The Rule in Ginyard's Case: Congressional Intent or Judicial Field Expedient?

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The Rule in Ginyard's Case—
Congressional Intent or Judicial Field Expedient?

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IN RECENT YEARS the exercise of court-martial jurisdiction over servicemen and women has received considerable attention from both the military and civilian courts.1 Much of this attention has centered around whether or not a particular offense was sufficiently "service connected" to justify a criminal trial without the full application of the Bill of Rights.2 But service connection is not the sole criteria for

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2. "Classes arising in the land or naval forces" are excepted from the constitutional requirement of a grand jury indictment. U.S. CONST. amend. V. In Relford v. Commandant, 401 U.S. 355 (1971), the Supreme Court set forth the following twelve factors to be considered in determining if a particular offense was sufficiently "service connected" to fall within Congress' authority to "make Rules for the Government and Regulation of the land and naval Forces" (U.S. CONST. art. I, § 8, cl. 14), and thus be within the jurisdiction of a military court-martial:

   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.
   10. The absence of any threat to a military post.
   11. The absence of any violation of military property.
   12. The offense's being among those traditionally prosecuted in civilian courts.


The Rule in Ginyard's Case—285
military jurisdiction. In addition to committing a service-connected offense, the accused must be in a status in which he is subject to the Uniform Code of Military Justice (U.C.M.J.). Article 2(1) of the Code provides that all "members of a regular component of the armed forces, including those awaiting discharge after expiration of their


4. 10 U.S.C. §§ 801-940 (1976) (originally enacted as Act of May 5, 1950, ch. 169, 64 Stat. 107) [hereinafter referred to as the Code or U.C.M.J.]. Becoming effective May 31, 1951, the U.C.M.J. marked the first time in U.S. military history that the military justice systems of the various branches of the armed forces operated under a uniform statutory scheme. Prior to the Code's enactment, each branch had its own system, sometimes referred to as separate, although similar, statutory provisions. The first statutory framework for military justice in the United States was provided by the Articles of War adopted on June 30, 1775, by the Continental Congress and based on existing British military law. Some five months later Congress enacted the Rules for the Regulation of the Navy of the United Colonies, again relying on the established British naval law. The Articles of War and the Rules for the Regulation of the Navy (later designated Articles for the Government of the Navy) underwent many independent revisions before finally being repealed in favor of the unitary scheme embodied in the U.C.M.J. Extensive literature exists on the development of military law, both pre- and post-Code. Among the most notable are WINTHROP, supra note 3 (considered the classic treatise on early military law); JURSM. JUSTICE AND THE MILITARY (in two volumes in 1886); W. AYCOCK & S. WURFEL, MILITARY LAW UNDER THE UNIFORM CODE OF MILITARY JUSTICE (1955); G. DAVIS, A TREATISE ON THE MILITARY LAW OF THE UNITED STATES (3d ed. 1915). A useful bibliography on military law is found in MOTT, HARTN. & MORTON, A SURVEY OF MILITARY LAW—A SELECTIVE BIBLIOGRAPHY. V. AND L. REV. 333 (1953). Publications dealing with more recent developments in the statutory basis of military law, specifically the Military Justice Act of 1968, Pub. L. No. 90-632, 82 Stat. 1335, include DOUGLASS, THE JUDICIALIZATION OF MILITARY COURTS. 22 HASTINGS L. J. 213 (1971); MOUNTS & SUGARMAN, THE MILITARY JUSTICE ACT OF 1968, 55 A.B.A.J. 470 (1969); SHERMAN, THE CIVILIZATION OF MILITARY LAW, 22 ME. L. REV. 339-103 (1970). In addition to providing the substantive criminal law for the military, the Code establishes procedures for review of court-martial convictions by both military and civilian judges. Created by U.C.M.J. art. 66, 10 U.S.C. § 867 (1976), the Court of Military Appeals (C.M.A.) consists of three civilian judges, appointed by the President for fifteen-year terms, and is the highest court in the military appellate system. The court must review cases in which the sentence as affirmed by a court of military review (C.M.R.) affects a general or flag officer or imposes the death penalty. Id. art. 67(b)(1); 10 U.S.C. § 867(b)(1) (1976). The court must also hear cases previously reviewed by a court of military review on a request by the judge advocate general of the branch of the armed forces. Id. art. 67(b)(2); 10 U.S.C. § 867(b)(2) (1976). The court also has discretionary power to hear cases upon petition of the accused "on good cause shown" after review by a court of military review. Id. art. 67(b)(3); 10 U.S.C. § 867(b)(3) (1976). It should be noted that Article 67 of the Code specifically relies on Article I of the Constitution for its authority to create the Court of Military Appeals; therefore, direct review of court-martial convictions by the Supreme Court and other civil courts is not available. NOYD v. BOND, 395 U.S. 683 (1969). The fact that the system of military courts is outside the judicial branch's powers established in Article III of the Constitution does not preclude a collateral attack on a court-martial proceeding. For a thorough treatment of civilian review of court-martial proceedings, see WECKSTEIN, FEDERAL COURT REVIEW OF COURTS-MILITARY PROCEEDINGS: A DECENTRALIZED HIERARCHY OF MILITARY RESPONSIBILITY. 54 MIL. L. REV. 1 (1971).

The intermediate appellate court within the military system is provided for by U.C.M.J. art. 66. This provision requires each judge advocate general to establish a court of military review consisting of no less than three members and to refer to it for review cases in which the sentence affects a general or flag officer or extends to death; dismissal of a commissioned officer, cadet, or midshipman; dishonorable discharge or bad-conduct discharge; or confinement for one year or more. U.C.M.J. art. 66(b); 10 U.S.C. § 866(b) (1976). Unlike appellate courts in the civilian systems, the courts of military review have the statutory power to review questions of both law and fact. Id. art. 66(c); 10 U.S.C. § 866(c) (1976).

Unlike the Court of Military Appeals, which was an original creation of the Uniform Code, the courts of military review had a predecessor in the form of boards of review under the Articles of War. See Act of June 4, 1920, ch. 227, art. 50(3), 41 Stat. 797-99. The members of the present courts of military review are, like their predecessors on the boards of review, appointed by the judge advocates general of the respective branches of the armed services. A decision by a court of review in one branch is not binding upon a court in another branch; a Court of Military Appeals decision does have a stare decisis effect in all services. For a complete discussion of the court-martial review procedures of the military justice system, see MOYER, supra note 3, §§ 2-751 to -867. See also WILLIS, THE UNITED STATES COURT OF MILITARY APPEALS: ITS ORIGIN, OPERATION AND FUTURE. 55 MIL. L. REV. 39 (1972).

286—The Air Force Law Review/1979
whether or not a hiatus occurred between the discharge and reenlistment? Under pre-Code military law, the answer depended upon whether or not a hiatus occurred between the discharge and reenlistment. The general rule was that a discharge at the expiration of an obligated term of service, or any other discharge that unconditionally separated the individual from the service, created a hiatus and jurisdiction lapsed. The reenlistment did not revive the jurisdiction lost by virtue of the hiatus, regardless of the length of time between discharge and reenlistment. This general rule was recognized and applied by the Supreme Court in the 1949 case of United States ex rel. Hirshberg v. Cooke, where the Court gave "great weight" to the long-standing practices of the services in deciding the scope of jurisdiction under the

The Rule in Ginyard's Case—287
Articles for the Government of the Navy.\textsuperscript{10} Like most general rules, there were certain exceptions. If the particular discharge was given prior to the expiration of a term of service to facilitate a reenlistment or if it was conditioned upon immediate reenlistment, then no hiatus occurred and jurisdiction continued uninterrupted.\textsuperscript{11} If, in the hypothetical situation posed above, the discharge was prior to the expiration of the soldier's obligated term of service, \textit{i.e.}, a "short" discharge, then pre-Code law would permit court-martial for offenses committed prior to the discharge. If, on the other hand, the discharge and reenlistment came at the expiration of the soldier's term of service, a hiatus would have occurred leaving the military without jurisdiction to try the individual, notwithstanding the fact that the subsequent reenlistment allowed rank, pay, and privileges to continue as if no break had occurred.

Under the Code, however, the solution to this hypothetical question required a different analysis. Article 3(a) of the Code provides:

\begin{quote}
Subject to section 843 of this title (article 43), no person charged with having committed, while in a status in which he was subject to this chapter, an offense against this chapter, punishable by confinement for five years or more and for which the person cannot be tried in the Courts of the United States or of a State, a Territory, or the District of Columbia, may be relieved from amenability to trial by court-martial by reason of the termination of that status.\textsuperscript{12}
\end{quote}

The application of the statutory language to the hypothetical situation requires an inquiry into five factors: (1) was the individual subject to the Code when he committed the offense; (2) has his status as a person subject to the Code terminated between the date of the offense and the date of trial; (3) is the accused currently in a status in which he is subject to the Code;\textsuperscript{13} (4) is the offense punishable by confinement of five years; (5) is the offense one which cannot be tried in a court of the United States or of a state, territory or the District of Columbia. An affirmative answer to all five inquiries is required to find jurisdiction under Article 3(a). In the hypothetical case, the soldier was on active duty when he committed the offense and also when charges were brought, thus satisfying the first and third requirements. But, has there

\begin{footnotes}
\item[10.] Hirshberg v. Cooke, 336 U.S. 210, 216 (1949).
\item[12.] 10 U.S.C. §803(a) (1976).
\item[13.] This particular requirement is not apparent from the language in the statute; in fact, the language used contemplates the exercise of jurisdiction regardless of the accused's status at time of trial. In \textit{Toth v. Quarles}, 350 U.S. 11 (1955), however, the Supreme Court declared Article 3(a) unconstitutional insofar as it purported to provide for jurisdiction over civilians who had severed all connections with the military. \textit{See} notes 209-216, \textit{infra}, and accompanying text. In \textit{United States v. Gallagher}, 7 C.M.A. 506, 22 C.M.R. 296 (1957), the Court of Military Appeals found Article 3(a) constitutional when applied to one in the service at the time of trial.
\end{footnotes}
been a termination of status as a person subject to the Code between the dates of the offenses and the date the court-martial sought to exercise jurisdiction? If there has been such a termination, it would be necessary to consider the fourth and fifth factors in resolving the question of jurisdiction. If, on the other hand, there has been no termination of status, Article 3(a) would be inapplicable and jurisdiction would be grounded on Article 2(1). The ultimate question becomes: What terminates status within the meaning of Article 3(a)? This question sparked a debate among the judges of the Court of Military Appeals that lasted some fourteen years and produced considerable confusion as to when jurisdiction existed for offenses committed in a prior enlistment. No less than three distinct theories or interpretations of Article 3(a) emerged during the course of the judicial debates over this aspect of military law. The confusion was finally resolved in United States v. Ginyard where a majority of the court was able to agree on a single theory and provide the military bar with a workable rule to govern the termination of status as a person subject to the Code.

The facts in Ginyard were simple. The accused was charged with six specifications of submitting false claims for travel expenses in violation of Article 132 of the Code. The offenses were committed between October 1964 and January 1965 but went undetected until July 1965. Between the dates of the offenses and the date of their discovery, Ginyard applied for, and was granted, a discharge prior to the expiration of his normal term of service for the purpose of immediate reenlistment. At trial and on appellate review, Ginyard argued that the intervening discharge terminated the Army's jurisdiction over him for offenses committed prior to the discharge and the subsequent reenlistment did not revive jurisdiction. Recognizing the state of confusion that existed in this area of the law, the Court of Military Appeals reasoned that a "simple rule of easy interpretation" was needed to avoid future misunderstanding. With this goal in mind, the court announced the following rule:

Once an enlisted man has been discharged from the armed forces, that discharge operates as a bar to subsequent trial for offenses occurring prior to discharge, except in those situations expressly saved by Article 3(a) of the Code.

16. U.C.M.J. art. 132(1)(A); 10 U.S.C. §932(1)(A)(1976) makes punishable the knowing presentment of false or fraudulent claims against the Government. The maximum punishment at the time of the offense was a dishonorable discharge and confinement at hard labor for five years. MANUAL FOR COURTS-MARTIAL, UNITED STATES para. 127c (1951). The punishment limitation contained in Article 3(a) was satisfied. However, the Court found that 18 U.S.C. § 1001 made this sort of fraud triable in a U.S. district court and thus the military's jurisdiction did not survive under Article 3(a).
17. According to a stipulation of fact entered into the record of trial, Ginyard originally enlisted in the Army on 24 July 1963 for a period of three years. His original enlistment was due to expire on 23 July 1966. In March 1965, Ginyard submitted a request to reenlist prior to the expiration of his normal term of service in order to have enough time to complete a normal overseas tour of three years and thus enable his family to join him in Europe as authorized dependents. United States v. Ginyard, 36 C.M.R. 683, 687 (A.B.R. 1966).
19. Id. at 516, 37 C.M.R. at 136 (emphasis in original).
Ginyard's conviction was, of course, reversed and the charges dismissed for want of jurisdiction.\textsuperscript{20} The net effect of the court's holding was to establish the rule that all discharges terminated status within the meaning of Article 3(a), thereby precluding the court-martial of a soldier for offenses committed in a prior enlistment, unless the offenses were punishable by five years' confinement and not triable in the civilian courts. At the outset, it must be noted that the Ginyard rule creates a significant gap in military jurisdiction. This lack of jurisdiction over offenses committed in a prior enlistment allows all purely "military offenses" that fail to meet the five-year punishment requirement of Article 3(a) to go unpunished\textsuperscript{21} and forces the armed services to rely on the state and federal courts to deal with a wide variety of other offenses.\textsuperscript{22}

\textsuperscript{20} Id.
\textsuperscript{21} Included in this category of offenses would be those violations of the Code that are peculiarly military in nature and have no civilian counterpart. Some offenses that may arise under factual conditions to which Ginyard is applicable are proscribed by the following articles of the U.C.M.J.: art. 84, unlawful enlistment; art. 83, fraudulent enlistment; art. 89, disrespect toward superior commissioned officer; art. 91, disobedience of lawful order, disrespect toward warrant or noncommissioned officer; art. 92, violation of lawful general order or regulation, knowingly failing to obey orders, dereliction of duty; art. 93, cruelty or maltreatment of a subordinate; art. 96, releasing prisoner without authority; art. 97, unlawful detention; art. 98, noncompliance with procedural rules; art. 107, false official statements; art. 134, conduct prejudicial to good order and discipline. The foregoing list is not intended to be all-inclusive. It would be virtually impossible to hypothecate the myriad of factual situations that could possibly call for the application of Ginyard with respect to each "military offense" in the Code. Of course, some offenses are more susceptible to going undetected for a period of time than others, and the Ginyard-excused offenses must remain undetected until the individual reenlists. It is assumed that an individual would not be permitted to reenlist if probable cause existed to charge him with an offense. But see United States v. Gladue, 4 M.J. 1 (C.M.A. 1977); note 219, infra. However, a situation may arise where an individual seeking reenlistment is suspected of an offense, but there are insufficient grounds, at the time, to deny the reenlistment. The military offenses proscribed by the following articles of the Code are punishable by five years' imprisonment and thus would survive a discharge and reenlistment: art. 99, misbehavior before the enemy; art. 100, subordinate compelling surrender; art. 102, improper use of countersign; art. 105, misconduct as a prisoner of war. Again, the list is not intended to be all-inclusive. See, MANUAL FOR COURTS-MARTIAL, para. 127c (1969 rev. ed.) for the maximum punishments of all offenses under the Code.

\textsuperscript{22} This category of offense includes those acts or omissions that are normally the subject of criminal statutes, e.g., assault (art. 128); murder (art. 118); rape (art. 120); robbery (art. 122); burglary (art. 129); etc. The maximum punishments for offenses in this area generally exceed five years' imprisonment but it is the amenability to civilian prosecution that works to divest the military of jurisdiction. The particular offense may be one that is a violation of a federal statute as well as the Code and thus triable in a district court. For example, assume Sergeant Smith, an active duty member of the Army, stole an item of government property worth $300. Before his involvement was discovered he reenlisted. Larceny of property of a value in excess of $100 is punishable under the Code by five years' confinement; therefore one Article 3(a) limitation is met. However, 18 U.S.C. § 641 (1976) provides for punishment for "[w]hoever ... steals ... any ... thing of the value of $100 ..." of the United States ... . Thus, Sergeant Smith's offense is triable in a civilian court and the military's jurisdiction does not survive the discharge and reenlistment. Instead of stealing government property, assume Sergeant Smith stole various items of personal property from his fellow soldiers' living quarters in the barracks. Since the property stolen was private rather than government property, 18 U.S.C. § 641 would not apply. If the value of the property stolen exceeded $100, the five-year punishment limitation of Article 3(a) would also be met and it would appear that the military's jurisdiction would remain intact. The offense was committed on a military post under exclusive federal jurisdiction; no federal criminal statute, except the Uniform Code, makes such conduct a criminal offense; and the punishment provided for by the Code meets the five-year limitation of Article 3(a). However, the Assimilative Crimes Act, 18 U.S.C. § 13 (1976), would preclude the exercise of military jurisdiction in this hypothetical case. That provision incorporates state criminal laws into areas of exclusive federal jurisdiction and provides for the state law to be applied in a trial in the district courts. The law of the state wherein the military post was located would be applied in the federal courts through the Assimilative Crimes Act and the offense would thus be cognizable by a civilian court and the Ginyard rule would destroy military jurisdiction. Of course, the actual decision to prosecute Sergeant Smith would be made by a local United States attorney who might or might not feel that Sergeant Smith's case deserved to be added to an already crowded federal docket.
This article focuses on whether Congress intended Article 3(a) to be applied so as to create this gap. In order to facilitate appreciation of the decisional morass that spawned the Ginyard rule, a brief review of the various jurisdictional theories that were employed by the judges of the Court of Military Appeals during their fourteen-year debate over the scope and meaning of Article 3(a) is appropriate. This article will then examine the Ginyard holding in light of the available evidence as to congressional intent. Finally, the author will draw some conclusions as to the correctness of the court’s interpretation of Article 3(a) and offer recommendations to fill the jurisdictional gap created by Ginyard.

1. WHEN DOES STATUS TERMINATE? FOURTEEN YEARS OF DEBATE AND DISAGREEMENT

The debate among the judges of the Court of Military Appeals over the termination of status issue began in 1953 with the case of United States v. Solinsky and culminated with the Ginyard rule in 1967. The intervening years saw no less than three distinct legal theories applied by the court to resolve the issue. The theories ranged from an adoption of pre-Code law, to a modified Hirshberg rule, to an intention-of-the-parties analysis, with each focusing on a different aspect of the issue. With seldom a majority behind any single theory, the conflicting and divergent case decisions produced considerable confusion within the military bar over the proper test for termination of status. Since the purpose of the Ginyard holding was to end the existing confusion and avoid future misunderstanding in this area of the law, a brief discussion of these judicial theories is helpful in setting Ginyard in its proper perspective.

Judge George W. Latimer approached the question of termination of status under Article 3(a) in the same fashion as had been done under pre-Code law, i.e., if the discharge created a “hiatus,” jurisdiction terminated; if no “hiatus,” was created then status as a person subject to the Code did not terminate and jurisdiction existed by virtue of Article 2. The application of Judge Latimer’s philosophy required a case-by-case analysis of the facts surrounding the discharge and reenlistment to determine if a hiatus had occurred. Consistent with pre-Code law,

24. It is apparent that the disagreement between counsel on this issue stems from an attempt to determine the specific factual situations in each case and to relate them to particular military regulations. It is equally obvious that if misunderstanding is to be avoided in the future a simple rule of easy interpretation is necessary. United States v. Ginyard, 16 C.M.A. 512, 535, 37 C.M.R. 132, 135 (1967).
25. Judge Latimer was one of the original judges of the Court of Military Appeals, serving on the bench from 20 June 1951 until 1 May 1961.
Judge Latimer believed that an unconditional discharge given at the expiration of an obligated term of service did constitute a sufficient break of hiatus to cause status as a person subject to the Code to terminate.\textsuperscript{27} If a hiatus had occurred, Judge Latimer then found it necessary to determine if the charged offenses met the requirements of being not triable in the civilian courts and of being punishable by confinement for five or more years, as provided by Article 3(a), before jurisdiction could be exercised.\textsuperscript{28} If, however, the discharge was prior to the expiration of an obligated term of service, or one conditioned on immediate reenlistment, the limitations imposed by Article 3(a) were irrelevant since status had not terminated and jurisdiction continued uninterrupted.\textsuperscript{29} Judge Latimer’s analysis centered on whether there was an actual break or hiatus in the individual’s status as a person subject to the Code and not merely on the question of whether there was a period of time between the discharge and reenlistment.

This aspect of Judge Latimer’s analysis is readily apparent from his opinion in \textit{United States v. Frayer}.\textsuperscript{30} While serving with the Army in West Germany, Sergeant Frayer’s term of enlistment expired and he was honorably discharged. The following day he reenlisted to fill his own vacancy. During the few hours between his discharge and reenlistment, Frayer continued to occupy government quarters and retained his post exchange and other privileges. Subsequent to his reenlistment, Frayer was charged with one specification of making a false official statement, several specifications of adultery, and one specification of communicating a threat. The false official statement and five of the alleged acts of adultery were charged as having occurred prior to the reenlistment.\textsuperscript{31}

The majority found that the discharge at the expiration of the term of service ended jurisdiction and that Article 3(a) did not save jurisdiction because the offenses were not punishable by five years’ imprisonment.\textsuperscript{32} Dissenting on the jurisdictional issue, Judge Latimer implicitly acknowledged that, ordinarily, a discharge at expiration of a term of service ends jurisdiction, regardless of the length of any hiatus. In fact, he stated that, in his opinion, for a person to be subject to trial by court-martial he must be “subject to military law both at the time the offense is committed and at the time of trial, and . . . at all times between the

\textsuperscript{28} United States v. Gallagher, 7 C.M.A. 506, 22 C.M.R. 296 (1957).
\textsuperscript{29} United States v. Martin, 10 C.M.A. 636, 28 C.M.R. 202 (1959). The accused had served sufficient time on an indefinite enlistment to demand an unconditional discharge, but instead of asking to be separated, he asked for a discharge and immediate reenlistment for a term of six years. In a concurring opinion, Judge Latimer recognized Martin’s right to be unconditionally discharged, but felt that his failure to exercise that right in favor of the request for a “short discharge and immediate reenlistment” pursuant to Army regulations prevented a hiatus from occurring and status continued uninterrupted. Id. at 639, 28 C.M.R. at 205.
\textsuperscript{30} 11 C.M.A. 600, 29 C.M.A. 416 (1960).
\textsuperscript{31} Id. at 602, 29 C.M.R. at 418.
\textsuperscript{32} Id. at 602-03, 29 C.M.R. at 418-19.

two events.” Judge Latimer concluded, however, that upon these facts jurisdiction did not lapse due to the honorable discharge since the accused merely went from one status as a person subject to the Code (a member of the regular component, Article 2(1)) to another status as a person subject to the Code (a person accompanying the armed forces outside the United States, Article 2(11)) and then back to an Article 2(1) status upon reenlistment. Thus, Judge Latimer concluded that the discharge was irrelevant since Frayer’s status as a person subject to the Code had not terminated and, therefore, Article 3(a) was inapplicable. The judge compared the facts of this case with the following dictum in United States v. Solinsky.35

“Under these circumstances he would either be accompanying or serving with the Armies of the United States from the moment he left these shores until he returned. If, for a moment, he stepped from his uniform into civilian clothes and then back again, he never stepped into a category which was not subject to military law. Under the principles announced in all the authorities, and under the Articles of War, he was always subject to courts-martial jurisdiction. A momentary break in service does not necessarily break court-martial jurisdiction. It did in the Hirshberg case but as we view the particular circumstances of this case, we find it did not do so here.36

33. Id. at 605, 29 C.M.R. at 421.
34. 10 U.S.C. § 802(11) (1976). This particular provision has been held unconstitutional when applied to dependents of members of the armed forces. Reid v. Covert, 354 U.S. 1 (1957), and to civilian employees of the armed forces overseas, McElroy v. United States ex rel. Guagliardo, 361 U.S. 281 (1960). The Supreme Court decisions concerning Article 2(11) had been rendered when Frayer was decided, but Judge Latimer, without analysis, stated that those decisions were not applicable. United States v. Frayer, 11 C.M.A. 600, 605-06, 29 C.M.R. 416, 421-22 (1960). Judge Latimer may have felt that Frayer’s status as a soldier on a short “hiatus” between discharge and reenlistment was sufficient grounds to distinguish Reid and McElroy and that Article 2(11) in those circumstances was constitutional.

35. 2 C.M.A. 153, 7 C.M.R. 29 (1953). Solinsky was decided under pre-Code law since the discharge and reenlistment of the accused occurred prior to the effective date of the Code. Latimer’s opinion represents a classic statement of the pre-Code rule governing discharges prior to the expiration of a term of service. Sergeant Solinsky was serving in Europe when he requested a discharge prior to the expiration of his enlistment so that he might reenlist for an indefinite period. The request was approved and the reenlistment accomplished on September 6, 1949. Some time after the oath of reenlistment was administered, Solinsky was given a discharge dated September 5, 1949. Subsequent to the reenlistment, it was discovered that while assigned as a postal clerk during the period April to June 1948, Solinsky stole and forged several postal money orders. Writing for the majority in a two-to-one decision, Judge Latimer found that under pre-Code law such a discharge did not interrupt the accused’s status as a person subject to military law. He noted that the discharge was conditioned upon the immediate reenlistment of the accused, the discharge certificate was not delivered until after the reenlistment, and that “every fact and all circumstances point to a situation where the discharge and reenlistment were to be simultaneous events for the sole purpose of preventing a hiatus or break in the service.” Id. at 159, 7 C.M.R. at 35. Judge Latimer noted that the Supreme Court in Hirshberg had relied on the long-standing practices of the services in finding that an unconditional discharge at the expiration of an obligated term of service did create a hiatus that destroyed jurisdiction, and he, therefore, relied on the same long-standing practices in determining the rule to apply in this case. See id. at 154-55, 7 C.M.R. at 30-31. Judge Latimer stated that if the court were to make the “unreasonable assumption” that the discharge interrupted Solinsky’s status, jurisdiction would still be present since the discharge and reenlistment took place in Europe and Article of War 2(d), Act of June 4, 1920, ch. 227, 41 Stat. 787, provided for jurisdiction over “all persons accompanying or serving with the Armies of the United States without the territorial jurisdiction of the United States.” Therefore, even during the “hiatus,” Solinsky would have still been in a status subject to military law. Id. at 160, 7 C.M.R. at 36. It was this portion of the opinion that Latimer relied on in Frayer to sustain jurisdiction.


The Rule in Ginyard’s Case—293
If Sergeant Frayer had been stationed in the United States when he was discharged, Article 2(11) would not have been applicable. The break, short as it was, between discharge and reenlistment would have created a hiatus in Frayer's status as a person subject to the Code and, under Judge Latimer's theory, jurisdiction could not have been sustained.\(^\text{37}\)

The second of the three theories espoused by the members of the Court of Military Appeals during this period was that of Chief Judge Robert E. Quinn\(^\text{38}\) and centered on the intent of the parties regarding the discharge and reenlistment. Chief Judge Quinn felt that if an examination of the facts surrounding the discharge in question revealed an intent to continue the individual's status uninterrupted, then jurisdiction did not lapse and Article 3(a) was not applicable.\(^\text{39}\) If this intent was not present, the discharge ended jurisdiction and the limitations of Article 3(a) must be met before prosecution would lie for an offense committed during the prior enlistment.\(^\text{40}\) The Chief Judge's reliance on the intent of the parties as the crucial factor in determining when status as a person subject to the Code terminated did not emerge at the outset of the debates. In fact, his early opinions appear totally inconsistent with his later expressions. For example, in his dissenting opinion in the pre-Code case of \textit{United States v. Solinsky},\(^\text{41}\) Chief Judge Quinn concluded that \textit{Hirshberg} stood for the proposition that "once an enlisted man has been discharged from the armed forces, that discharge operates as a bar to subsequent trial for offenses occurring prior to discharge, except in those situations expressly saved by applicable statute."\(^\text{42}\) The Chief Judge noted that there was no statute that saved

\(^{37}\) Judge Latimer's test for termination of status is the same one used by the military before the Code was enacted, and he never deviated from it nor inquired if Congress had intended to change the standard. In his \textit{Solinsky} opinion, Judge Latimer pointed out that:

Congress authorized the President to promulgate rules and regulations to govern the administration of military law, and as early as 1928, he had prescribed that so long as a discharge did not terminate an accused's status as a person belonging to a general category of persons subject to military law, courts-martial jurisdiction would not be lost. In spite of the fact that this regulation has been in the Manual since 1928, and that the Army has interpreted the regulations to continue jurisdiction over the dischargee, Congress has not seen fit to pass contrary regulations. Again, in this instance, we do not have conflicting Army regulations as the administrative construction has always been that under this type of discharge, jurisdiction does not terminate. Accordingly, if Congress has, by not requiring a change in the practice, approved the Army construction, the doctrine of the \textit{Hirshberg} case would require an affirmance of the conviction.


Judge Latimer relied on this same concept in \textit{United States v. Martin}, 10 C.M.A. 636, 28 C.M.R. 202 (1959), to justify his use of the pre-Code test. Evidently, in his opinion, the failure of Congress to specifically legislate on this point was tantamount to congressional approval. What this theory overlooks is that the statutes which, as interpreted, gave rise to the test were repealed and replaced by the Code. This being the case, some inquiry should have been made to determine if the Code and Congress adopted the old test, or if a new standard was envisioned. Judge Latimer, apparently, did not share this view.

\(^{38}\) Appointed as the court's first Chief Judge, Quinn served on the court in that capacity from June 20, 1951 to April 25, 1975.


\(^{41}\) 2 C.M.A. 153, 7 C.M.R. 29 (1953).

\(^{42}\) \textit{Id.} at 161, 7 C.M.R. at 37. See note 35 supra.


HeinOnline -- 21 A.F. L. Rev. 294 1979
the military's jurisdiction over Sergeant Solinsky. In *United States v. Gallagher*, Chief Judge Quinn noted that Congress had passed Article 3(a) to cover a reenlistment situation and, since Gallagher's offenses met the limitation of Article 3(a), jurisdiction was present.

The first crack in Chief Judge Quinn's theory appears in *United States v. Martin*. Martin was charged with several specifications of submitting false travel claims in violation of Article 132 of the Code. The offenses were committed prior to a discharge from an indefinite enlistment and an immediate reenlistment. Chief Judge Quinn noted his dissent in *Solinsky* but found that Article 3(a) was intended by Congress to "expand the 'statutory' jurisdiction of court-martial beyond the confines of the Hirshberg opinion." Chief Judge Quinn pointed out that the offenses were triable in a federal district court, but since the accused was on active duty at the time of the commission of the offenses and at the time of trial, the limitations of Article 3(a) were not applicable. His view was that Article 3(a) was "intended to enlarge jurisdiction, not to restrict it" and there was no need to examine the discharge or the circumstances surrounding it in order to determine if a gap or hiatus existed. To emphasize his view that jurisdiction depends solely on status at the time of the offense and at the time of trial regardless of any break in service, he cited the following portion of his opinion in *Gallagher*:

"One who reenlists in the service after a discharge is not 'like Toth.' [a civilian] On the contrary, his position is like that of a person who leaves the country after committing a crime. During the time he is outside the jurisdiction he cannot be tried. But if he returns, he can, subject to the statute of limitations, be tried and convicted for an

43. Id.
44. 7 C.M.A. 506, 22 C.M.R. 296 (1957).
45. Id. at 513, 22 C.M.R. at 303. Sergeant Gallagher was a prisoner of war in Korea when his enlistment expired. Upon his return to the United States after his release, he requested reenlistment. He was discharged, reenlisted, and was subsequently charged with various offenses committed while he was a prisoner. After being tried and convicted, the issue of jurisdiction was argued before the Army Board of Review. The Board held that the discharge given Gallagher at the expiration of his term of service ended jurisdiction despite the fact that abbreviated discharge procedures were used to facilitate the reenlistment and that jurisdiction could not be asserted under Article 3(a) since the Supreme Court in *Toth v. Quarles*, 350 U.S. 11 (1955), had ruled that provision unconstitutional. See *United States v. Gallagher*, 21 C.M.R. 435 (A.B.R. 1956). See also note 13, supra. The Court of Military Appeals reversed, holding that Article 3(a) was constitutional when applied to one who was in the service at the time of trial. United States v. Gallagher, 7 C.M.A. 506, 513, 22 C.M.R. 296, 303 (1957).
47. Id. at 638, 28 C.M.R. at 204.
48. Id. at 639, 28 C.M.R. at 205.
49. Id.
50. Id. The only possible explanation as to how Chief Judge Quinn was able to disregard the Article 3(a) requirement that the offense be not triable in a civilian court is that, prior to the Code, frauds against the Government were cognizable by a court-martial even after discharge (Article of War 94, Act of June 4, 1920, ch. 227, 41 Stat. 805-06), and since Article 3(a) was designed to "enlarge jurisdiction, not to restrict it," the jurisdiction over frauds still existed. If, in fact, Chief Judge Quinn followed this line of reasoning, he completely overlooked the fact that the jurisdiction over frauds was provided by statute and that statute, along with the rest of the Articles of War, was repealed and replaced by the Code. Furthermore, the Code is devoid of any mention of a special category of jurisdiction over frauds against the Government.

The Rule in Ginyard's Case—295

HeinOnline -- 21 A.F. L. Rev. 295 1979
offense committed by him before his departure."

Interestingly enough, Chief Judge Quinn made no references to the intent of the parties or the purpose of the particular discharge. In fact, he expressly stated that there was no need to even consider the fact that there was an intervening discharge. Military status at the time of the offense and at the time of trial was sufficient under his interpretation of Article 3(a). During the next term of court, United States v. Frayer was decided and Chief Judge Quinn added a new twist to his theory. Frayer, as will be remembered, was discharged at the expiration of his term of service and reenlisted the following day. He was subsequently charged with several specifications of adultery and making a false official statement, all prior to his discharge. Chief Judge Quinn cited his Martin opinion for the proposition that Article 3(a) was intended to enlarge jurisdiction but added that this enlarged scope only went to "major offenses," i.e., those punishable by confinement of five years or more. He concluded that, since the charged offenses were not so punishable, jurisdiction was lacking.

When the Chief Judge's opinion in Frayer is compared with his Martin opinion, a rather startling interpretation of Article 3(a) arises. In Martin, the fact that the accused was on active duty both at the time of the offense and at the time of trial was sufficient to maintain jurisdiction, thereby disregarding the limitation that the offense be one not triable in the civilian courts. In Frayer, however, Chief Judge Quinn finds the five-year punishment limitation controlling, regardless of the fact that the accused was on active duty both at the time of the offense and at the time of trial. It should be noted that the limitations on jurisdiction in Article 3(a) are in the conjunctive and the wording of that statute does not seem to elevate one limitation above the other. This approach enables the Chief Judge to ignore the express and unambiguous limitation that the offense be one not triable by a civilian court, but yet give effect to the punishment limitation, all in the name of the law.

52. "Whether the accused's discharge was, under the statutes and regulations, conditioned upon immediate reenlistment, or whether there was a gap or hiatus in the accused's service need not give us pause." Id. at 638, 28 C.M.R. at 204.
53. Id. at 638, 639, 28 C.M.R. at 204, 205.
55. Id. at 602, 29 C.M.R. at 418.
56. Id.
57. Id. at 603, 29 C.M.R. at 419.
58. See notes 46-53, supra, and accompanying text.
of congressional intent.\(^6\)

Of further significance to the development of Chief Judge Quinn’s theory is the fact that the Chief Judge noted that Frayer “reenlisted to fill his own vacancy” and that he retained his government quarters and privileges during the interval between his discharge and reenlistment because “it was his intention to reenlist.”\(^6\) As will be developed below,\(^6\) these and similar manifestations of the intent of the parties were to become crucial in deciding later cases, but were merely mentioned in the recitation of the facts in Frayer and were given no particular importance. Not until 1962 and the case of United States v. Noble\(^6\) did any hint of an “intent of the parties” or “purpose of the discharge” analysis emerge from Chief Judge Quinn’s analytical scheme.

In Noble, the accused was an Air Force master sergeant who was charged with several specifications of larceny and misappropriation. The offenses were allegedly committed prior to October 1960. It appears that the accused’s original term of service was due to expire on December 13, 1960; however, he had requested and had been granted two extensions of his six-year term which resulted in an obligation to serve until October 1962. On December 8, 1960, Noble requested that his previously approved extension be cancelled, his original discharge date be restored, and that he be allowed to reenlist in order to obtain benefits that were not available under an extension of enlistment. The requests were granted and Noble executed the oath of reenlistment on December 14, 1960. Orders were promulgated cancelling the two extensions “contingent upon” the December 14 reenlistment. A week later a discharge certificate dated December 13, 1960, the above-mentioned orders, and related papers were delivered to the accused. In October 1961, Noble was tried and convicted by a court-martial.\(^6\)

On appeal, the defense asserted that the alleged offenses were triable in the federal courts as larceny and misappropriation of government

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\(^{60}\) Compare United States v. Martin, 10 C.M.A. 636, 639, 28 C.M.R. 202, 205 (1959) where Chief Judge Quinn states:

> It is contended, however, that since the offense in issue is triable in a Federal district court as a violation of either 18 USC § 287 or § 1001, Article 3(a) prohibits the exercise of court-martial jurisdiction. The argument disregards the fundamental purpose of the Article. The Article was intended to enlarge jurisdiction, not to restrict it.

with the following language from his Frayer opinion:

> Although it [United States v. Martin] differed on its specific application in that case, a majority of the Court agreed that Article 3(a) of the Uniform Code of Military Justice, 10 USC § 803, was intended by Congress to confer upon the military the power to prosecute an accused after reenlistment for an offense committed before discharge, which the Supreme Court of the United States had found to be lacking in Hirshberg v. Cooke. . . . What is important is that the offense be one which Congress intended to be prosecutable, notwithstanding the intervening discharge. [Citations omitted.] The offenses Congress had in mind were those which could be considered “major” offenses.


\(^{62}\) See notes 70-80, infra, and accompanying text.

\(^{63}\) 13 C.M.A. 413, 32 C.M.R. 413 (1962).

\(^{64}\) Id. at 414-15, 32 C.M.R. at 414-15.
property\textsuperscript{65} and, thus, did not meet the Article 3(a) limitations for jurisdiction over offenses committed prior to a discharge.\textsuperscript{66} The defense further argued that the misappropriation offenses were not punishable by imprisonment of five years or more and thus failed the Article 3(a) requirement on both counts.\textsuperscript{67}

In view of Chief Judge Quinn’s opinions in \textit{Martin} and \textit{Frayer}, one would have expected him to sustain jurisdiction over the larceny offenses for two reasons: first, the accused was on active duty at the time of the offense and at the time of trial and, second, the alleged crime met the punishment criteria of five years and thus could be classified a “major” crime, similar to those charged in \textit{Martin}.\textsuperscript{68} By the same token, one would have expected the Chief Judge to deny jurisdiction over the misappropriation offenses, for they, like the charges in \textit{Frayer}, did not satisfy the five-year punishment requirement of Article 3(a).\textsuperscript{69} Strangely enough, Chief Judge Quinn seemed to abandon his \textit{Martin-Frayer} analysis completely and pay primary attention to the purpose and effect of the discharge.\textsuperscript{70} Upon examination of the facts surrounding the discharge and reenlistment, Chief Judge Quinn found that the new enlistment was merely a substitution of the previous extensions, since those extensions were cancelled only after the accused had executed the oath of reenlistment.\textsuperscript{71} Chief Judge Quinn concluded that under those circumstances, “status” as a person subject to the Code never terminated and Article 3(a) was not applicable.\textsuperscript{72}

Chief Judge Quinn’s dissenting opinion in \textit{United States v. Steidley}\textsuperscript{73} further illustrates his change of heart. Steidley was charged with multiple specifications of larceny, misappropriation, and forgery allegedly committed prior to a discharge and immediate reenlistment.\textsuperscript{74} The Chief Judge disagreed with the majority’s finding that the accused was not subject to military jurisdiction because the offenses were triable in the federal courts.\textsuperscript{75} He preferred returning the record to the Board of

\textsuperscript{67} \textit{Id.}
\textsuperscript{68} \textit{See notes 46-53, supra, and accompanying text.}
\textsuperscript{69} \textit{See notes 54-60, supra, and accompanying text.}
\textsuperscript{70} \textit{United States v. Noble.} 13 C.M.A. 413, 416, 32 C.M.R. 413, 416 (1962). Chief Judge Quinn pointed out that “military status is terminated upon the occurrence of two conditions: (1) Execution of a discharge certificate or promulgation of appropriate orders of separation; and (2) delivery of the instrument providing for discharge, with the intention that it take effect according to its terms.” \textit{Id.} at 415-16, 32 C.M.R. at 415-16 (emphasis added). He also noted that the orders providing for cancelation of the existing extensions of Noble’s original enlistment were contingent upon the reenlistment, and were not delivered until after the reenlistment papers had been executed.
\textsuperscript{71} \textit{Id. at 416, 32 C.M.R. at 416.}
\textsuperscript{72} “Manifestly, we are not dealing with an accomplished separation for the purpose of reenlistment, but with the fact that there was no actual termination of accused’s status as a person subject to military law.” \textit{Id.}
\textsuperscript{73} 14 C.M.A. 108, 33 C.M.R. 320, (1963).
\textsuperscript{74} \textit{Id. at 109-10, 33 C.M.R. at 321-22.}
\textsuperscript{75} Steidley was charged with twenty-one specifications of larceny and wrongful appropriation of government property in violation of U.C.M.J. art. 121 and eight specifications of forging government documents in violation of U.C.M.J. art. 123. The court found that several of the larceny and wrongful appropriation charges committed in the prior enlistment failed to satisfy the five-year punishment requirement of Article 3(a) due to the value of the property involved. \textit{MANUAL FOR COURTS-MARTIAL, UNITED STATES} para. 127c 1951). Additionally, the court found that, even though all offenses were committed in Japan, they were triable in the federal courts due to the extraterritorial effect of 18 U.S.C. §§ 641, 494. \textit{United States v. Steidley.} 14 C.M.A. 108, 111, 112, 33 C.M.R. 320, 323, 324 (1963).
Review for a rehearing on the jurisdictional issue. Chief Judge Quinn felt that the record was “too weak and too uncertain to support the conclusion that the accused was given an unqualified discharge.” He noted further that facts and circumstances in the record supported “an inference that the accused asked for an early discharge and simultaneous reenlistment to further his personal interests.” This approach by Chief Judge Quinn is a radical departure from his earlier views and seems to be rather close to Judge Latimer’s theory of a “real hiatus” or “actual” break in service. The extent of Chief Judge Quinn’s reliance on the intent of the parties in establishing the purpose and effect of the discharge is further illustrated by his dissent in Ginyard and in the

76. Id. at 113, 33 C.M.R. at 325 (Quinn, C.J., dissenting).
77. Id.
78. See notes 25-37, supra, and accompanying text. Chief Judge Quinn pointed out that Steidley enlisted August 2, 1956, for a period of six years, which placed his expiration date as August 1, 1962, but that he reenlisted some sixty days prior to the expiration date of his obligated term "in order to go to a "new duty station." United States v. Steidley, 14 C.M.A. 108, 113, 33 C.M.R. 320, 325 (1963). On these facts, Judge Latimer would have clearly found jurisdiction. The Chief Judge's view that the record should be remanded for "further inquiry" illustrates, however, that even though the discharge was prior to the expiration of the term of enlistment, he does recognize the possibility that the discharge may have been unqualified and thus Article 3(a) would apply. As his subsequent opinions indicate, the "further inquiry" was to be directed toward the intent of the parties. See notes 79, 80, infra.
79. The majority in Ginyard cited Chief Judge Quinn's dissent in Solinsky (see notes 41-43, supra, and accompanying text) for the proposition that "Hirschberg mandated that a discharge ended jurisdiction unless a statute provided otherwise. The Chief Judge stated that the majority's reliance on his Solinsky dissent was misplaced since, in his view, Solinsky was given an unconditional discharge and reenlisted the following day while the record in Ginyard clearly showed that "the parties intended that no actual separation from the service be effected."
80. United States v. Ginyard, 16 C.M.A. 512, 516-17, 37 C.M.R. 132, 136-37 (1967). Apparently, it was the type of evidence presented in the Ginyard and Solinsky cases that made the difference to Chief Judge Quinn. In Ginyard, Chief Judge Quinn stated:

I agree with the majority's unarticulated premise that the fact the accused received a "short term discharge," that is, a discharge prior to the regular date of expiration of the enlistment, is not controlling. However, unlike them, I think the intention of the parties is extremely important in determining the legal effect of what they did. As we observed in Noble, before an instrument has legal consequence it must be delivered "with the intention that it take effect according to its terms."

"Id. at 116, 33 C.M.R. at 325 (Quinn, C.J., dissenting)."

81. Id. In Solinsky, however, the accused did not testify. Applying the above quoted language to the facts of Solinsky one finds that the discharge was not delivered until after reenlistment had been accomplished. United States v. Solinsky, 2 C.M.A. 153, 159, 7 C.M.R. 29, 35 (1953). Since it was not delivered until after reenlistment, it was obviously not intended to terminate Sergeant Solinsky's status. Furthermore, as stated by Judge Latimer,

there was no break in service or pay; the accused could have been ordered to perform a special mission covering that period; he was entitled to every benefit incidental to membership in the armed forces; there was not a fraction of a second that he was not subject to military orders or military control; and every fact and all circumstances point to a situation where the discharge and reenlistment were to be simultaneous events for the sole purpose of preventing a hiatus or break in the service.

82. Id.

In finding that Ginyard did not have a separation from the service, Chief Judge Quinn, in effect, places Ginyard in the same situation as Solinsky: the only difference being that in Ginyard the accused testified on the jurisdictional issue and in Solinsky he did not. Chief Judge Quinn seems to be saying that the intent of the parties will control, but that intent must be established by direct evidence rather than circumstantial. Chief Judge Quinn's statement in Ginyard that "Solinsky was actually given an unconditional discharge on one day, and reenlisted on the next." United States v. Ginyard, 16 C.M.A. 512, 516, 37 C.M.R. 132, 136 (1967), is hardly supported by the evidence and may merely have been an attempt to rationalize two hopelessly inconsistent views.

The Rule in Ginyard's Case — 299

HeinOnline -- 21 A.F. L. Rev. 299 1979
post-Ginyard case of United States v. Robson. 80

Judge Homer Ferguson 81 was the proponent of yet another theory on the meaning of Article 3(a). Judge Ferguson felt that Hirshberg v. Cooke mandated that all discharges end jurisdiction and that reenlistment does not revive jurisdiction over offenses committed in a prior enlistment unless expressly saved by statute. 82 Judge Ferguson believed that Congress adopted this interpretation of Hirshberg in Article 3(a), with the exception of offenses not triable in civilian courts and those punishable by confinement of five years or more. 83 In this regard, Judge Ferguson found it unnecessary to inquire into the facts and circumstances surrounding a particular discharge in order to resolve the jurisdictional question. This view eventually carried a majority of the court and became the Ginyard rule. 84

At first blush the theory seems rather straightforward, but Judge Ferguson did waver at times, thereby contributing to the general confusion surrounding the issue. 85 His first opinion concerning the scope and meaning of Article 3(a) in a factual situation where the jurisdictional

80. 16 C.M.A. 527, 37 C.M.R. 147 (1967). In Robson the accused received a discharge prior to the expiration of his term of service and immediately reenlisted. He was subsequently convicted of larceny and forgery of postal money orders. The court applied the Ginyard rule and dismissed the charges for lack of jurisdiction since the offenses were triable in the federal district court. Chief Judge Quinn concurred and noted that the mere fact that the discharge was prior to the expiration of a term of service and authorized under a regulation that provided that the discharge would not be delivered until after reenlistment (A.R. 635-205, para. 3b (Jan. 11, 1960)) did not sufficiently establish an intention that status was to continue uninterrupted. The Chief Judge pointed out that the date of discharge reflected on the reenlistment documents was the day before the date of reenlistment and that the regulation provided for the individual to be reenlisted on the day following discharge. Id. at 528, 37 C.M.R. at 148. In concluding that the discharge was unconditional rather than contingent upon immediate reenlistment, the Chief Judge said:

It may be that the parties here, as the parties in Ginyard, did not intend an actual termination of accused's service, but rather a substitution of one period for another. No evidence of that intention appears in the record.

81. Judge Homer Ferguson was appointed to the bench on January 17, 1956, to fill the vacancy created by the death of Judge Paul Brosman. Judge Ferguson accepted an appointment as Senior Judge May 2, 1971: his former position was filled by Judge Robert M. Duncan.


85. See notes 94-99, infra, and accompanying text.

300—The Air Force Law Review/1979
limitations were not met appears in United States v. Martin. Both Chief Judge Quinn and Judge Latimer sustained jurisdiction on their respective theories and Judge Ferguson dissented. Noting that Martin's crimes were cognizable by the federal courts, Judge Ferguson argued that the requirements for jurisdiction had not been met. He relied on Hirshberg for the rule as to when jurisdiction terminated and on Article 3(a) for the exceptions. In Judge Latimer's view, Martin's discharge was conditioned upon his immediate reenlistment, thus continuing his status without a break or hiatus. Judge Ferguson disagreed with this characterization of the discharge and was of the opinion that the discharge was unconditional. After reviewing the facts, Judge Ferguson found that "the accused's discharge from the service was in nowise conditioned upon the execution of his reenlistment papers and that he, at the moment of his release, stood in the position as one who had completed his obligation to serve for a term certain." This conclusion regarding the character of the discharge led Judge Ferguson to find that Hirshberg controlled as to the termination of jurisdiction. In discussing the similarity between Hirshberg and Martin, Judge Ferguson stated:

Thus, it was held that a service member's discharge at the end of his period of obligated service ended jurisdiction to try him during a subsequent enlistment for any offense committed during the prior enlistment. As this accused occupies precisely the same position as Hirshberg, I believe the cited Supreme Court decision is dispositive here.

Judge Ferguson's extensive discussion of the facts and his conclusion as to the unconditional nature of the discharge and its similarity to the discharge given to Hirshberg at the "end of his period of obligated service" leads one to the conclusion that the Judge recognized the legal principle relied on by Judge Latimer, that is, a "short" or conditional discharge does not interrupt status and does not terminate jurisdiction, but that he merely disagreed with Latimer's factual findings. Alternatively, one may also conclude that Judge Ferguson was not accepting Judge Latimer's legal theory but merely attempting to point out to Judge Latimer the error in his factual assessment. In any case, the fact that two such conclusions can be drawn from Judge Ferguson's opinion illustrates its contribution to the confusion over the Article 3(a) question.

86. 10 C.M.A. 636. 642-46, 28 C.M.R. 202, 208-12 (1959) (Ferguson, J., dissenting). Judge Ferguson's first opinion concerning Article 3(a) appeared in United States v. Gallagher, 7 C.M.A. 506, 513-14, 22 C.M.R. 296, 303-04 (1957) (Ferguson, J., concurring) where he found that Article 3(a) was constitutional when applied to one in the service at the time of trial. See note 13, supra.
88. Id. at 644-45, 28 C.M.R. at 210-11.
89. Id. at 641, 28 C.M.R. at 207. See note 29, supra.
90. Id. at 643, 28 C.M.R. at 209.
91. Id. at 644, 28 C.M.R. at 210.
92. Id. (emphasis added).
Any confusion caused by Judge Ferguson in Martin was clarified by his dissent in Noble, where he set forth what ultimately became the Ginyard rule. Judge Ferguson noted that, in his view, Article 3(a) was a “limited version of the rule laid down by the Supreme Court in Hirshberg v. Cooke and, as a result, “when a member of the service ends one period of obligation and begins to serve under another—regardless of how the change is effectuated—the provisions of Code, supra, Article 3, come into play and govern the exercise of jurisdiction over offenses committed during the prior period.”

When Judge Paul J. Kilday replaced Judge Latimer on the Court of Military Appeals in 1961, an opportunity became available to resolve some of the confusion regarding the interpretation of Article 3(a). Judge Kilday represented the swing vote between Judge Ferguson’s “Hirshberg rule” and Chief Judge Quinn’s Martin-Frayer approach. The Noble case provided the military bar with its first look at Judge Kilday’s philosophy. As noted earlier, jurisdiction was sustained in Noble with Judge Quinn seemingly abandoning his Martin-Frayer approach in favor of a “purpose and effect of the discharge” analysis. Judge Ferguson, in dissent, applied his “Hirshberg rule.” Judge Kilday, without opinion, concurred with Judge Quinn. This alignment of a majority of the court behind a single theory would seem to inject an air of certainty and predictability into this area of military law. Any relief associated with the establishment of a “majority rule” must have been shaken somewhat when, in the very next term of court, the decision in United States v. Steidley was handed down. Chief Judge Quinn and Judge Ferguson held to their respective theories as espoused in Noble, but Judge Kilday, again without opinion, concurred with Judge Ferguson.

II. WHEN DOES STATUS TERMINATE? A RULE AT LAST

It was against this background of ever-changing and conflicting judicial opinions that United States v. Ginyard came to be decided. After an unsuccessful challenge to jurisdiction at trial, the issue was argued before the Army Board of Review. The Board found that Ginyard received a “short” or “qualified” discharge conditioned upon his immediate reenlistment, and the discharge and reenlistment were effectuated at his request and for his benefit, to complete a normal

95. See notes 46-63, supra, and accompanying text.
98. See notes 63-72, 94-96, supra, and accompanying text.
overseas tour. He never lost his status as a person subject to military law and there was "merely a substitution of a new term of enlistment" for the old.101

Accordingly, the Board determined that Ginyard's discharge was similar to Noble's and applied the rationale of Noble to uphold jurisdiction.102

Before the Court of Military Appeals, the defense argued that Steidley marked a change in the law. Citing Chief Judge Quinn's dissent in Steidley, appellate defense counsel contended that Steidley was given a "short" or "qualified" discharge prior to the expiration of his term of service, but the majority in Steidley considered that fact immaterial and reached a holding that, in effect, overruled Noble. The defense noted that Judge Kilday had concurred with Judge Quinn in Noble, but had concurred with Judge Ferguson in Steidley and, as a result of Judge Kilday's change of heart, the rule set out by Judge Ferguson in his Noble dissent became the applicable law.103 This rule, the defense contended, produced a better result since it [was] consistent with United States v. Hirshberg, supra, and Article 3(a), Uniform Code of Military Justice, without the necessity of importing exceptions to the apparent clear meaning of these authoritative sources based on particular and rather unimportant circumstances occurring at the time a soldier decides to reenlist, [and secondly], it is a clear rule that can be readily applied without the necessity for delving into confusing and often dimly recalled factual matters which, because they are not at all important at the time they occur, make the result in individual cases more or less fortuitous. Also, such a rule . . . avoid[s] unfair difference between the soldier who reenlists at the end of his previous enlistment (United States v. Frayer, supra) and the soldier who, perhaps at the urging of the Government, and certainly to its advantages, reenlists for an increased obligated term of service a few days or months prior to the expiration of his current enlistment.104

The Government contended that Noble and Steidley were not inconsistent since Noble involved a conditional or qualified discharge and Steidley, as conceded by the Government, involved an unconditional discharge given at the expiration of Steidley's enlistment.105 The Government also assailed the defense's contention that Hirshberg stood for the proposition that jurisdiction terminates upon discharge regardless of the surrounding circumstances.106

The court accepted the defense argument and set forth the rule that

102. See id.
104. Id. at 10 (citations omitted).
106. Id. at 4.

The Rule in Ginyard's Case—303
a discharge operates as a bar to subsequent trial for offenses occurring prior to discharge unless the offenses meet the Article 3(a) requirements of being punishable by confinement for five years or more and not triable in the federal or state courts. The Chief Judge dissented and argued that while he agreed with "the majority's unarticulated premise that the fact the accused received a 'short term discharge,' that is, a discharge prior to the regular date of expiration of the enlistment, it is not controlling," he felt that the intent of the parties was important in determining the legal effect of a discharge and, therefore, it was necessary to examine the surrounding circumstances.

The court's opinion in Ginyard put an end to the fourteen years of confusion surrounding the termination of status question. Unfortunately, the court's opinion did not deal with the cause of the confusion. In the opinion, Judge Kilday states:

It is apparent that the disagreement between counsel on this issue stems from an attempt to determine the specific factual situations in each case and to relate them to particular military regulations. It is equally obvious that if misunderstanding is to be avoided in the future a simple rule of easy interpretation is necessary.

This view does not touch the real issue. When a case reaches the Court of Military Appeals, the factual disputes should have all been resolved by the Court of Review. If factual matters have not been adequately resolved by the lower court, the case can be remanded for further factual determinations. Alternatively, the court may rule that the Government has the burden of proving jurisdiction and that those facts needed to establish jurisdiction must appear in the record; therefore, a record that reflects incomplete or conflicting jurisdictional facts must be decided in favor of the accused. In Ginyard, however, there was no disagreement over the specific factual situations. The facts were uncontroverted. The accused testified that he wanted to be transferred to Europe with his dependents, but the time remaining on his current enlistment was insufficient and, therefore, he signed an intent to reenlist. He also acknowledged that he knew the discharge was conditioned upon his reenlistment for a longer term. The indisputable conclusion is that Ginyard was given a discharge prior to the expiration of his term of service for the express purpose of immediate reenlistment. To be sure, there was misunderstanding and confusion, but not over factual matters. The misunderstanding and confusion resulted from some fourteen years of debate among the court members.

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108. Id. (Quinn, C.J., dissenting).
109. Id. at 515, 36 C.M.R. at 135.
over the applicable law. It is beyond question that something needed to be done to end the confusion. What the court should have done was to make a step-by-step analysis of the issue and then arrive at a conclusion based upon sound legal reasoning. What it did was to adopt a rule based on judicial expediency motivated by self-induced frustration.

The resulting rule assumes the threshold question. The issue is not one of continuing jurisdiction, but rather one of whether status as a person subject to the Code terminates within the meaning of Article 3(a). If so, the limitations on jurisdiction as imposed by the article govern; if not, those limitations are irrelevant since jurisdiction is then based on Article 2 of the Code.\(^{113}\)

During the fourteen years of debate within the court, legislative intent was often cited and relied upon to support one view or another, depending upon what position a particular judge held.\(^{114}\) However, a thorough and detailed inquiry into the legislative intent as to when status terminated was never made. Judge Ferguson particularly relied on congressional intent with regard to the types of offenses that could be tried under Article 3(a), while relying on Hirshberg for the rule as to terminations of status.\(^{115}\) This approach disregards the fact that Hirshberg was a statutory construction case and the statutes interpreted by the Supreme Court in that case were repealed and replaced by the Uniform Code of Military Justice.\(^{116}\)

To be sure, the basic principles relied on by the Court in interpreting the Articles for the Government of the Navy\(^{117}\) and the Articles of War\(^{118}\) can, and should, be applied to the Code.\(^{119}\) To assume, however, that these different statutes require the same result is to disregard the fact that Congress used the concept of "termination of the status" in Article 3(a) and, therefore, congressional intent should provide the meaning. As will be shown,\(^{120}\) the court's assumption that Hirshberg governs all discharges and that Congress adopted that misinterpretation in Article 3(a) cannot withstand analysis.

113. 10 U.S.C. § 802 (1976). Subsection (1) of Article 2 provides that "[m]embers of a regular component of the armed forces, including those awaiting discharge after expiration of their terms of enlistment" are subject to the Code. Article 17 provides that "[e]ach armed force has court-martial jurisdiction over all persons subject to this chapter." U.C.M.J., art. 17(a); 10 U.S.C. § 817(a) (1976). See also id., arts 18, 19, 20; 10 U.S.C. §§ 818, 819, 820 (1976).
116. See note 4, supra; notes 159-198, infra, and accompanying text.
120. See notes 159-198, infra, and accompanying text.
III. WHEN DOES STATUS TERMINATE? THE INTENDED RULE

As noted in the introduction to this article, the Supreme Court, in Hirshberg, gave "great weight" to the long-standing practices of the services in determining the scope of their jurisdiction under the Articles of War.\(^ {121}\)

Of particular significance in this regard is the Court's reliance on Colonel William Winthrop's classic treatise, *Military Law and Precedents*\(^ {122}\) for the view that discharge terminates amenability to court-martial and subsequent reenlistment does not revive the lapsed jurisdiction.\(^ {123}\) The provision cited by the Court is as follows:

> JURISDICTION AFTER A SECOND APPOINTMENT OR ENLISTMENT. It remains to refer to the effect, *per se*, of a subsequent appointment or enlistment of an officer or soldier, (once duly dismissed, resigned, &c., or discharged) upon his amenability to trial for an offense committed prior to such discharge, &c., (and within two years,) but not yet made the subject of a charge or trial. Upon this point there is not known to have been any adjudication. Putting out of the question the class of offenses, the amenability for which is expressly defined by the 60th article, it is the opinion of the author that, in separating in any legal form from the service an officer or soldier or consenting to his separation therefrom, and remanding him to the civil status at which the military jurisdiction properly terminates, the United States, (while it may of course continue to hold him liable for a pecuniary deficit,) must be deemed in law to waive the right to prosecute him before a court-martial for an offense previously committed but not brought to trial. In this view, a subsequent re-appointment or re-enlistment into the army would not revive the jurisdiction for past offenses, but the same would properly be considered as finally lapsed.\(^ {124}\)

It is significant to note that Colonel Winthrop is referring to a situation where the individual has been separated and "remanded... to the civil status at which the military jurisdiction properly terminates."\(^ {125}\) A reasonable interpretation of the language of this provision is that jurisdiction does not terminate unless the individual's discharge or separation does, in fact, remand the individual to a "civil status." This reading is supported by another provision in the same work:

> The general rule is that *military persons*—officers and enlisted men—are subject to the military jurisdiction, so long only as they remain such; that when, in any of the recognized legal modes of separation

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121. See note 9, *supra*; notes 144-158, *infra*, and accompanying text.
122. *WINTHROP*, *supra* note 3.
124. *WINTHROP*, *supra* note 3, at 93.
125. *Id.*
from the service, they cease to be military and become civil persons. such jurisdiction can, constitutionally, no more be exercised over them than it could before they originally entered the Army, or than it can over any other members of the civil community.26

Colonel Winthrop clearly states that jurisdiction ceases when “military persons” are separated in such a manner that they become “civil persons.” Whether this language was directed toward a Ginyard type discharge or whether Colonel Winthrop was merely stating his opinion as to the constitutionality of the exercise of court-martial jurisdiction over civilians is unclear. Colonel Winthrop did note that, at the time of his writing, there had been no known adjudication of the issue.27 An examination of the various volumes of the Digest of Opinion of The Judge Advocate General of the Army from 1862 through 1901 fails to reveal any decision on point. This being the case, one could argue that Colonel Winthrop’s view should be taken only to be a statement of the general rule that jurisdiction ceases when the individual leaves the service and should not be read as applicable to a discharge/immediate reenlistment situation. Assuming, arguendo, that Colonel Winthrop is not commenting on a Ginyard type discharge one way or the other, it remains to be considered what developments took place in military law subsequent to his work yet prior to the Hirshberg decision in 1949.

The earliest case having facts somewhat analogous to Ginyard is United States v. Brigham,128 in which the accused was charged with signing a false official statement in connection with his application for commission. At the time of the offense, Brigham was an enlisted man. Sometime after he was discharged to accept his commission, the false statement was discovered and he was court-martialed.129 In an endorsement dated June 12, 1917, from the Judge Advocate General to the Adjutant General concerning Lieutenant Brigham’s case, the Judge Advocate General opined that Brigham’s discharge was merely for the purpose of accepting a commission and was not like a discharge given at the expiration of a term of service.130 Because of this difference, the Judge Advocate General concluded that the discharge to accept a commission did not have the effect of terminating one’s military status and the exercise of jurisdiction was therefore proper.131 The Brigham case was relied upon in United States v. Rosenberg132

126. Id. at 89.
127. Winthrop’s treatise was first published in 1886.
128. No. CM 104677 (1917).
131. Id.
132. No. CM 121586 (1918).

The Rule in Ginyard’s Case—307
to sustain jurisdiction over an officer for offenses committed while he was an enlisted man, notwithstanding the fact that he was discharged in order to accept a commission. Similarly, jurisdiction was sustained in *United States v. Warz* in which the accused was an emergency officer and was discharged in order to be commissioned as a regular officer. The Board of Review found that the discharge did not release the accused from military service. The Board of Review stated:

> It follows that the recognized rule that discharge releases a person in the military service from amenability for offenses committed prior to such discharge, other than offenses under the 94th Article of War [frauds against the Government], which rule is based upon the complete change of status and termination of service caused by an ordinary discharge, is not applicable in this case.

In 1921, Major Charles Joly was convicted of making false official statements and of embezzling government funds. The accused challenged the court-martial’s jurisdiction on the ground that the alleged offense occurred while he was an emergency officer and that he had since been discharged and recommissioned in the Regular Army. In sustaining the conviction, the Board of Review noted that the embezzlement was charged as a violation of the 94th Article of War, which expressly provided for jurisdiction regardless of a discharge or other termination of status. With reference to the false official statements, the Board observed that it had “been repeatedly held, in parallel cases where there was no interval of time during which the accused was separated from the Army, that such a discharge does not relieve from liability to trial by court-martial for offenses committed prior to the discharge.”

This theory of uninterrupted status as an exception to the general

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133. *Id.* at 3-4.
134. *No. CM 145710* (1921).
135. *Id.* at 5.
136. *Id.*
138. *Id.* at 8.
139. *Id.* Major Joly later sought relief from the federal courts by way of a writ of habeas corpus, *Ex parte Joly*, 290 F. 858 (S.D.N.Y. 1922), alleging that the exercise of court-martial jurisdiction over him for offenses committed prior to discharge was unconstitutional. The court pointed out that the statutory provision allowing court-martial jurisdiction even after a complete separation, Article of War 94, had been on the books since 1863, and “in the face, therefore, of more than half a century of practical construction and of the reported cases, this court will not hold the act unconstitutional." *Id.* at 860. The charges of making false official statements were violations of Article of War 95 which did not expressly state that jurisdiction continued after separation, but, like the Army Board of Review, Circuit Judge Mayer had no difficulty sustaining the military’s jurisdiction, even though he cited no authority for his conclusion. In fact, he thought the presence of jurisdiction was “so obvious that extended discussion of that point [was] unnecessary." *Id.* at 861. This rationale was criticized by the district court in United States ex rel. Hirshberg v. Malanaphy, 73 F. Supp. 990, 995 (E.D.N.Y. 1947), but when the Supreme Court ruled in *Hirshberg*, they did not mention the *Joly* case because the Supreme Court considered Joly’s discharge as conditional and not an interruption of his status, whereas Hirshberg’s discharge was unconditional and completely separated him from the Navy. Thus there was no need to discuss *Joly* or similar cases where the discharges were less than unconditional. See notes 144-158, infra, and accompanying text.
rule that court-martial jurisdiction terminates upon discharge was recognized by the 1928 Manual for Courts-Martial. Paragraph 10 of that work provides:

In certain cases, where the person's discharge or other separation does not interrupt his status as a person belonging to the general category of persons subject to military law, court-martial jurisdiction does not terminate. Thus, where an officer holding an emergency commission was discharged from said commission by reason of acceptance of a commission in the Regular Army, there being no interval between services under the respective commissions, it was held that there was no termination of the officer's military status, but merely the accomplishment of a change in his status from that of a temporary to that of a permanent officer, and that court-martial jurisdiction to try him for an offense (striking enlisted men) committed prior to the discharge was not terminated by the discharge.\textsuperscript{140}

In United States v. Johnson,\textsuperscript{141} the accused received a discharge prior to the expiration of his term of service so that he might immediately reenlist for three years. Subsequent to the reenlistment he was charged with larceny, in violation of Article of War 93. The offense allegedly occurred prior to the discharge and reenlistment, and at trial the defense challenged the military's jurisdiction. The Board of Review recognized the general rule that discharge terminated jurisdiction, but also recognized the (by then) well-established corollary that where the discharge does not terminate the military status of the accused, jurisdiction does not lapse.\textsuperscript{142}

During the same period of time, the Boards of Review were also reaffirming the general rule itself, that is, an unconditional discharge given upon the expiration of a term of service ends the accused's amenability to court-martial for offenses committed prior to such discharge, a subsequent reenlistment notwithstanding.\textsuperscript{143}

Thus, it appears that at the time of the Hirshberg decision the rule in the Army was that discharge terminated jurisdiction unless the discharge did not interrupt the individual's status as a soldier.\textsuperscript{144} The Court of

\textsuperscript{140} A Manual for Courts-Martial, United States para. 10 (1928). The 1949 edition of the manual contains the same provision. In 1951, the same provision was again included in the manual, except the following sentence was added:

Similarly, when an enlisted person is discharged for the convenience of the Government in order to re-enlist before the expiration of his prior period of service, military jurisdiction continues provided there is no hiatus between the two enlistments.


\textsuperscript{144} See notes 121-140, supra, and accompanying text.

The Rule in Ginyard's Case—309
Military Appeals holding in United States v. Ginyard, however, applies Hirshberg to all discharges and reenlistments. A close look at Hirshberg reveals the fallacy of such an application. As the Supreme Court pointed out in its recitation of the facts, Hirshberg was "granted an honorable discharge because of expiration of his prior enlistment." This precise statement of the factual posture of the case is significant in the Court's examination of the "manner in which court-martial jurisdiction has long been exercised by the Army and Navy . . . ." All of the long-standing military practices expressly relied upon by the Court for aid in interpreting the scope of jurisdiction on the facts before it dealt either with situations where an individual had been discharged and was out of the service or where the discharge came at the expiration of an obligated term of service and the individual reenlisted. After reviewing an opinion rendered by the Attorney General in 1919, the Court noted that, prior to that opinion "neither the Navy nor Army had ever claimed court-martial power to try their personnel for offenses committed prior to an honorable discharge where proceedings had not been instituted before discharge." This statement is absolutely correct when strictly limited to the facts before the Court. As early as 1917, however, jurisdiction had been found to continue after an honorable discharge when the discharge did not interrupt the individual's military status. In the same vein, the Court's statement that before 1932 "both Army and Navy had for more than half a century acted on the implicit assumption that discharged servicemen, whether re-enlisted or not, were no longer subject to court-martial power," is only accurate when limited to the situation of a discharge at the expiration of the obligated term of service. The line of military cases previously discussed clearly established both the general rule that a discharge at the expiration of a term of service terminates jurisdiction and the exception, i.e., the uninterrupted status theory. Furthermore, the Supreme Court was aware of the rule that a discharge that does not interrupt military status does not terminate jurisdiction. The above quoted statements of the Court, considered in light of the Court's awareness of the "uninterrupted status" rule, clearly indicate that the Hirshberg decision applies only to

148. Id. at 216.
149. Id. at 216-217. See notes 121-140, supra, and accompanying text.
154. See notes 121-140, supra, and accompanying text.

310—The Air Force Law Review/1979
a discharge received at the expiration of a period of obligated service. In view of the fact that Hirshberg was discharged at the expiration of his term of enlistment and that the Court expressly relied upon "long standing" practices within the services in interpreting the jurisdictional statutes of the Navy, it simply cannot be said that the case stands for the proposition that all discharges, without exception, terminate jurisdiction. Such a view disregards one of the very principles upon which the decision was based, i.e., long-standing practices of the services should be given "great weight" in determining the scope of court-martial jurisdiction granted by Congress.

Decisions by the Boards of Review after Hirshberg and prior to the enactment of the Code recognized the true scope of the Hirshberg rule and held accordingly.

158. In United States v. Atkins, 5 B.R.-J.C. 331 (A.B.R. 1949); aff'd, 5 B.R.-J.C. 375 (Judicial Council 1949), the Board of Review noted that the rule stated in the Hirshberg case . . . applies in situations where the soldier's term of enlistment has expired or where he has been separated from the service and a hiatus occurred between his discharge and subsequent reenlistment, no such rule has been adhered to by The Judge Advocate General of the Army in cases where soldiers are discharged prior to the expiration of their terms of service for the convenience of the Government, either for purposes of reenlistment or acceptance of a commission: Indeed, the exact opposite is true.

Id. at 354 (citations omitted) (emphasis in original). The Board considered the line of decisions discussed above and held that

Since the accused reenlisted prior to the expiration of their terms of service and since they were not physically separated from the service prior to reenlistment, their discharges under such circumstances did not constitute a complete release from the military service. Thus, there was no break or hiatus in their military status and their military service was continuous and uninterrupted from the date of the commission of the offense in question [murder] until the date of trial.

Id. at 358.

The case of United States v. Butcher, 10 B.R.-J.C. 223 (A.B.R. 1951), presented the unique opportunity for the application of both the general rule, i.e., the Hirshberg rule, and the "uninterrupted status" rule. The accused, a first lieutenant at the time of trial, was separated from active duty on March 29, 1950, while serving as a commissioned officer. The orders releasing him from active duty were unconditional and served to relieve the accused from active duty and revert him to a reserve status. The following day, the accused enlisted for a term of three years in the Regular Army. Five months later, orders were issued appointing the accused to the grade of reserve first lieutenant, with an entry date of September 21, 1950. The accused was discharged on September 20 and reported for duty the following day as a commissioned officer. He was tried in December 1950 on several specifications of failure to support his lawful wife. The periods of nonsupport covered all three periods in question, that is, (1) the period ending March 29, 1950, in which the accused was an officer; (2) the five-month period of his enlistment; and (3) the period in which he was reappointed as a commissioned officer. Id. at 229-30. After a thorough review of precedent, the Board found that the orders releasing the accused from active duty on March 29, 1950, "manifested the intent that the accused be wholly released from the Army and his return to civilian life." Id. at 232. For this reason, the enlistment on the following day did not revive jurisdiction over offenses committed prior to the separation. The discharge on September 20, 1950, however, did not have the same purpose as the prior discharge and was accorded a different treatment. In the words to the Board:

On 20 September 1950, two years, seven months and ten days prior to the expiration of his contractual term of service, he received a discharge for the convenience of the Government, for the purpose of allowing him to report for active duty as an officer on the next day. The following day, 21 September 1950, he entered on active duty as an officer and is presently serving in such capacity. Under the rules hereinbefore stated, we find that the discharge received by the accused on 20 September 1950 served merely to terminate his enlisted service but not the military service to which he had engaged himself on 30 March

The Rule in Ginyard's Case—311
In light of the foregoing analysis, it becomes quite clear that Hirshberg does not stand for as broad a proposition as the Ginyard rule implies. Congress was aware of the Hirshberg decision when it enacted the Code, therefore it is necessary to carefully examine the legislative history of Article 3(a) for some indication that Congress intended to modify the Hirshberg holding in a manner that would justify or support the Ginyard decision.

Article 3(a), as originally proposed, bore little resemblance to the present version. It was aimed at maintaining jurisdiction over reservists while in a status in which they were subject to the Code, notwithstanding the fact that they had reverted to inactive

1950, and that offenses committed by the accused on and after 30 March 1950 are subject to military jurisdiction.

Id. at 233.


MANUAL FOR COURTS-MARTIAL, UNITED STATES (1951), promulgated pursuant to Exec. Order No. 10,214, 3 C.FR. 408 (1949-1953 Compilation), as authorized by the rule-making power Congress delegated to the President in Article 36 of the Code, also recognized the "uninterrupted status" theory as an exception to the general rule that a discharge terminates jurisdiction. Paragraph 11 of that work provides, in part:

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

b. Exceptions. - To this general rule there are, however, some exceptions which include the following:

....

In those cases when the person's discharge or other separation does not interrupt his status as a person belonging to the general category of persons subject to the code, court-martial jurisdiction does not terminate. Thus when an officer holding a commission in a Reserve component of an armed force is discharged from that commission, while on active duty, by reason of his acceptance of a commission in a Regular component of that armed force, there being no interval between the periods of service under the respective commissions, there is no termination of the officer's military status—merely the accomplishment of a change in his status from that of a temporary to that of a permanent officer—and court-martial jurisdiction to try him for an offense committed prior to such discharge is not terminated by the discharge. Similarly, when an enlisted person is discharged for the convenience of the Government in order to re-enlist before the expiration of his prior period of service, military jurisdiction continues provided there is no hiatus between the two enlistments. A member of the armed forces who receives a discharge therefrom while serving without the continental limits of the United States and without the Territories enumerated in Article 2(11), and who immediately becomes a person accompanying, serving, or employed by the armed forces in such an overseas area, remains amenable to trial by court-martial for offenses committed prior to his discharge because such discharge does not interrupt his status as a person subject to the code. So also a dishonorably discharged prisoner in the custody of an armed force may be tried for an offense committed while a member of the armed forces and prior to the execution of his dishonorable discharge.

Id. at para. 11. It must be noted that the rule-making power of the President cannot be used to expand jurisdiction beyond the limits set by Congress. See Hirshberg v. Cooke. 336 U.S. 210 (1949). The manual provision is, however, evidence of the "manner in which court-martial jurisdiction has long been exercised" by the services and should be given "great weight" by the courts in interpreting the scope of jurisdiction granted by Congress. Id. at 216.
duty. This provision was bitterly attacked by members of various reserve organizations who feared that such a broad grant of jurisdiction could be used to harass reservists by involuntarily recalling them to active duty to hold them accountable for even minor infractions of discipline committed while on active duty. It should be noted that this provision would have allowed jurisdiction "whether or not such status had terminated . . . ." In the case of a reservist, this would be a reversion to inactive duty or, in the words of Colonel Winthrop, the individual would be more of a "civil person" than a "military person." Responding to the criticism of such a broad expansion of military jurisdiction and cognizant of the Supreme Court's holding in Hirshberg, Congress took steps to amend Article 3(a). In discussing the original version of Article 3(a) before a subcommittee of the House Armed Services Committee, Mr. Felix Larkin, Assistant General Counsel to the Secretary of Defense, pointed out that the proposed section did not deal with a Hirshberg situation. Congressman Elston responded that both maintaining jurisdiction over reservists and correcting the Hirshberg result could be reached "with a very simple provision to the effect that any person who commits any offense and is subject to prosecution under this code may be prosecuted even though he may no longer be in the service and the only exceptions would be cases which are barred by the statute of limitations." As the discussion continued, the committee members expressed concern that an individual might escape prosecution for murder committed the day before his or her enlistment expired by "stepping] out of the service." Mr. Larkin framed the question before the committee as "whether you can abide, missing the few cases of that kind, or whether there should be provided across-the-board jurisdiction for people who do not reenlist and are not Reservists." Framing the issue in that manner makes it appear

159. ARTICLE 3. Jurisdiction to try certain personnel. (a) Reserve personnel of the armed forces who are charged with having committed, while in a status in which they are subject to this Code, any offense against this Code may be retained in such status or, whether or not such status has terminated, placed in an active duty status for disciplinary action, without their consent, but not for a longer period of time than may be required for such action.

Uniform Code of Military Justice: Hearings on H.R. 2498 Before a Subcomm. of the House Comm. on Armed Services. 81st Cong., 1st Sess. 567 (1949). In explaining the purpose behind this provision to members of the subcommittee, Robert Smart of the Committee's professional staff commented that Article 3(a) was designed to give "continuing jurisdiction over Reserve personnel on inactive duty if it is discovered while they are on inactive duty that they committed an offense while they were on active duty or in a status under the code." Id. at 880.


161. See note 159, supra.

162. Hearings on H.R. 2498, supra note 159, at 881.

163. Id. (emphasis added).

164. Id. at 882.

165. Id. Mr. Larkin added that the questions of jurisdiction over reservists on inactive duty who committed an offense while on active duty, jurisdiction over individuals who committed offenses while in the service but have since become civilians, and jurisdiction over a "Hirshberg style" reenlistment should be decided as "one whole problem rather than by a piecemeal approach." Id.
that the committee was working under the tacit assumption that one who does reenlist is subject to military jurisdiction. Congressman De Graffenried, a member of the committee, added that Article 3(a) should be amended to provide that jurisdiction “should be fixed as of the time the crime is committed and the mere fact that he is discharged at a later date and returns to civilian life ought not to free him from being prosecuted in a military court for an offense that he committed while he was in the service.”¹⁶⁶ In response to Congressman De Graffenried’s suggestion, Congressman Brooks proposed that some sort of limitation should be incorporated “so that minor infractions of discipline would not be taken advantage of to bring a man back under the jurisdiction of a court-martial.”¹⁶⁷ Mr. Robert Smart of the committee’s professional staff pointed out that Congressman Brooks’ suggestion concerned the major area of criticism of the proposed version; the fear expressed by members of the reserve components that Article 3(a) could be used to “pull them back into the service and away from their business for comparatively minor offenses as a harassing movement.”¹⁶⁸ It was at this point in the hearing that the limitations on punishment and civil jurisdiction were raised and added to Article 3(a). The significant point to note is that the committee was discussing a situation where an individual was not on active duty when the exercise of jurisdiction was contemplated. The committee discussion is replete with phrases such as “not on active duty,” “left the service,” “out of the Army,” and “returns to civilian life.”¹⁶⁹ Read in its entirety and considering the comments in the context in which they were made, it becomes abundantly clear that the committee was contemplating, not a Ginyard, “short” discharge situation, but a factual situation where an individual had committed an offense and was not on active duty when jurisdiction was sought to be exercised.¹⁷⁰ Of course, the subcommittee was aware of the Hirshberg holding, but, in the minds of the committee, Hirshberg was important, not for its specific type of discharge, but for the seriousness of the offense and the fact that such an offense might go unpunished.¹⁷¹ With this in mind, Article 3(a) was revised and resubmitted

¹⁶⁶. Id. (emphasis added).
¹⁶⁷ Id.
¹⁶⁸. Id. at 883.
¹⁶⁹. See notes 159-168, supra, and accompanying text.
¹⁷⁰. See id.
¹⁷¹. The following exchange among committee members places Hirshberg in its proper perspective:

Mr. Brooks. Perhaps a limitation would be in order.
Mr. Smart. Yes, I think it might be well for the committee to consider the possibilities of amending this article further to provide that courts-martial could try only those cases involving major offenses which were not triable in the civil courts.
Mr. Elston. In other words, if a man committed murder the day before his period of enlistment expired—
Mr. Smart. In the United States.
Mr. Elston. Yes; we will say he was in the United States and a certain State had the jurisdiction to try the case. they could not try him in the military courts?
Mr. Smart. That further, I think, the Reserve idea. Try everything in the civil courts you
to the committee in its present form. This examination of the subcommittee hearing leaves no doubt that the primary concern was with continuing jurisdiction over persons who had committed an offense and then left active duty before being called to account for their crimes. Congress was concerned with crimes going unpunished because the particular individual accused was no longer a member of the active forces and thus no longer subject to military law. The limitations on jurisdiction in Article 3(a) were designed to prevent civilians from being harassed and snatched away from their civilian

... can if the accused is not on active duty and limit prosecutions to major offenses.

Mr. Elston. I think that is a very good suggestion.

Mr. Hardy. Yes.

Mr. Elston. After all, the only purpose of this is to avoid a case like the Hirshberg case or any case where a person has committed a serious offense. If I do not say it should include minor offenses, but where he has committed a serious offense, he should not be permitted to escape by reason of the fact that he is out of the Army.

Mr. Larkin. That is right.

Mr. Elston. Whereas the same offense committed by a fellow who just enlisted would bring prosecution.

Mr. Larkin. That is right.

Mr. Elston. It is not fair. And my suggested amendment would be that except as cases are barred by the statute of limitations, jurisdiction shall continue as to major offenses committed in the service even though a person has left the service. And then we might have what Mr. Smart has suggested. Provided the offense is not one over which the States have some jurisdiction and can proceed with the trial. That is the substance of it.

Mr. Larkin. I think we certainly would not object to that. And I think we can work out some language. Although most of the comments against this article were that we were trying to encroach and enlarge our jurisdiction, we would be happy with the restrictions of a statute of limitations and not having jurisdiction over what is triable in the civil courts.

Mr. Hardy. I think you should give consideration to the point Mr. Brooks raised a while ago that you do not permit minor or disciplinary offenses to take a man back into the service for military trial.

Mr. Larkin. I agree.

Hearings on H.R. 2498, supra note 159. at 883-84 (emphasis added). As the quoted excerpt makes clear, the committee members were considering prosecution for one who committed an offense and then became a civilian. The reference to Hirshberg was made to illustrate a serious offense and was not mentioned for, nor was any special attention devoted to, the manner in which Hirshberg was discharged.

172. After the professional staff redrafted Article 3(a), it was again considered by the subcommittee:

Mr. Smart. I would next like to direct your attention to Article 3(a), which came in for a lot of criticism. I think the ultimate opinion of the committee was that Reserves should continue to be subject to trial, for offenses committed while they were on active duty, even after they had returned to an inactive status if the offense were a serious offense and if the civil courts of this country, either State or Federal, had no jurisdiction to try the case. With that understanding there is some proposed language to accomplish that. May I read it, sir?

Mr. Brooks. Will you read it?

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

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

Mr. Brooks. That will close up that loophole?

Mr. Smart. In my opinion it will, sir.

Mr. Brooks. What is your opinion?

Mr. Elston. I am inclined to feel it would.

Mr. Brooks. All right. If there is no objection, then we will adopt that language.

Hearings on H.R. 2498, supra note 159. at 1262 (emphasis added).

The Rule in Ginyard's Case—315
jobs and community to face charges for relatively minor infractions of discipline. The legislative history is devoid of any indication that Congress intended Article 3(a) to operate as a bar to punishing a soldier on active duty for offenses committed while on active duty. Mr. Smart of the House Armed Services Subcommittee professional staff reported that the “ultimate opinion of the committee was that Reserves should continue to be subject to trial, for offenses committed while they were on active duty, even after they had returned to an inactive status if the offense[s] were ... serious ... and if the civilian courts ... had no jurisdiction ... .” As the above excerpt makes clear, the concept of “termination of status” as used in the present version of Article 3(a) referred to a situation in which a reservist reverted to inactive duty and in which the individual was no longer a “member of a regular component.” The original version of Article 3(a) used this same concept to denote the same thing.

Further evidence of the congressional intent underlying the use of the phrase “termination of status” rather than “discharge” or “prior enlistment” can be found in other areas of the legislative history of Article 3(a). Thus, after approval of the amended version of Article 3(a) by the subcommittee, a hearing was held before the full House Armed Services Committee. It can be seen that the discharge in Ginyard was not even close to the degree of separation from the active forces that arose when a reservist terminated his active status and returned to his civilian occupation and inactive duty.

In discussing
Hirshberg, the report said that "Hirshberg's term of enlistment expired and after 1 day he reenlisted." This version of the Hirshberg facts indicates that the subcommittee felt that Hirshberg was totally processed out of the Navy and, subsequent to his discharge, he decided to reenlist.\(^8\) This being the case, it is unimportant, as far as determining the intent of Congress, whether or not Hirshberg was processed in an abbreviated manner in contemplation of his reenlistment. The report goes on to state that the Article 3(a) limitations as to the seriousness of the offense and availability of civil courts "will provide ample protection against any capricious action on the part of military authorities."\(^9\) Since it could hardly be considered capricious to court-martial a soldier while on active duty for crimes committed during active duty and within the statute of limitations, this phrase must be referring to the fear expressed by the reservists that Article 3(a) would be used to pull them away from their civilian occupation to answer for minor infractions of discipline. The report by the committee to the House of Representatives was the same as the report from the subcommittee to the full committee.\(^10\)

The course of debate over Article 3(a) in the Senate sheds more light upon the intended meaning and application of that statute. When the proposed code, as amended and passed by the House of Representatives,\(^11\) reached the Senate, a comprehensive amendment was introduced to significantly alter many provisions.\(^12\) One such amendment conferred jurisdiction on the United States district courts to try individuals, whose status had been terminated, for offenses committed against the Code.\(^13\) The Judge Advocate General of the Army made a statement supporting the Senate amendments, stating: "Insofar as Army and Air Force personnel are concerned, Articles 2(3) and 3(a) of the Code extend military jurisdiction over persons not now subject to it."\(^14\) The Judge Advocate General was obviously referring to a situation where the accused was totally separated from service, since at that time jurisdiction did exist over the Ginyard type discharge. The proposed

\(^{178}\) See id.
\(^{179}\) Id.
\(^{181}\) 95 CONG. REC. 5744 (1949).
\(^{182}\) 96 CONG. REC. 1294 (1950).
\(^{183}\) The full text of the amendment as it dealt with Article 3(a), is as follows:

(a) Subject to the provisions of article 43, jurisdiction is hereby conferred upon the several district courts of the United States to try and punish according to the applicable provisions and limitations of this code and the regulations made thereunder—

1. any person charged with having committed an offense against this code while in a status in which he was subject to this code which status has been terminated;
2. any person of the Reserve component of the armed forces for an offense against this code committed while such person is on inactive duty training authorized by written orders which are voluntarily accepted by such person;
3. retired personnel of a Regular component of the armed forces who are charged with having committed an offense against this code and who are entitled to receive pay.

\(^{184}\) Id. See also Uniform Code of Military Justice: Hearings on S. 857 and H.R. 4080 Before a Subcomm. of the Senate Comm. on Armed Services. 81st Cong., 1st Sess. 255, 256, 266 (1949).

The Rule in Ginyard's Case—317
amendment was defeated and Article 3(a) emerged in the same form as passed by the House. The Senate reported:

Article 3(a) provides continuing jurisdiction over certain persons who have left the service and who heretofore have been immune from prosecution. Under this section, however, such persons are subject to this code, whenever the Federal courts do not have jurisdiction, and when the offense is serious enough to call for at least 5 years sentence and was committed within the statute of limitations.

It should be noted that the Senate Report speaks of "persons who have left the service and who heretofore have been immune from prosecution." Again, as the previously discussed line of military cases clearly establishes, an individual receiving the type of discharge that Specialist Ginyard received was not "heretofore" immune for prosecution.

Aside from the actual debates and discussions within Congress, there are other indications of congressional intent that should have been examined by the Ginyard court. For example, Article 2(1) of the Code provides for jurisdiction over an individual whose term of service has expired but who has not been discharged. Thus, it has been held that when steps are taken "with a view to trial" before the expiration of an individual's term of service, his discharge can be withheld pending court-martial. This exercise of jurisdiction is justified...

185. 96 CONG. REC. 1446 (1950). During the Senate's consideration of the Code, Senator Pat McCarran, Chairman of the Senate Judiciary Committee, moved to have the proposed legislation referred to his committee for further study and deliberation. Id. at 1412. In a letter addressed to Senator Millard E. Tydings, Chairman of the Senate Armed Services Committee, Senator McCarran expressed his concern that certain aspects of the bill, specifically Article 3(a), would deprive "former [service] personnel" of the usual rights of a civilian trial, and thus the bill should receive the scrutiny of his committee. Id. at 1366. In reply, Senator Tydings noted that Article 3(a) was designed to cover three situations: (1) reservists who go on inactive duty; (2) persons who are discharged from the service; and (3) persons who, although once discharged, reentered the service. Senator Tydings cited Hirshberg as an example of the latter category and noted that the discharge in Hirshberg prevented court-martial "even though he was out of the service for one day only." Id. at 1367 (emphasis added).

He added that Navy reservists were already subject to similar jurisdiction and that Article 3(a) was designed to extend that jurisdiction to the other services and cover cases "over which there is no present jurisdiction." Id. (emphasis added). The Senator's characterization of the Hirshberg facts clearly indicates that, in his mind, the discharge in Hirshberg was one which entirely severed Hirshberg's connection with the military. His assertion as to the lack of present jurisdiction also indicates that Article 3(a) was designed to expand jurisdiction and was not intended to be applied in a Ginyard situation.

187. See notes 128-143, supra, and accompanying text.
189. MANUAL FOR COURTS-MARTIAL, UNITED STATES, para. 11d (1959 rev. ed.). See e.g., United States v. Brown, 13 C.M.R. 856 (A.F.B.R. 1953) (jurisdiction sustained where charges were preferred and the accused was given notice prior to the expiration of his commission, even though charges were not actually served on the officer until after the date of expiration); United States v. Estrada, 18 C.M.R. 872 (A.F.B.R. 1955), pet. denied, 19 C.M.R. 413 (C.M.A. 1955) (accused formally charged and placed in pretrial confinement prior to expiration of enlistment; subsequent to expiration date new offenses were charged and jurisdiction sustained). See also WINTHROP, supra note 3, at 90 (arrest or service of charges before expiration or discharge sufficient for jurisdiction to attach). The latest word from the Court of Military Appeals in this area is United States v. Hutchins, 4 M.J. 190 (C.M.A. 1978) where jurisdiction was sustained even though no formal charges or actions were taken prior to the expiration date of the accused's enlistment, but the accused did not demand his discharge and continued his service until charges were preferred.
on the grounds of the need for discipline. It would adversely effect a unit’s discipline, so the argument goes, if a soldier were allowed to commit various offenses right before discharge and the service was powerless to take action. Recognizing that jurisdiction under Article 2(1) has been acknowledged by the federal courts, it must be assumed that such jurisdiction meets the constitutional requirements calling for "the least possible power adequate to the end proposed." Why then, would Congress provide for jurisdiction in a situation where the soldier is held involuntarily, and in the very next article of the Code abandon jurisdiction (that had existed for years) when the soldier voluntarily remains in the service?

In the former situation, the soldier is being held involuntarily, resulting in a stronger argument for the application of the protections of the civilian system, while in the latter, the soldier has voluntarily elected to remain in the service and accept the concomittant rights, duties, rules, and regulations. Similarly, the impact on unit discipline is arguably less since the recalcitrant soldier will no longer be present in the organization, while the soldier in a Ginyard situation will be a constant reminder to both commanders and troops that he “beat the system.” It simply does not follow that Congress would labor long and hard to enact the Uniform Code of Military justice in order to provide a system tailored to the special needs and considerations of the armed forces and purposely create such conflicting and illogical jurisdictional results as the above example illustrates. Article 2(1) of the Code contains no limitations or qualifications as to jurisdiction over service personnel on active duty. By its very terms it includes all “members of a regular component of the armed forces.” Congress did not see fit to limit the amenability to court-martial of a person on active duty to only those offenses committed during the current enlistment. As Article 2(1) is the basic grant of jurisdiction over individuals on active duty, such a limitation, if intended, would seem to belong in that provision.

Of similar significance in determining the overall jurisdictional intent of Congress is Article 2(4) which makes “[r]etired members of a regular component of the armed forces who are entitled to pay” subject to the Code. Although infrequently exercised and subject to

190. WINTHROP, supra note 3, at 90:

In such cases the interests of discipline clearly forbid that the offender should go unpunished. It is held therefore that if before the day on which his service legally terminates and his right to a discharge is complete, proceedings with a view to trial are commenced against him, as by an arrest or the service of charges—the military jurisdiction will fully attach and once attached may be continued by a trial by court-martial ordered and held after the end of the term of the enlistment of the accused.

194. Id. § 802(4).
195. Id.
policy limitations by the various services, this provision has been invoked by the military and upheld on collateral attack in the civilian courts. More important than the actual use of the provision, however,

196. E.g., D.A.P. 27-174, para. 4-S(c)(6) (1976) ("Retired personnel subject to the Code will not be tried for any offense by any military tribunal unless extraordinary circumstances are present linking them to the military establishment or involving them in conduct inimical to the welfare of the nation."); A.F.M. 111-1, para. 2-6 (C-3, Nov. 15, 1978) ("Retired Regular Air Force personnel, who are entitled to receive pay, are not to be tried by court-martial unless their conduct clearly links them with the military establishment or is adverse to the welfare of the United States and, even then, trial is subject to prior approval thereof by the Secretary of the Air Force.").

197. The most celebrated of these cases is United States v. Hooper, 9 C.M.A. 637, 26 C.M.R. 417 (1958), in which a Navy admiral on the retired list was tried and convicted of sodomy by a Navy court-martial. The Court of Military Appeals per Quinn, C.J., upheld the constitutionality of Article 2(4) by reasoning that retired members of a regular component, entitled to receive pay, were a part of the "land and naval forces" and thus Congress could constitutionally subject them to military law. In reaching this conclusion Chief Judge Quinn stated:

Officers on the retired list are not mere pensioners in any sense of the word. They form a vital segment of our national defense for their experience and mature judgment are relied upon heavily in times of emergency. The salaries they receive are not solely recompense for past services, but a means devised by Congress to assure their availability and preparedness in future contingencies. This preparedness depends as much upon their continued responsiveness to discipline as upon their continued state of physical health. Certainly, one who is authorized to wear the uniform of his country, to use the title of his grade, who is looked upon as a model of the military way of life, and who receives a salary to assure his availability, is part of the land or naval forces.

Id. at 645, 26 C.M.R. at 425. Admiral Hooper argued the same jurisdictional question before the United States Court of Claims in a suit to recover his retired pay which was discontinued by the sentence of the court-martial. Hooper v. United States, 426 F.2d 982 (Ct. Cl. 1964), cert. denied, 377 U.S. 977 (1964). In denying the petitioner's claim, the court relied on the Supreme Court's decision in United States v. Tyler, 105 U.S. 244 (1882) where a retired Army captain sued to establish his right to receive the benefit of a statute (Act of July 15, 1870, ch. 294, § 24, 16 Stat. 320) which increased the pay of officers ten percent for each five year's of service. The Supreme Court framed the issue as "whether an officer thus situated [retiree from active service entitled to periodic compensation] is in the service, within the meaning of [the increased compensation statute]." Id. at 245. The Court stated that it was impossible to hold that men who are by statute declared to be a part of the army, who may wear its uniform, whose names shall be borne upon its register, who may be assigned by their superior officers to specified duties by detail as other officers are, who are subject to the rules and articles of war, and may be tried, not by a jury, as other citizens are, but by a military court-martial, for any breach of those rules, and who may finally be dismissed on such trial from the service in disgrace, are still not in the military service.

Id. at 246 (emphasis in original). Relying on the Supreme Court's assumption that Congress could subject a retiree to the Articles of War and maintain jurisdiction over him, the Court of Claims affirmed the constitutionality of Article 2(4) and denied Admiral Hooper's claim.

Also sustaining the constitutionality of Article 2(4) was Chambers v. Russell, 192 F. Supp. 425 (N.D. Cal. 1961), where the petitioner, a retired Naval officer, was arrested and charged by the Navy for various acts of sodomy allegedly committed while he was still on active duty. While confined awaiting trial he sought a writ of habeas corpus challenging the Navy's jurisdiction. In finding that there was a sufficient connection between the petitioner and the Navy for the exercise of jurisdiction to be constitutional, the court noted that one on the retired list, besides receiving pay, was entitled to wear the uniform, was afforded use of commissary stores and other facilities, as well as being entitled to medical care from the service. Id. at 427. These connections, as well as the Supreme Court's language in Tyler where it stated that "the increased compensation statute." Id. at 427-28.

For a detailed discussion of the Hooper and Chambers cases, as well as other aspects of military jurisdiction over those who are not full-time members of the armed services, see Bishop, Military Jurisdiction Over Military-Civilian Hybrids: Retired Regulars, Reservists, and Discharged Prisoners, 112 U. Pa. L. Rev. 317 (1964). In discussing Chambers, Professor Bishop notes that the charged offenses were triable in the local civilian courts but that "[A]rticle 3(a) could by its own terms have no application" since that provision presupposes that the accused's status as a person subject to the Code has terminated subsequent to the offense. Since Chambers went from a status in which he was subject to the Code, i.e., active duty, to a retired status which also subjected him to the Code, Professor Bishop reasons that status was uninterrupted and thus Article 3(a) was not applicable. Id. at 343 & n.113. The court in Chambers applied the same reasoning to avoid an Article 3(a) issue.

is the indication it gives of congressional intent in the area of jurisdiction. By its very terms, Article 2(4) retains jurisdiction over individuals who have severed all connections with the military except the right to receive retirement pay and benefits. There seems to be no compelling need for such jurisdiction to exist. Additionally, there was considerable controversy surrounding this provision in Congress. The fact remains, however, that jurisdiction does exist in this situation and it exists with no limitation as to the sort of offense charged. Again the question must be asked, Why would Congress maintain jurisdiction over individuals with such a tenuous connection with the service and, in the next breath, abandon jurisdiction over an individual who is still serving on active duty? The justification for Article 2(4) appears to be the need to maintain some disciplinary controls over retirees. The justification for maintaining jurisdiction over retirees who have practically no contact with the active forces cannot compare with the need of the military to deal with crimes committed by those currently on active duty. Thus, the incongruity between Article 2(4) and the court's interpretation of Article 3(a) casts further doubt on the correctness of the Ginyard decision.

The above survey of evidence of the congressional intent underlying Article 3(a) indicates that Congress was concerned with closing a loophole or gap in military jurisdiction. To accomplish this purpose, Congress enacted a statute that greatly expanded the military's jurisdiction. Congress did not focus solely on the Hirshberg case in which a discharge at the expiration of a period of service prevented court-martial for crimes committed prior to the discharge and reenlistment. Instead, it went considerably beyond the Hirshberg situation and included within the jurisdiction of a military court those who were no longer a part of the armed forces. The broad expansion of jurisdiction under Article 3(a) certainly carried Hirshberg along in its wake and closed that loophole in jurisdiction. The Ginyard court would have us believe, however, that this same jurisdiction-expanding provision was also designed to create a loophole that heretofore had never existed. Applying pre-Code law to the facts of Ginyard yields an opposite result. A discharge prior to the expiration of an obligated term of service did not interrupt the individual's status as a person subject to military law and therefore jurisdiction did not terminate. Yet, the court's application of Article 3(a)—a jurisdiction-expanding provision—creates a loophole where none had previously existed. Such a result was not in concert with the intent of Congress. It is true that Congress was concerned with punishing offenders for major crimes committed

198. See e.g., Hearings on H.R. 2498, supra note 161, at 706, 707, 864-67; Hearings on S. 857 and H.R. 4089, supra note 185, at 100-01, 147. It should be noted that retirees had been subject to military law since 1861, thus Article 2(4) was not a wholly new concept. See Bishop, supra note 197, at 532.
199. See notes 159-187, supra, and accompanying text.
200. See notes 195-198, supra, and accompanying text.
201. Hearings on H.R. 2498, supra note 159, at 1262. See note 172, supra.
202. See notes 121-143, supra, and accompanying text.
while on active duty. Minor infractions of discipline did not warrant removing the individual from the civilian community to answer to military authorities for his transgressions. When viewed against the full spectrum of criminal law, the crimes which go unpunished by virtue of the Ginyard rule are not “major.” When viewed in the context of the military environment, however, the same crimes become major breaches of discipline. It is inconceivable, therefore, that Congress intended Article 3(a) to be interpreted in a manner that directly contradicts the very purpose of a separate system of military justice, i.e., the maintenance of discipline within the armed forces.

The Ginyard decision does have one point in its favor—it accords identical treatment to one who receives a “short” discharge prior to the termination of an obligated term of service and to one who receives his discharge at the completion of his obligated term. Similar treatment in those two circumstances is desirable. In both cases, the individual receives a discharge and immediately reenlists. In both cases, the individual is never really out of the service, therefore there is no compelling policy reason to afford different jurisdictional treatment to the two situations. Article 3(a), however, does not compel different treatment. The discussions among members of the House Armed Services Committee centered on an individual’s crimes going unpunished because he was “out of the Army” or “returned to civilian life.” The original version of Article 3(a) spoke of one’s status terminating when a reservist left active duty and returned to his civilian job and the civilian community. The present version of Article 3(a) also speaks of status being terminated. However, there is absolutely nothing in the legislative history or in the committee hearings to indicate that Congress intended a different meaning to be afforded to that phrase. In fact, the evidence is to the contrary. The inescapable conclusion is that termination of status within the meaning of Article 3(a) involves something more than a mere discharge and immediate reenlistment. When a soldier reenlists at the expiration of a term of service, he never really leaves the service. He does not return to a civilian community and a civilian occupation. His pay, rank, and privileges continue uninterrupted. Any sort of severance from the armed forces is purely fictional and has none of the attributes that Congress envisioned when speaking of a reservist leaving active duty and returning to the civilian community.

When drafting Article 3(a), Congress did not, as Judge Ferguson asserted, enact the Hirshberg rule with certain qualifications. Congress

203. See notes 159-172, supra, and accompanying text.
204. See notes 21, 22, supra.
205. See notes 159-193, supra, and accompanying text.
206. See note 6, supra.

I cannot agree with the subtle reasoning of my brothers, for I believe it disregards the statutory enactment in Uniform Code of Military Justice, Article 3, 10 USC § 803, of a limited version of the rule laid down by the Supreme Court in Hirshberg v. Cooke [citation omitted].  

322 — The Air Force Law Review/1979
was influenced by the Hirshberg decision, but in the mind of Congress, Hirshberg was totally out of the service and then reenlisted. In its view, he was not given the sort of discharge provided those who desire immediate reenlistment—one that never really severs the individual's connection with the service. Judge Ferguson's interpretation of Hirshberg and Congress' interpretation of that case are entirely different.

Legislative history and congressional intent, not Hirshberg, must, therefore, supply the test for determining when one's status as a person subject to the Code terminates. As this article has demonstrated, Congress intended for status to terminate when an individual left active duty and returned to civilian life. Congress envisioned a significant severance of the individual's ties with the active forces as the proper test for termination of status, not the purely fictional break that occurs when a career military member reaches the end of one period of service and immediately embarks on another.

The case of Toth v. Quarles is an example of the application of Article 3(a) consistent with congressional intent. In Toth, the accused had been discharged and had severed all connections with the service when he was apprehended and court-martialed for a murder allegedly committed while he was stationed in Korea. The Air Force invoked Article 3(a) as jurisdictional authority to return the accused to Korea for trial. The sister of the accused sought a writ of habeas corpus. The district court granted the writ on the ground that Toth should not have been returned to Korea without a hearing. The court of appeals reversed and the Supreme Court granted certiorari and issued the writ holding that Congress could not constitutionally extend military jurisdiction to "civilian ex-soldiers who had severed all relationship with the military and its institutions." The constitutional infirmity of Article 3(a) did not, however, alter the original intent as to the test for termination of status. In Toth, the Air Force used Article 3(a) for the exact purpose that Congress intended. Toth had severed his connections with the military and returned to the civilian community.

208. See notes 159-198, supra, and accompanying text.
210. Id. at 13.
213. Id. at 13. The exercise of jurisdiction under Article 3(a) required the prior approval of the secretary of the branch of service concerned. MANUAL FOR COURTS-MARTIAL, UNITED STATES para. 11b (1951). The Court of Appeals for the District of Columbia, in reversing the district court in Toth pointed out that "[s]ection 11(b) of the Manual is a safeguard interposed by the President against the arbitrary subjection of civilians to trial by courts-martial for offenses committed while they were in the service." Talbott v. Toth, 215 F. 2d 22, 29 (D.C. Cir. 1954) (footnote omitted). The very presence of the requirement to obtain prior approval before exercising jurisdiction under Article 3(a) is compelling evidence of the interpretation the executive branch and the service departments gave to Article 3(a). It was obviously felt that Article 3(a) was designed to reach civilians who had left the service, thus the civilian head of the service department was required to approve its use. It would seem to serve no useful purpose, however, to have the secretary of the service department pass on a case where an individual, on active duty, is charged with an offense committed while on active duty. Interestingly enough, the requirement for prior approval from the secretary of a military department before using Article 3(a) was removed from the Manual when it was revised in 1969. MANUAL FOR COURTS-MARTIAL, UNITED STATES. para. 11b (1969 rev. ed.).
however, was one that Congress felt should not go unpunished merely because the perpetrator had returned to civilian life.214 The murder Toth was charged with was committed in Korea, therefore, beyond the jurisdiction of the American civilian courts.215 Thus, the limitations on the exercise of jurisdiction under Article 3(a) were met and the Air Force brought Toth before a court-martial. The fact that Congress did not have the constitutional power to confer such jurisdiction does not, however, justify the Ginyard court's judicial alteration of congressional purpose and the subsequent application of Article 3(a) to a fact situation that it was not designed to cover. The court should have looked to the statute and its legislative history to determine if Ginyard's status had terminated so as to make the Article 3(a) limitations on jurisdiction applicable rather than fashioning a judicial expedient.216

214. Mr. Elston. You would have some very absurd situations.
Mr. Larkin. Exactly.
Mr. Elston. A man might commit murder the day before his term of enlistment was up and step out of the service and could not be prosecuted.

Hearings on H.R. 2498, supra note 159, at 881-82 (1949).

215. Toth v. Quarles, 350 U.S. 11, 13 (1955). Before the court of appeals, the petitioner argued that the alleged murder was committed on an air base in Korea and thus "at a place within the special territorial jurisdiction of the United States; therefore jurisdiction could not be exercised under Article 3(a) since the offense was triable under 18 U.S.C. §3238 in the federal courts. Talbott v. Toth, 215 F. Supp. 22, 27 (D.C. Cir. 1954). The court rejected this argument since there was no authority for the proposition that a military installation located in a foreign country was a place within the territorial jurisdiction of the United States, and, therefore. "the offenses with which Toth [was] charged could not be tried as offenses against the United States within the jurisdiction of a District Court." Id. (citations omitted).

216. At this point the critical reader may respond with the familiar maxim that a statute unambiguous on its face must be given effect as written without resort to extrinsic aid. Caminetti v. United States, 242 U.S. 470 (1917).

But consider the following:

This rule is deceptive, however, in that it implies that words have intrinsic meanings . . . . The assertion in a judicial opinion that a statute needs no interpretation because it is "clear and unambiguous" is in reality evidence that the court has already considered and construed the act. It may also signify that the court is unwilling to consider matter or evidence bearing on the question as to how the statute should be construed, and is instead declaring its effect on the basis of the judge's own uninstructed and unrationalized impression of its meaning.


As has been illustrated, the Ginyard court's reliance upon Hirshberg for the proposition that all discharges terminate status is untenable; therefore, the only other source for such a rule must be derived from Article 3(a). The intent of Congress as derived through the legislative history, however, also fails to support such a position. It would appear, then, that the above-quoted words of Justice Sutherland may be applicable in explaining the Ginyard rule. In all fairness to Judges Kilday and Ferguson, however, the briefs submitted by the Government in the Ginyard case did not, in the opinion of the author, adequately examine and set forth the intent of the legislature. As a result, the responsibility for this "uninstructed" interpretation of Article 3(a) cannot be placed entirely upon the judicial shoulders of those two honorable and distinguished gentlemen.

Again, the critic may retort that Article 3(a) works to deny a certain class of individuals the rights and protections afforded by the Constitution and should, therefore, be strictly construed. It has long been the law, however, that even though a statute should be strictly construed, it should not be construed so as to defeat the intent of the legislature. As Mr. Justice Story noted in United States v. Winn, "the proper course in all these cases [construction of penal statutes] is to search out and follow the true intent of the legislature, and to adopt that sense of the words, which harmonizes best with the context, and promotes in the fullest manner the apparent policy and objects of the legislature." United States v. Winn, 28 F. Cas. 733, 734 (C.C.D. Mass. 1836) (No. 16, 740).

324 - The Air Force Law Review/1979
IV. WHEN DOES STATUS TERMINATE? A PROPOSED RULE

Even though Ginyard was wrongly decided, it is, nevertheless, still the law and must be recognized as such. The fact that it has endured for some ten years, however, does not mean that it is "good law."

The broad language used by the court virtually eliminated any loopholes or distinctions\(^1\) that might be argued to avoid application of the rule. Furthermore, there is no empirical data available to measure the impact the Ginyard decision has had on discipline. Since the decision was handed down, the issue has been noticeably absent from the decisions of the military appellate courts. Of course, this may

217. The Ginyard decision itself did not expressly overrule the Noble case where jurisdiction was found to exist despite a discharge and reenlistment because "[l]egally and factually, the new term of enlistment was a substitute for the original enlistment and its extensions." United States v. Noble, 13 C.M.A. 413, 414, 32 C.M.R. 413, 416 (1962). In fact, Judge Kilday went to great lengths to distinguish Noble from both Steidley and Ginyard. In discussing the lower court's holding sustaining jurisdiction over Ginyard by relying on Noble, Judge Kilday stated:

The fact overlooked by the board of review in its analysis of Noble is that Noble presented a special case. As the majority opinion therein points out, at the time he applied for a change in the term of his service, Noble already was serving the second of his two extensions of his original enlistment. He desired cancellation of the extension and restoration of the original date of expiration. Because of the peculiar nature of the situation a "special" order was issued which provided that the cancellation of the extensions was expressly made "contingent upon" Noble's reenlistment.

United States v. Ginyard, 16 C.M.A. 512, 514, 37 C.M.R. 132, 134 (1967). He then noted that in Steidley there was some doubt as to whether the discharge was unqualified or was one given prior to the normal discharge date for the purpose of simultaneous reenlistment. In any case, he found that the court in Steidley was not "faced with the 'special situation found in Noble.'" Id. at 515, 37 C.M.R. at 135. Judge Kilday went on to state, "In the case at bar, we hold that our opinion in Steidley is applicable and that the court-martial did not have jurisdiction to try the accused for the charged offenses." Id. at 516, 37 C.M.R. at 136. The court's efforts in distinguishing Noble and Steidley and then applying Steidley to resolve the case before it would indicate that Noble is still a viable case and would be an exception to the Ginyard rule that establishes a discharge as a bar to subsequent court-martial for offenses committed prior to discharge unless saved by Article 3(a). Upon analysis, however, the Noble and Ginyard cases are so factually similar that there exists no rational basis for distinction. Noble had an obligated extension cancelled so that he could immediately reenlist. Ginyard reenlisted prior to the expiration of his term of service, Noble already was serving the second of his two extensions of his original enlistment. He desired cancellation of the extension and restoration of the original date of expiration. Because of the peculiar nature of the situation a "special" order was issued which provided that the cancellation of the extensions was expressly made "contingent upon" Noble's reenlistment.

Another false exception to the Ginyard rule that warrants mention was enunciated by Chief Judge Quinn in United States v. Martin, 10 C.M.A. 636, 28 C.M.R. 202 (1959). Martin was charged with submitting false travel claims, an offense that was cognizable by both civilian and military courts. Chief Judge Quinn sustained jurisdiction, even though the offense was committed prior to a discharge and reenlistment, because the accused was on active duty at the time of trial. Chief Judge Quinn then added that frauds against the Government had been a basis of continuing jurisdiction for almost one hundred years and, in his opinion, the Hirschberg case did not alter that basis for jurisdiction. Id. at 639, 28 C.M.R. at 205. What the Chief Judge failed to realize, however, was that the reason jurisdiction over frauds against the Government continued past a separation from the service was because statutes had so provided. See, e.g., Article of War 94, Act of June 4, 1920, ch. 227, art. 94, 41 Stat. 805-06; WINTHROP, supra note 3, at 92. The Code repealed and replaced the prior statutes and contains no specific jurisdictional rules governing frauds against the Government. These sorts of offenses are, therefore, clearly within the Ginyard holding and cannot serve as the basis for an exception. See United States v. Martin, 10 C.M.A. 636, 645-46, 28 C.M.R. 202, 211-12 (1959) (Ferguson, J., dissenting). Accord, United States v. Justice, 2 M.J. 344, 347 & n.4 (A.F.C.M.R. 1976).

There does exist, however, one type of offense that survives the Ginyard rule. In discussing one of the allegations of larceny in Steidley, Judge Ferguson states:

The Rule in Ginyard's Case—325
be explained by the clarity of the court's rule. It is certainly a "simple rule of easy interpretation."\textsuperscript{218}

The fact that the decision in \textit{Ginyard} has not caused the very foundations of military discipline to crumble is not justification for ignoring it. The military bar should be concerned because of the unsound legal reasoning employed by the majority opinion. Commanders and convening authorities should be concerned over the potential for soldiers to escape appropriate discipline for breaches of military law. It is of little consolation to commanders faced with a \textit{Ginyard}-excused offense that the rule of the case has not totally undermined the entire system of discipline within the armed forces. Commanders are concerned primarily with discipline in \textit{their} unit and the impact on \textit{their} organization when one of its members can violate the rules and not only go unpunished but retain all the benefits as well.\textsuperscript{219} It is for these reasons that \textit{Ginyard}, even though over ten years old, must be reexamined and corrected. To accomplish this, there are essentially two avenues available to vitiate

There is nothing in the record to indicate the date on which any particular item set forth in the specification was taken or to establish whether the theft occurred wholly during the prior enlistment, wholly in accused's current service obligation, or partially in both. Under the circumstances, we are unable to determine the extent to which the court-martial had jurisdiction over the alleged offense. The matter may be resolved by the taking of evidence and submission of the issue at the rehearing on sentence which, as hereinafter noted, we deem necessary. See United States v. Ornelas, 2 USCMR 96, 6 CMR 96. If it is determined that the offense occurred in whole or in part during accused's existing enlistment, it may be considered appropriately by the court-martial in imposing punishment. If it is determined that it was committed during the prior term of service, the law officer may apply the principles enunciated herein and dismiss the specification.

United States v. Steidley, 14 C.M.A. 108, 111, 33 C.M.R. 320, 323, (1963) (emphasis added). Thus, despite the broad language of the \textit{Ginyard} rule, a continuing crime or conspiracy-type offense would not be affected by an intervening discharge as long as some act or element is present in the current enlistment. United States v. Gladue, 4 M.J. 1 (C.M.A. 1977). See also United States v. Rhodes, 11 C.M.A. 735, 742-43, 29 C.M.R. 551, 558-59 (1960).


\textsuperscript{219} Consider, for example, the hypothetical case of Staff Sergeant Smith, a drill sergeant assigned to a basic training company at Camp Swampy. He has eight years' service and recently reenlisted prior to his normal discharge date to qualify for certain specialized schooling. In addition, he received a handsome reenlistment bonus. Shortly after the reenlistment ceremony, Sergeant Smith's commanding officer became aware of conduct by Sergeant Smith in violation of a lawful general regulation. Sergeant Smith had, in his "zeal" to train the volunteers in today's Army, "sold" passing scores on the physical fitness and rifle qualification tests, subjected several trainees to various forms of prohibited mental and physical harassment, and had exhibited considerable favoritism toward other trainees by purchasing alcoholic beverages for them, as well as giving them preferential treatment on guard detail and other duty assignments. After investigation, the commander preferred charges against Sergeant Smith for violation of the regulation. U.C.M.J. art. 92. The offenses were, of course, committed prior to Sergeant Smith's discharge and reenlistment and had not continued into the current enlistment. Article 92 carries a maximum punishment of two years' confinement and, therefore, fails one prong of the Article 3(a) requirement, thus barring prosecution of the charges. Some of the conduct may be chargeable as assault, id. art. 128, extortion, id. art. 127, or accepting a bribe, id. art. 134. Those offenses, however, also fail to meet the five-year punishment limitations of Article 3(a). As a result, Sergeant Smith will retain his rank, privileges, and benefits, not the least of which is the reenlistment bonus and the guarantee to attend his requested school. Meanwhile, the Army remains powerless to take disciplinary action that, under the circumstances, would seem warranted. Of course, some of the conduct engaged in by Sergeant Smith, may be cognizable by the civilian courts. See note 22, supra. In all likelihood, however, the civilian prosecutors will be less than enthusiastic in spending their money, time, and effort to prosecute an offense which has a negligible impact upon the immediate civilian community. The needs of the military to discipline and correct such conduct simply do not carry great weight with the overworked and understaffed civilian criminal justice system.

The recent case of United States v. Gladue, 4 M.J. 1 (C.M.A. 1977), presents another example of
the *Ginyard* rule: (1) a direct attack in the courts to judicially overrule the case, or (2) overrule it legislatively.220

For the trial counsel arguing before the trial judge, the chances for success are, even optimistically speaking, limited. The trial judge is the bizarre and unsatisfactory results that are produced by the *Ginyard* rule. In *Gladue*, the accused was court-martialed for possession of heroin and for conspiracy to smuggle heroin into the United States on a military aircraft in violation of U.C.M.J. art. 134 and U.C.M.J. art. 81, respectively. Sergeant Gladue argued that a discharge on January 20, 1975, and an immediate reenlistment on the following day precluded the Air Force from exercising jurisdiction over the possession offense since it had occurred during his prior enlistment. *Id.* at 3. In resolving the jurisdictional issue, the court cited *Ginyard* for the proposition that for jurisdiction to survive an intervening discharge, the offense must be punishable by more than five years' confinement and not triable in the courts of the United States, or of a state, territory, or the District of Columbia. *Id.* The defense argued that the federal criminal laws prohibiting possession of heroin, 21 U.S.C. §844(a) (1976), had an extraterritorial application and the accused was, therefore, triable in a district court of the United States. The court, however, found that the statute did not have extraterritorial application and, therefore, one prong of the *Ginyard* test was satisfied. United States v. Gladue, 4 M.J. 1, 4 (C.M.A. 1977). The court also noted that the accused was charged under U.C.M.J. art. 134 which carries a maximum punishment of ten years' confinement, thus fulfilling the other aspect of the *Ginyard* rule for continuing jurisdiction.

The court's language in finding that the punishment requirement of Article 134 was not met, however, warrants careful scrutiny. The court found that the five-year punishment requirement was satisfied because, *at the time of the appellant's court-martial, the offense of wrongful possession of heroin was punishable under Article 134, UCMJ, by confinement at hard labor for 10 years. Paragraph 127c, Manual for Courts-Martial, United States, 1969 (revised edition). But see United States v. Jackson, 3 M.J. 101 (C.M.A. 1977); United States v. Courtney, 1 M.J. 438 (1976).*

*Id.* (emphasis added). The court's citation to *United States v. Courtney* and to *United States v. Jackson* indicates contrary results on similar facts in future cases. In *Courtney* the accused was charged under Article 134 for possession of marijuana. The charging of possession of drugs under Article 134 was challenged by the defense as a violation of equal protection under the fifth amendment in that the same offense was chargeable as a violation of a general regulation under Article 92. and, as such, carried a maximum confinement period of only two years. The court found that "drug offenses punished by the Army under Article 92, UCMJ, [were] virtually identical with those punished under Article 134, UCMJ." United States v. Courtney, 1 M.J. 438, 440 (C.M.A. 1976), and concluded that the denial of the motion to limit the maximum punishment to two years as provided by Article 92 was a denial of equal protection. *Id.* at 442. The *Jackson* case held that *Courtney* would be applied only to those cases brought to trial after the *Courtney* decision was published. The citation in *Gladue* to *Courtney* and *Jackson* clearly indicates that had *Gladue* been tried after *Courtney* there would have been no jurisdiction over the possession offense since the two-year punishment provision of Article 92 would have been applied and the Article 3(a) requirement of five years' confinement would not have been satisfied. Of course, the equal protection problem in *Courney* has been cured by recent policy changes directing that possession of heroin and certain other narcotics will be chargeable under Article 134 while possession of marijuana LSD, and other non-narcotic dangerous drugs will only be chargeable under Article 92. See, e.g. A.R. 600-50, para. 5-2 (Oct. 20, 1977). Cf. A.F.R. 30-2, para. 4-4 (Nov. 8, 1976) (similar to the Army rule except that marijuana ischargeable under U.C.M.J. art. 134 and has a five-year punishment limitation). Curing the equal protection problem does not, however, avoid the *Ginyard* rule with respect to those offenses chargeable under Article 134 with its two-year punishment limitation. *Gladue* situation presented itself today and the drug involved was LSD instead of heroin, the proper charge would be a violation of Article 92 and the service would be without jurisdiction over the possession offense, hardly a desirable state of affairs.

As discussed in note 217, *supra*, jurisdiction over the conspiracy charge would continue into the current enlistment as long as an overt act in furtherance of the conspiracy occurs in the current enlistment. United States v. Gladue, 4 M.J. 1, 5 (C.M.A. 1977).

220. Since court-martial jurisdiction cannot be exercised without a grant of congressional authority, changes in service regulations or the Manual for Courts-Martial would be ineffective. Hirshberg v. Cooke, 336 U.S. 210 (1949). It should be noted, however, that pursuant to U.C.M.J. art. 56 the President could raise the maximum punishment of all offenses to five years and retain jurisdiction over some offenses that are presently excluded by *Ginyard*. Such a course of action would result in punishment limitations being devices for jurisdictional purposes rather than being related to the seriousness of the offense. It hardly seems fair to subject a soldier to the possibility of a five-year prison sentence for breaking restriction (Article 134) in order to preserve jurisdiction over an individual who has reenlisted. The seriousness of the offense, not jurisdiction, should govern the punishments allowable under the Code; for this reason the use of Article 56 should not be considered as a method of vitiating the *Ginyard* holding.
bound by the decisions of the Court of Military Appeals and will be very reluctant to rule in a manner that is contrary to established precedent. The defense counsel will counter the Government's evidence of congressional intent with the fact that *Ginyard* has been the law for ten years and the failure of Congress to overrule it ratifies the correctness of the decision. In overcoming these obstacles, it should be noted that the development of law by judicial decision, which includes overruling prior decisions, is deeply rooted in American jurisprudence and is the very essence of the common law. Therefore, a trial judge should have no qualms about abandoning the law of a prior case when presented with sufficient evidence that the case was wrongly decided. The argument that legislative inaction ratified the court's decision is, like the Government's evidence, merely an aid to statutory construction and not dispositive of the issue.\(^2\)

Assuming the Government's argument carries the day at trial, the issue must, of course, be argued on appeal. If the issue reaches the Court of Military Review, the Court of Military Appeals will have an opportunity to review the viability of *Ginyard* through either a petition by the accused or a certification by the appropriate Judge Advocate General.\(^2\) In view of the fact that the present court has never had occasion to hear the issue, a well-briefed and argued case by the Government may be successful. In any event, one will never know unless the attempt is made.

In pursuing the other method of attack on *Ginyard*, the following legislation is proposed. Article 3(a) should be repealed. In its place the following should be enacted:

Subject to section 843 of this title (Article 43) no person who commits an offense against this chapter, while in a status in which such person was subject to this chapter, shall be relieved from amenability to trial by court-martial by reason of the termination of that status if such person is in a status subject to this chapter at the time of trial.

This provision would allow the exercise of jurisdiction over an individual if he were in the service at the time of the offense, and at the time of trial, regardless of any intervening discharge. This would avoid a *Ginyard* situation as well as a *Frayer* situation, where the discharge came at the expiration of the term of service. It would also cover the

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\(^{221}\) The "legislative inaction" argument disregards the realities of the political and legislative process and may be slipping from favor in certain areas. See Sutherland. *supra* note 216, § 49.10. Of interest to the Article 3(a) issue is the fact that Judge Latimer relied on this very argument to justify his theory of applying pre-Code law to determine when status terminated under the Code. See note 37, *supra*.


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case where the individual actually left the service and subsequently reenlisted. The statute of limitations would, however, continue to run.\textsuperscript{223} The above proposal does not limit prosecution to serious offenses, but would allow prosecution, subject to the statute of limitations, for any offense cognizable by the Code. The fact that an offense is made punishable by the Code is evidence that it is deleterious to discipline and needs to be dealt with to maintain the morale, discipline, and the effectiveness of the armed forces. The proposed legislation also eliminates the civilian court limitation in the current version of Article 3(a). The \textit{Relford-O'Callahan}\textsuperscript{224} tests for service connection offer sufficient protections for individuals on active duty to eliminate the need for an additional qualification in Article 3(a). Since the military is constitutionally prohibited from exercising court-martial jurisdiction over civilians,\textsuperscript{225} there is no need for such a limitation for their benefit. The elimination of the civilian court jurisdiction qualification also avoids the requirement that the military judiciary examine and interpret unfamiliar state and federal law to determine if military jurisdiction exists.

An alternative legislative approach to the \textit{Ginyard} rule may be accomplished by enacting the following provision as subsection (c) of 10 U.S.C. § 1168:

\begin{quote}
Discharge or release from active duty:
\begin{itemize}
\item[(c)] Any member of the armed forces qualified for and desiring reenlistment in the armed forces, whether at the expiration of the then current enlistment or pursuant to § 1171 of this title, will not be discharged, but will enter upon the new term of service as of the date the enlistment oath is executed. A reenlistment under such circumstances will be deemed to continue the individual's status as a member of the armed forces, without interruption, for all purposes, including, but not limited to, the administration of military justice.
\end{itemize}
\end{quote}

The above suggested addition to the law governing discharges would clearly indicate that the "technical" discharges administered in \textit{Ginyard} and \textit{Frayer}, and the accompanying fictional breaks in service, are not of jurisdictional significance.

There is no rational or logical reason why an individual in the service at the time of trial should not be held accountable for offenses committed while in the service. Allowing, as \textit{Ginyard} does, an individual to commit various offenses and yet remain in the military and go unpunished is not only irrational and illogical, but is also an insult to those honest and hardworking men and women who proudly serve their nation in the military service.

\textsuperscript{223} The statute of limitations applicable to offenses under the Code is found in U.C.M.J. art. 43; 10 U.S.C. § 843 (1976).
\textsuperscript{224} See note 2, supra.