Volume 174 **December 2002**

MILITARY LAW REVIEW

ARTICLES

BOOK REVIEWS

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MILITARY LAW REVIEW

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ARTICLES

BOOK REVIEWS

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MILITARY LAW REVIEW

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MILITARY CAPITAL LITIGATION: MEETING THE HEIGHTENED STANDARDS OF *UNITED STATES V. CURTIS*

MAJOR MARY M. FOREMAN[1]

I. Introduction

> *The problem with the death sentence in this case . . . is the lack of an adequate, full, and complete sentencing case . . . . I am convinced that this representation is unacceptable, substandard, inadequate, and ineffective in a military capital murder case. The result is a sentence that is not reliable.*[2]

In the summer of 1989, a general court-martial at Camp Lejeune, North Carolina, found Marine Lance Corporal (LCpl) Ronnie A. Curtis guilty of the premeditated stabbing murders of his lieutenant and the lieutenant's wife and sentenced him to death. The Navy-Marine Corps Court of Military Review (NMCMR) affirmed Curtis's death sentence in June 1989,[3] but the Court of Appeals for the Armed Forces (CAAF) ultimately reversed in 1997.[4] The renamed Navy-Marine Court of Criminal Appeals

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2. United States v. Curtis, 48 M.J. 331, 333 (1997) (Cox, C.J., concurring) (citations omitted).

3. 28 M.J. 1074 (N.M.C.M.R. 1989).

4. 46 M.J. 129 (1997).

(NMCCA)[5] affirmed a life sentence in 1998,[6] and in September 1999, the CAAF affirmed,[7] granting Ronnie Curtis his life.

United States v. Curtis[8] spent ten years in appellate review, during which the service court for the Navy and Marine Corps reviewed the case three times and the CAAF considered it four times.[9] Issues raised during the course of appeal included ineffective assistance of counsel, defense counsel qualifications, military panel size, the service-connection requirement in military capital cases, jury instructions, voting procedures, panel selection, the President's authority to impose capital punishment,[10] and the constitutionality of Rule for Courts-Martial (RCM) 1004.[11] Ultimately reversed on the grounds of ineffective assistance of counsel,[12] *Curtis* left unresolved many other issues that arguably relate to the reliability of an adjudged death sentence.

United States v. Curtis[13] was the first capital case to reach the CAAF after the promulgation of RCM 1004 and its creation of aggravating factors

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5. In 1994, pursuant to the National Defense Authorization Act for Fiscal Year 1995, Pub. L. No. 103-337, § 924, 108 Stat. 2831 (1994), the NMCMR was renamed the NMCCA, the Army Court of Military Review (ACMR) was renamed the Army Court of Criminal Appeals (ACCA), and the Court of Military Appeals (COMA) was renamed as the CAAF. *Id.* When discussing cases, this article refers to courts by their names when they issued their decisions.

6. United States v. Curtis, 1998 CCA LEXIS 493 (N-M. Ct. Crim. App. Nov. 30, 1998) (unpublished).

7. United States v. Curtis, 52 M.J. 166 (1999).

8. 28 M.J. 1074 (N.M.C.M.R. 1989), *aff'd in part*, 32 M.J. 252 (C.M.A. 1991) (upholding the constitutionality of Rule for Courts-Martial 1004), *remanded*, 33 M.J. 101 (C.M.A. 1991) (remanded for findings concerning sentencing instructions, computation of aggravating factors, proportionality review, and effectiveness of trial and appellate defense counsel), *cert. denied*, 502 U.S. 952 (1991), *cert. denied*, 502 U.S. 1097 (1992), *aff'd on reh'g*, 38 M.J. 530 (N.M.C.M.R. 1993), *aff'd on reh'g*, 44 M.J. 106 (1996), *rev'd and remanded*, 46 M.J. 129 (1997) (reversed as to sentence), *modified*, 48 M.J. 331 (1997) (denying government petition for reconsideration), 1998 CCA LEXIS 493 (N-M. Ct. Crim. App. Nov. 30, 1998) (unpublished) (affirming sentence of life imprisonment), *aff'd*, 52 M.J. 166 (1999). Lance Corporal Curtis is presently confined at the Federal Penitentiary in Leavenworth, Kansas.

9. *See Curtis*, 52 M.J. at 166-67.

10. Loving v. United States, 517 U.S. 748 (1996).

11. MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 1004 (2002) [hereinafter MCM] (creating aggravating factors, at least one of which a military panel must find unanimously to consider the death penalty).

12. *Curtis*, 52 M.J. at 169.

13. 46 M.J. 129 (1997).

for capital courts-martial.[14] While certainly illustrating the heightened standard of defense representation in capital cases, the impact of *Curtis* on military capital jurisprudence is comparable to that of *United States v. Matthews*,[15] in which the Court of Military Appeals (COMA) held that the existing military capital sentencing procedures were unconstitutional.[16] Where *Matthews* resulted in the promulgation of aggravating factors and brought the military death penalty in line with the constitutional mandates set forth in *Furman v. Georgia*,[17] *Curtis* created a heightened review of representation in capital cases and placed upon the armed forces an affirmative duty to ensure reliability and fairness in the few cases in which it seeks, obtains, and approves a sentence of death. In many aspects, however, *Curtis* created more issues than it resolved.

This article analyzes *United States v. Curtis* in the context of the reliability of the military death penalty and discusses the impact of the case on military capital jurisprudence. It briefly discusses the background of the military death penalty, followed by an overview of the facts and appellate history of *United States v. Curtis*. The article then examines the impact of *Curtis* in the areas of access to mitigation specialists and ex parte access to the convening authority as they relate to development of a qualified capital trial defense team. Finally, the article recommends changes to the Rules for Courts-Martial and suggests modifications in judge advocate career management which recognize and address the need for a heightened standard of defense in capital cases.

II. Capital Punishment Under the Uniform Code of Military Justice (UCMJ)

This section discusses the development of the jurisdiction of courts-martial to try capital cases in peacetime, beginning with the Articles of War and culminating in the landmark decisions of *United States v. Matthews*[18] and *United States v. Curtis*.[19] Then, to establish a context for the remainder of the article, it examines the procedural differences between capital and non-capital courts-martial.

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14. *See* MCM, *supra* note 11, R.C.M. 1004.

15. 16 M.J. 354 (C.M.A. 1983).

16. *Id.* at 379-80.

17. 408 U.S. 238 (1972); *see* MCM, *supra* note 11, R.C.M. 1004 analysis, app. 21, at A21-72.

18. 16 M.J. 354 (C.M.A. 1983).

19. 46 M.J. 129 (1997).

A. Brief Background

> *Although American courts-martial from their inception have had the power to decree capital punishment, they have not long had the authority to try and to sentence members of the Armed Forces for capital murder committed in the United States in peacetime.*[20]

The American Articles of War, promulgated in 1775 and enacted in 1789,[21] prescribed our nation's first military justice system. They were based largely on the British Articles of War and authorized the death penalty for fourteen offenses, but they required the military commander to allow civil authorities to prosecute offenders of capital crimes that were punishable under civil law.[22]

Not until 1863, concerned with the ability of civil courts to convene effectively amidst hostilities, did Congress empower general courts-martial with the authority to impose the death penalty in wartime for "civilian" offenses committed by soldiers.[23] Even in 1916, when Congress granted courts-martial jurisdiction over felonies committed by service members, that jurisdiction did not extend to murder and rape committed in the United States during peacetime.[24] It was not until the enactment of the UCMJ in 1950 that Congress authorized courts-martial to impose the death penalty for peacetime offenses.[25]

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20. Loving v. United States, 517 U.S. 748, 754 (1996).

21. Congress first enacted the American Articles of War in 1789, adopting Articles that had been promulgated by the Continental Congress in 1775, and revised in 1776. *See* Act of Sept. 29, 1789, ch. 25, § 4, 1 Stat. 96.

22. American Articles of War of 1776, *reprinted in* W. WINTHROP, MILITARY LAW AND PRECEDENTS 964 (2d ed. 1920).

23. Act of Mar. 3, 1863, § 30, 12 Stat. 736, Rev. Stat. § 1342, art. 58 (1875), *construed in Loving*, 517 U.S. at 753.

24. Articles of War of 1916, ch. 418, § 3, arts. 92-93, 39 Stat. 664, *construed in Loving*, 517 U.S. at 753.

25. *Loving*, 517 U.S. at 753.

Article 118 of the 1950 Code set forth four types of murder and authorized death in cases involving premeditated and felony murder.[26] In 1983, the COMA overturned the death sentence in *United States v. Matthews*[27] because "neither the Code nor the *Manual* requires that the court members specifically identify the aggravating factors upon which they have relied in choosing to impose the death penalty."[28] This fell short of the Supreme Court's 1972 decision in *Furman v. Georgia*,[29] in which the Court held that the discretionary capital sentencing statutes in Texas and Georgia violated the Eighth Amendment's prohibition against cruel and unusual punishment and were therefore unconstitutional.[30]

To remedy the defect identified in *Matthews*, President Reagan promulgated RCM 1004,[31] which requires that before a service member may be sentenced to death, the court-martial members must unanimously find that the service member is guilty of a capital offense, that at least one aggravating factor exists, and that any extenuation and mitigation evidence is substantially outweighed by the evidence of the aggravating factor(s) and circumstances.[32] In *Loving v. United States*,[33] the first military capital case reviewed by the Supreme Court since the enactment of the UCMJ, the Court considered the constitutionality of RCM 1004. The Court affirmed the lower court's holding that the promulgation of RCM 1004 was within

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26. UCMJ art. 118 (1950).

> Any person subject to this chapter who, without justification or excuse, unlawfully kills a human being, when he—
>
> (1) has a premeditated design to kill;
>
> (2) intends to kill or inflict great bodily harm;
>
> (3) is engaged in an act which is inherently dangerous to others and evinces a wanton disregard of human life; or
>
> (4) is engaged in the perpetration or attempted perpetration of burglary, sodomy, rape, robbery, or aggravated arson;
>
> is guilty of murder, and shall suffer such punishment as a court-martial may direct, except that if found guilty under clause (1) or (4), he shall suffer death or imprisonment for life as a court-martial may direct.

Id.

27. 16 M.J. 354 (C.M.A. 1983).
28. *Id.* at 379.
29. 408 U.S. 238 (1972).

the President's authority and that the capital sentencing scheme provided by the Rule is constitutional.[34]

There are presently six service members awaiting execution,[35] an additional four having been removed from death row in the past five years.[36] The first and perhaps most far-reaching reversal of a death sentence since *Matthews* occurred in 1997, when the CAAF reversed the service court's decision in *United States v. Curtis* based solely on ineffective

---

30. *See id* at 238; *see also* United States v. Gay, 16 M.J. 586 (A.F.C.M.R. 1983) (holding that the military death penalty procedures in place at that time (1981) were unconstitutional in light of *Furman*). Decided after the ACMR decided *Matthews*, the Air Force Court of Military Review held that "[m]easured by *Furman* and its progeny, Article 118(1) fails." *Gay*, 16 M.J. at 596. In support of this holding, it found that the military death penalty procedures

> permit the jury unlimited and undirected discretion, lacking either a narrow range of specific capital offenses (Texas) or specific aggravating factors (Florida and Georgia) for imposition of capital punishment. Under the military system there are no mandatory factors to be found; no required weighing for aggravating versus mitigating factors; no insistence that the members make specific findings or answer specific questions. In sum, no specific consideration needs be given the death penalty as a unique sentence, over and above the usual, so as to avoid arbitrariness. Instead, the absolute discretion is permitted the sentencing authority, unchecked by articulated standards.

Id.

31. *See* United States v. Loving, 517 U.S. 748, 754 (1996).

32. *See* MCM, *supra* note 11, R.C.M. 1004. In addition to evidence surrounding the aggravating factors, the panel may also consider general aggravation evidence admissible under RCM 1001(b)(4). *See id*. R.C.M. 1001(b)(4).

33. 517 U.S. at 748.

34. *Id*. at 773.

35. Three Army soldiers (Loving, Gray, and Kreutzer) and three Marines (Parker, Walker, and Quintanilla) are presently on death row. Death Penalty Information Center, *The U.S. Military Death Penalty* (July 1, 2002), *at* http://www.deathpenaltyinfo.org/military.html. The Supreme Court affirmed the CAAF's decision in *Loving* in 1996, 517 U.S. at 748, and the CAAF affirmed the ACMR's decision in *United States v. Gray* in 1999, 51 M.J. 1 (1999). At the time this article was submitted for publication, *Kreutzer* was pending review at the ACCA.

36. The death sentences of Simoy, Thomas, and Curtis were overturned. United States v. Simoy, 50 M.J 1 (1998); United States v. Thomas, 46 M.J. 311 (1997); United States v. Curtis, 46 M.J. 129 (1997). That portion of Sergeant Murphy's sentence extending to death was set aside in 1998. In 1998, the CAAF remanded *United States v. Murphy* to the ACCA for additional fact-finding concerning extenuation and mitigation evidence obtained post-trial, 50 M.J. 4 (1998). In 2001, the ACCA returned the case to the convening authority for a *DuBay* hearing, 56 M.J. 642 (Army Ct. Crim. App. 2001).

assistance of counsel at the sentencing phase of trial.[37] One year later, the CAAF set aside the death sentence[38] in *United States v. Murphy*[39] and remanded it to the Army Court of Criminal Appeals (ACCA) for remedial action, based in part on its finding of ineffective assistance of counsel.[40] In 2001, the ACCA returned *Murphy* to the convening authority for a *DuBay*[41] hearing to determine whether extenuation and mitigation evidence obtained post-trial might have impacted the sentence of death.[42]

B. Capital Sentencing: A Different Approach for Defense Counsel

Under the RCM, an accused in a non-capital case may be tried on the merits either by military judge alone or a panel consisting of at least five officer members.[43] If the accused is enlisted, he may elect to have his panel include at least one-third enlisted soldiers senior in rank to him.[44] During the trial on the merits, at least two-thirds of the members must find the accused guilty of a specification to find him guilty of the charged offense.[45] If the accused is found guilty of an offense, the sentencing phase of the court-martial follows—usually immediately after the court

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37. *See Curtis*, 46 M.J. at 130.

38. The decision does not set aside the entire death sentence. The CAAF set aside the service court's decision and returned the record of trial to The Judge Advocate General of the Army for remand to the service court for further review. United States v. Murphy, 50 M.J. 4, 38-39 (1998). Implicit in the decretal paragraph of the CAAF's decision is that the CAAF set aside that part of the sentence extending to death. This is evident when considering that one of the options the CAAF gave to the ACCA was to affirm a sentence of life imprisonment, with accessory penalties. That at least some of the adjudged sentence remains is evident when considering that another of the options the CAAF provided the ACCA was to authorize a rehearing as to the death sentence. *See id*. The actual meaning of the decretal paragraph was challenged in *United States v. Curtis*, 52 M.J. 166 (1999), wherein the CAAF clarified identical decretal language, holding that "we did not set aside the sentence of the court-martial. We set aside the portion of the Court of Criminal Appeals' decision that affirmed the death penalty, which left that court with the option of affirming the remaining portion of the sentence—confinement for life, or authorizing a capital rehearing." *Id.* at 168.

39. 50 M.J. at 4.

40. *Id.* at 38-39.

41. United States v. DuBay, 37 C.M.R. 411 (C.M.A. 1967). A *DuBay* hearing is a limited evidentiary hearing that is ordered by a service Court of Criminal Appeals to elicit facts sufficient to determine whether there was error at trial. *See* FRANCIS A. GILLIGAN & FREDRIC I. LEDERER, COURT-MARTIAL PROCEDURE § 24-76.00 (1991).

42. United States v. Murphy, 56 M.J. 642, 648 (Army Ct. Crim. App. 2001).

43. MCM, *supra* note 11, R.C.M. 903(b).

44. *Id.* R.C.M. 503(a)(2).

45. *Id.* R.C.M. 921(c)(2)(B).

announces its findings. The forum the accused selected for trial on the merits will also be his forum for sentencing.[46] The sentence announced by the members, so long as it is lawful, is the sentence adjudged by the court.[47]

To adjudge a sentence, two-thirds of the panel members must agree on the sentence after voting on all proposed sentences.[48] If the proposed period of confinement exceeds ten years, then three-fourths of the panel must agree on that sentence.[49] "If the required number of members [cannot] agree on a sentence after a reasonable effort to do so, a mistrial may be declared as to the sentence."[50]

A capital case follows a similar procedure, but with several noteworthy distinctions. The accused may not plead guilty to a capital offense[51] and is not entitled to trial by military judge alone;[52] he must elect between an officer or a one-third enlisted panel. To adjudge a sentence that includes death, the panel must unanimously agree, beyond a reasonable doubt, that the accused is guilty of the capital offense[53] and that at least one aggravating factor exists.[54] To vote on a sentence that includes death, the panel

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46. A judge alone determines the providence of pleas of guilty the accused might enter. *Id.* R.C.M. 910. If the accused pleads guilty to all charged offenses, he will not actually select forum until sentencing, at which point he may choose either military judge alone, or a panel. Legislation is presently before Congress to amend the Rules to permit an accused tried by a panel to be sentenced by military judge alone. The provision was included in a House amendment to the National Defense Authorization Act for Fiscal Year 2002, H. R. 333, S. 434, 107th Cong. (1st Sess. 2001), but was not included in the Act passed on 2 October 2001. As of the date this article was submitted for publication, the provision was before the Joint Service Committee on Military Justice for review.

47. *See* MCM, *supra* note 11, R.C.M. 1106(e). The convening authority ultimately approves or disapproves the findings and the sentence. *Id.* R.C.M. 1107. Unlike many civilian jurisdictions, the military judge may not alter the sentence announced by the panel; it is the adjudged sentence, rather than merely a recommendation to the military judge. *See id*. R.C.M. 1106(e) (providing for the judge to ensure only that the sentence is in proper form). Therefore, if a panel announces a sentence of death, then the sentence of the court is death.

48. MCM, *supra* note 11, R.C.M. 1006(d)(4)(C).

49. *Id*. R.C.M. 1006(d)(4)(B).

50. *Id*. R.C.M. 1006(d)(6). Were this to occur, the case would "be returned to the convening authority, who may order a rehearing on sentence only or order that a sentence of no punishment be imposed." *Id*.

51. UCMJ art. 45(b) (2000); MCM, *supra* note 11, R.C.M. 910(A)(1).

52. UCMJ art. 18; MCM, *supra* note 11, R.C.M. 201(f)(1)(C).

53. MCM, *supra* note 11, R.C.M. 1004(a)(2).

54. *Id*. R.C.M. 1004(a)(4)(A).

must also unanimously agree that any evidence in extenuation and mitigation is substantially outweighed by the evidence in aggravation.[55]

That the members make the required findings to consider the death penalty does not require them to actually vote on a death sentence.[56] As the CAAF held in *United States v. Loving*,[57] "the military death penalty procedures give the court-martial the absolute discretion to decline to impose the death penalty even if all the gates toward death-penalty eligibility are passed."[58] Further, only if the members agree unanimously on a sentence that includes death may they sentence the accused to death.[59]

In both capital and non-capital sentencing, the members must "vote on each proposed sentence in its entirety beginning with the least severe and continuing, as necessary, with the next least severe, until [the required concurrence is reached]."[60] Accordingly, in a non-capital case, the defense counsel's focus will be on presenting a sentencing case that achieves a sentence agreed upon by at least two-thirds (or three-fourths) of the members.

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55. *Id.* R.C.M. 1004(b)(4)(C).

56. *See id*. R.C.M. 1004(b). The panel is not required to enter a separate finding that the matters in extenuation and mitigation are substantially outweighed by the matters in aggravation; RCM 1004(b)(4)(C) simply requires that "all members concur" on this point, *id*. R.C.M. 1004(b)(4)(C), and the CAAF has interpreted this Rule to not require a separate finding. *See* United States v. Curtis, 32 M.J. 252, 269 (C.M.A. 1991) ("We are convinced, however, that the weighing of aggravating against mitigating factors can be adequately handled by instructions to the members that they must all concur as to this imbalance and does not require a separate finding.").

57. 41 M.J. 213 (1994).

58. *Id.* at 277. Whether the members must be instructed that they retain the discretion to decline to impose the death penalty, even after passing the first three gates, was initially raised by the COMA in that court's first review of *Curtis*. There, the COMA directed the NMCMR to consider whether an explicit instruction to this effect was required. United States v. Curtis, 33 M.J. 101, 107 n.8 (C.M.A. 1991). The NMCMR did not address this in its subsequent decision, United States v. Curtis, 38 M.J. 530 (N.M.C.M.R. 1993); however, the CAAF held later that this matter "was resolved against appellant in *Loving*, 41 M.J. at 276-77." United States v. Curtis, 44 M.J. 106, 160 (1996). In *Loving*, the members had been given the standard instructions, which informed them that if they made the required unanimous findings, they "*may* then consider, *along with all—with other possible sentences*, a sentence of death." *Loving*, 41 M.J. at 277 (quoting record of trial) (emphasis added by the Supreme Court). The Supreme Court found this language was sufficient to inform the members of their discretion to not impose death, even if all the eligibility requirements were met. *Id*.

59. UCMJ art. 52 (2000); MCM, *supra* note 11, R.C.M. 1006(d)(4)(A).

60. MCM, *supra* note 11, R.C.M. 1006(d)(3)(A).

In a capital case, the defense counsel's focus will be on obtaining a single vote for a life sentence.

The four requirements of a death sentence, as outlined above, are sometimes referred to as "gates."[61] They significantly change the dynamic of the defense because the panel must pass through each gate unanimously to proceed to the next. Should any member not concur at any one of the four gates, that member has effectively precluded the imposition of the death penalty. Put another way, each member must essentially vote against the accused four times to reach a death sentence.[62] This dynamic is especially heightened if the panel reaches the fourth gate because it must vote on the sentences from the least severe to most severe. If the panel reaches a three-fourths concurrence on a life sentence, they never vote on any proposed sentence that includes death.[63]

The practical effect of these differences is that in a capital sentencing case, the defense team has little incentive to hold anything back. Whereas a trial defense team in a non-capital case may be concerned with preserving its credibility by not revisiting a theory in sentencing that failed on the merits—because only a two-thirds or three-fourths concurrence is required for a non-capital sentence—a capital trial defense team need only persuade one member that the accused does not deserve to die to avoid the death penalty, even if the theory that achieves the one vote for life failed on the issue of guilt. This reverse dynamic is likely what led Chief Judge Cox to change his vote in *Curtis*: while in a non-capital case it would be understandable to not pursue voluntary intoxication during sentencing after that theory failed on the merits, there was little reason to not present it in sentencing when only one vote was required at any of the three remaining gates to save LCpl Curtis from death.

III. *United States v. Curtis*: The Turning of the Tide

> *I am now convinced that in order to ensure that those few military members sentenced to death have received a fair and*

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61. *See, e.g.*, *Loving*, 41 M.J. at 277; Mary T. Hall, *Death Penalty 101*, *in* DEFENSE CAPITAL LITIGATION 2000 (Naval Justice School 2000). Commander Hall is a retired Navy judge advocate who, while on active duty and after retirement, served as LCpl Curtis's appellate counsel and was his counsel at the time his death sentence was reversed.

62. *See* MCM, *supra* note 11, R.C.M. 1004(a)-(b).

63. *See id.* R.C.M. 1006(d)(3)(A); *see also* U.S. DEP'T OF ARMY, PAM. 27-9, MILITARY JUDGES' BENCHBOOK para. 8-3-40 (1 Apr. 2001).

> *impartial trial within the context of the death-penalty doctrine of the Supreme Court, we should expect that: 1. Each military service member has available a skilled, trained, and experienced attorney; 2. All the procedural safeguards prescribed by law and the* Manual for Courts-Martial *have been followed; and 3. Each military member gets full and fair consideration of all pertinent evidence, not only as to findings but also as to sentence.*[64]

The facts surrounding the murders were largely undisputed at trial. Lance Corporal Ronnie A. Curtis, an African-American Marine, was unhappy with his officer-in-charge, Lieutenant James Lotz, in part because LCpl Curtis felt that Lieutenant Lotz was racially biased against minorities. On the evening of 14 April 1987, after consuming a large quantity of alcohol, LCpl Curtis rode a bicycle to the lieutenant's quarters, knocked on the door, and made up a story as to why he needed to use the telephone. After Lieutenant Lotz allowed LCpl Curtis to enter his quarters, LCpl Curtis twice stabbed Lieutenant Lotz with a knife he had stolen that night; the second stab proved fatal. When Lieutenant Lotz's wife, Joan, appeared on the scene, LCpl Curtis stabbed her eight times and fondled her genitalia while she lay dying.[65]

At trial, the defense team attempted to present LCpl Curtis as "a young man adopted at age two and one-half and raised in a good Christian home whose dignity and self-worth had been systematically destroyed by LT Lotz's racial treatment of him."[66] Lance Corporal Curtis was convicted of both premeditated murders. During sentencing, the defense focused on his upbringing and reputation in his home community, avoiding what Judge Sullivan dubbed the "alcohol abuse-excuse,"[67] attempting instead to present LCpl Curtis "as a good, law-abiding person who was not violent rather than depicting him as maladjusted due to child abuse and alcoholism."[68] Although the defense possessed substantial evidence of LCpl Curtis's level of intoxication both before and after the murders, it did not introduce evidence regarding intoxication during the sentencing case, request an instruction that intoxication was a relevant factor for the mem-

64. United States v. Curtis, 48 M.J. 331, 332 (1997) (Cox, C.J., concurring).
65. United States v. Curtis, 44 M.J. 106, 117 (1996).
66. *Id.* at 120.
67. *Id.* at 171 (Sullivan, J., concurring).
68. *Id.* at 121.

bers to consider in their sentencing deliberations, or mention intoxication in its sentencing argument.[69]

The appellate history of *Curtis*, described by Judge Crawford[70] as "unfortunately long and tortured,"[71] raised numerous issues surrounding the reliability of the death sentence, many of which the CAAF addressed in its four reviews of the case, and two of which the Supreme Court resolved in *Loving v. United States*.[72] In its first review of *Curtis*,[73] the COMA considered whether the President's promulgation of the military capital punishment procedures was a permissible extension of presidential power and whether RCM 1004 was constitutional. The court answered both questions in the affirmative,[74] and the Supreme Court affirmed both holdings in *Loving*.[75] In a bifurcated review, the COMA also remanded several issues to the service court, including matters concerning sentencing instructions, computation of aggravating factors,[76] proportionality review, and effectiveness of the trial and appellate defense counsel.[77]

In its second review, the CAAF affirmed the service court's holdings after considering the issues of ineffective assistance of counsel and qualification of defense counsel.[78] In a split decision,[79] the CAAF considered

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69. *Id.* at 171 (Gierke, J., dissenting); *Curtis*, 48 M.J. at 333 (Cox, C.J., concurring).

70. Susan J. Crawford is presently the Chief Judge of the CAAF. U.S. Court of Appeals for the Armed Forces, *History of the Bench* (Oct. 17, 2002), *at* http://www.armfor.uscourts.gov/Judgehis.htm. At the time *Curtis* was finally decided, Walter T. Cox III was the Chief Judge. *See id.* This article identifies judges in the capacity in which they were serving at the time of the relevant decision.

71. United States v. Curtis, 52 M.J. 166, 169 (1999) (Crawford, J., concurring in part and dissenting in part).

72. 517 U.S. 748 (1996).

73. 32 M.J. 252 (C.M.A. 1991).

74. *Id.* at 252.

75. *Loving*, 517 U.S. at 773-74.

76. Also referred to as "double counting;" *see, e.g.*, United States v. Curtis, 38 M.J. 530, 533 (N.M.C.M.R. 1989) (concluding that "there was a double counting of aggravating factors in this double homicide case where each murder was considered to aggravate the other"); United States v. Curtis, 33 M.J. 101, 108 (C.M.A. 1991) ("we doubt that the President intended for commission of a double murder to constitute two 'aggravating factors,' rather than only one"); United States v. Curtis, 44 M.J. 106, 161 (1996); *Curtis*, 32 M.J. at 269.

77. *See Curtis*, 33 M.J. at 107-10.

78. *Curtis*, 44 M.J. at 167.

79. Judge Crawford wrote the majority opinion with Chief Judge Cox concurring, Judge Sullivan concurred separately, Judge Gierke concurred in part and dissented in part, and Judge Wiss attended oral argument but died before the CAAF issued its opinion. *See* 43 M.J. at CLXIII (1996) (*In Memoriam*, Judge Wiss).

a myriad of matters concerning the performance of the trial defense team that ultimately resulted in reversal of the death sentence two years later. Included among these issues were the defense team's failure to employ a "mitigation expert to explain [Lance Corporal Curtis's] troubled family background,"[80] the defense team's failure to present evidence of intoxication as a mitigating factor,[81] and the inexperience of the trial defense counsel.[82] The CAAF also addressed whether LCpl Curtis was entitled to appointment of defense counsel qualified under the American Bar Association Guidelines for death penalty representation,[83] an issue discussed later in this article.[84]

Both Judges Crawford and Sullivan found the defense team's decision to not exploit the intoxication defense reasonable.[85] Chief Judge Cox concurred with Judge Crawford.[86]

Judge Gierke strongly disagreed, pointing out that the case "was not a dispute about 'Did he do it?' Quite the contrary, the focus of the case was 'Why did he do it?' The defense team's job was to provide an explanation sufficient to win one vote for life."[87] Highlighting the absence of any explanation by the defense team for its failure to not pursue the intoxication evidence, especially in light of a sanity board finding that "it is doubtful that the event would have happened without the use of alcohol,"[88] Judge Gierke found that "this record cries out for explanation" and creates a "serious question whether LCpl Curtis would have been sentenced to death if counsel had used the intoxication evidence to convince at least one member to vote for life."[89] While intoxication may have failed on the merits, the defense team failed to explain its decision to not present it during sentencing, even though such evidence included testimony from another Marine, who was drinking with LCpl Curtis that night, that LCpl Curtis

80. *Curtis*, 44 M.J. at 120.
81. *Id.* at 122-23.
82. *Id.* at 124.
83. *Id.* at 126-27.
84. *See infra* notes 97 - 122 and accompanying text.
85. *Curtis*, 44 M.J. at 122 (Crawford, J.), 170 (Sullivan, J., concurring).
86. *Id.* at 167.
87. *Id.* at 171 (Gierke, J., concurring in part and dissenting in part).
88. *Id.* at 172 (quoting sanity board report).
89. *Id.* at 171-72.

was "heavily drunk" before leaving for the lieutenant's quarters and a North Carolina State Trooper's rating of LCpl Curtis as "unfit" to drive.[90]

Six months after deciding *Curtis*, the CAAF granted a motion for reconsideration, and in June 1997, set aside the death penalty in the case.[91] Chief Judge Cox proved to cast the deciding vote in overturning LCpl Curtis's death sentence, writing that "time has marched on since my vote in 1991" and that

> [u]pon further review of this case, I have concluded that LCpl Curtis did not receive a full and fair sentencing hearing and that, therefore, the sentence to death is wholly unreliable . . . there is just too much information which should have been presented to the court-martial members, the convening authority, and the United States Navy-Marine Corps Court of Military Review.[92]

In 1998, the NMCCA reassessed the sentence and, without explanation, affirmed a sentence of life imprisonment.[93] In 1999, the CAAF affirmed.[94]

IV. Trial Defense Counsel Qualifications: Does *Curtis* Raise the Bar?

> *In my judgment, [LCpl Curtis's] sentencing case was not fully developed because trial defense counsel lacked the necessary training and skills to know how to defend a death-penalty case or where to look for the type of mitigation evidence that would convince at least one court member that [LCpl Curtis] should not be executed.*[95]

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90. *Id.* at 172.

91. 46 M.J. 129 (1997). The CAAF actually reversed the decision of the lower court as to sentence, and returned the record of trial to The Judge Advocate General of the Navy for remand to the NMCCA. The CAAF instructed the lower court that it could affirm a sentence of life imprisonment and accessory penalties or order a rehearing on sentencing. *Id.* at 130. Implicit in this language is that the CAAF set aside that portion of the sentence extending to death, leaving in place the remaining elements of the sentence and accessory penalties. *See supra* note 38.

92. United States v. Curtis, 48 M.J. 331, 332-33 (1997) (Cox, C.J., concurring).

93. United States v. Curtis, 1998 CCA LEXIS 493 (N-M. Ct. Crim. App. Nov. 30, 1998) (unpublished).

94. United States v. Curtis, 52 M.J. 166 (1999).

95. *Curtis*, 48 M.J. at 333 (Cox, C.J., concurring).

This section addresses the American Bar Association's Guidelines for capital representation, the CAAF's reaction to those guidelines, the application of *Strickland v. Washington*[96] in the ultimate decision in *Curtis*, and the practical impact of *Curtis* on the standards of capital defense representation in courts-martial.

A. American Bar Association Guidelines

In 1989, the American Bar Association (ABA) published its *Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases*[97] and urged all jurisdictions that authorize the death penalty to adopt them.[98] These guidelines require two "qualified" attorneys at each stage of a capital case.[99] Qualification requires at least five years of criminal defense experience, including training and experience in "the specialized nature of practice involved in capital cases."[100] They specifically provide, however, "for such exceptions to the Guidelines as may be appropriate in the military."[101]

According to the ABA, "[n]o state has fully embraced the system . . . . To the contrary, grossly unqualified and under compensated lawyers who have nothing like the support necessary to mount an adequate defense are often appointed to represent capital clients."[102] In response to these concerns, legislation is pending concerning enforcement of the Guidelines. In February 1997, the ABA called upon all jurisdictions that authorize the death penalty to halt executions until the jurisdiction implements policies and procedures that are consistent with ABA policies.[103] In March 2001, Representative Jesse L. Jackson, Jr., introduced the National Death Penalty Moratorium Act of 2001,[104] which would prohibit the federal government

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96. 466 U.S. 668 (1984).

97. AMERICAN BAR ASSOCIATION, GUIDELINES FOR THE APPOINTMENT AND PERFORMANCE OF COUNSEL IN DEATH PENALTY CASES (Feb. 1989) [hereinafter ABA GUIDELINES].

98. AMERICAN BAR ASSOCIATION, DEATH PENALTY REPORT (Feb. 7, 1997), *available at* http://www.uncp.edu/home/vanderhoof/dp-news/aba-rept.htm [hereinafter ABA DEATH PENALTY REPORT]. The American Bar Association "calls upon each jurisdiction that imposes capital punishment not to carry out the death penalty until the jurisdiction implements policies and procedures that are consistent with . . . [the] ABA 'Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases.'" *Id.*

99. ABA GUIDELINES, *supra* note 97, guideline 2.1.

100. *Id*. guideline 3.1.

101. *Id*. at iii.

102. ABA DEATH PENALTY REPORT, *supra* note 98.

103. *Id*.

from executing death sentences while the National Commission on the Death Penalty reviews the fairness and the imposition of the death penalty.[105] The bill is pending before the House Committee on the Judiciary's Subcommittee on Crime.[106] An identical bill[107] is pending in the Senate.[108]

To date, the armed forces have declined to mandate adherence to the ABA Guidelines for defense counsel in capital courts-martial. The CAAF has considered this issue on three occasions, first in *United States v. Loving*,[109] again in its second review of *United States v. Curtis*,[110] and finally in *United States v. Murphy*,[111] each time declining to adopt such guidelines.[112]

Writing for the CAAF in its review of *Loving*, Judge Gierke noted that "appellate defense counsel have repeatedly invited this Court to involve itself in the internal personnel management of the military services, and we have repeatedly declined the invitation."[113] Citing the Supreme Court decision in *United States v. Cronic*[114] for the proposition that "limited experience does not raise a presumption of ineffectiveness" and finding that "the quality of representation compelled by the Constitution is determined by reference to *Strickland v. Washington*,"[115] the CAAF held in *Lov-*

104. H.R. 1038, 107th Cong. (2001).

105. *Id.* at 1.

106. Library of Congress, Thomas: Legislative Information on the Internet, *Bill Summary & Status for the 107th Congress*, *at* http://thomas.loc.gov (last visited Oct. 30, 2002).

107. S. 233, 107th Cong. (2001).

108. Library of Congress, Thomas: Legislative Information on the Internet, *Bill Summary & Status for the 107th Congress*, *at* http://thomas.loc.gov (last visited Oct. 30, 2002).

109. 41 M.J. 213 (1994).

110. 44 M.J. 106 (1996).

111. 50 M.J. 4 (1998).

112. *Loving*, 41 M.J. at 300; *Curtis*, 44 M.J. at 126-27; *Murphy*, 50 M.J. at 9-10; *see also* Curtis v. Stumbaugh, 31 M.J. 397 (C.M.A. 1990) (order denying writ of mandamus for "death qualified" counsel on appeal); Murphy v. The Judge Advocate General of the Army, 32 M.J. 312 (C.M.A. 1991) (order denying writ of mandamus for "death qualified" counsel on appeal).

113. *Loving*, 41 M.J. at 300.

114. 466 U.S. 648, 665 (1984).

115. *Loving*, 41 M.J. at 300 (citing Strickland v. Washington, 466 U.S. 668 (1984)).

ing that "the constitutional standard was met at the trial level in this case,"[116] notwithstanding the defense counsel's lack of ABA qualification.

When raised again in *Curtis*, Judge Crawford wrote that "it is not error that [LCpl Curtis] was not represented by counsel qualified under the ABA Guidelines," citing Judge Gierke's decision in *Loving*.[117] Judge Crawford noted that "[t]he few states that have rules on the matter have not adopted [the ABA Guidelines] in total" and emphasized that the ABA Guidelines themselves provide for "exceptions as may be appropriate in the military," quoting *United States v. Gray*.[118] In *Gray*, the ACMR found that "the ABA Guidelines do not apply specifically to the military," but nonetheless found that the defense counsel met the ABA Guidelines under the Alternative Procedures.[119] The ACMR qualified this finding by noting that "[e]ven if the ABA Guidelines apply, the appellant's counsel satisfies those standards."[120] Most recently in *Murphy*,[121] the court described the ABA Guidelines as "instructive," but as in *Loving*, again relied on *United States v. Cronic*, which "compels [the court] to look to the adequacy of counsels' performance, rather than viewing the limited experience of counsel as an inherent deficiency."[122]

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116. *Id*.

117. United States v. Curtis, 44 M.J. 106, 127 (1996) (citing *Loving*, 41 M.J. at 300).

118. *Curtis*, 44 M.J. at 126 (quoting United States v. Gray, 32 M.J. 730, 734 (A.C.M.R. 1991)).

119. *Gray*, 32 M.J. at 734. *See generally* ABA GUIDELINES, *supra* note 97, guideline 5.1(C). The Alternate Procedures provide for detailing of counsel

> with extensive criminal trial experience or extensive civil litigation experience, if it is clearly demonstrated to the appointing authority that competent representation will be provided to the capitally charged indigent defendant. Lawyers appointed under this paragraph shall meet one or more of the following qualifications: i. Experience in the trial of death penalty cases which does not meet the levels detailed in [Guideline 5.1, Attorney Eligibility]; ii. Specialized post-graduate training in the defense of persons accused of capital crimes; iii. The availability of ongoing consultation support from experienced death penalty counsel.

Id.

120. *Gray*, 32 M.J. at 734.

121. 50 M.J. 4 (1998).

122. *Murphy*, 50 M.J. at 9-10 (construing United States v. Chronic, 466 U.S. 648 (1984)). As discussed later in this article, the CAAF remanded *Murphy* to the service court based on its finding of ineffective counsel for reasons unrelated to the ABA Guidelines. *Id.* at 16. *Murphy* has since been returned to the convening authority for a *DuBay* hearing concerning the impact of extenuation and mitigation evidence obtained post-trial. United States v. Murphy, 56 M.J. 642 (2001).

B. *Curtis*'s Application of *Strickland v. Washington*

> *A standard of effective assistance that satisfies the Constitution must hold counsel for capital defendants to the performance of "a reasonably competent attorney" who is experienced in death penalty defense.*[123]

Strickland v. Washington[124] is a capital case that created the present two-prong test for analyzing claims of ineffectiveness of counsel.[125] An appellant alleging ineffective assistance of counsel must first demonstrate that his counsel's performance was so "deficient" that "counsel was not functioning as the 'counsel' guaranteed . . . by the Sixth Amendment," and then "that the deficient performance prejudiced the defense."[126] The second prong "requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable."[127]

In evaluating the trial attorney's performance, the reviewing court must consider "whether counsel's assistance was reasonable considering all the circumstances."[128] Recognizing that a "Monday morning quarterback" approach might adversely affect "counsel's performance and even willingness to serve,"[129] the Supreme Court held in *Strickland* that "[j]udicial scrutiny of counsel's performance must be highly deferential" and "requires that every effort be made to eliminate the distorting effects of hindsight . . . and to evaluate the conduct from counsel's perspective at the time."[130] The second prong of the *Strickland* analysis requires that "any deficiencies in counsel's performance must be prejudicial to the defense in order to constitute ineffective assistance under the Constitution."[131] To satisfy this prong, the appellant must demonstrate that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of

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123. Note, *The Eighth Amendment and Ineffective Assistance of Counsel in Capital Trials*, 107 HARV. L. REV. 1923, 1935 (June 1994) [hereinafter *Eighth Amendment and Ineffective Assistance*] (quoting Strickland v. Washington, 466 U.S. 668, 687 (1984); citing Ivan K. Fong, *Ineffective Assistance of Counsel at Capital Sentencing*, 39 STAN. L. REV. 461, 490-91 (1987)).

124. 466 U.S. 668 (1984).

125. For a thorough analysis of *Strickland* and the Supreme Court cases that interpret the right to effective representation of counsel, see Fong, *supra* note 123, at 467-85.

126. *Strickland*, 466 U.S. at 687.

127. *Id*.

128. *Id*. at 688.

129. *Id*. at 690.

130. *Id*. at 689.

131. *Id*. at 692.

the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome."[132]

While the CAAF has repeatedly cited *Strickland* as the measure of trial defense counsel competence in capital courts-martial, some scholars argue that the *Strickland* analysis is insufficient in capital cases.[133] Their criticism centers primarily on the requirement that the appellant demonstrate prejudice

> because the decision to impose death or to grant mercy is inherently subjective, [and] to prove a "reasonable probability" that "the result of the proceeding would have been different" is daunting indeed. Faced with a horrific crime and overwhelming evidence of guilt, reviewing courts are often unable to imagine that a jury would have imposed any sentence but death.[134]

Indeed, during the CAAF's second review of *Curtis* in 1996, Judge Crawford concluded for the majority that "[u]nder the circumstances of this case, it is difficult to imagine a jury that would not have imposed a penalty of death."[135]

Many who believe that capital cases require a higher standard of review for effectiveness point to the Supreme Court's recognition that the "qualitative difference between death and other penalties calls for a greater degree of reliability when the death sentence is imposed."[136] Some critics deem *Strickland* "a failed solution"[137] and "ill-suited to the sentencing portion of a capital trial."[138] They express concern that defense counsel may hide their ineptitude by labeling poor decisions as "tactical" or "strategic," thereby allowing an appellate court "to ignore gross incompetence if a mistake can somehow be labeled a choice"[139] and argue that such application

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132. *Id*. at 694.

133. *See, e.g*., Louis D. Billonis & Richard A. Rosen, *Lawyers, Arbitrariness, and the Eighth Amendment*, 75 TEX. L. REV. 1301 (May 1997); Jeffrey Levinson, *Don't Let Sleeping Lawyers Lie: Raising the Standard of Effective Assistance of Counsel*, 38 AM. CRIM. L. REV. 147 (Winter 2001); *Eighth Amendment and Ineffective Assistance*, *supra* note 123; Fong, *supra* note 123.

134. *Eighth Amendment and Ineffective Assistance*, *supra* note 123, at 1935 (quoting *Strickland*, 466 U.S. at 694).

135. 44 M.J. 106, 167 (1996).

136. Lockett v. Ohio, 438 U.S. 586, 604 (1978).

137. *Eighth Amendment and Ineffective Assistance*, *supra* note 123, at 1930.

138. Levinson, *supra* note 133, at 158.

139. *Id*. at 165.

of *Strickland* in a capital case fails to recognize the important differences between non-capital and capital sentencing. While defenders of *Strickland* are quick to point out that *Strickland* itself is a capital case, it is important to recall that the defendant in that case pled guilty to three capital offenses and was sentenced to death by a judge sitting alone as the sentencing authority.[140] The strength in the argument for a higher standard lies largely in recognition that in a capital sentencing trial with court members, "the attorney's role is not so much to litigate facts as to direct a morality play,"[141] and that only one vote for life is required to spare the accused from death.

Chief Judge Cox's ultimate decision regarding the reliability of the death sentence in *Curtis* resolves some of the issues raised in these attacks on *Strickland* by assessing counsel's performance in the context of the defense of a capital case. While his language mirrors that used by the Supreme Court in *Strickland*, in effect he applied a much more narrow analysis of the performance prong, arguably in recognition that "it only takes one court member's vote in either the findings or sentencing phase of a court-martial to defeat a death sentence."[142] Chief Judge Cox's conclusion that LCpl Curtis's death sentence was "wholly unreliable" derived from his finding that "there is just too much information which should have been presented to the court-martial members, the convening authority, and the [reviewing court]."[143] This much seems in keeping with the minimum standards of performance required by *Strickland*; however, Chief Judge Cox went on to find that the "sentencing case was not fully developed because trial defense counsel lacked the necessary training and skills to know how to defend a *death-penalty* case."[144] While not overtly articulating a different standard, Chief Judge Cox essentially applied the *Strickland* standard of "reasonably effective assistance,"[145] not within the

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140. David Leroy Washington waived his right to a jury trial and pled guilty to all charges, including three capital murder charges. Against the advice of his counsel, he similarly waived his statutory right to an advisory jury at his capital sentencing hearing. Levinson, *supra* note 133, at 154 (citing United States v. Strickland, 466 U.S. 668, 671 n.109 (1984)). Article 45, UCMJ, prohibits acceptance of a guilty plea to a capital offense. UCMJ art. 45 (2000). Article 18, UCMJ, prohibits trial by judge alone in a capital court-martial. *Id.* art. 18.

141. Levinson, *supra* note 133, at 164 (quoting WELSH S. WHITE, THE DEATH PENALTY IN THE NINETIES: AN EXAMINATION OF THE MODERN SYSTEM OF CAPITAL PUNISHMENT 76 (1991)).

142. *Curtis*, 48 M.J. 331, 332 (1997) (Cox, C.J., concurring).

143. *Id*.

144. *Id*. at 333 (emphasis added).

145. *Strickland*, 466 U.S. at 687.

"wide range of professionally competent assistance"[146] generally required in any defense, but rather within the very narrow range of professionally competent assistance required in a *death penalty* defense.

C. *Curtis*'s Impact on the Standard of Capital Defense Representation

Tried the same year as *Curtis*, *United States v. Murphy*[147] was the next military capital case that the CAAF decided after its final review of *Curtis*.[148] Sergeant Murphy had been convicted of the premeditated murders of his wife, their son, and his stepson and sentenced to death in December 1987. Chief Judge Cox, now writing for the majority, found that Sergeant Murphy "received ineffective assistance of counsel as to his sentencing case"[149] and returned the record to the service court for remedial action.[150]

Murphy followed a similar pattern between the appellate courts as *Curtis*, undergoing its first review by the ACMR in 1990,[151] and a second review in 1993[152] on remand from the COMA[153] for reexamination of the sentence in light of the court's first review of *Curtis*.[154] In 1998, the CAAF

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146. *Id*. at 690.

147. 30 M.J. 1040 (A.C.M.R. 1990) (affirming findings and sentence), *remanded*, 36 M.J. 8 (C.M.A. 1992) (setting aside the sentence and returning to the service court for reexamination of the sentence in light of *United States v. Curtis*, 32 M.J. 252 (C.M.A. 1991) and *United States v. Curtis*, 33 M.J. 101 (C.M.A. 1991)), 34 M.J. 310 (C.M.A. 1992) (amending the prior order remanding the case to the service court), *aff'd on reh'g*, 36 M.J. 1137 (A.C.M.R. 1993) (affirming the sentence of death), *remanded on reh'g*, 50 M.J. 4 (1998) (returning the case to The Judge Advocate General for remand to the ACCA for additional fact-finding concerning evidence obtained post-trial regarding SGT Murphy's mental status), *remanded on reh'g*, 56 M.J. 642 (Army Ct. Crim. App. 2001) (returning the record of trial to the convening authority for *DuBay* hearing).

148. *United States v. Gray*, 51 M.J. 1 (1999), was argued before the CAAF on 7 March 1995, and reargued on 17 December 1996, in light of Justice Stevens's concurring opinion in *United States v. Loving*, 517 U.S. 748, 774 (1996). *Murphy* was argued before the CAAF on 15 May 1997, and decided on 16 December 1998. Thus, while *Gray* appeared first before the CAAF, *Murphy* was decided first.

149. *Murphy*, 50 M.J. at 5.

150. *Id.* at 16.

151. *Murphy*, 30 M.J. at 1040.

152. *Murphy*, 36 M.J. at 1137.

153. *Murphy*, 34 M.J. at 310 (returning the record of trial to The Judge Advocate General for remand to the ACCA); *Murphy*, 36 M.J. at 8 (amending and clarifying remand order).

154. *Murphy*, 34 M.J. at 311. The court conducted a bifurcated review. *See generally* United States v. Curtis, 32 M.J. 252 (C.M.A. 1991); United States v. Curtis, 33 M.J. 101 (C.M.A. 1991).

again reviewed *Murphy* and again remanded it to the ACCA, this time based on mitigation evidence discovered post-trial.[155] Prior to the case reaching the CAAF, the Army had provided funding for a post-trial social history, which included examination by a mitigation specialist, a clinical psychologist, and several psychiatrists, which yielded affidavits that questioned Sergeant Murphy's mental ability to form the specific intent to commit the 1987 murders.[156] Unwilling to speculate as to the potential impact of this evidence, the CAAF remanded the case to the ACCA for remedial action.[157] In November 2001, the ACCA returned the case to the convening authority for a *DuBay* hearing to consider the impact of mental health evidence obtained as part of an extensive psychological examination conducted five years after trial.[158]

In his majority opinion in *Murphy*, Chief Judge Cox applied, as he did in *Curtis*, the *Strickland* performance prong against the standard of performance in the defense of a *capital* case. Noting that "our review of defense counsels' performance in this trial does not reveal anything which suggests that they were less than totally dedicated to the defense of SGT Murphy,"[159] he concluded that "a capital case—or at least this capital case—is not 'ordinary,' and counsels' inexperience in this sort of litigation is a factor that contributes to our ultimate lack of confidence in the reliability of the result: a judgment of death."[160]

Chief Judge Cox found that defense "counsels' lack of training and experience contributed to questionable tactical judgments, leading us to the ultimate conclusion that there are no tactical decisions to second-guess."[161] That "training and experience" refers to training and experience in capital litigation defense is evident earlier in the opinion, when Chief Judge Cox found that "SGT Murphy was defended by two attorneys who were neither educated nor experienced in defending capital cases, and they

155. United States v. Murphy, 50 M.J. 4, 16 (1998).
156. *Id.* at 13-14.
157. *See id*. at 16.
158. United States v. Murphy, 56 M.J. 642, 642 (Army Ct. Crim. App. 2001).
159. *Murphy*, 50 M.J. at 8.
160. *Id*. at 13.
161. *Id*.

either were not provided the resources or expertise to enable them to overcome these deficiencies, or they did not request same."[162]

Judges Sullivan and Crawford, both of whom dissented in the reversal of LCpl Curtis's death sentence, again dissented and sharply criticized Chief Judge Cox's opinion in *Murphy.* Judge Crawford expressed concern that "the majority, without explanation or justification, fails to follow Supreme Court precedent concerning the effective assistance of counsel when the sentence is death,"[163] and noted that "[t]he majority's decision lowers an appellant's burden in ineffective assistance of counsel cases in which the death penalty has been imposed."[164] Judge Sullivan similarly found "no legal basis upon which the majority can reverse this case because the defense attorneys might have been better trained."[165]

A year later, the CAAF affirmed the service court decision upholding the death sentence in the case of *United States v. Gray,*[166] in which the accused was sentenced to death, but was not afforded a mitigation specialist.[167] While *Gray* has been criticized as a backwards step from the heightened effectiveness standard set by *Curtis*,[168] the decisions are distinguishable.

Specialist Gray was convicted in 1988 of multiple specifications of premeditated murder, attempted premeditated murder, rape, forcible sodomy, burglary, and larceny, and was sentenced to death. Among the many appellate issues that he raised, he challenged the effectiveness of his trial defense team in several aspects, including the competence of the mental health experts who performed his mental health evaluation before trial and

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162. *Id*. at 9.

163. *Id*. at 29 (Crawford, J., dissenting).

164. *Id*. at 35 (Crawford, J., dissenting).

165. *Id*. at 27 (Sullivan, J., dissenting).

166. 51 M.J. 1 (1999).

167. 32 M.J. 730 (A.C.M.R. 1991) (denying motion to provide funding for expert psychiatrist, death penalty-qualified defense counsel, and investigator), *aff'd on reh'g*, 37 M.J. 730 (A.C.M.R. 1992) (denying petition for new trial based on "newly discovered evidence of lack of mental responsibility"), *aff'd on reh'g*, 37 M.J. 751 (A.C.M.R. 1993), *aff'd*, 51 M.J. 1 (1999).

168. *See* Major David D. Velloney, *Balancing the Scales of Justice: Expanding Mitigation Specialists in Military Death Penalty Cases*, 170 MIL. L. REV. 1 (2001).

his defense counsels' failure to adequately investigate "the mitigating circumstances of [his] traumatic family background."[169]

The crux of Specialists Gray's complaint with his defense team appears to lie in what he described as "new evidence" of organic brain damage discovered after trial.[170] The ACMR disagreed with his characterization of this evidence, pointing out that "according to appellant's own brief there were 'clear indicators of appellant's organic brain damage . . . present at the time of trial.'"[171] Two forensic psychiatrists and a psychologist had examined Specialist Gray before trial and noted "symptoms associated with organic involvement."[172]

After his trial, Specialist Gray underwent two additional sanity boards and additional neurological testing. While the most recent sanity board found "undifferentiated brain damage," it concluded, as did the pre-trial sanity board, that "it does not appear of sufficient magnitude to negate criminal responsibility."[173] The "new evidence" consisted largely of an affidavit from a physician specializing in neurology who, after reviewing the results of the tests and evaluations, concluded that Specialist Gray "suffers from organic brain defects that probably impaired his capacity to distinguish right from wrong and conform his conduct to the law."[174] Noting that the physician "did not personally examine the appellant, nor did he review the testimony of the experts,"[175] the ACMR found that while "it is true that the appellant now possesses information that was not presented at trial . . . the information presented has not been proved correct."[176]

Specialist Gray's claim of ineffective assistance of counsel was based largely on his counsel's failure to challenge the professional competence of the mental health experts who examined him during trial and to investigate his social and personal background adequately. Although Gray's request for an independent investigator was denied, the defense team was granted the assistance of a CID agent, and presented testimony from family members at trial concerning Specialist Gray's abusive childhood and "generally about the conditions under which he grew up."[177] The defense also

169. *Gray*, 37 M.J. at 745.
170. *See id*. at 742.
171. *Id*.
172. *Id*. at 742.
173. *Id*. at 743.
174. *Id*. at 742.
175. *Id*.
176. *Id*. at 743.

presented the forensic psychiatrist who conducted the sanity board, who testified "about [Gray's] social background of growing up in the projects, his alcohol dependence, and his abusive stepfather."[178]

Specialist Gray's claim of ineffectiveness was, in effect, an attempt to impeach the mental health evidence presented at his trial. While he challenged the adequacy of his defense team's investigation, he did not identify to the court any mitigating evidence (other than the "new" mental health findings) that his trial defense team did not present at trial. This is distinguishable from both *Curtis* and *Murphy.* In *Curtis*, the trial defense team was unable to provide an explanation for not presenting evidence of intoxication during sentencing, noteworthy in light of the pre-trial sanity board's finding that "it is doubtful that the event would have happened without the use of alcohol."[179] In *Murphy,* substantial new mental health evidence was discovered post-trial which the CAAF determined warranted additional fact-finding.[180]

Rather than viewing *Gray* as a backstep from *Curtis*, it seems more an affirmation of the CAAF's position that it will view defense counsel qualifications independent of the ABA standards, and that it will not reject a death sentence simply because the accused did not have the benefit of a mitigation specialist. While *Curtis* and *Murphy* demonstrate a decision to hold defense counsel to a higher standard in capital cases, *Gray* demonstrates the limits of that standard and the CAAF's resolve to apply a process rather than a result-oriented analysis in its review of counsel's effectiveness. Its review of defense counsel performance in capital cases, however, will measure counsel's performance not merely in the context of general competence, but in the context of acceptable performance in a *capital* court-martial, where the focus from the outset is avoiding a death sentence, and where only one vote is necessary to secure that victory.

IV. Defense Resources: How Wide Does *Curtis* Open the Door?

> *In capital cases the fundamental respect for humanity underlying the Eighth Amendment . . . requires consideration of the character and record of the individual offender and the circum-*

177. *Id*. at 746.
178. *Id*.
179. United States v. Curtis, 48 M.J. 331, 333 (1997) (Cox, C.J., concurring).
180. United States v. Murphy, 50 M.J. 4, 16 (1998).

> *stances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death.*[181]

In setting aside the death sentences[182] in *Curtis* and *Murphy*, the CAAF, while expressly refusing to mandate qualification standards for capital trial defense teams, made clear its concern with the quality of representation in capital cases. Having already expressed its frustration with the inability of the *Curtis* trial defense team to explain its rationale in not presenting crucial evidence in sentencing, the court put its collective foot down in *Murphy* and refused to speculate on the impact of the mitigation evidence undiscovered at trial. Clear from a reading of these cases together is that the defense of military capital cases demands a much greater dedication of resources than convening authorities might have previously considered necessary, and a greater level of expertise than the military trial defense services have been accustomed to providing. As Chief Judge Cox observed in *Curtis*, "[t]he sentencing hearing may have been adequate for an absence-without-leave case . . . it was woefully lacking and totally unacceptable in a capital murder case."[183]

The procedural differences between a capital and non-capital trial are something that defense counsel can appreciate after attending capital litigation training, and the defense team's appreciation of these differences is a step in the right direction toward meeting the heightened standard of representation that *Curtis* and *Murphy* require. Practitioners who are seasoned trial advocates, but new to military capital litigation, might ask why capital litigation training is not sufficient, by itself, to meet Judge Cox's call for reform. Understanding how a capital trial differs from a non-capital trial, however, only scratches the surface. Only with expert resources will a defense team discover potentially mitigating evidence in an accused's background that neither the accused nor his family members might provide, and only with experience, training, and exposure to experts with capital trial experience will the defense team be able to fully analyze

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181. Woodson v. North Carolina, 42 U.S. 280, 304 (1976).

182. In *Curtis*, the CAAF reversed the service court's decision as to sentence. United States v. Curtis, 46 M.J. 129, 130 (1997). In *Murphy*, the CAAF set aside the service court's decision. *Murphy*, 50 M.J. at 5. In both cases, the CAAF set aside that portion of the sentence extending to death, leaving in place the remaining elements of the affirmed sentence, and accessory penalties. *See supra* notes 38, 91.

183. *Curtis*, 48 M.J. at 332 (Cox, C.J., concurring).

and assess sometimes complicated social background evidence in a case in which the focus from the start may be not on guilt, but on mitigation.

This section discusses the lessons of *Curtis* as they relate to defense team resources. It addresses the role and the importance of mitigation specialists in capital courts-martial, as well as the need for ex parte access to the convening authority in obtaining both mental health and mitigation experts. Finally, it recommends changes to the Rules for Courts-Martial that recognize the importance of providing these resources to the capital trial defense team.

A. Employment of Mitigation Specialists

In setting aside the death penalty in *Murphy*,[184] the CAAF strongly indicated its unwillingness to second-guess the impact of the mitigation evidence withheld from the members at trial, either through lack of discovery, or an unexplained failure to present it. Even in light of the CAAF's later decision in *Gray*, *Curtis* and *Murphy*, when read together, are a strong signal to convening authorities that defense counsel in capital cases must be provided the resources and funding required to investigate a capital accused's social history thoroughly and expertly before trial.

In its review of *United States v. Thomas*,[185] the NMCMR, in considering Sergeant Thomas's argument that he did not receive an adequate defense without a thorough psycho-social background investigation, noted that "a psychosocial investigation is not within the ken of a competent attorney."[186] Similarly, the NMCMR noted in its second review of *Curtis* that "[i]t is not particularly surprising that a family would not initially reveal any form of dysfunction within the family, even when their child faced serious charges. This information could be perceived as embarrassing, humiliating, or insignificant."[187]

The field of mitigation specialists developed following *Furman v. Georgia*,[188] in which the Supreme Court distinguished between the "eligi-

184. *Murphy*, 50 M.J. at 5.

185. 33 M.J. 644 (N.M.C.M.R. 1991).

186. *Id*. at 647. The court also noted, however, that "the appellant is required to establish clearly the materiality and necessity" of such expert assistance, which Sergeant Thomas failed to do. *Id*.

187. United States v. Curtis, 38 M.J. 530, 539 n.10 (N.M.C.M.R. 1993).

188. 408 U.S. 238 (1972).

bility phase of capital cases," where the jury must determine whether the defendant's actions warrant eligibility for the death penalty, and the "selection phase," in which the Court "has recently reaffirmed the need for 'a broad inquiry into all relevant mitigating evidence to allow an individualized determination.'"[189] Mitigation specialists serve to fill the "significant blind spot [that] existed between the roles played by the private investigator and the psychiatrist, the two standard information-getters in the trial process."[190] Their job is to discover and communicate "the complex human reality of the defendant's personality in a sympathetic way" by conducting an investigation into the life history of an accused and sometimes testifying at trial.[191]

The Committee of Defender Services, Subcommittee on Federal Death Penalty Cases, described this evolving expert assistance as follows in the May 1998 Judicial Conference of the United States:

> Mitigation specialists typically have graduate degrees, such as a Ph.D. or masters degree in social work, have extensive training and experience in the defense of capital cases, and are generally hired to coordinate a comprehensive biopsychosocial investigation of the defendant's life history, identify issues requiring evaluation by psychologists, psychiatrists, or other medical professionals, and assist attorneys in locating experts and providing documentary materials for them to review.[192]

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189. Russell Stetler, *Why Capital Cases Require Mitigation Specialists*, INDIGENT DEFENSE, July/Aug. 1999, at 1 (quoting Buchanan v. Angelone, 522 U.S. 269, 275 (1998)).

190. *Id*. (quoting Lacey Fosburgh, *The Nelson Case: A Model for a New Approach to Capital Trials*, CALIFORNIA DEATH PENALTY MANUAL N6-N10, at N7 (July 1982)).

191. *Id*.

192. *Federal Death Penalty Cases: Recommendations Concerning the Cost and Quality of Defense Representation*, Subcommittee on Federal Death Penalty Cases, Committee on Defender Services, Judicial Conference of the United States (May 1998), adopted Sept. 15, 1998, *available at* http://www.uscourts.gov/dpenalty/4REPORT.htm.

While employment of a mitigation specialist is not legally required in a capital court-martial,[193] it is a sound means of adding capital experience to an otherwise inexperienced trial defense team.[194] Rule for Courts-Martial 1004 determines whether an accused is eligible for a death sentence, and grants a capital accused broad latitude in presenting evidence in extenuation and mitigation during pre-sentencing; however, it does not indicate what factors in extenuation and mitigation the sentencing authority should consider in determining whether to actually adjudge death.[195] As Judge Gierke emphasized in his dissenting opinion in the CAAF's first review of *Curtis*, the defense team must be able to explain to the members *why* the accused did what he did.[196]

Curtis was the first case in which a mitigation specialist was funded post-trial. Similar funding requests were granted in *United States v. Murphy*[197] and *United States v. Kreutzer.*[198] As discussed earlier, *Murphy* was recently returned to the convening authority to determine whether the mitigation evidence discovered after trial, had it been available to the sentencing authority, might have changed the outcome.[199] At least one scholar has predicted that *Kreutzer* will follow suit.[200]

None of the service courts or the CAAF has mandated employment of a mitigation specialist in a capital court-martial. In fact, the CAAF held in *United States v. Loving*[201] that such employment was not necessarily a requirement. In both *Loving* and *Gray,*[202] soldiers were sentenced to death but were not provided mitigation specialists.[203] In both cases, the ACMR

193. In both *Loving*, 41 M.J. 213 (1994), and *Gray*, 51 M.J. 1 (1999), the CAAF affirmed death sentences in cases in which the accused was not afforded a mitigation specailist. The Supreme Court affirmed *Loving* in 517 U.S. 748 (1996).

194. *See* Velloney, *supra* note 168, at 31-33.

195. *See* MCM, *supra* note 11, R.C.M. 1004.

196. United States v. Curtis, 44 M.J. 106, 171 (1996) (Gierke, J., dissenting).

197. 36 M.J. 1137, 1153 (A.C.M.R. 1993) (appellant's submissions to the ACMR indicating that the Office of The Judge Advocate General allocated $15,000 in funding for a mitigation expert in 1992).

198. United States v. Kreutzer, No. 9601044 (Army Ct. Crim. App. Dec. 15, 2000) (unpublished). Sergeant Kreutzer was sentenced to death in 1996 after he was convicted of murdering members of the 82d Airborne Division at Fort Bragg, North Carolina, when he opened fire on them during a morning physical training session at Fort Bragg's Towle Stadium on 27 October 1995. United States v. Kreutzer, No. 9601044 (Headquarters, 82d Airborne Division June 12, 1996).

199. United States v. Murphy, 50 M.J. 4, 16 (1998).

200. *See* Velloney, *supra* note 168.

201. 41 M.J. 213 (1994).

202. 51 M.J. 1 (1999).

affirmed the death sentence,[204] and the CAAF affirmed the ACMR.[205] In both cases, however, the appellants were unable to establish what evidence a mitigation specialist might have uncovered, and how that evidence might have impacted their death sentences.

While neither *Curtis* nor *Murphy* requires defense counsel to use a mitigation specialist or to use the information obtained during such an investigation, they strongly suggest that defense counsel must at least have access to all information available before making an informed, tactical decision as to how or whether to use it. It is certainly subject to debate whether the death sentence in *Curtis* would have survived had the defense team been able to explain adequately their decision to not present evidence of voluntary intoxication in pre-sentencing.

It is clear, however, from the court's action in *Murphy*, that a defense team's failure or inability to investigate a capital accused's social and psychological history thoroughly before a death sentence is almost a guarantee for sentence reversal on appeal. Had Private Loving and Specialist Gray been able to point to specific mitigation evidence that was missed at trial, the CAAF might have viewed their cases differently. A trial defense team treads on thin ice when it presents a capital defense without the benefit of a mitigation expert's investigation, and in Sergeant Murphy's case, the ice broke. Employing a mitigation expert does not guarantee that a death sentence will be reliable, but it ensures that the accused will have the benefit of a fully informed trial defense team, and that no stone in his psychosocial background will remain unturned.

The field of mitigation specialists has grown substantially in recent years,[206] and the value of mitigation specialists in ensuring the reliability of a death sentence is a source of debate in both the military and civilian capital litigation fields.[207] Many scholars argue that mitigation specialists' unique investigative skills make them indispensable members of a capital trial defense team,[208] and that a mitigation case that fails to employ

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203. *See supra* notes 167, 194 and accompanying text.

204. United States v. Loving, 34 M.J. 956, *on recon*., 34 M.J. 1065 (A.C.M.R. 1992); United States v. Gray, 32 M.J. 730 (A.C.M.R. 1991).

205. *Loving*, 41 M.J. at 213; *Gray*, 51 M.J. at 1. The Supreme Court did not consider this issue in its review of *Loving v. United States*, 517 U.S. 748 (1996).

206. *See, e.g*., NLADA MITIGATION DIRECTORY 2000, A NATIONAL COMPILATION OF DEATH PENALTY MITIGATION SPECIALISTS (2000).

207. *See generally* Dwight H. Sullivan et al., *Raising the Bar: Mitigation Specialists in Military Capital Litigation*, 12 GEO. MASON U. CIV. RTS. L.J. 199 (2002).

a mitigation specialist will likely run afoul of the Eighth and Fourteenth Amendments.[209] "Where potentially beneficial mitigating evidence exists and counsel has not presented it, counsel has precluded the sentencer from considering mitigating factors. Through failure to discover or present evidence, counsel has 'create[d] the risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty.'"[210]

Notwithstanding the recognized need for mitigation specialists in capital trials, there remains an "undue reluctance [on the part] of convening authorities and military judges to fund mitigation specialists to supplement capital defense teams."[211] In light of *Curtis* and *Murphy*'s affirmation that trial defense teams must possess all available relevant mitigation evidence *at trial*, convening authorities should strongly consider funding mitigation specialists as a means of adding capital experience to an otherwise under-qualified defense team. In light of the recent return of *Murphy* to a *DuBay* hearing,[212] and amidst speculation that *Kreutzer* faces the same future,[213] prudent convening authorities will recognize the heightened standard *Curtis* has established for capital representation. Convening authorities should understand that depriving a capital accused of the right to present all available mitigating evidence to the convening authority violates the law set forth by the Supreme Court. Accordingly, convening authorities should consider granting a defense request for a mitigation specialist as soon as they determine that a capital referral might be appropriate.

B. Access to the Convening Authority

Meeting the heightened standard of representation in capital courts-martial requires access to the convening authority. To obtain government employment of expert assistance—including the assistance of a mitigation specialist—the defense team must convince the convening authority that such assistance is necessary.[214] Such showing generally requires that defense counsel reveal information about the accused supporting the need

208. *See generally* Velloney, *supra* note 168; Stetler, *supra* note 189.

209. CONST. amends. VIII, XIV.

210. Gary Goodpaster, *The Trial for Life: Effective Assistance of Counsel in Death Penalty Cases*, 58 N.Y.U. L. REV. 299, 319 (May 1983) (citing Lockett v. Ohio, 438 U.S. 586, 605 (1978)).

211. Velloney, *supra* note 168, at 5.

212. United States v. Murphy, 56 M.J. 642, 648 (Army Ct. Crim. App. 2001).

213. Velloney, *supra* note 168.

for expert assistance. An accused might not wish to share potentially incriminating information with the convening authority before trial, or in some cases, before referral, but risks going to trial with inadequate defense resources if he does not. Similarly, defense counsel who desire a sanity board for their client must make a similar showing of necessity to the convening authority.[215] The request is almost always reviewed by government counsel, even though it may contain information damaging to the accused.

In *Ake v. Oklahoma*,[216] the Supreme Court recognized the need for psychiatric assistance in certain cases, noting that "a defense may be devastated by the absence of a psychiatric examination and testimony," but also contemplating "an *ex parte* threshold showing to the trial court that his sanity is likely to be a significant factor in his defense."[217] The present Rules for Courts-Martial make no provision for ex parte requests for assistance to the convening authority or to the military judge, even in capital cases. As a result, to meet the burden of demonstrating necessity, defense counsel are often faced with the dilemma of revealing sensitive information in the text of the request or not submitting the request at all. As seen recently in *Murphy*, the failure to investigate such matters thoroughly before trial is now a matter of great concern to the courts.

1. Curtis *Heightens the Need for Ex Parte Access*

In his analysis of the CAAF's decision in *Gray*,[218] one scholar points out that while counsel in *Gray* never specifically requested a mitigation specialist, "the tenor of the opinion regarding investigators and psychiatrists indicates a reluctance to provide any assistance to defense counsel absent an extensive showing of necessity on the record."[219] This observation highlights the shortcomings inherent in a system that denies a capital accused ex parte access to the convening authority. One might imagine a

214. United States v. Gonzalez, 39 M.J. 459, 461 (C.M.A. 1994) (applying the three-part test set forth by the ACMR which requires that the accused demonstrate first, why the expert assistance is needed; second, what expert assistance would accomplish for the accused; and third, why the defense counsel is unable to gather and present the evidence that the expert assistant would be able to develop); *see also* MCM, *supra* note 11, R.C.M. 703(d).

215. *See* MCM, *supra* note 11, R.C.M. 706.

216. 470 U.S. 68 (1985).

217. *Id.* at 82-83.

218. 51 M.J. 1 (1999).

219. Velloney, *supra* note 168, at 22.

scenario in which a trial defense team discovers evidence about the accused that might be characterized as "double-edged sword" evidence[220]—evidence that while providing mitigation, might also demonstrate an accused's future dangerousness or lead to additional harmful discoveries about the accused's past. Aside from the decision whether to present such evidence at trial,[221] a defense team encounters a formidable quandary when faced with the choice of disclosing the evidence to the trial counsel as part of a showing of necessity for expert assistance, or not meeting the necessity burden by omitting the information from the request, or not submitting the request at all to avoid disclosure of confidential information.

Ex parte access to the military judge is insufficient to remedy this dilemma because a competent trial defense team must have the assistance immediately to prepare a defense, or in some cases, to avoid a capital referral altogether. Once a case is referred as capital, half the battle is already lost; indeed, a trial defense counsel's greatest (and perhaps only) victory in a potential capital case may be to obtain a non-capital referral. To afford the convening authority with enough information about the accused to make a truly informed decision on whether to refer a case as capital, the trial defense team may require substantial information concerning the accused's social history before the referral decision. Even in cases in which the convening authority has already expressed his intent to refer a case as capital, the trial defense team must begin preparing the mitigation case immediately, in part due to the difficulty in discovering, locating, and contacting the many potential sources of information regarding the accused's social history.[222] This process must begin well before referral to ensure the accused has the opportunity to present all mitigating factors to a panel, the convening authority, or both—whether presented in defense of a non-capital referral, or as part of a sentencing case for life.

Federal practice recognizes the value of affording a defendant ex parte access to funding for investigative, expert, or "other services neces-

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220. Both Judge Sullivan in *Gray* and Judge Crawford in *Curtis* used this term to characterize mitigation evidence that can cut either for or against the accused. *Gray*, 51 M.J. at 41; United States v. Curtis, 44 M.J. 106, 120 (1996).

221. For a discussion of the "double-edge sword" approach to analyzing claims of ineffective assistance of counsel, see John H. Blume & Sheri Lynn Johnson, *Symposium Gideon—A Generation Later: The Fourth Circuit's 'Double-Edged Sword': Eviscerating the Right to Present Mitigating Evidence and Beheading the Right to Assistance of Counsel*, 58 MD. L. REV. 1480 (1999).

222. *See* Goodpaster, *supra* note 210, at 323-25.

sary for adequate representation,"[223] and provides for ex parte review of such requests by a court or magistrate when a defendant is financially unable to obtain those services himself. As noted earlier, *Ake v. Oklahoma*[224] contemplates a similar process,[225] but in *United States v. Garries*,[226] the COMA held that the federal right to request assistance ex parte does not apply to the military. In *United States v. Kaspers*,[227] the CAAF affirmed that "an *ex parte* hearing will only be used if the circumstances are 'unusual.'"[228] As both *Garries* and *Kaspers* were capital cases, these decisions imply that a capital referral does not by itself constitute an "unusual" circumstance; however, in neither case did the request for assistance involve a mitigation specialist or a mental health expert.[229]

The CAAF recognized in *Kaspers* that "our rule may burden the defense to make a choice between justifying necessary expert assistance and disclosing valuable trial strategy," but noted that "the defense is not without a remedy. The military judge has broad discretion to protect the rights of the military accused" and may permit an ex parte request for funding if the defense can demonstrate "unusual circumstances." [230] This rationale fails to recognize the need for expert assistance, such as a mitigation specialist or a forensic psychiatrist independent of the sanity board, before referral—assistance which in some cases may provide the accused's only hope in obtaining a non-capital referral, and in others may provide the basis for a defense. While in some instances a military judge may be able to preclude disclosure of confidential information in a capital cases by finding unusual circumstances, a defense counsel is likely to be able to establish that his circumstances are unusual only through disclosure of the very information he seeks to protect. *Kaspers*'s circuitous reasoning is simply unacceptable in cases in which an accused is facing death.

As discussed earlier, the United States Code provides a means by which an indigent defendant in federal court may request expert services

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223. 18 U.S.C. § 3006A(e)(1) (2000).

224. 470 U.S. 68 (1985).

225. For a discussion of whether ex parte proceedings are constitutionally required under *Ake v. Oklahoma*, see Donna H. Lee, Note, *In the Wake of* Ake v. Oklahoma*: An Indigent Criminal Defendant's Lack of Ex Parte Access to Expert Services*, 67 N.Y.U. L. REV. 154 (1992).

226. 22 M.J. 288, 291 (C.M.A. 1986), *cert. denied*, 479 U.S. 985 (1986).

227. 47 M.J. 176 (1997).

228. *Id*. at 180.

229. *See generally* Velloney, *supra* note 168, at 42-48 (thoroughly discussing the need for ex parte access to the military judge).

230. *Kaspers*, 47 M.J. at 180.

ex parte.[231] This provision was part of the Criminal Justice Act of 1964, a response to the growing issue of providing equal justice to indigent defendants. Enacted twenty years before the Supreme Court's decision in *Ake v. Oklahoma*, its legislative history provides meaningful insight into the rationale supporting the rule. As noted by Senator Hruska, acting Chair of the Senate Judiciary Committee on the Criminal Justice Act of 1964, without an ex parte procedure, "the penalty for asking for funds and services may be the disclosure, prematurely, and ill-advisedly, of a defense."[232]

Affording a capital accused the right to ex parte access to the convening authority for such funding would add little to the government's burden in prosecuting a capital case and would eliminate the Hobson's choice created when a capital accused needs investigative funding before trial, but cannot afford to disclose potentially damaging information about himself to obtain it. As discussed above, the recent remand of *United States v. Murphy*[233] illustrates that post-trial funding of such crucial resources is too late.

2. Changes to the Rules for Courts-Martial

In recognition of the heightened need for reliability in capital courts-martial, RCM 706[234] and RCM 703[235] should be amended to permit ex parte access to the convening authority for purposes of showing necessity in capital cases. In these proposed amendments, capital courts-martial should be defined to include cases in which charges have been preferred and under the circumstances are likely to be referred as capital.[236] This change would both bring military practice more in line with federal capital procedures[237] and provide the accused a real opportunity to present miti-

231. *See* 18 U.S.C. § 3006(A) (2000).

232. *Criminal Justice Act of 1963: Hearings on S. 63 and H. 1057 Before the Senate Comm. on the Judiciary*, 88th Cong. 173 (1963).

233. 50 M.J. 4 (1998) (returning the case to The Judge Advocate General for remand to the ACCA); 56 M.J. 642 (Army Ct. Crim. App. 2001) (returning the record to the convening authority for a *DuBay* hearing).

234. MCM, *supra* note 11, R.C.M. 706, Inquiry into the mental capacity or mental responsibility of the accused.

235. *Id.* R.C.M. 703, Production of witnesses and evidence.

236. Whether to leave this language vague or to provide a more specific definition would be a matter for consideration by the Joint Services Committee. In addition to this change, RCM 1004(b)(1) should be amended to require the government to provide notice of its intent to refer the case as capital, as well as the aggravating factors upon which it relies, before referral.

gation evidence to the convening authority before his decision to refer the case as capital.[238]

A government mental health evaluation is often the defense counsel's first view into the mind of the accused. The detailed results and conclusions of the evaluation are invaluable in determining what kind of mental health and/or mitigation expertise the defense of the service member facing a death sentence will require. While the need to establish a basis for requesting government services is understandable in the context of limited government resources, the routing of the request through the prosecution team is not.

Governed by RCM 706, an accused may receive a government health evaluation, commonly known as a "sanity board," by submitting a formal written request to the convening authority (or to the military judge, if the charges are referred to trial). The Rule requires that the request establish a basis upon which the evaluation is required.[239] That an accused has committed a capital offense is not in itself an adequate basis under the present RCM 706.[240] As discussed above, RCM 706 may place the defense counsel in an awkward position by requiring him to disclose confidential information to obtain a government mental health evaluation.

Rule for Courts-Martial 706 provides for disclosure of the board's detailed conclusions, often referred to as the "long form," only to the defense counsel (and if after referral, to the military judge)[241] because of

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237. U.S. ATTORNEY'S MANUAL para. 9-10.050 (June 2001) (providing that once a case has been submitted to the Assistant Attorney General in support of a request for authorization to seek the death penalty, the materials shall be reviewed by a committee appointed by the Attorney General, and "counsel for the defendant shall be provided an opportunity to present the Committee the reasons why the death penalty should not be sought").

238. While some may argue that the Article 32 process affords soldiers the right to present evidence in support of a non-capital referral to the convening authority before referral, in reality the defense team most likely has not yet received funding for expert assistance by the time the Article 32 is appointed and has developed very little of the case in mitigation. Forensic reports are most likely still pending, and the government may or may not yet have disclosed which aggravating factors it intends to pursue, as this disclosure is not required until sometime "before arraignment." MCM, *supra* note 11, R.C.M. 1004(b)(1). While federal death penalty procedures permit an oral presentation in support of a non-capital indictment to a Committee appointed by the Assistant Attorney General, *see supra* note 237, the Rules for Courts-Martial afford the accused no such right to present matters in person to the convening authority at any time, before or after referral.

239. MCM, *supra* note 11, R.C.M. 706.

240. *See id*.

the privileged nature of this information. The rule should be modified to make the request for the evaluation in capital cases ex parte as well, in recognition of the greater role that mental health issues typically play in a capital case,[242] and to encourage defense counsel to obtain such an evaluation early in the process. In the alternative, RCM 706 should be amended to delete the provisions requiring the statement of a factual basis for the request in capital cases. By removing this requirement and thereby the need to disclose privileged information, defense counsel in capital cases could obtain the evaluation with minimal risk to the accused.[243]

Similarly, RCM 703 should be amended to make requests for funding of defense experts in capital cases ex parte, a provision already included in federal criminal practice.[244] Rule for Courts-Martial 703 provides the mechanism for an accused to request employment of expert services,[245] and like an RCM 706 request, RCM 703 requests are routinely processed through the prosecution team to the convening authority. This again places the defense counsel in the very awkward position of having to disclose a potential defense (or very aggravating information) early in the case to obtain crucial assistance to the defense team.

While the contents of RCM 703 and RCM 706 requests are not admissible at trial,[246] requiring counsel in capital cases to disclose privileged information to the prosecution in the course of obtaining resources before trial, when the purpose of those resources is to ensure an adequate defense of the accused, is counterintuitive. Considering *Curtis*'s heightened standdard of representation, a standard mandated by the fact that a service-

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241. *Id.* R.C.M. 706(c)(3).

242. In a non-capital case, mental health issues are often resolved through a sanity board, and they may or may not be presented in mitigation. In a capital case, an accused's mental health, while not constituting a defense or rendering him incompetent, may be his only hope against execution. The potentially greater impact of mental health evidence in a capital trial, given that the accused is on trial for his life, mandates special rules for ex parte consideration.

243. While RCM 706 protects statements made by the accused to mental health professionals during the course of an RCM 706 evaluation, *see* MCM, *supra* note 11, R.C.M. 706(c)(5), those statements become discoverable if the accused raises mental responsibility as a defense at trial, *see id.* MIL. R. EVID. 302.

244. *See* 18 U.S.C. § 3006(A) (2000).

245. *See* MCM, *supra* note 11, R.C.M. 703.

246. In addition to Military Rule of Evidence (MRE) 802's exclusion of hearsay, MRE 302 protects statements made by a service member to his attorney for the purpose of facilitating the rendition of legal services to the client, and MRE 302 protects statements (or evidence derived therefrom) made by the accused during the course of a sanity board. MCM, *supra* note 11, MIL. R. EVID. 802, 302.

man's life is at stake, rules that tie defense counsels' hands unnecessarily should be amended to permit aggressive and immediate access to expert resources as soon as the defense can articulate a viable need. Removing the prosecution team from the process would allow the defense to ask for what it needs, while leaving the discretion to grant or deny the funding with the convening authority or the military judge.

V. Adequate Representation of Counsel: Are the Services Up to the Challenge?

> *The current system of providing and funding defense counsel shortchanges accused servicemembers who face the ultimate penalty. It has been long recognized by every U.S. jurisdiction with a death penalty that only qualified attorneys may conduct death penalty cases. The paucity of military death penalty referrals, combined with the diversity of experience that is required of a successful military attorney, leaves the military's legal corps unable to develop the skills and experience necessary to represent both sides properly.*[247]

In May 2001, fifty years after the enactment of the UCMJ, the National Institute of Military Justice sponsored a study of the military justice system. In its report, the Commission on the 50th Anniversary of the UCMJ (commonly referred to as the "Cox Commission" after its chairman, Judge Walter T. Cox, III), made several recommendations, including implementing additional protections in death penalty cases—specifically, addressing the issue of inadequate counsel and requiring a court-martial panel of twelve members.[248]

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247. REPORT OF THE COMMISSION ON THE 50TH ANNIVERSARY OF THE UNIFORM CODE OF MILITARY JUSTICE 10, 11 (May 2001) [hereinafter COX COMMISSION REPORT].

248. *Id.* It was Chief Judge Cox changing his vote in 1997 that ultimately spared LCpl Curtis from the death penalty due to his trial defense team's ineffectiveness during the pre-sentencing phase of his court-martial. *See* United States v. Curtis, 48 M.J. 331 (1997) (Cox, C.J., concurring). Chief Judge Cox also wrote the majority opinion in *United States v. Murphy*, 50 M.J. 4 (1998), a military death penalty case remanded based on claims of ineffective assistance of counsel. Article 16(1)(A) was recently amended to require that a panel in a capital court-martial consist of at least twelve members. National Defense Authorization Act for Fiscal Year 2002, Pub. L. No. 107-107, § 582, 155 Stat. 1012, 1124-25 (2001).

As discussed throughout this article, Chief Judge Cox's ultimate decision in *United States v. Curtis*[249] effectively raised the standard of representation in capital trial defense. Similarly, the Cox Commission challenged the armed services to recognize their duty to ensure adequate defense in capital cases and to find ways to carry out this duty.[250] While the services are presently considering alternatives to the present system of detailing counsel to capital cases, such as contracting with civilian law firms to try our capital cases,[251] the solution lies within the services.

Chief Judge Cox's decisions in both *Curtis* and *Murphy*[252] highlight the need for an experienced capital defense team. Although the CAAF has on several occasions expressly declined to mandate standards of counsel competence in capital cases apart from that set by the Supreme Court in *Strickland v. Washington*,[253] the Cox Commission has suggested that the services re-evaluate how they detail defense counsel to capital cases.[254] Indeed, most of the focus in capital litigation since *Curtis* has been on the lack of capital experience among military defense counsel.

The key to answering the call of *Curtis* is finding within the armed services a means to both breed capital experience within the ranks of the military defense bar and to capture the experience that already exists. The first step in such a process is recognizing the unique skills required in capital defense and identifying judge advocates possessing those skills with a skill identifier. Equally important, once experienced judge advocates are identified, is the creation of an organization that pools the experience within all of the services, establishes a network of experts both within and outside the military, and is available to military defense counsel detailed to capital courts-martial around the world.

A. Creation of a Capital Litigation Skill Identifier

Most of the branches of the Army comprise the Army Competitive Category (ACC), which forms the group within which officers compete for

249. 46 M.J. 129 (1997).

250. COX COMMISSION REPORT, *supra* note 247, at 9-11.

251. Telephone Interview with Lieutenant Tri Nahn, U.S. Navy, Office of the Judge Advocate General (Jan. 25, 2002); E-mails from Lieutenant Nhan to Mary T. Hall and to author (Jan. 23-25, 2002) (on file with author).

252. 50 M.J. at 4.

253. 466 U.S. 668 (1984).

254. COX COMMISSION REPORT, *supra* note 247, at 10-11.

promotion and for selection to attend civil and military professional schooling.[255] The Judge Advocate General's Corps (JAGC) is a special branch of the Army that is separate from the ACC. Accordingly, JAGC officers compete only among themselves for promotion and selection for civil and senior service schooling and are not required to become "branch qualified," as ACC officers must between their eighth and twelfth years of service.[256] In practice, this allows judge advocates an equal place on the playing field while recognizing their distinct skills and different career advancement objectives.

Officers of the ACC receive a branch or functional area within a career field immediately following their promotion to major.[257] A functional area is a grouping of officers by technical specialty or skills, most of which require significant education, training, and experience.[258] Each functional area falls under one of the four career fields.[259] Most company grade officers will not serve in functional area jobs until after branch qualification, ensuring that each officer obtains the basic skills, experience, and general knowledge of the branch before moving to a more specialized area of expertise.[260] The goal behind these groupings is to "build an officer corps that is both skilled in combined arms operations in the joint and multinational environment and fully experienced in the technical applications that support the Army's larger systemic needs."[261]

The JAGC does not assign functional areas or career fields, but has recognized two areas of concentration and four skill identifiers.[262] Separate classification of judge advocates specializing in these areas recognizes

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255. U.S. DEP'T OF ARMY, PAM. 600-3, COMMISSIONED OFFICER DEVELOPMENT AND CAREER MANAGEMENT para. 5-9 (1 Oct. 1998).

256. *Id*. para. 3-7a(5). For example, for an armor captain to be branch qualified, he must have completed an advanced course (usually the Armor Officer Advanced Course), successfully completed command of a company or troop for eighteen months, obtained a baccalaureate degree from an accredited college or university before attending the advanced course, and completed the staff process training phase of the Combined Arms and Services Staff School (CAS3). *Id*. para. 11-3(a)(2)(f).

257. *Id*. para. 8-1b.

258. *Id*. para. 8-3a.

259. *Id*. para. 8-3c.

260. *Id*. para. 8-2b.

261. *Id*. para. 8-1a.

262. *Id*. para. 48-1c(5). The areas of concentration are judge advocate (55A) and military judge (55B). The skill identifiers are 3D (government contract law specialist), 3F (patent law specialist), 3G (claims/litigation specialist), and 3N (international law specialist).

the unique education and experience required by positions within the areas of law they represent. Similarly, only officers assigned to the U.S. Army Trial Defense Service (USATDS), or those made available as individual military counsel (IMC), may be detailed to represent soldiers facing adverse military administrative or criminal action.[263] The USATDS is a relatively new organization that recognizes the unique training required in defending courts-martial and the need to separate defense counsel from the command structure.[264]

Before *United States v. Curtis*,[265] qualification and certification by the service Judge Advocate General under Article 27b, UCMJ,[266] were sufficient to defend a military death penalty case.[267] Because the CAAF has declined to mandate any additional qualifications, the services must determine how best to ensure adequate representation of capital accused in courts-martial given the inexperience of many military defense counsel, and the limited time their careers will allow them to remain in trial work. Service-wide recognition of capital litigation as a skill identifier would accomplish that purpose.

The JAGC has recognized the importance of having officers who specialize in contracting, patent law, claims and litigation, and international law by awarding skill identifiers for these areas of expertise.[268] Just as the Army needs experts in these areas to further modern-day missions and to protect the Army from civil lawsuits and criminal liability, *Curtis* clearly demonstrates that the Army also needs experts in defending capital courts-martial.

Obtaining a capital litigation skill identifier would require education and training similar to that required for the other four identifiers. As with the military judge area of concentration, it would also require criminal law experience in trial prosecution and defense. Like military judges, judge

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263. *Id*. para. 48-1c(3)(b).

264. For a history of the development of USATDS, see Lieutenant Colonel John R. Howell, *TDS: The Establishment of the U.S. Army Trial Defense Service*, 100 MIL. L. REV. 4 (1983). For a discussion of the purpose and mission of the USATDS, see Lieutenant Colonel R. Peter Masterton, *The Defense Function: The Role of the U.S. Army Trial Defense Service*, ARMY LAW., Mar. 2001, at 1. *See also* U.S. DEP'T OF ARMY, REG. 27-10, LEGAL SERVICES: MILITARY JUSTICE ch. 6 (6 Sept. 2002).

265. 46 M.J. 129 (1997).

266. UCMJ art. 27b (2000).

267. *See also* U.S. DEP'T OF ARMY, REG. 27-1, LEGAL SERVICES: JUDGE ADVOCATE LEGAL SERVICES para.13-2h (30 Sept. 1996).

268. *See supra* note 262.

advocates with a capital litigation skill identifier would be assigned to positions requiring their expertise and stabilized for a term of years to ensure the maximum benefit of their specialty. Similar to judge advocates with other skill identifiers, these judge advocates might temporarily leave the specialty to serve in general JAGC assignments, but would eventually resume service in the capital litigation specialty. Even while serving in assignments outside of capital litigation, they would remain identifiable as capital litigation resources.

B. Joint Services Capital Litigation Resource Center

In addition to creating a skill identifier, the services need a joint capital litigation resource center committed to obtaining, consolidating, and nurturing capital experience.[269] Such an organization would fall within the Department of Defense under one of the service appellate defense divisions or one of the service JAG schools, and would include judge advocates with the capital litigation skill identifier and those with substantial non-capital defense experience.

Employment of a full-time civilian attorney with capital litigation experience as a senior member of the center would provide continuity, promote long-term cooperation among the services in capital appellate defense, and would be the first step in closing the "ungoverned revolving door of [appellate] defense counsel" that Judge Wiss wrote of in *Loving v. United States*.[270] That attorney, while most likely unable to represent a capital accused throughout his appeal given his involvement in trial-level issues, would ensure that change of counsel during an appellant's appeal would not rise to the level that Judge Wiss so vehemently criticized in *Loving*.[271] While the nature of military service may never permit the revolving

269. From 1997 to 2000, a judge advocate captain in the U.S. Navy Reserve was assigned to the Navy-Marine Corps Appellate Defense Division as a joint services resource for capital litigation. That position is presently unfunded; however, the Navy is considering means by which capital litigation resources may be made more accessible to judge advocates detailed to capital cases. Telephone Interview with Lieutenant Tri H. Nahn, U.S. Navy, Office of the Judge Advocate General (Jan. 25, 2002); E-mails from Lieutenant Nahn to Mary T. Hall and to author (Jan. 23-25, 2002) (on file with author). An alternative to a joint organization would be to assign one of the service appellate divisions as the lead in providing capital defense resources to trial defense counsel.

door to close completely, a measure of continuity in the capital resource center would be a firm step in remedying its "ungoverned" nature.

The center's activities would include writing scholarly articles concerning capital litigation; assisting trial defense counsel in obtaining funding to attend capital litigation courses when detailed to a capital case;[272] and providing a network of civilian, retired, and reserve attorneys with capital experience willing to assist military counsel in the defense of capital cases. Whether to assign capital litigation center counsel to capital appellate cases would be a matter between the center and the appellant's service appellate division. The center would also assist trial defense counsel defending capital cases and, if necessary, provide judge advocates for detailing to capital cases in the field. With one phone call, a trial defense counsel detailed to a capital case could tap into the wealth of knowledge

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270. 41 M.J. 213, 327 (1994) (Wiss, J., dissenting). While the representation issues in *Curtis* and later in *Loving* focused primarily on the trial defense counsel, Judge Wiss in his dissent in *Loving* expressed great concern regarding the appellate defense counsel, writing that "[he was] not alone in expressing frustration of this Court at the delays and inefficiencies in capital litigation that are the direct result of lack of continuity of appellate counsel," and that "[i]t is time to fix what is broken." *Id*. at 329. He noted that "[s]even appellate counsel represented [Sergeant Murphy] in the Court of Military Review; five others represented him in this Court," and that "[n]o expression of concern appears anywhere for even informing the client of an impending change in representation, much less seeking the client's views." *Id*. at 327. Appended to his dissent was a congressional letter to the Secretary of Defense, in which the Chairman of the Subcommittee of Civil and Constitutional Rights expressed concern that "no procedures are in place . . . to provide continuity of representation" in military capital litigation, *id*. at 335, and urging the Secretary to take steps to "ensure that in proceedings where life itself is at stake, no American serviceman or servicewoman is denied the essential tools of an adequate defense." *Id*. at 336.

271. *Id*. Judge Wiss noted, for example, that "[i]t was unclear at times who was the lead counsel,"and that "[t]he confusion is so pervasive that even opposing counsel demonstrated confoundment." *Id*. at 327. He concluded that "it is clear from various pleadings in this case that lack of continuity and accountability of counsel directly caused substantial inefficiencies at both appellate levels." *Id*.

272. Capital litigation training courses are offered throughout the United States several times each year. For example, the Naval Justice School offers a Defense Capital Litigation Course each July, and the National Legal Aid and Defender Association sponsors a "Life in the Balance" capital litigation course each March. *See* U.S. DEP'T OF NAVY, COMMANDER, NAVY LEGAL SERVICES COMMAND, INSTR. 5450.3A, MISSION AND FUNCTIONS OF NAVAL JUSTICE SCHOOL, NEWPORT, RHODE ISLAND encl. 1, para. 3k (25 Nov. 1998); National League Aid & Defender Association, *Training & Conferences*, at http://www.nlada.org/Training/Train_Defender/Train_Defender_Balance (last visited Dec. 5, 2002).

and experience that presently exists, but that is unknown to the majority of military counsel in the field.

Because the combined services produce so few capital courts-martial, only through consolidation of experience and resources can the services grow their own qualified capital defense teams. Similarly, only through a joint point of contact for defense counsel in the field can inexperienced counsel engage the wealth of capital resources available to them. Identification, consolidation, and joint cooperation of counsel with capital experience are the first steps in answering Chief Judge Cox's call to arms.

VI. Conclusion

Chief Judge Cox's changing of his vote in 1997 both saved LCpl Ronnie Curtis from the "executioner's needle"[273] and set military capital jurisprudence on a path whose future is uncertain. Although *Strickland v. Washington* remains the standard of reviewing defense counsel's performance at trial, *Curtis* and *Murphy* effectively modified *Strickland* by measuring defense counsel performance in the context of capital defense representation standards. While the CAAF has on numerous occasions expressed its clear intent to avoid mandating capital defense standards, the message of *Curtis* is clear: defense counsel in capital cases must be capable of putting together a competent *capital* trial defense team. In a system where only one vote will derail the death sentence, every decision the team makes at trial carries the potential weight of life or death.

Curtis squarely places the duty to ensure adequate defense of capital cases on the armed forces, and its impact is felt today as the services struggle to find ways to ensure competent representation of capital cases at the trial and appellate levels amidst the competing demands of military service. Building a competent, qualified capital trial defense team requires training, experience, and access to resources. In many cases, convening authorities may not recognize the need for such funding, especially as operational budgets shrink.

The constitutionality of the military death penalty is a settled matter;[274] however, *Curtis* demonstrates that the system alone cannot ensure

273. United States v. Curtis, 48 M.J. 331, 331 n.1 (1997) (Cox, C.J., concurring).

the reliability of a death sentence. The services need not look past their own joint boundaries to find substantial talent, education, and experience in capital litigation. Until the services acknowledge this need and pool their wealth of information, however, they will struggle with the monumental task of finding counsel competent to defend capital courts-martial.

Awarding a skill identifier would permit judge advocates with capital litigation training and experience to remain in positions using that specialized knowledge and to be available should a need for their experience arise. It would recognize that just as being a military judge requires certain skills and experience, so too does defending a capital case. Classifying judge advocates as capital litigation specialists, however, is only one step in the process. Capital cases arise from installations throughout the world, and only when all defense counsel can tap into one centralized resource

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274. *See* Loving v. United States, 517 U.S. 748 (1996) (affirming the constitutionality of RCM 1004). The military death penalty remains subject to constitutional challenges on at least two grounds that were raised during *Curtis*'s appellate history. One issue involves the constitutionality of a variable size panel. *See, e.g.*, Dwight H. Sullivan, *Playing the Numbers: Court-Martial Panel Size and the Military Death Penalty*, 158 MIL. L. REV. 1, 24 (1998). While Article 16(1)(A) was recently amended to require that a panel in a capital court-martial consist of at least twelve members, National Defense Authorization Act for Fiscal Year 2002, Pub. L. 107-107, § 582, 115 Stat. 1012, 1124-25, the variable nature of "no [fewer] than" twelve members, *id.*, leaves the present military death penalty open to attack. The underlying premise of this argument is that because under the present Rules for Courts-Martial a challenged member is not replaced if a quorum remains, MCM, *supra* note 11, R.C.M. 505(c)(2)(B), an accused is penalized in a capital case when he conducts effective voir dire because with each member he successfully challenges and removes from the panel, he reduces his statistical probability of receiving one vote for life. As one judge on the Air Force Court of Criminal Appeals noted,

> Little mathematical sophistication is required to appreciate the profound impact . . . of reducing the court-martial panel size. To use a simple metaphor—if appellant's only chance to escape the death penalty comes from his being dealt the ace of hearts from a deck of fifty-two playing cards, would he prefer to be dealt thirteen cards, or only eight?

United States v. Simoy, 46 M.J. 592 (A.F. Ct. Crim. App. 1006), *rev'd*, 50 M.J. 1 (1998). A second ground for challenge to the constitutionality of the military death penalty, which Justice Stevens discussed in his concurring opinion in *Loving*, is whether service-connection should be a requirement for capital courts-martial jurisdiction. *Loving*, 517 U.S. at 774 (Stevens, J., concurring). While not directly addressing the issue of service-connection, the CAAF expressly found service-connection in both *Curtis*, 44 M.J. 106, 118 (1996), and *Gray*, 51 M.J. 1, 11 (1999).

center will the JAGC maximize the capital defense experience shared by so few of its members.

While one can only speculate as to what really led Chief Judge Cox to change his vote in 1997 and spare Ronnie Curtis his life, the impact of that decision will continue to haunt the services until we recognize that the challenge of ensuring qualified defense of capital courts-martial is formidable, but not impossible, and that the solution lies not in looking outside the services, but looking within.

BACK TO THE FUTURE?

THE ADMISSIBILITY OF POST-OFFENSE UNCHARGED MISCONDUCT TO PROVE CHARACTER

MAJOR HEATHER L. BURGESS[1]

Though this be madness, yet there is method in't.[2]

I. Introduction

The general prohibition against the use of character evidence in courts-martial is deceptively simple on its face: character evidence is not admissible for the sole purpose of proving that the person acted in conformity therewith on a particular occasion.[3] In many cases, however, the exceptions to the rule[4] all but eviscerate the general prohibition, often to the clear detriment of the accused.[5] Appellate courts interpreting the rules have further complicated matters by applying varied reasoning and reaching inconsistent decisions. As a result, proper application of the rules at the trial level has become an inordinately complex task.[6]

The general prohibition against character evidence found in Military Rule of Evidence (MRE) 404 is essentially the same as its federal counterpart and is grounded in American common-law practice since the late nine-

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2. WILLIAM SHAKESPEARE, HAMLET, act 2, sc. 2.

3. MANUAL FOR COURTS-MARTIAL, UNITED STATES, MIL. R. EVID. 404 (2002) [hereinafter MCM].

teenth century.[7] Although the prohibition is not universally recognized, at its heart, character evidence is propensity evidence by another name.[8] American courts have acknowledged that while such evidence is almost

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4. *Id*. The rule provides, in part, as follows:

> (a) *Character evidence generally.* Evidence of a person's character or a trait of a person's character is not admissible for the purpose of proving that the person acted in conformity therewith on a particular occasion, except:
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> (1) *Character of the accused.* Evidence of a pertinent trait of character of the accused offered by an accused, or by the prosecution to rebut the same; or if evidence of a trait of character of the alleged victim of the crime is offered by an accused and admitted under Mil. R. Evid. 404(a)(2), evidence of the same trait of character of the accused offered by the prosecution.
>
> (2) *Character of victim*. Evidence of a pertinent trait of character of the victim of the crime offered by an accused, or by the prosecution to rebut the same, or evidence of a character trait of peacefulness of the victim offered by the prosecution in a homicide or assault case to rebut evidence that the victim was an aggressor;
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> (3) *Character of witness*. Evidence of the character of a witness, as provided in Mil. R. Evid. 607, 608, and 609.
>
> (b) *Other crimes, wrongs, or acts*. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

Id.

5. *See* STEPHEN A. SALTZBURG ET AL., MILITARY RULES OF EVIDENCE MANUAL 527 (4th ed. 1997) (describing the general prohibition as "virtually subsumed" by the second sentence of Military Rule of Evidence (MRE) 404(b)); Edward J. Imwinkelried, *The Use of Evidence of an Accused's Uncharged Misconduct to Prove Mens Rea: The Doctrine That Threatens to Engulf the Character Evidence Prohibition*, 130 MIL. L. REV. 41, 46 (1990) (citing cases); Andrew J. Morris, *Federal Rule of Evidence 404(b): The Fictitious Ban on Character Reasoning from Other Crime Evidence*, 17 REV. LITIG. 181, 182 (1998) ("[d]ecisions on the admissibility of bad acts evidence may determine more criminal cases than any other type of evidence").

6. *See generally* United States v. Reynolds, 29 M.J. 105, 108 (1989) (commenting that "enough litigation has been generated concerning these rules to justify a substantial survey of the cases and statutes dealing with uncharged misconduct"); Major Victor M. Hansen, *New Developments in Evidence 2000*, ARMY LAW., Apr. 2001, at 41 (describing the scope of appellate evidentiary issues as "daunting" and commenting on the difficulty of "reaching that level of sophistication in the context of a trial").

always relevant, it is also usually highly prejudicial, time consuming, and confusing to the finder of fact.[9] As a fundamental proposition in a system of justice that provides a presumption of innocence, an accused should be convicted of committing a specific criminal offense, not for having a particular personal history or allegedly evil character.[10] The general prohibition against the admission of character evidence preserves this constitutionally based guarantee.[11]

In virtually all cases, the government seeks to introduce character evidence under MRE 404 that predates the charged offense, and, not surprisingly, the majority of appellate decisions analyzing the rule are devoted to instances of prior uncharged misconduct. On those limited occasions in which the admissibility of post-offense uncharged misconduct has been raised at the appellate level, courts have largely applied the same analysis used for prior uncharged misconduct, and found the evidence admissible.[12]

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7. *See* SALTZBURG, *supra* note 5, at 526; Kenneth J. Melilli, *The Character Evidence Rule Revisited*, 1998 BYU L. REV. 1547, 1558-60 (1998) (tracing the common law development of the present Rule 404(b)).

8. Acknowledging the reality of character evidence as propensity evidence, even the English, from whom the American common-law basis of Rule 404(b) derives, have abandoned it entirely in favor of simply applying Rule 403-like balancing test weighing probativeness and prejudicial effect. Morris, *supra* note 5, at 205-07; *see also* Michelson v. United States, 335 U.S. 469, 476 (1948); Thomas J. Reed, *The Character Evidence Defense: Acquittal Based on Good Character*, 45 CLEV. ST. L. REV. 345, 400 (1997) (noting that "the entire criminal history and psychological history of an accused is the very first item of evidence admitted in a French, German, Swiss or Austrian criminal prosecution, before the story of the crime itself is told by the fact witnesses"); Paul F. Rothstein, *The Federal Rules of Evidence in Retrospect: Observations from the 1995 AALS Evidence Section: Intellectual Coherence in an Evidence Code*, 28 LOY. L.A. L. REV. 1259, 1264 (1995) (describing prohibited character evidence as "just one type of propensity"); Richard B. Kuhns, *The Propensity to Misunderstand the Character of Specific Acts Evidence*, 66 IOWA L. REV. 777 (1981) (discussing the difficulty to distinguish between propensity and otherwise permissible character inferences).

9. *Michelson*, 335 U.S. at 476.

10. EDWARD J. IMWINKELRIED, UNCHARGED MISCONDUCT EVIDENCE § 1:03 (2d ed. 2001).

11. *See, e.g.*, Dowling v. United States, 493 U.S. 342 (1990) (recognizing that Federal Rule of Evidence 404(b) may implicate both double jeopardy and due process in certain limited circumstances, but declining to find a constitutional violation on the facts presented); United States v. Wright, 53 M.J. 476 (2000) (discussing the constitutional implications of MRE 413); *see also* MCCORMICK ON EVIDENCE § 190 (John W. Strong ed., 5th ed. 1999) (citing cases).

12. *See, e.g.*, United States v. Young, 55 M.J. 193, 196 (2001); United States v. Crowder, 141 F.3d 1202, 1208 (D.C. Cir. 1998); United States v. Latney, 108 F.3d 1446, 1449 (D.C. Cir. 1997); United States v. Bradley, 5 F.3d 1317, 1321 (9th Cir. 1993). *But see* United States v. Matthews, 53 M.J. 465, 469 (2000).

Similarly, legal scholars have offered limited specific analysis of post-offense misconduct, apparently finding no basis for excluding the evidence if it otherwise appears to satisfy the requirements of the rules.[13]

Contrary to these general positions, this article specifically argues that post-offense uncharged misconduct should be inadmissible to prove mens rea under MRE 404(b). First, the article briefly explains the general operation of the character evidence rules in courts-martial. Second, it analyzes the still unsettled issue of the admissibility of post-offense uncharged misconduct in military courts after *United States v. Matthews*,[14] *United States v. Young*,[15] and *United States v. Wright*.[16] Third, the article closely examines the theories that courts have relied on to admit post-offense misconduct evidence. Fourth, the article then argues that the theories for admitting post-offense uncharged misconduct to prove intent or knowledge allow otherwise prohibited propensity evidence to taint the court-martial process and make application of the character rules at the trial level unnecessarily complex. Finally, the article recommends amending MRE 404(b) to exclude specifically post-offense uncharged misconduct as proof of intent or knowledge.

II. Making Sense of the Character Evidence Rules

A. The Problem of Defining Character Evidence

To understand how the general prohibition against the use of character evidence operates in courts-martial requires a workable concept of the type of evidence the rules are designed to proscribe. Although not specifically defined, the term *character* in the rules appears synonymous with *propensity.*[17] The resulting dichotomy makes the rules both complicated to apply and inherently contradictory.[18] On the one hand, the common understand-

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13. *See, e.g.*, STEPHEN A. SALTZBURG, MICHAEL A. MARTIN & DANIEL J. CAPRA, FEDERAL RULES OF EVIDENCE MANUAL 517 (7th ed. 1998) [hereinafter MARTIN] (although the authors acknowledge that the rule seems to imply prior acts); IMWINKELRIED, *supra* note 10, § 5:04.

14. 53 M.J. 465 (2000).

15. 55 M.J. 193 (2001).

16. 53 M.J. 476 (2000).

17. *See* MCM, *supra* note 3, MIL. R. EVID. 404(a)-(b); *see also* Kuhns, *supra* note 8, at 780. *Webster's Dictionary* defines the word *character* as "[t]he combination of emotional, intellectual, and moral qualities distinguishing one person or group from another." WEBSTER'S II NEW RIVERSIDE UNIVERSITY DICTIONARY (1988). The definition of *propensity* is "an inherent inclination." *Id*.

ing of the term character requires reference to the tendency of an accused to commit bad acts. On the other, the finder of fact is not permitted to consider character evidence for that purpose. This inherent contradiction, coupled with the acknowledged power of character evidence,[19] has made the character evidence rules the subject of more published opinions than any other evidentiary issue.[20]

Legal scholars have devoted substantial effort to defining the acceptable limits of character evidence within the rules.[21] Unfortunately, the type of evidence the character rules permit is not what one would expect from the commonly understood use and definition of the term. There is an apparent consensus that the term character has a "moral overtone, which connotes something good or bad about a person."[22] At the same time, finders of fact are specifically prohibited from using evidence admitted under the character rules to determine that the accused is a bad person, and that because the accused is a bad person, that he acted as such on the occasion in question.[23] If the fact that the accused is a bad person—his moral character—is not to be taken into account, of what possible relevance is character evidence to the finder of fact for MRE 404(b) purposes?[24] A review of how the character evidence rules operate illustrates the counterintuitive

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18. *See* Melilli, *supra* note 7, at 1549; *see also* Rothstein, *supra* note 8, at 1259.

19. Professor Edward Imwinkelried, arguably the leading scholar in this area, calls the admissibility of uncharged misconduct evidence under Rule 404(b) "the single most important issue in contemporary criminal evidence law." Imwinkelried, *supra* note 5, at 42.

20. *See* IMWINKELRIED, *supra* note 10, § 1:04. Professor Imwinkelried cites the following statistics: "[I]n the mid-1980s a WESTLAW search of key numbers revealed 11,607 state cases . . . and 1,894 federal cases. Virtually every regional reporter advance sheet contains a new uncharged misconduct opinion, and the federal advance sheets ordinarily contain two or three new decisions on the topic." *Id*. *Accord* Morris, *supra* note 5, at 181 n.6 (citing advisory committee and other legislative data). A LEXIS search conducted by the author on 5 November 2002 returned 391 military justice cases citing MRE 404(b).

21. Character evidence is the subject of more academic legal commentary than any other area except hearsay doctrine. IMWINKELRIED, *supra* note 10, § 1:04 (citing what he terms a "staggering" number of law review articles).

22. Kuhns, *supra* note 8, at 778. *See also* Rothstein, *supra* note 8, at 1264 (distinguishing between a "moral" propensity, the type prohibited by the rules, and a "specific" propensity, a predisposition to do certain things in certain ways repeatedly).

23. *See* MCM, *supra* note 3, MIL. R. EVID. 404(b). The instruction given to military panel members is comparable with that given to civilian juries: "You may not consider this [uncharged misconduct] evidence for any other purpose and you may not conclude from this evidence that the accused is a bad person or has criminal tendencies and that (she)(he), therefore, committed the offense(s) charged." U.S. DEP'T. OF ARMY, PAM. 27-9, MILITARY JUDGES' BENCHBOOK para. 7-13-1 (1 Apr. 2001) [hereinafter BENCHBOOK].

inferences required to make the various types of character evidence both logically and legally relevant, and therefore admissible. The complex reasoning behind these inferences makes proper application of the rules at the trial level a difficult task, and leads to inconsistent outcomes in what should be a uniform military justice system.[25]

B. MRE 404(a): The Accused, the Victim, and the Witness

Military Rule of Evidence 404(a) begins with a blanket exclusion of the type of evidence commonly associated with the term character: evidence introduced to show the person's character, and that he therefore "acted in conformity [with that character] on a particular occasion."[26] Rule 404(a) goes on, however, to provide three specific exceptions allowing introduction of character evidence of the accused, victim, and witnesses.[27]

1. The Defense of Good Military Character Under MRE 404(a)(1): Opening the Door, or Slamming It Shut?

Military Rule of Evidence 404(a)(1) permits an accused to introduce evidence of a "pertinent" character trait.[28] Although adapted from the parallel Federal Rule of Evidence (FRE) 404(a)(1), the rule has far broader application in military courts-martial than in the federal system.[29] The expansive use of the provision derives from the rule's use as the basis for the defense of "good military character" to a wide array of court-martial offenses. The adoption of MRE 404(a)(1) from the federal rule was, on its face, a "significant departure" from the *1969 Manual* provision,[30] which

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24. Much of the discussion about character evidence refers to its power because despite the prohibitions surrounding it, most people have a gut feeling or common-sense basis for believing in its relevance. *See, e.g.*, Melilli, *supra* note 7, at 1554.

25. While military courts-martial are the focus of this article, the character evidence rules have caused comparable difficulty for federal and state systems operating under the Federal Rules of Evidence and analogous state counterparts.

26. MCM, *supra* note 3, MIL. R. EVID. 404(a); SALTZBURG, *supra* note 5, at 524.

27. *See* MCM, *supra* note 3, MIL. R. EVID. 404(a).

28. *Id.* MIL. R. EVID. 404(a)(1). With the exception of the defense of good military character, the pertinence of a particular character trait will vary with the offense charged. Examples include honesty for crimen falsi, and peacefulness for assaults or other violent offenses. *See generally* SALTZBURG, *supra* note 5, at 524-25.

29. SALTZBURG, *supra* note 5, at 524.

30. *Id*. at 525.

had permitted "evidence of 'general good character' of the accused to be received in order to demonstrate that the accused is less likely to have committed a criminal act."[31]

The apparent intent of the drafters of MRE 404(a)(1) was to limit the admissibility of good military character evidence on the merits to duty-related offenses.[32] Instead, military courts have liberally interpreted the term *pertinent*, permitting the defense to introduce evidence of the accused's good military character for essentially all offenses.[33] Some have criticized the military courts' permissive approach, arguing that the defense of military character, by its very nature, tilts the scales in favor of acquittal for a higher-ranking accused.[34]

More problematic, at least to understanding the admissibility of character evidence generally, is the essential premise of the good soldier defense at the merits phase of a court-martial: because SGT *X* is a "good soldier," he is less likely to have committed the charged offense. Evidence of good military character, in the context of a non-military specific offense, is precisely the type of evidence the rule purports to prohibit, as it is offered to prove that the person acted in conformity therewith on a particular occasion.[35] Such evidence is deemed wholly admissible, however, and is commonplace in modern courts-martial.[36]

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31. MCM, *supra* note 3, MIL. R. EVID. 404(a) analysis, app. 22, at A22-34.

32. *See id*. ("It is the intention of the Committee . . . to allow the defense to introduce evidence of good military character when that specific trait is pertinent. Evidence of good military character would be admissible, for example, in a prosecution for disobedience of orders."); *see also* SALTZBURG, *supra* note 5, at 525.

33. SALTZBURG, *supra* note 5, at 525 (citing cases).

34. *See* Elizabeth Lutes Hillman, *The 'Good Soldier' Defense: Character Evidence and Military Rank at Courts-Martial*, 108 YALE L. J. 879 (1999) (criticizing the good soldier defense generally and discussing its effect on the outcome of former Sergeant Major of the Army Gene McKinney's 1998 court-martial for sexual harassment); *see also* Randall D. Katz & Lawrence D. Sloan, *In Defense of the Good Soldier Defense*, 170 MIL. L. REV. 117 (2001) (supporting the application of the defense and responding to some of Professor Hillman's concerns).

35. In civilian courts, where the definition of *pertinent* is more narrowly construed, acquittal on the basis of character witnesses alone is virtually unheard of. *See* Hillman, *supra* note 34, at 883; Katz & Sloan, *supra* note 34, at 133; Reed, *supra* note 8, at 345 (discussing *United States v. Martinez*, 924 F. Supp. 1025 (D. Or. 1996), which the author classified as the "only case since the adoption of the Federal Rules of Evidence in which the defendant was acquitted on account of good character standing by itself"); *see also* BENCHBOOK, *supra* note 23, para. 7-8-1 (describing the permissible use of good character evidence in terms of showing the "probability of innocence").

Despite this expansive approach, the defense of good military character has perils and pitfalls that can significantly outweigh its potential benefit to the accused. First, other than the accused's own testimony, proof of good military character is limited to reputation or opinion evidence, which often sounds stilted and does not permit discussion of specific instances of the accused's good conduct.[37] Second, once the accused places a specific character trait in issue, MRE 404(a)(1) permits the prosecution to present evidence in rebuttal.[38] Although military courts liberally interpret the word *pertinent* to permit the defense of good military character, they apply an equally liberal standard to the scope of government rebuttal, and have rejected multiple defense attempts to limit direct testimony.[39] Given the sweeping on- and off-duty nature of the term *good military character*, an accused offers the defense at the substantial risk that every minor pre-trial infraction will become the subject of potentially damaging cross-examination.[40]

2. Character of the Victim: MRE 404(a)(2)

As is the case with evidence of his own character under MRE 404(a)(1), the accused controls whether evidence of the victim's character may be introduced at court-martial.[41] Military Rule of Evidence 404(a)(2) generally permits the accused to introduce evidence of a pertinent character trait of the victim.[42] In cases of homicide and assault, the rule specifi-

36. *See* SALTZBURG, *supra* note 5, at 526 n.58; *see also* Hillman, *supra* note 34, at 892 (discussing what Hillman says is the faulty reliance of military courts on the reasoning of Dean Wigmore, a World War I judge advocate, for admitting good soldier evidence in virtually all cases).

37. *See* MCM *supra* note 3, MIL. R. EVID. 405(a). The MRE permit testimony as to specific instances of conduct only when character is an essential element of the offense or defense. *Id*. MIL. R. EVID. 405(b). *See generally* SALTZBURG, *supra* note 5, at 570 (providing a more expansive discussion of foundational requirements).

38. MCM, *supra* note 3, MIL. R. EVID. 404(a)(1).

39. *See, e.g.*, United States v. Trimper, 28 M.J. 460, 466 (1989)**;** *see also* SALTZBURG, *supra* note 5 at 524; Hansen, *supra* note 6, at 43.

40. Unlike MRE 404(b), extrinsic evidence is not admissible to rebut evidence of good military character under MRE 404(a)(1). Cross-examination of character witnesses, however, may include specific instances of conduct, usually in the form of "are you aware" or "have you heard" questions. MCM, *supra* note 3, MIL. R. EVID. 405(a); *see also* United States v. Humpherys, 57 M.J. 83 (2002); United States v. Pruitt, 46 M.J. 148 (1997).

41. The only exception to this rule is if the accused is charged with sexual misconduct. MRE 412 specifically excludes evidence of the victim's behavior or sexual predisposition, with limited exceptions. MCM, *supra* note 3, MIL. R. EVID. 412(a).

42. *Id*. MIL. R. EVID. 404(a)(2).

cally allows evidence of the victim's character for violence, on the theory that such a character trait would have made the victim more likely to be the aggressor in a particular case.[43] The prosecutor's response has been traditionally limited to rebuttal evidence that the victim was a peaceful person.[44] As with MRE 404(a)(1), the evidence must consist solely of reputation or opinion.[45] Cross-examination of any reputation or opinion witness, however, may include inquiry into specific instances of conduct.[46]

3. Character of the Witness: MRE 404(a)(3)

Finally, MRE 404(a)(3) permits, with reference to Rules 607, 608, and 609, limited evidence concerning the character of a witness.[47] Incorporating the rules governing impeachment of witnesses, this rule concerns itself with only one character trait: credibility. The credibility of any witness, including the accused, may be impeached in one of four ways: (1)

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43. *Id.* The comparable federal rule does not permit such evidence in assault cases. The more expansive military rule was based on the premise that assaults were more likely to occur between military members living in "close quarters." SALTZBURG, *supra* note 5, at 526 (discussing the Drafter's Analysis of MRE 404(a)(2)).

44. MCM, *supra* note 3, MIL. R. EVID. 404(a)(2); *see also* SALTZBURG, *supra* note 5, at 526. On 1 June 2002, pursuant to MRE 1102, the December 2000 amendments to FRE 404(a)(1) automatically amended MRE 404(a)(1). Under the amended rule, the accused will also place his own character in issue by introducing evidence of a pertinent character trait of the victim under MRE 404(a)(2). The change to FRE 404(a)(1) is as follows:

> (a) *Character evidence generally.* Evidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a specific occasion, except:
>
> (1) *Character of accused*. Evidence of a pertinent trait of character offered by an accused, or by the prosecution to rebut the same[;] *or if evidence of a trait of character of the alleged victim of the crime is offered by an accused and admitted under Rule 404(a)(2), evidence of the same trait of character of the accused offered by the prosecution.*

SALTZBURG, *supra* note 5, at 88 (2001 Cum. Supp.).

45. MCM, *supra* note 3, MIL. R. EVID. 405(a). The amended MRE 404(a)(2) will permit only reputation or opinion evidence, and not extrinsic evidence of uncharged misconduct. SALTZBURG, *supra* note 5, at 90 (2001 Cum. Supp.) (reproducing the commentary to FRE 404(a)(1)).

46. MCM, *supra* note 3, MIL. R. EVID. 405(a).

47. *Id.* MIL. R. EVID. 404(a)(3). By testifying, and therefore becoming a witness, the accused also opens the door to the introduction of admissible character evidence under this provision. *Id.* MIL. R. EVID. 608 analysis, app. 22, at A22-46.

opinion and reputation evidence of character for truthfulness;[48] (2) evidence of specific instances of conduct that attack or support the credibility of a witness;[49] (3) evidence of bias or prejudice;[50] or (4) evidence of prior felony convictions.[51]

The focus of MRE 404(a)(3) is distinct from the remaining character evidence rules. Impeachment is intended to assist the finder of fact in determining the credibility of a particular witness and assessing the weight to be given to that witness's testimony. Unlike the bulk of evidence admissible under MRE 404, impeachment evidence is not intended to bear directly on the guilt or innocence of the accused.[52] By definition, credibility evidence does not make an operative fact more or less likely; instead, it pertains to the veracity of those testifying to the operative facts at issue in any given case. As a result, even though the impeachment rules contradict the bar against propensity evidence in the same fashion as the other exceptions, their use does not pose the same potential constitutional issues for the accused.[53]

B. MRE 404(b): The Exception That Swallows the Rule

Military Rule of Evidence 404(b) is a facially simple rule of incredibly complex and potentially powerful application, especially when con-

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48. *Id.* MIL. R. EVID. 608(a). Evidence of truthful character is permitted only after the witness's character for truthfulness has been otherwise attacked. *Id*.

49. *Id*. MIL. R. EVID. 608(b). Specific instances of conduct may not be proven through extrinsic evidence, but may be the subject of cross-examination if probative of the character for truthfulness of the witness at issue. *Id*.

50. *Id.* MIL. R. EVID. 608(c).

51. *Id*. MIL. R. EVID. 609. Military Rule of Evidence 609(c) excludes a conviction more than ten years old unless the court finds its probative value substantially outweighs its prejudicial effect. *Id*. Rule 608(b) permits proof of a conviction through the introduction of extrinsic evidence. *Id.* MIL. R. EVID. 608(b). At least one author has proposed banning all character evidence with the exception of convictions in criminal cases. *See* Melilli, *supra* note 7, at 1621.

52. SALTZBURG, *supra* note 5, at 736 n.44 (citing United States v. Yarborough, 18 M.J. 452 (C.M.A. 1984)).

53. Although he acknowledges an essential difference between the use of substantive character and impeachment evidence at trial, Professor Melilli argues that the possibility of cross-examination of the accused on specific instances of conduct under Rule 608 creates a chilling effect on a defendant's right to testify. Melilli, *supra* note 7, at 1576. Court decisions blurring the distinction between bases of admissibility under Rules 404 and 608 exacerbate this chilling effect. *See* Stephen A. Saltzburg, *Uncharged Acts: Substantive Versus Impeachment Use*, CRIMINAL JUSTICE, Spring 1993, at 35.

trasted with the real limits of MRE 404(a).[54] Rule 404(a) provides narrowly drawn, specific situations in which character evidence may be considered precisely to prove that the person acted in that manner.[55] Although cross-examination into specific instances of conduct is permitted, MRE 404(a) evidence is largely limited to the testimony of witnesses in the form of reputation or opinion.[56] More importantly, MRE 404(a) limits the government to rebuttal of facts that the accused chooses to put in issue.[57]

In contrast, MRE 404(b) permits the prosecution to offer extrinsic evidence of an accused's other uncharged crimes, wrongs, or acts as substantive evidence for an open-ended list of other purposes.[58] To the Rule's many critics, the purported distinction between these permissible and nonpermissible purposes is an artificial, largely academic inferential distinction with little practical effect.[59] Despite these criticisms, there has been no significant movement to amend MRE 404(b) and its federal and state counterparts.[60] Understanding the particular problem of post-offense uncharged misconduct requires examination of both the nature of MRE

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54. There is all but universal consensus on the complexity and power of Rule 404(b) in military, federal, and state criminal courts. *See, e.g.*, SALTZBURG, *supra* note 5, at 529; IMWINKELRIED, *supra* note 10, § 1:02 (citing cases).

55. *See supra* pp. 52-56.

56. MCM, *supra* note 3, MIL. R. EVID. 405.

57. SALTZBURG, *supra* note 5, at 528.

58. MCM, *supra* note 3, MIL. R. EVID. 404(b). Proper purposes include: "proof of motive, opportunity, intent, preparation, plan, knowledge, identify, or absence of mistake or accident." *Id*.

59. *See, e.g.*, Melilli, *supra* note 7; Reed, *supra* note 8; Rothstein, *supra* note 8; Kuhns, *supra* note 8.

60. Instead, the federal and state trend appears to be to create either specific exceptions or new rules of evidence for particular classes of crimes. *See* MCM, *supra* note 3, MIL. R. EVID. 413 (an analogous provision to the federal rule providing for the admissibility of evidence of similar crimes in sexual assault cases); *see, e.g.*, Edward J. Imwinkelried, *A Small Contribution to the Debate over the Proposed Legislation Abolishing the Character Evidence Prohibition in Sex Offense Prosecutions*, 44 SYRACUSE L. REV. 1125, 1126 (1993) (discussing crime-specific trend); Linell A. Letendre, Comment, *Beating Again and Again and Again: Why Washington Needs a New Rule of Evidence Admitting Prior Acts of Domestic Violence*, 75 WASH. L. REV. 973, 992 (2000) (arguing that Washington state adopt an evidentiary rule specifically permitting evidence of prior assaults in domestic violence cases, and discussing other states, including California, Colorado, and Minnesota, that have passed similar legislation).

404(b) evidence and the logical bases of the inferences its admissibility relies on.

1. Proper Purpose and the Permissible Inference Under MRE 404(b)

The prohibition in the first sentence of MRE 404(b) creates a "forbidden theory of logical relevance."[61] That forbidden theory is the classic formulation of the ban on character evidence: that it may not be used "to show action in conformity therewith."[62] For evidence to be admissible under MRE 404(b), the proponent must offer a non-character theory of logical relevance that will not call upon the finder of fact to make the forbidden character inference about the accused's guilt.[63] Those non-character theories include, but are not limited to, "motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident,"[64] a seemingly unrelated group of purposes taken almost wholesale from the pre-rules era common law of evidence.[65] Regardless of the specific purpose articulated, the permissible non-character inference of a particular item of evidence admitted under MRE 404(b) hinges on the aspect of the crime it is offered to prove: the actus reus or mens rea.[66]

Whether offered to prove actus reus or mens rea, the permissible use of character evidence under MRE 404(b) is counterintuitive, and legal scholars disagree both on its basis and whether the distinction can or should be made.[67] In his extensive writings on the subject, Professor Imwinkelried argues that the non-character purpose distinction depends on the nature of the "intermediate inference" the finder of fact must make.[68] Using illustrations, he argues that the forbidden theory requires the finder

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61. IMWINKELRIED, *supra* note 10, § 4:01.

62. MCM, *supra* note 3, MIL. R. EVID. 404(b).

63. IMWINKELRIED, *supra* note 10, § 4:01.

64. MCM, *supra* note 3, MIL. R. EVID. 404(b).

65. *See* IMWINKELRIED, *supra* note 10, § 1:01; H. Richard Uviller, *Evidence of Character to Prove Conduct: Illusion, Illogic, and Injustice in the Courtroom*, 130 U. PA. L. REV. 845, 877 (1982) (discussing the historical basis, and calling Rule 404(b) "an exception without a respectable name, a mongrel of diverse strains joined, it seems, by no more serious principle than happenstance").

66. *See* IMWINKELRIED, *supra* note 10, §§ 4-5; *see also* Uviller, *supra* note 65, at 878.

67. *See* IMWINKELRIED, *supra* note 10, §§ 4-5; Uviller, *supra* note 65; Kuhns, *supra* note 8, at 781; Rothstein, *supra* note 8, at 1264.

68. *See, e.g.*, IMWINKELRIED, *supra* note 10, §§ 4.01, 5.06; Imwinkelried, *supra* note 5, at 41; Edward J. Imwinkelried, *The Dispute over the Doctrine of Chances*, CRIMINAL JUSTICE, Fall 1992, at 16; Imwinkelried, *supra* note 60, at 1125.

of fact to draw an impermissible intermediate inference about the defendant's character.[69] From that inference, the finder of fact is asked to infer that the accused acted consistently with his character in committing the crime at issue.[70] Conversely, the purposes allowed by the rule call upon the finder of fact to make a non-character based intermediate inference. From that permissible intermediate inference, the finder of fact may derive the ultimate inference as to either the accused's commission of the actus reus, or his relevant mens rea. Although Professor Imwinkelried's construct is conceptually descriptive and logically consistent, the model also illustrates the complex and largely artificial nature of the required distinction.[71]

Moreover, Professor Imwinkelried's illustration of permissible purposes does nothing to ease the difficulty of applying Rule 404(b) in the courtroom.[72] The court-martial evidentiary instruction for MRE 404(b) calls upon panel members to abdicate the very common sense and life experience that they are selected for[73] and that other instructions specifically call upon them to use.[74] The permissible inference requires the finder of fact not to use MRE 404(b) evidence for the purpose for which it seems most logically relevant—character. Instead, the panel is called upon to divest the evidence of its character qualities and consider it for some other purpose in a manner that lawyers themselves often have difficulty under-

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69. IMWINKELRIED, *supra* note 10, § 4.01. Although this citation is to the chapter on actus reus, Professor Imwinkelried uses the same analysis in Chapter 5 dealing with mens rea. *See id*. § 5.06.

70. *Id*.

71. Professor Imwinkelried relies on variations of the doctrine of chances for his intermediate inference in both actus reus and mens rea contexts. *See id*. §§ 4.01, 5.06. The doctrine of chances is discussed in more detail *infra* pp. 83-88.

72. Melilli, *supra* note 7, at 1569.

73. UCMJ art. 25(d)(2) (2000). Article 25 requires the convening authority to detail "such members of the armed forces as, in his opinion, are best qualified for the duty by reason of age, education, training, experience, length of service, and judicial temperament." *Id.*

74. After restating the item of evidence and the limited purpose for which it was introduced, the uncharged misconduct instruction directs the panel members, "You may not consider this evidence for any other purpose and you may not conclude from this evidence that the accused is a bad person or has criminal tendencies and that (she)(he) therefore committed the offense(s) charged." BENCHBOOK, *supra* note 23, para. 7-13-1. The instruction on findings, in contrast, reads, "In weighing and evaluating the evidence, you are expected to use your own common sense and your knowledge of human nature and the ways of the world." *Id*. para. 8-3-11.

standing. The fact-finder's potential impermissible use of the evidence is what makes MRE 404(b) such a powerful prosecutorial tool.[75]

2. The Reynolds *Test: MRE 404(b) Evidence in Courts-Martial*

Precisely because of the potential danger for misuse of MRE 404(b) evidence, it is not enough that the government articulate a legitimate non-character theory of logical relevance. To be admissible, the government must also show that the accused actually committed the alleged act offered, and more importantly, the military judge must find that the act is legally relevant.[76] The Court of Appeals for the Armed Forces (CAAF) specified these requirements for admissibility in *United States v. Reynolds*,[77] setting forth a specific three-part test based on precedent.[78] When looking at evidence of uncharged misconduct under MRE 404(b), the military judge must determine (1) whether the evidence "reasonably support[s]" a finding that the accused committed the uncharged misconduct;[79] (2) whether the evidence is logically relevant under MRE 401; and (3) whether the evidence is legally relevant under MRE 403.[80] Of these factors, legal relevance is both the most critical and the most difficult to apply, as the more facially probative the evidence appears the more susceptible it likely is to misuse.[81]

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75. *See* IMWINKELRIED, *supra* note 10, § 1:02.

76. United States v. Reynolds, 29 M.J. 105, 109 (1989). The standard for legal relevance under MRE 403 provides for the exclusion of otherwise relevant evidence when "its probative value is substantially outweighed by the danger of unfair prejudice." MCM, *supra* note 3, MIL. R. EVID. 403.

77. 29 M.J. at 105.

78. *See id.* at 109.

79. *Id.* The fact-finder, not the military judge, must determine if the act itself occurred. Until relatively recently, there was some argument that the judge should make a preliminary finding that the accused had committed the uncharged act by a preponderance of the evidence. The Supreme Court held otherwise in *Huddleston v. United States*, 485 U.S. 681 (1988). Under *Reynolds*, the military judge merely determines whether there is sufficient evidence to support the fact-finders' conclusion. *Reynolds*, 29 M.J. at 109.

80. *Reynolds*, 29 M.J. at 109.

81. *See* IMWINKELRIED, *supra* note 10, § 1:02 (discussing the impact of uncharged misconduct evidence in a number of high-profile criminal cases). The concern over prejudicial effect extends beyond the fact-finder using the evidence to draw an impermissible character inference in determining the guilt of an accused for a particular crime. Other potential prejudice includes the possibility of the fact-finder, even subconsciously, punishing the accused for the other crimes, or according the uncharged misconduct too much evidentiary weight. *Id.* § 1:03.

Unfortunately, MRE 403 analysis is necessarily a case-by-case inquiry, subject to a high level of appellate court deference,[82] and is often done without supporting rationale on the record.[83] Trial and appellate courts frequently reach seemingly inconsistent results, a matter of particular concern considering the unique context and purpose of the military justice system.[84] A pattern of confusing and even contradictory precedent results, making an already complicated rule even more difficult to apply at the trial level.[85] The relatively narrow issue of the admissibility of post-offense uncharged misconduct illustrates these difficulties, and is one area where a per se rule instead of a case-by-case determination is both possible and warranted.

III. The Particular Problem of Post-Offense Uncharged Misconduct

In the recent case of *United States v. Matthews*,[86] the CAAF dealt directly with the issue of the admissibility of post-offense uncharged misconduct to prove knowledge under MRE 404(b). In *Matthews*, the majority held that evidence of a second, uncharged post-offense positive urinalysis was inadmissible under MRE 404(b) to prove knowledge of the charged, preceding use.[87] The decision is unclear whether the prohibition is limited to urinalysis cases or applies to all cases involving post-offense uncharged misconduct.[88] The CAAF muddied the already cloudy waters in this area even further in *United States v. Young*,[89] holding, ostensibly on other than MRE 404(b) grounds, that a tape recorded conversation discuss-

82. United States v. Sullivan, 42 M.J. 360 (1995).

83. This trend may be changing, as the CAAF recently said in dicta that they would give evidentiary rulings less deference "when the judge does not articulate the balancing analysis on the record." United States v. Dewrell, 55 M.J. 131, 138 (2001).

84. "The purpose of military law is to promote justice, to assist in maintaining good order and discipline in the armed forces, to promote efficiency and effectiveness in the military establishment, and thereby to strengthen the national security of the United States." MCM, *supra* note 3, preamble para. 3.

85. *See* Hansen, *supra* note 6.

86. 53 M.J. 465 (2000).

87. *Id*. at 470.

88. *See* United States v. Tyndale, 56 M.J. 209 (2001) (allowing evidence of a 1994 positive urinalysis under MRE 404(b) to rebut an innocent ingestion defense for a 1996 drug offense).

89. 55 M.J. 193 (2001).

ing a future drug sale was admissible to prove the existence of a prior charged conspiracy.[90]

A. *United States v. Matthews*: The Case for a Per Se Rule

Air Force Staff Sergeant (SSgt) Sherrie Matthews had over fourteen years of active duty and was the noncommissioned officer in charge of Information Management at an Office of Special Investigations (OSI) detachment when she was selected for random urinalysis on Wednesday, 24 April 1996, and told to report the next day for testing. Staff Sergeant Matthews claimed to be ill that day, returning to duty on Friday, 26 April 1996. For reasons not explained in the CAAF opinion, SSgt Matthews did not provide a urine sample until Monday, 29 April 1996. When that sample came back positive for marijuana with a concentration of fifty-seven nanograms per milliliter, the command directed a second urinalysis on 21 May 1996. The second urinalysis tested positive for marijuana at a concentration of forty-five nanograms per milliliter.[91]

The government charged SSgt Matthews based on the first urinalysis only, writing the specification to allege wrongful use of marijuana between "on or about 1 April 1996 and 29 April 1996."[92] At a members trial, SSgt Matthews raised the defense of good military character on the merits, introducing affidavits and testifying on her own behalf. She also testified briefly about the circumstances surrounding the positive urinalysis. Her defense counsel attempted to limit the scope of SSgt Matthew's testimony about the urinalysis by asking her a series of pointed, leading questions.[93] First, he asked specifically if she had used marijuana "between on or about 1 April 1996 and 29 April 1996."[94] Staff Sergeant Matthews replied, "No,

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90. *Id*. at 196; *see also* Major Charles H. Rose III, *New Developments in Evidence: Counsel, Half-Right Face, Front Leaning Rest Position—Move!*, ARMY LAW., April 2002, at 63, 64 (acknowledging that these recent cases have "blurr[ed] the lines regarding the general admissibility of evidence under MRE 404(b)" and that "[t]he resulting confusion makes it difficult for counsel to determine when such evidence may come in").

91. *Matthews*, 53 M.J. at 467.

92. *Id*.

93. *Id*.

94. *Id.*

sir."[95] He then asked whether she had "any idea how the results came back positive," to which SSgt Matthews replied, "No, sir, I do not."[96]

Immediately following SSgt Matthews's direct examination, the trial counsel requested an Article 39(a) session, arguing that Matthews's limited statements had "opened the door" for the 21 May 1996 positive urinalysis to be used for impeachment purposes.[97] The military judge agreed, citing alternative, somewhat confusing bases for his decision. First, he found that evidence of the 21 May 1996 urinalysis was admissible to impeach SSgt Matthew's testimony that she did not use marijuana between 1 and 29 April 1996. Despite this statement, the military judge would not allow any reference to the urinalysis in either rebuttal or cross-examination of defense good military character witnesses, claiming that MRE 608 was not applicable.[98]

The military judge went on to find, however, that proof of the uncharged 21 May 1996 urinalysis was admissible under MRE 404(b) to show the "knowing and conscious" nature of the prior, charged use.[99] There is no indication from the opinion that the military judge weighed the factors on the record as required by *United States v. Reynolds*[100] in arriving at this conclusion, although he apparently applied MRE 403 and found that the probative value of the second urinalysis was "not substantially outweighed by the danger of unfair prejudice, confusion to court members, or anything else."[101]

The trial continued with cross-examination of SSgt Matthews. First, the trial counsel asked SSgt Matthews if "good military members . . . use drugs," to which she replied, "No, sir."[102] He then went on to ask if she had provided a sample and tested positive on 21 May 1996, and she replied that she had. The trial counsel then asked if SSgt Matthews was trying to imply having innocently ingested the marijuana "twice within a five-day

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95. *Id*.

96. *Id*.

97. *Id*. at 468.

98. *Id*. Military Rule of Evidence 608(b) permits cross-examination regarding a specific instance of conduct of a witness, including the accused in a criminal case, if the military judge determines that it is "probative of truthfulness or untruthfulness." MCM, *supra* note 3, MIL. R. EVID. 608(b). Unlike MRE 404(b), extrinsic evidence of the alleged conduct is *not* permitted. *Id*.; *see supra* pp. 56-58.

99. *Matthews*, 53 M.J. at 468.

100. 29 M.J. 105, 109 (1989). *See supra* pp. 60-61.

101. *Matthews*, 53 M.J. at 468.

102. *Id*.

period," to which she replied, "It's possible."[103] On redirect, SSgt Matthews denied using marijuana on any occasion.[104]

The trial continued, with the military judge permitting the trial counsel to present expert testimony that it was not scientifically possible for the second positive result to have come from the first use.[105] Before deliberations began, the military judge issued a limiting instruction, directing that the members could use evidence of the 21 May 1996 urinalysis as proof of "knowledge . . . or opportunity" to commit the charged offense, as well as to evaluate "the credibility of [SSgt Matthews's] testimony before the court."[106] Despite the apparent inconsistency of this instruction with the military judge's earlier finding that the evidence was inadmissible under MRE 608, the defense counsel neither objected nor requested additional instructions.[107] The court-martial subsequently convicted SSgt Matthews of wrongful use of marijuana, sentencing her to a bad-conduct discharge and reduction to E-1.[108] The Air Force Court of Criminal Appeals (AFCCA) affirmed the conviction, finding the subsequent urinalysis admissible under both MRE 405 and 608(b).[109]

Rejecting the AFCCA's reasoning, the CAAF reversed SSgt Matthews's conviction on two distinct bases. First, the court cited two earlier urinalysis cases for the general proposition that evidence of prior positive urinalyses are inadmissible to prove wrongful use at a later date,[110] and apparently extrapolating from those cases, found that subsequent, unconnected positive urinalyses are similarly irrelevant.[111] Second, the court found that the military judge's instructions to the members allowing them to consider the evidence to evaluate SSgt Matthews's credibility were both "inadequate and incorrect" because the subsequent positive urinalysis

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103. *Id.*
104. *Id.*
105. *Id.*
106. *Id.* at 469.
107. *Id.*
108. *Id.* at 466.
109. United States v. Matthews, 50 M.J. 584, 590 (A.F. Ct. Crim. App. 1999).
110. *See Matthews*, 53 M.J. at 470 (citing United States v. Graham, 50 M.J. 56, 60 (1999); United States v. Cousins, 35 M.J. 70, 74 (1992)).
111. *Id.*

could not logically impeach her carefully limited direct testimony and the military judge had specifically found MRE 608 to be inapplicable.[112]

1. United States v. Matthews *Does Not Establish a General Rule for the Admissibility of Post-Offense Uncharged Misconduct to Prove Knowledge Under MRE 404(b)*

Close examination of the majority reasoning in *Matthews* reveals that the decision fails to settle the question of the admissibility of post-offense misconduct to prove knowledge or intent under MRE 404(b) in military courts. First, the CAAF's general proposition—that prior positive urinalyses are universally irrelevant to prove subsequent knowing use—is not supported by the cases it cites. Second, as it cursorily found this universal rule so readily apparent, the CAAF failed to analyze specifically the trial court's application (or lack thereof) of the *Reynolds* factors to the MRE 404(b) analysis in this case, and therefore how proper, detailed application of the factors on the record might affect the outcome of future cases. Finally, the CAAF's keen and repeated discomfort with the constitutional implications of the military's urinalysis testing program[113] support limiting the scope of the decision to urinalysis cases.[114]

a. Relevance and Urinalysis: How Sound Is the CAAF's General Proposition?

The majority relied on two distinguishable decisions[115] as authority for its sweeping assertion in *Matthews* that both prior and subsequent pos-

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112. *Id*.

113. *See, e.g*., United States v. Green, 55 M.J. 76 (2001); United States v. Campbell, 52 M.J. 386 (2000). *United States v. Graham* makes the majority opinion of the urinalysis program patently clear, as the CAAF commented in dicta,

> [O]ur service personnel, who are called upon to defend our Constitution with their very lives, are sometimes subject to searches and seizures of their bodies, without probable cause, for evidence of a crime. We should zealously guard the uses of these results and hold the Government to the highest standards of proof required by law.

Graham, 50 M.J. at 60.

114. *See* Hansen, *supra* note 6, at 44; Rose, *supra* note 90, at 65. Unfortunately, narrowing the decision to urinalysis cases only increases the complexity of the rules of evidence for trial-level practitioners and military judges.

itive urinalyses are universally irrelevant to prove knowledge of the charged offense. In *United States v. Graham*,[116] both the facts and legal basis for the decision are markedly different than those presented in *Matthews*. In *Graham*, the accused was an Air Force Master Sergeant (MSgt) charged with wrongful use of marijuana in 1995. Master Sergeant Graham testified at his court-martial that he was "shocked, upset, and flabbergasted" after being notified that his urine had tested positive.[117] Following this testimony, the military judge allowed the government to introduce rebuttal evidence that MSgt Graham had tested positive for marijuana four years earlier, in 1991.[118]

Following the 1991 urinalysis, MSgt Graham had been tried by court-martial and acquitted after raising an innocent ingestion defense, purportedly based on his unwitting consumption of a drug-laced birthday cake.[119] The military judge limited evidence of the 1991 offense to one question about the prior positive result.[120] When cross-examined about the prior result, MSgt Graham replied that he had tested positive, then volunteered that he had been acquitted of that offense.[121] The panel found MSgt Graham guilty, and sentenced him to a bad-conduct discharge, six months'

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115. *Graham*, 50 M.J. at 56; *Cousins*, 35 M.J. at 70. Judge Sulllivan found these cases distinguishable while concurring in the result. *Matthews*, 53 M.J. at 472 (Sullivan, J., concurring).

116. 50 M.J. 56 (1999).

117. *Id.* at 57.

118. *Id*.

119. *Id*. at 57 n.1. Interestingly, MSgt Graham had initially notified the government in the 1995 case that he would be raising yet another innocent ingestion defense, this time allegedly based on the unwitting consumption of a drug-laced brownie. *Id*. at 59-60. The majority characterized MSgt Graham as thinking better of this course of action at trial, perhaps after realizing how the striking foodstuff parallel may have been used against him. The majority characterized this change of tactic as an intentional switch from "innocent ingestion" to the broader "good soldier" defense, changing the scope of permissible rebuttal. *Id*. at 60. Criticizing the majority reasoning, the dissent calls it the "brownie defense without the brownies." *Id*. at 61 n.2.

120. *Id.* at 57. The military judge's rationale for admitting the evidence appears to have been based at least in part on the doctrine of chances, discussed *infra* pages 83-88, as he instructed the members that they could consider the prior result for "the limited purpose as to what likelihood would be that the accused would test positive twice for unknowing ingesting of marijuana and for the likelihood that the accused was flabbergasted when he was informed that he tested positive at this time." *Graham*, 50 M.J. at 58.

121. *Id.*

confinement, and reduction to E-1.[122] The AFCCA affirmed the conviction.[123]

On appeal, the CAAF reversed MSgt Graham's conviction on the grounds that evidence of his 1991 positive result was not logically relevant, either to his surprise at testing positive again in 1995 or to his good soldier defense. The majority dismissed outright the possibility of admitting the evidence under MRE 404(b), finding that the prior urinalysis fit none of the "recognized exceptions."[124] Although the court did not discuss what it meant by the term *exceptions*, the general reference to MRE 404(b) presumably includes knowledge, the element that the prosecution was trying to prove. For the sake of argument, the court assumed the prior urinalysis may have some probative value, and continued its discussion about MRE 404(b) in the alternative.[125]

Glaringly missing from the majority's discussion, however, is any mention of the *Reynolds* test, the supposed standard for measuring the admissibility of evidence under MRE 404(b).[126] Instead, citing a general statement about the probative value of MRE 404(b) from the *Military Rules of Evidence Manual*,[127] the court limited its evaluation of the prior urinalysis under MRE 404(b) to a brief comment on the trial court's failure to "develop a clear relationship between the prior test result and the issues at stake in the present case."[128] What *Graham* apparently stands for, therefore, is not what the *Matthews* majority asserted is a broad rule precluding admissibility of prior positive urinalyses to prove knowledge under MRE

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122. *Id.* at 57.

123. United States v. Graham, 46 M.J. 583 (A.F. Ct. Crim. App. 1997).

124. *Graham*, 50 M.J. at 60. The majority's use of the term *recognized exceptions* to describe the list of possible purposes found in MRE 404(b) represents a significant departure from precedent. Consistent with most federal courts, the CAAF had previously held that the list of purposes enumerated in MRE 404(b) was "illustrative, not exhaustive." United States v. Ferguson, 28 M.J. 104, 108 (1989).

125. *Graham*, 50 M.J. at 60.

126. *See* United States v. Reynolds, 29 M.J. 105, 109 (1989).

127. *Graham*, 50 M.J. at 60.

128. *Id.* In reality, the trial court had come close to strict application of the *Reynolds* factors, although the military judge neglected to mention them as such on the record. The trial court had before it a summarized record of the previous trial, which would be sufficient evidence for the members to conclude that the defendant committed the prior act. Second, the court had determined that the prior positive urinalysis pertained to two facts of consequence to the trial: (1) the likelihood of the accused testing positive twice and (2) his being "flabbergasted" at the positive result. Finally, the court had conducted MRE 403 balancing, and determined that while mention of the previous court-martial would be unfairly prejudicial, mere mention of the positive urinalysis was not. *Id.*

404(b). Instead, *Graham* allows for such evidence to be potentially relevant and admissible, but imposes a stringent requirement for the trial court to articulate clearly its reasoning on the record to establish a permissible basis for relating the prior misconduct to a fact at issue in the current case.

While the second case cited by the *Matthews* majority, *United States v. Cousins*,[129] is a MRE 404(b) urinalysis case, it too is factually distinguishable. In *Cousins*, the accused, an Air Force Senior Airman (SrA), was charged with wrongful use of cocaine in 1989 following a positive urinalysis. At trial, the government called another airman as a witness under a grant of immunity. That airman testified about the events of 29 July 1989, within the window of the charged cocaine offense. He described how he and SrA Cousins allegedly obtained marijuana, adding that their contact had obtained methamphetamine and cocaine the same day. The witness went on to testify that the contact had cut a line of methamphetamine for SrA Cousins. When asked how he knew that the line was methamphetamine, the witness replied that he thought it was methamphetamine because that is what he had seen SrA Cousins use on nine to eleven previous occasions.[130]

The mention of SrA Cousins's nine to eleven prior uncharged methamphetamine uses drew neither objection from the defense counsel nor unilateral action by the military judge. Exacerbating his error, the military judge permitted the trial counsel to call an expert witness who testified not only that methamphetamine worked in much the same way as cocaine, but also that the drug was called "poor man's cocaine."[131]

The accused did not testify, instead using the testimony of a female friend to raise an innocent ingestion defense. The friend testified that she had put cocaine into SrA Cousins's alcoholic drink to relieve pain he was suffering after a hand injury. She claimed not to have told him about the cocaine because "she knew that he was in the Air Force and was not allowed to use drugs."[132] The judge's sole limiting instruction to the panel members was that they could not consider the uncharged methamphetamine evidence to conclude that the accused was "a bad person or had criminal tendencies."[133] The panel convicted SrA Cousins, sentencing

129. 35 M.J. 70 (1992).
130. *Id.* at 71.
131. *Id.* at 72.
132. *Id.*
133. *Id.* at 73.

him to a bad-conduct discharge, confinement for eight months, and reduction to E-1.[134]

The CAAF reversed the conviction, finding plain error in the admission of the prior uncharged misconduct evidence.[135] Although MRE 404(b) was not raised at the trial level, the majority applied the *Reynolds* factors to determine the admissibility of the evidence in question. First, the majority found that the eyewitness testimony of the immunized drug source was sufficient to establish for the panel that the prior misconduct had occurred. Applying the second factor, the majority decided without analysis or explanation that the accused's use of methamphetamines nine to eleven times before the charged offense was irrelevant because those prior uses "did not make it more or less probable" that he had been provided cocaine on the evening in question.[136] The court ultimately concluded that even if the evidence were relevant, it would fail the MRE 403 balancing test due to the danger of unfair prejudice.[137]

Like *Graham*, *Cousins* cannot be made to stand for the essential proposition that the *Matthews* majority cited it for—namely, that the CAAF has "rejected the notion that evidence of an unlawful substance in an accused's urine at a time before the charged offense may be used to prove knowing use on the date charged."[138] In *Cousins*, the government's evidence consisted of an eyewitness account of multiple instances of the accused's prior drug use, not a urinalysis result. Unlike both *Matthews* and *Graham*, the accused in *Cousins* did not testify on his own behalf, relying instead on the testimony of another witness to raise his innocent ingestion claim, and did not raise the defense of good military character on the merits.

Nowhere in the *Cousins* opinion did the majority write that prior drug use is per se inadmissible to prove knowledge under MRE 404(b). Instead, the CAAF focused on both the significant volume of uncharged misconduct evidence presented, to include the government findings argument heavily relying on that evidence, and correctly concluded that the military judge's instructions were inadequate to ensure that the panel did not improperly use the uncharged misconduct evidence before it. The opinion does not, however, foreclose the admissibility of prior drug use to prove knowledge when (1) it is relevant under MRE 404(b) (i.e., the same sub-

134. *Id.* at 71.
135. *Id.* at 74.
136. *Id.*
137. *Id.*
138. United States v. Matthews, 53 M.J. 465, 469 (2000).

stance, whereas *Cousins* involves methamphetamine and cocaine); (2) the military judge scrupulously applies the *Reynolds* factors on the record to determine admissibility; and (3) the members receive proper limiting instructions.

b. Application of the Reynolds *Factors to* Matthews*: A Different Result?*

Adding to the difficulty of discerning a general rule from *Matthews* is the conspicuous absence of the application of the *Reynolds* factors to the subsequent urinalysis.[139] Although the majority cited *Reynolds* as controlling and set out the three-part test at the outset of the opinion, the CAAF utterly failed to apply the factors to the facts of the case. This failure is a striking departure from prior court practice and precedent.[140] Had the court applied the *Reynolds* factors, it could have reached the same decision while establishing clearer precedent for practitioners trying to apply *Matthews* to future issues of post-offense uncharged misconduct.

The first *Reynolds* factor requires that "the evidence reasonably support a finding by the court members that appellant committed prior crimes, wrongs, or acts."[141] The majority discussed this factor indirectly in its response to Judge Crawford's dissenting opinion, commenting somewhat disparagingly that the only proof of the subsequent positive urinalysis was the laboratory report. The government offered expert testimony to admit the first positive result, and the same expert testified that the two positive urinalyses could not have come from the same use. The government did not offer any evidence about the alleged facts and circumstances surrounding the second use.[142]

Although the majority is correct that additional evidence about the facts and circumstances of the uses might be required for the subsequent urinalysis to be admissible under the doctrine of chances,[143] such evidence is not required under the *Reynolds* analysis. The standard for admissibility

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139. *Id.* at 469.

140. *See, e.g.*, United States v. Tanksley, 54 M.J. 169 (2000) (applying the *Reynolds* factors in child sexual abuse case tried before the adoption of Rules 413-415, and finding thirty-year old uncharged sexual misconduct with other child admissible); United States v. Cousins, 35 M.J. 70 (1992) (discussed *supra* pp. 68-70).

141. United States v. Reynolds, 29 M.J. 105, 109 (1989).

142. *Matthews*, 53 M.J. at 470.

143. *See infra* pp. 83-88.

under MRE 404(b) is exceedingly low: enough evidence for the finder of fact to support a reasonable conclusion.[144] The standard is simple sufficiency, which is less than a preponderance of the evidence, and far below beyond a reasonable doubt.[145] The documentary evidence of the positive urinalysis result, coupled with expert testimony that the second positive result came from a separate use, is more than enough evidence under the sufficiency standard for the finder of fact to infer a second knowing use.

The second *Reynolds* factor requires the court to find the evidence logically relevant under MRE 401.[146] To be logically relevant, the existence of the evidence must have a tendency to make a fact of consequence more or less probable.[147] In the usual circumstance, this is a fairly low threshold to meet.[148] In *Matthews*, the trial court found that admission of the 21 May 1996 urinalysis under MRE 404(b) was relevant to establish both opportunity and knowing and conscious use of marijuana between 1 and 29 April 1996.[149] The CAAF rejected these bases for admissibility. In addition, both the CAAF and the AFCCA held that the 21 May 1996 positive urinalysis did not directly contradict the accused's testimony that she had not used marijuana between 1 and 29 April 1996.[150]

The more difficult issue, however, is whether the second urinalysis was relevant to prove knowledge in rebuttal to an innocent ingestion defense.[151] Based on the excerpts of the record reproduced in the CAAF opinion, the answer appears to be "no" because SSgt Matthews's testimony failed to raise the defense. In her carefully limited direct testimony, SSgt Matthews offered not an innocent ingestion defense, but a general denial of having "any idea" of how the results could have come back pos-

144. *Reynolds*, 29 M.J. at 109.

145. *See* Huddleston v. United States, 485 U.S. 681, 690-91 (1988) (specifically rejecting a preponderance of the evidence standard for the admissibility of evidence under the Federal Rule of Evidence 404(b)).

146. United States v. Reynolds, 29 M.J. 105, 109 (1989).

147. MCM, *supra* note 3, MIL. R. EVID. 401; *Reynolds*, 29 M.J. at 109.

148. *See* Hansen, *supra* note 6, at 41 (discussing the low standard for logical relevance).

149. United States v. Matthews, 53 M.J. 465, 468 (2000). Both the military judge and the AFCCA also found the evidence relevant to the accused's credibility, a non-404(b) basis not discussed here. *Id*. In addition, the AFCCA found the evidence relevant to rebut the accused's defense of good military character under MRE 405(a). United States v. Matthews, 50 M.J. 584, 590 (A.F. Ct. Crim. App. 1999).

150. *Matthews*, 53 M.J. at 468.

151. The AFCCA concluded that SSgt Matthews's testimony had raised the defense of innocent ingestion. *Matthews*, 50 M.J. at 590.

itive, coupled with evidence of her good military character.[152] In the absence of the acceptance of a doctrine of chances or other probability based theory of admissibility, the fact that she subsequently tested positive for marijuana does not have any tendency to make her knowledge between 1 and 29 April 1996 more or less probable. Although the majority ultimately reached the same conclusion, the court's failure to delineate the analysis of relevance under MRE 404(b) from other potential bases of admissibility[153] reduces the decision's precedential value to trial practitioners.

The third and final prong of the *Reynolds* test is MRE 403 analysis, which requires the court to determine whether the probative value of the evidence is substantially outweighed by its prejudicial effect.[154] In *Matthews*, the trial court conducted that balancing on the record before allowing the government to introduce evidence of the subsequent urinalysis, concluding that "its probative value was 'not substantially outweighed by the danger of unfair prejudice, confusion to court members, or anything else.'"[155] The military judge did not elaborate on his reasons for arriving at that conclusion.[156]

In contrast, the CAAF does not specifically discuss this factor in the opinion, even though it is a required test of the *Reynolds* analysis. The only mention the majority makes of the possible prejudicial effect of the subsequent urinalysis is a conclusory statement that the evidence was "highly inflammatory."[157] What about probative value? Had the evidence been logically relevant, which it might have been had it pre-dated the charged offense, would it have been probative of knowledge? [158] Courts and commentators universally acknowledge that MRE 404(b) evidence is usually prejudicial, but also usually highly probative.[159] As the court provides no reasoning for its conclusion in *Matthews*, determining what

152. *Matthews*, 53 M.J. at 467.

153. The evidence of the subsequent urinalysis is at least theoretically admissible under current case law to rebut a defense that SSgt Matthews clearly did put on—good military character. The AFCCA found the subsequent urinalysis relevant to rebut that defense under MRE 405(a). *Matthews*, 50 M.J. at 591. Even if the evidence was admissible to rebut the defense of good military character, the CAAF correctly noted that the extrinsic evidence offered at trial would not have been permitted. *See Matthews*, 53 M.J. at 470.

154. United States v. Reynolds, 29 M.J. 105, 109 (1989).

155. *Matthews*, 53 M.J. at 468 (citing MCM, *supra* note 3, MIL. R. EVID. 403).

156. *See id.*

157. *Id.* at 471.

would tip the balance in favor of admitting evidence of subsequent misconduct is difficult.

In light of the questionable precedent the CAAF relied on and the failure to specifically apply the *Reynolds* factors, is it safe to say that the *Matthews* rule against the admission of subsequent uncharged misconduct is limited to the urinalysis context? The best answer, unfortunately, is perhaps.[160] On one hand, the court's language lends itself to limited interpretation: "We . . . reject the notion that *evidence of an unlawful substance in the accused's urine* after the date of the charged offense and not connected to the charged offense may be used to prove knowing use on the date charged."[161] The court apparently based its holding on logical relevance, finding that subsequent misconduct cannot be relevant to show knowledge in the absence of an innocent ingestion defense. If that is true, then the court's statement in dicta that they have "no quarrel"[162] with a doctrine of chances theory of admissibility under different factual circumstances is puzzling, as it appears to allow for different outcomes in other than urinalysis cases.[163] On the other hand, certain members of the court seem to feel that *Matthews* is binding as to the entire issue of subsequent uncharged misconduct as proof of knowledge.[164] Such confusion, readily apparent

158. *See* United States v. Graham, 50 M.J. 56, 59 (1999) (acknowledging the possibility that a prior positive urinalysis may be logically relevant under MRE 404(b) to rebut an innocent ingestion defense); *see also* United States v. Tyndale, 56 M.J. 209 (2001) (holding that a prior positive urinalysis coupled with evidence that the prior use occurred under similar circumstances as the charged offense satisfied logical relevance under MRE 404(b) to rebut an innocent ingestion defense).

159. *See, e.g.*, Imwinkelried, *supra* note 5, at 43; Melilli, *supra* note 7, at 1549.

160. *See* Hansen, *supra* note 6, at 44.

161. *Matthews*, 53 M.J. at 470 (emphasis added).

162. *Id.*

163. *See also Tyndale*, 56 M.J. at 213 (accepting the doctrine of chances as a theory of logical relevance in a subsequent urinalysis case).

164. *Compare* United States v. Wright, 53 M.J. 476, 486 (2000) (Sullivan, J., dissenting) (arguing that *Matthews* stands for the proposition that evidence of misconduct that occurs after the charged offense but before trial is objectionable under MRE 403) *and* United States v. Young, 55 M.J. 193, 197 (2001) (Sullivan, J., dissenting) (arguing again that *Matthews* requires that the subsequent uncharged misconduct not be admitted), *with* United States v. Wright, 53 M.J. 476, 486 (Gierke, J., dissenting) (arguing against admissibility of post-offense sexual misconduct under MRE 413 without citing *Matthews* at all) *and Young*, 55 M.J. at 193 (applying *Reynolds* to an MRE 404(b) subsequent uncharged misconduct case involving conspiracy to distribute marijuana, not resolving the issue, and deciding the case on other grounds).

even within the CAAF itself, does little to assist the trial practitioner in an already complex area of the law.

2. Reconciling Matthews and Young: What Is Current Law?

The CAAF did little to clarify the issues *Matthews* presented in the subsequent case of *United States v. Young*.[165] Marine Corps Corporal (Cpl) Anthony Young was charged with conspiracy to distribute marijuana and distribution of marijuana following a controlled sale to a Naval Criminal Investigative Service (NCIS) informant on 26 December 1995. Another Marine, Private Frank Smith, had approached Cpl Young on 26 December 1995 and asked if he could store some marijuana at Young's home. The following day, the informant approached both Smith and Young at the barracks, asking Smith if Smith could get him some marijuana. Smith agreed to return to complete the sale that evening. At that point, Smith and Young went to Young's apartment, where the marijuana was stored. The two retrieved the marijuana, agreed to split the proceeds, and sold it to the informant back at the base.[166]

On 3 January 1996, the informant returned to Smith and complained of not receiving the entire amount of marijuana that he had asked for the week before. Smith blamed any error on Young, saying that Young was the one who had weighed and bagged the marijuana, and telling the informant that Young had probably smoked some of it while it was stored at Young's apartment. Two weeks later, on 17 January 1996, the informant, wearing an NCIS recording device, approached Young directly and asked to purchase more marijuana.[167]

During the conversation agreeing to another drug purchase, Young and the informant discussed Young's role in the 26 December 1995 drug transaction. At trial, over defense objection under MRE 404(b), the military judge allowed the government to play a tape and introduce a transcript of the entire 17 January 1996 conversation, to include the discussion of the second, uncharged drug transaction.[168] The court-martial panel convicted

165. 55 M.J. 193 (2001).
166. *Id.* at 194.
167. *Id.*
168. *Id.* at 195.

the accused and sentenced him to reduction to E-1, a bad conduct discharge, and thirty-six months' confinement.[169]

The government based the charged offenses on Young's agreement with Smith to sell the marijuana and split the proceeds, and Smith's overt act of selling the marijuana to the informant on 26 December 1995.[170] In response to the defense objection to the portion of the tape concerning the subsequent drug transaction, the government claimed that it was not offering the evidence to show Young's bad character.[171] Instead, the government argued that the panel needed to hear the entire tape to understand adequately that Young's admissions about the 26 December 1995 offenses concerned a drug transaction. Absent the context of a current transaction, the trial counsel argued, statements such as "[d]on't go to him [Smith] anymore" and "I didn't pinch out anything" lacked meaning.[172] The military judge admitted the evidence, and immediately issued a limiting instruction that the members were permitted to consider the tape and transcript "for the limited purpose of its tendency to show that the accused intended to join in a conspiracy," and were not permitted to "conclude from this evidence that [Young] is a bad person or his criminal tendency, and he, therefore committed the charged offenses (sic)."[173]

On appeal, Young argued that it was improper for the trial judge to admit the evidence of the subsequent uncharged misconduct under MRE 404(b).[174] While affirming Young's conviction, the opinion carefully disavows the existence of any per se rule in the area of subsequent uncharged misconduct under MRE 404(b). After setting out the *Reynolds* factors as the standard for admissibility under MRE 404(b), the majority discussed approvingly what it characterized as "prevailing federal practice" allowing the admissibility of subsequent uncharged misconduct under MRE 404(b) and its federal counterpart.[175] Ultimately, however, the CAAF skirted the issue entirely, finding that it "need not decide" the tricky issue of the logical relevance of the subsequent act because the taped conversation was "admissible for a separate limited purpose, to show the subject matter and context of a conversation in which [Young] admitted the charged conspir-

169. *Id.* at 193.
170. *Id.* at 194.
171. *Id.* at 195.
172. *Id.*
173. *Id.*
174. *Id.* at 193.
175. *Id.* at 196. *See also infra* pp. 77-79.

acy."[176] The court then cited *United States v. Matthews* in support of its reasoning.[177]

Unfortunately, as in *Matthews*, *Young* cites the *Reynolds* factors without specifically applying them. The opinion does not analyze the first factor at all, presumably because the taped conversation and testimony of the informant constituted more than sufficient evidence for the panel to determine that the misconduct occurred. The CAAF consciously avoided application of the second, most complicated factor—logical relevance—by deciding the case on other grounds. Finally, applying the third factor and balancing the evidence under MRE 403, the court found that the tape's purported admission is "the most probative and damaging evidence that can be admitted against an accused," outweighing any prejudicial effect.[178]

How, then, can *Matthews* and *Young* be read together to discern a coherent rule? One possible reading is that *Matthews* is intended to apply only in the urinalysis context.[179] Another, suggested by dicta in *Young*, is that subsequent uncharged misconduct cannot be relevant to prove knowledge or intent for prior charged offenses. Discussing possible errors in the military judge's limiting instruction, the CAAF wrote that the power of the admission "greatly overshadowed any suggestion . . . that [Young's] willingness to sell drugs on January 17 *might relate back to [Young's] intent to conspire with Smith on December 27. The prosecution did not rely on this tenuous theory.*"[180] This statement, combined with the court's reliance on two other intent-based decisions finding subsequent uncharged misconduct inadmissible under MRE 404(b),[181] suggests that under current military law, subsequent uncharged misconduct is not admissible to prove either intent or knowledge, regardless of the nature of the charged offenses.

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176. *Young*, 55 M.J. at 196.

177. *Id*. at 197.

178. *Id*. (quoting Arizona v. Fulminante, 499 U.S. 279, 292 (1991)).

179. *See supra* p. 73.

180. *Young*, 55 M.J. at 197 (emphasis added).

181. *Id*. at 197. In addition to *United States v. Matthews*, the majority cited *United States v. Hoggard*, 43 M.J. 1 (1995), parenthetically as follows, "[l]ustful intent in indecent assault 3-6 months after charged indecent act with another victim not admissible to show lustful intent during charged indecent assault." *Young*, 55 M.J. at 197.

Unfortunately for the military practitioner, this premise is far from clear, lacks defined reasoning, and is a possible departure from earlier precedent.[182] Aside from the argument that *United States v. Matthews*[183] is limited to urinalysis cases, the decision in *United States v. Hoggard*[184] is of questionable utility. First, its value as MRE 404(b) precedent has been partially undermined by the advent of MRE 413, which specifically allows the admission of propensity evidence in sexual misconduct cases.[185] Second, the reasoning in *Hoggard*, decided over six years ago, lacks precedential weight in light of *United States v. Wright*,[186] in which the CAAF found uncharged misconduct evidence of a sexual assault occurring six months after the charged offenses to be admissible under MRE 413 as evidence of propensity.[187] Finally, the court's reliance on the weight of other federal authority in *Young* can lead to inapposite conclusions, as the majority of those decisions fail to distinguish between admissibility of subsequent misconduct to prove actus reus versus mens rea.

B. The Weight of Authority Favors Admission of Post-Offense Uncharged Misconduct

Although MRE 404(b) and its federal and state counterparts are frequently referred to as the most litigated of the evidentiary rules,[188] legal scholars have devoted little scholarship to the specific issue of subsequent uncharged misconduct. The *Military Rules of Evidence Manual*[189] does

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182. In her dissent to *United States v. Hoggard*, Judge Crawford wrote, "Since the issue of intent is a question of logical relevance, the probative acts may be subsequent to the offense in issue." 43 M.J. 1, 16 (1995) (Crawford, J., dissenting). The case Judge Crawford relied on for this proposition, *United States v. Colon-Angueira*, 16 M.J. 20 (1983), was a case admitting evidence of subsequent conduct of a victim under MRE 412 to establish her motive to fabricate. *Id*. at 20.

183. 53 M.J. 465 (2000).

184. 43 M.J. 1 (1995).

185. MCM, *supra* note 3, MIL. R. EVID. 413. This article restricts its discussion of the admissibility of subsequent uncharged misconduct to MRE 404(b) and does not address the admissibility of similar acts under MRE 413.

186. 53 M.J. 476 (2000). *Wright* also struck down constitutional due process and equal protection challenges to MRE 413. *See id*. at 481-83.

187. *Id.* at 482.

188. *See, e.g*., SALTZBURG, *supra* note 5, at 529.

189. *Id.*

not address the issue of admissibility of subsequent acts at all. American Jurisprudence 2d states simply,

> Under Rule 404(b), evidence of other crimes, wrongs, or acts may include acts committed prior to, simultaneous to, or after the charged offense so long as the event occurred at a reasonably closely related time. However, it has been suggested that evidence of a subsequent extrinsic offense bears substantially less on predisposition than would a prior extrinsic offense.[190]

The *Federal Rules of Evidence Manual* discusses the issue for only a page and a half.[191] Professor Imwinkelried's extensive treatise on uncharged misconduct evidence, the largest single work in the field, addresses the timing of uncharged misconduct in less than three pages.[192] Ironically, though these works demonstrate an established consensus favoring the admission of subsequent uncharged misconduct evidence, they provide little analysis of the theories relied on to reach that conclusion.

Given this apparent academic agreement, it comes as no surprise that the majority of federal courts allow the admission of evidence of subsequent uncharged misconduct under FRE 404(b).[193] Some courts suggest that evidence of subsequent acts to prove mens rea, if not prohibited, is more rationally tenuous than admission of the same evidence to prove actus reus.[194] The more remote in time the subsequent act is from the prior offense, the more tenuous the connection becomes.[195] Other than this general principle, the federal courts lack uniform reasoning for their decisions. As the CAAF did in *United States v. Young*,[196] the federal circuit courts frequently invoke the Rule 404(b) jurisprudence of their respective jurisdictions without further analysis, making it difficult to derive coherent general principles to follow at the trial level.

Despite the lack of a uniting theory of admissibility, there has been surprisingly little support in the federal system for a per se rule in the area of subsequent uncharged misconduct.[197] In many cases, there are alternate evidentiary bases for admitting the evidence in controversy, allowing courts to decide cases on other issues without having to address the FRE 404(b) rationale for the relevance of subsequent uncharged misconduct. In the remaining cases, just as in the CAAF decisions to date, the case-by-

190. 29 AM. JUR. 2d EVIDENCE § 415 (2d ed. 2000) (citations omitted).
191. *See* MARTIN, *supra* note 13, at 517.
192. *See* IMWINKELRIED, *supra* note 10, § 5:04.

case approach leads to arbitrary and inconsistent results interpreting what were intended to be uniform evidentiary rules.[198]

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193. The Supreme Court has not directly addressed the issue, even when it has arguably been presented. *See* Huddleston v. United States, 485 U.S. 681 (1988) (holding that FRE 404(b) does not require a preliminary finding by the trial court under FRE 104(a) that the uncharged misconduct occurred, and finding that evidence of the defendant's receipt of stolen appliances one month after the charged offenses was relevant to prove knowledge under FRE 404(b) that the blank VCR tapes that were the subject of the charged offenses were also stolen); *see also* Dowling v. United States, 493 U.S. 342 (1990) (holding that admission of evidence of alleged circumstances of robbery occurring two weeks after the charged robbery offense relevant to prove identity under FRE 404(b)); McKoy v. United States, 516 U.S. 1065 (1996) (holding evidence of subsequent uncharged drug misconduct admissible to prove both identity and intent). The federal circuit decisions clearly favor admissibility of subsequent uncharged misconduct. *See, e.g.*, United States v. Crowder, 141 F.3d 1202 (D.C. Cir. 1998) (holding defendant's sale of crack cocaine to undercover officer seven months after charged cocaine offense admissible to prove intent); United States v. Latney, 108 F.3d 1446 (D.C. Cir. 1997) (holding discovery of crack cocaine and cash in car relevant to prove knowledge and intent for charged aiding and abetting crack distribution offense eight months earlier); United States v. Procopio, 88 F.3d 21 (1st Cir. 1996) (holding evidence of criminal association in 1993 relevant to prove charged conspiracy in 1991); United States v. Buckner, 91 F.3d 34 (7th Cir. 1996) (holding subsequent taped discussions admissible to prove knowledge of conspiracy); United States v. Olivo, 80 F.3d 1466, 1469 (10th Cir. 1996) (holding evidence of defendant's arrest for transporting large quantity of marijuana more than one year after charged drug distribution offense admissible to prove intent, knowledge, and lack of accident or mistake); United States v. Buckner, 91 F.3d 34 (7th Cir. 1996) (holding subsequent discussions involving uncharged misconduct admissible to prove intent for prior conspiracy); United States v. Delgado, 56 F.3d 1357 (11th Cir. 1995) (holding subsequent conspiracy and attempt to possess with intent to distribute cocaine relevant to charged cocaine importation, possession, and distribution); United States v. Morsley, 64 F.3d 907, 911 (4th Cir. 1995) (holding subsequent uncharged drug activity admissible to prove both knowledge and identity for prior charged conspiracy offense); United States v. Corona, 34 F.3d 876 (9th Cir. 1994) (holding defendant's subsequent possession of list of drug customers relevant under FRE 404(b) to show knowledge and intent in prosecution for cocaine possession with intent to distribute); United States v. Bradley, 5 F.3d 1317 (9th Cir. 1993) (holding evidence of subsequent uncharged successful homicide inadmissible to prove earlier conspiracy for attempted murder of another); United States v. Watson, 894 F.2d 1345 (D.C. Cir. 1990) (holding evidence of subsequent drug sale admissible to prove knowledge and intent for prior drug distribution); United States v. Childs, 598 F.2d 169 (D.C. Cir. 1979) (holding the post-offense sale of credit cards relevant to prior mail theft).

194. *See* MARTIN, *supra* note 13, at 517; IMWINKELRIED, *supra* note 10, § 5:04; *see also, e.g.*, *Procopio*, 88 F.3d at 29 (holding that evidence seized in shared apartment in 1993 admissible to show 1991 criminal association, but acknowledging that the "need to reason backward from 1993 to 1991 weakens the inference").

C. An Examination of the Theories of Admissibility of Post-Offense Uncharged Misconduct

1. The Federal Court Standard

Although MRE 404(b) and its federal counterpart are most often used to admit prior uncharged misconduct, the text of the Rule refers to "other,"[199] not necessarily prior, acts.[200] The notion that the uncharged act must predate the charged offense was, at one time, a commonly held view.[201] Courts were particularly inclined to find subsequent acts inadmissible to prove mens rea.[202] Over time, federal courts have moved away from this position, allowing subsequent acts evidence to prove mens rea in certain factual circumstances. Courts generally find subsequent acts to prove mens rea relevant when the subsequent act is similar or somehow related to the charged offense, and occurs relatively close in time.[203] The CAAF apparently endorses this view,[204] even though doing so is inconsistent with the court's holding in *United States v. Matthews*.[205] Although in *Matthews* the government could not establish that the two alleged marijuana uses took place under similar circumstances, the positive results did

195. *See, e.g.*, United States v. Mitchell, 49 F.3d 769 (D.C. Cir. 1995) (holding evidence of methamphetamine sale occurring two years after charged conspiracy to distribute cocaine too remote to be considered relevant); United States v. Echeverri, 854 F.3d 638 (3d Cir. 1988) (holding discovery of cocaine in the defendant's apartment eighteen months after the termination of the alleged conspiracy and four years after the latest overt act not relevant to prove knowledge and intent); United States v. Boyd, 595 F.2d 120 (3d Cir. 1978) (holding subsequent chemical purchases not admissible for charged methamphetamine production and distribution offense to prove intent, knowledge, or common plan or scheme).

196. 55 M.J 193 (2001).

197. IMWINKELRIED, *supra* note 10, § 5:04 (citing cases).

198. *See* Rothstein, *supra* note 8, at 1264.

199. MCM, *supra* note 3, MIL. R. EVID. 404(b).

200. *See* MARTIN, *supra* note 13, at 517; IMWINKELRIED, *supra* note 10, § 5.04 (both discussing FRE 404(b)). The *Military Rules of Evidence Manual* does not address the issue of subsequent uncharged misconduct. Although CAAF cited the Drafter's Analysis of MRE 404(b) in *United States v. Young*, 55 M.J. 193, 196 (2001), the analysis also does not address the admissibility of subsequent acts.

201. IMWINKELRIED, *supra* note 10, § 5:04.

202. *Id.*; *see, e.g.*, United States v. Gallo, 543 F.2d 361 (D.C. Cir. 1976).

203. MARTIN, *supra* note 13, at 517. *See, e.g.*, United States v. Watson, 894 F.2d 1345, 1349 (D.C. Cir. 1990) ("Later acts are most likely to show the accused's intent when 'they are fairly recent and in some significant way connected with prior material events.'") (citations omitted).

204. *See* United States v. Young, 55 M.J. 193, 196 (2001).

205. 53 M.J. 465, 470 (2000).

involve exactly the same drug, and the second urinalysis occurred less than one month after the charged offense.[206]

2. A Comparison of MRE 404(b) and MRE 413: The Same Standard for Admissibility of Subsequent Misconduct?

The CAAF's current interpretation of MRE 413,[207] allowing the use of subsequent uncharged acts in sexual assault cases, is likewise inconsistent with *Matthews*.[208] In enacting Rule 413, Congress explicitly intended to remove the Rule 404(b) bar to propensity evidence in sexual assault cases, so that "finders of fact [could] accurately assess a defendant's criminal propensities and probabilities in light of his past conduct."[209] Congress clearly envisioned the use of similar act evidence to establish a defendant's predisposition to commit the charged offense, although they placed no temporal limits within the text of the rule.

In *United States v. Wright*,[210] the government admitted evidence of an uncharged October 1996 sexual assault to establish the accused's propensity to commit the charged sexual assault, which had occurred six months earlier.[211] The CAAF affirmed the conviction, finding the later assault admissible under MRE 413.[212] Finding MRE 403 analysis critical to the constitutionality of the rule, the court enumerated specific factors to consider as part of that balancing, including:

> (1) strength of proof of prior act—conviction versus gossip; (2) probative weight of evidence; (3) potential for less prejudicial evidence; (4) distraction of the factfinder; and time needed for proof of prior conduct; (5) temporal proximity; (6) frequency of

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206. *Id.*

207. Military Rule of Evidence 413 provides, in pertinent part: "In a court-martial in which the accused is charged with an offense of sexual assault, evidence of the accused's commission of one or more offenses of sexual assault is admissible and may be considered for its bearing on any matter to which it is relevant." MCM, *supra* note 3, MIL. R. EVID. 413(a). Military Rule of Evidence 413 is almost identical to its federal counterpart. SALTZBURG, *supra* note 5, at 615.

208. United States v. Wright, 53 M.J. 476, 483 (2000).

209. SALTZBURG, *supra* note 5, at 615 (quoting from the floor statement of Representative Susan Molinari, proponent of the legislation).

210. 53 M.J. 476 (2000).

211. *Id.* at 478.

212. *Id.* at 483.

> the acts; (7) presence or lack of intervening circumstances; and relationship between the parties.[213]

Applying these factors, the majority found that the prejudicial effect of the subsequent assault did not substantially outweigh its probative value.[214]

With the exception of the "temporal proximity" factor,[215] the majority opinion does not discuss the post-offense timing of the similar act. The admission of a subsequent act, however, runs counter to the intended purpose of MRE 413: namely, to establish an accused's propensity or predisposition to commit the offense charged.[216] Addressing the constitutionality of the rule, the CAAF expressed support for more liberal admission of uncharged misconduct generally. First, the majority cited Uniform Code of Military Justice panel selection criteria as a countermeasure to the traditional concern that jurors may accord too much weight to character evidence.[217] Next, discussing the application of MRE 403, the court cited favorably from law review articles advocating "the trend in evidence law towards free proof" and away from "technical rules of evidence designed to prevent fact finders from making mistakes."[218]

The CAAF's statements in *Wright* run directly counter to its reasoning in *United States v. Matthews*,[219] which described the subsequent urinalysis as "highly inflammatory" evidence increasing the "danger of a conviction improperly based on propensity evidence."[220] Admittedly, MRE 413 carved an exception into MRE 404(b), permitting the finder of fact to consider propensity expressly for that purpose or any other deemed relevant, eliminating any concern of impermissible use. At the same time, the

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213. *Id*. at 482.

214. *Id.* at 483.

215. *Id.* at 482.

216. SALTZBURG, *supra* note 5, at 615. Judges Gierke and Sullivan support this view. In Judge Gierke's dissent, he cited both Professor Salzburg's commentary and the floor comments of Senator Dole, the Rule's co-sponsor. Acknowledging that the Rule does not contain an explicit temporal requirement, Judge Gierke concluded nonetheless that Rule 413 "does not authorize admission of evidence of sexual offenses committed after the charged offense." *Id.* at 486 (Gierke, J., dissenting). Citing *United States v. Matthews*, 53 M.J. 465 (2000), Judge Sullivan believed that "evidence of conduct that occurs after the charged offense but before the trial is objectionable under Mil. R. Evid. 403." *Id*. (Sullivan, J., dissenting).

217. *Wright*, 53 M.J. at 480.

218. *Id.* at 483 (citations omitted).

219. 53 M.J. at 465.

220. *Id.* at 471.

Wright majority's embrace of free proof doctrine and approval of the use of subsequent acts to prove similar conduct adds even more confusion to the status of the admissibility of subsequent acts under MRE 404(b).

3. The Doctrine of Chances: A Viable Theory of Admissibility or the "Real Hinterland of Evidentiary Metaphysics?"[221]

Another frequently cited basis for admitting subsequent acts under MRE 404(b) is the doctrine of chances. Professor Imwinkelried is undoubtedly the doctrine's most ardent supporter, having argued repeatedly[222] that the doctrine permits a rational intermediate inference from which the factfinder may draw a proper ultimate inference to establish either the actus reus[223] or mens rea[224] under Rule 404(b).[225]

a. The Operation of the Doctrine of Chances

In the actus reus context, the doctrine of chances usually comes into play when the accused invokes the defense of accident to an event.[226] Professor Imwinkelried often cites an English case, *Rex. v. Smith*,[227] to illustrate the operation of the inference. In the case, a man is accused of murdering his wife, who was found dead in her bathtub. The husband claimed the death was accidental.[228] The English court permitted evidence of the death of the husband's two previous wives, who had also been found drowned in their bathtubs.[229] As Professor Imwinkelried defines it, the

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221. Melilli, *supra* note 7, at 1564.

222. *See* IMWINKELRIED, *supra* note 10, § 4-5; Edward J. Imwinkelried, *The Use of Evidence of an Accused's Misconduct to Prove Mens Rea: The Doctrine That Threatens to Engulf the Character Evidence Prohibition*, 130 MIL. L. REV. 41 (1990); Edward J. Imwinkelried, *"Where There's Smoke, There's Fire": Should the Judge or the Jury Decide the Question of Whether the Accused Committed an Alleged Uncharged Crime Offered Under FRE 404?*, 42 ST. LOUIS L. J. 813 (1998); *Imwinkelried*, supra note 60; Edward J. Imwinkelried, *The Evolution of the Use of the Doctrine of Chances as a Theory of Admissibility for Similar Act Evidence*, 22 ANGLO-AM. L. REV. 73 (1993) [hereinafter Imwinkelried, *Doctrine of Chances Evolution*]; Imwinkelried, *supra* note 68.

223. IMWINKELRIED, *supra* note 10, § 4.

224. *Id.* § 5.

225. *See supra* pp. 58-60.

226. IMWINKELRIED, *supra* note 10, § 4:01.

227. *See, e.g.*, Imwinkelried, *Doctrine of Chances Evolution*, *supra* note 222, at 73 (citation omitted).

228. IMWINKELRIED, *supra* note 10, § 4.01.

229. Imwinkelried, *Doctrine of Chances Evolution*, *supra* note 222, at 77.

doctrine of objective chances provides the intermediate inference that the likelihood of accident decreases with the increase of the number of similar incidents. From that permissible intermediate inference, the finder of fact may then make a permissible ultimate inference about the accused's commission of the actus reus itself. Under this model, the question for the fact-finder becomes not about the accused's personal character, but about the objective chance of the accident at issue.[230]

The doctrine operates in a similar fashion to prove mens rea. In the mens rea setting, the intermediate inference is also one of objective improbability under the doctrine of chances. Citing examples from Professor Wigmore, Professor Imwinkelried argues that it is the recurrence or repetition of the act that increases the likelihood of intent or knowledge and thus the ultimate inference of mens rea.[231] Again, the inference is based on an objective assessment of probability instead of an improper character judgment, making it permissible under Rule 404(b).[232] The more similar the uncharged act, the greater likelihood that it was intentional rather than simple coincidence, although Professor Imwinkelried does cite several examples where he believes such similarity is not required.[233]

b. The Current Status of the Doctrine of Chances in Military Courts

Judge Crawford endorsed the use of Professor Imwinkelried's formulation of the doctrine of chances to prove mens rea in her dissent to *United States v. Matthews*.[234] Specifically, Judge Crawford found it "implausible" that SSgt Matthews could test positive for marijuana in two consecutive months and still "have an innocent state of mind."[235] Relying on the premise that even a single similar instance may be sufficient to establish improbability,[236] Judge Crawford argued that the similarity of the drug, the proximity in time, and the complex steps required to ingest marijuana make the subsequent positive urinalysis admissible under the doctrine of

230. IMWINKELRIED, *supra* note 10, § 4.01.

231. *Id.* § 5:06.

232. *Id.*; *see also id*. § 5:08.

233. *Id.*; *see also id.* § 5:04.

234. 53 M.J. 465 (2000).

235. *Id.* at 473 (Crawford, J., dissenting).

236. Professor Imwinkelried specifically acknowledges the evidentiary weakness of the doctrine of chances to prove knowledge when there is only one additional uncharged act. IMWINKELRIED, *supra* note 10, § 5:27.

chances.[237] Despite disagreeing with Judge Crawford regarding the application of the doctrine in *Matthews*, the CAAF remained open to the possibility that it could provide a basis for admissibility under MRE 404(b) in a case with more similar acts and a greater quantum of proof.[238]

The CAAF found just such a case the following year. In *United States v. Tyndale*,[239] the accused, a Marine staff sergeant, was charged with wrongful use of methamphetamine in 1996. The accused had been acquitted of methamphetamine use in a 1994 court-martial after raising an innocent ingestion defense. At the 1996 court-martial, the accused again raised the defense of innocent ingestion. The military judge allowed the government to introduce evidence of the 1994 positive urinalysis and the accused's 1994 innocent ingestion claim to rebut this defense.[240]

The CAAF hesitantly adopted the doctrine of chances in its decision affirming the conviction. Although, as in *Matthews*, there was evidence of only one additional use, the court found the facts surrounding the accused's claims of innocent ingestion sufficiently similar to make it unlikely that the accused had unknowingly done so twice.[241] The court went on in dicta to strictly limit the doctrine's use in future cases. First, citing *Matthews*, the court wrote that the prior urinalysis result would not have been admissible absent the additional evidence describing the circumstances of the earlier use.[242] Next, the court took a full paragraph of the opinion to explain its reasoning, stating that the "doctrine of chances . . . is not a roll of the appellate dice," and cautioning that "[i]ts use should not be frequent, except in rare factual settings as the one presented in this case."[243]

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237. *Id.* The AFCCA also relied, in part, on the doctrine of chances in its opinion. *See* United States v. Matthews, 50 M.J. 584, 590 (A.F. Ct. Crim. App. 1999).

238. *Matthews*, 53 M.J. at 470.

239. 56 M.J. 209 (2001).

240. *Id.* at 210.

241. *Id.* at 214. The court wrote, "While the circumstances in 1994 did not mirror those related to the 1996 use, they were substantially similar and were clearly probative on the issue of whether [the accused] plausibly found himself in a similar circumstance in 1996 where he might unknowingly be given a controlled substance." *Id.*

242. *Id.* at 213.

243. *Id.* at 214. Judges Gierke and Effron disagreed that the doctrine of chances was properly applied even in this limited circumstance. First, they believed that there was insufficient proof of the accused's prior use of methamphetamine before the members, who heard only the testimony of the prosecutor at the previous court-martial and not a laboratory expert. Second, even if sufficient evidence were presented, they believed the military judge's instructions were "blatantly inadequate" to allow members to properly apply the doctrine. *Id.* at 220 (Gierke, J., dissenting).

c. The Doctrine of Chances Outside of Military Courts

Outside of military courts, the doctrine of chances enjoys widespread acceptance as a theory of logical relevance to prove both actus reus and mens rea under Rule 404(b).[244] The doctrine gained an even stronger foothold with the enactment of FRE 413 in 1994. In proposing the amendment that ultimately became Rule 413, the Justice Department relied in part on "a variation of the so-called doctrine of chances."[245] The Justice Department argued for the admission of similar acts to prove sex crimes on the basis that

> [i]t is inherently improbable that a person whose prior bad acts show that he is in fact a rapist . . . would have the bad luck to be later hit with a false accusation of committing the same type of crime, or that a person would fortuitously be subject to multiple false accusations by a number of different victims.[246]

Even when not explicitly stated as the doctrine of chances, the commonsense application of probability permeates the federal decisions permitting subsequent acts to establish mens rea.[247]

d. The CAAF Should Not Accept the Doctrine of Chances as a Theory of Logical Relevance to Prove Mens Rea in Subsequent Acts Cases

As appealing as the doctrine of chances may be to common sense, the CAAF should heed its own caution and reject the doctrine as a theory of logical relevance to prove mens rea in subsequent act cases. First, the human experience-based version of the doctrine of chances that Professor Imwinkelried so ardently espouses bears little resemblance to its mathematically modeled ancestor.[248] If defined in mathematical terms, the doctrine becomes the basis of an impermissible character inference, as the underlying probability rule requires an assumption that the accused's character remains constant over time.[249] Even absent this inferential probabil-

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244. IMWINKELRIED, *supra* note 10, § 4-5 (citing cases).

245. Imwinkelried, *Doctrine of Chances Evolution*, *supra* note 222, at 1131.

246. *Id*. (quoting the Justice Department analysis to the 1991 Comprehensive Violent Crime Control Act) (citation omitted). Ironically, Professor Imwinkelried did not endorse this variation of the doctrine, finding it unnecessary since the base doctrine already provided a non-character based theory of logical relevance under Rule 404(b). *Id.* at 1130.

247. *See supra* pp. 77-79.

ity problem, using subsequent acts to establish prior knowledge or intent is logically flawed, as an accused's later knowledge or intent should not be used to infer an earlier state of mind.

Second, the evidentiary doctrine of chances to prove mens rea rests on the preliminary assumption that multiple accusations of criminal wrongdoing do not happen to innocent people. That assumption, particularly in a military context, is weak at best. At least one critic has observed that "in real life, a person who has been charged before commonly is charged any time a vaguely similar crime is reported," reducing the improbability of an innocent person being "repeatedly charged falsely" that the doctrine relies on as its starting point.[250] Anecdotally, the same would appear to be true in a military unit. The converse of the soldier of good military character[251] is the prototypical bad soldier. Once guilty of a particular act of misconduct,[252] the bad soldier is more likely to be suspected first, and thus more likely to be accused when a new offense occurs. This phenomenon makes the assumption underlying the doctrine of chances even more suspect when applied to subsequent acts in courts-martial.

Finally, there is merit in the criticism of the evidentiary doctrine of chances as nothing more than "a convoluted explanation of the general propensity inference."[253] Following the complex inferential steps and establishing the required predicate facts for proper application of the doctrine are daunting tasks, particularly in the dynamic nature of a contested court-martial.[254] In the end, the application of common-sense probability provides no greater rationale for practitioners to follow in MRE 404(b) cases than the current conclusory application of MRE 403 analysis by military courts. As a result, accepting the doctrine of chances for acts of sub-

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248. The original doctrine of chances evolved from Pascal's theory of probability. Pascal, with Galileo, derived the theory of probability in response to a commission from seventeenth century gamblers trying to calculate the odds of the then-popular dice game, Hazard. The mathematical doctrine of chances is the basis of modern day moral hazard theory, and played a critical part in the development of the insurance industry. Tom Baker, *On the Genealogy of Moral Hazard*, 75 TEX. L. REV. 237, 246 (1996).

249. Morris, *supra* note 5, at 194.

250. Rothstein, *supra* note 8, at 1263.

251. *See infra* pp. 6-9; *see also* Katz & Sloan, *supra* note 34.

252. The Army tacitly recognizes this very phenomenon, providing for administrative separation from the service for enlisted soldiers who exhibit patterns of misconduct. *See* U.S. DEP'T OF ARMY, REG. 635-200, ENLISTED PERSONNEL para. 14-12b (1 Nov. 2000).

253. Melilli, *supra* note 7, at 1568.

254. *See* IMWINKELRIED, *supra* note 10, §§ 4-5.

sequent misconduct would do little to ensure uniform application of evidentiary rules.

IV. Finding Method in the Madness: The Need for a Coherent Rule

A. The Composition of Military Court-Martial Panels Requires Judicious Use of MRE 404(b) Evidence

The unique nature of the court-martial process demands careful, uniform, and judicious application of MRE 404(b) to subsequent acts of uncharged misconduct. Although panel members are selected for their education, experience, maturity, and judicial temperament, that process usually results in panels with significant amounts of leadership experience.[255] Undoubtedly, education, maturity, and judicial temperament make military panel members more likely to follow the counterintuitive complex evidentiary instructions for using MRE 404(b) evidence.

The members' leadership experience is an important variable to consider. It is difficult to envision a panel member of any rank who has not had a prototypical bad soldier in his unit at some point during his military career. Assuming that is true, panel members may understandably classify an accused involved in even one additional alleged incident as a bad soldier, and as a result, give subsequent uncharged misconduct evidence more weight than it truly deserves. Excluding subsequent uncharged misconduct to prove intent or knowledge places a definable limit on MRE 404(b) evidence, reducing the likelihood that panel members will either accord too much weight to the evidence or draw impermissible inferences about the character of the accused.

Given the current criticism of the military justice system, limits that ensure the fair administration of justice are both prudent and warranted.[256] The government retains the opportunity to present evidence of the soldier's entire duty performance and rehabilitative potential during the sentencing phase, which may include evidence of post-offense misconduct.[257] At sen-

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255. *See, e.g.*, United States v. Beetie, 50 M.J. 489 (1999).

256. The military justice system is currently under increased public scrutiny for its perceived procedural unfairness. *See* REPORT OF THE COMMISSION ON THE 50TH ANNIVERSARY OF THE UNIFORM CODE OF MILITARY JUSTICE (2001), *available at* http://www.nimj.com/Home.asp.

257. MCM, *supra* note 3, R.C.M. 1001(b)(2).

tencing, the panel may properly consider the accused's other misdeeds and whether he is a good or bad soldier to determine an appropriate sentence.

B. Making Subsequent Acts Inadmissible to Prove Knowledge or Intent Reduces the Complexity of MRE 404(b) for Trial Practitioners

Many scholars have criticized both the complex rationale and application of Rule 404(b) in American criminal courts. In England, where the rule originated, the bar to propensity evidence has been replaced with a Rule 403-like balancing test.[258] Here in the United States, scholars have proposed a variety of new approaches. Some of these proposals include outright abandonment of the present ban,[259] barring all Rule 404(b) evidence that did not result in a criminal conviction,[260] and the use of expert witnesses and personality trait theory as a scientific method of proving relevant character evidence.[261]

Outside of abandoning the rule entirely, many of the proposed civilian solutions to the use of Rule 404(b) evidence are impractical for courts-martial. A bar to all evidence except prior criminal convictions would be tantamount to an outright ban, as individuals with prior criminal convictions are generally not qualified for military service. The dubious scientific basis of personality trait theory makes its admissibility questionable under current law,[262] and the prospect of expert testimony in every court-martial involving character evidence is clearly a waste of court-martial time and resources. Finally, given the long lineage of MRE 404(b), utter abrogation of the rule is unlikely to receive much support.

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258. Morris, *supra* note 5, at 205.

259. Uviller, *supra* note 65, at 883. Professor Uviller's proposed rule would still limit character evidence to repetitive prior uncharged acts. *Id.* at 885.

260. Melelli, *supra* note 7, at 1624.

261. Reed, *supra* note 8, at 400.

262. *See* MCM, *supra* note 3, MIL. R. EVID. 702. Federal Rule of Evidence 702 was amended on 1 December 2000 to incorporate the more stringent standards for the reliability of expert testimony set out in *Daubert v. Merrell Dow Pharmaceuticals Inc.*, 509 U.S. 579 (1993), and *Kumho Tire v. Carmichael*, 562 U.S. 137 (1999). By operation of MRE 1102, the amendment to FRE 702 amended MRE 702 effective 1 July 2002. Given the change to MRE 702 and the other types of evidence now being excluded, it is unlikely that personality trait testimony would be found reliable enough to be admissible in courts-martial. *See, e.g.*, United States v. Griffin, 50 M.J. 278 (1999) (excluding expert testimony about false confession); United States v. Blaney, 50 M.J. 533 (A.F. Ct. Crim. App. 1999) (excluding expert testimony about sleep disorders), *cert. granted*, 52 M.J. 412 (1999).

C. The CAAF Should Define Standards and Limits for Admitting Subsequent Acts to Prove Mens Rea Under MRE 404(b)

Given the impracticality of these proposed solutions for courts-martial, the CAAF should specifically define standards and limits within the existing framework of MRE 404(b). As this article illustrates, proper use of MRE 404(b) evidence presents a myriad of issues of ever-increasing complexity. While the law will always require case-by-case determinations, setting defined standards would eliminate appellate issues and ensure more uniform application of the law. The narrow field of the admissibility of post-offense uncharged misconduct to prove mens rea is an area where a per se rule is both warranted and possible.

While the standard was once to exclude evidence of subsequent uncharged misconduct, courts have steadily progressed towards admission without any rational basis for doing so. This trend has resulted in confusing and sometimes contradictory precedent, as a review of CAAF cases on the issue illustrates. At a minimum, the CAAF should mandate specific standards for courts conducting MRE 403 balancing, require factors to be considered on the record at the trial level, and explicitly discuss its analysis of the factors in future decisions on the issue.[263]

D. The President Should Amend MRE 404(b) to Exclude Evidence of Subsequent Uncharged Misconduct to Prove Knowledge or Intent

In the alternative, a simple amendment to MRE 404(b) excluding subsequent uncharged misconduct to prove knowledge or intent would provide clear guidance to trial practitioners and preclude future misapplication of the doctrine of chances to subsequent acts. The proposed amendment would change MRE 404(b) to read as follows:

> (b) *Other crimes, wrongs, or acts*. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may,

263. The CAAF could simply extend application of the factors required for MRE 413 analysis to all MRE 404(b) cases and require military judges to explain their reasoning on the record. *See* United States v. Wright, 53 M.J. 476, 482 (2000) (listing factors for MRE 413 analysis); United States v. Humpherys, 57 M.J. 83, 91 (2002) (giving more appellate deference to the military judge in an MRE 403 decision in which "his reasoning is articulated on the record"); *see also* MCCORMICK, *supra* note 11, at 672 (suggesting additional factors for courts to consider in Rule 403 analysis).

> however, be admissible for other purposes such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity or absence of mistake or accident, *except that evidence of subsequent crimes, wrongs, or acts is not admissible as proof of intent or knowledge*. [U]pon request by the accused, the prosecution shall provide reasonable notice in advance of trial, or during trial if the military judge excuses pretrial notice on good cause shown, of the general nature of any such evidence it intends to introduce at trial.

The proposed amendment does not bar the use of subsequent uncharged misconduct in all circumstances. Instead, the proposal would limit application of the doctrine of chances to prove intent or knowledge to prior conduct, eliminating the tenuous and illogical backward reasoning required to admit subsequent acts under the current rule. Directly amending the rule would ensure the uniform administration of justice in courts-martial with the added benefit of reducing complexity for the trial practitioner.

V. Conclusion

Despite the confusion surrounding MRE 404(b), its guiding principle remains unchanged: an accused should be convicted based on his guilt of a particular offense, not for being a person of bad character or the unit's prototypical bad soldier. Doing otherwise not only violates the accused's constitutionally guaranteed presumption of innocence, it directly affects the fair administration of the military justice system. Under any theory of admissibility, using subsequent acts to establish the accused's knowledge or intent to commit a prior offense is not only illogical, but inconsistent with the spirit of the rule itself.

The CAAF should retain what remains of the bar to propensity evidence and decline to consider subsequent acts as proof of mens rea under MRE 404(b). In addition, the President should amend MRE 404(b) to exclude specifically evidence of subsequent crimes, wrongs, or acts as proof of knowledge or intent. To do so is consistent with the common-law tradition of MRE 404(b), will result in more equitable application of military justice, and will lend method to the madness that has unfortunately come to dominate this area of law.

LET JURORS TALK: AUTHORIZING PRE-DELIBERATION DISCUSSION OF THE EVIDENCE DURING TRIAL

DAVID A. ANDERSON[1]

I am by no means enamored of jury trials . . .[,] but it is certainly inconsistent to trust them so reverently as we do, and still to surround them with restrictions which if they have any rational validity whatever, depend upon distrust.[2]

I. Introduction

The modern trend in jury trials is "to reduce the passive role of jurors."[3] Following this trend, the military has been on the forefront of juror innovations for the last twenty years.[4] Military jurors (known as "members")[5] may request to call or recall witnesses, interrogate witnesses, take notes during trial and use them in the deliberation room, request during deliberations that the court-martial be reopened and portions of the record be read to them or additional evidence introduced, and take written

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2. Learned Hand, *The Deficiencies of Trials to Reach the Heart of the Matter*, *in* LECTURES ON LEGAL TOPICS: 1921-1922, at 89, 101 (James N. Rosenberg et al. eds., 1926).

instructions with them into the deliberation room.[6] The essential purpose behind the innovations is to improve juror comprehension.[7]

A new, cutting-edge innovation, adopted for civil trials by Arizona in

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3. Douglas E. Motzenbecker, *Letting Jurors Join the Fray*, ABA LITIGATION NEWS, Nov. 1999, at 7. The argument in favor of the active, as opposed to the passive, juror model has been encapsulated as follows:

> Most of the reforms occurring . . . around the country are based on positions relating to effective adult learning that have been accepted by social scientists for many years. These experts have long been critical of the traditional legal model of trials. In this model, jurors are passive observers. Communications are one-way only. There is no feedback allowed, and instructions are not provided until the trial is virtually over. Critics contend that this model flies in the face of what studies about adult learning have proven. The educational model of learning, in contrast to the legal model, has demonstrated conclusively that active learners are better learners. This model rejects the *tabula rasa* vision of jurors as "blank slates" and recognizes the reality that jurors bring with them their own frames of reference. The existence of these frames of reference underscores the need to have continuous feedback and the need to provide a legal frame of reference as early in the trial as possible.

Jacqueline A. Connor, *Jury Reform: Notes on the Arizona Seminar*, 1 J. LEGAL ADVOC. & PRAC. 25, 25-26 (1999). *See* Valerie P. Hans, *U.S. Jury Reform: The Active Jury and the Adversarial Ideal*, 21 ST. LOUIS U. PUB. L. REV. 85, 87-90 (2002) (distinguishing between active and passive jury systems); Paula L. Hannaford, Valerie P. Hans, Nicole L. Mott & G. Thomas Munsterman, *The Timing of Opinion Formation by Jurors in Civil Cases: An Empirical Examination*, 67 TENN. L. REV. 627, 629-33, 650 (2000) (describing the legal and story models of juror decision-making; adding a third model, the "Schema-Tailored" model, based on the view that jurors make up their minds right after opening statements; and concluding that "the data appear far more consistent with the Story Model of juror opinion formation than with either the Legal Model or the Schema-Tailored Model").

4. These juror innovations originated in the 1984 edition of the *Manual for Courts-Martial* (*Manual*). *See* MANUAL FOR COURTS-MARTIAL, UNITED STATES (1984). The 1984 *Manual* implemented the Military Justice Act of 1983, Pub. L. No. 98-209, 97 Stat. 1393, and "made sweeping changes in court-martial practice" and "introduced numerous new procedures." Thomas J. Feeney & Captain Margaret L. Murphy, *The Army Judge Advocate General's Corps, 1982-1987*, 122 MIL. L. REV. 1, 26 (1988).

5. Jurors in the military court-martial process are referred to as "members." MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 103(14) (2002) [hereinafter MCM] ("The members of a court-martial are the voting members detailed by the convening authority."). For ease and clarity of discussion, the term "jurors" will be used interchangeably with court-martial panel "members."

6. *Id.* MIL. R. EVID. 614(a)-(b), R.C.M. 913(c)(1)(F), 920(d), 921(b).

7. *See* Jacqueline A. Connor, *Los Angeles Trial Courts Test Jury Innovations and Find They Are Effective*, 67 DEF. COUNS. J. 186, 187 (2000).

1995 and Colorado in 2000 and employed to a limited extent in Washington, D.C., is the practice of permitting jurors to deliberate as the case progresses, a practice contrary to the standard practice of preventing jurors from discussing the case until all the evidence has been presented and the case submitted to them.[8] To date, however, no jurisdiction has adopted a rule authorizing jurors in a criminal trial to discuss a case as it progresses. Should the military take the first revolutionary step? A review of the following matters will assist in answering this question: (1) the traditional basis for the prohibition against pre-deliberation discussion; (2) case law on the subject; (3) the Arizona, California, District of Columbia, and Colorado jury reform projects; (4) social science research; and (5) current military practice.

II. Traditional Prohibition

The earliest English juries could investigate the facts, talk with the parties and themselves, and question the witnesses without leave of court.[9] By the mid-sixteenth century, however, "[n]umerous controls were imposed on jury autonomy and activism, and rules of evidence emerged as a means to limit and control the information made available to jurors."[10] When the jury model was imported to the colonies in America, that model "was based on nearly complete passivity."[11] Of the many controls aimed at regulating the flow of information to the jury, one was a rule prohibiting

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8. Paula L. Hannaford, Valerie P. Hans & G. Thomas Munsterman, *Permitting Jury Discussions During Trial: Impact of the Arizona Reform*, 24 L. & HUM. BEHAV. 359, 360 (2000); COLO. CIV. JURY INSTR. 1:4, 1:8; Marc Fisher, *Designer Juries Are Made for Shabby Justice*, WASH. POST, Oct. 14, 2000, at B1 (noting that Judge Gregory Mize, of the D.C. Superior Court, "allows jurors to discuss the case among themselves during breaks in the trial"); E-mail from Gregory Mize, Senior Retired Judge, Superior Court of the District of Columbia, to author (Sept. 18, 2002) [hereinafter E-mail from Gregory Mize] (on file with author).

9. B. Michael Dann, *"Learning Lessons" and "Speaking Rights": Creating Educated and Democratic Juries*, 68 IND. L.J. 1229, 1231-33 (1993).

10. B. Michael Dann, *Free the Jury*, LITIG., Fall 1996, at 5. *Accord* Dann, *supra* note 9, at 1234.

11. Dann, *supra* note 10, at 5. *Accord* Dann, *supra* note 9, at 1235.

jurors from discussing the case with other jurors until the case was submitted to them for formal deliberations.[12]

The primary justification for this rule is to prevent jurors from making premature judgments about the case or an issue in the case before hearing all of the evidence, the judge's instructions on the law, and the argument of counsel.[13] In addition to this basic justification, numerous other reasons have been proffered: (1) "[S]ince the prosecution's [or plaintiff's] evidence is presented first, any initial opinions formed by the jurors are likely to be unfavorable to the defendant, and there is a tendency for a juror to pay greater attention to evidence that confirms his initial opinion.";[14] (2) "[O]nce a juror declares himself before his fellow jurors[,] he is likely to stand by his opinion even if contradicted by subsequent evidence.";[15] (3) "[T]he defendant is entitled to have his case considered by the jury as a whole, not by separate groups or cliques that might be formed within the jury prior to the conclusion of the case.";[16] (4) "An aggressive, overpowering juror might dominate discussions and have undue influence on the views of others.";[17] (5) "Allowing juror discussions prior to deliberations may detract from the ideal of the juror as a neutral decision[-]maker.";[18] (6) "The quality of deliberations may decline as jurors become more familiar with each other's views.";[19] (7) "[Pre-deliberation] discussions might produce a narrower and more confined set of final deliberations.";[20] and (8) "Juror stress might increase because of the conflicts produced by prior discussions."[21] At the heart of all these reasons is the goal of maintaining the open-mindedness of the jurors until the close of the case.[22]

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12. *See* Dann, *supra* note 9, at 1235-36, 1262; Robert D. Myers & Gordon M. Griller, *Educating Jurors Means Better Trials: Jury Reform in Arizona*, JUDGES' J., Fall 1997, at 14.

13. Janessa E. Shtabsky, Comment, *A More Active Jury: Has Arizona Set the Standard for Reform with Its New Jury Rules?*, 28 ARIZ. ST. L.J. 1009, 1028 (1996); *see* Dann, *supra* note 9, at 1262; William W. Schwarzer, *Reforming Jury Trials*, 132 F.R.D. 575, 593 (1990); Winebrenner v. United States, 147 F.2d 322, 328 (8th Cir. 1945).

14. Commonwealth v. Kerpan, 498 A.2d 829, 831 (Pa. 1985).

15. *Id.*

16. *Id.*

17. JURY TRIAL INNOVATIONS 139 (G. Thomas Munsterman et al. eds., 1997).

18. *Id.*

19. *Id.*

20. *Id.* at 140.

21. *Id.*

22. *See* Schwarzer, *supra* note 13, at 593.

III. Case Law

Over the last six decades, both federal and state courts have examined the issue of pre-deliberation jury discussions. The cases fall into three categories. The first category involves those cases in which the trial court simply omits to admonish the jury against pre-deliberation discussions.[23] The second category involves those cases in which jurors fail to abide by such an admonition.[24] The final category involves those cases in which the court affirmatively advises the jury that pre-deliberation discussions are permissible.[25] Although the first two categories offer some tangential insight into judicial philosophies about the propriety of or necessity for an admonition against pre-deliberation instructions, the last category, consisting of six federal cases and about a dozen state cases, directly illustrates

23. United States v. Abrams, 137 F.3d 704 (2d Cir. 1998); United States v. Weatherd, 699 F.2d 959 (8th Cir. 1983); United States v. Carter, 430 F.2d 1278 (10th Cir. 1970); United States v. Rotolo, 404 F.2d 316 (5th Cir. 1968); United States v. Viale, 312 F.2d 595 (2d Cir. 1963).

24. United States v. Gigante, 53 F. Supp. 2d 274 (E.D.N.Y. 1999); United States v. Williams-Davis, 90 F.3d 490 (D.C. Cir. 1996); United States v. Bertoli, 40 F.3d 1384 (3d Cir. 1994); United States v. Resko, 3 F.3d 684 (3d Cir. 1993); United States v. Abcasis, 811 F. Supp. 828 (E.D.N.Y. 1992); United States v. Armstrong, 909 F.2d 1238 (9th Cir. 1990); United States v. Oshatz, 715 F. Supp. 74 (S.D.N.Y. 1989); United States v. Piccarreto, 718 F. Supp. 1988 (W.D.N.Y. 1989); Stockton v. Virginia, 852 F.2d 740 (4th Cir. 1988); United States v. Wiesner, 789 F.2d 1264 (7th Cir. 1986); United States v. Yonn, 702 F.2d 1341 (11th Cir. 1983); United States v. Edwards, 696 F.2d 1277 (11th Cir. 1983); United States v. Pantone, 609 F.2d 675 (3d Cir. 1979); United States v. Chiantese, 582 F.2d 974 (5th Cir. 1978); United States v. Nance, 502 F.2d 615 (8th Cir. 1974); United States v. Klee, 494 F.2d 394 (1974); Goodloe v. Bookout, 980 P.2d 652 (N.M. Ct. App. 1999); State v. Aldret, 509 S.E.2d 811 (S.C. 1999); State v. Newsome, 682 A.2d 972 (Conn. 1996); Hunt v. Methodist Hosp., 485 N.W.2d 737 (Neb. 1992); Holland v. State, 587 So.2d 848 (Miss. 1991); People v. Rohrer, 436 N.W.2d 743 (Mich. Ct. App. 1989); People v. Saunders, 467 N.Y.S.2d 110 (N.Y. Sup. Ct. 1983); People v. Gordon, 430 N.Y.S.2d 147 (N.Y. App. Div. 1980); Commonwealth v. Scanlon, 400 N.E.2d 1265 (Mass. App. Ct. 1980).

25. United States v. Wexler, 657 F. Supp. 966 (E.D. Pa. 1987); United States v. Meester, 762 F.2d 867 (11th Cir. 1985); United States v. Lemus, 542 F.2d 222 (4th Cir. 1976); State v. Thomas, 414 S.E.2d 783 (S.C. 1992); Gallman v. State, 414 S.E.2d 780 (S.C. 1992); State v. Joyner, 346 S.E.2d 711 (S.C. 1986); State v. Pierce, 346 S.E.2d 707 (S.C. 1986); State v. Castonguay, 481 A.2d 56 (Conn. 1984); State v. Washington, 438 A.2d 1144 (Conn. 1980); State v. Gill, 255 S.E.2d 455 (S.C. 1979); People v. Monroe, 270 N.W.2d 655 (Mich. Ct. App. 1978); People v. Blondia, 245 N.W.2d 130 (Mich. Ct. App. 1976); Wilson v. State, 242 A.2d 194 (Md. Ct. Spec. App. 1968); People v. Hunter, 121 N.W.2d 442 (Mich. 1963).

the nature of judicial opinion on the use of an affirmative advisement permitting pre-deliberation discussions.

A. Federal Cases

The first reported federal case to consider an affirmative advisement for pre-deliberation discussions was *Winebrenner v. United States*,[26] a criminal conspiracy case involving two defendants. In *Winebrenner*, the trial court instructed the jurors, over defense objection, that although they could not discuss the case with others, they could discuss the case among themselves; the court also declined to admonish the jury not to form or express an opinion as to the guilt or innocence of the defendant until the case had been submitted to them.[27] The defendants were later convicted and appealed. The U.S. Court of Appeals for the Eighth Circuit, in a 2-1 decision, reversed the convictions based solely on the court's finding that this instruction was improper, without testing for either prejudice or harmless error.[28]

In the opinion of the appellate court, the instruction of the trial court authorizing pre-deliberation discussions had three flaws. First, the jurors were authorized to discuss the case without any preliminary instructions on the presumption of innocence or the burden and quantum of proof. Second, the jurors were not prohibited from discussing the case in groups of less than the entire jury. And third, the jurors might form premature judgments about the evidence, thereby "in effect shift[ing] the burden of proof and plac[ing] upon the defendants the burden of changing by evidence the opinion thus formed."[29] The court concluded: "The effect of the admonition given in this case is, of course, impossible of ascertainment, but as it violates the principle that an accused is entitled to be heard before he is condemned, and the essentials to a fair trial, the judgments appealed from must be reversed."[30]

The dissent disagreed with the reversal, finding that there was "no hint or suggestion [in the record] that any of the jurors in this case [made up their minds before the evidence was in], or that any one of them spoke an improper word throughout the trial."[31] As the dissent viewed the case,

26. 147 F.2d 322 (8th Cir. 1945).
27. *Id.* at 327.
28. *Id.* at 329.
29. *Id.* at 328.
30. *Id.* at 329.

in the absence of evidence to the contrary, the jurors could be presumed to have obeyed the court and not committed their minds until all the evidence was in, and the majority had "no right to assume the contrary."[32] Thus, "the right of the defendants to open minded deliberation was preserved to them," and "[t]hey were not prejudiced."[33]

In *United States v. Lemus*, [34] the trial judge instructed the jury, over defense objection, that discussion among the jury members prior to deliberation was "entirely proper."[35] The instruction was accompanied by "a lengthy admonition to the jury" that "advanced all of the reasons why jurors should not discuss the evidence and instructed them to refrain from reaching any conclusions until all the evidence was submitted and an appropriate charge given."[36] Reviewing this instruction on appeal, the U.S. Court of Appeals for the Fourth Circuit cited *Winebrenner* and found that if the instruction had been given "in the abstract," it would have "clearly jeopardized defendant's right to a fair trial."[37] However, because the instruction included an admonition as to open-mindedness, the court found that any danger to the defendant had been minimized and that any error in the instruction had been rendered harmless.[38]

In *Meggs v. Fair*,[39] the trial court instructed the jury, without objection, that "it's perfectly all right to talk about a witness'[s] testimony" during recesses.[40] Accompanying that instruction was the qualification that the jurors should not arrive at any conclusions until all of the evidence was in. On appeal, the petitioner contended that the instruction "undermined his [S]ixth [A]mendment right to a fair trial before an impartial jury."[41] Noting that the two federal courts which had previously considered the issue of an affirmative pre-deliberation instruction, *Winebrenner* and *Lemus*, were "divided," the U.S. Court of Appeals for the First Circuit "decline[d] to take a definitive stand on this delicate issue."[42] Instead, the

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31. *Id.* at 330.

32. *Id.*

33. *Id.* The dissenting judge commented on human nature to support his opinion: "No normal honest Americans ever worked together in a common inquiry for any length of time with their mouths sealed up like automatons or oysters." *Id.*

34. 542 F.2d 222 (4th Cir. 1976).

35. *Id.* at 223-24.

36. *Id.* at 224.

37. *Id.* (citing *Winebrenner*, 542 F.2d at 326-29).

38. *Id.*

39. 621 F.2d 460 (1st Cir. 1980).

40. *Id.* at 463.

41. *Id.*

court rejected the petitioner's contention by concluding that "the judge's admonition to the jury members not to commit themselves until [they had heard all the evidence, argument, and instructions] minimized any danger to the defendant."[43]

In *United States v. Broome*,[44] the trial judge informed the jurors, without objection, that they could discuss the case among themselves "at breaks and at other times," but they were not to try "to arrive at any judgment or decision about the facts in this case until the case [was] completely tried."[45] On appeal, the U.S. Court of Appeals for the Fourth Circuit held that because the instruction had not been challenged at trial, "the issue of its propriety was not preserved."[46] Even if the issue had been preserved, the court stated that it would follow the *Lemus* precedent and find only harmless error.[47]

Next, in *United States v. Meester*,[48] the trial court instructed the jury, without objection, that there was "nothing wrong with chit chat" during breaks in the trial.[49] That instruction included a warning not to reach any conclusions until the end of the trial:

> Until we reach that point, don't do anything to make up your mind. We know it's normal for fourteen people to talk about the case when you're together at a break, talk about a witness or in general. There's nothing wrong with chit chat. The prohibition is that you do nothing to make up your mind as to whether or not you will believe a witness or more than one witness or whether or not it then looks like somebody is guilty or innocent. Just keep those decisions in reserve until we reach the end of the case.[50]

The appellants contended that the "chit chat" instruction "denied them their [S]ixth [A]mendment right to trial by an impartial jury."[51] The U.S.

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42. *Id.* at 463-64.
43. *Id.* at 464.
44. 732 F.2d 363 (4th Cir. 1984).
45. *Id.* at 366.
46. *Id.*
47. *Id.*
48. 762 F.2d 867 (11th Cir. 1985).
49. *Id.* at 880.
50. *Id.*
51. *Id.*

Court of Appeals for the Eleventh Circuit disagreed, finding no plain error in the instruction. Because the jurors had received "a lengthy admonition" to refrain from reaching a decision until the end of the case, the appellate court found that the trial court had "minimized any danger of jury partiality by repeatedly emphasizing the need for the jurors to keep an open mind until the conclusion of the case."[52]

Finally, the last reported federal case to consider this issue is *United States v. Wexler*.[53] In *Wexler*, the district court judge instructed the jurors that they could talk with each other about the case but that they could not have private conversations or make up their minds "until they had heard all of the evidence, the arguments of counsel, the court's charge, and the viewpoints of their fellow jurors."[54] After being convicted of drug distribution, the defendant requested a new trial, contending that his right to a trial by a fair and impartial jury had been denied as a result of that instruction.[55] In denying the request for a new trial, the district court judge provided a detailed explanation as to why he "decided not to prohibit jury discussion during the course of the trial."[56]

First, he believed that his instruction, with its caveats that the jurors could only discuss matters when they were all together and that they could not make any decisions until after the case was completed, was adequate "to overcome the reasons traditionally given for not allowing jurors to consult with each other during the progress of the case."[57] With respect to the reason that because the prosecution's evidence is presented first, any initial opinions formed by juror's are likely to be unfavorable to the defendant, he disagreed and offered the following comment:

> [This reason] really refers to the order in which the evidence is presented and is no more a reason for prohibiting jury discussion than it is for encouraging it. It assumes that discussion will inevitably lead a juror to an opinion but that the absence of discussion will mean that no juror will reach an opinion on anything. This is an unvarnished non-sequitur which needs only to be stated to be exposed.[58]

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52. *Id.*
53. 657 F. Supp. 966 (E.D. Pa. 1987).
54. *Id.* at 967.
55. *Id.*
56. *Id.* at 969.
57. *Id.*
58. *Id.* at 968.

As to the reason that once a juror declares himself before his fellow jurors, he is likely to stand by his opinion even if contradicted by subsequent evidence, the judge again disagreed and offered the following analysis:

> [This reason] has the ring of pop psychology but is based upon an assumption which is, to my knowledge untested and, to my mind, unbelievable. It assumes that the juror who states an opinion is less likely to change his mind than the juror who has an opinion but does not state it. That would follow only in the rare instance where a need for self-vindication overwhelms a juror's sense of duty. I believe that the vast majority of jurors are concerned, responsible, conscientious citizens who take most seriously the job at hand. I find it difficult to believe that as a group they are more interested in justifying their own loosely formed notions than in doing justice.[59]

The second reason given by the judge for allowing pre-deliberation jury discussions was his belief that jurors "could discharge their responsibilities in a better way if they were permitted to discuss matters as the trial progressed."[60] He argued that if jurors were permitted to discuss the case among themselves, they might (1) "alert each other as to matters which may affect credibility[;]" (2) be "more attentive, more apt to be interested and involved, [and] more likely to focus on the issues as they unfold[;]" and (3) aid each other in assimilating, comprehending, and recollecting the evidence.[61] Finally, he stated that to tell jurors that they are not to discuss the case "runs contrary to what they would normally be expected to do," and

> [t]o give jurors instructions that run counter to human experience and common sense, is to make them suspicious of all the admonitions of the court[:] To expect them to listen to testimony which they recognize is to form the basis of perhaps the most important decisions about the lives of other people that they will ever make, and not discuss it with their fellow decision makers until they have had an ample chance to forget the subtleties, nuances, and actual words must strike them as being extraordinary. I firmly believe that jurors are more likely to do that which

59. *Id.*
60. *Id.* at 969.
61. *Id.*

> makes sense than to follow a command which is never explained because it is completely unexplainable.[62]

On appeal, the *Wexler* decision was reversed on other grounds.[63] Nonetheless, in a footnote, the U.S. Court of Appeals for the Third Circuit commented that it "believe[d] that the firmly-rooted prohibition against premature jury discussion [was] well-founded," and that "[a]n instruction that permits the jurors to discuss the evidence before conclusion of the case [was] erroneous."[64]

B. State Cases

In a series of criminal cases, the Supreme Court of South Carolina overturned convictions in which the trial judge instructed the jurors that they could discuss the case among themselves before deliberations provided they did not make up their minds about the case before it was submitted to them.[65] The court held in each case that such an instruction was "inherently prejudicial" because it, in essence, invited the jurors to begin deliberations before the close of the case, and it required reversal.[66] The fact that the judge cautioned the jurors against making up their minds "d[id] not cure" the improper instruction.[67] The court articulated its reasoning for juror silence before deliberations as follows:

> The human mind is constituted such that when a juror declares himself, touching any controversy, he is apt to stand by his utterances to the other jurors in defiance of evidence. A fair trial is more likely if each juror keeps his own counsel until the appropriate time for deliberation.[68]

In Connecticut, the supreme court, heavily relying on the reasoning in the federal *Winebrenner* case, held that if a trial judge expressly instructs jurors that they may discuss the case among themselves prior to its submis-

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62. *Id.* at 970 (citation omitted).

63. United States v. Wexler, 838 F.2d 88 (3d Cir. 1988).

64. *Id.* at 92.

65. State v. Thomas, 414 S.E.2d 783 (S.C. 1992); Gallman v. State, 414 S.E.2d 780 (S.C. 1992); State v. Joyner, 346 S.E.2d 711 (S.C. 1986); State v. Pierce, 346 S.E.2d 707 (S.C. 1986); State v. Gill, 255 S.E.2d 455 (S.C. 1979).

66. *Gallman*, 414 S.E.2d at 782.

67. *Pierce*, 346 S.E.2d at 710.

68. State v. McGuire, 253 S.E.2d 103, 105 (S.C. 1979).

sion to them, that instruction jeopardizes a defendant's right to an impartial trial and is an "error of constitutional magnitude," even if the jurors are cautioned not to come to any conclusions during their discussions.[69] The court reasoned that "the danger of allowing the jurors to discuss the case before all the evidence is presented and the court instructs on the law is that in the course of the discussion a juror may form and state an opinion before he has heard the countervailing evidence and may then be reluctant to be persuaded otherwise, either by the evidence or by other jurors."[70]

In Michigan, the court of appeals held that an instruction permitting the jury to discuss the case among themselves during the trial was reversible error. In arriving at this conclusion, the court adopted the rationale of the federal *Winebrenner* case.[71]

The only reported state court case not to condemn an instruction permitting pre-deliberation discussions is *Wilson v. State*.[72] In this case, the Maryland Court of Special Appeals held that a criminal defendant was not denied a fair and impartial trial when the trial judge advised the jurors that they could talk about the case throughout the trial, so long as they were alone among themselves or in the jury room.[73] The court stated that it was "not persuaded by *Winebrenner* that the right to due process of law is properly extended to embrace the matter," and it noted that an admonition against pre-deliberation discussions was not required "constitutionally or by statute, rule or decision."[74]

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69. State v. Washington, 438 A.2d 1144, 1149 (Conn. 1980). *Accord* State v. Castonguay, 481 A.2d 56, 66 (Conn. 1984).

70. *Castonguay*, 481 A.2d at 66.

71. People v. Monroe, 270 N.W.2d 655, 657 (Mich. Ct. App. 1978); *see* People v. Blondia, 245 N.W.2d 130 (Mich. Ct. App. 1976); People v. Hunter, 121 N.W.2d 442 (Mich. 1963).

72. 242 A.2d 194, 196-200 (Md. Ct. Spec. App. 1968).

73. *Id.* at 198-99.

74. *Id.* at 199.

IV. Jury Reform Projects

A. The Arizona Jury Reform Project

In 1993, the Arizona Supreme Court established the Committee on More Effective Use of Juries (Committee) to review Arizona's jury system and jury trial procedures.[75] Two of the principal concerns of the Committee were "enforced juror passivity during trials and unacceptably low levels of juror comprehension."[76] After a year and a half of study, the Committee issued a final report that contained fifty-five recommendations designed to totally reform the Arizona jury system.[77]

One of the Committee's recommendations was to allow structured pre-deliberation discussions of the evidence among the jurors in both civil and criminal cases. [78] The formal recommendation stated: "After being admonished not to decide the case until they have heard all the evidence, instructions of law and arguments of counsel, jurors should also be told, at the trial's outset, that they are permitted to discuss the evidence among themselves in the jury room during recesses."[79]

The Committee anticipated four benefits from this recommendation: (1) "Juror comprehension will be enhanced, given the benefits of interactive communication;" (2) "Questions can be asked and impressions shared on a timely basis rather than held until deliberations or forgotten;" (3) "A juror's tentative or preliminary judgments might surface and be tested by the group's knowledge;" and (4) "Divisive 'fugitive' conversations and cliques might be reduced, given the opportunities for 'venting' in the presence of the entire jury in the jury room."[80] The Committee offered the following rationale for its recommendation:

> The traditional admonition that forbids any and all discussions about the case among jurors until deliberations commence is a corollary of the "passive juror" model. Through enforced passivity, jurors are expected to merely store all evidence for later use and to suspend all judgments until the trial is over. The

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75. ARIZONA SUPREME COURT COMMITTEE ON MORE EFFECTIVE USE OF JURIES, JURORS: THE POWER OF 12, at 2, 5-6 (1994) [hereinafter ARIZONA SUPREME COURT COMMITTEE].

76. *Id.* at 2.

77. *Id.* at 3, 19-28.

78. *Id.* at 96.

79. *Id.*

80. *Id.* at 97-98.

> assumption is that pre-deliberation discussions of the evidence by jurors will inevitably lead to premature judgments about the case.
>
> The committee concluded that this limitation of all discussions among trial jurors and the accompanying assumption that jurors can and do suspend all judgments about the case are unnatural, unrealistic, mistaken and unwise. Behavioral researchers agree that the juror's natural tendency is to actively process information as and after it is received, forming at least tentative preferences or judgments about the evidence as they do. By their own admissions to jury researchers, at least 11 to 44% of jurors discuss the evidence among themselves before deliberations.
>
> We agree with those who favor permitting structured or regulated discussions of the evidence among jurors during trial as long as they are told that it is important to reserve final judgment until all the case has been presented and *why* it is important to do so. These authorities conclude that the traditional rule forbidding *all* discussions is anti-educational, nondemocratic and not necessary to ensure a fair trial.[81]

In 1995, as a result of this recommendation, the Arizona Supreme Court amended its procedural rules to permit pre-deliberation discussions of the evidence among jurors in civil, but not criminal, trials.[82] Under the amended rule, the discussions had to be only among the jurors, with all the jurors present, and only behind the closed doors of the deliberation room. The trial judge retained the discretion to proscribe such pre-deliberation discussions if that proscription was believed "necessary to preserve a fair trial."[83] The amended rule currently remains in effect and provides as follows:

> If the jurors are permitted to separate during the trial, they shall be admonished by the court that it is their duty not to converse with or permit themselves to be addressed by any person on any subject connected with the trial; except that the jurors shall be instructed that they will be permitted to discuss the evidence

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81. *Id.* at 96-97 (citation omitted).

82. B. Michael Dann & George Logan III, *Jury Reform: The Arizona Experience*, 79 JUDICATURE 280, 281, 283 (1996); ARIZ. R. CIV. P. 39(f); ARIZ. R. CRIM. P. 19.4.

83. Dann & Logan, *supra* note 82, at 283.

> among themselves in the jury room during recesses from trial when all are present, as long as they reserve judgment about the outcome of the case until deliberations commence. Notwithstanding the foregoing, the jurors' discussion of the evidence among themselves during recesses may be limited or prohibited by the court for good cause.[84]

Contrary to the recommendation of the Committee, the Arizona Supreme Court declined to amend its rules of criminal procedure to allow pre-deliberation discussions among jurors in criminal cases. The court expressed "concerns about a division among the federal courts of appeals on the question whether permitting juror discussions deprives the defendant of the Sixth Amendment right to an impartial jury."[85]

In late 1996, the Committee reconvened to consider a number of additional jury reform issues.[86] In its final report filed in 1998, the Committee once again favored pre-deliberation discussions of the evidence among jurors in criminal cases. The Committee noted that "[a]necdotal reports from judges, jurors, and most lawyers" with respect to this reform in civil trials were "very positive."[87] Based on two years of experience with the civil reform, the Committee cited seven benefits to jurors from pre-deliberation discussions: (1) "Enhanced jury comprehension of evidence and preliminary instructions on the law as a result of interactive communication;" (2) "Memories and impressions of testimony are better shared and questions are answered on a timely basis;" (3) "Jurors get to know each other better and some 'bonding' occurs;" (4) "Group questions can be better framed and submitted to the Court;" (5) "Juror stress is reduced;" (6) "'Fugitive' conversations are reduced;" and (7) "Deliberations are more focused and efficient since the jurors have already dealt with much of the 'evidentiary foreground.'"[88] Nonetheless, despite these cited benefits, the

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84. ARIZ. R. CIV. P. 39(f). A comment to the rule offers this advice to judges: "In exercising its discretion to limit or prohibit jurors' permission to discuss the evidence among themselves during recesses, the trial court should consider the length of the trial, the nature and complexity of the issues, the makeup of the jury, and other factors that may be relevant on a case by case basis." *Id.*

85. Dann & Logan, *supra* note 82, at 283.

86. ARIZONA SUPREME COURT COMMITTEE ON THE MORE EFFECTIVE USE OF JURIES, JURORS: THE POWER OF 12, PART TWO, at ii (1998).

87. *Id.* at 8.

88. *Id.* at 8-9.

Arizona Supreme Court to date has not approved pre-deliberation discussions among jurors in criminal trials.[89]

B. The California Jury Reform Project

In 1995, the Judicial Council of California created a Blue Ribbon Commission on Jury System Improvement (Commission) "to conduct a comprehensive evaluation of the jury system and to make timely recommendations for improvement."[90] In a report completed in 1996, the Commission issued twenty-two recommendations, many of which mirrored those issued by the Arizona Committee.[91] With respect to pre-deliberation discussions among jurors, however, the Commission's beliefs diverged from those of the Arizona Committee.

The Commission analyzed the pros and cons of pre-deliberation discussions among jurors as follows:

> Human beings process new information and reduce stress in part by talking to other persons. The proscription against jurors talking amongst themselves about the case thus runs contrary to basic human psychological needs. It is ironic that the one thing which jurors have in common—they are all sitting together watching a case develop—is precisely the one thing they are not permitted to talk about. The stress on jurors is particularly acute in longer trials. Several studies suggest that the rule is violated by substantial numbers of jurors.
>
> To address this issue, some advocate permitting jurors to discuss a case while the case is still on-going, which is the ordinary practice in England. This might be accomplished in several ways. First, jurors could simply be permitted to talk to each other infor-

89. *See* ARIZ. R. CRIM. P. 19.4 ("The court shall admonish the jurors not to converse among themselves . . . until the action is finally submitted to them.").

90. BLUE RIBBON COMMISSION ON JURY SYSTEM IMPROVEMENT: JUDICIAL COUNCIL OF CALIFORNIA, FINAL REPORT 1 (1996) [hereinafter BLUE RIBBON COMMISSION], *reprinted in* J. Clark Kelso, *Final Report of the Blue Ribbon Commission on Jury System Improvement*, 47 HASTINGS L.J. 1433, 1434 (1996). *See* Natasha K. Lakamp, Comment, *Deliberating Juror Predeliberation Discussions: Should California Follow the Arizona Model*, 45 UCLA L. REV. 845, 847 (1998).

91. Lakamp, *supra* note 90, at 848-49. *Compare* BLUE RIBBON COMMISSION, *supra* note 90, at 2-11, *with* ARIZONA SUPREME COURT COMMITTEE, *supra* note 75, at 19-28.

> mally about the case. Second, in long trials, the court could schedule periodic times (e.g., the end of the day or just after lunch) when the jury could engage in discussions as a group.
>
> The proposal to permit pre-deliberation discussions among jurors raises serious concerns. Delaying discussion until deliberation is intended to help jurors maintain an open mind. Pre-deliberation discussions might encourage jurors to become locked into positions before all of the evidence is in. Civil and criminal defendants would arguably be particularly disadvantaged because the jury would probably have had several discussions before the defense even begins to put on its case. Finally, the distinction between discussions and deliberations is tenuous at best. If a jury is permitted to retire to the jury room mid-trial for "discussions," it is easy to imagine those discussions quickly turning into deliberations. In fact, it is difficult to imagine how such discussions could avoid becoming deliberations.[92]

Believing that the risks connected with pre-deliberation discussions outweighed the benefits, the Commission recommended retaining the California rule barring discussions about a case before deliberations.[93] Notwithstanding this recommendation, the Commission "acknowledge[d] the value to jurors of permitting discussions, particularly in long cases," and "encouraged" California judges "to experiment in long civil trials with scheduled pre-deliberation discussions upon stipulation of counsel."[94] The Commission also recommended that the Judicial Council reconsider the issue at a later time when it could review "the experience in Arizona."[95]

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92. BLUE RIBBON COMMISSION, *supra* note 90, at 90 (citation omitted).

93. *Id*. A jury-reform task force in Texas similarly rejected the idea of pre-deliberation jury discussions: "In recognition of the potential harm to the impartiality of Texas trial proceedings, the Jury Task Force recommends that the current rule of procedure barring discussions among and by jurors about a case prior to deliberations remain in place." Tom M. Dees, III, *Juries: On the Verge of Extinction? A Discussion of Jury Reform*, 54 SMU L. REV. 1755, 1783 (quoting SUPREME COURT OF TEXAS JURY-REFORM TASK FORCE, FINAL REPORT 138 (1997)).

94. BLUE RIBBON COMMISSION, *supra* note 90, at 90.

95. *Id.* at 91.

C. The District of Columbia Jury Project

The Council for Court Excellence, a Washington, D.C. nonprofit, nonpartisan civic organization, initiated the D.C. Jury Project in 1996 by assembling a thirty-six member Jury Project Committee (Project Committee) "to evaluate and strengthen the institution of the jury in the District of Columbia."[96] After a year of study, research, and debate, the Project Committee proposed thirty-two jury improvement recommendations.[97] On the issue of pre-deliberation discussions, it commented that based on both social science research and anecdotal reports from jurors, the traditional prohibition against these discussions "runs contrary to human nature and is a source of frustration for jurors, especially in long or complicated trials."[98] It listed three advantages to the practice: (1) "improved juror comprehension and recollection of the evidence[;]" (2) "enhanced juror satisfaction and jury cohesion[;]" and (3) the "opportunity for the court to more effectively regulate juror discussions that may already be taking place."[99] In counterbalance, the Project Committee identified three disadvantages: (1) "the potential for jurors to become locked into positions before all the evidence is in, thus presenting the possibility for unfairness to the party who has not completed his or her case[;]" (2) "reduced quality of deliberations resulting from jurors having already become familiar with each other's views[;]" and (3) "a detraction from the ideal of the juror as a neutral decision maker."[100] In assessing the merits of the issue, the majority of the Project Committee determined that "[b]ecause the potential impacts of allowing pre-deliberation discussions are not yet well understood," it would be "premature to make a recommendation" until a written evaluation of the Arizona experiment in this area was published.[101] Although this evaluation has been completed, no further recommendation has been forthcoming.[102]

To date, the D.C. courts have not adopted any formal change with respect to pre-deliberation discussions. In D.C. Superior Court, whether to

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96. COUNCIL FOR COURT EXCELLENCE, DISTRICT OF COLUMBIA JURY PROJECT, JURIES FOR THE YEAR 2000 AND BEYOND: PROPOSALS TO IMPROVE THE JURY SYSTEMS IN WASHINGTON, D.C. v-vi, 75 (1998), *available at* http://www.courtexcellence.org/juryreform/juries2000_final_report.pdf.

97. *Id.* at v-xi.

98. *Id.* at 63.

99. *Id.*

100. *Id*.

101. *Id*.

102. E-mail from Gregory Mize, *supra* note 8.

allow pre-deliberation discussions has been left to the discretion of the particular trial judge. Three judges on that court have invoked this discretion in civil trials. One of these judges, Judge Gregory E. Mize, has arrived at several conclusions about the procedure after allowing its use in approximately 100 civil trials. First, he observed that attorneys rarely raised any objection to it. Second, he calculated from post-trial jury discussions that juries exercised the procedure in about half of the cases, and more often in the longer trials. And finally, he noted that several jurors commented after trial that the procedure allowed them the opportunity to formulate witness questions when witnesses returned to the stand after a recess.[103]

D. The Colorado Jury Reform Project

In 1996, the Colorado Supreme Court created the Committee on the Effective and Efficient Use of Juries in Colorado (Jury Committee) to study its jury system and recommend improvements designed, *inter alia*, "to enhance the effectiveness of communication with jurors."[104] Following a year of study, the Jury Committee proposed twenty-six reforms, one of which recommended that Colorado courts experiment with allowing juror pre-deliberation discussion: "Upon stipulation of counsel, or in pilot courtrooms, courts should experiment in civil trials with permitting juror pre-deliberation discussions, particularly in lengthy or complex cases."[105] In arriving at this recommendation, the Jury Committee debated both sides of the issue:

> Jurors are presently prohibited from talking among themselves about the case until the judge directs them to deliberate. Prohibiting jurors from talking about the case as the trial progresses may be contrary to basic human psychological needs and the adult learning process.
>
> Some commentators have urged that, because pre-deliberation discussions will occur regardless of whether they are permitted,

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103. *Id*.

104. REPORT OF THE SUPREME COURT COMMITTEE ON THE EFFECTIVE AND EFFICIENT USE OF JURIES IN COLORADO 3 (1997) [hereinafter COLORADO SUPREME COURT COMMITTEE REPORT], *available at* http://www.courts.state.co.us/supct/committees/juryreformdocs/juryref.pdf. *See also* AMERICAN JUDICATURE SOCIETY, ENHANCING THE JURY SYSTEM: A GUIDEBOOK FOR JURY REFORM 6 (1999).

105. COLORADO SUPREME COURT COMMITTEE REPORT, *supra* note 104, at 3-4, 48.

> the interests of justice are better served by giving jurors guidance on when and how such discussions should take place.
>
> The contrary view recognizes that all trials are a piece-by-piece presentation of evidence, with one of the parties going first and the other(s) waiting to present their evidence at a later time. The fear is that if the jury discusses the matter prior to hearing all of the evidence, the arguments of counsel, and the instructions on the law of the particular case, the jury could reach a decision and become intractable, or certain jurors could dominate the process.[106]

In 1997, the Colorado Supreme Court adopted the Jury Committee's pre-deliberation discussion recommendation in principle,[107] and in 1998, it authorized a one-year pilot study to evaluate the procedure in civil cases in selected courtrooms.[108] That study involved fifty-three civil jury trials, thirteen judges, and eleven different jurisdictions. The outcome of the study weighed heavily in favor of pre-deliberation discussion:

> Ninety-three percent of the jurors found that informal, pre-deliberations discussions helped them better understand the evidence and resolve confusion about the evidence during trial. Ninety-four percent believed that the information discussions improved formal deliberations. Only 6 percent of the jurors reported that all jurors' points of view were not thoroughly considered during informal discussions. Fourteen percent of the jurors believed that informal discussions encouraged jurors to make up their minds before all the evidence was presented, although 62 percent strongly disagreed with this conclusion.
>
> The support of the judges involved in the pilot was also very strong. Based on their experience, only 7 percent expressed opposition to the reform, while 33 percent were neutral, and 60 percent were strongly supportive. Attorneys involved in the pilot were less enthusiastic than the jurors and the judges, but strong support increased from 19 percent before any experience

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106. *Id*. at 48-49 (citation omitted).

107. *Id*. at 4.

108. JURY REFORM IN COLORADO IMPLEMENTATION PLAN 4 (1998), *available at* http://www.courts.state.co.us/supct/committees/juryreformdocs/98_jury_imp.pdf; Rebecca L. Kourlis & John Leopold, *Colorado Jury Reform*, COLO. LAW., Feb. 2000, at 22.

> with the reform to 32 percent after the attorneys' involvement in a pilot trial.[109]

Based on these results, the Pilot Study Committee recommended in March 2000, that the Colorado Supreme Court modify the jury instructions "to permit jurors in civil cases to discuss the evidence among themselves in the jury room when all jurors are present, as long as they reserve judgment about the outcome of the case until deliberations commence."[110] The Colorado Supreme Court approved this recommendation, and now pre-deliberation jury discussions are permitted in civil trials.[111] The current Colorado jury orientation instruction in civil trials provides the following pre-deliberation admonition:

> You may discuss the evidence during the trial, but only among yourselves and only in the jury room when all of you are present.
>
> You must not, individually or as a group, form final opinions about any fact or about the outcome of this case until after you have heard and considered all of the evidence, the closing arguments, and the rest of the instructions I will give you on the law. Keep an open mind during the trial. Form your final opinions only after you have discussed this case as a group in the jury room at the end of the trial.[112]

V. Social Science Research

Three studies have been conducted to examine Arizona's experience with pre-deliberation jury discussions. The first study involved a survey while the second and third studies involved actual field experiments. Each study is discussed below.

A. Lakamp Survey

In December, 1996, the editor-in-chief of the UCLA Law Review conducted a survey of 208 Arizona state court judges with respect to Ari-

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109. Kourlis & Leopold, *supra* note 108, at 22.

110. COLO. CIV. JURY INSTR. 1:4 n.2.

111. *Id*.

112. *Id.* INSTR. 1:4; *see also id.* INSTR. 1:8 (providing a similar admonition for recesses).

zona's pre-deliberation discussion reform. Of the ninety judges who returned the survey, thirty-eight had actual experience with civil jury trials in which pre-deliberation discussions were permitted. Of those thirty-eight judges, the vast majority felt that based upon their experiences, the pre-deliberation discussion reform was a positive development that should be continued in civil trials.[113] Some of the benefits of the reform observed by the judges included increased juror attentiveness, increased juror comprehension, increased juror happiness, and a decrease in deliberation time to reach a verdict.[114] In addition, the majority felt that neither side had any opposition to the rule. In fact, none of the judges believed that the reform benefited one party over the other.[115] Although most of the responding judges indicated that the pre-deliberation discussion reform did not create any problems, some risks were noted. One risk was a danger that jurors might arrive at a firm judgment before hearing all the evidence. Another was that because jurors were allowed to talk among themselves, they might conclude that they also could talk about the case with others.[116] Even with these noted risks, however, the survey results "provide[d] positive support that, in practice, the benefits of the predeliberation proposal outweigh[ed] the potential concerns."[117]

B. National Center for State Courts Field Experiment

From June 1997 to January 1998, researchers from the National Center for State Courts (NCSC), in cooperation with the Arizona Supreme Court, conducted a field experiment on pre-deliberation discussions in civil jury trials in the superior courts of four Arizona counties.[118] In this six-month study, trials were randomly assigned a "Trial Discussions" designation, signifying a trial in which jurors were instructed that they could discuss the evidence before final deliberations, or a "No Discussions" designation, signifying a trial in which pre-deliberation discussions were prohibited. Pre-deliberation discussion juries were advised that they could

113. Lakamp, *supra* note 90, at 871.

114. *Id*. at 871-73.

115. *Id*. at 873.

116. *Id*. at 874.

117. *Id*. at 875. The author specified two limitations of her survey. First, "those judges with success in implementing the reform and who originally supported enacting the measure [may have been] more inclined to respond to the survey than those who did not favor the reform measure." *Id.* at 874. Second, "there may exist a propensity on the part of the Arizona judiciary to overemphasize or overexaggerate the success of its reform program." *Id*. at 875.

only discuss the evidence in the jury room and only when all of the other jurors were present. After every trial, questionnaires asking for a variety of information about the case were distributed to jurors, judges, attorneys, and litigants. Approximately 160 civil trials were studied.[119] Based on an evaluation of the results of the questionnaires, the researchers offered the following findings about pre-deliberation discussions among jurors.[120]

First, the researchers found that many of the juries that were permitted to discuss the case before deliberations did not. This result was related to the length and complexity of the cases. "Jurors in short, uncomplicated trials were less likely to discuss the evidence during the trial" than were jurors in complex, lengthier cases.[121]

Second, the researchers found that "to a much greater degree than previous[ly] estimate[d]," jurors from both groups violated the judge's pretrial admonition not to have informal discussions with other jurors or to discuss the case with family or friends.[122] Nonetheless, jurors in the Trial Discussions group were "less likely to talk about the evidence with family and friends than jurors [in the No Discussions group], which suggests that being allowed to discuss the evidence provides an outlet that reduces the need to discuss the case with family and friends."[123]

Third, the researchers found that the vast majority of both judges and jurors who supported the pre-deliberation discussions reform believed that the discussions improved juror comprehension and thought that the discussions did not encourage premature judgments about the evidence.[124] About half of the lawyers and litigants did not support the reform, but agreed that juror discussions improved juror comprehension. The majority

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118. Paula L. Hannaford-Agor, Valerie P. Hans & G. Thomas Munsterman, *"Speaking Rights": An Evaluation of Arizona's Rule Permitting Juror Discussions in Civil Trials*, 85 JUDICATURE 237, 238 (Mar.-Apr. 2002) [hereinafter *"Speaking Rights"*]; Hannaford, Hans & Munsterman, *supra* note 8, at 363-65; Valerie P. Hans, Paula L. Hannaford & G. Thomas Munsterman, *The Arizona Jury Reform Permitting Civil Jury Trial Discussions: The Views of Trial Participants, Judges, and Jurors*, 32 U. MICH. J.L. REFORM 349, 365-66 (1999) [hereinafter *Arizona Jury Reform*].

119. *"Speaking Rights"*, *supra* note 118, at 238.

120. *Id*. at 238-43.

121. *Id*. at 239.

122. *Id*.

123. *Id*.

124. *Id*.

of them, however, felt that the pre-deliberation discussions would encourage premature decision-making.[125]

Fourth, the researchers "found no clear evidence that jurors who [were] permitted to discuss the evidence with one another before final deliberations reach[ed] conclusions about the evidence earlier than jurors who [were] prohibited from discussing the evidence."[126] "Contrary to fears that trial discussions might solidify early opinions, jurors assigned to the Trial Discussions group reported that they changed their minds just as often as those assigned to the No Discussions group."[127]

Fifth, the researchers found that jurors perceived that pre-deliberation discussions were "very helpful for resolving confusion about the testimony and evidence presented during trial."[128] Whether pre-deliberation discussions actually improved juror comprehension, however, is unknown because the study was not designed to assess that factor. The researchers did compare jury verdicts from both the Trial Discussions group and the No Discussions group with judicial assessments of the evidence presented at trial, but the comparison between the two groups was statistically insignificant. As a result, "at least according to the judges' assessments, there was no evidence in this study that juror discussions either improved or reduced the accuracy of jury verdicts."[129]

Finally, the researchers found "no evidence of greater cohesiveness among jurors who discussed the evidence during the trial."[130]

In view of these findings, the researchers arrived at three conclusions. First, pre-deliberation discussions among jurors did not appear to lead to premature judgments about the evidence and the verdict. Second, such discussions may aid juror comprehension. And third, such discussions may reduce a juror's need to discuss the case with non-jurors. The researchers offered this summary:

> Discussions about the evidence during civil jury trials did not appear to lead to prejudgment or prejudice, at least to the extent we were able to measure in our study. Nor did we detect dra-

125. *Id*. at 240.
126. *Id*. at 240-41.
127. *Id*. at 241.
128. *Id*. at 242.
129. *Id*.
130. *Id*.

> matic improvements in jury decision making across cases that affected jury verdicts. Nevertheless, if the jurors' own reports are to be believed, this technique may be quite helpful to jurors both for understanding the evidence and as an appropriate outlet for jurors' thoughts and questions that might otherwise be discussed with family or friends.[131]

C. Pima County Field Experiment

Instead of relying solely on surveys or questionnaires, a third research project evaluated the Arizona pre-deliberation discussion reform by videotaping the jury in addition to using post-trial questionnaires.[132] This research project, authorized by the Arizona Supreme Court in 1998 and completed in 2002, was conducted in Pima County, Arizona.[133] In this project, the researchers videotaped the trial and all juror discussions and deliberations in fifty actual civil trials.[134] Thirty-seven of these trials permitted pre-deliberation discussions and were referred to as "Discuss" trials. The other thirteen trials prohibited the use of pre-deliberation discussions and were referred to as "No Discuss" trials.[135] After each trial, the judge, jurors, and lawyers were asked to complete a questionnaire about the trial and their personal reactions to it.[136] To analyze the effects of the discussion reform, the researchers compared the pre-deliberation discussions, final deliberations, and jury verdicts of the Discuss juries with the No Discuss juries.[137] Based on an assessment of the trials, videotapes,

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131. *Id*. at 243. The researchers noted several questions that remained unanswered:

> (1) Would the introduction of a unanimity requirement for verdicts (Arizona requires a 3/4 majority in civil cases while many other jurisdictions require unanimity) alter the findings?; (2) Would the differences in the burdens of proof between civil (preponderance of the evidence) and criminal (beyond a reasonable doubt) trials affect the impact of trial discussions?; and (3) Would the greater risk involved in a criminal trial (loss of liberty as opposed to a monetary loss in a civil trial) affect the impact of trial discussions?

Id. at 242-43.

132. SHARI SEIDMAN DIAMOND ET AL., JUROR DISCUSSIONS DURING CIVIL TRIALS: A STUDY OF ARIZONA'S RULE 39(F) INNOVATION iv (2002), *available at* http://www.law.duke.edu/pub/vidmar/ArizonaCivilDiscussions.pdf.

133. *Id*. at 21.

134. *Id*. at iv, 21.

135. *Id*. at 21.

136. *Id*. at 23.

and questionnaires, the researchers provided the following findings about pre-deliberation discussions among jurors.[138]

First, the researchers found evidence that the discussion reform "encouraged jurors to exchange relevant information without coming to fixed and unchangeable preferences."[139] "The Discuss jurors spent very substantial amounts of time and energy engaged in discussions about the trial," and "[t]he longer and more complex the trial, the more Discuss jurors talked about the case."[140]

Second, the researchers found that the No Discuss jurors abided by the prohibition against discussing the case before deliberations. Although some jurors made occasional remarks about the case, these remarks were "brief and perfunctory."[141]

Third, the researchers found that the Discuss jurors often violated the judge's instruction not to discuss the case unless all of the jurors were present. "[M]any substantive discussions occurred when a sizeable number of the jurors were not present in the jury room."[142]

Fourth, the researchers found that although on occasion the Discuss jurors expressed final positions in violation of the judge's instruction to withhold judgment until the end, they also found that such early verdict statements "did not uniformly predict the positions that jurors took . . . during deliberations."[143] In fact, the researchers "found no clear indication that [early verdict statements] were responsible for altering case outcomes."[144]

Fifth, the researchers found that "the verdict patterns, as well as the rate of agreement with judicial verdict preferences did not differ" between the Discuss and No Discuss juries.[145] Discuss jurors were no more likely to favor the testimony presented at the beginning of trial (the "primacy

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137. *Id*. at 102.
138. *Id*. at 45, 64-66, 80-81, 99, 101-05.
139. *Id*. at 99, 103.
140. *Id*. at 103.
141. *Id*.
142. *Id*.
143. *Id*.
144. *Id*. at 104.
145. *Id*.

effect"), than they were to favor what they heard immediately at the end of trial before deliberations (the "recency" effect).[146]

Finally, the researchers found that Discuss jurors (1) "reported no less inclination to discuss the case outside the jury room than did No Discuss jurors, although only a small minority in both groups reported any outside conversations;" (2) "were somewhat more inclined to take an early first vote and completed their deliberations more swiftly than did No Discuss juries, but the differences were not statistically significant;" (3) "perceived their juries as more open-minded and thorough [than No Discuss juries], but the difference was not statistically significant;" and (4) "were somewhat more likely to be unanimous, suggesting greater cohesiveness, than the No Discuss juries."[147]

In light of these findings, the researchers concluded, as did the NCSC research project, that pre-deliberation discussions may aid juror comprehension and did not appear to lead to premature judgments.[148] They also suggested that the two shortcomings noted by the project, discussions by jurors when all were not present and early verdict statements, might be reduced or eliminated by two changes of procedure. First, a written copy of the preliminary instruction outlining the limits of pre-deliberation discussions could be given to each juror and posted in the jury room; and at recesses in the trial, the judge could repeat this instruction to the jurors.[149] Second, the jurors could be instructed to choose an interim foreman who would have the responsibility to ensure that no discussions took place until all the jurors were present.[150]

VI. Military Practice

Under the Uniform Code of Military Justice (UCMJ),[151] two types of courts-martial employ a panel of members (jury), the general court-martial and the special court-martial.[152] The general court-martial consists of a military judge and at least five members.[153] The special court-martial consists of a military judge and at least three members.[154] The member senior in rank

146. *Id*.
147. *Id*.
148. *Id*. at 104-05.
149. *Id*. at v, 105.
150. *Id*. at v, 106.
151. The Uniform Code of Military Justice comprises sections 801 to 946 of Title 10, United States Code. 10 U.S.C. §§ 801-946 (2000).

on each court-martial serves as president of the panel.[155] Who may serve as a member on a court-martial is governed by Article 25, UCMJ, which permits the convening authority—the official who exercises prosecutorial discretion in the case—personally to select the members of the court-martial panel.[156] The convening authority is required to select members who "are best qualified by reason of age, education, training, experience, length of service, and judicial temperament."[157]

"Courts-martial are not a part of the judiciary of the United States within the meaning of Article III of the Constitution," but instead "derive their authority from the enactments of Congress under Article I of the Constitution, pursuant to congressional power to make rules for the government of the land and naval forces."[158] As a result, the Sixth Amendment right to trial by jury does not apply to courts-martial.[159]

Nothing in the UCMJ or the *Manual for Courts Martial* (*Manual*) prohibits a military judge from allowing court-members to discuss the case among themselves before formal deliberations. Although a discussion section to Rule for Courts-Martial (RCM) 502(a)(2) of the *Manual* suggests that "members should not discuss any part of a case with anyone until the

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152. UCMJ art. 16 (2000). A general court-martial has jurisdiction over every service member and offense under the Uniform Code of Military Justice and can prescribe any punishment permitted by that Code and the President. *Id.* art. 18. A special court-martial has similar jurisdiction, but its punishment authority is limited to confinement for one year, forfeiture of two-thirds pay per month for a period of one year, and a bad-conduct discharge. *Id.* art. 19.

153. *Id.* art. 16(1)(a). The minimum five-member requirement is true for all general courts-martial except those in which the death penalty is authorized. A court-martial panel in a capital case shall consist of at least twelve members, unless twelve members are not reasonably available because of physical conditions or military exigencies, in which case the convening authority shall specify a lesser number of members not less than five. *Id.* art. 25(a).

154. *Id.* art. 16(2)(a). A special court-martial may convene without a military judge, but only if a military judge cannot be detailed because of physical conditions or military exigencies. Such a court cannot adjudge a discharge. MCM, *supra* note 5, R.C.M. 201(f)(2)(B).

155. MCM, *supra* note 5, R.C.M. 502(b)(1). Any need for an interim foreman identified in the Pima County Field Experiment is fulfilled in military practice by the president of the court-martial.

156. UCMJ art. 25.

157. *Id.* art. 25(c)(2).

158. United States v. Kemp, 46 C.M.R. 152, 154 (C.M.A. 1973).

159. *Id.*; *see* United States v. New, 55 M.J. 95, 103 (2001); United States v. Kirkland, 53 M.J. 22, 24 (2000); United States v. Loving, 41 M.J. 285 (1994); United States v. Smith, 27 M.J. 242, 248 (C.M.A. 1988).

matter is submitted to them for determination," that section is not "binding on any person, party, or other entity."[160] The standard preliminary instruction from the *Military Judges' Benchbook* (*Benchbook*) prohibits pre-deliberation discussions:

> During any recess or adjournment, you may not discuss the case with anyone, not even among yourselves. You must not listen to or read any account of the trial or consult any source, written or otherwise, as to matters involved in this case. You must hold your discussion of the case until you are all together in your closed session deliberations so that all of the panel members have the benefit of your discussion. . . . If anyone attempts to discuss the case in your presence during any recess or adjournment, you must immediately tell them to stop and report the occurrence to me at the next session.[161]

Like the discussion section, however, the *Benchbook* pattern instructions are not binding.[162] As noted in the introduction to the *Benchbook*, none of the instructions are intended "to be a substitute for the ingenuity, resourcefulness, and research skill of the military judge."[163]

The issue of pre-deliberation discussions in the military has been raised in only one unpublished case. In *United States v. Richards*,[164] a juror approached a prosecutor after trial and "expressed concern that some members had discussed the case during breaks before findings deliberations."[165] In a post-trial session dealing with other matters, the military judge declined to address the pre-deliberation discussion issue. On appeal, the Air Force Court of Criminal Appeals found that based upon the prohibitions in Military Rule of Evidence (MRE) 606(b), the military judge did not abuse his discretion by not pursuing the issue of possible informal discussion of the case.[166] Under MRE 606(b), a judge is prohibited from taking juror testimony about what occurred during deliberations unless that testimony concerns "whether extraneous prejudicial information was improperly brought to the attention of the members of the court-martial,

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160. MCM, *supra* note 5, R.C.M. 502(a)(2) discussion; pt. I, ¶ 4 discussion.

161. U.S. DEP'T OF ARMY, PAM. 27-9, MILITARY JUDGES' BENCHBOOK paras. 2-5, 2-6-1 (1 Apr. 2001) [hereinafter BENCHBOOK].

162. *See id*. at i, para. 1-1.

163. *Id*. para. 1-2.

164. No. ACM S29209, 1996 CCA LEXIS 401 (A.F. Ct. Crim. App. Dec. 27, 1996).

165. *Id.* at *2.

166. *Id*. at *7.

whether any outside influence was improperly brought to bear upon any member, or whether there was unlawful command influence."[167]

VII. Summary and Recommendation

Should the military become the first jurisdiction to adopt a rule permitting pre-deliberation discussions among jurors in criminal cases? From the standpoint of case law, most of the opinions that have considered the propriety of a pre-deliberation discussion instruction authorizing discussions among jurors have been "disapproving;"[168] however, many of these cases rely on the first federal case to consider the issue, *Winebrenner*, and the precedential value of that case should be limited to its unique facts: The trial judge failed to caution the jurors against making premature judgments about guilt or innocence or discussing the case unless all of the jurors were present, and he failed to give any preliminary instructions on the burden of proof and presumption of innocence. The bad facts of *Winebrenner* can be remedied with appropriate cautionary and preliminary instructions. In any event, a minority of opinions support a pre-deliberation rule and can be relied on as precedence for a change.

From a military law standpoint, no constitutional, statutory, regulatory, or case-made rules are an impediment to authorizing pre-deliberation discussions among jurors. In addition, because the Sixth Amendment right to a trial by jury does not apply to the military, the precedential value of *Winebrenner* and its progeny to courts-martial practice is, arguably, nil.

From the standpoint of jury reform projects, the verdict is mixed, but clearly leaning toward change. The Arizona project specifically favored the use of the pre-deliberation discussions in criminal cases. The Colorado project resulted in Colorado adopting the pre-deliberation discussions for civil trials, and the District of Columbia project resulted in D.C. Superior Court judges having the discretion to allow pre-deliberation discussions in civil cases. Although the California project rejected the change, it nonetheless acknowledged the value of permitting pre-deliberation discussions,

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167. MCM, *supra* note 5, MIL. R. EVID. 606(b). Federal courts may also decline, by way of Federal Rule of Evidence 606(b), to pursue an inquiry into whether pre-deliberation discussions occurred. *See* United States v. Williams-Davis, 90 F.3d 490, 504-05 (D.C. Cir. 1996); United States v. Gigante, 53 F. Supp. 2d 274, 276-78 (E.D.N.Y. 1999); FED. R. EVID. 606(b).

168. *Arizona Jury Reform*, *supra* note 118, at 360.

and it encouraged experimentation with the change in trials where the parties would agree.

From the standpoint of social science research, a survey and two field experiments support a change. Based on this research, pre-deliberation discussions may aid juror comprehension and should not lead to premature judgments. The potential risks of the change (discussions by jurors when all are not present and early verdict statements) could be reduced or eliminated through procedural modifications that would accompany the change.

Finally, from the standpoint of history and tradition, a change authorizing pre-deliberation discussions would serve to help move the jury back toward its active-jury roots. "Jurors need not and should not be merely passive listeners in trials, but instead should be given the tools to become more active participants in the search for just results."[169]

The military should remain on the forefront of jury innovations and become the first jurisdiction to specifically sanction regulated pre-deliberation discussions among jurors. The addition of the following two sentences to the end of RCM 502(a)(2) in the *Manual* would accomplish this result:

> Members shall be instructed that they are permitted to discuss the evidence among themselves in the members room during recesses from trial, when all are present, as long as they reserve judgment about the guilt or innocence of the accused until formal deliberations begin. Notwithstanding the foregoing, the members' discussion of the evidence among themselves during recesses may be limited or prohibited by the military judge for good cause.[170]

Like the Arizona rule, this rule would only permit structured discussions. Discussions could only occur in the deliberation room and only with all of the members present. The military judge is entrusted with the discretion to limit or proscribe pre-deliberation jury discussions in any case in which

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169. BROOKINGS INSTITUTION, REPORT FROM AN AMERICAN BAR ASSOCIATION/BROOKINGS SYMPOSIUM, CHARTING A FUTURE FOR THE CIVIL JURY SYSTEM 3 (1992). *See* Dann, *supra* note 9, at 1238-47 (comparing the passive and active jury models).

170. This proposed rule is adapted from a similar one proposed for use in Arizona by the Committee on More Effective Use of Juries. *See* ARIZONA SUPREME COURT COMMITTEE, *supra* note 75, at 98.

such discussions might interfere with the impartiality of the members or when other good cause is shown.[171]

To accompany this rule change to RCM 502(a)(2), the sentence in its discussion section, "Except as provided in these rules, members should not discuss any part of a case with anyone until the matter is submitted to them for determination," should be deleted. To replace it, the following preliminary jury instruction should be added to the end of that rule's discussion section:

> In preliminary instructions, the military judge should advise the members substantially as follows: "During the court-martial, you may discuss the evidence, but only among yourselves in the members room when all of the members are present. The kinds of things you may discuss include the witnesses, their testimony, and the exhibits. However, you must not, individually or collectively, make up your minds about the guilt or innocence of the accused until you have heard all the evidence, my instructions on the law, the arguments of counsel, and your formal deliberations have begun. Keep an open mind during the trial. Only form your final opinions after you have deliberated as a group in the members room at the end of trial. Not only would it be unfair to the accused, but it would also be illogical and unwise to decide the case until you have heard everything." A written copy of this portion of the preliminary instructions should be given to each member and posted in the members room. In addition, the president of the court-martial should be advised to ensure that no discussions occur unless all the members are present in the deliberations room.[172]

This instruction should also replace the one currently proscribing predeliberation discussions among members in the *Military Judges' Bench-*

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171. *See* Lakamp, *supra* note 90, at 876.

172. The proposed instruction is adapted from several sources: (1) the current predeliberation instruction used in Colorado civil trials; (2) the instruction proposed for use in Arizona by the Committee on More Effective Use of Juries; and (3) the instruction used by the National Center for State Courts in evaluating the effect of the Arizona rule. *See* COLO. CIV. JURY INSTR. 1:4, 1:8; ARIZONA SUPREME COURT COMMITTEE, *supra* note 75, at 99, app. G; *"Speaking Rights"*, *supra* note 118, at 243. The last sentence of the proposed instruction is added because "people are more likely to follow instructions if they are given a reason to do so." Elizabeth F. Loftus & Douglas Leber, *Do Jurors Talk?* 22 TRIAL 59, 60 (1996). *See* Diamond et al., *supra* note 132, at v, 104-05; Lakamp, *supra* note 90, at 876.

book.[173] It not only informs the members of their ability to conduct pre-deliberation discussions, but also of the importance of reserving final judgment until all the evidence has been presented and of the reason for its importance.[174]

This rule and accompanying change in instructions will legitimize pre-deliberation discussions for courts-martial. The comprehension, competence, and confidence of the members should benefit thereby, and will advance the rule of law accordingly.

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173. Military preliminary instructions already include instructions on the burden of proof and presumption of innocence, remedying one of the noted *Winebrenner* deficiencies. *See* BENCHBOOK, *supra* note 161, para. 2-5.

174. ARIZONA SUPREME COURT COMMITTEE, *supra* note 75, at 97.

CONSTITUTIONAL DIGNITY AND THE CRIMINAL LAW

November 21, 2002

JUDGE JAMES E. BAKER[1]
UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

Address Before the Twenty-Sixth Criminal Law
New Developments Course

I. Introduction

Thank you for inviting me to the JAG school today to share with you some thoughts on the criminal law. I appreciate the opportunity you have given me to look at the larger canvas. This is the first time I have done so regarding the criminal law since joining the court.

I also appreciate that I am given this opportunity at a first-class school. When I was at the State Department and at the National Security Council, I came to have great confidence in the JAG school's output—its students, its teachers, and its publications. You do not just teach doctrine here; you encourage students to step outside their experience, their service, and their culture to test theories and look over the horizon. That is what lawyers are supposed to do; and that is one of the missions of a great school.

But be careful what you ask for. I was told I could speak about "anything," and anything is what you are getting. The title of my presentation is "Constitutional Dignity and the Criminal Law." I will start with a few

1. Judge Baker has been a judge on the United States Court of Appeals for the Armed Forces since September 2000. He previously served as Special Assistant to the President and Legal Adviser (1997-2000) as well as Deputy Legal Adviser (1994-1997) to the National Security Council (NSC). Judge Baker has also served as Counsel to the President's Foreign Intelligence Advisory Board and Intelligence Oversight Board, as an attorney adviser in the Office of the Legal Adviser, Department of State, as a legislative aide and acting Chief of Staff to Senator Daniel Patrick Moynihan, and as a Marine Corps infantry officer. He is the author, with Michael Reisman, of *Regulating Covert Action* (Yale University Press: 1992). Judge Baker was born in New Haven, Connecticut, and raised in Cambridge, Massachusetts. He is a graduate of Yale College (1982) and Yale Law School (1990), where he is currently a visiting lecturer. Judge Baker is married to Lori Neal Baker of Springfield, Virginia. They live with their daughter, Jamie, and son, Grant, in Virginia.

comments about the importance of the criminal law to national life in real terms and in how Americans perceive the law.

Lawyers like us can never forget that we are part of something bigger than we are and that every act counts in an incremental way. An encounter with the criminal law from any perspective might be the most important event in someone's life, or forever shape how someone perceives the law and those who profess it. As a result, how we conduct ourselves can be as important as the results we reach. This is as true for you as it is for me.

My point of reference is the Court, and therefore, I have chosen to spend the majority of my time considering the way in which courts operate, or perhaps should operate, in upholding the criminal law and its constitutional foundation. The credibility and viability of a court stems in part from the public's perception that it is indeed honorable, impartial, and just. Therefore, it matters not only what courts say, but also how they say it. Some call this judicial dynamic collegiality, but I think "constitutional dignity" is a more appropriate descriptor for a process that is integral to the constitutional framework. If credibility is the capital of courts, constitutional dignity is interest accrued.

My comments are necessarily incomplete. I say that for three reasons. First, when I was appointed to the court, a distinguished judge I knew kindly told me that it had taken her three years before she fully appreciated appellate judicial practice; judges must learn as well as teach. This means that I come here today as a student of judicial practice and not its master.

Second, much of our popular understanding of how courts operate is based on observation of the Supreme Court. That is certainly how judicial practice was taught at my law school. Such an approach is inherently inductive. Conclusions drawn from the Supreme Court, with its relatively stable membership of nine, may not apply to the lower courts with fluid composition.

Finally, my own observations are inherently inductive, drawing as they do on my practical experience on but one Article I court of limited jurisdiction. With that in mind, I have left plenty of time for questions and discussion, as I really hope to gather your views, as much as to tell you mine.

A. Criminal Law

Let me start with a seemingly obvious comment—criminal law is foundational law in America. Along with property law and the structural fundamentals of the Constitution, I cannot think of an area of law that has more impact on how our society is ordered. (By criminal law I mean not just the law in an elements sense, but the criminal continuum from crime to confinement.)

Now this observation should not strike anyone as particularly insightful. You may wish to get your money back. But in the context of military justice, where criminal law is statutorily conceived as part of the disciplinary process—a commander's supporting arm—it may be useful to step back and consider just how important criminal law is to our society and our way of life. It is part of our social fabric, which is demonstrated alone by the shear number of persons directly affected.

Let me give some examples, which I present solely for illustrative purposes:

- In 2001 there were 5.7 million violent victimizations,[2] including 248,000 rapes and sexual assaults in the United States.[3]
- A 1999 NIH study concluded that for the years 1983-1991 homicide was the leading cause of death by injury in children under one.[4]

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2. BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, NCJ 194610, NATIONAL CRIME VICTIMIZATION SURVEY (NCVS) 1, 3, tbl.1 (Sept. 2002), *available at* http://www.ojp.usdoj.gov/bjs/abstract/cv01.htm.

3. *Id.* at 3, tbl.1. The British Crime Survey (BCS) measures the level of crime using interviews with individual members of the public. According to the BCS, "This approach of using interviews rather than official records is generally considered to give a more accurate picture of the level of crime in the country, as some people will be a victim of crime but not want, or bother to report the incident to the police." CrimeReduction.gov.uk, *British Crime Survey 2001/2002*, *at* http://www.crimereduction.gov.uk/statistics18.htm (last modified Dec. 4, 2002). The 2001/2002 BCS includes conclusions drawn from questionnaires completed in 1998 and 2000 by men and women ages sixteen to fifty-nine. The survey concluded that "[a]round 1 in 20 women (4/9%) said they had been raped since age 16. About 1 in 10 women (9.7%) said they had experienced some form of sexual victimisation (including rape) since age 16." Andy Myhill & Jonathan Allen, *Rape and Sexual Assault of Women: Findings from the British Crime Survey*, 159 HOME OFFICE RESEARCH FINDINGS 1 (2002), *available at* http://www.crimereduction.gov.uk/sexual06.htm. I have not found a comparable lifetime survey for the United States, but the UK figures suggest the extent to which society as a whole may be affected in a permanent way by crime.

- Nationwide the criminal justice system employs the same number of people as the automotive industry.[5]
- There are over 15,000 names of law enforcement officers killed in the line of duty on a memorial across the street from our court, including forty-three military policemen.[6]
- At year end in 2001, 1.4 million persons were incarcerated in America and another 6.6 million persons were on probation, 3.1% of all U.S. adult residents.[7]
- In 2001, more black men were incarcerated than attended college.[8] Some studies estimate that anywhere from twenty to thirty percent of black males between the ages of twenty and twenty-nine have served, or are serving, time for felony convictions.[9]

In short, criminal law directly impacts millions of Americans. For victim and accused, contact with the criminal law may be the most consequential experience of a lifetime.

1. Impact on Lives

There is also a less empirical and more visceral truth about the impact of criminal law. For juror, witness, spectator, participant, observer, as well as victim and accused, exposure to criminal law profoundly influences how they perceive the law generally, their place in society, and the law's ability to provide order and equity to society at large. The criminal law affects where we let our children play and where we feel comfortable walking.

We cannot forget this when we practice our profession. Every act counts. Every word matters. These acts and words collectively shape America's perception of the law as the most fundamental of our institutions that hold democratic society together.

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4. NIH News Alert, National Institute of Child Health and Human Development (NICHD), Major Causes of Early Childhood Death from Injury Identified (May 3, 1999), *at* http://www.nichd.nih.gov/new/releases/deaths2.cfm. A 2002 study by the NICHD concluded that for children ages one through four, unintentional injuries, in particular motor vehicle traffic accidents, were the leading cause of death, followed by cancer, birth defects, and homicides. FEDERAL INTERAGENCY FORUM ON CHILD AND FAMILY STATISTICS, AMERICA'S CHILDREN: KEY NATIONAL INDICATORS OF WELL-BEING, 2002, at 32 (2002), *available at* http://www.childstats.gov/americaschildren.

5. The Bureau of Labor Statistics (BLS) produces Occupational Employment Statistics (OES) for over 700 occupations, further divided into twenty-two broad categories. *See* U.S. Dep't of Labor, Bureau of Labor Statistics, *Occupational Employment Statistics*, *at* http://www.bls.gov/oes/home.htm (last visited Dec. 5, 2002).

In 2000, over three million Americans were employed in "Protective Services" jobs. BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, BULL. NO. 2459, OCCUPATIONAL EMPLOYMENT AND WAGES 3 (Apr. 2002) (actual number 3,009,070). These include police officers, corrections officers, and firefighters, as well as private security guards. *Id.* tbl.1, at 12. "Legal" jobs are a separate category, including lawyers (civil and criminal), judges, mediators, paralegals, and law clerks that account for an additional nearly 900,000 jobs. *Id.* at 10 (actual number 890,910).

In comparison, this is twice as large as the number employed in the "Community and Social Services" category (1,469,000), which includes counselors, social workers and members of the clergy, and slightly larger than those employed in the "Computer and Mathematical" category (2,932,810). *Id.* at 8-10. A mere 460,700 jobs are categorized as "Farming, Fishing, and Forestry." *Id.* at 13.

That year, there were more "Police and Sheriff's patrol officers" (571,210) than Postal Service Mail Carriers (354,980). *Id.* at 12-13. Patrol officers (571,210), "Correctional Officers and jailers" (405,360), "Detectives and criminal investigators" (87,090) and their supervisors (Police and detective supervisors (113,740) plus Correctional officer supervisors (29,380) equal 143,120 Total Supervisors) combined accounted for over one million jobs. *Id.* at 12 (actual number 1,206,780).

While the OES categories do not permit a precise comparison between the number of people working in criminal justice and in automotive work, one can extrapolate the following numbers.

Automotive installation, maintenance, and repair: 1,303,720

Automotive repairers, service technicians, and mechanics and their supervisors	
Auto body and related repairers	168,170
Auto glass installers & repairers	21,240
Auto service techs & mechanics	692,570
First-line supervisors	421,740
Total	1,303,720

6. National Law Enforcement Officers Memorial Fund Inc., *Police Facts*, *at* http://www.nleomf.com/FactsFigures/polfacts.html (last updated Apr. 22, 2002).

7. Bureau of Justice Statistics, *Corrections Statistics, Summary Findings*, *at* http://www.ojp.usdoj.gov/bjs/correct.htm (last revised Apr. 10, 2002).

8. JASON ZIEDENBERG & VINCENT SCHIRALDI, JUSTICE POLICY INSTITUTE, CELLBLOCKS OR CLASSROOMS?: THE FUNDING OF HIGHER EDUCATION AND CORRECTIONS AND ITS IMPACT ON AFRICAN AMERICAN MEN 9-10 (2002), *available at* http://justicepolicy.org/coc1/main.htm.

2. Insight into Society

Americans are fascinated by the criminal law. During prime time there are two crime shows on network television every night. Television reflects our tastes, and some suggest, contributes to those tastes by fostering the very violence depicted.

For sure, as Stanford University law professor Lawrence Friedman has pointed out, there is an element of prurient interest to this fascination.[10] The criminal law allows us a look at the lives of the rich and famous, and perhaps, in the fall from fame or wealth of a Claus von Bulow or an O.J. Simpson, we may gain confidence that happiness is not found in wealth or fame alone, if at all. Lizzy Borden and Charles Manson remain a revolting part of America's culture, and not because of the legal importance of their trials.

But as you all well know, and as I first learned when I studied the police blotter at Marine Corps Base, Camp Lejeune, North Carolina, criminal law is more mundane, relentless, and tragic than all that. It is not specific to a particular socio-econmic class or profile. It is more plea bargain (ninety-five to ninety-six percent)[11] than Perry Mason. It is human frailty and failure, and everyday lives broken. The importance of criminal law is not found in its hold on popular imagination, but on its window into the

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9. MARC MAUER, THE SENTENCING PROJECT, YOUNG BLACK MEN AND THE CRIMINAL JUSTICE SYSTEM: A GROWING NATIONAL PROBLEM (1990), *at* http://www.druglibrary.org/schaffer/other/sp/ybm1.htm.

10. LAWRENCE M. FRIEDMAN, LAW IN AMERICA 94-96 (2002).

11. *See* U.S. SENTENCING COMM'N, 2000 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS 24, tbl.5.31 (2001), *available at* http://www.albany.edu/sourcebook/1995/ind/DEFENDANTS.Federal_courts.Method_of_conviction.2.html (noting that 95.5% of defendants convicted in U.S. district courts for U.S. Sentencing Commission guidelines cases were convicted as a result of guilty pleas); BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, NCJ 194067, COMPENDIUM OF FEDERAL JUSTICE STATISTICS 2 (2000), *available at* http://www.ojp.usdoj.gov/bjs/pub/pdf/cfjs00mt.pdf (reporting that "the proportion of defendants who pleaded guilty [in the federal system] increased from eighty-eight percent during 1990 to ninety-five percent during 2000); BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, STATE COURT PROCESSING STATISTICS, FELONY DEFENDANTS IN LARGE URBAN COUNTIES iv (1998), *available at* http://www.ojp.usdoj.gov/bjs/abstract/fdluc98.htm (explaining that ninety-six percent of convictions obtained in the large urban counties "during the 1-year study period were the result of a guilty plea").

fragile side of society. As military historians and officers study behavior under fire, lawyers study behavior on the margin of the human condition.

3. Constitutional Values—Liberty with Order

But if we see what is worst in America, we also see what is best. Criminal law is important because it helps to define who we are as a constitutional democracy. There is much that distinguishes our form of government from others, but certainly much of that distinction is found in the Bill of Rights and in two simple words: due process. All of which help to affirm the value and sanctity of the individual in our society. Broadly then, criminal law helps to define who we are as a nation that values both order and liberty.

That is what many of the greatest judicial debates are about, like those involving Holmes, Hand, Jackson, and Douglas over the application of the First Amendment to potentially criminal contexts in *Debs*,[12] *Dennis*,[13] and *Terminiello*.[14] These debates reached across courts and across generations of jurists. The Alien and Sedition Acts, McCarthy's use of the contempt statutes, and seminal Supreme Court cases such as *Miranda v. Arizona*[15] and *Gideon v. Wainwright*[16] involved historic applications of criminal law. But they were also about much bigger issues regarding liberty and the relationship between government and the individual in democracy. Likewise, the "Scottsboro boys" rape case, *Powell v. Alabama*,[17] is a right to counsel case, but it is also a touchstone moment when the societal ship began its long turn from lynch law to rule of law. And that is why one-hundred percent of Americans support the war on terrorism, but there is less agreement on the whether, how, when, and where of military tribunals. This is criminal law, but it is also about constitutional values and duties.

12. Debs v. United States, 249 U.S. 211 (1919).
13. Dennis v. United States, 341 U.S. 494 (1951).
14. Terminiello v. Chicago, 337 U.S. 1, 37 (1948).
15. 384 U.S. 436 (1966).
16. 372 U.S. 335 (1963).
17. 287 U.S. 45 (1932).

4. Criminal Law and National Security

Finally, as the military tribunal debate shows, criminal law is part of national security. We all know this in the wake of September 11, but this has been the case for decades.

> (1) My first job as a lawyer was in the office of Law Enforcement and Intelligence at the State Department. Our daily bread was mutual legal assistance treaties, extradition, and rendition, all of which became the stuff of national security when terrorists were involved or acts of espionage.
>
> As recent events involving the snipers suggest, the line between crime and societal security can be a thin one, if there is a line at all. I also recall circular debates over whether cyber hacking should be treated as a criminal or national security event. Whatever the motive of the hacker, cyber security is both when a critical infrastructure or government computer is involved. In such cases, all the relevant tools in each kit bag should be brought to bear on the problem.
>
> (2) The law of armed conflict is U.S. criminal law.[18] And, whether we like it or not, increasingly U.S. military conduct will be evaluated not just by [Non-governmental Organizations], but also ad hoc tribunals like the [International Criminal Tribunal for the Former Yugoslavia] and, perhaps, the International Criminal Court.
>
> (3) Third, the U.S. military has played a tangential, but important role in the so-called war on drugs. Increasingly it will also play a vital role in homeland security, perhaps not taking a direct role in arrest, but certainly playing an integral role in what must become a seamless intelligence-law enforcement-military mesh. Putting aside constitutional arguments, there already exist numerous exceptions to the Posse Comitatus Act,[19] which together form a coherent framework for military participation in homeland defense.

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18. *See* 18 U.S.C. 2441 (2000).
19. 18 U.S.C. § 1385.

In short, criminal law is not a JAG specialty; it is an essential component of national security; it reflects who we are as humans; it is the most important event in too many lives; and it helps to define who we are as a constitutional democracy. This is worth remembering the next time you are bogged down in a "new matter" debate, reading the Code Committee report, deciding whether to read another case to prepare for argument, or a colleague finds fault with your blue booking. What you do matters and how you do it matters.

B. Constitutional Dignity and the Courts

Whereas criminal law is not the primary mission of the military, it is your primary mission, and it is the sole mission of our Court. If I have made the case that the criminal law is foundational, then it should follow that we should also care about everything we do as lawyers and judges.

When I was at the National Security Council, I was surprised to observe how fragile our constitutional system is. I came from schools that seemed to teach American history and government every year. If there is one thing I knew when I left high school, it was the certainty that the federal government is comprised of checks and balances, which apparently were on some sort of constitutional autopilot. But there is nothing automatic about the separation of powers or constitutional government.

It turns out that constitutional government is hard work, comprising an endless series of informal and formal contacts between branches, and a willingness on the part of participants to show equal devotion, if not more, to constitutional design as they do to policy objective, or in some cases, political objective. The political branches often want to "win," and short-term advantage often takes precedence over long-term constitutional perspective, unless, and even when, there is someone to remind about the constitutional balance. Justice Jackson captured this thought in *Youngstown Sheet & Tube Co. v. Sawyer*[20] when he reflected on his experience as the Attorney General: "The tendency is strong to emphasize transient results

20. 343 U.S. 579 (1952).

upon policies . . . and lose sight of enduring consequences upon the balanced power structure of our Republic."[21]

To illustrate with the war power, in any given context there may be policy and legal arguments why the President should not share information with the Congress, or consult with the Congress on the use of force. But if the exceptional case or hypothetical becomes the norm, constitutional design is undermined with little in the way of remedy. Similarly, a two-thirds majority of the Congress could overwhelm constitutional design by not funding inherent presidential functions. The balance of power between the political branches may shift; but if either branch ultimately wins, and can dictate its own constitutional terms, we all lose.

Courts are most fragile of all. Courts have little tangible power. They do not control budgets. They do not command armies. All of which is captured in Andrew Jackson's (hopefully) apocryphal comment regarding the Cherokee Indian cases: "[Chief Justice] Marshall has made his law, now let him enforce it."[22] The law was not enforced.

Courts are limited to cases and controversies brought by the parties, or in the case of criminal law, by local, state, or federal government. Their capital is credibility; their power is persuasion. Ultimately, their viability in the constitutional system stems from the respect of the American people for the law and, by extension, those institutions most identified with its preservation. We don't expect popular decisions, but we do expect decisions worthy of respect.

Washington Post newspaper columnist Andrew Cohen writing in the wake of the Ninth Circuit's Pledge of Allegiance case[23] struck this theme. Cohen stated,

> It's hard to remember a time in our recent history when federal judges were subjected to so much disrespect and vitriol from virtually every corner of America. . . . The judiciary has helped create this lamentable state. Judges sometimes disparage each other, and even the process itself. . . . [T]his offensive against the

21. *Id.* at 869.

22. Rennard Strickland & William Strickland, *A Tale of Two Marshalls: Reflections on Indian Law and Policy, the Cherokee Cases, and the Cruel Irony of Supreme Court Victories*, 47 OKLA. L. REV. 111, 114 (1994); Stephen Breyer, *For Their Own Good*, NEW REPUBLIC ONLINE (Aug. 7, 2000), *at* http://www.tnr.com/080700/breyer080700_print.html.

23. Newdow v. U.S. Cong., 292 F.3d 597 (9th Cir. 2002).

> sensibility of judges is clearly shaking the trust and confidence that people have in the ability of the judiciary to render fair and honest decision.[24]

Whether one agrees with Cohen or not, the judiciary certainly depends on long-term incremental reputation. This is not increased by debates over judicial nominations that may be cast in political terms by the political branches. This may give the impression to some that some or all cases are decided, in part or in whole, on the basis of partisan political factors, rather than neutral principles of law applied to facts.

Courts cannot help how others characterize their actions, but judges surely can take care to expend their own finite capital with care. As a result, when courts act, they must act with constitutional dignity.[25]

C. Constitutional Dignity

Constitutional dignity is about the grace with which we perform our duties and the spirit in which we apply the law. It is judicial esprit de corps. Constitutional dignity can be as simple as dissenting with respect, rather than just dissenting. More significantly, it is careful consideration of how judges address their colleagues and their world. Let me address three facets of this dynamic: independence or consensus, name-calling, and perspective.

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24. Andrew Cohen, *The Dangers of Holding Judges in Contempt*, WASH. POST, July 2, 2002, at B2.

25. I have adopted the phrase "constitutional dignity" from an article by Judge Kenneth F. Ripple of the Seventh Circuit, in which he describes the special role that law reviews play in critiquing the work product of the judiciary with "special constitutional dignity." Kenneth F. Ripple, *The Role of the Law Review in the Tradition of Judicial Scholarship*, 57 N.Y.U. ANN. SURV. OF AM. L. 428, 440 (2000).

1. Independence or Consensus

Courts are oligarchies. In the executive branch, both in theory and practice, there is a unitary executive. The Congress is something of a hybrid—an oligarchy to the extent anything with 535 Senate and House oligarchs can properly be viewed as such. But there is also a chain of command in the form of the leadership and system of committee chairs. Ultimately, like courts, the legislature comes down to one vote per member.

But where members of Congress ultimately vote "yea" or "nay," judges are offered every conceivable variation of vote. On our court, the computer voting system lists over 125 different voting options, like "Separate Opinion/Concur in the Result Dubitante," or "Separate Opinion/Concur in Part and Result/Dissent in Part." Clearly, we have a lot of opportunity to express our different views. When and how we do so will help define how we are perceived, as well as the public's perception of the law.

Professor Robert Post from Cal Berkeley has documented the great pressure Chief Justice William Howard Taft applied to the Supreme Court to find common ground and speak with one voice.[26] Taft, and others, thought unity essential to the institutional strength of the Court, the judiciary, and also to the law, which depends in part on the clarity and predictability of decision rooted in the doctrine of stare decisis. Post identified a twenty- to forty-percent disparity between conference votes expressing disagreement, and opinion votes resulting in consensus.[27] The post-conference paper trail includes missives like: "I think this is woefully wrong, but do not expect to dissent;"[28] and "I incline the other way. . . . If he is silent, I probably shall . . . shut up."[29] Mind, we are not talking about backbenchers, if there is such a thing on the Court. These are quotes from Brandeis and Holmes.

On the other hand, there are few judicial values as important as that of independence. A court is comprised of equal voices with equal status. That is a bedrock of judicial process. If judges (particularly with life tenure) won't speak their conscience, then who will. And there is value in dis-

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26. Robert Post, *The Supreme Court Opinion as Institutional Practice: Dissent, Legal Scholarship, and Decisionmaking in the Taft Court*, 85 MINN. L. REV. 1267, 1312-13 (2001).

27. *Id.* at 1345.

28. *Id.* at 1341.

29. *Id.* at 1342.

sent. It preserves principles and can help to clarify issues for legislatures and Presidents to address. I feel better about our system of justice knowing that at least two Supreme Court Justices dissented in *Dred Scott*.[30]

Based on my brief experience, it is possible to agree with both Justice Cardozo and Justice Jackson regarding the dissenter. First Justice Cardozo:

> For the moment he is the gladiator making a last stand against the lions. The poor man must be forgiven a freedom of expression, tinged at rare moments with a touch of bitterness, which magnanimity as well as caution would reject for one triumphant.[31]

Now Justice Jackson:

> It is said they clarify the issues. Often they do the exact opposite. The technique of the dissenter often is to exaggerate the holding of the Court beyond the meaning of the majority and then to blast away at the excess. So the poor lawyer with a similar case does not know whether the majority opinion meant what it seemed to say or what the minority said it meant. . . . [T]here is nothing good, for either the Court or the dissenter, in dissenting per se. Each dissenting opinion is a confession of failure to convince the writer's colleagues, and the true test of a judge is his influence in leading, not in opposing, his court.[32]

Courts have collectively balanced independence against consensus differently. On the D.C. Circuit, one percent of cases include a dissent.[33] On our court, during the two years in which I have sat, there have been dissents in thirty-eight percent of cases. Admittedly, there may be more opportunity to dissent on a court of limited jurisdiction where variations of the same issue may be repeated. Fixed membership will also tend to incrementally increase dissents over time. But there is more to it.

Having decided to dissent, or write separately, a judge must also decide on how long to carry the dissent. Our court seems to have a tradi-

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30. Scott v. Sandford, 60 U.S. (19 How.) 393, 529, 564 (1856) (Mclean & Curtis, JJ., dissenting).

31. Justice Benjamin N. Cardozo, *quoted in* GLENDON SCHUBERT, DISPASSIONATE JUSTICE (A SYNTHESIS OF THE JUDICIAL OPINIONS OF ROBERT H. JACKSON) 20-21 (1969).

32. Justice Robert H. Jackson, *quoted in* SCHUBERT, *supra* note 31.

33. Benjamin Wittes, *Too Smart to Be a Judge*, WASH. POST, June 11, 2002, at A25.

tion of the lingering dissent. On the one hand, this seems to buck the concept of stare decisis and diminish the value of finality. And, there would be something more than perilous afoot, for example, if the four dissenting justices in *Bush v. Gore*[34] held to their dissent by not recognizing the validity of presidential acts subsequently addressed in future cases. The dissenting Justices in *Miranda*[35] moved on and applied *Miranda* as binding law.

On the other hand, there may be questions of law that are sufficiently fundamental so as to always bar consensus. Regardless of one's substantive view, there seems something qualitatively different about holding to a dissent in *Roe v. Wade*[36] and its progeny, or *Gregg v. Georgia*,[37] ending what was in effect *Furman*'s[38] constitutional moratorium on state death penalty statutes.

2. Judicial Activism as Name-Calling

The tone of the separate opinion can be as important as the content. It is tempting to get carried away because in most cases, for us at least, there is no apparent cost to doing so. Relative to lead opinions, separate opinions are carefree; they do not bear the burden of precedent or the need for consent. And on our court, they are rarely subject to the intangible restraint of academic review and press inquiry.

I sense reading opinions at every level and in every forum that some people think that the worst thing you can call a judge is a "judicial activist." But I haven't been able to figure out exactly what that is or why the term is so often suggested as derogatory. I rather thought I was lacking something in analytic judgment, so I was relieved when Judge Noonan, who sits on the Ninth Circuit, recently published his book, *Narrowing the Nation's Power: The Supreme Court Sides with the States*,[39] which analyzes some of the Rehnquist Court's decisions on federalism. Noonan calls the opinions new, unprecedented, and surprising.[40] His point is not that they are right or wrong. (Chief Justice Marshall's opinions, he notes, were also

34. 531 U.S. 98 (2000).
35. Miranda v. Arizona, 384 U.S. 436 (1966).
36. 410 U.S. 113 (1973).
37. 428 U.S. 153 (1976).
38. Furman v. Georgia, 408 U.S. 238 (1972).
39. JOHN T. NOONAN, JR., NARROWING THE NATION'S POWER (2002).
40. *Id.* at 9.

"new, unprecedented, and astonishing to many of his contemporaries.")[41] What is noteworthy, Noonan argues, is that the decisions "do not depend on any words in the Constitution," notwithstanding their origin with a majority of the Court heretofore identified as historical literalists.[42] This leads Noonan to conclude that the terms "'[a]ctivist judge' and its polemic counterpart 'strict constructionist' probably should be banished from the political lexicon . . . because they cannot distinguish one set of judges from another."[43]

Justice Stevens recently accepted Judge Noonan's invitation to dialogue.[44] He made a number of points. First, like Noonan, he noted that many important developments in the law that are generally accepted today were once criticized for their activism.[45] In this category he places cases involving coerced confessions, voting rights, and most notably the line of equal protection cases leading up to *Brown v. Board of Education*.[46] Second, he makes an important distinction. "Even though not compelled by unambiguous language in the Constitution," Stevens said, "each [of these cases] was supported by a permissible reading of constitutional text. Second, each protected an interest in liberty that seems more important today than it may have seemed in 1789."[47] In contrast, like Noonan, Justice Stevens argued, the Court's opinions on sovereign immunity are "without any support whatsoever in the text of the constitution."[48]

I bring this matter up today, not so that I can join the substantive debate, but because I believe that constitutional dignity requires judges to eschew name-calling. My concern is two-fold. Labeling a court or judge as "activist" usually implies or is accompanied by words that allege that the judge or court is operating outside the bounds of democratically prescribed law. This represents far more than a difference of view on law. It suggests that the judge or court is acting ultra vires, outside the law. My point is not that this can't happen, or hasn't, but that we better really mean it if we use such language. Such language, if it is read at all, cannot but contribute to lack of respect for the law. If judges don't follow the law,

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41. *Id.*

42. *Id.*

43. *Id.*

44. *See* Justice John Paul Stevens, Address at the Third Annual John Paul Stevens Awards Dinner 8 (Sept. 25, 2002).

45. *Id.* at 4-8.

46. 347 U.S. 483 (1954); Stevens, *supra* note 44, at 4-8.

47. Stevens, *supra* note 44, at 8.

48. *Id.* at 9.

why should we? If judges do not seem to respect the system in which they serve, which permits and encourages honest difference of view, is this a system that others should respect.

Second, for some, such terms have come to be crude euphemisms for "liberal" and "conservative," whatever that means, which for some have also become crude euphemisms of political outlook. Whether any of this is actually true or not, name-calling of this sort lacks constitutional dignity; it suggests that courts make their decisions based on personal and political views, rather than on neutral principles of law over which reasonable people can disagree as they are applied to each case or controversy.

Some of our great moments in legal history involved the active use of the law, anchored in constitutional text. Some of our great judges are rightfully praised as judicial activists, not because they invented the law, but because they lived up to the law and the promise of the Constitution. While judges can and have operated outside accepted principles of law, there is a difference between disagreements about the proper method of interpreting the Constitution and statutes and the usurpation of the democratic process by judges who invent law from whole cloth. The first is the business of courts. The second should rightfully undermine our confidence in courts. We should not confuse the two. There are serious consequences in doing so.

3. Keeping Perspective

Finally, constitutional dignity is about keeping perspective. Appellate courts can isolate and elevate small issues to greatness, or hide great issues behind small debates.

For me, perspective includes distinguishing the great debate from the important, but ordinary, case. The Constitution is not at risk because the CAAF opinion, *United States v. Powell*,[49] is cited for the proposition that plain error requires error. Such citation is not ultra vires, but I would forgive you if you thought otherwise after reading a few of our cases. The Constitution *is* at stake if you follow the great and educational debate

49. 49 M.J. 460 (1998).

between Justice Scalia and Justice Breyer over the role of text and context in constitutional interpretation.[50]

Perspective is understanding that you are part of a system of justice that is part of the greatest democracy in history. The issues are more important than oneself; ego must get checked at the door. A lower court will be overturned. That happens in a system of tiered appellate review. That should not cause one to lose respect for the law, our system of law, or to deride those who apply the law in good faith; not if you believe in the rule of law. Justice Jackson said it well: "Reversal by a higher court is not proof that justice is thereby better done. . . . We are not final because we are infallible, but we are infallible only because we are final."[51]

II. Conclusion

This may all seem to you a bit like a discussion about judicial collegiality. But as I said earlier, collegiality seems a bit too much about judges and how they get along and not enough about the Constitution getting along or how Americans perceive the law. That is what I hope to suggest by using the term "constitutional dignity." There are no right answers, only a duty in each case to balance the needs of consensus against the imperative of dissent and to consider how one's individual voice may affect collective perceptions about the law, and to do so with the law alone in mind.

Nor is constitutional dignity for judges alone. Judge Craven has nicely observed that "[n]o appellate court can ever be much better than its bar. The bar of our court is the source of the raw material with which we sort: facts, inferences, ideas, insights, and prior decisions."[52] You and I are linked. We share a common mission and duty to the Constitution, and to the criminal law which is a foundational element of constitutional order.

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50. *Compare* Justice Stephen Breyer, Our Democratic Constitution, Address at the New York University School of Law James Madison Lecture (Oct. 22, 2001), *with* Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of the United States Federal Courts in Interpreting the Constitution and Laws*, *in* A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 16-17 (Amy Gutmann ed., 1997).

51. Brown v. Allen, 344 U.S. 443, 540 (1953) (Jackson, J., concurring).

52. Jones v. Superintendent, 465 F.2d 1091, 1093 (4th Cir. 1972), *cert. denied*, 410 U.S. 944 (1973).

In fulfilling this mission, we also share a common duty to do so with dignity.

I appreciate that it may not ultimately matter whether a case is decided unanimously or with dissent. And it may not matter what is said in a dissent and with what tone. The rule of law has survived many courts and many Supreme Courts where colleagues would not talk. And we on United States courts certainly have the luxury of worrying about refinements in substance and form that others do not. Just ask CAAF's newest member, Judge Erdmann, who served on a court comprised of two Serbs, two Croats, and two Muslims. On such a court, consent and dissent can take on life and death meaning.[53] And if you want profiles in constitutional dignity, think about the incredibly courageous judges in Bogota, Colombia; Sicily; and Sri Lanka who call it as they see it in the hopes of seeding a permanent legal plant. They might well trade some judicial dignity for a safe ride home at night in their armored car.

But law is incremental. It adds up. And if you believe as I do in the importance of criminal law to our society, every act we take deserves our best effort draped in dignity. Criminal law is integral to national security, not a separate stove pipe; in pure statistical form it deeply affects the lives of many in lasting manner; it tells us a great deal about the human condition; and it defines who we are as a constitutional democracy, which Constitution all of us in this room have sworn to uphold and defend.

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53. *Hearing on Nominations Before the Senate Armed Services Comm., in Hearing of the Senate Armed Service Comm.*, FED. NEWS SERV. (Sept. 27, 2002).

AN AUTUMN OF WAR[1]

REVIEWED BY MAJOR TODD S. MILLIARD[2]

> *We are at the precipice of a war we did not seek. We can grimly cross over it, confident in our resolve, more concerned about our poor dead than the hatred of enemies or the worries of fickle neutrals, assured that our cause is just, and reliant on the fierce men of our military who seek no quarter and need no allies in their dour task. Or we can fall into the abyss, the well-known darkness of self-loathing, identity politics, fashionable but cheap anti-Americanism, ostentatious guilt, aristocratic pacifism, and a convenient foreign policy that puts a higher premium on material comfort than on the security of our citizens and the advancement of our ideals.*[3]

Readers that find troubling the notions of righteous democratic values, Western military superiority, and the justifiable destruction of evil men and their regimes should not read Victor Hanson's latest work, *An Autumn of War.* Written during the four-month period of disbelief following the al Qaeda suicide hijackings on 11 September 2001,[4] *An Autumn of War* offers Americans confidence in and hope for their republic. Hanson accomplishes this feat by placing the nation's challenge to defeat terrorism in historical perspective, reminding readers that Western culture and ways of warfare have prevailed countless times in the past twenty-five hundred years. Supported by voluminous examples, both classic and modern, Hanson asserts that the United States, the "most powerful incarnation"[5] of the

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1. VICTOR D. HANSON, AN AUTUMN OF WAR: WHAT AMERICA LEARNED FROM SEPTEMBER 11 AND THE WAR ON TERRORISM (2002).

2. United States Army. Written while assigned as a student, 51st Judge Advocate Officer Graduate Course, The Judge Advocate General's School, United States Army, Charlottesville, Virginia

3. HANSON, *supra* note 1, at 90-91.

4. *Id.* at xiii. Hanson began his response on the day of the attacks, and "wrote each day until the cessation of general hostilities in Afghanistan, the formation of a new government in Afghanistan, and the final extinction of the smoldering fires at Ground Zero in late December." *Id.*

5. *Id.* at 7.

Western military tradition, will again prevail over its enemies through public resolve and military action.

A professor of classics at California State University, Hanson writes extensively on military history topics,[6] including his previous book, *Carnage and Culture: Landmark Battles in the Rise of Western Power.*[7] *An Autumn of War* collects thirty-eight Hanson essays, each chronicling the historian's thoughtful responses to the September 2001 attacks and their aftermath. While replete with historical examples that support Hanson's arguments, the essays serve also as snapshots in time, preserving the visceral emotion that most readers experienced in the wake of the attacks. But Hanson is no populist or modern-day Grub Street hack;[8] his assertions are persuasive because Hanson artfully weaves analogous historical examples through every page of *An Autumn of War.*

The book's introduction sets out four "themes"[9] that provide a coherent backdrop to the diverse essays, which Hanson organizes into the book's four chapters. Hanson derives each theme from a lesson learned from history, and together the four themes comprise Hanson's thesis statement. Before each chapter, named after the four months of autumn, Hanson orients the reader with a brief overview of the month's events, and he reintroduces the theme or themes that place those events in historical perspective.[10]

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6. *See, e.g.*, VICTOR D. HANSON, THE SOUL OF BATTLE: FROM ANCIENT TIMES TO THE PRESENT DAY, HOW THREE GREAT LIBERATORS VANQUISHED TYRANNY (1999) [hereinafter HANSON, THE SOUL OF BATTLE]; VICTOR D. HANSON, THE WARS OF THE ANCIENT GREEKS AND THEIR INVENTION OF WESTERN MILITARY CULTURE (1999); VICTOR D. HANSON, THE WESTERN WAY OF WAR: INFANTRY BATTLE IN CLASSICAL GREECE (1989).

7. VICTOR D. HANSON, CARNAGE AND CULTURE: LANDMARK BATTLES IN THE RISE OF WESTERN POWER (2001).

8. English writers of the early eighteenth century who first wrote for the sometimes-vulgar public, rather than for sophisticated, wealthy patrons. *See* THOMAS MACAULAY, THE LIFE OF SAMUEL JOHNSON 44 (1856) (Merrill 1911) (noting that the prolific and brilliant Johnson struggled on Grub Street for many years). As with Johnson, Hanson's writing exudes pragmatism, perhaps owing to his practical experience gained from running a 120-acre family farm. *See* HANSON, *supra* note 1, at xvi.

9. "Four general consequences from the events of September 11 characterize these essays and provide themes for the book at large." HANSON, *supra* note 1, at xiv.

Hanson's first and primary theme posits that Muslim fundamentalists targeted the United States, "the epitome of Westernism and modernism all in one, . . . because of who we are, *not* what we did."[11] Muslim's relative lack of "consensual government, freedom, and material security"[12] fuels this seemingly irrational fury toward the West, a collective hatred not limited to a few terrorists, but rather shared by millions.[13] Arab governments have only compounded this disparity when compared to the United States, Hanson argues, by "failing to come to grips with the dizzying and sometimes terrifying pace of globalization and the spread of popular Western culture."[14] In the context of this cultural inferiority complex of sorts, Hanson concludes, "September 11 must be seen as the opportunistic response of fundamentalists to funnel collective [Muslim] frustration against the United States."[15]

Hanson calls for a "Bush Doctrine" to counter this hostility on two levels, thereby addressing the overt actions of terrorists and the complicity of supporting nations. The doctrine would "state unequivocally that a terrorist attack on the citizens or the shores of the United States is defined as an act of war, and will bring immediate retaliation of all our forces, without qualification, against any state that hosts, aids, or comforts the perpetrators."[16] Hanson also encourages President Bush to articulate a moral component of U.S. policy, which emphasizes democratic values for Islamic peoples as the highest ideal.[17] While this suggestion sounds at first naive, especially when compared to the sophistry of modern diplomacy's mea-

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10. For instance, Hanson's introduction of the book's final chapter, *December*, reminds readers that zealots and fanatics are not new to history, nor is the recipe for their demise:

> The war [against the Taliban in Afghanistan] was also reminding millions worldwide of a long-forgotten lesson about human nature—that zealotry and fanaticism, for all their shrillness and terror, fade before real military power when coupled with justice. Some Americans, at any rate, seemed stunned that vocal fundamentalists who had weeks earlier promised a century of mayhem were now nowhere to be found or in caves high in the mountains.

Id. at 162.

11. *Id.* at xiv. *See also id.* at 15, 67, 90, 97, 107-08, 173-77.

12. *Id.* at xiv.

13. *Id.* "[I]f al-Qaeda did not exist, it would have to have been invented to assuage the psychological wounds of hundreds of millions of Muslims . . . ." *Id.*

14. *Id.* Other commentators have made similar observations. *See, e.g.*, FATIMA MERNISSI, ISLAM AND DEMOCRACY: FEAR OF THE MODERN WORLD (1992).

15. HANSON, *supra* note 1, at xiv.

sured words, it is the premise upon which the special U.S. relationship with Israel is built.

> [Israel is] the Middle Eastern state most like ourselves in their commitment to a free society based on the rule of law and the consent of the governed. Our special relationship with Israel is open equally to any Islamic country that accepts the idea of democracy and the essence of freedom.[18]

Hanson clearly intends that this idealistic U.S. policy serve as a warning to Arab governments and as an incentive to their citizens. He urges, "The United States should declare that it supports the right of all Islamic

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16. *Id.* at 72. Hanson's message may already be influencing U.S. foreign policy. Vice President Cheney, who with his small staff has "emerged as the fulcrum of Bush's foreign policy," "is now reading *An Autumn of War* . . . and raving to his staff that it captures his philosophy." Glenn Kessler & Peter Slevin, *Cheney Is Fulcrum of Foreign Policy: In Interagency Fights, His Views Often Prevail*, WASH. POST, Oct. 13, 2002, at A16.

17. HANSON, *supra* note 1, at 191.

> Democracy is hardly a Western secret like Greek Fire of the Byzantines to be closely guarded and kept from the *mujaheddin.* Islam is welcome to it, with the blessing and subsidy of the West. Yes, we must promote democracy abroad in the Muslim world, but only they, not we, can ensure its success.

Id. After all, Hanson reminds readers, an unabashedly democratic policy toward Eastern Europe eventually brought down the Iron Curtain of Soviet totalitarianism. *Id.* at 201. In his recent United Nations address, President Bush seemingly heeded Hanson's advice when he repeatedly emphasized U.S. pursuit of democratic principles in the Middle East.

> America stands committed to an independent and democratic Palestine, living beside Israel in peace and security. Like all other people, Palestinians deserve a government that serves their interests and listens to their voices.
>
> . . . .
>
> Liberty for the Iraqi people is a great moral cause and a great strategic goal. The people of Iraq deserve it and the security of all nations requires it. Free societies do not intimidate through cruelty and conquest and open societies do not threaten the world with mass murder. The United States supports political and economic liberty in a unified Iraq.

President George W. Bush, Address Before the United Nations (Sept. 12, 2002). Moreover, the President's National Security Strategy further reflects the principles that Hanson advocates in his first theme. *See* NATIONAL SECURITY COUNCIL, THE NATIONAL SECURITY STRATEGY OF THE UNITED STATES OF AMERICA pts. III, VII (Sept. 2002).

18. HANSON, *supra* note 1, at 73.

peoples to self-determination through consensual government, and, indeed, [it] shall work for the gradual evolution of democracy in countries where the impoverished have no voice or freedom."[19] Hanson argues convincingly that staying true to these democratic principles during the War on Terrorism will be the cornerstone to an effective "war on all fronts," including the military, diplomatic, philosophical, and cultural.[20]

With his first theme, Hanson certainly opens *An Autumn of War* to criticism for "Islamophobia" or "Arab smearing."[21] He even facetiously titles one essay in the book *Pillars of Ignorance*, [22] perhaps in parody of T.E. Lawrence's flattering account of the Arab revolt against Ottoman rule.[23] Throughout its pages, *An Autumn of War* maintains that democracy is a rare phenomenon, a system of government inherently better for its citizens than the theocracies and autocracies of the Muslim world.[24] Unlike Lawrence of Arabia and today's relativists, however, Hanson makes no attempt to equate the culture and governance of the Muslim world to the esteemed principles of Western democracy. Instead, he demonstrates that dictatorships have always been illegitimate, whether in the form of Germany's Nazi fascism, Eastern Europe's Soviet totalitarianism, or the Middle East's increasingly radical manifestations of Islam.[25] Moreover,

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19. *Id.* at 72.

20. *Id.* at 69-74. Hanson admits that this strategy is not without peril. Unapologetic, however, Hanson asserts that the United States will be no worse off than it is now.

> Fundamentalism may well be elected and replace autocrats professedly sympathetic to America. But such reform offers the only chance to avoid repetitions of the present disaster in which corrupt Westernized strongmen buy off indigenous criticism, by allowing their fundamentalists to vent popular outrage against us rather than them. These illegitimate governments have a free press only in the sense that they are free to damn America.

Id. at 72.

21. Hanson offers one essay satirizing Edward R. Murrow in which the newsman raises similar concerns on the day after the Japanese kamikaze attacks against Pearl Harbor. One American religious leader warns "against castigating the entire Japanese people for the actions of a few fanatics, [and said] 'Bushido, is, in fact, merely a variant of Shintoism, itself an age-old and misunderstood faith that is as humane as anything in Christian teaching.'" *Id.* at 41.

22. *Id.* at 189-99.

23. T.E. LAWRENCE, THE SEVEN PILLARS OF WISDOM (1922). Hanson may also have intended this as a sarcastic reference to the elements—sometimes called pillars—of Islam's Divine Wisdom, which Muslims believe were inspired by God to the prophet Muhammad and came to be known as the *Sunna* or Prophet's Traditions. *See* MAJID KHADDURI, THE ISLAMIC CONCEPTION OF JUSTICE 3 (1984).

Hanson sees little distinction between moderate and radical Middle Eastern regimes. Of modern Saudi Arabia, Hanson says simply, "the royal family . . . cannot act out of principle because *no* principle other than force [placed them] and keeps them in power."[26]

Hanson's second theme, more succinct if no less controversial than his first, asserts that today's popular yet unproven social theories have not altered the realities of war and human nature.[27] Hanson thus prefers the Greek response to conflict: "war is terrible but innate to civilization,"[28] and human nature remains "raw, savage, and self-serving just beneath the veneer of civilization."[29] In this predictable light, history has shown that civilization—certainly not a natural occurrence as Hanson illustrates—must constantly struggle against savagery and chaos.[30]

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24. *See, e.g.*, HANSON, *supra* note 1, at 191.

> Government spokesmen in the Middle East should ignore the nonsense of the cultural relativists and discredited Marxists and have the courage to say that they are poor because their populations are nearly half illiterate, that [their] governments are not free, that their economies are not open, and that their fundamentalists impede scientific inquiry, unpopular expression, and cultural exchange.

Id.

25. *Id.* at 143, 200-03.

26. *Id.* at 190.

27. *See, e.g., id.* at xviii, 4, 11-12 ("Democracies are derided as decadent and soft. They are neither when aroused, but it requires vision to convince a complacent citizen that moderation in war is imbecility, that tragically real humanity is to put to rest those who would slay the helpless"), 62-68 ("War is 'the father, the king of us all" the philosopher Heraclitus lamented. Even the utopian Plato agreed: 'War is always existing by nature between every Greek city-state.' How galling and hurtful to us moderns that Plato, of all people, once called peace, not war, the real 'parenthesis'!").

28. *Id.* at xv.

29. *Id.*

> As a student of classical literature, I was deeply influenced by the epics of Homer, the plays of Sophocles, Thucydides' history, and the dialogues of Plato, which all seem to offer time-honored alternatives to modern behaviorism, Freudianism, Marxism, and social construction. In the Hellenic view, the *wrong* questions to ask in this present conflict are "Why is there war?[,]" "Why do they hate us?[,]" or "What did we do to them?"

Id.

30. *Id.* at 49.

Evil, a term disdained for its simplicity,[31] manifests itself through "bellicose theocratic and autocratic nations," or non-state actors like the al Qaeda, which "rush to battle out of classical motives like Thucydidean fear, envy, and self-interest that in turn are fueled by a desire for power, fame, and respect."[32] So "war is often fought rationally," Hanson says, but "the causes for its outbreak are seldom rational."[33] If the reader accepts Hanson's notion that these evil motivations are inherent in man's nature, it is a short step to recognize war's inevitable recurrence. But war can also be fought without evil intentions, and Hanson reiterates the sometimes-forgotten, originally Greek concept that war is "not always unjust or amoral if it is waged for good causes to destroy evil and save the innocent."[34]

Hanson's third theme identifies a Western shortcoming, one distinctly at odds with Hanson's belief in the unchanging essence of war and human nature. This theme holds that democracy eventually creates a privileged class whose members espouse utopian pacifism from their insular position of security and relative comfort.[35] These so-called cultural elites, "principled opponents of the use of force in response to violence,"[36] alternately question and deny Western civilization's moral authority to act against Muslim fundamentalists and their supporting nations.[37] While the equalizing lenses of multiculturalism[38] and cultural relativism[39] allow the cultural elite to refrain from such moral judgments, Hanson retorts that the "misery of the Middle East" is simply "the predictable result of widespread failure to adopt free institutions, democracy, open markets, and civilian

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31. Yaroslav Trofimov, *Anti-U.S. Consensus Soars Amid Threats Against Iraq*, WALL ST. J., Sept. 11, 2002 (reporting that many Arab analysts perceive President Bush's use of the term "axis of evil" in referring to Iran as, rightly or wrongly, proof of U.S. bias against Islam), http://online.wsj.com/home/us (archives) (subscription database).

32. HANSON, *supra* note 1, at xv.

33. *Id.*

34. *Id. See also id.* at 98, 104, 170. According to one recent news account, Vice President Cheney shares this philosophy of just war. *See* Kessler & Slevin, *supra* note 16, at A16.

35. HANSON, *supra* note 1, at 23, 53-56 (remarking that initial European hesitancy to back an American military response against the Taliban makes those nations no more than "neutrals" in the War on Terrorism), 66 ("[D]uring the International Year of Peace in 1986[,] a global commission of experts concluded that war was unnatural and humans themselves unwarlike[.]"), 75-78 ("In a 'war' are we the moral equivalents of our enemies? . . . 'War,' after all, brings such unwholesome baggage, the entire nineteenth-century lexicon of 'treasonous' and 'evil,' or their antitheses 'patriotic' and 'moral'—or even worse terminology like 'defeat' and 'victory' or 'surrender' and 'triumph.'"), 92-95 (identifying a philosophical American "fault line [that] pits a utopian cultural elite against the working middle class").

36. *Id.*

audit."[40] While Hanson identifies the logical fallacies of using the pacifists' approach to defend certain Arab regimes, he cautions that "in a war with deadly adversaries like [al Qaeda] and their supporters, [such] utopianism is near suicidal."[41]

Hanson's fourth theme resonates best with military readers. It reminds Americans, especially those who would question the nation's ability to fight a seemingly "untraceable [and] . . . unstoppable" enemy,[42] of the "vast extent of their nation's military power."[43] This final premise reiterates a theme that runs throughout Hanson's other military history writings.[44]

> [T]he three-millennia story of Western civilization on the battlefield has proved to be one of abject terror for its enemies. Europe and its cultural offspring have across time and space fashioned a deadly form of warfare that transfers ideas of freedom, rational-

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37. *Id.* at xvii-xix. Hanson bluntly states his case:

> Many enlightened and well-educated Americans—often among the most influential of our society—simply cannot believe that awful men abound in the world who cannot be cajoled, bought off, counseled, reasoned with, or reported to the authorities, but rather must be hit and knocked hard to cease their evildoing if the blameless and vulnerable are to survive.

Id. at xvii.

38. "[A]ll peoples are more or less equal, one society not qualitatively better than any other." *Id.* at xviii.

39. "[I]t is wrong to judge a people on its habits and practices—there being no real objective standard of good or evil behavior, since both concepts are not absolute, but simply 'constructions' or 'fictions' of the day, created by those in power to maintain their control and privilege." *Id.*

40. *Id.* at xviii-xix.

41. *Id.* at xviii.

42. *Id.* at 49. Hanson argues that history provides numerous examples where strong civilizations were gripped with fear in the face of enemies of mythological proportions, beginning with tales of the early Greeks confronting Furies, Gorgons, and Cyclopes. Hanson then discusses the victorious march of the Theban liberator, Epaminondas, into the heart of the invincible Sparta, the halting by American GIs of an unstoppable Waffen SS division at Falaise Gap, and the defeat of forces promising "the mother of all battles" in but four days on the sands of Iraq. *Id.* at 49-50. Hanson later demonstrates striking religious and military parallels between Japanese soldiers in World War II and members of al Qaeda. *See id.* at 123-26.

43. *Id.* at xix.

44. *See, e.g.*, HANSON, *supra* note 7, at 15.

> ism, consensual government, and egalitarianism to lethally trained civic militaries—highly disciplined, well led, technologically advanced, and superbly armed.[45]

According to Hanson, Western civic organization and cultural values translate uniquely into superior battlefield abilities,[46] especially when coupled with pursuit of a righteous cause.[47] When attacked by Darius and his Persian forces at Marathon in 490 B.C., the Athenian hoplites defeated the invaders and went on to decimate the Persians ten years later at Salamis and Plataea.[48] More recently, the total Allied victory[49] over Axis powers turned bitter enemies Germany and Japan into close partners within one year.[50] Likewise, Hanson demonstrates, military forces pursuing unjust causes deserve defeat, which the Athenians suffered after butchering neutral Melians[51] and the Confederacy experienced in its attempt to maintain the plantation state.[52]

Hanson doubts neither the military superiority of U.S. forces, nor the moral imperative that forced the nation to war after the September 2001 terrorist attacks. As evidence, Hanson points to the stunning and rapid victory of U.S. forces over the Taliban in Afghanistan.

> [T]he present campaign so far stands as one of the most amazing and lopsided victories in the annals of battle—in sheer opera-

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45. HANSON, *supra* note 1, at xix.
46. *Id.* at xix, 50-51.
47. *See id.* at 71-73.
48. *Id.* at 64, 139.
49. Hanson reminds the reader that total victory is a uniquely Western concept:

> The idea of annihilation, of head-to-head battle that destroys the enemy, seems a particularly Western concept largely unfamiliar to the ritualistic fighting and emphasis on deception and attrition found outside Europe . . . . Westerners, in short, long ago saw war as a method of doing what politics cannot, and thus are willing to obliterate rather than check or humiliate any who stand in their way.

Id. at 34.

50. *Id.* at 56, 143.
51. *Id.* at 66.
52. *Id.* at 24-32. "War, as Sherman said, is all hell, but as Heraclitus admitted, it is also 'the father of us all.' Wickedness—whether chattel slavery, the gas chambers, or concentration camps—has rarely passed quietly into the night on its own." *Id.* at 18. Hanson continues, "The present evil [presented by Muslim fundamentalists] isn't going to either." *Id.*

> tional terms reminiscent of the victorious Ten Thousand suffering a single casualty at Cunaxa, Alexander the Great a few thousand while destroying the Achaemenid Empire, or Cortés fewer than one thousand at the fall of Tenochtitlán. The facts of the Afghani War, both militarily and its long-term historical significance, are quite stunning—comparable to anything found in either Creasy's or Fuller's classic compendia of great battles.[53]

This despite many scholars' warnings that Alexander the Great, Britain, and the Soviet Union all failed in Afghanistan.[54] But Hanson insists that the United States must not stop with the Taliban, even at the risk of incurring charges of "unilateralism." As if predicting the future, Hanson instead argues for continuing the nation's decisive military response, beginning with Iraq,[55] because "national weakness [or inaction] invites attack more often than thanks and appreciation of past self-restraint."[56]

While Hanson's unabashed praise for the U.S. armed forces leaves servicemembers feeling confident and proud,[57] military readers should be aware of *An Autumn of War*'s few minor pitfalls. First, Hanson's impressive command of military history sometimes places the novice historian at a disadvantage. A few more details with the historical examples, just to place events in context, would greatly assist the reader. Absent that, readers seeking professional development would benefit from citations to historic references or even a bibliography for further study. Second, Hanson occasionally attempts humor to make his point through satire or parody.

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53. *Id.* at 165 (referring apparently to Edward S. Creasy's *The Fifteen Decisive Battles of the World* (1851) and J.F.C. Fuller's *Decisive Battles of the Western World* (1954)).

54. *Id.* at 19.

55. Hanson's November 2001 analysis of the danger posed by Iraq and the necessity for U.S. military action in continuing the War on Terrorism beyond Afghanistan has proven most prescient.

> If [the United States wishes] to end terror, in the coming months we should turn to Iraq. If we turn to Iraq, we should be resigned to go it alone. If we attack alone, we should seek absolute victory; if we obtain victory, we should institute a constitutional government; if we promote legitimacy [through democratic governance], we will see a gradual end to terror.

Id. at 143. In an earlier work, Hanson lamented the restraint shown by victorious coalition forces after defeating the Iraqi army. *See* HANSON, THE SOUL OF BATTLE, *supra* note 6. In *An Autumn of War*, Hanson repeats several of history's examples, demonstrating convincingly that absolute victory demands pursuit and the complete vanquishing of enemy forces. *See* HANSON, *supra* note 1, at 138-42.

While Hanson's skilled wit can be a relief in light of his topic's gravity, his parody of future al Qaeda trials—wherein O.J.'s "dream team" represents the defendants—is just too much.[58] Finally, Hanson's introduction admirably lays out his four themes, and it prepares the reader for the collection of essays that follows. Moreover, the essays provide substantial support for Hanson's four themes. After the last essay, however, there is no closing chapter or epilogue to reinforce Hanson's main points. This forces the reader to go back and review the introduction for a complete understanding of the work. Therefore, a few concluding paragraphs after the last essay, slightly less levity, and greater historical detail could have added polish to Hanson's otherwise exceptional book.

Anyone involved in planning and executing U.S. military action in the War on Terrorism should study *An Autumn of War* for its invaluable historical perspective.[59] This study should begin sooner rather than later because, as Hanson reminds military readers: "War . . . really is a 'violent teacher.' And the present one is no exception."[60] Even cynics may be surprised by Hanson's compelling historical examples that illuminate America's legitimacy in taking the War on Terrorism to the Muslim fundamentalists who would plot her downfall. After reading *An Autumn*

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56. HANSON, *supra* note 1, at 15. "Even our magnanimity in sending food to the Taliban was as frequently interpreted as irresolution as it was seen as charity. And military restraint in not responding to prior bombings [by the Taliban] can be dismissed as timidity rather than praised as sobriety." *Id.* Hanson extends this argument to Osama bin Laden, who was only encouraged by past American restraint.

> Mr. bin Laden killed thousands of Americans because he was depraved and thought it more likely that he could gain fame and power than court death and destruction. We were Britain to his Hitler, a power not in any way culpable for past transgressions, but an obstacle nonetheless by virtue of our democracy and liberality to his mad dreams of grandeur. He envisioned a medieval Caliphate under his sway. And he was convinced by the past restraint of the United States that the world's sole superpower either could not or would not retaliate against him, despite his longstanding history of murder.

Id. at xvi.

57. *See, e.g.*, *id.* at 112-17.

58. *See id.* at 132-37.

59. Hanson also offers historical insight into military leadership. He provides a thorough analysis of Sherman's Georgia campaign, even offering a moral defense for Sherman's tactics. *Id.* at 24-37. He further observes, "Periodic scariness is not a vice in military leadership," *id.* at 12, and, "We have enough handlers and experts to curb our leaders' exuberance, but in our present age far too little audacity," *id.* at 13.

60. *Id.* at 99 (paraphrasing the historian Thucydides).

of War, most readers will conclude that the United States must make one of two choices in confronting terrorism. The first is inaction and further debate, supported by the "[p]undits who give us every reason to do little, and little reason to do much."[61] The second is action and resolve, which Hanson advocates in characteristically plain terms:

> [W]e are at a great juncture in American history. We can go to battle, as we once did in the past—hard, long, without guilt, apology, or respite until our enemies are no more. It was our ancestors who passed on to us that credo and with it all that we hold dear, and so just as they once did, we too must confront and annihilate these killers and the governments that have protected and encouraged them. Only that way can we honor and avenge our dead and keep faith that they have not died in vain. Only with evil confronted and crushed can we ensure that our children might someday live, as we once did, in peace and safety.[62]

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61. *Id.* at 53.

62. *Id.* at 5. Hanson relates a similarly inspiring call for national action and resolve, which Winston Churchill made to a group of students as England braced for a protracted war.

> Do not let us speak of darker days; let us rather speak of sterner days. These are not dark days; these are great days—the greatest days our country has ever lived; and we must all thank God that we have been allowed, each of us according to our stations, to play a part in making these days memorable.

Id. at 45 (quoting Winston Churchill, Address at the Harrow School (Oct. 29, 1941)).

NO ONE LEFT BEHIND[1]

REVIEWED BY MAJOR YIFAT TOMER[2]

> *A man who is good enough to shed his blood for his country is good enough to be given a square deal afterward. More than that no one is entitled to, and less than that no one shall have.*[3]

Around midnight on 16 January 1991, Lieutenant Commander Michael Scott Speicher, a naval aviator, launched from the deck of the *USS Saratoga* in the Red Sea. His F/A-18 "Hornet" was among the forty-six planes that participated in the very first strike of the Persian Gulf War. It was a mission from which he would not return. Twelve hours later, Dick Cheney, then Secretary of Defense, in a briefing to the press, told the public that Speicher was the first casualty of the Gulf War.[4] He was listed as Killed In Action/Body Not Recovered (KIA/BNR). Almost ten years later, on 10 January 2001, Speicher's status was changed—he was declared missing in action (MIA).[5]

In *No One Left Behind: The Lieutenant Commander Michael Scott Speicher Story*, Amy Waters Yarsinske chronicles the events surrounding Speicher's disappearance, from the first day of the Gulf War until the present. The book is written as a detective tale. Slowly, step by step, Yarsinske reveals all the evidence uncovered over the intervening years, finally leading to the revision of Speicher's status. The author recounts the events

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1. AMY WATERS YARSINSKE, NO ONE LEFT BEHIND: THE LIEUTENANT COMMANDER MICHAEL SCOTT SPEICHER STORY (2002).

2. Judge Advocate, Israel Defense Force (IDF). Written while assigned as a student, 51st Judge Advocate Officer Graduate Course, The Judge Advocate General's School, United States Army, Charlottesville, Virginia.

3. YARSINSKE, *supra* note 1, at 1 (citing President Theodore Roosevelt, Address at Springfield, Illinois (July 4, 1903)); *see also* the fifth stanza of the Army Ranger creed, which states: "I shall never leave a fallen comrade to fall into the hands of the enemy." *Id.* at 168.

4. *Id.* at 40-41. The assumption that Speicher was dead was based on an explosion seen by one of the pilots and because Speicher had not tried to contact anyone with his surviving radio. *Id.* at 41.

5. *Id*. at 243-45.

in meticulous detail and exposes the reader to all of the developments in the investigation.

Yarsinske's book is a critical charge sheet against the U.S. government for not doing enough to bring Speicher back home. Yarsinske does not leave much room for the reader's own impressions; she does not let the reader draw his own conclusion from the facts and events presented. From the book's first page her allegation is very clear: "The U.S. government failed to rescue Scott[,] . . . breaching the very premise of not leaving a fallen comrade on the field of battle."[6] Yarsinske does not hesitate to use harsh words against the government.[7] She alleges that the investigation into Speicher's crash was plagued by mistakes and purposeful neglect. Throughout the entire book, she points her finger toward specific figures who did not want to admit their errors: "It was more important to them to be proven right—that Scott was dead—in order to avoid being painted into a corner thanks to their mistakes."[8]

Yarsinske contrasts the United States' high expectation of its pilots with how little the country has done for Speicher after his disappearance. This technique effectively allows the reader to absorb the contradiction between Speicher's devotion and dedication and the betrayal of his country. For example, Yarsinske describes the briefing on the *Saratoga* before going to war, when Speicher and his squadron mates were told that: "George Bush has called on [you] to do [your] duty . . . . [T]his will be with you for the rest of your lives . . . [,] so you want to do the best job you possibly can because if you don't[,] you will regret it until you die."[9] She continues by describing how Speicher was not originally assigned to that mission; he was tapped as the spare, but pleaded with his commander to let him join.[10] In addition, Yarsinske describes Speicher as an exemplary fighter.[11] In complete contradiction, the U.S. government, according to the author, did not keep its part of the bond. Its representatives have been inac-

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6. *Id.* at 1-2.

7. For example, one of Yarsinske's main accusations is that no rescue operation was sent to rescue Speicher. In this context, she cites a memorandum issued by the Deputy Assistant Secretary of Defense (POW/Missing Personal Affairs) stating that attempts *were* made to rescue Speicher, but they met with negative results. Yarsinkse says that "neither of these statements is true. No rescue forces were ever contacted to search for Scott Speicher." *Id.* at 102.

8. *Id.* at 148.

9. *Id.* at 5-6.

10. *Id.* at 6.

11. *See, e.g., id.* at 50 (quoting Speicher's wife: "he loved his country . . . [;] he was doing what he had to do").

tive and idle, although they have repeatedly promised Speicher's wife they have been doing everything to locate her husband.[12] Using this motif of contradictions serves well Yarsinske's aim in criticizing the government's conduct.

As a former Navy Reserve intelligence officer,[13] Yarsinske had a vantage point in writing *No One Left Behind.* Thoroughly researched,[14] the book is a fascinating mosaic of facts and testimonies drawing upon more than 500 interviews, government documents, intelligence case files, correspondence, and other material. Throughout the book, Yarsinske integrates quotations of Speicher's squadron mates, his old friends, his commanders, and the people involved in the investigation of the case. These quotations contribute to the credibility and reliability of the book. Yarsinske uses photographs as another effective technique to convey her message. For example, she includes pictures of Speicher's family and their home, Speicher's squadron mates, and the Hornet's wreckage, which was later found. These pictures vividly display the essence of Speicher's story, and make the reader feel empathy for Speicher's fate.

Still, writing about current intelligence issues has some inherent difficulties. The main difficulty is the confidentiality of the sources.[15] Yarsinske often describes certain facts without giving a satisfactory explanation for their basis, claiming "it was known."[16] Another inherent difficulty is the frequent use of anonymous sources.[17] These difficulties make it hard for the reader to make his own evaluation of the facts. The notes section in the book is very short and lacks detail, impairing the

12. *Id.* at 48.

13. Steve Otto, *Remembering Another Loss and Wondering*, TAMPA TRIBUNE ONLINE EDITION (Oct. 16, 2002), *at* http://tampatrib.com/FloridaMetro/columns/MGAQKFXQC7D.html.

14. Yarsinske wrote the book after eight years of research. YARSINSKE, *supra* note 1, at 283.

15. Indeed, the Navy stamped a large portion of Speicher's file as classified. *Id*. at 137-38.

16. For example, Yarsinske claims that after being shot down, Speicher was rescued by a nomadic Bedouin tribe. Yarsinske says that "it is known" that the Bedouins attempted for several years to return Speicher to the United States without getting any response. *Id*. at 152. Yarsinske claims that later on Saddam Hussein's agents spotted Speicher, took him away, and slaughtered the Bedouin tribe that protected him. Yarsinske bases this argument on two sources—an Iraqi driver who claims to have delivered Scott to Baghdad, and a Saudi source nicknamed the "Falcon Hunter." *Id.* at 154. Yarsinske's authority for her arguments is unclear. How did the author find out what those sources said? Did she personally talk with them? Did she hear it second-hand, and if so, who was her source?

book's credibility. It also opens the door for those sources to deny facts that the author claims they had told her.[18]

Still, Yarsinske succeeds in making the reader feel troubled about the mistakes made in Speicher's case. For instance, the author mentions that in 1994, a Kuwaiti colonel, who had escaped an Iraqi prison, claimed to have been in a hospital with an American pilot during the last days of the Gulf War. The colonel was willing to assist in any way (including looking through photographs to identify the pilot), but according to Yarsinske, the XVIII Airborne Corps headquarters' response was: "The prisoner exchange had taken place. We're not missing anybody. We have one hundred percent accountability."[19] Following such revelations, the reader cannot avoid the feeling of fury and frustration.

The book next describes the developments in the investigation. In late 1993, new satellite shots revealed Speicher's wrecked Hornet in the Iraqi desert. The United States asked the International Committee of the Red Cross to send a special team to the crash site.[20] The team arrived in Iraq in December 1995 and located the Hornet's wreckage and the aircraft's canopy, found less than a mile away.[21] The author describes in great

17. For example, one of the facts supporting the assumption that Speicher survived the crash was that signals were sent from his crash site. Yarsinske cites a confidential source saying that two months after the Joint Services Survival, Evasion, Resistance, and Escape Agency director, Colonel Bob Bonn, determined those signals were strong evidence that Scott was alive, Bonn ordered the source not to find any more signals on the imagery. The source added that this incident occurred just after Colonel Bonn met with some generals, and that shortly thereafter Bonn wrote and sealed a document marked "to be opened only after [Bonn's] death." *Id*. at 144-47. These are rather grave accusations, hard to accept from an anonymous source.

18. For instance, Barry Hull, one of Speicher's squadron mates, whom Yarsinske quotes in the book, recently said that he had never spoken with Yarsinske. Hull said he only spoke with a reporter in Norfolk, with whom Yarsinske wrote a series on Speicher, published in the *Virginia Pilot*. *See* Paul Pinkham & Rachel Davis, *Speicher Book Sparks Disputes*, FLORIDA TIMES-UNION, June 17, 2002, at B-1.

19. YARSINSKE, *supra* note 1, at 138-42.

20. *Id*. at 163-68. The U.S. government chose this diplomatic path over conducting a covert mission. *See id.* at 157-69.

21. *Id*. at 172-77. The cockpit was missing. Yarsinske claims that a special U.S. covert unit had previously taken the cockpit from the site. Here, again, comes to fruition the difficulty in relying upon anonymous sources. Yarsinske bases her claim on an anonymous Navy commander, who alleges that he heard a covert team fighter saying: "Yeah man, we're going out to the desert to get some guy's cockpit and bring it back." *Id.* at 171. Not only is Yarsinske's source anonymous, her source is giving second-hand testimony based on another anonymous source.

detail the series of tests conducted on these findings and on a flight suit the Iraqis later transferred to the team, leading to the conclusion that Speicher had ejected from the aircraft.[22]

Additional significant evidence of Speicher's survival described in the book is the testimony of an Iraqi defector. This Iraqi claims that years after the Gulf War, he was asked by Iraqi officials to pick up and bring to Baghdad an American prisoner—a pilot still wearing a flight suit. In a lineup of mug shots, "the driver" identified Speicher as the pilot he shuttled.[23]

Based on such mounting evidence, presented as a whole in the book, on 11 January 2001, ten years after he had been shot down, Speicher was removed from the KIA list. He is the only American from any war to have his status changed by the government from KIA/BNR to MIA.[24]

The main significance of the book derives from its discussion of the value of "leave no one behind." This is a universal value, and its applications, of course, are much wider than the Speicher case.[25] Many nations mull over questions such as: Is it an absolute value or should it be balanced with other contradicting values? Does this value apply to all circumstances, or are there circumstances when other considerations will overpower? And do you risk hundreds for one?[26]

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22. *Id.* at 191-208.

23. *Id* at 229-30. Still, Yarsinske does not address the difficulties "the driver's" testimony raises. For example, if the pilot was delivered years after he was shot down, why was he still wearing his flight suit?

24. *Id.* at 243-45.

25. Yarsinske mentions that Speicher is not the only American soldier "left behind." *Id.* at 95-99 (telling the story of five other Navy aviators also shot down during the Gulf War; according to Yarsinske "nobody did much to look for them either").

26. In Israel, for example, a flurry of emotions burst over the case of Madhat Yusuf, a border guard soldier killed on 1 October 2000, during the first days of the Palestinian hostilities. Yusuf was shot while he was protecting Joseph's Tomb. Since this was an insulated site, surrounded by Palestinians, the Israel Defense Forces (IDF) determined that the soldier's evacuation would be done in cooperation with the Palestinians, and not by Israeli troops breaking in. Sadly, Yusuf died from his wounds before he was evacuated. This decision led to a series of accusations that Yusuf was abandoned, in violation of the value of no one left behind ("hare'ut"), which is included in the IDF's ethic code. The team investigating this case concluded that the IDF based its decision on professional consideration, thinking cooperation with the Palestinians was the fastest and most effective way to evacuate Yusuf. *See generally* Israel Ministry of Foreign Affairs, *Temporary Evacuation of Joseph's Tomb by the IDF and Its Transfer to the Palestinian Authority* (Oct. 7, 2000), *at* http://www.mfa.gov.il/mfa/go.asp?MFAH0i0r0.

Precisely due to this complexity, the author's simplistic standpoint on this matter is disappointing. The author is apparently unaware of the many sides of this issue. According to her, it's a simple question of math—Yarsinske claims that the small number of rescue missions during the Gulf War represents a drastic change in policy compared to the war in Vietnam.[27] But is it appropriate to apply a quantitative test? Shouldn't one apply a qualitative standard that takes into consideration the risk to the rescue forces and whether the person they are out to rescue is dead or alive? Yarsinske avoids this discussion.[28] Undoubtedly, "leave no one behind" is a noble principle, but the issues are more difficult than Yarsinske makes them appear. In Yarsinske's defense, however, she is positive that Speicher's case is a clear situation of abandonment, and not a borderline case. Hence, a complex analysis of the "no one left behind" dilemma is perhaps unnecessary.

While *No One Left Behind* gives indepth coverage of the events regarding Speicher's case, its main drawback is the lack of clear distinction between proven facts and the author's assumptions, which as much as everyone would hope are true, are not definite at all. Yarsinske adamantly claims that Speicher is still alive. Unfortunately, her book raises many questions regarding Speicher's current condition, and her unequivocal conclusion is too extreme given the evidence she presents.[29] Yarsinske bases her claim upon a series of assumptions: that Speicher survived the crash; that Speicher was found by a tribe of Bedouins that nurtured him; and that not until 1995 was he captured and sent to an Iraqi prison. Above all of these assumptions looms a very big question mark. But even if we

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27. *See* YARSINSKE, *supra* note 1, at 104-05. Yarsinske notes that in the Persian Gulf War, thirty-seven fixed-wing aircraft were lost in combat, but a search team was launched for only seven of them. Regarding this, she says, "The math is simple. Seven searches out of thirty-seven, with only three recoveries." *Id.*

28. Yarsinske describes how a proposed covert operation was aborted based on the Chairman of the Joint Chief of Staff's opinion that "[he didn't] want to be the one to write letters home to the parents telling them that their son or daughter died looking for old bones." *Id*. at 169. Certainly, this is not a genteel remark. Still, couldn't one think of a situation in which the danger to the covert unit justifies a decision not to carry out an operation? Yarsinske herself tells the story of a rescue operation of an F-16 pilot. During the operation, the rescue helicopter was shot down and several crewmembers were killed, while the pilot they were sent to rescue had been captured the moment he hit the desert floor. *Id*. at 108. This case illustrates well the difficulty of these decisions.

29. Despite the lack of evidence to support her conclusion, Yarsinske relates to Speicher as if he is still alive from the prologue, where she claims "[Speicher] continues to fight for his life every day in a country that took him captive," *id*. at 1, to the last chapter, where she claims that "Scott will have to continue to endure the lion's den, as he has so bravely for the past ten years," *id.* at 276.

accept all of them, the book does not provide enough evidence to conclude that Speicher is still alive *today.* The book includes testimonies regarding the cruel and merciless torture methods the Iraqis used in their prisons.[30] It is a well-known fact that human lives in Iraq are not highly valued.[31] Therefore, how Yarsinske could positively conclude that Speicher is still alive is unclear.

Yarsinske further argues that the question of "where is Scott now" cannot be answered without discussing Saddam Hussein's personality. She claims that "Saddam Hussein hates the United States . . . . [E]very day Saddam gets joy knowing he has Scott, a prize possession of his enemy the great Satan—the U.S. . . . Why kill someone who provides daily pleasure?"[32] Yarsinske further claims that Speicher's present location might have to do with Hussein's desire to resurrect the glory days of Nebuchadnezzar and the Babylon Empire. She suggests that Hussein might be keeping him in one of Nebuchadnezzar's gigantic palaces he had rebuilt.[33] This discussion screams of speculation. Drawing an assumption of where Hussein is holding Speicher by using "popular" psychology is not convincing. Is it not possible to argue with the same firmness that precisely because of this hatred, and in order to prove his supremacy over the United States, Hussein had killed Speicher? The possible alternative scenarios are numerous. It seems that, as Mark Bowden has lately written, "[t]he sheer scale of the tyrant's deeds mocks psychoanalysis."[34]

As much as Yarsinske tries to force all the pieces of the puzzle to fit the conclusion that Speicher is still alive, unfortunately, too many question marks surround this case.[35] Still, as previously mentioned, since the book

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30. For example, Al-Mousawi, an Iraqi prisoner, said that one of his duties was to clean the interrogations rooms, "where he often found inmates' bodies, blood and remains". *Id.* at 265-67.

31. *See, e.g.*, Mark Bowden, *Tales of the Tyrant: What Does Saddam Hussein See in Himself That No One Else in the World Seems to See? The Answer Is Perhaps Best Revealed by the Intimate Details of the Iraqi Leader's Daily Life*, ATLANTIC MONTHLY, May 2002, at 17.

32. YARSINSKE, *supra* note 1, at 270.

33. *Id.* at 270-73.

34. Bowden, *supra* note 31, at 35.

35. Another example of the lack of separation between facts and assumptions is Yarsinske's claim that Speicher was hit by friendly fire. She claims that one of Speicher's squadron mates, assuming Speicher was an Iraqi MiG–25, panicked, and shot him. YARSINSKE, *supra* note 1, at 61. This theory is possible, but Yarsinske does not explain why it is "more likely" than the theory that Speicher actually was shot down by an Iraqi MiG-25. After all, many pilots on that night mission battled with a MiG-25. *Id.* at 18-26.

is dealing with current intelligence issues, it is clear that not all evidence can be revealed to the reader. And so, Yarsinske ends the last chapter by describing new intelligence information that suggests Speicher is still alive.[36]

Another interesting issue is the author's attitude toward Speicher's wife, Joanne. Although Yarsinske avoids criticizing Joanne explicitly, it seems that she disapproved of Joanne's "passivity." Yarsinske says, "[Joanne] put it behind her as much as she could" and that "as soon as she clammed up, Scott Speicher's name fell away from the front page and the chances of anyone pressing for his return faded with every day that passed."[37] Later, Yarsinske reveals that in July 1992, Joanne remarried one of Speicher's squadron mates. Yarsinske repeats three times that Joanne continued to receive large amounts of money, even though once remarried, she was no longer Speicher's next-of-kin, and hence not entitled to it.[38] These details seem unnecessary and irrelevant to Speicher's ordeal. Though, as stated, the author doesn't blame Joanne specifically for anything, even her implied criticism seems unfair.[39] No one should put herself in Joanne's shoes, especially when, according to the book, Joanne was getting partial and even misleading information.[40]

Despite its shortcomings, *No One Left Behind* is an interesting and significant story that deserves to be told. The book touches one of the most profound values in every moral army, the value of "leave no one behind." Furthermore, the aftermath of 11 September 2001 has raised the same questions as Speicher's case: Did the various agencies involved share

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36. *Id*. at 273-74. The author claims that British and Dutch intelligence sources had recently provided the Central Intelligence Agency (CIA) and the Defense Intelligence Agency (DIA) with information about Speicher's location. *Id*. She also claims that in a special session of the Senate Select Committee on Intelligence held last March, CIA and DIA directors testified that given all the information in their possession, Speicher is alive today. *Id*. at 280-81.

37. *Id*. at 114.

38. *Id*. at 185-86, 217, 240 (detailing the exact sums of all payments Joanne received over the years).

39. Yarsinske uses a very subtle method to express, between the lines, her criticism. Initially, she identifies Speicher's wife as "Joanne Speicher." *See, e.g.*, *id*. at 186. Later on, she calls her "Joanne Speicher–Harris," *id.* at 217, and finally, when she elaborates on the different sums of money Joanne got, she calls her "Joanne Harris." *Id*. at 217, 240.

40. *Id*. at 143.

information? How well did they analyze data? Could they critique their own work?

On another level, *No One Left Behind* demonstrates the great influence of the media in modern society. It was Secretary Cheney's press announcement that doomed Speicher to the KIA list; and it was the media's investigation and reporting of Speicher's story, among other reasons, that caused a chain of reaction culminating in the change of Speicher's status.[41]

Most importantly, the book is a constant reminder of every nation's duty to fight for its soldiers. Yarsinske ends the book in a call for bringing Speicher back home: "It is time to do something."[42] If Scott Speicher is still alive today, one can only hope that the book will become another cornerstone in the just struggle to return him to his country.[43]

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41. Before publishing *No One Left Behind*, Yarsinske had published, together with Ron Wagner, a six-part series in the *Virginia Pilot* about Speicher. Lon Wagner & Amy Waters Yarsinske, *Scott Speicher—Dead or Alive?*, VIRGINIA PILOT (six-part series, published Dec. 30, 2001 through Jan. 4, 2002), *available at* http://www.aiipowmia.com/pgw/speicherindex.html. For unknown reasons, the book does not mention at all this series (for which Yarsinske has been nominated for the Pulitzer Prize for Journalism). The reader only learns about it from the book's jacket.

42. YARSINSKE, *supra* note 1, at 277.

43. After submission of this book review for publication, Speicher's status changed again. On 11 October 2002, Secretary of the Navy Gordon England determined that the more appropriate category for Speicher is "Missing/Captured." In his memorandum, Secretary England stated that he has "no evidence to conclude that Captain Speicher is dead. While the information available to me does not prove definitively that Captain Speicher is alive and in Iraqi custody, I am personally convinced the Iraqis seized him sometime after his plane went down." Memorandum, U.S. Dep't of Navy, Office of Sec'y, subject: Captain Michael "Scott" Speicher, USN para. 5 (11 Oct. 2002), *available at* http://www.nationalalliance.org/gulf/secnavmemo.htm. England further emphasized that the facts supporting this change also support the conclusion that, if alive, Speicher is a prisoner of war. *See id.*

THE SECRETS OF INCHON[1]

REVIEWED BY MAJOR PETER C. GRAFF[2]

On August 26, 1950, I was summoned to the office of Captain Edward Pearce, USN, in the Dai Ichi Insurance Building in downtown Tokyo, overlooking Emperor Hirohito's imperial palace. For the past year, I had been serving under Captain Pearce on General Douglas MacArthur's staff.

"Gene," Eddie Pearce said in his gruff deadpan way, "I believe we've cooked up a little rumble you're going to like."

Lieutenant Eugene Franklin Clark was not the kind of man that walked away from a rumble. In *The Secrets of Inchon*, Clark gives an amazing first person account of his covert mission on the eve of the historic United Nations invasion. Clark's adventures read like a C.S. Forrester novel set in the twentieth century.[3] In the span of two weeks, Clark and a handful of Koreans captured an island less than twelve miles from Inchon, survived hand-to-hand combat in running firefights, and fought a naval battle in wooden junks. Bit by bit, they created an intelligence network that monitored enemy activities all the way to Seoul, and they radioed Tokyo daily with vital information that saved thousands of lives. When the U.N. fleet entered the unforgiving waters off Inchon harbor, the fleet had the beacon of a single lighthouse to guide it. Clark and his men ignited the flame.[4]

The Secrets of Inchon offers more than a terrific war story of the Korean conflict. Clark's thoroughly human presentation offers valuable insights into leadership, relations that cross cultures, and the law of war.

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1. EUGENE FRANKLIN CLARK, THE SECRETS OF INCHON (2002).

2. United States Army. Written while assigned as a student, 51st Judge Advocate Officer Graduate Course, The Judge Advocate General's School, United States Army, Charlottesville, Virginia.

3. From 1937 until 1967, C.S. Forrester published several novels featuring the daring exploits of Horatio Hornblower, an officer of the Royal Navy who served during the Napoleonic Wars. The National Library Service for the Blind and Physically Handicapped of the Library of Congress, *Minibibliographies, The Horatio Hornblower Series by C.S. Forrester, at* http://www.loc.gov/nls/bibliographies/minibibs/horatio.html (last visited Aug. 24, 2002).

4. CLARK, *supra* note 1, at ix-x (introduction by Thomas Fleming).

His story is as daring and as moving as the events he lived. Clark writes for the man of action, and he appreciates the human dimension of war.

Clark's well-organized account follows a straightforward timeline, and it culminates with the U.N. landing on Inchon. In the first part of *The Secrets of Inchon*, Clark lays his groundwork. Clark receives his mission on 26 August 1950, and he enters Inchon harbor with only fourteen days to complete it.[5] Clark has no time to do preliminary planning; he has to improvise. Fortunately, he selects two outstanding Korean officers to accompany him: Navy Lieutenant Youn Joung, and Colonel Ke In-Ju.[6] The former is a fearsome commando, and the latter an expert interrogator. Throughout most of the book, Clark refers to these men by their respective aliases, "Yong" and "Kim." These aliases do little to further the story, and there appears little reason to use them in place of real names.

After boarding a small Korean PC-703 gunboat on his way to Inchon, Clark discovers that the Communists have only a skeleton force on the nearby island of Younghung-do. Exploiting this opportunity, Clark and his Korean comrades recapture the island and develop close ties with most of the villagers.[7] Clark conveys their earthy personalities well. Through Clark, the reader meets the salty pirate, Chang, and the tragic young lovers, Lim and Chae.[8] Clark knows them personally, and he cares for them genuinely. The narrative remains firmly rooted in Clark's perspective, however. The reader can only speculate on the inner minds of Clark's Korean comrades. *The Secrets of Inchon* misses the opportunity to give them a voice.

On Younghung-do, Clark immediately fortifies his fragile defensive position, creates a network of informants, and builds a junk fleet to prevent a counter-invasion. Clark lives in the shadow of a vastly superior Communist garrison on the surrounding islands. Infiltrators pose a constant threat. Undeterred, he begins exploratory operations and discovers an abandoned lighthouse on the island of Palmi-do.[9]

Clark takes initiative and exploits targets of opportunity. Each rapid adventure conveys the crushing feeling that time is running out. The reader appreciates Clark's physical strain, his weight loss, lack of sleep,

5. *Id*. at 33.
6. *Id.* at 8.
7. *Id*. at 39-40.
8. *Id*. at 61, 90.
9. *Id*. at 120.

and diet of Benzedrine tablets. Before too long, Clark notices an increase of infiltrators arriving on his island.[10] A clash is imminent.

In the second phase of the book, the rumble "turns hot."[11] Refugees tell Clark about Yeh, a brutal political commissar on the nearby island of Taemuui-do. With information from the refugees, Clark and his companions conduct a raid to capture Yeh.[12] Clark treats his readers to history as heart-racing action. The raid on Yeh's beach house illustrates the aggressive tempo of the many combat scenes that energize Clark's book:

> Someone was moving inside again. A faint hollering could be heard up the beach. I freed my forty-five for quick action, and Yong followed suit. We crouched now, facing the doors. There it was—the slamming of forty-fives and the hacking of Hyun's submachine gun. There were loud exclamations from inside, and before they could reach the doors, the rending crash of grenades a few houses down lit up the outside. They filed through the door now, and as they were fumbling to slide the outer doors aside, Yong jumped the nearest one. I was behind him and in a bound was on top of the man at the door, driving my knife hard up into his ribs. As he went limp, a knee drove hard into my side. But our guide was on the third man before I could recover my balance. . . .[13]

Moments later, Clark clubs the fleeing commissar over the head with his pistol. As the raiders carry Yeh's limp body out of the house, they meet a hail of bullets. Their unconscious prize dies in the firefight.[14]

Clark does not rest on his laurels. He continues with a series of equally harrowing reconnaissance missions that literally touch the seawalls of Inchon harbor. Against all odds, he is still alive on the fourteenth of September.[15] Clark recounts the last day of his mission in the final chapter of his book, "Younghung-do's Last Stand."[16] Hollywood screenwriters could not have drafted a more gripping and bittersweet ending to his adventures. Clark and his allies fight desperately, but their situation is

10. *Id.* at 127.
11. *Id.* at 137.
12. *Id.* at 139-74.
13. *Id.* at 170.
14. *Id.* at 172.
15. *Id.* at 301.
16. *Id.* at 291-319.

hopeless. Evacuating the island within footsteps of hundreds of North Korean soldiers, Clark urges young Chae to leave behind his fallen love, Lim. Chae answers with a shove and falls on his own hand grenade. Still reeling from the explosion, an exhausted Clark finally reaches the lighthouse at Palmi-do. His beacon guides the invasion fleet in the dark, dangerous waters to complete MacArthur's strategic masterpiece at Inchon.[17]

Few can challenge Clark's account of this nearly impossible mission. His military credentials are impeccable. Commander Clark retired as a career naval officer with vast experience in amphibious operations and covert missions. Rising from the rank of seaman to petty officer, he earned his commission during World War II.[18] Clark received both the Silver Star and the Legion of Merit for his Inchon reconnaissance.[19]

Eugene Clark wrote this first person narrative shortly after his return from Korea. He made no attempt to publish it during his lifetime. For nearly fifty years, the manuscript remained in a safety deposit box along with a Department of Defense clearance to tell the story as he experienced it. His family rediscovered the manuscript and gave it to historian Thomas Fleming, who published *The Secrets of Inchon* after Clark's death.[20] Clark never intended the book to go public. Its origins and posthumous publication reinforce the sincerity of his narrative.

Clark's background on Operation Chromite captures the spirit of the times, but fails to achieve historical accuracy. His cursory treatment of allied plans for the Inchon invasion focuses almost entirely on a Tokyo meeting between General MacArthur and two members of the Joint Chiefs of Staff, General Collins and Admiral Sherman. Clark's principal source appears to be MacArthur's "peroration that was soon echoing throughout the Dai Ichi Building."[21] In *The Secrets of Inchon*, MacArthur's eloquence in defense of the Inchon landing won over Admiral Sherman and reduced General Collins to "surly silence."[22]

Historian James Edwin Alexander, who has studied both primary and secondary sources from the August meeting, offers a very different description. "General MacArthur did not ask Collins or Sherman to

17. *Id.* at 319.
18. *Id.* at 4.
19. *Id.* at 321-25 (epilogue by Thomas Fleming).
20. *Id.* at x (introduction by Thomas Fleming).
21. *Id.* at 10.
22. *Id.*

approve his plans, nor did they offer to do so."[23] Clark's version appears off the mark, and it goes beyond the scope of his story. Fortunately, Clark does not dwell on it. He quickly returns the reader to the mission at hand.

Another weakness lies in the book's supplementary materials. Better maps would enhance the flow of Clark's narrative. *The Secrets of Inchon* offers only two small maps at the very front of the book.[24] At times, the reader struggles to follow Clark's movements and his running battles on Younghung-do. Clark thoroughly describes Younghung-do early in the book,[25] but most of the battles around the island occur much later.[26] Detailed maps of Younghung-do and the Inchon invasion would give the reader a better sense of Clark's situational awareness.

If battles and narrow escapes are the book's lifeblood, Clark's humanity and introspective mind give *The Secrets of Inchon* its heart. Clark transparently reveals his own biases, opinions, and complex inner dialogue. He comments on leadership, his coalition partners, and the law of war in brutal situations. The book is heavy on Cold War rhetoric, but it is far from anachronistic. Clark's lessons are relevant today.

Clark frequently offers candid perceptions of Korean culture. In contrast to Western impatience, his Korean allies insist on structured, polite exchanges. Clark believes that his Korean comrades must always save face. At Younghung-do, he reminds himself, "Although time was of the essence, the customs and amenities of these people were not to be denied by a mere war."[27] He also contrasts Korean social mores against Western sensibilities, noting that "at least a few of his friends would have developed a psychotic condition" over their casual attitude towards nudity.[28] Such observations enrich the book's cultural and historical context.

Clark writes openly and does not conceal his own biases. He believes that Korean women are totally subordinate in their culture. When Kim kills a deadly viper that threatened the lives of three local women, they

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23. JAMES EDWIN ALEXANDER, INCHON TO WONSAN: FROM THE DECK OF A DESTROYER IN THE KOREAN WAR 150 (1996) (relying on letters by the participants and Walter M. Kraig's *Battle Report, The War in Korea* (1952)). Both Admiral Joy and General Almond were present at the meeting and describe Kraig's work as substantially correct. *Id.*

24. *See* CLARK, *supra* note 1, at vi-vii.

25. *See id*. at 48-49.

26. *See id.* at 175-202, 301-17.

27. *Id.* at 40.

28. *Id*. at 94.

express no thanks whatsoever. Clark explains, "They merely understood, that the saving of a woman's life was so negligible an act on [Kim's] part that an expression of gratitude would demean him."[29] By contrast, Clark sees women as the gentler sex. Before the mission, Clark tells his wife he is going on a routine trip in Japan. "Women should not be subjected to such trying experiences,"[30] he notes near the end of the book. Of course, Chae's tragic suicide and Lim's courageous death dramatically undermine both of these oversimplified views of women.

Clark's inner dialogue on leadership is useful to military and civilian leaders alike. Clark is not immune from fear and doubt. After taking Younghung-do, he admits, "I could feel myself crumbling inside again. Must get back to work—only by working could I overcome this sense of utter inadequacy."[31] Clark reminds himself, however, that he must control this impulse to keep busy: "As always in a critical evolution, there is desire to push aside the helmsman or signalman and 'do it yourself.' Fatal as I knew giving way to this urge would be, I nevertheless entertained it."[32] In the end, Clark trusts his junior leaders and resists the temptation to do too much.

Clark quickly perceives the effects of stress on others. When three planes attack the PC-703, Commander Lee is away from his ship as it goes into action. Visibly upset, Lee loses his composure. When the clash was over, Lee "wilted to the ground alongside me, blood on his thin lips where he had bitten them, glasses still glued to his eyes, scanning the distance where the Yaks [Soviet jet fighters] had disappeared."[33] Instinctively, Clark knows how to approach the young man: "I would undertake the delicate task of convincing him that, far from losing face, he should be proud of himself and his crew. Failure would mean I would have to request Tokyo to send in another gunboat. Lee must be observed carefully in the next few hours."[34]

Clark succeeds because he inspires men and women to follow him. He also succeeds because he is wise enough to appreciate his allies' agenda

29. *Id.* at 84.
30. *Id.* at 302.
31. *Id.* at 58.
32. *Id.* at 105.
33. *Id.* at 112.
34. *Id.* at 113.

and work within it to achieve a common end. As his mission commences, Clark notes:

> For this I would require Korean natives of unquestioned loyalty to the South Korean cause and personally "my men." This concurrent loyalty to their own country and to an American was not conflicting unless the American strayed from Republic of Korea objectives and interests, the exact dividing line not always as apparent as it might seem.[35]

Clark knows that his allies will follow their own agenda, and they will not always commit to American interests. Clark does not make demands, realizing that demands are unproductive. They waste scarce time and energy. Instead, he perceives his allies' interests and acts upon them. When the local fishing association resists his proposal to cannibalize their boats to build a navy for the island, Clark does not give way to impatience, even though he has good cause. Thinking quickly, Clark remarks that there will be "damage" when they shift the rigging on the junks. His proposal of five scarce bags of rice to pay for it gets the job done.[36]

Similarly, Clark offers no resistance when the South Korean Navy orders Commander Lee's gunboat away to search for a group of barges. Clark knows that the loss of the gunboat will expose him to a Red invasion. He also knows that Lee must obey his orders, and Clark is in no position to change them. He compliments the young Commander for his bravery and accepts the loss of the gunboat. The reader is not surprised to learn that Lee and his gunboat return.[37]

Lieutenant Clark brings the law of war out of the classroom and invites his readers to struggle with it on the battlefield. Clark perceives one major difference between himself and his Korean allies, and it revisits him throughout the book. He senses the conflict between humanitarian principles and the reality of war during a struggle for national survival. The Communist enemy shows no mercy. Clark presents his views on the law of war in this context:

> The Republic of Korea was waging "total" war against the Reds, admitting no compromise—utterly ruthless in her determination

35. *Id.* at 22.
36. *Id.* at 92.
37. *Id.* at 261.

> to expel the enemy and bring the nation together under one flag. Korea was fighting this war under Oriental rules, with no pretense of observing the fast-becoming outmoded "humanitarian" laws of warfare established by the Western conventions. No squeamish American could hope to obtain the respect or following of such ardent Korean revolutionaries as Young and Kim. I was thankful that my past eight years of service in the Orient in war and peace had made me a sufficiently enlightened leader to be acceptable to these proponents of direct action.[38]

Clark's actions betray these words during the entire operation. Throughout the book, he is the voice of restraint. His behavior provides a fascinating irony that animates *The Secrets of Inchon*. His men do not find him squeamish. They respect him. In their company, Clark experiences "a simple thing that cuts across race, creed, and color, and without reason or second thought, require[s] a man to lay down his life for his friend."[39]

The Secrets of Inchon is replete with examples of Clark's restraint. When the villagers greet them on the shores of Younghung-do, Clark fears a trap. He realizes, however, that fire support from the gunboat is "now entirely out of the question."[40] Lee could not throw "death and destruction among those villagers."[41] Later on, his lieutenants look at him "quizzically" when he orders that they use no coercion against a Younghung-do prostitute who consorted with the enemy.[42] Near the end of the book, Clark perceives his influence on Lieutenant Young during one of their last raids: "[I]ndeed I could not help but notice the positive effort of will he put forth to restrain the commission of atrocities. I am quite certain that my presence alone stayed his hand."[43] This comment may or may not reflect Clark's bias, but it demonstrates his instinct to follow the law of war and ensure that others do the same.

Clark adheres to his "outmoded" humanitarian principles because they are pragmatic in the long run. Clark notices that casualties increase when men are untrained and undisciplined.[44] Clark and his officers also appreciate the simple fact that "the living speak" and offer the vital intelli-

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38. *Id.* at 22.
39. *Id.* at 271.
40. *Id.* at 39.
41. *Id.*
42. *Id.* at 87.
43. *Id.* at 287.
44. *Id.* at 306.

gence they need.[45] He follows humanitarian principles and tries to reinforce his own ethics with a warrior's practicality.

Lieutenant Clark does not judge his Korean comrades too harshly. "I was not in sympathy with the summary manner in which these people were inclined to deal with one another, although to be truthful, I could well understand their propensity in this regard."[46] Clark appreciates the temptation to abandon the law of war when the perceived choice lies between following its precepts and surviving against an enemy that doesn't play by the rules.

On the whole, *The Secrets of Inchon* has strengths that eclipse its relatively minor weaknesses. This book tells a great story and provides a compelling read. Clark grabs hold of his reader and plunges him into high adventure and fast-paced combat action. On a deeper level, Clark invites his reader to contemplate leadership, multi-cultural coalitions, and the law of war. He considers humanitarian principles when the stakes are highest and the cause most desperate. Any member of the armed forces will find this book enjoyable and professionally rewarding. Any American will appreciate the modest hero that wrote it.

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45. *Id.* at 54.
46. *Id.* at 60.

KILLING PABLO
THE HUNT FOR THE WORLD'S GREATEST OUTLAW[1]

REVIEWED BY MAJOR WENDY P. DAKNIS[2]

It was an ugly business, killing Pablo . . . .[3]

Mark Bowden, acclaimed for his work in *Black Hawk Down*,[4] has once again created an intense, action-packed account of U.S. military operations in his most recent book, *Killing Pablo.* Proving that truth can be stranger than fiction, Bowden chronicles the sixteen-month search for Colombian drug lord Pablo Escobar, who stymied both the Colombian and U.S. governments, as well as their military forces, in their efforts to locate him. Bowden couples extensive research with his exceptional narrative talents to produce a fact-based report that reads like a suspense novel. More than that, he raises questions about U.S. military operations in foreign territories that have current relevance, especially following the 11 September 2001 attacks against America.

Bowden's tale begins in Bogota, Colombia, in April 1948, when Colombia's politics and culture were facing upheaval. He draws the reader back to that time and place to describe the evolution of the Colombian struggle with power and violence. Bowden uses detailed examples to portray the evolution of a nation more violent than most Americans can imagine:

> In Colombia it wasn't enough to hurt or even kill your enemy; there was ritual to be observed. . . . To amplify revulsion and fear, victims were horribly mutilated and left on display. . . . The joke Colombians told was that God had made their land so beautiful, so rich in every natural way, that it was unfair to the rest of

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1. MARK BOWDEN, KILLING PABLO: THE HUNT FOR THE WORLD'S GREATEST OUTLAW (2001).

2. United States Army. Written while assigned as a student, 51st Judge Advocate Officer Graduate Course, The Judge Advocate General's School, United States Army, Charlottesville, Virginia.

3. BOWDEN, *supra* note 1, at 270.

4. *See, e.g.*, Book Review, KIRKUS REVIEWS, January 15, 1999, *available at* LEXIS, News Library, Book Reviews File; Gary Anderson, *A Harrowing Case Study in Modern Warfare*, WASH. TIMES, March 21, 1999, at B8; William Finnegan, *A Million Enemies*, N.Y. TIMES, March 14, 1999, § 7, at 6.

> the world; He had evened the score by populating it with the most evil race of men.[5]

Bowden vividly describes a land in which lawlessness was revered and violence was power.

After laying this groundwork, Bowden next focuses attention on Pablo's rise to become the head of the infamous Medellin drug cartel. Bowden examines the time and place of Pablo's childhood years, explaining the outside influences that helped shape Pablo into "the greatest outlaw in history."[6] Bowden outlines Pablo's teenage escapades of running petty scams on the streets before turning to auto theft and ultimately drug distribution. More importantly, Bowden highlights how Pablo earned his reputation for "casual, lethal violence."[7] Over the course of his career, Pablo's acts of violence impacted not only those within his hometown of Medellin, but also citizens throughout Colombia and even the rest of the world. By the end of the introductory chapters, Bowden has convinced the reader that Pablo Escobar was far more than just a drug lord—he was, in fact, an enemy of the state and a "clear and present danger."[8]

The history provided in the initial chapters of the book is very effective in establishing a frame of reference with which the reader can better evaluate the rest of the story. It would be impossible, without prior knowledge of Colombian history and way of life, to understand fully how a man like Pablo Escobar was able to succeed in his quest for power. By describing Colombian culture, Bowden helps explain not only why Pablo felt justified in his use of violence,[9] but also why Colombian society accepted the power he wielded. In fact, at some levels, Pablo succeeded in becoming a legend, revered for his lawlessness.[10]

The remainder of *Killing Pablo* is devoted to recounting the efforts of the Colombian government to control Pablo and end his reign of terror. Bowden details Pablo's elusive run from the Colombian justice system and

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5. BOWDEN, *supra* note 1, at 14.

6. *Id.* at 14.

7. *Id.* at 20.

8. *Id.* at 59.

9. *Id.* at 20 ("A man had to protect his interests. . . . [I]n Medellin there was little effective or honest law enforcement. If someone cheated you, you either accepted your losses or took steps yourself to settle the score.").

10. *See id.* at 21 (describing how Pablo became admired for the alleged kidnapping and murder of a wealthy industrialist).

his successful evasion of extradition. Bowden describes Pablo's brief period of self-imposed imprisonment in a complex he planned and designed on his own land, and how Pablo continued to run his drug cartel from this luxury prison until he finally escaped. Bowden emphasizes the government corruption and military ineptitude that subsequently permitted Pablo to remain a fugitive for over a year. While telling the story, Bowden explains the politics that turned the Colombian quest for justice into a quest for death.

Bowden also focuses on the organizations and players involved in the pursuit. He delves into the labors of the Colombian National Police (La Policia Nacional de Colombia (PNC)) and more specifically, the organization within the PNC known as the Search Bloc, headed by Colonel Hugo Martinez. Bowden also highlights the contributions made by Colonel Martinez's son, Hugo, Jr. He describes President Gaviria's and the Justice Ministry's involvement in the hunt for Pablo. Bowden documents the rise of a vigilante group called Los Pepes that stalked Pablo's family, friends, and associates, killing as many as six people associated with Pablo every day.[11] Finally, Bowden explores the United States' role in bringing Pablo to justice, discussing the involvement of the U.S. ambassador, the Drug Enforcement Agency, the Central Intelligence Agency, and U.S. special operations forces, including the intercept team, Centra Spike.

Bowden ties the story together in a section titled *Aftermath*. Here, he analyzes the immediate cause of Pablo's death and follows up with many of the key players, describing the impact the hunt for Pablo had on their lives.[12] After reliving the grueling pursuit and all the effort and trauma involved, knowing the final consequences is immensely gratifying. Bowden concludes the book with a fitting quote from Drug Enforcement Agency agent Joe Toft: "I don't know what the lesson of the story is. I hope it's not that the end justifies the means."[13]

Bowden's background and previous works help lend credibility to *Killing Pablo*. He spent over twenty years as a reporter for the *Philadelphia Inquirer*, winning many national awards for his writing.[14] He wrote two books that were relatively unknown before *Black Hawk Down* made him a celebrity in 1999. *Black Hawk Down* was included on the *New York*

11. *Id.* (photo insert).
12. *Id.* at 253-72.
13. *Id.* at 272.
14. *Id.* (inside cover).

Times' bestseller list for the better part of a year and earned Bowden recognition as a 1999 National Book Award finalist.[15] The book made such an impact that it was adapted for film and recently released in theaters throughout the country under the same name.

It is clear that this reporting and research experience served Bowden well in the preparation of *Killing Pablo*. Over the course of three years,[16] he consulted a plethora of sources, to include books, articles, documents, and interviews.[17] He even traveled to Colombia to interview drug runners and civilians.[18] Bowden's reliance on primary sources, such as interviews with personnel involved in the hunt for Pablo and cables from the U.S. embassy in Bogota to Washington, D.C.,[19] add to the trustworthiness of the tale. He took the necessary steps to ensure complete, thorough coverage of the rise and fall of Pablo Escobar. Because of his exhaustive research, Bowden's knowledge of the events leading to Pablo's ultimate demise is unquestionable.

At times, however, Bowden's comprehensive research is almost detrimental in that it makes the book so detailed that it is difficult to follow. For example, Bowden includes the name of every participant—no matter how small a part that person actually played.[20] Because many of the Colombian surnames are the same, keeping track of who is who and how they are interrelated is a challenge. (Even Pablo and the Colombian president who became his nemesis share the same last name—Gaviria.) The book could be simplified by either excluding some of the less important names or including a "cast of characters" for reference. The book's level of detail makes it almost impossible to comprehend the story fully after a single reading.

Bowden's reporting background is also evident in the presentation of *Killing Pablo*. The book, much like a well-written news story, stirs and maintains the reader's interest. The cover itself is captivating. The grue-

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15. Chris Waddington, *'Black Hawk Down' Author Is 'Not a War Reporter'*, STAR TRIB., Apr. 14, 2002, at 1F.

16. *Id.*

17. BOWDEN, *supra* note 1, at 273-85.

18. Waddington, *supra* note 19, at 1F.

19. BOWDEN, *supra* note 1, at 273.

20. *See, e.g.*, *id.* at 191 (naming Pablo's brother-in-law (Hernan Henao), two of Pablo's attorneys (Santiago Uribe and Roberto Uribe), the *El Espectador* editor (Guillermo Cano), a judge (Myrian Velez), and a realtor who had once assisted Pablo (Diego Londono)).

some photograph of a dead Pablo Escobar surrounded by soldiers laughing and celebrating generates interest in the story. What bizarre series of events could possibly lead to such an unlikely and unthinkable result? How could anyone take so much pleasure in another person's death? Additionally, Bowden's inclusion of photographs in the center of the book is an excellent tool that brings the story to life and allows the reader to feel as though he "knows" many of the players. The photographs of Pablo's "cell" at La Catedral (his Medellin prison) were especially illuminating. Next, Bowden divides the book into several short discreet sections—each readable in a single sitting. Finally, he chooses to provide his references at the end of the book, rather than intersperse them throughout the main body, which adds to the overall readability.

Bowden's writing style and language also make *Killing Pablo* enjoyable and easy to read. He creates clear visual images of the people, places, and events involved and fills the pages with excitement and suspense. Bowden's exceptional narrative skills make *Killing Pablo* read more like a spy-novel than nonfiction. There are times, in fact, when even Bowden seems to forget that he is writing a report and not a novel. He frequently attributes emotions and motives to Pablo without any indication that these are based in fact or supported by sources.[21] It is this type of writing, however, that keeps the story interesting.

Further in keeping with his reporter background, Bowden's main purpose in writing *Killing Pablo* appears to be to recount the details of the pursuit and ultimate killing of Pablo Escobar, emphasizing the role played by the United States. Bowden himself was surprised by the level of U.S. involvement in the manhunt,[22] and apparently felt compelled to reveal this information to the public. Bowden expresses this intent when he states that

> [t]he manhunt for Pablo Escobar is another of those complex missions in the modern history of the U.S. military, like the battle story told in *Black Hawk Down*, that otherwise would have remained largely unknown. The issue of whether the United States should target foreign citizens for assassination merits scrutiny and discussion, but I think this story makes it clear that on occasion it still does so.[23]

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21. *See, e.g., id.* at 21 ("His deepest anger was always reserved for those who interfered with that fantasy.").

22. *Id.* at 273.

23. *Id.* (acknowledgments).

While Bowden succeeds in detailing U.S. involvement in Pablo's death, his discussion of assassination and the laws governing it are oversimplified and misleading. Bowden provides a one-half page explanation of the origins of Executive Order (E.O.) 12,333[24] (prohibiting assassination) and W. Hays Parks's[25] subsequent clarification of the order.[26] Whether purposely or inadvertently, this explanation implies that the first Bush administration carved out an exception in E.O. 12,333 to suit its purposes and allow it to participate in previously illegal acts.

Unfortunately, a half-page examination of E.O. 12,333 is inadequate for a book that purports to make it clear that the U.S. is involved in assassination. One major problem is that there is no clear definition for assassination; therefore, "[d]epending on the breadth of the definition, assassination could define any intentional killing, or it could define only murders of state leaders in the narrowest of circumstances." [27] When even the definition of assassination is debatable, any conclusion that the United States is involved in the practice is unreliable and serves only to denigrate the government and the military. Bowden implies that many U.S. government organizations, including the military, wanted so badly to become involved in the hunt for Pablo that they were willing to either overlook U.S. policy and Executive Orders or interpret them in a way that suited their needs.[28] By this implication, he portrays the military's subsequent involvement as overreaching and illicit, leading the reader to question the legitimacy of not only this operation, but others not covered in this book.

In addition to casting a negative light on U.S. military operations, Bowden's tale may also potentially jeopardize military operations and personnel. Examining Bowden's listed sources, it is significant that Bowden does not reveal the names of many of his sources. In addition to receiving information from the men and women whose names he cites, Bowden enlisted the aid of several military sources who remain anonymous.[29]

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24. Exec. Order No. 12,333, 3 C.F.R. 200 (1982).

25. W. Hays Parks is a high-ranking civilian attorney who serves as the Chief, Law of War Branch, International & Operational Law Division, Office of The Judge Advocate General, U.S. Army.

26. BOWDEN, *supra* note 1, at 81-82.

27. Major Tyler J. Harder, *Time to Repeal the Assassination Ban of Executive Order 12,333: A Small Step in Clarifying Current Law*, 172 MIL. L. REV. 1, 3 (2002).

28. *See* BOWDEN, *supra* note 1, at 140-41 ("Pablo offered a test case, an opportunity for these agencies to prove themselves—the CIA, the NSA, the FBI, the Bureau of Alcohol, Tobacco, and Firearms (ATF), the DEA, and the army, navy, and air force. All would want a piece.").

29. *Id.* (acknowledgements).

Moreover, he received more than 3000 classified documents pertaining to U.S. involvement from an anonymous source. Given the classified and somewhat clandestine nature of these sources, it appears as though portions of this story were never meant to be told. In fact, the Pentagon initiated an investigation to discover the source of the documents.[30] While Bowden claims that the Pentagon was "none too happy with his claims that the U.S. was involved with [the] vigilante group called Los Pepes,"[31] there may be other bases for the Pentagon's interest. The Pentagon may also be concerned with preserving security; after all, top secret intelligence organizations such as Centra Spike do not remain top secret when reporters detail their mode of operations. To remain protected and effective, the military necessarily must safeguard some information from the public.

Killing Pablo makes it clear that nothing is simple about a manhunt. Even though only offering assistance to the Colombians, the United States devoted significant manpower and equipment to the pursuit of Pablo. Additionally, our nation's representatives may have become involved in some arguably immoral, illegal, and unconscionable activities to help achieve the ultimate goal. In today's world, when the United States has its own enemy in Osama bin Laden, the lessons from the book make the reader wonder how far the government will go in its pursuit of Osama and other terrorists. How is the hunt for terrorists like the hunt for Pablo? What exactly is the U.S. policy on assassination, and is the United States following that policy? Is there anything that the United States wouldn't do to further the goal of killing Osama? One would hope that operations would be tempered by lessons learned from the government's and military's previous experiences, such as the hunt for Pablo.

Although it simplifies key military concepts and delves into some questionable areas, *Killing Pablo* is a fascinating tale that provides valuable insight into U.S. military operations in foreign territories. Mark Bowden does an excellent job of reconstructing history while raising interesting questions regarding U.S. policy and operations. As the United States grapples with its stance toward Osama bin Laden and members of his terrorist group, Al Qaida, the issues raised by *Killing Pablo* have even more relevance. This book is an eye-opener that all officers should read.

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30. James Macgowan, *Making a Killing Out of Pablo*, OTTAWA CITIZEN, June 24, 2001, at C13.

31. *Id.*

JUDGE ADVOCATES IN COMBAT: ARMY LAWYERS IN MILITARY OPERATIONS FROM VIETNAM TO HAITI[1]

REVIEWED BY MAJOR CHRISTOPHER W. BEHAN[2]

> *During the bulldozing operations, General Franks radioed to Colonel Huffman, asking if burying the enemy alive in his own trenches was permitted under the Law of War. If not, said Franks, he would "stop it now." Colonel Huffman assured him that the breaching operations were lawful. He advised, however, that the location where Iraqi defenders were being buried should be marked for later reporting to the International Committee for the Red Cross.*[3]

Long before the first Brigade Operational Law Team (BOLT)[4] grabbed its Rucksack Deployable Law Office and Law Library (RDL)[5] and went off to war, Army judge advocates were refining the discipline of operational law both in combat and in operations other than war. In *Judge Advocates in Combat: Army Lawyers in Military Operations from Vietnam to Haiti*, Colonel (COL) Frederic Borch tells the story of how the U.S. Army Judge Advocate General's (JAG) Corps transformed itself from an organization focused on providing primarily garrison-type legal services in a deployed environment to a fully integrated part of the Army operational team. By sharing the stories of individual judge advocates' experiences during operations in such diverse locations as Vietnam, the Dominican Republic, Iraq, Western Samoa, Egypt, and Haiti, *Judge Advocates in Combat* demonstrates that the practice of operational law has evolved from the ad-hoc initiatives of judge advocates in unique circumstances to its cur-

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1. FREDERIC L. BORCH, JUDGE ADVOCATES IN COMBAT: ARMY LAWYERS IN MILITARY OPERATIONS FROM VIETNAM TO HAITI (2001).

2. United States Army. Written while assigned as a student, 51st Judge Advocate Officer Graduate Course, The Judge Advocate General's School, United States Army, Charlottesville, Virginia.

3. BORCH, *supra* note 1, at 182.

4. The BOLT is comprised of at least one attorney and several enlisted paralegal support staff. The primary mission of the BOLT is to provide operational law support to brigade-size elements in any type of operation. U.S. DEP'T OF ARMY, FIELD MANUAL 27-100, LEGAL SUPPORT TO OPERATIONS 5-21 (1 Mar. 2001).

5. The RDL generally consists of a notebook computer, printer, digital camera, and hardened case. The RDL comes with CD-ROM versions of legal and military research materials and has Internet-connection capability. *Id.* (glossary).

rent state of doctrinal and practical institutionalization in both the JAG Corps and in the Army.

Colonel Borch is a prolific writer who has co-authored three books[6] and written or co-authored more than thirty-five articles and book reviews published in both military and civilian periodicals and legal journals. He has served in a variety of assignments in the United States and abroad, has taught at the Judge Advocate General's School of the Army (TJAGSA) in Charlottesville, Virginia, and is currently on the faculty at the Naval War College in Newport, Rhode Island.[7]

Judge Advocates in Combat was written under the direction of The Judge Advocate General of the Army and is the first book published under the auspices of the Office of the Judge Advocate General and the Center of Military History.[8] In a sense, the publication of this book is a historical event in itself; in the 225 year existence of the JAG Corps there has been only one prior published history of the Corps.[9]

Judge Advocates in Combat is a valuable resource for Army lawyers,[10] commanders, and anyone interested in the role of the judge advocate in modern operations. It is well-organized, tightly written, and packed with stories of how judge advocates have used their abilities as soldiers and lawyers to solve problems and enhance mission success. Helpful features of the book include fifteen organizational charts depicting the legal organization of judge advocates during various operations,[11] sixteen maps depicting judge advocate locations and their supported commands in the-

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6. FREDERIC L. BORCH & WILLIAM R. WESTLAKE, THE SILVER STAR: A HISTORY OF AMERICA'S THIRD-HIGHEST AWARD FOR COMBAT VALOR (2001); FREDERIC L. BORCH & WILLIAM R. WESTLAKE, PURPLE HEART: A HISTORY OF AMERICA'S OLDEST MILITARY DECORATION (1996); FREDERIC L. BORCH & WILLIAM R. WESTLAKE, THE SOLDIERS MEDAL: A HISTORY OF THE US ARMY'S HIGHEST AWARD FOR NON-COMBAT VALOR (1994).

7. Telephone Interview with COL Frederic L. Borch (Oct. 18, 2002).

8. *See* BORCH, *supra* note 1, at xi-xii.

9. THE ARMY LAWYER: A HISTORY OF THE JUDGE ADVOCATE GENERAL'S CORPS, 1775-1975 (1975). *The Army Lawyer*, however, was not written as a comprehensive history; rather, it was a collection of articles from earlier publications involving historical aspects of the Corps. *See generally id*.

10. The book is already ubiquitous within the JAG Corps, much like the black beret. With an initial production run of some 10,000 volumes, it is easier to find a copy of this book than a hard copy of the 2002 edition of the *Manual for Courts-Martial* among members of the Army judge advocate community. Basic and graduate course students, distinguished visitors, and complete strangers will receive copies for years to come before the first printing is exhausted; indeed, the book may replace the vaunted Jefferson cup as TJAGSA's signature gift.

ater,[12] and a number of photographs and illustrations. The book's two appendices contain a glossary,[13] biographical sketches of about ninety of the three hundred judge advocates mentioned by name in the book,[14] and rules of engagement cards drafted by judge advocates in many recent operations.[15] Each chapter has extensive endnotes, and there is also an exhaustive index.

Perhaps the most useful reference feature of *Judge Advocates in Combat* is the bibliography. Colonel Borch lists literally hundreds of primary source documents, including official records, personnel records, after-action reports, regulations, and cases.[16] He also lists a rich collection of secondary sources,[17] an invaluable resource to anyone wishing to learn more about the operations discussed in the book or the development of Army operational law doctrine over the years.

The theme of the book is "the evolution of the role of judge advocates in military operations and how this development has enhanced commanders' ability to succeed."[18] Colonel Borch develops this theme by focusing on the individual activities of selected judge advocates during operations in Vietnam, Grenada, Panama, Desert Shield, Desert Storm, Somalia, and Haiti. Each operation is given its own chapter in the book. There is also a catch-all chapter on operations other than war from 1965-1994 that includes such diverse operations as Operation Power Pack in the Dominican Republic from 1965-1966 and Army participation in Joint Task Force Los Angeles during the 1992 riots.[19]

Each chapter begins with a brief synopsis of the events leading up to the conflict or deployment. Borch sets the scene by summarizing the political situation and the Army mission, then moves on to an examination of what Army judge advocates were doing in support of operations, a task he accomplishes primarily by weaving together stories of individual judge

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11. *See, e.g.*, BORCH, *supra* note 1, chart 1, at 18 (diagramming the legal organization of U.S. Army units in Vietnam and the respective technical supervision and command relationships).

12. *See, e.g.*, *id.* map 4, at 60 (depicting judge advocate locations during Operation Urgent Fury).

13. *Id.* app. A, at 329-33.

14. *See id*. app. A, at 333-50.

15. *Id.* app. B.

16. *See id*. at 369-79.

17. *See id*. at 379-91.

18. *Id.* at vii.

19. *Id.* ch. 8.

advocate feats and initiatives. He then concludes each chapter with a comment about the significance of the operation to the Army and the JAG Corps. The only drawback to this organizational scheme is the catch-all chapter, which interrupts the flow of the book. Having just finished reading about operations in Haiti, when judge advocate participation is at a peak, the reader is suddenly jolted back thirty years to Operation Power Pack in the Dominican Republic, before judge advocates began truly practicing operational law. The effect is disconcerting and might have been avoided by choosing a chronological or subject-based organization.

Younger judge advocates accustomed to JAG participation in military operations and the JAG Corps' firmly established role in the military decision-making process will benefit from the historical perspective the book provides. For example, Army lawyers did not participate in the planning for Operation Urgent Fury in Grenada in 1983. Colonel (retired) (then Lieutenant Colonel (LTC)) Quentin Richardson, the Staff Judge Advocate (SJA) for the 82d Airborne Division, had barely twelve hours' notice to prepare for the operation, and he had to convince the division chief of staff to leave behind another staff officer from the assault command post and take him instead.[20]

By 1989, during Operation Just Cause, judge advocates participated fully in the planning process and were embedded into the Army organization of command at all levels. When the 82d Airborne Division flew off to combat, the SJA, COL (retired) (then LTC) James J. Smith, was on the lead aircraft with the division commander and made the first combat jump by an Army judge advocate.[21]

In 1990 and 1991, over two hundred judge advocates deployed in support of Desert Shield/Desert Storm, supporting every level of command. They performed such functions as drafting rules of engagement, trying courts-martial, processing claims, serving on targeting cells, providing legal assistance to soldiers, facilitating battlefield contracting, and even, in one case, acting as a liaison officer to an Egyptian Army transportation battalion.[22] Judge advocates made a significant contribution to the war effort; according to COL Raymond C. Ruppert, Central Command SJA

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20. *Id.* at 63-64. Given the issues that subsequently arose, including prisoner of war issues, claims, and law of war issues, LTC Richardson said that convincing the division chief of staff to take him "was the smartest thing [he] did." *Id.* at 64 (quoting Interview with LTC Richardson by then-LTC Borch (4 Mar. 1996)).

21. *Id.* at 99.

22. *Id.* at chs. 4-5.

during the conflict, Desert Storm was "the most legalistic war we've ever fought."[23]

Operations after Desert Shield/Desert Storm featured further refinement of judge advocate participation in operations. Recognizing their versatility, commanders gave judge advocates new roles traditionally performed by other staff sections. For example, during Operation Uphold Democracy in Haiti, the XVIII Airborne Corps SJA, Major General (retired) (then COL) John Altenburg was tasked to explain the operation's rules of engagement at a press conference.[24] Judge advocates have also served as a liaison to non-governmental organizations such as the International Committee for the Red Cross in Somalia[25] and Guantanamo Bay,[26] drafted status of forces agreements during disaster relief operations in Bangladesh[27] and Western Samoa,[28] and helped coordinate lawful military support to local elections during relief operations in Florida after Hurricane Andrew.[29]

Colonel Borch wrote *Judge Advocates in Combat* as a narrative history, selecting stories and experiences of various judge advocates and using them to illustrate his theme that the role of judge advocates has evolved over the years and has enhanced commanders' ability to succeed. This narrative approach is both the great strength and weakness of the book. On one hand, Borch is a gifted storyteller who chose his stories and experiences well; readers will enjoy paging through the book and reading about the exploits of various judge advocates in different operational settings. In turn, each of the stories admirably illustrates an aspect of the transformational development of operational law in the JAG Corps. On the other hand, because this is a contemporary history, Borch runs the risk that some readers who participated in these operations may feel left out or slighted by his decision to focus on certain individuals or units.[30]

In addition, Borch's approach leaves several gaps, particularly with the doctrinal and institutional changes the JAG Corps made between operations, that he never satisfactorily fills. In the conclusion to the chapter on Grenada, for example, Borch notes that "[b]eginning in 1986, there was a

23. *Id.* at 194.
24. *Id.* at 242.
25. *Id.* at 222.
26. *Id.* at 293.
27. *Id.* at 288-89.
28. *Id.* at 280.
29. *Id.* at 304.

concerted effort to reconfigure the corps' assets and training to meet [the challenges identified during the operation]."[31] Borch never goes into detail about this "concerted effort," however, leaving the reader to wonder how the JAG Corps conducted this reconfiguration.

Judge Advocates in Combat begins with an account of the Vietnam conflict. The first judge advocate in Vietnam, COL (retired) (then LTC) Paul Durbin, arrived in 1959, with virtually no guidance on his mission. He began by providing traditional garrison legal services to the command. Life in South Vietnam was relatively uneventful for him until an attempted coup by the South Vietnamese Army several months into his tour. During the coup attempt, Durbin walked outside his quarters and noticed that an American Army advisor was riding in a jeep with a South Vietnamese paratrooper colonel involved in the attempt. Durbin flagged down the jeep, advised the American officer that it was outside the scope of the officer's duties to advise the Vietnamese officer on carrying out a coup, and subsequently drafted written guidance for Military Assistance Advisory Group personnel in the event of a breakdown in internal law and order.[32]

Throughout their sixteen years of involvement in Vietnam, Army judge advocates, as LTC Durbin's experience illustrates, saw needs that fell outside the traditional model of legal services and took the initiative to fill them. In addition to providing traditional legal services, Army judge advocates served as advisors to the South Vietnamese army, developed policy on prisoners of war and war crimes, helped train troops on the Law of War, administered a creative and effective claims system, and towards the end of the war, served as legal advisors to the Four-Party Joint Military

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30. This is particularly evident with Operation Desert Storm. Colonel Borch concentrates heavily on the activities of VII Corps and 1st Armored Division judge advocates, stating that they "typify those of the military lawyers who deployed during Desert Storm." *Id.* at 180. Although this is undoubtedly true, some readers may feel it is no mere coincidence that the VII Corps SJA and 1st Armored Division SJA were, respectively, The Judge Advocate General and The Assistant Judge Advocate General during the writing of this book. There were many other divisional and corps SJA sections serving in Southwest Asia that might have typified operations just as well.

31. *Id.* at 81.

32. *Id.* at 7.

Commission.[33] Borch notes that, looking back, "it is clear that a metamorphosis in the role of the Army lawyer was under way."[34]

Institutionally, the most significant change in judge advocate operations wrought by Vietnam came in the aftermath of the My Lai massacre and the subsequent Peers inquiry.[35] The inquiry found that a contributing cause to the killings was inadequate training in the Law of War. Senior judge advocates assisted in revising Army regulations to require that judge advocates, together with commanders, provide instruction in the Law of War. In 1972, COL Waldemar A. Solf recommended that the Army propose to the Department of Defense (DOD) the creation of a DOD-level Law of War Program.[36] The Judge Advocate General endorsed the suggestion, and the Secretary of Defense promulgated DOD Directive 5100.77[37] on 5 November 1974. The directive established a uniform Law of War program for all the services with the Army JAG Corps as the lead organization in implementing the program. Of greater significance to the development of operational law, however, was the requirement that judge advocates be involved in the development and review of operations plans to ensure compliance with the law of war; although few realized it at the time, this would set the stage for the eventual transformation of the Army JAG Corps.[38]

The JAG Corps, however, did not capitalize on the lessons learned from the Vietnam War. When the war was over, Army judge advocates returned to their traditional garrison roles. Operational law was not part of the JAG Corps mission, and the JAG Corps did virtually nothing to conduct training or prepare its officers to provide operational support in the field. Consequently, the JAG Corps as an institution was unprepared for Operation Urgent Fury in Grenada in 1983. Nonetheless, judge advocates

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33. The Joint Military Commission was formed as part of the Paris Peace Accords; its mission was to oversee a mutual troop withdrawal; serve as a communication forum for the Four Parties (the United States, South Vietnam, North Vietnam, and the Viet Cong); assist in verifying and implementing the agreement, and arrange for the return of prisoners of war and identification of those missing in action. *Id.* at 47-48.

34. *Id.* at 51.

35. *See id*. at 30. The inquiry took its name from Lieutenant General William R. Peers, the senior member of the investigative committee. *Id*.

36. *Id.* at 30.

37. U.S. DEP'T OF DEFENSE, DIR. 5100.77, DOD LAW OF WAR PROGRAM (5 Nov. 1974), *cancelled by* U.S. DEP'T OF DEFENSE, DIR. 5100.77, DOD LAW OF WAR PROGRAM (9 Dec. 1998) (reissuing 1974 directive "to update policy and responsibilities in the Department of Defense").

38. BORCH, *supra* note 1, at 31.

thrown into combat demonstrated great ingenuity and flexibility, and they did a superb job of providing operational legal support to the command. When they returned, their experiences served "as a catalyst for the development of a new military legal discipline referred to as 'operational law,' a compendium of domestic, foreign, and international law applicable to U.S. forces engaged in combat or operations other than war."[39]

At this point in *Judge Advocates in Combat*, a major weakness of the narrative history technique reveals itself. In his conclusion to the chapter on Grenada and again in the conclusion to the book, COL Borch mentions that Urgent Fury served as a catalyst for the JAG Corps to reconfigure its assets and training.[40] He fails to address in any detail, however, what specific doctrinal, organizational, and educational changes enabled the JAG Corps institutionally to rise to the challenge posed by Grenada. The omission is critical because if Grenada was truly a time of transition, there can be no true sense of historical perspective on the operation without a thorough discussion of what the Army—and specifically the JAG Corps—did to bring about a change.[41] This material would be particularly valuable to judge advocates in the future who may have to make similar transitional changes in response to new challenges.

Without this bridging material, COL Borch takes up Operations Just Cause, Desert Shield, Desert Storm, operations in Somalia, Operation Uphold Democracy in Haiti, and operations other than war from 1965-1994. In each operation, through the careful selection of representative examples, COL Borch traces the further evolution of the judge advocate role in operations, continuing to develop his two-fold theme of how the role of judge advocates in military operations has increased and how this development has enhanced the commanders' ability to succeed. His documentation of the expanded role of judge advocates in military operations is admirable.

Borch spends less time developing the second part of his theme: how increased judge advocate participation has enhanced commanders' abili-

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39. *Id.* at 81.

40. *Id.* at 81, 320.

41. Colonel Borch does cite to an *Army Lawyer* article on the subject in an endnote. *See id*. at 85 n.53 (citing Lieutenant Colonel David E. Graham, *Operational Law—A Concept Comes of Age*, ARMY LAW., July 1987, at 9). The bibliography also references other materials that document the development of operational law-type services during wartime. *See, e.g., id*. at 384 (citing Colonel Ted. B. Borek, *Legal Services During War*, 120 MIL. L. REV. 19 (1988)).

ties to succeed. He treats as self-evident the proposition that commanders have found judge advocates to be valuable, as demonstrated by the fact that commanders have increasingly turned to judge advocates to perform non-traditional tasks. One of the best examples is Major General Bull-Hansen of the Multi-National Force and Observers calling on COL (then Major) David Graham to draft a formal document turning over control of the Sinai Peninsula from Israel to Egypt, something the diplomats had neglected to do.[42] These stories are interesting, and they help buttress Borch's argument that judge advocates have been increasingly useful to commanders over the years.

The primary weakness in Borch's development of his argument, however, is its viewpoint: everything is told from the judge advocate's point of view. Colonel Borch missed a great opportunity to interview the commanders and principal staff officers involved in these missions, many of whom, like the judge advocates who advised them, are still living. General (retired) Gordon R. Sullivan, former Chief of Staff of the Army, did write a laudatory foreword, but the book itself contains no primary source material from commanders or principal staff officers. This oversight robs the book of an important perspective that would benefit not only judge advocates, but also other officers who might read the book.

Judge Advocates in Combat is a rich storehouse of historical perspective, information, and ideas. The book traces the development of operational law from a time when judge advocates had to "re-invent the wheel"[43] for every operation, to the current state of affairs in which judge advocates are a welcome and integral part of the operational team at every echelon of command. Judge advocates deploying today stand on the shoulders of an innovative group of officers who proved their worth in all types of contingency and combat operations throughout the world. It is a proud heritage, and COL Borch has done a superb job of documenting it.

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42. *Id.* at 275.
43. *Id.* at 322.

WHY TERRORISM WORKS: UNDERSTANDING THE THREAT, RESPONDING TO THE CHALLENGE[1]

REVIEWED BY MAJOR SUSAN J. BURGER[2]

> *We need to start thinking outside the boxes that failed us, but without becoming like those who attacked us.*[3]

One year after the 11 September 2001 terrorist attack on America, numerous policy makers, historians, and journalists published articles and books analyzing why this attack happened and proposing solutions on how to prevent terrorist attacks in the future.[4] In *Why Terrorism Works: Understanding the Threat, Responding to the Challenge*, Alan Dershowitz contributes to this body of literature from a lawyer's perspective. Although many of his suggestions, such as the use of torture, are rather controversial, Dershowitz encourages the reader to rethink current notions of security, liberty, and international law.

Dershowitz acknowledges that he is not an expert on terrorism, but notes that the "book is a product of a lifetime of experience in thinking about crime and violence—from the perspective of a defense lawyer and a professor of criminal law and a student of psychology."[5] Dershowitz brings a unique perspective to the table. He is a professor of law at Harvard Law School, a civil libertarian, and a staunch advocate of First Amendment causes. He is a consultant to *Penthouse* magazine, a supporter of Israeli spy Jonathan Pollard, and perhaps best known by the American public as the defender of O. J. Simpson.[6] Dershowitz has written eighteen other books, including *Shouting Fire: Civil Liberties in a Tur-*

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1. ALAN M. DERSHOWITZ, WHY TERRORISM WORKS: UNDERSTANDING THE THREAT, RESPONDING TO THE CHALLENGE (2002).

2. United States Army. Written while assigned as a student, 51st Judge Advocate Officer Graduate Course, The Judge Advocate General's School, United States Army, Charlottesville, Virginia.

3. DERSHOWITZ, *supra* note 1, at 228.

4. *See, e.g.*, MALISE RUTHVEN, FURY FOR GOD: THE ISLAMIST ATTACK ON AMERICA (2002); THOMAS L. FRIEDMAN, LONGITUDES AND ATTITUDES: EXPLORING THE WORLD AFTER SEPTEMBER 11 (2002); MICHAEL A. LEEDEN, THE WAR AGAINST THE TERROR MASTERS: WHY IT HAPPENED, WHERE WE ARE NOW, HOW WE'LL WIN (2002).

5. DERSHOWITZ, *supra* note 1, at 13.

6. *See generally* Harvard Law School, *Faculty Directory, at* http://www.law.harvard.edu/faculty/directory (last modified July 29, 2002); Bennett J. Beach & John E. Yang, *The Lawyer of Last Resort*, TIME, May 17, 1982, at 64.

bulent Age,[7] *Reversal of Fortune: Inside the von Bulow Case*,[8] *Chutzpah*,[9] *Reasonable Doubts: The Criminal Justice System and the O.J. Simpson Case*,[10] and *Supreme Injustice: How the High Court Hijacked Election 2000*.[11] He has so established himself as a champion of unpopular causes that within hours of the destruction of the World Trade Center, people asked him, "You're not going to defend these bastards, are you?"[12]

Why Terrorism Works is divided into five parts. First, Dershowitz examines ways to deter terrorism based on fundamental rules of deterring crime in general. Next, he argues that terrorism "works" because instead of deterring terrorism, the international community has consistently rewarded terrorist organizations. In the third part, Dershowitz paints a "Big Brother" scenario in which America could easily eliminate terrorism by disregarding legal, moral, and humanitarian considerations. Fourth, he argues that a democracy must make tragic choices between two evils—repression of human rights and liberties versus deadly attacks on U.S. citizens. Finally, Dershowitz concludes with his thesis that America can deter terrorism and still strike an appropriate balance between liberty and security.

In the first part, Dershowitz applies the principles of criminal deterrence to the act of terrorism. His prose is easy to read, sounding very much like a lecture from a law professor. He compares and contrasts "ordinary crime" with terrorism, concluding that terrorism is different, but not that different.[13] Dershowitz illustrates his points with analogies, and he persuasively lays a foundation for his main argument. He highlights the principal difference between terrorists and ordinary criminals—the usual means of criminal deterrence will not work against suicide bombers.

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7. ALAN M. DERSHOWITZ, SHOUTING FIRE: CIVIL LIBERTIES IN A TURBULENT AGE (2002).

8. ALAN M. DERSHOWITZ, REVERSAL OF FORTUNE: INSIDE THE VON BULOW CASE (1986) (describing Dershowitz's successful defense on appeal of Claus von Bulow of attempting to murder his millionaire wife, Sunny von Bulow.)

9. ALAN M. DERSHOWITZ, CHUTZPAH (1991) (providing Dershowitz's perspective on Jews in America.)

10. ALAN M. DERSHOWITZ, REASONABLE DOUBTS: THE CRIMINAL JUSTICE SYSTEM AND THE O.J. SIMPSON CASE (1997) (describing Dershowitz's successful defense of Simpson against murder charges).

11. ALAN M. DERSHOWITZ, SUPREME INJUSTICE: HOW THE HIGH COURT HIJACKED ELECTION 2000 (2001) (arguing that the Supreme Court engaged in partisan politics when ruling on candidate Al Gore's challenge to the Florida election process in the 2000 presidential election).

12. DERSHOWITZ, *supra* note 1, at 219.

13. *Id.* at 21.

Because of this distinction, Dershowitz argues that the United States must look beyond traditional concepts of criminal deterrence. He concludes that the best way to deter terrorism is to make the terrorists' cause or mission suffer.[14] He relies on this principle later in the book to justify tactics such as collective punishment to deter the threat.[15]

In the second part, Dershowitz argues that Europe and the United Nations have contributed to a rise in terrorism by, among other things, seeking to understand, legitimate, or assist the plight of the Palestinian people.[16] Focusing almost exclusively on world reaction to Palestinian terrorism, Dershowitz makes overarching conclusions. Although entirely logical, his conclusions appear biased. As if in a courtroom drama, the reader is convinced by what Dershowitz presents, but cannot help feeling there is more to the story. Dershowitz is not an expert in foreign policy, and assessing the international community's response to terrorism may be beyond his realm of expertise. In his thirty pages of endnotes, Dershowitz relies heavily on two authors, Bruce Hoffman and Philip B. Heymann, when analyzing terrorism and developing empirical examples to support his argument.[17] Despite his rather superficial case, Dershowitz does not hold back in his criticism, alleging in the title to this part that the response of European countries to terrorist acts laid the groundwork for the September 11 attack on America.[18] He argues that Europe and the United Nations consistently rewarded the terrorist actions of the Palestinian terrorist organizations, thereby ensuring that others would take up terrorism as the means of achieving their goals.[19]

The timing of *Why Terrorism Works* and its cover design featuring photographs of Yasser Arafat and Osama bin Laden both suggest the author intends to address the terrorist acts of 11 September 2001.[20] Throughout the book, however, Dershowitz focuses almost exclusively on

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14. *Id.* at 23-30.

15. *See id.* at 172.

16. *Id.* at 53.

17. *See id*. at 32 (citing BRUCE HOFFMAN, INSIDE TERRORISM (1998); PHILIP B. HEYMANN, TERRORISM AND AMERICA (2000)).

18. *Id*. ch. 2, at 35 (entitled "The Internationalization of Terrorism: How Our European Allies Made September 11 Inevitable").

19. *Id.* at 103.

20. Barry Gewen, an editor at the *New York Times Book Review*, asks, "Is there anything the man won't write an instant book about?" Barry Gewen, *Thinking the Unthinkable*, N.Y. TIMES, Sept. 15, 2002, §7, at 12 (book review). Bob Minzesheimer calls the book "opportunistic." Bob Minzesheimer, *Dershowitz Explains 'Why Terrorism Works'*, U.S.A. TODAY, Aug. 29, 2002, at 7D.

Palestinian terrorist organizations; the book's scant treatment of al-Qaeda has caused some critics to suggest it could have been written before the recent attack on America.[21] Dershowitz devotes twenty-one pages to a chart detailing Palestinian terrorist acts and the benefits of these acts to the Palestinian cause.[22] Yet, he fails to explain why this history is instructive for the United States in responding to the challenge of Islamic terror groups such as al-Qaeda. Although Dershowitz acknowledges that al-Qaeda and other terrorist organizations are very different from the Palestinian terrorists,[23] he does not prescribe a different method of addressing that threat. Instead, he generally applies his evidence about specific Palestinian terrorists to all terrorist organizations. Conversely, at the end of the book, Dershowitz uses the 11 September 2001 actions of al-Qaeda to call for radical action, such as "collective punishment," against the supporters of Palestinian terrorist organizations.[24]

In the third part of the book, Dershowitz argues that the best way to combat terrorism is to suspend civil liberty in favor of security. He conjures up an authoritarian regime in which the state controls the press; suppresses free expression; restricts movement; permits assassination, torture, and collective punishment; and tries enemies in secret military tribunals.[25] Through this hypothetical, Dershowitz effectively communicates to the reader the dangers of suspending civil liberties in the name of national security. He sets this up as an extreme, compared to which his proposals are quite reasonable.

The fourth part begins with a series of hypothetical problems that present tragic choices, such as an attorney who knows his client committed a murder for which another man is condemned to die.[26] In these problems, Dershowitz challenges readers to accept that there is no alternative other than two illegal or immoral choices, and asks the reader to choose the least tragic choice. To introduce the topic of torture, Dershowitz uses the scenario of a captured terrorist who knows the location of numerous bombs about to detonate throughout a city. In the "Ticking Bomb Terrorist" scenario, the only way police can prevent the death and devastation the exploding bombs will cause is to torture the terrorist.[27] The reader feels

21. Minzesheimer, *supra* note 20, at 7D.
22. DERSHOWITZ, *supra* note 1, at 57.
23. *Id.* at 100.
24. *Id.* at 179.
25. *Id.* at 107.
26. *Id*. at 132.
27. *Id*. at 142.

like a student in a freshman philosophy class, discussing the moral principles of Camus, Bentham, Dostoevsky, Kant, and Voltaire. If Dershowitz intends to be inflammatory, he succeeds in this section. Arguing that the world changed for Americans on 11 September 2001, Dershowitz throws down the gauntlet to policymakers and academics to confront torture and other tragic choices when thinking about terrorism.

Despite its prohibition by international law,[28] Dershowitz advocates non-lethal torture as the moral choice when a captured terrorist is unwilling to give information on an impending attack.[29] He argues that there is precedence in American criminal jurisprudence allowing for such a choice,[30] and that other countries routinely engage in torture in such situations. Particularly compelling is a 1995 case reported in *The Washington Post* in which Philippine authorities used torture to obtain information that prevented the hijacking and crashing of eleven civilian airliners.[31] This kind of utilitarian argument is familiar to judge advocates accustomed to the dilemma commanders face in following international law at the expense of mission accomplishment and soldiers' lives.[32] Whether or not one agrees with Dershowitz's conclusion that torture may be justified, the

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28. International Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Res. 39/46, U.N. GAOR, 34th Sess., Supp. No. 51, art. 4, U.N. Doc. A/39/51 (1984), *reprinted in* 23 I.L.M. 1027 (1987) (entered into force on June 26, 1987, and for the United States on Nov. 20, 1994); *see also* Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287; Universal Declaration of Human Rights, G.A. Res. 217A (III), U.N. Doc. A/810, at 71 (1948); RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 702 (1987).

29. DERSHOWITZ, *supra* note 1, at 142. But, Dershowitz recognizes that torture can get out of hand. He does not want law enforcement to torture anybody for any reason, so he suggests that law enforcement officers go to a magistrate to get a torture "warrant" before engaging in such procedures. *Id.* at 158.

30. *Id.* at 136 n.8 (discussing United States v. Cobb, [2001] 1 S.C.R. 587 (Can.); Ingraham v. Wright, 430 U.S. 651 (1977); Leon v. Wainwright, 734 F.2d 770 (11th Cir. 1984)).

31. *Id*. at 137 n.10 (discussing Matthem Brzezinski, *Bust and Boom: Six Years Before the September 11 Attacks, Philippine Police Took Down an al Qaeda Cell That Had Been Plotting, Among Other Things, to Fly Explosives-Laden Planes into the Pentagon—and Possibly Some Skyscrapers*, WASH. POST, Dec. 30, 2001, at W09.

32. For example, the decision whether to shoot the Bedouin child who discovered the hidden Special Forces team in Iraq before the beginning of the ground war in Operation Desert Shield/Desert Storm. *See generally* AMERICAN COMMANDOS (Discovery Channel Video, Inc. 1998) (interviewing team member MSG Robert Degroff and team leader CW4 Richard "Bulldog" Balwanz).

book's significance is that it demands that the American public and its government confront such dilemmas in arriving at a terrorism policy.

In the last part of the book, Dershowitz argues that if America preserves the "feel of freedom," it may compromise some liberties without becoming a tyranny.[33] An avowed civil libertarian,[34] Dershowitz recommends targeted assassination of suspected terrorists, criminal "profiling" of Arab-Americans, and a nationwide identity card system.[35] Without explicitly saying so, he seems to use the state of Israel as the model for achieving this balance between liberty and security. Although controversial, this is the most compelling portion of the book. Lawyers will recognize the author's effective use of argument and counter-argument. In this part, Dershowitz challenges the reader to consider non-traditional choices for the future.[36] As Bob Woodward illustrates in *Bush at War,* non-traditional thinking is precisely what President Bush sought from his cabinet in developing his terrorism response plan in the days and months following the 11 September 2001 attacks.[37] Dershowitz expands on this theme of "thinking outside the box," calling for nonpartisan cooperation between civil libertarians and government officials to achieve both safety and freedom.[38]

In *Why Terrorism Works*, Dershowitz purports to instruct the United States on how to respond to the terrorist threat it faces from Islamic fundamentalist terror groups. In essence, however, the book outlines the terrorist threat facing Israel, and then provides a justification for the tactics Israel employs to combat terrorism, such as torture, pre-emptive military strikes, and collective punishment. Despite these limitations, *Why Terrorism Works* is recommended reading for judge advocates. The significance of the book is not Dershowitz's specific proposals, but the call to Americans to think creatively when combating terrorism. The balance struck in the next few years between national security and civil liberty will frame our future. As soldiers, lawyers, and American citizens, judge advocates are uniquely qualified to contribute to the creation of this balance.

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33. DERSHOWITZ, *supra* note 1, at 130.

34. *See supra* note 6.

35. DERSHOWITZ, *supra* note 1, at 166-210. He calls military tribunals, however, "frightening." *Id.* at 217.

36. *See id*. at 166.

37. BOB WOODWARD, BUSH AT WAR (2002).

38. DERSHOWITZ, *supra* note 1, at 222.

RAIDER:[1] SOLDIER OF FORTUNE OR UNFORTUNATE SUBJECT?

REVIEWED BY MAJOR JEFFREY C. HAGLER[2]

Biography is a very definite region bounded on the north by history, on the south by fiction, on the east by obituary, and on the west by tedium.[3]

Charles W. Sasser, the author of *Raider*, is a former Special Forces soldier and a decorated Vietnam veteran.[4] As a soldier, he was presumably proficient at land navigation using a map and compass. As a biographer, however, Sasser appears to have misplaced his compass and wandered far beyond his proper boundaries.

Biographies, like any other written genre, can satisfy multiple and often divergent purposes. One may read them to get the subject's first-hand account of great historical events. In other cases, the reader may hope the subject's collective life experiences will provide lessons, inspiration, or insight into the human condition. Biographies can also serve simply as diversion or amusement. Readers seeking to achieve either the first or second purposes will likely be disappointed with *Raider.* The book's lack of documentation and first-hand authenticity seriously undermine its historical legitimacy. Likewise, the author's shallow attempt at biography will frustrate readers who seek to draw lessons from the subject's life as a whole. But if their sole purpose is entertainment, readers may find some satisfaction with the book.

Raider chronicles Command Sergeant Major (Retired) Galen Kittleson's participation in four separate prisoner rescue missions: the rescue of civilians at Cape Oransbari, New Guinea in 1944; the raid of a Japanese prison camp at Cabanatuan, the Philippines, in 1945; an attempted rescue of Lieutenant James "Nick" Rowe from the Viet Cong in 1968; and the

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1. CHARLES W. SASSER, RAIDER (2002).

2. United States Army. Written while assigned as a student, 51st Judge Advocate Officer Graduate Course, The Judge Advocate General's School, United States Army, Charlottesville, Virginia.

3. Philip Guedalla, *quoted in* OBSERVER (London), Mar. 3, 1929, *reprinted in* THE COLUMBIA WORLD OF QUOTATIONS (1996), *available at* http://www.bartleby.com/66/23/26423.html.

4. SASSER, *supra* note 1 (author's biography located inside the back cover).

now-famous Son Tay prison raid in 1970. *Raider*'s theme, as expressed throughout the book, is that attempting such daring missions is valid, regardless of success, because of the inspiration they provide American soldiers should they become prisoners. Sasser sums up this sentiment, stating, "[I]f even one prisoner is still in captivity and looking to the skies day after day for salvation, he deserves to look up one day and see, dropping out of the clouds, brave saviors like Sergeant Major Galen Kittleson—The Raider."[5]

Despite its worthwhile theme, *Raider* is burdened by several significant flaws. Foremost is its lack of historical integrity. The book includes neither footnotes nor index, and its only "bibliography" consists of several books cited in the author's acknowledgement.[6] Sasser admits he "drew from" these works in writing *Raider*, but he fails to note when and to what extent he did so.[7] Further, he states, "In various instances dialogue and scenes have necessarily been recreated,"[8] but again, he does not tell the reader which scenes and dialogue he recreated, and which are grounded in fact. Consequently, the reader is left to guess, "Is this what actually happened, or is it just Sasser's clever invention?" The danger in this type of "true account" is that an inattentive reader may not catch the author's disclaimer buried in his acknowledgement, and the reader may take the book to be an authoritative work of non-fiction, which *Raider* is not. In truth, Sasser's method of writing is little more than historical fiction masquerading as biography.

Raider also suffers from a lack of clear focus. In his preface, Sasser describes the book as "the story of [Kittleson's] four raids and the extraordinary farmer-warrior from Iowa who participated in them."[9] His explicit objectives in writing *Raider* are "to present a true account of one man's selfless duty to country and to his fellow soldiers captured by enemy forces"[10] and to chronicle "the remarkable journey that was Kit Kittleson's courageous life in the service of his country."[11] But the actual focus of the book is much less Kittleson's life story than it is the story of the missions themselves. Although these raids are a worthy and interesting topic, Sasser's approach confuses the book's scope. For example, significant

5. *Id*. at xi.
6. *Id*. at xiv.
7. *Id*.
8. *Id*.
9. *Id*. at xi.
10. *Id*. at xiv.
11. *Id*. (back cover).

portions of Sasser's narrative concern events in which Kittleson was not involved. One chapter consists entirely of General Douglas MacArthur's actions and private thoughts leading up to his storied landing at Leyte in 1944.[12] Another chapter recounts, in breathless suspense, the capture of Nick Rowe and Captain Humbert "Rocky" Versace in 1963, an event which occurred almost four years before Kittleson arrived in Vietnam.[13] Quite reasonably, Kittleson appears in neither of these chapters because he was nowhere near these actions when they occurred. So the reader is left asking where these accounts came from, and why Sasser included them, unless simply to build drama? Both of these events have been the subject of other published accounts,[14] but characteristically, Sasser does not acknowledge the source of his versions. Likewise, much of the description of the raids themselves focuses on portions in which Kittleson took no direct part. For example, the bulk of the Cabanatuan and Son Tay raids are recounted from other soldiers' and prisoners' points of view.[15] Consequently, Kittleson's personal participation in the raids is not the center of the book's attention, despite the author's claims.

In a similar vein, if the reader approaches the book as the "biography" it purports to be, *Raider* is a disappointment. After reading the book, the only conclusions one can safely draw about Kittleson are that he is a deeply religious, self-sacrificing man who enjoys homemade bread. This criticism is not meant to demean Kittleson in any way; on the contrary, the book provides no grounds to find fault with him, either as a person or for his role in the raids. From the comparatively brief discussions of Kittleson's activities during each operation, one can conclude he performed his duties admirably. But Sasser spends very little time addressing Kittleson's private life or career outside the operations. For example, the decade Kittleson spent as a civilian between his discharge following World War II and his reenlistment in 1956 is covered in six pages, and much of that space deals with his reminiscences of the war.[16] Likewise, only five pages are devoted to the eleven years between Kittleson's reenlistment and his deployment to Vietnam in 1967,[17] and a mere sentence to his career from his return from Son Tay until his retirement in 1978.[18] Two paragraphs—

12. *Id.* ch. 13, at 77-80.

13. *Id.* ch. 40, at 211-21.

14. *See, e.g.*, WILLIAM MANCHESTER, AMERICAN CAESAR, DOUGLAS MACARTHUR, 1880-1964 (1978); JAMES N. ROWE, FIVE YEARS TO FREEDOM (1971).

15. *See* SASSER, *supra* note 1, at 153-73, 293-307.

16. *See id.* at 177-83.

17. *See id.* at 184-89.

18. *See id.* at 319.

less than half a page—cover his life from 1978 to the present.[19] Presumably, one could draw valuable lessons from Kittleson's life as a whole, given the breadth of his military experiences and the length of time he has been able to reflect on them during his retirement. Unfortunately, the author makes no serious attempt to highlight these points. Instead, Sasser treats Kittleson and his life as merely a thread of continuity between the four rescue missions.

As a person, Galen Kittleson comes across in the book as exceptionally modest and reserved. Despite his unique experiences, he may not be an ideal subject for a gripping adventure-style biography. One suspects Sasser found it difficult to get Kittleson to speak in detail about his own actions in each of the operations. Moreover, because two of the raids occurred nearly sixty years ago, the passage of time may have compounded the author's difficulty in obtaining detailed recollections of the events. Even so, if Sasser was interested in Kittleson as a person and not just as a thread of continuity, he could have interviewed more of Kittleson's fellow soldiers or found other sources to paint a more complete picture of the man. Again, the author's lack of documentation prevents the reader from assessing how much research he actually devoted to his biographical subject.

This failure underscores an additional flaw in the book. *Raider* contains no real epilogue covering Kittleson's fellow participants in the raids, who seem to disappear at the conclusion of each mission.[20] Books of this type—historic military actions narrated from a soldier's point of view—tend to succeed when the reader can identify and empathize with the participants. Yet the author portrays Kittleson's comrades almost as stock characters or extras in a movie. In truth, several of these "extras" were historically prominent in their own right: Colonel Arthur "Bull" Simons[21] and Colonel Henry Mucci.[22] But Sasser makes only a cursory effort to

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19. *See id*.

20. The book does contain an epilogue, which deals almost exclusively with the immediate aftermath and reaction to the Son Tay raid. *See id.* at 315.

21. Simons led the assault force at Son Tay. After he retired from a distinguished Army career, Simons led a mission to rescue a group of H. Ross Perot's employees, who were held by terrorists in Tehran, Iran. *See* KEN FOLLETT, ON WINGS OF EAGLES (1983).

22. Mucci commanded the 6th Ranger Battalion from its activation in January 1944 through the end of the war, to include the Cabanatuan raid. *See generally* HAMPTON SIDES, GHOST SOLDIERS: THE FORGOTTEN EPIC STORY OF WORLD WAR II'S MOST DRAMATIC MISSION (2001); DAVID W. HOGAN, JR., U.S. ARMY SPECIAL OPERATIONS IN WORLD WAR II (1992), *available at* http://www.us.army.mil/cmh-pg/books/wwii/70-42/70-42c.htm.

build this empathy with the reader and to develop these characters, aside from the missions they led.

Despite its extensive shortcomings, the book has some redeeming qualities. After all, biographies should not be bland, sterile works of scholarship, and *Raider* certainly does not fit this mold. It contains entertaining, sometimes graphic accounts of the four raids in which Kittleson participated, describing the action from the ground level in the hard-hitting prose of a *Soldier of Fortune* adventure story. The back cover offers evidence of the book's tough-guy flavor. "Galen Charles Kittleson was slight, modest, and born to wage war," it reads.[23] Sasser's background as a soldier and police detective[24] are apparent in his aggressive style and word choice, and he moves the narrative at a steady gait.[25] Furthermore, several of the events portrayed in the book may be unfamiliar to some readers, particularly the raid on Cape Oransbari and the lengthy preparation phase of the Son Tay raid. Overall, the book may fulfill a useful role by inspiring readers to seek out more authoritative works on these subjects.[26]

In sum, *Raider* drifts far south of its author's stated aims. The book's packaging lures readers interested in the saga of American Prisoners of War. The front cover announces Kittleson's participation in "more POW raids than any other American in history."[27] The back cover further entices potential readers, alluding to POW raids during both World War II and the Vietnam Conflict.[28] A prospective reader is hooked—much as Sasser must have been when he first learned of Kittleson—by the enormous potential of this man's story. The idea that one soldier participated in several daring rescue missions, spanning a twenty-five year period, is compelling to say the least. Kittleson's recollections could have tremendous value, a vault of

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23. SASSER, *supra* note 1 (back cover).

24. Charles Sasser, *All About Charles*, *at* http://www.charlessasser.com/biography.cfm (last visited Dec. 9, 2002). Sasser is also the author of more than thirty books. *Id.*

25. More often than not, however, his dialogues seem clichéd, as if *The Dirty Dozen* script served as his primary source of inspiration. Presumably, these exchanges were among those Sasser "necessarily recreated." *See supra* p. 196.

26. *See, e.g.*, BENJAMIN F. SCHEMMER, THE RAID (1976) (a well-documented, detailed account of the Son Tay raid); SIDES, *supra* note 22 (a critically and commercially successful account of the Cabanatuan raid).

27. SASSER, *supra* note 1 (front cover).

28. *Id.* (back cover).

gems worthy of collection and preservation. Sadly, the author does little to mine these potential treasures.

The plight of American prisoners of war in World War II and Vietnam is, of course, well documented.[29] Numerous published accounts have simultaneously saddened, angered, and inspired the American public. Likewise, books about rescue attempts continue to captivate our attention. The recent success of *Ghost Soldiers*,[30] a riveting account of the often-overlooked raid on Cabanatuan, shows the ongoing popularity of these writings. In fact, the reader may suspect that the financial success of *Ghost Soldiers* was among Sasser's primary motivations in writing *Raider*,[31] and that he simply chose Kittleson as a convenient vehicle.

Galen Kittleson's life certainly deserves to be the subject of a thoroughly researched and well-composed biography. His experiences could undoubtedly serve to illuminate and inspire the general public and to teach and guide a military audience. Unfortunately, by straying far from its historical "true north," Charles Sasser's *Raider* does neither.

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29. *See, e.g.*, ROWE, *supra* note 14; JAMES B. STOCKDALE, A VIETNAM EXPERIENCE: TEN YEARS OF REFLECTION (1984).

30. SIDES, *supra* note 22.

31. *Ghost Soldiers* was so successful that a movie of the same name, starring Tom Cruise and directed by Steven Spielberg, is scheduled for release in 2004. Josh Grossberg, *Spielberg, Cruise, "Re-Enlist" in Soldiers*, E! ONLINE NEWS (Jan. 25, 2002), *at* http://www.eonline.com/News/Items/0,1,9426,00.html.

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