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"The great thing in this world is not so much where we stand as in which direction we are moving[.]"[1]

INTRODUCTION

Over fourteen years ago, precedent was broken like shattering crystal. The United States Supreme Court handed down the landmark decision of *O'Callahan v. Parker*,[2] and with it, the abrupt demise of unlimited subject matter jurisdiction over military personnel.[3] The previous eighty-four years had provided little constitutional protection for service personnel, since military status alone brought the accused before the exclusive jurisdiction of the courts-martial.[4] *O'Callahan* recognized the dangers of this narrow basis for jurisdiction and added the requirement that the accused's action must *also* have a "service connection."[5] The days of unlimited subject matter jurisdiction over military personnel appeared to be over.[6]

Unfortunately, the service connection requirement was to protect the constitutional rights of military personnel for only the next eleven years. On October 14, 1980, the United States Court of Military Appeals (COMA) in *United States v. Trottier*[7] emascu-

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1. O.W. HOLMES, THE AUTOCRAT OF THE BREAKFAST TABLE ch. 4 (1858).

2. 395 U.S. 258 (1969). *See also*, the Uniform Code of Military Justice, 10 U.S.C. 802 (1983), which was in existence at the time *O'Callahan* placed military personnel within the jurisdiction of the courts-martial based *only* on military status.

3. *O'Callahan*, 395 U.S. at 267; *see also* Kinsella v. Singleton, 361 U.S. 234, 241 (1960).

4. *See infra* notes 27-47 and accompanying text.

5. *O'Callahan*, 395 U.S. at 273, 274. The Court noted that although the petitioner was a United States Army Sergeant and had assaulted a young girl and attempted rape, a) he was absent from his military base; b) the crimes were not committed on a military post or enclave; and c) the victim was not, in any way, performing any duties relating to the military. Furthermore, the crimes were d) not committed with authority stemming from war power; e) they were committed within United States territorial limits; f) did not involve any question of flouting military authorty; nor g) impair the security of a military post, or the integrity of military property.

6. *See supra* note 3 and accompanying text.

7. 9 M.J. 337 (C.M.A. 1980). COMA held that almost any case concerning drugs was automatically service connected.

lated the service connection requirement,[8] thereby condemning a new generation of American military personnel to the savage and capricious nature of military law. Court-martial jurisdiction centered once again on a strict interpretation of the Uniform Code of Military Justice (UCMJ), which was established prior to the *O'Callahan* decision, and its *single* requirement—the accused's military status.[9]

During the eleven year reign of *O'Callahan*, a further move was made to protect the right of military personnel, this time in the area of military recruitment. In the 1975 case of *United States v. Russo*,[10] COMA ruled that there was no court-martial jurisdiction over the accused (a recruit), where the recruiter involved had acted deviously and fraudulently.[11] The court held that it was important to protect, "applicants who do not meet specified mental, physical, and moral standards for enlistment . . . [from an] environment [in] which they may be incapable of functioning effectively."[12] The courts seemed to be headed in the right direction, but just as the service connection requirement was overruled in 1980, the Congress of the United States responded by making it possible for a recruit to be subject to court-martial jurisdiction[13] regardless of how duplicitously the recruiter had acted during the time of recruitment.[14]

It is obvious that since 1980 we have been moving in the wrong direction. With all due respect to Mr. Justice Holmes, it appears that in the context of court-martial jurisdiction, the real danger lies not only in the direction, but also with the *present extent* of our movement. Under the Uniform Code of Military Justice (UCMJ) military personnel are denied the right to grand jury indictment,[15] trial by impartial jury,[16] and bail. In addition, military personnel are denied the right to independent counsel.[17] There is no doubt that military personnel enjoy less constitutional rights

8. *Id.* at 350.

9. 10 U.S.C. 802 (1983). This section simply enumerates the various types of military positions or posts as sufficient to establish jurisdiction.

10. 1 M.J. 134 (C.M.A. 1975).

11. *Id.* at 137.

12. *Id.* at 136.

13. 10 U.S.C. § 802(b)(c) (1980). 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).

14. 10 U.S.C. § 802(b)(c) (1980). *See* Schlueter, *Court-Martial Jurisdiction: An Expansion of the Least Possible Power*, 73 J. CRIM. L. REV. 74, 83 (1982).

15. U.S. CONST. amend. V.

16. 10 U.S.C. § 825 (1968). The convening authority selects the officers, by name, who will adjudge guilt or innocence (set forth).

17. Henry v. Middendorf, 425 U.S. 25, 29 (1976). During the summary court-martial proceeding no counsel need be given.

than their civilian counterparts.[18] It is this author's aim to extend all of the constitutional rights traditionally enjoyed by United States citizens to military personnel absent compelling justification. Therefore, it is contended that court-martial jurisdiction should be limited to those statutory offenses that *require* military status and therefore should apply exclusively to members of the armed forces.[19] In sum, it is the author's thesis that military justice is the oxymoron of the 1980's. To explore this premise, this Article will closely examine three major areas of military law: personal jurisdiction,[20] subject matter jurisdiction,[21] and procedural military justice.[22] Each of these three areas will be examined from a historic perspective, viewing present developments with an eye toward projected or proposed change. Finally, by means of contrast, the military justice systems of France and Germany will be considered briefly to show how other democratic countries have reacted to their entrance into the twentieth century.[23]

I. PERSONAL JURISDICTION

The first of the three areas of military law to be examined is personal jurisdiction. Courts-martial have personal jurisdiction over an accused when the accused has obtained some form of military status.[24] For example, military courts have no power to try civilians including those who accompany military personnel.[25] To complete this analysis, this section will focus on one of the most litigated aspects of personal jurisdiction, the *inception* of military status. It is this area of military law which supplies one of the

18. Parker v. Levy, 417 U.S. 733 (1974); Burns v. Wilson, 346 U.S. 137, 140 (1952); *In re* Grimley, 137 U.S. 147, 153 (1890). Under military jurisdiction constitutional right of freedom of speech, no excessive bail, counsel, indictment, may be legally denied.

19. United States v. McDonagh, 14 M.J. 415, 423 (C.M.A. 1983); United States v. Marsh, 15 M.J. 252, 254 (C.M.A. 1983). According to COMA's standard the following offenses should be considered "peculiarly military." Desertion, 10 U.S.C. § 885 (1956); Absence Without Leave; 10 U.S.C. § 886 (1956); Contempt towards officers 10 U.S.C. § 888 (1956); Insubordinate conduct toward warrant officer, noncommissioned officer, or petty officer, 10 U.S.C. § 891 (1956); Misbehavior before the enemy; 10 U.S.C. § 899 (1956); Misbehavior of sentinel; 10 U.S.C. § 913 (1956); 10 U.S.C. 933; Conduct unbecoming an officer and a gentleman; 10 U.S.C. 934 (1956).

20. *See infra* notes 24-86 and accompanying text.

21. *See infra* notes 87-130 and accompanying text.

22. *See infra* notes 131-62 and accompanying text.

23. *See infra* notes 163-75 and accompanying text.

24. *See generally* Reid v. Covert, 354 U.S. 1 (1956); Toth v. Quarles, 350 U.S. 11 (1955).

25. *See e.g.*, Reid v. Covert, 354 U.S. 1 (1959); Toth v. Quarles, 350 U.S. 11 (1955). *See generally*, Giovagnoni, *Jurisdiction Minus a Uniform*, 14 AF JAG L. REV. 190 (1973).

most powerful arguments for limiting the jurisdiction of military courts. Here it will be noted that military status will be found, regardless of any fraud or coercion perpetrated by the recruiter against the accused.[26] By necessity, the oscillating expanse of personal jurisdiction over the past ninety-three years will be explored since it is only through this historic viewpoint that the present nature of the recruitment process can be understood.

A. Inception of Personal Jurisdiction: 1890-1974

Throughout the history of personal jurisdiction there has been one scenario that has steadfastly provoked litigation. The scenario begins with a person who enlists in the military. That individual subsequently commits an offense proscribed by the Uniform Code of Military Justice and the enlistee is ultimately court-martialed. However, during the court-martial proceedings the accused argues that the court possesses no jurisdiction because his enlistment is void due to his failure to meet one or more of the standards established by Congress.[27]

This scenario was resolved during the 1890-1974 era through two rationales, both adopted in the year 1890. The first rationale made its debut in the case of *In re Grimley*,[28] In *In re Grimley*, an enlistee was court-martialed after being adjudged a deserter. During the proceedings, Grimley argued that he could not be court-martialed because the court did not have personal jurisdiction over him. His theory was that, since he was above the maximum legal age when he enlisted, his enlistment was fraudulent and void ab initio. The Supreme Court disagreed and ruled that personal jurisdiction existed. The High Court held that in order for Grimley's enlistment to be valid, thereby changing his status from civilian to soldier, two things had to exist: The enlistment contract had to: 1) be entered into *voluntarily*, and 2) be entered into by an individual who was *competent* to do so.[29] Grimley met both of these requirements. The Supreme Court and many courts took this approach regarding enlistment because they were afraid that

26. United States v. Buckingham, 11 M.J. 184 (C.M.A. 1981).
> The deliberate violation of service regulations in and of itself did not void an enlistment contract for jurisdictional purposes under the *Russo* decision . . . Accordingly, even assuming the recruiter, in contravention of service regulations, advised the appellant not to list his involvement [in previous criminal offenses], this alone would not defeat court-martial jurisdiction.

Id. at 186.

27. AR No. 601-210 Chap. 2 (15 Jan. 1975) sets forth the different standards that must be met before enlistment will be allowed. These include citizenship, trainability, educational, physical, moral, and age requirements.

28. 137 U.S. 147 (1890).

29. *Id.* at 151.

if people like Grimley were able to invoke enlistment defects to void their enlistments and destroy personal jurisdiction, then there would be little to stop wholesale desertion by these soldiers during battle.[30] The court also observed that it might have ruled differently, had it felt that Grimley's enlistment had been undertaken while he was under "duress, ignorance, intoxication, or any other disability which by its nature, disabled him from changing his status or entering into new relations."[31]

The second rationale which provided a basis for validating an otherwise improper or void recruitment was called "constructive enlistment,"[32] and it was seen as nothing more than an implied contract.[33] A defective enlistment was transformed into a valid enlistment if the soldier voluntarily performed his military duties, and had received his salary and benefits from the military.[34] The reasoning was that a defective enlistment did not confer military status, but that the defective enlistment ripened into a valid enlistment, once the enlistee manifested his interest to change his status.[35] This manifestation of intent occurred when the enlistee carried out his duties voluntarily and the enlistee accepted his pay and benefits from the military. In other words, though an individual's formal attempt to change his status had failed, his status would nevertheless be changed by the implied contract that had subsequently been formed.[36]

The use of these two rationales to invoke military status should not be understood to mean that individuals who enlisted while below the minimum legal age *would be forced to stay in the military.* Minors under the minimum enlistment age were not considered competent to make enlistment contracts.[37] Therefore their enlistments were void.[38] For those minors who had enlisted with the consent of a parent or guardian, regaining civilian status was a bit more difficult. The child's guardian or parent had the right "to

30. *See, e.g., In re* McVey, 23 F. 878, 880 (D. Cal. 1885). Insane individuals are incompetent to enlist, therefore their enlistment is void ab initio AR 635-200. Persons who are intoxicated, have been convicted of a felony, or are aliens not admitted for permanent residency are also disqualified from enlisting. However, the enlistment of these individuals is voidable rather than void. AR 635-300.

31. *Grimley*, 137 U.S. at 151-3.

32. United States v. Overton, 9 C.M.A. 684, 688, 26 C.M.R. 464, 468 (1958); United States v. Johnson, 6 C.M.A. 320, 20 C.M.R. 36 (1956).

33. Unites States v. Overton, 9 C.M.A. 684, 688, 26 C.M.R. 464, 468 (1958); United Sates v. Fant, 25 C.M.R. 643 (1957).

34. United States v. Fant, 25 C.M.R. 643, 645-47 (1957).

35. *Id.*

36. *Id.*

37. *In re* Morrissey, 137 U.S. 157, 159 (1890); United States v. Graham 22 C.M.A. 75, 46 C.M.R. 75 (1972); United States v. Blanton, 7 C.M.A. 664, 23 C.M.R. 128 (1957).

38. *Morrissey*, 137 U.S. at 159.

invoke the aid of the court, and secure the restoration of a minor to his or her control . . . ,"[39] but, the child had no right to undertake this action for himself.[40] By contrast, the fraudulent enlistment of a seventeen year old minor today, who subsequently passes the statutory minimum enlistment age of eighteen, is considered valid through the doctrine of constructive enlistment. This is based on two alternative assumptions: (1) there has been no protestation from the minor, and he has accepted his pay; or (2) a parent or guardian (that had not consented to his enlistment) has not requested the enlistee's release within ninety days after enlistment.[41] The minor retains military status, and the military courts retain personal jurisdiction only so long as neither alternative assumption occurs.[42] Finally, there is absolutely no jurisdiction over a child sixteen years old or younger.[43]

In *United States v. Fant*[44] a typical example of a constructive enlistment occurred, where a sixteen year old enlisted by fraudulently representing himself as an eighteen year old. When he was seventeen years old, his mother sent a letter to the Adjutant General of the army telling him of the fraud. After the letter was received the minor committed a court-martial offense. The issue was: Did the mother's letter void personal jurisdiction? The Court ruled that it had personal jurisdiction,[45] holding that a constructive enlistment existed since Fant had submitted to military authority, performed his military duties, had received his pay, and reached an age (seventeen) when the army could legally accept his services.[46] Today, this same result would occur, but only if Fant had enlisted at age seventeen.[47]

B. Inception of Personal Jurisdiction: 1974-1980

The second era of personal jurisdiction was ushered in by *United States v. Catlow*.[48] *Catlow* was the forerunner of three cases where COMA began to limit jurisdiction over military per-

39. *Id.*
40. *Id.*
41. 10 U.S.C. § 1170 (1970); AR 635-200, para. 7-5; *cf. In re* Morrissey, 137 U.S. 157, 159 (1890).
42. United States v. Graham, 22 C.M.A. 75, 95 C.M.R. 75 (1972); United States v. Bean, 13 C.M.A. 203, 32 C.M.R. 203 (1962).
43. United States v. Graham, 22 C.M.A. 75, 76, 46 C.M.R. 75, 76 (1972); United States v. Blanton, 7 C.M.A. 664 at 667, 23 C.M.R. 128, 131 (1957); AR No. 613-200 Chap. 7 (Aug. 17, 1975): Where a minimum age is stated by a regulation implementing a statute, it is a minimum age "prescribed by law."
44. 25 C.M.R. 643 (1958).
45. *Id.* at 647.
46. *Id.*
47. United States v. Brown, 23 C.M.A. 162, 48 C.M.R. 778 (1974).
48. 23 C.M.A. 142, 48 C.M.R. 758 (1974).

sonnel with defective enlistments. The process was completed in *United States v. Brown*,[49] and *United States v. Russo*.[50] During this process COMA looked back to *In re Grimley*[51] and the related law regarding constructive enlistment. It is interesting to note that in all three cases, some form of recruiter misconduct gave rise to the cause of action.

The limitations of personal jurisdiction represented by these leading cases can be divided into three categories: duress, underage enlistment, and recruiter misconduct. When taken as a whole, these three categories provide a clear basis to limit personal jurisdiction, however, each category provides its own motivation for limiting personal jurisdiction.

1. Duress.—In *Catlow*, the accused had been charged, before enlistment, with loitering, resisting arrest, carrying a concealed weapon, and assault. The judge gave Thomas Catlow a choice between trial on the charges which carried a maximum possible sentence of five years, or enlistment in the army. Catlow, who was seventeen years old at the time, obtained his mother's consent and enlisted. Eight days after enlistment the charges against him were dropped.[52] Thomas Catlow's commitment to army life was soon evident; he committed several offenses in an attempt to compel a discharge and finally succeeded; he was soon court-martialed. Catlow argued that he could not be tried by the court of military review because there was no personal jurisdiction. His position was that the recruiter who recruited him had failed to follow army regulations which absolutely disqualified for enlistment any individual who had criminal charges pending against him.[53]

The court of military review held that the regulation regarding disqualification was solely for the benefit of the army and that jurisdiction existed because the army had the absolute right to waive that benefit. On appeal, however, COMA overturned Catlow's conviction, ruling that no jurisdiction existed. The court enumerated three reasons for its decision. First, because of the harsh nature of the military status, and the lack of facilities for rehabilitation, the prohibition in the code was also for the equal

49. 23 C.M.A. 162, 48 C.M.R. 778.
50. 1 M.J. 134 (C.M.A. 1975).
51. 137 U.S. 147 (1890).
52. *Catlow*, 23 C.M.A. at 143, 48 C.M.R. at 759.
53. AR 601-210 para. 2-12, n.2 (May 1, 1968). In its opinion the court of military review ruled that this regulation could be waived, by authority granted by another regulation AR 635-200, para. 3-5(b)(2) (July 11, 1966). The regulation allows the army to retain disqualified individuals.

benefit of Catlow.[54] Second, borrowing from *In re Grimley*,[55] COMA concluded that Catlow did not voluntarily enlist in the military because he was under the duress of a possible jail term.[56] Finally, COMA's decision rested on the theory of constructive enlistment. The Court ruled that no constructive enlistment had occurred because the two part test for constructive enlistment had not been met. While it was true that Catlow received his pay and benefits from the army, Thomas Catlow had never voluntarily carried out his work. COMA ruled that Catlow's acts of misconduct were actually acts of protest against his continued military service.[57] In light of the above, Catlow's enlistment was void ab initio and the door was opened to further scrutiny regarding recruitment abuses.

2. Underage Enlistment.—In *United States v. Brown*,[58] COMA limited personal jurisdiction in a second area—underage enlistment. In *Brown*, the recruiter failed to discover that the accused forged his father's signature to the consent form by failing to comply with the regulation requiring the recruiter to either witness the signature or that the signature be notarized. Brown claimed that he had informed his commanding officers at two different military bases of the circumstances of his enlistment, and that no steps were taken to investigate his claim.

COMA found that the recruiter's failure to comply with regulations, and the commanding officer's failure to investigate the claim estopped the government from relying on the concept of constructive enlistment.[59] The government had a duty to act with reasonable speed to investigate a possible fraudulent enlistment.[60] In addition, the court changed the law of constructive enlistment as it applied to persons under seventeen years of age, indicating that even if an accused should reach age seventeen during the time the investigation was taking place, the government would be barred from relying on constructive enlistment to provide jurisdiction.[61] In the court's language, "[T]he proscription of the law is that there should not be sixteen year old persons in the army. The age barrier is not to be negotiated by the wishes of the enlistee or his superiors."[62] COMA ruled that since underage enlistments

54. United States v. Catlow, 23 C.M.A. 142, 145, 48 C.M.R. 758, 761 (1974).
55. 137 U.S. 147 (1890).
56. *Catlow*, 23 C.M.A. 142 at 145, 48 C.M.R. 758 at 761.
57. *Id.* at 146, 48 C.M.R. at 762.
58. 23 C.M.A. 162, 165, 48 C.M.R. 778, 781 (1974).
59. *Id.* at 165, 48 C.M.R. at 781.
60. *Id.*
61. *Id.*
62. *Id.*

were void, they could never serve as the basis of a constructive enlistment. This rationale provided a severe limitation on the military jurisdiction of the previous era where such an enlistment could evolve into a constructive enlistment once the enlistee reached seventeen years of age. This new protection was extended to underage personnel because of the public policy that children must be protected from themselves and overzealous recruiters.[63] *Brown* had ruled that an enlistment would be voided if a recruiter failed to follow "proper and lawful recruiting practices."[64] This was to be a foreshadowing of *United States v. Russo*.[65]

3. Recruiter Misconduct.—While the last area of change as memorialized by *United States v. Russo*, occurred in a recruiter misconduct case, its impact also reverberated throughout the realm of personal jurisdiction.

Russo suffered from dyslexia. This condition severely impaired his reading ability so when he enlisted, the recruiter gave him the answers to the qualifying test. Russo was later court-martialed, but he claimed that the court had no jurisdiction because of recruiter misconduct. The army claimed that Russo lacked standing to challenge the army's failure to abide by the regulation requiring that a minimum mental aptitude be shown before admission in the army. The army said that the regulation was solely for the protection and benefit of the armed services. COMA disagreed and ruled that there was no jurisdiction because of basic contract law principles and the public policy of "fair play."[66] The court held, "because fraudulent enlistments are not in the public interest, we believe that common law contract principles appropriately dictate that where recruiter misconduct amounts to a violation of the fraudulent enlistment statute,[67] as was the situation here, the resulting enlistment is void as contrary to public policy."[68]

There were two parts to this fairness argument. First, COMA found that just as in *Catlow*, the army regulation was also for the benefit of individuals. The regulation requiring minimum test scores protected "applicants who [did] not meet specified mental, physical, and moral standards for enlistment by barring their ac-

63. *Id.*
64. *Id.*
65. 1 M.J. 134 (C.M.A. 1975).
66. *Id.* at 137.
67. 10 U.S.C. § 884 (1956). Unlawful enlistment, appointment, or separation. Any person subject to this chapter who effects an enlistment or appointment in or a separation from the armed forces of any person who is known to him to be ineligible for that enlistment, appointment, or separation because it is prohibited by law, regulation, or order shall be punished as a court-martial may direct.
68. United States v. Russo, 1 M.J. 134, 136 (1975).

cess to an environment in which they may be incapable of functioning effectively . . . it is the recruit who is ultimately protected . . . from himself . . . ."[69] Secondly, COMA did not permit the application of a constructive enlistment. "Fairness prevents the government from relying upon a constructive enlistment as a jurisdictional base where government agents acted improperly in securing an individual's enlistment."[70] Thus, no change of status resulted.

Subsequently, the Court narrowed, and Congress limited, the results of the *Catlow-Russo-Brown* trilogy. First, the rule barring the enlistment of an individual, where recruiter misconduct was present, was narrowed; only recruiter actions that were intentional or grossly negligent voided an enlistment.[71] Secondly, even if a recruit fraudulently entered the armed forces, his enlistment was voidable but not necessarily void, if the recruiter or the government was unaware of the fraud.[72]

C. Jurisdiction Expansion by Congressional Amendment: 1980 to Present

The Congressional response to the judicial restriction of personal jurisdiction during the previous era was the following amendment to Article 2 of the UCMJ:

> (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 jurisdication 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 to the oath of enlistment.
> (c) Notwithstanding any other provision of law, a person serving with an armed force who—
> (1) submitted voluntarily to military authority;
> (2) met the mental competency and minimum age qualifications of sections 504 and 505 of this title at the time of voluntary submission to military authority;
> (3) received military pay or allowances; and
> (4) performed military duties;
> is subject to this chapter until such person's active service has been terminated in accordance with law or regulations promul-

69. *Id.*
70. *Id.*
71. United States v. Valadez, 5 M.J. 470, 474-75 (C.M.A. 1978). Constructive enlistment was allowed only if mere negligence was shown.
72. 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). If recruiters, in good faith, based on information provided them, assumed that enlistee was qualified, public policy dictated that enlistment not be voided.

gated by the Secretary concerned.[73]

In essence, Congress had reinstituted the law as it had stood seven years earlier in the 1890-1974 era. To determine whether military status existed, subsection (b) used criteria first enunciated in *In re Grimley*.[74] A valid enlistment requires a *voluntary* undertaking by a *competent* individual. Subsection (c) resurrected the doctrine of constructive enlistment.

Conspicuously absent from the amendment is any mention of the effect of recruiter misconduct during enlistment. It appears that recruiter misconduct is now a neutral factor in a determination of whether an enlistment is valid and personal jurisdiction exists.[75] This fact is particularly distressing since recruiter misconduct is a pervasive and growing problem as evidenced in testimony given by former Marine Corps recruiters to a Senate Armed Services Subcommittee in October, 1978:

> Former Sergeant Donald Robinette described how recruiters in northern Ohio falsified high school diplomas and police records to meet the demands for recruits from his commander, Major Klaus Schreiber, who considers himself "the best recruiting officer in the Marine Corps." Said Robinette: "The pressure never stopped. We were doing everything to get the bodies and they still wanted more."[76]

At one point, Schreiber threatened to break a recruiter's arm if he failed to meet his quota. Schreiber told the committee that the threat was not serious. Said he: "We're in the Marine Corps. That's the way we speak. We're not graduates of the College of the Immaculate Conception." With considerable pride Schreiber reported that he managed to raise his staff's performance from 59% of its quota to 100% after he took charge in 1977. His reward: headquarters increased his quota by thirteen percentage points.

To meet such demands, ex-recruiters and Marine lawyers across the country testified that recruiters have gone to such lengths as enlisting a violence-prone youth from a juvenile home and even signing-up a fictitious candidate. To qualify a youth with a long police record, a recruiter would drop the first letter of the candidate's name so the police check would turn up no trace of criminal activity. Schreiber told recruiters to ask Marine hopefuls leading questions such as, "You haven't smoked marijuana, have you?" Answers, of course, were negative. Some recruiters coach candi-

73. Pub. L. No. 96-107 title, VIII §§ 801(A)(1)(7), 93 Stat. 810 (1979); (FY 1980 Defense Authorization Act).

74. 137 U.S. 147 (1890).

75. Schlueter, *Court Martial Jurisdiction: An Expansion of the Least Possible Power*, 73 J. CRIM. L. 75, 83 (1982).

76. Time, October 23, 1978, at 35.

dates in advance to ensure that they pass aptitude tests, or use bright stand-ins for those who seem sure to fail. Robinette said that one ringer in northern Ohio had taken the test for fifteen candidates and was so proficient that he could deliver any score needed.[77]

The pervasiveness of recruiter misconduct offers a major reason why personal jurisdiction should be restricted and should prevent improper enlistments from becoming valid through the doctrine of constructive enlistment.

By analogy, the rationales providing the philosophical underpinnings which support the exclusionary rule can also be utilized in analyzing improper attachment of military jurisdiction. In *Mapp v. Ohio*[78] the United States Supreme Court held that illegally obtained evidence could not be used against an accused since there is no benefit in having a constitutional amendment against illegal searches and seizures if police can still *use* the illegally obtained evidence.[79] The court stated:

> [I]n extending the substantive protections of due process to all constitutionally unreasonable searches—state or federal—it was . . . necessary that the exclusion doctrine—an essential part of the right of privacy—be also insisted upon as an essential ingredient of the right newly recognized by the *Wolf* case. In short, the admission of the new constitutional right by *Wolf* could not consistently tolerate denial of its most important constitutional privilege, namely, the exclusion of the evidence which an accused has been forced to give by reason of the unlawful seizure. To hold otherwise is to grant the right but in reality to withhold its privilege and enjoyment.[80]

Just as the court in *Mapp v. Ohio* recognized that using evidence obtained by improper and illegal means negated the very right created, so too are protective recruitment standards circumvented when illegal and improper means are used. Both instances ultimately end in the accused being improperly tried. In the first instance there is a denial of fourth amendment rights, while in the second a lack of proper personal jurisdiction and consequently a denial of the constitutional right to due process. By means of example, various disqualifications against entering the military exist to protect potential enlistees. As noted in *United States v. Russo*,[81] by Judge Fletcher:

> The various enlistment disqualifications evidence not only a desire to assure an effective fighting force for the country but

77. Time, October 23, 1978, at 35.
78. 367 U.S. 643 (1961).
79. *Id.* at 656.
80. Mapp v. Ohio, 367 U.S. 643, 655-56 (1961).
81. 1 M.J. 134 (C.M.A. 1975).

> also a commendable attempt to minimize future administrative and disciplinary difficulties with recruits by qualitatively reducing the class of eligible enlistees. The latter objective is not solely for the benefit of the armed services. It is also a means of protecting applicants who do not meet specified mental, physical, and moral standards for enlistment by barring their access to an environment in which they may be incapable of functioning effectively. . . . The result we reach will have the salutary effect of encouraging recruiters to observe recruiting regulations while also assisting the armed forces in their drive to eliminate fraudulent recruiting practices.[82]

If fraudulent enlistments are allowed to become valid through the doctrine of constructive enlistment, then these statutory protections are of little value to an enlistee. Just as the exclusionary rule was developed to protect the Fourth Amendment right against illegal searches and seizures, so too must recruiter misconduct render fraudulent enlistment void ab initio. There is no other way to protect individuals who cannot possibly succeed in a military environment.

The second rationale offered as a basis for the exclusionary rule enunciated in *Mapp* is its deterent affect on illegal police conduct.[83] "Only last year the Court itself recognized that the purpose of the exclusionary rule 'is to deter—to compel respect for the constitutional guaranty in the only effectively available way—by removing the incentive to disregard it.' "[84]

Brown v. Illinois[85] offers an interesting analogy to the issue of deterring recruiter misconduct. Brown was arrested without probable cause and without a warrant. He was given his Miranda rights while he was in custody. Thereafter, while in custody he made incriminating statements, which were later used to convict him. The Supreme Court reversed his conviction saying:

> If Miranda warnings, by themselves, were held to attenuate the taint of an unconstitutional arrest, regardless of how wanton and purposeful the Fourth Amendment violation, the effect of the exclusionary rule would be substantially diluted. . . . Arrests made without warrant or without probable cause, for questioning or "investigation," would be encouraged by the knowledge that evidence derived therefrom could well be made admissible at trial by the simple expedient of giving Miranda warnings.[86]

Today, recruiters know that for a fraudulent enlistment to become binding, a recruit needs only to take his pay and perform his

82. *Id.* at 136.
83. 367 U.S. 643, 656 (1961).
84. *Id.*
85. 422 U.S. 590 (1975).
86. *Id.* at 602.

duties.[87] Since recruiter misconduct is now a neutral factor in the determination of whether a valid enlistment exists, there is nothing to deter a recruiter from acting improperly and enlisting unqualified recruits. The recruiter knows that once a recruit takes his first pay and performs his duties, the taint of an illegal enlistment will be "attenuated." In sum, for the protection of the individual's constitutional rights, and for the deterrence of government misconduct, any illegal recruiter conduct should cause an enlistment to be void ab initio.

II. SUBJECT MATTER JURISDICTION

> If you cry "Forward" you must be sure to make clear the direction in which to go. Don't you see that if you fail to do that and simply call out the words to a monk and a revolutionary they will go in precisely opposite directions.[88]

During the past 200 years there has been much debate on court-martial jurisdiction and during the last fifteen years, subject matter jurisdiction has been at the forefront of this debate. In 1969, the Supreme Court held that one way to improve the military justice system was to rule that no jurisdiction existed over a soldier who committed a rape while he was off duty, off base, and out of uniform.[89] The Supreme Court stated that in order to assure military personnel of the maximum amount of constitutional protection, they could only be tried in the military if their offense was "service connected."[90] However, in apparent contradiction to this new standard, COMA ruled in 1980 that the one way to improve

87. 10 U.S.C. § 802(b)(c) (1979).

88. Quote attributed to Anton Chekhow, J. GARDNER, KNOW OR LISTEN TO THOSE WHO KNOW (1975).

89. We have concluded that [for a] crime to be under military jurisdiction it must be service connected, lest cases arising in the land or naval forces, or in the militia, when in actual service in time of War or public danger as used in the Fifth Amendment, be expanded to deprive every member of the armed services of the benefits of an indictment by a grand jury and a trial by a jury of his peers. The power of Congress to make Rules for the Government and Regulation of the land and naval Forces, art. I, § 8, cl. 14, need not be sparingly read in order to preserve those two important constitutional guarantees. For it is assumed that an express grant of general power to Congress is to be exercised in harmony with express guarantees of the Bill of Rights. We were advised on oral argument that Art. 134 is construed by the military to give it power to try a member of the armed services for income tax evasion. This article has been called "a catchall" that "incorporated almost every Federal penal statute into the Uniform Code."

R. EVERETT, MILITARY JUSTICE IN THE ARMED FORCES OF THE UNITED STATES 68-69 (1956). "The catalogue of cases put within reach of the military is indeed long; and we see no way of saving to servicemen and servicewomen in any case the benefits of indictment and of trial by jury, if we conclude that this petitioner was properly tried by court-martial." O'Callahan v. Parker, 395 U.S. 258, 273 (1969).

90. O'Callahan v. Parker, 395 U.S. 258, 273 (1969).

the military justice system was to provide for court-martial jurisdiction over drug offenses committed off base by military personnel even though off duty and out of uniform.[91]

While there is no doubt that the sale and use of illegal drugs is a scourge that plagues all of society, this does not provide an ample excuse to take away from service personnel the constitutionally protected rights which other United States citizens enjoy. To insure that military personnel receive the full benefit of all of the constitutional protections as often as possible, military subject matter jurisdiction must be restricted to purely military offense.[92] To support this contention an analysis of subject matter jurisdiction during the past fifteen years will be undertaken.

A. The Development of the Service Connection Requirement During the First Eleven Years

Prior to 1969, subject matter jurisdiction was unlimited.[93] All that was required for a finding of subject matter jurisdiction was that the accused be in the military, and the offense be set out in the UCMJ.[94]

In 1969, the Supreme Court modified subject matter jurisdiction.[95] Suspicious of military justice, subject matter jurisdiction of courts-martials was limited to those offenses that were "service connected." "[C]ourts-martial as an institution are singularly inept in dealing with the nice subtleties of constitutional law."[96] However, no mention was made at that time of what constituted a service connected offense. Two years later in *Relford v. Commandant*,[97] the Supreme Court went to great effort to define the requirement.

Relford was court-martialed for kidnapping and raping two women on a military reservation. The Supreme Court ruled that the offense was "service connected." In doing so, the Court delineated twenty-one factors to be considered in determining whether

91. United States v. Trottier, 9 M.J. 337 (C.M.A. 1980). "Such conduct is inimical to a fit and ready armed force; and it is, under those circumstances, appropriately subject to prosecution and punishment by the military." *Id.* at 353.

92. This would not be such a drastic step since many legal scholars agree that *O'Callahan* was designed to limit military jurisdiction to only those cases where jurisdiction is required by military exigencies. *See generally* Note, *Military Jurisdiction Over Crimes Committed by Military Personnel Outside the United States: The Effect of* O'Callahan v. Parker, 68 MICH. L. REV. 1016 (1970). *See generally Jurisdiction of Military Courts Service-Connected Crimes*, 37 TENN. L. REV. 421 (1970).

93. Kinsella v. Singleton, 361 U.S. 234 (1960).

94. *Id.* at 241.

95. O'Callahan v. Parker, 395 U.S. 258 (1969).

96. *Id.* at 265.

97. 401 U.S. 355 (1971).

an offense was "service connected."[98] The presence of the first twelve factors in a case would indicate that an offense was not service connected. The last nine factors were additional considerations in determining the presence of a "service connection."

The Supreme Court in *Relford* determined that court-martial

98. We stress seriatim what is thus emphasized in the holding:

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 being among those traditionally prosecuted in civilian courts.

Relford, 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 and persons and of property on the military enclave. . . . (b) The responsibility of the military commander for maintenance of order. *See* Cafeteria & Restaurant Workers Union v. McElroy, 367 U.S. 836 (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 area and its nonmilitary areas, or between a serviceman-defendant's on-duty and off-duty activities and hours on the post.

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

jurisdiction existed due to the nonexistence of factors 1, 2, 3, 7, and 10.[99] However, *Relford* added the basis for two additional areas that would allow military courts the chance to have jurisdiction in the future. The first areas of the "service connection" to be broadened were elements A, B, C, and E of the nine additional considerations. Just three years later the Supreme Court was to note in *Schlesinger v. Councilman*:[100]

> [The issue of service connection] turns on major part on gauging the impact 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.[101]

Thus, jurisdiction could be expanded, because there is almost no crime, committed by military personnel, that won't fall under at least one of these criteria.[102] In addition, since the military court's expertise in gauging the impact of these criteria is now "singularly relevant," there is even more opportunity for allowing military tribunals an expanding "service connection."

The second area that was to allow for an expansion of jurisdiction was element (H) of the nine additional considerations. In the words of the court,

> We recognize that any *ad hoc* approach leaves outer boundaries undetermined. *O'Callahan* marks an area, perhaps not the limit, for the concern of the civil courts and where the military may not enter. The case today marks an area, perhaps not the limit, where the court-martial is appropriate and permissible. What lies between is for decision at another time.[103]

The Court was saying that future courts (by implication military courts of review and COMA) would decide for themselves what the extent of court-martial jurisdiction would be. Military appellate courts would soon show that if there was anything in the world that they could not resist, it was temptation.

However, in the immediate years following *Schlesinger* there

99. Relford v. United States, 401 U.S. 355, 366 (1971).
100. 420 U.S. 738 (1975).
101. *Id.* at 760.
102. United States v. Trottier, 9 M.J. 337 (C.M.A. 1980). A drug offense committed by a soldier who was at the time off-base, off-duty and out of uniform was found to be service connected.
103. Relford v. United States, 401 U.S. 355 (1971).

was a rather liberal COMA which sought to extend the maximum amount of constitutional protection to service members, by limiting court-martial jurisdiction. In *United States v. Hedlund*,[104] COMA overturned the earlier view that a victim's military status would create the service connection. Prior to *Hedlund*, COMA had consistently held that the military status of a victim would yield service connection.[105]

United States v. McCarthy[106] heralded another restriction of military jurisdiction, this time in the area of drug offenses. Beginning in 1969, with *United States v. Beeker*[107] and extending to 1976, COMA had ruled that drugs posed a special danger to the military community. Therefore, drug offenses, whether they occurred on or off-post, were service connected. In *McCarthy*, however, COMA ruled that not all drug offenses were automatically service connected. This was because COMA realized that off-post/off-base drug offenses did not always pose special danger to the military community.

In 1979, COMA further whittled away at subject matter jurisdiction over drug offenses. Borrowing from its rulings in *United States v. Hedlund*[108] and *United States v. McCarthy*,[109] COMA handed down the opinion of *United States v. Conn*.[110] In *Conn*, a Military Police lieutenant openly used drugs in the presence of his men, at an off-base apartment. COMA ruled that there was no jurisdiction because no service connection existed. Unfortunately, *Conn* marked the end of the era of restricting subject matter jurisdiction. A year later, the process of restricting subject matter jurisdiction would not only come to an end, but start to reverse itself.

B. 1980 to Present

A giant step in the move to expand court-martial jurisdiction was made in *United States v. Trottier*.[111] *Trottier* dealt with drug offenses. However, its perniciousness to the constitutional rights of military personnel lay with the fact that it would later be used to open up a wide range of other offenses and patterns to a yielding of service connection.[112]

104. 2 M.J. 11 (C.M.A. 1976).
105. *See* United States v. Everson, 19 C.M.A. 70, 41 C.M.R. 70 (1969) and cases cited therein.
106. 2 M.J. 26 (C.M.A. 1976).
107. 18 C.M.A. 563, 40 C.M.R. 275 (1969).
108. 2 M.J. 11 (C.M.A. 1976).
109. 2 M.J. 26 (C.M.A. 1976).
110. 6 M.J. 351 (C.M.A. 1979).
111. 9 M.J. 337 (C.M.A. 1980).
112. United States v. Lockwood, 15 M.J. 1 (C.M.A. 1983), off-base theft and for-

Stating that drug abuse among service members was a serious problem to military discipline COMA noted:

> [W]hen 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 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.[113]

Thus, COMA created, for all practical purposes, automatic service connection for all drug offenses. Jurisdiction even existed over those military personnel who committed drug offenses off base knowing that the drugs would not be introduced onto a military installation. COMA had finally utilized those two special areas of *Relford v. Commandant*[114] that were further emphasized in *Schlesinger v. Councilman.*[115] By stating that military courts could assume jurisdiction over crimes that affect discipline, or adversely affect military effectiveness, COMA had begun a process that could eventually find an almost unlimited number of service connections.

United States v. Shea[116] offers a brilliant example of this extension. Shea was convicted of wrongful appropriation of another service member's property and forgery of that person's name. Both offenses were committed off base. The Navy-Marine Corps Court of Military Review upheld the conviction saying:

> [W]e conclude that forgeries and other property offenses where the victim is a fellow service member may be sufficiently service-connected to support court-martial jurisdiction. While jurisdiction cannot be predicated solely upon the military status of the victim of the offense, . . . the serious negative impact that such property offenses indisputably have on morale, good order, and discipline within a command and on an individual servicemember's performance may establish the requisite service-connection.[117]

In one full swoop, the Court of Military Review extended service connection to another offense, and neutralized *United States v.*

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gery service connected; United States v. Masuck, 14 M.J. 1017 (A.C.M.R. 1982); United States v. Shea 14 M.J. 882 (N.F.C.M.R. 1982), off-base by service member ruled service connected; United States v. Fortenberry, 14 M.J. 505 (A.F.C.M.R. 1982).

113. 9 M.J. 337, 350 (C.M.A. 1980).

114. 401 U.S. 355, 367-69 (1971).

115. 420 U.S. 738, 760 (1975). *See supra* note 94 and accompanying text.

116. 14 M.J. 882 (N.F.C.M.R. 1982).

117. *Id.* at 884.

Hedlund,[118] by creating a criteria for service connection that could easily be met.

A second example of the expanding service connection was offered by *United States v. Lockwood*.[119] Therein, the accused was charged with several offenses, including forgery of another service member's signature on a promissory note that had been stolen from an acceptance corporation. Even though the act occurred off-base, COMA ruled that a service connection existed. In an opinion of inscrutible sagacity the Court said:

> While larceny from the Murphy Acceptance Corporation and the forgery of Sage's signature to a promissory note took place off base, Airman Sage was located on base and, although he may not have been the primary victim of the forgery and theft, . . . he was among the victims of these crimes. For one thing, it was forseeable that as a result of Lockwood's actions, a demand would be made that Sage pay the forged promissory note and if he declined to pay, a suit on the note would be instituted against him. In that event, he would be exposed to the inconvenience—and possibly the expense—of defending himself against the claim and would run the risk of an adverse decision by the trier of fact in the civil action brought by the noteholder. Furthermore, Sage would be exposed to the danger that nonpayment on the note executed in his name would be included in credit reports without any explanation that he was under no legal obligation to pay the note. Even though, as pointed out in *Uhlman*, a person generally is not bound legally by a forgery if his signature is on a note, check, or other legal document, we are sure that, in view of the inconvenience and expense to which is he subjected, a person whose signature has been forged usually considers himself to be a victim of the crime.[120]

First, Sage was a victim of a crime because of a hypothetical fact pattern. No actual damage occurred because Sage did not have to pay on the forged note, yet the possibility of damage to Sage was enough for the court to support the finding of a service connection. Henceforth, jurisdiction may be based on hypothetical fact patterns and/or inconvenience! The court also emphasized the *Relford* consideration of adverse effect of an off-base crime on, "the 'morale, discipline, reputation, and integrity of the base itself.' "[121] The Court implicitly recognized that a military organization had an interest in maintaining a good reputation.[122] Subject matter jurisdiction was potentially enlarged because under this vague criteria, virtually any crime committed by a serv-

118. 2 M.J. 11 (C.M.A. 1976).
119. 15 M.J. 1 (C.M.A. 1983).
120. *Id.* at 9.
121. United States v. Lockwood, 15 M.J. 1, 10 (C.M.A. 1983).
122. *Id.*

ice member might now be found to effect a military installation's "good reputation." The elements of *Relford* will undoubtedly allow an increasing number of assertions of service connections.

C. *Subject Matter Jurisdiction: Unlimited Jurisdictional Reach of the Devil's Articles*

Articles 133 and 134 of the Uniform Code of Military Justice,[123] sometimes referred to as the Devil's Articles, offer potentially unlimited subject matter jurisdiction over military personnel. These articles were declared to be constitutional in *Parker v. Levy*.[124] Levy was tried and convicted by court-martial for uttering "disloyal statements" such as the following:

> The United States is wrong in being involved in the Viet Nam War. I would refuse to go to Viet Nam if ordered to do so. I don't see why any colored soldier would go to Viet Nam: They should refuse to go to Viet Nam and if sent should refuse to fight because they are discriminated against and denied their freedom in the United States, and they are sacrificed and discriminated against in Viet Nam by being given all the hazardous duty and they are suffering the majority of casualties. If I were a colored soldier I would refuse to go to Viet Nam and if I were a colored soldier and were sent I would refuse to fight. Special Forces personnel are liars and thieves and killers of peasants and murderers of women and children.[125]

The Supreme Court upheld the conviction of Levy. The Court said that these articles were not unconstitutionally vague. Rather, they were proper requirements that the military could make of its members. "This Court has long recognized that the military is, by necessity, a specialized society separate from civilian life. We have also recognized that the military has, again by necessity, developed laws and traditions of its own during its long history."[126]

The Devil Articles offer yet another imploring plea to limit subject matter jurisdiction. As Justice Douglas noted in *O'Callahan v. Parker*,[127] "[art. 134] has been called 'a catch all' that 'incorporates almost every federal penal statute into the Uniform Code.' "[128]

123. 10 U.S.C. §§ 133-34 (1956). Any commissioned officer, cadet, or midshipman who is convicted of conduct unbecoming an officer and a gentleman shall be punished as a court-martial may direct. 10 U.S.C. § 933 (1956); *See infra* note 127 and accompanying text.

124. 417 U.S. 733 (1974).

125. *Id.* at 735.

126. *Id.*

127. O'Callahan v. Parker, 395 U.S. 258, 273 (1969).

128. *Id.* Article 134 provides:

> Though not specifically mentioned in this chapter, . . . all disorders and neglects to the prejudice of good order and discipline in the armed forces, all conduct of a nature to bring discredit upon the armed forces, and crimes and

O'Callahan v. Parker required a service connection to exist before court-martial jurisdiction could apply. *United States v. Trottier*[129] began a movement to bastardize this requirement to the point that anything that could possibly adversely effect a military base was found to meet the service connection requirement. In *United States v. Lockwood*,[130] COMA ruled that an off-base larceny was service connected because Article 134 allowed for the prosecution of anyone who adversely affects the good name of the military establishment.

> By prohibiting in Article 134 of the Uniform Code, 10 U.S.C. § 934, "all conduct of a nature to bring discredit upon the armed forces," Congress also has acknowledged the importance of maintaining the good name of the military establishment. Even though Lockwood's forgery and theft occurred off-base, they nonetheless had an adverse effect on the general reputation of Sheppard Air Force Base and those assigned there.[131]

There is no offense that is committed by a member of the armed forces that could not eventually be found to be service connected using the preposterously overbroad criteria of Articles 133 and 134. Therefore, Articles 133 and 134 offer another important reason to limit jurisdiction.

III. PROCEDURAL MILITARY JUSTICE

An additional reason to restrict court-martial jurisdiction is found in the very nature of procedural military justice. Although not all aspects of military criminal procedure are narrower than their civilian counterpart,[132] on balance, Military Criminal Procedure is so ineffective in protecting the constitutional rights of military personnel, that it passes the point of being obscene.[133]

> None of the travesties of justice perpetrated under the UCMJ is really very surprising, for military law has always been and

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> offenses not capital, of which persons subject to this chapter . . . may be guilty, shall be taken cognizance of by a general, special, or summary court-martial, according to the nature and degree of the offense, and shall be punished at the discretion of that court.

10 U.S.C. § 934 (1956) (citations omitted).

129. 9 M.J. 337 (C.M.A. 1980).

130. 15 M.J. 1 (C.M.A. 1983).

131. *Id.* at 9.

132. The Supreme Court in Goda v. Mayden, 413 U.S. 665, 681 (1973), observed that the military's pretrial investigation procedures furnished an accused with more protection than was available to a civilian in the indictment process. In 1980, the military adopted, with very few exceptions, the Federal Rules of Evidence. *See* 8 M.J. LXVIII. *See generally* S. SALTZBURG, L. SCHINASI & D. SCHLETER, MILITARY RULES OF EVIDENCE MANUAL (1981).

133. *See generally* L. WEST, THEY CALL IT JUSTICE COMMAND INFLUENCE AND THE COURTS-MARTIAL SYSTEM (1977). *See generally* R. SHERRILL, MILITARY JUSTICE IS TO JUSTICE AS MILITARY MUSIC IS TO MUSIC (1971).

> continues to be primarily an instrument of discipline not justice. . . . A civilian trial, in other words, is held in an atmosphere conducive to the protection of individual rights, while a military trial is marked by the age-old manifest destiny of retributive justice.[134]

There are three levels of trial courts-martial—Summary, Special, and General.[135] The lowest level of trial courts-martial is the Summary.[136] The injustice and potential for abuse in this court is apparent ab initio. The accusing officer is allowed to act as the convening authority of a Summary Court-Martial.[137] Thus, the officer preferring charges, decides on who will determine guilt or innocence. If the accusing officer is biased, he is supposed to hand the matter over to a superior authority who will act as the convening authority;[138] however, there is nothing to prevent an immoral officer from hand picking a presiding officer, who will surely find the accused guilty as charged. "[T]he fact that the convening authority or the Summary Court officer is the accuser in a case does not invalidate the trial."[139] The injustice of this court is further exemplified by the fact that this form of military trial is generally held without the presence of counsel[140] or a professional jurist.[141] In fact, there is no requirement that the presiding officer even be an attorney. The nature of the Summary Courts-Martial System was described in *Henry v. Middendorf*.[142]

> The presiding officer acts as judge, fact finder, prosecutor, and defense counsel. . . . The maximum sentences which may be imposed by summary courts-martial are: one months confinement at hard labor, 45 days hard labor without confinement; two months restrictions to specified limits; reduction to the lowest enlisted pay grade; and forfeiture of two-thirds pay for one month.[143]

Lest anyone consider vile, the idea of a serviceman being possibly sentenced to forty-five days at hard labor and reduced to the lowest pay grade by a presiding officer hand picked by the convening authority, defenders of the system say that there is no need to worry. These "defenders" point out that a fair trial is guaranteed by the following two postulates: First, Article 37 of the Uni-

134. O'Callahan v. Parker, 395 U.S. 258, 266 (1969).
135. 10 U.S.C. § 816 (1956).
136. 10 U.S.C. § 820 (1956).
137. United States Manual for Courts-Martial ¶ 5(c) (rev. ed. 1969).
138. *Id.*
139. *Id.*.
140. Henry v. Middendorf, 425 U.S. 25, 34 (1976). There is no constitutional right to independent counsel because a Summary Court Martial is not a criminal prosecution.
141. *Id.* at 29.
142. 425 U.S. 25 (1976).
143. *Id.* at 32-33.

form Code of Military Justice[144] has officially outlawed command influence. The convening officer is prohibited from "coercing" by "any unauthorized means" the actions and judgments of the court-martial in reaching its decision.[145] Second, as even the Supreme Court has noted, fair trials are guaranteed by section 79 of the Manual of Courts-Martial:

> The function of the presiding officer is quite different from that of any participant in a civilian trial. He is guided by the admonition in section 79 of the MCM that "[t]he function of a summary court-martial is to exercise justice promptly . . . [t]he summary court will [also] thoroughly and impartially inquire into both sides of the matter and will assure that the the interests of both the government and the accused are safeguarded."[146]

The preceeding two safeguards look and sound effective. However, with a bit of scrutiny these arguments get tripped up like a phonograph needle tracking the grooves of a warped record.

Article 37 of the UCMJ, and section 79 of the MCM may attempt to outlaw coercion and ensure impartiality, but, there are still ways that a commander can subtley influence the outcome of a trial. The presiding officer always knows that he may be passed up for promotion, receive an unfavorable evaluation, or lose an important friendship if his verdict displeases the convening authority. Nothing need be done at the time of the trial, but the officer understands just the same.[147] In addition, since the accusing officer picks the presiding officer by name, he does not have to say anything to ensure a conviction. He will just pick an officer who will not disappoint him.

In addition to the above, another safeguard that is often mentioned is that an enlisted man can refuse a summary court-martial.[148] If an enlisted person refuses a summary court-martial, the

144. 10 U.S.C. § 837 (1956).

145. *See* 10 U.S.C. § 838 (1956).

146. Henry v. Middendorf, 425 U.S. 25, 41 (1976).

147. United States v. Littrice, 3 C.M.A. 487, 13 C.M.R. 43 (1953) (Ruled command influence and conviction of the accused overturned after the convening authority made several references to the efficiency rating of the court members in pretrial conference). United States v. Hawthorn, 7 C.M.A. 893, 22 C.M.R. 83 (1956) (Ruled command influence and conviction of accused overturned, after commanding general, not the convening authority, made it known to all officers and court members of his desire for a conviction in all similar situations; his comments were made at a time before arrest and trial through a policy directive) United States v. Navarre, 5 C.M.A. 32, 17 C.M.R. 32 (1954). However, conviction of accused upheld, after comments by convening authority ruled innocous and innocent. Conviction even upheld through evidence commanding officer lectured court members on another officer who had given low efficiency report rating to a member of his command for his performance as a member of a court-martial.

148. 10 U.S.C. § 820 (1956).

alternative is a special or general court-martial.[149] These expose the accused to potentially harsher penalites. Thus, there is considerable "bitter," that goes along with the "better" court!

The final problem with the summary court-martial has to do with its application. Only enlisted persons, not officers, are subject to trial by summary court-martial.[150] Upon what meat do these officers feed that they have grown so great? Perhaps the writers of the Uniform Code of Military Justice knew that the summary courts-martial system is blatantly unfair, and wished to save officers the ignominy of dealing with this system. Whatever the reason, it is clear that this discrepancy raises serious moral, if not equal protection issues, under the law.

Special courts-martial[151] are the intermediate level trial courts; it may consist of any number of members, but it may contain no less than three. These courts are convened by a higher level command than one needed to convene a summary court-martial.[152] These proceedings are truly adversarial in nature with separate counsel for both sides, a military judge and a court reporter being present. In this proceeding "court members" serve basically as would a jury. The maximum punishment authorized to be dispensed by this court is a bad conduct discharge, six month's incarceration and/or forfeitures of two-thirds pay per month for six months.[153]

General courts-martial are the highest level of the military trial courts. As with special courts-martial, general courts-martial contain separate counsel for both sides, a military judge and a court reporter. However, unlike special courts-martial, general courts-martial can only be convened by high level commanders and they must consist of a military judge and at least five court members.[154] The maximum possible punishment that can be authorized by such a court is death.[155]

These second and third levels of courts-martial will be analyzed together. Except for a few minor differences,[156] they are practically identical for procedural purposes.

The general and special courts-martial give the apearance of being fair adjudicators of guilt and innocence. Unfortunately, this

149. *Id.* Another alternative, in theory, would be a dropping of charge.
150. *Id.*
151. 10 U.S.C. § 816 (1956).
152. 10 U.S.C. § 823 (1956).
153. 10 U.S.C. § 819 (1956). Manual for Courts-Martial § 127(c)(6) (1956).
154. 10 U.S.C. § 816 (1956).
155. 10 U.S.C. § 818 (1956).
156. 10 U.S.C. § 816, 819 (1956). Manual For Courts-Martial § 127(c)(6) (1956). The minimum number of court members and the maximum sentence that can be handed down.

fairness is only cosmetic since both courts-martial systems are *vulnerable* to command influence. In fact, command influence can be a threat even before an accused reaches the courtroom of either of these two systems. It is the commander who decides whether a service member should be prosecuted. If a commander likes a particular serviceman, in many cases there is nothing to prevent him from not preferring charges. Alternatively, if a commander dislikes a particular service member, there is nothing to prevent charges from being preferred.

Once a commander decides to prefer charges, it is now another commander's will which carries the great weight: the convening authority. For it is the convening authority who is given wide latitude to decide which court-martial will try the accused.[157] Therefore, it is submitted that there is command influence at this point in the trial process, because the convening authority indirectly controls sentencing. Since it is he who determines which court-martial will try the accused, it is the convening authority who decides, in a real and substantial manner, what the maximum punishment will be.

Command influence is not isolated to the court-martial selection process. It is the convening authority who also decides by name, who will serve as court members. It is they who determine guilt or innocence,[158] and assuming conviction, impose the sentence. As previously mentioned, the finding of guilt or innocence can be determined as much by the members chosen to adjudicate guilt or innocence, as by the actual guilt or innocence of the accused.[159]

Defenders of the system are quick to point out that there is a possible safeguard built into the general and special courts-martial procedure to prevent this type of abuse. A service member may, at his own request, have one-third of the members of the court comprised of enlisted men.[160] In fact, this "safeguard" affords very little protection from a corrupt convening authority. First of all, there is no *mandatory* requirement that one-third of the court be comprised of enlisted persons; the convening authority can cite "military exigencies" and refuse the accused's request.[161] Secondly, even if the "one third" request is granted, a fair selection is not assured. There is nothing in the Uniform Code of Military Justice to prevent the convening authority from

157. Manual for Courts-Martial ¶ 33(h) (rev. ed. 1969).
158. 10 U.S.C. § 825(2) (1956).
159. L. WEST, THEY CALL IT JUSTICE: COMMAND INFLUENCE AND THE COURTS-MARTIAL SYSTEM 7-9 (1977).
160. 10 U.S.C. § 825(c)(1) (1956).
161. *Id.*

appointing the general's pastry chef or chauffeur. Third, even assuming a fair selection, it should be noted that a military judicial finding of guilt requires a vote of guilty by only two-thirds of the court.[162] Finally, a moral, if not equal protection problem, arises when officers are tried by courts-martial, since officers cannot be tried with enlisted members as members of the court.[163]

IV. ALTERNATIVES TO OUR PRESENT MILITARY JUSTICE SYSTEM

> The Military tribunals must be abolished, and will be. They are a survival of medieval prejudices. All citizens must be equal before the law. The danger of allowing one cast to consider itself separate from the rest of the nation and above common law was vividly exemplified by today's monsterous decision.[164]

The bizarre reality of justice in the military has been demonstrated. What solution can remedy the myriad of abuses that plague the system?

Some advocate that we do nothing. They view a broad military jurisdictional reach as the only way to ensure a disciplined military.[165] Others maintain that we abandon our long-outmoded concept of military justice and shrink military jurisdiction to cover only those crimes that are unique to the military (e.g., AWOL, Detention).[166]

Almost every (truly free) democracy in the world (except the United States of America) has greatly enlarged civilian control over their respective military justice systems.[167] The Federal Republic of Germany (FRG) and France have, for all practical pur-

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162. 10 U.S.C. § 852(a)(1), (b)(10, (b)(3) (1956). Except no person may be convicted of an offense for which the death penalty is mandatory unless the vote is unanimous.

163. 10 U.S.C. § 825(d)(1) (1956). This section reads, "When it can be avoided, no member of the armed forces may be tried by any member which is junior to him in rank or grade." There is almost no case when it cannot be avoided.

164. Statement of Jean Juares, socialist leader of France, spoken after the second court-martial reaffirmed the conviction of Captain Alfred Dreyfus at Rennes, France, 1889. *See*, W. HARDING, DREYFUS: THE PRISONER OF DEVILS ISLAND 328-29 (1899).

165. *See generally* Hunt, *Trimming Military Jurisdiction: An Unrealistic Solution to Reforming Military Justice*, 63 CRIM. L.C and P.S. 23 (1972). The author sees the military as a system predicated on law and order, to which discipline is the only way to preserve law and order, and expanded jurisdiction being the only way to preserve discipline. 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).

166. For an analysis of how this system would work, *see infra* note 172 and accompanying text.

167. L. WEST, THEY CALL IT JUSTICE; COMMAND INFLUENCE AND THE COURTS-MARTIAL SYSTEM 284 (1977).

poses, abolished their court-martial systems. Both countries now handle military criminal justice matters through their civilian judiciaries.[168] In order to give a better understanding of how these two approaches work, a brief description of both military criminal justice systems will be considered.

On January 1, 1966 Jean Jaures' diatribe of indignation came very close to becoming a reality in France.[169] On that date, a new "French Code of Military Justice"[170] became effective. It created enormous changes in military justice procedure and jurisdiction. The French realized that military tribunals do serve a valuable function. Therefore, they felt the best way to cure the abuse in the system was not to abolish the system, as Jaures advocated, but rather to limit its jurisdiction.[171] The French Code states that during peacetime and within the territory of France, the permanent judicial district courts[172] will exercise jurisdiction over members of the armed forces who committed purely military offenses.[173] These courts also exercise jurisdiction over any military personnel who commit any criminal offense within a military establishment or incident to military service.[174]

The French do not stand alone at the vanguard of the movement to give military personnel the same constitutional rights enjoyed by their civilian counterparts. FRG gave its military

168. *Id.* at 284.

169. *See supra* note 163 and accompanying text.

170. Law No. 65-542, 8 Jul. 1965, as amended by Law No. 66-1038, 30 Dec. 1966, Code de Justice Militarie, Petits Codes Dalloz (1967-1968) [hereinafter cited as CJM].

171. *See generally The New French Code of Military Justice*, 44 MIL. L. REV. 71 (1969).

172. The permanent judicial district court consists of five members—two civilian magistrates (the president of the court and his assistant) belonging to the Military Justice Corps, and three military judges. CJM art. 7.

173. Title II, Book III, CJM, lists the military offenses recognized. Chapter 1 is concerned with the avoidance of military obligations such as failure to abide by enlistment or conscription laws, the several forms of desertion and unauthorized absences, encouraging or concealing deserters and malingering. Chapter 2 deals with offenses against honor or military duties. Listed therein are the offenses of capitulation, treason, military conspiracy, pillage, destruction of military property, misappropriation of military property or funds, uniform violations, offenses against the flag of the armed forces, and inciting acts against military duties or discipline. In Chapter 3 are set forth infractions against discipline. These offenses consist of insubordination (military revolt, rebellion, disobedience, illegal acts directed toward superiors, assault, insults, threats and refusal by a military commander to follow orders) and abuse of authority (illegal acts against subordinates, abuse of military requisitions and maintaining an illegal or repressive system of military justice). Chapter 4 concerns itself with military offenses in violation of standing or general orders including misbehavior before the enemy offenses by and against sentinels or lookouts and improper hazarding of a vessel or airplane.

Comment, *The New French Code of Military Justice*, 44 MIL. L. REV. 71, 85 (1969).

174. C.J.M. art. 56.

personnel even more constitution protections, and the FRG did this ten years before the French.[175]

> As already mentioned, criminal punishment of soldiers of the Bundeswehr [Forces of the FRG] for violation of the German criminal law is at present exclusively a matter of civil courts, irrelevant of the fact that these offenses may have been committed on duty or otherwise are of a typically military nature. With the above mentioned exceptions [German forces stationed in a foreign country and German forces embarked on naval units] military courts are provided only in a case of armed conflict.[176]

These two systems illustrate that there are viable alternatives to our present military justice system. Both France and Germany offer a successful history of protecting the rights of military personnel, while at the same time not adding to the problem of maintaining discipline in the military.

CONCLUSION

A disquieting and steady move toward expanding court-martial jurisdiction has occurred during the past three years. There is no evidence to show that this expansion will stop, or even slow down in the immediate future. In fact, there is every reason to believe that this expansion will continue unabated.[177] Defenders of the system state that the military is a constitutionally mandated distinct community, separate from civilian society.[178] They go on to say that this "law and order society" is built on a foundation of discipline, which in turn is founded upon broad military jurisdiction.[179]

The author concludes that military jurisdiction should be re-

175. *See generally* Comment, *The Administration of Justice Within the Armed Forces of the German Federal Republic* 7 MIL. L. REV. 1 (1960).

176. *Id.* at 5.

177. The current Chief Judge, Robinson O. Everett, has given every indication that he favors widening military jurisdiction. He has repeatedly expressed trust in the ability of the military justice system to protect the constitutional rights of service members. *See, e.g.*, Everett, *Some Comments On the Civilization of Military Justice*, ARMY LAW, Sept. 1980, at 1. Chief Judge Robinson O. Everett and Associate Judge Cook also spoke before the House Armed Services Committee in favor of increasing personal jurisdiction over military personnel. Amendments to Articles 2 and 36, Uniform Code of Military Justice: Hearings on § 428. Before the military personnel subcomm. of the House Comm. on Armed Services, 96th Cong., 1st Sess. (1979). It should be noted that at the committee hearing Chief Judge 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.

178. U.S. CONST. art. 1, § 8. Parker v. Levy, 417 U.S. 733, 744 (1974); Burns v. Wilson, 346 U.S. 137, 140 (1953).

179. Schlueter, *Court-Martial Jurisdiction: An Expansion of the Least Possible Power* 73 J. CRIM. L. 74, 94 (1982).

stricted to purely military offenses,[180] for four major reasons:

First, military discipline does not require a broad military justice system that ravages the constitutional rights of military personnel. This contention is supported by the fact that the Federal Republic of Germany has not even provided for court-martial jurisdiction over any crimes committed by military personnel, and that France has limited military jurisdiction to "purely military offenses."[181] Neither country has seen a need to change their civilian systems.

Second, military jurisdiction attaches against service members fraudently induced into joining.[182] This results in destruction of their constitutional rights, and subjects them to the capriciousness of military law, without considering the actions of the recruiter.[183]

Third, military justice and specifically, military procedural law are inately unfair.[184] Therefore, we should welcome any opportunity of diminishing military jurisdiction.

Finally, because of the inate unfairness of military law, court-martial jurisdiction should not attach over offenses committed off base that have no real connection to the military establishment. In this regard, there can be no justification for the elimination of the constitutional rights of military personnel by asserting military jurisdiction where there is no harm for the military to vindicate.

Unfortunately, heretofor, the sphere of ideas in Congress, with regard to military jurisdiction has been a conquered province, occupied by expansionist attitudes and assumptions.[185] The limitation of military jurisdiction is not impossible; all that it entails is the edification of Congress.

180. *See supra* note 172.
181. *Id.*
182. 10 U.S.C. § 802(b)(c) (1956).
183. *Id.*
184. *See generally* L. WEST, THEY CALL IT JUSTICE: COMMAND INFLUENCE AND THE COURTS-MARTIAL SYSTEM (1977). *See generally* R. SHERILL, MILITARY JUSTICE IS TO JUSTICE AS MILITARY MUSIC IS TO MUSIC (1971).
185. S. REP. NO. 96-197, 96th Cong., 1st Sess. 121 (1979). The Senate Committee supported an increase in personal jurisdiction, even in enlistments that involved recruiter fraud or misconduct. However, it was their hope that recruiter fraud and misconduct would cease to exist.