework here.").

or regulation speaks to the service member's discharge.[324] For reasons discussed *supra* Part III.C, that threshold inquiry has its limitations.[325] But the court's reliance on statutes can make sense in certain specific circumstances.

D. The Benefits of a Bright-Line Rule

A bright-line rule removes gamesmanship from the litigation. Since a Soldier's discharge operates at a single point in time based on the DD Form 214 or discharge certificate, the commander cannot act *ex post* to maintain jurisdiction, such as the case in *Christensen*.[326] The same concerns do not attach *ex ante* because a commander's intent matters prior to the service's issuance of the discharge certificate. Put another way, the Command can cancel or revoke a DD Form 214 up and until it goes into effect. A single standard removes ambiguity from the equation and lessens a commander's discretion with respect to the point of discharge.

A principal concern may be what to do in the absence of a discharge certificate when, for example, self-executing orders sever jurisdiction.[327] This article recognizes that the official document need not simply be a DD Form 214—although that is the most ubiquitous.[328] Military orders can also function as the official act of the United States, severing jurisdiction and transforming a Soldier into a civilian.[329]

Importantly, this proposed rule would not alter the CAAF's case law that discuss the attachment of jurisdiction prior to discharge. As the CAAF has recognized, if the government takes official action against a Soldier prior to his discharge, then jurisdiction does not end when the Soldier's ETS arrives.[330] For example, in *United States v. Smith*, the CMA held in 1978 that the mere writing down of charges did not sufficiently signal the

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[324] *See* discussion *supra* Part III.C.
[325] *Id*.
[326] *See* United States v. Christensen, 78 M.J. 1, 6 (C.A.A.F. 2018) (concluding that the military did not have jurisdiction over the accused).
[327] *See* discussion *supra* Part II.B.
[328] *Id*.
[329] *Id*.
[330] *See* United States v. Smith, 4 M.J. 265, 267 (C.M.A. 1978) (citing United States v. Hutchins, 4 M.J. 190 (C.M.A. 1978)) ("By the very terms of this article, the mere expiration of a period of enlistment, alone, does not alter an individual's status under the Uniform Code.").

government's "intent to impose its legal processes upon the individual."[331] The court recognized that jurisdiction may attach prior to a service member's discharge and then continue until the court-martial concludes.[332] In contrast, in 1982, in *United States v. Self*, the court found that criminal investigators labeling the Soldier as a suspect, interviewing him, and advising him of his legal rights were enough for jurisdiction to attach.[333] In the latter case, the commander's actions voided the self-executing orders, while in the former it did not.

One of the most significant benefits of a bright-line rule is the reduction in information costs for commanders and practitioners. The certainty with which military personnel can operate under this new rule will reduce ambiguity on whether a service member is subject to court-martial jurisdiction. It will also eliminate many of the issues the CAAF has had to confront with its three-part test, including issues surrounding the physical delivery of the discharge certificate to the service member as well as whether the Soldier received his or her final accounting of pay and allowances.[334] The reduction in litigation and resource costs is a worthwhile benefit. The CAAF has been facing *in personam* jurisdiction issues for over thirty years; the time has come to find a solution that is fair, effective, and legally sound.

VI. Conclusion

The hallmark of military jurisdiction has always been a question of a Soldier's status.[335] The answer to this key question marks the dividing line between a Soldier and a civilian. Much is at stake. From a practical standpoint, military commanders and their legal advisors need a clear answer to this question so they can determine when a Soldier is or is not subject to their jurisdiction. From an equity standpoint, military courts

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[331] *Id*.

[332] *Id*. ("[I]f jurisdiction has attached prior to discharge, it continues until termination of the prosecution.").

[333] *See* United States v. Self, 13 M.J. 132, 136, 138 (C.M.A. 1982) ("Jurisdiction having attached by commencement of action with a view to trial—as by apprehension, arrest, confinement, or filing of charges—continues for all purposes of trial, sentence, and punishment.").

[334] *See* discussion *supra* Part IV.B-C.

[335] *See* SCHLUETER, *supra* note 20, § 4-4, at 206 (citing Toth v. Quarles, 350 U.S. 11 (1955)) ("Personal jurisdiction is a question of 'status.'").

should not have the ability to subject discharged Soldiers who have become civilians to trial.[336] Any ambiguity in the answer to this key question subjects civilians to a court-martial that never should have been—as in *Christensen* and *Nettles*.[337]

This article proposes a new way forward for the CAAF on personal jurisdiction. Judge Maggs's concurrence in *Christensen* cut through over thirty years of personal-jurisdiction jurisprudence and acknowledged a harsh reality: *Howard* proved a mistake.[338] The CAAF's reliance on two personnel statutes for its jurisdictional test has proved unworkable for the field and potentially unfair to the accused. Both accused Soldiers in *Christensen* and *Nettles* were subjected to the military-justice process when those courts lacked the power to try them for any offense.[339] The fault does not lie with the trial counsel and military judges—they applied the law as the CAAF had announced it.[340] Consequently, the burden falls to the CAAF to announce a rule that results in less ambiguity and ensures military courts do not subject civilians to a court-martial. A bright-line rule meets this standard and will save the military from expending unnecessary resources in unnecessary prosecutions.

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[336] *See* discussion *supra* Part II.C-D.

[337] *See* United States v. Christensen, 78 M.J. 1, 6 (C.A.A.F. 2018) (concluding that the military did not have jurisdiction over the accused); United States v. Nettles, 74 M.J. 289, 293 (C.A.A.F. 2015) (finding no jurisdiction).

[338] *See Christensen*, 78 M.J. at 6 (Maggs, J., concurring) ("These considerations suggest that the Court may have made a wrong turn in *Howard* and that we should reconsider our approach for determining when a service member has been discharged for the purposes of terminating court-martial jurisdiction.").

[339] *See id*. (concluding the military did not have jurisdiction over the accused); United States v. Nettles, 74 M.J. 289, 293 (C.A.A.F. 2015) (finding no military jurisdiction).

[340] *See Christensen*, 78 M.J. at 5 ("[T]he Government cites our decision in *Hart* as binding precedent and latches onto the argument that Appellant's discharge was not effectuated because a final accounting of pay had not been conducted."); *Nettles*, 74 M.J. at 291 ("Were we to apply the above analysis to the current case (as did the lower courts), the result would be clear. The command did not intend for the discharge to take effect, as the convening authority intended to prevent discharge by placing Appellant on administrative hold. Nor was there physical receipt of the discharge certificate, due to the paper shortage. For the reasons below, though, we decline to employ the 10 U.S.C. § 1168(a) framework here.").

Article III tribunals should be the forum where civilians face federal prosecution.[341] "The Founders envisioned the army as a necessary institution, but one dangerous to liberty if not confined within its essential bounds."[342] The legitimacy of the U.S. court-martial system is at stake when it jumps outside its limits. A simpler approach to determining personal jurisdiction that comports with a narrow conception of military jurisdiction ensures courts-martial remain "within [their] essential bounds."[343] The CAAF is already moving in the right direction as evidenced by *Christensen* and *Nettles*.[344] The final step is only one case away.

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[341] *See* United States *ex rel*. Toth v. Quarles, 350 U.S. 11, 19-22 (1955) (emphasizing the importance of "Bill of Rights safeguards" for civilians).
[342] Reid v. Covert, 354 U.S. 1, 23-24 (1957).
[343] See id.
[344] *See* discussion *supra* Part III.C.