The Court-Martial Cornerstone: Recent Developments in Jurisdiction

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Introduction

"*Three things are to be looked to in a building: that it stand on the right spot; that it be securely founded; that it be successfully executed.*"[1]

Like a well-constructed house, a court-martial must be built upon a solid foundation—a foundation not only consisting of legally sound pretrial procedure,[2] but a foundation that also contains an impenetrable theory of jurisdiction. During trial and on appeal, jurisdiction serves as the cornerstone for the court's existence, and must be the first legal principle considered when addressing an issue before a military court. Often this part of the structure is assumed to be sturdy; but, as our military courts emphasize in this year's jurisdiction cases,[3] without it, the court-martial will collapse.

In concept, the jurisdictional cornerstone of a court-martial is not complicated. It consists of proper subject matter and personal jurisdiction, and a properly comprised court-martial.[4] This article addresses the recent cases that touch on issues impacting each one of these basic tenets of jurisdiction. In addition to issues arising from court-martial jurisdiction, this article also discusses appellate jurisdiction—specifically, the authority of our courts to issue writs. In each area, the article briefly explains the relevant jurisdictional concept, reviews the case or cases that touch on the concept, and identifies any trends that may exist. Like previous years, this year's jurisdiction cases do not present a singular theme or trend; rather, each case exhibits a unique thesis. Regardless of the theme involved, each case illustrates the importance of having a court-martial built upon the solid foundation of jurisdiction.

Subject Matter Jurisdiction: The "Service Connection" Requirement in Capital Cases

In the area of subject matter jurisdiction, the United States Court of Appeals for the Armed Forces (CAAF) continues to perpetuate the issue of whether the government must establish a connection between the offense and the military to assert court-martial jurisdiction in a capital case.[5] This is a past trend, but is worth discussing again because the CAAF, once more, raises the issue.[6]

This year, in the capital murder case of *United States v. Gray*,[7] the accused argued before the CAAF that the court-martial lacked jurisdiction because the prosecution failed to show that his murder charges were service connected.[8] The accused's argument stems from the 1969 Supreme Court case *O'Callahan v. Parker*,[9] in which the Court limited the reach of courts-martial jurisdiction by requiring a connection between the accused's military duties and the crime, commonly referred to

1. James Anthony Froude, Elective Affinities of 1808, *reprinted in* JOHN BARTLETT, FAMILIAR QUOTATIONS 477a (1968).

2. *See* Major John Saunders, *The Emperor's New Clothes: Developments in Court-Martial Personnel, Pleas and Pretrial Agreements, and Pretrial Procedures*, ARMY LAW, Apr. 2000, at 14 for a discussion of recent pretrial procedure cases.

3. This article focuses on cases decided by the military appellate courts during the 1998 term, a term that began 1 October 1998 and ended 30 September 1999.

4. MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 201(b)(1)-(5) (1998) [hereinafter MCM]. Rule for Courts-Martial (R.C.M.) 201(b) sets forth the five elements of court-martial jurisdiction. They are: (1) jurisdiction over the offense (subject matter jurisdiction), (2) jurisdiction over the accused (personal jurisdiction), (3) a properly composed court, (4) a properly convened court, and (5) properly referred charges (the last three equate to a properly composed court-martial).

5. The connection between the crime and the military is referred to as a "service connection." *See* Relford v. Commandant, 401 U.S. 355 (1971).

6. *See* Major Martin H. Sitler, *The Power to Prosecute: New Developments in Courts-Martial Jurisdiction*, ARMY LAW., Apr. 1998, at 2. A portion of the article discusses how the military appellate courts have given credence to the idea that the government must establish a connection between the crime and the military in a capital case.

7. 51 M.J. 1 (1999).

8. *Id.* at 11.

9. 395 U.S. 258 (1969). It is important to note that *O'Callahan* is a non-capital case. Prior to 1969, subject matter jurisdiction was defined by status—was the accused subject to the UCMJ at the time of the alleged crime. If so, subject matter jurisdiction was satisfied. Therefore, not only did the government have to show proper status, but it also had to establish a nexus between the crime and the military. The Court determined that the service connection requirement provided the necessary rational to assert military jurisdiction over its members.

as a "service connection."[10] Eighteen years later, however, this limitation ended.

In 1987, the Supreme Court abandoned the service connection requirement for court-martial jurisdiction with its decision in *Solorio v. United States.*[11] With *Solorio*, the Court made clear that to satisfy subject matter jurisdiction, the government only has to show that the accused was subject to the Uniform Code of Military Justice (UCMJ) at the time of the offense. No other prerequisites exist. In reaching its decision, the Court looked to the plenary powers of Congress, and concluded that if Congress wanted to limit court-martial jurisdiction to crimes connected to the service it would have expressly done so. As it did not, the Court overturned the service connection limitation created in *O'Callahan.* This, however, is not the end of the story. A closer look at *Solorio*, and in particular Justice Stevens's concurrence and the results therefrom, reveals the vitality of the service connection limitation in capital cases.

In *Solorio*, the Court decided 6-3 that court-martial jurisdiction existed.[12] Five justices in the majority agreed that court-martial jurisdiction does not depend on the service connection of the offenses charged. Rather, subject matter jurisdiction is determined solely by the status of the accused at the time of the offense.[13] In a concurring opinion, Justice Stevens agreed that court-martial jurisdiction existed but did not agree that the Court should eliminate the service connection requirement.[14] Justice Stevens's attachment to the service connection test resurfaced in 1996 with the Army's capital murder case of *Loving v. United States.*[15]

In *Loving*, the primary issue the defense raised before the Supreme Court was the constitutionality of the military's capital sentencing scheme. In a unanimous decision, the Court held that the military's capital sentencing scheme was proper.[16] In a concurring opinion in which three other Justices joined, Justice Stevens focused on jurisdiction—an issue the defense did not raise with the Court.[17] He seized the opportunity to once again promote his belief in the service connection requirement. He emphasized that *Solorio* was a non-capital case, and questioned its precedential value in capital cases. Then, he asserted his beliefs that the service connection test applies to capital cases. After employing the service connection test, Justice Stevens concluded, "the 'service connection' requirement has been satisfied."[18] Although just dicta, the military courts have recognized, and even applied the rule set forth in Justice Stevens's concurrence.[19] Unfortunately, none of the courts have ruled on its necessity. This year was no different.

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10. *See id.* at 267. *See also* Relford v. Commandant, 401 U.S. 355 (1971) (enumerating many factors for courts to consider in determining whether a crime is service connected, i.e., proper absence from base, location, committed during peacetime, connection to military duties, status of victim, damage to military property, etc.).

11. Solorio v. United States, 483 U.S. 435 (1987). In *Solorio*, the Supreme Court overruled *O'Callahan*, abandoning the "service-connection" test, and held that subject matter jurisdiction of a court-martial depends solely on the accused's status as a member of the armed forces. In reaching its decision, the Court deferred to the plenary power of Congress to regulate the armed forces. *Id.* at 441.

12. *Id.* at 437. Richard Solorio, an active duty member of the Coast Guard, was convicted of crimes committed while stationed in Juneau, Alaska. The crimes (non-capital) were committed off-post and consisted of sexual abuse of two young females. Solorio challenged jurisdiction before the Supreme Court. He argued that there was no service connection between the charged offenses and the military; and therefore, no jurisdiction to bring the matter before a court-martial. *Id.* at 440.

13. *Id.* at 450. As Richard Solorio was subject to the UCMJ at the time of the offenses, jurisdiction vested.

14. *Id.* at 451. His conclusion, however, was based on application of the service connection test. Applying the service connection test to the facts of *Solorio*, he opined there was sufficient evidence to link the crimes to the military.

15. 517 U.S. 748 (1996). Private Loving, an Army solider stationed at Fort Hood, Texas, murdered two taxicab drivers. He attempted to murder a third, but the driver escaped. Loving's first victim was an active duty service member and his second victim was a retired service member. In January 1996, *Loving* was argued before the Supreme Court.

16. *Id.* at 773.

17. *Id.* at 774 (Stevens, J., concurring).

18. *Id.* Once again, it is important to emphasize that *O'Callahan*, the precedent that established the service connection, is a non-capital case.

19. *See* United States v. Curtis, 44 M.J. 106 (1996). Within three weeks of the *Loving* decision, the CAAF issued its opinion in *Curtis*, another military capital-murder case (*Loving* was decided 3 June 1996 and *Curtis* was decided 21 June 1996). Although the defense did not raise the issue, in the first paragraph of the discussion, the court made a specific finding that the service connection test was met. *Id.* at 118. The court stated: "The offenses were service connected because they occurred on base and the victims were appellant's commander and his wife." *Id.* In support of this official conclusion, the court cited Justice Stevens's concurring opinion in *Loving. Id.*

Similarly, in *United States v. Simoy,* 46 M.J. 592 (A.F. Ct. Crim. App. 1996), an Air Force capital-murder case, the Air Force Court of Criminal Appeals, sua sponte, found a service connection between the murder and the military. *Id.* at 601. The majority stated: "The felony murder was service-connected because it occurred on base and the victim was an active duty military member." The Air Force court also cited Justice Stevens's concurring opinion. *Id.*

Citing *O'Callahan* and Justice Stevens's concurring opinion in *Loving*, the accused in *Gray* raised the service connection issue before the CAAF. The CAAF "agreed with Justice Stevens that the question whether *Solorio* applies in a capital case is an important question."[20] However, the court made a conscious decision to not decide the issue.[21] Instead, the CAAF validated the question by assuming the service connection rule "applies to capital courts-martial."[22] Looking to the facts of the case, and relying on service connection precedent, the court disagreed with the accused and found that there was a "sufficient service connection . . . to warrant trial by court-martial."[23]

By applying the service connection requirement to *Gray*, the CAAF has, in effect, assumed that the military's capital sentencing scheme is inherently unfair, and before the military can assert it, there must exist a more compelling reason to do so than just "status." After all, this was the rationale the Supreme Court relied on in deciding *O'Callahan* thirty-one years ago—the *non-capital* case that created the service connection requirement. In *O'Callahan*, the Supreme Court went to great lengths to highlight the differences between the civilian criminal justice system and the military justice system. The Court viewed these differences as inadequacies that left the court-martial system unfair. Therefore, before the military could impose its unfair system of justice on a service member, there needed to be more than just status. The Court determined that the service connection requirement provided the necessary rationale to justify the military asserting courts-martial jurisdiction over its members. Unfortunately, what the CAAF and Justice Stevens have failed to do is articulate the inadequacies of the military's capital sentencing scheme to justify the jurisdictional limitation of the service connection requirement—a limitation that neither Congress nor the Supreme Court demands.[24]

Regardless of the CAAF's underlying rationale, there is undoubtedly a trend to recognize a service connection requirement in military capital cases. Practitioners should heed this message. When faced with a capital case, counsel should develop facts at the earliest stage possible that either support or attack a service connection finding.

Personal Jurisdiction: Defining a Discharge

The concept of personal jurisdiction focuses on the time of trial. Specifically, can the military assert court-martial jurisdiction over the accused at the time of trial? Similar to subject matter jurisdiction, the answer to this question hinges on the status of the accused. If at the time of trial the accused is subject to the UCMJ, personal jurisdiction is satisfied.

Generally, a person's status under the UCMJ begins at enlistment and ends at discharge.[25] Of the two defining events, discharge is the most litigious issue. A discharge occurs when a service member receives a valid discharge certificate, a final accounting of pay, and completes a clearing process.[26] Regardless of where you are in the pretrial or trial stage, if the accused receives a discharge, personal jurisdiction is lost and the court-martial crumbles.[27] This year, two of the service courts grappled with the requirements of a discharge.

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20. United States v. Gray, 51 M.J. 1, 11 (1999). *Gray* is a capital-murder case from the Army. In 1988, a general court-martial found the accused guilty of the pre-meditated murder of two victims and attempted pre-meditated murder of another, and sentenced him to death. In 1993, the case made its way before the CAAF. *Id.* at 9, 10. See Major Paul Turney's forthcoming May 2000 capital litigation article in *The Army Lawyer* for a detailed discussion of the capital issues associated with *Gray.*

21. *Gray*, 51 M.J. at 11.

22. *Id.*

23. *Id.* (citing Relford v. Commandant, 401 U.S. 355 (1971); O'Callahan v. Parker, 395 U.S. 258 (1969) (identifying many factors for courts to consider in determining if a crime is service connected); . The court based its service connection finding on the following facts: (1) the accused was a member of the military, that is, had proper status; (2) both murder victims were associated with the post (one was a member of the military assigned to the post and the other was a civilian who worked there); and (3) the bodies were found on the post. *Id*.

24. *See generally* MCM, *supra* note 4, R.C.M. 1004. Furthermore, in *Solorio*, the Supreme Court unequivocally put the service connection requirement to rest.

25. MCM, *supra* note 4, R.C.M. 202(a) discussion. This provision states:

> In general, a person becomes subject to court-martial jurisdiction upon enlistment in or induction into the armed forces, acceptance of a commission, or entry into active duty pursuant to orders. Court-martial jurisdiction over active duty personnel ordinarily ends on delivery of a discharge certificate or its equivalent to the person concerned issued pursuant to competent orders.

Id.

26. *See* 10 U.S.C.S. § 1168(a) (LEXIS 2000). *See also* United States v. Keels, 48 M.J. 431 (1998) (holding that delivery of a valid discharge certificate, a Department of Defense Form 214 (DD 214), and final accounting of pay defines a discharge); United States v. Batchelder, 41 M.J. 337 (1994) (finding that the early delivery of a discharge certificate for administrative convenience does not terminate jurisdiction when the certificate is clear on its face that the commander issuing the certificate did not intend the discharge to take effect until later); United States v. King, 27 M.J. 327 (C.M.A. 1989) (refusing to complete a reenlistment ceremony after receiving a discharge certificate does not terminate jurisdiction because the accused did not undergo a clearing process); United States v. Howard, 20 M.J. 353 (C.M.A. 1985) (holding that jurisdiction terminates upon delivery of a discharge certificate and final accounting of pay).

In *United States v. Melanson*,[28] the Army Court of Criminal Appeals considered the issue of when a discharge is complete. Much of the court's analysis focused on the completion of a clearing process. In the end, the court found that a clearing is complete when the accused out-processes from the armed forces, and not just from the accused's unit. When stationed overseas, this not only includes an administrative out-processing from the accused's unit, but also a clearing from the host nation.[29]

Private Melanson was one of many potential suspects in an aggravated assault investigation. The assault occurred outside a German nightclub, and the victim was unsure of the identity of his assailants.[30] While the investigation progressed, Private Melanson, who was being administratively separated from the Army for drug use, began out-processing from his unit.[31] On 19 May 1998, Private Melanson completed out-processing from his unit. At 0008 the next day, with a copy of his discharge certificate and a plane ticket to the United States in hand, his unit escorted him to the nearest airport.[32] He was to fly from Nuremberg airport to Frankfurt airport. After a short layover in Frankfurt, he was to fly to Washington, D.C.[33]

While in route to the Frankfurt airport, two eyewitnesses to the assault identified Private Melanson in a photo lineup as one of the assailants.[34] The command was quick to respond. Soon after Private Melanson's plane arrived in Frankfurt, he was apprehended and returned to his unit.[35] Shortly thereafter, charges were referred to a general court-martial.

At trial, the accused challenged the jurisdiction of the court-martial. He argued that the court-martial lacked personal jurisdiction to try him because he had been discharged. The military judge denied his challenge, finding that he had not received a valid discharge certificate, or a final accounting of pay.[36] The military judge did find that he had cleared his unit. On appeal, the Army court focused on the clearing process.

The Army court agreed with the military judge that the accused cleared his unit yet further found that this was not enough to satisfy the clearing process from the Army.[37] Because the accused was stationed in Germany, the United States had to repatriate the accused, that is, return the accused to the United States. This was a requirement under the North Atlantic Treaty Organization Status of Forces Agreement (NATO SOFA).[38] Since this did not occur, the court found that the accused's "out-processing from the Army was incomplete, and thus his status as a soldier was never terminated prior to his apprehension at the Frankfurt airport."[39] The court ended its opinion with a declaration that the military judge was correct when she found that the accused never received a valid discharge certificate.[40] There was no discussion supporting this

27. *See* Smith v. Vanderbush, 47 M.J. 56 (1997) (finding that personal jurisdiction was lost when an accused received a valid discharge certificate, underwent a clearing process, and obtained a final accounting of pay, even after arraignment).

28. 50 M.J. 641 (Army Ct. Crim. App. 1999).

29. *Id.* at 644. The Army court determined that "[f]or soldiers stationed overseas, the process of separating from the Army includes compliance with all treaty obligations." *Id.* The Army court interpreted the NATO SOFA to require the United States to repatriate its soldiers stationed overseas. According to the court, this meant removing the soldier from the host nation (Germany) and returning him to the United States. Until this process was complete, the soldier had not cleared the Army. *Id.* at 644 (citing June 19, 1951-Oct. 27, 1953, NATO, T.I.A.S. No. 2846 [hereinafter NATO SOFA]; Agreement to Supplement NATO SOFA with respect to Foreign Forces stationed in the Federal Republic of Germany, Aug. 3, 1959-June 1, 1963, NATO, T.I.A.S. No. 5351 [hereinafter Supplementary Agreement]).

30. *Melanson*, 50 M.J. at 642. The assault occurred outside the Nashville Club in Vilseck, Germany.

31. *Id.*

32. *Id.* at 643. Private Melanson's unit gave him copy 4 of his DD 214. The nearest airport was Nuremberg airport.

33. *Id.*

34. *Id.*

35. *Id.* The command obtained the services of the German *polizei* to apprehend the accused.

36. *Id.* After the military judge denied the accused's motion to dismiss for lack of jurisdiction (R.C.M. 907(b)(1)(A)), the accused filed an extraordinary writ to the Army court. The Army court denied hearing the writ, and the CAAF denied the accused's writ appeal. The issue came before the Army court in the ordinary course of its appellate review of the case. *Id.* at 642.

37. *Id.* at 644.

38. If a service member decides to remain in Germany after being discharged, repatriation is not required; instead, the United States must notify German authorities that the service member has not been repatriated. Additionally, the service member must obtain a valid passport and visa. *See* NATO SOFA, *supra* note 29; Supplementary Agreement, *supra* note 29; and accompanying text.

39. *Melanson*, 50 M.J. at 645.

40. *Id.*

conclusion. The court did not address the issue of whether the accused received a final accounting of pay.

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.[41]

Another service court case that addresses when a discharge is effective is *United States v. Williams*.[42] The jurisdiction issue in *Williams* was not raised at trial; rather, the defense argued the issue for the first time on appeal.[43] Specifically, the accused argued that the court-martial lacked personal jurisdiction because the government had discharged him.[44]

Private First Class (PFC) Williams was physically unfit to perform duties in the U.S. Marine Corps. As such, on 18 December 1996, his unit sent him home to await the final disposition of his physical evaluation board, which would serve as the basis for his medical discharge.[45] Meanwhile, an investigation began into the theft of military identification cards from PFC Williams's unit. The accused soon became a prime suspect.

On 15 January 1997 at approximately 2230, the accused's commander signed a letter that abated the accused's medical discharge and placed him on legal hold.[46] On the same date, without the commander's knowledge, a previously prepared discharge certificate (DD 214) reflecting a medical discharge effective 15 January 1997 at 2359 was mailed to the accused.[47] The following day a relative of the accused received the certificate. By 22 January 1997, the accused was back with his unit; he was eventually court-martialed.[48]

On appeal, the accused challenged the jurisdiction of the court-martial. He argued that the discharge certificate trumped the legal hold letter. He asserted that the time on the discharge certificate was not determinative; rather, the date controlled. Therefore, because the effective date of his discharge certificate was 15 January 1997, any action to stop the discharge on that same day was futile.[49] The Navy-Marine Corps court disagreed. The court held that the legal hold letter signed hours before the effective date and time of the discharge certificate voided the certificate.[50] The eleventh hour action on the part of the commander indicated a clear intent not to discharge the accused. *Williams* stresses that the commander's intent to discharge is an important fact to consider when determining the validity of a discharge certificate.

Both *Melanson* and *Williams* emphasize the technical aspects of a discharge. Interestingly, the common factual thread in both cases is that if the accused had the benefit of one more day, the government would have lost personal jurisdiction. Fortunately for the government, this was not the case. Regardless, the message from these cases is clear—when a discharge occurs, jurisdiction is lost.[51] This is clearly a concept that is a significant part of the jurisdictional cornerstone of a court-martial.

The Effect of a Valid Discharge: The Concept of Continuing Jurisdiction

There are several exceptions to the general rule that a discharge terminates court-martial jurisdiction.[52] One exception that surfaced this year is the concept of continuing jurisdiction—not a statutory exception, but an exception recognized by case law.[53] Under this concept, a court-martial can continue to proceed even though the military discharged the accused. This

41. On 3 February 2000, *United States v. Melanson* was argued before the CAAF. It will be interesting to see how the CAAF addresses the issue of the overseas clearing process.

42. 51 M.J. 592 (N.M. Ct. Crim. App. 1999).

43. *Id.* at 595. Among other offenses, the accused was charged with larceny and forgery. He pled guilty before a military judge alone and was convicted. Failure to raise the lack of jurisdiction issue at trial did not waive it. *See* MCM, *supra* note 4, R.C. M. 905(e).

44. *Williams*, 51 M.J. at 593.

45. *Id.* at 594.

46. *Id.*

47. *Id.*

48. *Id.*

49. *Id.* at 595.

50. *Id.*

51. In two recent cases, Judge Crawford strongly urged the services or the President to promulgate a regulation that limits the authority to discharge those under charges or pending appellate review to the service secretary or a designated under secretary. *See* Steele v. Van Riper, 50 M.J. 89, 92 (1999); Smith v. Vanderbush, 47 M.J. 56 (1997).

is not a new theory of jurisdiction post-discharge. In 1997, in *Smith v. Vanderbush*,[54] the government urged the CAAF to apply the concept of continuing jurisdiction to a situation where the Army inadvertently discharged the accused after arraignment.[55] The government argued that once arraignment occurred, court-martial jurisdiction attached and the "issuance of an administrative discharge would not divest a court-martial of jurisdiction to try a civilian former member of the armed forces."[56]

In rejecting this argument, the CAAF held that there was no statutory authority that extended the concept of continuing jurisdiction to the trial. The CAAF clarified that continuing jurisdiction only permits appellate review and execution of a sentence "in the case of someone who already was tried and convicted while in a status subject to the UCMJ."[57] This year, the courts addressed two cases that discussed the concept of continuing jurisdiction—one CAAF case,[58] and one service court case.[59] When examining these two cases, together with *Vanderbush*, one can define the parameters of this jurisdictional concept.

In *Steele v. Van Riper*,[60] the CAAF addressed the effect of a post-conviction administrative discharge on a court-martial. A special court-martial convicted Private First Class (PFC) Steele of wrongfully using marijuana and sentenced him to a bad-conduct discharge and reduction to private.[61] Eleven months later, the convening authority eventually took action on the findings and sentence.[62] During this period, PFC Steele performed his duties at his unit without incident, and seven months after his court-martial, but before the convening authority's action, Steele's command honorably discharged him on his expiration of term of service (ETS).[63] Three months later, the convening authority took action by approving the findings and sentence, placed Steele on involuntary leave, and informed him that he had been erroneously discharged.[64] In response, Steele filed a petition with the Navy-Marine Corps Court of Criminal Appeals to stop the government from invalidating his honorable discharge. The service court denied the petition, and Steele raised the issue before the CAAF.[65]

In its brief to the CAAF, the government eventually agreed that the accused was entitled to his honorable discharge. "The Government further acknowledged the sentence could not be approved by the convening authority 'and [was] effectively remitted due to [Steele's] honorable discharge.'"[66] These concessions made the issue moot. Regardless, the CAAF opined that even though the administrative discharge remitted the puni-

52. *See* UCMJ arts. 2(a)(7), 3(a)–(d) (LEXIS 2000). *See also* Willenbring v. Neurauter, 48 M.J. 152 (1998) (holding that jurisdiction existed over the accused, a member of the reserve component at the time of trial, to try him for misconduct committed while a member of the regular component despite an intervening discharge); United States v. Reid, 46 M.J. 236 (1997) (finding that Article 3(b) requires a two-step trial process when prosecuting an accused for misconduct committed prior to the fraudulent discharge: first, a trial to determine if the accused committed a fraudulent discharge, then a trial to if the accused committed the other misconduct); United States v. King, 30 M.J. 334 (C.M.A. 1990) (prosecuting an accused after receiving a punitive discharge is permissible when the accused is serving a sentence of confinement imposed by a prior court-martial).

53. *See generally* Carter v. McClaughry, 183 U.S. 365 (1902); United States v. Montesinos, 28 M.J. 38, 46 (C.M.A. 1977).

54. 47 M.J. 56 (1997).

55. *Id.* at 59. Sergeant Vanderbush was administratively assigned to Eighth United States Army (EUSA), Korea, but was operationally assigned to the 2d Infantry Division (2ID), Korea. As his ETS approached, he committed misconduct, which eventually led to 2ID referring charges. The government arraigned Sergeant Vanderbush, and set a trial date. Meanwhile, unaware of the pending court-martial, EUSA discharged Sergeant Vanderbush from the Army. Soon thereafter, the defense moved to dismiss the charges due to a lack of personal jurisdiction. The military judge denied the motion. The defense filed a writ of extraordinary relief with the Army Court of Criminal Appeals, challenging the military judge's ruling. The Army court dismissed the charges for lack of personal jurisdiction, finding that Sergeant Vanderbush received a valid discharge. The CAAF agreed with the Army court. One of the arguments presented by the government to justify jurisdiction was the concept of continuing jurisdiction. *Id.* at 57-59.

56. *Id.*

57. *Id.*

58. Steele v. Van Riper, 50 M.J. 89 (1999).

59. United States v. Byrd, 50 M.J. 754 (N.M. Ct. Crim. App. 1999).

60. 50 M.J. 89 (1999).

61. *Id.* at 90.

62. *Id.*

63. *Id.* Private First Class Steele cleared his unit, was issued a DD 214 discharge certificate, and received his final accounting of pay. This occurred three months before the convening authority took action on the court-martial.

64. *Id.*

65. *Id.*

tive discharge, it did not "affect the power of the convening authority or appellate tribunals to act on the findings and sentence."[67]

In *Steele*, the CAAF unambiguously affirmed that after a conviction (that is, the announcement of sentence), jurisdiction exists to review the findings and sentence of the court-martial despite an intervening administrative discharge. This means that the convening authority and military appellate courts can approve the findings and sentence of the court-martial. An administrative discharge may remit the punitive discharge, but it will not divest the convening authority and appellate courts of jurisdiction to review the court-martial.

In *United States v. Byrd*,[68] the Navy-Marine Corps court discussed another facet of the concept of continuing jurisdiction. Specifically, what happens when the accused's punitive discharge is executed? The court finds that jurisdiction ceases, provided the discharge results from an act of judicial character.[69]

On 15 October 1996, the Navy-Marine Corps Court of Criminal Appeals affirmed the findings and sentence of Hospital Corpsman Third Class Byrd's court-martial.[70] As he did not appeal the service court's decision to the CAAF within sixty days, the Navy executed the bad-conduct discharge.[71] Despite the discharge, Byrd petitioned the CAAF. The CAAF, unaware that the Navy had executed the punitive discharge, waived its sixty-day filing rule and heard Byrd's petition.[72]

After hearing Byrd's petition, the CAAF set aside the service court's decision and remanded the case for an additional fact-finding inquiry.[73] On its return to the Navy-Marine Corps court, the government informed the court for the first time that Byrd had been discharged. Armed with this important fact, the government argued that the appellate courts lacked jurisdiction to review Byrd's court-martial any further.[74] The service court agreed.

In reaching its decision, the Navy-Marine Corps court drew a distinction between an administrative discharge—a discharge made pursuant to command action, and the execution of a punitive discharge—a discharge predicated upon an act of judicial character. When the discharge is a command action, the concept of continuing jurisdiction applies, and appellate review can advance. If, however, the "acts of judicial character resulted in the termination of jurisdiction," no authority exists for further appellate review.[75] When Byrd failed to petition the CAAF within sixty days, his court-martial conviction became final. As such, the Navy acted properly when it executed Byrd's punitive discharge. The discharge did not result from command action; rather it resulted from the service court affirming Byrd's court-martial findings and sentence—an act of judicial character. Therefore, the punitive discharge divested the appellate courts of further review.

Synthesizing *Vanderbush*, *Steele*, and *Byrd*, one can better define the parameters of continuing jurisdiction. The concept attaches upon conviction, and ceases once the punitive discharge is executed. Should the government administratively discharge the accused during the appellate process, the discharge does not divest the appellate courts of review, rather it remits the punitive discharge that the court-martial adjudged. 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.

A Properly Composed Court-Martial

The concepts of subject matter and personal jurisdiction make up the bulk of the jurisdictional cornerstone; however, the

66. *Id.* at 91. The government filled two responses to the CAAF. In the first response, the government argued that the convening authority could approve the punitive discharge. In the second response, the government changed its position and conceded that the accused is entitled to the honorable discharge.

67. *Id.* at 92.

68. 50 M.J. 754 (N.M. Ct. Crim. App. 1999).

69. An example of an act of judicial character is when an appellate court affirms or disaffirms a court-martial finding or sentence. *Id.* at 757. *Cf.* UCMJ art. 2(a)(7) (LEXIS 2000) (stating that "[p]ersons in custody of the armed forces serving a sentence imposed by a court-martial" are subject to the UCMJ despite the execution of a punitive discharge).

70. *Byrd*, 50 M.J. at 755.

71. *Id.* at 756. "By rule of the United States Court of Appeals for the Armed Forces (CAAF), [Byrd] had 60 days to petition CAAF for review." *Id. See also* UCMJ art. 67(b).

72. *Byrd*, 50 M.J. at 756. The accused's petition argued that he was deprived of his Sixth Amendment right to effective assistance of counsel.

73. *Id.* The CAAF ordered a *Dubay* hearing to gather additional facts to determine if the accused received effective assistance of counsel. *See* United States v. Dubay, 37 C.M.R. 411 (C.M.A. 1967).

74. *Byrd*, 50 M.J. at 756.

75. *Id.* at 757.

composition of the court-martial (the personnel necessary for the court-martial to exist) is the mortar that holds it together.[76] Two years ago, in *United States v. Turner*,[77] the CAAF determined that under certain circumstances errors in court-martial composition may not weaken the jurisdiction of a court-martial provided the rules are substantially complied with.[78] This year, the service courts wrestled with this concept of substantial compliance. The Navy-Marine Corps court limited its application, whereas the Army court fully embraced the doctrine. To fully appreciate the issue, one must begin with *Turner.*

At trial, Chief Warrant Officer Turner's defense counsel made a written and oral request for trial by military judge alone.[79] The accused did not, on the record, *personally* request or object to trial by military judge as required by Article 16.[80] On appeal, the defense challenged jurisdiction, arguing that the court-martial was not properly convened because the accused did not personally request to be tried by military judge alone.[81] The Navy-Marine Corps court agreed. Relying on the language of Article 16,[82] the service court held that "failure of the accused personally to make a forum choice was a fatal jurisdictional defect and reversed" the conviction.[83]

The CAAF overturned the Navy-Marine Corps court's decision and found substantial compliance with Article 16. The court's finding, however, is based on the record of trial as a whole and limited to the facts of the case.[84] The CAAF clearly found a violation of Article 16, but determined that because there was substantial compliance, any error committed "did not materially prejudice the substantial rights of the accused."[85]

This year, in *United States v. Townes*,[86] when faced with a similar court-martial composition issue, the Navy-Marine Corps court once again relied on the plain language of the statue to find a jurisdictional error.[87] In doing so, the service court unequivocally refused to apply the substantial compliance doctrine.[88] *Townes* focused on Article 25, not Article 16. Article 25 is the statute that gives an enlisted accused the ability to request trial by officer and enlisted members. The language in Article 25 is similar to the language of Article 16 except that Article 25 includes the word "personally," whereas Article 16 does not.[89] This difference, although just one word, was enough for the service court to justify its refusal of the substantial compliance doctrine.[90]

The facts in *Townes* present a situation in which the accused, although tried, convicted, and sentenced by a panel of officer and enlisted members, did not personally request on the record to be tried by such a forum.[91] At no time during the trial did the accused object to the forum of the court-martial, but on appeal before the Navy-Marine Corps court the accused argued that the court-martial lacked jurisdiction.[92] The accused premised his argument on the fact that he did not *personally* make the forum election as required by Article 25.[93] The government looked to the CAAF's rationale in *Turner* to argue that the court-martial substantially complied with Article 25.[94] The court agreed with the accused.

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76. *See* MCM, *supra* note 4, R.C.M. 202(b)(2). This rule states that "[t]he court-martial must be composed in accordance with these rules with respect to number and qualifications of its personnel. As used here "personnel" includes only the military judge, the members, and the summary court-martial." *Id.*

77. 47 M.J. 348 (1997).

78. *See* United States v. Seward, 49 M.J. 369 (1998) (holding that failure of the accused to request a trial by military judge alone before assembly violates Article 16, but is not a jurisdictional error, and therefore, should be tested for prejudice).

79. *Turner*, 47 M.J. at 349.

80. UCMJ art. 16 (LEXIS 2000). Article 16(1) permits the accused to elect trial by military judge alone when tried at either a general or special courts-martial. In pertinent part, Article 16(1)(B) provides: "only a military judge, if before the court is assembled the accused, knowing the identity of the military judge and after consultation with defense counsel, requests orally on the record or in writing a court composed only of a military judge and the military judge approves."

81. *See Turner*, 47 M.J. at 348. *See also* United States v. Turner, 45 M.J. 531 (N.M. Ct. Crim. App. 1996). In relying on the plain language of UCMJ, Article 16, the service court determined that the accused must personally elect to be tried by military judge alone. Failure to personally make such a request is not a "meaningless ritual;" rather "it is the only way for the military judge sitting alone to obtain jurisdiction." *Turner*, 45 M.J. at 534.

82. UCMJ art. 16.

83. *Turner*, 47 M.J. at 349.

84. *Id.* at 350.

85. *Id*. On the record, Turner's defense counsel stated that Turner wanted to be tried by military judge alone. Turner's defense counsel also submitted a written request for trial by judge alone. Finally, when the military judge informed Turner of his forum rights, Turner indicated for the record he understood his rights to be tried by military judge alone.

86. 50 M.J. 762 (N.M. Ct. Crim. App. 1999).

87. *Id.* at 765.

88. *Id.*

The Navy-Marine Corps court refused to apply the substantial compliance analysis. The court opined that Article 16 and Article 25 are different.[95] Under Article 25, Congress used the word "personally," a clear indication that the accused is the one who must make the election to be tried by officer and enlisted members. The court posited that this is not meaningless language, and cannot be ignored.[96] In the end, the service court found that the accused's failure to personally make a request for enlisted members was a jurisdictional error.[97]

Three months later, in *United States v. Daniels*,[98] the Army Court of Criminal Appeals addressed the same issue, but came to a different result. Similar to the facts in *Townes*, the accused in *Daniels* did not personally make an election to be tried by officer and enlisted members as required by Article 25.[99] On appeal before the Army court, the accused argued that this omission equated to a jurisdictional error. In response, the court ordered a *Dubay* hearing to determine the accused's understanding of forum.[100] During the hearing, the accused testified that she remembered discussing the issue of forum election with her defense counsel, and recalled telling her defense counsel she wished to be tried by officer and enlisted members.[101] Armed with the information gleaned from the *Dubay* hearing, the Army court concluded that, based on the entire record, the court-martial substantially complied with Article 25.[102] The failure of the accused to make the election to be tried by officer and enlisted members on the record was a procedural defect and not a jurisdictional error. Further, under the circumstances, the defect was harmless.[103]

In reaching its decision, the Army court relied heavily on the outcome of the *Dubay* hearing.[104] It is likely that the court would have reached a different result had the accused testified that she did not understand her forum election. An interesting

89. UCMJ art. 25(c)(1) states:

> Any enlisted member of an armed force on active duty who is not a member of the same unit as the accused is eligible to serve on general and special courts-martial for the trial of any enlisted member of an armed force who may lawfully be brought before such courts for trial, but he shall serve as a member of a court only if, before the conclusion of a session called by the military judge under section 839(a) of this title (article 39(a)) prior to trial or, in the absence of such a session, *before the court is assembled for the trial of the accused, the accused personally has requested orally on the record or in writing that enlisted members serve on it.* After such a request, the accused may not be tried by a general or special court-martial the membership of which does not include enlisted members in a number comprising oat least one-third of the total membership of the court, unless eligible enlisted members cannot be obtained on account of physical conditions or military exigencies. If such members cannot be obtained, the court may be assembled and the trial held without them, but the convening authority shall make a detailed written statement, to be appended to the record, stating why they could not be obtained.

UCMJ art. 25(c)(1) (LEXIS 2000) (emphasis added). *Cf.* UCMJ art 16(1)(B).

90. *Townes*, 50 M.J. at 766. The court also relied on *United States v. Brandt*, 20 M.J. 74 (C.M.A. 1985), to justify its holding. The court determined that in *Brandt*, the Court of Military Appeals "made it clear that Congress intended the election of enlisted members be made by the accused." *Id.* at 765.

91. *Id.* at 763. Sergeant Townes was charged with a multitude of misconduct. He pled guilty to some of the offenses, and not guilty to remaining offenses. To those offenses he pled not guilty to, he was tried by a general court-martial composed of officer and enlisted members.

92. *Id.* at 764.

93. *Id.* at 765. In an attempt to gather more facts, the service court ordered a *Dubay* hearing. *See* United States v. Dubay, 37 C.M.R. 411 (C.M.A. 1967). During the hearing, the accused testified that he did not recall making any choice as to forum election. *See also Brandt*, 20 M.J. at 74.

94. *Townes*, 50 M.J. 765.

95. *Id.* at 766.

96. *Id.*

97. *Id.* The court set aside the findings to the charges that went before the members, and also set aside the sentence. In a dissenting opinion, Judge Anderson, citing to *Turner*'s substantial compliance doctrine opined that the case involved a technical error and not a jurisdictional defect in the court-martial. Looking at the entire record, Judge Anderson believed that Article 25 had been substantially complied with and there was no prejudice. *Id.* (Anderson, dissenting).

98. 50 M.J. 864 (Army Ct. Crim. App. 1999).

99. *Id.*

100. *See id. See also* United States v. Dubay, 37 C.M.R. 411 (C.M.A. 1967).

101. *Daniels*, 50 M.J. at 865. This is a significant factual distinction from *Townes*. In *Townes*, the accused testified during the *Dubay* hearing that he did not recall making a forum election. *Townes*, 50 M.J. at 765.

102. *Daniels*, 50 M.J. at 867.

103. *Id.*

point of comparison is that in *Turner*, the CAAF did not require a *Dubay* hearing before employing the substantial compliance analysis. Although one may distinguish the facts in *Townes* and *Daniels*, the analysis used by each court is different. Specifically, the Navy-Marine Corps court refused to apply the substantial compliance analysis used by the Army court to resolve Article 25 errors.

The CAAF recently resolved the issue. On 9 December 1999, the CAAF heard argument on *Townes*,[105] and on 8 March 2000 rendered its decision.[106] With little discussion, the CAAF unanimously applied the substantial compliance analysis to *Townes*, and once again, disagreed with the Navy-Marine Corps court's strict statutory interpretation.[107] The CAAF's decision in *Townes* perpetuates a trend that technical errors with the court-martial composition process are not jurisdictional. Further, at least at the appellate level, the courts will use the substantial compliance analysis to determine the effect of the error. What cannot be overlooked is that the failure to follow the court-martial composition procedural requirements is error. The issue can easily be avoided if the military judge and counsel remain vigilant to the court-martial composition rules.

Military Writ Authority

Once the court-martial has been built upon a solid jurisdictional foundation, the government can try the case. If the court-martial results in a conviction, the service appellate courts may review the case and all its related issues. Similar to the court-martial stage, the first issue the appellate courts must determine is whether their review is founded upon a sound jurisdictional basis. If not, the appellate review will crumble. Generally, the authority for appellate jurisdiction lies in Articles 66, 67, and 69.[108] Another jurisdictional theory of appellate review can also be found under the All Writs Act.[109] This year, in *Clinton v. Goldsmith*,[110] the Supreme Court clarified the scope of the CAAF's writ authority under the All Writs Act.

In 1948, Congress enacted the All Writs Act,[111] which gave federal appellate courts the ability to grant relief in aid of their jurisdiction. In 1969, the Supreme Court held that the All Writs Act applied to the military appellate courts.[112] Consistent with other federal courts, the military appellate courts view writ relief as a drastic remedy that should only be invoked in truly extraordinary situations.[113] In addition to the actual jurisdiction granted military appellate courts under the UCMJ,[114] those courts have relied on the All Writs Act as a source of potential, ancillary, or supervisory jurisdiction.[115] The issue often

104. *Id.* at 866. The Army court viewed the *Dubay* hearing as part of the "record of trial as a whole." And, when considering the record of trial as a whole, the court concluded that Article 25 had been complied with. *Id.* at 867.

105. Telephone Interview with Glenda Martin, Legal Technician, United States Court of Appeals for the Armed Forces (Mar. 7, 2000) [hereinafter Martin Interview].

106. United States v. Townes, No. 99-5004 (C.A.A.F. Mar. 8, 2000) (to appear at 52 M.J. ___).

107. *Id.* at slip op. 4. The CAAF found that the accused's failure to make the election for enlisted members on the record was error, but determined that "the 'record of trial as a whole makes clear that the selection was the accused's choice, and that the error . . . did not materially prejudice the substantial rights of the accused.'" *Id.* (quoting United States v. Turner, M.J. 348, 350 (1997)). The CAAF emphasized that its decision does not "relieve judges of their obligation to obtain a personal election by the accused on the record." *Id.*

108. *See* UCMJ arts. 66, 67, 69 (LEXIS 2000). Article 66 establishes the parameters for appellate review by the service courts of criminal appeals. Article 67 establishes the parameters for appellate review by the CAAF. Article 69 provides for appellate review by the judge advocates general of the various services.

109. 28 U.S.C.S. § 1651(a) (LEXIS 2000).

110. 119 S. Ct. 1538 (1999).

111. 28 U.S.C.S. § 1651(a).

112. Noyd v. Bond, 395 U.S. 683 (1969). Within the military justice system there are four writs that are commonly used: mandamus, prohibition, error coram nobis, and habeas corpus. A writ of mandamus is an order from a court of competent jurisdiction that requires the performance of a specified act by an inferior court or authority. BLACK'S LAW DICTIONARY 866 (5th ed. 1979). The writ of prohibition is used to prevent the commission of a specified act or issuance of a particular order. *Id.* at 1091. The writ of error coram nobis is used to bring an issue before the court that previously decided the same issue for the purpose of reviewing error of fact or retroactive change in the law, which affects the validity of the prior proceeding. *Id.* at 487. The writ of habeas corpus is used to challenge either the legal basis for or the manner of confinement. *Id.* at 638. Rules 27 and 28 of the United States Court of Appeals for the Armed Forces Rules of Practice and Procedure sets forth the requirements for the contents of a petition for extraordinary relief. UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES RULES OF PRACTICE AND PROCEDURES (27 Feb. 1996).

113. Daniel J. Wacker, *The "Unreviewable" Court-Martial Conviction: Supervisory Relief Under the All Writs Act From the United States Court of Military Appeals*, 32 HARV. C.R.-C.L. L. REV. 33 (1975).

114. *See* UCMJ arts. 66, 67, 69 (LEXIS 2000).

115. *See* McPhail v. United States, 1 M.J. 457, 462 (C.M.A. 1976); Dew v. United States, 48 M.J. 639, 645 (Army Ct. Crim. App. 1998).

becomes, as was the situation this year, when can military appellate courts exercise relief under the All Writs Act?

In *Goldsmith*, the accused, U.S. Air Force Major James Goldsmith, was convicted of an HIV aggravated assault.[116] He was sentenced to a lengthy period of confinement, but no punitive discharge.[117] In 1995, the Air Force Court of Criminal Appeals affirmed his conviction and sentence. Goldsmith did not petition the CAAF, and his conviction became final.[118]

While in confinement, the accused filed a writ before the Air Force Court of Criminal Appeals. The accused complained that the confinement facility was improperly administering and maintaining his HIV medication.[119] By the time the writ came before the Air Force court, the accused had been released from confinement and the HIV issue was moot. Therefore, the writ was denied.[120]

Soon thereafter, the accused filed a writ appeal to the CAAF, not arguing that the denial of the initial writ was improper; instead, the accused raised a new issue before the court.[121] The challenge was that the government was unlawfully dropping the accused from the rolls of the Air Force.[122] Because the accused was not adjudged a punitive discharge in his court-martial, the government sought to discharge the accused by dropping him from the rolls of the Air Force—action taken pursuant to a federal statute. The law in effect at the time of the accused's conviction, however, did not permit the government to drop an officer from the rolls based solely on a court-martial conviction. This action by the government, argued the defense, was additional punishment that violated the ex post facto clause of the Constitution.[123] Before addressing this issue, however, the CAAF had to determine if it possessed the jurisdiction to grant the relief. Specifically, could the CAAF grant relief over an issue that it did not address, and could not address, under its statutory appellate authority?

Before the CAAF, the government insisted that "dropping [the accused] from the rolls [was] only an 'administrative' matter and [did] not concern punishment."[124] Therefore, because the challenge did not amount to a military justice matter, the CAAF lacked even the supervisory authority under the All Writs Act to grant relief. In denying the government's argument, the majority declared that the action by the government, that is, dropping the accused from the rolls, amounted to additional punishment.[125] Since the action equated to punishment, the issue was a military justice matter. As such, the majority of the court reasoned it could exercise its inherent supervisory power under the All Writs Act to grant relief if necessary.[126] Under the facts in the case, the CAAF felt it necessary to grant relief, and ordered the government to not drop the accused from the rolls of the Air Force.[127]

On 4 November 1998, the Supreme Court agreed to review *Goldsmith*, and to address the issue of the scope of the CAAF's supervisory authority under the All Writs Act.[128] This year, in a 9-0 decision, the Supreme Court reversed the CAAF.[129]

The Supreme Court unequivocally held that the CAAF lacked jurisdiction to grant Major Goldsmith's petition for

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116. *Goldsmith*, 119 S. Ct. 1541.

117. *Id.* The accused was sentenced to six years of confinement.

118. *Id.*

119. *Id.*

120. *Id.*

121. *See* Goldsmith v. Clinton, 48 M.J. 84 (1998). By allowing the petitioner to first raise the issue before the CAAF, the court made clear that its previous holding in *ABC, Inc. v. Powell*, 47 M.J. 363 (1997) (declaring that a writ for extraordinary relief must first be brought before the Court of Criminal Appeals absent good cause) is not an ironclad rule. *Goldsmith*, 48 M.J. at 88.

122. *Id.* at 86.

123. *Id.* at 89.

124. *Id.* at 90.

125. *Id.*

126. *Id.* at 87.

127. *Id.* at 90. The CAAF held that the government's action in dropping the accused from the rolls of the Air Force violated the ex post facto clause of the Constitution. In a concurring opinion, Chief Judge Cox cautions that the court's exercise of jurisdiction in the case is limited to its facts. Judges Gierke and Crawford strongly disagreed with the court's decision.

128. Clinton v. Goldsmith, 119 S. Ct. 402 (1998).

129. Clinton v. Goldsmith, 119 S. Ct. 1543, 1545 (1999).

extraordinary relief. The Court looked to the appellate authority granted the CAAF by Congress.[130] Dropping a service member from the rolls is not a finding or sentence that the CAAF has authority to review under its statutory authority. Rather, the process is an executive action.[131] Furthermore, even if there existed a jurisdictional basis to address the issue, granting the relief was not necessary or appropriate "in light of alternative remedies available."[132]

The message the Supreme Court sent in *Goldsmith* is clear: the CAAF does not have jurisdiction "to oversee all matters arguably related to military justice, or to act as a plenary administrator even of criminal judgments it has affirmed."[133] The foundation on which the CAAF has built many writ cases is not as broad as what the court intended. It will be interesting to see how our appellate courts, especially the service courts, interpret and apply *Goldsmith* to future writ cases.

Conclusion

This year's jurisdiction cases present several interesting developments. In most instances, the courts perpetuate existing trends. For example, in *United States v. Gray,*[134] the CAAF continues to recognize the issue that a service connection showing may be required to satisfy subject matter jurisdiction in capital cases. Unfortunately, instead of answering the issue when given the opportunity, the CAAF acquiesces in its existence, applies it, but leaves it unresolved. Also, the courts continue to strictly construe the requirements that define a discharge. In several of this year's cases, the appellate courts either rely on an exception to the general rule that a discharge terminates jurisdiction, or look to the technical requirements needed to satisfy a discharge, in finding that court-martial jurisdiction exists.

In a few cases, however, we see the emergence of a new trend or the end of an old trend. A development emerged as the service courts grappled with Article 25, and the failure of an enlisted accused to personally elect on the record to be tried by a court composed of officer and enlisted members. What surfaced was a split among the service courts on what the appellate test is for such a failure—is the error jurisdictional or administrative? If it is administrative, does the doctrine of substantial compliance apply? The CAAF answered this question in *United States v. Townes*.[135] It appears that technical errors with the court-martial composition process are not jurisdictional and the doctrine of substantial compliance applies. Finally, in *Clinton v. Goldsmith*,[136] the Supreme Court puts an end to a trend by considerably curtailing the CAAF's long-standing, self-proclaimed theory of supervisory writ authority under the All Writs Act. Despite this year's jurisdiction cases presenting a variety of trends and issues, one message is clear: Whether at trial or on appeal, jurisdiction is the cornerstone to a well-constructed court-martial. For without it, the case will surely topple.

130. *Id.* at 1542.

131. *Id.* at 1544.

132. *Id.* at 1543.

133. *Goldsmith*, 119 S. Ct. at 1543.

134. 51 M.J. 1 (1999).

135. United States v. Townes, No. 99-5004 (C.A.A.F. Mar. 8, 2000) (to appear at 52 M.J. __) *See* Martin Interview, *supra* note 105; *see also* text accompanying note 105.

136. 119 S. Ct. 1538 (1999).