The Emperor's New Clothes:[1] Developments in Court-Martial Personnel, Pleas and Pretrial Agreements, and Pretrial Procedures

Major John P. Saunders
Professor, Criminal Law Department
The Judge Advocate General's School, United States Army
Charlottesville, Virginia

My sister's expecting a baby, and I don't know if I am going to be an uncle or an aunt.[2]

Telling it like it is means telling it like it was and how it is now that it isn't what it was to the is now people.[3]

Introduction

Trying to discern new developments in the past year of military court decisions in the areas of court personnel, pleas and pretrial agreements, and pretrial procedure, is a perilous undertaking, just as efforts to forecast future trends or to purport to "tell it like it is" can be. Such efforts run the risk of imposing the subjective view or expectations (or shortcomings) of the reviewer on the "is" that is under discussion. This, in turn, can lead to artificial and, as the quotes above indicate, inherently flawed or meaningless conclusions. Nevertheless, casting caution to the winds, such exercises do have merit. They create at least one prism or lens through which to compare emerging case law with the decisions that have gone before and provide some basis, if ultimately only speculative, for predicting future paths a court's decisions may take.

One pervasive theme emerging from the decisions of the Court of Appeals for the Armed Forces (CAAF) of the past year could be characterized as increasing deference. Deference, that is, to convening authorities, military judges, staff judge advocates (SJAs), and others on the government side of the military justice process, by way of defining very broadly the discretionary zone in which these officials act. Thus, whether actually called upon to do so or not, the court in several cases assessed the roles and behavior of various court-martial personnel and seemingly pushed back the restrictions on their actions in the court-martial arena. This theme is less identifiable in some areas, such as pleas and pretrial agreements, where the court sanctioned a new provision of a pretrial agreement, but set aside a case in which seemingly collateral circumstances affected the sentence that the members sought to impose.

This article analyzes selected recent decisions by the military appellate courts that focus on court-martial personnel, panel selection, voir dire, and pleas and pretrial agreements. Discussion of every case would not be possible, so only those cases that purport to say something significant about the roles of court personnel or the panel selection process, or that might affect the accused's ability to bargain with the convening authority, will be discussed. In that practical limitations preclude a full survey of all the service appellate courts, most of the cases reviewed will be those from the CAAF. Finally, where possible, this article identifies and discusses a decision's practical implications for trial and defense counsel.

Court-Martial Panel Selection

The most notable development in the area of panel selection is the random selection report, recently prepared by the Joint Service Committee on Military Justice (JSC) and delivered to Congress in the fall 1999.[4] In 1997, Congress, responding to criticism of the military's method of panel selection, directed the Secretary of the Department of Defense (DOD) to study alternatives to the present method of selection, including random selection of panel members, which the military does not practice.[5] Indeed, Congress, in enacting Article 25, Uniform Code of Military Justice (UCMJ), the statutory scheme governing panel selection, mandated that the convening authority personally, rather than randomly, select panel members.[6] Thus, Article 25 requires that the convening authority select only those members who, in his opinion, best comply with the criteria of Article 25, UCMJ.[7]

1. HANS CHRISTIAN ANDERSON, THE EMPEROR'S NEW CLOTHES (1989). This portion of the title of Anderson's work is quoted to suggest, consonant with the theme of this article, that the military courts, particularly the Court of Appeals for the Armed Forces, are showing increased deference to military justice authorities, namely, the convening authority, the military judge, and the staff judge advocate. This article questions whether such deference is appropriate, and whether we should heed the few, brave, lonely voices, often raised in dissent, which warn the Emperor that his marvelous raiment is illusory.

2. ROSS PETRAS & KATHRYN PETRAS, THE 776 STUPIDEST THINGS EVER SAID 175 (1993) (quoting Chuck Nevitt).

3. *Id.* 195 (quoting Jill Johnston).

4. DOD JOINT SERVICE COMMITTEE ON MILITARY JUSTICE, REPORT ON THE METHODS OF SELECTION OF MEMBERS OF THE ARMED FORCES TO SERVE ON COURTS-MARTIAL 6 (Aug. 1999) [hereinafter REPORT] (on file with the Office of the Judge Advocate General, U.S. Army).

Interestingly, Congress directed the DOD to study alternatives that were *consistent* with the Article 25(d) criteria. Arguably, consideration of a truly or mathematically random selection scheme was beyond the scope of the directive.[8] The DOD General Counsel requested that the JSC conduct a study and prepare a report on random selection.[9] The JSC conducted research and sought the opinions of each service, and reviewed court-martial selection practices in Canada and the United Kingdom.[10] The JSC considered six alternatives. They were: maintain the current practice, random nomination,[11] random selection,[12] random nomination and selection,[13] modifying the source of the appointment,[14] and an independent selection authority.[15] After reviewing these different proposals, the JSC concluded that the current practice "ensures fair panels of court-martial members who are best qualified" and that there is "no evidence of systemic unfairness or unlawful command influence."[16] The JSC report has been sent to Congress and we await further word on this issue.

Change to the Manual for Courts-Martial Effects Reserve Military Judges

The President implemented several changes to the *Manual for Courts-Martial (MCM)*[17] over the past year. One of those changes removes a holdover provision concerning qualifications for military judges. Although not required by Congress, the *MCM* had mandated that, to be qualified to try courts-martial, military judges be commissioned officers on active duty in the armed forces.[18] The President's Executive Order removed the active duty requirement from R.C.M. 502.[19] This change will enable reserve military judges to try cases while on active

5. *See* Major Gregory Coe, *On Freedom's Frontier: Significant Developments in Pretrial and Trial Procedure*, ARMY LAW., May, 1999, at 1 n.8 (discussing The Strom Thurmond National Defense Authorization Act for Fiscal Year 1999, Pub. L. No. 105-261, § 1, 112 Stat. 1920 (1998), which required the Secretary of Defense to develop and to report on a random selection method of choosing individuals to serve on courts-martial panels); *see also* Major Guy P. Glazier, *He Called For His Pipe And He Called for His Bowl, And He Called For His Members Three–Selection Of Juries By The Sovereign: Impediment To Military Justice*, 157 MIL. L. REV. 1 (1998).

6. *See* UCMJ art. 25 (LEXIS 2000).

7. Those criteria are: age, education, training, experience, length of service, and judicial temperament. *Id.*

8. *See id.* n.12, n.21 ("By mandating that the alternatives remain consistent with Article 25(d)(2), the JSC believes that Congress intended that any alternative must have sufficient provisions to maintain high levels of court-martial member competence.").

9. REPORT, *supra* note 4, at 3.

10. *Id.*

11. *Id.* at 20 (creating a system for random nomination of prospective members; the convening authority would then select the members of the panel from the nominees).

12. *Id.* at 26 (explaining that nominations would be provided by subordinate commands, the panel members would be randomly selected, and the convening authority would then screen the selectees to ensure availability and compliance with Article 25).

13. *Id.* at 30 (explaining that panel members would be nominated and selected at random; the convening authority would screen the potential selectees to ensure availability and compliance with Article 25 before the random selection would occur).

14. *Id.* at 35 (expanding, either geographically or along command lines, the source from which members would be identified and selected; from the expanded source, potential members would be nominated using Article 25 criteria, and later selected by the convening authority). *See id.* at 35 n.78 ("The British military justice system now uses this approach by selecting court-martial members from a lateral command separate from that of the commander who refers a case to their prosecuting attorney.").

15. *Id.* at 40 (removing the convening authority from the selection process and placing her with an authority outside the command). *See id.* at 40 n.82 ("[I]n Canada, the Chief Military Trial Judge screens and details randomly selected court-martial members from a worldwide source.").

16. *Id.* at 45.

17. MANUAL FOR COURTS-MARTIAL, UNITED STATES (1998) [hereinafter MCM].

18. *Id.* R.C.M. 502(c).

> A military judge shall be a commissioned officer *on active duty* who is a member of the bar of a Federal court or a member of the bar of the highest court of a State and who is certified to be qualified for duty as a military judge by the Judge Advocate General of the armed force of which the military judge is a member. In addition, the military judge of a general court-martial shall be designated for such duties by the Judge Advocate General or the Judge Advocate General's designee, certified to be qualified for duty as a military judge of a general court-martial, and assigned and directly responsible to the Judge Advocate General or the Judge Advocate General's designee. The Secretary concerned may prescribe additional qualifications for military judge is special courts-martial. As used in this subsection "military judge" does not include the president of a special court-martial without a military judge.

Id. (emphasis added).

duty, inactive duty training, or inactive duty training and travel.[20] It should be noted, however, that this change only increases their opportunities to try special courts-martial. It does not qualify them to try general courts-martial (GCM).[21]

CAAF Review of Challenges to Panel Selection

Over the past two years, the CAAF has resolved three cases that show a predilection on the part of the court in dealing with challenges to panel selection. Specifically, the CAAF upheld the denial of challenges to the panel in *United States v. Bertie*,[22] *United States v. Upshaw*,[23] and *United States v. Roland*.[24] As a result of the combined holdings of these cases, the burden on the defense to show impropriety in panel selection is, arguably, increasingly onerous. A majority of the CAAF, apparently, used each of these cases to toughen the burden on defense counsel who seek to challenge the array, and capitalized on the opportunity to articulate guidance for military judges to resolve such challenges.

In *Bertie*, the accused, a specialist (SPC) or E-4, challenged the panel arrayed for his trial. The panel was composed of predominantly higher-ranking members (no member was below major (0-4), or sergeant first class (E-7)). The defense argued that the practice of the command proved that an inappropriate criteria was used in the selection of members. Namely, that the convening authority had focused on the members' ranks in selecting them for court-martial duty. Rank is not an appropriate criteria for selecting panel members.[25] While the record established that court-martial nominees were requested and provided in all grades down to private first class, the defense, nevertheless, presented evidence showing that no officer below the grade of 0-3 and no enlisted person below the grade of E-7 had been selected to serve over the course of the previous year. Despite this evidence, the military judge found that there was no impropriety in the selection of the panel.

In upholding the panel selection, the CAAF held that, contrary to the defense argument, there was no presumption of impropriety that flowed from the composition of the panel. The CAAF began by characterizing the accused's argument as one of court-stacking; that is, the claim that the convening authority purposefully stacked a panel with members of senior grades or ranks "to achieve a desired result."[26] Acknowledging that the intent of the convening authority is an essential factor in determining compliance with Article 25, the CAAF observed that the "lynchpin" of the accused's argument was that the composition of the panel created a presumption of court stacking.[27] The majority found no precedent for this finding.

While suggesting that a statistically-based challenge under Article 25 was still viable, the CAAF stated that "other evidence" must be considered in deciding what a convening authority's motive was in a particular case.[28] The CAAF's conclusion appeared to hinge on the evidence that the acting SJA had advised the convening authority of the Article 25 criteria and admonished him not to use rank or other criteria to systematically exclude qualified persons. In addition, the CAAF noted that the convening authority stated in a memorandum that he had considered Article 25.[29] After considering this evidence, the CAAF concluded that the accused did "not persuasively establish a court-stacking claim."[30]

The *Bertie* result reflects the CAAF's unwillingness to set aside panel selections unless there is evidence of bad faith by the convening authority or the convening authority's minions. In 1998, the CAAF rejected a challenge to a panel where, it was shown that otherwise qualified service members were deliberately excluded from convening authority consideration. In

19. Exec. Order 13,140, 64 Fed. Reg. 55,120.

20. *Id*.

21. *Cf.* U.S. DEP'T OF ARMY, REG. 27-10, LEGAL SERVICES: MILITARY JUSTICE, ch. 8 (20 Aug. 1999) (United States Army Trial Judiciary – Military Judge Program); *see also* discussion *supra* note 18 (detailing R.C.M. 502(c)).

22. 50 M.J. 489 (1999).

23. 49 M.J. 111 (1998).

24. 50 M.J. 66 (1999).

25. *See, e.g.*, United States v. Smith, 37 M.J. 773 (A.C.M.R. 1993) (discussing where the convening authority used rank as a selection criteria when he directed the staff judge advocate to "get" a soldier of a specified rank from each of the subordinate units).

26. *Bertie*, 50 M.J. at 492.

27. *Id*.

28. *Id*. (citation omitted).

29. *Bertie*, 50 M.J. at 493.

30. *Id*. (citation omitted).

United States v. Upshaw,[31] the SJA had solicited panel nominees based on the mistaken belief that the accused was an E-6. As a result, he requested nominees in the grade E-7 and above. At trial, it was apparent that the accused was an E-5, and the defense moved to dismiss for lack of jurisdiction based on the convening authority's exclusion of E-6s from consideration. The military judge denied the challenge and the CAAF upheld, holding that an innocent, good faith mistake on the part of the convening authority's subordinates did not imperil the panel selection absent a showing of prejudice.[32] The accused could not show prejudice, and his case was affirmed.

Nevertheless, Judge Effron dissented and had, arguably, the stronger position. Defense counsel should look to his dissent for guidance when challenging a panel's composition. Judge Effron noted that, innocent mistake or not, a violation of Article 25 had occurred because an entire category of otherwise qualified members were excluded from consideration.[33] Judge Effron pointed out three situations where the court-martial panel selection excludes or includes potential members: instances that rise to the level of command influence; instances where the convening authority is attempting to apply Article 25 through some shorthand method, such as using rank as a criteria; and instances such as the situation in *Upshaw*, where the exclusion was an administrative mistake but nonetheless error in the selection process which entitles an accused to a new panel.[34] This framework will be helpful in evaluating the last panel selection case.

United States v. Roland [35] appeared, at first blush, to be a replication of *Upshaw* but with a twist. In *Roland*, the SJA *deliberately* failed to request nominees from otherwise qualified groups of service members. As in *Upshaw*, the SJA sent out a memorandum to solicit nominees for the court-martial panel. The SJA requested nominees in the grades "E-5 to O-6"; thus, service members in the grade of E-4 were excluded (the accused was an E-2). Although most E-4s would probably not fit the Article 25 criteria, the courts have increasingly recognized, particularly in the Air Force, that E-4s have significant educational background and military experience that enhances their eligibility as court members.[36] Moreover, the military courts have recognized that, based on the application of Article 25, only service members in the grade of E-1 and E-2 are presumptively disqualified from service on courts-martial panels.

When the defense challenged the panel selected based on the SJA's memorandum, the SJA claimed that she had never intended to exclude groups of otherwise eligible nominees; she had simply identified other groups for consideration. In addition, the special court-martial convening authority (SPCMCA) testified that he was aware of Article 25, and that he knew he could nominate anyone in his command who he felt was qualified. Supporting the defense notion that the SJA's memorandum had excluded certain nominees was the testimony of two executive officers from units subordinate to the convening authority's headquarters, who stated they felt they were precluded from nominating anyone below the grade of E-5. The military judge found no impropriety in the panel selection.

In affirming, the CAAF majority focused on evidence that the general court-martial convening authority (GCMCA) who referred the case (but who, incidentally, never testified) had been told, according to the SJA's memoranda, that he was not limited to the nominees provided, and that he did, in fact, nominate a member who was not among the SPCMCA's nominees. Moreover, the CAAF noted the presumption that the GCMCA was aware of his duty under Article 25 as well as his unlimited discretion.[37]

The CAAF characterized the relevant standard of proof as follows: "Once the defense comes forward and shows an improper selection, the burden is upon the government to show that no impropriety occurred."[38] The CAAF held that the defense had not met its burden of showing "that there was command influence."[39] Writing for the majority, Judge Crawford identified with the SJA, reiterating the rather beguiling slight-

31. 49 M.J. 111 (1998). *See* Coe, *supra* note 5, at n.24 (discussing *United States v. Upshaw*). Although it is not technically a "new development," *Upshaw* provides further insight into the deference the CAAF has shown to the convening authority's selection process, especially where there is acknowledged error by the government.

32. *Upshaw*, 49 M.J. at 113.

33. *Id.* at 115.

34. *Id.*

35. 50 M.J. 66 (1999).

36.

> [I]n the Air Force, the majority of E-4s have served 5 or more years on active duty, the majority of E-5s have served 10 or more years on active duty, and the majority of E-6s have served 15 or more years on active duty. . . . Likewise, we take judicial notice that 88 percent of E-4s have some amount of post-secondary education, 18 percent of E-5s have an associate's or higher degree, and 33 percent of E-6s have an associate's or higher degree.

United States v. Benson, 48 M.J. 734, 739 (A.F. Ct. Crim. App. 1998) (citations omitted).

37. *Roland*, 50 M.J at 68.

38. *Id.* at 69.

of-hand that the SJA had not excluded any groups from consideration: "Other groupings simply had been identified."[40] Judge Sullivan, in a concurrence, agreed there was no violation of Article 25, UCMJ, or Article 37, UCMJ, and, with a nod to the Department of Defense, noted somewhat axiomatically that "if a random selection now being studied . . . is adopted, challenges like the one in this case would occur less."

Judge Gierke would have none of this argument, however, claiming that the *government* had not met *its* burden. Judge Gierke correctly pointed out that in none of the precedent cited by the majority had the courts required the defense to show command influence. "All that was required of the defense was a showing that qualified, potential members appeared to have been excluded."[41] Taking issue with the SJA's suggestion that her memorandum was simply guidance, Judge Gierke wrote that this "does not pass the reality test." The SJA "acted with the mantle of command authority," and her memorandum effectively excluded other potential, qualified service members from consideration.

Applying the template suggested by Judge Effron in *Upshaw*, it seems apparent that a majority of the CAAF will require that defense challenges to the panel selection produce evidence of bad faith or an intent to "stack" the court on the part of the convening authority. This is, however, as Judge Effron's *Bertie* template suggests and Judge Gierke proclaims in *Roland*, an inappropriately heavy burden for the defense and one that is not required when challenging the panel under Article 25. Indeed, the majority's formulation of the standard in *Roland* is most troubling because it confuses a challenge under Article 25, UCMJ, with a challenge under Article 37, UCMJ.[42] Under Article 25, UMCJ, once the defense has shown that "qualified, potential members appeared to be systematically excluded,"[43] the matter is ended. Yet a majority of the CAAF seems determined to require the defense to show command influence in every panel challenge. This is neither supported by the opinions of the service courts nor the CAAF ample precedent.[44]

A Reassuring Note on Interloper's and Jurisdiction

As the foregoing discussion indicates, the current era is one where the CAAF and the service courts are taking a "more liberal approach to technical defects in the composition of courts-martial."[45] Perhaps it is because this approach is the dominant theme among courts of review that it is reassuring to see that courts remain committed to ensuring that the accused is tried only by those personnel whom the convening authority has personally selected. In *United States v. Peden*, the convening authority, in selecting panel members, chose a SFC Doyle to sit on the court-martial. Unfortunately, a legal clerk typed in the name of SFC Doss, the person immediately preceding SFC Doyle on the alphabetical list. Doss had not been selected by the convening authority to serve on the court-martial. Nevertheless, SFC Doss duly sat at the accused's court-martial. The accused pleaded guilty, and SFC Doss participated in the deliberations on sentencing. Sometime after action, the convening authority disclosed in a memorandum for record that SFC Doyle had originally been selected but that he "ratified" SFC Doss's selection.[46]

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39. *Id.*

40. *Id.*

41. *Id.* at 70 (Gierke, J., dissenting).

42. The majority stated that the burden shifts to the government to show no improper selection occurred only *after* "the defense comes forward and shows an improper selection." *Id.* at 69. Such a standard should cause government counsel concern as well, for how can the government show no impropriety occurred once the defense has shown impropriety occurred?

43. *Id.* at 70 (Gierke, J., dissenting).

44. *Cf.* United States v. Smith, 37 M.J. 773, 776-77 (A.C.M.R. 1993) (noting that the convening authority's motivation in selecting members based on rank was never inquired into, let alone considered dispositive of the alleged Article 25, UCMJ, violation).

The CAAF's decision in *Roland* (and, for that matter, in *Bertie)* is contrary to precedent. *See, e.g.*, United States v. Nixon, 33 M.J. 433 (C.M.A. 1991) (holding that a lack of enlisted personnel on the panel below E-8 created an appearance of impropriety); United States v. McClain, 22 M.J. 124 (C.M.A. 1986) (noting that the SJA recommended against selecting junior members to avoid lenient sentences and the convening authority selected only E-7s and above); United States v. Daigle, 1 M.J. 139 (C.M.A. 1975) (holding that the selection process under which commanders asked to nominate only captains and above impermissibly used rank as a device for systematic exclusion of qualified persons); United States v. Greene, 43 C.M.R. 72 (C.M.A. 1970) (holding that selection of only colonel and lieutenant colonel members gave rise to the appearance that members had been "hand picked" by the government); United States v. Benson, 48 M.J. 734, 739 (A.F. Ct. Crim. App. 1998) ("When circumstances surrounding the selection process create an appearance of systematic exclusion of qualified persons, however, doubts will be resolved in the accused's favor."). The refusal of the CAAF to recognize that presumption in either *Bertie* or *Roland* tolls the knell of the "appearance of impropriety" challenge. *See* Coe, *supra* note 5, at n.49 ("It appears that the CAAF has, sub silentio, reversed or modified those cases that hold the issue of improper selection is raised by the presence of high rank or many commanders on a panel.").

45. United States v. Peden, 52 M.J. 622 (1999) (citing United States v. Cook, 48 M.J. 434, 436 (1998) (holding that an excusal of more than one-third of the members by the staff judge advocate "does not involve a matter of such fundamental fairness that jurisdiction of the court-martial would be lost"); United States v. Turner, 47 M.J. 348 (1997) (holding that a request for trial by military judge alone made by counsel, rather than the accused, not jurisdictional error); United States v. Mayfield, 45 M.J. 176, 178 (1996) (holding that an accused's failure to make a judge alone request orally or in writing prior to adjournment is a technical error, not jurisdictional); United States v. Kaopua, 33 M.J. 712 (A.C.M.R. 1991) (holding that failure to announce the names of court members on the record is not a jurisdictional defect)).

In reviewing the selection process, the Army Court of Criminal Appeals (ACCA) looked to "long standing precedent" finding jurisdictional error where interlopers (personnel not properly detailed to the court) had participated in court proceedings.[47] Comparing this precedent with a more liberal approach, mentioned above,[48] the ACCA was, nevertheless, unwilling to find some sort of "substantial compliance" with the UCMJ and the Rules for Courts-Martial. The ACCA refused to allow the convening authority to ratify SFC Doss's presence,[49] holding that "SFC Doss's participation as an interloper in the sentencing hearing was a jurisdictional error that renders the sentencing proceedings a nullity."[50] Having found jurisdictional error, the ACCA further buttressed its ruling by stating that, even if SFC Doss's presence were not a jurisdictional defect, it was error and, because the ACCA could not be convinced the error did not affect the sentence, the sentence was set aside.[51]

Peden serves as a telling reminder to all trial participants to scrutinize the panel selection documents. For the defense, such scrutiny may produce a basis for mounting a jurisdictional attack on the court. For the government, such review is vital to ensure that the panel is properly constituted and that the case will not have to be tried a second time.

Pleas and Pretrial Agreements

The CAAF's deference to convening authorities spilled over into the realm of pretrial negotiations as the CAAF delineated the broad discretion vested in the convening authority to negotiate, enter into, and withdraw from pretrial agreements, even though that withdrawal appears to result from unlawful command influence. Also notable in this area was the CAAF's sanctioning of a new provision for pretrial agreements and reminding practitioners of other provisions prohibited by public policy.

Convening Authority's Discretion to Withdraw from Pretrial Agreements

The military justice system differs from its civilian counterparts in a number of ways. One notable distinction is that, while the military permits pretrial agreements (PTAs) or, more colloquially, plea bargaining, such agreements are between the accused and the convening authority.[52] The Rules for Courts-Martial place few limitations on the ability of the accused and the convening authority to enter into pretrial negotiations or PTAs.[53] While the accused has virtually unfettered ability to withdraw from a PTA,[54] the convening authority does not enjoy such untrammeled discretion. It is true that a convening authority may withdraw from a PTA for any reason before an accused begins performance of the agreement.[55] After the accused begins performance, however, the convening authority may withdraw: (1) where the accused has failed to perform a material promise or condition of the PTA, (2) where the judge determines there is a disagreement among the parties over the interpretation of a material term of the PTA,[56] or (3) where an appellate court later finds the guilty plea improvident.[57] The breadth of the convening authority's discretion to withdraw from a PTA before performance by the accused was the issue at stake in the Navy case, *United States v. Villareal*.[58] The CAAF seized the opportunity that this case presented to further entrench its deference to convening authority discretion in the realm of pretrial negotiations.

46. *Id*. at 623.

47. *Id.* (citing United States v. Harnish, 31 C.M.R. 29, 29-30 (1961) (when interlopers sit as court members, proceedings are a nullity) (other citations ommitted)).

48. *See supra* note 44 (discussing the trend toward more liberal treatment of defects in the composition of courts-martial).

49. The ACCA distinguished *United States v. Padilla*, 5 C.M.R. 31 (C.M.A. 1952), which permitted consideration of the convening authority's intent to determine who the proper members of a court-martial were, holding that courts have "never permitted after-the-fact ratification of court members not properly selected. . . . When the convening orders are clear and unambiguous, however, the subjective desires of the convening authority are of no import." *Peden*, 52 M.J. at 623.

50. *Peden*, 52 M.J. at 623.

51. Because *Peden* was a guilty plea, the presence of the interloper only affected the sentencing proceedings.

52. MCM, *supra* note 17, R.C.M. 705(a).

53. *Id.* R.C.M. 705(c)(1) (prohibiting certain terms and conditions, for example, a term depriving the accused of the right to counsel).

54. *Id.* R.C.M. 705(c)(4)(A) (noting that the accused may withdraw from a PTA "at any time").

55. *Id.* R.C.M. 705(d)(5)(B).

56. *Id*.

57. *Id*.

58. 52 M.J. 27 (1999).

In *Villareal*, the accused "senselessly" shot the victim, his best friend, during a game "similar to Russian roulette."[59] While the victim was talking on the telephone, the appellant spun the cylinder of the .32-caliber revolver and fired at his friend, "[h]aving apparently deviated from their normal procedure of checking the position of the round to make sure it was 'safe.'" The victim died, and the accused was charged with, among other things, murder, under Article 118(3), UCMJ.

The accused and the convening authority, Captain Schork, agreed to a PTA that permitted the accused to plead guilty to involuntary manslaughter in exchange for the convening authority's promise to suspend any confinement in excess of five years.[60] When the victim's family learned of the PTA, they were quite upset, feeling that the accused was guilty of murder and that the agreed sentence was too lenient. Captain Schork, under pressure to withdraw from the pretrial agreement, telephoned an old friend and shipmate, Captain Eckart, for advice. On the day the call occurred, Captain Eckart was, technically, the superior GCMCA.[61] After discussing Captain Schork's concerns, Captain Eckart suggested that he withdraw from the pretrial agreement. Captain Schork did withdraw, contrary to the advice of his SJA. The SJA, however, alertly managed to get the case shipped to another GCMCA for disposition.

The new convening authority referred the case to trial, and the accused filed a motion to compel specific performance of the pretrial agreement, arguing that Captain Schork's withdrawal was the product of unlawful command influence. The military judge found that the telephone call raised the appearance of command influence.[62] He also found, however, that insofar as the appearance of command influence had tainted the processing of the case, that taint was purged by sending the case forward to a new GCMCA.[63] The accused, denied relief, pleaded not guilty to all charges and specifications. He was convicted of involuntary manslaughter, obstruction of justice, and violation of an order relating to the possession of the weapon. His sentence included ten years of confinement.[64]

On review, the CAAF found that there was no command influence. The CAAF relied on *United States v. Gerlich*,[65] which found unlawful command influence in the transmission of a letter from the convening authority's superior suggesting that the convening authority set aside an Article 15, UCMJ, punishment in order to refer the case to court-martial. Distinguishing *Gerlich*, the CAAF noted that, in *Villareal*, the contact was initiated by the *subordinate* convening authority rather than by the superior.[66] The CAAF then noted that, even if the phone call did raise the appearance of unlawful command influence, that was a conclusion which the court "need not reach here."[67] In any event, any command influence was "cured by the transfer of the case to a new convening authority for separate consideration and action."[68]

The CAAF found that there was no basis to order specific performance of the PTA because the accused had not relied upon it to his detriment. While he was clearly denied the five-year confinement cap and he "certainly was *placed in a different position* by the convening authority's decision to withdraw from the agreement, this is not the type of legal prejudice that would entitle appellant to relief."[69]

Having effectively insulated the convening authority's withdrawal decision from appellate scrutiny, the CAAF announced, in language seething with portent, that, "in the military justice system, discretion to plea bargain is a policy and leadership decision; it is not a legal decision subject to the remedies that this [c]ourt offers."[70]

59. United States v. Villareal, 47 M.J. 657, 658 (N.M. Ct. Crim. App. 1997), *aff'd*, 52 M.J. 27 (1999).

60. The convening authority also promised to limit forfeitures to one-half of the accused's pay per month for a period of 60 months from the date of court-martial. *Villareal*, 52 M.J. at 29.

61. *Id*. n.3. The superior command was Commander, Naval Air Forces Pacific (AIRPAC); Captain Eckart was the Chief of Staff to the Commander of AIRPAC, Admiral Spane. On the day that Captain Schork called Captain Eckart, Captain Eckart was the Acting AIRPAC Convening Authority.

62. *Id.* at 30.

63. *Id*.

64. *Id.* at 28. The Navy Marine Corps Court of Criminal Appeals reduced the confinement to seven and one-half years. *Id.* at 29 n.2.

65. 45 M.J. 309 (1996).

66. *Villareal*, 52 M.J. at 30.

67. *Id*. This statement is paradoxical, given that the CAAF had previously stated its acceptance of the military judge's findings of fact: "The military judge made detailed findings of fact, and these findings are clearly supported by the record. We accept them for our de novo analysis." *Id.*

68. *Id*.

69. *Id.* (emphasis added). The accused was "placed in a different position" to the tune of an extra two and one-half years' confinement. *Id.* at 29 n.2. "As for prejudice, appellant is liable for 2 ½ more years of confinement." *Id.* at 31 (Sullivan, J., dissenting).

70. *Id.* at 31.

The idea of deference to the convening authority permeates the majority's language in *Villareal*. The language is so sweeping in its import that one might question whether the CAAF truly meant what it said. Is a convening authority's decision to enter into or withdraw from a PTA so virtually immune from scrutiny? Does not the Constitution's Due Process Clause require, at the very least, that the convening authority act reasonably and not on a whim? Is the minimal second-guessing required by *Gerlich* overruled, if only sub silentio? What about the manner in which the majority distinguished *Villareal* from *Gerlich*?

The dissenters seemed to be troubled by these questions as well. Judge Sullivan would have found that command influence tainted the decision to withdraw from the PTA, noting that Article 37, UCMJ, recognizes no "old friend and shipmate exception . . . nor an exception for the convening authority who first initiates the discussion with the superior concerning the case."[71] He took issue with "the majority's trumpeting of the command's right to enter plea bargains as somehow justifying this additional punishment" received by the accused. The right to enter into a PTA, he reminded the court, is "not absolute, and it must give way to the overarching concerns of due process of law."[72]

Similarly, Judge Effron found the majority's attempt to distinguish *Gerlich* unconvincing, noting that "when a subordinate contacts a superior on a military justice matter that rests within the discretion of the subordinate, the superior must scrupulously avoid improper influence on the subordinate's discretion, regardless of whether their relationship is otherwise characterized by friendship."[73] The key here is that "convening authority Captain Schork, like the convening authority in *Gerlich*, testified that his superior's comment made him reexamine his position."[74] Therefore, the military judge's finding was correct. Judge Effron further noted that, while the convening authority had the authority to withdraw from the PTA before the accused began performance, that withdrawal was "tainted by unlawful command influence."[75] Transferring the case to a new GCMCA did not purge the taint of the command "from the discretionary action already taken."[76]

The prejudice to the accused, said Judge Effron, flows from the circumstances of this case.

> A decision to abide by an agreement already in place is qualitatively different from the decision-making process that goes into the negotiation of a new pretrial agreement . . . . [U]ntil appellant acted in reliance on the agreement, the new convening authority would have had the right to withdraw from the agreement, but appellant would not have had the unfair burden of having to try to negotiate a new agreement as a direct result of the unlawful command influence.[77]

Military due process dictates, therefore, that the accused's case should have been transferred to a new GCMCA with the pretrial agreement intact.

What lessons, if any, can be learned from the accused's travails in *Villareal*? The majority's conclusion does not bode well for accused, seeming to guarantee to the convening authority virtually unfettered autonomy to enter into and withdraw from PTAs. While it may be difficult to bind convening authorities to the terms of favorable agreements, counsel should consider, as a starting point, ways to begin "performance" of the PTA as soon as possible to lock in the convening authority before he has a chance to withdraw from the pretrial agreement. For example, an accused may begin performance of the PTA by signing a stipulation of fact.[78] Further, faced with a situation similar to that of the accused in *Villareal*, counsel should keep the focus on the central issue in such cases, that is, the ability of the convening authority to take discretionary decisions that are nonetheless tainted by at least an appearance of command influence. The opinions of the dissenting judges are important not only for their assessment of prejudice but for the significant distinction drawn between negotiating PTAs on the one hand and entering into them on the other.[79]

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71. *Id.* at 32.

72. *Id*. (citing UCMJ art. 37).

73. *Villareal*, 52 M.J. at 33 (Effron, J., dissenting).

74. *Id*.

75. *Id*.

76. *Id*.

77. *Id*.

78. *Cf.* United States v. Manley, 25 M.J. 346 (C.M.A. 1987) (holding that the convening authority could not withdraw from agreement where accused had performed the provisions of the PTA, to include entering into the stipulation of fact).

79. Judge Effron implies that the convening authority's decision to negotiate a PTA is entitled to greater deference than is the convening authority's decision to withdraw from a PTA.

Terms of Pretrial Agreements

The *MCM* clearly recognizes the right of an accused to make certain promises or waive procedural rights as bargaining chips in negotiating a PTA.[80] At the same time, there are provisions that he may not waive.[81] Finally, the *MCM* prohibits provisions that violate public policy.[82] However, R.C.M. 705 is not exclusive, and the CAAF has sanctioned several PTA provisions over the years that are not specified in R.C.M. 705.[83]

During this past year, the CAAF was very active in the realm of PTAs, confronting two new PTA provisions, retracing its judicial steps over ground previously explored, and passing judgment on other PTA provisions that had been previously condemned. In addition, the CAAF reviewed the effect of ostensibly collateral service regulations on the accused's understanding of his PTA, and, ultimately, the providency of the plea. Finally, the CAAF strode into the shadowy twilight of ambiguous agreements and sub rosa agreements.

Accused's Waiver of Article 13, UCMJ, Motion

In *United States v. McFadyen*,[84] the accused argued that public policy prohibited him from waiving his right to litigate an allegation of pretrial punishment in violation of Article 13, UCMJ.[85] The accused was an airman who had been placed in pretrial confinement in a Navy brig. While not arguing that this constituted pretrial punishment per se, the accused claimed that he had been stripped of his rank, denied an opportunity to contact counsel, and, when he could contact his attorney, he claimed their calls were monitored.

Believing these actions by the Navy violated Article 13, the accused nevertheless offered to waive his right to litigate that claim as part of his pretrial agreement.[86] The government acceded to that request and agreed to the PTA that the accused proposed. At trial, the military judge fully explored the PTA with the accused, and conducted a thorough inquiry of the accused's understanding of the provision waiving the Article 13 motion. During the pre-sentencing phase of the trial, the military judge allowed the accused to discuss the circumstances of the pretrial punishment and also permitted defense counsel to argue those circumstances as matters in mitigation and extenuation.[87] On appeal, the accused contended that public policy should preclude him from waiving a right to litigate a claim of punishment in violation of Article 13.[88]

The CAAF dealt quickly with the validity of the actual waiver, crediting the military judge with conducting a thorough inquiry into the PTA.[89] It was evident that the term at issue originated with the accused and that the defense did not wish to

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80. MCM, *supra* note 17, R.C.M. 705(c)(2). This section permits pretrial agreements to contain the following terms:

> (A) A promise to enter into a stipulation of fact concerning offenses to which a plea of guilty or as to which a confessional stipulation will be entered;
> (B) A promise to testify as a witness in the trial of another person;
> (C) A promise to provide restitution;
> (D) A promise to conform the accused's conduct to certain conditions of probation before action by the convening authority as well as during any period of suspension of sentence, provided that the requirements of R.C.M. 1109 must be complied with before an alleged violation of such terms may relieve the convening authority of the obligation to fulfill the agreement; and
> (E) A promise to waive procedural requirements such as the Article 32 investigation, the right to trial by court-martial composed of members or the right to request trial by military judge alone, or the opportunity to obtain the personal appearance of witnesses at sentence proceedings.

Id. See also United States v. Gansemer, 38 M.J. 340, 342 (C.M.A 1993) (recognizing as "an important bargaining chip" the fact that the accused was willing to accept either a punitive or an administrative discharge in lieu of a harsher sentence).

81. MCM, *supra* note 17, R.C.M. 705(c)(1), prohibits terms or conditions:

> (A) *Not voluntary.* A term or condition in a pretrial agreement shall not be enforced if the accused did not freely and voluntarily agree to it.
> (B) *Deprivation of certain rights.* A term or condition in a pretrial agreement shall not be enforced if it deprives the accused of: the right to counsel; the right to due process; the right to challenge the jurisdiction of the court-martial; the right to complete sentencing proceedings; the complete and effective exercise of post-trial and appellate rights.

82. *Id.* R.C.M. 705(d)(1). This section provides that "[e]ither the defense or the government may propose any term or condition not prohibited by law or public policy." *Id.*

83. *See, e.g.*, *Gansemer*, 38 M.J. 340 (accused may waive the right to a post-court-martial separation board).

84. 51 M.J. 289 (1999).

85. UCMJ art. 13 (LEXIS 2000).

86. *McFadyen*, 51 M.J. at 290.

87. *See* MCM, *supra* note 17, R.C.M. 1001(c).

raise the motion. The CAAF, however, remained somewhat concerned about such terms in future cases. The CAAF created a prospective rule to ensure that such waivers are truly knowing and voluntary. For all cases tried after 20 November 1999,[90] a military judge faced with such a provision should "inquire into the circumstances of the pretrial confinement and the voluntariness of the waiver, and ensure that the accused understands the remedy to which he would be entitled if he made a successful motion."[91]

Despite the CAAF's favorable review of the military judge's actions and the sanctioning of a new PTA provision, the inescapable impression, however, is that the *McFadyen* holding is problematic. Military judges have broad discretion in fashioning remedies for Article 13, UCMJ, violations.[92] But what should the military judge tell an accused who wishes to waive an Article 13 motion? Must the military judge fashion a notional, hypothetical remedy on the spot, without any facts? Should the military judge hold an evidentiary hearing? And if the military judge should hold a hearing, what is to be gained from allowing such a waiver in the first place? Finally, what happens if the military judge informs the accused of the potential remedy for an Article 13 violation and the accused then withdraws from the PTA, requesting the remedy stated by the military judge but, after a hearing, the military judge finds there was no Article 13 violation (or one of a much lesser magnitude)? Counsel for both sides must be alert for such issues when confronted with the type of waiver encountered by the court in *MacFadyen.*

Is Anyone Listening? Accused May Not Waive Speedy Trial Violation In PTA!

As suggested earlier, the CAAF has ruled categorically that certain PTA terms violate public policy. Provisions that purport to waive the accused's right to a speedy trial have been viewed in this light.[93] Such terms, however, continue to appear and to spark appellate litigation.

In *United States v. McLaughlin*,[94] the accused offered, as part of a PTA, to waive his right to challenge a violation of his right to a speedy trial. Although confirming at trial that the accused did not wish to raise the issue, the defense on appeal argued that a viable speedy trial motion existed and that the offer to waive that motion violated public policy.[95] The defense pointed out that the accused was in pretrial confinement for ninety-five days and that the burden is on the government to prove that it acted with reasonable diligence. Noting the demise of the ninety-day *Burton* rule,[96] the CAAF refused to revitalize the notion of a "magic number" for speedy trial violations. Nevertheless, the CAAF found that the speedy trial provision of the PTA was impermissible and unenforceable.[97] The military judge should have made such an announcement at trial and given the accused the opportunity to make a speedy trial motion. If the accused declined to do so, "his waiver [would be] clearer."[98] In any event, said the CAAF, the accused must make a prima facie showing that he was prejudiced by the waiver of the motion. Despite the delay of ninety-five days, the accused could not show that he was prejudiced, that he made a demand for trial, or that the charged offenses were so simple

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88. *McFadyen*, 51 M.J. at 290. Article 13, UCMJ, provides:

> No person, while being held for trial, may be subjected to punishment or penalty other than arrest or confinement upon the charges pending against him, nor shall the arrest or confinement imposed upon him be any more rigorous than the circumstances required to insure his presence, but he may be subjected to minor punishment durign that period for infractions of discipline.

UCMJ art. 13.

89. *McFadyen*, 51 M.J at 291.

90. The CAAF announced the rule would apply to "all cases tried on or after 90 days from the date of this opinion [16 August 1999]." *Id.*

91. *McFadyen*, 51 M.J. at 291.

92. *See, e.g.*, United States v. Newberry, 37 M.J. 777, 781 (A.C.M.R. 1992) (noting that the nature and amount of sentencing relief for pretrial punishment vary from case to case).

93. United States v. Cummings, 38 C.M.R. 174, 176 (1968) (holding that a pretrial agreement may not be conditioned on the accused's waiver of his statutory and constitutional right to speedy trial).

94. 50 M.J. 217 (1999).

95. *Id.* at 218.

96. United States v. Burton, 44 C.M.R. 166 (C.M.A. 1971) (holding that an accused in pretrial confinement for more than 90 days raised a presumption that he had been denied his right to a speedy trial). *Burton*'s presumption was abolished by *United States v. Kossman*, 38 M.J. 258 (C.M.A. 1993).

97. *McLaughlin*, 50 M.J. at 218.

98. *Id.* at 219.

that they would not need the amount of time taken by the government to investigate.[99] Thus, the CAAF denied relief.

The door is by no means closed on accused who wish to waive speedy trial motions but then seek relief on appeal. As suggested by the CAAF, the accused may be entitled to relief if he can show that he was prejudiced by waiver of the motion; in other words, if he could show he had an otherwise valid claim of a violation of his right to speedy trial. This is borne out in a case handed down last year by the Navy-Marine Corps Court of Criminal Appeals. There, in *United States v. Benitez*,[100] the accused offered as part of his PTA to waive "all non-constitutional or non-jurisdictional motions."[101] At trial, the military judge determined that the defense had previously intended to raise a speedy trial motion, that the basis for this motion would have been the statutory (rather than constitutional) right to speedy trial, and that the provision had originated with the *government*.[102]

On appeal, the accused argued the provision violated public policy and the case should be set aside. The Navy-Marine Corps court agreed, finding a colorable claim of a violation of Article 10, UCMJ,[103] based on the lengthy time the accused spent in pretrial confinement before arraignment (117 days).[104] Having found error, the court stated: "[W]e cannot conclude the error was harmless," and returned the case to the Navy for a rehearing.[105]

Taking *McLaughlin* and *Benitez* together, the possibility remains for the accused to waive a speedy trial issue as part of a PTA, but yet prevail on appeal if there is evidence in the record that suggests a violation of the accused's speedy trial right. The moral of the story is that the government should think twice about accepting PTAs that contain offers to "waive all motions" or to "waive a speedy trial motion." Or, at least, government counsel must be aware that such provisions are simply void and should be stricken by the military judge. More importantly, offers to waive a speedy trial should *not* originate with the government, particularly if a "colorable" claim of a speedy trial violation could be made out from the record. A conditional plea[106] might be just the ticket for resolving these issues. The government could thus ensure a plea of guilty while permitting the accused to raise a speedy trial motion and if needed, the protection of a pretrial agreement.

An Empty Ritual? A De Facto Guilty Plea Sans Providence Inquiry

As the preceding cases suggest, the accused in negotiating a pretrial agreement enjoys wide latitude to propose terms to the convening authority. Rule for Courts-Martial 705 places certain areas off-limits for pretrial negotiations, however, and public policy concerns may occasionally trump the accused's terms.[107] But does public policy preclude an accused from having an agreement that effectively allows him to plead no contest and avoid the rigors of a providence inquiry? In *United States v. Davis*,[108] the accused posed this question by skirting the rigorous *Care*[109] inquiry through a plea of not guilty and a promise to present no evidence.

The accused was charged with larceny and with use of drugs. For reasons that remain unclear, the accused could not admit to the intent element of the forgery or to the wrongfulness element of the drug use. However, he sought the protection of a pretrial agreement. In exchange for the convening authority's agreement to suspend any confinement in excess of twelve months, the accused promised to request trial by judge alone, enter into a confessional stipulation, to call no witnesses and to present no evidence on his behalf, and complete an in-patient drug rehabilitation program.[110] The stipulation admitted basically all elements of the offenses except the wrongfulness of marijuana use and the intent to defraud concerning the bad check offenses.[111] At trial, the military judge was concerned that the stipulation

99. *Id*.

100. 49 M.J. 539 (N.M. Ct. Crim. App. 1998).

101. *Id.* at 540.

102. *Id.* at 541 (emphasis in original).

103. UCMJ art. 10 (LEXIS 2000).

104. *Benitez*, 49 M.J. at 542.

105. *Id.*

106. *See* MCM, *supra* note 17, R.C.M. 910.

107. *See supra* notes 81 and 82 (reflecting R.C.M. 705's prescriptions concerning pretrial agreement terms).

108. 50 M.J. 426 (1999).

109. United States v. Care, 40 C.M.R. 247 (1969).

110. *Davis*, 50 M.J. at 427.

amounted to a confessional stipulation, so he conducted a searching inquiry in accordance with *United States v. Bertelson*.[112] The military judge found the accused guilty of all charges and specifications.

On appeal, before the CAAF, the accused claimed that the acceptance of his PTA meant that his trial (his plea of not guilty coupled with his promise to present no evidence) was an empty ritual. He claimed his plea violated public policy by avoiding the providence inquiry, in violation of the scheme envisioned by Congress in Article 45, UCMJ.[113] The CAAF noted that confessional stipulations are permitted by the *MCM*.[114] The CAAF held, however, that the agreement to enter into a confessional stipulation but present no evidence was a violation of part of the holding in *Bertelson*.[115] Nevertheless, the CAAF was apparently loath to set aside the findings and sentence, and instead tested for prejudice. Inquiring into the terms of the pretrial agreement, the CAAF emphasized that the military judge thoroughly discussed the stipulation of fact and all terms of the PTA with the accused, that he repeatedly ensured that the accused understood the proceedings and his rights, and he secured the accused's knowing and voluntary waiver of his rights on the record.[116] In light of such evidence, the CAAF held that the accused was not deprived of due process. The CAAF refused to condone or encourage such agreements, but found no prejudice to the accused's rights.[117]

Judge Crawford noted insightfully that the proceedings in this case probably resulted from the accused's inability, "when faced with the moment of truth . . . [to] admit the elements involved."[118] Judge Crawford also suggested that the ruling from the majority is somewhat ambiguous because it "fails to clarify which portion of *Bertelson* still applies."[119] In other words, it is not clear what set of rules should apply to guide proceedings such as occurred in *Davis*. Judge Crawford surveyed federal case law and determined that "[n]o circuit seems willing to equate a confessional stipulation with a guilty plea. However, most circuits that have examined this topic do afford some constitutional protections . . . requir[ing] that the trial judge inquire into whether the defendant entered the stipulation voluntarily and intelligently."[120] Judge Crawford concludes that the problems in *Davis* could have been avoided "had defense counsel stated on the record" that the accused could not admit to the wrongfulness of drug use or the intent to defraud for the bad check offenses.[121] She recognized that military law should "permit a plea like the one in this case when there is no contest concerning the underlying facts," and noted that Congress could amend Article 45 to permit the accused to enter an *Alford*[122] plea.[123]

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111. *Id.* The stipulation also omitted a Navy instruction that would have prohibited the wrongful possession of drug paraphernalia.

112. 3 M.J. 14 (C.M.A. 1977). *Bertelson* requires that, before a military judge may admit a confessional stipulation into evidence, he must establish that the accused knowingly and voluntarily enters into the stipulation and that she fully understands its meaning and effect. Here, the military judge ascertained that, among other things, the accused understood that his confessional stipulation "practically admits" each element of the offense charged. *Davis*, 50 M.J. at 427.

113. UCMJ art. 45 (LEXIS 2000). Article 45(a) requires the military judge to reject a guilty plea if the accused "makes an irregular pleading, or after a plea of guilty sets up a matter in consistent with the plea, or if it appears that he has entered the plea of guilty improvidently or through lack of understanding of its meaning and effect." This is further implemented by R.C.M. 910(c), which requires the military judge to inform the accused of the nature of the offense to which his plea is offered, the maximum punishment, his right to counsel, to plead not guilty, etc.

114. MCM, *supra* note 17, R.C.M. 811(c). The Discussion to R.C.M. 811(c) states:

> If the stipulation practically amounts to a confession to an offense to which a not guilty plea is outstanding, it may not be accepted unless the military judge ascertains: (A) from the accused that the accused understands the right not to stipulate and that the stipulation will not be accepted without the accused's consent; that the accused understands the contents and effect of the stipulation; that a factual basis exists for the stipulation; and the accused, after consulting with counsel, consents to the stipulation; and (B) from the accused and counsel for each party whether there are any agreements between the parties in connection with the stipulation, and if so, what the terms of such agreements are.

MCM, *supra* note 17, R.C.M. 811(c), discussion.

115. *Davis*, 50 M.J. at 430. According to the CAAF, *Bertelson* recognized that allowing the government to enter into PTAs conditioned upon a stipulation "(as opposed to a plea) of guilt coupled with a promise not to raise any defense or motion would utterly defeat the Congressional purpose behind Article 45(a), for it would allow the Government to avoid the hurdles Congress imposed in Article 45(a) while nevertheless reaping benefits equivalent to a guilty plea." *Id*. (quoting *Bertelson*, 3 M.J. at 317).

116. *Davis*, 50 M.J. at 430-31.

117. *Id.*

118. *Id.* (Crawford, J., concurring).

119. *Id.* at 432 (Crawford, J., concurring).

120. *Id.* at 434-35.

121. *Id.* at 435.

Davis is somewhat opaque, with the CAAF unanimous that the accused was not deprived of due process, but hesitant to open the floodgates and endorse a new form of abbreviated guilty plea that seems to do an end run around Article 45, UCMJ.[124] Whether Judge Crawford's concurring opinion will usher in a bold, new era of "*Davis* pleas" remains to be seen, but the language of her opinion has an innovative air about it.[125]

Ambiguous Terms, Unforeseen Consequences, and Sub Rosa Agreements: The CAAF Reaches Out

As the discussion above suggests, this term saw the CAAF deal with a wide variety of issues arising from pretrial agreements. The CAAF was called upon to resolve ambiguity in the terms of pretrial agreements, deal with the issue of unforeseen consequences of the terms of those agreements, and struggle with allegations of sub rosa agreements raised for the first time on appeal. Significantly, at least as concerns the issue of unforeseen consequences and sub rosa agreements, these may be the only two areas in which the CAAF permitted itself to defer to the accused. First, however, we shall deal with the CAAF's analysis of ambiguity in the PTA.

In deciding *United States v. Acevedo*,[126] the CAAF set out a formula for resolving ambiguities in PTAs. In *Acevedo*, the accused pleaded guilty to offenses arising from a scheme to steal and pawn Coast Guard equipment and supplies. He pleaded guilty in exchange for the convening authority's agreement to enter into a plea bargain, one of the terms of which specified the following:

> A punitive discharge may be approved as adjudged. If adjudged and approved, a dishonorable discharge will be suspended for a period of 12 months from the date of the court-martial at which time, unless sooner vacated, the dishonorable discharge will be remitted without further action.[127]

The military judge sentenced the accused to confinement for thirty months, total forfeitures, reduction to E-1, and a *bad-conduct* discharge (BCD). The convening authority approved the sentence but suspended a portion of the confinement pursuant to another provision of the PTA. At issue was whether the convening authority could approve the bad-conduct discharge without suspending it.

On appeal, a majority of the Coast Guard court determined that the parties understood that the convening authority was not bound to suspend the BCD.[128] The dissenters on the Coast Guard court disagreed, contending that a suspended dishnorable discharge (DD) is less serious than an unsuspended BCD– the suspended DD was a *cap*, a "ceiling for punitive discharges above which the convening authority could not go."[129]

In agreeing with the majority of the Coast Guard court, the CAAF noted that contract law principles apply to construction of PTA terms.[130] The CAAF set out a template for reviewing ambiguous terms, looking first to the language of the PTA itself.[131] "When the terms of the contract are unambiguous, the intent of the parties is discerned from the four corners of the contract."[132] When the agreement is ambiguous, extrinsic evidence is admissible to determine the meaning of the term.

Here, the CAAF found that the "fact that the agreement does not specifically mention a [BCD] suggests that no condition applies to a [BCD]."[133] The CAAF, however, went on to look at the actions of the participants at trial, particularly the response from defense counsel when the military judge inquired about the BCD. The military judge acknowledged that there was nothing in the agreement about "doing anything"

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122. North Carolina v. Alford, 400 U.S. 25 (1970) (permitting an accused to plead guilty while maintaining his innocence).

123. *Id.*

124. UCMJ art. 45 (LEXIS 2000).

125. *See* Major Douglas Depeppe, The *Davis* Plea: Better than an *Alford* Plea for the Military (Apr. 1999) (unpublished research paper) (on file with the Criminal Law Department, The Judge Advocate General's School, U.S. Army, Charlottesville, Va.) (advocating the use of the plea to ease potential conflicts between counsel and accused over potential pleas, and to permit fair, efficient proceedings for accused who want—but are unable—to plead guilty and who are willing to enter into a confessional stipulation of fact).

126. 50 M.J. 169 (1999).

127. *Id.* at 171.

128. *Id.*

129. *Id.* at 171-72.

130. *Id.* at 172.

131. *Id.*

132. *Id.*

with the BCD, to which the defense counsel responded in the affirmative.[134] The accused never asserted that he had believed any punitive discharge would be suspended. Finally, neither defense counsel nor the accused took issue with the SJA's post trial recommendation under R.C.M. 1106 or contended that they understood the BCD would be suspended. Satisfied that the parties fully intended that the convening authority was only have been required to suspend only a DD, the CAAF ruled against the accused, refusing to speculate, as had the dissenters on the Coast Guard court, which punishment was more severe, an unsuspended bad conduct discharge or a suspended dishonorable discharge. At least one member of the CAAF suggested that such a conclusion might be appropriate in a different case, leaving the issue to be litigated another day.[135]

Unforeseen Consequences and Collateralness

Over the years the courts have wrestled with the problem of regulations or statutes that may eviscerate or at least limit the terms of a PTA.[136] Generally, the courts find such issues to be collateral.[137] During this term, the CAAF again faced the problem of service regulations effectively precluding the favorable terms negotiated in the PTA and, in *United States v. Mitchell*,[138] the CAAF signaled a significant departure from the settled case law in remanding the case for further proceedings.

In *Mitchell*, the accused had enlisted in the Air Force in 1974.[139] He reenlisted in 1988 for six years. In April 1994, he voluntarily extended his enlistment for nineteen months. His extension was not effective until 19 September 1994, however. In July 1994, approximately two months before his extension became effective, he committed the misconduct for which he was ultimately tried at court-martial.[140] Acknowledging that he needed help, the accused sought to expedite his trial and to provide financially for his family. He and the convening authority signed a PTA that included the following provision: the convening authority agreed to suspend any adjudged forfeiture of pay and allowances, to the extent that such forfeiture would result in the accused receiving less than $700 per month.[141] The forfeitures would be suspended for a period of twelve months or the duration of the confinement, whichever was greater. In addition, the accused agreed to execute an allotment to his family for $700 per month.

The accused's trial occurred on 14 September, five days before his enlistment would have become effective. The military judge fully explored the provision of the PTA concerning the accused's forfeitures. During the presentencing hearing, the accused asked the panel members to punish him, not his family, for his misdeeds. The panel members posed several questions concerning the accused's eligibility for pay if confined. The military judge instructed the members that the accused would not lose either his base pay or his basic allowance for quarters. The court sentenced the accused to confinement for five years,

133. *Id.* The ACCA recently wrestled with a similarly ambiguous provision in *United States v. Ladoucer*, No. 9800724 (Army Ct. Crim. App. Oct. 19, 1999), where the agreement stated: "The Convening Authority agrees to disapprove any confinement adjudged in excess of 180 days and a bad conduct discharge." The military judge sentenced the accused to four months of confinement and a bad conduct discharge. At issue was whether the convening authority could approve the bad conduct discharge. The ACCA resolved the issue against the accused, relying on *Acevedo*:

> (1) the interpretation of a pretrial agreement is a question of law which we review de novo; (2) when interpreting pretrial agreements, resort to basic contract principles is appropriate [unless outweighed by the Constitution's Due Process clause protections] and; (3) if a pretrial agreement is ambiguous on its face because it may be interpreted more than one way, then examination of extrinsic evidence is appropriate to assist in determining the intended meaning of the ambiguous terms.

Ladoucer, No. 9800724, slip op. at 3 (citation omitted). The ACCA resorted to the record of trial, in which the military judge had inquired of both parties, including the accused, whether the sentence could be approved as adjudged and both sides responded affirmatively. *Id.* slip op. at 3-4.

134. *Acevedo*, 50 M.J. at 173.

135. *Id.* at 175 (Effron, J., concurring).

136. *See, e.g.*, United States v. McElroy, 40 M.J. 368 (C.M.A. 1994) (holding that generally judge should not instruct on collateral, administrative consequences of sentence); United States v. Paske, 29 C.M.R. 505 (C.M.A. 1960) (ruling that an SJA did not err in failing to advise a convening authority of the adverse financial impact on sentence as a result of decision of comptroller general); United States v. Pajak, 29 C.M.R. 502 (C.M.A. 1960) (holding that a plea of guilty was not improvident where the appellant was unaware that legislation would have effect of denying him retirement earned after 25 years active service); United States v. Lee, 43 M.J. 518 (A.F. Ct. Crim. App. 1995) (holding that the general rule has been that collateral consequences of a sentence are not properly a part of the sentencing consideration).

137. *Acevedo*, 50 M.J. at 175.

138. 50 M.J. 79 (1999).

139. *Id.* at 80.

140. *Id.*

141. *Id.*

forfeiture of $500 pay per month for five years, and reduction to the grade of E-4.[142] The adjudged forfeitures would have been suspended to the extent necessary to permit the accused to continue to receive $700 pay per month to support his family. His pay would have continued for the nineteen months remaining on his enlistment.[143] The convening authority, pursuant to the PTA, ultimately approved confinement for four years and reduction to the grade of E-4.[144]

Unfortunately for the accused, his desire to expedite the proceedings may have precluded, at least ostensibly, his extension from becoming effective. As of 14 September, he lost his eligibility to extend because he was confined.[145] Thus, his regular enlistment, and his entitlement to pay, ended on 19 September.[146] The CAAF noted:

> Had appellant begun serving his confinement after September 19, 1994–the date on which his enlistment extension became effective–the pretrial agreement would have been implemented in the manner anticipated by the participants. Under Air Force personnel regulations, the enlistment extension could not take effect while appellant was in confinement, even with an approved extension.[147]

The accused argued before CAAF that the unanticipated termination of his pay status reflected a substantial misunderstanding of the effects of his pretrial agreement.[148] Complicating the issue was that the defense introduced documentation to the CAAF showing that the accused was retirement eligible and that he, in fact, retired from the Air Force on 1 February 1998.[149] The CAAF, understandably bemused by these documents, remanded the case for determination of the accused's status by the Air Force Court of Criminal Appeals.[150]

While the facts of *Mitchell* are unique, and somewhat chaotic by virtue of the Air Force granting the accused a retirement, the CAAF, in remanding the case, appears to be reversing the trend referred to earlier.[151] That is, the CAAF's decision reflects an inclination to grant relief to accuseds who are adversely affected either because the sentencing authority was not told of the ramifications of proposed sentences, or because of some, arguably, collateral regulatory administrative actions that may affect the terms of a pretrial agreement. After all, the CAAF directed the Air Force Court of Criminal Appeals to determine if:

> [T]he Secretary's action [granting retirement] could be viewed as an adequate means of providing appellant with the *benefit of his bargain*. . . . Moreover, even if the Court of Criminal Appeals concludes the Secretary's action is insufficient to provide appropriate alternative relief . . . the court may set aside the findings, as well as the sentence, and authorize a rehearing based on appellant's improvident pleas.[152]

Thus the CAAF recognized that the regulation in question was beyond the ken of the convening authority, the SJA, counsel, and the accused, at the time the PTA was signed. More importantly, the CAAF concluded, at least tacitly, that the impact of this regulation was not collateral, and thus the opinion's focus was on ensuring the accused got the "benefit of his bargain." Finally, the CAAF implicitly rejected the notion that a service's finance and personnel records were matters collateral to the pretrial agreement and the accused's plea. Thus, it appears that, to the CAAF, where personnel and finance regulations obviate the terms of a PTA, such impact will no longer be considered collateral. This idea is already showing signs of becoming a trend.[153]

Sub Rosa Agreements

If we had to pick two areas that seemed to run counter to the trend of deference to convening authorities, SJAs, and military

142. *Id.*

143. *Id.* at 81.

144. *Id.*

145. *Id.*

146. *Id.*

147. *Id.* (citation omitted).

148. *Id.* at 81-82.

149. *Id.*

150. *Id.* at 83.

151. *Id.*

152. *Id.* at 83 (emphasis added).

judges, the possibility of unintended consequences of a PTA, discussed above, might be one, and the second might very well be the area of sub rosa agreements. A case reviewed during this past year suggests that, at least to the extent that sub rosa agreements implicate command influence concerns, the CAAF is willing to shoulder the mantle of its care-taking function and continue to ferret out command influence.

Before looking to the significant case this term, it helps to set the stage by looking back to a case decided two years ago, *United States v. Bartley.*[154] In *Bartley*, the accused argued on appeal that command influence was evinced by a poster in the convening authority's waiting room. The poster purported to debunk "myths" about drug use, to include such apocrypha as "drug users can be dependable airmen."[155] The accused claimed that he had wanted to raise this command influence issue, but that a sub rosa agreement between the trial and defense counsel buried the motion.

In a battle of the post-trial affidavits, the defense counsel stated that he had in fact drafted such a motion, that he had sent the motion to the government, but that he did not raise the issue because he believed it was not a "sure fire winner."[156] The defense claimed, nevertheless, that he felt the motion made the government more receptive to the proposed PTA. The defense further claimed that part of the inducement for the government to enter into the PTA was that "we would drop the motion."[157] The government, during appellate argument, conceded that there was indeed a sub rosa agreement concerning unlawful command influence.[158] The CAAF, with Judge Crawford writing for the majority, simply could not be convinced beyond a reasonable doubt that unlawful command influence did not induce the guilty plea.[159]

The CAAF was confronted with another post trial allegation of a sub rosa agreement in *United States v. Sherman*.[160] There, the accused claimed that his commander had unlawfully interfered with his pretrial confinement hearing. He alleged, however, that he had not raised the issue at trial because his defense counsel had told him that by making such a motion he would lose a chance at a favorable pretrial agreement.[161] In another battle of the affidavits, defense alleged that trial counsel had "implied" he might not support the PTA if an unlawful command influence motion was raised.[162] The trial counsel, predictably, disputed this claim, saying he recalled the defense mentioning a possible unlawful command influence motion but "I do not recall . . . a sub rosa" agreement.[163] The CAAF elected to order a *Dubay*[164] hearing, finding the affidavits raised a factual dispute as to the existence of a sub rosa agreement.[165]

The hearing was ordered over the strenuous dissent of Judge Crawford, who argued that, "when a military judge properly inquired and received assurances from appellant that no sub rosa agreements existed, we will not consider inconsistent post-trial assertions."[166] *Sherman* "is not" *Bartley*, in which "a col-

153. *See, e.g.*, United States v. Williams, 49 M.J. 542 (N.M. Ct. Crim. App. 1998), *review granted*, 1999 CAAF LEXIS 1480 (C.A.A.F. June 4, 1999). In *Williams*, the Navy-Marine Corps court was asked to invalidate the accused's plea because a Department of Defense regulation placed him in a no-pay status, thus invalidating a provision of the PTA in which the convening authority agreed to suspend any adjudged forfeiture of pay and waive automatic forfeitures. The Navy-Marine Corps court found the DOD regulation's impact to be collateral and affirmed the findings and sentence. *Williams*, 49 M.J. at 548.

154. 47 M.J. 182 (1997).

155. *Id.* at 184.

156. *Id.* at 185.

157. *Id.*

158. *Id.* at 186.

159. *Id.* at 186-87.

160. 51 M.J. 73 (1999).

161. *Id.* at 74.

162. *Id.* at 75.

163. *Id.* at 74.

164. United States v. Dubay, 37 C.M.R. 411 (C.M.A. 1967).

165. *Sherman*, 51 M.J. at 76. The CAAF posed six questions to be answered in the *Dubay*: (1) Did the convening authority threaten the initial review officer to keep the accused in pretrial confinement? (2) Did the convening authority threaten accused's wife with the loss of base housing unless she cooperated with the prosecution? (3) Were witnesses interfered with? (4) At R. 56–was the accused telling the truth when he told the judge there were no agreements other than the written pretrial agreement? (5) Did defense counsel knowingly remain silent and allow the accused to give an untruthful answer when the accused said no other agreements induced him to plead guilty? (6) Were there any sub rosa agreements made with the defense that were outside the wording of the PTA?

166. *Id.* at 76 (quoting United States v. Muller, 21 M.J. 205, 207 (C.M.A. 1986)).

orable claim of command influence . . . appears on the record"[167]

Military justice practitioners might very well ask, in the end, why all the fuss about sub rosa agreements? Why should we be concerned about such agreements, or the rulings in *Bartley* and *Sherman*? The answer to these questions is multifaceted.

One concern is systemic integrity.[168] Pretrial agreements exist between the accused and the convening authority.[169] When trial and defense counsel bargain away important issues such as allegations of unlawful command influence, they contravene the *MCM*'s prescription that PTAs be between the convening authority and the accused. Equally important, sub rosa agreements that bargain away command influence preclude the appellate courts from exercising their care-taking and oversight functions through which they stand guard against the "mortal enemy" of military justice.[170] Practitioners should be concerned when counsel seem to be burying issues of great moment in the pretrial negotiation process. Finally, and of most immediate significance for counsel on both sides of the aisle, the decisions in *Bartley* and *Sherman* reflect a disturbing judicial skepticism of counsel's representation that a PTA contains "all agreements" between the government and the defense.[171] The fact that such skepticism is not without justification should cause all practitioners to be concerned that counsel are not being as candid with the tribunal as they should.

How can the system guard against sub rosa agreements? The solution may lie, at least in part, in identifying the problem, and recognizing the potentially cavalier pretrial negotiations of trial and defense counsel. Some suggestions include the following.

First, teach counsel to be sensitive about the weighty issues they may encounter in pretrial negotiations. For example, government counsel should *never* tell defense counsel, especially concerning allegations of command influence, "if you raise that motion, the deal goes away." Such a lesson may easily be lost in the rough-and-tumble, hurly-burly world of pretrial negotiation, but counsel need to understand that the CAAF has expressed a preference for the litigation of command influence issues.

Second, a trial counsel who has been tipped off to a potential command influence issue must relay such information to her superiors. The SJA can then review the issue and advise the convening authority to take action as appropriate. Staff judge advocates could direct that trial counsel inform the defense to "raise or forego" such issues, but it should be made clear that neither course of action will affect the pretrial agreement.[172] Finally, SJAs, trial counsel, and defense counsel should take full advantage of the provision of the *MCM* permitting conditional guilty pleas.[173]

Ultimately, sub rosa agreements benefit neither side and represent a dysfunction in the system of military justice that must be avoided.

Voir Dire and Challenges

There is little in the area of voir dire and challenges that could be described as truly "new" or ground-breaking, but several notable cases dealing with issues in voir dire and challenges evince the CAAF's continuing deference to the role of the military judge in the trial process.[174] As has been stated, nowhere is this deference more evident than in the realm of selection of panel members.[175]

United States v. Belflower[176] serves as an excellent refresher to both government and defense counsel that there is no guar-

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167. Notably, in *Bartley* it was the concession of a sub rosa by the government at oral argument rather than anything in the record of trial that supported the inference of a sub rosa agreement. Aside from the government's concession during appellate argument that such an agreement existed, the two cases are largely indistinguishable.

168. Discussion with Colonel Frederic L. Borch, Staff Judge Advocate, Fort Gordon (Oct. 6, 1999) (providing compelling thoughts on the issue of sub rosa agreements).

169. *See* MCM, *supra* note 17, R.C.M. 705(a).

170. Unlawful "command influence is the mortal enemy of military justice." United States v. Thomas, 22 M.J. 388, 393 (CMA 1986). Indeed, this is the concern that seemed of greatest import to the court in *Sherman*.

171. Two of the six questions posed by the CAAF to the *Dubay* hearing involve the candor of the accused and counsel to the court. *Sherman*, 51 M.J. at 76. Moreover, Judge Crawford suggests the problematic difficulty of raising such issues post-trial: "Candor with the tribunal requires that both parties be open and honest at the time of trial and not litigate these issues through post-trial affidavits." *Id.* at 77.

172. *Cf.* United States v. Conklan, 41 M.J. 800 (Army Ct. Crim. App. 1995) (PTA reflecting higher quantum if DC sought to raise command influence motion was violative of public policy).

173. MCM, *supra* note 17, R.C.M. 910(a)(2).

174. *See* Coe, *supra* note 5 (discussing the CAAF's "Reaffirmation of Power and Respect" for the military judge).

175. *Id.*

anteed right to individual voir dire of members and that the parties must demonstrate that individual voir dire is necessary because certain areas could not be covered in group questioning. In this case, the accused pleaded guilty to several offenses involving sexual activity with a child, and chose to have members for sentencing.

After group voir dire, the defense requested individual voir dire of four members: Lieutenant Colonel (LTC) Russi, Major (MAJ) Burry, Captain (CPT) Dougherty, and CPT Ali. During the military judge's initial voir dire instructions, LTC Russi had indicated he had a degree in criminology and that he worked in a courthouse "drug program" in the 1970s. He told the military judge that he understood that he should not bring any knowledge from that experience to the *Belflower* case. The defense later requested individual voir dire of LTC Russi to further explore his criminology background, as well as its potential influence on the other members. The military judge stated that he had already inquired about the background and that LTC Russi had said nothing that suggested the need for individual voir dire.[177]

Major Burry was a nurse, who had worked in adult intensive care. The defense questioned her during group voir dire, eliciting that she had little training on dealing with sexual abuse victims, "other than reporting."[178] Nevertheless, defense requested individual voir dire of her as well, to further explore her education and training. The military judge denied the request.

The defense did not question either CPT Dougherty or CPT Ali during group voir dire, but sought individual voir dire of these members. Captain Dougherty was a single parent, and the defense wanted to ask about the impact of the separation from his child upon him. As to CPT Ali, the defense felt that his religious beliefs could be relevant, since Arabic countries tend to mete out harsh punishment for criminal behavior.[179] The military judge denied both requests.

In finding that the military judge had not abused his discretion, the CAAF noted that the parties must show "that individual voir dire is necessary because certain areas could not be covered in group questioning.[180] As to LTC Russi, his professional background in substance abuse seemed irrelevant to the instant case and, in any event, he had assured the military judge that he would not let any knowledge gained from that experience influence him in the instant case.[181]

Concerning MAJ Burry, the military judge did not abuse his discretion because MAJ Burry's training had been explored on group voir dire, and she had indicated that she had little training in dealing with sexually abused children beyond the necessity of reporting.[182] Similarly, the military judge did not abuse his discretion when he denied the requests for individual voir dire of CPT Dougherty and CPT Ali. There appears to have been nothing in the questions that defense sought to ask which would have been "likely to produce a response which would have poisoned the remainder of the panel." The questions of CPT Ali's religion would not have involved such intimate details that he would have refused to speak freely before the other members.[183]

The CAAF did give a nod, at least, to the tension that may exist between the requirement to establish a need for individual voir dire and the risk of the member saying something that might "poison" the panel. However, said the CAAF, "it was within the discretion of the military judge to take that risk."[184]

The concurring opinion points out that the majority did not distinguish the *Belflower* holding from *United States v. Jefferson*.[185] In *Jefferson*, the then-Court of Military Appeals applied an abuse of discretion test to determine if the defense was inappropriately denied individual voir dire.[186] The *Jefferson* majority held that the military judge errs when he cuts off "further inquiry . . . on a critical issue."[187] The majority in *Belflower* elected to forego the further inquiry test for an abuse of discretion standard "focusing on the defense counsel's failure to ask the challenged questions during group voir dire."[188]

176. 50 M.J. 306 (1999).

177. *Id.* at 307.

178. *Id.* at 308.

179. *Id.*

180. *Id.* at 309 (citing United States v. Jefferson, 44 M.J. 312 (1996)).

181. *Id.* at 309.

182. *Id.*

183. *Id.*

184. *Id.*

185. *Id.* at 310 (Sullivan, J., concurring) (noting that the majority does not distinguish *Belflower* from *United States v. Jefferson*, 44 M.J. 312 (1996)).

186. *Jefferson*, 44 M.J. at 317.

The CAAF majority opinion offers some sound guidance to counsel seeking individual voir dire of particular members. The judges suggest, for example, that defense counsel could have (1) asked more detailed questions during group voir dire, (2) asked the military judge to re-open or (3) asked for an Article 39(a) session to alert the military judge to specific matters which the defense wished to pursue on individual rather than group voir dire. All counsel would do well to heed the message that individual voir dire is not a right. Counsel should be ready to argue for individual voir dire in a particular case, and, if nothing else, err on the side of asking all questions on general voir dire rather than banking on the opportunity to conduct individual voir dire.

As suggested, by departing from *Jefferson* and reviewing refusals of requests for individual voir dire under an abuse of discretion standard, the CAAF evinces in *Belflower* great deference to the military judge's control of voir dire. This deference was also at the heart of the CAAF's decision in *United States v. Schlamer.*[189]

In *Schlamer*, the accused was charged with the brutal premeditated murder of a female Marine. The case was referred capital and, prior to trial, each member completed a nineteen-page questionnaire prepared by the government and the defense.[190] Two members gave responses on the questionnaires and during voir dire that became the basis of appellate issues.

The first member, a SSG B, wrote "yes" in response to the question of whether an accused should have to produce evidence that he is not guilty. She also stated that she believed courts did not deal "severely enough" with criminal accused.[191] Further, she stated she believed there should be set punishments for certain crimes: "'An eye for an eye;' Rape–castration. Theft–remove hand." Concerning her general feelings about the death penalty, she stated: "If you take a life, you owe a life."[192] Not surprisingly, these responses generated extensive questioning of SSG B during voir dire.

In summary, SSG B stated during the questioning that she would follow the military judge's instructions, that she would listen to the evidence on both sides, that she would apply the presumption of innocence, and that she had not made up her mind concerning the accused's guilt or potential punishment.[193] At the conclusion of the voir dire, the defense challenged SSG B for cause. The military judge denied the challenge, finding that SSG B had not "already made up her mind . . . . I completely believe her."[194]

The CAAF applied the standards of actual and implied bias to assess the military judge's ruling. The CAAF noted that, to find actual bias, the test is whether the bias will not yield to the evidence presented and the judge's instructions.[195] For implied bias, the test is whether a reasonable person would question the fairness of the proceedings.[196] The CAAF held that the member's thoughtful responses to repeated questioning from the military judge and counsel showed she would keep an open mind, that she would consider all the facts, and that she would not automatically vote for the death penalty. Although noting that SSG B's beliefs were "out of line with the maximum penalties for rape and larceny," the majority found her views on those offenses were less significant because those offenses were not charged.[197]

Ultimately, the majority held that the military judge's assessment of the member's credibility was entitled to deference, that a reasonable person would not question the fairness of the proceedings in light of the member's responses, and that the military judge had not abused his discretion.[198] "An inflexible

187. *Id.* at 321 ("[T]his court cannot countenance cutting off voir dire questions as to potential grounds for challege of members having friends and family who were victims of crimes.").

188. *Id.* at 310 (Sullivan, J., concurring) (agreeing that no error occurred with respect to LTC Russi, CPT Doughterty, and CPT Ali, and that the military judge did not abuse his discretion in refusing to allow further voir dire of MAJ Burry).

189. 52 M.J. 80 (1999).

190. *Id.* at 86.

191. *Id.*

192. *Id.*

193. *Id.* at 87-92.

194. *Id.* at 92.

195. *Id.*

196. *Id.* at 94.

197. *Id.* at 93.

198. *Id.* at 94.

member is disqualified," said the majority, "a tough member is not."[199]

A second challenge for cause was debated on appeal. The government had challenged 1LT H, a member who had disclosed that he once received punishment under Article 15, UCMJ,[200] for destruction of government property. First Lieutenant H acknowledged that he had initially felt that he should not have been punished under Article 15, but stated that the punishment was appropriate.[201] The trial counsel challenged 1LT H based on the concern about his "overidentification with the accused." The military judge initially denied the challenge, but later changed his mind, stating 1LT H "cannot be fair and impartial."[202] In upholding the challenge on appeal, the CAAF, again, deferred to the military judge's assessment of the member (who had appeared "embarrassed"), and held that granting the challenge was consistent "with the liberal grant mandate."[203]

Judge Effron, in dissent, took issue with the majority's decision affirming the challenge for cause against SSG B. He argued that SSG B's "firm and unwavering support for sentences that have long been outside the accepted range of punishment in military jurisprudence" showed that she was "not qualified" under Article 25, UCMJ.[204] Thus, the military judge's denial of the challenge for cause was an abuse of discretion.

Inevitably, the majority's opinion strikes one as slightly unbalanced, and the impression lingers that undue deference was given to the military judge. It is troubling, for example, that SSG B, with her disturbingly Draconian predisposition toward punishment, could be allowed to sit, despite the mandate that challenges for cause be liberally granted. When compared with the *granted* challenge against 1LT H, the logic of the opinion seems that much more inconsistent and insupportable. Staff Sergeant B, according to the majority, never stated she was biased, but her answers to the questionnaire displayed a medieval punishment philosophy. Yet she was allowed to sit. However, 1LT H neither said that he was biased in favor of the accused or the government, nor did there appear to be any basis for assuming 1LT favored leniency toward the accused. Indeed, the inference that 1LT H, who had, apparently, damaged a government vehicle sometime in his past, would "overidentify" with an accused charged with a brutal murder of a fellow Marine seems unjustified.

The CAAF's invocation of the "liberal grant" mandate as further justification for the military judge's action is an ironic blow indeed, because, arguably, the liberal grant mandate should favor the defense.[205] The disturbing impression left in the wake of the majority opinion is that "a tough member" is to be preferred over a member who might show any inclination toward leniency.

As indicated in the preceding discussion, the theme of the CAAF's deference to the military judge was most extant in the realm of voir dire. But the deference was also evident in the review of a wide range of decisions relating to the military judge's control of the courtroom.[206] While space limitations preclude discussion of these cases here, they are commended to counsel's review.

The Article 32 Investigation and Report

The extent to which the Article 32, UCMJ,[207] investigating officer may assist the government counsel in case preparation, and what should be done with the fruits of that assistance, was at issue in *United States v. Holt*.[208] Lance Corporal Holt was, in

199. *Id.* at 93 (citation omitted).

200. UCMJ art. 15 (LEXIS 2000).

201. *Schlamer*, 52 M.J. at 94.

202. *Id.* at 95.

203. *Id.*

204. UCMJ art. 25; *Schlamer*, 52 M.J. at 97 (Effron, J., dissenting).

205. *Cf.* United States v. Carter, 25 M.J. 471, 478 (1988) (Cox, J., concurring) ("The Government has the functional equivalent of an unlimited number of peremptory challenges.").

206. *See, e.g.*, United States v. Barron, 52 M.J. 1 (1999) (holding that the military judge did not abuse his discretion in refusing to grant mistrial where government psychological expert witness improperly passed notes to trial counsel); United States v. Cooper, 51 M.J. 247 (1999) (holding that the military judge did not lose appearance of impartiality where he expressed his personal irritation with defense counsel before members); United States v. Vassar, 52 M.J. 9 (1999) (holding that the military judge erred in applying wrong evidentiary standard but there was no prejudice); *but see* United States v. Weisbeck, 50 M.J. 461 (1999) (holding that the military judge abused his discretion in denying a request for continuance to arrange for testimony of important expert witness; denial based on desire for expeditious processing; case reversed).

207. UCMJ art. 32.

208. 52 M.J. 173 (1999).

the parlance of our times, a "biker." He, along with several fellow bikers, to include one Private (PVT) Sprenger and Corporal (CPL) Arthurs, stole a trailer to transport their motorcycles. Military investigative authorities discovered the trailer at Camp Pendleton, and questioned Private Sprenger. Worried that the investigation could affect his anticipated reassignment to Washington state, the accused, allegedly, encouraged PVT Sprenger to flee. Private Sprenger absented himself without leave. Testimony established that the accused was concerned that CPL Arthurs was being indiscreet and "running his mouth."[209] The accused then, allegedly, killed CPL Arthurs with a knife.

The accused proved to be far more indiscreet than CPL Arthurs, and, over the course of several days following the murder, he told at least four people what he had done. He also donned Arthurs' riding leathers and took his motorcycle, and showed Sprenger his blood-stained jeans as further proof. Ultimately, investigative authorities seized the motorcycle and, from a garage at the home of the accused's mother, the riding leathers and a pair of jeans. The jeans were sent for testing to the U.S. Army Crime Laboratory at Fort Gillem, Georgia (USACIL). Unfortunately, the testing showed no signs of blood on the jeans. Requests for further testing by other labs were refused by the USACIL authorities.

Meanwhile, in August 1992, the Article 32, UCMJ, investigation convened. Major N, the investigating officer, recommended that the charges be referred to a general court-martial (GCM) as a capital case. After completing his duties, MAJ N attended a forensic conference in December 1992. One of the presentations concerned blood spatter analysis evidence by a civilian law enforcement expert, Rod Englert. On his return to Camp Pendleton, MAJ N had a conversation with the trial counsel about the *Holt* case. Major N described Mr. Englert's presentation and gave the trial counsel Mr. Englert's name and telephone number. After arraignment, the jeans were sent to Mr. Englert for testing. Mr. Englert and one of his colleagues testified for the government at trial. The substance of their testimony was that luminol testing revealed human blood stains on the jeans and that the stains showed blood spatter consistent with stabbing.[210]

The accused was convicted. The conversation between the Article 32 investigating officer and the trial counsel only came to light after trial, however, and was raised for the first time on appeal.[211] The Navy-Marine Corps Court of Criminal Appeals found that the communication between the investigating officer and trial counsel was improper, and made the investigator appear to be an "adjunct trial counsel."[212]

The CAAF noted that two issues were raised by this communication, each one suggesting a different remedy. Either the investigating officer could have been biased in the original Article 32 investigation, in violation of the accused's right to an impartial Article 32 investigation, or the communication could support a claim that the investigator served in a prohibited role, such as trial counsel.[213] Because the accused did not raise the issue of bias on the part of the investigator, only the latter issue was before the CAAF.

The CAAF determined that the accused suffered no prejudice as a result of the ex parte contact. The CAAF noted that, even if the investigator was deemed to be a de facto member of the prosecution, none of his actions prejudiced the accused in this case. Rather, the investigator merely suggested an individual as a potential witness and to test certain evidence. Major N made no tactical or strategic decisions concerning the conduct of the trial. Moreover, the decisions with respect to the testing and the timing of the witnesses and evidence and the disclosure to the defense were all made by the trial counsel, not MAJ N. Finally, the CAAF concluded that the communication had no effect on the military judge's rulings.

> Either [the government witnesses] were experts or they were not. Either testimony was relevant and admissible, or it was not. Either there was a valid objection under *Garries* or there was not. Information concerning the role of Major N in suggesting the possibility of such testing to trial counsel would not have made a substantive difference as to the propriety of the military judge's rulings on any of these issues.[214]

Thus, the CAAF held that Major N's role did not result in prejudicial error during the trial proceedings.

The CAAF's holding is instructive to counsel in the field who are seeking to raise an impropriety. The framing of the issue will dictate the relief that can be granted. For example, the defense could have argued that the investigating officer's (IO) actions prejudiced the accused at trial *and* that his actions showed a prosecutorial bias which skewed the result of the Arti-

209. *Id.* at 174.

210. *Id.* at 178.

211. *Id.* at 182.

212. *Id.* at 183.

213. *Id.* at 183. R.C.M. 405(d) prohibits an investigating officer from acting later "in the same case in any other capacity." MCM, *supra* note 17, R.C.M. 405(d).

214. *Holt*, 52 M.J. at 184.

cle 32, UMCJ, investigation. Had the defense in *Holt* argued that the post-investigation behavior of the Article 32 officer displayed a governmental bias, the remedy would have to be a new Article 32 investigation, rather than having CAAF simply review the military judge's rulings to see if they were tainted by the IO's behavior. This is not to say that the result would have been different, but at least the CAAF would have had to address the alleged bias of the Article 32 officer.

The CAAF decision is troubling for two reasons. First, there is the prejudice that the accused suffered from the Article 32 investigating officer's obvious desire to assist the government's case; the government, it may be presumed, would not have otherwise obtained the expert testimony that suggested there was blood on the jeans seized from the accused and that the spatter pattern was consistent with a stabbing. This was an essential part of the government's case, because it corroborated obvious aspects of the accused's supposed confession.

Second, the CAAF did not even mention, let alone resolve, the issue of whether prejudice was *presumed*. The *MCM* requires that an Article 32 officer be impartial. Having served as the IO, therefore, he may not participate in the case in any other capacity.[215] Here, the CAAF conceded that the IO "may have created at least appearance of impropriety" by giving the trial counsel the supplemental recommendation. Indeed, the CAAF noted the defense contention that the IO may have become a *de facto* member of the prosecution, which would violate the *MCM*'s prohibition. More importantly, the CAAF did not address the extent to which the IO's discussion with trial counsel was a *substantive ex parte communication*. Military appellate courts have, in the past, applied a presumption of prejudice to such contacts.[216] By choosing to test for prejudice rather than presume it, the CAAF signaled a departure from the prior case law.

It may be simply that the CAAF was satisfied that the evidence against the accused was overwhelming and that, even if erroneous, the Article 32 IO's behavior could not possibly have prejudiced the result against the accused. Ultimately, however, the court's analysis does not bode well for future challenges based on ex parte contacts between trial counsel and the IO.

SJA Involvement in Pretrial Negotiations

It may be axiomatic among trial practitioners that SJAs should remain above the fray, so to speak, if only because they need to maintain a certain sense of aloofness to be able to provide independent, impartial assessment of a particular court-martial to the convening authority.[217]

United States v. Jones[218] examined such an issue. In that case, the accused, a finance clerk, was charged with soliciting several soldiers to help submit false claims to finance and splitting the proceeds.[219] Convinced that the accused was the kingpin of the operation, the government made pretrial agreements with at least three co-accused. These co-accused were to be key witnesses against the accused.[220] They struck a deal with the government to avoid courts-martial. They would instead receive punishment under Article 15, UCMJ, in exchange for which they would testify against the accused.[221]

The mechanics of the plan, however, had not been fully worked out. While each of the three received nonjudicial punishment, they did not receive grants of immunity immediately from the convening authority. Thus, when it came time for the three witnesses to testify at the accused's Article 32 investigation, they refused to testify on advice of counsel. This prompted a call from the SJA to the regional defense counsel (RDC). The SJA wished the RDC to pass the word to each of the counsel that, if their clients refused to testify against the accused, then "court-martial action is likely."[222]

Needless to say, the three eventually testified against the accused. At trial, the defense sought to preclude their testimony on the grounds that they had been unlawfully influenced. The military judge refused to suppress the testimony, although she did note that, if the three co-accused were ever prosecuted, the government's actions could "constitute a de facto grant of immunity."[223]

On appeal, the defense argued that the three co-accuseds' deal with the government constituted sub rosa agreements and de facto grants of immunity.[224] To the extent that the defense was seeking to argue that the government had violated the self-incrimination rights of *A*, *B*, and *C*, the CAAF found that the accused had no standing to raise such a claim. However, the

215. MCM, *supra* note 17, R.C.M. 405(d).

216. *See, e.g.*, United States v. Payne, 3 M.J. 354 (C.M.A. 1977) (holding that a presumption of prejudice applies to improper actions of judicial officer such as Article 32 investigating officer).

217. *See, e.g.*, UCMJ art. 34 (LEXIS 2000).

218. 52 M.J. 60 (1999).

219. *Id.* at 61-62.

220. *Id.*

221. *Id.* at 62.

accused had standing to raise such a claim to "prevent a serious risk of unreliable evidence being received at the movant's trial."[225] In other words, the accused could allege that inappropriate command influence had pressured the witnesses to testify against him and that this raised concerns about the reliability of the testimony presented against him.

The CAAF went on to review the accused's claim that the government's actions prejudiced his right to a fair trial. The CAAF began by noting that R.C.M. 704 recognizes both testimonial and transactional immunity, and that a promise by an SJA may result in de facto immunity.[226] An assessment of de facto immunity is essentially an after-the-fact determination that a promise by a person with apparent authority to make it means that an accused will not be prosecuted.[227] In addition, said the CAAF, some jurisdictions recognize informal or "pocket" immunity;[228] this means immunity exists where there is a "voluntary agreement between a government official and a witness not to prosecute that witness based on his or her testimony. Such a grant of immunity may "give rise to a judicial determination that the actions taken and the promises made constitute de facto immunity."[229] Having found that such immunity was granted here, the CAAF majority stated that it need not address the propriety of granting informal immunity in the military system.

The CAAF nevertheless embarked upon a discussion of the relative merits of formal versus informal immunity, finding that the CAAF's past decisions had enforced informal immunity through judicial findings of de facto immunity.[230] Under informal immunity, however, an individual may not be prosecuted for a failure to testify, thus, "leaving the government in a lurch."[231] Formal immunity, on the other hand, eliminates post-trial issues over the scope and extent of immunity (that is, transactional versus testimonial immunity).[232] In any event, the informal agreement in this case benefited the three co-accused because it "resulted in de facto transactional immunity versus testimonial immunity."[233]

The actions of the SJA in calling the RDC were not designed to pressure the three co-accused, however. Rather, the SJA's call was intended to "set forth practically what would happen if" the three did not testify.[234] The CAAF found that these actions had no adverse impact upon the reliability of the evidence presented against the accused.[235] The SJA, wrote the court, did not behave inappropriately when he apprised the co-accused of the practical implications of their failure to testify; this was not command influence which coerced the three co-accused to testify against the accused.[236] Moreover, because the substance of the agreements had been disclosed to defense counsel, there was no issue concerning sub rosa compacts between the government and the co-accused. While the court gently upbraided the government for not reducing its agreement with the three co-accused to writing, it refused to find that the accused was prejudiced.[237]

In his concurring opinion, Judge Sullivan bluntly asserted the impropriety of the SJA's behavior, pointing out that R.C.M. 704(c) permits only the convening authority to grant immunity, and that R.C.M. 704(d) requires that such grants be in writing.

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222. *Id.* at 62-63.

223. *Id.* at 62.

224. *Id.* at 63.

225. *Id.* at 64.

226. *Id.* at 65-66.

227. *Id.*

228. *Id.*

229. *Id.* at 65.

230. *Id.* at 66 (citation omitted).

231. *Id.* at 66.

232. *Id.*

233. *Id.*

234. *Id.* at 67.

235. *Id.*

236. *Id.* at 68.

237. *Id.* at 68-69.

Somewhat prophetically, Judge Sullivan took issue with the majority's discussion of informal immunity and its failure to take a sterner stand on the propriety of the SJA's behavior, echoing a case from 1888 in which Justice Bowen wrote that "obiter dicta, like the proverbial chickens of destiny, come home to roost sooner or later in a very uncomfortable way to the Judges who have uttered them."[238]

In keeping with the theme of deference noted throughout this article, it is clear, although rather disturbing, that a majority of the CAAF was untroubled by the SJA's involvement in this case. Indeed, the majority's discussion of informal immunity tacitly recognizes that the SJA has broad authority to use immunity as a bargaining chip in the pretrial negotiation process. Perhaps more disconcerting is the CAAF's analogizing the SJA's telephone call with the RDC in *Jones* to a "prosecutor" presenting "to a defendant the unpleasant alternatives of going to trial."[239] This is an unfortunate conclusion because, as noted by Judge Sullivan, it is directly contrary to provisions of the *MCM* and was pure obiter dicta. In fact, as mentioned, the CAAF needlessly found that the SJA's action had granted informal *transactional* immunity, despite a lack of findings from the trial judge that supported that conclusion. Ironically, for all the majority's talk of standing, the opinion failed to note that the military judge at trial had *refused* to rule on the issue of de facto immunity because it simply was not *ripe*. It may be, therefore, that the best lesson to take from *Jones* is that the CAAF's tacit endorsement of the use of informal immunity may, paradoxically, be more of a burden than a boon to SJAs who entangle themselves in pretrial negotiations and unwittingly confer transactional immunity on an accused.

Conclusion

This article has reviewed some of the significant decisions issued by the CAAF during the past year in an attempt to discern trends among the significant cases issued. Because this article was not intended as a survey, it may have excluded cases other authors would have included. Generally, however, it seems fair to say that the CAAF is increasingly deferring to court-martial personnel such as the convening authority and the SJA. In most cases such deference is probably warranted, because seldom do those who implement and enforce the military justice system seek to achieve improper ends. As the ministers of military justice, judge advocates must take care to ensure that when they act within the military justice system, they do so, always, in the name of justice.

238. *Id.* at 69 (Sullivan, J., concurring) (citation omitted).

239. *Id.* at 68 (citations omitted). Such an analogy is completely at odds with the *Manual for Courts-Martial*, which presumes that the SJA, as the supposedly impartial adviser to the convening authority, will remain above the fray of criminal prosecutions and that she will not, by definition, be a prosecutor. *Cf*. MCM, *supra* note 17, R.C.M. 406 discussion (stating that the SJA pretrial advice must include "independent and informed appraisal" of charges); United States v. Sorrell, 47 M.J. 432 (1998) (holding that R.C.M. 1106(b) provides that an SJA is disqualified from the post-trial review process if the SJA acted as a member, military judge, prosecutor, defense counsel, or investigating officer); United States v. Coulter, 14 C.M.R. 75 (C.M.A. 1954) (holding that the presumption of prejudice from an Article 6(c) violation; same officer served as trial counsel and as staff judge advocate to the reviewing authority); United States v. Plumb, 47 M.J. 771 (A.F. Ct. Crim. App. 1997) (holding that R.C.M. 1106 contemplates that the SJA who authors the post-trial recommendation will be sufficiently impartial as to provide the convening authority with a balanced and objective evaluation of the evidence).