Moving Towards the Apex: Recent Developments in Military Jurisdiction

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Introduction

"A court-martial always has jurisdiction to determine whether it has jurisdiction."[1]

Military jurisdiction has undergone significant changes since the enactment of the Uniform Code of Military Justice (UCMJ) fifty-three years ago. Although the current list of persons subject to military jurisdiction found in Article 2, UCMJ, has not changed substantially from the original Article 2 language of 1950, several watershed events have significantly altered the jurisdictional landscape of today. For example, Supreme Court decisions in the 1950s clarified and limited the grant of jurisdiction over civilians that Congress had initially extended to the military.[2] In 1969, the Supreme Court ushered in the service-connection era with its decision in *O'Callahan v. Parker*,[3] only to reverse itself eighteen years later in *United States v. Solorio*.[4] Reacting to obvious shortcomings in jurisdiction over Reservists, Congress passed legislation in 1986 that would subject Reservists "in Federal status to the same disciplinary standards as their regular component counterparts."[5] More recently, at the end of 2000, Congress passed the Military Extraterritorial Jurisdiction Act (MEJA),[6] extending federal jurisdiction over U.S. civilians accompanying the armed forces overseas.

So what will be the next historical milestone to alter the jurisdictional landscape in the military? Time will tell, but some noteworthy changes this past year may have moved us nearer to the apex of the next watershed event than many realize. The Court of Appeals for the Armed Forces (CAAF) had its hand in settling a few minor jurisdictional issues, refining the law regarding court-martial jurisdiction. The service courts took on several interesting issues, addressing areas such as fraudulent discharges and reserve jurisdiction. Perhaps the most telling (but thus far, least talked-about) new development is a provision in the 2003 National Defense Authorization Act calling for a model state code of military justice and a model state manual for courts-martial.[7]

This article discusses the significant changes in military jurisdiction in 2002. The first part addresses the cases decided by the CAAF and the various service courts, while the second part discusses the recent congressional amendment to 32 U.S.C. §§ 326-333 found in the 2003 National Defense Authorization Act.

Court-Martial Jurisdiction

Rule for Courts-Martial (RCM) 201(b) lists five requirements for a court-martial to have jurisdiction. Those are: (1) the court-martial must be convened by a proper official; (2) the court-martial must be properly composed with respect to the number and qualifications of the members and the military judge; (3) the charges must be properly referred to the court-martial by a competent authority; (4) there must be jurisdiction over the accused; and (5) there must be jurisdiction over the offense.[8] The first part of this article is divided into three sections, with each section addressing a different jurisdictional element. The first section discusses a recent CAAF decision focusing on the second element listed above, proper court-martial composition. The second section discusses three opinions touching on the fourth element, jurisdiction over the accused, otherwise known as personal jurisdiction. The final section discusses two opinions addressing the fifth element, jurisdiction over the offense, or subject-matter jurisdiction.

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1. MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 201(b) (2002) [hereinafter MCM].

2. *See, e.g.*, Reid v. Covert, 354 U.S. 1 (1957); United States *ex rel.* Toth v. Quarles, 350 U.S. 11 (1955).

3. 395 U.S. 258 (1969).

4. 483 U.S. 435 (1987).

5. *See* Willenbring v. Neurauter, 48 M.J. 152, 169 (1998) (citing H.R. REP. NO. 99-718, 2d Sess. 225 (1986)).

6. 18 U.S.C.S. §§ 3261-3267 (LEXIS 2003).

7. Bob Stump National Defense Authorization Act for Fiscal Year 2003, Pub. L. No. 107-314, § 512, 116 Stat. 2458, 2537 (2002) (codified at 32 U.S.C.S. § 326 (LEXIS 2003)).

8. MCM, *supra* note 1, R.C.M. 201(b)(1)-(5).

A Properly Composed Court-Martial: Substantial Compliance Revisited

The second element needed to perfect court-martial jurisdiction is a properly composed court. Rule for Courts-Martial 201(b)(2) requires that the court-martial be composed in accordance with the rules addressing the requisite number and qualifications of the members and the military judge.[9] Articles 16 and 25, UCMJ, are two such rules addressing court-martial composition. Article 16 authorizes a court-martial consisting of only a military judge, without any members, if the accused requests.[10] Similarly, Article 25 authorizes enlisted members to serve on courts-martial if requested by an enlisted accused.[11] In 1997, the CAAF addressed the requirements of Article 16 in *United States v. Turner.*[12] The CAAF held that there had been a violation of Article 16 but that the violation did not require reversal of the conviction. Although the accused, and not the defense counsel, should have made the request for trial by a military judge alone, the court determined that it was a non-jurisdictional procedural error. The court found that under the circumstances, there had been substantial compliance with Article 16.[13]

Three years later, the CAAF extended the substantial compliance doctrine to Article 25 in *United States v. Townes*.[14] The accused in *Townes* never personally requested that enlisted members serve on his court-martial panel, as required by Article 25. Rather, the defense counsel made the request on the record in the accused's presence. Nonetheless, the CAAF found "sufficient indication" that the accused had personally requested enlisted members. Just as in *Turner*, the CAAF held that although there was error, it was not jurisdictional error.[15]

The CAAF revisited the substantial compliance doctrine this past year in *United States v. Morgan*,[16] when it again addressed the requirements of Article 25. In *Morgan*, the military judge advised the accused at his arraignment of his right to request that enlisted members sit on his court-martial. The defense counsel deferred forum selection, and the military judge set a trial date, with a 21 October deadline for the accused to make his forum selection. The defense counsel faxed a "Notice of Plea and of Forum" to the military judge on 21 October, indicating that the "defense will request trial before a court-martial consisting of at least one third enlisted members."[17] The court-martial reconvened two weeks later, and at no time during the ensuing four-day trial, from voir dire through sentencing, did the accused object to the enlisted members on the panel.[18] On appeal, the accused argued that the record failed to show that he personally requested enlisted members to sit on his panel, thus violating Article 25 and creating a jurisdictional error.[19] The service court ordered a *DuBay* hearing to determine the relevant facts surrounding the accused's forum election.[20] After the

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9. *Id.* R.C.M. 201(b)(2) ("The 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.").

10. UCMJ art. 16(1)(B) (2002). Article 16(1)(B) provides that a court-martial may consist of "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." *Id*.

11. Article 25(c)(1) provides, in part:

> Any enlisted member of an armed force on active duty is eligible to serve on general and special courts-martial for the trial of any enlisted member . . . 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.

UCMJ art. 25(c)(1).

12. 47 M.J. 348 (1997). In *Turner*, the military judge advised the accused at arraignment of his right to choose either a trial composed of members or a trial composed of military judge alone. The accused initially deferred his election. Before trial, the accused's defense counsel submitted a written request for trial by military judge alone. The defense counsel, in the presence of the accused, confirmed that request orally at trial. The accused never personally made the forum selection. *Id*. at 349.

13. *Id.* at 350. The CAAF noted that the military judge had informed the accused of his forum choices on the record, that the accused had discussed his choices with his defense counsel, that the defense counsel elected trial by military judge alone on the accused's behalf and in his presence, and that at no time did he ever object. *Id.*

14. 52 M.J. 275 (2000). In *Townes*, the military judge advised the accused at arraignment of his choice of forum, including the right to be tried by a court-martial composed of at least one-third enlisted members. The accused stated that he understood these rights. At a later session, in the presence of the accused, the defense counsel orally requested enlisted members to serve on the panel. The accused never personally made the request. *Id.* at 276.

15. *Id*. at 277. In finding substantial compliance with Article 25, the court noted that the accused had been advised of and understood his forum choices, that the defense counsel requested enlisted members in the presence of the accused, and that the accused was present during ten days of trial, to include testifying for an entire day in front of the enlisted members. *Id.*

16. 57 M.J. 119 (2002).

17. *Id*. at 120.

18. *Id*. at 121.

DuBay hearing, the service court affirmed the case, concluding that there had been substantial compliance with Article 25, UCMJ.[21]

The accused and both of his defense counsel testified at the *DuBay* hearing. The accused recalled being advised of his forum choices as well as seeing enlisted members on the panel at his trial. He reaffirmed that he understood those choices and understood that the choice belonged to him, not his attorney. Both of his defense counsel acknowledged that the request for enlisted members accurately reflected the accused's wishes, and that if their client had wanted a forum other than one with enlisted members, they would have informed the court.[22] The military judge then made findings of fact. First, he found that the accused had been advised of his forum choices, to include his choice to elect a panel composed of both officers and enlisted members. Second, the judge found that the accused understood those forum choices. Third, he found that the trial judge had set a deadline for submission of forum election, and that the defense counsel met that deadline by providing written notice that the accused would request a panel consisting of officer and enlisted members. Finally, he found that the defense counsel had discussed the various forum choices with the accused before the deadline, and that the accused "personally chose to be tried by a court consisting of at least one-third enlisted members."[23]

On appeal, the CAAF affirmed, holding that the failure to get the accused's forum selection on the record was a procedural error, but not a jurisdictional defect. It agreed with the service court that there had been substantial compliance with Article 25, noting that the accused never objected to the presence of the enlisted members, either at trial, in his post-trial submissions, or his initial appellate pleadings. The CAAF stated that in this case, as "in *United States v. Townes* . . . and *United States v. Turner*, . . . the record establishes that the selection of an enlisted forum was appellant's choice. There were many opportunities to voice an objection to having enlisted members on the panel, and none was made."[24]

The obvious significance of the holding in *Morgan* is the expansion of the substantial compliance doctrine as applied to Article 25. In both *Turner* and *Townes*, the CAAF held that there is substantial compliance with Articles 16 and 25, respectively, when the defense counsel makes a forum selection on behalf of the accused on the record and *in the accused's presence*. In *Morgan*, the court now finds substantial compliance with the statutory requirement that an accused personally request "orally on the record or in writing" his forum choice in a situation where the defense counsel makes the request *outside the accused's presence*. As Judge Effron notes in his dissenting opinion, the only record of forum selection at trial was the faxed notice signed by the defense counsel indicating that the defense "*will* request" enlisted members.[25] Judge Effron argues that the request must be made at trial, orally on the record, or in the case of a written request, personally signed by the accused. While Judge Efron is willing to find substantial compliance in a situation where the defense counsel makes a forum selection on behalf of the accused on the record in the accused's presence, he is not willing to find substantial compliance in a situation where the forum selection is made by the defense counsel without any indication that the accused had knowledge of the request.[26]

The majority opinion continues the trend the CAAF has seemed to follow for the last few years when determining jurisdictional issues—to look beyond procedural and administrative defects and focus on the pragmatic effect of any errors.[27] While that may be reassuring to judges and prosecutors, it should be emphasized that in all these cases, the rules were not followed and the CAAF found error. Insofar as proper court-martial composition is concerned, both Articles 16 and 25 still *require* that the accused, either orally on the record or in writing, personally make the forum selection.

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19. *Id.* at 120.

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

21. *Morgan*, 57 M.J. at 122.

22. *Id.* at 121.

23. *Id.* at 122.

24. *Id.*

25. *Id.* at 126 (Effron, J., dissenting).

26. *Id.* at 125. Judge Effron states that it was error for the appellate courts to rely on the post-trial *DuBay* hearing to cure the defective trial proceedings. He writes, "A jurisdictional deficiency cannot be corrected through a post-trial reconstruction of events in a *DuBay* hearing." *Id.*

27. *See* Major Tyler J. Harder, *Recent Developments in Jurisdiction: Is This the Dawn of the Year of Jurisdiction?*, ARMY LAW., Apr. 2001, at 3; Major Tyler J. Harder, *All Quiet on the Jurisdictional Front . . . Except for the Tremors from the Service Courts*, ARMY LAW., Apr. 2002, at 5 [hereinafter Harder, Apr. 2002] (discussing this jurisdictional trend).

Personal Jurisdiction: Retirees, Prisoners, and Fraudulent Discharges

The fourth requirement of court-martial jurisdiction is that the "accused must be a person subject to court-martial jurisdiction."[28] This element of *in personam* jurisdiction requires that an accused occupy a status as a person subject to the UCMJ at the time of trial.[29] A list of those subject to the UCMJ is found in Article 2, UCMJ.[30] In 2001, the Navy-Marine Corps Court of Criminal Appeals (NMCCA) decided *United States v. Morris*,[31] a case that focused on members of the Fleet Reserve and Fleet Marine Corps Reserve, one class of persons listed in Article 2(a) as being subject to military jurisdiction.[32] In *Morris*, the NMCCA determined that the requirement of RCM 204(b)(1) to place a member of the Reserve Component (RC) on active duty before arraignment does not apply to retirees and members of the Fleet Reserve or Fleet Marine Corps Reserve.[33] The court held that members of the Fleet Reserve and Fleet Marine Corps Reserve are not members of the RC as envisioned by RCM 204(b)(1), and concluded that jurisdiction existed over the accused at trial based upon his "status as a member of the Fleet Marine Corps Reserve, and not upon the fact that he had been recalled to active duty."[34] During the past year, the NMCCA decided *United States v. Huey*,[35] a case that focused on another status of persons listed in Article 2(a), retirees of a regular component.[36]

The accused, Petty Officer First Class Huey, served twenty years on active duty in the Marine Corps and the Navy. He was transferred to the Fleet Reserve on 1 August 1982, and then placed on the retired list on 1 January 1989.[37] In 1996, the accused, his wife, and their three adopted children moved from Hawaii to Okinawa, where the accused worked as a Navy civilian employee. Shortly after arriving on Okinawa, he began engaging in forcible sexual intercourse with his teenage daughter several times a week over a nine-month period. Around March 1997, the rapes stopped, but not before the accused's daughter was pregnant with his child.[38] In August 1997, Mrs. Huey requested an early return of dependents for her pregnant daughter and revealed her belief that her husband was molesting their daughter. Following an investigation, the accused was charged, and a court-martial convicted him of rape, forcible sodomy, and indecent assault.[39]

At trial, the military judge denied the accused's motion to dismiss the charges for lack of personal jurisdiction. On appeal, the accused argued that the military judge erred in denying his motion because the exercise of court-martial jurisdiction over him was a violation of constitutional due process under the Fifth Amendment.[40] While he conceded that Article 2(a)(4), UCMJ, and case law subjected retirees to court-martial jurisdiction, the accused, citing *United States ex rel. Toth v. Quarles*,[41] argued that he had obtained "civilian status" as a factual matter. He argued that it was highly unlikely he would ever be recalled

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28. MCM, *supra* note 1, R.C.M. 201(b)(4).

29. *Id.* R.C.M. 202(c) discussion.

30. *See* UCMJ art. 2(a) (2002).

31. 54 M.J. 898 (N-M. Ct. Crim. App. 2001). Staff Sergeant Morris was charged with sexual acts with his minor daughter that investigators had discovered after he retired from active duty. Although the Marine Corps recalled him to active duty for trial by court-martial, Staff Sergeant Morris argued on appeal that he was not on active duty at the time of his trial, and that RCM 204(b)(1) required him to be on active duty. *Id.*

32. UCMJ art. 2(a)(6).

33. MCM, *supra* note 1, R.C.M. 204(b)(1) ("[A] *member of a reserve component* must be on active duty prior to arraignment at a general or special court-martial.") (emphasis added).

34. *Morris*, 54 M.J. at 904. The Commander, Marine Reserve Forces, had requested and received permission from the Secretary of the Navy to recall the accused to active duty, but the NMCCA held that Staff Sergeant Morris did not need to be recalled to active duty for purposes of exercising court-martial jurisdiction. *Id.* at 902; *see* Harder, Apr. 2002, *supra* note 27, at 6 (discussing *Morris* in greater detail).

35. 57 M.J. 504 (N-M. Ct. Crim. App. 2002).

36. UCMJ art. 2(a)(4).

37. *Huey*, 57 M.J. at 505. Transfer from the Regular Marine Corps or Marine Corps Reserve to the Fleet Marine Corps Reserve is made at the member's request following twenty or more years of active service. Once transferred, the member begins receiving retainer pay. *See* 10 U.S.C. § 6330 (2000). After the member has completed thirty years of service, the member is then transferred to the retired list of the Regular Marine Corps or the Marine Corps Reserve and begins receiving retired pay. *See id.* § 6331. For jurisdictional purposes, there is no distinction between retired pay and retainer pay. *See Morris*, 54 M.J. at 899.

38. *Huey*, 57 M.J. at 506.

39. *Id.* at 507.

40. *Id.* at 506.

41. 350 U.S. 11 (1955) (holding that it is unconstitutional to subject a former service member to trial by court-martial after he had been discharged from the Air Force).

to active duty to defend his country, pointing to his retirement pay as the only remaining connection he had with the military. This de facto civilian status entitled him to all the due process rights available in a civilian courtroom, and it was his contention that trial by court-martial deprived him of those constitutional rights.[42]

The service court quickly dispatched this argument, noting that *Toth* had been "decided in the infancy of our modern system of military justice."[43] Disagreeing with the accused's characterization of his status as a "civilian," the NMCCA found his likelihood of being recalled to active duty irrelevant, stating that there "is no doubt that a court-martial has the power to try a person receiving retired pay."[44]

While *Huey* is no new revelation of law, it still contains two points worth noting. First, it reaffirms the fact that retirees from a regular component are forever subject to military jurisdiction. The accused had been off active duty for over fifteen years at the time he was charged with these offenses. It appears that under the circumstances, the case was prosecuted at a court-martial because it was the only option available.[45] Nonetheless, it is clear that military jurisdiction continues to exist over retired members of a regular component even long after they leave active duty. Second, in answering a rather easy jurisdictional question, the NMCCA may have touched upon a deeper issue. When the UCMJ was enacted in 1950, Congress provided for military jurisdiction over civilians in several situations.[46] The first Supreme Court decisions restricting this congressional grant of jurisdiction over civilians were decided almost fifty years ago.[47] The military justice system has undergone significant changes in the interim, and if the Supreme Court were faced with similar situations today, it is entirely possible that the Court would decide these issues differently. In *Huey*, the accused argued that his de facto civilian status entitled him to "due process rights unavailable to him in a court-martial."[48] As the NMCCA noted, "Given the broad panoply of due process accorded a military accused in our current system of military justice, the general concerns expressed by the U.S. Supreme Court in *Toth v. Quarles* do not support the appellant's argument."[49] Could not the same Supreme Court that overruled *O'Callahan v. Parker* agree with the NMCCA's sentiments regarding civilians accompanying the armed forces overseas during peacetime? This is certainly something to consider.[50]

While *Huey* focused on retirees, the NMCCA decided another personal jurisdiction case during the past year that focused on a different status of persons listed in Article 2(a)—persons in custody serving a court-martial sentence.[51] In *Fisher v. Commander, Army Regional Confinement Facility*,[52] the NMCCA addressed the status of a military prisoner serving a civilian sentence and addressed the principle of continuing jurisdiction.[53]

On 13 June 1991, the accused, Anthony Fisher, was arraigned at a general court-martial on charges of rape and assault consummated by a battery. After the arraignment, he deserted the Navy. A court-martial tried him in absentia on 9 August 1991, and convicted him of desertion, in addition to the rape and battery. His sentence included confinement for seven years and a dishonorable discharge. During his unauthorized absence, the accused was shot and wounded during an armed robbery in California, and was subsequently arrested by local law enforcement officials. Military authorities took custody of

42. *Huey*, 57 M.J. at 506.

43. *Id.*

44. *Id.*

45. The offenses occurred in Okinawa before passage of the Military Extraterritorial Jurisdiction Act of 2000, 18 U.S.C.S. §§ 3261-3267 (LEXIS 2003). *Huey*, 57 M.J. at 506. Thus, unless the host nation was willing to prosecute or the accused was charged under a statute having extraterritorial jurisdiction in a federal civilian court, the only other option was a court-martial.

46. *See* UCMJ art. 2(10) (1951) (extending UCMJ jurisdiction to "persons serving with or accompanying an armed force during time of war"); UCMJ art. 2(11) (extending UCMJ jurisdiction to "persons serving with, employed by, or accompanying the armed forces outside the United States"); UCMJ art. 2(12) (extending UCMJ jurisdiction to "persons within an area leased by, reserved or acquired for the United States and under control by a Department Secretary which is outside the United States").

47. *See, e.g.*, Reid v. Covert, 354 U.S. 1 (1957); United States *ex rel*. Toth v. Quarles, 350 U.S. 11 (1955).

48. *Huey*, 57 M.J. at 506.

49. *Id.*

50. The service court set aside the findings and sentence, dismissed the charges, and abated the proceedings in *Huey* on 29 August 2002, due to the accused's death on 2 July 2002 (ten days before the court decided the case). United States v. Huey, No. 200000995, 2002 CCA LEXIS 186 (N-M. Ct. Crim. App. Aug. 29, 2002).

51. UCMJ art. 2(a)(7) (2002).

52. 56 M.J. 691 (N-M. Ct. Crim. App. 2001).

53. *Id*.

him from the State of California on 25 August 1991, at which time he began serving his court-martial sentence. The military turned him back over to the State of California five days later to face trial for the armed robbery charges in state court. The accused was convicted and sentenced to sixteen years in state prison on 6 February 1992. On 5 November 1999, the accused completed his civilian sentence, and the State of California returned him to military control to serve out the remainder of his court-martial sentence.[54] On 17 July 2001, the accused filed a petition for extraordinary relief with the NMCCA, requesting a writ of habeas corpus on the ground that he was being held unlawfully after the completion of his court-martial sentence to confinement.[55]

The accused made two arguments to support his petition. First, he argued that his court-martial sentence to confinement had run concurrently with his civilian sentence to confinement, and therefore, he had finished serving the seven years of military confinement before the State of California returned him to military control in 1999. Second, he argued that the military had no authority to confine him because military jurisdiction over him terminated when he received his dishonorable discharge certificate in civilian confinement.[56]

The accused argued that under the Interstate Agreement on Detainers Act (IADA),[57] his military confinement continues to run "while the military prisoner is temporarily in state custody."[58] The NMCCA acknowledged that the IADA applies to the military, and that under the IADA, if invoked, military confinement would continue to run while the accused was in state custody.[59] It found, however, that the IADA had not been invoked in this case. The NMCCA determined that the delivery of military prisoners to state authorities may be accomplished in two ways—under the IADA, or pursuant to Article 14, UCMJ.[60] The court looked to the regulatory authority of the *Manual of the Judge Advocate General* (*JAGMAN*), which provides that "delivery of custody shall be governed by Article 14, UCMJ" when the IADA is not invoked.[61] The court determined that a transfer under the IADA "occurs only '[u]pon request under the Act by either State authorities or the prisoner.'"[62] It held that neither the State of California nor the accused made such a request under the IADA. Because neither invoked the IADA, the accused's transfer to the state was under Article 14, UCMJ. By the clear language of Article 14, transfer from military to civilian authorities interrupts the court-martial sentence until the accused is "returned to military custody for the completion of his sentence."[63]

The accused next argued that, even if his delivery to state authorities was pursuant to Article 14, UCMJ, the military lost jurisdiction over him when he received his dishonorable discharge in a civilian prison.[64] The NMCCA found the principle of continuing jurisdiction dispositive of this issue. Jurisdiction over the accused attached at the time of his trial and continued through the completion of his sentence and punishment. The execution of his dishonorable discharge certificate "merely executed that part of the petitioner's sentence extending to the dishonorable discharge."[65]

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54. *Id*. at 692.

55. *Id*. at 693. The accused's petition requested relief in the nature of a writ of habeas corpus, error *coram nobis*, and mandamus. *Id.* at 692.

56. *Id*. at 694-95.

57. 18 U.S.C. app. § 2 (2000). The IADA is an agreement between the United States, forty-eight States, the District of Columbia, Puerto Rico, and the Virgin Islands. It is designed to facilitate the expeditious disposition of pending charges by one jurisdiction against a person already incarcerated in another jurisdiction. *See Fisher*, 56 M.J. at 693 n.1 (citing Carchman v. Nash, 473 U.S. 716, 719 (1985); 18 U.S.C. app. § 2, art. I).

58. *Fisher*, 56 M.J. at 694 (citing U.S. DEP'T OF NAVY, JAG INSTR. 5800.7C, MANUAL OF THE JUDGE ADVOCATE GENERAL § 0613(b) (3 Oct. 1990) [hereinafter JAGMAN]).

59. *Id*. at 693 n.1, 694.

60. UCMJ art. 14 (2002).

61. *Fisher*, 56 M.J. at 694 (citing JAGMAN, *supra* note 58, § 613(c)).

62. *Id*. (citing JAGMAN, *supra* note 58, § 613(b)).

63. Article 14(b) states:

> When delivery under this article is made to any civil authority of a person undergoing sentence of a court-martial, the delivery, if followed by a conviction in a civil tribunal, *interrupts the execution of the sentence of the court-martial*, and the offender after having answered to the civil authorities for his offense shall, upon the request of competent military authority, be returned to military custody *for the completion of his sentence.*

UCMJ art. 14(b) (emphasis added).

64. *Fisher*, 56 M.J. at 694.

65. *Id*. (citing MCM, *supra* note 1, R.C.M. 201(c)(1); Coleman v. Tennessee, 97 U.S. 509 (1878)).

It is interesting that the NMCCA also addressed the accused's status as a military prisoner under Article 2(a)(7), UCMJ.[66] The court noted that the accused's discharge "terminated his status as an active duty service member, but not his status as a 'military prisoner.'"[67] Referring to the requirement that the state turn the accused back over to the military pursuant to Article 14, UCMJ, the court stated, "[W]e believe he effectively remained a prisoner subject to military control . . . . In other words, delivery of *temporary* custody to state authorities did not relinquish military control over him, nor did it change his status as a military prisoner."[68] This was apparently in response to the accused's argument that he was no longer a military prisoner because he was not physically under military control. The significance of his status as a military prisoner subject to military jurisdiction under Article 2(a)(7), however, is unclear. While the court's analysis is basically correct (that is, Article 2(a)(7) does give the military jurisdiction over the accused), it is also unnecessary, because continuing jurisdiction already applied in this case. The accused did not need to be a military prisoner for the principle of continuing jurisdiction to apply to him. Continuing jurisdiction is the concept that military jurisdiction continues over an individual even after a valid discharge, but only for the limited purpose of executing the sentence and completing appellate review of the case.[69] Since the accused had not completed his sentence to confinement, it would seem that the concept of continuing jurisdiction would apply for that limited purpose—completion of the sentence. If the military sought jurisdiction over the accused to try him for a *new* offense, then his status as a military prisoner might be significant; as it was, the military already had jurisdiction over the accused for the limited purpose of completing the sentence of "someone who already was tried and convicted while in a status subject to the UCMJ."[70]

The last personal jurisdiction case this article will discuss is *United States v. Brevard*,[71] a case that stems from a government appeal under Article 62, UCMJ.[72] The Army Court of Criminal Appeals (ACCA) originally addressed *Brevard* in November 2002,[73] and discussed Article 3(b), UCMJ, and fraudulent discharges.[74] The accused, Sergeant (SGT) Brevard, was flagged on 4 May 2001, and his commander preferred charges against him on 12 July 2001. Before the Article 32 pretrial investigation, the accused advanced his expiration of term of service (ETS) date to 11 August 2001, by canceling his tour extension, and then, without authority, requested clearing papers and orders from the transition center.[75] The accused was told during his out-processing that he was flagged, so he submitted a forged document to the transition center purporting to lift the flag. On 10 August, he presented forged clearing papers to the transition center for his final out-processing.[76] After receiving a courtesy copy of his DD Form 214[77] and reviewing his final pay computations with the installation-level finance personnel, the accused departed his unit and left Germany on 11 August. On 16 August, after SGT Brevard failed to appear for the Article 32 investigation, the Finance Commander directed that SGT Brevard's final pay not be processed.[78] On 8 November 2001, Army authorities detained the accused at Fort Meyer, Virginia, and on 23 November, flew him back to Germany for trial. In

66. *Id*. Article 2(a)(7) provides for jurisdiction over persons "in custody of the armed forces serving a sentence imposed by a court-martial." UCMJ art. 2(a)(7).

67. *Fisher*, 56 M.J. at 694.

68. *Id.* at 694-95.

69. *See* Smith v. Vanderbush, 47 M.J. 56 (1997) ("[T]he concept of continuing jurisdiction may be applied for the limited purpose of permitting appellate review and execution of the sentence in the case of someone who already was tried and convicted while in a status subject to the UCMJ.").

70. *Id.* at 59; *see also* United States v. Byrd, 53 M.J. 35 (2000) (holding that the concept of continuing jurisdiction extends beyond the execution of a punitive discharge).

71. United States v. Brevard, 58 M.J. 124 (2003).

72. UCMJ art. 62 (2002).

73. United States v. Brevard, 57 M.J. 789 (Army Ct. Crim. App. 2002).

74. Article 3(b) provides a two-step process in establishing jurisdiction over a person who fraudulently obtains a discharge from the service. It provides:

> Each person discharged from the armed forces who is later charged with having fraudulently obtained his discharge is . . . subject to trial by court-martial on that charge and is after apprehension subject to this chapter while in the custody of the armed forces for that trial. Upon conviction of that charge he is subject to trial by court-martial for all offenses under this chapter committed before the fraudulent discharge.

UCMJ art. 3(b).

75. *Brevard*, 57 M.J. at 790.

76. *Id.* at 790-91. The accused never cleared the various sections in his unit, nor did he ever receive the authority to begin the clearing process. *Id.*

77. U.S. Dep't of Defense, DD Form 214, Certificate of Release or Discharge from Active Duty (Nov. 1988). The DD Form 214 indicated a discharge date of 11 August 2001. *Brevard*, 57 M.J. at 791.

December, the Army released the accused's final pay to his bank, but then recalled it before he gained access to it.[79] The court did not arraign SGT Brevard until 13 February 2002, at which time he argued lack of personal jurisdiction.[80] Two weeks later, the military judge ruled that the accused had not completed the clearing process, had not received his final pay, and had received his discharge fraudulently. The military judge found, however, that the accused was discharged on 11 August—thereby terminating jurisdiction over him—and abated the proceedings. The military judge ruled that the government must first convict the accused of fraudulent separation before proceeding on the preferred charges.[81] The government then preferred a single charge of fraudulent separation against the accused on 1 April 2002, and referred the case to a court-martial on 15 May. On 10 June, following the arraignment, the defense argued a motion to dismiss based on lack of a speedy trial in front of a different military judge. On 3 July 2002, the second military judge granted the defense motion and dismissed the fraudulent separation charge with prejudice. The military judge found that the accused had "completed the clearing process, albeit deceptively; received a final accounting of pay; and was delivered his DD Form 214."[82] Based on these findings, the military judge concluded that SGT Brevard had been discharged from the Army on 11 August 2001, and that the government had to prove the fraudulent discharge before it could try SGT Brevard on the other offenses.[83]

The government appealed the ruling to the ACCA under the provisions of Article 62, UCMJ. The service court disagreed with the military judge's ruling, finding that the military judge erred as a matter of law. The service court focused on the military judge's conclusion that the accused had been discharged. The ACCA agreed that a trial and conviction for fraudulent discharge was necessary to establish jurisdiction over offenses committed before the discharge; however, it did not agree that a discharge had occurred in this case.[84] Looking at the three elements[85] necessary to effectuate a valid discharge, the court found that the accused had not received a final accounting of pay.[86]

The military judge concluded that SGT Brevard had received a final accounting of his pay because he had processed through the installation finance office and was informed how much money he would receive. The service court disagreed but stopped short of specifically stating what actually constitutes a final accounting of pay. The court, referencing Defense Finance and Accounting Service (DFAS) regulations and policy, conceded that the military cannot extend jurisdiction indefinitely by simply not providing a soldier's final pay; however, the court did not elaborate any further on the issue.[87]

The CAAF granted the accused's petition for review, and on 5 March 2003, affirmed the ACCA's decision to reverse the military judge's dismissal of the fraudulent separation charge. The CAAF viewed the posture of the appeal differently from the ACCA, however. The CAAF specifically held that the military judge erred in finding that there was a speedy trial violation, but declined to rule on the validity of the rulings made in the first court-martial.[88] The CAAF found that the two courts-martial were separate proceedings, and held that the ACCA was without jurisdiction to address any issues stemming from the first court-martial. The government appeal only raised the issue of the motion to dismiss the fraudulent separation charge of the second court-martial. The CAAF stated that while it was

78. *Brevard*, 57 M.J. at 791. "According to testimony at trial, actual receipt of eighty percent of final pay usually occurs seven to ten days after ETS. The remaining twenty percent of final pay is paid approximately twenty days later, after a second and final DFAS computer check." *Id.* at 791 n.6.

79. *Id.* at 791.

80. *Id.* Generally, a valid discharge terminates jurisdiction. *See* MCM, *supra* note 1, R.C.M. 202(a) discussion. A discharge is complete upon: (1) a delivery of a valid discharge certificate; (2) a final accounting of pay; and (3) undergoing a clearing process required under appropriate service regulations to separate a service member from military service. 10 U.S.C. §§ 1168-1169 (2000); United States v. Keels, 48 M.J. 431, 432 (1998); United States v. King, 27 M.J. 327, 329 (C.M.A. 1989).

81. *Brevard*, 57 M.J. at 792. The military judge also abated the proceedings to permit the government to appeal her ruling; however, the Government Appellate Division, after failing to file the necessary documentation on time, elected not to appeal on 29 March 2002. *Id.*

82. *Id*.

83. *Id.* In essence, it was impossible for the government to establish jurisdiction over the accused because it first had to prove the fraudulent discharge, but the military judge had dismissed the fraudulent separation charge with prejudice. The military judge found a speedy trial violation and determined that the government decision not to proceed on the fraudulent separation charge earlier was "based on a grossly negligent and unreasonable interpretation of both the undisputed facts and the existing case law." United States v. Brevard (Headquarters, 1st Infantry Division, July 3, 2002) (order granting defense motion to dismiss) (on file with author).

84. *Brevard*, 57 M.J. at 794.

85. *See supra* note 80.

86. *Brevard*, 57 M.J. at 794 ("[H]ere we hold that a final accounting of pay did not occur under the facts of [Sergeant Brevard's] attempted separation.").

87. *Id.* at 794 n.14.

88. United States v. Brevard, 58 M.J. 124, 127 (2003).

appropriate for the ACCA to consider matters from the first trial for "the limited purpose of reviewing the speedy trial ruling" of the second court-martial, the service court could not rule on issues arising out of the first court-martial.[89] The CAAF recognized that the military judge at the accused's first court-martial had determined by a preponderance of the evidence that the accused had been discharged, and therefore found it necessary for the government to prove that the discharge had been fraudulently obtained beyond a reasonable doubt at the second court-martial.[90]

The *Brevard* decision sends the case back to the second court-martial for trial on the fraudulent separation charge. If the accused is convicted of that charge, jurisdiction in the first court-martial will be established, and the government can proceed with the original charges that were referred to the first court-martial. Article 3(b), UCMJ, clearly indicates that this two-part process is necessary in fraudulent discharge cases. Practitioners may find a lesson, however, in the fact that the ACCA apparently felt that there had been no discharge, fraudulent or otherwise. Had the government appealed the ruling of the military judge from the first court-martial, the ACCA would have had jurisdiction over the issue and could have properly addressed the validity of the accused's discharge. Since the service court's opinion made clear that the discharge had not been completed,[91] it appears likely that the case would have continued without the need to ever convict the accused of a fraudulent separation charge.

While the CAAF opinion remained silent on the fraudulent discharge issue this time, it is very likely that the issue will resurface on direct review of the case. The question that the appellate courts must address is whether the discharge, without regard to the fraud, was a complete and valid discharge as the term is currently defined.[92] In *Brevard*, the question boiled down to whether there had been a final accounting of pay. Is this requirement satisfied when the money leaves the government's hands, when it reaches the service member's account, or when the service member withdraws the money? Is the determination based upon something else entirely? In an age of electronic transfers of money from one account to another, this is now an issue that requires more specificity. When exactly is the final accounting of pay completed? In many cases, the answer to this question will also be the answer to when jurisdiction terminates.

Subject-Matter Jurisdiction and Reservists

The fifth element necessary for court-martial jurisdiction is that the offense be subject to court-martial jurisdiction.[93] This element is further enunciated in RCM 203, which provides, "To the extent permitted by the Constitution, courts-martial may try any offense under the code . . . ."[94] An additional aspect of subject-matter jurisdiction unique to the military is the status of the accused at the time the offense is committed. The U.S. Supreme Court addressed this in *Solorio v. United States*,[95] when it held that court-martial jurisdiction over an offense depends on the status of the accused and not on the "service connection" of the offense charged.[96] Therefore, in determining whether subject-matter jurisdiction exists, it is necessary to look at the service member's status at the time the offense is committed. If the service member is lacking a military status at the time of the offense, there is no jurisdiction over that offense, regardless of whether the offense violates any UCMJ article.[97] For active duty personnel, the question of military status at the time of the offense seldom requires much analysis. For members of the Reserve Component, however, the question becomes much more significant and is often difficult to answer. There are two military statuses in Article 2 that apply to reservists; the first is found in Article 2(a)(1), providing jurisdiction over "persons lawfully called . . . to duty in or for training in, the armed forces."[98] The second is found in Article 2(a)(3), providing for jurisdiction over "[m]embers of a reserve component while on inactive-duty training."[99] For a court-martial to have subject-matter jurisdiction over an offense committed by a

89. *Id*. ("The issue of what, if any, action may be taken with respect to the charges in the first court-martial is not before this court in the present appeal.").

90. *Id*.

91. *Brevard*, 57 M.J. at 794.

92. *See supra* note 80.

93. MCM, *supra* note 1, R.C.M. 201(b)(5).

94. *Id*. R.C.M. 203.

95. 483 U.S. 435 (1987).

96. *Id*. at 436 (overruling *O'Callahan v. Parker*, 395 U.S. 258 (1969), and abandoning the requirement that the offense charged be "service-connected").

97. The various statuses subject to military jurisdiction are found in Article 2, UCMJ. The question of military status at the time of the offense is one of subject-matter jurisdiction. *See Solorio*, 483 U.S. at 439; MCM, *supra* note 1, R.C.M. 203 discussion; *id* R.C.M. 203 analysis, at A21-12. Since these are also the same statuses that are used in determining personal jurisdiction (status at the time of trial), it is common, but incorrect, to view that aspect of subject-matter jurisdiction as an issue of personal jurisdiction.

98. UCMJ art. 2(a)(1) (2002). Active duty includes Active Duty (AD), Active Duty for Training (ADT), and Annual Training (AT). *See id*.

reservist, therefore, the reservist must either be on active duty or on inactive-duty training at the time the offense is committed.[100] This well-settled rule was at issue in two cases this past year, one decided by the CAAF, and another decided by the Air Force Court of Criminal Appeals (AFCCA).

In *United States v. Oliver*,[101] the accused, a member of the Marine Corps Reserve, reported to Camp Lejeune for a period of active duty. The period of active duty was to begin on 25 August 1997 and continue until 27 September 1997. On 25 August, Staff Sergeant (SSG) Oliver checked into the Bachelor Enlisted Quarters (BEQ). He checked out of the BEQ on 7 September, and then checked back into the BEQ on 11 September, staying there until 29 September. On 29 September, he filed a travel claim for his period of active duty and claimed $1888 for lodging expenses.[102] Along with his travel claim, SSG Oliver submitted a computer-generated hotel receipt indicating that he stayed at a nearby hotel from 23 August to 11 September. The receipt contained several obvious alterations and raised the suspicions of personnel at the disbursing office.[103] Following an investigation, SSG Oliver was charged with and convicted of three specifications under Article 132, UCMJ (making a false claim, presenting a false claim, and using an altered lodging receipt in support of the claim).[104] At trial, and in response to the military judge's inquiry into the status of the accused, the trial counsel stated that SSG Oliver was on "medical hold" and would remain on active duty until his medical problems were resolved. The defense did not object to this response, and even stated during opening statement that the accused "was on active duty and 'continues on active duty as a reservist here today.'"[105]

On appeal to the NMCCA, SSG Oliver argued lack of subject-matter jurisdiction.[106] He contended that his active duty ended on 27 September (28 September if one day of travel time is included), and that it was not until 29 September that he made and submitted his travel claim and hotel receipt. He argued that he was not subject to the UCMJ at the time he submitted the alleged false claim.[107] In a 2001 NMCCA opinion, the court found that SSG Oliver received medical treatment on 20 September, which resulted in the Marine Corps placing him on medical hold on 28 September. The court determined that Staff SSG Oliver's medical hold status continued him on active duty, without interruption, past the expiration of his active duty orders and through the date of arraignment and sentencing.[108]

On appeal to the CAAF last year, SSG Oliver argued that "the government must prove sufficient facts to establish subject-matter jurisdiction" over a reservist at trial.[109] He based his argument on his belief that the language at the beginning of Article 132 established a separate element for the offense.[110] The CAAF disagreed, holding that that language, "any person subject to this chapter," was nothing more than a basic jurisdictional prerequisite or baseline that must be met before jurisdiction existed.[111] The court further held that jurisdiction "is an interlocutory issue, to be decided by the military judge, with the burden placed on the Government to prove jurisdiction by a preponderance of the evidence."[112] Staff Sergeant Oliver did not challenge the jurisdiction of the court at trial, but rather raised the issue on appeal. The government, recognizing its burden, then attached SSG Oliver's medical records indicating that he was on medical hold and continued on active duty beyond the expiration of his orders.[113] The CAAF disposed of

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99. UCMJ art. 2(a)(3). Inactive duty training (IDT) typically consists of the weekend drills conducted by Reserve units.

100. *See* UCMJ art. 2(a)(1), 2(a)(3), 2(d).

101. 57 M.J. 170 (2002).

102. *Id.* at 171.

103. United States v. Oliver, 56 M.J. 695, 698 (N-M. Ct. Crim. App. 2001). On the receipt, the middle initial of the patron, the month of arrival, the date of departure, and the room rate had all been altered by hand. *Id.*

104. *Id.* at 697. The NMCCA held that the first two specifications (making a false claim and presenting a false claim) were multiplicious and dismissed the first specification, affirming the findings as to the remaining two specifications. *Id.* at 704.

105. *Oliver*, 57 M.J. at 171-72.

106. *Oliver*, 56 M.J. at 698. An appellant may raise lack of jurisdiction for the first time on appeal. *See* MCM, *supra* note 1, R.C.M. 905(e).

107. *Oliver*, 56 M.J. at 698.

108. *Id.* at 699-700.

109. *Oliver*, 57 M.J. at 171.

110. Article 132, like most of the other punitive articles of the UCMJ, begins with the language, "Any person subject to this chapter . . . ." UCMJ art. 132 (2002).

111. *Oliver*, 57 M.J. at 172.

112. *Id.* (citations omitted).

the issue by finding that medical hold was a valid reason for extending a reservist on active duty.[114]

The CAAF resolved the issue in *Oliver* without addressing the tougher questions of *when* the offense was committed or *when* a reservist's active duty or inactive duty training begins and ends. If a reservist submits a fraudulent travel claim or settlement voucher, does it matter when he signed the paper work? Or is the only important issue the fact that the service member filed the claim in an official capacity? When *does* training for reservists officially begin and when *does* it officially end? While it was unnecessary for the CAAF to address these questions in *Oliver*, the Air Force service court has squarely faced these issues twice in the recent past.

In 2000, the AFCCA decided *United States v. Morse*,[115] an unpublished opinion, factually similar to *Oliver.* The service court found subject-matter jurisdiction existed where an Air Force Reserve colonel filed false travel vouchers, even if the claims had been signed by the accused *after* he completed his travel.[116] Although the court determined that there was ample evidence at trial to conclude that the accused signed the forms before his departure from the base, it stepped beyond the traditional parameters of Reserve jurisdiction by noting that it was irrelevant *when* the accused signed the forms.[117] In its concluding paragraph on this issue, the court stated:

> Finally, even if we were to ignore the overwhelming evidence of subject matter jurisdiction noted above, we would still find jurisdiction based upon the simple and undeniable fact that *the appellant signed these forms in his official capacity as a reserve officer* in the United States Air Force. It was part of *his duty incident to these reserve tours or training* to complete these forms with truthful information and that *duty was not complete until the forms were signed*, regardless of whether or not he completed travel pursuant to his orders. Therefore, it is *immaterial if the appellant did not sign these forms until after completing his travel*. He did so in a duty status.[118]

This analysis of subject-matter jurisdiction is a significant departure from past decisions that viewed status at the time of the offense as *the* determining factor in deciding whether subject-matter jurisdiction exists. Past cases have focused on the accused's military status at the precise moment the offense was committed.[119] The CAAF denied a petition for review in *Morse*,[120] probably because there was ample evidence to support the finding that Colonel Morse signed the forms before he departed from his active duty or inactive duty training. Whether the CAAF agrees with the AFCCA's analysis in *Morse*—that jurisdiction existed because the forms were signed in "his official capacity as a reserve officer"—remains to be seen.

In 2002, the AFCCA decided another case addressing subject-matter jurisdiction over reservists, *United States v. Phillips*.[121] Lieutenant Colonel Phillips was a Reserve nurse ordered to perform her two-week annual training from 12 July 1999 through 23 July 1999. Her orders authorized her one travel day (11 July) to get from her home in Pittsburgh to her duty station at Wright-Patterson Air Force Base, Ohio.[122] She left her home around 1200 hours on 11 July, arrived at her duty station around 1630, and checked into her government quarters. That evening in her quarters, she consumed three marijuana brownies that she brought with her from home. The accused

113. *Id.* at 172-73.

114. *Id.* at 173 ("The medical records submitted clearly indicate that appellant was retained on active duty beyond the expiration of his orders and, therefore, established that the court-martial possessed subject matter jurisdiction over the offense.").

115. No. ACM 33566, 2000 CCA LEXIS 233 (A.F. Ct. Crim. App. Oct. 4, 2000) (unpublished), *petition for review denied*, 55 M.J. 473 (2001). The accused, a colonel in the Air Force Reserve, submitted various travel vouchers for reimbursement for active duty tours and inactive duty training between 15 October 1995 and 3 November 1996. On these forms, the accused swore that he traveled from and returned to Plano, Texas. Based on these forms, the accused was charged with and found guilty of attempted larceny and filing false travel vouchers. *Morse*, 2000 CCA LEXIS 233, at *2.

116. *Morse*, 2000 CCA LEXIS 233, at *17-19. At trial, the accused stipulated that he was serving on active duty or inactive duty for training when he signed the forms, but on appeal he argued that the trial court lacked subject-matter jurisdiction because he signed the forms *after* he was released from active duty or inactive duty for training. *Id.* at *2, 15.

117. *Id.* at *15-19.

118. *Id.* at *19 (emphasis added).

119. *See, e.g.*, United States v. Solorio, 483 U.S. 435 (1987); United States v. Cline, 29 M.J. 83 (C.M.A. 1989) (finding subject matter jurisdiction where the accused was a reservist on active duty at the time of the offense); United States v. Chodara, 29 M.J. 943 (A.C.M.R. 1990) (setting aside findings where the government failed to establish that the accused used drugs while on active duty).

120. United States v. Morse, 55 M.J. 473 (2001).

121. 56 M.J. 843 (A.F. Ct. Crim App. 2002).

122. *Id.* at 844-45.

tested positive for marijuana as part of a random urinalysis test conducted on 16 July. A court-martial later convicted her of wrongful use of marijuana.[123]

On appeal, the accused argued that the court lacked jurisdiction over her wrongful use of marijuana because the use occurred before her two-week active duty period began.[124] The service court disagreed and held that jurisdiction existed under two separate provisions. First, the court found that the accused was "subject to UCMJ jurisdiction on 11 July under Article 2(a)(1), because she was a person 'lawfully called or ordered into . . . duty in or for training . . . from the dates when [she was] required by the terms of the call or order to obey it.'"[125] Second, it found the accused subject to jurisdiction under Article 2(c), the constructive enlistment provision.[126]

With regard to the first provision, the court held that jurisdiction existed under Article 2(a)(1) because the accused was called to active duty pursuant to orders that authorized an optional travel day. The orders gave her a choice; she could be called to duty on 12 July or she could choose the travel day and be called to duty on 11 July. She chose to use the travel day, thus extending her active duty time to 11 July.[127] The court recognized that the accused, in completing her orders at the end of her training, "specifically noted that her tour of duty began on 11 July."[128] The court also held that jurisdiction existed under Article 2(c), the constructive enlistment provision. Article 2(c) provides for jurisdiction over persons serving with the military who: (1) submitted voluntarily to military authority; (2) met the mental competence and minimum age qualifications at the time of voluntary submission; (3) received military pay and allowances; and (4) performed military duties.[129] The court found that all four requirements had been satisfied in this case. First, the accused voluntarily chose to use her travel day and thereby submitted to military authority on that day.[130] Second, it was undisputed that the accused met the mental competence and minimum age requirements. Third, the accused filed for and received full military pay and allowances for 11 July. Fourth, the court found that the accused performed military duties on 11 July, noting that "[t]ravel is a normal part of military duty."[131]

While the dissent believes that the decision is contrary to the holding in *United States v. Cline*,[132] the majority finds that the accused was in a status on 11 July that made her subject to military jurisdiction. The rationale behind both arguments is logical. The dissent relies on the clear holding in *Cline* interpreting the language in Article 2(a)(1) literally. That is, jurisdiction begins *from the date* the soldier is lawfully called to duty, and not the travel day before the date the accused is to begin duty. On the other hand, the majority attempts to apply Articles 2(a) and 2(c) "in a common sense and straightforward manner, consistent with plainly stated congressional intent to subject reservists to UCMJ jurisdiction to the same extent as active duty members."[133] Are reservists subject to military jurisdiction during authorized travel to and from active duty training? The CAAF granted review of this issue, so an answer to this question should be forthcoming.[134]

123. *Id.* at 845.

124. *Id*. The accused claimed that the Air Force did not have in personam jurisdiction over her marijuana use. *Id.* This is simply incorrect as the issue is one of subject-matter jurisdiction, not personal jurisdiction. *See supra* notes 93-97 and accompanying text.

125. *Phillips*, 56 M.J. at 845 (quoting UCMJ art. 2(a)(1) (2002)).

126. *Id*. at 846-47 (citing UCMJ art. 2(c)).

127. *Id.* Later in the opinion, the court notes that when she accepted the optional travel day, the accused filed for and received full military pay and allowances for that day, including a Reserve point for retirement purposes. *Id.* at 846-47.

128. *Id.* at 846.

129. UCMJ art. 2(c).

130. *Phillips*, 56 M.J. at 846. The court determined that the accused had three options: (1) travel to the base on 11 July and simply claim her mileage; (2) travel to the base on 12 July, the day her training was to begin; or (3) accept the authorized travel day, claiming travel reimbursement and full pay and allowances. The accused elected the third option. *Id*.

131. *Id.* at 847. The dissent disagrees with the majority that traveling to the base qualifies as "performing military duties." *Id*. at 848 (Pecinovsky, J., concurring in part and dissenting in part).

132. 29 M.J. 83 (C.M.A. 1989) (finding that jurisdiction over reservists begins at one minute past midnight on the day the orders require the reservist to report for active duty).

133. *Phillips*, 56 M.J. at 847. Congress amended Articles 2 and 3 in 1986 to provide for greater military jurisdiction over reservists. The House Armed Services Committee stated in its report that the changes "would conform the UCMJ to the total-force policy by subjecting members of the reserve components in Federal status to the same disciplinary standards as their regular component counterparts." Willenbring v. Neurauter, 48 M.J. 152 (1998) (quoting H.R. REP. NO. 718, 99th Cong., 2d Sess. 225 (1986)).

134. *See* United States v. Phillips, 57 M.J. 428 (2002) (order granting review). The CAAF affirmed the case as this article was going to print. *See* United States v. Phillips, 58 M.J. 217 (2003).

The AFCCA is certainly leading the way in expanding the traditional lines of subject-matter jurisdiction. Through its decisions in *Morse* and *Phillips*, the court has provided interesting ways to expand the traditional lines of subject-matter jurisdiction over reservists, potentially encompassing acts that occur during periods of time outside active duty or inactive duty training.

As previously stated, the rule is fairly clear: there is no jurisdiction over a reservist who commits an offense when not on active duty or inactive duty training. The AFCCA has expanded this rule, however, to possibly include misconduct that occurs while the service member is engaged in "official duties" incident to active duty or inactive duty training, such as filing travel settlement vouchers or while traveling to a duty station. How far the courts can expand those lines before legislative change is required remains to be seen.

National Guard Jurisdiction

Perhaps the most significant event concerning military jurisdiction this year came in the form of legislative change. The recently enacted 2003 National Defense Authorization Act (NDAA) contains an important tasking for the Secretary of Defense that will potentially simplify future courts-martial of National Guard members when not in federal service.[135]

Jurisdiction over members of the National Guard generally rests with either the federal government or the state to which their National Guard unit belongs. When National Guard members are in a federal status (commonly referred to as a "Title 10" status), court-martial jurisdiction over them rests with the federal government, and soldiers and airmen who commit offenses while in this status are subject to the UCMJ.[136] When National Guard soldiers are in a state status (commonly referred to as a "Title 32" status), court-martial jurisdiction rests with the state. Soldiers and airmen who commit offenses while in a state status are not subject to the UCMJ, but are subject to state laws governing their respective National Guard units. Generally, when the federal government calls National Guard members to active duty, they are in federal service. National Guard members are generally in a state status during their typical weekend drills, and the soldiers and airmen would thus not be subject to the UCMJ during these drills.[137]

Sections 326 and 327 of Title 32 provide general jurisdictional authority for convening courts-martial of National Guard members when in a state status. At first glance, the NDAA appears to change the existing authority to convene courts-martial over National Guard members that are not in federal service.[138] A closer look, however, reveals no substantive changes to existing law. The Act reorganizes the sections by placing essentially the same provisions from sections 328 through 331 into sections 326 and 327, and repealing sections 328 through 333.[139] Members of the National Guard not in federal service are still subject to the "laws of the respective States and Terri-

135. *See* Bob Stump National Defense Authorization Act for Fiscal Year 2003, Pub. L. No. 107-314, § 512, 116 Stat. 2458, 2537 (2002) (codified at 32 U.S.C.S. § 326 (LEXIS 2003)).

136. *See* UCMJ arts. 18-20 (2002).

137. *See id*. art. 2(a)(3) (stating that members of the Reserve Component are subject to the UCMJ "while on inactive-duty training, but in the case of members of the Army National Guard of the United States or the Air National Guard of the United States[,] only when in Federal service").

138. 116 Stat. at 2537. Initial reactions to this legislation indicated that jurisdiction over members of the National Guard not in federal service had been expanded. *See FastTrack*, MARINE CORPS TIMES, Dec. 23, 2002, at 6.

139. 32 U.S.C.S. §§ 326-333 (LEXIS 2003). The provisions addressing punishment were repealed and addressed in section 327 ("Punishments shall be as provided by the laws of the respective States and Territories, Puerto Rico, and the District of Columbia."). Section 328 (Special courts-martial of National Guard not in federal service) and section 329 (Summary courts-martial of National Guard not in federal service) are now contained in new subparagraphs of section 327, which reads as follows:

> (a) In the National Guard not in Federal service, general, special, and summary courts-martial may be convened as provided by the laws of the respective States and Territories, Puerto Rico, and the District of Columbia.
> (b) In the National Guard not in Federal service—
> (1) general courts-martial may be convened by the President;
> (2) special courts-martial may be convened—
> (A) by the commanding officer of a garrison, fort, post, camp, air base, auxiliary air base, or other place where members of the National Guard are on duty; or
> (B) by the commanding officer of a division, brigade, regiment, wing, group, detached battalion, separate squadron, or other detached command; and
> (3) summary courts-martial may be convened—
> (A) by the commanding officer of a garrison, fort, post, camp, air base, auxiliary air base, or other place where members of the National Guard are on duty; or
> (B) by the commanding officer of a division, brigade, regiment, wing, group, detached battalion, detached squadron, detached company, or other detachment.
> (c) The convening authorities provided under subsection (b) are in addition to the convening authorities provided under subsection (a).

Id. § 327.

tories, Puerto Rico, and the District of Columbia," and not the UCMJ.[140] This essentially creates more than fifty different jurisdictions within the National Guard. In what appears to be an attempt to conform the various National Guard jurisdictions to one uniform code of military justice, the NDAA requires the Secretary of Defense to "prepare a model State code of military justice and a model State manual for courts-martial to recommend to the States for use with respect to the National Guard not in Federal service."[141] Proposals of both models are to be submitted within one year of the date of enactment of the NDAA, along with a "discussion of the efforts being made to present those proposals to the States for their consideration for enactment or adoption."[142] The goal seems to be a future consolidation of all the various National Guard military justice statutes into one uniform state code and manual. This achievement would obviously eliminate the differences that currently exist between the various states, and would create a uniform justice system that, through the jurisdiction of the respective states, applies to all National Guard members—a much-needed new development.

Conclusion

Throughout the past fifty years, the changes to military jurisdiction have been marked by various milestones, brought about by needs for clarification, change, or both. The current problems facing the scope of military jurisdiction today are much like the problems of the past. Today, the lack of appropriate jurisdiction over members of the Reserve Component and National Guard seems to be the largest and most immediate concern. While some of the cases discussed here have little or no significant impact on this concern, some of this year's developments are moving us towards the apex of the next jurisdictional watershed event. The two most significant developments are the AFCCA decision in *Phillips*, a case in which the CAAF has granted review, and the legislative efforts to create a uniform code of military justice for the National Guard. The lack of appropriate jurisdiction over reservists and guardsmen will probably continue to plague the vision of a "total force," at least in the immediate future. While the courts can extend jurisdiction over members of the Reserve Component through judicial interpretation in some situations, it will likely take legislative change to truly resolve the problem. That is a discussion for another day, however. At least for now, practitioners must continue to achieve military justice, both in the active and Reserve components, within the jurisdictional framework that currently exists—until we reach the apex of the next watershed event in military jurisdiction.

140. *See id.* § 326.

141. § 512(e)(1), 116 Stat. at 2537. "State" includes the District of Columbia, Puerto Rico, the Virgin Islands, and Guam. *Id.* § 512(e)(5).

142. § 512(e)(4), 116 Stat. at 2537.