

The Power to Prosecute: New Developments in Courts-Martial Jurisdiction

Major Martin H. Sittler, United States Marine Corps
Professor, Criminal Law Department
The Judge Advocate General's School, United States Army
Charlottesville, Virginia

Introduction

At the heart of any court-martial lies the requirement of jurisdiction—the power of a court to try and determine a case and to render a valid judgment.¹

—David A. Schlueter

Before the military can flex its judicial muscle, there must be proper court-martial jurisdiction. In general, three prerequisites must be met for courts-martial jurisdiction to vest: (1) jurisdiction over the offense, (2) personal jurisdiction over the accused, and (3) a properly convened and composed court-martial.² The first two requirements are the focus of this article.

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.³ These litigious issues of courts-martial jurisdiction relate to either subject matter jurisdiction (jurisdiction over the offense) or personal jurisdiction (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.⁴ If the offense is chargeable under the Uniform Code of Military Justice (UCMJ) and the accused is a service member at the time the offense is committed, subject matter jurisdiction is satisfied.⁵ Personal jurisdiction, however, focuses on the time of trial: can the government put the *habeas grabus*⁶ on the accused and court-martial him?⁷ The answer is yes, so long as the accused has proper status—that is, if the accused is a service member at the time of trial.⁸ At first blush, these jurisdictional concepts seem rudimentary, but recent jurisdiction cases reveal that these concepts are not as simple as they appear.

This article first discusses developments in subject matter jurisdiction—the interesting trend of applying a service connection requirement to capital cases⁹ and the possibility of a jurisdictional gap when faced with a fraudulent discharge scenario.¹⁰ The focus then shifts to personal jurisdiction, addressing two new cases that relate to terminating jurisdiction.¹¹ Finally, this article briefly reviews other jurisdiction cases which are unrelated to subject matter and personal jurisdiction, but which nonetheless affect the law in this area.¹²

1. DAVID A. SCHLUETER, *MILITARY CRIMINAL JUSTICE: PRACTICE AND PROCEDURE* § 4-1 (2d ed. 1987).
2. *MANUAL FOR COURTS-MARTIAL, UNITED STATES*, R.C.M. 201(b)(1)-(5) (1995) [hereinafter MCM]. See also SCHLUETER, *supra* note 1, at 112.
3. See generally EVA H. HANKS, *ELEMENTS OF LAW* 18 (1994).
4. MCM, *supra* note 2, R.C.M. 203; *Solorio v. United States*, 483 U.S. 435 (1987) (holding that subject matter jurisdiction is contingent upon the status of the accused—in other words, whether the accused was a member of the armed service at the time of the offense charged, and not whether there was a service connection).
5. *Solorio*, 483 U.S. at 451.
6. Taken from the Latin word *habeas* (to have) and the fictitious Latin term *grabus* (grab); commonly cited as the authority for the government to “grab” the accused and to ensure his presence at trial.
7. UCMJ art. 2 (West 1995); MCM, *supra* note 2, R.C.M. 202.
8. MCM, *supra* note 2, R.C.M. 202 analysis, app. 21, at A21-9. Generally, court-martial jurisdiction over a person begins at enlistment and ends at discharge. In order to satisfy personal jurisdiction, the offense and the court-martial must occur between these two defining periods. If, however, the accused is discharged after the offense, but before the court-martial, jurisdiction is lost.
9. See generally *Loving v. United States*, 116 S. Ct. 1737, 1751 (1996) (Stevens, J., concurring); *United States v. Curtis*, 44 M.J. 106 (1996), *rev'd per curiam*, 46 M.J. 129 (1997); *United States v. Simoy*, 46 M.J. 592 (A.F. Ct. Crim. App. 1996).
10. See *United States v. Reid*, 46 M.J. 236 (1997).
11. See *United States v. Vanderbush*, 47 M.J. 56 (1997); *United States v. Guest*, 46 M.J. 778 (Army Ct. Crim. App. 1997).
12. See, e.g., *United States v. Turner*, 47 M.J. 348 (1997); *United States v. Sargent*, 47 M.J. 367 (1997). A recent case relevant to a properly convened court-martial, but not discussed in this article, is *United States v. Vargas*, 47 M.J. 552 (N.M. Ct. Crim. App. 1997), which holds that a court-martial convened by one commander, with charges referred by a successor-in-command, was properly convened and had jurisdiction over the accused.

Subject Matter Jurisdiction: The Service Connection Undertow

In 1969, the Supreme Court limited the reach of court-martial jurisdiction by requiring a connection between the accused's military duties and the crime.¹³ Not only did the government have to show proper status (in other words, that the accused was subject to the UCMJ when the offense was committed), but it also had to establish a nexus between the crime and the military.¹⁴ Eighteen years later, however, this limitation ended.

In 1987, the Supreme Court abandoned the service connection requirement for court-martial jurisdiction with its decision in *Solorio v. United States*.¹⁵ With *Solorio*, the Court made clear that the government only has to show that the accused was subject to the UCMJ at the time of the offense to satisfy subject matter jurisdiction. No other prerequisites exist. This, however, is not the end of the story. A closer look at *Solorio*, and in particular Justice Stevens' concurrence and the results therefrom, reveal the vitality of the service connection limitation in a seemingly settled area of law.

Richard Solorio, an active duty member of the Coast Guard, was convicted of crimes committed while stationed in Juneau, Alaska.¹⁶ The crimes, which were non-capital, were committed off-post and consisted of sexual abuse of two young females.¹⁷ Solorio challenged jurisdiction before the Supreme Court. He argued that there was no service connection between the charged offenses and the military and, therefore, that there was no jurisdiction to bring the matter before a court-martial.¹⁸ The

Court, in a six-three decision, held that court-martial jurisdiction existed. Five justices in the majority agreed that court-martial jurisdiction does not depend on the service connection of the offenses charged. Rather, subject matter jurisdiction is determined by the status of the accused at the time of the offense.¹⁹ Since Richard Solorio was subject to the UCMJ at the time of the offenses, jurisdiction vested.

In a concurring opinion, Justice Stevens agreed that court-martial jurisdiction existed.²⁰ His conclusion, however, was based on application of the service connection test. Applying the service connection test to the facts of *Solorio*, he opined that there was sufficient evidence to link the crimes to the military.²¹ He strongly disagreed with the majority's abandonment of the service connection test. Justice Stevens' attachment to the service connection test resurfaced in the Army capital murder case *Loving v. United States*.²²

In January 1996, *Loving* was argued before the Supreme Court.²³ The defense raised the issue of the constitutionality of the military's capital sentencing scheme. In a unanimous decision, the Court held that the military's capital sentencing scheme was proper.²⁴ In a concurring opinion in which three other justices joined, Justice Stevens focused on jurisdiction—an issue the defense did not raise with the Court.²⁵ He seized the opportunity to once again promote his belief in the service connection requirement. He emphasized that *Solorio* was a non-capital case and questioned whether a service connection test still applied to a capital case. He then employed the service connection test in *Loving* and concluded that "the 'service connection' requirement [had] been satisfied."²⁶ Although it was

13. *O'Callahan v. Parker*, 395 U.S. 258, 273 (1969) (holding that a crime tried by a court-martial must be service connected).

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

15. 483 U.S. 435 (1987). In *Solorio*, the Supreme Court overrules *O'Callahan v. Parker*, 395 U.S. 258 (1969), abandoning the "service-connection" test, and holds that subject matter jurisdiction of a court-martial depends solely on the accused's status as a member of the armed forces. In reaching its decision, the Court defers to the plenary power of Congress to regulate the armed forces. *Id.* at 441.

16. *Id.* at 437.

17. *Id.*

18. *Id.* at 440.

19. *Id.* at 450.

20. *Id.* at 451.

21. *Id.*

22. 116 S. Ct. 1737 (1996).

23. *Id.* Private Loving, an Army soldier who was stationed at Fort Hood, Texas, murdered two taxicab drivers. He attempted to murder a third, but the driver escaped. Loving's first victim was an active duty service member, and his second victim was a retired service member.

24. *Id.* at 1750.

25. *Id.* at 1751 (Stevens, J., concurring).

not the majority's view, Justice Stevens' concurrence in *Loving* has affected military jurisprudence.

Within three weeks of the *Loving* decision, the Court of Appeals for the Armed Forces (CAAF) issued its opinion in *United States v. Curtis*,²⁷ another military capital murder case. In the first paragraph of the opinion, the CAAF addressed service connection. Even though the defense did not raise this issue, the court made a specific finding that the service connection test was met.²⁸ In support of this conclusion, the court cited Justice Stevens' concurring opinion in *Loving*.²⁹

Similarly, in *United States v. Simoy*,³⁰ an Air Force capital murder case, the Air Force Court of Criminal Appeals, sua sponte, found a service connection between the murder and the military.³¹ The Air Force court also cited Justice Stevens' concurring opinion.³²

One can only conclude that the military appellate courts are exercising an abundance of caution when addressing the service connection test in capital cases. Neither Congress nor the Supreme Court has limited court-martial jurisdiction to crimes that are service connected. In *Solorio*, the Supreme Court unequivocally put the service connection test to rest. Nevertheless, Justice Stevens remained committed to limited court-martial jurisdiction. As a result, precedent exists to challenge court-martial jurisdiction based on service connection, at least for capital offenses.

Subject Matter Jurisdiction: A Jurisdictional Gap Remains

Fortunately, in non-capital cases, the law regarding subject matter jurisdiction is settled: if the accused is subject to the UCMJ at the time of the offense, subject matter jurisdiction is satisfied.³³ The rule seems simple, but what if the accused commits misconduct after a fraudulent discharge?³⁴ Is there subject matter jurisdiction over the offenses? At first blush, it appears that subject matter jurisdiction is satisfied. After all, if the discharge is based on fraud, the discharge does not exist. Since there is no discharge, the accused remains in a military status.³⁵ Since the accused is in a military status at the time of the offense, subject matter jurisdiction is, therefore, met. A closer look at the courts' treatment of this issue, however, reveals that logic may not always prevail.

This year, the CAAF decided *United States v. Reid*,³⁶ a fraudulent discharge case. The court addressed the procedural requirements necessary to prosecute such a case. Wrapped up in the facts, however, was the issue of asserting court-martial jurisdiction over post-fraudulent discharge misconduct. A brief review of the facts and the procedural issues in the case is helpful.

While pending a medical discharge, Specialist Reid was apprehended for possession and distribution of marijuana.³⁷ The command quickly took action to stop Reid's discharge.³⁸ The command's efforts notwithstanding, Reid managed, through fraud, to finagle a separation from the Army—"complete with a Certificate of Discharge and more than \$8,000.00

26. *Id.*

27. 44 M.J. 106 (1996). *Loving* was decided on 3 June 1996, and *Curtis* was decided on 21 June 1996.

28. *Id.* at 118. The court states: "The offenses were service connected because they occurred on base and the victims were appellant's commander and his wife." *Id.*

29. *Id.*

30. 46 M.J. 592 (A.F. Ct. Crim. App. 1996).

31. *Id.* at 601 (stating that "the felony murder was service-connected because it occurred on base and the victim was an active duty military member").

32. *Id.* The majority also cites *Relford v. Commandant*, 401 U.S. 355 (1971). See *supra* note 14 and accompanying text.

33. *Solorio v. United States*, 483 U.S. 435 (1987).

34. UCMJ art. 83 (West 1995). Article 83a(2) states: "Any person who . . . procures his own separation from the armed forces by knowingly false representation or deliberate concealment as to his eligibility for that separation shall be punished as a court-martial may direct." *Id.*

35. MCM, *supra* note 2, R.C.M. 202 discussion. Court-martial jurisdiction normally continues even if the service member's completion of an enlistment or term of service has expired. Jurisdiction will continue until delivery of a valid discharge certificate or its equivalent or until the government fails to act within a reasonable time after the person objects to continued retention. See *United States v. Poole*, 30 M.J. 149 (C.M.A. 1990) (holding that there is no constructive discharge when a service member is retained on active duty beyond the end of an enlistment, even if the accused protests the retention).

36. 46 M.J. 236 (1997).

37. *Id.* at 237.

38. *Id.* The process of suspending favorable personnel action (such as an honorable discharge) pending court-martial action is called "flagging." See U.S. DEP'T OF ARMY, REG. 600-8-2, SUSPENSION OF FAVORABLE PERSONNEL ACTIONS (FLAGS) (1 Mar. 1988).

in severance pay.”³⁹ Approximately thirty days later, Reid was apprehended and returned to his unit.

Shortly thereafter, the command preferred charges. The charged offenses related to: (1) misconduct occurring before the fraudulent discharge,⁴⁰ (2) the fraudulent discharge itself,⁴¹ and (3) misconduct occurring after the fraudulent discharge.⁴² Pursuant to a pretrial agreement, Reid pleaded guilty to the fraudulent discharge and to the crimes which occurred before and after the fraudulent discharge.⁴³ On appeal, the Army court affirmed the fraudulent discharge conviction, but reversed the other convictions because the government failed to follow proper procedures.⁴⁴ Based on Article 3(b) of the UCMJ,⁴⁵ the service court determined that a two-step trial process is required: first, a court-martial must convene to determine the guilt or innocence on the fraudulent discharge offense; then, if there is a conviction, a second trial may be convened to try other offenses. This year, the CAAF agreed with the Army court’s interpretation of Article 3(b).

In reviewing *Reid*, the CAAF relied on the plain language of Article 3(b). The court recognized that, generally, a discharge terminates court-martial jurisdiction. When the discharge is based on fraud, however, Article 3(b) gives the military limited

authority to determine court-martial jurisdiction.⁴⁶ Before the military can try the accused for conduct other than the fraudulent discharge, there first must be a trial to determine whether the military has jurisdiction. If the accused is convicted of fraudulent discharge,⁴⁷ the discharge is no longer valid, and the military has jurisdiction to try the accused for the other offenses. If, however, the accused is acquitted of fraudulent discharge, the discharge is binding, and the military lacks jurisdiction to try the accused for other misconduct. Despite the government’s logical and somewhat persuasive arguments of judicial economy and waiver, the CAAF concluded that this two-step trial process was required in such a case.⁴⁸

The court’s judgment regarding the procedural issue in *Reid* is not disturbing or surprising. Left unanswered, however, is the issue of whether the military can exercise jurisdiction over offenses committed after the fraudulent discharge.⁴⁹ The language of Article 3(b) makes it clear that once an accused is convicted of fraudulent discharge, “he is subject to trial by court-martial for all offenses under [the UCMJ] committed before the fraudulent discharge.”⁵⁰ In dicta, the Army court suggests that once there is a conviction for fraudulent discharge, the discharge is void. The government may then seek to establish

39. *Reid*, 46 M.J. at 237.

40. *Id.* The pre-discharge offenses were UCMJ arts. 107 (false official statement), 112a (possession and distribution of marijuana), 121 (larceny of government property), 128 (assault consummated by a battery), and 134 (drunk and disorderly conduct).

41. *Id.* See also UCMJ art. 83 (West 1995).

42. *Reid*, 46 M.J. at 237. The post-fraudulent discharge offense was desertion, in violation of UCMJ Article 85. The government’s theory was that the accused deserted the day after his fraudulent discharge.

43. *Id.* In accordance with Reid’s pleas, the military judge found Reid guilty of fraudulent separation, desertion, making a false official statement, possession and distribution of marijuana, larceny of government property, and assault consummated by a battery.

44. *United States v. Reid*, 43 M.J. 906 (Army Ct. Crim. App. 1996) (holding that the government failed to follow the two-step trial process required by UCMJ art. 3(b)). See Major Amy Frisk, *The Long Arm of Military Justice: Court-Martial Jurisdiction and the Limits of Power*, ARMY LAW., Apr. 1997, at 9 (containing a detailed analysis of the Army court’s opinion in *Reid*.)

45. UCMJ art. 3(b) (West 1995).

Each person discharged from the armed forces who is later charged with having fraudulently obtained his discharge is, subject to section 843 of this title (article 43), subject to trial by court-martial on that charge and is after apprehension subject to this chapter while in the custody of the armed forces for that trial. Upon conviction of that charge he is subject to trial by court-martial for all offenses under this chapter committed before the fraudulent discharge.

46. *Reid*, 46 M.J. at 239.

47. *Id.* The CAAF held that conviction “means more than initial announcement of findings.” *Id.* Citing Rule for Court-Martial 1001(b)(3)(A), the court finds that, under UCMJ art. 3(b), a conviction for fraudulent discharge does not occur until a sentence has been adjudged. *Id.* See MCM, *supra* note 2, R.C.M. 1001(b)(3)(A).

48. *Reid*, 46 M.J. at 240. In a concurring opinion, Justice Sullivan recognizes that the “arguments of efficiency, logic, and equity are strong and sane arguments on the side of the Government.” *Id.* Regardless, he agrees with the majority that the law is “squarely and decisively” on the accused’s side. *Id.*

49. There are myriad scenarios when the military would want to exercise jurisdiction over post-fraudulent discharge offenses. For example, a service member who is fraudulently separated from the military but hangs around the military installation and engages in some form of misconduct that has a direct impact on good order and discipline (for example, larceny in the barracks). The commander has a valid general deterrence interest in seeking justice over the post-fraudulent discharge misconduct.

50. UCMJ art. 3(b) (West 1995) (emphasis added).

jurisdiction over the accused under Article 2.⁵¹ This advice is logical, appealing, and persuasive.

Although the CAAF did not discuss the issue of jurisdiction over post-fraudulent discharge misconduct, one can reasonably predict how it may resolve this issue. Considering the court's reliance on the plain language of the statute, the CAAF would likely hold that the military could not assert court-martial jurisdiction over post-fraudulent discharge offenses. The language in Article 3(b) appears to limit jurisdiction to "offenses committed before the fraudulent discharge."⁵² Through omission, it appears that Congress intended to exclude post-fraudulent discharge offenses. Accordingly, the CAAF would likely find that Congress did not intend to extend court-martial jurisdiction to post-fraudulent discharge misconduct.⁵³ When faced with a case involving post-fraudulent discharge misconduct, government counsel should argue the rationale suggested by the Army court.⁵⁴ Defense counsel, however, should rely on the plain meaning of Article 3(b) and the limitation it places on the exercise of court-martial jurisdiction.

Personal Jurisdiction: Terminating Court-Martial Jurisdiction

Not only is proper status essential at the time of the offense, it is also necessary at the time of trial. The accused must be subject to the UCMJ at the time of the court-martial.⁵⁵ If not, the military lacks personal jurisdiction to prosecute the accused.

Generally, court-martial jurisdiction terminates upon discharge. Discharge occurs when there is: (1) delivery of a valid discharge certificate, (2) final accounting of pay, and (3) completion of a clearing process.⁵⁶ In *United States v. Guest*⁵⁷ and *Smith v. Vanderbush*,⁵⁸ the military appellate courts dealt with the question of when a valid discharge terminates court-martial jurisdiction.

Beyond the "Four Corners" of the Discharge Certificate

In *Guest*, the Army Court of Criminal Appeals considered the commander's intent in determining a valid discharge. Prior to entering a terminal leave status, Specialist Guest received a courtesy copy of his discharge certificate, cleared the Army, and arranged for his final accounting of pay.⁵⁹ While on permissive leave, but prior to his expiration of term of service (ETS), Guest's command attempted to recall him because of discovered misconduct.⁶⁰ Guest ignored the recall. He eventually was apprehended, but not until after his ETS.⁶¹ Upon return to military control, Guest was convicted of drug use and other crimes.⁶² At trial and on appeal, Guest challenged jurisdiction, arguing that he was discharged prior to the date of trial, and therefore, at the time of trial, he was not subject to the UCMJ.⁶³ Specifically, Guest reasoned that on the date of his ETS, he possessed a discharge certificate, had undergone a clearing process, and had made arrangements for his final accounting of pay. He argued that he was, therefore, properly discharged on the date of his ETS.⁶⁴

51. *United States v. Reid*, 43 M.J. 906, 910 (Army Ct. Crim. App. 1996). Article 2(a)(1) provides jurisdiction over members of the regular component, including those who are awaiting a discharge after the expiration of their terms of service. UCMJ art. 2(a)(1) (West 1995).

52. UCMJ art. 3(b).

53. See SENATE COMM. ON ARMED SERVICES, ESTABLISHING A UNIFORM CODE OF MILITARY JUSTICE, S. REP. NO. 486, at 8 (1949), reprinted in INDEX AND LEGISLATIVE HISTORY: UNIFORM CODE OF MILITARY JUSTICE 1950, at 1236 (1950) ("Subdivision (b) . . . provides that a person who obtains a fraudulent discharge is not subject to this code for offenses committed during the period between the date of the fraudulent discharge and subsequent apprehension for trial by military authorities.").

54. *Reid*, 43 M.J. at 910. See also *supra* note 51 and accompanying text.

55. See MCM, *supra* note 2, R.C.M. 202(a).

56. See *id.* R.C.M. 202(a) discussion. See also *United States v. Batchelder*, 41 M.J. 337 (1994); *United States v. Howard*, 20 M.J. 353 (C.M.A. 1985); *United States v. Scott*, 29 C.M.R. 462 (C.M.A. 1960); *United States v. King*, 37 M.J. 520 (A.C.M.R. 1993).

57. 46 M.J. 778 (Army Ct. Crim. App. 1997).

58. 47 M.J. 56 (1997).

59. *Guest*, 46 M.J. at 779.

60. *Id.* at 780. Guest was suspected of drug use and distribution. He was administratively flagged by his command (his personnel records were annotated to reflect suspension of favorable personnel actions), and his commander directed him to report to his first sergeant for further instructions. Instead of reporting to the first sergeant as directed, Guest absented himself from his unit.

61. *Id.* The accused's effective date of discharge was 20 January 1995, but he was not apprehended until 15 March 1995.

62. *Id.* at 779. Specialist Guest was convicted by general court-martial of attempted murder, desertion terminated by apprehension, reckless driving, wrongful use of cocaine, endangering human life by discharging a firearm, carrying a concealed weapon, and communicating a threat.

63. *Id.*

The Army court determined that Guest was not discharged.⁶⁵ In reaching this conclusion, the court looked to the intent of the commander (the separation authority). Guest's commander did not intend the courtesy copy of Guest's discharge certificate to serve as an official discharge certificate;⁶⁶ hence, the command did not deliver to Guest a *valid* discharge certificate. The court's consideration of intent, a factor outside of the "four corners" of the discharge certificate, is an influential element to consider when faced with a valid discharge issue.⁶⁷

Whose intent is relevant? It seems that only the commander's⁶⁸ intent would be pertinent. After all, a discharge is a unilateral action on the part of the government. The commander produces the discharge certificate and permits the final accounting of pay and the clearing process. If the commander fails to complete this process on time (in other words, on the scheduled ETS date), regardless of the service member's intent, the service member remains subject to the UCMJ.⁶⁹ In a footnote, however, the Army court hints that the service member's intent has some relevance.⁷⁰ How much weight should be given to the accused's intent is unclear.

Guest provides counsel with additional ammunition either to challenge or to sustain a discharge. Government counsel should look to the commander's intent surrounding the discharge certificate. Defense counsel should consider the

accused's understanding of the document. These factors, which are outside of the "four corners" of the discharge certificate, may be relevant when analyzing the validity of a discharge.

Post-Arrest Discharge

*Smith v. Vanderbush*⁷¹ is another recent case concerning the termination of court-martial jurisdiction. Sergeant Vanderbush was administratively assigned to the Eighth United States Army (EUSA), Korea, but he was operationally assigned to (performed his duties with) the 2d Infantry Division (2ID).⁷² As Sergeant Vanderbush's ETS date (15 June 1996) approached, he committed misconduct in two distinct episodes, both of which involved disrespect, disorderly conduct, assault, provoking speech, and disobedience of orders.⁷³ As a result, the 2ID commander convened a court-martial. The accused was arraigned on 30 May 1996 (fifteen days before his ETS date), and trial was set for 26 June 1996.⁷⁴ Meanwhile, unaware of the pending court-martial, EUSA continued processing Sergeant Vanderbush for discharge from the Army.⁷⁵ On 15 June 1996, Sergeant Vanderbush, in possession of a valid discharge certificate and paperwork which memorialized his final accounting of pay, flew home.⁷⁶ In an Article 39(a) session⁷⁷ on 24 June, the defense moved to dismiss the charges due to a lack of personal jurisdiction. The military judge denied the motion,⁷⁸ and the defense filed a writ of extraordinary relief with the Army

64. *Id.*

65. *Id.* at 780.

66. *Id.*

67. *See generally* United States v. Batchelder, 41 M.J. 337 (1994) (observing that early delivery of a discharge certificate for administrative convenience does not terminate jurisdiction when the commander does not intend the discharge to take effect until later).

68. For purposes of this discussion, "commander" means the commander with the authority to separate the accused.

69. *See* MCM, *supra* note 2, R.C.M. 202 discussion; UCMJ art 2(a)(1) (West 1995); *Smith v. Vanderbush*, 47 M.J. 56, 57 (1997).

70. *Guest*, 46 M.J. at 780 n.3 ("We find that, because it was never intended to operate as the official certificate—and both the Army and the appellant so understood—it could never take effect. The intent of the parties is germane to the effect which such a certificate may have.")

71. 47 M.J. 56 (1997). In last year's jurisdiction symposium article, Major Amy Frisk artfully addressed the service court's opinion in *Vanderbush*. *See* Frisk, *supra* note 44, at 6.

72. *Vanderbush v. Smith*, 45 M.J. 590, 592 (Army Ct. Crim. App. 1996).

73. *Vanderbush*, 47 M.J. at 61 (Sullivan, J., dissenting).

74. *Id.* at 57.

75. *Id.*

76. *Id.*

77. UCMJ art. 39(a) (West 1995). An Article 39(a) session is a court session without the presence of the members for purposes of arraignment, receiving pleas and forum, hearing and ruling on motions, and performing any other procedural functions. The persons typically present are the accused, defense counsel, trial counsel, the court reporter, and the military judge.

78. *Vanderbush*, 47 M.J. at 57. The military judge denied the motion, finding that once charges were preferred, court-martial jurisdiction attached and the accused could not be discharged until lawful authority (the convening authority) took authorized action on the charges.

Court of Criminal Appeals.⁷⁹ Hearing the writ, the Army court dismissed the charges for lack of personal jurisdiction, finding that Sergeant Vanderbush received a valid discharge from the Army.⁸⁰

The CAAF reviewed *Vanderbush* and, contrary to the visceral opinions of many,⁸¹ affirmed the lower court's decision.⁸² Specifically, the CAAF held that, even though the government arraigned the accused and court-martial jurisdiction attached, a valid administrative discharge terminated jurisdiction.⁸³

The government urged the CAAF to apply the concept of continuing jurisdiction.⁸⁴ Once arraignment occurred, the government argued, court-martial jurisdiction attached, and the "issuance of an administrative discharge would not divest a court-martial of jurisdiction to try a civilian former member of the armed forces."⁸⁵ In rejecting this argument, the CAAF reasoned that there was no statutory authority that extended the concept of continuing jurisdiction to the trial.⁸⁶ Continuing jurisdiction only permits appellate review and execution of a sentence "in the case of someone who already was tried and convicted while in a status subject to the UCMJ."⁸⁷

The government also argued that once court-martial jurisdiction attached, only the convening authority could issue an administrative discharge.⁸⁸ The CAAF rejected this position as

well. From the evidence presented by the government, the court could not find any regulatory restriction which prohibited the administrative commander from discharging a soldier at his ETS, despite the attachment of court-martial jurisdiction.⁸⁹ Absent any regulatory restrictions, the administrative discharge was valid. Sergeant Vanderbush received a valid discharge certificate and completed a final accounting of pay and a clearing process. Further, there was no administrative flagging to indicate that the commander of EUSA did not intend to discharge Sergeant Vanderbush at his ETS.⁹⁰

It is unlikely that military practitioners will frequently encounter the *Vanderbush* predicament. Regardless, there are some legitimate practice points to take away from this case. First, counsel should closely track the ETS dates of accuseds, and government counsel should ensure that proper administrative action is taken to avoid an inadvertent ETS discharge. Second, similar to what the Army court recognized in *Guest*, counsel should consider the intent of the commander as a significant factor when advocating or challenging a discharge. Third, counsel should consider alternative theories of prosecution, such as fraudulent discharge. Interestingly, however, the CAAF gratuitously suggests that the Army provide "regulatory procedures to ensure that no official other than a convening authority (or other designated official) [is] empowered to issue an administrative discharge to an accused after arraignment."⁹¹

79. *Id.* This case was heard by the Army Court of Criminal Appeals in response to the petitioner's petition for extraordinary relief in the nature of a writ of prohibition, asking the court to dismiss for lack of jurisdiction the charges that were referred to a special court-martial.

80. *Vanderbush v. Smith*, 45 M.J. 590, 598 (Army Ct. Crim. App. 1996).

81. *Vanderbush*, 47 M.J. at 61 (Sullivan, J., dissenting). In his dissent, Judge Sullivan clearly displays his frustration with the majority's judgment. He states:

It appears Todd Vanderbush viewed the Army as a huge bureaucracy with a gavel in one hand (his court-martial) and a discharge stamp (his freedom) in the other hand. Vanderbush . . . merely became the master of his fate and decided to outprocess himself with the discharge stamp hand of the Army.

Id. In the author's own experience, many people are disturbed with the result in *Vanderbush*. When I explain the CAAF's holding to various audiences, there is often a murmur from the crowd. Students frequently express their dissatisfaction, usually not with the court's legal analysis, but with the outcome.

82. *Id.*

83. *Id.*

84. *Id.* at 59 (arguing that the concept of continuing jurisdiction allows the government to exercise court-martial jurisdiction over an accused even though the accused is a civilian former member of the armed forces). Historically, this concept only applied to execution of a sentence or completion of appellate review.

85. *Id.*

86. *Id.*

87. *Id.*

88. *Id.* at 60. The government's argument was based on its interpretation of provisions in *Army Regulation (AR) 600-8-2*. The government did not cite to the provisions of *AR 635-200*, as it had in its arguments before the Army court. There is an apparent discrepancy between *AR 600-8-2* and *AR 635-200* over the proper timing of the general court-martial convening authority's approval to extend the accused beyond his ETS. See Frisk, *supra* note 44, at 9 n.43.

89. *Vanderbush*, 47 M.J. at 60.

90. *Id.* at 61.

91. *Id.* at 58.

All services should heed of the lessons learned in Vanderbush and review discharge regulations to avoid a similar problem.

Jurisdictional Issues at the Court-Martial

In addition to deciding exciting subject matter and personal jurisdiction issues, the military courts have answered jurisdictional questions which relate to properly convened and composed courts-martial. In *United States v. Turner*,⁹² the CAAF held that an accused's request for trial by military judge alone can be inferred from the record.⁹³

At trial, Chief Warrant Officer Turner's defense counsel made a written and oral request for trial by military judge alone.⁹⁴ The accused did not, on the record, *personally* request or object to trial by military judge, as required by Article 16.⁹⁵ On appeal, the defense challenged jurisdiction, arguing that the court-martial was not properly convened because the accused did not personally request to be tried by military judge alone.⁹⁶ The Navy-Marine Corps court agreed. Relying on the language of Article 16,⁹⁷ the service court held that "failure of the accused personally to make a forum choice was a fatal jurisdictional defect and reversed" the conviction.⁹⁸

The CAAF overturned the Navy-Marine Corps court's decision and found substantial compliance with Article 16. The CAAF's finding, however, is based on the record of trial as a whole and is limited to the facts of the case.⁹⁹ The CAAF clearly found a violation of Article 16, but the court determined

that, since there was substantial compliance, any error committed "did not materially prejudice the substantial rights of the accused."¹⁰⁰

In *United States v. Sargent*,¹⁰¹ another case pertaining to court-martial composition, the CAAF held that an unexplained absence of a detailed court member did not create a jurisdictional defect.¹⁰² In *Sargent*, before a military judge alone, the accused was found guilty of committing larceny and wrongful appropriation. The accused, however, requested members for sentencing. When the court-martial convened for sentencing, one of the members was absent. Neither the trial counsel nor defense counsel raised the issue at trial. The members who were present were empanelled, heard the evidence, and sentenced the accused.¹⁰³

On appeal, the defense argued defective jurisdiction. Relying on Rule for Courts-Martial 805,¹⁰⁴ the defense maintained that the unexplained absence of a detailed court-martial member constituted defective jurisdiction.¹⁰⁵ The CAAF disagreed. The court held that "the absence of four members detailed to a ten-member general court-martial did not constitute jurisdictional error."¹⁰⁶ So long as the number of members does not fall below the required quorum,¹⁰⁷ a court-martial can lawfully proceed. If members are missing and quorum is not broken, the appellate courts will test for prejudice.¹⁰⁸ Based on the facts in *Sargent*, there was no substantial prejudice to the accused.¹⁰⁹

Military practitioners should not interpret *Turner* and *Sargent* as an invitation to ignore courts-martial procedures. In both cases, the CAAF resolutely declared that error occurred.

92. 47 M.J. 348 (1997). For a learned discussion of the facts and other issues raised in *Turner*, refer to Major Gregory Coe's article in this issue discussing pretrial and trial procedures. See Major Gregory B. Coe, "Something Old, Something New, Something Borrowed, Something Blue": Recent Developments in Pretrial and Trial Procedure, ARMY LAW., Apr. 1998, at 44.

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

94. *Id.* See *infra* note 100 and accompanying text.

95. UCMJ art. 16 (West 1995). Article 16(1) permits the accused to elect trial by military judge alone when tried at either a general or special court-martial. *Id.* In pertinent part, Article 16(1)(B) provides for trial by "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.*

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

97. UCMJ art. 16. See also *supra* note 95 and accompanying text.

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

99. *Id.* at 350.

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

101. 47 M.J. 367 (1997).

102. *Id.* at 369.

103. *Id.*

Based on the circumstances particular to the cases, however, the errors were not jurisdictional or prejudicial. Military practitioners should heed these opinions and ensure that the jurisdictional requirements relevant to courts-martial composition are followed.

Conclusion

In reviewing this year's cases, it is evident that without jurisdiction the government is powerless to prosecute. The *Vanderbush* case makes this point abundantly clear. In addition to highlighting the importance of jurisdiction, the military courts resurrect issues that some may argue are settled. For example, in the area of subject matter jurisdiction, with *Curtis* and *Simoy*,

the courts give credence to a service connection requirement for capital cases. This year's cases also plant the seeds for creative arguments about when a discharge is effective. Still unanswered, unfortunately, is the jurisdictional gap associated with post-fraudulent discharge offenses. This year's cases left military practitioners with armament and ammunition to employ when facing jurisdictional issues. Next year's cases will hopefully answer the unresolved issues.

104. MCM, *supra* note 2, R.C.M. 805(b). R.C.M. 805(b) states:

Members. Unless trial is by military judge alone pursuant to a request by the accused, no court-martial proceeding may take place in the absence of any detailed member except: Article 39(a) sessions under R.C.M. 803; examination of members under R.C.M. 912(d); when the member has been excused under R.C.M. 505 or 912(f); or as otherwise provided in R.C.M. 1102. No general court-martial proceeding requiring the presence of members may be conducted unless at least 5 members are present and, except as provided in R.C.M. 912(h), no special court-martial proceeding requiring the presence of members may be conducted unless at least 3 members are present. Except as provided in R.C.M. 503(b), when an enlisted accused has requested enlisted members, no proceeding requiring the presence of members may be conducted unless at least one-third of the members actually sitting on the court-martial are enlisted persons.

105. *Sargent*, 47 M.J. at 368.

106. *Id.*

107. The required quorum for a general court-martial is five, and the quorum for a special court-martial is three. UCMJ art. 16 (West 1995).

108. *See* UCMJ art. 59(a). Article 59(a) states: "A finding or sentence of court-martial may not be held incorrect on the ground of an error of law unless the error materially prejudices the substantial rights of the accused."

109. *Sargent*, 47 M.J. at 369.