

52D MILITARY JUDGE COURSE
COURT-MARTIAL JURISDICTION

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Outline of Instruction

I. INTRODUCTION.

Jurisdiction means the power of a court to try and determine a case, and to render a valid judgment. Courts-martial are courts of special and limited jurisdiction. For example, courts-martial jurisdiction applies worldwide, but is limited in application to a certain class of people—members of the armed forces. In general, three prerequisites must be met in order for courts-martial jurisdiction to vest. They are: (1) jurisdiction over the offense, (2) personal jurisdiction over the accused, and (3) a properly convened and composed court-martial.

Whether a court-martial is empowered to hear a case—whether it has jurisdiction—frequently turns on issues such as the status of the accused at the time of the offense, or the status of the accused at the time of trial. These issues of courts-martial jurisdiction relate to either subject matter jurisdiction (jurisdiction over the offense) or personal jurisdiction (personal jurisdiction over the accused). Subject matter jurisdiction focuses on the nature of the offense and the status of the accused at the time of the offense. If the offense is chargeable under the Uniform Code of Military Justice (UCMJ) and the accused is a servicemember at the time the offense is committed, subject matter jurisdiction is satisfied. Personal jurisdiction, however, focuses on the time of trial: can the government court-martial him? The answer is yes, so long as the accused has proper status; i.e., that the accused is a servicemember at the time of trial.

A. Sources of Jurisdiction.

1. The Constitution: Article I, section 8, clause 14
2. UCMJ, articles 2, 3 and 36
3. MCM, 2005 ed., RCM 201 - 204
4. Customary international law and treaties

B. **Five Elements of Court-Martial Jurisdiction, R.C.M. 201(b):**

1. Proper jurisdiction over the offense (subject matter jurisdiction).
2. Proper jurisdiction over the person (personal jurisdiction).
3. Properly composed court (military judge and members must have proper qualifications.) Absent evidence of coercion or ineffective assistance of counsel, accused's request to be tried by military judge alone can be inferred from the record of trial (applying "substantial compliance" doctrine to Article 16. *United States v. Turner*, 47 M.J. 348 (1997). Article 25 (request for enlisted members to serve on panel) is also satisfied by substantial compliance. *United States v. Townes*, 52 M.J. 275 (2000). *See also United States v. Morgan*, 57 M.J. 119 (2002).
4. Proper convening authority. A properly constituted court-martial may try any person subject to the UCMJ, even if the accused is not under the command of the convening authority. *United States v. Murphy*, 30 M.J. 1040 (A.C.M.R. 1990), *set aside, on other grounds*, 36 M.J. 8 (C.M.A. 1992); *accord, United States v. Randle*, 35 M.J. 789 (A.C.M.R. 1992). *See also United States v. Cantrell*, 44 M.J. 711 (A.F.Ct.Crim.App. 1996).
5. Properly referred charges. *United States v. Pate*, 54 M.J. 501 (Army Ct. Crim. App. 1997). The PTA was not signed by the GCMCA, but instead the word "accepted" was circled and a notation made indicating a voco to the SJA. The accused argued that since the CA never signed the PTA, the "new" charge to which the accused was pleading guilty was never referred and, therefore, the court-martial lacked jurisdiction over that charge. The Army Court held that jurisdiction existed since a proper referral does not need to be in writing and the lack of signature was "insignificant." *See also United States v. Williams*, 55 M.J. 302 (2001). *But see United States v. Henderson*, 59 M.J. 350 (2004).

II. JURISDICTION OVER THE OFFENSE.

A. Historical Overview.

1. *O'Callahan v. Parker*, 395 U.S. 258 (1969). The Supreme Court establishes the “service-connection” test. *See also Relford v. Commandant*, U.S. Disciplinary Barracks, 401 U.S. 355 (1971) (the Court sets-forth the *Relford* factors as a template to determine “service-connection”).
2. *Solorio v. United States*, 483 U.S. 435 (1987). The Supreme Court overrules *O'Callahan*, abandoning the “service-connection” test, and holds that jurisdiction of a court-martial depends solely on the accused’s status as a member of the Armed Forces.

B. **BOTTOM LINE:** Subject matter jurisdiction is established by showing military status at the time of the offense.

C. **Administrative Double Jeopardy Policies.** Generally, a member of the Armed Forces will not be tried by court-martial or punished under Article 15, UCMJ, for the same act for which a civilian court has tried the Soldier. This policy is based on comity between the federal government and state or foreign governments. See AR 27-10, para. 4-2; JAGMAN, para. 0124.

D. Capital Cases.

1. *Loving v. United States*, 116 S.Ct. 1737 (1996). Justice Stevens (concurring) raised the question of whether a “service connection” requirement applies to capital cases. *See also United States v. Simoy*, 46 M.J. 601 (A.F. Ct. Crim. App. 1996) (a capital murder case in which the court made a specific finding that the felony murder was “service-connected”).
2. *United States v. Gray*, 51 M.J. 1 (1999). The CAAF gives credence to Justice Stevens’ concurring opinion in *Loving*. The CAAF makes a specific finding that there are sufficient facts present in *Gray*, a capital case, to establish a service connection to warrant trial by court-martial, but does not answer the question of whether a “service connection” requirement applies to capital cases.

E. Subject Matter Jurisdiction Over Reservists/National Guard.

1. The offense must be committed while the reservist has military status. *United States v. Chodara*, 29 M.J. 943 (A.C.M.R. 1990). *But see United States v. Lopez*, 37 M.J. 702 (A.C.M.R. 1993) (questioning the validity of the *Chodara* decision). *See also United States v. Smith*, Case No. 9500065, unpub. (Army Ct. Crim. App. 1998) (holding there was no court-martial jurisdiction over an offense that the accused allegedly committed while he was enlisted in the Mississippi National Guard).
2. Jurisdiction attaches at 0001 hours of the effective date of the orders to active duty. *United States v. Cline*, 29 M.J. 83 (C.M.A. 1989), *cert. denied*, 493 U.S. 1045 (1990).
3. Jurisdiction may exist outside the parameters of the orders. *United States v. Phillips*, 58 M.J. 217 (2003). The accused was a reserve nurse ordered to perform her two-week annual training from 12-23 July 1999. Her orders authorized her one travel day (11 July) to get to her duty station. The accused traveled to her duty station on 11 July and checked into her government quarters. That evening, she consumed some marijuana brownies that she had brought with her from home. The accused tested positive for marijuana as part of a random urinalysis test conducted on 16 July. On appeal, the accused argued that the court lacked jurisdiction over her wrongful use of marijuana, because the use occurred prior to the start of her two-week active duty period. The CAAF disagreed and affirmed AFCCA's decision holding that jurisdiction existed over all of the offenses. The CAAF held that jurisdiction existed pursuant to Art 2(c), UCMJ, which "by its express terms, establishes a specific analytical framework." Applying a two-step analysis, the CAAF first held that the accused was "serving with" the armed forces on 11 July, because she was a reservist traveling to her duty station pursuant to orders issued for the purpose of performing active duty, she occupied government quarters, and she received compensation in the form of travel reimbursement, retirement credit, and base pay and allowances. For the second step in the analysis, the CAAF applied Art 2(c)'s four-part test, finding that on 11 July the accused: (1) submitted voluntarily to military authority; (2) met the minimum age and mental qualifications; (3) received pay and allowances; and (4) performed military duties by traveling to her duty station. The CAAF emphasized that "[t]he fact that her orders did not require her to report to a specific

organization until July 12 does not detract from her voluntary performance of the duty, pursuant to orders, to travel on July 11.”

4. Offenses committed as part of the accused’s “official duties” *may* be subject to court-martial jurisdiction even where the accused is not on active duty. *See United States v. Morse*, 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) (finding subject matter jurisdiction existed even if the reserve officer signed his false travel vouchers after he completed his travel following active duty or inactive duty training).
5. If a member of the National Guard is performing duties in a Title 10 status, a unit or commander in Title 32 status does not have jurisdiction over him. In *United States v. Dimuccio*, 61 M.J. 588 (A.F. Ct. Crim. App. 2005), the appellant was a member of the Air National Guard in Arizona who had been mobilized under Title 10 and was performing duty at Davis-Monthan Air Force Base. The commander of his Air National Guard unit, while in Title 32 status, ordered a unit urinalysis inspection of the appellant’s Air National Guard unit during a Unit Training Assembly. The appellant submitted to the inspection and had a positive result for cocaine metabolites. He subsequently confessed. The military judge suppressed the urinalysis and the confession, ruling that while in a Title 10 status and attached to another unit, the appellant was not subject to an inspection ordered by a commander from a unit that was in Title 32 status. The AFCCA affirmed.
6. 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.” *United States v. Oliver*, 57 M.J. 170 (2002). The CAAF found that the medical records submitted on appeal established that the accused had been retained on active duty beyond the expiration of his orders, thus satisfying subject-matter jurisdiction over the offense.

III. JURISDICTION OVER THE PERSON.

- A. General Rule: In general, a person becomes subject to court-martial jurisdiction upon enlistment in or induction into the Armed Forces, acceptance of a commission, or entry onto active duty pursuant to order. Court-martial jurisdiction terminates upon a valid discharge.

- B. General Provisions: UCMJ, art. 2, provides jurisdiction over categories of persons with military status:
1. Enlistees; Inductees; Academy Cadets/Midshipmen;
 2. Retirees;
 - a) Jurisdiction over retirees is constitutional. *Pearson v. Bloss*, 28 M.J. 376 (C.M.A. 1989); *United States v. Hooper*, 26 C.M.R. 417 (C.M.A. 1958); *Sands v. Colby*, 35 M.J. 620 (A.C.M.R. 1992).
 - b) *United States v. Huey*, 57 M.J. 504 (N-M. Ct. Crim. App. 2002). The accused had served 20 years on active duty and was placed on the Retired List on 1 January 1989. In 1996 he worked as a Naval civilian employee in Okinawa. He confessed to engaging in sexual intercourse several times a week over a nine-month period with his 16-year old adopted daughter. By the time the raping stopped, the accused was 58 years old and his daughter was pregnant with his child. At trial, the accused moved to dismiss for lack of personal jurisdiction based upon a violation of constitutional due process under the Fifth Amendment. The accused cited to *Toth v. Quarles*, 350 U.S. 11 (1955) and argued that he had “obtained civilian status” and was being deprived of due process rights available only in a civilian courtroom. The service court disagreed stating that there “is no doubt that a court-martial has the power to try a person receiving retired pay.”*
 - c) HQDA approval is required before prosecuting retirees (AR 27-10, para. 5-2). Failure to follow “policy” and obtain HQDA approval to try a retiree, however, is not jurisdictional error. *United States v. Sloan*, 35 M.J. 4 (C.M.A. 1992).
 - d) The Article 2(d), UCMJ, involuntary recall process required for members of a reserve component, is not

* The service court set aside the findings and sentence, dismissed the charges, and abated the proceedings in this case on 29 Aug 2002 due to the accused’s death on 2 July 2002 (ten days before the opinion was decided). See *United States v. Huey*, 2002 CCA LEXIS 186 (Aug. 29, 2002).

required to bring retirees and members of the Fleet Reserve or Fleet Marine Corps Reserve on to active duty in order to have jurisdiction over them. *United States v. Morris*, 54 M.J. 898 (N-M. Ct. Crim. App. 2001) *petition for review denied*, 2001 CAAF LEXIS 597 (May 22, 2001).

3. Persons in custody;
 - a) Jurisdiction terminates once an accused's discharge is ordered executed (or enlistment expires) and he or she is released from confinement. The remaining suspended punishments are automatically remitted. *United States v. Gurganious*, 36 M.J. 1041 (N.M.C.M.R. 1993).
 - b) *Fisher v. Commander, Army Regional Confinement Facility*, 56 M.J. 691 (N-M. Ct. Crim. App. 2001). An accused that still has military confinement to serve pursuant to a court-martial sentence, is still a military prisoner subject to military jurisdiction under the concept of "continuing jurisdiction," notwithstanding the execution of his punitive discharge and receipt of the DD Form 214. This is true even where the prisoner is serving time in a state civilian prison. The discharge merely terminated his status of active duty, but did not terminate his status as a military prisoner.

4. P.O.W.'s;

5. In time of declared war or a contingency operation, persons serving with or accompanying an armed force in the field. (covered in more detail in Part VI of this outline)

6. Reservists. "Reserve Component" includes USAR and Army National Guard of the United States (ARNGUS) soldiers in Title 10, U.S. Code, duty status. (See sections II.E. and IV. of this outline).

C. **General Rule:** In general, a person becomes subject to court-martial jurisdiction upon enlistment in or induction into the Armed Forces, acceptance of a commission, or entry onto active duty pursuant to order.

Court-martial jurisdiction ends upon delivery of a valid discharge certificate.

D. Inception of Court-Martial Jurisdiction.

1. **Enlistment:** A Contract Which Changes “Status.” UCMJ, art. 2(b).

Art. 2(b) The voluntary enlistment of any person who has the capacity to understand the significance of enlisting in the armed forces shall be valid for purposes of jurisdiction under subsection (a) of this section, and a change of status from civilian to member of the armed forces shall be effective upon the taking of the oath of enlistment.

2. **Involuntary enlistment:** *United States v. Catlow*, 23 C.M.A. 142, 48 C.M.R. 758 (1974) (coercion); *United States v. Lightfoot*, 4 M.J. 262 (C.M.A. 1978); and *United States v. Ghiglieri*, 25 M.J. 687 (A.C.M.R. 1987) (proposed enlistment as alternative to civil prosecution -no coercion).

3. **Constructive Enlistment.** The codification of *In Re Grimley*, 137 U.S. 147 (1890). UCMJ, art. 2(c) (as amended in 1979):

Art. 2(c) Notwithstanding any other provision of law, a person serving with an armed force who—

- (1) Submitted voluntarily to military authority;
 - (2) Met the mental competence and minimum age qualifications of sections 504 and 505 of this title at the time of voluntary submission to military authority;
 - (3) Received military pay or allowances; and
 - (4) Performed military duties;
- is subject to this chapter until such person’s active service has been terminated in accordance with law or regulations promulgated by the Secretary concerned.”

E. Termination of Jurisdiction Over the Person.

1. **General Rule:** Discharge Terminates Jurisdiction.
2. ETS/EAS by itself does not terminate jurisdiction.

- a) RCM 202(a) discussion: “Completion of an enlistment or term of service does not by itself terminate court-martial jurisdiction . . . court-martial jurisdiction normally continues past the time of scheduled separation until a discharge certificate or its equivalent is delivered or until the Government fails to act within a reasonable time after the person objects to continued retention.”

- b) *United States v. Poole*, 30 M.J. 149 (C.M.A. 1990). Jurisdiction to court-martial a servicemember exists despite delay—even unreasonable delay—by the government in discharging that person at the end of an enlistment. Even if the member objects, it is immaterial—the significant fact is that the member has yet to receive a discharge. Caveat: Unreasonable delay may provide a defense to “some military offenses.”

- c) RCM 202(c)(1): “Court-martial jurisdiction attaches over a person when action with a view to trial of that person is taken. Actions by which court-martial jurisdiction attaches include: apprehension; imposition of restraint, such as restriction, arrest, or confinement; and preferral of charges.” See *United States v. Self*, 13 M.J. 132 (C.M.A. 1982); *United States v. Benford*, 27 M.J. 518 (N.M.C.M.R. 1988).

- d) *United States v. Lee*, 43 M.J. 794 (N.M. Ct. Crim. App. 1995). Focusing investigation on accused as prime suspect is enough to establish a “view towards trial” and preserve military jurisdiction beyond ETS/EAS. The court cites to apprehension, imposition of restraint, and preferral of charges as other actions, which attach court-martial jurisdiction, i.e., indicate a “view towards trial.”

- e) **Appellate Leave.** *United States v. Ray*, 24 M.J. 657 (A.F.C.M.R. 1987) (jurisdiction upheld where accused, on appellate leave, was not provided discharge due to governmental delay in executing punitive discharge).

3. When is discharge effective?

- a) **On delivery.** *United States v. Melanson*, 53 M.J. 1 (2000). Jurisdiction existed because pursuant to AR 635-200, a discharge takes effect at 2400 hours on the date of notice of discharge to the soldier. *See also United States v. Williams*, 53 M.J. 316 (2000). A valid legal hold had been placed on accused prior to expiration of the date that constituted the effective date of the discharge. *United States v. Scott*, 11 C.M.A. 646, 29 C.M.R. 462 (1960). A discharge takes effect at 2400 hours on the date of discharge; even if the discharge is delivered earlier in the day (unless it is clear that it was intended to be effective at the earlier time).
- b) **Valid Discharge Certificate:** Discharge Authority's Intent. Early delivery of a discharge certificate for administrative convenience does not terminate jurisdiction when certificate is clear on its face that the commander did not intend the discharge to take effect until later. *United States v. Batchelder*, 41 M.J. 337 (1994). *See also United States v. Guest*, 46 M.J. 778 (Army Ct. Crim. App. 1997).
- c) **Final accounting of pay.** Final accounting of pay is later than the final appointment at the local finance office. Jurisdiction may still exist several days after a servicemember has undergone a clearing process and received their DD214, since the local finance office is only the first of many steps required to accomplish a final accounting of pay. *See United States v. Hart*, 66 M.J. 273 (C.A.A.F. 2008). *See also United States v. Howard*, 20 M.J. 353 (C.M.A. 1985) (jurisdiction terminates on delivery of discharge and final pay).
- d) **Undergo a clearing process.** *United States v. King*, 27 M.J. 327 (C.M.A. 1989) (sailor refused to complete re-enlistment ceremony after he received a discharge certificate). Three elements per King to effectuate an early discharge:
- (1) Delivery of a valid discharge certificate;
 - (2) A final accounting of pay; and

- (3) Undergoing a “clearing” process as required under appropriate service regulations to separate the member from military service.
4. **Erroneous Delivery.** Erroneous delivery will not terminate jurisdiction. *United States v. Garvin*, 26 M.J. 194 (C.M.A. 1988) (premature delivery of a BCD certificate); *United States v. Brunton*, 24 M.J. 566 (N.M.C.M.R. 1987) (early delivery of discharge, in violation of Navy regulations, meant discharge was not effective on receipt).
5. **Post-arraignment Discharge.** A valid discharge of a soldier prior to trial operates as a formal waiver and abandonment of court-martial in personam jurisdiction, whether or not such jurisdiction had attached prior to discharge. *Smith v. Vanderbush*, 47 M.J. 56 (1997). In personam jurisdiction was lost when accused was discharged after arraignment but before lawful authority resolved the charges. The court considered the intent of the discharge authority and found that there was no evidence to show that the discharge authority (not CA) did not intend to discharge accused on his ETS. In determining a valid discharge the court considered: 1) delivery of discharge certificate; 2) final accounting of pay; and 3) intent of discharge authority.
6. **Note:** Army responds to *Smith v. Vanderbush* with provision in AR 27-10, Military Justice (6 September 2002). AR 27-10, para 5-15, now provides that after any charge is preferred, the DD Form 458 will automatically act to suspend all favorable action and that any issuance of a discharge certificate is void until the charge is dismissed or the convening authority takes initial action on the case.
7. **Post-conviction Discharge.**
 - a) *Steele v. Van Riper*, 50 M.J. 89 (1999). After a court-martial conviction, but before the convening authority took action, the government honorably discharged the accused. When the convening authority finally took action, he approved the findings and sentence (which included a punitive discharge), declared that the honorable discharge was erroneous, and placed the accused in an involuntary appellate leave status. The accused challenged the invalidation of his honorable discharge. In a supplemental

brief, the government concurred. As such, the CAAF denied the accused's writ-appeal, but advised that the honorable discharge does not affect the power of the convening authority or appellate tribunals to act on the findings and sentence. *See also United States v. Stockman*, 50 M.J. 50 (1998).

- b) *United States v. Davis*, 63 M.J. 171 (2006). Where the appellate courts are invoked by an appellant and a rehearing is authorized, an intervening administrative discharge does not serve to terminate jurisdiction over the person of the accused for purposes of that rehearing. The power of the court-martial over appellant was established at his initial trial, and the intervening administrative discharge does not divest the appellate courts of the power to correct error, order further proceedings, and maintain appellate jurisdiction over the person during the pendency of those proceedings. Appellant was convicted of rape and other sexual offenses related to the prolonged sexual abuse of his stepdaughter, and sentenced to confinement for life and forfeiture of \$2,500.00 per month for twenty-four months (but NOT a dismissal). The NMCCA affirmed the findings and sentence in 1997. Sometime in 1997, appellant received an administrative discharge (presumably since he was not sentenced to a dismissal). CAAF returned the case for a *DuBay* hearing regarding IAC in 1999, after which the NMCCA again affirmed the findings and sentence. Upon further review, CAAF found IAC and overturned the sentence, authorizing a rehearing. At the sentencing rehearing, the military judge dismissed the case, finding the court lacked personal jurisdiction, because appellant was no longer a sentenced prisoner, and had been administratively discharged in 1997. The government appealed to the NMCCA, who granted the appeal, and directed the trial court to proceed with the sentencing rehearing. Appellant petitioned the CAAF, resulting in this opinion.

8. Execution of Punitive Discharge.

- a) *United States v. Keels*, 48 M.J. 431 (1998). Promulgation of a supplemental court-martial convening order that ordered executed a punitive discharge does not terminate court-martial jurisdiction. Even when there is a punitive discharge, jurisdiction does not terminate until delivery of

- b) *United States v. Byrd*, 53 M.J. 35 (2000). In October 1996, the Navy-Marine Corps Court affirmed the accused's conviction and sentence, which included a punitive discharge. The accused did not petition CAAF for review until 22 January 1997. On 2 January 1997 the convening authority executed his sentence under Article 71. The service court held that since the accused did not petition CAAF for review within 60 days (a CAAF rule), the intervening discharge terminated jurisdiction. CAAF vacated the lower court's decision on the grounds that the Govt. failed to establish the petition for review as being untimely and, therefore, the sentence had been improperly executed. CAAF also held that jurisdiction existed notwithstanding execution of a punitive discharge under Article 71, and it was only a question of whether to consider the case under direct review or collateral review. *See also United States v. Engle*, 28 M.J. 299 (C.M.A. 1989).
9. **In Personam Jurisdiction in a Foreign Country.** *United States v. Murphy*, 50 M.J. 4 (1998). The accused was convicted of premeditated murder and sentenced to death for murders he committed while stationed in Germany. The accused challenged the jurisdiction of the court-martial. He argued that the military investigators misled the German Government to believe that the United States had primary jurisdiction of the case under the NATO SOFA. Based on this information, the German Government waived its jurisdiction. Had the German Government asserted jurisdiction, the accused could not have been sentenced to death because the Constitution of Germany prohibits the death penalty. The CAAF held that the accused lacked standing to object to which sovereign prosecuted the case. The important jurisdictional question to answer is, Was the accused in a military status at the time of the offense and at the time of trial? The court found that the accused was. The case was set aside and remanded on other grounds.
10. **Exceptions to General Rule that Discharge Terminates Jurisdiction.**

- a) **Exception:** UCMJ, art. 3(a).
- (1) a person is subject to the UCMJ at the time of the offense;
 - (2) the person is discharged without trial; and
 - (3) the person subsequently re-enters the service and is thus subject to the UCMJ at the time of trial.
- b) *Willenbring v. Neurauter*, 48 M.J. 152 (1998). The CAAF holds that under the 1986 version of Article 3(a), UCMJ, court-martial jurisdiction exists to prosecute a member of the reserve component for misconduct committed while a member of the active component so long as there has not been a complete termination of service between the active and reserve component service. In dicta, however, the CAAF advises that the current version of Article 3(a), UCMJ, “clearly provides for jurisdiction over prior-service offenses without regard to a break in service.” *But see Murphy v. Dalton*, 81 F.3d 343 (3d Cir. 1996) (holding that it is improper to involuntarily recall a member of the reserve component to active duty for an Article 32(b) investigation when the alleged misconduct occurred while the service member was a member of the active component).
- c) Break-In-Service. *United States v. Erickson*, 63 M.J. 504 (A.F. Ct. Crim. App. 2006). Appellant was convicted of violating a lawful order, rape and sodomy of a female under the age of 12, and indecent acts and liberties with a female under the age of 16. The crimes were committed while he was on active duty in the Army, he was discharged, and subsequently enlisted in the Air Force. He was sentenced to a DD and confinement for life with the possibility of parole. Where appellant was on active duty in the Army when he committed misconduct, was discharged and subsequently enlisted in the Air Force, and was on active duty at the time of trial, as here, the court-martial had jurisdiction over the appellant by virtue of Article 3(a), UCMJ.

d) **Exception:** UCMJ, art. 3(b), person obtaining a fraudulent discharge.

(1) *Wickham v. Hall*, 12 M.J. 145 (C.M.A. 1981). May the government prosecute a soldier whose delivered discharge (Chapter 8 - pregnancy) was revoked for being obtained by fraud? C.M.A. allowed the court-martial proceedings to continue. The 5th Circuit affirmed the district court's denial of Wickham's request for habeas corpus relief. The court-martial may proceed. *Wickham v. Hall*, 706 F.2d 713 (5th Cir. 1983).

(2) *United States v. Reid*, 46 M.J. 236 (1997). The government must secure a conviction for fraudulent discharge prior to prosecuting the accused for other offenses. Article 3(b) clearly requires a two-step trial process. QUERY: What about offenses committed after the fraudulent discharge? Article 3(b) does not confer jurisdiction over offenses committed after the fraudulent discharge. The service court, in dicta, reasoned that after conviction for the fraudulent discharge, jurisdiction would exist over offenses committed after the discharge under UCMJ, art. 2.

(3) *United States v. Pou*, 43 M.J. 778 (A.F. Ct. Crim. App. 1995). Declaring a missing person "dead" is not the equivalent of a discharge of that person, therefore, art. 3(b) is inapplicable, and court-martial jurisdiction exists.

e) **Exception:** UCMJ, art. 3(c) - Deserter obtaining discharge for subsequent period of service. *United States v. Huff*, 7 C.M.A. 247, 22 C.M.R. 37 (1956).

f) **Exception:** UCMJ, art. 2(a)(7) - Persons in custody of the armed forces serving a sentence imposed by court-martial. *United States v. Harry*, 25 M.J. 513 (A.F.C.M.R. 1987) (punishment cannot include another punitive discharge); *United States v. King*, 30 M.J. 334 (C.M.A. 1990) (prosecuted after BCD executed but still in confinement).

- g) **Exception:** UCMJ, art. 3(d) - Separation from Active Components to Reserve Status. Leaving a Title 10 status does not terminate court-martial jurisdiction. *But see Murphy v. Dalton*, 81 F.3d 343 (3d Cir. 1996) (jurisdiction did not exist over offenses committed on active duty for officer, who received an honorable discharge and simultaneously received a commission as a reserve officer and, who maintained contacts with the military through participation in reserve drills; “active duty” within the context of art. 3(d) and art. 2(d)(2)(A) only applies to active duty while serving in a reserve status).

- h) **Exception:** Intent of the Discharge Authority – When the command places a hold on the accused prior to 2359 on the date of discharge, even though the discharge certificate had been delivered earlier that day, the discharge does not terminate jurisdiction. In *United States v. Harmon*, 63 M.J. 98 (2006), the appellant was scheduled to be administratively separated from active duty on 17 May 2001. Early in the morning of 17 May, he participated in the robbery of another servicemember. By 0815, NIS had identified him as a suspect. At 0900, appellant received his DD 214 (which listed his effective discharge date and time as 2359 on 17 May) and got on a bus to go home. At 1020, appellant’s command learned of his involvement in the robbery and revoked his administrative discharge. The CAAF held that because the command placed a hold on appellant prior to the time his discharge became effective, jurisdiction was never lost.

IV. JURISDICTION OVER THE RESERVE COMPONENT.

- A. Historical Overview.

- B. **BOTTOM LINE:** Reserve Component soldiers are subject to the UCMJ whenever they are in a Title 10 status: Inactive Duty Training (IDT), Active Duty Training (ADT), Annual Training (AT), or Active Duty (AD).

- C. When does jurisdiction exist for IDT individual?

1. Compare UCMJ, art. 2, to service regulations defining IDT. *See* AR 27-10, para. 21-2(a) (jurisdiction continues during periods such as “lunch breaks” between unit training assemblies or drills on the same day and may continue overnight in situations such as overnight bivouac). For examples of IDT, *see* AR 140-1, Mission, Organization, and Training of Army Reserve.
 2. Compare to ADT. *See United States v. Cline*, 29 M.J. 83 (C.M.A. 1989), cert. denied, 493 U.S. 1045 (1990) (holding that jurisdiction attaches at 0001 hours of the effective date of the orders). *See also United States v. Phillips*, 58 M.J. 217 (2003) (jurisdiction over reservist existed under Article 2(c) when reservist voluntarily submitted to military authority by traveling on, and receiving pay and benefits for, an authorized travel day).
 3. *United States v. Wall*, 1992 CMR LEXIS 642 (A.F.C.M.R. 1992) (unpub. opinion) (jurisdiction existed over the accused during his lunchbreak).
 4. *United States v. Morse*, 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) (accused’s duty was not complete until travel forms were signed even if he did not sign the fraudulent travel forms until after he completed his travel).
- D. UCMJ, art. 3(d). Prevents the termination of court-martial jurisdiction over a member of a Reserve Component who violates the UCMJ while in a Title 10 status by the member’s release from active duty or inactive-duty training. Closes jurisdiction gaps recognized by *Duncan v. Usher*, 23 M.J. 29 (C.M.A. 1986).
- E. Involuntary Recall to Active Duty. UCMJ, art. 2(d), authorizes a member of a Reserve Component, who is the subject of proceedings under Articles 15 or 30, UCMJ to be ordered involuntarily to active duty for:
1. Article 32 investigation.
 2. Trial by court-martial.
 3. Nonjudicial punishment.

F. Restrictions on the involuntary recall process.

1. A member may only be ordered to active duty by an active component general court-martial convening authority (GCMCA). UCMJ, art. 2(d)(4); AR 27-10, para. 21-3.
2. Unless the order to involuntary active duty was approved by the appropriate Service Secretary, the member may not be:
 - a) sentenced to confinement;
 - b) forced to serve any punishment involving restriction on liberty except during a period of inactive duty training or active duty; or
 - c) placed in pretrial confinement. UCMJ, art. 2(d)(5).
3. General and Special Courts-Martial. Prior to arraignment the reservist must be on active duty. R.C.M. 204(b)(1).
4. Summary Courts-Martial. Can be initiated and tried within the reserve structure and without active duty involvement. R.C.M. 204(b)(2). But the summary court-martial officer must be placed on active duty. UCMJ, art. 25; R.C.M. 1301.

G. Impact on the National Guard.

1. 32 U.S.C. § 505 - Training in a state status - No federal military jurisdiction.
2. 10 U.S.C. § 672 - Training in a federal status - Guard member is subject to jurisdiction and the reserve jurisdiction legislation's major provisions. This includes involuntary recall. *But see In United States v. Dimuccio*, 61 M.J. 588 (A.F. Ct. Crim. App. 2005) (holding that a Guard member in Title 10 status was not subject to an inspection under MRE 313 ordered by a commander in Title 32 status and suppressing the positive urinalysis resulting from that inspection).

3. Federal status continues until the guard member has completed his federal service (excluding AWOL time) and federal jurisdiction exists notwithstanding state action to terminating jurisdiction. *United States v. Wilson*, 53 M.J. 327 (2000).

V. PROCEDURAL CONSIDERATIONS.

- A. Pleading Jurisdiction. *United States v. Alef*, 3 M.J. 414 (C.M.A. 1977).
- B. Lack of Jurisdiction: Raised by Motion to Dismiss, R.C.M. 907. May be made at any stage of the proceeding.
- C. Burden of Proof:
 1. *United States v. Bailey*, 6 M.J. 965 (N.M.C.M.R. 1979); R.C.M. 905(c)(1)(preponderance); R.C.M. 905(c)(2)(B) (burden of persuasion on government).
 2. *United States v. Marsh*, 15 M.J. 252 (C.M.A. 1983) (for “peculiarly military” offenses like AWOL, an accused’s military status is an element of the offense which must be proved beyond a reasonable doubt to the fact finders). *See also United States v. Roe*, 15 M.J. 819 (N.M.C.M.R. 1983).

VI. JURISDICTION OVER CIVILIANS

- A. MEJA. Military Extraterritorial Jurisdiction Act of 2000, 18 U.S.C. § 3261, Pub. L. No. 106-523.
 1. The MEJA was approved by Congress and signed into law by the President on 22 November 2000. This legislation *does not expand military jurisdiction*; it extends federal criminal jurisdiction over certain civilians (DOD employees, contractors, and dependents thereof, and military dependents) accompanying the military overseas. The implementing regulations went into effect on 3 March 2005. The Act was amended in 2005 to cover civilian employees, contractors, and contractor employees of any Federal agency “to the extent such employment relates to supporting the

mission of the Department of Defense overseas.” See 2005 NDAA, Sec. 1088.

2. The Act applies to felony level offenses that would apply under federal law if the offense had been committed within the "special maritime and territorial jurisdiction of the United States."
3. The Act provides for an initial appearance proceeding, which may be carried out telephonically, conducted by a Federal magistrate judge. At this proceeding, the magistrate will determine if there is probable cause to believe a crime was committed and if the person committed it. If pretrial detention is an issue, the magistrate will also conduct a detention hearing as required by federal law. This detention hearing may also be conducted telephonically if the person so requests.
4. The Act directly involves the military in two ways.
 - a) The Act, depending on implementing rules, may authorize DOD law enforcement personnel to arrest those civilians covered by the Act.
 - b) The Act entitles those civilians covered by the Act, to representation by military counsel (i.e. judge advocates) at the initial hearing, if determined by the Federal magistrate.
5. MEJA Resources
 - a) DODI 5525.11 (3 Mar 2005)
 - b) DA Message (13 May 2005)
 - c) OTJAG Info Paper (24 May 2005)
 - d) AR 27-10, CH 26 (16 Nov 2005)

B. Patriot Act. Uniting and Strengthening America by Providing Appropriate Tools Required To Intercept and Obstruct Terrorism (USA PATRIOT ACT) Act of 2001, Pub. L. No. 107–56.

1. One reason there was a jurisdictional gap prior to MEJA was that the definition of “special maritime and territorial jurisdiction of the United States,” (SMTJ) was interpreted as excluding U.S. military installations overseas. *See United States v. Gatlin*, 216 F. 3d 207 (2d Cir. 2000). In 2001, the Patriot Act amended the definition to include military installations overseas, however the definition excludes anyone already covered by the MEJA. *See* 18 U.S.C. § 7.

C. Court-martial Jurisdiction under Amended Article 2(a)(10), UCMJ.

1. The 2007 National Defense Authorization Act amended Article 2(a)(10) as follows:
 - a) OLD: In time of war, persons serving with or accompanying an armed force in the field.
 - b) NEW: In time of declared war or a contingency operation, persons serving with or accompanying an armed force in the field.
2. “Contingency Operation,” 10 U.S.C. Sec. 101(a)(13): The term “contingency operation” means a military operation that-
 - a) is designated by the SECDEF as an operation in which members of the armed forces are or may become involved in military actions, operations, or hostilities against an enemy of the United States or against an opposing military force; or
 - b) results in the call or order to, or retention on, active duty of members of the uniformed services under section 688, 12301(a), 12302, 12304, 12305, or 12406 of this title, chapter 15 of this title, or any other provision of law during a war or during a national emergency declared by the President or Congress.

- c) Current operations in Afghanistan and Iraq clearly meet the definition of “contingency operation” above.
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- 3. The only significant guidance to date on implementation of the amended Article 2(a)(10), UCMJ, is contained in a SECDEF Memorandum dated 10 March 2008. This memo reserves the authority to prefer charges or initiate NJP against a civilian to the GCMCA level, however each case must be sent up to SECDEF and over to DOJ first, for a decision on whether to prosecute under the MEJA rather than under the UCMJ. *See* Memorandum from the Secretary of Defense to the Secretaries of the Military Departments, Chairman of the Joint Chiefs of Staff, Undersecretaries of Defense and Commanders of the Combatant Commands, subject: UCMJ Jurisdiction Over DoD Civilian Employees, DoD Contractor Personnel, and Other Persons Serving With or Accompanying the Armed Forces Overseas During Declared War and in Contingency Operations (10 Mar. 2008).

 - 4. There has been one civilian tried by court-martial using Article 2(a)(10) jurisdiction. In *United States v. Ali*, the accused, a Canadian/Iraqi citizen, pled guilty to three specifications involving possessing, hiding, and lying about a knife (the original charge was aggravated assault for stabbing another interpreter in the chest), and was sentenced to five months confinement (time already served in PTC). It is important to note that this case will not receive automatic appellate review because there was no discharge and the sentence was less than six months. As of February, 2009, the case was at OTJAG Criminal Law for a recommendation to TJAG on whether to send it to ACCA for review.