All Quiet on the Jurisdictional Front . . . Except for the Tremors from the Service Courts

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Introduction

Prognostics do not always prove prophecies - at least the wisest prophets make sure of the event first.[1]

As the title of this article implies, things were relatively quiet in the area of military jurisdiction this past year. In 2000, several significant jurisdictional cases were decided,[2] and the Military Extraterritorial Jurisdiction Act of 2000 (MEJA)[3] was signed into law. While these developments promised exciting things to come, the anticipated follow-on developments have been slow to unfold, leaving the prophetic anticipation of 2001 as the Year of Jurisdiction unfulfilled.[4] But as the professional baseball player Yogi Berra once said, "It's tough to make predictions, especially about the future."[5] The implementing regulations for the MEJA still remain to be written and the Court of Appeals for the Armed Forces (CAAF) did not decide the tough jurisdictional issues this year. However, a closer look at two service court opinions, one published and the other unpublished, reveals a potential jurisdictional issue of great scope looming at the CAAF's doorstep.[6]

This article discusses those opinions and offers some analysis of the potential future of military jurisdiction. Additionally, this article discusses the CAAF opinions and other service court opinions of the past year that touch on issues of jurisdictional concern. The article is divided into two parts: court-martial jurisdiction in general and appellate jurisdictional issues involving post-trial relief.

Court-Martial Jurisdiction

The five requisites of court-martial jurisdiction are found in Rule for Courts-Martial (RCM) 201(b): (1) the court-martial must be convened by the proper official, (2) the military judge and members must be of the proper number and have the proper qualifications, (3) the charges must be referred to the court-martial by competent authority, (4) there must be jurisdiction over the accused, and (5) there must be jurisdiction over the offense.[7] During the 2001 term of court, the CAAF decided only one case that addressed any of these elements; however, as already mentioned, the various service courts issued a number of opinions of jurisdictional concern, several of which addressed these elements.

The first part of this article is divided into four sections. The first section discusses a Navy-Marine Corps Court of Criminal Appeals (NMCCA) decision involving the second element listed above, proper court-martial composition. The second section discusses the sole CAAF opinion decided this term, which addresses the third element listed above, properly referred charges. The third section discusses an NMCCA opinion touching upon personal jurisdiction, and the final section discusses those service court opinions addressing subject-matter jurisdiction.

A Properly Composed Court-Martial

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.[8] One such

1. Horace Walpole, Letter to Thomas Walpole, Feb. 19, 1785, *reprinted in* JOHN BARTLETT, FAMILIAR QUOTATIONS 324:2 (1992).

2. See Major Tyler J. Harder, *Recent Developments in Jurisdiction: Is This the Dawn of the Year of Jurisdiction?* ARMY LAW., Apr. 2001, at 2, for a discussion of the prior year's jurisdiction cases.

3. 18 U.S.C. §§ 3261-3267 (2000).

4. *See* Harder, *supra* note 2.

5. High School Baseball Web, Yogi Berra Quotes (revised Dec. 29, 2001), *at* http://www.hsbaseballweb.com/yogi-isms (listing a variety of humorous quotes attributed to Yogi Berra).

6. *See infra* notes 63-85 and accompanying text.

7. MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 201(b)(1)-(5) (2000) [hereinafter MCM].

8. *Id.* R.C.M. 201(b)(2). Rule for Courts-Martial 201(b) reads: "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." *Id.*

rule addressing court-martial composition is found in Article 16, UCMJ, which allows for a court-martial without any members, or in other words, trial by military judge alone.[9] The right of an accused to elect a trial by a military judge alone is limited in capital cases (in which the death penalty is an authorized sentence). Article 18, UCMJ, specifically withholds jurisdiction from military judge alone courts-martial in cases in which the death penalty is a possible sentence.[10]

In 2000, the CAAF addressed the application of Articles 16 and 18 in *United States v. Fricke*.[11] Lieutenant Commander Fricke initially pled not guilty to premeditated murder at a general court-martial that had been referred capital.[12] Following the conclusion of the government's case, the accused entered into a pretrial agreement with the convening authority whereby the convening authority would withdraw the capital referral if the accused successfully pled guilty to premeditated murder.[13] The withdrawal of the capital referral and the subsequent noncapital referral were done orally on the record.[14]

On appeal, Fricke claimed that the court lacked jurisdiction under Article 18 to accept his guilty plea because there was no paperwork in the record to show that the convening authority withdrew the capital referral and re-referred it as a noncapital case.[15] The CAAF disagreed, holding that paperwork was not required. The court noted that the military judge had acknowledged the noncapital referral on the record, and that the failure to reduce the re-referral to writing did not mean the case had not been re-referred.[16]

This past year, the NMCCA addressed a similar situation in *United States v. Thomas*.[17] In *Thomas*, the accused was charged with the premeditated murder of his son.[18] The convening authority originally referred the case to a general court-martial as a capital case. Following the psychological evaluation of the accused by a defense-employed civilian forensic psychiatrist, the accused entered into a pretrial agreement with the convening authority. In return for the accused's agreement to plead guilty to the charges, the convening authority agreed to refer the case noncapital.[19] The charge sheet was amended to reflect the noncapital referral and the accused entered pleas of guilty to the charges and specifications, to include the premeditated murder charge.[20]

On appeal, the accused argued that his trial by military judge alone lacked jurisdiction to try him for premeditated murder because the case had been initially referred as a capital case. He argued that the language in Article 18 required that the case be *previously* referred to trial as a noncapital case.[21] The NMCCA disagreed, holding that the trial by military judge alone had jurisdiction. The court stated that even though the case was initially referred as a capital case, the convening authority modified the referral to a noncapital referral as part of the pretrial agreement, and once referred noncapital, a trial by military judge alone had jurisdiction to hear the case.[22]

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9. UCMJ art. 16(1)(B) (2000). Article 16 states that a courts-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*. (emphasis added).

10. *Id*. art. 18. Article 18 states that "a general court-martial of the kind specified in . . . article16(1)(B) . . . shall not have jurisdiction to try any person for any offense for which the death penalty may be adjudged unless the case has been previously referred to trial as a noncapital case." *Id*.

11. 53 M.J. 149 (2000).

12. *Id*. In 1988, the accused, a thirty-eight year old naval officer with seventeen years of service, hired a hit man to kill his wife in exchange for $25,000. The hit man shot the accused's wife twice and stole her purse as she entered her vehicle at a Virginia Beach supermarket. The accused was not arrested for the murder until October 1993. *Id*. at 150.

13. *Id*. at 151.

14. *Id*. Before the acused entered his guilty plea, the military judge asked the trial counsel to make an announcement regarding the pretrial agreement and the capital referral. The trial counsel stated: "Sir, I've been authorized by the convening authority that this General Court-Martial's now been referred noncapital. That referral decision is conditioned upon your acceptance of a plea of guilty from the accused." *Id*. The military judge then informed the accused that "because the Government has withdrawn the capital referral at this time, that gives you a different option regarding forum election." *Id*.

15. *Id*. at 153.

16. *Id*. at 154.

17. 56 M.J. 523 (N-M. Ct. Crim. App. 2001).

18. *Id*. at 525. The accused pled guilty to attempted unpremeditated murder of his son, premeditated murder of his son, two specifications of assault on his wife, and kidnapping of his wife. He was sentenced to confinement for life, total forfeitures, reduction to E-1, and a dishonorable discharge. *Id*. at 524.

19. *Id*. at 525-26.

20. *Id*. at 526.

21. *Id*. at 530; *see supra* note 10.

Properly Referred Charges

The third element found in RCM 201(b) necessary for court-martial jurisdiction is that each charge before the court-martial be referred to trial by competent authority.[23] The question of whether a charge has been properly referred to trial is often one of procedure. The procedural requirements for a proper referral are found in Chapter VI of the Rules for Courts-Martial.[24] Military appellate courts, however, have seemed to look past procedural and administrative deficiencies when determining if a case has a jurisdictional defect.[25] The CAAF appeared to continue that trend in *United States v. Williams*.[26]

In *Williams*, the only court-martial jurisdictional case decided by the CAAF during the 2001 term of court, the accused was charged with numerous offenses, including murder.[27] On 10 October 1995, the commanding officer of Fort Ritchie, Maryland, Brigadier General (BG) Essig, referred the case to a general court-martial convened by General Court-Martial Convening Order (GCMCO) Number 1. The accused was arraigned on 19 October, but did not enter his pleas. On 26 October BG Essig sent the case to Major General (MG) Foley, his immediate superior, with a note stating that the case had been previously referred to trial by general court-martial.

On 31 October BG Essig retired, and Lieutenant Colonel (LTC) Lefluer became the acting commander and the general court-martial convening authority for Fort Ritchie; however, MG Foley, the commander of the Military District of Washington, immediately withdrew LTC Lefluer's general court-martial convening authority and reserved it to his level. Based upon the recommendation of his staff judge advocate, MG Foley referred the case to a general court-martial convened by GCMCO Number 2, Headquarters, Military District of Washington.[28] At the time of the second referral, the court had already held several Article 39(a) sessions in the case under GCMCO Number 1. The second referral did not expressly withdraw the charges referred to court-martial by GCMCO Number 1.[29]

At trial and on appeal, the defense argued that the court-martial lacked jurisdiction because MG Foley did not properly withdraw the initially referred charges and re-refer the charges as required by law. No document indicated an express intent to withdraw the initial charges, and the trial counsel stated early in the proceedings that MG Foley "let stand" the initial referral and that an "amending order to GCMCO 1" was forthcoming.[30] The accused argued that the act of re-referral "cannot be read to imply an intent to withdraw" because withdrawal of charges and referral of charges are separate and distinct acts under RCM 601 and 604.[31]

The CAAF agreed that withdrawal of charges and referral of charges are separate acts; however, it stated these functions "are closely related, and it is reasonable to presume that re-referral of a charge by a proper convening authority implies a decision to withdraw that charge from a prior referral."[32] The CAAF also added, "Although it is preferable for a convening authority to indicate this intent expressly, RCM 604 does not require that the convening authority memorialize this decision in any particular form."[33] The court looked at all the circumstances of this case and held that MG Foley's intent to withdraw the initial charges was implicit in his re-referral of those charges.[34] The

22. *Thomas*, 56 M.J. at 530.

23. MCM, *supra* note 7, R.C.M. 201(b)(3).

24. *Id.* R.C.M. 601-604.

25. *See, e.g.*, United States v. Townes, 52 M.J. 275 (2000) (error was not jurisdictional when military judge failed to obtain on the record the accused's personal request for enlisted members); United States v. Turner, 47 M.J. 348 (1997) (procedural error but not jurisdictional error where the accused failed to personally make the request orally or in writing for a military judge alone); United States v. Pate, 54 M.J. 501 (Army Ct. Crim. App. 2000), *petition for grant of review denied*, 2001 CAAF LEXIS 216 (Mar. 5, 2001) (finding jurisdiction existed when pretrial agreement changing the charged offense was unsigned by convening authority). For a more thorough discussion of these cases, see Harder, *supra* note 2, at 3.

26. 55 M.J. 302 (2001).

27. *Id.* at 303.

28. *Id.* at 304. Major General Foley was provided with the same Article 34 pretrial advice that had been provided to BG Essig prior to the first referral. The charges were identical to the first referral, except for some minor pen-and-ink changes. The Staff Judge Advocate's recommendation described the action as a "re-referr[al]" of the charges. *Id.*

29. *Id.*

30. *Id.*

31. *Id.* Rule for Courts-Martial 601 provides the rules governing referral of charges, while RCM 604 provides the rules governing withdrawal and re-referral of charges. *See* MCM, *supra* note 7, R.C.M. 601, 604.

32. *Williams*, 55 M.J. at 304.

33. *Id*. at 305.

court concluded by stating that any "administrative deficiency in memorializing this process was insubstantial and did not deprive the court-martial of jurisdiction."[35]

Williams may appear to be of minor significance; however, the conclusion reached by the court is a continuation of what appears to be a "substance over form" analysis when it comes to satisfying the jurisdictional requirements of RCM 201. Several cases decided by the military appellate courts in recent years have emphasized the importance of placing the practical effect and substance of the rule above the technical adherence to the rule.[36] *Williams* is one more case that emphasizes the substance of the rule and minimizes the significance of administrative deficiencies. This trend has thus far been limited to issues arising out of the second and third elements of RCM 201(b)—a properly composed court and properly referred charges.[37]

Personal Jurisdiction

The fourth element of court-martial jurisdiction is that the "accused must be a person subject to court-martial jurisdiction."[38] This element of *in personam* jurisdiction requires that an accused occupy a status as a person subject to the Uniform Code of Military Justice (UCMJ) at the time of trial.[39] A list of those persons subject to the UCMJ is found in Article 2, UCMJ.[40] This past year the NMCCA decided *United States v. Morris*,[41] a case that focused on members of the Fleet Reserve and Fleet Marine Corps Reserve, one status of persons listed in Article 2(a) as being subject to military jurisdiction.[42]

On 31 January 1995, Staff Sergeant (SSG) Morris was transferred to the Fleet Marine Corps Reserve after completing twenty years of active service in the Marine Corps. Following his retirement,[43] the accused's sexual activity with his minor daughter was discovered, and an investigation was conducted. On 20 August 1997, the Commander, Marine Reserve Forces, submitted a request to the Secretary of the Navy to recall the accused for a period of active duty for trial by court-martial and service of any post-trial confinement. On 5 November 1997, the Secretary of the Navy approved that request, and the accused was ordered to report to Jacksonville, North Carolina (Camp Lejeune).[44] At a general court-martial, SSG Morris pled guilty to committing carnal knowledge, sodomy, indecent acts, and indecent liberties against his daughter.[45]

On appeal, SSG Morris argued that the court-martial lacked personal jurisdiction over him because he was discharged and retired from active duty. He argued that his DD Form 214[46] indicated no reserve obligation termination date, therefore, he could not be recalled for court-martial. He argued further 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.[47]

The NMCCA quickly dismissed SSG Morris's lack of jurisdiction argument. It found the provisions of Article 2 and Arti-

34. *Id.* Some of the specific circumstances the court considered significant were that MG Foley had reserved the general court-martial convening authority to himself, the SJA specifically referred to the action as a re-referral, the SJA used the same pretrial advice used by BG Essig's SJA, and the trial counsel made it clear at trial that the government viewed the action by MG Foley as a withdrawal and re-referral (trial counsel apparently clarified his earlier comment that MG Foley "let stand" the initial referral). *Id.*

35. *Id.*

36. *See supra* note 25.

37. While it may be reassuring to know that the appellate courts draw a distinction between procedural error and jurisdictional error, it should be emphasized among practitioners that the best way to avoid these jurisdictional issues in the first place is to follow the procedural requirements of the Rules for Courts-Martial.

38. MCM, *supra* note 7, R.C.M. 201(b)(4).

39. *Id.* discussion.

40. *See* UCMJ art. 2(a) (2000).

41. 54 M.J. 898 (N-M. Ct. Crim. App. 2001).

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

43. 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). Upon completion of thirty years 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.

44. *Morris*, 54 M.J. at 899.

45. *Id.* at 898.

46. U.S. Dep't of Defense, DD Form 214, Certificate of Release or Discharge From Active Duty (Nov. 1988).

47. *Morris*, 54 M.J. at 899.

cle 3 sufficiently established jurisdiction in this case.[48] Article 2(a)(6) specifically lists "[m]embers of the Fleet Reserve and Fleet Marine Corps Reserve" as persons subject to the UCMJ.[49] Article 3(a) provides that jurisdiction continues over persons who commit offenses while in a status subject to the UCMJ, even if their status later changes, so long as their new status is still one subject to the UCMJ.[50] In *Morris*, the accused was on active duty when he committed the charged acts and was a member of the Fleet Marine Corps Reserve when he was recalled to active duty for trial. Military jurisdiction existed over SSG Morris both as an active duty member and as a member of the Fleet Marine Corps Reserve.

The court could have finished its analysis of the jurisdiction issue at this point; however, it addressed the application of RCM 204(b)(1) to this case. Rule for Courts-Martial 204(b)(1) states that "[a] *member of a reserve component* must be on active duty prior to arraignment at a general or special court-martial."[51] The court concluded that RCM 204(b)(1) did not apply to retirees and members of the Fleet Reserve or the Fleet Marine Corps Reserve.[52]

First, the court questioned whether the Fleet Marine Corps Reserve is part of the *reserve component*. It reasoned that because retirees and members of the Fleet Reserve or Fleet Marine Corps Reserve are specifically listed in Article 2 apart from "members of a reserve component," that Congress must have intended to define them as separate groups.[53] As the court concluded, it would make little sense to separately list a group if that group was meant to be included in an already listed group.[54]

Second, the court looked at the Analysis of RCM 204(b)(1) and the fact that RCM 204(b)(1) was added in 1987 to implement recent amendments that had been made to Articles 2 and 3.[55] The amendments to Articles 2 and 3 addressed jurisdictional issues with regard to *reservists*. Because Congress did not amend the provisions in Article 2 concerning jurisdiction over retirees and members of the Fleet Reserve or Fleet Marine Corps Reserve, the court concluded that RCM 204 was not intended to apply to retirees and members of the Fleet Reserve or Fleet Marine Corps Reserve.[56]

As a final comment on the jurisdictional issue, the court addressed a regulatory concern that had not been raised by either party. In a footnote, the court stated "that secretarial instructions prohibit ordering a member of the Fleet Marine Corps Reserve to active duty solely for the purpose of exercising court-martial jurisdiction;"[57] however, the court found this a policy prohibition, and not related to jurisdiction.[58]

Although the court's additional analysis of personal jurisdiction in *Morris* was unnecessary, it is nonetheless of some significance. The court makes clear that the requirement of RCM 204(b)(1) to place a member of the reserve component on active duty before arraignment does not apply to retirees and members

48. *Id.* at 900.

49. UCMJ art. 2(a)(6) (2000).

50. *Id.* art. 3(a). Article 3(a) provides in part:

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

Id.

51. MCM, *supra* note 7, R.C.M. 204(b)(1) (emphasis added).

52. *Morris*, 54 M.J. at 901. The accused argued he was not on active duty at the time of his trial and, even though the service court found ample evidence to conclude to the contrary, the court still addressed the applicability of RCM 204 to retirees and members of the Fleet Reserve or Fleet Marine Corps Reserve. *Id*.

53. *Id.* Article 2(a)(4) subjects to the UCMJ "[r]etired members of a regular component of the armed forces who are entitled to pay." UCMJ art. 2(a)(4). Articles 2(a)(3) and 2(d) address jurisdiction over members of a "reserve component." *Id*. arts. 2(a)(3), (d). The court cited to *United States v. Hooper*, 26 C.M.R. 417 (C.M.A. 1958) (holding that retired members of a regular component are subject to military jurisdiction without the necessity of an order calling them to active duty), as its basis for this reasoning. *See Morris*, 59 M.J. at 901.

54. *Morris*, 59 M.J. at 901.

55. *See* MCM, *supra* note 7, app. 21, at A21-13.

56. *Morris*, 54 M.J. at 901. The court unsuccessfully looked to Title 10 of the United States Code for a clear definition of the term "reserve components." While it found a statutory provision listing the "Retired Reserve" as one of the "Elements of Reserve Components," it also found a statutory provision listing the Marine Corps Reserve, but not the Fleet Marine Corps Reserve, as a reserve component of the armed forces. *Id.* (citing 10 U.S.C. § 10154 and 10 U.S.C. § 10101, respectively).

57. *Id.* at 902 n.5 (citing to U.S. DEP'T OF NAVY, JAG INSTR. 5800.7C, MANUAL OF THE JUDGE ADVOCATE GENERAL § 0123a(1) (3 Oct. 2990) [hereinafter JAGMAN]).

58. *Id.* at 902. The court states that this prohibition "is not related to jurisdiction, as the same section states that such members may simply be ordered to appear. Apparently, the prohibition is a fiscal consideration. . . . This prohibition, however, is merely policy and was not promulgated for the benefit of an accused." *Id.*

of the Fleet Reserve or Fleet Marine Corps Reserve. This means that jurisdiction would have existed over SSG Morris even if the Commander, Marine Reserve Forces, had not requested permission from the Secretary of the Navy to "recall" the accused.[59]

This analysis implies that the involuntary recall procedures contained in Article 2(d) would also not apply to retirees and members of the Fleet Reserve or Fleet Marine Corps Reserve. If this is the case, it was unnecessary for the Commander, Reserve Marine Forces, to request Secretary of the Navy approval to recall the accused to active duty. While the secretarial instruction requires prior authorization of the Secretary of the Navy before a retiree or a member of the Fleet Marine Corps Reserve is *referred* to trial by court-martial, the instruction also specifically provides that such members may *not* be recalled to active duty solely for court-martial purposes. It states that, once referred to a court-martial, such members are "directed to appear."[60] Based upon the request submitted to the Secretary of the Navy in this case, it seems the accused was erroneously treated as a reservist. Although there may be reasons to recall a retiree to active duty, there did not appear to be any reason to do so in this case.[61] At least the NMCCA does not view recalling a retiree to active duty as a prerequisite to obtaining personal jurisdiction over the retiree.[62]

Subject-Matter Jurisdiction

The final element necessary for court-martial jurisdiction is that the offense be subject to court-martial jurisdiction.[63] 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."[64] However, an aspect of subject-matter jurisdiction that is unique to the military is an *in personam* facet to the larger question of whether subject-matter jurisdiction exists. The Supreme Court addressed this issue in *Solorio v. United States*[65] in which it held that military jurisdiction depended on the status of the accused and not on the "service connection" of the offense charged.[66] Therefore, in determining whether subject-matter jurisdiction exists, it is necessary to look at the service member's status when the offense was committed. If the service member lacks military status at the time of the offense, then the military has no jurisdiction over that offense, regardless of whether the offense violates the UCMJ.[67]

With active duty personnel, the question of military status at the time of the offense is usually a conclusion that requires little analysis; however, with members of the reserve component, the question is much more significant. For a court-martial to have subject-matter jurisdiction over an offense committed by a reservist, the reservist must be on active duty or inactive duty training at the time the offense is committed.[68] The NMCCA discussed this well-settled rule in *United States v. Oliver*[69] this

59. In fact, the court concludes that "jurisdiction in this case was based upon the appellant's status as a member of the Fleet Marine Corps Reserve, and *not upon the fact that he had been recalled to active duty.*" *Id.* at 904 (emphasis added).

60. JAGMAN, *supra* note 57, § 0123a(1).

61. See *Morgan v. Mahoney*, 50 M.J. 633 (A.F. Ct. Crim. App. 1999) as an example of the necessity to recall a retiree to active duty to establish personal jurisdiction. In *Morgan*, the retiree was a member of the Retired Reserve, and as a member of the reserve component, had to be recalled to active duty pursuant to Article 2(d) before personal jurisdiction existed. *Id.* at 636 (construing UCMJ art. 2(d) (2000)). The distinction in *Morris* was the court determined that, as a member of the Fleet Marine Corps Reserve, SSG Morris was not a member of the Reserve Component.

62. Army regulation provides: "[I]f necessary to facilitate courts-martial action, retired soldiers may be ordered to active duty." U.S. DEP'T OF ARMY, REG. 27-10, LEGAL SERVICES: MILITARY JUSTICE para. 5-2b(3) (20 Aug. 1999). While this is not a jurisdictional requirement, there are still valid reasons why commanders will recall retired members to active duty for courts-martial. It is also worth noting that in the Army, HQDA approval must first be obtained before referring charges against a retiree; it is Army policy not to court-martial retirees unless extraordinary circumstances are present. *See id.*; *see also* United States v. Sloan, 35 M.J. 4 (C.M.A. 1992).

63. MCM, *supra* note 7, R.C.M. 201(b)(5).

64. *Id.* R.C.M. 203.

65. 483 U.S. 435 (1987).

66. *Id.* at 436. In *Solorio*, the Court expressly overruled *O'Callahan v. Parker*, 395 U.S. 258 (1969), and abandoned the requirement that the offense charged be "service-connected." *Id.*

67. The various categories of military status that are looked for at the time of the offense to establish subject-matter jurisdiction are found in Article 2, UCMJ. Because these are also the same categories used to determine personal jurisdiction (status at the time of trial), it is common to view this aspect of subject-matter jurisdiction as an issue of personal jurisdiction. *Solorio* and both the Discussion section and Analysis of RCM 203 make it clear that the question of military status at the time of the offense is one of subject-matter jurisdiction.

68. *See* UCMJ art. 2(a)(1), (3), 2(d). Active duty includes Active Duty (AD), Active Duty for Training (ADT), and Annual Training (AT). Inactive duty training (IDT) is typically the weekend drills conducted by reserve units.

69. 56 M.J. 695 (N-M. Ct. Crim. App. 2001).

past year, or at least it discussed the jurisdictional substance of the rule.

In *Oliver*, 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 Oliver checked into the Bachelor Enlisted Quarters (BEQ). Oliver 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. Along with his claim, Oliver submitted a computer-generated hotel receipt indicating he stayed at a nearby hotel from 23 August until 11 September. The receipt contained several obvious alterations and raised the suspicions of the personnel at the disbursing office.[70] Following an investigation, Oliver was charged with and convicted of making a false claim, presenting a false claim, and using an altered lodging receipt in support of the claim.[71]

On appeal, Oliver argued lack of subject-matter jurisdiction. Oliver contended that his active duty ended on 27 September (28 September if one day of travel time is included) and 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 the alleged false claim was submitted.[72] Surprisingly, the NMCCA addressed the argument as a personal jurisdiction issue.[73] After determining that the government does not have an affirmative obligation to prove personal jurisdiction if the issue is not raised at trial, the court addressed the issue as raised on appeal.[74] The court noted that Oliver received medical treatment on 20 September, which resulted in Oliver being placed on medical hold on 28 September. Oliver was placed on light duty until December, at which time he was placed on a limited duty board status for six months. Thus, Oliver's active duty started on 25 August and continued, without interruption, through the date of arraignment and sentencing.[75]

As mentioned above, the accused must have been on active duty at the time the offense was committed for subject-matter jurisdiction to exist. In *Oliver*, the accused argued lack of subject-matter jurisdiction because he was not on active duty at the time he submitted his travel claim. The NMCCA erroneously addressed the lack of subject-matter jurisdiction as a personal jurisdiction issue. The court appears to misunderstand the personal aspect of subject-matter jurisdiction discussed previously.[76] If the accused was not on active duty at the time he violated the UCMJ, military jurisdiction over that offense would not exist. Obviously, if the accused's active duty status began on 25 August and continued past the date the accused submitted his travel claim (29 September), the question of subject-matter jurisdiction has been resolved—the accused was on active duty at the time he submitted his travel claim. So, while the NMCCA addressed the issue as one of personal jurisdiction, it correctly resolved the subject-matter jurisdiction issue raised by the accused. It is worth noting that the CAAF recently granted review in this case.[77]

Another service court case, an unpublished opinion, provides for a good comparison with *Oliver*. Factually similar, *United States v. Morse*[78] was decided by the Air Force Court of Criminal Appeals (AFCCA) in 2000.

Morse, a colonel in the Air Force Reserve, submitted various AF Forms 938[79] and DD Forms 1351-2[80] 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 to and from Plano, Texas. Based upon these forms, the accused was charged with and found guilty of attempted larceny and filing false travel vouchers. At trial, the accused stipulated that he was serving on active duty or inactive duty for training when he signed the forms. On appeal, Morse argued

70. *Id*. at 698. 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.*

71. *Id.*

72. *Id*.

73. The court stated, "We view the appellant's initial reference to subject-matter jurisdiction as a confused allusion to the actual issue of personal jurisdiction that he ultimately addresses." *Id.* at 699.

74. Lack of jurisdiction may be raised for the first time on appeal. *See* MCM, *supra* note 7, R.C.M. 905(e).

75. *Oliver*, 56 M.J. at 699-700.

76. *See supra* note 67 and accompanying text.

77. United States v. Oliver, No. 02-0084/MC, 2002 CAAF LEXIS 181 (Feb. 22, 2002). The CAAF granted review on the following issue: "Whether, in a contested court-martial of a reservist, the government must prove sufficient facts to establish *subject-matter jurisdiction* over the alleged offense." *Id*. (emphasis added).

78. No. ACM 33566, 2000 CCA LEXIS 233 (A.F. Ct. Crim. App. Oct. 4, 2000), *petition for grant of review denied*, 2001 CAAF LEXIS 1021 (Aug. 24, 2001).

79. U.S. Dep't of Air Force, AF Form 938, Request and Authorization for Active Duty Training/Active Duty Tour (Oct. 1981).

80. U.S. Dep't of Defense, DD Form 1351-2, Travel Voucher and Subvoucher (Aug. 1997).

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.[81] The AFCCA found ample evidence to conclude that the accused regularly signed the forms before he left the base; however, the court continued its analysis by stating, "[E]ven 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*."[82]

Morse exhibits a substantial advance in subject-matter jurisdiction analysis. Past decisions have drawn clear lines in determining when subject-matter jurisdiction exists. If the accused is not on active duty when the offense was committed, then there is no subject-matter jurisdiction.[83] The AFCCA seems to expand these lines to potentially encompass acts that occur during time outside active duty or inactive duty training, for example, when the service member is engaged in "official duties" incident to active duty or inactive duty training, or when the service member is completing tasks assigned to him while he was subject to the UCMJ.[84]

How far these lines can be expanded remains to be seen. The AFCCA has certainly raised the question of where the lines are drawn. In *Oliver*, the NMCCA avoided the question by finding that the accused was on active duty at the time he submitted his travel voucher. On 24 August 2001, the CAAF denied a petition for grant of review in *Morse*, thereby also avoiding the question . . . for now.[85]

Post-Trial Relief Jurisdiction

The second part of this article reviews two cases that the CAAF decided during the last term of court. Both cases, decided 2 May 2001, deal with the issue of cruel and unusual punishment under Article 55, UCMJ, and the Eighth Amendment to the Constitution. Before discussing these cases, however, a short review of *United States v. Sanchez*,[86] decided by the CAAF on 30 August 2000, is necessary.

In *Sanchez*, the accused was convicted of larceny-related offenses and sentenced to one-year confinement at the Naval Consolidated Brig at Miramar, California. During her confinement, military guards and other inmates subjected Sanchez to verbal sexual harassment. Following her release from confinement, the accused claimed the harassment amounted to cruel and unusual punishment in violation of both the Eighth Amendment and Article 55.[87] The AFCCA affirmed the findings and sentence, holding that it was without jurisdiction to entertain the accused's claim for sentence relief because her claim was based upon "post-trial sexual harassment."[88]

Although the CAAF affirmed the findings and sentence, the majority opinion did not address the jurisdictional basis used by the lower appellate court in affirming the case. Instead, the majority opinion addressed the substantive issue raised by the accused.[89] Following a legal analysis of "cruel and unusual punishment" law, the CAAF held that there was no Article 55 or Eighth Amendment violation.[90]

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81. *Morse*, 2000 CCA LEXIS 233, at *2, 15. The accused also argued lack of personal jurisdiction, contending that he was not properly on active duty or involuntarily recalled to active duty pursuant to Articles 2(c) and 2(d). *Id*. at *14-15. For purposes of this discussion, however, only the subject-matter jurisdiction issue will be addressed.

82. *Id.* at *19 (emphasis added). The court further stated:

> 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.

Id.

83. *See Solorio*, 483 U.S. 435 (1987); United States v. Cline, 29 M.J. 83 (C.M.A. 1989) (finding subject-matter jurisdiction when 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 subject to the code).

84. It appears that the AFCCA is creating a sort of "service connection" test that applies to reservists. If a reservist commits an offense that is closely connected to the reservist's military service, then subject-matter jurisdiction would arguably attach even if the reservist is not on active duty or inactive duty training when committing the offense. Current law, however, does not support such a test.

85. *See* United States v. Morse, 2001 CAAF LEXIS 1021 (Aug. 24, 2001). The CAAF may have denied review because there was ample evidence to support the finding that Colonel Morse signed the forms before departing from active duty or inactive duty training. Whether the AFCCA's analysis is correct—that jurisdiction existed because the forms were signed in "his official capacity as a reserve officer"—remains to be seen.

86. 53 M.J. 393 (2000).

87. *Id.* at 394. The Eighth Amendment states, "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted." U.S. CONST. amend. VIII. Article 55 states in part, "Punishment by flogging, or by branding, marking, or tattooing on the body, or any other cruel or unusual punishment, may not be adjudged by a court-martial or inflicted upon any person subject to this chapter." UCMJ art. 55 (2000).

88. *Sanchez*, 53 M.J. at 397.

While the majority opinion never addressed the jurisdictional question, two judges felt the issue was important enough to warrant discussion. In a concurring opinion, Judge Gierke wrote, "By deciding the merits of the issue, this [c]ourt has *sub silentio* asserted its jurisdiction."[91] In distinguishing the case from *Clinton v. Goldsmith*,[92] he stated that *Sanchez* was in front of CAAF on *direct review* under Article 67 and did not involve the All Writs Act.[93] Similarly, Judge Sullivan viewed unlawful post-trial punishment as "a matter of law related to 'the review of specified sentences imposed by courts-martial' under Articles 66 and 67, UCMJ."[94] In his opinion, sexual harassment was not a lawful punishment under the UCMJ, was not adjudged at the accused's court-martial, and was "unquestionably a matter of codal concern."[95]

Although the majority opinion did not address the jurisdictional issue in *Sanchez*, the fact that it addressed the issue of post-trial cruel and unusual punishment was understood to imply it had jurisdiction to address such post-trial issues. At least one service court followed this implicit holding. The Army Court of Criminal Appeals (ACCA) decided a line of cases involving claims of post-trial cruel and unusual punishment in 2000. In each case, the government argued that the court lacked jurisdiction to consider the matter under Article 66, UCMJ, and *Goldsmith*; however, in each case the ACCA disagreed, holding it had jurisdiction on direct review to consider post-trial cruel and unusual punishment claims.[96]

If the implied holding in *Sanchez* was ever in question, the CAAF addressed it again this past year. In *United States v. White*,[97] the accused had been convicted by court-martial twice for cocaine use.[98] Following his first conviction, he was processed into the confinement facility at Lackland Air Force Base to begin serving his sentence to confinement. As part of the inprocessing, the accused was required to submit a urine sample for medical purposes. The urine sample tested positive for cocaine, and the accused was court-martialed a second time. In his clemency submission to the convening authority following his second conviction, the accused made numerous allegations about the conditions of his confinement.[99] After the convening authority approved the adjudged sentence, the accused asserted on appeal that the conditions of his confinement constituted cruel and unusual punishment. In an unpublished opinion, the AFCCA opined that it did not have jurisdiction to address the accused's complaints.[100]

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89. The granted issue was "[w]hether appellant was subjected to cruel and unusual punishment in violation of the Eighth Amendment and Article 55 of the UCMJ when guards at the military confinement facility repeatedly sexually harassed her." *Id.* at 394.

90. *Id*. at 395. The majority opinion states:

> While appellant endured inexcusable behavior during her confinement, it did not rise to the level of cruel and unusual punishment as contemplated by the Eighth Amendment and Article 55 of the UCMJ. We conclude that verbal sexual harassment at the level appellant suffered is insufficient to establish conduct amounting to cruel and unusual punishment. Further, the record does not establish the requisite state of mind for an Eighth Amendment violation.

Id.

91. *Id*. at 397. Apparently, the government position on appeal was that the appellate court lacked jurisdiction. Judge Gierke stated, "I write separately to address the question of jurisdiction, which the Government asserts is 'a matter of considerable debate.'" *Id.*

92. 526 U.S. 529 (1999). In *Goldsmith*, the Supreme Court found the CAAF lacked jurisdiction in an administrative matter involving the accused. The Court held that the military court did not have authority to "oversee all matters arguably related to military justice," but rather its jurisdiction was limited to the authority to act "only with respect to the findings and sentence as approved by the [court-martial's] convening authority and as affirmed or set aside as incorrect in law by the Court of Criminal Appeals." *Id.* at 534, 536.

93. 28 U.S.C. § 1651(a) (2000). The authority for appellate jurisdiction comes from one of two sources: direct review of cases pursuant to Articles 62, 66, 67, 67a, and 69, UCMJ, or collateral review of issues under authority of the All Writs Act. *See id*.; UCMJ arts. 62, 66-67, 67a, 69.

94. *Sanchez*, 53 M.J. at 397 (Sullivan, J., dissenting).

95. *Id*. at 398. Judge Sullivan cites to the following *Goldsmith* language as support: "It would presumably be an entirely different matter if a military authority attempted to alter a judgment by revising a court-martial finding and sentence to increase the punishment, contrary to specific provisions of the UCMJ . . . ." *Goldsmith*, 526 U.S. at 536.

96. *See* United States v. Faulkner, No. 9900432 (Army Ct. Crim. App. Dec. 21, 2000); United States v. Emminger, No. 9900428 (Army Ct. Crim. App. Dec. 15, 2000); United States v. Kinsch, 54 M.J. 641 (Army Ct. Crim. App. 2000) (holding that jurisdiction exists when the court-martial is not final and the accused on direct appeal requests relief for cruel and unusual punishment that was not part of the adjudged and approved sentence).

97. 54 M.J. 469 (2001).

98. *Id*. at 470. On 27 July 1998, he was convicted for using cocaine on or about 17 November 1997. On 24 November 1998, he was convicted for using cocaine between 13-28 July 1998. *Id.*

99. *Id*. The complaints by the accused included being yelled at by guards, excessively harassed and intimidated, deprived of sleep, threatened by the noncommissioned officer in charge not to talk to lawyers or chaplains, and having his personal property thrown all over the floor. *Id.*

On appeal, the CAAF stated, "We now expressly hold that we have jurisdiction under Article 67(c) to determine on direct appeal if the adjudged and approved sentence is being executed in a manner that offends the Eighth Amendment or Article 55."[101] The court limited its holding, however, by determining that it had authority on *direct appeal* to review claims of post-trial violations of Article 55 and the Eighth Amendment.[102] Once the court determined it had jurisdiction, it affirmed the case, finding that the accused's complaints did "not amount to either a constitutional or statutory violation in derogation of the Eighth Amendment or Article 55."[103]

In a second case, factually similar and decided at the same time as *White*, the CAAF reached a different outcome. In *United States v. Erby*,[104] the accused had been previously convicted at a general court-martial and sentenced to three years in confinement. After serving some of his confinement at the Naval Consolidated Brig at Miramar, California, he was transferred to the Dyess Air Force Base confinement facility in Texas, where he was court-martialed a second time. At his second court-martial, Erby was convicted of two specifications of larceny of government currency. On appeal to the AFCCA, the accused argued that the treatment he received while confined at Dyess Air Force Base amounted to cruel and unusual punishment in violation of Article 55 and the Eighth Amendment.[105] The AFCCA affirmed the case and, although it found the treatment alleged by the accused to be appalling, held that it lacked authority to review the accused's complaints because the alleged mistreatment "was not a part of the approved sentence of his court-martial, nor was it raised as a part of his clemency request to the convening authority."[106]

In *Erby*, the CAAF first looked at the jurisdictional issue and determined, as it did in *White*, that the AFCCA erred in concluding that it lacked jurisdiction. But, unlike *White*, the court set aside the AFCCA's decision and returned the case to the Judge Advocate General for remand. In finding that the court had jurisdiction on direct appeal to hear the issue, the court cited to its decision in *White*, but held that it was unable to resolve the issue of whether the accused had been subjected to cruel and unusual punishment. The CAAF, therefore, found that further fact-finding was necessary to determine (1) if the accused had exhausted his administrative remedies, (2) if the mistreatment rose to the level of cruel and unusual punishment, and (3) if any relief was appropriate.[107]

The AFCCA, without the assistance of the *Sanchez* opinion, incorrectly determined it was without jurisdiction to hear the complaints of post-trial violations in *Erby* and *White*. The ACCA, on the other hand, had the benefit of the *Sanchez* opinion when it decided *Kinsch* and its progeny, and correctly determined that it had jurisdiction. While the question still remains whether *Goldsmith* prevents the military appellate courts from reviewing a collateral attack on the conditions of confinement, it is at least clear that the courts have the authority on direct review to determine if post-trial confinement conditions violate the Eighth Amendment or Article 55.

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100. *See* United States v. White, No. ACM 33583, 1999 CCA LEXIS 220 (A.F. Ct. Crim. App. July 23, 1999).

101. *White*, 54 M.J. at 472.

102. *Id*. The court stated that because "this case is before us on direct appeal, we need not and do not determine the extent of our authority to review a collateral attack on the conditions of confinement." *Id.* The court also added, "We are not persuaded, however, by the Government's suggestion that jurisdiction is precluded by *Clinton v. Goldsmith*, 526 U.S. 529 (1999)." *Id*.

103. *Id.* at 475.

104. 54 M.J. 476 (2001).

105. *Id.* at 477. The accused alleged that he was continuously cursed at and threatened by the guards, forced to remove his clothing and stand at attention while the guards cursed at and ridiculed him, had his personal belongings thrown about, awakened at 5:00 a.m. and not allowed to sleep until 9:00 p.m., forced to perform personal services for the staff, forced to intimidate new prisoners, and put in fear that he would be raped. *Id.*

106. United States v. Erby, No. ACM 33282, 2000 CCA LEXIS 120 (A.F. Ct. Crim. App. Apr. 14, 2000). The AFFCA stated that had "the appellant raised the complaint during his clemency petition, it would be a part of the record of trial and would, therefore, be properly before us." *Id.*

107. *Erby*, 54 M.J. at 479.

Conclusion

Things appeared quiet on the jurisdictional front this past year. It will undoubtedly not be remembered as "the year of jurisdiction;" however, the jurisdictional landscape continues to change and the tremors from the service courts are an indication of the direction of that change. Although the aftershocks of *Goldsmith* are beginning to dissipate and appellate jurisdiction is again finding its legs, there remain jurisdictional questions of great importance. This year again holds the promise of exciting things to come. The implementing regulations for the MEJA are still pending and, while MEJA does not expand military jurisdiction, the regulations will nonetheless leave their mark on the way we do business overseas.

Of a more direct concern is the question of the limits of reserve jurisdiction. The CAAF denied review in *Morse*, but has granted review in *Oliver*. Unfortunately, the issue granted for review in *Oliver* will not likely allow the CAAF to address the big questions: Are we entering an era of "service connection" for offenses committed by reservists? If so, can we expand the limits of reserve jurisdiction without legislative change to support the expansion? If the CAAF is to take on this tough jurisdictional issue, it may have to wait until a more opportune case presents itself. While the CAAF successfully avoided the issue of reserve jurisdiction last year, it is an issue that must eventually be addressed. As reserve units continue to become a larger part of our total force, the reserve jurisdictional issues become more significant and deserve precise answers. These answers will undoubtedly create some noise on the jurisdictional front.