The Long Arm of Military Justice: Court-Martial Jurisdiction and the Limits of Power[1]

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Introduction

There are five elements of court-martial jurisdiction: (1) The court-martial must be convened by an officer empowered to convene it; (2) The court-martial personnel must have the proper qualifications; (3) The charges must be properly referred to it by competent authority; (4) The accused must be a person subject to court-martial jurisdiction; and (5) The offense must be subject to court-martial jurisdiction.[2] In recent decisions addressing court-martial jurisdiction, the courts addressed several of these elements.

In *United States v. Kohut*,[3] the United States Court of Appeals for the Armed Forces (CAAF) addressed the power of the convening authority to convene courts in the face of a service regulation that appears to limit that authority. In other cases, the service courts addressed various aspects of subject matter and personal jurisdiction. The most intriguing case of the year, however, was not decided by a military appellate court. In *Murphy v. Dalton*,[4] the United States Court of Appeals for the Third Circuit considered whether a member of the Reserve Component could be recalled to active duty under Article 2(d)(2)(A) of the Uniform Code of Military Justice[5] to stand trial for crimes committed while formerly a member of the Regular Component. In a decision that directly contradicts the Court of Military Appeals[6] holding on this issue,[7] the United States Court of Appeals for the Third Circuit (Third Circuit) concluded that the Marine Corps lacked personal jurisdiction to try a Reserve Component Marine for crimes he committed while a member of the Regular Component.

Impact of Service Regulations Upon Convening Authority

In *United States v. Kohut*, the CAAF considered the impact of service regulation violations on statutory authorizations to convene courts-martial. The accused pled guilty at a special court-martial to two specifications of assault. The incident giving rise to the charges had previously been the subject of a state criminal prosecution.[8] On appeal, Kohut claimed that the court lacked jurisdiction over these offenses because a Navy Instruction abrogated the power of the convening authority to convene the court. Section 0124 of the Manual of the Judge Advocate General Manual (JAGMAN) provides that, once a servicemember has been tried for an offense in the state court, court-martial is permitted only if essential to the interests of justice and upon permission of the Navy's Judge Advocate General (JAG).[9] The appellant claimed the government violated section 0124 because the Navy JAG did not give permission to court-martial the accused.[10] The appellant's theory was that the Secretary of the Navy, in promulgating section 0124 of the JAGMAN, withheld from the convening authority the power to convene a

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1. *See* McDonald v. Mabee, 243 U.S. 90, 91 (1917): "The foundation of jurisdiction is physical power" (Holmes, J.). *See also* United States ex. rel. Mayo v. Satan and His Staff, 54 F.R.D. 282, 283 (W.D. Pa. 1971):

> He alleges that Satan has on numerous occasions caused plaintiff misery and unwarranted threats, against the will of plaintiff, that Satan has placed deliberate obstacles in his path and has caused plaintiff's downfall. Plaintiff alleges that by reason of those acts Satan has deprived him of his constitutional rights . . . .We question whether plaintiff may obtain personal jurisdiction over the defendant in this judicial district.

2. MANUAL FOR COURTS-MARTIAL, United States, R.C.M. 201(b)(1)-(5) (1995 ed.) [hereinafter MCM].

3. 44 M.J. 245 (1996).

4. 81 F.3d 343 (3rd Cir. 1996).

5. UCMJ art. 43 (1988).

6. On 5 October 1994, the National Defense Authorization Act for Fiscal Year 1995, Pub. L. No. 103-337, 108 Stat. 2663 (1994), changed the name of the United States Court of Military Appeals to the United States Court of Appeals for the Armed Forces (codified at 10 U.S.C. § 941 (1995)).

7. Murphy v. Garrett, 29 M.J. 469 (C.M.A. 1990).

8. United States v. Kohut, 41 M.J. 565, 566 (N.M.Ct.Crim.App. 1994).

9. DEP'T OF THE NAVY, JAG INSTRUCTION 5800.7C, MANUAL OF THE JUDGE ADVOCATE GENERAL, § 0124 (3 Oct. 90) [hereinafter JAGMAN section 0124]. The Army announced a similar policy in DEP'T OF ARMY, REG. 27-10, LEGAL SERVICES: MILITARY JUSTICE, para. 4-2 (24 June 96) [hereinafter AR 27-10]. The Army policy differs somewhat from the Navy policy, particularly in the level of approval necessary to try a soldier after a state prosecution. In the Army, the general court-martial convening authority (GCMCA) must give approval to proceed to court-martial. AR 27-10, para. 4-3a.

court-martial in cases where the offenses had been tried in state court.

The CAAF addressed the impact service regulation violations have on the statutory authorization[11] to convene courts-martial. It is a well-settled principle that jurisdictional significance should not attach to implementing service regulations in the absence of express characterization by Congress.[12] The court examined Article 23 of the UCMJ[13] and found that "Congress' specific designation of this commander as a convening authority was not made expressly dependent on service regulations or secretarial designation."[14]

The appellant's attack on jurisdiction also failed on another level. The court noted that section 0124 of the JAGMAN merely stated Navy policy, and as such, "[i]mposed no legal or binding restriction on subordinate commanders that deprived courts-martial convened by them of jurisdiction."[15] Finally, the court held that the Navy Instruction did not create a binding regulatory procedure.[16]

Practitioners should not interpret *Kohut* as an invitation to ignore service regulations.[17] Rather, the case reassures government counsel that mistakes in complying with such policies[18] will not limit a convening authority's statutory right to convene courts.

Valid Discharge After Action with a View Toward Trial Terminates Personal Jurisdiction

Vanderbush v. United States[19] should strike fear in the hearts of those serving as chiefs of military justice, especially those stationed overseas. The jurisdictional issue in this case arose from a common overseas scenario: a soldier is assigned to one unit, but attached to another for administration of military justice. According to the Army Court of Criminal Appeals (ACCA), the government lost personal jurisdiction[20] over the accused when he was validly discharged from the Army after arraignment, but before the trial. The case reminds chiefs of justice that they must understand key personnel regulations and must personally check to ensure completion of appropriate flagging action to prevent an unintended discharge.[21] Even more significant, chiefs of justice must personally secure and monitor the extension of an accused or suspect beyond the individual's expiration of term of service (ETS).[22]

In *Vanderbush*, the accused was assigned to the Eighth United States Army (EUSA), Korea, but performed his military duties in the 2d Infantry Division (2d ID) area of responsibility. In an exceptional series of events, the 2d ID was proceeding to court-martial at the precise time that EUSA was completing the accused's final outprocessing from the Army.[23] The military judge arraigned the accused on 30 May 1996, and set the trial for 26 June 1996. In the meantime, EUSA issued separation

10. *Kohut*, 41 M.J. at 567.

11. In articles 22, 23, and 24 of the UCMJ, Congress specified who may convene general courts-martial, special courts-martial, and summary courts-martial, respectively. UCMJ arts. 22-24 (1988).

12. *Kohut*, 41 M.J. at 569 (quoting United States v. Jette, 25 M.J. 16, 20 (C.M.A 1987)).

13. UCMJ art. 23 (1988). Article 23 enumerates who may convene special courts-martial.

14. United States v. Kohut, 44 M.J. 245, 250 (1996).

15. *Id.*

16. *Id*. Section 0124 expressly states that the policy is "[n]ot intended to confer additional rights upon the accused." JAGMAN section 0124. JAGMAN section 0124, *supra* note 9.

17. Army judge advocates should be particularly mindful of the requirements of AR 27-10. The proponent of the regulation is The Judge Advocate General of the Army.

18. In *United States v. Sloan*, 35 M.J. 4, 8 (C.M.A. 1992), the court considered the jurisdictional impact of noncompliance with an Army policy that retirees not be tried by court martial unless extraordinary circumstances exist and approval is given by the Office of The Judge Advocate General, Criminal Law Division. The court similarly concluded that such a policy did not limit the power of statutorily-designated commanders to convene courts. *Id*. The Army's current policy on trying retirees is largely unchanged. AR 27-10, *supra* note 9, para. 5-2b(3).

19. No. 9601265 (Army Ct. Crim. App. Nov. 13, 1996).

20. Courts-martial may only try those persons when authorized to do so under the code. MCM, *supra* note 2, R.C.M. 202(a).

21. The Army operates a system to guard against the accidental execution of specified favorable personnel actions for soldiers who are not in good standing. DEP'T OF ARMY, REG. 600-8-2, SUSPENSION OF FAVORABLE PERSONNEL ACTIONS (FLAGS), para. 1-8 (1 Mar. 1988) [hereinafter AR 600-8-2]. Imposition of charges, pretrial restraint or initiation of an investigation into suspected criminal activity all require that the subject's records be "flagged" to reflect the unfavorable action. *Id*. paras. 1-11 & 1-12.

22. Soldiers will not be retained past their ETS because they are flagged. AR 600-8-2, *supra* note 21, para. 1-16. The GCMCA, though, may authorize retention beyond ETS for court-martial actions and for charges, pretrial restraint or investigation. *Id*. para 2-8(c).

orders effective on 15 June 1996. On that date, the accused flew to his home of record in the United States in possession of a valid discharge certificate and final accounting of his pay, which was to be mailed to him.[24]

In June, the court-martial reconvened without the accused. The defense counsel moved to dismiss for lack of personal jurisdiction. The military judge denied the motion, finding that the discharge did not terminate jurisdiction.[25] The accused filed a Writ of Prohibition, seeking to have the ACCA dismiss the charges. The ACCA defined the issue as "[w]hether court-martial jurisdiction was severed when the petitioner was discharged after arraignment but before charges were resolved by lawful authority."[26]

The Army court examined the discharge to determine whether it was complete and valid at the time the court-martial reconvened. On the question of completeness, the government contended that the discharge was not complete because the Army had not yet prepared to deliver the accused's final pay.[27] The government argued that a final audit by the Defense Finance and Accounting Service was required before the Army could deliver final pay to the accused.[28] The court easily rejected this argument and concluded that computation of final pay and examination of that amount at the installation level satisfied 10 U.S.C. § 1168(a).[29]

On the question of validity, the court refused to find that the discharge was invalid because of a fraud committed by the accused.[30] The court also rejected the government's mistake of fact argument. The government argued that the discharge authority would never have issued the discharge certificate had she known court-martial charges were pending. The court, however, refused to impute the convening authority's intent to retain the accused to the discharge official who, in the absence of any flagging action and extension approval by the GCMCA, discharged the accused in accordance with the Army procedures.[31]

Likewise, the court rejected the government's argument that the accused's discharge was invalid due to a mistake of law. The court examined the provisions in both *Army Regulation (AR) 600-8-2*[32] and *AR 635-200*[33] for retaining soldiers beyond their ETS while pending court-martial. Contrary to the government's position, the court held that "[a]rraignment by court-martial does not operate automatically either to restrict a soldier's eligibility for ETS discharge or to limit the actual authority of a properly appointed discharge official to issue a valid ETS discharge."[34]

Having decided that the accused's discharge was valid, the court examined what effect the discharge had on jurisdiction. Citing "[b]lack letter law that in personam jurisdiction over a military person is lost upon his discharge from the service

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23. *Vanderbush*, slip op. at 2.

24. *Id.*

25. *Id.* at 2-3.

26. *Id.* at 3.

27. Discharges at ETS are governed by 10 U.S.C. § 1168(a) (1995), which states:

> (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.

10 U.S.C. § 1168(a) (1995). This delivery has significant legal meaning, signifying "[t]hat the transaction is complete, that full rights have been transferred, and that the consideration for the transfer has been fulfilled." United States v. Howard, 20 M.J. 353, 354 (C.M.A. 1985).

28. *Vanderbush*, slip op. at 6.

29. *See supra* note 27, 10 U.S.C. § 1168(a) (1995). The court noted that Congress did not intend the statute to be used as a "[m]eans of retaining court-martial jurisdiction when the government cannot or will not meet its obligation to timely deliver the soldier's final pay." *Vanderbush*, slip op. at 7.

30. Citing Article 3, the court concluded that the government had not secured the predicate conviction of the fraudulent discharge at a separate trial. UCMJ art. 3(b) (1988); United States v. Reid, 43 M.J. 906 (Army Ct. Crim. App. 1996); *infra* note 36 and accompanying text.

31. *Vanderbush*, slip op. at 8; s*ee also*, *supra* notes 21 & 22 and accompanying text.

32. *See supra* notes 21 and 22 and accompanying text.

33. Dep't of Army, Reg. 635-200, Enlisted Personnel (17 Oct. 1990) [hereinafter AR 635-200]. AR 635-200 provides that soldiers may be retained after ETS in three circumstances: (1) when an investigation of conduct has been started with a view of trial by court-martial; (2) when charges have been preferred; and (3) when the soldier has been apprehended, arrested, confined, or otherwise restricted by appropriate military authority. *Id*. para. 1-24a(1)-(3). Paragraph 1-24b provides, however, that a soldier who is awaiting trial by court-martial when he or she would otherwise be eligible for discharge will not be discharged until final disposition of the court-martial charges. *Id*. para. 1-24b.

34. *Vanderbush*, slip op. at 9.

absent some saving circumstance or statutory authorization,"[35] the court quickly concluded that no statutory authorization extended jurisdiction over the accused, a discharged person.[36] The court next considered whether some "saving circumstance" allowed jurisdiction despite the discharge.[37] The government argued that jurisdiction attaches at arraignment[38] and that such attached jurisdiction continues until the charges are resolved. The court, however, again disagreed. It distinguished the current case, in which the discharge occurred before trial and sentencing, from cases where jurisdiction survived a valid discharge. In those cases, the discharge occurred after court-martial findings and sentencing, and the courts considered the impact of discharge upon authority to complete post-trial action and appellate review.[39] Here, the court was reluctant to extend the concept of continuing attached jurisdiction where, as in the case at bar, it would result in a "[b]road and unprecedented judicial extension of court-martial jurisdiction."[40] The court held "[t]hat a valid discharge of a soldier from the Army prior to trial operates as a formal waiver and abandonment of court-martial in personam jurisdiction, whether or not such jurisdiction had attached prior to discharge."[41]

Judge advocates will certainly await anxiously the CAAF's resolution of this issue.[42] In the meantime, the prudent chief of justice should personally ensure that appropriate flagging action is completed on all suspects and accuseds. In addition, they must check the ETS of every suspect and accused, and gain timely approval from the GCMCA to extend an accused beyond ETS in compliance with AR 600-8-2.[43] These actions will ensure that the accused is not inadvertently but lawfully discharged due to the absence of these actions.[44]

Fraudulent Discharge

In *United States v. Reid*,[45] the Army Court of Criminal Appeals considered whether a discharged soldier can be tried for both fraudulent discharge[46] and other offenses during the same proceeding. Although appropriately flagged[47] for a variety of crimes, the accused fraudulently secured a discharge and severance pay. The Army prosecuted the accused for all his crimes at the same trial--those committed before the fraudulent discharge, the fraudulent discharge, and the one committed after the fraudulent discharge.[48] Pursuant to the accused's guilty plea, the military judge announced a finding of guilty to

35. *Id.* (quoting United States v. Howard, 20 M.J. 353, 354 (C.M.A. 1985)).

36. *Id.* at 4. The UCMJ provides explicit statutory authority to try discharged soldiers in a variety of circumstances. First, article 3(a) of the UCMJ provides jurisdiction over discharged soldiers who later reenter the service and become, once again, subject to the code. UCMJ art. 3(a) (1988). Article 3(b) states that a discharged person who is convicted of having obtained the discharge by fraud may be prosecuted for offenses committed prior to the fraudulent discharge. UCMJ art 3(b) (1988). Deserters who later rejoin a service and are discharged may still be prosecuted for the desertion committed before the discharge. UCMJ art. 3(c) (1988). Article 2(a)(7) provides that jurisdiction exists over persons in custody of the Armed Forces serving a sentence imposed by a court-martial even though the prisoner may have been discharged. UCMJ art. 2(a)(7) (1988); *see, e.g.*, United States v. Harry, 25 M.J. 513 (A.F.C.M.R. 1987) (jurisdiction exists to try prisoner, but punishment may not include another punitive discharge). Jurisdiction continues over retirees from both the Regular Component and the Reserve Component. UCMJ art. 2(a)(4)-(5) (1988). Finally, the Court of Military Appeals has interpreted Article 2(d) as allowing, under limited circumstances, prosecution of members of the Reserve Component who committed offenses prior to their discharge from the active component. *See*, United States v. Murphy, 29 M.J. 469 (C.M.A. 1990); *see also*, discussion to R.C.M. 202. *But see, infra* notes 55 through 85.

37. *Vanderbush*, slip op. at 6.

38. According to R.C.M. 202(c), personal jurisdiction attaches at a much earlier time. It provides that court-martial jurisdiction attaches over a person when action with a view toward trial of that person is taken. MCM, *supra* note 2, R.C.M. 202(c)(1). "The action must be such that one can say that at some precise moment the sovereign had authoritatively signaled its intent to impose its legal processes upon the individual." United States v. Self, 13 M.J. 132, 137 (C.M.A. 1982) (quoting United States v. Smith, 4 M.J. 265, 267 (C.M.A. 1978)). R.C.M. 202(c)(2) states that action with a view toward trial can include apprehension, imposition of restraint such as restriction, arrest or confinement, and preferral of charges. The courts have expanded the list of events which constitute action with a view toward trial. *See, e.g., Self*, 13 M.J. at 137 (criminal investigation by military law enforcement agency which made guilt clear and prosecution likely, fulfills this requirement); United States v. Wheeley, 6 M.J. 220 (C.M.A. 1979) (official advisement of Article 31 and *Miranda* rights is action with a view toward trial).

39. *See* United States v. Speller, 24 C.M.R. 173 (1957) (discharge may terminate military status to be tried but it does not require dismissal of appellate review). *See also* United States v. Engle, 28 M.J. 299 (C.M.A. 1989) (execution of discharge does not deprive Court of Military Appeals of jurisdiction to grant petition for review); United States v. Montesinos, 28 M.J. 38 (C.M.A. 1989) (administrative separation after finding of guilty does not vacate the conviction or terminate process of appellate review); United States v. Jackson, 3 M.J. 153 (C.M.A. 1977) (jurisdiction not lost when accused is administratively discharged while case is pending before an appellate court); United States v. Entner, 36 C.M.R. 62 (1965) (jurisdiction not lost when accused is administratively discharged while case is pending before an appellate court); United States v. Sippel, 15 C.M.R. 50 (1954) (appellate jurisdiction not divested by separation from the service).

40. *Vanderbush*, slip op at 5.

41. *Id.* at 6. Judge Russell, in his dissenting opinion, disagreed with the majority's view of attached court-martial jurisdiction. *Id*. at 11. According to his expansive interpretation, action with a view toward trial attaches *in personam* court-martial jurisdiction, and this attached personal jurisdiction survives a discharge. *Id.* at 11, 12. Accordingly, the only category of ex-soldier who is the constitutionally exempt from court-martial is the "[c]ategory [of] persons who are *validly* discharged without action with a view toward trial and who have not subsequently re-entered the service." *Id.* at 12. (emphasis in original). The accused did not fit into this category because the government took definite "action with a view toward trial"--it arraigned the accused. Further, Judge Russell opined that discharge lacked "[t]he imprimatur of competent judicial authority over the case [and] could not change the status of the petitioner from that of a soldier awaiting court-martial." *Id*. at 13.

42. On 6 February 1997, The Judge Advocate General of the Army filed a certificate for review of the decision of the service court. *Id., appeal docketed*, No. 97-5003/AR (CAAF Feb. 6, 1997).

the fraudulent discharge and then continued the proceeding as to the other charges. On appeal, the Army court affirmed the fraudulent discharge conviction, but reversed the remaining convictions.[49]

The court observed that the plain language of Article 3(b)[50] "[e]stablishes that a court-martial lacks jurisdiction over offenses committed prior to an alleged fraudulent separation until a predicate conviction of fraudulent discharge is obtained."[51] The court concluded that the accused's plea of guilty did not fulfill the requirement for a "conviction." It held that the "conviction" contemplated by the Congress in Article 3(b) is an adjudged sentence based on the finding of guilty to fraudulent separation.[52] Further, because the predicate conviction empowers the court-martial to hear a case it otherwise is powerless to consider, the accused cannot waive the issue through a guilty plea to the later offense.[53]

In dicta, the court also addressed the issue of jurisdiction over the offense[54] that occurred after the discharge.[55] On its face, Article 3(b) explicitly restores jurisdiction only over offenses committed prior to the fraudulent discharge.[56] The question for practitioners is whether jurisdiction exists--after a conviction for fraudulent discharge--over offenses committed after the fraudulent discharge. The court found that such a discharge is void, and absent a valid discharge, the accused remains subject to the UCMJ as a servicemember under Article 2.[57]

Reid instructs government counsel to follow the proper procedures for prosecuting fraudulent discharges and other crimes. Although it is more expedient to try an accused for all offenses at one proceeding, the court-martial simply lacks jurisdiction to try the accused for the pre-discharge offenses until the government secures a conviction for the fraudulent discharge. Government counsel must follow the explicit language of the statute and plan for two trials.

Death Declaration Does Not Equate to Discharge

In *United States v. Pou*,[58] the Air Force Court of Criminal Appeals dealt with the unique question of whether a declaration

43. There is an apparent discrepancy between AR 600-8-2 and AR 635-200 over the proper timing of the GCMCA approval to extend beyond ETS. The former explicitly states that approval of the GCMCA is required to retain a soldier past ETS. Flagging alone does not authorize retention of a soldier past ETS. AR 600-8-2, *supra* note 21, para. 1-16. Further, the steps for retaining beyond ETS include submitting the request for approval to the GCMCA with a suspense of thirty days before the ETS, and telephonic follow-up if the GCMCA does not respond to the request within thirty days of ETS. *Id.*, para. 1-10. AR 635-200, the regulation commonly consulted by judge advocates on this issue, states "[i]f charges have not been preferred, the soldier will not be retained more than 30 days beyond the ETS unless the [GCMCA] approves." AR 635-200, *supra* note 33, para. 1-24b. Because of this provision, most judge advocates think that a soldier can be retained beyond ETS for thirty days *without* approval of the GCMCA. The safest course of action is for government counsel to work closely with the servicing personnel office and to obtain GCMCA approval *prior* to the ETS date. In any event, government counsel absolutely must ensure that the accused is properly flagged.

44. Mere failure by the government to accomplish these actions--in the absence of a valid discharge--normally will have no effect on court-martial jurisdiction. United States v. Hutchins, 4 M.J. 190, 192 (C.M.A. 1978).

45. 43 M.J. 906 (Army Ct. Crim. App. 1996).

46. *See* UCMJ art. 83 (1988); MCM, *supra* note 2, pt. IV, para. 8a.

47. *See supra* note 21.

48. *Reid*, 43 M.J. at 908.

49. *Id.* at 910.

50. Article 3(b) provides, in pertinent part: "Upon conviction [for fraudulent discharge] he is subject to trial by court-martial for all offenses under this chapter committed before the fraudulent discharge." UCMJ art. 3(b) (1988).

51. *Reid*, 43 M.J. at 909 (quoting United States v. Banner, 22 C.M.R. 510, 515 (A.B.R. 1956)).

52. *Id.* at 910.

53. *Id.*

54. The accused was charged with having deserted the day after his fraudulent discharge. *Id.* p. 909.

55. The Court of Appeals for the Armed Forces has decided two cases involving Article 3(b). *See* Wickham v. Hall, 12 M.J. 145 (C.M.A. 1981); United States v. Cole, 24 M.J. 18 (C.M.A.) *cert. denied*, 484 U.S. 828 (1987). In both cases the additional offenses occurred prior to the fraudulent discharge.

56. *See supra* note 50.

57. *Reid*, 43 M.J at 910. Article 2(a)(1) provides jurisdiction over members of the Regular Component, including those who are awaiting a discharge after expiration of the term of service. UCMJ, art. 2(a)(1) (1988).

58. 43 M.J. 778 (A.F. Ct. Crim. App. 1995).

that a missing servicemember is dead equates to a discharge from the service for the purpose of terminating jurisdiction. In *Pou*, the accused faked his death and deserted from the Air Force. The Air Force declared him dead soon thereafter. Years later, the Air Force learned of the deceit and tried the accused for a number of offenses that he had committed after the Air Force declared him dead.[59]

On appeal, the accused challenged jurisdiction over the offenses. He contended that because Article 3(b)[60] governed the jurisdiction in the case, the government lacked jurisdiction over offenses that were committed after the "fraudulent discharge." The Air Force Court never addressed the scope of Article 3(b) jurisdiction, though, because it concluded that Article 3(b) did not apply to the case. The court found that the Air Force never discharged the accused; instead, it merely declared him dead. It distinguished between a fraudulent discharge, where the accused induces the service to take an affirmative action to separate the accused, and a death, where the military never effects a separation. With a death, the military merely officially acknowledges an event that is beyond the control of the service.[61]

The CAAF and the Third Circuit Disagree on Article 2

Perhaps the most interesting case involving jurisdiction last year was *Murphy v. Dalton*,[62] although it has questionable applicability to the military practitioner. Murphy served as an officer on active duty in the Marine Corps from April 1981 until May 1988.[63] In May 1988, he simultaneously resigned his commission in the regular Marine Corps and accepted a commission as an officer in the Marine Corps Reserve.[64] In August 1989, Murphy was informed of court-martial charges preferred against him involving his conduct while commissioned in the Regular Component, and of the government's intent to recall him to active duty.[65]

Murphy sought extraordinary relief from the Court of Military Appeals (CMA). He petitioned the court for an injunction and dismissal of the charges for lack of personal jurisdiction.[66] In particular, he alleged that the Marine Corps lacked the authority under Article 2 of the UCMJ to recall him to active duty for the Article 32 investigation. In Article 2(d)(1) Congress provided the express authority to recall to active duty, involuntarily, members of the Reserve Component for the purpose of an Article 32 investigation, trial by court martial, and nonjudicial punishment.[67] Article 2(d)(2) places a limitation on the power to recall these members of the Reserve Component. It states that "A member of a reserve component may not be ordered to active duty under paragraph (1) except with respect to an offense committed while the member was (A) on active duty; or (B) on inactive-duty training . . . ."[68]

The court denied Murphy's petition and held that Article 2(d)(2)(A) authorized the Marine Corps to recall the accused for offenses that he had committed while he was on active duty, regardless of whether he was on active duty in the Reserve Component or in the Regular Component.[69] Furthermore, it held that since the accused was commissioned in the reserves simultaneously with resigning from the Regular Component, that there was no break in service which would normally have terminated jurisdiction over the accused for the offenses.[70] Murphy was recalled to active duty and pled guilty at a general court-martial.[71] After exhausting his appellate rights, Murphy

59. *Id.* at 779.

60. *See supra* note 50 and accompanying text.

61. *Pou*, 43 M.J. at 780.

62. 81 F.3d 343 (3rd Cir. 1996).

63. Murphy v. Garrett, 29 M.J. 469, 470 (C.M.A. 1990). From 1986 until 1987, the accused attended law school under the Marine Corps Funded Law Education Program (FLEP). In June 1987, he requested to be dropped from the FLEP and was reassigned to a recruiting unit. Unknown to the Marine Corps, he continued his law school studies and neglected his full-time military duties. *See also* Murphy v. Garrett, 729 F. Supp. 461, 463 (W.D. Pa. 1990).

64. *Murphy*, 29 M.J. at 470. As a reservist, the accused frequently participated in inactive duty training until his transfer into the Individual Ready Reserve. *Id.*

65. *Id.* The accused immediately filed suit in federal district court, asserting jurisdiction under the habeas corpus statute. 28 U.S.C. § 2241(c)(1). He sought first a temporary restraining order, Fed. R. Civ. P. 65(b), and then a preliminary injunction, Fed. R. Civ. P. 65(a), to enjoin the Marine Corps from ordering him to active duty for an Article 32 investigation into the charges. *Murphy*, 729 F. Supp. at 462. Article 32 of the Uniform Code of Military Justice (UCMJ) provides that no charges may be referred to a general court-martial until a thorough and impartial investigation of the allegations has been conducted. This investigation is commonly referred to as an Article 32 investigation. UCMJ art. 32 (1988). The district court denied the petition for a preliminary injunction and dismissed the complaint, in part, for failure to exhaust military administrative remedies. *Id.* at 461.

66. 29 M.J. 469, 470 (C.M.A. 1990).

67. UCMJ art. 2(d)(1) (1988).

68. *Id.* at 2(d)(2).

69. The court found that the term "active duty" should be given its plain and ordinary meaning, to include active duty in both the Regular Component and the Reserve Component. *Murphy*, 29 M.J. at 471.

again sought relief in the federal courts.[72] The district court granted summary judgment in favor of the Secretary of the Navy.[73] On appeal, the Third Circuit reversed, concluding that the court-martial lacked personal jurisdiction over Murphy.[74]

The Third Circuit, like the CMA,[75] focused on the applicability of Article 2(d)(2)(A) and the meaning of the term "active duty." Unlike the CMA, the Third Circuit concluded that, based on the legislative history of Article 2(d), the term "active duty" means active duty in the Reserve Component. According to the court, "[n]owhere is there evidence of a congressional intent to subject a reservist to court-martial jurisdiction for offenses committed on active duty while in the regular component."[76] The Third Circuit held since Murphy had committed the offenses while a member of the Regular Component and not the Reserve Component, the Marine Corps could not use Article 2(d)(2)(A) as a mechanism to recall Murphy and secure personal jurisdiction over him.[77]

The Third Circuit also addressed the issue of whether Murphy's resignation and simultaneous commission amounted to a break in service which would terminate personal jurisdiction. The Third Circuit again disagreed with the CMA[78] and held that personal jurisdiction over Murphy terminated upon his resigning his commission in the Regular Component.[79] It found that there was a clear and complete break in Murphy's service because at the time of his resignation, Murphy had no further military obligation and his discharge was not conditioned upon further military service.[80] Having concluded that personal jurisdiction over Murphy did not survive the discharge, the Third Circuit next examined whether jurisdiction was restored under either Article 3(a)[81] or Article 3(b).[82] It concluded that Article 3(a) was not applicable because neither of the two charges to which Murphy pled guilty was punishable by confinement for five years or more.[83] Article 3(b) was likewise inapplicable because Murphy was never convicted of fraudulent separation.[84] As such, the Third Circuit held that the Marine Corps lacked personal jurisdiction over Murphy and

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70. *Id.*

71. The accused was fined and dismissed from the service. Murphy v. Dalton, 81 F.3d 343 (3d Cir. 1996).

72. He sought, *inter alia*, compensatory and punitive damages, and declaratory and equitable relief. *Murphy*, 81 F.3d at 345. The district court had jurisdiction under 28 U.S.C. § 1331 (1980), which states that "The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States." 28 U.S.C. § 1331 (1980).

73. *Murphy*, 81 F.3d at 345.

74. *Id.* at 352. The Third Circuit vacated the district court's order granting summary judgment in favor of the Secretary of the Navy and remanded the case for further proceedings. *Id.*

75. *Supra* notes 69 and 70 and accompanying text.

76. 81 F.3d at 351.

77. *Id.* In her dissenting opinion, Judge Mansmann stated that she could "[f]ind no support . . . for majority's holding that the term 'active duty' should apply only to periods of active duty while Murphy was a member of the reserve component and not the regular component." *Id.* at 353-54 (Mansmann, J., dissenting).

78. *Supra* note 70 and accompanying text.

79. *Murphy*, 81 F.3d at 349.

80. *Id.* at 348. Judge Mansmann also disagreed with the majority on this issue. She concluded that there was never a lapse in Murphy's military status. *Id.* at 354 (Mansmann, J., dissenting).

81. The version of Article 3(a) applicable to this case stated:

> [N]o person charged with having committed, while in a status which he was subject to under this chapter, an offense against this chapter, punishable by confinement for five years or more and for which the person cannot be tried in the courts of the United States or of a State, a Territory, or the District of Columbia, may be relieved from amenability to trial by court-martial by reason of the termination of that status.

UCMJ art. 3(a) (1988). Congress amended Article 3(a) in 1992, which now states:

> [A] person who is in a status in which the person is subject to this chapter and who committed an offense against this chapter while formerly in a status in which the person was subject to this chapter is not relieved from amenability to the jurisdiction of the chapter for that offense by reason of a termination of that person's former status.

The National Defense Authorization Act for Fiscal Year 1993, Pub. L. No. 102-484, § 1059(a) (1992).

82. Article 3(b) provides personal jurisdiction over a former servicemember who fraudulently obtained the discharge. UCMJ art. 3(b) (1988). *See supra* notes 45 through 57 and accompanying text.

vacated the order of the district court granting summary judgment on behalf of Murphy.[85]

It is unlikely that military practitioners will confront an accused similarly situated to Murphy because the current version of Article 3(a), in effect since 1992, will provide personal jurisdiction in the majority of cases where the accused has had a break in service.[86] Further, the CAAF has previously stated that it does not consider itself to be bound by decision of federal courts of appeals.[87] Still, when representing a Reserve Component accused whom the government recalls under Article 2(d)(2)(A) for crimes committed while a member of the Regular Component, defense counsel should consider whether to fashion an argument consistent with the Third Circuit's interpretation of Article 2(d)(2)(A). In making such an argument, defense counsel must be aware of Rule for Professional Conduct 3.3,[88] which requires counsel to disclose to the tribunal legal authority in the controlling jurisdiction which is directly adverse to the position of the client.[89] Defense counsel, therefore, must always disclose to the trial court the CMA decision in conjunction with urging the trial court to apply the analysis from the Third Circuit decision.

Conclusion

Surprisingly, the jurisdiction cases from the last year oftentimes limited the long arm of military justice. These cases should energize defense counsel to place renewed emphasis on the more sophisticated jurisdictional issues. Although failure to raise a jurisdictional issue does not waive the issue on appeal,[90] defense counsel should carefully examine and raise any potential jurisdictional issue. The cases also hold lessons for trial counsel, particularly, the *Vanderbush* case. Trial couns el cannot automatically rely on the long arm of military justice to reach the accused. Trial counsel must insure that jurisdiction is preserved by gaining timely approval from the GCMCA to extend an accused beyond ETS.

83. *Murphy*, 81 F.3d at 349. The government had preferred five offenses against Murphy, but dropped three when Murphy pled guilty to violations of Articles 92 and 133. UCMJ arts. 92 and 133 (1988). The only offenses which carried a sentence over five years were among the three the government dropped.

84. *Murphy*, 81 F.3d at 349. The government originally preferred a fraudulent separation charge against Murphy, but later dismissed it. *Id.* Since the government failed to secure a conviction for fraudulent separation, jurisdiction was never restored for the remaining offenses Murphy allegedly committed prior to the discharge. *See supra* note 51 and accompanying text.

85. The court remanded the case to the district court for further proceedings consistent with the decision. *Id.* at 351

86. Due to the five-year statute of limitations, most crimes the government will prosecute will not have occurred earlier than 1992. UCMJ art. 43(b) (i) (1988). There is no statute of limitations, though, for crimes punishable by death. UCMJ 43(a) (1988).

87. In *Garrett v. Lowe*, with respect to a decision by the Court of Appeals for the Tenth Circuit, the CAAF stated:

> [T]his court is not bound by the decision [of the Tenth Circuit] . . . .This appellate court of the United States is as capable as is a Court of Appeals of the United States of analyzing and resolving issues of Constitutional and statutory interpretation. In fact, to the extent that an issue involves interpretation and application of the Uniform Code of Military Justice and the *Manual for Courts-Martial* in the sometimes unique context of the military environment, this Court may be better suited to the task.

Garrett v. Lowe, 39 M.J. 293, 296 n.4 (C.M.A. 1994).

88. DEP'T OF ARMY, REG. 27-26, LEGAL SERVICES: RULES OF PROFESSIONAL CONDUCT FOR LAWYERS, rule 3.3 (1 May 92) [hereinafter AR 27-26].

89. AR 27-26, rule 3.3(a)(3) and comment. The rule technically does not require disclosure unless the opposing party neglects to bring the authority to the attention of the tribunal. The most prudent course of action, though, is to acknowledge the CMA decision immediately and then seek to distinguish the case at bar from the decision.

90. MCM, *supra* note 2, R.C.M. 907(b)(1)(A).