

The Unsheathing of a Jurisdictional Sword: The Application of Article 2(c) to Reservists

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Introduction

*[T]he rule is fairly clear: there is no jurisdiction over a reservist who commits an offense when not on active duty or inactive duty training*¹

The “rule” was fairly clear, but it is not clear anymore. Last year, the Court of Appeals for the Armed Forces (CAAF) muddied the jurisdictional water with its decision in *United States v. Phillips*,² holding that jurisdiction extends to certain reservists even if they are not on active duty or inactive duty training. How did the court extend jurisdiction? It unsheathed a jurisdictional sword—Article 2(c), Uniform Code of Military Justice (UCMJ)³—used by the government to cure defective enlistments,⁴ but never before used as a sole basis to establish jurisdiction over reservists.

This article primarily focuses on *Phillips* and the ramifications it has for jurisdiction over members of the reserve component. Other than *Phillips*, the jurisdictional front remained relatively quiet during the CAAF’s 2003 Term.⁵ Nevertheless,

this article addresses two additional developments in the area of military jurisdiction: (1) a 2002 change to *Army Regulation (AR) 27-10*,⁶ addressing the validity of post-preferral discharges; and (2) the CAAF’s recent decision in *United States v. Henderson*,⁷ finding a jurisdictional defect in the referral process of a capital offense.

Overview of Jurisdiction

This article discusses all three developments within the framework of Rule for Courts-Martial (RCM) 201(b), which essentially breaks down the requirements for court-martial jurisdiction into three categories.⁸ First, the offense must be subject to court-martial, i.e., subject matter jurisdiction.⁹ Second, the accused must be subject to court-martial jurisdiction, i.e., personal jurisdiction.¹⁰ Finally, certain procedural requirements must be met: (1) the court-martial must be convened by a proper official; (2) the court-martial personnel must have the proper qualifications; and (3) the charges must be properly referred to the court-martial by a competent authority.¹¹

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1. Major Tyler J. Harder, *Moving Towards the Apex: Recent Developments in Military Jurisdiction*, ARMY LAW., Apr./May 2003, at 15.
 2. *United States v. Phillips*, 58 M.J. 217 (2003)
 3. UCMJ art. 2(c) (2002).
 4. Congress added Article 2(c) to Article 2 in the 1979, Department of Defense Authorization Act, 1980, Pub. L. No. 96-107, § 801, 93 Stat. 803, 811 (1979). It

provides for jurisdiction based upon a constructive enlistment . . . [and] thus overrules [case law] which held that improper government participation in the enlistment process estops the government from asserting constructive enlistment. It also overrules [case law] which stated that an uncured regulatory enlistment disqualification, not amounting to a lack of capacity or voluntariness, prevented application of the doctrine of constructive enlistment.

See S. REP. NO. 96-197, at 122 (1979).

5. Although the CAAF briefly discussed appellate jurisdiction in *United States v. Riley*, 58 M.J. 305, (2003), *Phillips* is the only case decided by the 2003 term of court that addresses court-martial jurisdiction.
6. U.S. DEP’T OF ARMY, REG. 27-10, MILITARY JUSTICE (6 Sept. 2002) [hereinafter AR 27-10].
7. *United States v. Henderson*, 59 M.J. 350 (2004).
8. MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 201(b) (2002) [hereinafter MCM].
9. *Id.* R.C.M. 201(b)(5).
10. *Id.* R.C.M. 201(b)(4).
11. *Id.* R.C.M. 201(b)(1)-(3).

The critical issue in determining court-martial jurisdiction is military status.¹² Both subject matter jurisdiction and personal jurisdiction depend on the military status of the accused. Subject matter jurisdiction focuses on the nature of the offense and the status of the accused at the time of the offense.¹³ Personal jurisdiction focuses solely on the accused's status at the time of trial.¹⁴ If the military has both subject matter and personal jurisdiction, the case can proceed to court-martial, provided RCM 201's procedural requirements are also met.

Subject Matter Jurisdiction

Military Status of Reservists: United States v. Phillips

Until *Phillips*, determining subject matter jurisdiction over reservists' misconduct was somewhat simple: If a reservist was not on active duty status or inactive duty training at the time of the offense, the military did not have subject matter jurisdiction.¹⁵ The basis for this rule is Article 2, UCMJ, which provides a list of all persons subject to the UCMJ. Article 2(a)(1) and Article 2(a)(3) specifically address jurisdiction over reservists:

- (1) Members of a regular component of the armed forces, including . . . other persons lawfully called or ordered into, or to duty in or for training in, the armed forces, from the dates when they are required by the of the call or order to obey it. . . .
- (3) Members of a reserve component while on inactive duty training. . . .¹⁶

Article 2(a)(1) and Article 2(a)(3), therefore, apply to reservists serving on active duty (AD), active duty training (ADT), annual training (AT) and inactive-duty training.¹⁷

These two specific clauses are straightforward and determinative in their application to reservists. Article 2(a)(1) establishes military status based on the orders' required starting (reporting) and ending dates.¹⁸ Article 2(a)(3), on the other hand, requires reservists to be "on inactive-duty training" for court-martial jurisdiction to vest.¹⁹ The military, therefore, only has jurisdiction over offenses committed by reservists while on active duty status or during inactive duty training. The CAAF, however, recently stretched Article 2 to also apply to certain reservists about to enter active duty. It unsheathed a seldom-used sword, Article 2(c), the constructive enlistment clause,²⁰ to establish military status of reservists.

In *Phillips*, the CAAF affirmed the Air Force Court of Criminal Appeal's (AFCCA) expansion of jurisdiction over reservists to misconduct occurring outside the strict parameters (reporting and ending dates) of the orders requiring reservists to perform duty.²¹ Lieutenant Colonel (LTC) Phillips, an Air Force reserve nurse, was ordered to perform her two-week annual training at Wright-Patterson Air Force Base (W-PAFB) from 12-23 July 1999.²² Her orders authorized her one travel day (11 July) to get to her duty station.²³ On 11 July 1999, she left her home in Pittsburgh, Pennsylvania and traveled to W-PAFB. That evening, after checking into the base government visiting officers' quarters (VOQ), LTC Phillips ate some marijuana brownies she brought with her from home.²⁴

12. *United States v. Phillips*, 58 M.J. 217 (2003) ("Court-martial jurisdiction exists to try a person as long as that person occupies a status as a person subject to the [UCMJ].") (quoting *United States v. Ernest*, 32 M.J. 135, 139 (C.M.A. 1991)). Article 2, UCMJ establishes who has military status and is, therefore, subject to the UCMJ. *Id.*

13. *See Solorio v. United States*, 483 U.S. 435 (1987) (finding that subject matter jurisdiction is satisfied if the offense is chargeable under the UCMJ and the accused has military status at the time the offense is committed); *see also MCM, supra* note 8, R.C.M. 203, discussion, analysis.

14. *See MCM, supra* note 8, R.C.M. 202(a), discussion (explaining that the government can court-martial an accused provided the accused has military status at the time of trial).

15. *See generally Harder, supra* note 1, at 15.

16. UCMJ art. 2(a) (2002)

17. *Id. See also MCM, supra* note 8, R.C.M. 103 discussion.

18. *United States v. Cline*, 29 M.J. 83 (C.M.A. 1989).

19. UCMJ art. 2(a)(3) (2002).

20. UCMJ art. 2(c). The CAAF acknowledged that Article 2(c) was "primarily enacted to ensure the court-martial jurisdiction would not be defeated by assertions that military status was tainted by recruiter misconduct." *United States v. Phillips*, 58 M.J. 217, 219 (2003). Nevertheless, the CAAF held that Article 2(c) applies to circumstances not involving defective enlistments. *Id.*

21. *Phillips*, 58 M.J. at 219.

22. *Id.* at 218.

23. *Id.*

On 16 July 1999, LTC Phillips was selected for a random urinalysis test.²⁵ While in the bathroom, she asked a second lieutenant to provide a urine sample for her. The lieutenant, however, refused to comply with LTC Phillips' request, and LTC Phillips provided her own urine sample.²⁶

Lieutenant Colonel Phillips' urine sample tested positive for marijuana, prompting Air Force Office of Special Investigations (AFOSI) special agents to question her two months later during her next reserve tour, a two-day inactive duty training tour.²⁷ After making a false official statement to AFOSI, she confessed to purchasing marijuana in Pittsburgh, making a batch of marijuana brownies at her home, bringing the brownies with her to W-PAFB, and eating them the night of 11 July in her VOQ.²⁸

A military judge convicted LTC Phillips, pursuant to her pleas, of wrongfully using marijuana, conduct unbecoming an officer by wrongfully and dishonorably soliciting a junior officer to provide a urine sample on her behalf, and making a false official statement.²⁹ The approved sentence included forty-five days confinement and a dismissal.³⁰ On appeal, LTC Phillips argued that the court-martial lacked jurisdiction over the offense of wrongfully using marijuana, because the use occurred when she was not in a military status—the use occurred the day before her two-week active duty period began.³¹ Both the AFCCA and the CAAF disagreed.

The AFCCA held that jurisdiction existed over LTC Phillips primarily under Art 2(a)(1), UCMJ.³² The service court found LTC Phillips was subject to UCMJ jurisdiction under the language of Article 2(a)(1) on 11 July, "because she was a person 'lawfully called or ordered into. . . duty in or for training. . . from the dates when [she was] required by the terms of the call or order to obey it.'"³³ Although LTC Phillips' orders specifically required her to report for duty on 12 July, the orders also provided her a choice to travel and, therefore, "be called to duty on 11 July."³⁴ The service court, therefore, held that by choosing to travel on 11 July as authorized by her orders, LTC Phillips was required by the terms of those orders to obey them. Consequently, the court found that there was subject matter jurisdiction under Article 2(a)(1) over LTC Phillips' wrongful use of marijuana on 11 July, her authorized travel day.³⁵

Furthermore, the service court held that jurisdiction over LTC Phillips' marijuana use also existed under Article 2(c), UCMJ.³⁶ Article 2(c), UCMJ, extends jurisdiction to:

a person serving with an armed force who—

(1) submitted voluntarily to military authority;

(2) met the mental competence and minimum age qualifications . . . at the time of voluntary submission to military authority;

24. *Id.* at 219.

25. *United States v. Phillips*, 56 M.J. 843, 845 (A.F. Ct. Crim. App. 2002).

26. *Id.*

27. *Id.*

28. *Id.*

29. *Phillips*, 58 M.J. at 218.

30. *Id.*

31. *Phillips*, 56 M.J. at 845. Jurisdiction over the other two of the offenses, conduct unbecoming an officer and false official statement, was not an issue on appeal. First, she was serving on active duty in accordance with her orders when she solicited the second lieutenant to provide a urine sample. Second, she was performing inactive duty training when she made the false official statement to AFOSI. *Id.*

32. *Id.*

33. *Id.*

34. *Id.* The service court stated:

But, her orders provided her a choice. She could have been called to duty on the date she was required to start her training, 12 July, or she could have exercised her option to take a day of travel and be called to duty on 11 July. The appellant chose the latter option.

Id.

35. *Id.*

36. *Id.*

(3) received military pay or allowances; and

(4) performed military duties.³⁷

The service court held that on 11 July, LTC Phillips: (1) voluntarily submitted to military authority by “accepting the authorized travel day” and filing for and receiving pay and allowances for that travel day;³⁸ (2) met the military’s mental competence and minimum age requirements; (3) received pay and allowances, including base pay, basic allowance for subsistence, lodging and travel reimbursements, and a retirement point for the travel day; and (4) performed military duties by voluntarily undertaking her “duty to travel from home to Wright–Patterson AFB.”³⁹

According to the AFCCA,

[b]y applying the language of Article 2(a)(1) and the four criteria of Article 2(c) in a common sense and straightforward manner, consistent with plainly stated congressional intent to subject reservists to UCMJ jurisdiction to the same extent as active duty members, the appellant’s status made her subject to the UCMJ on 11 July 1999.⁴⁰

As in preceding years,⁴¹ the AFCCA stretched the boundaries and once again found jurisdiction over misconduct occurring outside the stated parameters of a reservist’s orders—this time finding jurisdiction exists over reservists traveling on travel days.⁴² Although the AFCCA gave the legal practitioner a clear-cut rule, the CAAF was not as willing to stretch boundaries.

In affirming the AFCCA’s decision, the CAAF held that jurisdiction existed over LTC Phillips on 11 July under Article 2(c), UCMJ.⁴³ The court, however, did not address the service court’s primary rationale and, thus, avoided deciding whether Article 2(a) extends jurisdiction over all reservists traveling on authorized travel days. The CAAF also applied Article 2(c) slightly differently than the service court, adding a critical step to the analysis.

The CAAF held that, before applying the four criteria of Art 2(c), it must first determine whether LTC Phillips was “serving with” an armed force at the time of the offense.⁴⁴ This determination being “dependent upon a case-specific analysis of the facts and circumstances of the individual’s particular relationship with the military”⁴⁵ Accordingly, the CAAF did not surmise that LTC Phillips was a person serving with an armed force because she was traveling on an authorized travel day. Rather, the CAAF found that six uncontested facts established LTC Phillips’ status as a person serving with an armed force on 11 July:

37. UCMJ art. 2(c).

38. *Phillips*, 56 M.J. at 846. Note, however, in establishing that LTC Phillips voluntarily submitted to military authority, the service court contradicts its Article 2(a)(1) analysis by emphasizing that “[t]he orders specifically authorized, *but did not require*, a travel day. . . .” *Id.*

39. *Id.* at 846-47.

40. *Id.* at 847.

41. See *United States v. Morse*, No. 33566, 2000 CCA LEXIS 233 (A.F. Ct. Crim App. Oct. 4, 2000) (unpublished). In *Morse*, the accused was convicted of attempted larceny and filing false travel vouchers for active duty tours and inactive duty training. At trial he stipulated that “the offenses, if they occurred, were committed while the accused was either on active duty or inactive duty for training.” On appeal, however, he claimed that he actually signed the travel vouchers two days after he was released from active duty. Therefore, he argued, the court-martial lacked subject matter jurisdiction. Despite an apparent inconsistency between the dates on the travel vouchers and the parties’ stipulations at trial, the AFCCA found the evidence demonstrated that LTC Morse signed the travel vouchers before he was released from active duty and departed the military installation. The AFCCA then made a bold assertion in dicta:

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 or whether or not he completed travel pursuant to his orders. See *Cline*. Therefore, it is immaterial if the appellant did not sign these forms until after completing his travel. He did so in duty status.

Id. at *19.

42. See generally *Harder*, *supra* note 1; Major Tyler J. Harder, *All Quiet on the Jurisdictional Front . . . Except for the Tremors from the Service Courts*, *ARMY LAW.*, Apr. 2002.

43. *United States v. Phillips*, 58 M.J. 217, 220 (2003).

44. *Id.*

45. *Id.*

(1) on that day, she was a member of a reserve component of the armed forces; (2) she traveled to a military base on that day pursuant to military orders, and she was reimbursed for her travel expenses by the armed forces; (3) the orders were issued for the purpose of performing active duty; (4) she was assigned to military officers' quarters, she occupied those quarters, and she committed the pertinent 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 base pay and allowances for that date.⁴⁶

After finding LTC Phillips was a person serving with an armed force on 11 July, the CAAF applied the four criteria of Article 2(c). The court, having concluded the four criteria were met, found that the military had subject matter jurisdiction over LTC Phillips' wrongful use of marijuana on 11 July, her authorized travel day.⁴⁷

What does *Phillips* mean to the judge advocate in the field? First, *Phillips* does not stand for the proposition that a travel day equals jurisdiction. Unlike the AFCCA, the CAAF did not stretch the boundaries by establishing an easy to follow, bright-line rule extending Article 2(a) status to reservists traveling on authorized travel days.⁴⁸ *Phillips* does mean, however, that the government can draw the Article 2(c) sword to establish subject matter jurisdiction over instances of reservist misconduct occurring outside the timeframe specified in reservists' orders.⁴⁹

How lethal this jurisdictional sword is remains to be seen since the CAAF did not give any guidance for applying Article 2(c) to situations that are not as clear-cut as the *Phillips* case. By failing to weigh or prioritize the various factors it considered, the CAAF left many questions unanswered, thus provid-

ing the defense with a possible shield to this jurisdictional sword. For instance, the court considered that LTC Phillips "was assigned to military officers' quarters, she occupied those quarters, and she committed the pertinent offense in those quarters"⁵⁰ as one of the six "uncontested facts" establishing LTC Phillips as a person serving with an armed force.⁵¹ What if LTC Phillips committed the offense in route to the duty station? What if she checked into the VOQ and thereafter went off-post to engage in misconduct? What if she stayed in a local off-base hotel the night before reporting for duty? Finally, what if she stayed on base the night after her two-weeks of annual training ended and committed the offense on 24 July? The courts' answers to these questions will determine the lethality of the Article 2(c) jurisdictional sword.

Personal Jurisdiction

Changes to AR 27-10 Affecting Termination of Military Status

For active duty personnel, the question of military status at the time of the offense (subject matter jurisdiction) seldom requires much analysis.⁵² The determination, however, of whether military status terminated by the time of trial (personal jurisdiction) is frequently litigated. Military status generally terminates upon (1) the delivery of a valid discharge certificate; (2) a final accounting of pay; and (3) undergoing a clearing process as required under appropriate service regulations.⁵³

In *Smith v. Vanderbush*,⁵⁴ the accused was arraigned and his case set for trial; however, the command never "flagged" the accused and personnel officials separated the accused on his expiration of term of service.⁵⁵ The CAAF held that personal jurisdiction over the accused terminated since the accused received his discharge certificate (DD Form 214),⁵⁶ cleared his unit, and received a final accounting of pay.⁵⁷ The CAAF suggested, however, that the Secretary of the Army amend Army

46. *Id.*

47. *Id.*

48. By failing to address the bright-line rule, however, this theory of jurisdiction may be left to be tested at a later day.

49. Trial counsel should note that, although *Phillips* involved active duty training under Article 2(a)(1), the CAAF's Article 2(c) analysis may be applicable to questionable periods of inactive-duty training under Article 2(a)(3).

50. *Id.*

51. *Id.*

52. Harder, *supra* note 1, at 11.

53. *United States v. King*, 27 M.J. 327, 329 (C.M.A. 1989).

54. *Smith v. Vanderbush*, 47 M.J. 56 (1997).

55. *Id.* at 57.

56. U.S. Dep't of Defense, DD Form 214, Certificate of Release or Discharge From Active Duty (Nov. 1988).

regulations to prevent similar scenarios from occurring in the future.⁵⁸

In September 2002, five years after the *Vanderbush* decision, the Secretary of the Army followed the CAAF's advice and amended *AR 27-10. Army Regulation 27-10*, para. 5-15b, now provides that after any charge is preferred, the DD Form 458 (Charge Sheet) automatically suspends all favorable personnel action and any discharge certificate issued thereafter is void until the charge is dismissed or the convening authority takes action on the case.⁵⁹ Administrative oversights—forgetting to flag a soldier—will no longer result in a valid discharge terminating court-martial jurisdiction, as was the case in *Vanderbush*.

A Special Court-Martial's Limited Jurisdiction

United States v. Henderson

In addition to personal and subject matter jurisdiction, RCM 201 sets forth three procedural requirements for court-martial jurisdiction: (1) the court-martial must be convened by an official empowered to convene it;⁶⁰ (2) the court-martial must be composed in accordance with the RCM with respect to the number and the qualifications of its personnel,⁶¹ and (3) each charge before the court-martial must be referred to it by competent authority.⁶² Although RCM 201 states that these requisites must be met for a court-martial to have jurisdiction,⁶³ the CAAF has historically found defects in meeting these requirements as procedural rather than jurisdictional.⁶⁴

57. *Vanderbush*, 47 M.J. at 59.

58. *Id.* at 61. The CAAF noted:

[t]o the extent this case suggests a need to clarify the responsibility of convening authorities and other officials to flag records or to withhold discharge authority from certain officials other than convening authorities, the responsibility for amending AR 635-200 or taking other appropriate, corrective actions rests with the Secretary of the Army.

Id.

59. *AR 27-10*, *supra* note 6, para. 5-15b.

After any charge is preferred, the DD Form 458 will automatically act to suspend all favorable personnel actions including discharge, promotion, and reenlistment. Filing of a DA Form 268 (Suspension of Favorable Personnel Action) and other related personnel actions are still required. Failure to file DD Form 268 does not affect the suspension accomplished by the DD Form 458, or give rise to any rights to the soldier. See *AR 600-8-2 (Suspension of Favorable Personnel Actions (FLAGS))*. After preferal of a charge, regardless of any action purporting to discharge or separate a soldier, any issuance of a discharge certificate is void until the charge is dismissed or the convening authority takes initial action on the case in accordance with R.C.M. 1107; all other favorable personnel actions taken under such circumstances are voidable

Id.

60. MCM, *supra* note 8, R.C.M. 201(b)(1).

61. *Id.* R.C.M. 201(b)(2).

62. *Id.* R.C.M. 201(b)(3).

63. *Id.* R.C.M. 201(b).

64. See *United States v. Henderson*, 59 M.J. 350, 355 (2004) (Crawford, C.J., dissenting). In her dissent, Chief Judge Crawford summarizes this trend:

"It is well established that a defective referral. . . does not constitute jurisdictional error." *United States v. King*, 28 M.J. 397, 399 (C.M.A. 1989). Indeed, this Court has repeatedly opined that errors in the referral process are not jurisdictional. In *King*, we held that the trial of an accused by a court-martial panel other than the one to which the case had been referred was nonjurisdictional error. *Id.* In *United States v. Kohut*, 44 M.J. 245, 250 (C.A.A.F. 1996), this Court found nonjurisdictional error in the trial of a case by court-martial without approval of the Judge Advocate General after the same case had been previously tried by the state. In *United States v. Hayward*, 47 M.J. 381, 383 (C.A.A.F. 1998), we held that the post-arraignment referral of a second charge was nonjurisdictional error. Finally, this Court found nonjurisdictional error in the convening authority's failure to forward charges against the accused to the next higher level of command when that convening authority was an accuser, and therefore prohibited from convening the court-martial. *United States v. Jeter*, 35 M.J. 442, 446 (C.M.A. 1992); see *United States v. Tittel*, 53 M.J. 313, 314 (C.A.A.F. 2000); *United States v. Shiner*, 40 M.J. 155, 157 (C.M.A. 1994).

Id. See also generally *Harder*, *supra* note 1, at 5.

In *United States v. Henderson*,⁶⁵ however, the CAAF found jurisdictional error when a charge before a court-martial was not referred by competent authority. Specifically, a special court-martial convening authority (SPCMCA), without authorization, referred a capital offense to a special court-martial (SPCM).⁶⁶

Article 19, UCMJ,⁶⁷ states “special courts-martial have jurisdiction to try persons subject to this chapter for any noncapital offense made punishable by this chapter and, under such regulations as the President may prescribe, for capital offenses.”⁶⁸ Through RCM 201(f)(2)(C)(i), the President prescribed that “[a] capital offense for which there is prescribed a mandatory punishment [spying, premeditated murder, and felony murder] beyond the punitive power of a special court-martial shall not be referred to such a court-martial.”⁶⁹ For all other capital offenses—those not requiring a mandatory sentence—a general court-martial convening authority (GCMCA) may permit, or the Secretary concerned may authorize by regulation, SPCM-CAs to refer such capital offenses to SPCMs.⁷⁰

In *United States v. Henderson*, the accused, Damage Controlman Fireman Apprentice (DCFA) Henderson was stationed aboard the U.S.S. *Tarawa*.⁷¹ According to DCFA Henderson, he intended to commit suicide by detonating an improvised explosive device (IED) onboard the ship.⁷² He created the IED out of “urine sample tubes, crushed flare powder, electrical

wires, oil, and washers”⁷³ and stored it in the fan room onboard ship. Fortunately, the IED was found before DCFA Henderson attempted to detonate the device.⁷⁴

Damage Controlman Fireman Apprentice Henderson was charged with willfully hazarding a vessel in violation of Article 110, UCMJ, a capital offense.⁷⁵ The SPCMCA, the commanding officer of the U.S.S. *Tarawa*, referred the charge to a SPCM without receiving authorization to refer a capital offense to a SPCM.⁷⁶ The SPCMCA, however, subsequently entered into a pretrial agreement allowing DCFA Henderson to plead guilty to the lesser included offense of negligent hazarding of a vessel, a non-capital offense.⁷⁷ Damage Controlman Fireman Apprentice Henderson was convicted, pursuant to his pleas, by a military judge alone at a SPCM.⁷⁸

On appeal, the Navy-Marine Corps Court of Criminal Appeals (NMCCA) questioned whether the referral of a capital offense was error, resulting in a lack of jurisdiction over the offense.⁷⁹ In an unpublished opinion, the NMCCA held that the SPCMCA erroneously referred the original charge without proper authorization under the provisions of RCM 201(f)(2)(C).⁸⁰ Nevertheless, the court found that “[b]y entering into this pretrial agreement, the [SPCMCA], in effect, amended his decision regarding the referral of the original charge and substituted the lesser included offense.”⁸¹ The NMCCA, therefore, held that the “erroneous referral of the

65. *Henderson*, 59 M.J. at 350.

66. *Id.*

67. UCMJ art. 19 (2002).

68. *Id.*

69. MCM, *supra* note 8, R.C.M. 201(f)(2)(C)(i).

70. *Id.* R.C.M. 201(f)(2)(C)(i)-(ii).

71. *Henderson*, 59 M.J. at 351.

72. *Id.*

73. *Id.*

74. *Id.*

75. *Id.* Article 110(a), UCMJ states: “Any person subject to this chapter who willfully or wrongfully hazards or suffers to be hazarded any vessel of the armed forces shall suffer death or such punishment as a court-martial may direct.” UCMJ art. 110(a) (2002).

76. *Henderson*, 59 M.J. at 351.

77. *Id.*

78. *Id.*

79. *United States v. Henderson*, 2003 CCA LEXIS 48 (N-M.C.C.A. Feb. 27, 2003) (unpublished). The case was submitted to the NMCCA on its merits (without assignment of errors). *Id.* at *2.

80. *Id.* at *6.

81. *Id.* at *5.

original charge to a SPCM was not jurisdictional and was corrected in a timely manner by the [SPCMCA].”⁸²

The CAAF reversed the NMCCA’s decision and set aside the finding of guilty to the charge of negligent hazarding of a vessel.⁸³ The CAAF rejected all of the government’s arguments: (1) that if the referral was erroneous, it was a nonjurisdictional, procedural error; (2) that the SPCMCA “functionally” referred the non-capital charge upon entering the pretrial agreement; and (3) that the SPCMCA implicitly referred the lesser included offense when he referred the capital charge.⁸⁴

Instead of following its recent trend of characterizing defective referrals as procedural, nonjurisdictional error,⁸⁵ the CAAF reaffirmed its holding from a half century ago in *United States v. Bancroft*,⁸⁶ a case from the Korean War. In *Bancroft*, the accused was convicted at a SPCM of the capital offense of sleeping at his post during time of war.⁸⁷ As in *Henderson*, the original charge was referred to a SPCM without the required authorization.⁸⁸ Because the facts of *Bancroft* and *Henderson* are “strikingly similar”⁸⁹ and unlike any in the trend of cases holding referral defects as nonjurisdictional, procedural error, the CAAF found “that ‘evolution’ does not extend so far as to alter the logic and holding in *Bancroft*.”⁹⁰

Next, the CAAF rejected the government’s remaining two arguments that the SPCMCA either “implicitly referred” the lesser included, non-capital charge when he referred the capital charge or “functionally referred” the lesser-included, non-capital charge when he entered into the pretrial agreement with DCFA Henderson.⁹¹ The CAAF held “[s]ince the lesser-included charge of negligently hazarding a vessel was never formally referred . . . it was dependent on the greater charge and was fatally tainted by the lack of jurisdiction [over the original charge].”⁹² The court-martial, therefore, lacked jurisdiction “ab initio” to try either the capital offense or the lesser-included, noncapital offense to which the accused plead guilty because the SPCMCA never received authorization to refer the capital offense to a SPCM.

What does *Henderson* mean for government counsel? Most importantly, the CAAF strictly interpreted Article 19 and RCM 201(f)(2)(C) and found that violations of RCM 201(f)(2)(C) constitute fatal jurisdictional error.⁹³ Therefore, if such a violation is discovered before findings are announced, the prudent chief of justice should advise the SPCMCA or the GCMCA to avail themselves to RCM 604⁹⁴ and withdraw the charges from the SPCM. After withdrawing the charges, the convening authority can either forward the charges to a superior authority,⁹⁵ amend the charges and refer the lesser included, noncapital charge anew;⁹⁶ or dismiss the charges without prejudice and start the pretrial process over again.⁹⁷

82. *Id.* at *6.

83. *Henderson*, 59 M.J. at 354.

84. *Id.* at 352.

85. *See supra* note 64.

86. *United States v. Bancroft*, 11 C.M.R. 3 (C.M.A. 1953).

87. *Id.*

Any sentinel or lookout who is found drunk or sleeping upon his post or leaves it before being regularly relieved, shall be punished, if the offense is committed in time of war, by death or such other punishment as a court-martial may direct, but if the offense is at any other time, by such punishment other than death as a court-martial may direct.

UCMJ art. 113 (2002).

88. Unlike *Henderson*, however, *Bancroft* was convicted of the capital offense at the SPCM. *Henderson* was only convicted of the lesser included, non-capital offense.

89. *Henderson*, 59 M.J. at 353.

90. *Id.*

91. *Id.* at 353-54.

92. *Id.* at 354.

93. *Id.*

94. MCM, *supra* note 8, R.C.M. 604(a).

95. *Id.* R.C.M. 404(c).

Conclusion

Although the CAAF's 2003 term was relatively quiet in the area of jurisdiction, its decision in *Phillips*, is the most important development in subject matter jurisdiction in the new millennium. By applying Article 2(c) to reservists, the CAAF armed the government with a new jurisdictional sword,

enabling it to strike at misconduct occurring outside the parameters specified in a reservist's orders. By failing to give detailed guidance for applying Article 2(c), however, the CAAF also provided the defense with a possible shield. It will be interesting to watch how this battle will be fought with the growing number of reservists serving in support of the global war on terrorism during a period of everincreasing military operations.

96. *Id.* R.C.M. 603.

97. *Id.* R.C.M. 404(a).