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Court-Martial Jurisdiction: An Expansion of the Least Possible Power

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COURT-MARTIAL JURISDICTION: AN EXPANSION OF THE LEAST POSSIBLE POWER

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Free countries of the world have tried to restrict military tribunals to the narrowest jurisdiction deemed absolutely essential to maintaining discipline among the troops in active service. . . .[1]

I. INTRODUCTION

The historical limitation on the jurisdiction of courts-martial, which is solely criminal in nature,[2] has been based in large part upon concern for overreach of military control, fear of unnecessary deprivation of constitutional protections for service members, and a general lack of confidence in military justice. The national desire for a fit and disciplined armed force has provided a counterweight to these concerns.

The delicate balance between the desire for limited jurisdiction and the need for an effective national defense is first set by Congress. With a constitutional mandate to govern the armed forces,[3] Congress has established the general boundaries of court-martial jurisdiction in the Uniform Code of Military Justice.[4] In turn, the civilian and military courts have further refined and defined the scope of military jurisdiction. Combined, the legislative and judicial modifications keep the boundaries, and the balance, in a constant state of flux. This perpetual shifting—at most times almost imperceptible—is not without debate. On the one hand the proponents of restriction argue that unchecked expansion of court-martial jurisdiction potentially robs service members of constitutional protections such as indictment by grand jury and trial by

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1 Toth v. Quarles, 350 U.S. 11, 22 (1955).

2 UNITED STATES, MANUAL FOR COURTS-MARTIAL ¶¶ 8, 126(h)(1) (rev. ed. 1969).

3 Article 1, section 8 of the U.S. Constitution vests Congress with a variety of responsibilities in governing the armed forces. For example, clause (14) requires Congress "[t]o make Rules for the Government and Regulation of the land and naval Forces."

4 10 U.S.C. §§ 801-940 (Supp. III 1979) [hereinafter cited as UCMJ].

jury.[5] On the other hand, the military is concerned that restrictions on court-martial jurisdiction severely hamper the authority to insure discipline in a legitimately separate society that feeds on law and order.[6] A related issue here is the concern that too narrow court-martial jurisdiction will create "jurisdictional gaps." Simply put, lack of military jurisdiction over the person or subject matter does not always mean that federal or state jurisdictions will automatically take up the slack. In the past several years, spirited debate has resulted in several major changes in court-martial jurisdiction—both personal and subject matter. This article examines those developments and their potential impact on the reach of military jurisdiction. We first address the changes in the military's jurisdiction over active duty service members.

II. PERSONAL JURISDICTION

A. A QUESTION OF STATUS

A court-martial has personal jurisdiction not only over persons who possess the status of service member but also over a wide variety of individuals who do not fit the traditional definition of soldier or sailor. Congress, in the Uniform Code of Military Justice, has provided for jurisdiction over service academy students,[7] reservists,[8] retirees,[9] and persons accompanying the armed forces.[10] Despite this legislative attempt to cover a wide range of individuals, the courts generally have limited court-martial jurisdiction to those individuals who actually possess some form of military *status*. For example, notwithstanding the statutory extension of jurisdiction, there is no power to try civilians in peacetime;[11] not yet resolved is the question of whether there is jurisdiction over civilians accompanying the armed forces in time of war.[12] Whether one of these particular groups or classifications of individuals

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[5] *See, e.g.*, O'Callahan v. Parker, 395 U.S. 258, 262-64 (1969).

[6] *See generally* Hunt, *Trimming Military Jurisdiction: An Unrealistic Solution to Reforming Military Justice*, 63 J. CRIM. L.C. & P.S. 23 (1972). The Supreme Court has repeatedly recognized the "separateness" of the military justice system and the importance of maintaining discipline. *See, e.g.*, Brown v. Glines, 444 U.S. 348, 354 (1980).

[7] UCMJ, art. 2(a)(2), 10 U.S.C. § 802(a)(2). R.O.T.C. students are not subject. *See, e.g.*, Allison v. United States, 426 F.2d 1324 (6th Cir. 1970).

[8] UCMJ, art. 2(a)(3), 10 U.S.C. § 802(a)(3). *See generally* Murray, *Court-Martial Jurisdiction Over Reservists*, 10 A.F.JAG L. REV. 10 (1968).

[9] UCMJ, art. 2(a)(4),(5), 10 U.S.C. § 802(a)(4),(5).

[10] UCMJ, art. 2(a)(10),(11), 10 U.S.C. § 802(a)(10)-(11).

[11] *See, e.g.*, Reid v. Covert, 354 U.S. 1 (1957); Toth v. Quarles, 350 U.S. 11 (1955). *See generally* Everett & Hourcle, *Crime Without Punishment—Ex-Servicemen, Civilian Employees and Dependents*, 13 A.F. JAG L. REV. 184 (1971); Giovagnoni, *Jurisdiction: Minus a Uniform*, 14 A.F. JAG L. REV. 190 (1973).

[12] *See* United States v. Averette, 19 C.M.A. 363, 365, 41 C.M.R. 363, 365 (1970) (civilian Army contractor's court-martial voided because Vietnam conflict was not a "time of war").

(reservists, retirees, etc.) is subject to the military jurisdiction is generally not in question. Instead, litigation has most often centered on alleged defects in the inception or termination of the "status."

B. INCEPTION OF PERSONAL JURISDICTION: THE ENLISTMENT

In recent years litigation surrounding "involuntary" entrance into the armed forces has been sparse. Induction is not being currently employed as a means of entry. Other commonly recognized means, such as the involuntary activation of reservists, also seems to have fallen into disuse—in many instances because of regulatory direction[13] or simply because of the administrative burdens presented.[14]

The most visible area of personal jurisdiction centers on the enlistment—a voluntary change of status from civilian to service member. In noting that the enlistment is a contract which effects a change of status, the Supreme Court of the United States in *In re Grimley*[15] stated that this special contract must be entered into voluntarily by one competent to enlist. For years *Grimley's* progeny in both civilian and military case law supported court-martial jurisdiction over individuals who may have indeed had legitimate claims of a defective contractual change of status. Several rationales supported military jurisdiction. First, courts were reluctant to permit a service member to invoke contractual defects as a bar to criminal trial. They feared that a service member knowing of the defect could desert his comrades at will, perhaps in the heat of battle, arguing that he was not actually in the armed forces.[16] Defects could be remedied in the federal courts—after the court-martial had tried him. A second rationale rested on the "constructive enlistment," which was, in effect, an implied contract.[17] In receiving military pay and benefits and voluntarily performing military duties, a service member could evidence an intent to change his status notwithstanding the initially defective formal attempt to change it.

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[13] *See, e.g.*, Army National Guard and Army Reserve—Service Obligations, Methods of Fulfillment, Participation Requirements and Enforcement Procedures, Army Reg. 135-91 (C5, 15 May 1980).

[14] *See generally* Dilloff, *Involuntary Activation of Reservists*, 63 KY. L.J. 895 (1975). *See also* United States v. Kilbreth, 22 C.M.A. 390, 47 C.M.R. 327 (1973).

[15] 137 U.S. 147 (1890). Grimley was overage at the time of enlistment and unsuccessfully attempted to use his fraud as a bar to court-martial jurisdiction. *See* Schlueter, *The Enlistment Contract: A Uniform Approach*, 77 MIL. L. REV. 1, 10-12 (1977).

[16] *See, e.g., In re* McVey, 23 F. 878, 880 (D. Cal. 1885).

[17] United States v.King, 11 C.M.A. 19, 28 C.M.R. 243 (1959). The doctrine has been relied upon by the federal courts, *see, e.g.*, Barrett v. Looney, 158 F. Supp. 224 (D. Kan. 1957), *aff'd*, 252 F.2d 588 (10th Cir.), *cert. denied*, 357 U.S. 940 (1958), and by the Comptroller General. *See, e.g.*, 45 Comp. Gen. 218 (1965).

C. JUDICIAL RESTRICTION OF PERSONAL JURISDICTION

A broad interpretation of personal jurisdiction remained until 1974 when the United States Court of Military Appeals, in three decisions, severely limited the military's ability to exercise jurisdiction over service members with defective enlistments. In the first case, *United States v. Catlow*,[18] the court ruled that a service member enlisting in lieu of an otherwise inevitable jail sentence had involuntarily entered the armed forces; his continued protestations once on active duty (in the nature of repeated A.W.O.L.'s) prevented formation of a constructive enlistment. And in *United States v. Brown*,[19] the fraudulent enlistment of a minor was aided by a recruiter who failed to follow Army regulations.[20] That oversight coupled with sluggish reaction by military authorities to discharge him, according to the court, estopped the government to argue that a constructive enlistment had been formed after the accused turned seventeen. These two cases, far-reaching in their own right, were soon eclipsed by *United States v. Russo*,[21] where the court ruled that court-martial jurisdiction could not be premised upon an enlistment obtained with recruiter misconduct. In ruling such enlistments to be void *ab initio* the court relied upon common law contract principles and the public policy against enforcing illegal contracts.[22]

In the aggregate these three cases drastically reduced the ability of the armed forces to try service members accused of a multitude of both military and civilian type offenses. If a service member fraudulently enlisted with the assistance of a recruiter, the enlistment, under what became loosely referred to as the *Russo* rule, was void *ab initio* and could never ripen into a constructive enlistment under *Brown*. It also adversely affected thousands of service members who were serving honorably but had defective enlistments; because of the possibility that such service members could later commit offenses with impunity, many were administratively discharged whenever recruiter misconduct was discovered. Many others, whose defects went undetected, found themselves holding a get-out-of-jail free ticket; because the government bears the burden of establishing jurisdiction,[23] military prosecutors often faced lapses of time and memory in proving that misconduct by the military

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18 23 C.M.A. 142, 48 C.M.R. 758 (1974).

19 23 C.M.A. 162, 48 C.M.R. 778 (1974).

20 The recruiter failed to properly witness completion of the parental consent form. If he had done so the recruit could not have forged his father's signature. *See generally* Grayson, *Recent Developments in Court-Martial Jurisdiction: The Demise of Constructive Enlistment*, 72 MIL. L. REV. 117, 119-21 (1976).

21 1 M.J. 134 (C.M.A. 1975).

22 *Id.* at 137.

23 Runkle v. United States, 122 U.S. 543, 556 (1887); United States v. Barrett, 1 M.J. 74 (C.M.A. 1975).

recruiter did not occur.[24] Ironically, those same hurdles often frustrated the prosecution of recruiters who had fraudulently enlisted unqualified recruits.[25] Once free of military jurisdiction, many military offenders simply avoided prosecution altogether as civilian authorities often lacked the jurisdiction, resources, or the desire to prosecute them. Thus, *Russo* had created a jurisdictional gap.

D. CONGRESSIONAL RESPONSE TO RUSSO: JURISDICTION EXPANDED

As might be expected, the reaction to *Russo* was mixed. The case did not result in the intended salutary effect of reducing recruiter misconduct[26] and it was perceived by many as an ill-conceived and unrealistic bar to trial. Within the next four years the *Russo* rule was judicially refined to extend only to intentional or grossly negligent recruiter actions.[27] Further, although a recruit may have fraudulently entered the armed forces, his enlistment was not in and of itself void, but only voidable[28] when government officials were unaware of the defect.[29]

The controversial enlistment rules were finally aired in the Senate Armed Services Committee in 1978 during investigation of military

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[24] *See, e.g.*, United States v. Loop, 4 M.J. 529, 530 (N.C.M.R. 1977), where the court stated:

> This case illustrates a continuing problem in recruiter misconduct cases. We believe that the recruiter's lack of specific recall, as in this case some two years after the event, is not unusual and to be expected. A recruiter sees innumerable applicants for enlistment as a natural consequence of his job. To expect recall in detail of conversations which take place in routine situations does not comport with reason or experience. The measure of proof of a negative fact which can be mustered and the expenditure of effort in money and manpower to controvert an allegation of recruiter misconduct places a particularly onerous burden on the Government once an issue has been raised by a bald but detailed assertion of an accused seeking to avoid criminal penalties.

Id. at 530.

[25] *Cf.* United States v. Hightower, 5 M.J. 717 (A.C.M.R. 1978) (recruiter convicted for misconduct.)

[26] In United States v. Russo, 1 M.J. 134 (C.M.A. 1975), the court noted that: "[t]he result we reach will have the salutary effect of encouraging recruiters to observe applicable recruiting regulations while also assisting the armed forces in their drive to eliminate fraudulent recruiting practices."

[27] United States v. Valadez, 5 M.J. 470, 474-75 (C.M.A. 1978). And simple negligence by a recruiter would not necessarily estop the prosecution to show a constructive enlistment. United States v. Harrison, 5 M.J. 476, 482 (C.M.A. 1978) (recruiter failed to detect that recruit was underage).

[28] The enlistment could be voided by either the service member (prior to commission of any offenses) or by the government. *See, e.g.*, United States v. Wagner, 5 M.J. 461, 468-69 (C.M.A. 1978).

[29] United States v. Wagner, 5 M.J. 461, 466-68 (C.M.A. 1978); United States v. Lightfoot, 4 M.J. 262, 263 n.3 (C.M.A. 1978). *See generally* Schlueter, *Wagner, Valadez and Harrison: A Definitive Enlistment Trilogy?*, ARMY LAW., Jan. 1979, at 4.

This judicial refinement to *Russo* rested, in part, on the rationale that public policy would not be served by voiding enlistments where the recruiting officials were in good faith and based on the information before them, assumed that the enlistee was qualified.

recruiting problems. The Committee viewed the developing case law with concern and proposed a statutory change to the jurisdiction provisions of the Uniform Code of Military Justice. In promoting the change, the Committee intended to overrule *Russo* and *Brown* and return to the simpler two-pronged test first espoused in *Grimley*. Addressing *Russo* and related doctrines in its report, it stated:

> The Committee strongly believes that these doctrines serve no useful purpose, and severely undermine discipline and command authority. No military member who voluntarily enters the service and serves routinely for a time should be allowed to raise for the first time after committing an offense defects in his or her enlistment, totally escaping punishment for offenses as a result. That policy makes a mockery of the military justice system in the eyes of those who serve in the military services.[30]

These concerns and others were later publicly addressed in hearings before the Military Personnel Subcommittee of the House Armed Services Committee.[31] That committee also agreed that change was needed and in November 1979, article 2, UCMJ was amended to include the following provisions:

> (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.
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> (c) Notwithstanding any other provision of law, a person serving with an armed force who—
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> (1) submitted voluntarily to military authority;
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> (2) met the mental competency and minimum age qualifications of sections 504 and 505 of this title at the time of voluntary submission to military authority;
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> (3) received military pay or allowances; and
>
> (4) performed military duties;
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> 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.[32]

Subsection (b) mirrors the criteria for a valid enlistment laid out in *In re Grimley* and focuses attention on the initial entry into the armed forces. It was expressly intended to overrule *Russo* but was not intended to condone military recruiter misconduct.[33] Subsection (c) reflects the long-

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[30] S. REP. NO. 96-197, 96th Cong., 1st Sess. 121 (1979) [hereinafter cited as SENATE REPORT].

[31] *Amendments to Articles 2 and 36, Uniform Code of Military Justice: Hearings on S. 428 Before the Military Personnel Subcomm. of the House Comm. on Armed Services*, 96th Cong., 1st Sess. (1979).

[32] UCMJ, art. 2(b),(c), 10 U.S.C. § 802(b),(c). The amendment was part of the FY 1980 Defense Authorization Act, Pub. L. No. 96-107, title VIII, § 801(a)(1),(2), 93 Stat. 810 (1979). That Act also contained amendments to article 36 of the UCMJ which were intended to clarify the President's authority to promulgate rules of court-martial procedure.

[33] SENATE REPORT, *supra* note 30, at 122.

recognized doctrine of constructive enlistment and focuses on the subsequent conduct of the service member.[34]

E. JUDICIAL RESPONSE TO THE AMENDMENTS

The full impact of the statutory expansion of personal jurisdiction was softened by an almost simultaneous shift by the Court of Military Appeals. In *United States v. Stone*,[35] decided one month after the congressional overruling of *Russo*, the court sustained personal jurisdiction over a disqualified service member who was enlisted with the active assistance of a recruiter. Chief Judge Fletcher in his lead opinion and accompanying footnotes noted that the *Russo* rule applied only to enlistments where a nonwaivable defect was coupled with intentional recruiter misconduct.[36] Because the disqualification was waivable[37] the enlistment was not void. Judge Cook, the remaining judge,[38] concurred in the result.[39] Neither judge made reference to the actions of Congress. Recently, the Court of Military Appeals again addressed personal jurisdiction questions raised by allegations of intentional recruiter misconduct. The accused in *United States v. Buckingham*[40] had several informal adverse juvenile actions pending against him when he enlisted in the Air Force; his recruiter told him not to note his involvement in those incidents on his application. The court reiterated that "deliberate violation of service regulations in and of itself did not void an enlistment contract for jurisdictional purposes under the *Russo* decision."[41] Hence, even assuming the recruiter's actions were intentional, there was no nonwaivable "significant regulatory impediment to the accused's enlistment."[42] In his concurring opinion, Judge Cook stated that the amendments to article 2, UCMJ controlled disposition of the case:

> [T]he primary question is whether that statutory change forecloses appellate review of the purported error in the standard of proof utilized by the trial judge to reach a conclusion that no recruiter misconduct tainted the

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34 *Id.* at 122-23.

35 8 M.J. 140 (C.M.A. 1979).

36 *Id.* at 141 & n.2.

37 At the time of the accused's enlistment, the pertinent Navy recruiting regulations permitted a waiver of disqualification due to prior use of marijuana. In effect, the *Stone* decision shifts focus from the recruiter's actions to the nature of the disqualification. The illegal acts of the recruiter so strongly condemned in *Russo* bar jurisdiction only where the defect or disqualification is significant.

38 When *Stone* was decided, a vacancy existed on the court. *See* note 45 *infra*.

39 8 M.J. at 142. Judge Cook had earlier indicated personal dissatisfaction with the *Russo* rule. *See* United States v. Torres, 7 M.J. 102, 105-07 (C.M.A. 1979)(Cook, J., concurring).

40 11 M.J. 184 (C.M.A. 1981).

41 *Id.* at 186.

42 *Id.* Here the court could find no evidence that the prior juvenile actions had risen to the level of a judicial finding or disposition. There was therefore no regulatory disqualification. *Id.*

> accused's voluntary enlistment. In my opinion, the congressional clarification of the public policy incidents of a voluntary enlistment demonstrates that the Court's view in *United States v. Russo* of the effect of recruiter misconduct on the enlistment process was impermissibly overbroad. I would, therefore, apply the new provisions of Article 2 to the accused's case and hold that no jurisdictional issue exists for review.[43]

Although the foregoing opinion is the only formal judicial recognition from the Court of Military Appeals of the statutory attempt to overrule *Russo*, all three judges now sitting on the court appeared at the hearings on the amendment:[44] Chief Judge Everett[45] and Judge Cook supported the change; Judge Fletcher did not. He expressed concern that neutralizing the effect of recruiter misconduct on court-martial jurisdiction would perpetuate serious recruiting misconduct.

While the response from the Court of Military Appeals has been sparse, several opinions from the service Courts of Military Review[46] have squarely addressed the effect of the amendments. One panel of the Army Court of Military Review in *United States v. McDonagh*[47] and *United States v. Boone*[48] paid particular attention to the argument that the amendment may be *ex post facto* with regard to enlistments entered, or offenses committed, prior to the effective date of the amendments. Jurisdiction was sustained over both of the accused.

However, the Navy-Marine Corps Court of Military Review in an *en banc* decision in *United States v. Marsh*[49] ruled the amendments *ex post*

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[43] *Id.* at 187 (footnote omitted).

[44] *See* note 31 *supra*.

[45] At the time of his appearance before the House Armed Services Committee, Chief Judge Robinson O. Everett was a professor of law at Duke University and spoke in his capacity as chairman of the A.B.A. Committee on Military law. He was later appointed to the court as chief judge, filling the vacancy left by the departure of Judge Matthew Perry.

[46] When the sentence falls above certain statutory limits, the person who was convicted by a court-martial may find that his case is automatically appealed to one of the courts of military review. *See* UCMJ art. 66, 10 U.S.C. § 866. Other cases may be referred to these courts by one of the judge advocates general. The four intermediate appellate courts (Air Force, Army, Coast Guard, and Navy-Marine Corps) are composed of senior judge advocates who sit in panels of three. Their jurisdictional powers are set out in UCMJ art. 66, 10 U.S.C. § 866. The judges are given fact-finding powers and have the authority to reassess sentences imposed by the courts-martial. Appeals from the decisions of these intermediate courts are made to the Court of Military Appeals which is composed of three civilian judges. *See* UCMJ art. 67, 10 U.S.C. § 867.

[47] 10 M.J. 698 (A.C.M.R. 1981).

[48] 10 M.J. 715 (A.C.M.R. 1981). This decision contains a good discussion of the voluntariness of an enlistment entered as an alternative to a possible civilian jail sentence. In the court's opinion that situation is not per se involuntary. *Id.* at 720-21. *Cf.* United States v. Catlow, 23 C.M.A. 142, 49 C.M.R. 758 (1974) (accused was given choice of joining the Army for 3 years or spending 5 years in jail).

[49] 11 M.J. 698 (N.M.C.M.R. 1981). The Navy Judge Advocate General has requested review by the Court of Military Appeals of this case under UCMJ art. 67(b)(2). 11 M.J. 404 (C.M.A. 1981) (misc. docket).

facto as to offenses committed prior to the amendments. In reaching that conclusion the court noted that although the statute itself was silent regarding retrospective application it was apparently the intent of Congress to apply the amendments retrospectively. And even though Congress simply intended to clarify and reaffirm pre-*Russo* law, the statutory change, in the court's opinion, effected a nullification of a "defense" and would be *ex post facto* for offenses committed before Congress acted.[50] In a lone dissent Senior Judge Baum stated in part:

> I see these amendments as merely restating expressly what had always been the law. By reaffirming the principles of *In re Grimley*, 137 U.S. 147 (1890), the United States Congress created no new rules; it simply underscored the continuity in the law from *Grimley* to the present. By its action, the Congress of the United States rejected the pronouncement of *United States v. Russo*, 1 MJ 134 (CMA-1975), for what it was, an attempt at judicial legislation beyond the authority of the Court of Military Appeals and clearly in conflict with the legislative intent of Congress. The military services suffered the adverse effects of that ill-advised opinion for four years, with literally thousands of military offenders escaping prosecution and conviction. To continue this charade for what may be an unlimited indefinite period, permitting countless past offenders—both absentees and common law felons—to periodically reappeal [*sic*] and assert the renounced doctrine of *Russo* and thereby avoid accountability for criminal acts is, in my view, unthinkable.[51]

He concluded by urging the Court of Military Appeals to expressly overrule *Russo* if it determined that the amendments to article 2 were *ex post facto*.[52]

F. IMPACT OF THE AMENDMENTS ON PERSONAL JURISDICTION

Do the amendments to article 2 actually expand court-martial jurisdiction? In effect, yes. Although they do not broaden the basic categories of individuals who are subject to military jurisdiction, they do expand the jurisdictional reach within one category—enlistees. To that extent, the statutory change permits trial by court-martial over a large number of individuals who, under *Russo*, would not have been subject to military jurisdiction.

Notwithstanding this change, the prosecution must still establish jurisdiction over the accused by a preponderance of the evidence.[53] Where military status is an underlying element of the offense,[54] the prosecution must be prepared to show jurisdiction, that is, status, beyond a

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[50] 11 M.J. at 710-11.

[51] *Id.* at 711-12.

[52] *Id.* at 712.

[53] *See, e.g.*, United States v. Jessie, 5 M.J. 573, 576 (A.C.M.R.), *petition denied*, 5 M.J. 300 (C.M.A. 1978).

[54] *E.g.*, desertion, which is proscribed by UCMJ, art. 85, 10 U.S.C. § 885.

reasonable doubt.[55] The recent legislative changes will, however, remove a number of equitable, public policy based hurdles such as the *Russo* rule. In that respect, the prosecution's burden may be met, even though the initial entry was defective, by showing a change of status through a constructive enlistment.[56]

The full constitutional breadth of the amendments to article 2 will be measured by attempts to exercise court-martial jurisdiction over individuals who are mere interlopers in military service. In theory, a person masquerading as a service member could meet the criteria of the constructive enlistment in article 2(c) without ever going through the formal motion of enlisting.[57] However, Congress intended that the amendments would not provide jurisdiction over civilians.[58]

The amendments do appear to be having the desired effect of reducing the litigation of questionable enlistments to the essential elements laid out in the new article 2. Because recruiter misconduct is now a neutral factor in determining personal jurisdiction, attention will focus on the primary issues of capacity to change one's status and the voluntariness of that change.

G. TERMINATION OF PERSONAL JURISDICTION: THE DISCHARGE

Military courts also have given renewed attention to the rules governing the termination of jurisdiction over a service member who has been discharged from active duty. There are some subtle indicators foretelling expansion of personal jurisdiction in two specific areas: First, when a discharge is effective and second, circumstances under which

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55 United States v. Bailey, 6 M.J. 967, 968 (N.C.M.R. 1979) (en banc).

56 UCMJ, art. 2(c), 10 U.S.C. § 802(c). *See* United States v. Boone, 10 M.J. 715, 721-22 (A.C.M.R. 1981). The practical application of the amendments is discussed in detail in Schlueter, *Personal Jurisdiction Under Article 2, UCMJ: Whither Russo, Catlow, and Brown?*, ARMY LAW., Dec. 1979, at 3.

57 There is support for this argument in the SENATE REPORT, *supra* note 30, at 122-23:

> [Subsection (c)] is intended only to reach those persons whose intent it is to perform as members of the active armed forces and who met the four statutory requirements. It thus overrules such cases as *United States v. King*, 11 U.S.C.M.A. 19, 28 C.M.R. 243 (1959). An individual comes within new subsection (c) whenever he meets the requisite four-part test regardless of other regulatory or statutory disqualification.

The accused in *King*, after receiving an adverse administrative discharge donned his uniform, forged orders, and served several months before his masquerade was discovered. His court-martial for various offenses was voided by the Court of Military Appeals, which held that the accused had not formally attempted to enlist. 11 C.M.A. at 26, 28 C.M.R. at 250. There was therefore no court-martial jurisdiction over an interloper. Congress apparently intended to change that result without extending the jurisdictional reach to include civilians. *See* note 58 *infra*. Apparently, Congress felt that a clear line could be drawn where the "interloper" manifested every intent to act and to be treated as a service member. At that point, the individual was no longer a "civilian" for purposes of military discipline and would be subject to military jurisdiction.

58 SENATE REPORT, *supra* note 30, at 122.

jurisdiction may be exercised over a service member for offenses committed during a prior enlistment.[59]

As a general rule a discharge terminates personal jurisdiction. Mere expiration of the term of the enlistment does not.[60] For example, ongoing criminal investigations will justify involuntary continuation of the individual's status as a member of the armed forces.[61] In any case, the individual may consent to a continued military status.[62] To minimize confusion and provide a clear rule, the Court of Military Appeals held in *United States v. Scott*[63] that a discharge is effective, for purposes of jurisdiction, when it is actually delivered. Notwithstanding this rule, the regulations of the armed forces may provide that the discharge is not effective until midnight of the day the discharge is delivered.[64]

Recently, however, the Air Force Court of Military Review indicated in dicta in *United States v. Barbeau*[65] that a change in the statutory provision governing issuance of discharges[66] mandated that the effective time of the discharge was that time stated in the regulations.[67] This interpretation would, in many cases, expand personal jurisdiction by a matter of hours. In some instances that could be crucial where, for example, the service member has received his discharge and then shortly thereafter commits an offense or the government learns for the first time

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59 United States v. Justice, 2 M.J. 344 (A.F.C.M.R. 1976), *aff'd on rehearing*, 2 M.J. 623 (A.F.C.M.R. 1977). *See generally* Zeigler, *The Termination of Jurisdiction Over the Person and the Offense*, 10 MIL. L. REV. 139 (1960).

60 United States v. Hutchins, 4 M.J. 190, 191 (C.M.A. 1978).

61 *See, e.g.*, United States v. Beard, 7 M.J. 452, 453 (C.M.A. 1979); United States v. Wheeley, 6 M.J. 220, 222 (C.M.A. 1979).

62 United States v. Bowman, 9 M.J. 676 (A.C.M.R. 1980), *aff'd mem.*, 9 M.J. 397 (1980) (consented to continued status while German investigation pending); United States v. Hadick, 18 C.M.A. 533, 40 C.M.R. 245 (1969) (medical treatment).

63 11 C.M.A. 646, 29 C.M.R. 462 (1960).

64 *See, e.g.*, Personnel Separation—Enlisted Personnel, Army Reg. 635-200, ¶ 2-12 (C3, 1980). *Cf.* United States v. Smith, 4 M.J. 265 (C.M.A. 1978) (reservist's tour of active duty ended at midnight of the effective date with self-executing orders).

65 9 M.J. 569 (A.F.C.M.R. 1980), *petition denied*, 9 M.J. 277 (C.M.A. 1980).

66 10 U.S.C. § 8811 (1956) provided:

> (a) *A discharge certificate shall be given to each lawfully inducted or enlisted member of the Air Force upon his discharge.* (b) No enlisted member of the Air Force may be discharged before his term of service expires, except—(1) as prescribed by the Secretary of the Air Force; (2) by sentence of a general or special court-martial; or (3) as otherwise provided by law.

Id. [emphasis added].

This was later replaced by 10 U.S.C. § 1169 (1976) which provides: "No regular enlisted member of an armed force may be discharged before his term of service expires, except—(1) as prescribed by the Secretary concerned; (2) by sentence of a general or special court martial [sic]; or (3) as otherwise provided by law." *Id.* Because the statutory language referring to "delivery" of the discharge was removed, the Air Force Court concluded that the support for the rule in *Scott* no longer existed. 9 M.J. at 574.

67 9 M.J. at 524. Air Force Manual 39-12, paragraph 1-13c, specified that the effective time of the discharge was 2400 hours (midnight) on the date of the discharge.

that the service member committed an offense before his discharge. To date, the judicial momentum has not swung in favor of the dicta presented in *Barbeau*, but it is safe to conclude that many military leaders and members of Congress would endorse its adoption as a modification of *Scott*. Because the military is administratively responsible for service members until their discharge is effective, it seems fair to expect that they could be held accountable for their misdeeds during that same period.[68]

The second area of potential expansion centers on the military's authority to try an individual, on active duty, for offenses committed prior to discharge from an earlier enlistment. As noted earlier, the general rule is that a discharge terminates jurisdiction.[69] But Congress has provided that certain classes of individuals will continue to be subject to court-martial notwithstanding their discharge. For example, as noted earlier, military retirees may be court-martialed.[70] Nor will a discharge bar personal jurisdiction over individuals who fall within the provisions of article 3(a), UCMJ, which states:

> Subject to [statutes of limitation], no person charged with having committed, while in a status in which he was subject to this chapter, an offense against this chapter, punishable by confinement for five years or more and for which the person cannot be tried in the courts of the United States or of a State, a Territory, or the District of Columbia, may be relieved from amenability to trial by court-martial by reason of the termination of that status.[71]

This provision is unconstitutional insofar as it purports to provide jurisdiction over civilians,[72] but it has been repeatedly sustained as to service members on active duty at the time of trial.[73]

Following years of debate over whether article 3(a) was called into question even where there was no actual break in military status (for instance where the service member reenlisted immediately following his discharge) the Court of Military Appeals laid out a straightforward rule.

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68 A related issue was apparently raised in the hearings on the amendments to article 2 of the UCMJ. Note that even where the military has determined to administratively discharge a service member, he will remain subject to the UCMJ until his service has been terminated in accordance with applicable regulations. *See* note 32 & accompanying text *supra*.

69 *See* text accompanying note 60 *supra*.

70 UCMJ, art. 2(a)(4),(5), 10 U.S.C. § 802(a)(4),(5). *See generally* United States v. Hooper, 9 C.M.A. 637, 26 C.M.R. 417 (1958). As a practical matter, exercise of court-martial jurisdiction over retirees is rare. As a matter of policy the Army will not try retired personnel unless extraordinary circumstances link them with the military establishment or they are involved in conduct inimical to the nation's welfare. JAGJ 1956/4914 (June 20, 1956); 7 DIG.OPS.JAG § 45.8 at 108-09 (1957-58).

71 10 U.S.C. § 803(a).

72 *See* Toth v. Quarles, 350 U.S. 11 (1955).

73 *See, e.g.*, United States v. Gladue, 4 M.J. 1, 3 (C.M.A. 1977).

In *United States v. Ginyard*,[74] the court stated that a discharge, no matter what the circumstances or purpose, precluded jurisdiction over all offenses not saved by article 3(a).

This simple rule has often been criticized as an unjustified grant of immunity to service members who reenlisted prior to discovery of their offenses.[75] Simply reenlisting and receiving a discharge for the prior period of military service effectively saves an individual from prosecution of all but serious military offenses,[76] and offenses committed overseas beyond the reach of federal, state and territorial courts.[77] By modifying the *Ginyard* rule to exclude from the operation of article 3(a) those discharges given for purely administrative convenience, a court could expand personal jurisdiction. The Court of Military Appeals is currently considering that argument in several cases[78] certified to it by the Army's Judge Advocate General.[79]

III. SUBJECT MATTER JURISDICTION

The second area of jurisdictional shift has centered on the scope of courts-martial subject matter jurisdiction. A variety of offenses are set out in the punitive articles of the Uniform Code of Military Justice;[80] those articles include both military and common law crimes.[81] There is no "automatic" subject matter jurisdiction, however, even where civilian authorities decline to prosecute. The prosecution must be prepared to show that the offenses charged are "service connected"—a requirement first laid out in *O'Callahan v. Parker*.[82]

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74 16 C.M.A. 512, 516, 37 C.M.R. 132, 136 (1967).

75 *See generally* Woodruff, *The Rule in Ginyard's Case—Congressional Intent or Judicial Field Expedient?*, 21 A.F.L. REV. 285 (1979).

76 *E.g.*, desertion (with intent to avoid hazardous duty), UCMJ art. 85, 10 U.S.C. 885; willful disobedience of lawful order of superior officer, UCMJ, art. 90, 10 U.S.C. § 890. The military's maximum punishments are set out in Chapter 25 of the UNITED STATES, MANUAL FOR COURTS-MARTIAL (rev. ed. 1969).

77 *See, e.g.*, United States v. Gladue, 4 M.J. 1 (C.M.A. 1977) (overseas heroin offense and continuing conspiracy were both triable in new period of enlistment).

78 United States v. Clardy, 10 M.J. 121 (C.M.A. 1980) (misc. docket); United States v. Calhoun, 10 M.J. 188 (C.M.A. 1980) (misc. docket).

79 Under UCMJ, art. 67(b)(2), 10 U.S.C. § 867(b)(2), the Judge Advocate General may send cases to the Court of Military Appeals for further appellate review; it is in effect a government appeal from a decision by the service appellate courts.

80 UCMJ, arts. 77-134, 10 U.S.C. §§ 877-934.

81 Offenses not listed in the UCMJ may be tried under the general, and controversial, articles 133 and 134, 10 U.S.C. §§ 933, 934.

82 395 U.S. 258 (1969).

A. THE O'CALLAHAN-RELFORD SERVICE CONNECTION REQUIREMENT

Prior to 1969 jurisdictional issues in courts-martial focused on the question of the accused's status. In decisions limiting court-martial jurisdiction the Supreme Court repeatedly cut back on the authority of courts-martial to try civilians and discharged service members.[83] At the same time it endorsed the view that the military society was a legitimately separate system. Thus, where the military was dealing with its own problems or personnel the Court traditionally refrained from questioning the military's jurisdictional reach.

But that changed with the Court's decision in *O'Callahan v. Parker*. Citing historical precedent for limiting court-martial jurisdiction over "civilian" offenses and the ineptness of courts-martial to deal "with the nice subleties of constitutional law,"[84] the Court stated that court-martial jurisdiction would extend only to offenses which were "service connected."[85] This new and substantial limitation on military jurisdiction was designed in part to secure for members of the military the constitutional right to indictment by grand jury and trial by jury in those cases not arising in "the land and naval forces."[86]

The *O'Callahan* rule was refined two years later in *Relford v. Commandant*,[87] where the Court ruled that subject matter jurisdiction existed over a service member who had been court-martialed for kidnapping and raping two women on a military reservation. In distinguishing *O'Callahan* the Court set out a number of factors to be applied in measuring whether jurisdiction existed.[88] Missing from the majority's opinion was the concern expressed in *O'Callahan* that military courts could not adequately deal with constitutional issues.

The Court was presented with further opportunity to clarify the

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83 *See* notes 11 and 72 & accompanying text *supra*.

84 395 U.S. at 265.

85 *Id.* at 272.

86 395 U.S. at 262. The fifth amendment expressly exempts "cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger" from its indictment and trial by jury provisions. U.S. CONST. amend. V. *See* 395 U.S. at 261.

87 401 U.S. 355 (1971). In footnotes to its opinion the Court set out the numerous cases and scholarly comments generated by *O'Callahan*.

88 The Court, in an effort to isolate a workable definition of "service connection," listed a total of 21 factors. The first 12 are the most commonly recognized:

O'Callahan ruling in *Schlesinger v. Councilman*,[89] where the accused sought federal intervention in his court-martial for various off-post drug offenses. The Court declined to enjoin the military proceedings, noting that the accused had not exhausted his remedies and that the federal rule barring equitable intervention also applied to military courts.[90] In so ruling, the Court did not directly reach the question of service connection but noted that:

> [The issue of service connection] turns in major part on gauging the im-

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1. The serviceman's proper absence from the base.
2. The crime's commission away from the base.
3. Its commission at a place not under military control.
4. Its commission within our territorial limits and not in an occupied zone of a foreign country.
5. Its commission in peacetime and its being unrelated to authority stemming from the war power.
6. The absence of any connection between the defendant's military duties and the crime.
7. The victim's not being engaged in the performance of any duty relating to the military.
8. The presence and availability of a civilian court in which the case can be prosecuted.
9. The absence of any flouting of military authority.
10. The absence of any threat to a military post.
11. The absence of any violation of military property.

One might add still another factor implicit in the others:

12. The offense's being among those traditionally prosecuted in civilian courts.

401 U.S. at 362-63. The remaining nine are general considerations in measuring service connection:

> (a) The essential and obvious interest of the military in the security of persons and of property on the military enclave . . . . (b) The responsibility of the military commander for maintenance of order in his command and his authority to maintain that order. See Cafeteria & Restaurant Workers Union v. McElroy, 367 U.S. 886 (1961). . . . (c) The impact and adverse effect that a crime committed against a person or property on a military base, thus violating the base's very security, has upon morale, discipline, reputation and integrity of the base itself, upon its personnel and upon the military operation and the military mission. (d) The conviction that Art. I, § 8, cl. 14, vesting in the Congress the power "To make Rules for the Government and Regulation of the land and naval Forces," means, in appropriate areas beyond the purely military offense, more than the mere power to arrest a serviceman offender and turn him over to the civil authorities. The term "Regulation" itself implies, for those appropriate cases, the power to try and punish. (e) The distinct possibility that civil courts, particularly nonfederal courts, will have less than complete interest, concern, and capacity for all the cases that vindicate the military's disciplinary authority within its own community. . . . (f) The very positive implication in *O'Callahan* itself, arising from its emphasis on the absence of service-connected elements there, that the presence of factors such as geographical and military relationships have important contrary significance. (g) The recognition in *O'Callahan* that, historically, a crime against the person of one associated with the post was subject even to the General Article. . . . (h) The misreading and undue restriction of *O'Callahan* if it were interpreted as confining the court-martial to the purely military offenses that have no counterpart in nonmilitary criminal law. (i) Our inability appropriately and meaningfully to draw any line between a post's strictly military areas and its nonmilitary areas, or between a serviceman-defendant's on-duty and off-duty activities and hours on the post.

401 U.S. at 367-69 (footnote omitted).

89 420 U.S. 738 (1975).

90 *Id.* at 754-58.

> pact of an offense on military discipline and effectiveness, on determining whether the military interest in deterring the offense is distinct from and greater than that of civilian society, and on whether the distinct military interest can be vindicated adequately in civilian courts. These are matters of judgment that often will turn on the precise set of facts in which the offense has occurred. See *Relford v. U.S. Disciplinary Commandant*, 401 U.S. 355 (1971). *More importantly, they are matters as to which the expertise of military courts is singularly relevant, and their judgments indispensable to inform any eventual review in Art. III courts*.[91]

Thus, the specific boundaries of subject matter jurisdiction were to be drawn by the military courts—not the Supreme Court.

B. MILITARY APPLICATION OF O'CALLAHAN-RELFORD: JURISDICTION RESTRICTED

The military courts promptly, but cautiously applied *o'callahan* and then *relford*. From those early decisions emerged several general and easily applied principles for determining whether service connection existed. For example, crimes committed on post,[92] or off-post offenses involving a service member as a victim,[93] or offenses involving drugs[94] were service connected. Likewise, the *O'Callahan* rule did not, according to the military courts, apply to petty offenses[95] or offenses committed overseas.[96] The rationale supporting these exceptions to the service connection requirement rested on the proposition that *O'Callahan* would not apply to offenses for which there would be no right to indictment by grand jury or trial by jury.[97]

These principles remained fairly settled until 1976 when the Court of Military Appeals, in a series of decisions, severely limited subject mat-

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91 420 U.S. at 760 (footnote omitted; emphasis added).

92 United States v. Paxiao, 18 C.M.A. 608, 40 C.M.R. 320 (1969). This principle is sometimes referred to as the "on-post" exception to *O'Callahan*. *See* Cooper, *O'Callahan Revisited: Severing the Service Connection*, 76 MIL. L. REV. 165, 168-71 (1977).

93 United States v. Everson, 19 C.M.A. 70, 41 C.M.R. 70 (1969). *See generally* Rice, *O'Callahan v. Parker: Court-Martial Jurisdiction, "Service Connection," Confusion, and the Serviceman*, 51 MIL. L. REV. 41 (1971); Zillman, *Recent Developments*—Relford v. Commandant: *On-Post Offenses and Military Jurisdiction*, 52 MIL. L. REV. 169 (1971).

94 United States v. Beeker, 18 C.M.A. 563, 40 C.M.R. 275 (1969) (drug offenses are per se service connected).

95 United States v. Wentzel, 50 C.M.R. 690 (A.F.C.M.R. 1975) (petty civilian offense); United States v. Sharkey, 19 C.M.A. 26, 41 C.M.R. 26 (1969) (petty military offense). In theory, the government could side-step *O'Callahan* by trying an otherwise major offense at either a summary or special court-martial where the jurisdictional limits on confinement are 1 month and 6 months respectively. The Court of Military Appeals, however, has rejected that argument where the special court-martial was authorized to impose a punitive discharge. United States v. Smith, 9 M.J. 359, 360 n.1 (C.M.A. 1980).

96 *See, e.g.*, United States v. Keaton, 19 C.M.A. 64, 41 C.M.R. 64 (1969); United States v. Goldman, 18 C.M.A. 516, 40 C.M.R. 228 (1969).

97 *See* O'Callahan v. Parker, 395 U.S. at 272-73.

ter jurisdiction. In *United States v. Hedlund*,[98] the court concluded that the military status of the victim was not determinative and in *United States v. McCarthy*,[99] the special status of drug offenses was struck down. According to *United States v. Lazzaro*,[100] an overseas offense was not necessarily exempt from the *O'Callahan* requirement; the court noted that where an offense is also violative of a penal statute with extraterritorial effect, the prosecution must establish service connection.[101] In other decisions the court noted that service connection would not necessarily exist where portions of the offense were committed on a military installation,[102] and that offenses completed within feet of the installation were to be treated as off-post offenses.[103] Finally, in order to better resolve the factual issues surrounding determination of service connection at the trial and appellate levels, the court in *United States v. Alef*[104] mandated that the *Relford* factors relied upon by the prosecution would have to be presented as a part of the sworn pleadings. Throughout these opinions the Court of Military Appeals emphasized an ad hoc application of the *Relford* factors[105] and read *Schlesinger v. Councilman*[106] as a mandate to abandon any simplistic formulas for determining service connection.

The highwater mark of these narrow readings of the Supreme Court's opinions was reached in *United States v. Conn*.[107] There, the accused, a Military Police lieutenant, openly used drugs in the presence of his enlisted subordinates at an off-post apartment. Rejecting a variety

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98 2 M.J. 11, 14 (C.M.A. 1976).

99 2 M.J. 26, 29 (C.M.A. 1976). *See generally* Hodgson, *Limiting Court-Martial Jurisdiction: A Continuing Process*, 20 A.F.L. REV. 256, 281-84 (1978).

100 2 M.J. 76 (C.M.A. 1976) (per curiam) (overseas larceny offense was triable in federal district court; therefore, showing of service connection was required.). *See also* United States v. Black, 1 M.J. 340 (C.M.A. 1976) (overseas exception must be narrowly drawn).

101 2 M.J. at 76. For an excellent discussion of extraterritorial application and its effect on court-martial jurisdiction, see Horbaly & Mullin, *Extraterritorial Jurisdiction and Its Effect on the Administration of Military Criminal Justice Overseas*, 71 MIL. L. REV. 1 (1976). The same result might occur where an American court sitting overseas has jurisdiction over the service member and his offense. For example, in United States v. Tiede, 86 F.R.D. 227 (1979), U.S. district court judge Stern issued an opinion in his appointed capacity as the United States Court for Berlin stating that persons tried by that court were entitled to jury trial. *Id.* at 260. To date, the Court of Military Appeals has rejected arguments that service members court-martialed in Berlin are therefore entitled to the benefits of *O'Callahan*. United States v. Sweeney, 10 M.J. 292 (C.M.A. 1981) (order denying petition for review).

102 United States v. Tucker, 1 M.J. 463 (C.M.A. 1976) (per curiam).

103 United States v. Klink, 5 M.J. 404 (C.M.A. 1978) (per curiam) (drug sales occurred thirty feet off post and on a tract of land literally surrounded by a military installation).

104 3 M.J. 414, 419 (C.M.A. 1977). *See generally* Cooper, *United States v. Alef: Punishing the Pleader for Sins of Subject Matter Jurisdiction*, ARMY LAW., Nov. 1977, at 1.

105 *See* note 88 & accompanying text *supra*.

106 420 U.S. 738 (1975).

107 6 M.J. 351 (C.M.A. 1979).

of government arguments, the court declined to find any service connection. In many respects this decision represented rote application of the *Relford* factors without careful consideration of the language in *Schlesinger*, which would have required the court to address the clearly adverse impact of this officer's criminal behavior on his unit's discipline. One of the most controversial aspects of the service connection rule has been its effect on off-post drug offenses. Thus, the combination of an offense involving off-post use of drugs by an officer obligated not only to follow the law but also to enforce it, was a hard judicial pill to swallow. Rightly or wrongly, the *Conn* decision provided one final stir to the confusion and frustration of military commanders, prosecutors and law enforcement personnel.

A series of cases evidencing subtle judicial drift followed *Conn*. While continuing to cite an ad hoc approach to *Relford*, the Court of Military Appeals found service connection in a series of drug cases where the actual use, transfer, or sale had occurred off post. If the "contract of sale" had commenced on post,[108] or if the drug seller knew the contraband would be used by other service members,[109] service connection would exist. In other cases the court, in slightly tortured reasoning, found service connection in larceny offenses "completed" on a military installation.[110] The court in effect had returned to a simpler approach to the *O'Callahan* rule—a result it had sought to avoid some four years earlier when it had routinely rejected simplistic formulas in determining service connection.

C. UNITED STATES V. TROTTIER: JURISDICTION EXPANDED

The military's apparent readoption of more simplistic application of *O'Callahan* took a giant step forward in *United States v. Trottier*.[111] The accused was court-martialed for various off-post drug offenses. Although the Court of Military Appeals could have relied on earlier decisions and concluded that service connection existed on the grounds that the accused knew the drugs would be introduced into a military installation,[112] the court went much further.[113] Chief Judge Everett, writing the lead opinion, presented a thorough review of the service connection requirement as it applied to drug offenses, and concluded that the time

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108 United States v. Strangstalien, 7 M.J. 225 (C.M.A. 1979); United States v. Hardin, 7 M.J. 399 (C.M.A. 1979).

109 United States v. Chambers, 7 M.J. 24 (C.M.A. 1979).

110 United States v. Seivers, 8 M.J. 63 (C.M.A. 1979); United States v. Escobar, 7 M.J. 197 (C.M.A. 1979).

111 9 M.J. 337 (C.M.A. 1980).

112 *See* note 109 & accompanying text *supra*.

113 The historical appellate background of the *Trottier* case is set out in Mounts, *Going For It: The Government's Case in United States v. Trottier*, THE REP., Feb. 1981, at 1.

was ripe for reconsideration of earlier precedents which had rejected the arguments that jurisdiction be recognized in certain classes of cases:

> Accordingly, while the jurisdictional test of service connection may remain firm, its application must vary to take account of changing conditions in the military society. Indeed, the Supreme Court's enumeration in *Relford* of myriad factors and considerations relevant to service connection seems intended to promote flexible application of the concept, so that changing conditions can be responded to.[114]

Citing congressional and judicial authorities in support of the conclusion that drug abuse among service members is a serious problem, the court reviewed the adverse effect of drugs on military discipline and concluded that:

> when we reflect on the broad scope of the war powers, the realistic manner in which the Supreme Court has allowed Congress to exercise power over commerce, and the flexibility which the Supreme Court intended for the concept of service connection so that, with the aid of experience, there could be a suitable response to changing conditions that affect the military society, we come to the conclusion that almost every involvement of service personnel with the commerce in drugs is "service connected."[115]

This does not mean that all drug offenses are per se service connected. Nonetheless, the court observed in a footnote that only under "unusual" circumstances would drug abuse not have "a major and direct untoward impact on the military."[116]

It is also important to note that the court in *Trottier* did not abandon its ad hoc application of *Relford*. It did state, however, that the vast majority of drug offenses will fit within several of the *Relford* criteria. The court specifically referred to criterion five (relation of war powers and control of drugs), criterion six (connection between military duties and drug abuse), criterion eight (negligible interest by civilian prosecutors), and criterion ten (drug abuse as threat to military post).[117] Additionally, the court found support in favor of the nine additional considerations cited by the court in *Relford*[118] and concluded:

> We are now entirely persuaded that exercising "the least possible power adequate to the end proposed," it is necessary and proper in today's world that court-martial jurisdiction over most drug offenses be invoked as a proper exercise of the war powers. Nothing short of such exercise, we believe, will permit our nation's war machine to perform its constitutional duty to fight—and be fully prepared to fight—to protect this country's national interests. In fact, anything short of such exercise would critically

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114 9 M.J. at 345.

115 *Id.* at 350 (footnote omitted).

116 *Id.* at 350 n.28. *See also* United States v. Smith, 9 M.J. 359, 360 (C.M.A. 1980); United States v. Norman, 9 M.J. 355, 356 (C.M.A. 1980).

117 9 M.J. at 351-52. *See* note 88 *supra*.

118 *Id.* at 352 (footnotes omitted).

detract from this capability.[119]

In short, the Court of Military Appeals examined the delicate and age-old jurisdictional balance and tipped the scales in favor of a disciplined armed force.

But did the Court of Military Appeals in *Trottier* actually expand court-martial jurisdiction? In the past, the military courts narrowly construed the *Relford* criteria without full regard for the *Schlesinger* guidance to guage the impact on military discipline. Now, at least in drug offenses, the court will be more likely to consider military discipline and take a flexible approach in applying more of the factors noted in *Relford*. The service appellate courts have generally tended to favor service jurisdiction over drug offenses.[120] *Trottier* will simply endorse that trend.[121] Although *Trottier* addressed only the issue of jurisdiction over drug offenses, much of its underpinning is equally applicable to other off-post offenses. For example, the court will likely consider the reluctance of civilian jurisdictions to prosecute service members—a factor virtually ignored in the past.[122]

Whatever effect *Trottier* may have on easing the military prosecutor's burden of showing subject matter jurisdiction, it is unlikely to lead to any rigid formulas of determining service connection. Because the fluid factors of *Relford* remain, there will be difficulty in gauging whether any set of circumstances will support jurisdiction. One point seems clear: the military courts, both trial and appellate, will determine whether the facts presented support subject matter jurisdiction.

IV. CONCLUSION

The current movement toward expansion of court-martial jurisdic-

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119 *Id.*

120 *See generally* Cooper, *supra* note 92, at 175-82.

121 *See, e.g.*, United States v. Brace, 11 M.J. 794 (A.F.C.M.R. 1981) (jurisdiction existed over off-base use of marijuana at a national park, 275 miles from base, while accused was on leave). *Cf.* United States v. Barton, 11 M.J. 621 (C.G.C.M.R. 1981), where the court could find no substantial evidence in the record to support service connection over simple off-post possession of marijuana and amphetamines. Ironically, the case was originally tried in 1975 when the per se rule governing drug offenses was still in effect. *See* note 92 *supra*.

122 *See, e.g.*, United States v. McCarthy, 2 M.J. 26, 29 (C.M.A. 1976) (per curiam). In *McCarthy* the accused was charged with selling three pounds of marijuana to a fellow soldier just outside the gate of Fort Campbell, Kentucky. Although the court found the military's interest in prosecuting the case to be overriding of the civilian community's interest, it stated that a civilian community's hands-off approach was insufficient in itself to trigger subject matter jurisdiction. Concurring in the result, Judge Cook pointed out that at the time of the offense, possession of marijuana for personal use was punishable, under Kentucky law, by confinement in a county jail for not more than 90 days and by a fine not in excess of $250.00. He further stated that the fact that civilian prosecutors might have less than complete interest, concern and capacity for pursuing violations of controlled substances statutes resulted in a tendency to foster disregard for similar military prohibitions. 2 M.J. at 30-31.

tion includes a mixture of both dramatic and subtle changes. In the aggregate, this recent expansion does not mark a wholesale abandonment of the principles which have for years restricted court-martial jurisdiction. For example, the requirement of "status" for personal jurisdiction is still viable, as is the *O'Callahan* service connection requirement. However, the extent to which Congress and the courts will stretch these flexible boundaries is not yet clear; we can surmise that the boundaries will continue to fluctuate and that the debate will continue on the propriety of those shifts.

It is important to note that the recent expansion of jurisdiction does not inevitably lead to overreach by the military into civilian affairs. What these jurisdictional changes do signal is the option of pursuing military prosecution where an off-post offense impacts directly on the military community or where a fraudulent enlistee has voluntarily donned the uniform and accepted the consequences of his change of status. Thus, the current state of court-martial jurisdiction seems entirely consistent with the Supreme Court's interpretation of Congress' constitutional mandate to govern the armed forces.

Identifying the areas of jurisdictional expansion is not as difficult as isolating the reasons for the changes. Recent changes in the composition of the Court of Military Appeals,[123] and a favorable national attitude toward a disciplined armed force have certainly smoothed the paths of expansion. Underlying the changes, however, is a subtle growth in the confidence of the military justice. The system which tried Sergeant O'Callahan in 1956 no longer exists.[124] In many respects the procedural and substantive rights now available to a service member equal or exceed those enjoyed by civilian defendants.[125] Simply put, the majority

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123 The current chief judge, Robinson O. Everett, seems to favor broader jurisdictional powers and has repeatedly expressed trust in the ability of the military justice system to protect a service member's constitutional rights. *See, e.g.*, Everett, *Some Comments on the Civilization of Military Justice*, ARMY LAW., Sept. 1980, at 1.

124 The Uniform Code of Military Justice underwent major revision in the Military Justice Act of 1968, Pub. L. No. 90-632, 82 Stat. 1335 (1968).

125 *See generally* Cook, *Courts-Martial: The Third System in American Criminal Law*, 1978 S. ILL. U.L.J. 1 (1978); Moyer, *Procedural Rights of the Military Accused: Advantages Over a Civilian Defendant*, 22 ME. L. REV. 105 (1970). For example, the military accused is generally entitled to extremely broad discovery rights, *see* MOYER, JUSTICE AND THE MILITARY § 2.440; worldwide production of witnesses, *see* U.C.M.J. art. 46, 10 U.S.C. § 846; United States v. Daniels, 48 C.M.R. 655 (C.M.A. 1974); military counsel if reasonably available, U.C.M.J., art. 38 (b), 10 U.S.C. § 838(b); United States v. Kelker, 4 M.J. 323 (C.M.A. 1978). At pretrial investigations, conducted prior to general courts-martial, the accused is present, is represented by counsel, is permitted to examine the evidence against him, and is permitted to present matters in defense. U.C.M.J. art. 32, 10 U.S.C. § 832. Interestingly, the Supreme Court in Gosa v. Mayden, 413 U.S. 665, 681 (1973), recognized that the military's pretrial investigations provided an accused with more protection than was available in the indictment process.

Military judges (lawyers) preside at courts-martial. U.C.M.J. art. 26, 10 U.S.C. § 826,

position in *O'Callahan*, that military courts are inept in dealing with the subtleties of constitutional law, is now a minority view. The current majority view toward the administration of military justice—and implicitly, its reasonable jurisdictional reach—is expressed in Justice Powell's opinion in *Schlesinger v. Councilman*.[126] Writing for the majority he stated:

> [I]mplicit in the congressional scheme embodied in the Code is the view that the military court system generally is adequate to and responsibly will perform its task. We think this congressional judgment must be respected and that it must be assumed that the military court system will vindicate servicemen's constitutional rights.[127]

It seems, then, that in determining whether court-martial jurisdiction is restricted to the narrowest limits absolutely essential to maintaining discipline, congressional action and military judicial interpretations will carry great weight.

and apply procedural and evidentiary rules similar in many respects to those employed in federal criminal practice. In 1980, the military adopted almost verbatim the Federal Rules of Evidence. *See* 8 M.J. XLVII. *See generally* S. SALTZBURG, L. SCHINASI & D. SCHLUETER, MILITARY RULES OF EVIDENCE MANUAL (1981).

126 420 U.S. 738 (1975).

127 *Id.* at 758. However, in dissent, Justice Brennan noted that "[i]t is virtually hornbook law that 'courts-martial as an institution are singularly inept in dealing with the nice subtleties of constitutional law.'" *Id.* at 765.