

Sheathing the Jurisdictional Sword: Constraining the Application of Article 2(c), UCMJ, to the Reserve Components

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I. Introduction.

On March 16, 2015, the Court of Appeals for the Armed Forces (CAAF) issued its much anticipated opinion in *U.S. v. Morita*.¹ This case explored the limits of applying Article 2(c) of the Uniformed Code of Military Justice (UCMJ) to the reserve components.² At issue in *Morita* was whether UCMJ jurisdiction could be applied to an Air Force lieutenant colonel who signed the majority of his fraudulent travel vouchers and requests for orders while not subject to active duty or inactive duty training (IDT) orders.³ The case allowed CAAF to refine its opinion in *United States v. Phillips* and to establish the parameters for future application of Article 2(c).⁴

II. Background.

Traditionally, reserve component service members have only been subject to the UCMJ under two provisions of the code. Pursuant to Article 2(a)(1), reserve component servicemembers under a call or order for duty or training, are subject to the UCMJ from the dates when they are required by the terms of the order to obey it (active duty provision).⁵

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¹ See *U.S. v. Morita*, No. 14-5007, 2015 CAAF LEXIS 238 (C.A.A.F. Mar. 16, 2015).

² *Id.* at *20-21.

³ *Id.*

⁴ See *United States v. Phillips*, 58 M.J. 217 (C.A.A.F. 2003). Court-martial jurisdiction is dependent upon personal and subject matter jurisdiction, in addition to a properly constituted court martial. See *United States v. Oliver*, 57 M.J. 170, 172 (C.A.A.F. 2002). Subject matter jurisdiction is concerned with UCMJ violations committed by persons subject to the Code. See *United States v. Chodara*, 29 M.J. 943, 944 (A.C.M.R. 1990). Thus, a court-martial has subject matter jurisdiction only over those violations of the UCMJ, which are committed by persons who are subject to the Code at the time of the offense. See *id.* Conversely, personal jurisdiction looks at both military control over the individual at the time of trial and at the time of the offense. See *Oliver*, 57 M.J. at 172. Personal jurisdiction (and to a large extent subject matter jurisdiction) is governed by Article 2 of the UCMJ. See UCMJ art. 2 (2012); see also *Ali*, 71 M.J. at 265.

⁵ See UCMJ art. 2(a)(1). The provision reads:

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,

Further, under Article 2(a)(3) of the UCMJ, “members of the reserve component while on inactive-duty training” are also subject to the UCMJ (IDT provision).⁶ Therefore, reserve component service members are only explicitly subject to UCMJ jurisdiction when performing active duty or IDT.⁷

United States v. Phillips marked the first occasion in which the CAAF exclusively applied Article 2(c) of the UCMJ to the reserve components thereby recognizing a third way to attach UCMJ jurisdiction to reserve service members.⁸ In *Phillips*, an Air Force Reserve lieutenant colonel admittedly ingested marijuana-laced brownies while in a travel status the night before her annual training order was to begin.⁹ The officer argued that the Air Force lacked jurisdiction over her use of marijuana because her active duty tour was not scheduled to begin until 0730 on 12 July.¹⁰ The officer’s orders required her to report for duty on 12 July and to be released from duty on 23 July with an optional one day of travel on 11 July.¹¹ Instead of applying its traditional analysis under Article 2(a)(1) of the UCMJ, the court found the officer subject to the Code on 11 July (her travel day) under Article 2(c).¹²

With regard to Article 2(c), the UCMJ establishes a specific analytical framework for its application.¹³ The first

the armed forces, from the dates when they are required by the terms of the call or order to obey it. *Id.* This means that Reserve component Soldiers ordered to annual training (AT), active duty for training (ADT), or other forms of active duty are subject to the Uniform Code of Military Justice (UCMJ). See *id.* See also MANUAL FOR COURTS-MARTIAL, UNITED STATES R.C.M. 202 discussion (2)(A)(i) (2012) [hereinafter MCM].

⁶ See UCMJ art. 2(a)(3) (“[m]embers of a reserve component while on inactive-duty training, but in the case of members of the Army National Guard of the United States or the Air National Guard of the United States only when in Federal service.”); see also MCM, *supra* note 5, R.C.M. 204.

⁷ See UCMJ arts. 2(a)(1), 2(a)(3).

⁸ See *Phillips*, 58 M.J. at 220. See also *United States v. Ernest*, 32 M.J. 135, 138-39 (finding an alternate basis for jurisdiction under Article 2(c) for a Reserve Component service member whose voluntary request for continuation orders during his court martial was not properly processed by the Air Force.)

⁹ See *Phillips*, 58 M.J. at 218.

¹⁰ *Id.* at 217.

¹¹ *Id.* at 217-18.

¹² *Id.* at 219.

¹³ See UCMJ art. 2(c) (2012). Article 2(c) is known as the “constructive enlistment” provision and was added to the UCMJ in reaction to the “*Russo Doctrine*,” which held the Government could be estopped from showing jurisdiction when recruiter misconduct affected the accused’s enlistment.

step in the analysis looks at whether the service member is “serving with an armed force.”¹⁴ If this can be established, the court then applies a four part test set out in Article 2(c).¹⁵ First, the service member must voluntarily submit to military authority.¹⁶ Second, the service member must meet the mental competence and minimum age qualifications of the service at the time of voluntary submission to military authority.¹⁷ Third, the service member must receive military pay and allowances.¹⁸ Finally, the service member must perform military duties until such service has been properly terminated.¹⁹

In applying Article 2(c) to the case, the court in *Phillips* reasoned the officer was clearly a member of the force because: (1) on the travel day, she was a member of a reserve component; (2) she traveled to a military base on her travel day pursuant to military orders, and she was reimbursed for her travel expenses; (3) the orders were issued for the purpose of performing active duty; (4) she was assigned to military quarters, she occupied those quarters, and she committed the charged offense in those quarters; (5) she received military service credit in the form of a retirement point for her service on that date; and (6) she received military pay and allowances for that date.²⁰

With respect to the four-prong analysis, the officer had submitted to military authority by voluntarily traveling on 11

See U.S. v. Quintal, 10 M.J. 532, 534 (A.C.M.R. 1980). The Congressional Report on the provision states:

“The committee strongly believes that [the *Russo* doctrine serves] no useful purpose, and severely undermine[s] discipline and command authority. No military member who voluntarily enters the service and serves routinely for a time should be allowed to raise for the first time after committing an offense defects in his or her enlistment, totally escaping punishment for offenses as a result. That policy makes a mockery of the military justice system in the eyes of those who serve in the military services.” *Id.* (quoting S. Rep. No. 96-197, 96th Cong., 1st Sess. 121, 122 reprinted in [1979] U.S. Code Cong. & Ad. News 1827, 1828).

¹⁴ United States v. Fry, 70 M.J. 465, 469 (C.A.A.F. 2012). “The phrase ‘serving with’ an armed force has been used to describe persons who have a close relationship to the armed forces without the formalities of a military enlistment or commission. *Phillips* at 219. “The question of whether a person is ‘serving with’ the armed forces is dependent upon a case-specific analysis of the facts and circumstances of the individual’s particular relationship with the military, and means a relationship that is more direct than simply accompanying the armed forces in the field.” *Id.*

¹⁵ See U.S. v. Lawanson, No. 201200187, 2012 CCA LEXIS 345, *24 (N.M. Ct. Crim. App. Aug. 31, 2012).

¹⁶ See *Phillips*, 58 M.J. at 219.

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.* at 220.

July and accepting the military conditions of her travel to use government quarters.²¹ Further, the officer clearly met age and mental requirements for active service and received pay and allowances for the day of travel.²² The court also found the officer performed military duties on her travel day.²³ It stated, “Travel is a normal part of military duty. In the discharge of that duty, it was incumbent upon the appellant to adhere to military standards and to the UCMJ.”²⁴ Therefore, the court found jurisdiction over the case pursuant to Article 2(c) of the UCMJ.²⁵

Although not at issue in *Phillips*, the court’s dicta from an unpublished opinion in 2000, where the court potentially found jurisdiction outside of traditional constraints, is also relevant to the issue of reserve component jurisdiction.²⁶ In *United States v. Morse*, an Air Force Reserve colonel was convicted of attempted larceny and filing false travel vouchers in conjunction with active duty and IDT.²⁷ On appeal, Colonel Morse argued that he signed several of his vouchers after he was released from active duty or IDT, and jurisdiction was, therefore, lacking.²⁸ However, the officer had previously stipulated at trial that he was serving on active duty or IDT when he signed all the vouchers, and, hence, the military judge found jurisdiction over the offenses.²⁹ Though this could have ended the analysis, the court then went further, adding:

Finally, even if we were to ignore the overwhelming evidence of subject matter jurisdiction noted above, we would still find jurisdiction based upon the simple and undeniable fact that the appellant signed these forms in his official capacity as a reserve officer in the United States Air Force. It was part of his duty incident to these reserve tours or training to complete these forms with truthful information and that duty was not complete until the forms were signed, regardless of whether or not he completed travel pursuant to his orders. Therefore, it is immaterial if the appellant did not sign these

²¹ *Id.*

²² *Id.*

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.*

²⁶ See *United States v. Morse*, No. 33566, 2000 CCA LEXIS 233 (A.F. Ct. Crim. App. Oct. 4, 2000).

²⁷ *Id.* at 1.

²⁸ *Id.* at 16.

²⁹ *Id.*

forms until after completing his travel. He did so in a duty status.³⁰

Thus, with its dicta, the court opened the door to an expanded interpretation of UCMJ jurisdiction over reserve component service members.³¹

III. *U.S. v. Morita*.

Fifteen years after *Morse*, the Air Force Court of Criminal Appeals (AFCCA) re-examined the expansive dicta in that decision, as well as the criteria for determining jurisdiction under Article 2(c).³² In *United States v. Morita*, Lieutenant Colonel (Lt Col) Steven S. Morita, the appellant, was a member of the Air Force Reserve who frequently traveled to various medical units, assisting in the planning, design, and development of construction projects.³³ As the only reserve service member assigned to his unit, Lt Col Morita used the relative inexperience of, and lack of oversight by, his supervisor to forge signatures on “numerous travel orders and vouchers, reimbursement documents, active duty orders, and IDT records.”³⁴ In all, Lt Col Morita forged 510 signatures or initials on over 100 documents, netting him \$124,664.03 in fraudulent funds.³⁵ As his fraudulent activities covered a long period of time and allegedly took place while he was on active duty orders, on IDT, and serving with the armed forces (though not covered by military orders), the government claimed jurisdiction over Lt Col Morita based on both Article 2(a) and Article 2(c).³⁶

At his court-martial, the military judge determined jurisdiction under Article 2(c) existed for Lt Col Morita’s fraudulent activities during those periods not explicitly covered by military orders by relying on the *Morse* dicta, which arguably predicated jurisdiction on committing any act merely related to reserve duties.³⁷ The military judge found that Lt Col Morita’s actions took place in his official capacity as a reserve officer, thereby establishing he “served with an armed force,” notwithstanding the fact many of the fraudulent acts occurred when the officer was not on active duty or IDT.³⁸ Further, the military judge determined that Lt

Col Morita’s status as a reserve officer alone met the four-part test in Article 2(c) without any additional factual showing by the government.³⁹ Thus, the military judge found jurisdiction over the case.⁴⁰

However, the AFCCA declined to follow the trial court’s decision and rejected the expansive language in *Morse*, reasoning that the *Phillips* decision precluded a broad and expansive application of the dicta in the unpublished decision.⁴¹ Further, the court pointed to the legislative history of Articles 2(a) and 2(c) to conclude that reserve members should not “automatically be subject to military jurisdiction at any time he or she commits an act merely related to his reserve duties.”⁴² In addition, the AFCCA feared that the expansive reasoning used in *Morse* would allow “the floodgates of UCMJ jurisdiction . . . to be opened for reservists for actions long considered outside the scope of court-martial jurisdiction.”⁴³

Rather than rely on *Morse*, the AFCCA used the fact-specific analysis applied in *Phillips* to determine whether jurisdiction under Article 2(c) was triggered.⁴⁴ In so doing, the Court distinguished the numerous facts in *Phillips*, showing the officer “served with” an armed force with the dearth of facts supporting such a conclusion in *Morita*.⁴⁵ According to the AFCCA, the only factor showing jurisdiction that existed at the time Lt Col Morita forged his travel documents was the fact that he was “a member of a reserve component on the dates in question.”⁴⁶ As a result, the court found “this factor alone was insufficient to trigger the Article 2(c), test for jurisdiction.”⁴⁷

The court made its finding notwithstanding the fact that Lt Col Morita’s offenses were “military specific” and not committed by a reserve member “in a purely civilian capacity with no connection to the military.”⁴⁸ However, the Court reasoned that Lt Col Morita’s use of his “knowledge of military procedures to forge signatures” was a “far cry” from the facts in *Phillips* which showed the reserve service

³⁰ *Id.*

³¹ *Id.*

³² See *United States v. Morita*, 73 M.J. 548 (A.F. Ct. Crim. App. 2014).

³³ *Id.* at 551.

³⁴ *Id.* at 551-52.

³⁵ *Id.* at 553; see *Morita*, 2015 CAAF LEXIS at *7.

³⁶ See *Morita*, 73 M.J. at 554.

³⁷ *Id.* at 554, 561-62.

³⁸ *Id.* at 554.

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Id.* at 561-62.

⁴² *Id.*

⁴³ *Id.* at 560.

⁴⁴ *Id.*

⁴⁵ *Id.* at 560-61.

⁴⁶ *Id.* at 560.

⁴⁷ *Id.*

⁴⁸ *Id.*

member “served with” an armed force.⁴⁹ Of significance to the court was the government’s failure to demonstrate that Lt Col Morita was compensated or received retirement credit for the “mere-act of completing travel-related forms.”⁵⁰ The court recognized that he may have later received compensation for his fraudulent activity, but found this did not satisfy the third criteria of Article 2(c), which required he receive compensation on the dates the offenses were committed.⁵¹

The CAAF granted review of the *Morita* decision and, in doing so, firmly answered whether jurisdiction exists under Article 2(c) for reserve servicemembers, based solely on the fact that they are members of a reserve command and acting in a manner related to their duties.⁵² The answer is no.⁵³ Agreeing with the AFCCA, the CAAF found that Lt Col Morita’s status as a member of a reserve component was insufficient, by itself, to find that he was “serving with an armed force” under Article 2(c), UCMJ.⁵⁴ In examining whether Lt Col Morita “served with an armed force,” the CAAF, like the AFCCA, distinguished the numerous facts alleged by the government in *Phillips* with lack of such facts in the record in *Morita*.⁵⁵

The decision solidified the analysis required for finding jurisdiction under Article 2(c), UCMJ. Specifically, the CAAF held the government must prove jurisdiction by showing that, as a threshold issue, a reserve servicemember “served with an armed force.”⁵⁶ The court also made clear that the government must next prove that Article 2(c)’s four-part test is satisfied.⁵⁷ The four-part statutory test is satisfied when the government shows, by a preponderance of the evidence,⁵⁸ that each of the four elements described above is met.⁵⁹ In *Morita*, CAAF noted that none of the four statutory criteria for jurisdiction were met.⁶⁰ Using an

example of the government’s failure on just one element, the CAAF declared that the “Government did not demonstrate that [Lt Col Morita] received any compensation or retirement credit for days on which he merely initiated the issuance of or completed travel forms..., or established that [he] otherwise performed military duties during these times.”⁶¹

IV. Conclusion.

The *Morita* decision serves as a warning to trial counsel attempting to prove jurisdiction over a reserve servicemember outside of the enumerated boundaries of Articles 2(a)(1) (active duty) and 2(a)(3) (IDT). The UCMJ requires they come armed with sufficient facts to show that each of the statutory factors enumerated under Article 2(c) are met.⁶² In fact, following *Morita*, it is difficult to imagine a scenario when jurisdiction could be shown under Article 2(c) for a reserve component servicemember outside of performing a travel day as described in *Phillips*.⁶³

A careful reading of *Morita* should give the military justice practitioner pause when faced with a situation where a reserve servicemember commits a potentially criminal act under the UCMJ when not performing active duty or IDT. The expansive language used by the court in *Morse* can no longer be cited as persuasive authority for courts to look outside of the strict parameters of the reserve servicemember’s orders to find jurisdiction.⁶⁴ As stated by William Shakespeare when contemplating the timing of things: “There is a tide in the affairs of men which, taken at the flood, leads on to fortune; omitted, all the voyage of their life is bound in shallows and in miseries.”⁶⁵

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² See *United States v. Morita*, No. 14-5007, 2015 CAAF LEXIS 238 (C.A.A.F. March 16, 2015).

⁵³ *Id.* at *19-20.

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ *Id.* at *3, *19. The Court affirmed that a member has “served with an armed force” when they have “a close relationship to the armed forces without the formalities of a military enlistment or commission.” *Phillips*, 58 M.J. at 220.

⁵⁷ *Id.* at *4, *19.

⁵⁸ *Id.* at *12-13 (citing *United States v. Oliver*, 57 M.J. 170, 172 (C.A.A.F. 2002)).

⁵⁹ *Id.* at *5.

⁶⁰ *Id.* at *20.

⁶¹ *Id.*

⁶² *Id.* at *18-19.

⁶³ *Id.*

⁶⁴ *Id.* at *19.

⁶⁵ WILLIAM SHAKESPEARE, *JULIUS CAESAR*, act 4, sc. 3..