WEAK LINK: TIME TO REFINE THE CONCEPT OF CRIMINAL CAUSATION IN THE MILITARY JUSTICE SYSTEM

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I. Introduction

Many offenses under the Uniform Code of Military Justice (UCMJ) include causation as a required element, with homicides being the most notable.[1] But what does it mean to say an accused's misdeeds *caused* a particular harm? This seemingly simple question can be deceptive. As eminent jurist Richard Posner once quipped, defining cause is a bit like trying to explain "the word 'time' in a noncircular way."[2] After all, every event is, in some way, the result of countless series of combined causes and effects, stretching back to the beginning of time. It is unsurprising, then, that the efforts of courts to narrow the concept of cause for purposes of legal liability have produced a proliferation of explanations for it.[3] Military courts are no different in this respect.[4] Yet such variety can be

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[1] *See, e.g.*, UCMJ arts. 108–09, 115–16, 118, 119–20, 124, 128 (2012).

[2] United States v. Hatfield, 591 F.3d 945, 949 (7th Cir. 2010).

[3] *Id.* at 947 "[Causation] continues to confuse lawyers, in part because of a proliferation of unhelpful terminology (for which we judges must accept a good deal of the blame)." The court further observed that *Black's Law Dictionary* lists twenty-six different terms to describe the word "cause." *Id.* at 948 (citing BLACK'S LAW DICTIONARY (8th ed. 2004)).

[4] Depending on the factual circumstances of the case, military trial judges currently rely on one (or more) of five standardized instructions to explain causation to court-martial panels. *See* U.S. DEP'T OF ARMY, PAM. 27-9, MILITARY JUDGE'S BENCHBOOK para. 5-19 (15 Sept. 2014) [hereinafter BENCHBOOK]. In turn, these instructions employ a variety of causal terms such as proximate cause; direct cause; contributory cause; intervening cause; and contributory negligence. *Id.* para. 5-19 nn.2–7.

problematic in the criminal context. To what degree can the definition of cause vary without violating an accused's right to know what he is accused of and by what standard he will be judged? And what if one definition of cause is less difficult to prove than another?

Such uncertainties in the law of criminal causation recently attracted the Supreme Court's attention in *Burrage v. United States*.[5] In *Burrage*, the Court held that, absent a statutory definition, but-for cause generally represents the minimum standard for cause when causation is an element of an offense.[6] Importantly, the Court also determined this standard cannot be met by showing the defendant's actions were merely a contributing or substantial factor in producing the harm.[7] Instead, the government must prove that but for the defendant's actions, the harm would not have occurred.[8]

Burrage brings needed clarity to the concept of criminal causation and exposes flaws in the military judiciary's current efforts to define it. In Part I, this article attempts to explain why this is so, and the practical impact *Burrage* may have on military justice practice in the future. Part II discusses the Court's analysis in *Burrage* and its implications in the criminal context. Part III demonstrates why the various courts-martial panel instructions and military appellate court explanations of causation conflict with the Supreme Court's standard and create the potential for legal error. Finally, Part IV proposes that military courts incorporate the *Burrage* Court's holding into courts-martial practice by adopting the causation standard expressed in the American Law Institute's Model Penal Code.

II. The Supreme Court's Decision in *United States v. Burrage*

In *Burrage*, the Supreme Court considered the applicability of a federal mandatory-minimum sentence for drug distribution when "death or serious bodily injury results from the use of such substance."[9] To

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[5] 134 S. Ct. 881, 187 L. Ed. 2d 715 (2014).
[6] *Id.* at 889, 892.
[7] *Id.* at 886, 891.
[8] *Id.* at 892.
[9] *Id.* at 885 (internal quotation marks omitted) (quoting 21 U.S.C. § 841(a)(1), (b)(1)(A)–(C) (2012)). Because the mandatory minimum sentence provision required proof of additional facts, the Court treated the provision as an element of the offense for due process purposes. *See id.* at 887 (citing Alleyne v. United States, 133 S. Ct. 2151, 2162–63 (2013);

determine this, the Court granted certiorari on two related questions: (1) could Burrage be convicted of the sentence enhancement when the drug he provided was only a contributing cause of a recipient's death; and (2) did the trial court err by not instructing the jury to decide whether death was a foreseeable result of Burrage's drug-trafficking.[10] As the Court observed, these questions generally coincide with the law's traditional understanding of causation as a hybrid concept,[11] requiring proof that a defendant's conduct be "both (1) the actual [or but-for] cause, and (2) the 'legal' cause (often called the 'proximate cause') of the result."[12] However, because the Court found the actual cause question dispositive, it did not address the legal cause issue.[13]

A. Trial Proceedings

Marcus Burrage stood trial in federal district court for unlawfully distributing heroin, which resulted in the death of a recipient named Banka.[14] The evidence established that, before obtaining heroin from Burrage, Banka ingested multiple other drugs obtained from independent sources.[15] A government expert also testified that Banka died from a "mixed drug intoxication with heroin, oxycodone, alprazolam, and clonazepam all playing a contributing role."[16] The expert "could not say whether Banka would have lived had he not taken the heroin, but observed that Banka's death would have been "[v]ery less likely."[17]

In light of this evidence, Burrage moved for a judgement of acquittal to the sentence enhancement, arguing "that Banka's death did not 'result from' heroin use because there was no evidence that heroin was a but-for cause of death."[18] Burrage also requested jury instructions explaining that the mandatory-minimum sentence provision did not apply unless the

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Apprendi v. New Jersey, 530 U.S. 466, 490 (2000)).

[10] *Id.* at 886.

[11] *Id.* at 887 (citing H.L.A. HART & ANTHONY M. HONORÉ, CAUSATION IN THE LAW 104 (1959)).

[12] *Id.* (internal quotation marks omitted) (quoting 1 WAYNE LAFAVE, SUBSTANTIVE CRIMINAL LAW § 6.4(a), at 464–66 (2d ed. 2003); also citing MODEL PENAL CODE § 2.03 (AM. LAW INST. 1985)).

[13] *Id.*

[14] *Id.* at 885.

[15] *Id.*

[16] *Id.* at 886 (internal quotation marks omitted).

[17] *Id.*

[18] *Id.*

government proved his distribution was the proximate cause of Banka's death.[19] He further proposed defining proximate cause as "a cause of death that played a substantial part in bringing about the death, meaning that '[t]he death must have been either a direct result of or a reasonably probable consequence of the cause and except for the cause the death would not have occurred.'"[20] The trial court denied both motions and instead instructed that the government need only "prove that the heroin distributed by the Defendant was a contributing cause of Joshua Banka's death."[21] The jury ultimately convicted Burrage of drug distribution and the enhancement, resulting in a mandatory-minimum sentence of twenty years' imprisonment.[22]

B. The Supreme Court's Analysis

The crux of the Supreme Court's decision lies in the ordinary meaning of "results from" when the phrase is not defined by statute.[23] According to the Court, phrases like "results from" generally impart actual causality, requiring proof that the injury would not have occurred but for the accused's wrongful acts.[24] And unless a statute indicates otherwise, the but-for cause "formulation represents '*the minimum* requirement for a finding of causation when a crime is defined in terms of conduct causing a particular result.'"[25] As the Court explained, "it makes little sense to say that an event resulted from or was the outcome of some earlier action if the action merely played a nonessential contributing role in producing the event."[26]

The Court also rejected the idea that acts amounting to a substantial or contributing factor can establish actual causation.[27] According to the Court, Congress could have included such language in the statute, but

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[19] *Id.*
[20] *Id.* (internal quotation marks omitted).
[21] *Id.* (internal quotation marks omitted).
[22] *Id.*
[23] *Id.* at 887.
[24] *Id.* at 888–89.
[25] *Id.* at 888 (emphasis in original) (quoting MODEL PENAL CODE § 2.03 explanatory note, at 25–26 (AM. LAW INST. 1985)).
[26] *Id.* The Court analogized this idea to a baseball team winning a game by 5–2. Under those circumstances, it makes no sense to say the victory resulted from the first or last run scored. *See id.*
[27] *Id.* at 890–91.

chose not to.[28] Citing the rule of lenity,[29] the Court emphasized that it may not derogate from the ordinary meaning of a criminal statute at the defendant's expense.[30] The Court further found that attempting to estimate a defendant's contribution to the outcome as material or substantial creates uncertainty of a kind that "cannot be squared with the beyond-a-reasonable-doubt standard applicable in criminal trials or with the need to express criminal laws in terms ordinary persons can comprehend."[31] In other words, lower courts and defendants cannot be left to guess how substantial a contributing factor must be to establish guilt.[32]

Applying this reasoning, the Court reversed and remanded the case for further review.[33] Subsequently, the Eighth Circuit Court of Appeals held the sentence enhancement legally insufficient and ordered a sentence rehearing.[34]

C. Implications of *Burrage*

The Court's decision in *Burrage* not only provides clarity in the statutory interpretation process, but also emphasizes the special importance of but-for causation in criminal cases. By doing so, the Court's decision limits the discretion of subordinate federal courts to adopt alternative formulations for actual cause in a number of respects.

1. Application to Statutory Construction

First, while the *Burrage* Court does not mandate but-for cause in every instance, it does dictate the starting point when interpreting causation elements. As recognized by both the Supreme Court and the U.S. Court of Appeals for the Armed Forces (CAAF), the first step in statutory

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[28] *Id.* at 891.

[29] The rule of lenity is a "judicial doctrine holding that a court, in construing an ambiguous criminal statute that sets out multiple or inconsistent punishments, should resolve the ambiguity in favor of the more lenient punishment." *Rule of Lenity*, BLACK'S LAW DICTIONARY (10th ed. 2014).

[30] *Burrage*, 134 S. Ct. at 891.

[31] *Id.* at 892 (citing United States v. L. Cohen Grocery Co., 255 U.S. 81, 89–90 (1921)).

[32] *Id.* at 892.

[33] *Id.*

[34] United States v. Burrage, 747 F.3d 995, 997–98 (8th Cir. 2014).

interpretation "is to determine whether the language at issue has a plain and unambiguous meaning with regard to the particular dispute in the case. The inquiry ceases if the statutory language is unambiguous and the statutory scheme is coherent and consistent."[35] When applying this test to causation, it is now clear that the "but-for requirement is part of the common understanding of cause."[36] Consequently, courts may only derogate from the but-for standard if its application would frustrate other provisions of the same statute.

For example, in *Paroline v. United States*, the Court did not apply a strict but-for cause standard to avoid an anomalous result.[37] In that case, the defendant was convicted of possessing numerous images of child pornography.[38] Relying on 18 U.S.C. § 2259, the government sought $3.4 million in restitution against the defendant on behalf of a victim depicted in two of the images he possessed.[39] According to the government, the victim's claimed losses were attributable to the trauma caused to her by the widespread distribution of the images.[40] However, the government produced no evidence that the victim was aware of or suffered any specific loss, probably due to the defendant's comparatively minor role in this distribution.[41] These facts created an ambiguity when applied to the text of § 2259. While the statute clearly required the district court to award the full amount of the victim's losses, it also required the government to prove that the defendant's offense was the proximate cause of those losses.[42] If, as the district court held, proximate cause required proof that the victim's losses would not have occurred but for the defendant's offense, the victim would be entitled to nothing.[43] Yet if, as the circuit court held, the victim was entitled to the full amount of her losses, the defendant would effectively be held criminally liable for offenses he did not commit.[44]

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[35] United States v. McPherson, 73 M.J. 393, 394 (C.A.A.F. 2014) (internal quotation marks omitted) (quoting Barnhart v. Sigmon Coal Co., Inc., 534 U.S. 438, 450 (2002)).
[36] *Burrage*, 134 U.S. at 888.
[37] Paroline v. United States, 134 S. Ct. 1710, 1726–27 (2014) (citing 18 U.S.C. § 2259 (2006)).
[38] *Id.* at 1717–18.
[39] *Id.* at 1718.
[40] *Id.*
[41] *Id.*
[42] *Id.* at 1718–19, 1726–27.
[43] *Id.* at 1718.
[44] *Id.* at 1718, 1726. Though restitution seeks monetary damages and liability is determined by a preponderance of the evidence, the Court considers restitution suits under the rubric of criminal law. *See id.* at 1726.

The Supreme Court resolved the ambiguity in *Paroline* by interpreting the statute to require a non-traditional causation standard.[45] As in *Burrage*, the Court confirmed that the concept of proximate cause generally requires proof of both actual and legal causation.[46] The Court also reiterated that "the traditional way to prove that one event was a factual cause of another is to show that the latter would not have occurred 'but for' the former."[47] However, based on the overall statutory scheme, the Court found that a strict but-for cause standard would undermine Congress's express intent to make restitution mandatory.[48] At the same time, the Court could not interpret the statute to hold the defendant liable for the entirety of the victim's losses without potentially violating the Eighth Amendment's Excessive Fines Clause.[49] Instead, the Court adopted a modified form of actual causation, which allows a defendant to be held proportionally liable "in an amount that comports with the defendant's relative role in the causal process that underlies the victim's general losses."[50] Thus, in *Paroline* the Court illustrates how a statute may textually or contextually preclude application of the traditional but-for cause standard.[51]

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[45] *Id.* at 1727.
[46] *Id.* at 1719.
[47] *Id.* at 1722; *see also Burrage*, 134 S. Ct. at 888–89 ("[C]ourts regularly read phrases like 'results from' to require but-for causality.").
[48] *Paroline*, 134 S. Ct. at 1726–27.
[49] *Id.* at 1726.

> [T]here is a real question whether holding a single possessor [of child pornography] liable for millions of dollars in losses collectively caused by thousands of independent actors might be excessive and disproportionate in these circumstances. These concerns offer further reason not to interpret the statute the way the victim suggests.

Id.
[50] *Id.* at 1727. Essentially, the Court interpreted the statute to require a two-step analysis for determining liability. First, instead of asking whether the victim's losses would not have occurred but for the defendant's actions, courts must determine if the defendant was part of an aggregate force which produced the victim's losses. Second, courts must then, in their discretion, assess a reasonable amount of restitution based on the defendant's relative contribution to the victim's losses. *Id.* at 1727–28. Obviously, a test of this kind makes sense only in the context of restitution or civil damages involving divisible monetary claims.
[51] *See id*. (citing *Burrage*, 134 S. Ct. at 889–90).

2. Application in Criminal Cases

Second, criminal and tort law conceptions of causation differ in key respects.[52] As one legal scholar observed:

> Because of the higher stakes in the criminal law, and its especially strong commitment to personal, rather than vicarious, responsibility, some courts expressly provide that a tort conception of causation is insufficient to impose criminal responsibility. Instead, a stricter test, requiring a closer connection between the defendant's conduct and the resulting harm, may be applied.[53]

This focus on personal responsibility "illustrates why the [Supreme] Court has been reluctant to adopt [tort law] aggregate causation logic in an incautious manner, [when] interpreting criminal statutes where there is no language expressly suggesting Congress intended that approach."[54] Similar considerations also explain the *Burrage* Court's emphasis on the rule of lenity.[55]

Moreover, in criminal cases, the use of vague language to define causation may violate the Constitution. As explained in *Burrage*, describing cause in terms of probabilities or relative shares of contribution "cannot be squared with the beyond-a-reasonable-doubt standard applicable in criminal trials or with the need to express criminal laws in terms ordinary persons can comprehend."[56] This conclusion is rooted in the Court's decision in *United States v. L. Cohen Grocery Co.*, which considered the constitutionality of a federal statute criminalizing the making of "any unjust or unreasonable rate or charge in handling or dealing in or with any necessaries . . . ."[57] There, the Court held the statute

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[52] JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW § 14.01, at 182 (3d ed. 2001).
[53] *Id.*
[54] *Paroline*, 134 S. Ct. at 1724 (citing *Burrage*, 134 S. Ct., at 890–91).
[55] *See Burrage*, 134 S. Ct. at 891 ("Especially in the interpretation of a criminal statute subject to the rule of lenity . . . we cannot give the text a meaning that is different from its ordinary, accepted meaning, and that disfavors the defendant."). For the two concurring members of the Court, Justices Ginsburg and Sotomayor, the rule of lenity was the deciding factor in *Burrage*. The concurring justices wrote separately only to clarify that they would not interpret antidiscrimination laws to require but-for causality in the context of civil litigation. *Id.* at 892 (Ginsburg and Sotomayor, J.J., concurring).
[56] *Id.* at 892 (citing United States v. L. Cohen Grocery Co., 255 U.S. 81, 89–90 (1921)).
[57] *L. Cohen Grocery Co.*, 255 U.S. at 86 (internal quotation marks omitted) (quoting Lever Act, ch. 53, § 4, 40 Stat. 276 (1917), as amended by Act of Oct. 22, 1919, ch. 80, § 2, 41

unconstitutional under the Fifth and Sixth Amendments because it did not fix "an ascertainable standard of guilt and [was not] adequate to inform persons accused of violation thereof of the nature and cause of the accusation against them."[58] The Court also found the statute to be an unconstitutional delegation of legislative authority, because its vague language effectively allowed individual courts and jurors to determine the applicable standard of guilt.[59] Thus, the *Burrage* Court's reliance on *L. Cohen Grocery Co*. warns that interpreting causation elements to require but-for causation is essential to criminal due process, unless Congress itself affixes an ascertainable alternative.[60]

III. Contrasting the Supreme Court and Military Court Definitions of Causation

Military courts endorse a causation standard inconsistent with *Burrage*. This conflict arises from the problematic definition of proximate cause repeatedly expressed in military appellate court decisions over the past sixty years. That precedent now forms the basis of the military trial judiciary's standard causation instructions.[61] Until the military bench reconciles its conception of cause with that of the Supreme Court, affected courts-martial could be at risk of legal error.

A. Development of Military Court Causation Precedent

Among the first military cases to address causation was the 1954 Court of Military Appeals (CMA) decision in *United States v. Schreiber*.[62] In *Schreiber*, the accused was convicted of murder after ordering subordinates to shoot an injured Korean detainee.[63] At trial, competing

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Stat. 297 (1919)).

[58] *Id.* at 89.

[59] *Id.*

[60] *See also* Boos v. Barry, 465 U.S. 312, 330–31 (1988) (explaining that courts have a duty to interpret potentially overbroad statutes narrowly to "avoid constitutional difficulties . . . if such a construction is fairly possible").

[61] *See* BENCHBOOK, *supra* note 4, para. 5-19 references (citing United States v. Taylor, 44 M.J. 254 (C.A.A.F. 1996); United States v. Reveles, 41 M.J. 388 (C.A.A.F. 1995); United States v. Lingenfelter, 30 M.J. 302 (C.M.A. 1990); United States v. Cooke, 18 M.J. 152 (C.M.A. 1984); United States v. Moglia, 3 M.J. 216 (C.M.A. 1977); United States v. Romero, 1 M.J. 227 (C.M.A. 1975); United States v. Klatil, 28 C.M.R. 582 (A.B.R. 1959)).

[62] 18 C.M.R. 226 (C.M.A. 1954).

[63] *Id.* at 229.

experts disagreed on whether the shooting ordered by the accused caused the detainee's death, or merely contributed to the death in combination with the victim's prior injuries.[64] Based on this testimony, the accused appealed his conviction asserting the evidence legally insufficient to establish shooting as the cause of death.[65] In reply, the CMA held that "the evidence presented by both sides established, at the very least, that the shooting contributed to the ultimate result. This is sufficient."[66] Regrettably, the CMA's contribution theory of causation proved persistent.

A few years later, in *United States v. Houghton*, the CMA considered the question of causation in the context of panel instructions.[67] There, the accused was convicted of the child abuse-related murder of his daughter.[68] At trial, the accused claimed his daughter died not from his abuse, but of wounds sustained after falling out of bed.[69] Based on this theory, the defense requested an instruction directing the panel that "it must be satisfied beyond a reasonable doubt that the accused's acts were the sole proximate cause of the subdural hematoma which eventually led to the victim's death."[70] Denying this request, the law officer instead instructed the panel "as a matter of law . . . an accused is criminally responsible for homicide if his unlawful act contributed to or accelerated the death of the victim."[71]

On appeal, Houghton claimed the law officer's instruction improperly permitted the panel to convict, even if his actions did not directly result in death.[72] The CMA disagreed this was error. Relying on *Schreiber*, the court reasserted its view that "[c]riminal responsibility for a homicide exists . . . if the accused's act directly causes death or contributes to death."[73] According to the court, "the challenged instruction merely presented the second basis for liability to complete the statement of the general rule."[74]

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[64] *Id.* at 230–31.
[65] *Id.* at 231.
[66] *Id.*
[67] 32 C.M.R. 3, 4 (C.M.A. 1962).
[68] *Id.* at 4–5.
[69] *Id.* at 5.
[70] *Id.* (internal quotation marks omitted).
[71] *Id.* at 4 (internal quotation marks omitted).
[72] *Id.* at 5.
[73] *Id.* (citing United States v Schreiber, 18 C.M.R. 226, 231 (C.M.A. 1954); 40 C.J.S. Homicide § 11d, at 855–56 (1962)).
[74] *Id.* More specifically, Houghton claimed there was "no evidence to support liability on

The general rule announced in *Houghton* laid the foundation for the formulation of proximate cause later developed by the CMA. Based in part on *Houghton*, successive CMA decisions in the 1970s held:

> [A]n accused is responsible for a homicide only if his act was a proximate cause of same. To be proximate, an act need not be the sole cause of death, nor must it be the immediate cause—the latest in time and space preceding the death. But a contributing cause is deemed proximate only if it plays a material role in the victim's decease.[75]

Since its adoption, both the CMA and its successor, the CAAF, have consistently upheld this "material role" theory of proximate cause.[76] And, at the trial level, this remains the standard causation instruction memorialized in the *Military Judge's Benchbook*.[77]

B. Conflicts with *Burrage*

The military court definition of proximate cause does not jibe with the Supreme Court's description of the concept. As the Court explained in *Burrage* and *Paroline*, the default test for determining proximate cause is a two-step analysis of both actual and legal causation.[78] Within this analysis, but-for causation provides the minimum standard for establishing actual cause.[79] Thus, the government cannot prove proximate cause

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the theory [that his] acts contributed to, rather than directly caused, death; and, as a result, the court-martial might have based its finding on a theory not presented by the evidence." *Id*. (internal quotation marks omitted). The court disagreed, citing ample evidence that Houghton denied abusing his daughter and that she sustained the fatal head injury by falling out of bed. *Id*. at 5–6. Of course, the same evidence also demonstrates that the panel might have acquitted Houghton, had the law officer required the government to prove that the victim would not have died but for his acts or omissions.

[75] United States v. Romero, 1 M.J. 227, 230 (C.M.A. 1970) (citing *Houghton*, 32 C.M.R. 3; 1 O. WARREN AND B. BILAS, WARREN, HOMICIDE § 59 (perm. ed. 1938); 1 R. ANDERSON, WHARTON, CRIMINAL LAW AND PROCEDURE § 290 (1957)). The CMA re-affirmed the same passage from *Romero* seven years later. United States v. Moglia, 3 M.J. 216, 217 (C.M.A. 1977) (quoting *Romero*, 1 M.J. at 230).

[76] *See, e.g*., United States v. Reveles, 41 M.J. 388, 394 (C.A.A.F. 1995); United States v. Lingenfelter, 30 M.J. 302, (C.M.A. 1990); United States v. Cooke, 18 M.J. 152, 154 (C.M.A. 1984).

[77] *See* BENCHBOOK, *supra* note 4, para. 5-19 nn.2–7.

[78] Burrage v. United States, 134 S. Ct. 881, 887 (2014); Paroline v. United States, 134 S. Ct. 1710, 1719 (2014).

[79] *Burrage*, 134 S. Ct. at 887.

without first establishing but-for cause.[80] By failing to incorporate but-for cause as an essential element of proximate cause, the CMA's material role standard is equivalent to the substantial or contributing factor theory of actual cause expressly repudiated in *Burrage*.[81]

The rationale behind the CMA's material role standard further demonstrates its error. In *United States v. Cooke*, the CMA favorably compared its material role standard to the concepts of concurrent sufficient causes and intervening cause as expressed in some legal treatises.[82] Quoting one legal treatise, the CMA explained the concept of concurrent sufficient causes as follows:

> In the criminal law . . . the situation sometimes arises where two causes, each alone sufficient to bring about the harmful result, operate together to cause it. Thus A stabs B, inflicting a fatal wound; while at the same moment X, acting independently, shoots B in the head with a gun, also inflicting such a wound; and B dies from the combined effects of the two wounds. *It is held that A has caused B's death (so he is guilty of murder if his conduct included an intent to kill B, manslaughter if his conduct constituted recklessness). (X, of course, being in exactly the same position as A, has equally caused B's death.) So the test for causation-in-fact is more accurately worded, not in terms of but-for cause, but rather: Was the defendant's conduct a substantial factor in bringing about the forbidden result?* Of course, if the result would not have occurred but for his conduct, his conduct is a substantial factor in bringing about the result; but his conduct will sometimes be a substantial factor even though not a but-for cause.[83]

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[80] *See id.* at 887, 892 (finding it unnecessary to address the applicability of legal cause where the government did not establish but-for cause).

[81] *See id.* at 890 (rejecting the "less demanding . . . line of authority, under which an act or omission is considered a cause-in-fact if it was a 'substantial' or 'contributing' factor in producing a given result").

[82] 18 M.J. 152, 154–55 (C.M.A. 1984).

[83] *Id.* at 154 (alteration and footnotes omitted in original) (quoting LAFAVE & SCOTT, HANDBOOK ON CRIMINAL LAW 249–50 (1972). Concurrent sufficient causes should not be confused with the concept of principal liability, wherein two or more persons acting in concert may be found guilty of the same offense. *See* UCMJ art. 77 (2012). Instead, the concept of concurrent sufficient causes only addresses circumstances where the action of two or more persons and/or forces *independently* cause a particular harm and each act or

The CMA then observed that some legal scholars address the concepts of concurrent sufficient causes and intervening cause "in an almost identical fashion."[84] Quoting one such source, the court explained:

> It must not be assumed that negligence of the deceased or of another is to be entirely disregarded. Even though the defendant was criminally negligent in his conduct it is possible for negligence of the deceased or another to intervene between his conduct and the fatal result in such a manner as to constitute a superseding cause, completely eliminating the defendant from the field of proximate causation. *This is true only in situations in which the second act of negligence looms so large in comparison with the first, that the first is not to be regarded as a substantial factor in the final result.*[85]

After analyzing these sources, the CMA concluded they "accord with our understanding of proximate cause."[86] However, in *Burrage*, the Supreme Court considered and roundly rejected sources substantially similar to those relied upon in *Cooke*.[87]

In *Burrage*, the Government urged the Court to adopt a test for causation wherein the defendant's act or omission "need not be a but-for cause of death, nor even independently sufficient to cause death, so long as it contributes to an aggregate force . . . that is itself a but-for cause of death."[88] Like the CMA's analysis in *Cooke*, the government's argument relied on authorities using the substantial factor test to address multiple-cause scenarios.[89] The Supreme Court found the government's reliance on these authorities misplaced. According to the Court, the majority view is that the substantial factor test applies, if ever, only in the context of concurrent sufficient causes.[90] This represents an exceedingly narrow exception to the but-for cause standard. While theoretically possible, circumstances involving multiple forces that independently inflict the

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force "alone was sufficient to cause the result that occurred *when it did*." DRESSLER, *supra* note 52, § 14.02, at 185.

[84] *Cooke*, 18 M.J. at 154 (citing R. PERKINS, CRIMINAL LAW, 698–701 (2d ed. 1969)).

[85] *Id.* (alteration in original) (quoting PERKINS, *supra* note 84, at 703).

[86] *Id.* at 155.

[87] Burrage v. United States, 134 S. Ct. 881, 890 (2014).

[88] *Id.*

[89] *Id.*

[90] *Id.*

same harm at the same time represent the rare case.[91] Absent these unique circumstances, the Court found it unnecessary to "accept or reject the special rule developed for [concurrent sufficient cause] cases . . . ."[92]

The Court expressly rejected the minority view, which extended application of the substantial factor test to all cases involving multiple-factor causation.[93] Under the minority view, "an act or omission is considered a cause-in-fact if it was a 'substantial' or 'contributing' factor in producing the result."[94] Unlike concurrent *sufficient* cause cases, the minority view replaces but-for cause with a form of aggregate causation, even when the defendant's actions are *insufficient* to produce the result independent of other factors beyond his control.[95] Following the Model Penal Code's lead, the *Burrage* Court declined to adopt this more permissive view of causation.[96]

As *Burrage* demonstrates, the CMA's material role standard for proximate cause represents the minority view. Like other expressions of the minority view, the material role test relies on a form of aggregate causation incompatible with the Supreme Court's understanding of actual cause. Under *Burrage*, actual cause requires proof that the prohibited result would not have occurred but for the *defendant's* actions even in the presence of other contributing factors.[97] Stated differently, while other factors may render a victim more susceptible to a particular result, the defendant's actions must represent "the straw that broke the camel's back," not simply one among the bale.[98] Accordingly, an accused cannot be an actual cause if his actions are merely a contributing cause that plays

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[91] *Id.* (citing University of Tex. Southwestern Medical Center v. Nassar, 133 S. Ct. 2517, 2525 (2013); WAYNE R. LAFAVE, SUBSTANTIVE CRIMINAL LAW § 6.4(a), at 467 (2d ed. 2003)).
[92] Burrage v. United States, 134 S. Ct. 881, 890 (2014).
[93] *Id.* (citing State v. Christman, 249 P.3d 680, 687 (Wash. Ct. App. 2011); People v. Jennings, 237 P.3d 474, 496 (Cal. 2010); People v. Bailey, 549 N.W.2d 325, 334–36 (Mich. 1996); Commonwealth v. Osachuk, 681 N.E.2d 292, 294 (Mass. App. Ct. 1997)).
[94] *Id.*
[95] *Id.*
[96] *Id.* at 890–91 (citing American Law Institute, Proceedings of the American Law Institute 39th Annual Meeting 135–41 (1962); MODEL PENAL CODE § 2.03(1)(a) (AM. LAW INST. 1985)).
[97] Burrage v. United States, 134 S. Ct. 881, 890–91 (2014).
[98] *Id.* at 888.

a material role in the result.[99] And without proof of actual cause, proximate cause is a moot point.[100]

C. Change on the Horizon

How the military judiciary will reconcile the Supreme Court's definition of actual cause with its current understanding of proximate cause remains an open question. With its recent published opinion in *United States v. Bailey*, the Army Court of Criminal Appeals (ACCA) became the first military appellate court to address the apparent conflict.[101] And while the *Bailey* court ultimately sustained the *Benchbook*'s standard causation instructions, its analysis portends further legal challenges to the military's conception of proximate cause.

In *Bailey*, the ACCA considered whether the military trial judge "erred by instructing the panel that the appellant could be convicted of manslaughter and negligent homicide if appellant's actions were a contributing cause to the resulting death instead of a 'but for' cause."[102] The homicide charges against Bailey arose from his role in a fatal car crash. Precipitating this incident, Bailey abruptly drove across "three lanes into oncoming traffic and smashed into the driver's side of a Dodge Durango traveling in the opposite direction."[103] The impact deflected Bailey's vehicle off the road into the path of a pedestrian, whom he struck and killed.[104] After the vehicle came to rest, multiple witnesses testified that Bailey appeared "high or intoxicated."[105] Subsequent law enforcement investigation further revealed two empty packets of synthetic marijuana in Bailey's vehicle and metabolites of the same in his bloodstream.[106]

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[99] *Compare* BENCHBOOK, *supra* note 4, para. 5-19 n.3 (stating that a proximate cause need not be the only cause, but "must be a direct or contributing cause that plays a material role, meaning an important role, in bringing about the [harm]"), *with Burrage*, 134 S. Ct. at 891 (stating that but-for cause requires the harm to result from the defendant's conduct, "not from a combination of factors to which [that conduct] merely contributed").

[100] *See Burrage*, 134 S. Ct. at 887; Paroline v. United States, 134 S. Ct. 1710, 1719 (2014).

[101] United States v. Bailey, 75 M.J. 527 (A. Ct. Crim. App. 2015).

[102] *Id.* at 529.

[103] *Id.* at 529–30.

[104] *Id.* at 530.

[105] *Id.*

[106] *Id.*

At trial, Bailey offered the testimony of an accident reconstruction expert to challenge the causation elements of the homicide offenses.[107] According to the expert, the driver of the Durango "took no action to avoid the collision . . ." with Bailey.[108] "The expert concluded that if the Durango driver had applied her brakes 1.6 seconds prior to impact, [the victim] would not have been struck by appellant's vehicle . . . ."[109]

The trial judge subsequently instructed the panel that the homicide offenses required proof beyond a reasonable doubt "that the act of the accused which caused the death . . . was the proximate cause."[110] In defining the term proximate cause, the trial judge explained:

> Proximate cause means that the death must have been the natural and probable result of the accused's culpably negligent act. The proximate cause does not have to be the only cause, but it must be a contributory cause which plays an important part in bringing about the death. If the death occurred only because of some unforeseeable, independent, intervening cause which did not involve the accused, then the accused may not be convicted of involuntary manslaughter. The burden is on the prosecution to prove beyond a reasonable doubt that there was no independent, intervening cause and that the accused's culpable negligence was the proximate cause of the victim's death.[111]

Consistent with military practice, the trial judge did not instruct the panel to determine whether the death would have occurred but for Bailey's culpable or simple negligence.[112]

In its analysis, the ACCA found *Bailey* and *Burrage* factually distinguishable in key respects.[113] As an initial matter, the court observed that "[t]he Supreme Court found in *Burrage* there was an instructional error in that the drug given to the victim by Burrage was not an '*independently sufficient cause of the victim's death or serious bodily*

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[107] *Id.* at 530–31.
[108] *Id.* at 530.
[109] *Id.* at 530–31.
[110] *Id.* at 531.
[111] *Id.* (citing BENCHBOOK, *supra* note 4, para. 3-44-2(d) n.1).
[112] *Id.* at 531–32 (citing BENCHBOOK, *supra* note 4, para. 3-44-2(d) n.1).
[113] *Id.* at 533.

injury.'"[114] Comparing this holding to the military's current causation precedent, the ACCA determined neither standard requires that "[s]tatutory phrases like 'because of' . . . be interpreted to mean 'solely because of.'"[115] And "[u]nlike in *Burrage*, the facts in [*Bailey*] support that the victim would have lived but for appellant's conduct."[116] Indeed, "the collision and injuries caused to the victim were wholly contingent on appellant's acts . . . ."[117] Any failure on the Durango driver's part merely represented a foreseeable "effect in a cause-and-effect chain of events."[118] Thus, in contrast to the facts in *Burrage*, Bailey's culpable acts were clearly an independently sufficient cause.

Under the circumstances, the ACCA found no instructional error. While recognizing the conflict between the holding in *Burrage* and the trial judge's reference to contributory cause, the court did not find the inconsistency dispositive. According to the ACCA, when viewed in context of the instructions as a whole, the trial judge's proximate cause definition sufficiently conveyed "the same meaning as 'but for' causation."[119] Moreover, even if the instructions did not implicitly include a but-for cause requirement, the court found the deficiency harmless beyond a reasonable doubt.[120]

Careful readers of *Bailey* will find no reassurance in its outcome. Far from endorsing the military's proximate cause standard, the ACCA's opinion expressly acknowledged its flaws. The court tacitly conceded that the contributing cause language in the trial judge's instructions was inconsistent with the Supreme Court's minimum standard for determining criminal causation.[121] More tellingly, the ACCA called on the military justice community to address this issue. Commenting in a footnote, the court stated:

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[114] *Id*. at 532 (alteration in original) (quoting Burrage v. United States, 134 S. Ct. 881, 892 (2014)).
[115] *Id*. (citing United States v. Gordon, 31 M.J. 30, 35 (C.M.A. 1990); United States v. Romero, 1 M.J. 227, 230 (C.M.A. 1975)); *see also id.* at 533 (quoting United States v. Cooke, 18 M.J. 152, 154 (C.M.A. 1984)).
[116] *Id.* at 533.
[117] *Id.*
[118] *Id.*
[119] *Id.*
[120] *Id.*
[121] *See id.* ("While the words 'contributing cause' were used, the military judge qualified this by instructing the panel that the burden is on the government to establish beyond a reasonable doubt that there was no independent, intervening cause.").

> *Burrage* was decided subsequent to appellant's court-martial. As with all opinions of our superior courts applicable to the practice of military justice, the relevant provisions of the *Benchbook* should be re-evaluated in light of the Supreme Court's holding in *Burrage*.[122]

Thus, military justice practitioners should view *Bailey* as a warning, not a resolution.

Other aspects of *Bailey* also merit a note of caution. First, the ACCA's finding that the trial judge's proximate cause instruction sufficiently conveyed "the same meaning as 'but-for' causation," is not well-supported.[123] In reaching this conclusion, the court relies heavily on those portions of the instructions discussing intervening cause.[124] However, the intervening cause instruction only required the government to disprove that someone independent of the accused was the "only" cause of the result.[125] Simply disproving that someone else was not an independently sufficient cause does not prove that the accused's actions were independently sufficient to produce the result. If anything, the intervening cause instruction renders the trial judge's proximate cause instruction more problematic. Together, these instructions tell the factfinder that two independent but separately insufficient causes may combine to produce the result. In other words, the trial judge's instructions clearly replaced but-for cause with a form of aggregate causation in direct contradiction of the Supreme Court's analysis in *Burrage*.[126]

The ACCA's harmless error analysis in *Bailey* provides a far stronger basis to sustain the conviction. Even so, it is not safe to assume that the same instructions will be harmless in every case. As the ACCA correctly noted, *Bailey* "is not a *Burrage* case."[127] The overwhelming evidence in *Bailey* left no question that the accused's reckless behavior was independently sufficient to kill the victim.[128] Hence, the same outcome was inevitable, even had the trial judge provided an appropriate but-for cause instruction.[129] Unfortunately, the link between cause and effect is

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[122] *Id.* at 532 n.6 (italics added).
[123] *Id.* at 533.
[124] *Id.*
[125] *Id.* at 531.
[126] *See* Burrage v. United States, 134 S. Ct. 881, 890–92 (2014).
[127] *Bailey*, 75 M.J. at 533.
[128] *Id.* at 530, 533.
[129] *Id.* at 533.

not always so obvious. Had *Bailey* presented a more ambiguous set of circumstances, the court might have reached a different conclusion. For this reason, proximate cause instructions like those provided in *Bailey* remain fertile ground for litigation.

IV. Incorporating *Burrage* into Military Justice Practice

It is unnecessary to await the outcome of future appellate litigation to ensure the next case is not a "*Burrage* case." Trial judges should instead accept the ACCA's recommendation in *Bailey* to re-evaluate the *Benchbook's* standard causation instructions "in light of the Supreme Court's holding in *Burrage*."[130] As the ACCA apparently recognizes, existing military case law does not mandate the use of a particular causation instruction.[131] Moreover, the CAAF has long held that military trial judges "bear the primary responsibility for assuring that the jury [is] properly . . . instructed on the elements of the offenses raised by the evidence as well as potential defenses and other questions of law."[132] And "[i]n regard to form, a military judge has wide discretion in choosing the instructions to give but has a duty to provide an accurate, complete, and intelligible statement of the law."[133] Therefore, it is well within the discretion of the trial judiciary to amend the *Benchbook* to reflect the current state of the law, rather than perpetuate erroneous precedent.

Conforming the *Benchbook* to *Burrage* does not require drafting new causation instructions out of whole cloth. Trial judges need only look to the Model Penal Code's (MPC) causation provisions for a readily-adaptable example.[134] Along with providing an existing template, the MPC's causation standard offers at least two notable advantages over common law alternatives. The most obvious of these is that the Supreme

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[130] *Id.* at 532 n.6.

[131] *Cf.* United States v. Cooke, 18 M.J. 152, 153–55 (C.M.A. 1984) (upholding the trial judge's decision not to provide proximate and intervening cause instructions and simply explain cause as a result of the accused's actions).

[132] United States v. Ober, 66 M.J. 393, 405 (C.A.A.F. 2008) (internal quotation marks omitted) (quoting United States v. Westmoreland, 31 M.J. 160, 164 (C.M.A. 1990)).

[133] United States v. Behenna, 71 M.J. 228, 232 (C.A.A.F. 2012).

[134] *See* MODEL PENAL CODE § 2.03 (AM. LAW INST. 1985). Seven state jurisdictions currently apply causation standards modeled on the Model Penal Code. *See* ARIZ. REV. STAT. ANN. § 13-203 (West 2015); DEL. CODE ANN. tit. 11, §§ 262-264 (West 2015); HAW. REV. STAT. ANN. §§ 702-214 through 702-217 (West 2015); KY. REV. STAT. ANN. § 501.060 (West 2015); MONT. CODE ANN. § 45-2-201 (West 2015); N.J. STAT. ANN. § 2C:2-3 (West 2015); 18 PA. CONS. STAT. ANN. § 303 (Purdon 2016).

Court approvingly cited the MPC's treatment of actual cause throughout its analysis in *Burrage*.[135] Equally important, however, is that the MPC resolves any potential conflict between actual and legal cause.[136]

As defined by the MPC, the word "cause" exclusively means actual cause as expressed through the but-for causation standard.[137] The MPC consequently eliminates the traditional idea of cause as a measure of both actual cause and the proximity between cause and effect sufficient to justify legal liability.[138] Instead, the MPC reframes legal cause as a question of culpability when divergence exists between the result and the *mens rea* element of the offense.[139] Under the MPC, divergence occurs when the result intended or risked differs from: "(1) the victim or object of harm[;] (2) the extent or severity of harm[;] (3) the character of the harm[;] [or] (4) the manner of occurrence of the harm."[140] When evidence raises a divergence issue, the question is not whether the defendant's conduct proximately caused the result, but whether "he caused the prohibited result with the level of culpability—purpose, knowledge, recklessness, or negligence—required by the definition of the offense."[141] For example, in a negligent homicide case, an MPC-based causation instruction would require the government to prove the following:

> First, but for the defendant's conduct, the result in question would not have happened. In other words, without defendant's actions the result would not have occurred. . . .
>
> Second, . . . that the actual result must have been within the risk of which the defendant should have been aware. If not, it must involve the same kind of injury or harm as the probable result and must also not be too remote, too

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[135] *See* Burrage v. United States, 134 S. Ct. 881, 887–88, 890 (2014) (citing MODEL PENAL CODE § 2.03).

[136] "The idea of proximate [or legal] cause, as distinct from actual cause or cause in fact, defies easy summary." Paroline v. United States, 134 S. Ct. 1710, 1719 (2014).

[137] DRESSLER, *supra* note 52, § 14.04, at 195; *see also* MODEL PENAL CODE § 2.03(a).

[138] *See* MODEL PENAL CODE § 2.03, explanatory note, at 26. *See also Paroline*, 134 S. Ct. at 1719 ("Every event has many causes . . . and only some of them are proximate, as the law uses that term. So to say that one event was a proximate [or legal] cause of another means that it was not just any cause, but one with a sufficient connection to the result.").

[139] DRESSLER, *supra* note 52, § 14.04, at 195; *see also* MODEL PENAL CODE § 2.03, explanatory note, at 26.

[140] David J. Karp, *Causation in the Model Penal Code*, 78 COL. L. REV. 1249, 1266 (1978).

[141] DRESSLER, *supra* note 52, § 14.04, at 195.

> accidental in its occurrence or too dependent on another's volitional act to have a just bearing on the defendant's liability or on the gravity of his/her offense.[142]

The MPC treats causation in the context of specific intent and recklessness offenses in a similar fashion.[143] Under this framework, the MPC eliminates the fuzzy distinction between actual causes and causes which, from a policy standpoint, are sufficiently related to the result to merit criminal punishment.[144] In so doing, the MPC ensures that whatever the collateral circumstances, proof of but-for causation remains the *sine qua non* of actual cause.[145]

The MPC represents the kind of holistic approach to causation currently lacking in military courts. As demonstrated in Appendix A, the military trial judiciary should draw on the MPC's example to develop causation instructions that not only explicitly require but-for causality, but also deconflict that concept with proximate (or legal) cause. Amending the *Benchbook* accordingly will ensure uniform integration of the Supreme Court's minimum standard for causation into military practice.

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[142] N.J. SUP. CT. COMM. ON MODEL CRIMINAL JURY CHARGES, MODEL JURY CHARGE (CRIMINAL): CAUSATION AND TRANSFERRED INTENT (2013), http://www.judiciary.state.nj.us/criminal/charges/causatnti.pdf. *See also* N.J. STAT. ANN. § 2C:2-3 (West 2015); MODEL PENAL CODE § 2.03.

[143] *See* N.J. SUP. CT. COMM. ON MODEL CRIMINAL JURY CHARGES, MODEL JURY CHARGE (CRIMINAL): CAUSATION AND TRANSFERRED INTENT (2013), http://www.judiciary.state.nj.us/criminal/charges/causatnti.pdf; N.J. STAT. ANN. § 2C:2-3 (West 2015); MODEL PENAL CODE § 2.03.

[144] As the Supreme Court recently noted, "The idea of proximate cause, as distinct from actual cause or cause in fact, defies easy summary." *Paroline*, 134 S. Ct. at 1719. This uneasy distinction was also the subject of Judge William Andrews's famous dissent in *Palsgraf v. Long Island Railroad Co*., where he lamented: "A cause, but not the proximate cause. What we do mean by the word 'proximate' is that, because of convenience, of public policy, of a rough sense of justice, the law arbitrarily declines to trace a series of events beyond a certain point. This is not logic. It is practical politics." Palsgraf v. Long Island Railroad Co., 248 N.Y. 339, 352, 162 N.E. 99, 103 (1928) (Andrews, J. dissenting).

[145] *Sine qua non* is Latin for "without which not" and is commonly used as a legal term of art to describe "[a]n indispensable condition or thing; something on which something else necessarily depends." *Sine qua non*, BLACK'S LAW DICTIONARY (10th ed. 2014). But-for cause is also often referred to as the "s*ine qua non* test." DRESSLER, *supra* note 52, § 14.02, at 182.

V. Conclusion

The Supreme Court's decision in *Burrage* shows that when causation is an element of an offense, there is a big difference between contributing factors and actual causes. Like all other elements of an offense, causation elements derive their meaning from a statutory text, not judicial prerogative. In that respect, *Burrage* clarifies that when a criminal statute requires a specified outcome, the text ordinarily refers to a result that would not have occurred but-for the accused's actions. Military courts have thus far ignored this basic principle of causation. Instead, military judges have expanded the reach of causal offenses to punish actions that contribute to, or play a material role in, a particular result, even when it is unclear whether the same result could have occurred without the accused's involvement. This view of causation not only decreases the Government's burden of proof, but subjects the accused to an unconstitutionally vague legal standard.

Without a clear statutory basis to justify a less demanding causation standard, it seems inevitable that the CAAF will eventually adopt the Supreme Court's reasoning in *Burrage*. When it does, any completed courts-martial that relied on a form of aggregate causation may be at risk of reversal for instructional error or legal insufficiency. In the meantime, military trial courts can—and should—mitigate the risk of legal error by adopting panel instructions that clearly articulate cause in terms of but-for cause.

Appendix A. Recommended Model Penal Code-Based *Benchbook* Instruction

5–19. LACK OF CAUSATION, INTERVENING CAUSE, AND CONTRIBUTORY NEGLIGENCE[146]

NOTE 1: General. Some offenses require a causal nexus between the accused's conduct and the harm alleged in the specification. For example, if the accused's omission is alleged to have suffered the loss of military property, the prosecution must prove beyond a reasonable doubt that the omission caused the loss. Other offenses may also raise this issue, e.g., homicides, hazarding a vessel.

NOTE 2: Using this instruction. The military judge must provide appropriately tailored instructions on causation when an element of an offense requires proof of a causal nexus between the accused's conduct and a specified harm. When raised by some evidence, the military judge must also provide, *sue sponte*, appropriately tailored instructions on intervening cause and/or contributory negligence.

a. If transferred intent is not in issue, and there is no evidence of an intervening cause independent of the accused, only give the instructions following NOTE 3.

b. If the evidence raises the issue of transferred intent, incorporate the instructions following NOTE 4 with the instructions following NOTE 3 as appropriate.

c. If there is evidence that an independent, intervening event or person, other than the victim or accused, played a role in the alleged harm, give the instructions following NOTEs 3 and 5.

d. If contributory negligence of the alleged victim is in issue, give the instructions following NOTEs 3 and 6. When the evidence raises the issue of intervening cause and contributory negligence, give the instructions following NOTEs 3, 4, and 6, tailored as

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[146] This instruction represents a hybrid between the current *Benchbook* causation instruction and the Model Penal Code-based causation instruction employed by New Jersey state courts. *See* U.S. DEP'T OF ARMY, PAM. 27-9, MILITARY JUDGE'S BENCHBOOK para. 5-19 (15 Sep. 2014); N.J. SUP. CT. COMM. ON MODEL CRIMINAL JURY CHARGES, MODEL JURY CHARGE (CRIMINAL): CAUSATION AND TRANSFERRED INTENT (2013), http://www.judiciary.state.nj.us/criminal/charges/causatnti.pdf.

appropriate to the circumstances.

NOTE 3: Causation in issue.

To find the accused guilty of the offense(s) of (state the alleged offense(s)), you must be convinced beyond a reasonable doubt that the accused's (conduct) ((willful) (intentional) (inherently dangerous) act) (omission) ((culpable) negligence) (_____) caused the (injury to_____) (loss of_____) (destruction of_____) (damage to_____) (grievous bodily harm to_____) (death of_____) (_____). The accused's (act) (omission) need not be the only factor related to the result, nor must it immediately cause the result. However, the (act) (omission) must be essential to the result.

Causation has a special meaning under the law. To establish causation, the prosecution must prove two elements, each beyond a reasonable doubt:

First, but for the accused's conduct, the result in question would not have happened. In other words, without accused's actions the result would not have occurred.

[WHEN INTENTIONAL OR KNOWING CONDUCT INVOLVED]

Second, the actual result must have been within the design or contemplation of the accused. If not, it must involve the same kind of injury or harm as that designed or contemplated, and must also not be too remote, too accidental in its occurrence or too dependent on another's volitional act to have a just bearing on the accused's liability or on the gravity of his/her offense.

[WHEN RECKLESS OR NEGLIGENT CONDUCT INVOLVED]

Second, that the actual result must have been within the risk of which the accused (was) (should have been) aware. If not, it must involve the same kind of injury or harm as the probable result and must also not be too remote, too accidental in its occurrence or too dependent on another's volitional act to have a just bearing on the accused's liability or on the gravity of his/her offense.

> In determining whether the accused's (conduct) (act) (omission) (negligence) (_____) was the cause of the (injury) (loss) (destruction) (damage) (grievous bodily harm) (death) (_____), you must consider all relevant facts and circumstances, (including, but not limited to (here the military judge may specify significant evidentiary factors bearing on the issue and indicate the respective contentions of counsel for both sides).
>
> The burden is on the prosecution to prove causation. Unless you are satisfied beyond a reasonable doubt that the accused's (conduct) (act) (omission) (negligence) (_____) caused the alleged harm, you may not find the accused guilty of the offense(s) of (state the alleged offense(s)).

NOTE 4: Transferred intent in issue.

> An accused is not relieved of responsibility for causing a result if the only difference between what actually occurred and what was designed, contemplated or risked is that a different person or property was injured or affected or that a less serious or less extensive injury or harm occurred.

NOTE 5: Intervening cause. If there is evidence that an intervening event, act, or omission independent of, and not in concert with, the accused caused the alleged harm, give the following instruction:

> There is evidence raising the issue of whether (state the event or the act/omission of one or more persons other than the accused) may have caused the (injury) (loss) (destruction) (damage) (grievous bodily harm) (death) (_____). If the accused's (conduct) (act) (omission) (negligence) (_____) caused the (injury) (loss) (destruction) (damage) (grievous bodily harm) (death) (_____), the accused is not relieved of criminal responsibility simply because another (event) (act) (omission) may also have contributed to the alleged result. However, if some other unforeseeable, independent, intervening (event) (act) (omission), that did not involve the accused, was the only cause that brought about the (injury) (loss) (destruction) (damage) (grievous bodily harm) (death) (_____), then the accused is not guilty.

To find the accused guilty of this offense, you must be convinced, beyond a reasonable doubt, that the (state the event or the act/omission of one or more persons other than the accused) was not the only cause of the alleged harm to (state the name of the alleged victim). You must also be convinced, beyond a reasonable doubt, that the (conduct) ((willful) (intentional) (omission) ((culpable) negligence) (recklessness) (_____) of the accused did cause the alleged harm as I have previously described.

NOTE 6: Contributory negligence. If there is evidence that the victim of an injury or death may have been contributorily negligent, the military judge should give the following instruction. The military judge should consider whether there are situations other than homicide, assault, or injury in which contributory negligence can be a defense.

There is evidence raising the issue of whether (state the name of person(s) allegedly harmed/killed) failed to use reasonable care and caution for his/her own safety. If the accused's (conduct) (act) (omission) (negligence) (_____) caused the (injury) (death), the accused is not relieved of criminal responsibility simply because the negligence of (state the name of person(s) allegedly harmed/killed) may have contributed to his/her own (injury) (death). However, the conduct of the (injured) (deceased) person should be considered in determining whether the accused's (conduct) (act) (omission) (negligence) (_____) was the cause the (injury) (death).

If some other unforeseeable, independent, intervening (act) (omission), that did not involve the accused, was the only cause that brought about the (injury) (death), then the accused's (conduct) (act) (omission) (negligence) (_____) was not the cause of the harm. Therefore, if the negligence of (state the name of the victim) looms so large in comparison with the (conduct) (act) (omission) (negligence) (_____) by the accused that the accused's conduct should not be regarded as the cause of the final result, then the conduct of (state the name of the victim) is an independent, intervening cause and the accused is not guilty.

To find the accused guilty of this offense, you must be convinced, beyond a reasonable doubt, that the conduct of (state the name of the victim) was not the only cause of his/her the alleged harm. You must also be convinced, beyond a reasonable doubt, that the

(conduct) ((willful) (intentional) (omission) ((culpable) negligence) (recklessness) (_____) of the accused did cause the alleged harm as I have previously described.