case it is discretionary with the convening authority whether he will forward the charges to superior authority or will appoint the court himself. Note that the only limitation on the appointment of summary courts-martial is that, when more than one officer is present with a command, a subordinate officer must be designated as summary court-martial. If only one officer is present, however, the convening authority *may* designate himself as summary court-martial of that command.[88] Under such circumstances, a single officer could be the convening authority, the accuser, and the summary court-martial.

[88] UCMJ, Art. 24(b), provides that when only one officer is present with a command or detachment he *shall* be the summary court-martial.

CHAPTER V

JURISDICTION OVER PERSONS HAVING MILITARY STATUS

1. INTRODUCTION

This chapter will be concerned with the inception and termination of military jurisdiction over persons who possess some form of military status.

The general source of jurisdiction over all military personnel on active duty is the following provision of the Uniform Code of Military Justice: [1]

The following persons are subject to this chapter:

(1) Members of a regular component of the armed forces, including those awaiting discharge after expiration of their terms of enlistment; volunteers from the time of their muster or acceptance into the armed forces; inductees from the time of their actual induction into the armed forces; and other persons lawfully called or ordered into, or to duty in or for training in, the armed forces, from the dates when they are required by the terms of the call or order to obey it.[2]

2. WHEN DOES JURISDICTION ATTACH?

a. *Inductees.* Inductees are subject to the Code from the time of their actual induction. The induction must be complete, that is, the accused must have participated in the induction ceremony to the extent required by law.

(1) *The general case law.*

(a) In *Billings v. Truesdell,*[3] the petitioner for habeas corpus had been convicted by general court-martial of willful disobedience of a lawful order. He had unsuccessfully claimed exemption as a conscientious objector, reported for induction but refused to take the oath prescribed as part of the induction process. The Court held that a draft selectee remains subject to civil jurisdiction until the prescribed induction ceremony has been completed.

(b) In *United States v. Ornelas,*[4] the accused moved to dismiss for lack of jurisdiction on the ground that he had failed to take the oath of allegiance. The law officer denied the motion and refused a subsequent defense request to submit the issue to the court. The Court of Military Appeals held the defense motion was legally sound and should have been submitted with appropriate instructions to the triers of fact for their determination of the factual issue of whether the accused had completed the induction ceremony.

(c) An exception to the rule requiring completion of the induction ceremony is illustrated in *United States v. Rodriguez,*[5] decided the same day as *Ornelas.* Prior to arraignment the accused challenged the jurisdiction of the court-martial on the grounds that he was a Mexican citizen who had not been lawfully inducted because (1) he was not advised of his rights as a Mexican citizen and (2) he did not take the oath of allegiance. The Court found no error in the failure to inform him of his "rights," which the Court finds would not have exempted him from service. With respect to the second contention, the Court distinguished this case from *Ornelas* on the ground that no factual issue was raised. In *Ornelas* the accused claimed not to have been present at an induction ceremony and to have returned home immediately after his physical examination. Here the accused admits he did everything but take the

[1] UCMJ, Art. 2(1).
[2] The pertinent Manual provision, para. 9, MCM, 1951, simply refers the reader to the statutory provision and its annotations.
[3] 321 U.S. 542 (1942).
[4] 2 USCMA 96, 6 CMR 96 (1952).
[5] 2 USCMA 101, 6 CMR 101 (1952).

oath, that he did not object to induction and that he "voluntarily entered upon the Army duty assigned him." Although the expression is not used in the decision, the Court seems to find a "constructive induction."

(2) *Failure to meet minimum standards for induction.* There have been unsuccessful attempts to construe the statutory standards as precluding, and therefore making void and of no effect for jurisdictional purposes, the induction of selectees who do not meet these requirements.[6]

Illustrative cases.

(a) In *United States v. Martin,*[7] the accused Martin scored 9 points on the Armed Forces Qualification Test, but it was administratively determined that he was acceptable for induction. The accused was inducted and subsequently absented himself without leave on three occasions. The first two were tried by special court-martial; the last, from 12 January to 18 July 1957, was tried by general court-martial. Charged with desertion, he was convicted of absence without leave (to which he had pleaded guilty) and sentenced to dishonorable discharge, total forfeitures and confinement for one year. He contended before the Court that the statutory provision[8] precluded his induction. The Director of Selective Service filed a brief as *amicus curiae* in support of the Government's contention that the statute was intended to prevent the exclusion of certain categories of persons from induction. Chief Judge Quinn, speaking for a unanimous court, reviewed the history of the statute and agreed with the Government. In contrast to *Blanton*[9] the test result "did not make [Martin] ineligible for induction" and accordingly the court-martial had jurisdiction under Article 2(1).

(b) *Korte v. United States.*[10] The defendant had refused to report for induction, claiming exemption because he had been convicted of a felony. In upholding his conviction for failure to report for induction, the Court said that the exemption of convicted felons was a permissive exemption only, created not for the benefit of the inductees, but for the benefit of the armed forces, which could waive the disability.

(3) *Failure to assert right to exemption before induction.* A valid right to a draft exemption, which was not asserted through the selective service system will not bar court-martial jurisdiction over the person after he has been inducted.

Illustrative cases.

(a) *United States v. McNeill.*[11] The accused, after his induction, went absent without leave. He was apprehended and convicted of desertion. The accused had prior military service, a fact which, if known to his selective board, would have exempted him from induction. But the accused never furnished the information to the local board.

Held: The accused is subject to military law. "[H]e failed to show any reason for an exemption, he reported for duty, and he was housed, fed, clothed, and possibly paid for six weeks and then, when selected for possible overseas duty, he went absent. To allow an exemption to be exercised in that manner would allow an inductee to enter upon his duties as a soldier and then abandon the service according to his own whims without fear of punishment."

(b) *Pickens v. Cox.*[12] The petitioner failed to inform his local selective service board that he was the sole surviving son of a family which had a son who was killed in military service. This fact entitled Pickens to an exemption from induction. He was inducted and later convicted by general court-martial of absence without leave and disobedience of a superior

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[6] 50 U.S.C. APP. § 454(a) (1958) provides in part that "[N]o person shall be inducted into the Armed Forces for training and service or shall be inducted for training in the National Security Training Corps under the title [sections 451–454 and 455–471 of this Appendix] until his acceptability in all respects, including his physical and mental fitness, has been satisfactorily determined under standards prescribed by the Secretary of Defense: *Provided,* That the minimum standards for physical acceptability established pursuant to this subsection shall not be higher than those applied to persons inducted between the ages of 18 and 26 in January 1945: *Provided, further* That the passing requirement for the Armed Forces Qualification Test shall be fixed at a percentile score of 10 points."

[7] 9 USCMA 568, 26 CMR 348 (1958).

[8] *Supra* n.6.

[9] United States v. Blanton, *infra* n.17.

[10] 260 F.2d 683 (9th Cir. 1958), *cert. denied,* 358 U.S. 928 (1959).

[11] 2 USCMA 488, 9 CMR 18 (1953).

[12] 282 F.2d 764 (10th Cir. 1960).

officer. On habeas corpus, Pickens attacked the jurisdiction of the court-martial.

Held: Pickens failed to establish his right to an exemption from induction before he was inducted. When his induction occurred, he became a member of the military in active service, and as such was subject to military jurisdiction.

b. *Enlistees.* Personnel on active duty pursuant to an enlistment in the regular forces or to an enlistment in the reserve forces with a subsequent or concurrent call to active duty are subject to the Uniform Code of Military Justice.[13]

Congress has imposed limitations upon the authority of each service Secretary to enlist persons in his service. Historically these restrictions have not been the same for each armed force.[14]

(1) *Minority Enlistments.*[15] The Secretary of the Army may accept original enlistments from male persons who are not less than 17 years of age and female persons who are not less than 18 years of age. However, no male person under 18 years of age, or female person under 21 years of age, may be enlisted without written consent of his parent or guardian.[16]

A person may not validly enlist in the Army if he is under seventeen years of age. Such an enlistment would be void and do nothing to change the minor's civilian status. If an offense, proscribed by the Uniform Code of Military Justice is committed by the minor before his seventeenth birthday, there is no jurisdiction to try the offender by court-martial. Such a person, under the current statute has no competence to acquire military status and is not subject to military law.

If a person had enlisted when he was less than seventeen years old, but then served beyond his seventeenth birthday, he may acquire military status through a "constructive" enlistment by accepting benefits and voluntarily performing military duties. This "constructive" enlistment is voidable, but only at the option of the enlistee's parents or guardians.

If a person enlists when he is over seventeen but less than eighteen years old without written consent of his parents or guardian, the enlistment is a voidable one; again only the parents or guardian may attack such an enlistment.

The right in the parent or guardian to apply for the minor's discharge may be forfeited if by their conduct, the parents have ratified or acquiesced in the enlistment. The timing of the parental demand for release is crucial. If the parent or guardian does not request the child's release by minority discharge until after he has committed an offense, then the parent's right to custody will likely be subordinated to the government's rights to hold the minor soldier responsible for his crime.

Illustrative cases.

(a) *United States v. Blanton.*[17] The accused enlisted in the Army when he was fourteen years old. He absented himself without authority before his sixteenth birthday. Four years later he was apprehended and convicted by general court-martial of desertion.

Held: The accused was never on active duty at an age when he was competent to serve in the Army. His enlistment was void. The court-martial had no jurisdiction over the accused.

(b) *United States v. Overton.*[18] The accused enlisted at sixteen years of age and, without his parent's or guardian's consent, by using his brother's name and birth certificate. After finding the military life not to his liking, the accused went to his commanding officer to disclose his true age and identity in an attempt to straighten out his records. Next he absented himself without leave in order to obtain his

[13] UCMJ, Art. 2(1).

[14] The limitations on enlistments in the Army are found in 10 U.S.C. §§ 3253–3256 (1958). The restrictions on Navy and Marine Corps enlistments are expressed in 10 U.S.C. §§ 5532–5535 (1958). Air Force limitations, which are identical to those for the Army are contained in 10 U.S.C. §§ 8253–8256 (1958).

[15] The Court of Military Appeals has rejected a defense contention that military jurisdiction was lost over a soldier because as a seventeen-year-old, he could only be tried as a juvenile delinquent under the Juvenile Delinquency Act (18 U.S.C. §§ 5031–5036). United States v. Baker, 14 USCMA 311, 34 CMR 91 (1963).

[16] 10 U.S.C. § 4256 (1958).

[17] 7 USCMA 664, 28 CMR 128 (1957).

[18] USCMA 664, 26 CMR 464 (1958).

birth certificate. He was convicted by a special court-martial of AWOL and while serving confinement for the AWOL, he was charged with willful disobedience of a lawful order and convicted upon his guilty plea. The accused had reached age seventeen before the willful disobedience offense was committed. His family, especially his mother, had been trying to obtain a minority discharge for the accused before the last offense was committed.

Held: The court-martial lacked jurisdiction over the person of the accused at time of trial. Before the accused reached his seventeenth birthday, his enlistment was void. If his status changed after his seventeenth birthday, that *fact* must be affirmatively established by the prosecution. There has been no showing of a "constructive" enlistment by the accused or consent by the parent.[19]

(c) *United States v. Scott.*[20] The accused enlisted after his seventeenth birthday, but before his eighteenth, with the help of forged signatures on the parental consent form. He was charged with taking indecent liberties with a thirteen year old boy. The offense occurred before the accused had reached eighteen years of age. A month after the offense and a week before the trial, the accused's parents expressed a desire to have their son released because they had not given written consent to his enlisting. The facts disclosed that the parents knew their son was in the Army, had corresponded with him, and had even accepted a Class E allotment of $25.00 from him.

Held: The court-martial had jurisdiction. The enlistment contract in this case was voidable only and the right to apply for the discharge ran to the parents. This right may be waived if by their conduct the parents ratify the enlistment. The parents in this case benefited from the enlistment and only sought their son's release to avoid his prosecution.

(d) *United States v. Bean.*[21] The accused enlisted soon after his seventeenth birthday, with the consent of a Mrs. Turner, who signed as guardian, stating that the whereabouts of either natural parent was unknown to her. The accused was charged with murder and found guilty of voluntary manslaughter. The offense took place before the accused's eighteenth birthday. After the case had been referred for trial, the natural mother of the accused addressed a letter to the convening authority stating that she had just learned of her son's enlistment and demanding his immediate release.

Held: The accused was subject to court-martial jurisdiction. The court said:

> The enlistment of a minor of the statutory age, even though without the required consent, is valid, and he thereby becomes *de jure* and *de facto* a soldier, subject to military jurisdiction. A nonconsenting parent is not entitled to custody of the minor prior to the expiation of the latter's crime, when the parent has not sought his discharge until after the commission of an offense triable by court-martial. The parent's right to the minor's custody is, under those circumstances, subordinate to the right of military authorities to hold the minor soldier to answer for his crime.[22]

(2) *Overage Enlistments. Re Grimley,*[23] involved an overage enlistee. Grimley was over the statutory age when he volunteered for enlistment; he was forty and falsely represented that he was twenty-eight. He was convicted of desertion and sentenced to six months' confinement. The Supreme Court upheld military jurisdiction.

The Court compared an enlistment with a marriage, noting that both create or change the "status" of the party. It concluded the accused cannot—

> renounce his relations and destroy his status on the plea that, if he had disclosed truthfully the facts, the other party, the State, would not have entered the new relations with him, or permitted him to change his status. Of course these considerations may not apply where there is insanity, idiocy, infancy or other disabil-

[19] Judge Latimer, dissenting, was satisfied that a "constructive" enlistment had been shown and that the mother's action came too late to terminate her son's military status.
[20] 11 USCMA 655, 29 CMR 471 (1960).
[21] 13 USCMA 208, 32 CMR 208 (1962).
[22] 13 USCMA 208, 207, 32 CMR 208, 207 (1962).
[23] 137 U.S. 147 (1890).

ity, which, in its nature disables a party from changing his status or entering into new relations.[24]

The statutory age limit for enlistment merely announced a policy rather than establishing a standard for the competence of a person to acquire a military status.

(3) *National Guard and Reservists.*

(a) *Six months "active duty for training."* As an alternative to induction, a prospective inductee has been permitted to enlist in the National Guard of his state, serve a six months tour of "active duty for training" and complete his military obligation by a satisfactory inactive duty.[25] There have been cases where accused, serving in this status, claimed that by the technical language of the statute, they were subject only to the jurisdiction of the state National Guard. These claims were based on the fact that their orders called them to "active duty for training," while the statute conferred jurisdiction over them when called to "active duty."

Illustrative cases.

(*1*) *In re Taylor.*[26] The petitioner was a member of the North Carolina National Guard, who was ordered to six months active duty for training with his consent and the consent of the Governor of North Carolina. During the six months for which he was ordered to active duty, the petitioner absented himself without authority. After his conviction, the petitioner attacked court-martial jurisdiction, claiming that as a member of the National Guard on "active duty for training" as distinguished from "active duty" he was not subject to the Uniform Code of Military Justice.

Held: The court rejected any distinction between how the order read ("active duty for training") and what the statute said ("active duty"). The court found that the petitioner became subject to military law on the date he was ordered to active duty.[27]

(*2*) *United States v. Carroll and Sims.*[28] Both accused were members of the National Guard, who volunteered and were ordered by Department of the Army, National Guard Bureau to six months active duty for training. The accused claimed the Armed Forces Reserve Act provided for subjecting National Guardsmen to federal control only when called to active duty.

Held: The accused were subject to court-martial jurisdiction. Congress included full-time training duty within the definition of "active duty."[29] While serving their six month active duty for training the accused were on active duty in the federal service and were subject to the Uniform Code of Military Justice.

(b) *Involuntary call to active duty for forty-five days.* Another problem arises with respect to the provision for an involuntary call to active duty for forty-five days of reservists who fail to perform satisfactorily their inactive duty training.[30] Persons called under this provision have been held to be subject to the Uniform Code of Military Justice.

Illustrative cases.

(*1*) *In re La Plata's Petition.*[31] A Ready Reservist in the United States Marine Corps Reserve was ordered without his consent to forty-five days active duty. When he failed to comply with the orders, he was apprehended by the Marine Corps Military Police. He petitioned for habeas corpus.

Held: The apprehension was lawful, and the petitioner is subject to the Uniform Code of Military Justice under Article 2(1) from the date he was ordered to active duty.[32]

(*2*) A Coast Guard Reservist, who

[24] 187 U.S. 147, 152-153.

[25] 10 U.S.C. § 672(d) (1958).

[26] 160 F. Supp. 932 (W.D. Mo. 1958).

[27] This case involved a question of when military jurisdiction over the accused and over particular offenses terminates. This issue is discussed in para. 8, *infra*.

[28] 26 CMR 598 (1958), *pet. denied*, 27 CMR 512 (1958).

[29] 10 U.S.C. § 101(22) (1958). "'Active duty' means full-time duty in the active military service of the United States. It includes duty on the active list, full-time training duty, annual training duty, and attendance, while in active military service, at a school designated as a service school by law or by the Secretary of the military department concerned."

[30] 10 U.S.C. § 270(b) (1958). "A member of the Ready Reserve . . . who fails in any year to satisfactorily perform the training duty prescribed . . ., may be ordered without his consent to perform additional active duty for training for not more than forty-five days."

[31] 174 F. Supp. 884 (E.D. Mich. 1959).

[32] The applicable portion of Art. 2(1), UCMJ, reads: "The following persons are subject to the Code:

(1) . . . [A]ll other persons lawfully called or ordered into, or to duty in or for training in, the armed forces, from the dates they are required by the terms of the call or order to obey the same."

had failed to perform his drill obligation satisfactorily, was ordered to active duty for training for forty-five days. He failed to obey the orders and was convicted by a summary court-martial of absence without leave and failure to obey an order.

Held: As a "person lawfully called or ordered into" duty in the armed forces, this man was a person subject to court-martial jurisdiction under Article 2(1).[33]

3. WHEN DOES JURISDICTION TERMINATE?[34]

a. *Introduction.* Within the term "military jurisdiction" or "court-martial jurisdiction" are two types of jurisdiction, both of which must exist before a military court has the power to act. They are jurisdiction over the person of the accused at the time of trial and jurisdiction over the offense charged. If either one of these types of jurisdiction has been lost or terminated, the court-martial has no jurisdiction in the particular case. The first question to ask is: can this accused be lawfully tried by court-martial? If he can be lawfully tried by court-martial, is the offense charged one which can be tried by court-martial?

In all of the problem areas discussed in this paragraph, jurisdiction over the offense and over the person existed at a particular point in time. The difficulty is in determining when the jurisdiction is terminated. The major problem in termination involves the effect of a discharge or release from active duty which intervenes between the time the offense was committed and the time of trial.

b. *Effect of Discharge Between Commission of the Offense and Trial by Court-Martial.*

(1) *General Rule.* The general rule is stated in the Manual for Courts-Martial as follows:[35]

> The general rule is that court-martial jurisdiction over officer, cadets, midshipmen, warrant officers, enlisted persons, and other persons subject to the code ceases on discharge from the service or other termination of such status and that jurisdiction as to an offense committed during a period of service or status thus terminated is not revived by re-entry into the military service or return into such status.

The Supreme Court recognized the general rule in *United States ex rel. Hirshberg v. Cooke.*[36] In 1942 Hirshberg was serving a second enlistment in the Navy and was taken prisoner by the Japanese upon the surrender of the United States forces on Corregidor. After the war ended, he was liberated, returned to the United States, and, after hospitalization, restored to duty in January 1946. On March 26, 1946, he was granted an honorable discharge because of the expiration of his prior enlistment. The next day he reenlisted. About a year later, he was convicted by a general court-martial of maltreatment of fellow prisoners-of-war.

The Court held that the court-martial lacked jurisdiction to try Hirshberg for the offense committed during his prior enlistment.

In 1863, Congress had enacted a statute which made service personnel charged with service frauds subject to court-martial jurisdiction after discharge or dismissal. The Court found that in 1863 "Congress did act on the implicit assumption that without a grant of congressional authority military courts were without power to try discharged or dismissed soldiers for any offenses committed while in the service." [37] Also the Court noted that no statute enlarging court-martial jurisdiction over discharged servicemen, whether they reenlisted or not, had been passed since 1863.

Both the Army and the Navy, until 1932, had accepted the view that a court-martial did not have jurisdiction to try service personnel for offenses committed during a prior enlistment. In 1932, however, the Navy issued regulations purporting to vest power in courts-martial to try such persons. The Court found this action was an ineffective attempt to ex-

[33] OP CCCG 1957/2, 15 Dec. 1957, 7 Dig. Op., "Courts-Martial" § 45.7 (1957).
[34] See Zeigler, *The Termination of Jurisdiction*, 10 MIL. L. REV. 139 (DA Pam 27–100–10, Oct. 1960).
[35] Para. 11a, MCM, 1951.
[36] 336 U.S. 210 (1949).
[37] 336 U.S. 210, 215

tend the Navy's court-martial jurisdiction beyond the statutory limits fixed by Congress.

(2) *When does military status terminate?* Military status for purposes of court-martial jurisdiction ends on the delivery of a valid discharge certificate, or, in the case of a reservist, on the delivery of orders which relieve him from active duty and are effective on the day of delivery. Once delivery is made, jurisdiction is terminated and will not be revived by revocation of the discharge or the orders, regardless of what service regulations purport to allow.

Illustrative cases.

(a) *United States v. Scott.*[38] The accused was given a general discharge. After the discharge certificate was delivered to him, he confessed to stealing a radio. The discharge orders were revoked and charges were preferred against him. The Court of Military Appeals held that jurisdiction to try the accused by court-martial ended with the delivery of the discharge certificate to the accused.

(b) *United States v. Brown.*[39] The accused had completed four years' active duty as a Navy reservist. After he received orders transferring him to the Ready Reserve and directing him to proceed to his home, he departed his ship. An hour later it was discovered that he was involved in selling the solutions to competitive examinations for enlisted promotions. His orders were revoked, and he was apprehended later in the day. The Court held that jurisdiction to try the accused depended on his continued service on active duty and not on the lack of discharge. His membership in the reserve was not a sufficient military connection to support military jurisdiction. Delivery of the orders effective on that day ended court-martial jurisdiction. The orders relieving him from active duty were considered analogous to the discharge certificate.[40]

(3) *Exceptions.* Some exceptions to the general rule are listed in paragraph 11*b* of the Manual. They are:

(a) Article 3(a) offenses,[41]

(b) Person in custody serving a court-martial sentence.[42]

(c) Person obtaining a discharge fraudulently.[43]

(d) Deserter who received a discharge for a subsequent period of service,[44] and

(e) An uninterrupted status as a person subject to the Code.

(4) *Article 3(a), UCMJ.*[45] Apparently aroused by the effect of the *Hirshberg* decision, Congress was determined to remedy the situation by granting jurisdiction to try certain individuals who had been discharged from the service.[46] This grant of authority was embodied

[38] 11 USCMA 646, 29 CMR 462 (1960).

[39] 12 USCMA 698, 31 CMR 279 (1962).

[40] See United States v. Griffin, 13 USCMA 213, 32 CMR 213 (1962) (discharge certificate had been prepared, but jurisdiction upheld because there had been no delivery to the accused).

[41] UCMJ, Art. 3(a), discussed *infra* n's 45–54, and accompanying text.

[42] UCMJ, Art. 2(7).

[43] UCMJ, Art. 3(b).

[44] UCMJ, Art. 3(a).

[45] "Art. 3. JURISDICTION TO TRY CERTAIN PERSONNEL. (a) Subject to the provisions of Article 43, any person charged with having committed, while in a status in which he was subject to this code, an offense against this code, punishable by confinement of five years or more and for which the person cannot be tried in the courts of the United States or any State or Territory thereof or of the District of Columbia, shall not be relieved from amenability to trial by courts-martial by reason of the termination of said status."

[46] Hearings before a Subcommittee of the Committee on Armed Services, House of Representatives, 81st Congress, 1st Session on H. R. 2498 at 617:

"MR. ELSTON. I would like to ask you this question. I think it was since you completed your hearings that a case has been decided by the Supreme Court of the United States.

"DR. MORGAN. The Hirshberg case?

"MR. ELSTON. Yes. To the effect that a person who has left the service, that is, who has been separated from the service, cannot be tried subsequently by a military court for an offense committed prior to such separation.

"MR. KILDAY. Even though he has reenlisted?

"MR. ELSTON. Even though he has reenlisted.

"DR. MORGAN. That is right.

"MR. ELSTON. Now, you have not anything in your bill covering that?

"DR. MORGAN. One thing we have about that is in the case of desertion. If he has deserted in the earlier service, then the fact that he has been discharged from a later service does not deprive the court of jurisdiction.

"MR. ELSTON. Yes. He may have even committed a murder within 3 days of his separation from the service.

"MR. MORGAN. That is right. We have not covered that.

"MR. ELSTON. He reenlists and cannot be tried for it.

"DR. MORGAN. That is right.

"MR. ELSTON. I think this committee can write something into the law that will take care of that ridiculous situation.

"DR. MORGAN. Of course, the Supreme Court put it on the basis of the interpretation of the present statute, as I remember it, and that is that Congress did not intend to have the jurisdiction exercised over the man after he had once been discharged.

"MR. ELSTON. Well, I do not think Congress ever intended anything of the kind.

"DR. MORGAN. I know, but that is what they said. There was not anything in the statute which saved the jurisdiction, and, of course, they interpreted it that way."

. . . .

in Article 3(a), which allowed the military to exercise jurisdiction over discharged personnel provided two prerequisites were satisfied. The offense must be punishable by confinement of five years or more, and the offense must not be triable in a civilian court of the United States, or of a state, territory, or the District of Columbia. The article did not contain any requirement that the accused be a person of military status, subject to the code at the time of trial by court-martial. The new article indeed remedied the situation that arose in Hirshberg, but Congress went further and subjected to court-martial jurisdiction persons who committed offenses prior to discharge and who never returned to military service.

(a) *Jurisdiction over civilians under Article 3(a):* A dramatic use of this expanded jurisdiction over former servicemen by the Air Force brought a constitutional challenge to Artice 3(a) in *United States ex rel. Toth v. Quarles.*[47] Toth had been honorably discharged from the Air Force and was working in Pittsburgh, where Air Force authorities arrested him on charges of murder and conspiracy to commit murder. At the time of his arrest he had no connections at all with the military. He was immediately whisked to Korea to stand trial before a court-martial under authority of Article 3(a).

The Court held that "Congress could not constitutionally subject *civilians* like Toth to trial by court-martial. They, like other civilians, are entitled to have the benefit of safeguards afforded those tried by regular courts authorized by Article III of the Constitution." [48] Military jurisdiction could not be constitutionally extended to "civilian ex-soldiers who had severed all relationships with the military and its institutions."

A comparison of the *Hirshberg* and *Toth* cases points up how both jurisdiction over the person and over the offense are necessary to the exercise of court-martial jurisdiction. In *Hirshberg,* the accused, as a member of the Navy, was subject to military jurisdiction at the time of the trial. He was a person who could be tried by court-martial. Court-martial jurisdiction was defeated because the intervening discharge had terminated jurisdiction over the offense charged.

On the other hand, *Toth* was a person who could not constitutionally be subjected to trial by court-martial. Jurisdiction over his person was lacking because he was a civilian who had severed all connections with the military. Although jurisdiction over the offense might not have been extinguished because of Article 3(a), some military status on the part of the accused was necessary to justify a trial by court-martial. The Supreme Court in *Toth* did not elevate the general rule that re-enlistment will not revive jurisdiction to constitutional doctrine. The decision was simply that Congress could not constitutionally subject *civilians* like Toth to trial by court-martial.

(b) *Applicability of Article 3(a) to persons having military status:* Since the *Toth* decision, the exercise of Article 3(a) jurisdiction over persons who have re-enlisted has continued. The Court of Military Appeals approved this practice in *United States v. Gallagher.*[49]

The alleged offenses occurred while Gallagher was a prisoner of war, held by the Chinese communists. In 1953 he was returned to the United States where he was given a short form discharge so that he might re-enlist. His term of enlistment had expired. The charges were brought two years after Gallagher's re-enlistment. The Board of Review dismissed, for lack of jurisdiction over the offenses,[50] and The Judge Advocate General

"MR. SMART (reading):

Subject to the provisions of article 43—this will be too long to write down, Mr. Chairman—any person charged with having committed an offense against this code punishable by confinement for 5 years or more and for which the person cannot be tried in the courts of the United States or any State or Territory thereof or of the District of Columbia while in a status in which he was subject to this code, shall not be relieved from amenability to trial by court-martial by reason of the termination of such status.

Now, that will get the Hirshberg case where he reenlisted. It would get Hirshberg even though he had not reenlisted.

"MR. BROOKS. That will close up that loophole?

"MR. SMART. In my opinion it will, sir.

"MR. BROOKS. What is your opinion?

"MR. ELSTON. I am inclined to feel it would.

"MR. BROOKS. All right. If there is no objection, then, we will adopt that language."

[47] 350 U.S. 11 (1955).

[48] 350 U.S. 11, 23 (emphasis added).

[49] 7 USCMA 506, 22 CMR 296 (1957).

[50] CM 386668, Gallagher, 21 CMR 485 (1956).

certified the question of jurisdiction to the Court of Military Appeals.

The Court thought that, on the facts, *Gallagher* could not be distinguished from *Hirshberg*. By enacting Article 3(a), Congress had obviously intended to remedy situations such as arose in *Hirshberg*. The defense argued that as the result of *Toth*, Article 3(a) was unconstitutional and that the *Hirshberg* rule controlled. The Court, however, distinguished *Gallagher* and *Toth* and held that Article 3(a) was constitutionally valid when applied to persons like Gallagher, that is, a person who is not a civilian ex-soldier. Gallagher was a *soldier;* Toth was a *civilian*. Gallagher had continued to serve; Toth had severed all relationships with the military. The Court reasoned further that the Supreme Court had indicated in *Hirshberg* that Congress could constitutionally confer military jurisdiction over persons, who like Hirshberg, had, reenlisted.

All three judges of the Court of Military Appeals agreed that in *Toth* the Supreme Court decided that Article 3(a) was unconstitutional only as applied to civilians like Toth.

Although the *Gallagher* opinions only discussed the constitutional validity of Article 3(a) as to persons like Gallagher, subsequent decisions have indicated that in order to base court-martial jurisdiction on Article 3(a), the requirements of the provision must be met, that is, the offense must be punishable by five years' confinement or more and not triable in either a federal or state court.[51]

Since court-martial jurisdiction terminates on the release of a reservist from active duty,[52] the question arises—is court martial jurisdiction revived by Article 3(a) when the reservist returns to active duty? In *United States v. Wheeler*,[53] the Court of Military Appeals decided that Article 3(a) did apply to a member of the reserve who voluntarily returned to active duty.[54]

(5) *Uninterrupted Status.*

(a) *Background.* The Manual provides that when a discharge or other separation does not interrupt a person's status as a person subject to the code, court-martial jurisdiction does not terminate.[55] As an example, the Manual points out that when an enlisted man is discharged for the convenience of the Government in order to re-enlist, there is no termination of court-martial jurisdiction provided there is no hiatus between the periods of enlistment.[56] Although this exception to the general rule for termination of jurisdiction is not based on any provision of the Uniform Code, it was included in Manuals for Courts-Martial in use before the enactment of the Uniform Code of Military Justice,[57] and had been recognized in a number of military decisions.[58]

The Court of Military Appeals first recognized the exception in *United States v. Solinsky*.[59] With the replacement on the Court of both judges who formed a majority in *Solinsky*, the continuing validity of the "uninterrupted status" exception seemed doubtful. Nearly ten years after Solinsky, however, the Court of Military Appeals again used this exception to find court-martial jurisdiction.[60] *Noble* and *Solinsky* are the only two instances when the

[51] United States v. Frayer, 11 USCMA 600, 29 CMR 416 (1960); United States v. Steidley, 14 USCMA 108, 33 CMR 320 (1963). These two conditions need not exist to support continuing jurisdiction despite the intervening discharge on the "uninterrupted status" exception, for example. See United States v. Noble, 13 USCMA 413, 32 CMR 413 (1962); United States v. Martin, 10 USCMA 636, 28 CMR 202 (1959). Judge Ferguson believes that a strict application of Article 3(a) provides the only basis for jurisdiction when the offense occurred before the discharge and reenlistment. United States v. Noble, 13 USCMA 413, 416, 32 CMR 413, 416 (dissenting opinion).

[52] United States v. Brown, *supra* n.89.

[53] 10 USCMA 646, 28 CMR 212 (1959). See Wheeler v. Reynolds, 164 F. Supp. 951 (N.D. Fla. 1958).

[54] Judge Latimer thought that an inactive reservist still had sufficient military status to be tried—that, unlike Toth, he had not severed all his military connections, and constitutionally could be tried pursuant to Article 3(a) without being returned to active duty. The Court of Military Appeals in United States v. Brown, 12 USCMA 693, 31 CMR 279 (1962), however, refused to draw a distinction between discharge and release of a reservist from active duty.

[55] Para. 11b, MCM, 1951.

[56] *Ibid.*

[57] See para. 10, MCM, U.S. Army, 1949 and para. 10, MCM, U.S. Army, 1928.

[58] CM 344522, Butcher, 10 BR–JC 223 (1951); CM 337039, Aikens and Sewers, 5 BR–JC 381 (1949), *aff'd*, 5 BR–JC 375 (Judicial Council 1949); CM 212084, Johnson, 10 BR 213 (1939). See Dig. Op., JAG 1912–1940, § 369(3) at 181.

[59] 2 USCMA 153, 7 CMR 29 (1953). Judge Quinn dissented. See also United States v. Johnson, 6 USCMA 320, 20 CMR 36 (1955).

[60] United States v. Noble, 13 USCMA 413, 32 CMR 413 (1962). Chief Judge Quinn, with Judge Kilday concurring, wrote the opinion of the Court, *distinguishing Solinsky* on the facts. Judge Ferguson dissented on the finding of continuing military status despite the discharge. Judge Ferguson would recognize Article 3(a) as governing all questions of jurisdiction over offenses committed during prior enlistments of obligations terminated by discharge.

Court has relied on this exception to find military jurisdiction.

(b) *When is military status "continuing?"* Jurisdiction over the offense continues through a discharge when the accused was obligated to serve beyond the date of the discharge. Was the accused entitled to end his military service and again become a civilian at the time of the discharge? Or was the discharge and reenlistment process merely the substitution of one obligation to serve for another? If the accused had completed his obligation under his term of enlistment and was entitled to return to civilian life, a short-form discharge delivered after re-enlistment would not afford continuing jurisdiction. Complete reliance on the concept of "no hiatus" is dangerous here. While the absence of a time period between discharge and re-enlistment may be necessary to support continuing jurisdiction under the "uninterrupted status" exception, the lack of "hiatus" alone, without the pre-existing obligation to serve, will not prevent the termination of jurisdiction over the offense.

Illustrative cases.

(*1*) *United States v. Solinsky.*[61] The accused enlisted in August 1947. On 5 September 1949, prior to the expiration of his term of enlistment he was given an honorable discharge for "the convenience of the Government" so that he could re-enlist for an indefinite period. The discharge was dated 5 September 1949, and the re-enlistment was effective the next day. The offenses were committed in 1948. The trial and conviction took place in 1951.

Opinion: Jurisdiction existed to try the accused for offenses committed during the prior enlistment. The accused's discharge did not terminate his membership in the Army because his original term of enlistment did not expire until after the discharge and re-enlistment. Where a person is discharged before the expiration of his term of obligated service for the purpose of re-enlistment, there is a presumption against the lapse of military jurisdiction. The purpose of the proceeding prior to the expiration of the term of enlistment is to effect continuous military service. The Court, assuming a change in status from military to civilian during the discharge and re-enlistment proceedings said: "A momentary break in service does not necessarily break court-martial jurisdiction. It did in the *Hirshberg* case but as we view the particular circumstances of this case, we find it did not do so here."[62]

(*2*) *United States v. Noble.*[63] The offenses were committeed before October 1960, and the accused's original term of enlistment would have expired 13 December 1960. Because of voluntary extensions, however, the accused was obligated to serve until October 1962. In December 1960, the accused requested discharge in order that he might re-enlist. The extended obligation was cancelled and the discharge granted, both contingent on the accused's re-enlistment. The charges were preferred and the trial held in the autumn of 1961.

Opinion: The Court found court-martial jurisdiction to try the accused for the offenses committed before the discharge. "Legally and factually, the new term of enlistment was a substitute for the original enlistment and its extensions. . . . [T]here was no actual 'termination' of accused's status as a person subject to military law."[64]

[61] 2 USCMA 153, 7 CMR 29 (1953).

[62] Judge Quinn, in his dissent, said, no matter how persuasive the policy arguments supporting a finding of jurisdiction, the jurisdiction of courts-martial is to be conferred only by statute. Absent any statute, as here, the *Hirshberg* decision would be controlling. The case arose before the enactment of the Code. Hence, Article 3(a) was inapplicable.

[63] 13 USCMA 418, 32 CMR 418 (1962).

[64] Chief Judge Quinn, in his opinion, attempts to distinguish *Solinsky* as a decision based on Army regulations. He implies the distinction between *Solinsky* and *Noble* is that a "hiatus" existed in *Solinsky*, but not in *Noble*. This would help to explain away his apparent inconsistency in the two cases. That is, where there is a "break in service or hiatus," *Hirshberg* and Article 3(a) control (consistent with his *Solinsky* dissent) and where there is no hiatus, his *Noble* opinion applies. However a close examination of the facts in the two cases, reveals that distinction on this basis does not hold up. Both *Solinsky* and *Noble* had a pre-existing obligation to serve beyond the dates of the discharges. Both discharges were conditioned on immediate reenlistment. Both involved, in essence, the substitution of one period of obligation for another. Perhaps, it would be more realistic to say that the "policy arguments" for continuing jurisdiction, which are indeed strong, and which undoubtedly influenced the majority in *Solinsky*, have, after ten years, made an impact on the Chief Judge.

Judge Ferguson, in his dissent, continues his strict statutory view of military jurisdiction, that is, jurisdiction is terminated by discharge under the rule of the *Hirshberg* case, and that continuing jurisdiction may be conferred only by statute. Article 3(a) sets out very clearly the conditions for such continuing jurisdiction. This view is precisely the one stated in Chief Judge Quinn's dissent in *Solinsky*.

(6) *Military Prisoners.* Article 2(7), UCMJ provides that "persons in custody of the armed forces serving a sentence imposed by a court-martial" are subject to the Code. The Manual also states that such persons remain subject to military jurisdiction even after the execution of a discharge.[65]

The United States Supreme Court upheld the constitutionality of a similar provision in 1921.[66] The present provision has withstood attacks on its validity in the federal courts[67] and the Court of Military Appeals.[68]

(7) *Fraudulent Discharge.* Article 3(b) provides—

> Each person discharged from the armed forces who is later charged with having fraudulently obtained his discharge is, subject to . . . (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.[69]

This provision does not provide for jurisdiction over offenses committed during the time period between the fraudulent separation and apprehension. Jurisdiction over offenses committed before the fraudulent discharge may not be exercised until after the accused has been convicted of fraudulent discharge. There are no reported cases dealing with an assertion of jurisdiction under Article 3(b).

(8) *Deserters.* Persons who desert from the armed forces remain subject to the jurisdiction of the Code even if separated from a subsequent period of service.[70] This remains true regardless of the type of separation from the subsequent period of service.[71]

4. RETIRED MEMBERS

The Code subjects to military jurisdiction "retired members of a regular component of the armed forces who are entitled to pay," [72] "retired members of a reserve component who are receiving hospitalization from an armed force," [73] and "members of the Fleet Reserve and Fleet Marine Corps Reserve."[74]

Although the validity of these provisions has been upheld,[75] the Army has rarely tried retired persons by court-martial. Department of the Army policy dictates that retired personnel subject to the Code will not be tried for any offenses by courts-martial absent "extraordinary circumstances linking them to the military establishment or involving them in conduct inimical to the welfare of the nation." [76]

The Powell Committee[77] recommended the elimination of courts-martial jurisdiction over retired personnel, as unnecessary, saying:

> Retired members of the armed forces are merged with the general civilian population of the United States. They should be subject to the same laws as their neighbors with the same obligations and the same freedom of action. Courts-martial jurisdiction imposes an obligation to abide by a different set of laws.

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[65] Para. 11*b*, MCM, 1951.

[66] Kahn v. Anderson, 255 U.S. 1 (1921).

[67] Simcox v. Madigan, 298 F.2d 742 (9th Cir. 1962), *cert. denied*, 370 U.S. 864 (1962); Ragan v. Cox, 320 F.2d 815 (10th Cir. 1963). See also Lee v. Madigan, 248 F.2d 733 (9th Cir. 1947), *rev'd. on other grounds*, 358 U.S. 228 (1959); Simcox v. Harris, 324 F.2d 376 (8th Cir. 1963).

[68] United States v. Ragan, 14 USCMA 119, 33 CMR 331 (1963); United States v. Nelson, 14 USCMA 93, 33 CMR 305 (1963). Ragan was convicted of assault on a fellow prisoner (Art. 128) and assault upon a person in the execution of military police duties (Art. 134). Nelson was convicted of offering violence to a superior officer (Art. 90). Judge Ferguson, in a concurring opinion in *Nelson*, doubts the validity of the exercise of such jurisdiction, but concurs because of the Supreme Court's undisturbed *Kahn* decision. To resolve these doubts, raised by the decisions invalidating military jurisdiction over civilians overseas, the Supreme Court may soon face the question squarely.

[69] See para. 11*b*, MCM, 1951.

[70] UCMJ, Art. 3(c).

[71] Para. 11*b*, MCM, 1951. Seaman A, a member of the Navy, after a short unauthorized absence, enlists in the Army. Upon learning of his Navy status, the Army administratively discharges Seaman (Private) A. May Seaman A be lawfully tried and convicted by the Navy of unauthorized absence (Art. 86)? Or does Article 3(c), read in light of *Hirshberg v. Cooke, supra* n.36, permit *trial* and conviction of desertion only? *But see* CGCM 9837, Huff, 19 CMR 603 (1955), and United States v. Huff, 7 USCMA 247, 22 CMR 37 (1956).

[72] UCMJ, Art. 2(4).

[73] UCMJ, Art. 2(5).

[74] UCMJ, Art. 2(6).

[75] United States v. Hooper, 9 USCMA 637, 163 F. Supp. 437 (S.D. Cal. 1958); Hooper v. United States, 326 F.2d 982 (Ct. Cl. 1964); Chambers v. Russell, 192 F. Supp. 425 (S.D. Cal. 1961).

[76] JAGJ 1956/4914, 29 June 1956, 7 Dig Op., "Courts-Martial" § 45.8 (1957–58).

[77] The Ad Hoc Committee to Study the Uniform Code of Military Justice, called the Powell Committee for General Herbert B. Powell, USA, who headed the study.

Good order and discipline in the armed forces are not benefited by continuing jurisdiction over retired members unless they are on active duty.[78]

5. CONTINUING JURISDICTION—COMMENCEMENT OF ACTION WITH A VIEW TO TRIAL

The Manual provides that jurisdiction having attached by commencement of action with a view to trial continues for all purposes of trial, sentence, and punishment.[79] Even though his term of enlistment may have expired, until discharged, the accused remains subject to the Code.[80]

Although some decisions seem to imply that once jurisdiction attaches it continues regardless of changes in the accused's military status,[81] reliance on such a proposition may well be misplaced. *Mansbarger*,[82] which is the only case involving *trial* after separation from active duty, was decided before the Supreme Court handed down its *Toth*[83] opinion. An assertion of continuing jurisdiction despite a discharge based on the filing of charges alone prior to the discharge raises serious constitutional questions.[84]

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[78] Report to Honorable Wilber M. Brucker, Secretary of the Army, by the Committee on The Uniform Code of Military Justice and Good Order and Discipline in the Army, 18 January 1960.

[79] Para. 11*d*, MCM, 1951.

[80] UCMJ, Art. 2(1).

[81] United States v. Sippel, 4 USCMA 50, 15 CMR 50 (1954); United States v. Speller, 8 USCMA 363, 24 CMR 173 (1957); CM 383814, Mansbarger, 20 CMR 449 (1955).

[82] CM Mansbarger, *supra* n.81.

[83] United States *ex rel.* Toth v. Quarles, *supra* n.47. United States v. Speller, *supra* n.81, and United States v. Sippel, *supra* n.81 involved no actual separation *prior* to trial.

[84] The issue is whether a civilian may be tried by court-martial. The government which prosecutes also has the power to terminate a person's status as a member of the military which grants the government jurisdiction to prosecute. Does protecting the government from its own mistakes justify trying civilians, who formerly had military status, by courts-martial?

CHAPTER VI

JURISDICTION OVER CIVILIANS

1. PEACETIME JURISDICTION

Congress attempted to provide court-martial jurisdiction over "all persons serving with, employed by, or accompanying the armed forces without the continental limits of the United States" and its territories.[1]

In 1957, the United States Supreme Court invalidated military jurisdiction to try two service wives for murdering their husbands.[2] Because of the divergent opinions of the majority in *Reid v. Covert*,[3] overseas military jurisdiction over the civilian employee in both capital and non-capital cases and the civilian dependent in non-capital cases remained unsettled, although the trend definitely pointed toward complete invalidation of court-martial jurisdiction over civilians during peacetime.

Finally in 1960, the Supreme Court held unconstitutional military jurisdiction in peacetime over all overseas civilians, employee or dependent, for any type of offense, capital or non-capital.

In *Grisham v. Hagan*,[4] the Court held that an overseas civilian employee was not subject to military jurisdiction for a capital offense. A majority of the Court felt that the considerations in *Reid v. Covert*,[5] were equally applicable in this case. Mr. Justice Frankfurter and Mr. Justice Harlan concurred because the case involved a capital offense. Mr. Justice Whittaker and Mr. Justice Stewart dissented. They believed that there was a distinction between employees and dependents, that the civilian employees were part of the armed forces and that Congress could constitutionally make them subject to military power.

In *Kinsella v. United States ex rel. Singleton*,[6] the Court decided that there was no military jurisdiction over civilian dependents charged with non-capital offenses. The Court saw no distinction between capital and non-capital offenses, but said that the test was one of status, "whether the accused in the court-martial proceeding is a person who can be regarded as falling within the term 'land and naval forces.'"[7] Mr. Justice Whittaker and Mr. Justice Stewart concurred. Mr. Justice Harlan and Mr. Justice Frankfurter dissented, asserting that in non-capital cases there was justification for the exercise of military jurisdiction over non-military personnel because of the closeness of the relationship between the accused civilian and the military establishment.

In *McElroy v. United States ex rel. Guagliardo* and *Wilson v. Bohlender*,[8] the Court found that there was no military jurisdiction over civilian employees who had committed non-capital offenses. The majority felt that this result followed from the rationale of *Grisham*, *Singleton*, and *Reid v. Covert*. Mr. Justice Whittaker and Mr. Justice Stewart dissented, claiming that civilian employees of the armed services were "members" of the armed forces

[1] UCMJ, Art. 2(11).

[2] Reid v. Covert (Kinsella v. Krueger, companion case), 354 U.S. 1 (1957). The Court reached this decision under rather complex circumstances. In 1956, the Court had sustained military jurisdiction under Article 2(11) over Mrs. Smith and Mrs. Covert in a 5-3 decision, with Mr. Justice Frankfurter reserving his opinion. Kinsella v. Krueger, 351 U.S. 470 (1956); Reid v. Covert, 351 U.S. 487 (1956). Later in the summer of 1956, a majority of the Court voted to reconsider the earlier decision. Then in 1957, the Court upset the 1956 *Covert* and *Kinsella* decisions, with Justices Frankfurter, Harlan (who changed his vote from 1956) and Brennan (who had joined the court after the 1956 decisions) joining the 1956 dissenters to form the majority.

[3] Chief Justice Warren and Justices Black, Douglas, and Brennan concluded that all peacetime military trials of civilians were unconstitutional. Justices Frankfurter and Harlan limited their concurrence to the trial of a civilian dependent for a capital offense.

[4] 361 U.S. 278 (1960).

[5] *Supra* n.2.

[6] 361 U.S. 234 (1960).

[7] 361 U.S. at 241.

[8] 361 U.S. 281 (1960).

and had nearly the same effect of security and disciplinary problems as did military personnel. Mr. Justice Harlan and Mr. Justice Frankfurter again dissented; they would distinguish between non-capital and capital offenses.

In each of these cases, which all involved a civilian accused who committed an offense while accompanying the armed forces overseas during peacetime, military jurisdiction under Article 2(11), USMJ, was denied as unconstitutional.

2. WARTIME JURISDICTION

Jurisdiction over "persons serving with or accompanying an armed force in the field," in time of war, is expressly granted by the Code.[9]

The Supreme Court has never specifically denied military jurisdiction over civilians accompanying the armed forces in the field. Until expressly invalidated by the Court, exercise of wartime jurisdiction seems more than justified. In the principal opinion in *Reid v. Covert*,[10] Mr. Justice Black used some language that seems (albeit grudgingly) to support the exercise of military jurisdiction under Article 2(10). The following are some excerpts from his opinion:

> There have been a number of decisions in the lower federal courts which have upheld military trial of civilians performing services for the armed forces "in the field" during *time of war* [original emphasis]. *To the extent that these cases can be justified,* [emphasis added] insofar as they involved trial of persons who were not "members" of the armed forces, they must rest on the Government's "war powers." *In the face of an actively hostile enemy, military commanders necessarily have broad power over persons on the battlefront.* [Emphasis added.] From a time prior to the adoption of the Constitution the extraordinary circumstances present in an area of actual fighting have been considered sufficient to permit punishment of some civilians in that area by military courts under military rules.[11]
>
> . . . .
>
> We have examined all the cases of military trial of civilians by the British or American Armies prior to and contemporaneous with the Constitution that the Government has advanced or that we were able to find by independent research. Without exception these cases appear to have involved trials *during wartime* in the area of battle —"in the field"—or in occupied enemy territory.[12]
>
> . . . .
>
> Article 2(10) of the UCMJ, provides that in *time of war* persons serving with or accompanying the armed forces in the field are subject to court-martial and military law. We believe that Art. 2(10) sets forth the maximum historically recognized extent of military jurisdiction over civilians under the concept of "in the field." [13]

Mr. Justice Black's harsh view towards the military justice system in general, however, is evidenced by these statements from his opinion:

> Traditionally, military justice has been a rough form of justice emphasizing summary procedures, speedy convictions, and stern penalties with a view to maintaining obedience and fighting fitness in the ranks.[14]
>
> . . . .
>
> Notwithstanding the recent reforms, military trial does not give an accused the same protection which exists in civil courts.[15]
>
> . . . .
>
> [Military law] emphasizes the iron hand of discipline more than it does the even scales of justice.[16]

3. CONCLUSION

The problems posed by the *Reid-Kinsella-Grisham-Guagliardo* line of decisions are indeed perplexing and profound. Although the

[9] UCMJ, Art. 2(10). See annotation, concerning the interpretation of "in the field" and "accompanying," MCM, 1951 at 413.
[10] 354 U.S. 1 (1957).
[11] 354 U.S. at 33.
[12] *Id.* at 33 n.60.
[13] *Id.* at 34 n.61.
[14] *Id.* at 35–36.
[15] *Id.* at 37.
[16] *Id.* at 38.

decisions indicate that war-time jurisdiction over civilians "in the field" will probably be sustained, many present questions are as yet unanswered. In particular, the decisions did not eliminate the basic problem of how to control and punish serious crimes committed by our civilian dependents and employees overseas. Our treaties permit the receiving state to exercise jurisdiction over such offenses, but as a practical matter the countries concerned are not really interested in doing so when the offense involves only our property or personnel. Administrative sanctions on our part are insufficient to deter or punish serious offenses. No feasible and constitutional solution to this problem has yet been found.

In addition, the rationale of the Supreme Court cases throws in question the validity of jurisdiction over all the other quasi-military personnel (not on active duty) enumerated in Article 2, UCMJ. It would seem that litigation involving each of these categories must eventually be decided by the Supreme Court before this turbulence will finally have run its course.

APPENDIX

TABLE OF CASES

By Order of the Secretary of the Army:

HAROLD K. JOHNSON,
General, United States Army,
Chief of Staff.

Official:

J. C. LAMBERT,
Major General, United States Army,
The Adjutant General.

Distribution:

Active Army:
CNGB (2)
TJAG (50)
ARADCOM (15)
OS Maj Comd (50)
LOGCOMD (10)
MDW (25)
Armies (25)
Corps (15)
Div (5)
USMA (25)
Svc Colleges (5)
Br Svc Sch (5)
PMS Sr Div Units (1)
Instl (5)
WRAMC (2)
BAMC (2)
NG: State AG (2); units—Div (2).
USAR: None.
For explanation of abbreviations used, see AR 320–50.

USAPERSCEN (1)
POE (5)
Trans Tml Comd (5)
Army Tml (2)
PG (1)
GENDEP (OS) (2)
Sup Sec GENDEP (2)
Dep (2)
Arsenals (2)
Army Ammo Plants (1)
DB (2)
FOUSA (2)
Proc Dist (1)
Engr Comd (2)
USAC (Res) (1)

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