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Military Justice Symposium—Volume I

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Foreword

Welcome to the sixth Military Justice Symposium, the annual criminal law year in review. It is that time of year again—time for the nine members of the Criminal Law Department, The Judge Advocate General's School, U.S. Army, to provide our assessment of the most significant cases and developments in military justice over the past year. This month's issue of *The Army Lawyer* contains Volume I of the Symposium, including articles on recent developments in courts-martial jurisdiction and the Military Extraterritorial Jurisdiction Act, pretrial procedure and court-martial personnel, military rules of evidence, substantive criminal law, and fraternization. Volume II of the Symposium will appear in the May 2001 issue of *The Army Lawyer* and will contain articles on discovery, unlawful command influence, search and seizure, urinalysis, self-incrimination, confrontation, sentencing, and post-trial procedures.

The survey of cases in the Symposium is not a digest of all cases decided this past year. Instead, we offer our assessment of the most significant opinions by the Court of Appeals for the Armed Forces and the service courts, and the most significant developments in military law over the past year. Our goal is to provide perspective, identify trends, and offer practical advice. We hope that you find our articles interesting and helpful in your practice and, as always, welcome your questions and comments.

Recent Developments in Jurisdiction: Is This the Dawn of the Year of Jurisdiction?

Major Tyler J. Harder
Professor, Criminal Law Department
The Judge Advocate General's School, United States Army
Charlottesville, Virginia

Introduction

Jurisdiction. The word is a term of large and comprehensive import, and embraces every kind of judicial action.[1]

With jurisdiction serving as the cornerstone of any military court,[2] the importance of understanding and being familiar with the latest cases and legislation in this area should not be underestimated. The past year saw passage of the Military Extraterritorial Jurisdiction Act of 2000 (MEJA),[3] as well as several important decisions from the Court of Appeals for the Armed Forces (CAAF). Although the legislation and cases may have only minor effects on the jurisdictional landscape in the military, they could very well be an indication of bigger things to come.

The CAAF decided several cases involving jurisdictional issues that had been decided at the service court level the previous year. While the CAAF affirmed the lower courts' decisions in some of these cases, there were those cases where the decision of the lower court was set aside. This article discusses these decisions within the framework of the prerequisites of military jurisdiction. The five necessary prerequisites of court-martial jurisdiction are found in Rule for Courts-Martial (RCM) 201(b): (1) the court-martial must be convened by a proper official; (2) the military judge and members must be of proper number and qualifications; (3) the charges must be referred to the court-martial by competent authority; (4) there must be jurisdiction over the accused; and (5) there must be jurisdiction over the offense.[4] The decisions handed down this past year address several of these elements. The first two parts of this article will look at those decisions addressing properly composed courts and properly referred charges. The third part will review those decisions addressing personal jurisdiction. The fourth and fifth parts will discuss appellate jurisdiction and recent legislation, respectively.

A Properly Composed Court-Martial: Substantial Compliance

The second element needed to perfect court-martial jurisdiction is a properly composed court. Rule for Courts-Martial 201(b)(2) requires that a court-martial be composed in accordance with the rules addressing the right number and qualifications of the members and the military judge.[5] Article 16 of the Uniform Code of Military Justice (UCMJ) allows for a court-martial without any members (military judge alone),[6] while Article 25, UCMJ, allows for enlisted members to serve on courts-martial.[7] In 1997, the CAAF held in *United States v. Turner*[8] that there was a violation of Article 16 where the accused had not *personally* made the request for a military

1. BLACK'S LAW DICTIONARY 443 (5th ed., abr. 1983) [hereinafter BLACK'S].

2. *See* Major Martin H. Sitler, *The Court-Martial Cornerstone: Recent Developments in Jurisdiction,* ARMY LAW., Apr. 2000, at 2.

3. 18 U.S.C. §§ 3261-3267 (2000).

4. MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 201(b)(1)-(5) (2000) [hereinafter MCM].

5. *Id.* R.C.M. 201(b)(2) ("The court-martial must be composed in accordance with these rules with respect to number and qualifications of its personnel. As used here 'personnel' includes only the military judge, the members, and the summary court-martial.").

6. Article 16(1) states that a court-martial may consist of "only a military judge, if before the court is assembled the accused, knowing the identity of the military judge and after consultation with defense counsel, *requests orally on the record or in writing* a court composed only of a military judge and the military judge approves." UCMJ art. 16(1)(B) (2000) (emphasis added).

7. Article 25(c)(1) states:

> Any enlisted member of an armed force on active duty is eligible to serve on general and special courts-martial for the trial of any enlisted member . . . only if, before the conclusion of a session called by the military judge under section 839(a) of this title (article 39(a)) prior to trial or, in the absence of such a session, before the court is assembled for the trial of the accused, *the accused personally has requested orally on the record or in writing* that enlisted members serve on it.

UCMJ art. 25(c)(1) (emphasis added).

8. 47 M.J. 348 (1997). In *Turner*, the accused had been advised by the military judge of his choice of forum at arraignment. The accused's defense counsel later submitted a written request for trial by military judge alone, and the defense counsel confirmed that request orally at trial in the accused's presence. *Id.* at 349.

judge alone either orally or in writing. However, the court decided there had been substantial compliance with Article 16 and that the error did not materially prejudice the substantial rights of the accused. The court looked to the history behind Article 16 and regarded the error as procedural and not jurisdictional.[9]

In 1999, the Navy-Marine Corps Court of Criminal Appeals (NMCCA) decided *United States v. Townes*, a case which focused on Article 25.[10] In *Townes*, the military judge advised the accused at the initial Article 39(a) session of his right to be tried by a court-martial composed of at least one-third enlisted members.[11] The accused stated that he understood this right. At a later session, in the presence of the accused, the defense counsel orally requested enlisted members to serve on the panel.[12] At no time did the accused personally request orally or in writing that enlisted members serve on the panel, as required by Article 25.[13] On appeal, the accused challenged the jurisdiction of the court. The NMCCA ordered a *DuBay* hearing,[14] at which the accused testified that he "did not recall" if he desired to be tried by enlisted members.[15] Following the *Dubay* hearing, the NMCCA found the military judge's failure to obtain from the accused personally (either orally or in writing) his election of enlisted members to be jurisdictional error. Relying on *United States v. Brandt*,[16] the court held that this election had to be made *personally* by the accused; his counsel could not make the election for him.[17] In so holding, the court distinguished Article 25 (which uses the language "*personally*") from Article 16 (which omits the word "personally").[18]

This past year the CAAF set aside the NMCCA decision in *Townes*.[19] The court reviewed the legislative history and found that "both Article 16 and Article 25 require personal election by the accused as to the forum," thus making the NMCCA distinction immaterial.[20] The CAAF also held that the military judge erred in not obtaining, on the record, the accused's personal request for enlisted members.[21] However, this error was not deemed jurisdictional because there was sufficient indication by the accused orally and on the record that he personally requested enlisted members.[22] The court held that there was substantial compliance with Article 25 and, as in *Turner*, the error did not materially prejudice the substantial rights of the accused.[23] With this decision, the "substantial compliance" doctrine now extends to Article 25. It is worth noting that although the trend is to treat failures to comply with the rules regarding court-martial composition as technical errors and not jurisdictional errors, in both *Turner* and *Townes* the CAAF reminded judges of their duties to obtain personal election on the record from accuseds.[24]

Properly Referred Charges

The third requirement for court-martial jurisdiction is that "[e]ach charge before the court-martial must be referred to it by competent authority."[25] This is usually not a jurisdictional element that generates much litigation, but the Army Court of Criminal Appeals (ACCA) recently addressed this requirement in *United States v. Pate*.[26] Specialist Pate had been originally charged with violating Article 92(2), UCMJ, failure to obey a

9. *Id.* at 350.

10. 50 M.J. 762 (N-M. Ct. Crim. App. 1999).

11. *Id.* at 763.

12. *Id.*

13. *See supra* notes 6-7.

14. *See* United States v. Dubay, 37 C.M.R. 411 (C.M.A. 1967).

15. *Townes*, 50 M.J. at 764.

16. 20 M.J. 74 (C.M.A. 1985).

17. *Townes*, 50 M.J. at 765.

18. *See supra* note 6-7.

19. 52 M.J. 275 (2000).

20. *Id.* at 276.

21. *Id.*

22. *Id.* at 277.

23. *Id.* at 276.

24. United States v. Turner, 47 M.J. 348, 350 (1997); *Townes*, 52 M.J. at 277.

lawful order, but at trial he pled guilty by exceptions and substitutions to Article 92(3), UCMJ, negligent dereliction of duty.[27] His plea of guilty by exceptions and substitutions was made pursuant to a pretrial agreement, which the convening authority had not personally signed.[28] Instead, both the offer portion and the quantum portion of the pretrial agreement had the word "accepted" circled and then a notation reading: "VOCO to . . . Staff Judge Advocate, 15 Oct 98 0900 hrs."[29] Neither the military judge nor the counsel for either side commented at trial on the lack of the convening authority's signature.[30]

One argument advanced on appeal by the accused was that because the convening authority had not signed the pretrial agreement, the offense of dereliction of duty was never referred and, therefore, the court did not have jurisdiction over that offense.[31] The ACCA disagreed, holding that the convening authority could accept the pretrial agreement without signing it. The court looked beyond the lack of the convening authority's signature. It found the pretrial agreement valid and held that acceptance of the pretrial agreement constituted a referral of the new offense, stating that "the form of the referral is not jurisdictional."[32] The court referred to RCM 601(e), which provides that a referral "shall be by the personal order of the convening authority."[33] The court stated that, "[t]he rule does not require a referral to be in writing, nor does the rule require a signature."[34]

Unlike *Turner* and *Townes*, the court in *Pate* was not contending with a technical departure from the rules; the rule was found to have been satisfactorily met. However, the service court's decision seems to be of the same essence as the CAAF's decisions in *Turner* and *Townes*. That is, when determining jurisdictional issues, it is not so much the technical adherence to the rule that matters, but rather, the pragmatic effect resulting from application of the rule.[35]

Personal Jurisdiction: When Is a Discharge Effective?

The fourth element of court-martial jurisdiction is that "[t]he accused must be a person subject to court-martial jurisdiction."[36] This element of jurisdiction, commonly referred to as personal jurisdiction, requires that an accused occupy a status as a person subject to the UCMJ at the time of trial.[37] Generally, this military status begins at enlistment and ends at discharge.[38] A discharge is complete upon: 1) a delivery of a valid discharge certificate; 2) a final accounting of pay; and 3) undergoing a clearing process required under appropriate service regulations to separate a servicemember from military service.[39] In 1999, the service courts decided two cases that visited the issue of

25. MCM, *supra* note 4, R.C.M. 201(b)(3). The discussion section of the rule refers the reader to R.C.M. 601, which provides for rules governing referral of charges. *Id.* discussion.

26. 54 M.J. 501 (Army Ct. Crim. App. 2000).

27. *Id.* at 503. The accused was entering Larson Barracks, in Kitzingen, Germany, and failed to stop for the gate guards. The act of driving through the gate after being directed to stop was charged as a violation of Article 92(2), failure to obey a lawful order. Pursuant to a pretrial agreement, the accused pled guilty by exceptions and substitutions to a violation of Article 92(3), negligent dereliction of duty by failing to remain stopped at the gate until he was allowed to proceed. *Id.*

28. *Id.*

29. *Id.* VOCO is commonly used shorthand that stands for "Vocal Communication."

30. *Id.*

31. *Id.* A convening authority's entry into a pretrial agreement is the functional equivalent of an order that the uncharged offenses in the pretrial agreement be referred to the court-martial for trial. United States v. Wilkins, 29 M.J. 421, 424 (C.M.A. 1990). The accused contended that the pretrial agreement was never signed and, therefore, the convening authority never properly referred that uncharged offense to trial. *Pate*, 54 M.J. at 504.

32. *Id.*

33. MCM, *supra* note 4, R.C.M. 601(e)(1).

34. *Pate*, 54 M.J. at 504. The court stated that "if the convening authority issued an order—however informal, oral or written—that a charge . . . be tried by the same court-martial which ultimately entered the findings of guilty, then jurisdiction existed to enter findings on that charge." *Id.* (quoting *Wilkins*, 29 M.J. at 424).

35. This is certainly not to say that practitioners can ignore the rules. Judges, counsel, staff judge advocates, and convening authorities need to be mindful of and follow the procedural requirements contained in the Rules for Courts-Martial.

36. MCM, *supra* note 4, R.C.M. 201(b)(4).

37. *See id.* R.C.M. 202(c) discussion.

38. *See id.* R.C.M. 202(a) discussion.

39. *See* 10 U.S.C. §§ 1168-1169 (2000); United States v. Keels, 48 M.J. 431, 432 (1998); United States v. King, 27 M.J. 327, 329 (C.M.A. 1989).

when a discharge becomes effective.[40] Both cases were affirmed by the CAAF this year and warrant some discussion.

In *United States v. Melanson*,[41] whether military jurisdiction existed depended on the *hour* at which the discharge became effective. On 10 May 1998, a noncommissioned officer (NCO) had been badly assaulted outside a nightclub in Vilseck, Germany, but was unable to identify his attackers.[42] While Military Police Investigations (MPI) was investigating the case, the accused was being administratively separated for drug use under *Department of the Army Regulation (AR) 635-200*, paragraph 14-12c.[43] His separation orders reflected a discharge date of 20 May.[44] He completed his administrative outprocessing on 19 May, received a copy of his DD Form 214 (Certificate of Release or Discharge from Active Duty), and on 20 May at 0008 hours, he signed out of his unit and was escorted to a nearby airport where he flew to Frankfurt.[45] Meanwhile, later on 20 May, two eyewitnesses identified the accused in a photographic lineup (on 20 May) as one of those who had assaulted the NCO on 10 May. Based on this identification the company commander directed military law enforcement to stop the accused from boarding his flight in Frankfurt.[46] Later that day, at 1800 hours, the brigade commander revoked the accused's administrative separation.[47]

The ACCA looked at the three elements required to effectuate a discharge and found that jurisdiction had not terminated.[48] The court stated that "for soldiers stationed overseas, the process of separating from the Army includes compliance with all treaty obligations."[49] The North Atlantic Treaty Organization status of forces agreement requires the United States to remove service members from the host nation and return them to the United States.[50] The service court held that the accused was required to be repatriated to the United States and was, therefore, still a member of the United States Army until that was accomplished.[51] The court also agreed with the military judge's finding that copy 4 of the accused's DD Form 214 did not equal a discharge certificate and determined he had also been unable to satisfy the "delivery of a discharge" element.[52] And while the court found it unnecessary to address the "final accounting of pay" element, it did mention in a footnote that "current technology and accounting practices may have changed the analysis necessary for determining when a final accounting of pay has occurred."[53]

Although the CAAF affirmed *Melanson*, it found a different basis for doing so. The court looked at *AR 635-200*, paragraph 1-31d, which states that "a discharge takes effect at '2400 [hours] on the date of notice of discharge to the soldier.'"[54] Based on this regulation, the court held that an administrative discharge is not effective until 2400 hours on the date of notice

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40. United States v. Williams, 51 M.J. 592 (N-M. Ct. Crim. App. 1999); United States v. Melanson, 50 M.J. 641 (Army Ct. Crim. App. 1999). These cases were discussed extensively in last year's jurisdiction article as service court decisions. *See* Sitler, *supra* note 2, at 4.

41. 53 M.J. 1 (2000).

42. *Melanson*, 50 M.J. at 642. The service court opinion provides greater detail and will be cited for purposes of laying out some of the facts of this case.

43. U.S. DEP'T OF ARMY, REG. 635-200, PERSONNEL SEPARATION: ENLISTED PERSONNEL, para. 14-12c (5 July 1984) (C14, 17 Oct. 1990), *superseded by* U.S. DEP'T OF ARMY, REG. 635-200, PERSONNEL SEPARATION: ENLISTED PERSONNEL (1 Nov. 2000).

44. *Melanson*, 50 M.J. at 643.

45. *Id.* He was given copy 4, a courtesy copy, of his DD Form 214. The original discharge certificate, copy 1, was to be mailed to the service member within five days of the date of his discharge. *Melanson*, 53 M.J. at 3.

46. *Melanson*, 50 M.J. at 643. The accused was making a connecting flight in Frankfurt to Washington, D.C., and was taken into custody by German polizei at the request of the military police investigators. *Id.*

47. *Melanson*, 53 M.J. at 3.

48. *Melanson*, 50 M.J. at 644. The three elements being: (1) delivery of a discharge, (2) final accounting of pay, and (3) undergoing the clearing process.

49. *Id.*

50. *Id.* (citing Agreement Between the Parties to the North Atlantic Treaty Regarding the Status of Their Forces, June 19, 1951, 4 U.S.T. 1792, 199 U.N.T.S. 67 [hereinafter NATO SOFA]; Agreement to Supplement the Agreement between the Parties to the North Atlantic Treaty Regarding the Status of Their Forces with respect to Foreign Forces stationed in the Federal Republic of Germany, Aug. 3, 1959, 14 U.S.T. 531, 481 U.N.T.S. 262 [hereinafter NATO SOFA Supplementary Agreement]).

51. *Id.* Thus, the service court held that the accused failed to satisfy the element requiring completion of the clearing process.

52. *Id.* at 645.

53. *Id.* at 645 n.6.

54. *Melanson*, 53 M.J. at 2 (quoting U.S. DEP'T OF ARMY, REG. 635-200, PERSONNEL SEPARATION: ENLISTED PERSONNEL, para. 1-31d (5 July 1984) (C15, 26 June 1996)).

of discharge to the soldier, absent a clear showing of an intent to discharge a service member at an earlier time.[55] The military, therefore, did not lose jurisdiction over the accused because the discharge was withdrawn at 1800 hours, prior to the effective time of the discharge—2400 hours. The "delivery of a valid discharge" element was not satisfied, so the court declined to decide whether the military judge and the service court were correct in concluding that jurisdiction would have continued based upon the issues of overseas clearance procedures and accounting of pay.[56]

A similar situation presented itself in *United States v. Williams*.[57] In *Williams*, the accused was evaluated by a physical evaluation board (PEB) due to a back injury and was determined to be unfit for duty.[58] On 18 December 1996, the accused went home on terminal leave awaiting final disposition of his medical discharge.[59] Meanwhile an investigation into fraudulent military identification cards had focused on the accused.[60] On 15 January 1997, his command placed him on legal hold. However, without the knowledge of the commander, the accused's previously prepared DD Form 214 was mailed to the accused's mother-in-law's residence, arriving there on 16 January.[61] The accused had also received his final pay and accounting by direct deposit on 15 January.[62] He then received orders dated 17 January 1997 terminating his previous PEB orders and directing him to return to duty. The accused reported for duty on 22 January.[63]

On appeal, the accused argued that the legal hold was ineffective since his DD Form 214 was effective on 15 January and, therefore, he was already discharged at the time the legal hold was placed on him.[64] The service court disagreed and held that jurisdiction never terminated. It found that the effective time of the orders (as entered on his Separation/Travel Pay Certificate) was 2359 hours.[65] The CAAF reviewed the case this year and in a short opinion found that the accused was indeed placed on legal hold prior to "the expiration of the date that constitute[d] the effective date of the discharge."[66] The CAAF agreed with the service court that the discharge had been properly rescinded thus maintaining personal jurisdiction over the accused.[67]

The rule to be taken from the CAAF decisions in *Melanson* and *Williams* seems to be a simple, and yet a very important one—military jurisdiction remains up until the very moment, even the very second, that a discharge becomes effective. And the discharge does not become effective until the *expiration* of the effective date.[68] So even if all three elements are satisfied, as was the case in *Williams*, personal jurisdiction continues to the very end.[69] In the words of the imortal Yogi Berra: "It ain't over till it's over."[70]

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55. *Id.* at 4.

56. *Id.*

57. 53 M.J. 316 (2000).

58. *Id.* at 317.

59. *Id.*

60. United States v. Williams, 51 M.J. 592, 594 (N-M. Ct. Crim App. 1999). The service court opinion provides additional detail and is cited for purposes of laying out some of the facts of this case.

61. *Id.* The discharge dated annotated on the DD Form 214 was 15 January 1997. *Id.*

62. *Williams*, 53 M.J. at 317.

63. *Williams*, 51 M.J. at 594.

64. *Id.* at 595.

65. *Id.* The service court determined that the accused's discharge was to take effect on 15 January 1997 at 2359 hours based upon the entry appearing in the pay information block of the accused's Separation/Travel Pay Certificate of 9 January 1997 which read: "SNM HAO EFF [service member home awaiting orders effective] 1630/961218 - 2359/970115." *Id.* at n.3 (emphasis added).

66. *Williams*, 53 M.J. at 317.

67. *Id.*

68. The question of *what time of day* the discharge takes effect is not a new one. *See* United States v. Self, 13 M.J. 132 (C.M.A. 1982); United States v. Smith, 4 M.J. 265 (C.M.A. 1978) (holding that the discharge became effective at 12:01 a.m., or one minute after midnight on the date specified on the self-executing orders); United States v. Brown, 31 C.M.R. 279 (C.M.A. 1962) (holding that orders relieving the accused from active duty became effective the moment they were received by him). The rule that a discharge is not effective until the end of the date specified may not apply in all situations.

69. It must still be remembered that the three elements necessary to effectuate a discharge operate under the assumption that the effective date on the DD Form 214 (or other orders stating the date of discharge) has arrived.

Turning to another recent CAAF decision that addressed the element of personal jurisdiction, *United States v. Wilson*[71] examined the question of how a *state* discharge from the National Guard affects *federal* jurisdiction. In *Wilson*, the accused was a member of the California Air National Guard (ANG) and was ordered to active duty on 21 July 1995 for a period of ninety-eight days (27 July through 1 November).[72] On 18 October he stole $320 from a fellow airman and then on 19 October he left his unit without authority. He remained absent without authority for over a year, until he was apprehended on 30 November 1996.[73] Meanwhile, on 3 November 1995, during his unauthorized absence, the California ANG issued an order extending his active duty orders, "by order of the Secretary of the Air Force," to 31 December 1995 (an additional sixty days).[74] Sometime in May 1996, the ANG unit personnel clerk completed a DD Form 214 and mailed it to the accused's home of record, purportedly discharging the accused.[75]

On appeal the accused argued lack of in personam jurisdiction since he had already been given his DD Form 214. The CAAF disagreed, holding that the discharge was invalid.[76] However, the court indicated that the validity of the discharge was not the central focus in the case. It found that the accused was placed on active federal service for a period of 158 days (including the extension) and that his unauthorized absence suspended the terminal date of his orders.[77] Until he completed his term of federal service, he remained subject to military jurisdiction. The state had no authority to unilaterally terminate his period of federal service, so any actions to discharge the accused by state officials did not affect his federal active duty status.[78]

Wilson provides a helpful analysis in determining when court-martial jurisdiction exists over a member of the National Guard. The jurisdictional relationship between the active component, the reserve component, and the National Guard is confusing for many and sometimes can be difficult to apply. *Wilson* emphasizes the distinction between state status and federal status, and the importance of understanding when federal status begins and when federal status ends. Once an individual is placed into federal status, they remain in federal status until they complete their term of federal service.

The last case addressing personal jurisdiction in the past year is *United States v. Byrd*.[79] This case focuses on the concept of "continuing jurisdiction." This is the concept that military jurisdiction continues over an accused even after a valid discharge, but applies for the limited purpose of executing the sentence and completing appellate review of a case.[80] Over the past three years there have been several cases that have helped refine this concept.[81] Continuing jurisdiction starts after a conviction occurs, and continues through the entire appellate process, notwithstanding an intervening administrative discharge or even the execution of a punitive discharge.[82] But once the appellate process is completed and the punitive discharge is executed, does this not terminate military jurisdiction? This was the question addressed in *Byrd*.

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70. Yogi Berra, professional baseball manager, as 1973 manager of the New York Mets, quoted by William Safire, *On Language*, N.Y. TIMES, Feb. 15, 1987, at F8, *available at* LEXIS, News, Major Newspapers File.

71. 53 M.J. 327 (2000).

72. *Id.* at 330.

73. *Id.* at 331.

74. *Id.* at 330. Altogether the accused had an active duty service obligation of 158 days.

75. *Id.* at 331. Apparently, a master sergeant took it upon himself to remove the accused from the unit rolls and then later prepare the separation orders, the DD Form 214 (checking the block providing for an "other than honorable" discharge), and the National Guard Bureau Form 22 (Report of Separation and Record of Service). The court found the state discharge invalid. However, it would have found that military jurisdiction existed even if the state discharge had been valid. *Id.* at 331-33.

76. *Id.* at 333.

77. *Id.* at 332.

78. *Id.* at 333. The CAAF stated, "[t]he discharge documents issued by the California ANG had no effect on the authority of the federal government to retain jurisdiction over appellant until he was relieved by federal authorities form his federal duties." *Id.*

79. 53 M.J. 35 (2000).

80. *See* Smith v. Vanderbush, 47 M.J. 56, 59 (1997).

81. *See generally* Steele v. Van Riper, 50 M.J. 89 (1999); Willenbring v. Neurauter, 48 M.J. 152 (1998); *Vanderbush*, 47 M.J. at 56.

82. *See Van Riper*, 50 M.J. at 89 (an honorable discharge after a court-martial conviction does not affect the power of the convening authority or appellate courts to act on the findings and sentence, however, it supersedes any adjudged punitive discharge); *Vanderbush*, 47 M.J. at 56 (the accused had been arraigned but was administratively discharged before trial; the CAAF refused to extend the concept of continuing jurisdiction to pretrial cases); *see also* United States v. Stockman, 50 M.J. 50 (1998); United States v. Engle, 28 M.J. 299 (1989) (execution of a discharge does not deprive the appellate court of jurisdiction to grant a petition for review).

In *Byrd*, the NMCCA had affirmed the accused's conviction and sentence on 15 October 1996.[83] The accused did not petition CAAF for review until 22 January 1997. However, on 2 January 1997, the accused's punitive discharge was ordered executed pursuant to Article 71(c), UCMJ, and the accused was issued his DD Form 214.[84] The CAAF granted the petition on 10 June 1997 and, following oral argument, set aside the NMCCA decision.[85] On remand to the service court, the government for the first time raised the fact that the punitive discharge had already been executed.[86] On 8 April 1999, the NMCCA held that the executed discharge terminated jurisdiction, stating that the accused's untimely filing resulted in the execution of his punitive discharge and the loss of his right to appeal.[87]

The CAAF disagreed with the NMCCA, vacating the service court's decision on 17 May 2000. The court held that jurisdiction still existed. The court found that the government had failed to establish the untimeliness of the petition because there was nothing in the record to clearly and properly indicate when the sixty-day review clock actually started. The execution of the discharge was premature and, therefore, the NMCCA erred in concluding that the accused was properly discharged under Article 71(c).[88]

More importantly, however, is the court's discussion of the effect a properly executed discharge might have upon the jurisdiction of the court. It makes two major points. First, the court makes clear that the statute, Article 67, UCMJ, and the court rule, Rule 19, Rules of Practice and Procedure for the CAAF,[89] which both provide for a sixty-day time limit to appeal to the CAAF, are *not* jurisdictional.[90] Second, it stated that even a proper execution of a punitive discharge under Article 71 does not deprive the court of jurisdiction to grant a petition for review.[91] Finally, the court concludes with a significant discussion of the certified question.[92] The discussion leaves little speculation as to whether the concept of continuing jurisdiction extends beyond the execution of the punitive discharge. The government acknowledged that the CAAF would have jurisdiction when there is good cause for an untimely filing under the All Writs Act.[93] But does the court have actual jurisdiction under direct review to hear such a case? This is the only real question remaining and the court declined to answer it for now.[94]

To summarize, this case leaves the parameters of continuing jurisdiction somewhat more defined. *Vanderbush* provides a beginning—continuing jurisdiction starts when there is a conviction. And now *Byrd* provides an indication of where continuing jurisdiction might finally terminate—it continues through the appellate process until judicial action is complete,

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83. *Byrd*, 53 M.J. at 38.

84. *Id.* at 39. Article 71(c) provides in part:

> that part of the sentence extending to . . . a dishonorable or bad-conduct discharge may not be executed until there is a final judgment as to the legality of the proceedings . . . . A judgment as to legality of the proceedings is final in such cases when review is completed by a Court of Criminal Appeals and -- (A) *the time for the accused to file a petition for review by the Court of Appeals for the Armed Forces has expired and the accused has not filed a timely petition for such review* and the case is not otherwise under review by that Court.

UCMJ art. 71(c)(1) (2000) (emphasis added). Article 67(b) provides the accused with sixty days from the date on which the accused is actually notified of the service court's decision or the date the decision is sent by certified mail to the accused (providing it was also served on appellate defense counsel), whichever occurs earlier, to file a petition for review. *Id.* art. 67(b).

85. *Byrd*, 53 M.J. at 38. The CAAF was unaware that the punitive discharge had been executed.

86. *Id.* at 39.

87. United States v. Byrd, 50 M.J. 754, 758 (1999).

88. *Byrd*, 53 M.J. at 41. The sixty-day review clock starts with either actual service of notice to the accused or constructive service of notice to the accused. *See* UCMJ art 67(b); *see also* discussion at *supra* note 84. There was no proof of actual service of notice and the CAAF found, with respect to constructive service, that the record failed to include "a number of basic documents that would have facilitated clear calculation of the beginning of the sixty-day period." *Byrd*, 53 M.J. at 40.

89. UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES, RULES OF PRACTICE AND PROCEDURE R. 19 (1999), *available at* http://www.armfor.uscourts.gov/Rules.pdf.

90. *Byrd*, 53 M.J. at 38. The court viewed the sixty-day time period as nonjurisdictional, emphasizing that procedural time frames may be waived in the interests of justice. *Id.*

91. *Id.* The court stated: "We have emphasized that an untimely petition may be considered upon a showing of good cause for the late filing, *even where a punitive discharge already had been executed upon the running of the 60-day appeal.*" *Id.* (emphasis added). The court cites to *United States v. Engle*, 28 M.J. 299 (1989), for this authority.

92. The question certified for appeal was: Whether proper execution of appellant's punitive discharge in accordance with Article 71(c), UCMJ, made appellant's case final under Article 76, UCMJ, and terminated military appellate court jurisdiction over the case. *Byrd*, 53 M.J. at 40 n.3.

93. 28 U.S.C. § 1651(a) (2000). For a discussion of appellate jurisdiction and the All Writs Act see infra notes 97-137 and accompanying text.

even if that means going beyond the execution of the punitive discharge. When is judicial action complete? That may be when the sentence is executed, time has run on all appeals, and good cause for a late filing cannot be shown.[95]

Appellate Jurisdiction: The Aftermath of *Clinton v. Goldsmith*

The authority for appellate jurisdiction is derived generally from one of two sources: direct review of cases pursuant to Articles 62, 66, 67, 67a, and 69, UCMJ,[96] or collateral review of issues under authority of the All Writs Act.[97] Congress enacted the All Writs Act in 1948 providing all federal appellate courts with authority to "issue all writs necessary or appropriate in aid of their respective jurisdictions."[98] The Supreme Court has determined that the All Writs Act applies to the military appellate courts.[99] Under this Act, the military appellate courts are able to grant relief within their respective jurisdictions by way of extraordinary writ authority.[100] However, writ relief is viewed by appellate courts as a drastic remedy that should be used sparingly and invoked only in truly extraordinary situations.[101]

The scope of appellate jurisdiction would seem rather definitive given these principles, and yet the decision by the Supreme Court in *Goldsmith* has injected some uncertainty into the parameters of appellate jurisdiction. Following a steady expansion of involvement by way of the All Writs Act, the CAAF was finally reigned in by the Supreme Court in 1991. In *Goldsmith*, an Air Force major was convicted at court-martial and sentenced to six years confinement, but no punitive discharge.[102] The Air Force proceeded to drop him from the rolls pursuant to a recent statute authorizing such action in the case of any officer who had been sentenced to more than six months confinement.[103] Goldsmith petitioned the military appellate courts for extraordinary relief under the All Writs Act, challenging the Air Force's action as violating the *Ex Post Facto* Clause of the Constitution.[104] The CAAF granted his petition and enjoined the government from dropping him from the rolls. The Supreme Court granted certiorari and reversed, finding that the CAAF lacked jurisdiction.[105] The Supreme Court held that "the CAAF is not given authority, by the All Writs Act or otherwise, to oversee all matters arguably related to military justice."[106] It emphasized the important fact that the All Writs Act does not enlarge a court's jurisdiction, but rather, it authorizes the use of extraordinary writs within the confines of its existing jurisdiction.[107] Looking to Article 67(c), UCMJ, for the limits

94. The court concluded as follows:

> If, in the future, we receive a petition in which there is clear and unequivocal evidence of untimeliness, and the issue of good cause for a late filing is raised, we shall consider at that time whether it is appropriate to consider the case under the standards applicable t o direct review or the standards applicable to collateral review.

Byrd, 53 M.J. at 41.

95. It is worth noting that eventually, even continuing jurisdiction in the military must terminate. Although it is uncertain at what point that termination actually occurs, the Supreme Court stated in *Clinton v. Goldsmith*, 526 U.S. 529, 536 (1999), that "there is no source of continuing jurisdiction for the CAAF over all actions administering sentences that the CAAF at one time had the power to review."

96. Article 62 addresses appeals by the government. Article 66 addresses appellate review by the service courts. Article 67 discusses appellate review by the CAAF. Article 67a discusses review by the Supreme Court. Article 69 discusses review by the different services' judge advocates general.

97. 28 U.S.C. § 1651(a).

98. *Id.* § 1651(a). The four writs commonly used in the military courts are mandamus, prohibition, error coram nobis, and habeas corpus.

99. *See* Noyd v. Bond, 395 U.S. 683 (1969).

100. The All Writs Act does not create jurisdiction; rather, it provides the appellate court with the ability to grant extraordinary relief within the statutory jurisdiction it already possesses. In addition to the actual jurisdiction that an appellate court has under Articles 66 and 67, UCMJ, the All Writs Act provides extraordinary writ authority which enables the court to exercise its ancillary, potential, or supervisory jurisdiction. *See* Dew v. United States, 48 M.J. 639, 645 (Army Ct. Crim. App. 1998). Ancillary jurisdiction is the authority to determine matters incidental to the court's exercise of its primary jurisdiction. BLACK's, *supra* note 1, at 45. Potential jurisdiction is the authority to determine matters that may reach the actual jurisdiction of the court. Supervisory jurisdiction is the broad authority of a court to determine matters that fall within the supervisory function of administering military justice. *See generally Dew*, 48 M.J. at 645-50.

101. *See* United States v. Labella, 15 M.J. 228 (C.M.A. 1983); Unger v. Ziemniak, 27 M.J. 349 (C.M.A. 1989).

102. Clinton v. Goldsmith, 526 U.S. 529, 531 (1999).

103. *Id.* at 532.

104. *Id.* at 533. The *Ex Post Facto* Clause is found in Article I, Section 9 of the U.S. Constitution.

105. *Goldsmith*, 526 U.S. at 533.

106. *Id.* at 536.

of that jurisdiction, the Supreme Court stated, "the CAAF has the power to act 'only with respect to the findings and sentence as approved by the [court-martial's] convening authority and as affirmed or set aside as incorrect in law by the Court of Criminal Appeals."[108] The issue in *Goldsmith* was not related to his court-martial sentence, it was an administrative action separate and apart from his court-martial.[109] How has the *Goldsmith* decision affected the use of the All Writs Act by the military appellate courts? A discussion of several cases decided by the military courts since *Goldsmith* may help answer this question.

One such case, *United States v. Byrd*, has already been discussed at length in this article.[110] As previously mentioned, the CAAF determined that the execution of the punitive discharge pursuant to Article 71, UCMJ, had been premature since the accused's petition to the CAAF was considered timely. However, assuming a proper expiration of the sixty-day period in which to petition for review, the execution of the punitive discharge would have been valid.[111] In such a post-punitive discharge scenario, the CAAF said it would still have jurisdiction but declined to address the issue of whether to exercise that jurisdiction under direct review or with the aid of the All Writs Act.[112] This holding may need additional explaining in light of the Supreme Court's decision in *Goldsmith*, in which Justice Souter wrote, "there is no source of continuing jurisdiction for the CAAF over all actions administering sentences that the CAAF at one time had the power to review."[113] The CAAF has not yet conceded when the termination of appellate jurisdiction occurs, but as already discussed, even under the All Writs Act, it must eventually end.[114]

Two other cases involving the use of the All Writs Act since the *Goldsmith* decision warrant brief discussion. The first is *United States v. King*.[115] *King* is an ongoing case that has bounced between the convening authority, the NMCCA, and the CAAF since 1999.[116] The accused is facing espionage charges involving classified materials. He was represented by two military counsel and a civilian defense counsel, of which only one military counsel had the security clearance necessary to obtain access to relevant information.[117] On 2 March 2000, prior to the Article 32, UCMJ, pretrial investigation, the convening authority imposed certain restrictions on the communications between the accused and his defense counsel to "monitor the information disclosed and to ensure that no unauthorized disclosures took place."[118] The accused petitioned the NMCCA for extraordinary relief but, based on the holding in *Clinton v. Goldsmith*, the court denied relief.[119] On appeal of the petition to the CAAF, the accused was granted a stay of the Article 32 proceedings. In a concurring opinion, Judge Sullivan stated that the NMCCA "was clearly wrong in denying relief under *Clinton v. Goldsmith*. They had power to issue relief under the All Writs Act. Moreover, this Court clearly has the power to supervise criminal proceedings under Article 32."[120] The CAAF message to the NMCCA seems to be not to apply *Goldsmith* too broadly.

The second case involving use of the All Writs Act, *Ponder v. Stone*,[121] would indicate the NMCCA heard the message from CAAF. In *Ponder*, the accused was charged with willfully disobeying a lawful order from a superior commissioned officer.[122] He petitioned the NMCCA for extraordinary relief under the

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107. *Id.* at 534.

108. *Id.*

109. *Id.* at 535.

110. *See supra* notes 79-94 and accompanying text.

111. *Id.*

112. *See supra* note 94.

113. *Goldsmith*, 526 U.S. at 536.

114. *See supra* note 95 and accompanying text.

115. No. 00-8007/NA, 2000 CAAF LEXIS 321 (Mar. 16, 2000).

116. The accused was placed in pretrial confinement on 29 October 1999 on suspicion of espionage. Charges were preferred on 5 November 1999. The CAAF addressed issues between 16 March 2000 and 19 September 2000. The NMCCA addressed issues between 24 October 2000 and 26 January 2001. The case is still in the early stages of criminal litigation. *See* King v. Ramos, No. NMCM 200001991 (N-M. Ct. Crim. App. Jan. 26, 2001) (unpublished).

117. *Id.*

118. *Id.*

119. *King*, No. 00-8007/NA, 2000 CAAF LEXIS 321.

120. *Id.* (citations omitted).

121. 54 M.J. 613 (2000).

All Writs Act alleging error by the military judge in a ruling at trial.[123] The government argued that the NMCCA lacked jurisdiction to entertain the accused's petition. In relying on *Goldsmith*, the government argued that the service court could "only grant extraordinary relief on matters affecting the findings and sentence of a court-martial."[124] The NMCCA disagreed, stating that such an interpretation of *Goldsmith* was overbroad. The petition involved a judicial action, and it fell within the jurisdiction the court was given to supervise and oversee actions of its inferior courts.[125] Relying on the All Writs Act, the court held that it could properly review the petition since it was a matter in aid of its jurisdiction.[126] There is no doubt the CAAF will agree with this holding. One need only look to the *King* case for confirmation.

The last case addressing appellate jurisdiction is *United States v. Sanchez.*[127] In *Sanchez*, the CAAF addressed an issue regarding the Eighth Amendment to the United States Constitution and Article 55, UCMJ. The accused was sentenced to one-year confinement at the Naval Consolidated Brig Miramar, during which time she was the subject of verbal sexual harassment from military guards and other inmates.[128] After her release from confinement, she claimed the harassment amounted to cruel and unusual punishment, in violation of both the Eighth Amendment and Article 55.[129] The Air Force Court of Criminal Appeals affirmed the findings and sentence and held it was without jurisdiction to entertain the accused's claim for sentence relief because her claim was based upon "post-trial sexual harassment."[130] The CAAF affirmed the findings and sentence but disagreed on the lack of jurisdiction issue. In a concurring opinion, Judge Gierke wrote that "[b]y deciding the merits of the issue, th[e] Court ha[d] *sub silentio* asserted its jurisdiction."[131] In distinguishing the case from *Goldsmith*, he stated that the case was in front of CAAF on *direct review*, and did not involve the All Writs Act, because the issue fell under Article 67.[132] Similarly, Judge Sullivan viewed unlawful post-trial punishment as "a matter of law related to 'the review of specified sentences imposed by courts-martial' under Articles 66 and 67, UCMJ."[133] In his opinion, sexual harassment is not a lawful punishment under the UCMJ, was not adjudged at the accused's court-martial, and is "unquestionably a matter of codal concern."[134]

Sanchez, easily distinguished from *Goldsmith*, reaffirms the jurisdiction of the appellate courts in cases involving matters of military justice. Appellate jurisdiction does not extend just to the adjudged sentence at a court-martial; even post-*Goldsmith*, what may be arguably collateral in nature, may still be an issue for the appellate courts.[135] The trend from the cases cited above seems clear. Following the scolding of the Supreme Court, and in an abundance of caution, the service courts gave broad deference to the *Goldsmith* decision.[136] The CAAF reviewed the

122. *Id.* at 614. The accused refused to receive the anthrax vaccine.

123. *Id*. The accused argued that the military judge prevented him from introducing evidence that the anthrax vaccine was being used by the military in an inconsistent manner from that which the Food and Drug Administration intended. This, in turn, prevented him from presenting his affirmative defense that the order was unlawful. The military judge held that the legal authority on which the accused relied provided no individual legal rights enforceable at a court-martial. *Id.*

124. *Id.* at 615.

125. *Id*. at 615. The court stated, "[i]t would defy common sense, as well as a long-standing precedent of its own, if the Supreme Court truly intended to hold that our superior Court—and, by extension, this court— has no inherent authority to oversee the interlocutory actions of its inferior courts." *Id*.

126. *Id*. at 616. It should be emphasized that the issue of jurisdiction is the first consideration in deciding whether to grant relief under the All Writs Act. Once jurisdiction is established, the court can review a petition under the All Writs Act. However, the court must still decide whether relief is necessary or appropriate. *See supra* notes 97-100 and accompanying text.

127. 53 M.J. 393 (2000).

128. *Id.* at 394.

129. *Id.* The accused was released from confinement on parole. *Id.* Article 55 provides, in part, "cruel or unusual punishment, may not be adjudged by a court-martial or inflicted upon any person subject to this chapter." UCMJ art. 55 (2000).

130. *Sanchez*, 53 M.J. at 397.

131. *Id.*

132. *Id.* Article 67 provides for appellate review by the CAAF. UCMJ art. 67.

133. *Sanchez*, 53 M.J. at 397 (Sullivan, J., dissenting).

134. *Id*. at 398. Judge Sullivan quoted the following *Goldsmith* language as support: "It would presumably be an entirely different matter if a military authority attempted to alter a judgment by revising a court-martial finding and sentence to increase the punishment, contrary to specific provisions of the UCMJ . . . ." Clinton v. Goldsmith, 526 U.S. 529, 536 (1999).

135. *See also* United States v. Kinsch, 54 M.J. 641 (Army Ct. Crim. App. 2000) (holding that jurisdiction exists where the court-martial is not final and the accused on direct appeal requests relief for cruel and unusual punishment that was not part of the adjudged and approved sentence)).

cases and reestablished the scope of appellate jurisdiction.[137] While it remains to be seen if the Supreme Court disagrees with the CAAF's application of its *Goldsmith* decision, that application provides important insight to military practitioners at all levels: actions of purely an administrative nature do not fall within the jurisdiction of the military courts, but all criminal matters are subject to consideration.

The Military Extraterritorial Jurisdiction Act of 2000[138]

When looking at all the developments that have occurred in the area of jurisdiction this past year, the MEJA has undoubtedly drawn the most attention, and yet it is probably the one area that raises more questions than answers.[139]

The MEJA was approved by Congress and signed into law by the President on 22 November 2000. Its purpose is to close a jurisdictional gap that has existed for some time. Civilians accompanying the military overseas are not subject to military jurisdiction unless during time of war.[140] Further, most federal criminal statutes do not apply outside the territory of the United States or the special maritime and territorial jurisdiction of the United States.[141] Therefore, civilians who committed crimes overseas could only be subjected to prosecution by the nation where the crime occurred. The problem arises when the foreign country declined to prosecute. The MEJA now expands the federal jurisdiction of the United States over civilians accompanying the military overseas.[142]

Who does the Act cover? The Act extends extraterritorial federal jurisdiction over civilians (except nationals or residents of the host nation) accompanying the U.S. Armed Forces or employed by the U.S. Armed Forces.[143] This language "accompanying the force" and "employed by the force" includes employees of the Department of Defense (including nonappropriated fund instrumentalities), contractors, subcontractors, employees of contractors or subcontractors, and any dependent of a military member or any dependent of one of the above.[144] It also extends federal jurisdiction to military members who have been discharged after commission of a covered offense.[145]

What does the Act cover? The Act applies to felony level offenses (punishable by more than one year in prison) that would apply under federal law if the offense had been committed within the "special maritime and territorial jurisdiction of the United States."[146] One limitation to prosecution under this Act is if a foreign government, in accordance with jurisdiction

136. *See* United States v. King, No. 00-8007/NA, 2000 CAAF LEXIS 321 (Mar. 16, 2000); *Sanchez*, 53 M.J. 393.

137. *See* Ponder v. Stone, 54 M.J. 613 (2000); *Kinsch*, 54 M.J. at 641.

138. 18 U.S.C. §§ 3261-3267 (2000).

139. See Captain Glenn R. Schmitt, *The Military Extraterritorial Jurisdiction Act: The Continuing Problem of Criminal Jurisdiction over Civilians Accompanying the Armed Forces Abroad - Problem Solved?*, ARMY LAW, Dec. 2000, at 1, for a more thorough discussion of the Act.

140. *See* UCMJ art. 2(a)(10)-(11); *see also* Reid v. Covert, 354 U.S. 1 (1957); Toth v. Quarles, 350 U.S. 11 (1955).

141. In order to apply outside the United States, the federal statute must have extraterritorial jurisdiction. Examples of such statutes include: 18 U.S.C. § 32 (destruction of aircraft); *id.* § 112 (violence against internationally protected person); *id.* § 175 (prohibition against biological weapons); *id.* § 351 (congressional, cabinet, and supreme court assassination, kidnapping, and assault); *id.* § 793 (espionage); *id.* § 878 (threats, and other offenses, against internationally protected persons); *id.* § 1116 (murder or manslaughter of foreign official, official guests, or internationally protected persons); *id.* § 1119 (murder of U.S. national by other U.S. national); *id.* § 1203 (hostage taking); *id.* § 1512 (tampering with a witness, victim, or an informant); *id.* § 1751 (presidential and presidential staff assassination, kidnapping or assault); *id.* § 1001 (false and fraudulent statements); *id.* § 1956 (money laundering); *id.* § 2331 (extraterritorial jurisdiction over terrorist acts abroad against U.S. nationals); *id.* § 2401 (war crimes); *id.* § 46502 (aircraft piracy). Some federal statutes have inferred extraterritorial jurisdiction. *See, e.g.*, *id.* § 286 (conspiracy to defraud the government); *id.* § 287 (false, fictitious, or fraudulent claim against U.S.); *id.* § 844(f) (damage to government property); 21 U.S.C. §§ 841, 952, 960 (2000) (drug offenses).

142. The Act does not expand military jurisdiction over civilians.

143. 18 U.S.C. § 3261(a).

144. *Id.* § 3267.

145. *Id.* § 3261(d).

146. *Id.* § 3261(a). "Special maritime and territorial jurisdiction of the United States" is defined in 18 U.S.C. § 7(3). It may be that any conduct that would be a federal crime regardless of where the conduct takes place in the United States, is covered. *See* Schmitt, *supra* note 139, at 3. Schmitt refers to the House Report for this conclusion; however, the language in the Act specifically states "if the conduct had been engaged in within the special maritime and territorial jurisdiction of the United States." 18 U.S.C. § 3261(a). Statutes applicable to the "special maritime and territorial jurisdiction of the United States" include: 15 U.S.C. §§ 1243, 1245 (2000) (manufacture, sale or possession of certain knives); 18 U.S.C. § 13 (Assimilative Crime Act, making state crimes federal offenses); *id.* § 81 (arson); *id.* § 113 (assault); *id.* § 114 (maiming); *id.* § 661 (theft); *id.* § 662 (receiving stolen property); *id.* § 831 (transactions involving nuclear materials); *id.* § 1025 (fraud on high seas); *id.* §§ 1111-1113 (homicides); *id.* § 1201 (kidnapping); *id.* § 1363 (damage to real property); *id.* § 1460 (obscene matter); *id.* § 1957 (racketeering activities); *id.* § 2111 (robbery); *id.* § 2119 (carjacking); *id.* §§ 2241-2244, 2252, 2252A (sex abuse); *id.* § 2261A (stalking); *id.* § 2318 (trafficking in certain counterfeited documents); *id.* § 2332b (certain terrorist acts); *id.* §§ 2422-2423 (coercion/enticement/transport of minor for sex).

recognized by the United States, has prosecuted or is prosecuting the person. Before the United States can prosecute the person for the same offense, there must be approval by the United States Attorney General or Deputy Attorney General.[147] Another limitation has to do with service members. Military members subject to the UCMJ will not be prosecuted under this Act, unless the member ceases to be subject to the UCMJ, or the indictment or information charges that the member committed the offense with one or more other defendants, at least one of whom is not subject to the UCMJ.[148]

How does it work? Basically, a federal magistrate judge will conduct an initial appearance proceeding, which may be carried out by telephone or other voice communication means to determine if there is probable cause to believe a crime was committed and that the person committed it.[149] The federal magistrate judge will also determine the conditions of release if government counsel does not make a motion seeking pretrial detention.[150] If pretrial detention is an issue, the federal magistrate judge will also conduct any detention hearing required under federal law, which *at the request of the person* may be carried out overseas by telephonic means, and may include any counsel representing the person.[151]

How will this affect the military? This Act directly involves the military in two general areas. First, the Act (depending on implementing legislation) could authorize all DOD law enforcement personnel to arrest (based upon probable cause of commission of an offense covered by this Act) any persons to which this Act applies.[152] And second, the Act entitles the person to representation by a judge advocate at the initial proceeding conducted outside the United States, if the federal magistrate judge so determines.[153] The Secretary of Defense, after consultation with the Secretary of State and Attorney General, is responsible for prescribing regulations governing apprehension, detention, delivery and removal of persons to the U.S.[154]

Until the implementing regulations are in effect, many questions remain to be answered. What time constraints will apply? How familiar with the Federal Rules will the judge advocates involved need to be? Where are arrested civilians to be turned over? Who pays for the costs associated with the processing and transportation of arrested civlians? Now that the Act is in effect, what happens if it is needed before the implementing regulations are in place? What about offenses that occur before the effective date of the Act?[155] Even after the regulations are in place there will undoubtedly be questions. Does the Act apply to retirees and reservists when they commit an offense while in a military status but leave that status before apprehension?[156] What happens if the conduct is not a violation of federal law within the special maritime and territorial jurisdiction of the United States, but still violates some other federal law?[157]

Conclusion

This past year may not have been "the year of jurisdiction." However, several significant decisions were handed down, the aftershocks of *Goldsmith* reverberated through the appellate courts, and the MEJA was signed into law. All in all, it was an exciting time in the area of jurisdiction. But there remain questions still unanswered, and the jurisdictional landscape in the military continues to change, albeit slowly. With the implementing regulations for the MEJA to look forward to, this next year promises to be another exciting one . . . and just may be one that becomes known as "The Year of Jurisdiction."

147. 18 U.S.C. § 3261(b).

148. *Id.* § 3261(d).

149. *Id.* § 3265(a).

150. *Id.*

151. *Id.* § 3265(b).

152. *Id.* § 3262. The person arrested would then be turned over "as soon as practicable" to United States civilian law enforcement officials. *Id.*

153. *Id.* § 3265(c).

154. *Id.* § 3266. The regulations will not take effect until ninety days after a report containing such regulations, to be uniform throughout the DOD, are submitted to Senate and House Judiciary Committees. *Id.*

155. At least one Federal Circuit Court of Appeals has held that military bases and leased housing overseas falls within the special maritime and territorial jurisdiction of the United States and finds the federal government has jurisdiction. *See* United States v. Corey, 232 F. 3d 1166 (9th Cir. 2000). *But see* United States v. Gatlin, 216 F. 3d 207 (2d Cir. 2000) (holding that military installation overseas did not fall within the special maritime and territorial jurisdiction of the United States). The MEJA renders this issue immaterial in the future.

156. The plain language of the Act seems to leave room for the argument that a reservist or retiree would have to be involuntarily recalled to active duty under Article 2(d)(1), UCMJ, and could not be prosecuted under the Act. *See id.* § 3261(d). However, another interpretation is that the Act allows the government to prosecute a reservist in federal court without having to go through the recall process. *See* Schmitt, *supra* note 139, at 4.

157. *See supra* note 146 and accompanying text.

Hunting for Snarks: Recent Developments in the Pretrial Arena

Lieutenant Colonel John P. Saunders
Professor and Vice-Chair Criminal Law Department
The Judge Advocate General's School, U.S. Army
Charlottesville, Virginia

This is the dead land
This is the cactus land
Here the stone images
Are raised, here they receive
The supplication of a dead man's hand
Under the twinkle of a fading star.[1]

To love is to suffer. To avoid suffering, one must not love. But then, one suffers from not loving. Therefore, to love is to suffer, not to love is to suffer, to suffer is to suffer. To be happy is to love. To be happy, then, is to suffer, but suffering makes one unhappy. Therefore, to be happy, one must love, or love to suffer, or suffer from too much happiness.[2]

It was in order to accustom us to the legitimacy of pain that Nietzsche spent so much time talking about mountains.[3]

Introduction

The title of this article refers to the Snark, a mythical animal mentioned in Lewis Carroll's epic poem, *The Hunting of the Snark*.[4] The poem describes the hunting of this beast, although it never actually describes the beast itself. The poem has been construed to mean many things, and has been described as "a poem about being and non-being, an existential poem, a poem of existential agony."[5] Of his own words, Lewis Carroll said, "words mean more than we mean to express when we use them: so a whole book ought to mean a great deal more than the writer meant."[6] Applying this tenet to a review of recent cases from the Court of Appeals for the Armed Forces (CAAF), we can see that the business of assessing the significance of a case, and trying to identify it within the rather fanciful context of a "trend" or "development," is endlessly fascinating, occasionally painful, and unfailingly subjective.

The Convening Authority

To begin at the beginning, so to speak, we must look to the evolving way in which the CAAF treats the convening authority, particularly on the issue of convening authority disqualification.

Congress, in passing the Military Justice Act,[7] made it clear that convening authorities who are involved in the prosecution function of particular cases become disqualified, that is, that they lose their right to be convening authorities.[8] Thus, where a convening authority is said to become an "accuser," a convening authority may not refer a case to trial by special or general court-martial but must forward the case to a superior authority.[9]

1. T.S. ELIOT, THE WASTE LAND AND OTHER POEMS 62 (Helen Vendler ed., 1998) (1936).

2. LOVE AND DEATH (MGM 1975).

3. ALAIN DE BOTTON, THE CONSOLATIONS OF PHILOSOPHY 217 (2000).

4. LEWIS CARROLL, THE HUNTING OF THE SNARK 28 (Martin Gardiner ed., 1995).

5. *Id.* at 22.

6. *Id.*

7. Act of Aug. 10, 1956, ch. 1041, § 1, 70A Stat. 44 (enacting Title 10, United States Code). This provision traces its origin bac k to 1830, when Congress enacted legislation to bar a convening authority from "selecting the court . . . and . . . passing upon the proceedings of such trial . . . where, by reason of having preferred the charge or undertaken personally to pursue it, he might be biased against the accused." United States v. Gordon, 2 C.M.R. 161,164 (C.M.A. 1952) (quoting WILLIAM WINTHROP, MILITARY LAW AND PRECEDENTS 61 (2d ed. 1920)).

8. The Uniform Code of Military Justice (UCMJ) effectively prohibits a general or special court-martial convening authority from convening a court if he is an "accuser." UCMJ arts. 22(b), 23(b) (2000). In such cases, "the court shall be convened by superior competent authority." *Id*. Article 1(9), UCMJ states that an "accuser" is "a person who signs and swears to charges, any person who directs that charges nominally be signed and sworn to byanother, and any other person who has an interest other than an official interest in the prosecution of the accused."

9. MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 601(c) (2000) [hereinafter MCM]. *See also id.* R.C.M. 504(c)(2) ("When a commander who would otherwise convene a general or special court-martial is disqualified in a case, the charges shall be forwarded to a superior competent authority for disposition.").

Over the years, the CAAF and the service courts of appeals have wrestled with the issue of when a convening authority becomes an accuser and when he is disqualified from serving as the convening authority for a particular case. The Court of Military Appeals (CMA) initially appeared to take a hard line, declaring that anyone with an other than official interest in the case was prohibited from making decisions regarding the case.[10] The CMA held that "the *right to an impartial review* is an important right which must be recognized in the military judicial system and an accused is entitled to have the record reviewed and the limits of his sentence fixed by one who is free from any connection with the controversy."[11]

The debate over how much involvement the convening authority may have in a particular case before he is declared an accuser continues today. Indeed, many years after *Gordon*, in *United States v. Nix*,[12] the CAAF reinforced the notion that an accused is entitled to have his case considered by an impartial convening authority when it remanded the case for a hearing on the extent to which the accused's personal contact with the convening authority's fiancée may have affected the referral of charges.

Nevertheless, the years following *Gordon* have been marked by an apparent willingness by the CAAF and the service courts to broaden the scope of what is acceptable "official" behavior by convening authorities. While still accepting that a convening authority should not have a personal interest in a particular case, the courts have found convening authorities sufficiently impartial to convene courts-martial where, for example: a convening authority had behaved in a manner that suggested his mind was made up;[13] and a convening authority threatened to "burn" the accused if he refused to enter into a pretrial agreement (PTA).[14] The courts have further found that a convening authority's "misguided zeal" in prosecuting the accused is not enough, by itself, to disqualify him.[15] Thus, the extent to which the convening authority's involvement in a case will cross the line from official action to personal disqualification remains a case-by-case determination, and the issue continues to be litigated in our case law.

The courts have largely settled the issue of whether a convening authority is disqualified if he is a victim in the case (a la *Gordon*).[16] They continue to be confronted, however, by the claim that a convening authority whose orders are violated is a victim and therefore disqualified. The scenario is fairly predictable: A convening authority, acting in his capacity as a commander, issues an order to a soldier which the soldier violates. The issue arises whether the convening authority has become a victim and thus has other than an official interest in the case and is, therefore, precluded from acting.

This was essentially the situation in *United States v. Byers*.[17] In *Byers*, the accused engaged in some misconduct and, per the terms of a local regulation, a written order was issued revoking his privilege to drive on post for two years. The order was signed "For the Commander" and communicated to him by a member of the staff judge advocate's (SJA's) office. He was later caught violating this proscription. Charges were preferred, and the accused was convicted of willfully disobeying the order in violation of Article 90, UCMJ, along with other unrelated drug offenses.[18] On appeal, the Army court found that the convening authority had not referred the case based on an improper motive, but stated: "We are convinced, however, that an officer who seeks to enforce his own order by convening a court-martial for an offense charged under Article 90, UCMJ, is so closely connected to the offense that a reasonable person could conclude that he has a personal interest in the matter."[19] The Army court found that the convening authority's attempt to convene the court was without force and effect.

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10. *Gordon*, 2 C.M.R. at 161 (convening authority whose house the accused was charged with attempting to burglarize, although that charge was later dismissed, was disqualified from convening the court that tried the accused). Personal interests relate to matters affecting the convening authority's ego, family, and personal property. United States v. Voorhees, 50 M.J. 494 (1999).

11. *Gordon*, 2 C.M.R. at 168 (emphasis added).

12. 40 M.J. 6 (C.M.A. 1994).

13. United States v. Wojciechowski, 19 M.J. 577 (N.M.C.M.R. 1984).

14. *Voorhees*, 50 M.J. at 498.

15. United States v. Thomas, 22 M.J. 388 (C.M.A. 1986) (convening authority's comments to subordinates in which he appeared to discourage members of the command from testifying on behalf of soldiers constituted command influence, but despite his "misguided zeal" the convening authority's initial interest in the various prosecutions was official, rather than personal); *see also* United States v. Jackson, 3 M.J. 153, 154 (C.M.A. 1977) (convening authority's angry outburst indicated an other than official interest in the case that disqualified him).

16. *See supra* note 10.

17. 34 M.J. 923 (A.C.M.R. 1992), *vacated and remanded by* 37 M.J. 73 (C.M.A. 1992).

18. United States v. Byers, 40 M.J. 321, 322 (C.M.A. 1994).

19. *Byers*, 34 M.J. at 924.

The CMA, disagreeing that the convening authority's status as an accuser constituted jurisdictional error, overturned the Army court and remanded the case.[20] In a subsequent unpublished opinion, the Army court upheld the findings and sentence against the accused.[21] On appeal, again to the CMA, the accused argued that since the CMA had determined that the commander did not have sufficient personal involvement in the case to become an accuser, his order was not a personal one and the violation should not have been charged under Article 90, UCMJ. Rather, the order should have been charged under Article 92, UCMJ.[22]

The CMA agreed with the accused's theory on appeal.[23] The convening authority had done nothing "to lift his routine order 'above the common ruck' to make disobeying it properly punishable under Article 90, UCMJ."[24] The order was a "routine administrative sanction for a traffic offense" and "issued by a staff officer on behalf" of the convening authority.[25] The CMA reversed that portion of the Army court decision that "affirm[ed] findings of guilty of an offense greater than a violation of Article 92(2)," and remanded for reassessment of the sentence.[26]

The *Byers* series of cases left practitioners with the impression that there was a symmetry between a violation of orders and accuser status: The convening authority whose order has been violated would not be an accuser unless the order was charged as a violation of a personal order under Article 90, UCMJ, rather than a routine order or regulation charged under Article 92, UCMJ.[27]

This past term the CAAF dispelled this suggestion in *United States v. Tittel*.[28] Specialist Third Class Tittel, while assigned in Japan, was convicted of shoplifting and several other offenses and processed for administrative elimination. The day before he was to be discharged, he was again caught shoplifting from the post exchange (PX). At this time, the Commanding Officer, Fleet Activities, the special court-martial convening authority (SPCMCA), issued an order barring the accused from entering any Navy PX. The accused then violated that order by entering a PX. The accused pleaded guilty to larceny and to violation of a lawful order under Article 90, UCMJ. The SPCMCA approved the sentence.[29]

On appeal, the accused argued that the convening authority, who must be neutral, cannot be where he is the victim of the willful disobedience of his personal order. Here, the convening authority's personal directive to the accused was violated, and this made the convening authority a victim in the case, which gave him more than an official interest in the case. The CAAF disagreed, quoting at length from the Navy Court of Criminal Appeals' analysis in which the Navy court found no evidence that the SPCMCA had become "personally involved" with the accused to such an extent that he became an accuser.[30] Further, even assuming arguendo that he had become an accuser, his failure to forward the case to a higher authority was a non-jurisdictional error that was waived by the accused. Considering the serious nature of the charges in this case, the Navy court found "it unlikely that any competent authority would not have referred this case to" a special court-martial. Thus, there was no fair risk of prejudice to the accused from the error.[31]

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20. United States v. Byers, 37 M.J. 73 (C.M.A. 1992) (summary disposition).

21. *See Byers*, 40 M.J. at 322.

22. At trial the military judge found that the convening authority was not personally involved in the case because the order suspending the accused's driving privileges was issued to the accused through the SJA office, per a local regulation, and there was no evidence the convening authority even knew of the issuance of the order or of the driving infraction. *Id.* at 322.

23. The CMA did not address the accuser issue specifically because the accused did not challenge the military judge's findings in that regard during the later appeal. *Id.* at 323 n.3.

24. *Id.* at 323.

25. *Id.*

26. *Id.* at 324.

27. *Cf. id.* at 323 ("Article 90 contemplates a personal order 'directed specifically to the subordinate.'" (citations omitted)); *see also* United States v. Shiner, 40 M.J. 155 (C.M.A. 1994) (stating that the court was unable to determine on the sparse record whether ship's commander who gave the accused a liberty-risk order prohibiting him from leaving the ship, became an accuser when the accused was later charged with violating that order); United States v. Cox, 37 M.J. 543 (N.M.C.M.R. 1993) (imposition of pretrial restriction is an "official act" which does not connect the convening authority so closely with the offense that a reasonable person would conclude he had anything other than an official interest in the matter).

28. 53 M.J. 313 (2000).

29. *Id.* at 313-14.

30. *Id.* at 314.

31. *Id.*

Concurring in the result, Judge Effron and Judge Sullivan were troubled with the suggestion that the issue of the convening authority's status as an accuser could be passively waived, and would have required instead a knowing and intelligent waiver.[32] They agreed, however, that the record did not establish that the SPCMCA became an accuser. The order that the accused disobeyed "was a routine, administrative type of order that virtually automatically flowed from the fact of appellant's arrest for shoplifting."[33]

While the reviewing courts seemed satisfied that the SPCMCA was acting in a sufficiently official capacity, the case should arouse concern. Had the charges been contested, the convening authority could, conceivably, have been called to testify against the accused.[34] The convening authority may have been the best witness on the issue of the terms of the order he issued to the accused. Further, the accused was charged with a violation of Article 90, UCMJ, suggesting that the order was one more personal to the accused than a routine issuance. The finding that the convening authority was not an accuser seemingly puts to rest the impression left by the *Byers* cases: That a convening authority whose personal order is violated may yet remain sufficiently impartial to convene the court so long as that order has an appropriately routine quality to it. Perhaps equally significant is the emergence of a notion of prejudice precluded: even if the convening authority was an accuser, the accused could not be found to have suffered prejudice because any reasonable convening authority would have referred the case to trial.[35] It might not be too much of a stretch to say that the CAAF is signaling that the door of appellate relief is closing on the issue of convening authority disqualification.

At the very least, *Tittel* is a potent reminder for defense counsel that issues such as the convening authority's impartiality and possible disqualification will not fare well when raised and litigated for the first time on appeal.[36] As for government representatives, SJAs and military justice managers must remain vigilant to ensure that their convening authorities do not stray over the line that separates official from personal involvement. Indeed, it may enhance the integrity of the system for local SJA's to impose a more demanding standard than the one used by the courts. One can only speculate about the potential impact on panel members (hand-picked, after all, by the convening authority to sit as finders of fact) of seeing the convening authority's name in a specification alleging disobedience of an order.

The issue of the forwarding commander's disqualification was raised in another case this term, this time from the opposite side, with the defense claiming prejudice where the forwarding commander *failed* to make a recommendation. The case was *United States v. Norfleet*,[37] and it is a case that is instructive on many levels, perhaps primarily because it highlights differences in the way the Army and the Air Force configure their legal personnel (and the ramifications that can flow from that configuration). In the Army, attorneys and legal specialists are generally assigned to the organization to which they provide support. Thus, for example, trial counsel and legal specialists supporting the 1st Infantry Division in Europe are, generally, assigned to the 1st Infantry Division for administrative support, for disciplinary matters, for everything. In contrast, judge advocates assigned to the Trial Defense Service (TDS) typically report directly to TDS and, although they may be attached for support purposes to a local unit, they remain for virtually all purposes assigned to the TDS headquarters in Virginia.[38] The TDS legal specialists , however, remain assigned to local units, and are rarely, if ever, assigned directly to TDS.

In the Air Force the structure is slightly different, as staff sergeant (SSgt) (E5) Norfleet learned during the processing of her court-martial. She was a paralegal who worked for the Area Defense Counsel Office at RAF Lakenheath, England. She was assigned for administrative purposes (to include UCMJ matters) to the Air Force Legal Services Agency (AFLSA), based at Bolling Air Force Base, Washington, D.C. The AFLSA, in turn, fell under the 11th Wing, for UCMJ purposes, and the Commander, 11th Wing, was the convening authority for courts-martial involving AFLSA personnel.[39] This was the

32. *Id.* at 315 (Effron, J., and Sullivan, J., concurring).

33. *Id.*

34. The order was communicated to the accused by a written Class C liberty risk order personally signed by the SPCMCA. United States v. Tittel, No. NMCM 97 01224, 1999 CCA LEXIS 39 (N-M. Ct. Crim. App. 18 Feb. 1999).

35. *Tittel*, 53 M.J. at 314 ("[W]e find it unlikely that any competent authority would not have referred this case to a special court-martial." (citations omitted)); *see also* United States v. Kroop, 34 M.J. 628 (A.F.C.M.R. 1992) (stating that the court can examine the advice of the staff judge advocate under Article 34 to determine whether the evidence warranted trial by court-martial and, if it did, conclude that the case would have been referred to trial by any convening authority, regardless of any psychological baggage), *aff'd* 36 M.J. 470 (C.M.A. 1993).

36. *Cf.* United States v. Voorhees, 50 M.J. 494 (1999) (stating that the accused waived issue of whether commander who threatened to "burn" him if he did not sign pretrial agreement (PTA) thereby became an accuser).

37. 53 M.J. 262 (2000).

38. *See* U.S. DEP'T OF ARMY, REG. 27-10, LEGAL SERVICES: MILITARY JUSTICE, para. 6-3 (20 Aug. 99) (placing TDS under U.S. Army Legal Services Agency), para. 6-4 (requiring local SJA offices to provide clerical support), para. 6-8(b) (requiring TDS counsel to wear distinctive insignia).

39. *Norfleet*, 53 M.J. at 263.

chain through which SSgt Norfleet's court-martial charges were forwarded after her urine sample tested positive for marijuana. A charge was preferred and forwarded through the Commander, AFLSA. The AFLSA commander did not render a recommendation, noting that SSgt Norfleet's duty performance was "excellent," but that it was "inappropriate" for him to make a recommendation as to disposition. The 11th Wing Commander then referred the case to a special court-martial.[40] At the outset of the proceedings, the defense requested that the military judge recuse himself under RCM 902(a),[41] arguing that the defense intended to call into question the processing of the accused's court-martial case by the military judge's superiors at AFLSA. In particular, the defense noted that the AFLSA commander had, presumably, written a recommendation concerning the accused's request for discharge in lieu of court-martial. Further, the defense pointed out that the Commander, AFLSA, had violated his responsibility under the *MCM* to render a recommendation in the case.[42] Finally, the defense concluded, the AFLSA commanders' actions constituted an abuse of discretion because they failed in their obligations as SSgt Norfleet's commanders.[43]

While the military judge acknowledged that the Commander, AFLSA reviewed his officer efficiency reports, he noted that he was required by oath to render justice impartially, and that he had never received any criticism of his rulings from his commanders. He then reviewed the actions of the superior commanders, noting that the act of forwarding the charges and disapproving the request for discharge in lieu of court-martial did not represent a conclusion that the accused was guilty but "rather an expression that that the issue should be resolved by a court."[44] Stating that he felt absolutely no pressure to resolve the case in a manner inconsistent with his understanding of the law or his conscience, the military judge denied the motion.[45]

The CAAF agreed that the presence of the military judge's superiors in the convening authority's chain of command did not require the military judge's recusal under RCM 902. The CAAF reviewed the evolution of the position of military judge, and wrote that Congress "established the position of military judge within the context of the military establishment, rather than as a separate entity."[46] Thus, military judges are subject to the same personnel practices that apply to military officers in general. In addition, military judges are often called on by the nature of their work to render decisions adverse to superior officers, but this does not impinge upon their exercising independence in judicial rulings.[47] In addition, the CAAF noted that prior courts have held that the preparation of fitness reports for the appellate military judges by senior judge advocates does not create a circumstance in which the impartiality of the judge might reasonably be questioned under RCM 902(a).[48]

Ultimately, the CAAF found that the military judge was not *per se* disqualified, despite the fact that the military judge and the accused were assigned to the same organization, and that both shared a similar professional affiliation with each other and their superiors who had processed the charges.[49] Further, the CAAF noted there was no risk that the forwarding of the charges through the accused's chain of command would cause the military judge to fail in the performance of his judicial duties. Those superiors, the CAAF noted, had taken themselves out of the case processing, and the military judge's ruling on the propriety of their doing so did not "raise an issue so controversial that an adverse decision would have had a lasting impact on their professional reputations for competence and integrity."[50] The issues presented in the case were similar to those which military judges decide routinely without regard for the impact of such rulings on their careers. The nature of the issues at stake, the full disclosure of the military judge, and the opportunity provided to voir dire the military judge left the

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40. *Id*. at 264-65.

41. MCM, *supra* note 9, R.C.M. 902(a) states that a military judge "shall disqualify himself or herself in any proceeding in which the military judge's impartiality might reasonably be questioned."

42. The defense cited RCM 306(c)(5) and RCM 401(c)(2)(A). Rule for Courts-Martial 306(c)(5) states that a commander who lacks authority to take action on a case should forward the case to a superior officer with a recommendation as to disposition. Rule for Courts-Martial 401(c)(2)(A) requires that "[w]hen charges are forwarded to a superior commander for disposition, the forwarding commander shall make a personal recommendation as to disposition. If the forwarding commander is disqualified from acting as convening authority in the case, the basis for the disqualification shall be noted."

43. *Norfleet*, 53 M.J. at 264-65.

44. *Id*. at 265.

45. *Id*.

46. *Id*. at 268.

47. *Id*.

48. *Id*. at 269 (citations omitted).

49. *Id*. at 260.

50. *Id*. at 270.

CAAF with little doubt that the accused received a fair trial presided over by an impartial military judge, and that a reasonable observer would not question the judge's impartiality.[51]

The CAAF's decision seems reasonable under the circumstances, for few would doubt the military judge's declaration that he would apply the law as his conscience and oath dictated. The CAAF's decision also seems in line with other recent decisions tending to defer to the military judge's declarations of impartiality.[52] Nevertheless, it is vaguely unsettling that the CAAF appeared to give short shrift to two issues raised by the accused. First, the CAAF tacitly endorsed the Air Force Court of Criminal Appeals resolution of the claimed violation of RCM 401, citing to the Air Force court's reasoning that there was no requirement to include a recommendation since the case was being forwarded to a parallel, not a superior commander.[53] This is disconcerting, for under this holding the Commander, AFLSA, had *no discretion* to make a recommendation because the Commander, 11th Wing, was not a "superior" commander. This reading would no doubt surprise the AFLSA chain of command, some of them Air Force judges, who evidently felt that they had discretion whether to render a recommendation under RCM 401. Indeed, it appears that the AFLSA commander did not make a recommendation because of his knowledge of the accused, not because he felt he was barred by RCM 401(c)(2)(B).[54] Moreover, the value of requiring a commander to make a recommendation is that the commander, it is believed, knows the soldier well and should, therefore, advise on an appropriate disposition.[55] Thus, if RCM 401(c)(2)(B) truly governs here, then every commander of the AFLSA is precluded from making a recommendation any time an ALFSA member is prosecuted, so long as AFLSA is assigned to 11th Wing for UCMJ purposes. And more importantly, every AFLSA counsel[56] and airman who is court-martialed will be denied the potential benefit of a recommendation merely because of the arbitrary unit configuration.[57] This result seems contrary to the purpose of RCM 401 and simply cannot be what the President intended in drafting this rule.

The accused also claimed that she should have a judge from another service appointed to hear her case. This claim was based on a prior case in which an Army judge was made available to the Air Force for a trial of an Air Force defense counsel.[58] The Air Force court noted that the AFLSA commander had been the accuser in the prior case, having preferred charges, so there were greater concerns about the perceptions of the military judge's impartiality. Here, the AFLSA commander had expressed no sentiment at all concerning the court-martial,

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51. *Id.*

52. *See, e.g.*, United States v. Rivers, 49 M.J. 434 (1998) (stating that where military judge makes full disclosure on the record and affirmatively disclaims any impact on him, where the defense has full opportunity to voir dire the military judge and to present evidence on the question, and where such record demonstrates that appellant obviously was not prejudiced by the military judge's not recusing himself, the concerns of RCM 902(a) are fully met); *see also* United States v. Thompson, 54 M.J. 26 (2000) (stating that military judge did not abuse his discretion in failing to recuse himself despite intemperate exchanges with defense counsel which defense counsel maintained rendered her unable to continue the trial).

53. Rule for Courts-Martial 401(c)(2)(A) requires a recommendation when a case is forwarded to a superior commander for disposition. Rule for Courts-Martial 401(c)(2)(B) states that "When charges are forwarded to a commander who is not a superior of the forwarding commander, no recommendation as to disposition may be made." In its opinion, the Air Force court wrote:

> It is not unusual in the Air Force for a general court-martial convening authority to be a wing commander with several tenant units attached to his organization. The commanders of these tenant units are often superior in grade to the convening authority. R.C.M. 401(c)(2)(B) helps prevent the appearance of a senior officer commander exercising undue influence on the independence of a convening authority who is junior to him.
>
> AFLSA/CC reports directly to The Judge Advocate General of the Air Force and is not in the 11th Wing chain of command. The commanders of both AFLSA and the 11th Wing held the grade of 0-6 at the time in question. The 11th Wing commander was not senior in grade or chain of command to AFLSA/CC. Therefore, AFLSA/CC acted properly and was complying with R.C.M. 401(c)(2)(B), which directed that he make no recommendation when he forwarded appellant's charges to a convening authority who was not his superior.

United States v. Norfleet, No. ACM S29280, 1998 CCA LEXIS 301, *4-*7 (A.F. Ct. Crim. App. 1998).

54. "I also decline to make a recommendation as to rehabilitation potential . . . ." *Norfleet*, 53 M.J. at 264.

55. *Cf.* United States v. Snowden, 50 C.M.R. 799 (A.C.M.R. 1975) (stating that implicit in the commander's recommendation as to disposition is an evaluation of the accused's past soldierly qualities and conduct).

56. Air Force trial defense counsel are assigned to AFLSA. United States v. Nichols, 42 M.J. 715 (A.F. Ct. Crim. App. 1995).

57. Our courts have long acknowledged the importance of having the convening authority receive subordinate commander recommendations on disposition of court-martial charges. *Cf.* United States v. Ginn, 46 C.M.R. 811 (A.C.M.R. 1972) (stating that an error occurred where SJA failed to notify convening authority of subordinate commander's recommendation for alternate disposition; in view of the subordinate commander's recommendations in accused's favor, court could not discount reasonable possibility that subordinate commander's recommendation might have tipped the scales to the accused's favor had it been weighed in the balance by convening authority).

58. United States v. Nichols, 42 M.J. 715 (1995).

so there was less of a need to seek a military judge from another service. Moreover, the Air Force court held there was no right to a military judge from another service merely because the accused was assigned to AFLSA.[59]

The combined effect of *Nichols* and *Norfleet* will be to preclude the AFLSA commander from making recommendations in court-martial cases arising from AFLSA while generally ensuring that AFLSA accused are tried by judges whose efficiency reports are written, at least in part, or reviewed by the AFLSA commander. While it is indeed a testament to how far the military has come that this prospect does not offend the CAAF or the service courts, such a practice should disturb the spirit, if not the letter, of Article 26, UCMJ.

Panel Selection

The process by which the services nominate and select panel members has been the subject of significant litigation for decades. Over the years, however, the CAAF has made it increasingly difficult for the defense to successfully attack the panel selected by the convening authority. As a possible result of this trend, the defense attacks on panel selection have shifted from the array chosen by the convening authority to the nomination process that produced the list from which the convening authority made his initial selection. A review of two cases from the past two years will set the stage for a recent case that brings this trend more into focus, and will demonstrate that the CAAF's analysis of these issues appears, after one or two rather tortuous detours, to be back on track.

In 1999 and 2000, the CAAF issued two opinions on panel selection, *United States v. Upshaw*[60] and *United States v. Roland*.[61] In both cases, the defense argued that the convening authority had violated Article 25, UCMJ, by using rank as a criterion in selecting members. The CAAF found, instead, that the defense had failed in its burden to show court stacking, a species of command influence.[62] In other words, the CAAF appeared to be holding that the defense had to show command influence in order to prevail on challenges to panel selection.

In *Upshaw,* the SJA, mistakenly believing the accused was an E6 (he was an E5), sent out a memorandum seeking nominees in the grade of E7 and above from the SPCMCAs. While this was clearly an error (because the nomination process subsequently excluded all E6s from consideration for panel selection)[63] the CAAF did not set the case aside. Instead, the CAAF held that, though erroneous, the SJA's belief was not prompted by bad faith or by a desire to stack the court. The defense conceded that the exclusion of technical sergeants (E6) was simply a mistake, and the CAAF agreed, holding that the evidence did not raise the issue of court stacking. The error was simply administrative and not jurisdictional, and the court found no prejudice to the accused.

In *Roland*, again, the controversy grew out of the SJA's panel nomination documents. Here, the SJA asked for nominees in the grades of E5 to 06. While this would appear to arbitrarily and unilaterally exclude grades below E5, the CAAF held that there was no error. The SJA's memorandum had not excluded any groups. It had merely identified certain groups for consideration.[64] The CAAF looked to the evidence that showed: (1) the SPCMCA knew he was not bound by the list of nominees and could nominate anyone for selection; and (2) the GCMCA was apparently advised about Article 25, UCMJ, and the fact that he could select anyone in his command. Thus it appeared that neither the convening authority nor his subordinate commanders felt constrained by the E5 to 06 language used by the SJA.[65] The CAAF saw no evidence of command influence and, noting that the defense had not met its burden of proving command influence, affirmed the conviction.[66]

Both *Upshaw* and *Roland* cause concern because the CAAF appeared to be changing the defense's burden of proof. Rather than requiring the defense to show that the convening authority had used a criteria in violation of Article 25, UCMJ, the decision appeared to foist on to the defense the burden of showing command influence in every panel selection case. And this, in turn, appeared to be a departure from established case law.[67] So, one might ask how the CAAF came to require a showing of command influence in every challenge to panel selection under Article 25, UCMJ. Arguably, the CAAF

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59. *Norfleet*, 1998 CCA LEXIS 301, at *4-*7.

60. 49 M.J. 111 (1998).

61. 50 M.J. 66 (1999).

62. *Cf. Upshaw*, 49 M.J. at 113 (holding that court stacking is a form of unlawful command influence; here, the court held the issue of unlawfu l court stacking was not raised by the defense.); *Roland*, 50 M.J. at 69 ("the defense has not carried its burden to show there was unlawful command influence").

63. The CAAF has consistently held that deliberate and systematic exclusion of lower grades and ranks from court-martial panels is not permissible. *See* United States v. Nixon, 33 M.J. 433, 434-35 (C.M.A. 1991); United States v. Hilow, 32 M.J. 439 (C.M.A. 1991); United States v. Greene, 43 C.M.R. 72 (C.M.A. 1970); United States v. Crawford, 35 C.M.R. 3 (C.M.A. 1964).

64. *Roland*, 50 M.J. at 69.

65. *Id.* at 67-68.

66. *Id.* at 70.

reached that conclusion by expanding the criteria that a convening authority may consider when selecting panel members.

Over the years, the CAAF has been called upon to determine whether the convening authority may use race,[68] gender,[69] and command position[70] as criteria in panel selection. Perhaps reluctant—understandably—to unilaterally dismiss the use of such criteria, the CAAF's response was to ask *why* the convening authority was using these criteria not mentioned in Article 25. The theory would be that if the convening authority used the new criteria in a fair manner not inconsistent with Article 25 (for example, to ensure a representative cross-section of the military community),[71] then there would be no error. On the other hand, if the convening authority used the criteria in a manner inconsistent with Article 25 (for example, to ensure a conviction or a harsh sentence), then the convening authority would violate Article 25 as well as Article 37 and its prohibition on command influence. It would appear that every alleged violation of Article 25 requires consideration of the convening authority's intent, which necessarily raises command influence concerns under Article 37,UCMJ.[72] The difficulty with this approach, however, is that not every violation of Article 25, UCMJ, occurs because of command influence, or because of a bad motive on the part of the convening authority. The best example of this is rank, which stands alone as the one criterion that is anathema,[73] the one criterion that simply may not be used as the sole criterion in panel selection, regardless of the convening authority's intent. This was the conclusion to which the CAAF obligingly returned in *United States v. Kirkland*.[74]

In *Kirkland*, the SJA solicited nominees from subordinate commanders via a memorandum signed by the SPCMCA. The memo sought nominees in various grades, and included a chart on which the commanders could nominate individuals with a separate block for each rank. The chart had sections for listing nominees in the grades of E9, E8, and E7, but no place to list a nominee in a lower grade. To nominate someone E6 or below, a nominating officer would have had to modify the form.[75] The defense challenged the documents, claiming they implicitly excluded all ranks below E7. The CAAF agreed with the defense. Citing to *United States v. McClain*,[76] the CAAF held that where there is an "unresolved appearance" of exclusion of ranks (here, E6s and below), "'reversal of the sentence is appropriate to uphold the essential fairness . . . of the military justice system.'"[77]

The CAAF's holding in *Kirkland* is interesting, and a bit perplexing, because the facts in *Kirkland* were not terribly different from those in *Roland*.[78] In both cases, the evidence showed that although the SJAs' memoranda ostensibly limited the pool of potential members, the convening authorities applied Article 25 criteria, knew they were not bound by the list of nominees, and knew they could select anyone in their commands. Nevertheless, the CAAF found in *Kirkland* that the government had not overcome its burden of showing no impropriety occurred, as the appearance of exclusion was "unresolved."[79]

With *Kirkland*, the good ship *USS CAAF*, having listed in the ocean of panel selection these past two years, appears to have

67. *Cf.* United States v. Nixon, 33 M.J. 433 (C.M.A. 1991) (stating that the court affirmed based on convening authority's statement that he complied with Article 25; court emphasized that military grade by itself is not a permissible criterion for selection of court-martial members, with no reference to a requirement to show command influence).

68. United States v. Smith, 27 M.J. 242, 249 (C.M.A. 1988) (convening authority free to require representativeness on court-martial panels and to insist that no important segment of military community such as African-Americans, Hispanics, or women, be excluded).

69. *Id.*

70. United States v. White, 48 M.J. 251 (1998) (stating that the commander who ensured preponderance of commanders on panel did not violate Article 25, UCMJ).

71. *See supra* note 68.

72. The intent or purpose of the convening authority in executing the panel selection procedure is "an essential factor in determining compliance with Article 25." United States v. Bertie, 50 M.J. 489, 491 (1999) (citing United States v. Daigle, 1 M.J. 139, 141 (C.M.A. 1975) (observing a "fixed policy" to exclude certain members)) (additional citations omitted).

73. In virtually all the cases preceding *Roland*, the military courts of appeal have never required that the defense show command influence to prevail on an argument that the convening authority violated Article 25, UCMJ. *See, e.g., supra* note 67 and case cited therein.

74. 53 M.J. 22 (2000).

75. *Id*. at 23-24.

76. 22 M.J. 124 (C.M.A. 1986).

77. *Kirkland*, 53 M.J. at 25 (citing *McClain*, 22 M.J. at 133 (Cox, J., concurring)).

78. *See* United States v. Kirkland, No. 99-0651/AF, 2000 CAAF LEXIS 574 (June 1, 2000) (Petition for Clarification) (citing *Kirkland*, 53 M.J. at 25 (Sullivan, J., dissenting) ("I fail to understand why the majority is departing from *United States v. Roland*, 50 M.J. 66 (1999), which was decided only a year ago.")).

79. *Kirkland*, 53 M.J. at 25.

valiantly righted itself. The CAAF seems to have abandoned, thankfully, the hybrid, overly burdensome analysis evinced in *Roland* and *Upshaw*; that is, the requirement that the defense show command influence or "court stacking" in violation of Article 37, UCMJ, in order to prevail on every challenge to the panel selection. This fact is probably welcome news to Judge Gierke, who dissented in *Roland*, claiming that the majority had increased the burden on the defense by requiring them to show command influence in mounting a challenge to the panel under Article 25, UCMJ.[80]

Moreover, the CAAF's citation to *McClain* and the "unresolved appearance" language tacitly resurrects the line of cases that include such precedents as *United States v. Nixon* and *United States v. Daigle*, precedents rendered passé by the rulings in *Upshaw* and *Roland*. In revitalizing the notion of an *appearance* of an improper panel selection, the CAAF sends a strong signal to the government and to the defense: the government must scrupulously avoid language in its panel selection documents that appears to exclude certain classes of service members from nomination, while the defense must continue to scour panel selection documents to reap the potential harvest that lies therein. While defense challenges based on the appearance of the *array* will continue to be—usually—unsuccessful,[81] challenges that can establish an appearance of deliberate (as opposed to accidental)[82] exclusion of certain ranks have a brighter prospect for success.

From challenges to the panel as a whole we move to challenges to individual panel members. As in the civilian legal world, the military uses voir dire to question members and explore bases for potential challenges. Trial and defense counsel may challenge any member for cause, and there is no numerical limit on challenges for cause. In addition, trial and defense counsel are both allowed to strike one member without any justification, that is, "peremptorily."[83]

Voir dire should be used to obtain information for the intelligent exercise of challenges.[84] The grounds for challenge are set out in the *MCM*, and they require excusal of a member who has, for example, served as investigating officer on the case, or has forwarded the case with a recommendation for disposition.[85] There is, in addition, a broad prohibition that bars a member from serving "in the interest of having the court-martial free from substantial doubt as to legality, fairness, and impartiality."[86] In exploring potential bases for challenging a panel member under this provision, defense counsel may ask the member whether the member has already made up his mind about the accused's guilt, or whether the member has already decided what the sentence should be based solely on the charges. The purpose of this questioning is to find out whether the member has an inflexible attitude toward guilt or toward the sentence that is unlikely to yield to the judge's instructions. Such members should be excused because their failure to follow the judge's instructions and their unwillingness to listen to evidence from the defense, either on the merits or on sentencing, will render the proceedings unfair to the accused.[87]

Over the years, the CAAF has been sensitive to what is often seen as artful or tricky questioning by the defense—efforts to get the panel members to commit to a particular sentence before any evidence is introduced. The CAAF seems concerned that counsel will ask ostensibly ludicrous questions such as (in a brutal premeditated murder case), "Could you ever vote for 'no punishment' in this case?"[88]

This concern was evident last year in *United States v. Schlamer*[89] and it appeared again this past year in another case, *United States v. Rolle*.[90] In *Schlamer*, one of the panel members had expressed strong sentiments about the criminal justice system and about criminals, adding that certain crimes should carry specific punishments (fore example, rape deserves castration).[91] Nevertheless, through exhaustive examination by the military judge and counsel, the member maintained that she

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80. *Roland*, 50 M.J. at 71 (Gierke, J., dissenting).

81. *See, e.g.*, United States v. Bertie, 50 M.J. 489, 492 (1999) (stating that the court expressed unwillingness to accept accused's claim of improper selection based on the appearance of the array).

82. The issue still simmering on the back burner of the CAAF's stove, however, remains the sleight of hand in *Upshaw.* The CAAF majority simply got it wrong in *Upshaw* where the convening authority erroneously excluded an entire class of service members (E6s) from consideration. The CAAF appeared to hold that such "administrative errors" do not warrant relief because the convening authority only mistakenly failed to consider E6s. This is a sleight of hand because the fact remains that the convening authority *deliberately* excluded a group of otherwise qualified members (E6s), thus violating Article 25, UCMJ. The fact that the convening authority did so based upon the mistaken advice of his staff judge advocate in no way cleanses the record of the error. The accused was deprived of the opportunity to have his case considered by a panel that was properly constituted under Article 25, UCMJ, which is the minimal due process that our system requires, and the CAAF's lasting error lay in the failure to afford him this right.

83. UCMJ art. 41 (2000).

84. MCM, *supra* note 9, R.C.M. 912(d) discussion.

85. *Id.* R.C.M. 912(f)(1)(F), (I).

86. *Id.* R.C.M. 912(f)(1)(N).

87. *Cf.* United States v. Heriot, 21 M.J. 11, 13 (C.M.A 1985) ("[W]e are convinced that an accused is entitled to be tried by court members whose minds are open as to what is an appropriate sentence; and *voir dire* of the members is the accepted way to ascertain whether this openness is present.").

had not made up her mind concerning an appropriate sentence, that she would follow the judge's instructions, and that she would listen to all the evidence before making her decision. In light of this testimony, the military judge's denial of a challenge for cause was upheld by the CAAF. The majority noted that "an inflexible member is disqualified, a tough member is not."[92]

The CAAF had another chance to probe the distinction between inflexibility and toughness in *Rolle*. In *Rolle*, the accused, a staff sergeant (E6), pleaded guilty to wrongful use of cocaine. Much of the voir dire focused on whether the panel members could consider seriously the option of no punishment, or whether they felt a particular punishment, such as a punitive discharge, was appropriate for the accused. One member, Command Sergeant Major (CSM) L, stated: "I wouldn't" let the accused stay in the military. He further stated that, "[a]n individual that admits guilt through some—some criminal act cannot be going unpunished although he may have a lot of mitigating circumstances, et cetera, he already admitted guilt . . . you know I would take in consideration all the mitigating circumstances, but when somebody has admitted guilt, I am inclined to believe that probably there is some punishment in order there . . . I very seriously doubt that he will go without punishment" (although CSM L did note that there was a difference between a discharge and an administrative elimination from the Army).[93] Another member, SFC W, stated "I can't [give a sentence of no punishment] . . . because basically it seems like facts have been presented to me because he evidentially said that he was guilty."[94] The military judge denied the challenges for cause against CSM L and SFC W.

In affirming the military judge's decision denying the two challenges for cause, the CAAF noted that "the notion of 'no punishment' has bedeviled this Court for most of its history. A punishment of no punishment appears to be an oxymoron, but it is a valid punishment."[95] The concept "no punishment" is especially problematic in voir dire, where questions are "propounded to the members in a vacuum, before they heard any evidence or received instructions from the military judge."[96] Thus, the courts have long been sympathetic to the plight of members who "'on voir dire are asked hypothetical questions about the sentence they would adjudge in the event of conviction.'"[97] The CAAF, therefore, restated its reluctance "to hold that a prospective member who is not evasive and admits to harboring an opinion that many others would share—such as that a convicted drug dealer should not remain a non-commissioned officer or should be separated from the armed services—must automatically be excluded if challenged for cause."[98] As the court identified, "'[T]he test is whether the member's attitude is of such a nature that he will not yield to the evidence presented and the judge's instructions.'"[99] Applying this test to the two members in *Rolle*, the CAAF concluded that the military judge had not abused his discretion.

The CAAF reasoned that CSM L, "along with the other members, expressed no predisposition to impose a punitive discharge, confinement, or reduction in grade based on the nature of the offense."[100] While he did express an *inclination* toward some punishment, he agreed that he would follow the military judge's instructions and would never exclude the possibility of

88. *See* United States v. McLaren, 38 M.J. 112 (C.M.A. 1993), where Judge Gierke, writing for the court, noted:

> I would have substantial misgivings about holding that a military judge abused his discretion by refusing to excuse a court member who could not in good conscience consider a sentence to no punishment in a case where all parties agree that a sentence to no punishment would have been well outside the range of reasonable and even remotely probable sentences.

Id. at 119 n.*.

89. 52 M.J. 80 (1999).

90. 53 M.J. 187 (2000).

91. *Schlamer*, 52 M.J. at 86.

92. *Id.* at 93.

93. *Rolle*, 53 M.J. at 189.

94. *Id.* at 190.

95. *Id.* at 191.

96. *Id.*

97. *Id.* (quoting United States v. Heriot, 21 M.J. 11, 13 (C.M.A. 1985)).

98. *Id.*

99. *Id.* (quoting United States v. McGowan, 7 M.J. 205, 206 (C.M.A. 1979)).

100. *Id.* at 192.

no punishment.[101] In other words, although perhaps predisposed to punishment, he was not inflexible.

The CAAF then addressed the challenge to SFC W. Conceding that SFC W had said he could not give "no punishment," the CAAF noted it was not clear whether SFC W meant no conviction, no collateral consequences of a conviction, or no administrative separation. This, said the CAAF, is "another case of responses to 'artful, sometimes ambiguous inquiries' that do not require the military judge to grant a challenge for cause."[102] The CAAF went on to note that even if SFC W truly meant that he could not vote for a sentence of "no punishment" under any circumstances, the conclusion about the denial of the challenge for cause would not change. This is because, in the CAAF's estimation, both sides virtually conceded that "no punishment" was never a reasonable likelihood in this case. The CAAF noted that: (1) the accused pleaded guilty pursuant to a PTA that permitted imposition of a bad conduct discharge; (2) in his unsworn statement, the accused expressed doubt about his worthiness to wear the uniform; and (3) defense counsel's sentencing argument did not ask for "no punishment;" rather, he asked for no discharge and no confinement. Thus, the parties evidently considered a sentence of "no punishment" to be outside the range of reasonable and even remotely probable sentences.[103]

Clearly, *Schlamer* and *Rolle* illustrate CAAF's increasing sympathy toward members who are dragged through the minefield of punishment hypotheticals on voir dire. *Rolle*, however, may signal a further departure for the CAAF. Having expressed frustration over the "artful" defense questioning, and being presented with a case where a member specifically stated he could not vote for "no punishment," the CAAF's decision was seemingly predetermined by *United States v. Giles*.[104] At issue in *Giles* was whether the accused should receive a punitive discharge. One of the members had stated he would vote for a punitive discharge regardless of the evidence presented, and the Court of Military Appeals found that the military judge had abused his discretion in denying the challenge for cause. The CAAF distinguished *Giles* from *Rolle*, noting that SFC W had an inelastic attitude about "no punishment." Unlike *Giles* (where the member's inflexibility concerned a punitive discharge), in *Rolle*, "no punishment" was beyond the realm of reasonable sentences, as tacitly conceded by the parties. In other words, SFC W expressed no predisposition regarding the real sentencing issues in *Rolle* (that is, whether the accused should receive a punitive discharge and confinement). SFC W's attitude regarding "no punishment" had no bearing on the real sentencing issues because the defense virtually conceded in the sentencing argument that "no punishment" was "outside the range of reasonable and even remotely probable sentences."[105]

The CAAF's effort to distinguish *Rolle* and *Giles* (which was disparaged by the concurring opinion in *Rolle* as an unsupportable distinction)[106] may simply be another expression of the CAAF's frustration with "artful" voir dire questioning. Alternatively it may be a signal of the lengths to which the CAAF will go to foster a voir dire environment in which members' honest comments about crime and punishment cannot be used against them unless they show a true inflexibility to what are the "real" issues in a particular case. The danger of this approach lies in the fact that identifying the "real" issues can only be done in retrospect, after the trial is ended, evidence introduced, and arguments made. It is, therefore, an intensely problematic, speculative standard for trial judges to use in ruling on challenges for cause.

The CAAF's apparent willingness to defer to members on the issue of inflexibility seems to translate into a broad deference to military judges in the area of challenges for cause. In both *Schlamer* and *Rolle* the CAAF was clearly loath to reverse the military judges' findings that the members remained unbiased concerning the important issues of their cases. This impression was perpetuated in *United States v. Napolitano*.[107] The court in *Napolitano* faced the issue that has probably dogged anyone who has served as a civilian defense counsel at court-martial: The lingering disapproval by court members of civilian counsel.

In *Napolitano*, Captain Malankowski was appointed to serve on the accused's court-martial. During voir dire, Captain Malankowski disclosed that he felt that the accused's civilian lawyer, and civilian lawyers generally, were "freelance guns for hire."[108] His opinion was based on his impression of famous civilian lawyers, such as Johnny Cochran, and on his assessment of some friends of his who were practicing criminal law in Florida. He also felt that civilian attorneys would set aside their moral beliefs to represent someone they believed was

101. *Id.*

102. *Id.* (citing United States v. Bannwarth, 36 M.J. 265, 267 (C.M.A. 1993) (quoting United States v. Tippit, 9 M.J. 106, 108 (C.M.A. 1980))).

103. *Id.* at 193.

104. 48 M.J. 60 (1998).

105. *Rolle*, 53 M.J. at 193.

106. *Id.* (Sullivan, J., concurring in the result) (disputing the majority's "vain" effort to distinguish *Rolle* and *Giles*).

107. 53 M.J. 162 (2000).

108. *Id.* at 164 (stating that on his member questionnaire, CPT Malankowski used the example of Johnny Cochran, of the O.J. Simpson trial).

guilty, and this was repugnant. The military judge explained the duty of defense counsel to zealously represent their clients, and the member conceded that "that's the only way [the system] could really work."[109] Captain Malankowski assured the military judge that he could keep an open mind, that he believed the accused was, at the start of the trial, innocent, and that he would not hold against the accused the fact that his family had hired civilian defense counsel.[110]

In reviewing the denied challenge for cause, the CAAF began by noting that the military appellate courts will overturn a military judge's denial of a challenge for cause only where there is a clear abuse of discretion by the judge in applying the liberal grant mandate.[111] In evaluating virtually any challenge for cause, the reviewing court will test for actual bias and for implied bias. Actual bias is a question of fact, and the military judge is given greater deference in deciding whether actual bias exists because he has observed the demeanor of the member.[112] Implied bias involves less deference to the military judge because the court is reviewing the denied challenge based on an objective standard. Implied bias exists when regardless of an individual member's disclaimer of bias, "most people in the same position would be prejudiced."[113]

Testing first for actual bias, the CAAF found none, noting that CPT Malankowski made it clear that he did not have an actual bias against the accused's civilian counsel. Turning to the question of implied bias, the CAAF also found none, pointing out that Captain Malankowski's member questionnaire reflected his disapproval of one civilian attorney, but not the accused's attorney, and he later reconsidered his opinion during voir dire. The CAAF also noted the member stated he had no bias against civilian defense counsel in general or the accused as the result of his choice of civilian counsel. Finally, the court noted that, "most people . . . would not consider themselves bound by their initial comments suggesting a bias," thus Captain Malankowski's presence on the panel did not give rise to a reasonable appearance of unfairness.[114]

The discretion the CAAF seems to be affording military judges in the area of challenges for cause is not so generous, however, that the CAAF is prepared to cease its vigilance where law enforcement personnel enter the court-martial milieu.

The military courts have often expressed a strong preference against permitting local law enforcement personnel to sit on courts-martial panels.[115] Nevertheless, no per se exclusions have been handed down because courts have recognized that not all law enforcement personnel will necessarily be involved in criminal investigation of the accused.[116] Still, it remains relatively clear that where a member has a considerable law enforcement connection and, perhaps more importantly, is acquainted with the law enforcement witnesses, the military judge should err on the side of granting a challenge for cause.[117] *United States v. Armstrong*[118] presented the CAAF with an opportunity to reaffirm this perspective for practitioners.

In *Armstrong*, the accused was tried for several offenses involving larceny, forgery, violation of a general order, making a false claim against the United States, and a number of other offenses. The accused entered mixed pleas and was convicted of several offenses. He was sentenced to reduction from E7 to E6, to pay a fine, and to be confined for one year. The Coast Guard Court of Criminal Appeals set aside the findings of guilty and the sentence on the ground that the military judge erred in failing to grant a challenge for cause against one of the members.[119] The CAAF affirmed.

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109. *Id.* at 165.

110. *Id.*

111. *Id. at* 166.

112. *Id.*

113. *Id.* at 167 (citations omitted).

114. *Id.*

115. United States v. Swagger, 16 M.J. 759, 760 (A.C.M.R. 1983) (holding that the military judge erred in allowing local provost marshal to serve on panel, stating: "At the risk of being redundant—we say again—individuals assigned to military police duties should not be appointed as members of courts-martial. Those who are the principal law enforcement officers at an installation must not be."); *see also* United States v. Dale, 42 M.J. 384 (1995) (stating that it was error to deny challenge for cause against deputy chief of security police who had sat in on criminal activity briefings with base commander).

116. *Cf.* United States v. Fulton, 44 M.J. 100 (1996) (stating that the military judge did not abuse discretion in denying challenge for cause against member who was chief of security police but had no knowledge of accused's case).

117. *See, e.g.*, United States v. Berry, 34 M.J. 83 (C.M.A. 1992) (stating that it was error to deny challenge against member who was member of base security office and knew and worked with key government witnesses).

118. 54 M.J. 51 (2000).

119. United States v. Armstrong, 51 M.J. 612 (C.G. Ct. Crim. App. 1999).

The lead investigator in the accused's case was Special Agent (SA) Cannon. Special Agent Cannon actively assisted the trial counsel at the trial, sitting at counsel table as a member of the prosecution team and also testifying as a prosecution witness. One of the panel members, a Lieutenant Commander (LCDR) T, disclosed during voir dire that he knew SA Cannon and that he worked in the same office with him. Special Agent Cannon was one of fourteen people assigned to LCDR T's office. They all shared a common workspace and had daily meetings, at which, according to LCDR T, he had heard the accused's case discussed, and the agents investigating the case make "disparaging comments."[120]

Lieutenant Commander T had been involved in law enforcement all his career, but he worked more in intelligence and counter-terrorism than in criminal investigation, and had not worked on the accused's case. The military judge inquired whether LCDR T could be impartial, to which he replied "absolutely," and that he could set aside what he had heard at the daily briefings.[121] Further, he denied that the daily meetings might have some impact on his judgment, and averred that he had "no doubt" that he could be impartial. In denying the defense's challenge for cause, the military judge observed that LCDR T was "quite candid," "very earnest," "somebody that has some self-knowledge," and "quite credible."[122]

The Coast Guard Court of Criminal Appeals agreed with the military judge that LCDR T was not actually biased against the accused.[123] The court was unable to determine, however, whether the military judge had even considered implied bias.[124] The court found that "the facts in this case warranted granting a challenge for cause for implied bias." In language eerily reminiscent of the cases cited at the beginning of this discussion, the court noted the challenged member: (1) was part of the law enforcement branch on the staff of the convening authority; (2) was associated with those who investigated the accused; (3) had regularly attended briefings on the accused's case; and (4) was part of the same branch as the lead investigative agent, who was both a witness for the prosecution and part of the prosecution team.[125] The court concluded that the member's disclaimers simply could not dispel the perception of unfairness and prejudice created by the facts of the case.

Before the CAAF, the government challenged the service court's conclusion, arguing that the Coast Guard Court of Criminal Appeals' decision should be tested only for plain error, and that the issue of implied bias should not have been addressed by the lower court because the defense did not specifically articulate a challenge based upon implied bias. The CAAF rejected this argument, noting that (1) appellate courts were not bound to apply the plain error doctrine, and (2) RCM 912(f)(1)(N) encompasses both actual and implied bias. The CAAF stated definitively that "[a]ctual bias and implied bias are separate legal tests, not separate grounds for challenge."[126]

The CAAF's decision was based, in part, on its deference to the service court's "'awesome, plenary, de novo power of review' to substitute its judgment for that of the military judge."[127] "[T]he court below was empowered, indeed obligated, to make its own judgment if it believed that implied bias warranted granting the challenge for cause."[128] The CAAF held that the Coast Guard Court of Criminal Appeals did not make findings that were clearly erroneous nor did it base its decision on an erroneous view of the law.

The *Armstrong* decision should be welcomed by trial defense counsel in the field and at the appellate level. The government's argument that the defense should have articulated a challenge based upon actual and implied bias at trial, rather than simply lodging a more general challenge for cause, would have elevated pedantry in trial practice to new heights and, as suggested by the CAAF, was contrary to established case law.[129] Thus, defense may rest assured that so long as a challenge is fully explored on the record, the military appellate courts will

120. *Armstrong*, 54 M.J. at 52.

121. *Id.* at 53.

122. *Id.*

123. *Armstrong*, 51 M.J. at 614.

124. MCM, *supra* note 9, R.C.M. 912(f)(1)(N) provides that a member shall be excused for cause whenever it appears that the member "should not sit as a member in the interest of having the court-martial free from substantial doubt as to legality, fairness, and impartiality." Rule for Courts-Martial 912(f)(1)(N) encompasses "both actual bias and implied bias." United States v. Warden, 51 M.J. 78, 81-82 (1999) (citations omitted). The test for actual bias is whether any bias is such that it will not yield to the evidence presented and the judge's instructions. Actual bias is a question of fact, and the military judge is given great deference on issues of actual bias, recognizing that he or she "has observed the demeanor" of the challenged party. Implied bias, on the other hand, is viewed through the eyes of the public, with the focus on the perception or appearance of fairness of the military justice system." *Id.* The military judge is given less deference on questions of implied bias.

125. *Armstrong*, 51 M.J. at 615.

126. *Armstrong*, 54 M.J. at 53 (citing *Warden*, 51 M.J. 78 (1999); United States v. Napoleon, 46 M.J. 279, 283 (1997); United States v. Minyard, 46 M.J. 229, 231 (1997); United States v. Daulton, 45 M.J. 279, 283 (1997)).

127. *Id.* (quoting UCMJ art. 66 (2000)).

128. *Id.* at 54.

review the military judge's conclusions under both an actual and implied bias template. *Armstrong* is a reminder that military judges should routinely make findings with respect to actual and implied bias when judging any challenge under RCM 912(f)(1)(N).

Amstrong is also welcome news because it resolved the issue of whether the Supreme Court's recent resolution of a split in the federal circuits applies to the military. In *United States v. Martinez-Salazar*,[130] the defendant challenged a juror for cause. The challenge was denied, and the defendant used one of his peremptory challenges to strike the juror. On appeal, he argued that the district court improperly denied the challenge for cause and this error forced the defense to use one of its peremptory challenges against that juror. The Supreme Court noted that there is no constitutional right to a peremptory challenge; that the entitlement to peremptory challenges comes from Federal Rule of Criminal Procedure 24(b) (which gives the prosecution six peremptory challenges and the defense ten peremptory challenges in a non-capital case involving an offense punishable by more than one year). Thus, the Court held that the defendant's exercise of his peremptory challenge was not denied or impaired when he chose to use it against a member who should have been excused for cause. In other words, the defendant is not required to use his peremptory challenge against the juror to preserve his challenge for appeal, but if he does, he has effectively alleviated the issue by ensuring he was not tried by a jury on which a biased juror sat. This decision resolved a split in the federal circuits,[131] and was the basis for the government's argument in *Armstrong* that the accused's use of his peremptory challenge against LCDR T meant that he suffered no prejudice because he effectively removed the potentially biased member from the panel.

The CAAF disagreed with this argument, refusing to apply *Martinez-Salazar* to Article 41, UCMJ. The CAAF acknowledged that Article 41 bestows on counsel for the defense and the government only one peremptory challenge each, and RCM 912(f)(4)[132] establishes unique procedural rules for preserving a challenge issue for later appellate review. The Rules for Court-Martial, the CAAF reasoned, gave to the accused in *Armstrong*

> the right to use his peremptory challenge against any member of the panel, even if his challenge of LCDR T was erroneously denied. It also preserved [his] right to appellate review of the military judge's ruling on the challenge for cause, even though the challenged member was removed by a peremptory challenge. Those rights are not mandated by the Constitution or statute and are not available in a civilian criminal trial.[133]

Thus, the CAAF held that Article 41, UCMJ and RCM 912(f)(4) confer a right greater than the Constitution, and the accused is entitled to that protection. *Martinez-Salazar* "does not preclude the President from promulgating a rule saving an accused from the hard choice faced by defendants in federal district courts—to let the challenged juror sit on the case and challenge the ruling on appeal or to use a peremptory challenge to remove the juror and ensure an impartial jury."[134]

Ultimately, the CAAF majority held that the Coast Guard Court of Criminal Appeals did not abuse its discretion. "Unable to discern the military judge's conclusions regarding implied bias, it exercised its 'awesome, plenary, de novo power of review.'"[135] The service court properly interpreted the cases on implied bias, used its knowledge and experience to evaluate how the service community would perceive LCDR T's presence on the court panel, and it applied the liberal-grant mandate and RCM 912(f)(1)(N).[136]

129. *But see id.* at 55 (Sullivan, J., dissenting) (citing United States v. Ai, 49 M.J. 1 (1998) (stating that where accused challenged member at trial based upon actual but not implied bias, implied bias claim on appeal was reviewed under a plain error standard)).

130. 528 U.S. 304 (2000).

131. *Id.* at 310. Several circuits were split over the question of "whether a defendant's peremptory challenge right is impaired when he peremptorily challenges a potential juror whom the district court erroneously refused to excuse for cause, and the defendant thereafter exhausts his peremptory challenges." United States v. Martinez-Salazar, 120 S. Ct. 774, 779 (1995).

132. RCM 912(f)(4) states:

> When a challenge for cause has been denied, failure by the challenging party to exercise a peremptory challenge against any member shall constitute waiver of further consideration of the challenge upon later review. However, when a challenge for cause is denied, a peremptory challenge by the challenging party against any member shall preserve the issue for later review, provided that when the member who was unsuccessfully challenged for cause is peremptorily challenged by the same party, that party must state that it would have exercised its peremptory challenge against another member if the challenge for cause had been granted.

MCM, *supra* note 9, R.C.M. 912(f)(4).

133. *Armstrong*, 54 M.J. at 55.

134. *Id.* (citation omitted).

135. *Id.*

Needless to say, the dissent strongly disagreed with the majority's holding, arguing that if an accused does "not expressly challenge a member on an implied-bias basis at trial, a post-trial claim of this issue is only reviewed for plain error."[137] Here, the dissent argued, the accused did not specify an implied bias challenge at trial, so the judge's ruling should be tested for plain error. Applying that standard, "it cannot be said that the military judge committed plain error when she did not sua sponte excuse LCDR T on the basis of implied bias."[138]

In light of the CAAF's holding in *United States v. Warden*,[139] it could be argued that the majority has the better argument. In any event, however, trial and defense counsel can at least take consolation in the fact that the CAAF has clearly set out that actual and implied bias are tests for assessing a potential member's bias, and need not be stated as distinct grounds for challenge at trial. In an ideal world, counsel would be prepared to articulate grounds supporting both actual and implied bias when making a challenge. Given the stressful reality of life in the courtroom, however, this would be a daunting task indeed. Counsel should, at the very least, keep both the subjective and objective standards in mind when exploring bases for challenge to best articulate those challenges to the military judge.

From the hurly burly world of challenges for cause, we turn now to the somewhat more settled realm of peremptory challenges and, more particularly, justifications for peremptory challenges under the progeny of *Batson v. Kentucky*.[140] Virtually all trial practitioners in the military are familiar with the evolution of *Batson* in the military, but a brief review will help give context to a new case that appears poised to sweep away at least some of the military precedent in this area.

In *Batson***,** the Supreme Court condemned the prosecution's use of the peremptory challenge to remove all African American members of the accused's jury. The Court required the government, after defense objection, to explain the reason for the use of the peremptory. The prosecutor was required to provide a race-neutral reason to support the challenge. In *United States v. Moore*,[141] the CMA adopted a *per se* rule that "every peremptory challenge by the Government of a member of an accused's race, upon objection, must be explained by trial counsel." This rule was later extended to challenges ostensibly based upon gender.[142]

The Supreme Court later had to address the issue of the sufficiency of the race—or gender—neutral reason. In other words, what constitutes a sufficiently race—or gender—neutral explanation? The Supreme Court ruled that it would not second-guess counsel, permitting prosecutors' "hunches" to suffice, so long as they were "genuine."[143] In *United States v. Tulloch*,[144] the CAAF refined this requirement in the military, imposing on trial counsel a more demanding standard when responding to a *Batson* challenge. Rather than merely requiring a genuine race or gender neutral explanation, the military courts, after *Tulloch*, require a trial counsel to give a race or gender neutral reason that is not implausible or unreasonable.

The CAAF imposed this rule, in part, because of a perceived tension between Articles 25 and 41, UCMJ. Article 25 directs that the convening authority personally pick members who are, in his "personal opinion," best qualified under Article 25, UCMJ. It is contradictory, therefore, for the trial counsel, exercising his peremptory challenge under Article 41 to be able to willy-nilly remove a member merely because he or she has a "hunch" that the member is not qualified or not impartial. The trial counsel, the court felt, had to be able to articulate something more concrete, something demonstrable on the record, than a mere hunch that the member should not serve.[145]

Against this backdrop, two cases were decided by the CAAF this year that addressed the adequacy of trial counsel's explanations for the exercise of their peremptory challenges. First, in

136. *Id.*

137. *Id.* (Sullivan, J., dissenting); *see also supra* note 129.

138. *Id.* (citations omitted).

139. 51 M.J. 78 (1999). In *Warden*, the panel president said that he "trusted" a prosecution witness who had been his personal secretary, yet claimed he could set that aside and be impartial. The defense challenged the member for cause, stating he would not be able to properly evaluate the witness' testimony. While the CAAF ultimately affirmed, it did so only after noting that RCM 912(f)(1)(N) encompasses both actual and implied bias, and applying both tests against the challenged member. *Id.* at 81-82.

140. 476 U.S. 79 (1986).

141. 28 M.J. 366 (C.M.A. 1989).

142. United States v. Witham, 47 M.J. 297 (1997).

143. Purkett v. Elm, 514 U.S. 765 (1995).

144. 47 M.J. 283 (1997).

145. In *Tulloch*, trial counsel proffered the explanation that the member blinked and looked nervous. Because this observation was not reasonably or plausibly linked to any perceived deficiency on the part of the member, the CAAF held that the trial counsel's explanation was insufficient to support the peremptory challenge. *Tulloch*, 47 M.J. at 288-89.

United States v. Norfleet,[146] the trial counsel challenged the sole female member of the court. In response to the defense counsel's objection and request for a gender-neutral explanation, trial counsel stated that the member "had far greater court-martial experience than any other member," implying that she would dominate the panel. This would not bode well for the government because this member had potential "animosity" toward the SJA office because of "disputes" she had had with that office. The military judge did not require trial counsel to further explain these disputes, nor did defense object or ask for further information. The CAAF found that the military judge did not abuse his discretion in approving the peremptory challenge. The CAAF stated that when a proponent of a peremptory challenge responds to a *Batson* objection with (1) a valid reason, and (2) a separate reason that is not inherently discriminatory and on which the opposing party cannot demonstrate a pretext, the denial of a *Batson* objection may be upheld on appeal.[147]

The second *Batson* case to emerge this year has even greater implications for military practice and, as suggested earlier, may signal a retrenchment on the *Tulloch* decision. In *United States v. Chaney*,[148] the government used its peremptory challenge against the sole female member. After a defense objection based upon *Batson*, the trial counsel explained that the member was "a nurse." The trial counsel offered no further explanation. The military judge then stated that he was aware that counsel often challenged members of the medical profession.[149] Defense counsel did not object to this contention or request further explanation from the trial counsel. Interestingly, it was the Air Force Court of Criminal Appeals, on review, that supplied the missing logical link in the syllogism: The Air Force court wrote that the trial counsel "rightly or wrongly" felt members of the medical profession were sympathetic to accused, but that it was not a gender issue.[150]

The CAAF upheld the military judge's ruling permitting the peremptory challenge, noting that the military judge's determination is given great deference. The CAAF noted it would have been preferable for the military judge to require a more detailed clarification by trial counsel, but here the defense counsel failed to show that the trial counsel's occupation-based peremptory challenge was unreasonable, implausible or made no sense.[151]

One message from *Norfleet* and *Chaney* to defense counsel is to object to trial counsel's proffered explanation and request findings from the military judge on the record. Clearly the CAAF will continue to find such minimalist explanations from trial counsel to be sufficient where it appears from the record that the defense is satisfied with the explanation as well.

The *Chaney* decision is more subtly invidious, however. In recognizing occupation-based peremptory challenges, this decision erodes the heretofore-firm ground underlying *Tulloch* in three clear ways.

First, the CAAF's recognition of occupation-based challenges administers the intellectual coup-de-grace to Judge Cox's warning that occupation-based challenges may be inherently pretextual.[152] Judge Cox made this claim in obvious recognition of the fact that certain occupations are predominantly populated by women, and have been for years.

Second, by permitting occupation-based challenges, the CAAF undermines *Tulloch's* requirement that the trial counsel articulate the reasonable relationship between a member's statements or behavior and some perceived deficiency that suggests the member should not sit. Put another way, the CAAF majority in *Tulloch* was skeptical of "hunches" as a basis for a peremptory challenge because they are incapable of being substantiated by anything on the record. Yet occupation-based challenges are just that: they are challenges based not on anything identifiable that the member has done or said during voir dire. Rather, such challenges are simply based on the trial counsel's "hunch" or guess that a member of the medical corps is going to be more favorably disposed toward the accused or, to use another potential example, a quartermaster officer is going to be less "hardcore" than a combat arms officer.[153]

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146. 53 M.J. 262 (2000).

147. *Id.* at 272.

148. 53 M.J. 383 (2000).

149. United States v. Chaney, 51 M.J. 536, 541 (A.F. Ct. Crim. App. 1999).

150. *Id.*

151. *Cheney*, 53 M.J. at 385.

152. Judge Cox has written that "a peremptory challenge based on a juror's occupation has been presumed by some to be pretextual on its face." United States v. Ruiz, 49 M.J. 340, 344 (1998) (citing *De Riggi, Appellate Court Guidance on Batson Challenges*, 215 N.Y.L.J. 48 (1996)). Judge Cox further noted that the "disfavor of occupation-based challenges may be more powerful in the military, where the court members have been selected by the convening authority precisely because they are 'best qualified for the duty by reason of their age, education, training, experience, length of service, and judicial temperament." *Id.* at 344-45 (citations omitted).

153. Indeed, given that women are *excluded* from certain military branches (for example, combat arms), is not the quartermaster example almost *inherently* pretextual? Herein lies the danger of occupation-based challenges in the military service, a danger far more acute than that likely to be experienced by our colleagues in the civilian world.

These are exactly the sort of unverifiable gut reactions that the *Tulloch* majority was trying to guard against to ensure effective implementation of *Batson* and minimize the opportunity for racially—or gender—discriminatory uses of peremptory challenges.

Third, and finally, the recognition of occupation-based challenges, and the implicit vindication of trial counsel's completely unverifiable "hunches," deals a palpable blow to the convening authority's responsibility to personally select panel members under Article 25, UCMJ. Presumably, the convening authority is well aware of all panel members' branches when he selects them. Indeed, he may select a particular member precisely because of his or her particular branch.[154] Is it then appropriate for the trial counsel to effectively *overrule* the convening authority and remove a member precisely because of a factor that may very well have played a part in the convening authority's selection under Article 25? This is this height of prosecutorial hubris.

Notwithstanding the trend discussed above, all is not lost. While CAAF may be retrograding over the ground gained in *Tulloch*, that decision remains good law, and the service courts continue to enforce it with some vigor.[155]

The Article 32 Investigation

It is generally well known that the government has no power to subpoena witnesses to Article 32, UCMJ investigative hearings.[156] The question raised by this issue is whether the accused can successfully challenge testimony obtained through the use of an illegally issued subpoena. The CAAF set out to answer this question in *United States v. Johnson*.[157] In *Johnson*, the accused was convicted of charges relating to various assaults committed on his eight month-old daughter. The most damning testimony came from the accused's wife. She testified against him at the Article 32 investigative hearing, and later at trial. She appeared at the Article 32 hearing pursuant to a German subpoena, which threatened criminal penalties if she did not comply. The military judge found that the subpoena was unlawful and issued without apparent legal authority, but found that the accused was not prejudiced by having a witness illegally produced at the hearing.[158]

The CAAF agreed with the military judge that the subpoena was unlawful, and that the accused suffered no prejudice to his substantial rights as a result of the improper production of the witness. Intriguingly, the CAAF concluded that the accused did not have standing to object to the use of the Article 32 testimony against him at trial because the evidence presented was "reliable."[159] The CAAF examined Supreme Court precedent permitting third parties to quash grand jury subpoenas, and stated its belief that the accused could have challenged the issuance of the subpoena at the Article 32 hearing if he could have established standing. Standing, said the CAAF, may be found:

> when the actions of the government impact upon the reliability of the evidence presented against [the accused] at trial, for example, coerced confessions, unlawful command

154. Arguably, it would be perfectly appropriate for a convening authority to consider the panel members' branches if her motivation was otherwise in accord with Article 25, UCMJ, if, for example, it was her desire to obtain a fairly representative cross-section of the military community. *See, e.g.*, United States v. Smith, 27 M.J. 242, 249 (1988) ("[A] commander is free to require representativeness in his court-martial panels and to insist that no important segment of the military community—such as blacks, Hispanics, or women—be excluded from service on court-martial panels."). In *Smith*, the CMA tacitly accepted as valid the convening authority's rationale during panel selection:

> My philosophy regarding selection of court panels involves striking several balances. I look at age because I believe that it is associated with rank and experience. I look for a spread of units on the panel to include division units, non-division units, and tenant activities. I look at the types of jobs and positions of individuals in an effort to have a mix of court members with command or staff experience. I alsolook for some female representation on the panel. At no time have I had a concern for minority representation based upon race. *In sex cases, however, I have a predilection toward insuring that females sit on the court*. I did not generally articulate nor did I state this preference to Colonel Jack Hug [the SJA] regarding the *Smith* case.

Smith, 27 M.J. at 247-48 (emphasis in original); *see also* United States v. White, 48 M.J. 251, 255 (1998) ("Selection of more commanders than non-commanders on a court-martial panel, absent evidence of improper motives or systemic exclusion of a class or group of eligible candidates, does not by itself raise an issue of court packing.").

A member's branch is also inextricably part of the member's background, affecting—and affected by—her assignment pattern, supervisory responsibilities, and understanding of the military, humanity, and the ways of the world (in other words, a vital component of her "experience, education, training," and other matters.).

155. *See, e.g.*, United States v. Robinson, 53 M.J. 749 (Army Ct. Crim. App. 2000) (trial counsel's proffered reason for striking minority member, that he was new to the unit and that his commander was also a panel member, was unreasonable; counsel did not articulate any connection between the stated basis for challenge and the member's ability to faithfully execute the duties of a court-martial member).

156. "[M]ilitary authorities have consistently held that there is no legal authority to compel a civilian witness to appear at a pretrial investigation, nor any funds to pay these witness fees." United States v. Roberts, 10 M.J. 308, 308 n.1 (C.M.A. 1981) (citations omitted).

157. 53 M.J. 459 (2000).

158. *Id.* at 461.

159. *Id.*

> influence, interference with the rights of confrontation or cross-examination, and interference with the right to present evidence.[160]

The CAAF looked to a 1963 case, *United States v. Smelley*,[161] for the proposition that a defect in the pretrial investigation which erroneously permits evidence to be adduced against the accused is not a violation of a substantial right. Moreover, the discussion to RCM 405(a) states that "[f]ailure to comply substantially with the requirements of Article 32, which failure prejudices the accused, may result in delay in disposition of the case or disapproval of the proceedings."[162] Here, the CAAF noted, the accused was present at the Article 32 proceeding, the witness testified without objection, and the testimony was reliable (that is, it was not the result of coerced confessions, unlawful command influence, interference with the rights of confrontation or cross-examination, or interference with the right to present evidence). Thus, he was neither deprived of a substantial right nor hindered in presenting his case.[163]

The *Johnson* opinion further expands the "standing" concept discussed last year in *United States v. Jones*,[164] a case in which the staff judge advocate allegedly coerced three of the accused's accomplices to testify against him. There, the CAAF held that the accused had no standing to argue the violation of the accomplices' rights under Article 31 or the 5th Amendment. The CAAF further held, however, that the accused did have standing to challenge alleged violations of military due process through coercive government tactics. Nevertheless, the CAAF found that the accused was not prejudiced by those tactics.

After *Jones* and *Johnson*, the issue of standing seems somewhat murky. As noted, the *Jones* opinion conceded the accused had standing to attack the reliability of his accomplice's testimony, but that he was not prejudiced by the SJA's actions (that is, the testimony of the accomplices was deemed reliable). In *Johnson*, the accused was denied standing because the court found there was no coercive action on the part of the governmental authorities that prejudiced the accused's substantial rights (that is, the testimony of the accused's wife was deemed reliable). The issue of standing remains a tricky one, therefore, because it is not clear whether a showing of prejudice is required to establish standing, whether it is required to warrant granting relief once standing is found, or both. We can distinguish the outcomes, perhaps, in the following way: The CAAF evidently found some sort of coercive conduct on the part of the SJA in *Jones*, for, after entertaining the accused's challenge, the CAAF found that the SJA's conduct conferred *de facto* immunity on the three accomplices. The CAAF found, nevertheless, that the accused suffered no prejudice.[165] In *Johnson*, the CAAF agreed the government illegally summoned a witness into an Article 32 hearing, but nevertheless refused to find that this was a coercive practice that would impinge upon the potential reliability of the testimony so as to grant the accused standing.

Since this distinction is less than satisfactory, however, counsel are encouraged to turn to Judge Gierke's concurrence in *Johnson*, which may provide some illumination. Judge Gierke found two separate standing issues in the *Johnson* case: the first relating to the accused's standing to assert a violation of his wife's rights; the second relating to his standing to assert that the illegal subpoena affected the reliability of the evidence or the fairness of his trial.[166] The lack of standing on the first issue would not preclude standing on the second, but, in any event, the issue was moot and waived. The issue was moot because the accused's wife's Article 32 testimony was never offered at trial. It was waived because the testimony was used only to refresh her recollection and impeach her, and the defense did not object to this. Judge Gierke was satisfied, therefore, that there was no plain error.[167]

It has long been recognized that trial counsel may issue what might be termed ineffectual or illegal subpoenas without sanction.[168] While the use of such subpoenas may not trigger the striking of testimony obtained via the subpoenas, they do give the unsettling impression that the government can illegally compel witness testimony with impunity. It is, perhaps, because of this lingering unease that neither the majority opinion nor the concurrences in *Johnson* provide a satisfactory resolution of the issue.

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160. *Id.* (citations omitted).

161. 33 C.M.R. 516 (A.B.R. 1963).

162. MCM, *supra* note 9, R.C.M. 405(a) discussion.

163. *Johnson*, 53 M.J. at 462.

164. 50 M.J. 60 (1999).

165. *Cf.* United States v. Jones, 52 M.J. 60, 68 (1999) ("The Government did not *improperly* coerce the testimony of the accomplices." (emphasis added)).

166. *Johnson*, 53 M.J. at 464 (Gierke, J., concurring).

167. *Id.*

168. *Cf.* United States v. Wooten, 34 M.J. 141 (C.M.A. 1992) (holding that trial counsel's alleged violations of federal law in issuing and serving subpoenas *duces tecum* would not warrant exclusion of the challenged evidence).

Pleas and Pretrial Agreements.

If a trend could be identified in the area of pleas, guilty plea proceedings, and pre-trial agreements (PTA), it would be that the CAAF has continued its relentless pursuit of substance over form. And it could also be said that this is one area where the accused appear to have gained more ground than they have lost, which is not always the case in the apocalyptic struggle between the government and the accused.

An example of this trend can be seen in the capital arena. The UCMJ technically precludes a military judge from accepting a guilty plea in a case that has been referred capital.[169] These statutes could, arguably, have precluded the military judge's acceptance of the accused's plea of guilty in *United States v. Fricke*.[170] Lieutenant Commander Fricke was charged with the premeditated murder of his wife. His case was referred capital, meaning that the death penalty would be an authorized punishment if he were found guilty. He initially pleaded not guilty but, at the conclusion of the government's case, he pleaded guilty pursuant to a PTA. In the agreement the convening authority agreed to refer the case non-capital if the accused's plea was accepted. Before the plea was entered, the trial counsel announced that the general court-martial has "*now been referred non-capital . . . conditioned upon [the military judge's] acceptance of a plea of guilty . . . .*"[171] The military judge declared that "*because the Government has withdrawn the capital referral at this time*, that gives you a different option regarding forum selection . . . ."[172]

On appeal, the accused argued that because his case had been referred capital at the time his plea of guilty to premeditated murder was proffered and accepted by the military judge, his guilty plea was void under Article 45(b) and that the military judge had no jurisdiction to accept the plea under Article 18, UCMJ. The accused argued there was no record of the convening authority actually withdrawing and re-referring the ~~accused's case, so the case remain~~ed a capital case throughout the proceedings. The CAAF was not persuaded by this rather formalistic argument, however, noting: (1) that there is no express requirement that a non-capital referral be stated in a written instruction; (2) the military judge acknowledged the non-capital referral prior to the acceptance of the plea; and (3) the failure to reduce the re-referral to writing was technical in nature and did not deprive the accused of the protections set out in Articles 45 and 18, UCMJ.[173] Clearly, the courts seem willing to effect the convening authority's intent, even if such procedural niceties as a written re-referral are not provided to the accused. The *Fricke* holding reminds us that referral need not always be a perfectly choreographed ballet, but even a jurisprudential mosh pit will suffice so long as "common sense" prevails.[174]

As is well known, once a guilty plea is entered the military judge must conduct a providence inquiry.[175] This consists largely of placing the accused under oath and then having him explain why he believes he is guilty of the offense to which he has pleaded guilty. A question arises, however, if there are witnesses present in the courtroom who will be testifying against the accused on the merits of other charges or on sentencing. Must a court sequester these merits and sentencing witnesses from the accused's providence inquiry? This was the question posed in *United States v. Langston*.[176] During a tour of duty on the staff at the Mannheim Confinement Facility in Germany, Sergeant First Class (SFC) Langston allegedly maltreated several female prison staff members. He was charged with making offensive sexual remarks and advances, committing indecent assaults, and exposing himself to these women. At his court-martial, after entering pleas of guilty to some of the offenses, the accused, through counsel, requested that the three victims, Specialist (SPC) T, Private First Class (PFC) W, and Staff Sergeant (SSG) C, be removed from the courtroom during the providence inquiry. The military judge denied the motion, holding that the sequestration provision of Military Rule of Evidence (MRE) 615 did not apply because the providence inquiry did not constitute the taking of "testimony."[177] After the accused's providence inquiry, two of the victims, SPC T and PFC W, testified on the merits of the contested charges. The accused was convicted of the charges to which he had pleaded

169. Article 45 states in part: "(b) A plea of guilty by the accused may not be received to any charge or specification alleging anoffense for which the death penalty may be adjudged." UCMJ art. 45 (2000). Article 18 states: "However, a general court-martial of the kind specified in section816(1)(B) of this title (Article 16(1)(B)) shall not have jurisdiction to try any person for any offense for which the death penalty may be adjudged unless the case has been previously referred to trial as a noncapital case." *Id*. art. 18.

170. 53 M.J. 149 (2000).

171. *Id*. at 151 (emphasis in original).

172. *Id*. (emphasis in original).

173. *Id*. at 154.

174. *Id*.

175. MCM, *supra* note 9, R.C.M. 910(d), (e) (stating that military judge must ensure plea of guilty is made voluntarily and knowingly, and question the accused under oath about the circumstances of the offenses to ensure there exists a factual basis for the plea).

176. 53 M.J. 335 (2000).

guilty, and he was also found guilty of additional specifications of the offenses to which he had pleaded guilty. Private First Class W and SSG C testified on sentencing.

The CAAF disagreed with the military judge's ruling on MRE 615's applicability, noting that the "purpose of the sequestration rule is to prevent witnesses from shaping their testimony to match another's and to discourage fabrication and collusion."[178] The CAAF pointed out that the three victims were present during the taking of the accused's sworn testimony on providency, "the strongest form of proof in our legal system,"[179] that he entered mixed pleas (necessitating a trial on the merits), and that the sentencing phase of the trial "still had to occur, where a concern for shaped or false testimony remained."[180] Having found that the military judge erroneously failed to sequester the three victim-witnesses, the CAAF then addressed whether the military judge's error prejudiced the accused's trial. The CAAF held that the failure to remove the three witnesses did not materially prejudice the accused's substantial rights. Applying a harmless error analysis, the CAAF noted that, while PFC W testified on the merits of the contested offenses and sentencing, her pretrial statements were available to the defense for impeachment, and her testimony at sentencing related only to the effect of the crimes upon her. Thus, there was "no reasonable possibility that her testimony was altered by what she heard" of the providence inquiry.[181] Similarly, SPC T, who also testified on the merits, adhered to her version of the events (which conflicted slightly with the accused's) even after hearing his providence inquiry, and, in any event, the defense had the ability to disclose any alteration of her testimony. As to SSG C, she did not testify on the merits because the accused stipulated to his acts involving her. Her testimony on sentencing concerned victim impact only. The court concluded that there was no reasonable possibility that the failure to remove the witnesses prejudiced the accused.[182]

The court left open the question of whether MRE 615 *always* applies to providence inquiries, or only "in these circumstances"[183] (for example, mixed plea cases). Clearly, the safer approach is for counsel and military judges to err on the side of applying MRE 615 to all providence inquiries and exclude merits and sentencing witnesses, if only because the sentencing phase of the trial will always follow, with its attendant concerns for shaped testimony.

Military Rule of Evidence 615 is a powerful sequestration tool that permits the military judge no discretion so long as the witness in the gallery does not fall into one of the exceptions listed in the rule. Counsel must also bear in mind, however, that if a victim-witness present is to be called for sentencing only, that person should be allowed to remain in the courtroom.[184]

The issue of whether the accused's providence inquiry constitutes "testimony" raises a related issue of the *uses* which can be made, by either side, of the accused's providence inquiry admissions, especially in mixed plea cases. Just how vulnerable is the accused to having his providence inquiry admissions turned against him on the merits of other charges? The Army Court of Criminal Appeals recently addressed this issue, and that holding is relevant to "new developments" because the ser-

177. *Id.* at 336. The then-current version of MRE 615 stated:

> At the request of the prosecution or defense the military judge shall order witnesses excluded so that they cannot hear the testimony of other witnesses, and the military judge may make the order *sua sponte*. This rule does not authorize exclusion of (1) the accused, or (2) a member of an armed service or an employee of the United States designated as representative of the United States by the trial counsel, or (3) a person whose presence is shown by a party to be essential to the prosecution of the party's case.

MANUAL FOR COURTS-MARTIAL, UNITED STATES, MIL. R. EVID. 615 (1995).

178. *Langston*, 53 M.J. at 336 (citations omitted).

179. *Id.* at 337.

180. *Id.*

181. *Id.* at 338.

182. *Id.* at 337.

183. *Id.*

184. Military Rule of Evidence 615 was amended by a recent change to Federal Rule of Evidence 615. The "Supreme Court, approved an amendment, effective 1 December 1998, to Federal Rule of Evidence 615 which would allow crime victims to hear the testimony of other witnesses if 'authorized by statute.'" United States v. Langston, 50 M.J. at 516; *see* MCM, *supra* note 9, MIL. R. EVID. 615(4). Congress has authorized victims to be present in court at all times so long as they are only to testify on sentencing. See 18 U.S.C. § 3510, concerning rights of victims to attend and observe trial, which states:

> Non-capital cases. Notwithstanding any statute, rule, or other provision of law, a United States district court shall not order any victim of an offense excluded from the trial of a defendant accused of that offense because such victim may, during the sentencing hearing, make a statement or present any information in relation to the sentence.

18 U.S.C. § 3510 (2000).

vice courts seem to be split on the issue, and the CAAF may—or should be—on the verge of stepping into the fray.

We begin with the premise that, in mixed plea cases, the accused's *plea* to one offense may, generally, not be used to prove up the offense or offenses that are to be contested.[185] There are, of course, exceptions to this rule. The military judge should inform the members of the accused's prior plea of guilty when the accused specifically requests, or when the "plea of guilty was to a lesser included offense within the contested offense charged in the specification."[186]

So this answers the question of what use can be made of the accused's guilty plea in a mixed plea case. The more complicated issue concerns the use that can be made of the accused's providence inquiry *admissions* (that is, the substance of the accused's sworn testimony to the military judge). It is well-settled that the accused's providence inquiry admissions may be introduced against the accused during the *sentencing* portion of the trial,[187] but it is not entirely clear whether his providence inquiry admissions may be admitted on the *merits* of other charges. This was the issue posed to the Army court a few years ago in *United States v. Ramelb.*[188] In *Ramelb*, the accused, charged with larceny of over $20,000 from the government, pleaded guilty to the lesser included offense of wrongful appropriation under the theory that he did not have the intent to permanently deprive the government of the money he had taken (he was a finance clerk, and he testified that he took money to test the system to determine whether the finance system was fraud-proof). During his providence inquiry, he told the military judge he had spent some of the money. The prosecution then went forward on the contested charge, the greater offense of larceny. In trying to prove the accused had the intent to permanently deprive the owner of the money, the government called to the stand a witness who had been present in the gallery during the accused's providence inquiry. The defense did not object, and the military judge permitted the witness to testify as to the accused's providence inquiry admission.[189]

On appeal, the Army court held that the military judge erred, although the error was harmless. The Army court focused on the fact that the military judge advised the accused, prior to the providence inquiry, that he gave up his right against self-incrimination "solely with respect to the issue of guilt or innocence, and only with respect to the offenses to which [he] pled guilty."[190] Thus, the use of his providence inquiry admissions in contravention of this limited waiver would violate the accused's right to remain silent.[191] Moreover, the court found that that there is "no authority for the proposition that the accused's answers during a guilty plea inquiry on one offense may be used as evidence by the government to prove a greater or separate offense to which the accused has pleaded not guilty."[192] The Army court concluded that "the elements of a lesser offense established by an accused's plea of guilty but not the accused's admissions made in support of that plea can be used as proof to establish the common *elements* of a greater offense to which an accused has pleaded not guilty."[193]

185. "If mixed pleas have been entered, the military judge should ordinarily defer informing the members of the offenses to which t he accused pleaded guilty until after the findings on the remaining contested offenses have been entered." MCM, *supra* note 9, R.C.M. 913(a); *see also id.* R.C.M. 910(g) discussion ("If the accused has pleaded guilty to some offenses but not to others, the military judge should ordinarily defer informing the members of the offenses to which the accused has pleaded guilty until after findings on the remaining offenses have been entered.").

186. MCM, *supra* note 9, R.C.M. 913(a) discussion (citations omitted); *see also* U.S. DEP'T OF ARMY, PAM. 27-9, LEGAL SERVICES: MILITARY JUDGE'S BENCHBOOK 46-47 (1 Apr. 2001) [hereinafter BENCHBOOK] (setting out the military judge's instructions on pleas to lesser included offenses).

187. According to *United States v. Holt*, 27 M.J. 57 (C.M.A. 1988), an accused's oral statements made during the guilty plea providence inquiry may be used during the trial for determining the providence of the plea and for sentencing. Indeed, in *Holt*, the CMA essentially presumed the entire providence inquiry would be relevant to sentencing. *Id.* at 60. ("Unless the military judge has ranged far afield during the providence inquiry, the accused's sworn testimony will provide evidence "directly relating to" the offenses to which he has pleaded guilty").

188. 44 M.J. 625 (Army Ct. Crim. App. 1996).

189. In fact, the witness speculated beyond the providence inquiry admissions. He was asked if the accused had used the money for personal expenses, he answered "Yes" although the accused never stated the purpose of the expenditure. *Id.* at 627.

190. *Ramelb*, 44 M.J. at 626.

191. *Id.* at 629.

192. *Id.* The court noted:

> The government cites *United States v. Thomas*, 39 M.J. 1094 (A.C.M.R 1994), for the proposition that the appellant's admissions during a guilty plea inquiry can be used to establish *facts* relevant to both a lesser offense to which an accused pleads guilty and to a greater offense to which an accused pleads not guilty. We disagree. In *Thomas*, this court held that a military judge, as a finder of fact, could consider an accused's admissions during a guilty plea inquiry concerning consensual sodomy as *proof of one element* of the offense of forcible sodomy to which he pleaded not guilty. Although Thomas asserted on appeal that the military judge improperly considered the *content* of his admissions during the guilty plea inquiry *as evidence* to convict him of forcible sodomy, as well as to convict him on the other contested charges of rape and burglary, this court found no basis for that assertion.

Id. (emphasis in original).

This past year, the Air Force Court of Criminal Appeals was presented with a similar situation but came to a very different conclusion. In *United States v. Grijalva*,[194] the Air Force court held that neither *Ramelb* nor the *MCM* prohibited the use of all providency admissions by the accused. Thus, the court held that statements made during a providence inquiry on a lesser included offense may be considered by the fact finder as those admitted facts relate to an admitted element of the greater offense.

193. *Id.* (emphasis in original) (citations omitted).

194. 53 M.J. 501 (A.F. Ct. Crim. App. 2000).

The facts of *Grijalva* are important to this discussion. There the accused was charged with attempted premeditated murder and desertion for shooting his wife in the back and then fleeing. He attempted to plead guilty to both charges but after the military judge rejected his plea, he pleaded guilty to aggravated assault (intentional infliction of grievous bodily harm). During the providence inquiry, the accused stated that he went to the house where his wife was staying with the intent to shoot her. After a contested trial on the merits of the attempted murder charge before a military judge alone, the accused was convicted of attempted premeditated murder. During announcement of special findings, the military judge referred to the accused's providence inquiry admission of his intent to shoot his wife. The accused challenged this use of his providence inquiry by the military judge before the Air Force court, arguing that the Army court's decision in *Ramelb* precluded the use of his providence inquiry admissions against him. The Air Force court, however, found the military judge did not err.

First (and perhaps most importantly) the Air Force court noted that, immediately preceding the providence inquiry, the military judge informed the accused—and the accused agreed—that his admissions during the providence inquiry could be used against him on the merits of the contested offense.[195] The Air Force went beyond this important distinction, however, and pointed out that, contrary to the accused's argument (and contrary, apparently, to the plain language of *Ramelb*), the Army court did not intend to announce a complete ban on the use of the accused's providence inquiry admissions on the merits of contested offenses. The Air Force court noted that the elements of a lesser included offense established during a guilty plea inquiry may be used to establish the common elements of a greater offense to which the appellant pleads not guilty.[196] Thus, the Army court in *Ramelb* actually held only that the accused's providence inquiry admissions were inadmissible unless they were *relevant* to the plea. In *Ramelb*, the Air Force court reasoned, the accused's statements about what he did with the appropriated money were irrelevant to whether he had the intent to permanently deprive the government of its funds, so the *Ramelb* court properly held that statements that were not relevant to the plea could not be used during findings on the greater offense. This interpretation, said the Air Force court, has support in precedent.[197] In *Grijalva*, on the other hand, the "members could have been instructed [on the contested attempted murder charge] that the appellant admitted shooting Lisa with the specific intent to cause grievous bodily harm."[198] The military judge also "could have instructed that the appellant admitted that he held this intent when he entered the house . . . [t]herefore . . . the military judge did not err when he accepted as proven that the appellant intended to shoot his wife."[199]

The *Grijalva* decision is an intriguing puzzle for several reasons. Its apparent gainsaying of the Army court's categorical language in *Ramelb* seems unsupportable.[200] Perhaps more significantly, however, the decision ostensibly endorses a practice that is contrary to the Army's guilty plea format.[201] Army practitioners can appreciate the symmetry of the *Ramelb* reasoning, for it fits squarely within the parameters of the Army's guilty plea format. To the extent that *Grijalva* endorses a departure from that script (for example, by encouraging military judges to advise the accused that his privilege against self-incrimination is also waived with respect to the merits of greater offenses; and by encouraging military judges to admit and consider testimony taken during the providence inquiry), it should be eschewed by Army counsel.

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195. The military judge informed the accused that "some of what you tell me, *the Government may use that in their argument or in their case to prove the charged offense* . . . . So you understand that some of what you tell me, or anything that you tell me that applies to the elements of attempted premeditated murder, *I may also consider that in deciding whether you are guilty of that charged offense* . . . ." *Id.* at 502 (emphasis in original).

196. *Id.* at 503.

197. The Air Force court cited *United States v. Glover*, 7 C.M.R. 40 (C.M.A. 1953) in support of its position. In *Glover*, the accused pleaded guilty to wrongful appropriation of a vehicle. The government went forward on the larceny charge and the accused testified in his own defense, stating he intended to return the vehicle. The law officer instructed the members on the offense of larceny but failed to instruct on the lesser included offense of wrongful appropriation. The accused was convicted of larceny. The Army Board of Review reduced the conviction to one of wrongful appropriation, based on the perceived instructional error. The Court of Military Appeals held that no relief was required because the accused was not prejudiced. Thus, the citation to *Glover* appears somewhat inapposite since (1) *Glover* dealt with an issue of instructional error and (2) it predates the rigorous guilty plea system we know today. *See* United States v. Care, 40 C.M.R. 247 (C.M.A. 1969). *Care*, the landmark decision requiring an extensive providence inquiry, was still thirteen years away when *Glover* was decided. It is not at all clear that providence inquiry admissions, or their equivalent, were deemed admissible on the merits of the greater charge.

198. *Grijalva*, 53 M.J. at 503.

199. *Id.*

200. "[T]he elements of a lesser offense established by an accused's plea of guilty but not the accused's admissions made in support of that plea can be used as proof to establish the common *elements* of a greater offense to which an accused has pleaded not guilty." United States v. Ramelb, 44 M.J. 625, 627 (Army Ct. Crim. App. 1996) (emphasis in original).

201. The *Military Judge's Benchbook* prescription for the taking of a guilty plea presumes, at least tacitly, that the accused's privilege against self-incrimination is waived only with respect to the offense to which he is pleading guilty. *See* BENCHBOOK, *supra* note 186, at 14-15 (stating that the accused is to be advised that the plea of guilty means that he waives the right to say nothing at all, that anything he says during the providency may be used against him "in the *sentencing* portion of the trial," and that his "*plea* of guilty to a lesser included offense may also be used to establish certain *elements* of the charged offense, in the event the government decides to proceed on the charged offense . . . ." (emphasis added)).

Finally, in a tactical sense, *Grijalva* seems somewhat at odds with the CAAF's holding in *United States v. Langston*.[202] Recall that in that case, the CAAF applied MRE 615 to the providence inquiry and held that the military judge must, at the request of a party, sequester a merits witness during the accused's testimony. Thus, where the trial counsel seeks to call, as in *Ramelb*, a witness to testify about the accused's providency on the merits of the greater offense, the defense can object and the military judge has, generally, no choice but to exclude the witness. This raises the question that, if the prosecution can be barred from calling a witness to testify about the accused's providence inquiry admissions, should the military judge simply inform the panel of those admissions?

Thus, the *Grijalva* case left rather unanswered the question of the manner in which providence inquiry admissions are to be presented to the court, assuming they are admissible. The Air Force court implied the military judge could simply *instruct* the members concerning the accused's statements, raising the inference that the prosecution would not have to introduce the statements. This can only mean that it is the military judge's responsibility to determine which providence inquiry admissions are relevant on the contested charge, and then to instruct the members that they can take such statements as *proof* to be considered on the contested element of the charged offense. Not only does this ruling completely contradict *Ramelb*, as suggested previously, it is contrary to the extensive case law that permits introduction of providence inquiry statements during sentencing.[203] It can only be hoped that *Grijalva*, if affirmed, will be limited to its particular facts. In the meantime, however, defense counsel should be alert to government attempts to ~~introduce the accused's providence~~ inquiry on the merits, and be prepared to: (1) sequester government witnesses under *Langston*; (2) argue that the providence inquiry admissions are categorically inadmissible under *Ramelb*, (3) argue that, even if technically admissible, such providency admissions are, in a particular case, irrelevant to the plea under *Grijalva*, and (4) object to any reference in trial counsel's closing argument to the accused's providence inquiry admissions.

Ironically, the CAAF had an opportunity to resolve this issue in a case last year, *United States v. Nelson*.[204] There, the accused, charged with several offenses, sought to enter a plea of guilty to a charge of absence without leave. He intended to plead not guilty to the remaining offenses, and moved to preclude the use of his statements during the providence inquiry on the merits of the other offenses. The military judge denied the motion, the accused entered pleas of not guilty, and he was convicted of all charges. The Army Court of Criminal Appeals affirmed the findings and sentence without opinion. The CAAF ruled the accused had not preserved for appeal the issue of whether the military judge erred in ruling that the accused's providence inquiry admissions could be used against him on the merits of the other offenses. The CAAF then set aside the Army court's decision on unrelated grounds.

The CAAF has granted review of *Grijalva*, so they may shortly clarify this issue for all service courts and military judges.[205]

Having discussed pleas and providence inquiries, we move inevitably into the realm of PTAs. Each year brings new cases litigating the propriety of terms before the CAAF.[206] This year was no different.

We begin with the understanding that both the government and the defense may propose terms in PTAs, and that there is relatively little limitation on the terms that may be proposed.[207] An agreement to enter into a stipulation of fact has become an accepted part of our PTA practice (indeed, it is virtually presumed that there will be a stipulation of fact in support of each PTA). The stipulation is often used by the government as a vehicle to bring before the court evidence that might be otherwise inadmissible, assuming it can leverage the accused into agreeing.[208] Over the years, few limits have been placed on the type of evidence that can be recited in the stipulation. This past

202. 53 M.J. 335 (2000).

203. The holding of *Holt*, which permits the introduction of providence inquiry admissions on sentencing, requires that the admissions be relevant and be presented in an admissible form. United States v. Holt, 27 M.J. 57 (C.M.A. 1988); *see also* United States v. Irwin, 42 M.J. 479 (1995) (stating that the admissibility of the statement for sentencing purposes must satisfy the Military Rules of Evidence); United States v. Johnson, No. ACM 27954, 1990 CMR LEXIS 177 (A.F.C.M.R. 1990) ("An authenticated transcript of the providence inquiry could have been introduced by trial counsel as evidence in aggravation during the Government's sentencing case in chief.").

204. 51 M.J. 399 (1999).

205. *Grijalva*, No. 00-0558/AF, 2000 CAAF LEXIS 1303 (Nov. 16, 2000).

206. *See, e.g.*, United States v. Davis, 50 M.J. 426 (1999) (stating that the accused offered a PTA in which he agreed to plead not guilty and, in exchange for a sentence limitation, to enter into a confessional stipulation and to present no evidence; the CAAF found the provision violated the prohibition against accepting a confessional stipulation as part of a PTA promising not to raise any defense, but found that the accused's due process rights were not prejudiced); *see also* United States v. Bertelson, 3 M.J. 314 (C.M.A. 1977)

207. *See* MCM, *supra* note 9, R.C.M. 705(d)(1) (stating that either the government or the defense may propose any term or condition not prohibited by law or public policy).

208. *Cf.* United States v. Glazier, 26 M.J. 268 (C.M.A. 1988) (stating that parties may stipulate to admissibility of otherwise inadmissible evidence).

term, however, the CAAF showed that this license is not unlimited.

The accused in *United States v. Clark*[209] filed a false claim for the loss of some stereo speakers during his household goods move. The accused did not attribute the theft to the movers, however, believing that the speakers had been stolen before his household goods were packed by the movers. Suspicions were aroused, and investigators were contacted. The investigators spoke to the accused who agreed to take a polygraph to support the truthfulness of his claim. The polygraph result indicated deception and, when confronted by this news, the accused confessed to filing a false claim and lying to the investigator. Shortly thereafter, he entered into a PTA. The agreement had as one of its terms that the accused would enter into "reasonable stipulations concerning the facts and circumstances of the case."[210] At trial, after entering his pleas and discussing his offenses with the military judge, the military judge reviewed the accused's stipulation. The stipulation showed that the accused had agreed to take a polygraph and that the test results indicated deception. The military judge admitted the stipulation into evidence.

In reviewing the portion of the stipulation that mentioned the polygraph, the CAAF noted that inadmissible evidence may be admitted at trial through a stipulation, provided there is no overreaching by the government in obtaining the PTA, and provided the military judge finds no reason to reject the stipulation "in the interest of justice."[211] The CAAF then pointed out that MRE 707[212] prohibits the use of polygraph evidence at trial. The analysis to the rule prohibits polygraph evidence based on a concern that such evidence is unreliable. Thus, the rule adopts a bright-line rule that polygraph evidence "is not admissible by any party to a court-martial even if stipulated to by the parties."[213] The CAAF noted further that the Supreme Court recently upheld this per se prohibition in *United States v. Scheffer.*[214]

The CAAF found the military judge had erred in admitting the stipulation of fact with its reference to the polygraph examination, holding that the military judge's error was "plain and obvious."[215] However, the CAAF found the accused suffered no prejudice. In reaching this conclusion, the CAAF focused on the fact that the providence inquiry was substantially complete before the military judge admitted the stipulation. In fact, it appeared the military judge maintained a healthy skepticism toward the stipulation, for when the trial counsel initially offered the exhibit, the military judge stated "I like to look at that only after I've completed the inquiry, so I don't get confused by the lawyers' version of events."[216] Thus, it did not appear that the military judge had relied on the offending language in finding the accused's plea provident.

In addition, the CAAF was guided by the Supreme Court's concern in *Scheffer* with the "widespread uncertainty" about polygraphs, as well as the Supreme Court's declaration that the accused has no constitutional right to present polygraph evidence.[217]

Returning to the PTA, the CAAF held that the document did not specifically require the stipulation to include a reference to the polygraph. Even if the terms of the agreement called for such a stipulation, however, the appropriate remedy would be for the military judge to hold the impermissible term unenforceable and to strike the reference to the polygraph in the stipulation.

While the result of the case seems relatively straightforward, it is clear that the members of the court are divided on the extent to which MRE 707 poses a complete ban on polygraph evidence, and the concurring opinions suggest this is an area that remains ripe for litigation. Chief Judge Crawford wrote that she would have permitted the accused to waive the admissibility bar presented by MRE 707, and noted that polygraph evidence may be admissible under a number of different theories.[218]

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209. 53 M.J. 280 (2000).

210. *Id.* at 281.

211. *Id.* at 282 (quoting United States v. Glazier 26 M.J. 268, 270 (C.M.A. 1988)).

212. MRE 707(a) states:

> Notwithstanding any other provision of the law, the results of a polygraph examination, the opinion of a polygraph examiner, or any reference to an offer to take, failure to take, or taking of a polygraph examination, shall not be admitted into evidence.

MCM, *supra* note 9, MIL. R. EVID. 707 (a).

213. *Clark*, 53 M.J. at 282.

214. 523 U.S. 303 (1998).

215. *Clark*, 53 M.J. at 282.

216. *Id.*

217. *Id.* at 282-83.

Senior Judge Everett, also concurring, cautioned against the sweeping reading which the lead opinion gave to MRE 707, stating that the absolute bar is not supported by the plain language of the rule. Moreover, Judge Everett questioned whether the ban even applied to sentencing, and suggested the President did not intend to exclude all references to polygraphs, particularly where the taking of a polygraph would be relevant to determining whether a suspect's subsequent statements to investigators was voluntary.[219] Perhaps anticipating *United States v. Clark*, Justice Stevens noted in his dissent in *Scheffer* that "Indeed, even if the parties stipulate in advance that the results of a lie detector test may be admitted, the Rule requires exclusion."[220] Only time will tell whether the CAAF's finding of error in *Clark* will come back to haunt it.

Unintended Consequences

The past two years have seen a mild revolution in the area of post-trial relief to accused whose PTAs are trumped by Department of Defense (DOD) or service regulations that nullify particular provisions of PTAs. Generally, a misunderstanding concerning the impact of a service regulation on a PTA's terms will not result in relief for the accused unless the understanding relates to a material term of the agreement.[221] Where the misunderstanding is collateral, or where collateral consequences of a court-martial conviction are relied upon as the basis for contesting the providence of guilty pleas, the accused is entitled to succeed only when the collateral consequences are major, and the accused's misunderstanding: (1) results forseeably and almost inexorably from the language of the pretrial agreement; (2) is induced by the trial judge's comments during the providence inquiry; or (3) is made readily apparent to the judge, who nonetheless fails to correct the misunderstanding.[222]

With these rules as the backdrop, the CAAF has shone the beam of its concern most recently on DOD and service regulations that cut off the accused's entitlement to pay after trial, thus nullifying terms of pretrial agreements that purport to grant the accused some relief on forfeiture of pay and allowances.[223] Prior to 1999, the CAAF treated similar issues as collateral to the pretrial agreement.[224] The CAAF has signaled a sea-change in its decisions in this area, starting with *United States v. Mitchell*.[225]

In *Mitchell*, the CAAF was concerned with the impact of DOD and Air Force regulations on the convening authority's promise that the accused would get some relief on forfeiture of pay and allowances so that he could continue to support his

218. *Id.* at 283-84 (Crawford, J., concurring).

219. *Id.* at 284-85 (Everett, J., concurring).

220. 523 U.S. at 321.

221. United States v. Olson, 25 M.J. 79 (C.M.A. 1987).

222. United States v. Bedania, 12 M.J. 373, 376 (C.M.A. 1982).

223. In the author's experience, such terms are *de riguer* in trial practice. Many accuseds who have family members to support often include a provision in their pretrial agreements by which the convening authority promises to reduce the forfeiture of pay and allowances to the extent permitted by law (or some lesser amount) so that the accused can ensure that some money goes to his family.

The catalyst for this practice must surely be the recent congressional amendments to the UCMJ that mandated automatic forfeiture of pay for more severe sentences in the military. In April 1996, congressional amendments to the UCMJ became effective. As the Air Force Court of Criminal Appeals has explained:

> Article 57, UCMJ, was amended to change the effective date for forfeitures and grade reduction to the earlier of 14 days after sentence is adjudged or the convening authority's action. Under the previous version of Article 57, forfeitures did not commence until the convening authority took action on the sentence. Congress also added a new section to the UCMJ, codified as Article 58b, which states, in pertinent part, that one sentenced to confinement for more than six months, or to any period of confinement and a punitive discharge, shall forfeit all pay and allowances in the case of a general court-martial during the period of confinement.

United States v. Hester, No. ACM 32364, 1997 CCA LEXIS 163 (A.F. Ct. Crim. App. 1997).

Congress allowed the convening authority to defer automatic forfeitures until action, and, at action, waive the forfeitures for six months on condition that the funds are paid to the service members' dependents. UCMJ art. 58b(b) (2000).

It is, perhaps, because of the advent of these somewhat draconian conditions, and the concomitant confusion they have inspired, that the CAAF has entered the lists on behalf of accused who seek to have the convening authority blunt the harshness of the impact of these measures on our service members' families.

224. *See, e.g.*, United States v. Albert, 30 M.J. 331 (1990). In *Albert*, the accused entered into a pretrial agreement which included a provision for suspension of forfeitures for one year. His enlistment had expired previously, however, and he was involuntarily extended for trial. After trial, he was confined, and his entitlement to receive pay terminated. The forfeiture suspension provision was of no practical benefit because he could no longer receive pay and allowances. The CMA, relying on *United States v. Bedania*, 12 M.J. 373 (C.M.A. 1982), affirmed that the accused's entitlement to pay was beyond the purview of the court-martial. The court was also satisfied that the accused had been more interested in limiting confinement than in suspending forfeitures. *Albert*, 30 M.J. at 331.

225. 50 M.J. 79 (1999).

family after trial. There was no provision pertaining to confinement. The adjudged sentence included confinement, however. Under Air Force regulations, the accused's requested extension of his enlistment could not be granted. Thus, the accused went into a no-pay status. The CAAF, concerned that the DOD regulations and the Air Force regulations had effectively deprived the accused of the benefit of his bargain, remanded the case to the Air Force court with the guidance that, if the accused had not received the benefit of his bargain, the plea would be treated as improvident, and the findings set aside.[226]

After *Mitchell*, the writing was on the wall, so to speak, for the government and the service courts, and this was clearly demonstrated in two cases following closely on the heels of *Mitchell* during this term.

United States Williams[227] and *United States v. Hardcastle*[228] both involved service members whose expiration of term of service nullified the forfeiture provisions of their PTAs. Both cases also involved government concessions that resulted in the cases being set aside. In *Williams*, the accused pleaded guilty to two specifications of writing bad checks (twenty-nine checks over $20,000). He entered into a PTA that would limit his punishment to a bad conduct discharge, twelve months' confinement, and total forfeitures. The agreement also sought to provide support to the accused's family. In return for the plea of guilty, the convening authority agreed to suspend a portion of adjudged forfeitures and to waive automatic forfeitures. At trial, the military judge recited the terms of the PTA on the record to ensure the accused understood them.

Unfortunately, the accused had been placed on legal hold owing to the expiration of his term of service two weeks prior to trial.[229] Neither his defense counsel nor the government was aware of a DOD regulation that required service members on legal hold, who are later convicted of an offense and confined, to forfeit their right to pay and allowances after conviction. The accused went into confinement after trial and then learned that his pay and allowances were terminated. On appeal, he argued that the only reason he entered into the PTA was to waive forfeitures and provide for his dependents.[230]

The government conceded that the accused did not receive the benefit of his bargain and, therefore, his pleas were improvident. The government based its concession on a methodology stemming from *United States v. Bedania*[231] and *United States v. Olson*,[232] noting that the waiver of forfeitures provision was material because it was interjected into the terms of the PTA, and that, therefore, the misunderstanding of that material term (that is, that it was a nullity) permitted the accused to cancel the agreement. The government further conceded that, even if the nullity of the forfeiture provision was a collateral issue, the accused would still be able to rescind the agreement. Collateral consequences may result in rescinding the agreement where they are major and the accused's misunderstanding of the consequences is induced by the military judge.[233]

226. The Air Force court subsequently determined that the accused had been allowed to retire and, therefore, granting the accused relief would be inappropriate. United States v. Mitchell, No. ACM 31421, 2000 CCA LEXIS 150 (A.F. Ct. Crim. App., May 26, 2000).

227. 53 M.J. 293 (2000).

228. 53 M.J. 299 (2000).

229. "Legal Hold" is one way of describing a procedure by which an accused is involuntarily extended on active duty to complete the processing of court-martial proceedings against him. *See, e.g.*, U.S. DEP'T OF ARMY, REG. 635-200, PERSONNEL SEPARATIONS: ENLISTED PERSONNEL, para. 1-22(a) (1 Nov. 2000) (stating that a soldier may be retained after his term of service has expired when an investigation of his conduct has been started with a view to trial by court-martial, charges have been preferred, or the soldier has been apprehended, arrested, confined, or otherwise restricted by the appropriate military authority).

230. *Williams*, 53 M.J. at 295. The accused's defense counsel took issue with this claim, stating that the accused and his family were most concerned with limiting confinement.

231. 12 M.J. 373, 376 (C.M.A. 1982). In *Bedania*, the court set out a test for assessing whether a misunderstanding of some provision of the agreement—or a failure to perceive collateral consequences might cause a misunderstanding about a provision of the agreement—would warrant relief for an accused:

> When collateral consequences of a court-martial conviction—such as administrative discharge . . . are relied upon as the basis for contesting the providence of a guilty plea, the appellant is entitled to succeed only when the collateral consequences are major and the appellant's misunderstanding of the consequences (a) results forseeably and almost inexorably from the language of the pretrial agreement; (b) isinduced by the trial judge's comments during the providence inquiry; or (c) is made readily apparent to the judge, who nonetheless fails to correct that misunderstanding. In short, chief reliance must be placed on defense counsel to inform an accused about the consequences of a court-martial conviction and to ascertain his willingness to accept those consequences.

Id. at 376.

232. 25 M.J. 293 (1987). In *Olson*, the accused's plea was based on a pretrial agreement where he promised to make restitution. At trial, the government stated the accused had made restitution, yet the finance office later recouped a similar amount from the accused's pay. The accused argued on appeal that he had not received the benefit of his bargain. The government argued that the finance action was collateral, and the court agreed that unforeseen collateral consequences do not justify cancellation of the pretrial agreement. Nevertheless, the court held that restitution was a material term of the pretrial agreement. The term was material because it was interjected into the terms of pretrial agreement. The accused's misunderstanding of this material term gave him the right to rescind the agreement.

233. *Williams*, 53 M.J. at 296 (quoting Bedania, 12 M.J. 373, 376 (C.M.A. 1982)).

In *Hardcastle*, the accused entered into a PTA in which the convening authority agreed to suspend adjudged forfeitures in excess of $400, and to waive all forfeitures in excess of $400 for six months. The adjudged sentence included a bad conduct discharge, total forfeiture of pay and allowances, and confinement for thirty months. After trial, while confined, the accused's term of service expired, placing him in a no-pay status. On appeal, the government conceded, and the CAAF accepted the concession, that the accused had not received the benefit of his bargain, that his pleas were improvident, and the case should be set aside. The government conceded that, under *Olson*, the term was material because it was interjected into the terms of the PTA. The accused's misunderstanding of this material term meant that he had a right to rescind the agreement. The government further acknowledged that, even if the issue of pay entitlement was collateral, the accused was entitled to relief, because (1) "the collateral consequences are major," and (2) the "appellant's misunderstanding of the consequences" was "induced by the trial judge's comments during the providence inquiry."[234]

As noted, these cases involved concessions by the government that resulted in the decisions being set aside. Nevertheless, the government's apparent willingness to make these concessions, and the CAAF's willingness to accept these concessions, serve as a reminder to all counsel that what were hitherto considered collateral consequences are no longer to be treated as such. Counsel for both sides are reminded that the simplest way to protect the accused and the record in such cases is to review the charge sheet, and be ever mindful of the fact that an accused approaching the end of his enlistment should think twice about the efficacy of a PTA provision that limits forfeitures.[235]

Conclusion

Any effort to divine a unifying theme from the preceding cases is likely to be a botched job at best, so perhaps the most worthwhile thing to do is try to review the dominant themes that have been discussed here. The CAAF, arguably, pursued substance over form in the technical world of voir dire and pleas and pretrial agreements,[236] clarified that MRE 615 applies to providence inquiries, and continued to show a strong interest in ensuring that accused service members get the benefit of the bargain of their pretrial agreement. The CAAF also reaffirmed the necessity that the accused show prejudice (and, implicitly, the difficulty of meeting that standard) in order to challenge allegedly illegal pretrial actions by the government. Meanwhile, the CAAF appeared to retrench on the military's application of *Batson v. Kentucky*, which may be part of a broader trend of deference toward military judges and convening authorities. Perhaps most significantly, though, the CAAF tacitly renounced its requirement that the defense show command influence in order to sustain a challenge to panel selection procedures under Article 25, UCMJ.

Only time will tell whether these cases will prove to be part of a continuing trend. Their immediate import is to remind all judge advocates of the necessity to review the new case law and understand the occasionally subtle distinctions within the *Manual for Courts-Martial*. Without such an understanding, counsel for either side risk being placed in the mode of the gladiator who is disarmed the moment the challenger enters the pit. Thus, counsel could hardly heed better cautionary advice than that of the poet with whom we began this article:

Beware the Jabberwock, my son!
The jaws that bite, the claws that catch!
Beware the Jubjub bird, and shun
The frumious Bandersnatch![237]

234. *Id.* at 295.

235. *Id.* at 296 n.* (stating the CAAF noted the charge sheet showed the accused enlisted for six years in February 1991; the date of trial was February 1997).

236. The CAAF did, however, affirm a complete ban on polygraph evidence underM.R.E. 707.

237. LEWIS CARROLL, JABBERWOCKY, *at* http://www76.pair.com/keithlim/jabberwocky/poem/jabberwocky.html (last visited 18 Feb. 2001).

New Developments in Evidence 2000

Major Victor M. Hansen
Professor, Criminal Law Department
The Judge Advocate General's School, United States Army
Charlottesville, Virginia

Introduction

This past year's cases addressing the rules of evidence once again illustrate the dynamic nature of evidence law. The breadth and scope of issues covered by the rules of evidence truly is daunting. Appellate courts examining evidentiary issues with the benefit of 20/20 hindsight often see issues that practitioners in the heat of battle overlook. Reading these appellate court opinions can be both enlightening and frustrating from the viewpoint of the trial practitioner. Enlightening because the appellate courts may discuss the rules and provide explanation on a level that trial practitioners have never considered. Frustrating because it may seem impossible to reach that level of sophistication in the context of a trial.

Nonetheless, practitioners are not absolved of the responsibility of knowing and correctly applying the rules of evidence just because the task is challenging and sometimes overwhelming. This article is an attempt to distill some of the most important lessons and trends in evidence law over the past year to aid trial practitioners in their task. The focus is primarily on cases from the Court of Appeals for the Armed Forces (CAAF). The article also discusses significant federal circuit cases, one Supreme Court case, and a few service court cases.

Differing Standards of Logical and Legal Relevance

Over the past two terms, the CAAF has scrutinized urinalysis cases very closely. Last term, the CAAF surprised many practitioners with their opinions in *United States v. Graham*[1] and *United States v. Campbell*.[2] In both cases, the CAAF arguably departed from previous case law in reversing two urinalysis convictions.[3] The court continued the trend this year in *United States v. Matthews*[4] by applying a standard for logical and legal relevance that is stricter for urinalysis cases than in other contexts.

Military Rule of Evidence (MRE) 401 defines logical relevance as evidence that has any tendency to make the existence of any fact of consequence more or less probable than it would be without the evidence.[5] Practitioners have long recognized that this is a low standard.[6] Military Rule of Evidence 403 sets out the requirements for legal relevance, stating that even relevant evidence can be excluded if the probative value is substantially outweighed by the risk of unfair prejudice, confusion, delay or cumulativeness.[7] To understand how the CAAF is applying a stricter standard for logical and legal relevance in urinalysis cases than in other areas, it is helpful to look first at how the court applies these concepts in other cases. *United States v. Burns*,[8] a case decided this year, provides a good example.

Typical Application of Logical and Legal Relevance

In *Burns*, an officer and enlisted panel convicted the accused of conspiracy to commit rape and indecent acts.[9] On the night of the crime, the accused held a party at his apartment and a number of airmen attended. All of the partygoers, including the accused and the victim, were drinking heavily. Late into the night everyone left except for the victim, the accused, and two other male airmen. The victim eventually fell asleep.[10] She later awoke and found herself naked in the bedroom with one of

1. 50 M.J. 56 (1999).

2. 50 M.J. 154 (1999), *supplemented in reconsideration at* 52 M.J. 386 (2000).

3. Major Walter M. Hudson & Major Patricia A. Ham, *United States v. Campbell: A Major Change for Urinalysis Prosecutions?* , ARMY LAW., May 2000, at 38.

4. 53 M.J. 465 (2000).

5. Military Rule of Evidence 401 provides that: "Relevant evidence means evidence having any tendency to make the existence of any fact of consequence to the determination of the action more or less probable than it would be without the evidence." MANUAL FOR COURTS-MARTIAL, UNITED STATES, MIL. R. EVID. 401 (2000) [hereinafter MCM].

6. STEPHEN A. SALTZBURG ET AL., MILITARY RULES OF EVIDENCE MANUAL 473 (4th ed. 1997).

7. MCM, *supra* note 5, MIL. R. EVID. 403.

8. 53 M.J. 42 (2000).

9. *Id.* at 42.

the male airman having sex with her. She heard other voices in the room and started to struggle. Then someone held her wrists while the airman continued to have sex with her. Once she was released, she ran out of the apartment and a passing motorist picked her up and took her back to base. [11] The accused later admitted to removing the victim's clothes and molesting her but said any sexual intercourse between her and the other airmen was consensual.[12]

The next day the police searched the accused's apartment and found an unopened condom at the head of the accused's bed on the floor. The government introduced a photo of the condom at trial claiming that this sexual paraphernalia was relevant to show the existence of a conspiracy to commit rape. The defense objected on relevancy grounds because there was no link between the condom and the alleged crimes.[13] The military judge admitted the evidence over the defense objection.[14]

The CAAF ruled that under MRE 401, this evidence was relevant to corroborate the victim's statement that the rape occurred in the bedroom and as evidence of the conspiracy.[15] The CAAF also said that since the charge was conspiracy, as long as the condom was linked to one of the co-conspirators that was sufficient to make it relevant against the accused.[16]

Guidance

There is nothing particularly new or earth shattering about the holding in *Burns*. It is simply a good reminder of the low standard for logical relevance under MRE 401. The language in the rule, "any tendency," means just what it says. In this case, the nexus between the crime and an unopened condom found in a bedroom is very slight at best. Yet, given the low standard of MRE 401 and the relatively innocuous nature of the evidence, it satisfies the basic criteria. It is also interesting to note that the evidence was deemed to be admissible to show the location of the crime, even though it does not appear from the record that the government offered it for that purpose at trial. This case is interesting when compared with *United States v. Matthews*,[17] because it illustrates how the CAAF applies logical and legal relevance in a much stricter fashion in urinalysis cases.

A Stricter Application of Relevance

Staff Sergeant Matthews, an Air Force Office of Special Investigations (OSI) agent, was randomly selected to provide a urine sample on 29 April 1996.[18] That sample tested positive for delta-9-Tetrahydracannibanol (THC). Twenty-three days after she submitted the first sample, the accused was tested again as part of a command directed urinalysis. She tested positive for THC on the second sample as well.[19] The accused was only charged with the first use. At trial, the accused put on a good soldier defense. The accused testified in her defense. On direct examination, she testified that she had not used marijuana between the 1st and 29th of April. She also testified that she had no idea how the sample could have tested positive for THC.[20]

After the accused testified on direct examination, the military judge allowed the government to introduce evidence of the second positive urinalysis which took place on 21 May. The government introduced expert testimony that this second positive urinalysis was from a separate use.[21] The judge admitted this evidence as rebuttal evidence under MRE 404(b) to show knowing use by the accused.[22] The judge specifically held that the probative value of this evidence was not outweighed by the risk of unfair prejudice, citing MRE 403.[23]

The judge did place some limitations on this evidence. He ruled that the government could not use this evidence to impeach the accused's character for truthfulness under MRE 608(b).[24] In spite of this ruling, however, the military judge

10. *Id.* at 43.

11. *Id.*

12. *Id.*

13. *Id.*

14. *Id.*

15. *Id.* at 44.

16. *Id.*

17. 53 M.J. 465 (2000).

18. *Id.* at 467.

19. *Id.*

20. *Id.*

21. *Id.* at 468.

held that the accused's testimony that she did not use marijuana at any time between 1and 29 April opened the door to impeachment with evidence of the second positive urinalysis.[25] He also instructed the members that they could consider this evidence of a second positive urinalysis to assess the credibility of the accused's testimony.[26]

At trial and on appeal, the defense contended that this was not proper rebuttal evidence because the accused had done nothing more than deny the elements of the offense. The Air Force court disagreed.[27] That court said that the accused asserted an innocent ingestion defense by testifying that she had no qualms about the collection and testing procedure and that she had no idea of how the THC got into her system.[28] Moreover, the court noted that by putting on a good solder defense, she opened the door under 404(a)(1)[29] to allow the government to cross examine witnesses with evidence of bad character.[30] The court analogized this case to *United States v. Trimper*[31] and held that a date specific denial coupled with a good soldier defense is analogous to a sweeping denial that allows the government to impeach with contradictory facts both to attack the accused's credibility and rebut evidence of good military character.[32]

The CAAF disagreed. First the court noted that while the accused opened the door to rebuttal evidence of her good military character by testifying that she was a good soldier, MRE 405(a)[33] limits that evidence to cross-examination about specific acts.[34] The rule does not allow introduction of extrinsic evidence, as was done here where the government introduced

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22. Military Rule of Evidence 404(b) provides in part:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan knowledge, identity, or absence of mistake or accident[.]

MCM, *supra* note 5, MIL R. EVID. 404(b).

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

24. Military Rule of Evidence 608(a) states:

> The credibility of a witness may be attacked or supported by evidence in the form of opinion or reputation, but subject to these limitations: (1) the evidence may refer only to character for truthfulness or untruthfulness, and (2) evidence of truthful character is admissible only after the character of the witness for untruthfulness has been attacked by opinion or reputation evidence or otherwise.

MCM, *supra* note 5, MIL. R. EVID. 608(a).

25. *Matthews*, 53 M.J. at 469.

26. *Id.*

27. United States v. Matthews, 50 M.J. 584 (A.F. Ct. Crim. App 1999).

28. *Id.* at 588.

29. MRE 404 (a) provides in part:

> Evidence of a person's character or a trait of a person's character is not admissible for the purpose of proving that the person acted in conformity therewith on a particular occasion, except: (1) Evidence of a pertinent trait of the character of the accused offered by an accused, or by the prosecution to rebut the same.

MCM, *supra* note 5, MIL R. EVID. 404(a)(1).

30. *Matthews*, 50 M.J. at 588.

31. 28 M.J. 460 (C.M.A. 1989). In *Trimper*, the accused, an Air Force judge advocate, was charged with several specifications of wrongful use of marijuana and cocaine in violation of Article 112(a), UCMJ. In his defense the accused testified that he had never used drugs. To rebut that claim, the government was allowed to introduce the test results of a urine sample submitted by the accused to a civilian hospital. The testing occurred outside of the charged incidents and it revealed that the accused's urine tested positive for cocaine. The then Court of Military Appeals held that the accused by his own testimony and sweeping denials opened the way for the prosecution to use the test results, even though the results would have otherwise been inadmissible. *Id.* at 461.

32. *Matthews*, 50 M.J. at 588-589.

33. Military Rule of Evidence 405(a) provides: "In all cases in which evidence of character or a trait of character of a person is admissible, proof may be made by testimony as to reputation or by testimony in the form of an opinion. On cross-examination, inquiry is allowable into relevant specific instances of conduct." MCM, *supra* note 5, MIL. R. EVID. 405(a).

34. United States v. Matthews, 53 M.J. 465, 470 (2000).

the actual test results. The court also said that the cross-examination should be limited to acts committed prior to the charged offense.[35] Here the act occurred twenty-three days after the charged offense. This portion of the opinion is arguably dicta because, as the CAAF noted, the military judge did not instruct the members on this theory of admissibility.[36] The comment does, however, raise some concerns discussed below.

The CAAF also disagreed with the military judge and the Air Force court that the extrinsic evidence of the second urinalysis was admissible to impeach the accused's credibility with contradictory facts.[37] First, the trial judge did not adequately instruct the members on how they may properly consider this evidence as impeachment.[38] More importantly, the evidence did not impeach the accused's very carefully limited testimony that she did not knowingly use drugs between 1 and 29 April, because the evidence did not contradict that point.[39]

Finally, consistent with their opinion last year in *Graham*, the CAAF said that this evidence does not prove knowing use on the date charged. Here the majority rejected Judge Crawford's argument that this evidence was admissible to prove guilty knowledge under the doctrine of chances.[40] Judge Crawford argued in dissent that it was unlikely that the accused would repeatedly be innocently involved in drug use, and thus the second urinalysis was admissible to show her guilty knowledge.[41] The majority rejected that argument, reasoning that there was no factual predicate about how the accused ingested the marijuana on either occasion. Such a factual predicate, the majority said, is required in order to make this theory of admissibility relevant.[42] The CAAF held that evidence of an unlawful substance in an accused's urine at a time before the charged offense may not be used to prove knowledge on the date charged. Further, evidence of an unlawful substance in the accused's urine after the date of the charged offense and not connected to the charged offense may not be used to prove knowing use on the date of the charged offense.[43]

Guidance

The standard for logical relevance is any tendency. The CAAF showed in *Burns* how low that standard can be. Yet in *Matthews*, when the case involves an uncharged urinalysis, the requirements seem more stringent and the court is scrutinizing the evidence much more closely. A couple of points warrant further comment. First, at the trial level, it does not appear that the government argued that evidence of the second positive urinalysis could be used in cross-examining the accused and other character witnesses under MRE 404(a)(1) and MRE 405(a), to rebut her good military character claim. Had this theory been argued at trial, the majority's statement that cross-examination should be limited to acts that occurred prior to the charged offense would have even more significance. The court did not rely on any legal authority for their proposition other than the opinion of the authors of the *Military Rules of Evidence Manual*.[44] The authors of that treatise do not cite to any legal authority for that opinion. Nothing in the language of the rule or the drafter's analysis places any time restriction on the use of evidence in cross-examination. In fact, there are similar federal district court cases where post offense misconduct is used.[45]

The rationale for excluding post offense misconduct when cross-examining a character witness under MRE 405(a) seems to be that the court is only concerned with the accused's character at the time of the offense, and only prior misconduct would be relevant to the accused's character on that date. This rationale does not make sense. As the Air Force court noted, to accept that proposition would require a court to hold that an accused can state that "my good military character should create a reasonable doubt in your mind that I knowingly used mar-

35. *Id.*

36. *Id.*

37. *Id.* at 471.

38. *Id.* The CAAF noted that the military judge instructed the members that the second positive urinalysis could be considered in their assessment of appellant's credibility without giving any further guidance. This instruction was also contradictory to his earlier ruling that MRE 608 was not a proper basis for the admission of the second urinalysis. *Id*.

39. *Id.*

40. *Id.* at 470.

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

42. *Id.* at 470-471.

43. *Id.* at 470.

44. *Id.* (citing SALTZBURG, *supra* note 6, at 572).

45. *See, e.g.*, Crowder v. United States, 141 F.3d 1202 (D.C. Cir. 1998). In *Crowder*, the government used post-offense misconduct under Federal Rule of Evidence (FRE) 404(b) to prove the accused's identity at the time of the offense.

ijuana between the 1st and the 29th of April, but all bets are off after that date."[46] Certainly, misconduct within a few days of the charged offense may be logically relevant as to the accused's character on the date of the offense. A leopard cannot change its spots that quickly. Instead of a blanket prohibition, a better approach is to look at each case on its facts and for the military judge to consider the timing of the misconduct as one factor to weigh in the logical and legal relevance analysis.

The second point of note in *Matthews* is that the majority views the doctrine of chances theory of admissibility very narrowly. According to the majority, unless there is some evidence of how the accused ingested the substance into her system on each occasion, a second positive urinalysis for the same drug would never be relevant to show her knowledge. In a paper urinalysis case there will rarely be a sufficient factual predicate of the various ingestions. The factual predicate that the court should focus on is not the circumstances surrounding the ingestions, but the fact that the accused tests positive for the same drug more than once over a short time period and asserts an innocent ingestion defense. The fact that the accused tests positive in another instance logically rebuts the claim that the charged use was unknowing, since the chances of two visits by the dope fairy[47] are rare.

In spite of these criticisms, practitioners must appreciate the trend of a majority of the CAAF judges. Reading *Matthews* together with the CAAF's opinions in *Campbell* and *Graham* from last term, the inescapable conclusion is that a majority of the CAAF is scrutinizing urinalysis cases very closely. The government is more restricted than in the past on the methods they can use in order to obtain a conviction. Attempts to prove the accused's knowledge with evidence of prior or post offense use will probably fail.

Character Evidence

The next series of cases involve various aspects of character evidence, primarily of the accused. Some interesting points here are that the appellate courts do not like profile evidence of the accused or any other witnesses, and the rules apply equally to both parties. There are also a few examples where very old uncharged misconduct is admitted under MRE 404(b) but recent post offense misconduct may not be admissible under MRE 413.

What's Good for the Goose . . .

The Air Force court reminded defense counsel that the character rules apply equally to them as they do to the government. In *United States v. Dimberio*,[48] an officer and enlisted panel convicted the accused of aggravated assault against his child.[49] On the evening and early morning hours of 2-3 February 1997, the accused was alone with his son upstairs for several hours. In the morning, the baby's mother was awakened by the baby's cry and she ran upstairs to see the accused putting the baby in the crib. The child had dried blood around his nose and mouth and his nose was red.[50] The wife took the child to the hospital that morning and further examination revealed that the baby had been severely injured and the injuries were consistent with being shaken in the hours immediately before the examination.[51] The accused made some partial admissions about handling the baby in a rough manner and then invoked his rights. At trial, the defense theory was that the wife had equal access to the child and she could have been the source of the injury.[52]

In support of this theory, the defense first introduced testimony from an expert in child abuse who testified that shaken baby syndrome is a quick, unthinking act that can be triggered by anger, frustration, or stress.[53] The defense next wanted to call a psychiatrist regarding the mental health diagnosis of the accused's wife. The defense expert, Dr. Sharbo, reviewed the wife's medical records and interviewed her. He diagnosed her with a non-specific personality disorder with narcissistic, histrionic, and borderline traits. The expert also opined that she could not be expected to handle stressful situations well. The military judge excluded the evidence as irrelevant because there was no link to the mother's impulsive behavior and violence.[54]

The Air Force court affirmed the conviction. The court said that what the defense was really trying to do was to introduce

46. United States v. Matthews, 50 M.J. 584, 589 (A.F. Ct. Crim. App 1999).

47. The term dope fairy comes from the Air Force court's opinion in *United States v. Graham*, 46 M.J. 583, 586 (A.F. Ct. Crim. App. 1997).

48. 52 M.J. 550 (A.F. Ct. Crim. App. 1999).

49. *Id.* at 552.

50. *Id.* at 553.

51. *Id.*

52. *Id.* at 554.

53. *Id.* at 555.

54. *Id.* at 556.

profile evidence of the wife and show that she was predisposed to act in a certain manner. This is something that the character rules do not allow.[55] The court rejected the defense argument that this evidence was admissible under MRE 404(b), "other crimes, wrongs, or acts," to show the wife's mental state. First, the court said that even if the accused's wife had this mental condition, such a character trait does not equate to evidence of a guilty state of mind, which is the type of mental state contemplated by MRE 404(b).[56] The Air Force court, like the military judge, also questioned the logical and legal relevance of this evidence because there was no evidence that the wife acted violently when stressed or that people with histrionic personalities are more or less likely to shake a baby than anyone else.[57]

As another indication that the defense was attempting to introduce profile evidence, the Air Force court noted that MRE 404(b) refers to evidence of other crimes, wrongs, or acts. In this case, however, the defense was not offering acts, but a mental diagnosis; in other words, character evidence. The rules do not allow this. The only character trait that is admissible for a witness other than the accused or the victim is a witness's character for truthfulness or untruthfulness.[58] The court said that the wife's mental diagnosis was not probative of truthfulness or untruthfulness.[59] The court also rejected the defense argument that due process requires the court to relax the rules of evidence when evaluating evidence favorable to the defense. The court held that evidence proffered by the accused must meet the same standards for admissibility as those imposed on the prosecution.[60]

Guidance

This opinion explains the concepts of legal and logical relevance and their relationship to the character rules very clearly. An attempt to launch a character assault on a witness is not allowed. The opinion is a good reminder to practitioners that under MRE 404(a)(3) and MRE 608 the only character trait of a witness other than the accused or the victim that the law is concerned with is the witness's character for truthfulness or untruthfulness. The opinion also tells trial lawyers that the evidence must satisfy the basic requirements of relevance, even if it is expert testimony and even if the expert has the requisite qualifications. There are no special exceptions for expert witnesses or defense proffered evidence. The rules mean what they say and apply equally to both sides. There is no special exception that allows the military judge to apply a different and lower standard of relevance simply because the evidence is being offered by the defense. One final point from this opinion: Even though courts tend to interpret MRE 404(b) broadly to allow bad acts evidence for a non-character theory of relevance, the rule must be complied with. Military Rule of Evidence 404(b) is not an exception to the rules prohibiting propensity evidence. In order for evidence to come in under MRE 404(b), counsel must convincingly articulate a non-character theory of relevance.

How Old is Too Old?

The next two cases deal with MRE 404(b) evidence in the context of past sexual assaults. Both of these cases were litigated before MRE 413[61] and MRE 414[62] came into effect, which may change the outcome in future cases. Both cases involved very old incidents of past sexual assaults. In one case, the CAAF found the evidence inadmissible, in the other, the court said the evidence was properly admitted. These cases serve as a reminder that admissibility of MRE 404(b) evidence is very fact specific, and it is difficult to glean rules that will apply across the board.

The first case is *United States v. Baumann*.[63] The accused, Sergeant Baumann, was convicted in 1997 by an officer and enlisted panel of indecent acts and indecent liberties with a

55. MCM, *supra* note 5, MIL. R. EVID. 404.

56. *Dimberio*, 52 M.J. at 557-8.

57. *Id.*

58. Military Rule of Evidence 404 (a) provides in part: "Evidence of a person's character or a trait of a person's character is not admissible for the purpose of proving that the person acted in conformity therewith on a particular occasion, except: (3) Evidence of a character of a witness, as pr ovided in Mil. R. Evid. 607, 608, and 609." MCM, *supra* note 5, MIL. R. EVID. 404(a)(3).

59. *Dimberio*, 52 M.J. at 558.

60. *Id.* at 559.

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

62. Military Rule of Evidence 414 provides in part: "(a) In a court-martial in which the accused is charged with an offense of child molestation, evidence of the accused's commission of one or more offenses of child molestation is admissible and may be considered for its bearing on any matter to which it is relevant." MCM, *supra* note 5, MIL. R. EVID. 414(a).

63. 54 M.J. 100 (2000).

child.[64] The accused was charged with having his eleven-year-old daughter masturbate him and placing his hands on his daughter's breasts and between her legs. The government admitted a statement that the accused made to the military police. In the statement, the accused admitted, among other things, to masturbating in front of his daughter in order to teach her how boys masturbate.[65] The government also introduced the testimony of the victim and the accused's wife.

The defense theory was that the accused's wife coached the victim to embellish and lie about the deliberate touching because she wanted a divorce.[66] In response to questions from the military judge, the accused's wife testified that she initiated divorce proceedings in March 1997 after finding out about the alleged abuse that occurred in 1992 as well as other information she found out about the accused from his mother. She did not explain what this other information was.[67]

Later, one of the members submitted a question asking what Mrs. Baumnan had found out from the accused's mother. Over defense objection, Mrs. Bauman was allowed to testify that the accused's mother told her that the accused had sexually molested his younger sisters when he was thirteen, some twenty-five years earlier.[68] The military judge ruled that this evidence was admissible under MRE 404(b) to explain why the accused's wife ultimately decided to initiate divorce proceedings and to rebut the defense claim that Mrs. Bauman had coached her children to make accusations against the accused. The judge also ruled that this evidence was not unduly prejudicial under MRE 403.[69] The judge followed the wife's testimony with a limiting instruction.[70]

The CAAF held that it was harmless error for the military judge to admit this evidence.[71] First, on the hearsay issue, the CAAF said that because the evidence was offered to show what was said to the accused's wife that caused her to seek a divorce, it was offered for a non-hearsay purpose.[72] The court then did an MRE 404(b) analysis. The CAAF ruled that this evidence was being admitted for a proper non-character purpose, not to show that the accused had a propensity to commit this type of crime. The court said that this evidence was relevant under MRE 404(b) to show the wife's motive for seeking a divorce. The defense had argued that nothing in MRE 404(b) allows the actions of the accused to prove the motive of another person. According to the CAAF, even though MRE 404(b) does not specifically allow for this, the list of permissible uses of uncharged misconduct in the rule is not exclusive, and other non-character theories such as this are permissible.[73]

The evidence is still subject to an MRE 403 balancing and it is here that the court said that the trial judge erred. The CAAF said that the government already had ample evidence of the wife's motive for a divorce without this evidence. The need for this evidence was, therefore, relatively low. On the other hand, the potential for unfair prejudice and confusion was great and the military judge abused his discretion by admitting this evidence. In light of the other evidence of the accused's guilt, however, the court ruled that the error was harmless.[74]

Guidance

Baumann is a good case for understanding the workings of MRE 404(b) and serves as a reminder that the potential uses of MRE 404(b) evidence are not limited to the factors listed in the rule. Consistent with the federal courts, the CAAF has repeatedly held that this is a rule of inclusion. The key to satisfying 404(b) is that the party offering the evidence must articulate a valid non-character theory of relevance. This, however, does not end the analysis. Military Rule of Evidence 403 may still exclude otherwise relevant evidence because of unfair prejudice or other concerns. Here the court focused on the government's need for this evidence. Necessity is often an important factor when litigating admissibility of evidence under MRE 403. If the proponent has less inflammatory evidence that can prove the same issue, the MRE 403 scale may be tipped against admitting the evidence. Although this case was litigated before

64. *Id.* at 101.

65. *Id.*

66. *Id.* at 102.

67. *Id.*

68. *Id.* at 103.

69. *Id.* at 102.

70. *Id.* at 103.

71. *Id.* at 105.

72. *Id.*

73. *Id.* at 104.

74. *Id.* at 105.

the promulgation of MRE 414 the same MRE 403 analysis should apply.

The other interesting point to note is that the military judge and the CAAF did not comment on the fact that the uncharged misconduct occurred some twenty-five years earlier while the accused was still a juvenile. The CAAF avoided that issue by saying that the focus of their analysis is not on the underlying conduct, but rather on the wife's reaction to the information. The court, however, cannot ignore the potential prejudice that the uncharged misconduct itself could have on the members. Although the court did not address the issue directly, the age of the incident and the accused's status as a juvenile at the time may also have played a role in their MRE 403 analysis. As we see from this case and the case that follows, the fact that the uncharged misconduct occurred several years in the past is not in and of itself dispositive of the MRE 403 issue.

The second case, *United States v. Tanksley*,[75] involved uncharged misconduct that was nearly thirty years old. A panel convicted the accused, a Navy Captain of indecent liberties with his child and other offenses.[76] The accused first married in 1959. He and his wife had four daughters. The accused and his first wife divorced in 1980 amid allegations that the accused physically and sexually abused his daughters.[77] Captain Tanksley later remarried and had a daughter from this second marriage. In 1993, the accused, his new wife, and his now six-year-old daughter were visiting with one of his older daughters. During the visit, an older daughter noticed an incident where the accused and his six-year-old took a shower together and then the accused had his six-year-old dry him off.[78] This incident brought back memories of the abuse the elder daughter had suffered at the hands of the accused years before, so she reported the incident to law enforcement and social workers.[79] Captain Tanksley was subsequently charged with indecent liberties for this incident in the shower and one other incident in the bathtub.[80]

At trial, the victim did not testify. The government did introduce the testimony of the accused's oldest daughter, who testified that when she was a young child the accused sexually molested her in the bathtub. These incidents involved bathing her, digitally penetrating her, and fondling her. By the time she was nine or ten, the accused began raping her.[81] The military judge admitted this evidence under MRE 404(b) to show the accused's intent to molest his now six-year-old daughter. These thirty-year-old incidents showed the accused's lustful intent.[82] The defense objected to this evidence on MRE 404(b) grounds because the uncharged misconduct was too remote and dissimilar to the charged offenses. The defense also argued that the uncharged misconduct evidence diluted the presumption of innocence and should be precluded under MRE 403 because the evidence was unfairly prejudicial.[83] The military judge overruled these objections.

The CAAF affirmed the conviction, holding that the trial judge did not abuse his discretion by admitting this uncharged misconduct. The court noted that intent is an element of the offense and, consistent with previous case law, a pattern of lustful intent in one set of circumstances is relevant to show lustful intent in a different set of circumstances.[84] The court also noted that although the prior incident was thirty years old, the two incidents were very similar and evidenced an intent by the accused to sexually abuse his daughters when they reached a certain age. The court rejected the defense counsel's argument that the uncharged misconduct must be almost identical for it to be relevant and admissible.[85] The CAAF also agreed that the probative value of this evidence was not outweighed by unfair prejudice.[86]

Guidance

Although the CAAF in *Baumann* did not discuss the age of the uncharged misconduct, it was a factor that the court dis-

75. 54 M.J. 169 (2000).

76. *Id.* at 170.

77. *Id.* at 171.

78. *Id.*

79. *Id.*

80. *Id.* at 173.

81. *Id.* at 174.

82. *Id.*

83. *Id.* at 175.

84. *Id.*

85. *Id.* at 176.

86. *Id.*

cussed in *Tanksley*. The court overcame the time gap concern by stating that a pattern of lustful intent in one situation can be used to show lustful intent on another occasion, so long as the acts are similar in nature. It is on this point that Judge Effron dissented. According to the dissent, the incidents that occurred some thirty years ago involved significant differences in the nature of the acts and surrounding circumstances.[87] For example, the prior incidents were done in secret, involved digital penetration, and did not include the daughter drying off her father. None of those facts were present in the charged offenses. Because of these differences, Judge Effron said that the government failed to show a pattern of conduct that would make this evidence admissible under MRE 404(b).[88]

The majority and dissenting opinions provide a good example of how narrowly or how broadly courts can read MRE 404(b). The trend in sexual assault and child abuse cases over the last several years has been to read MRE 404(b) very broadly in order to allow for the admission of uncharged misconduct. In fact, the majority's language stating that a pattern of lustful intent on one occasion can be used to show a pattern on another occasion sounds disturbingly like propensity evidence.

With the promulgation of MRE 413 and MRE 414, any pretense that this evidence is not being used as propensity evidence is gone. The dissent recognized this, noting that after the promulgation of MRE 414 this evidence may be admissible. Judge Effron correctly recognized, however, that just because evidence is admissible under MRE 414, the evidence is not per se admissible under MRE 404(b).[89] The cases discussing MRE 413 and MRE 414 sometimes blur this distinction.

Both *Baumann* and *Tanksley* also illustrate the very factual analysis necessary when litigating the admissibility of evidence under MRE 404(b). The similarity of the uncharged misconduct to the charged offense and the availability of other, less prejudicial evidence to prove the disputed issue are both important in this analysis. These factors also have a role in admitting evidence under the new MRE 413 and MRE 414.

Propensity Evidence is Here to Stay

Military Rules of Evidence 413 and 414 have now been in effect for a few years. These rules represent a significant departure from the long-standing prohibition against using uncharged misconduct to show that the accused is a bad person or has the propensity to commit criminal misconduct. The language of both rules state that in a court-martial for sexual assault and child molestation offenses, evidence that an accused committed other acts of sexual assault or child molestation can be considered for its bearing on "any matter to which it is relevant."[90] While the language "any matter to which it is relevant" does not specifically mention propensity, the practical effect of these rules is to allow admission of propensity evidence. As discussed above, courts addressing uncharged misconduct under MRE 404(b) have consistently held that the only thing MRE 404(b) does not allow the proponent to do is use the evidence to show propensity. In sexual assault and child molestation cases the only new "matter" for which the fact finder can now consider the uncharged misconduct, that they could not before these new rules, is the accused's propensity to commit these types of crimes.

This year two cases have finally made their way up to the CAAF for review of these rules. Not surprisingly, in both cases the CAAF followed the lead of the federal courts and held that these new rules of evidence are constitutional. Interestingly, however, some members of the court believe that post offense misconduct is per se excluded under these new rules.

The first case addressed MRE 413.[91] In *Wright*, officer members tried the accused. He pleaded guilty to indecent assault of P in October 1996. He pleaded not guilty but was convicted of indecent assault of D in April 1996, assault consummated by a battery on D in August of 1996, and housebreaking of P's room in October 1996.[92] At trial, the government wanted to introduce evidence of the indecent assault against P that the accused pleaded guilty to show that he had the propensity to commit the offenses against D, six and three months earlier. The government argued that evidence of the October indecent assault would already come before the members to prove the housebreaking charge and MRE 403 should not, therefore, exclude the use of the evidence for propensity purposes.[93] The military judge agreed, finding that the indecent assault against P was close in time and similar in nature to the other charged offenses, and MRE 413 allowed this evidence to prove propensity.[94] The military judge also held that MRE 413 was constitutional.[95]

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87. *Id.* at 179 (Effron, J., dissenting).

88. *Id.*

89. *Id.*

90. MCM, *supra* note 5, MIL. R. EVID. 413, 414.

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

92. *Id.* at 478.

93. *Id.*

On appeal the defense challenged the constitutionality of MRE 413. The defense claimed that the use of this propensity evidence violates the Due Process Clause of the Fifth Amendment.[96] Relying on a number of recent federal court cases,[97] the CAAF rejected the defense challenge and held that MRE 413 was constitutional. According to the court, MRE 403 plays an important role in evaluating the admissibility of this evidence and because the trial judge is required to do a balancing before admitting this evidence, that is a sufficient due process protection.[98] Judge Crawford, writing for herself and Judge Cox listed several factors that the judge should consider in the MRE 403 analysis. These factors include: Sufficiency of the evidence of the *prior act* (emphasis added); probative weight of the evidence (similarity); potential for less prejudicial evidence; distraction of the factfinder; time needed to prove the *prior conduct* (emphasis added); temporal proximity; frequency; presence or lack of intervening circumstances; and relationship between the parties.[99]

Guidance

The CAAF's ruling in this case is not surprising given the treatment of these rules in the federal courts. Even the concurring and dissenting opinions do not challenge the constitutionality of the rules. Judge Gierke's dissent does raise another concern. Judge Gierke contends that because the MRE 413 evidence used by the government was post-offense misconduct, the trial judge should not have admitted it.[100] The government was using an offense which occurred in October to prove the accused's propensity to commit the crimes that occurred the preceding April and August. According to Judge Gierke, this result was not intended by the rule and any post offense misconduct should be excluded under MRE 403.[101] Judge Gierke raises an interesting issue, and even Judge Crawford in the court's opinion addresses the factors that should be considered under MRE 403 in the context of prior acts.

There is nothing in the rule, however, that requires the other offenses to have occurred prior to the charged offense. Arguably, so long as the other offenses are related closely enough in time to the charged offense to make them probative, it should not matter that the incident occurred after the charged offense. It may be a factor for the judge to consider but it should not operate as a blanket exclusion of this evidence. Further, Judge Gierke's reliance on the legislative history and comments made by Senator Dole to support his opinion is unnecessary since the court should consider the legislative history only when the plain language of the rule is unclear.[102] Here the language of the rule is not unclear. It says "evidence of similar crimes." Instead of a per se ban that Judge Gierke suggests, the better approach would be to consider the timing of the uncharged misconduct as one factor to consider under MRE 403.

In the second case the CAAF looked at the constitutionality of MRE 414.[103] In *Henley*, an officer panel convicted the accused of committing oral sodomy on his natural son and daughter.[104] The abuse took place over several years. At trial, the government introduced incidents outside the statute of limitations under MRE 414 to show the accused's propensity to commit the charged offenses. The military judge admitted the evidence under MRE 414 to show propensity, and under MRE 404(b) to prove a common plan, motive and preparation.[105] At trial and on appeal, the defense challenged the constitutionality of MRE 414.[106]

94. *Id.* at 479-80.

95. *Id.*

96. *Id.* at 481.

97. *See, e.g.*, United States v. Mound, 149 F.3d 799 (8th Cir. 1998), United States v. Castillo, 140 F.3d 874 (10th Cir. 1998), United Statesv. LeCompte, 131 F.3d 767 (8th Cir. 1997), United States v. Enjady, 134 F.3d 1427 (10th Cir. 1998).

98. *Wright*, 53 M.J. at 482.

99. *Id.* (emphasis added).

100. *Id.* at 486 (Gierke, J., dissenting).

101. *Id.* at 486-87 (Gierke, J., dissenting).

102. *See* United States v. Faulk, 50 M.J. 385, 390 (1999). ("If the statute is unclear, we look at legislative history."). Some commentators view statements like those made by Senator Dole on the floor of Congress as "junk legislative history." ABNER MIKVA & ERIC LANE, AN INTRODUCTION TO STATUTORY INTERPRETATION AND THE LEGISLATIVE PROCESS 36 (1997).

103. United States v. Henley, 53 M.J. 488 (2000).

104. *Id.* at 489-90.

105. *Id.* at 490.

106. *Id.*

The Air Force court ruled that the evidence was admissible under MRE 404(b), and that they did not need to address the MRE 414 issue.[107] The Air Force court reasoned that MRE 404(b) was a more restrictive rule than MRE 414 and evidence admitted under MRE 404(b) would moot any issues of admissibility under MRE 414.[108] The CAAF agreed with the Air Force court's approach and affirmed the trial judge's ruling.[109] The CAAF went on to say that in light of their opinion in *Wright*, MRE 414 is constitutional and this evidence would have been admissible under MRE 414 to show the accused's similar sexual molestation of his children.[110]

Guidance

The CAAF, like the Air Force court, resolved the issue on MRE 404(b) grounds. Unfortunately, the court's reasoning in this case misses the mark. Even if the evidence is admissible under MRE 404(b), that should not automatically render it admissible under MRE 414. Evidence admitted under MRE 404(b) can only be admitted for a non-character purpose. This means that the military judge should give a limiting instruction to the panel to specifically tell them that they cannot consider this evidence to conclude that the accused has a bad character or has a propensity to commit criminal misconduct.[111] Contrast this with the theory of admissibility of evidence under MRE 414. Here the evidence is expressly admitted for its tendency to show the accused's propensity to commit this type of offense. Because the theories of admissibility under MRE 404(b) and MRE 414 differ, evidence admitted under MRE 404(b) does not moot questions of admissibility under MRE 414. Evidence admitted under MRE 404(b) with a proper limiting instruction may not be unfairly prejudicial, and yet the same evidence offered under MRE 414 to show propensity may be more prejudicial than probative. It is confusing for the court to mix the MRE 404(b) analysis with the MRE 414 analysis since the rules are expressly intended to allow proof of different things. Also, sloppiness in the distinction leads to confusion and an eviscer-ation of the character protections found in MRE 404(b). This was the concern raised by Judge Effron on a similar issue in his dissent in *Tanksley* discussed above.

The CAAF did go on to briefly address the constitutional attack on MRE 414, and consistent with their opinion in *Wright*, held that MRE 414 is constitutional. The opinions in *Wright* and *Henley* are important for trial judges and practitioners. Until now, there may have been some hesitation in using these new rules and allowing the government to argue propensity because use of propensity evidence goes against traditional notions of how uncharged misconduct may be used. Now that the CAAF has expressly found these new rules to pass constitutional muster, judges may be more willing to admit this evidence and allow the government to argue propensity. This will make the defense's job more difficult in sexual assault and child molestation cases where the accused has other incidents of similar misconduct.

MRE 513 Provides the Only Protections

In 1996, the Supreme Court recognized for the first time a psychotherapist - patient privilege in the federal system.[112] In October 1999, the President promulgated a psychotherapist-patient privilege for the military under MRE 513.[113] The question the CAAF addressed in two cases this year is whether a privilege existed between 1996 and November 1999 when MRE 513 went into effect. In both cases, *United States v. Rodriguez*[114] and *United States v. Paaluhi*[115] the CAAF held that the privilege created by the Court in *Jaffee* did not apply to the military.[116] The basis for the CAAF's opinion is that the military privilege rules have a different history than the federal rules. Specifically, the language of MRE 501(d) expressly rejects a medical officer privilege, and since psychiatrists fall within this definition, no privilege existed prior to 513.[117]

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107. United States v. Henley, 48 M.J. 864, 870-71 (A.F. Ct. Crim. App. 1998).

108. *Id.*

109. *Henley*, 53 M.J. at 487.

110. *Id.*

111. Military Rule of Evidence 105 provides: "When evidence which is admissible as to one party or for a purpose but not admissible as to another party or for another purpose is admitted, the military judge, upon request, shall restrict the evidence to its proper scope and instruct the members accordingly." MCM, *supra* note 5, MIL. R. EVID. 105.

112. Jaffee v. Redmond, 518 U.S. 1 (1996).

113. Exec. Order No. 13,140, 64 Fed. Reg. 55,115 (1999).

114. 54 M.J. 156 (2000).

115. 54 M.J. 181 (2000).

116. *Rodriguez*, 54 M.J. at 161.

Guidance

The outcome in these cases reflects the history of the privilege rules and reminds practitioners that the privilege rules developed differently than the other rules of evidence. This is one area where the military rules are distinct from the federal rules. Another interesting point in *Paaluhi* is that the CAAF reversed the conviction, not because of a privilege violation, but because it was ineffective assistance for the defense attorney to have the accused talk to a military psychologist without having the psychologist appointed to the defense team first.[118] *Paaluhi* has future significance in cases where the MRE 513 privileges may not apply.[119] Because of the large number of broad exceptions under MRE 513, counsel cannot rely on the privilege in all cases and assume that all communications to a counselor or therapist are privileged.

Witness Impeachment

There were some interesting cases dealing with impeachment issues this year. One case came from the Supreme Court. In one CAAF case, the court applied that Supreme Court holding. In another case, the CAAF examined a common method of cross-examination and ruled that it was impermissible.

The Danger of Removing the Sting

Good trial advocates know that one of the fundamental rules of trial practice is to establish and maintain credibility with the trier of fact. In almost every case there is likely to be some unfavorable information about your client, the conduct of the investigation, or a key witness that could damage your case. In order to maintain credibility with the fact finder, a good advocate often brings unfavorable information out about their case or client before the opposing party has a chance. By "drawing the sting" with these preemptive tactics, counsel has more control of the information and shows the fact finder that he has nothing to hide.

A recent Supreme Court holding[120] cautions defense counsel that there is a danger with these preemptive tactics. If the defense objects to the admissibility of the unfavorable evidence in limine and loses, and then introduces the unfavorable evidence preemptively, they waive any objection on appeal.

In *Ohler*, the defendant drove a van carrying approximately eighty-one pounds of marijuana from Mexico to California. A U.S. Customs agent at the border searched the van and discovered the drugs. Maria Ohler was charged with importation of marijuana and possession of marijuana with the intent to distribute.[121] Before trial, the government moved in limine to admit Ohler's 1993 felony conviction for possession of methamphetamine. The government wanted to admit this evidence under Federal Rule of Evidence (FRE) 404(b) as character evidence, and under FRE 609 (a)(1)[122] as impeachment evidence.[123]

The trial judge did not allow this evidence under FRE 404(b), but ruled that if the accused testified, the prosecution could impeach her with her prior conviction under FRE 609(a)(1).[124] In spite of this ruling, the defendant testified in her own defense and denied any knowledge of the eighty-one pounds of marijuana found in the van she was driving. In order to lessen the anticipated impact of the prosecution's cross-examination, the defendant on direct examination also admitted

117. *Id*. at 157-160. Military Rule of Evidence 501 (d) says: "Notwithstanding any other provision of these rules, information not otherwise privileged does not become privileged on the basis that it was acquired by a medical officer or civilian physician in a professional capacity." MCM, *supra* note 5, MIL.R. EVID. 501(d).

118. *Paaluhi*, 54 M.J. at 184-85.

119. Military Rule of Evidence 513 provides that there is no privilege under the rule:

> (1) when the patient is dead;
> (2) when the communication is evidence of spouse abuse, child abuse, or neglect or in a proceeding in which one spouse is charged with a crime against the person of the other spouse or a child of either spouse;
> (3) when federal law, state law, or service regulation imposes a duty to report information contained in a communication;
> (4) when a psychotherapist or assistant to a psychotherapist believes that a patient's mental or emotional condition makes thepatient a danger to any person, including the patient;
> (5) if the communication clearly contemplated the future commission of a fraud or crime or if the services of the psychotherapist are sought or obtained to enable or aid anyone to commit or plan to commit what the patient knew or reasonably should have known to be a crime or fraud;
> (6) when necessary to ensure the safety and security of military personnel, military dependents, military property, classified information, or the accomplishment of a military mission;
> (7) when an accused offers statements or other evidence concerning his mental condition in defense, extenuation, or mitigation, under circumstances not covered by R.C.M. 706 or Mil. R. Evid. 302, the military judge may, upon motion, order disclosure of any statement made by the accused to a psychotherapist as may be necessary in the interests of justice; or
> (8) when admission or disclosure of a communication is constitutionally required.

MCM, *supra* note 5, MIL. R. EVID. 513(d).

120. Ohler v. United States, 529 U.S. 753 (2000).

121. *Id*. at 754.

to the previous felony conviction.[125] The defendant was convicted and sentenced to thirty months in prison.[126]

The defense appealed the conviction, claiming that the trial court's in limine ruling allowing the prosecution to impeach her with the prior conviction was in error.[127] The Ninth Circuit did not address the substance of the accused's complaint. The court ruled that because it was the defense that introduced the evidence of the prior conviction during direct examination, they waived the right to appeal the trial judge's in limine ruling.[128] The Supreme Court granted certiorari[129] to resolve a conflict among the circuits on this issue.[130]

In a five to four decision, the Court affirmed the Ninth Circuit's ruling and held that a defendant who preemptively introduces evidence of a prior conviction on direct examination may not claim on appeal that the admission of the evidence was erroneous.[131] The defendant argued before the Court that FRE 103 and FRE 609 create an exception to the general rule that a party who introduces evidence cannot complain on appeal that the evidence was erroneously admitted. The Court rejected this argument out of hand, noting that Rule 103 simply requires the party to make a timely objection to an evidentiary ruling but is silent on when a party waives an objection.[132] Likewise, Rule 609 authorizes the defense to elicit the prior conviction on direct examination but makes no mention of waiver.[133]

The majority was equally unsympathetic to the defendant's argument that it would be unfair to apply waiver in this situation. The defendant contended that the waiver rule would force them to either forego the preemptive strike and appear to the jury to be less credible, or make a preemptive strike and loose the opportunity to appeal.[134] The Court responded by noting that this is just one of the many difficult tactical decisions that trial practitioners are faced with. The defendant's decision to testify brings with it any number of potential risks. These risks include the possibility of impeachment with a prior conviction. The Court pointed out that the government must also balance the decision to cross-examine with a prior conviction against the danger that an appellate court will rule that such impeachment was reversible error.[135]

The Court was unwilling to let the defendant have her cake and eat it too by short circuiting the normal trial process. According to the Court, to allow the defense to object to evidence they introduced would deny the government its usual right to decide, after the accused testifies, whether or not to use her prior conviction.[136] This outcome would also run counter to

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122. Federal Rule of Evidence 609(a)(1) provides:

> For the purpose of attacking the credibility of a witness, (1) evidence that a witness other than an accused has been convicted of a crime shall be admitted, subject to Rule 403, if the crime was punishable by death or imprisonment in excess of one year under the law under which the witness was convicted, and evidence that an accused has been convicted of such a crime shall be admitted if the court determinesthat the probative value of admitting this evidence outweighs its prejudicial effect to the accused.

FED. R. EVID 609(a)(1). Note that the balancing test for admitting a prior felony conviction against an accused is different and more stringent than the Rule 403 balancing test used for other witnesses.

123. *Ohler*, 529 U.S. at 755.

124. *Id*.

125. *Id.*

126. *Id*.

127. United States v. Ohler, 169 F.3d 1200, 1201 (9th Cir. 1999).

128. *Id*. at 1203.

129. Ohler v. United States, 528 U.S. 950 (1999).

130. The Eighth and Ninth Circuits follow the waiver rule. The Fifth Circuit held that appellate review was still available even after the preemptive questioning. *Ohler*, 529 U.S. at 755.

131. *Id*. at 754.

132. *Id*. at 756.

133. *Id*.

134. *Id.* at 757.

135. *Id*. at 758.

136. *Id*. at 758.

the Court's earlier holding on a similar issue in *Luce v. United States.*[137]

Finally, the accused contended that the waiver rule unconstitutionally burdens her right to testify. The Court held that while the threat of the government's cross-examination may deter a defendant from testifying, it does not prevent her from taking the stand, stating: "[It is not] inconsistent with the enlightened administration of criminal justice to require the defendant to weigh such pros and cons in deciding whether to testify."[138]

Justice Souter led the four justice dissent. The dissent said that the majority's reliance on *Luce* was misplaced. The holding in *Luce* was based on the practical realities of appellate review. Since the accused in *Luce* never testified, there was simply no way for an appellate court to know why. Further, the appellate court could never compare the actual trial with the one that might have occurred if the accused had taken the stand.[139] According to the dissent, Ohler's case was different because it was very clear on the record that the only reason the defense impeached their own client was because of the judge's in limine ruling. An appellate court would have no difficulty in conducting a harmless error analysis based on the record.[140]

The dissent also attacked the majority's common sense rationale for their decision. According to the dissent, this is one exception to the general rule that a party cannot object to their own evidence.[141] In a rare reference to FRE 102,[142] Justice Souter said that allowing the defendant to initiate preemptive questioning and still preserve the issue on appeal promotes the fairness of the trial while fully satisfying the purposes of FRE 609.[143]

Guidance

The majority opinion in *Ohler* is an important warning for defense counsel. It means that counsel will have to consider even more carefully the consequences of advising their clients whether or not to testify. Are the benefits of taking the stand outweighed by the risk of possible impeachment with prior convictions? If so, is it better for the defense to at least lessen the blow by eliciting the incriminating evidence on direct examination and forfeit the opportunity to appeal the judge's decision to allow the impeachment? These are difficult questions and the answer will obviously vary according to the particular circumstances of each case. The point for defense counsel is that they must fully appreciate what is at stake before deciding to draw the sting.

It is also important to note that while the opinion is limited to the context of impeachment with a prior conviction, the majority's rationale can apply to other forms of impeachment and other situations where the defense may want to engage in preemptive questioning of their own client or other defense witnesses. Here again, defense counsel should be very cautious and make the decision only after fully considering all of the potential consequences.

CAAF Applies Ohler

Soon after the Supreme Court decided *Ohler*, the CAAF had the opportunity to apply it in a military case. In *United States v. Cobia*,[144] the accused was convicted by a military judge of rape, forcible sodomy with a child, indecent acts with a child, and adultery.[145] Over several years, the accused had sexually groomed his thirteen year-old stepdaughter and committed various sexual acts with her including intercourse on several occasions.[146] Prior to the court-martial, the accused had been tried and pleaded guilty in state court to five felony counts including incest and indecent acts.[147] He was tried for two of these same offenses (rape and sodomy) at his court-martial.[148]

137. 469 U.S. 38 (1984). In *Luce*, the Court held that a criminal defendant who did not take the stand could not appeal an in limine ruling to admit prior convictions under FRE 609(a).

138. *Ohler*, 529 U.S. at 759 (citing McGautha v. California, 402 U.S. 183, 215 (1971)).

139. *Id.* at 760 (Souter, J., dissenting).

140. *Id.* at 761 (Souter, J., dissenting).

141. *Id.* (Souter, J., dissenting).

142. Rule 102 provides: "These rules shall be construed to secure fairness in administration, elimination of unjustifiable expense and delay, and promotion of growth and development of the law of evidence to the end that the truth may be ascertained and proceedings justly determined." FED. R. EVID. 102.

143. *Ohler*, 529 U.S. at 764 (Souter, J., dissenting).

144. 53 M.J. 305 (2000).

145. *Id.* at 306.

146. *Id.* at 307-308.

147. *Id.* at 307.

Before trial, the defense moved to suppress this prior conviction, claiming that because there were no allocution rights afforded to the accused in state court, the accused accepted the guilty plea without understanding its impact in order to get a reduced sentence.[149] The military judge ruled that this evidence was inadmissible under MRE 404(b), but was admissible for impeachment purposes.[150] During the defense case, the accused testified and the defense counsel introduced the prior conviction and had the accused explain the guilty plea process and that the accused did not fully understand what was happening. On cross-examination, the trial counsel was able to get the accused to admit that he read the charges, that he understood them, and that he was satisfied with his civilian counsel in that prior case.[151]

The CAAF, citing to *Ohler*, held that since the defense introduced this evidence during the direct examination of the accused, they waived any objection on appeal.[152] All five of the CAAF judges agreed on that point. Judge Crawford and Judge Cox went on to say in dicta, that this evidence was admissible, not only under MRE 609, but also under the common law theory of impeachment by contradiction.[153] When the accused completely denied the commission of the charged acts, the defense opened the door for the government to impeach the accused with the contradictory facts of the prior conviction.[154]

Judge Sullivan and Judge Effron agreed that *Ohler* applied in this case and the defense waived any objection by introducing the conviction on their case in chief.[155] The concurrence did express some doubts about the judge's in limine ruling that allowed this impeachment. Judge Sullivan was concerned about the prejudicial effect of using a conviction for the same offense that the accused is charged with to impeach him. Because this was a trial before a military judge alone, that prejudice was minimized.[156]

Guidance

This case is a good follow-on to *Ohler* and a reminder to defense counsel that when they lose the pre-trial motion and then introduce the evidence to remove the sting, they waive the issue for appeal. The case is also interesting because of the opinion (albeit advisory) on impeachment by contradiction. This form of impeachment is not codified in the rules and not often used. It can be effective where the extrinsic evidence goes to a significant issue at trial and directly contradicts the testimony of the witness. Finally, Judge Sullivan's concurrence is a warning to military judges that he and Judge Effron believe trial judges should rarely, if ever, allow the government to impeach the accused under MRE 609 with a conviction for the same offense that the accused is being tried for.

Liar, Liar

Both *Ohler* and *Cobia* involve impeachment with prior convictions under FRE and MRE 609. Although this can be an effective method of impeachment, it comes up only rarely in courts-martial. A much more common form of impeachment is to attack a witness's character for untruthfulness under MRE 608.[157] There is a difference, however, between attacking a witness's character and getting a witness to comment on the credibility of another witness's testimony. In *United States v. Jenkins*,[158] the CAAF held that it was error for the judge to allow the trial counsel to cross over that line and get the witness to comment on the truthfulness of other witnesses' testimony.

In *Jenkins*, an officer and enlisted panel convicted the accused of larceny and forgery for his involvement in a scheme to cash government checks with fake identification cards.[159] The defense theory was that the real perpetrators and the

148. *Id.*

149. *Id.* at 308.

150. Military Rule of Evidence 609(a)(1) provides:

> For the purpose of attacking the credibility of a witness, (1) evidence that a witness other than an accused has been convicted of a crime shall be admitted, subject to Mil. R. Evid. 403, if the crime was punishable by death, dishonorable discharge, or imprisonment in excess of one year under the law under which the witness was convicted, and evidence that an accused has been convicted of such a crime shall be admitted if the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the accused.

MCM, *supra* note 5, MIL. R. EVID. 609(a)(1).

151. *Cobia*, 53 M.J. at 309.

152. *Id.* at 310.

153. *Id.* Impeachment by contradictory facts goes beyond an attack on the witness's credibility. When there are facts in direct contradiction to the witness's in court testimony on a material issue, extrinsic evidence can be used to prove those contradictory facts.

154. *Id.*

155. *Id.* at 311, (Sullivan, J., concurring).

156. *Id.*

accused's old girl friend framed him.[160] The accused testified in his defense. On cross examination the government asked the accused a number of questions about what other witnesses had testified to and then asked the accused numerous times if these witnesses were lying. In response to some of these questions the accused testified that other witnesses had lied in their testimony.[161] The government then argued in closing that either the accused was guilty or all of the government's witnesses were lying.[162] The defense did object to these questions at trial.[163]

On appeal, defense claimed it was improper for the trial counsel to ask these questions because it infringed on the role of the jury to decide credibility issues.[164] The CAAF noted that there was a split among the federal courts on whether the trial counsel can ask the accused to opine whether the witnesses against him are lying.[165] The court adopted the "*Ritcher* principle" established in the Second Circuit.[166] Under this approach, prosecutorial cross-examination that compels the accused to state that witnesses against him lied is improper. If the trial counsel engages in this type of questioning, the court must determine if the improper questioning was prejudicial.[167]

The CAAF's rationale for adopting this approach is that this type of questioning violates the MRE 608 limitations, which allow for opinions on a character trait for honesty or dishonesty only. These questions are improper because the witness is becoming a human lie detector and the answers are not helpful or relevant to the fact finder.[168] In this case, however, the court held that the improper questions did not rise to the level of plain error. The CAAF reasoned that since the defense's theory was that the accused was framed, the questions by the government merely reinforced that theory.[169]

Guidance

The rules of impeachment and relevance do not allow the witness to comment on the credibility of other witnesses' testimony. However, when, as here, the defense theory is that the accused was framed, the defense is in effect calling the government witnesses liars. If the defense elects to go down that road, it seems only fair that the government should be allowed to ask the accused specifically who framed him and who is lying. In order for the fact finders to find the truth, the government should be allowed to force the accused to give specifics. Otherwise, the accused can make very vague and general claims without being forced to specify the allegations. The CAAF in effect reached this conclusion by holding that any error in the trial counsel's questioning was harmless. This case is an important warning to practitioners in spite of the harmless error conclusion. Counsel must be very careful not to elicit opinions from anyone, including the accused, about the truthfulness of other witnesses' testimony.

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157. Military Rule of Evidence 608(a) states:

> (a) The credibility of a witness may be attacked or supported by evidence in the form of opinion or reputation, but subject to these limitations: (1) the evidence may refer only to character for truthfulness or untruthfulness, and (2) evidence of truthful character is admissible only after the character of the witness for untruthfulness has been attacked by opinion or reputation evidence or otherwise.

MCM, *supra* note 5, MIL. R. EVID. 608(a).

158. 54 M.J. 12 (2000).

159. *Id.* at 13.

160. *Id.* at 14.

161. *Id.* at 15.

162. *Id.* at 16.

163. *Id.* at 15.

164. *Id.* at 16.

165. *Id.*

166. The approach taken by the Second Circuit came from the case of *United States v. Richards*, 826 F.2d 206 (2nd Cir. 1987).

167. *Jenkins*, 54 M.J. at 17.

168. *Id.* at 16.

169. *Id.* at 18.

Expert Testimony

Expert testimony continues to be one of the most dynamic areas of evidence law. The CAAF decided several cases this year touching on various aspects of expert testimony from the qualifications of the expert, and the helpfulness of the testimony, to the reliability of the evidence. There is also an interesting trend developing in the federal circuits. After the Supreme Court's ruling in *Kumho Tire v. Carmichel*,[170] some courts are putting significant limitations on various types of forensic evidence.

Expert Qualifications

In 1993 the CAAF in the case of *United States v. Houser*[171] set out a framework for analyzing the admissibility of expert testimony and evidence. The court distilled the various rules of evidence relating to expert testimony down into six factors. These factors are: the qualifications of the expert; the subject matter of the expert testimony; the basis of the expert testimony; the legal relevance of the evidence; the reliability of the evidence; and whether the probative value of the evidence outweighs other considerations.[172] In recent years, most of the focus from the Supreme Court has been on the fifth factor, the reliability of the evidence.[173] The following cases from CAAF illustrate that practitioners need to satisfy all of the prongs and cannot focus on one at the exclusion of others.

Expert Qualifications

In the first case, *United States v. McElhaney*,[174] the court looked at the qualifications of the expert. During the sentencing phase of the accused's trial for carnal knowledge, sodomy, and indecent acts with his wife's young niece, the government called an expert (Dr. Morales) to testify about the rehabilitative potential of the accused, and victim impact.[175] The defense objected, claiming that Dr. Morales' opinion lacked the proper foundation because it came only from his in-court observations and information from the victim about the accused.[176] The expert said he could not diagnose the accused because he had not interviewed him nor had he reviewed his medical records.[177] The military judge ruled that Dr. Morales could testify about specific victim impact, future dangerousness, and that the accused's behavior was consistent with the profile of a pedophile. Dr. Morales was not allowed to testify that the accused was diagnosed as a pedophile.[178] In his testimony, Dr. Morales testified about pedophilia and strongly implied that the accused was a pedophile, and he had little hope of rehabilitation.[179]

The CAAF held that it was error for the judge to admit evidence from Dr. Morales about the future dangerousness of the accused as related to pedophilia.[180] Citing to *Houser*, the court noted that the expert lacked the proper foundation for this testimony. Dr. Morales was a child psychiatrist, not a forensic psychiatrist. He had not interviewed the accused or reviewed his medical records, and he himself testified that he could not give a diagnosis of pedophilia without interviewing the accused.[181] The court noted that lack of contact with the accused usually impacts the weight of the evidence, not its admissibility. In this case, however, these other factors showed that the witness lacked a proper foundation and his testimony really amounted to labeling the accused as a pedophile.[182]

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170. 526 U.S. 137 (1999).

171. 36 M.J. 392 (C.M.A. 1993).

172. *Id.* at 397.

173. *See* Daubert v. Merrell Dow Pharms., 509 U.S. 579 (1993); Gen. Electric v. Joiner, 522 U.S. 136, (19 97); Kumho Tire v. Charmichael, 526 U.S. 137 (1999).

174. 54 M.J. 120 (2000).

175. *Id.* at 132.

176. *Id.* at 133.

177. *Id.*

178. *Id.*

179. *Id.*

180. *Id.* at 134.

181. *Id.* at 133.

182. *Id.* at 134.

Guidance

This case is an important reminder to practitioners that experts cannot be given a blank check once they are on the witness stand. The first *Houser* factor that the expert must satisfy is that they have the necessary qualifications. The third factor is that the expert must have a proper basis for his testimony. In this case, even if Dr. Morales was able to testify about victim impact, he lacked the proper expertise and the proper basis to talk about the future dangerousness of the accused. Counsel must understand the need to establish a complete foundation for all of the issues or information that the expert is going to testify about.

Expert Testimony on Rehabilitation Potential

The CAAF decided another closely related case involving the accused's future dangerousness. In *United States v. Latoree*, [183] the accused pleaded guilty to sodomizing a seven year-old girl.[184] In a Rule for Courts-Martial (RCM) 802[185] session the defense raised an issue of the government's expert witness testifying about recidivism and rehabilitation potential because he did not have an adequate basis for the testimony. The military judge deferred ruling on the issue and the defense did not raise the objection later.[186] In sentencing, the government expert testified, in response to both defense and government questioning, that during treatment most sexual offenders admit to other, previously unknown sexual assaults. The expert also speculated on the accused's rehabilitation potential.[187]

On appeal, the defense claimed it was error for the expert to provide this information. The CAAF treated the defense's concern raised at the RCM 802 session as an objection on the record but cautioned counsel that concerns stated in an RCM 802 session do not qualify as an objection on the record under MRE 103(a)(1).[188] The CAAF ruled that the expert evidence lacked relevance and failed the reliability standards as required by *Daubert*.[189] The court noted that the basis of the expert's testimony was limited to his own work with inmates. This experience was too limited and too cursory to meet the *Daubert* requirements. The court also held that this evidence was not relevant since there was no attempt to link the accused to these studies.[190] Because of the other evidence in the case, the CAAF ruled that any error in admitting the testimony was harmless.[191]

Guidance

In this case, the CAAF takes a slightly different approach to the expert testimony. Here, the CAAF looked at the lack of a foundation that would make the expert's opinion reliable under the fifth *Houser* factor. Because the government failed to show the reliability of the expert's methods or conclusions, or link those methods and conclusions to this particular accused, the evidence was not reliable. This case, like *McElhaney*, is a good example of the need for practitioners to do a complete analysis of the expert's testimony. Even though the expert may be qualified under MRE 702,[192] there is more to the analysis, and a qualified expert does not necessarily mean reliable testimony. The proponent of the evidence must still lay a proper foundation to show that the evidence is reliable and that it satisfies all of the *Houser* factors.

Expert Opinions on Credibility

The problem of experts commenting on the credibility of other witnesses is a recurring issue that the CAAF seems to address in some form every year. Two years ago, in *United*

183. 53 M.J. 179 (2000).

184. *Id.* at 179.

185. MCM, *supra* note 5, R.C.M. 802.

186. *Id.* at 180.

187. *Id.* at 180-81.

188. *Id.* at 181. Military Rule of Evidence 103 states:

> (a) Error may not be predicated upon a ruling which admits or excludes evidence unless the ruling materially prejudices a substantial right of a party, and (1) In case the ruling is one admitting evidence, a timely objection or motion to strike appears of record, stating the specific ground of objection, if the specific ground was not apparent from the context[.]

MCM, *supra*, note 5, MIL. R. EVID. 103(a)(1).

189. Daubert v. Merrell Dow Pharms., 509 U.S. 579 (1993).

190. *Latorre*, 53 M.J. at 182.

191. *Id.*

192. MCM, *supra* note 5, MIL. R. EVID. 702.

States v. Birdsall,[193] the CAAF reversed a conviction because two government experts opined about the credibility of the child victims. The case set out a clear explanation of the law and why this type of evidence is not helpful to the members. This year the CAAF looked at two cases where experts and other witnesses commented on the credibility of other witness's in-court testimony. The outcome in these cases illustrates how the CAAF's analysis may change depending on the forum.

In *United States v. Armstrong*,[194] an officer and enlisted panel convicted the accused of indecent acts with his daughter.[195] The accused made a statement to the police and testified at trial that any contact with his daughter was not of a sexual nature. On rebuttal the government called an expert in child abuse.[196] The expert worked as a "validator." Her job was to evaluate children and determine if they display symptoms of sexual abuse. The defense objected to her testimony, claiming, among other things, that she would become a human lie detector.[197] The military judge overruled the objection and allowed the expert to testify that the victim showed symptoms consistent with abuse. In response to government questioning, the expert testified that in her opinion the victim suffered abuse at the hands of her father.[198] The defense did not object to this answer. Immediately after her testimony, the military judge gave a limiting instruction.[199]

On appeal, the CAAF held that it was reversible error for the expert to testify in this fashion. The witness in effect became a human lie detector and the testimony was highly prejudicial given the nature of the crime and the credibility battle between the accused and the victim.[200] Interestingly, the court also held that the military judge's curative instruction was not enough to render the error harmless.[201]

Contrast this case with *United States v. Robbins*,[202] where the CAAF reached a different outcome, based in part on the fact that *Robbins* was a judge alone case. Here the accused was charged with two specifications of sodomy with a child under sixteen.[203] The victim testified and the government also called a social worker to tell about statements the victim and her mother made to the social worker. While laying the MRE 803(4) foundation, the expert testified that her job was to do intake interviews and refer cases to a panel of clinicians who substantiate cases. She said that in this case, the panel substantiated the allegation.[204] A second witness also testified about what the victim told her. This witness testified that when the victim reported the incident to her, she appeared not to be lying.[205] The defense did not object to any of this evidence.[206]

The granted issue on appeal was whether the witness's comments on the credibility of the victim rose to the level of plain error.[207] The CAAF distinguished this case from prior cases, and held that because this was a judge alone case and the judge is presumed to know and apply the law correctly, any error was harmless.[208] The CAAF also said that the statements touching on credibility were incidental to the hearsay foundation and there was no prejudicial error.[209]

193. 47 M.J. 404 (1998).

194. 53 M.J. 76 (2000).

195. *Id.*

196. *Id.* at 80.

197. *Id.*

198. *Id.* at 81.

199. *Id.*

200. *Id.*

201. *Id.* at 82.

202. 52 M.J. 455 (2000).

203. *Id.* at 456.

204. *Id.*

205. *Id.* at 457.

206. *Id.*

207. *Id.*

208. *Id.* at 458.

209. *Id.*

Guidance

These two cases illustrate that while it is error for any witness, lay or expert, to testify about the credibility of another witness, the error may not be prejudicial in a judge alone forum where the judge is presumed to know and apply the law correctly. The cases also serve as another reminder to counsel of the need to work carefully with expert witnesses and not allow them to comment on ultimate questions of credibility. Practitioners who are not sensitive to this issue run the risk of either a mistrial or a reversal of the conviction on appeal. Once this testimony is before the members, a curative instruction may not be an adequate remedy.

Federal Courts Re-Look at Handwriting Experts

A final area to cover under expert testimony is a trend developing in some federal courts that may impact on military cases. The Supreme Court's decision in *Kumho Tire* held that all types of expert testimony and evidence must undergo a reliability determination.[210] *Kumho Tire* puts the same gatekeeping obligation on the trial judge to keep out unreliable nonscientific expert testimony that *Daubert* placed on judges evaluating scientific evidence. This means that courts are carefully scrutinizing some forms of nonscientific expert testimony for the first time, and some courts do not like what they see.[211] This is particularly true with handwriting experts and questioned document examiners. Two more district courts this year are following the trend to limit the expert's testimony to comparing characteristics of a known and questioned document or signature.[212] Courts are preventing the expert from testifying either that a certain individual was the author of a questioned document or to their degree of certainty about a match. These courts reason that the methods underlying this evidence are weak and very subjective. As of yet, there are no reported military cases that have taken up this issue, but it appears to be an area ripe for challenge.

New Federal Rules

On 1 December 2000 several changes to the Federal Rules of Evidence went into effect. By operation of MRE 1102, these rules will automatically apply to the military on 1 June 2002 unless the President takes a contrary action.[213] The federal rules that changed are FRE 103, 404(a), 701, 702, 703, 803(6), and 902. Each of the rules is set out below with the new or changed language underlined, followed by a brief explanation.

Changes to FRE 103

Rulings on Evidence:

(a) Effect of erroneous ruling. Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected, and
(1) Objection. In case the ruling is one admitting evidence, a timely objection or motion to strike appears of record, stating the specific ground of objection, if the specific ground was not apparent from the context; or
(2) Offer of proof. In case the ruling is one excluding evidence, the substance of the evidence was made known to the court by offer or was apparent from the context within which questions were asked.
<u>Once the court makes a definitive ruling on the record admitting or excluding evidence, either at or before trial, a party need not renew an objection or offer of proof to preserve a claim of error for appeal</u>.

This change removes the requirement for counsel to renew an objection that has been definitively ruled on at a previous court session, including motions in limine. Counsel still have the obligation to clarify when the judge's ruling is definitive in order to preserve the issue. Further, the amendment does not preclude the judge from revisiting a definitive in limine ruling at the time the evidence is offered. Finally, the amendment is not intended to affect the Supreme Court's rulings in *Luce v. United States*[214] or *Ohler v. United States*,[215] discussed above.

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210. Kumho Tire v. Carmichael, 526 U.S. 137, 141 (1999).

211. United States v. Hines, 55 F. Supp 2d. 62 (D. Mass. 1999). In *Hines*, the district court judge conducted a close scrutiny of the government's handwriting expert. The judge ruled that because of a lack of reliability, the expert could not opine that the accused was the author of the questioned document. *Id.* at 69-70.

212. United States v. Ruthaford, 104 F. Supp. 2d 1190 (D. Neb. 2000); United States v. Santillan, 1999 U.S. Dist. Lexis 21611 (N.D. Ca.).

213. Military Rule of Evidence 1102 states: "Amendments to the Federal Rules of Evidence shall apply to the Military Rules of Evidence 18 months after the effective date of such amendments, unless action to the contrary is taken by the President." MCM, *supra* note 5, MIL. R. EVID. 1102.

214. 469 U.S. 38 (1984).

215. 529 U.S. 753 (2000).

Changes to FRE 404(a)

Character Evidence Generally:

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

This change to Ruel 404(a) is potentially very significant. The drafters say it is intended to provide a more balanced presentation of the evidence when the accused decides to attack the victim's character. Under the current rule, even if the accused attacks the victim's character, the accused's character is still off limits, and the jury does not have the opportunity to consider an equally relevant character trait of the accused. Under the new rule that will change. Once the accused goes after a pertinent character trait of the victim, the accused automatically subjects himself to attack on that same trait. The easiest illustration is where the defense is trying to paint the victim as the aggressor in a homicide case by introducing evidence of the victim's violent character. With the change to these rules, the government can now offer evidence of the accused's character for violence, even though the accused has not introduced any evidence that he is a peaceful person.

Changes to FRE 701

Opinion Testimony by Lay Witnesses.

If the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness, (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue, and (c) not based on scientific, technical or other specialized knowledge within the scope of Rule 702.

The change to Ruel 701 is designed to prevent parties from avoiding the reliability requirements for expert testimony. Before this change, some parties were trying to slip expert opinion testimony in under the guise of lay witness testimony and thus avoid the requirements of Rule 702 and *Daubert*. This change is intended to put a stop to that practice.

Changes to FRE 702

Testimony by Experts.

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, my testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

The changes to FRE 702 incorporate the Supreme Court's holdings in, *Daubert*, *Joiner*, and *Kumho Tire*. The language of the rule provides more detail about the reliability requirements that expert testimony must satisfy. The most helpful change is the explanation the drafters added in the comments to FRE 702. In the comments to the rule, the drafters give a good synopsis and explanation of the *Daubert* factors, as well as other factors that trial courts can consider when evaluating the reliability of expert testimony.

Changes to FRE 703

Bases of Opinion Testimony by Experts.

The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence in order for the opinion or inference to be admitted. Facts or data that are otherwise inadmissible shall not be disclosed to the jury by the proponent of the opinion or inference unless the court determines that their probative value in assisting the jury to evaluate the expert's opinion substantially outweighs their prejudicial effect.

This change is intended to limit the amount of inadmissible testimony that an expert can refer to when testifying about the basis of his opinion. The problem before this change was that experts could smuggle inadmissible testimony before the fact finders when discussing the basis for their opinion. This smuggling happens because FRE 703 clearly says that the facts or data that the expert relies on do not need to be admissible in order for the expert to use them in reaching his opinion. The example is where the expert relies on medical reports and other

third party hearsay to form his opinion. Simply because the medical reports or other information is hearsay, does not mean the expert's opinion does not have a proper basis. The problem occurs when the expert refers to that inadmissible hearsay in his testimony. The change now limits the expert to his opinion only. He cannot introduce otherwise inadmissible facts or data along with that opinion unless the court determines that the probative value of that evidence in assisting the jury to evaluate the expert's opinion substantially outweighs the prejudicial effect.

Note that this is not a Rule 403 balancing. Under Rule 403, admissibility is presumed and evidence is only excluded if its probative value is substantially outweighed by undue prejudice. Here, the balancing test is exactly the opposite. Prejudice is presumed and the evidence only comes in if substantially outweighed by probative value. This will most likely happen when the opposing counsel opens the door to this evidence in their cross-examination of the expert.

Changes to FRE 803(6) and FRE 902

FRE 803(6), Hearsay exceptions, availability of declarant immaterial:

The following are not excluded by the hearsay rule, even though the declarant is available as a witness (6) Records of regularly conducted activity. A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, or by certification that complies with Rule 902(11), Rule 902(12), or a statute permitting certification, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness. The term "business" as used in this paragraph includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.

FRE 902, Self authentication:

Extrinsic evidence of authenticity as a condition precedent to admissibility is not required with respect to the following:
(11) Certified domestic records of regularly conducted activity. The original or a duplicate of a domestic record of regularly conducted activity that would be admissible under Rule 803(6) if accompanied by a written declaration of its custodian or other qualified person, in a manner complying with any Act of Congress or rule prescribed by the Supreme Court pursuant to statutory authority, certifying that the record
(A) was made at or near the time of the occurrence of the matters set forth by, or from information transmitted by, a person with knowledge of those matters;
(B) was kept in the course of the regularly conducted activity; and
(C) was made by the regularly conducted activity as a regular practice.
A party intending to offer a record into evidence under this paragraph must provide written notice of that intention to all adverse parties, and must make the record and declaration available for inspection sufficiently in advance of their offer into evidence to provide an adverse party with a fair opportunity to challenge them.

The amendments to rule 803(6) and 902(11) add new procedures which allow parties to authenticate certain domestic records of regularly conducted activity without calling a foundation witness. There is also a new Rule 902(12) for certain foreign documents. This new rule only applies in civil cases.

Conclusion

If there is one unifying theme from these cases it is that evidence law continues to be the bread and butter of every trial practitioner's life. Trial and defense counsel must have more than a passing familiarity with the rules. To successfully litigate cases, counsel need to become intimately familiar with the rules and be able to apply them in the heat of battle. Hopefully, this article will assist counsel in this endeavor.

Justice and Discipline: Recent Developments in Substantive Criminal Law

Major Timothy Grammel
Professor, Criminal Law Department
The Judge Advocate General's School, United States Army
Charlottesville, Virginia

Introduction

> *The difference between a military organization and a mob is the role of command and control in channeling, directing, and restraining human behavior.*[1]

The purpose of military law, as stated in the *Manual for Courts-Martial*, is "to promote justice, to assist in maintaining good order and discipline in the armed forces, to promote efficiency and effectiveness in the military establishment, and thereby to strengthen the national security of the United States."[2] There has been an ongoing debate whether the military justice system is a system of justice or a system of discipline.[3] Many commentators, however, see the dual purposes of justice and military discipline as complementary.

> Insofar as our fundamental goal is concerned, it is clear that military criminal law in the United States is justice-based. This is not, however, incompatible with discipline. Congress has, at least implicitly, determined that discipline within an American fighting force requires that personnel believe that justice will be done. In short, the United States uses a justice-oriented system to ensure discipline; in our case, justice is essential to discipline.[4]

The Court of Appeals for the Armed Forces (CAAF) has often faced the problem of striking the proper balance between justice and military discipline, and last year was no exception.

The decisions of the CAAF during the 2000 term[5] reflect trends in three different areas. First, the court scrutinized four cases involving improper relationships between male noncommissioned officers (NCOs) and female subordinates, where the NCOs were charged with nonconsensual crimes against the subordinates. The CAAF reversed the convictions in all four cases. The victim's lack of consent must be manifest. Unless the accused used his position to create a situation of dominance and control, rank is not enough.

Second, the court recognized the importance of military discipline in the military justice system. It rejected a rule that would have prohibited courts from considering deportment when determining whether alleged language was disrespectful. Also, on factual issues concerning military discipline, it was reluctant to overturn the decision of the court-martial members.

Third, the CAAF added clarity to conspiracy law in the military. It defined the crime of conspiracy strictly, but it allowed the prosecution the full advantage of the traditional special rules that come with the crime of conspiracy. When interpreting conspiracy under the Uniform Code of Military Justice (UCMJ), the court adhered to its role of interpreting, and not creating, the law. The CAAF focused on the intent of Congress and federal common law.

This article discusses each of these three trends in detail. The opinions of the CAAF show that the court was attempting to strike the proper balance by both ensuring justice and promoting military discipline; a challenging and contentious task. In most of the cases this article discusses, one or two of the court's judges wrote dissenting opinions. The most contentious area was the one involving NCOs having improper relationships with subordinates and being charged with nonconsensual crimes against those subordinates.

Rank Is Not Enough To Prove Nonconsensual Sexual Offenses Against a Subordinate

The senior-subordinate relationship is critical to the accomplishment of the military mission. Congress protects this special relationship by specifically proscribing disrespect to,[6]

1. United States v. Rockwood, 52 M.J. 98, 107 (1999).

2. MANUAL FOR COURTS-MARTIAL, UNITED STATES, pt. I, ¶ 3 (2000) [hereinafter MCM].

3. DAVID A. SCHLUETER, MILITARY CRIMINAL JUSTICE: PRACTICE AND PROCEDURE § 1-1 (5th ed. 1999).

4. FRANCIS A. GILLIGAN & FREDRIC I. LEDERER, COURT-MARTIAL PROCEDURE § 1-30.00 (2nd ed. 1999) (footnote omitted).

5. The 2000 term began 1 October 1999 and ended 30 September 2000.

6. UCMJ arts. 89 (proscribing disrespect toward a superior commissioned officer), 91(3) (proscribing disrespect in language or depo rtment toward a warrant, noncommissioned, or petty officer) (2000).

disobedience of,[7] and assault on superior commissioned officers and NCOs.[8] Military superiors must necessarily be in a position of control. Unfortunately, some officers and NCOs abuse their positions. Some officers and NCOs engage in sexual relationships with their subordinates. This conduct is detrimental to the good order and discipline of a unit and is punishable as fraternization.[9] Furthermore, in some cases, the subordinate may not be a willing participant. The subordinate, as well as the unit, may be a victim. In such a case, the accused may be guilty of more than just fraternization or violation of a general regulation. If so, the accused should be charged with the appropriate crimes, such as rape, indecent assault, battery, extortion, indecent language, indecent exposure, and maltreatment. The line between consensual and nonconsensual, however, is often blurred, especially in cases where the subordinate may not feel as free to protest to the military superior as she would another person. In a series of four opinions issued in September 2000, the CAAF sent a clear message: for nonconsensual sexual offenses against a subordinate, rank is not enough. Unless the accused exercises dominance and control, the victim's lack of consent must be manifest, especially where there has been prior consensual physical contact between the accused and victim.

The four CAAF opinions share many similarities. They all involve male NCOs who engaged in inappropriate relationships with female subordinates. In *United States v. Johnson*,[10] Staff Sergeant (SSG) Benjiman Johnson was convicted of assault consummated by a battery upon Specialist (SPC) C by rubbing her back. In *United States v. Tollinchi*,[11] Marine Sergeant Pedro Tollinchi was convicted of raping EH, the seventeen year-old girlfriend of a sixteen year-old recruit. In *United States v. Ayers*,[12] SSG Jeffrey Ayers was convicted of two specifications of indecent assault upon a trainee, Private First Class (PFC) TH. In *United States v. Fuller*,[13] Sergeant (SGT) Paul Fuller was convicted of maltreatment of PFC M by "having sexual relations with her after she became extremely intoxicated and by sexually harassing her in that he made a deliberate offensive comment of a sexual nature."[14] In all four cases, general courts-martial composed of officer and enlisted members found the accused NCOs guilty. In September 2000, the CAAF reversed all of these convictions because the evidence was legally insufficient to prove the elements of the offenses. The message from CAAF is that it will closely scrutinize this type of case, and will not tolerate overcharging.

United States v. Johnson: *Backrubs in the Office Not Battery*

In *Johnson*, the accused and SPC C were both assigned to the 10th Mountain Division Band at Fort Drum, New York. According to SPC C, she was "friends" with SSG Johnson, who had been her squad leader. There was consensual hugging, tickling, and "punch fights."[15] Also, the accused rubbed her back on several occasions, when she was typing or doing other work in the office. She did not like the backrubs because they interrupted her work, and they made her feel uncomfortable. She did not tell him to stop because there were other people around, and she did not want to draw attention to herself. She would try to shrug him off. After the shrugging, sometimes he stopped and sometimes he would rub a little more.[16] She did not report the incident until she was questioned about unrelated carnal knowledge allegations against the accused.[17]

The accused was charged with indecent assault for the hugging and the rubbing of the back. After the victim testified that the hugging was consensual and the defense counsel made a motion for a finding of not guilty, the military judge excepted "hugging" from the specification. A panel of officers and enlisted members found the accused guilty of the lesser-

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7. *Id.* arts. 90(2) (proscribing disobedience of a superior commissioned officer), 91(2) (proscribing disobedience of a warrant, noncommissioned, or petty officer).

8. *Id.* arts. 90(1) (proscribing striking or assaulting a superior commissioned officer), 91(1) (proscribing striking or assaulting a warrant, noncommissioned, or petty officer).

9. *See* MCM, *supra* note 2, pt. IV, ¶ 83. Practitioners in the Army should be aware that the new Army regulation's provisions on fraternization are punitive. U.S. DEP'T OF ARMY, REG. 600-20, ARMY COMMAND POLICY, paras. 4-14 through 4-16 (15 July 1999) [hereinafter AR 600-20]. It may be easier for trial counsel to charge and prosecute fraternization as a violation of a general regulation, under Article 92, rather than fraternization, under Article 134.

10. 54 M.J. 67 (2000).

11. 54 M.J. 80 (2000).

12. 54 M.J. 85 (2000).

13. 54 M.J. 107 (2000).

14. *Id.* at 110.

15. *Johnson*, 54 M.J. at 68.

16. *Id.*

17. *Id.*

included offense of assault consummated by a battery for the backrubs.[18]

The Army Court of Criminal Appeals (ACCA) affirmed the conviction for battery. It found that failing to verbally protest to a superior in the office did not equate to consent and did not create an honest and reasonable mistake by the accused that SPC C consented.[19] The CAAF disagreed with the Army court and reversed the conviction for battery.

The issue was consent. The offense of battery consists of bodily harm done with unlawful force or violence.[20] As the *Manual for Courts-Martial* states, bodily harm is "any offensive touching of another, however slight."[21] The CAAF pointed out that consent can turn otherwise offensive touching into non-offensive touching.[22] The bodily harm must be without the lawful consent of the victim,[23] and the prosecution has the burden to prove lack of consent.[24] Also, a reasonable and honest mistake of fact as to consent is a defense.[25]

The CAAF acknowledged that under certain circumstances a backrub could constitute an offensive touching.[26] The court also stated that it was "sensitive" to the fact that the accused was a NCO and that a relationship between a NCO and a subordinate enlisted soldier could create a situation of "dominance and control." It found that this was not such a situation.[27]

Two important factors in the court's analysis were the physical contact that was part of the friendly relationship and SPC C's failure to express lack of consent. The CAAF found that the facts in the record did not establish that SPC C felt unable to protest the accused's actions.[28] The court noted that she felt comfortable enough to try to shrug him off. It also noted that the only problem SPC C had with the backrubs was the accused's bad judgment. "She was uncomfortable because the backrubs were open and notorious in the work environment, but she did not provide any evidence that they were offensive."[29] According to the court, this conclusion was supported by the fact that she did not report the touching until she heard about the unrelated carnal knowledge allegation.[30] Furthermore, the court found that, even if there was sufficient evidence of lack of consent, the accused was not on notice that SPC C did not consent to the backrubs.[31]

In a dissenting opinion, Judge Sullivan wrote, "The majority today takes the law relating to sexual harassment in the work place back a few steps from the progress our modern armed forces have made along the path of true protection for subordinate members."[32] Judge Sullivan found the evidence to be legally sufficient. The victim showed the accused that she did not want to be massaged by her obvious evasive conduct on a number of occasions, but the accused continued the unwanted touching.[33] Judge Sullivan would have, viewing the evidence in the light most favorable to the government as required by the

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18. *Id*. The accused had pled guilty to carnal knowledge with S, a fourteen year old baby-sitter. In addition to battery the membersalso found the accused guilty of maltreatment of SPC C. The members adjudged a sentence of a bad-conduct discharge (BCD), confinement for five years, forfeiture of $874 per month for sixty months, and reduction to the grade of E1. The Army Court of Criminal Appeals set aside the conviction for maltreatment and otherwise affirmed the findings and sentence. *Id*. at 67-68.

19. *Id.* at 69.

20. UCMJ art. 128 (2000) (proscribing assault).

21. MCM, *supra* note 2, pt. IV, ¶ 54c(1)(a).

22. *Johnson*, 54 M.J. at 69. The law, however, does not generally recognize consent as a valid defense to aggravated assault. United States v. Bygrave, 46 M.J. 491, 493 (1997).

23. MCM, *supra* note 2, pt. IV, ¶ 54c(1)(a).

24. *Johnson*, 54 M.J. at 69 n.3.

25. *Id.* at 69.

26. *Id.*

27. *Id.*

28. *Id.*

29. *Id.*

30. *Id.*

31. *Id.* at 70.

32. *Id.* at 73 (Sullivan, J., dissenting).

33. *Id.*

well-established standard for legal sufficiency, affirmed the conviction for battery.[34]

The dissenting opinion has merit. During the trial, the members observed SPC C testify about the senior-subordinate relationship, the shrugs and the continued backrubs. There was some evidence on which the members could base a finding that SPC C did not consent and that the accused was aware of this. Even the majority opinion states "there is no indication that SPC C felt unable to protest appellant's actions and in fact felt comfortable enough to shrug him off."[35] The court acknowledged that the shrugs were an expression of protest. The CAAF, however, appears to be applying a higher level of review than the law requires for legal sufficiency.

United States v. Tollinchi:
Sex with Recruit's Girlfriend Not Rape

Sergeant Tollinchi was a Marine recruiter. He persuaded a sixteen year-old high school student to enlist. The recruit and his seventeen year-old girlfriend, EH, went to the recruiting office. Sergeant Tollinchi took out a bottle of Dewars whiskey and began to toast the enlistment and continued until the recruit and his girlfriend were intoxicated.[36] The accused encouraged the other two to kiss, undress each other, and engage in sexual acts. The accused then moved close to EH and touched her breasts and vaginal area. This was eventually charged as an indecent assault. The recruit and his girlfriend lay on the floor. The recruit performed oral sex on her, but she pulled him up next to her, because the accused tried to put his penis in her mouth.[37] This became a charge of attempted sodomy. The accused then performed oral sex on EH, which became a charge of sodomy. He then penetrated her with his penis. She gasped and whispered to the recruit, "Stop him, he's inside me." The recruit told her not to worry and it would be over soon.[38] This became a charge of rape, which is the offense at issue. The recruit moved the accused and feigned sexual intercourse with EH. The accused masturbated and ejaculated on EH's breasts. This became another specification of indecent assault. EH became hysterical and ran to the bathroom. The accused dressed, gave the recruit $20 for a taxi, and left.[39]

At trial, the girlfriend testified that she was drunk and afraid, but she never said "no." The accused testified and denied that the incident happened.[40] The members found the accused guilty of all of the above-mentioned offenses, as well as adultery and two specifications of violating a general order.[41] The Navy-Marine Corps Court of Criminal Appeals affirmed. Because of EH's ability to remember with "ringing clarity," it did not base its decision on her intoxication. It found she was capable of manifesting her non-consent. It found, however, that it was dark, she was under her boyfriend, and she was unaware of any attempt to penetrate until it already occurred.[42]

The CAAF found the evidence to be legally insufficient, because the prosecution failed to prove lack of consent. The court quoted the *Manual for Courts-Martial* on the inference of consent from lack of resistance: "If a victim in possession of his or her mental faculties fails to make lack of consent reasonably manifest by taking such measures of resistance as are called for by the circumstances, the inference may be drawn that the victim did consent."[43]

The CAAF will not overturn findings of fact by a service court, unless they are clearly erroneous or unsupported by the record.[44] It found the lower court's conclusion that the victim was capable of manifesting her lack of consent amply supported by the record, because of the "ringing clarity" of her memory and her ability to demonstrate lack of consent when the accused attempted to place his penis in her mouth.[45] The CAAF, however, found the lower court's conclusion that EH was unaware of any attempt to penetrate until it had already occurred was unsupported by the record. Although the room

34. *Id.* at 70 (Sullivan, J., dissenting).

35. *Id.* at 69.

36. United States v. Tollinchi, 54 M.J. 80, 81 (2000).

37. *Id.*

38. *Id.*

39. *Id.*

40. *Id.*

41. The members adjudged a sentence of a dishonorable discharge (DD), confinement for five years, total forfeitures, and reduction to the lowest enlisted grade. *Id.* at 80-81.

42. *Id.* at 82. Failure to resist is immaterial when the victim was unaware that the accused was going to penetrate her, because rape is complete upon the penetration without her consent. *See* United States v. Traylor, 40 M.J. 248, 249 (C.M.A. 1994).

43. *Id.* at 82 (quoting MANUAL FOR COURTS-MARTIAL, UNITED STATES, pt. IV, ¶ 45c(1)(b) (1995)).

44. *Id.*

was darkened, there was enough light for her to see what was happening and describe it in detail. She testified that she could see the accused when he performed oral sex on her and when he moved into position to penetrate her. Also, she testified that her boyfriend was lying beside her, not on top of her. The court found that EH saw what the accused was about to do and did not express her lack of consent to sexual intercourse.[46] Furthermore, the court stated, "Even if she did not actually consent, there was no way for appellant to know that she did not consent."[47]

Two factors that were important in *Johnson* were also present in this case: prior sexual activity and failure to express a lack of consent. The court emphasized that EH undressed in front of the accused, "allowed" him to touch her breasts and vaginal area,[48] allowed him to perform oral sex on her, and said nothing when she saw him move into position for sexual intercourse. The court reversed the conviction for rape.[49]

Chief Judge Crawford dissented. She thought that a different factual conclusion by the lower court was clearly erroneous. She thought that there was ample evidence that EH was not able to consent because of intoxication.[50] According to her dissent, the evidence was clear that EH was intoxicated and the accused had good reason to believe that she was too intoxicated to consent to sexual intercourse with him. The military judge gave the members an instruction on intoxication's impact on a person's capacity to consent, and the members found the accused guilty of rape based on all the evidence.[51] Chief Judge Crawford stated that "it will be a sad day for all victims of sexual crimes if their ability to recall the criminal acts perpetrated upon them is used against them in this fashion."[52]

United States v. Ayers:[53]
Sexual Contact with Trainee Not Indecent Assault

Staff Sergeant Ayers was an Initial Entry Training (IET) instructor at Fort Lee, Virginia. One night when he was on duty as the Charge of Quarters (CQ), he engaged in a conversation with a female trainee, PFC TH. He told her that there would be a movie in the day room after bed check, and she asked if she could come. He told her it was her choice, but it would be her responsibility if she got in trouble.[54] After bed check, she went to the day room to watch the movie. The accused asked her to meet him in the operations room. She went back to her room, told her "battle buddy" what she was doing,[55] and climbed out the window to meet the accused. The accused led her into a conference room, so nobody would see them. The accused asked PFC TH if she was nervous and afraid, and she said,

45. *Id.*

46. *Id.* at 82-83.

47. *Id.* at 83.

48. *Id.* One factor the court relied on was that EH "*allowed* him to touch her breasts and vaginal area." *Id.* (emphasis added). However, as stated above in the text, the accused was convicted of indecent assault for that offensive touching. Consent is a defense to indecent assault, but the CAAF affirmed the conviction of indecent assault. *Id.* Perhaps the court was relying on the fact that, after the indecent assault had been committed, EH did not protest to the accused.

49. *Id.* The court affirmed the lesser-included offenses of indecent act by having sexual intercourse in the presence of a third person, her boyfriend, and authorized a rehearing on sentence. *Id.* at 83.

50. *Id.* at 83-84 (Crawford, C.J., dissenting).

51. *Id.* at 84 (Crawford, C.J., dissenting). In her dissenting opinion, Chief Judge Crawford quoted the following provisions from the military judge's instructions:

> When a victim is incapable of consenting because she is intoxicated to the extent that she lacks the mental capacity to consent, no greater force is required than that necessary to achieve penetration.
>
> * * *
>
> In deciding whether [EH] had consented to the sexual intercourse you should consider all the evidence in this case, including, but not limited to [EH's] age, her experience with alcohol, the degree of Miss [H's] intoxication, if any, her mental alertness, the ability of Miss [H] to walk, to communicate coherently, and other circumstances surrounding the sexual intercourse.
>
> If Miss [H] was incapable of giving consent, and if the accused knew or had reasonable cause to know that Miss [H] was incapable of giving consent because she was intoxicated, the act of sexual intercourse was done by force and without consent

52. *Id.* at 84 (Crawford, C.J., dissenting).

53. 54 M.J. 85 (2000).

54. *Id.* at 87-88.

55. In IET, the "battle buddy" system requires trainees to report to those in leadership positions with a fellow trainee assignedas a constant companion. *See* United States v. Lloyd, No. 9801781, at 2 (Army Ct. Crim. App. Oct. 24, 2000) (unpublished); *Ayers*, 54 M.J. at 88 n.1.

"Hell yeah." He told her not to be nervous. He touched her face, breasts, and buttocks, and he kissed her. The accused had to leave to check on his CQ duties, and she waited for him.[56] When he returned, he massaged her and asked her to lie "belly down" on a table. He straddled her, continued to massage her, moved her shorts and panties aside, and touched her vagina with his penis. She told him that she did not want to have sex with him. He kept telling her to relax and kept touching her with his penis. She told him to stop, and he did and left the room. When he returned, he asked her to come back later, but she declined and told him she was tired and going to bed.[57]

The accused had given PFC TH his pager number. She called him several times over the next week. One week after the incident in the conference room, they ran into each other during a break in training. She agreed to meet him in a second-floor latrine that was under repair. PFC TH had her "battle buddy" wait in a nearby janitor's closet, and she waited for the accused in the latrine for twenty to thirty minutes.[58] When he arrived, he criticized her for speaking to him in a familiar way in front of other people. He touched her face and tried to kiss her and touch her buttocks. She did not want him to touch her, so she backed away. He stopped and left the latrine.[59]

The accused was charged with several offenses involving PFC TH and another female trainee. He was charged with two specifications of indecent assault for the incidents in the conference room and the latrine. At trial, PFC TH testified that, in the conference room, she was a willing participant. She was infatuated with the accused. In explaining why she was not upset about it, she said that it was a situation where "a guy tries to see how far he can get, but then it doesn't go anywhere. I really didn't consider it an assault or rape or nothing like that."[60] She testified that her feelings about the accused had changed between the incident in the conference room and the incident in the latrine. The incidents were not important to her, and she did not tell anyone in her command until her senior drill sergeant and commander questioned her about it.[61] The defense theory at trial was that neither incident happened, and PFC TH's testimony was "total lurid fiction."[62] An instruction on mistake of fact was neither requested nor given.[63] The members found the accused guilty of both specifications of indecent assault, as well as several other offenses.[64]

In a three to two opinion,[65] the CAAF found the evidence to be legally insufficient to support either specification of indecent assault. As for the incident in the conference room, the majority found that the accused indicated that he wanted to have sexual intercourse with PFC TH by touching her vagina with his penis. She told him to stop. He tried to persuade her to go further, but she continued to refuse. The accused then stopped and left. According to the majority, "TH drew the line at sexual intercourse, and appellant did not cross the line."[66]

As for the incident in the latrine, the majority found that the prosecution failed to prove lack of consent. After the incident in the conference room, PFC TH continued the relationship by calling the accused. She readily agreed to meet him alone and waited twenty to thirty minutes for him. As soon as she indicated she no longer consented, the accused stopped.[67]

The court reversed the convictions for the two specifications of indecent assault. The majority opinion, however, stated:

> Our holding on the issue of consent does not affect the legal sufficiency of appellant's conviction of multiple violations of the regulation proscribing inappropriate contact with trainees, nor does it condone his behavior. While the appellant's conduct with a trainee

56. *Ayers*, 54 M.J. at 88.

57. *Id.*

58. *Id.*

59. *Id.*

60. *Id.*

61. *Id.* at 89.

62. *Id.*

63. *Id.*

64. Based on his conduct with PFC TH and another female trainee, PVT BD, the members convicted the accused of attempted adultery, attempted violation of a lawful general regulation, violation of a lawful general regulation (five specifications), adultery, and indecent assault (two specifications). The members adjudged a sentence of a DD, confinement for four years, total forfeitures, and reduction to the grade of E1. *Id*. at 87.

65. Chief Judge Crawford and Judge Sullivan dissented. *Id*. at 95-99.

66. *Id.* at 89-90.

67. *Id.* at 90.

> fell short of an indecent assault, his conviction of the regulatory violation clearly reflects that it was unacceptable.[68]

The majority made it clear that it did not approve of the accused's behavior, even if it was consensual.

Chief Judge Crawford wrote an interesting dissenting opinion. In the beginning of the opinion, she stated:

> The majority appears to equate TH with Ado Annie Carnes, the character in Rodgers and Hammerstein's hit musical Oklahoma, who sings "I Cain't Say No!" Since I believe that "no" means "no," I, like country music singer Lorrie Morgan, ask the majority, "What part of no don't you understand?"[69]

Chief Judge Crawford viewed the facts differently from the majority, pointing out that they were not as clear as the majority painted them. The members were properly focusing on the issue of consent. A member even requested to hear PFC TH testify again about the assault in the conference room. The subsequent testimony confirmed the fact that the accused continued to rub his penis against PFC TH's vagina three to five times after she told him to stop.[70] Chief Judge Crawford disagreed with the majority's conclusion that PFC TH drew the line at sexual intercourse. According to Chief Judge Crawford, she also told him to stop doing what he was doing—touching her vagina with his penis. When he failed to do so, he committed an assault. "When a woman tells a would-be paramour to stop touching her body improperly, she draws the line! When the paramour persists in engaging in the same conduct that has been explicitly rejected, the paramour has crossed that line!"[71]

Chief Judge Crawford's argument makes sense. The majority and dissent, however, disagreed on the factual issue of where PFC TH drew the line. In a review for legal sufficiency, the appellate court must view the evidence in the light most favorable to the government, which is what Chief Judge Crawford did.

The dissenting opinion, however, lost credibility when it discussed the incident in the latrine. It stated that "there was no evidence that TH had led appellant to believe that she wished to have any type of romantic relationship with him."[72] Her actions could have led the accused to reasonably believe that she wanted such a relationship. She called him, agreed to meet him alone, and did not tell him or otherwise indicate that she did not want to be touched until after it had already occurred. Once she so indicated, the accused stopped and left. Even if one was to conclude that the incident in the conference room should have been affirmed as an indecent assault, the incident in the latrine was not an indecent assault.

United States v. Fuller:
Consensual Sex with Subordinate Not Maltreatment

Sergeant Fuller was a platoon sergeant at the Inprocessing Training Center (ITC) in Darmstadt, Germany. As a cadre member, he assisted soldiers and their families transition into Europe. Over a period of two to three weeks, the ITC provides orientation activities, such as German language training, driver training, and unit inprocessing.[73] Sergeant Fuller spoke to PFC M, a female ITC soldier, who planned to go to an on-post club with her friend, Private (PVT) I. The accused suggested that he and another ITC platoon sergeant, Sergeant First Class (SFC) Davis, would meet them at the club. Private First Class M was drinking all night in celebration of PVT I's birthday.[74] At the club, the accused suggested that the four of them go to an off-post club to further celebrate the birthday. The privates talked about it in the bathroom and decided to go. They lied to their friends by telling them that they were going back to the barracks to use the telephone. The privates left the club first, and they waited at the accused's car for twenty minutes.[75] In the car, the sergeants suggested going to the accused's apartment to avoid being seen by other cadre members. The privates agreed, and they stopped on the way so SFC Davis could buy some liquor. While he was in the gas station, PFC M moved into the passenger seat to sit next to the accused.[76]

When they got to the accused's apartment, all four drank a double shot of tequila. After the accused left the room, the pri-

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68. *Id.*

69. *Id.* at 96 (Crawford, C.J., dissenting) (citing http://www.countrycool.com).

70. *Id.* at 97 (Crawford, C.J., dissenting).

71. *Id.*

72. *Id.*

73. United States v. Fuller, 54 M.J. 107, 108 (2000).

74. *Id.*

75. *Id.*

76. *Id.*

vates each had four to six more double shots of tequila. While PFC M sat on a sofa, SFC Davis and PVT I danced, undressed each other, and engaged in sexual intercourse.[77] When the accused returned to the room, he and PFC M drank some brandy and then engaged in sexual intercourse. After a few minutes, the accused told SFC Davis, "You've gotta get some of this." SFC Davis then had sexual intercourse with PFC M, while the accused had sexual intercourse with PVT I. The accused engaged in further sexual acts with PFC M. The next day, on the way back to post, all four joked in the car and stopped to eat lunch together.[78]

The accused was charged with several offenses, including maltreatment by "having sexual relations with [PFC M] after she became extremely intoxicated and sexually harassing her in that he made a deliberate offensive comment of a sexual nature." At trial, PFC M testified that nobody forced her to drink that night.[79] She also testified that she willingly engaged in sexual intercourse with the accused and that he had her permission.[80] After the accused made the comment and SFC Davis started to have sexual intercourse with her, she thought to herself: "[O]h my gosh, I can't believe I am having sex with him too."[81] She did not actually want to have sexual intercourse with the accused or SFC Davis, but she did not indicate that to them. She testified that she did not say "no" or try to resist.[82] The members found the accused guilty of the maltreatment charge and other charges.[83]

The CAAF unanimously found the evidence to be legally insufficient to support the conviction for maltreatment. The court began by discussing the nature of the offense of maltreatment. The two elements of maltreatment are: (1) a certain person was subject to the accused's orders; and (2) the accused was cruel toward, or oppressed, or maltreated that person.[84] The second element is measured objectively, and sexual harassment may constitute maltreatment.[85]

The charge of maltreatment in this case was based on consensual sexual relations. The court pointed out that Article 93 does not cover all improper relationships between superiors and subordinates.[86] The court stated that, although the evidence clearly supported the charge of fraternization,[87] it was not sufficient to support a conviction for maltreatment. Once again, the court acknowledged that the relationship between a NCO and a subordinate may create a "unique situation of dominance and control," but the facts did not indicate such a situation in this case. The inherently coercive nature of the typical training environment was not present and was not a factor in PFC M's decision to engage in consensual sexual relations.[88]

The court dealt with the two allegations in the maltreatment specification, the sexual relations with an extremely intoxicated soldier and the offensive comment, separately. As for the intoxication, the court held that the prosecution failed to prove that the accused knew that PFC M was extremely intoxicated when they had sexual relations. According to the testimony of PFC M, she was acting normal before getting to the accused's apartment. Also, the accused was not present when she drank several shots of tequila. There was no evidence that she showed any visible signs of intoxication.[89] The court required the prosecution to prove that the accused knew or should have known of the "extreme intoxication," and the prosecution failed to do so.

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77. *Id.*

78. *Id.*

79. *Id.* at 109.

80. *Id.* at 110.

81. *Id.* at 109.

82. *Id.* at 110.

83. Based on this incident and other incidents involving female soldiers, the members found the accused guilty of maltreatment (three specifications), rape, sodomy (three specifications), indecent assault, unlawful entry, fraternization, and kidnapping, and they adjudged a sentence of a DD, confinement for five years, and reduction to the grade of E1. *Id.* at 108.

84. MCM, *supra* note 2, pt. IV, ¶ 17b.

85. *Id.* ¶ 17c(2).

86. *Fuller*, 54 M.J. at 110-11.

87. The accused was charged with fraternization. Although it was not in effect at the time of the offense, Judge Effron mentioned i n a footnote that "[t]he Army's most recent fraternization regulation punitively prohibits a wide range of inappropriate relationships between superiors and subordinates." *Id*. at 111 n.3 (citing AR 600-20, *supra* note 9, para. 4-14).

88. *Id.* at 111.

89. *Id.*

As for the sexual harassment allegation, the CAAF concluded that the statement did not constitute maltreatment, because the prosecution failed to prove that it was offensive. The testimony of PFC M established that she was embarrassed, "but embarrassment does not support a finding of maltreatment."[90] The court acknowledged that, in a different situation, such a comment would constitute maltreatment. Under these facts and circumstances, however, the evidence was legally insufficient.[91]

Judge Sullivan wrote a concurring opinion to expound on a few points. The problem was not whether the allegations in the specification constituted maltreatment. The problem was that the prosecution failed to prove what was alleged in the specification.[92] Also, this case involved consensual sexual relations between a NCO and a subordinate. According to Judge Sullivan, "[t]he absence of coercion on the basis of rank remove[d] this case from the scope of Article 93."[93]

Trends

Although the four CAAF opinions involved four different offenses, they have similarities that signal a trend. The CAAF will closely scrutinize this type of case to ensure the evidence supports all the elements of the offenses. As Judge Sullivan argued in his dissenting opinion in *Johnson*, it appears that the court is using a higher standard than the law provides for legal sufficiency.[94]

The factual issues in these cases were close calls. By deciding these cases together and reversing all four, the court sent a clear message: it will not tolerate overcharging in this type of case. If, beyond fraternization or violation of a regulation, a nonconsensual crime against the subordinate is charged, then rank is not enough. Even when a senior-subordinate relationship is involved, all the elements of the offense must be proven. There may be situations where the evidence supports a finding of lack of consent and no mistake of fact, even though the victim does not physically or verbally indicate a lack of consent. Those situations, however, are limited to cases where the accused used his position of dominance and control to coerce the victim. According to the CAAF, none of these four cases involved such a situation.

One could walk away from these four cases with a couple of different perceptions. Some may think that the court is misogynistic—distrustful of women. The court should not deny women the power to clearly make certain touching of their bodies off-limits by shrugging off physical contact or by saying "stop." However, at the same time, the court must ensure justice in courts-martial.[95] Some have used the term "predator" to describe an officer or NCO who embarks on a campaign of sexually suggestive remarks and physically assaultive overtures in hopes of engaging subordinates in romantic adventures.[96] A predator is detrimental to the good order and discipline of a unit. Commanders may be incensed at the possibility of predators in their units, and they might charge misconduct as nonconsensual when it is not.

In these four cases, the court made it clear that it did not condone the accuseds' conduct. However, the court can affirm convictions only when the evidence supports all the elements of the offenses. For nonconsensual offenses, the prosecution has the burden to prove lack of consent beyond a reasonable doubt. The CAAF will hold the prosecution to that burden. Unless the accused used his superior position to create a situation of dominance and control to coerce the victim, rank is not enough.

Promoting Military Discipline

The intangible concept of "military discipline" is as difficult to define as the concept of justice. Military discipline is based on self-discipline and respect for properly constituted authority, and it has as its goal proper conduct and prompt obedience to lawful military authority by all military personnel.[97] Some of the offenses Congress has proscribed in the Uniform Code of Military Justice (UCMJ) are primarily focused on promoting military discipline, such as disrespect toward,[98] disobedience of,[99] and assaulting officers and noncommissioned officers.[100] The CAAF opinions that addressed offenses against military order also signal a trend. In *United States v. Najera*,[101] the CAAF held that a court can consider the manner in which

90. *Id.* at 112.

91. *Id.* The court affirmed the lesser-included offenses of indecent act by having sexual intercourse in the presence of a third person, as the court had done in *Tollinchi*. *Id*. *See supra* note 49 and accompanying text. The court affirmed the sentence. *Fuller*, 54 M.J. at 112.

92. *Fuller*, 54 M.J. at 112-13 (Sullivan, J., concurring).

93. *Id.* at 113 (Sullivan, J., concurring).

94. *See supra* text accompanying note 34.

95. *See supra* text accompanying note 2.

96. This description of the predator's *modus operandi* comes from the concurring opinion by Judge Squires at the ACCA, which Judge Sullivan quoted in his dissenting opinion in *Johnson*. United States v. Johnson, 54 M.J. 67, 72 (2000) (Sullivan, J., dissenting).

97. AR 600-20, *supra* note 9, para. 4-1.

words are spoken to determine if the words constitute disrespect under the UCMJ. In *United States v. Diggs*,[102] the CAAF showed deference to the court-martial members' decisions on factual issues involving military discipline and held that the evidence was legally sufficient to support convictions for assaulting a NCO and resisting apprehension. These cases demonstrate that the CAAF is well aware of the importance of military discipline in the military justice system.

United States v. Najera: *Taking Off the Blinders To Consider Evidence of Demeanor and Context in "Language-Only" Disrespect Cases*

The superior-subordinate relationship is crucial to military discipline. One way in which the UCMJ attempts to deter and punish insubordination is by proscribing, in Article 89, disrespect toward superior commissioned officers.[103] It also proscribes, in Article 91, disrespect toward warrant officers and noncommissioned officers.[104] The courts have held that words[105] and acts[106] may constitute disrespect.

For the past decade, new judge advocates have been taught that language and deportment were distinct bases for disrespect under Articles 89 and 91 of the UCMJ. The guidance was that, if a specification alleged disrespect in language but did not mention deportment, then the court could not consider the manner in which the accused spoke the words.[107] Professor Schlueter even stated this rule in his treatise, *Military Criminal Justice: Practice and Procedure*.[108] He accurately cited the Air Force Court of Military Review's (AFCMR) opinion in the 1988 case of *United States v. Wasson*[109] as the basis for the rule. In language-only disrespect cases, this rule was like a set of blinders that allowed the court to look at the alleged language but not the circumstances surrounding the language. In *Najera*, the CAAF pointed out that it had never adhered to such a rule, and it specifically overruled *Wasson*. The CAAF held that courts can consider all the circumstances, including demeanor and context, when determining whether the alleged language was disrespectful behavior under Article 89, even if deportment was not alleged in the specification. In *Najera*, the CAAF clarified the offense of disrespect.

The Old Rule for "Language-Only" Disrespect Specifications from United States v. Wasson

In 1988, the AFCMR considered, in *United States v. Wasson*, the legal sufficiency of a specification that alleged that the accused "was disrespectful in language toward [two non-commissioned officers] . . . by saying to them, 'If you are going to separate me, I wish you would hurry it up because I'm tired of this crap,' or words to that effect."[110] According to the AFCMR, the drafter of the specification identified this as a "language-only" case by not including deportment in the specification. The court interpreted the *Manual for Courts-Martial* as requiring the words in a language-only case to contain abusive epithets or contemptuous or denunciatory language.[111] It

98. UCMJ arts. 89 (proscribing disrespect toward a superior commissioned officer), 91(3) (proscribing disrespect toward a warrant, noncommissioned, or petty officer) (2000).

99. *Id.* arts. 90(2) (proscribing disobedience of a superior commissioned officer), 91(2) (proscribing disobedience of a warrant, noncommissioned, or petty officer).

100. *Id*. arts. 90(1) (proscribing striking or assaulting a superior commissioned officer), 91(1) (proscribing striking or assaulting a warrant, noncommissioned, or petty officer).

101. 52 M.J. 247 (2000).

102. 52 M.J. 251 (2000).

103. UCMJ art. 89. The statute provides that "[a]ny person subject to this chapter who behaves with disrespect toward his superior commissioned officer shall be punished as a court-martial may direct." *Id*.

104. *Id*. art. 91(3). Under this subparagraph of the statute, a court-martial may punish a warrant officer or enlisted member who "treats with contempt or is disrespectful in language or deportment toward a warrant officer, noncommissioned officer, or petty officer while that officer is in the execution of his office." *Id.*

105. *See, e.g.*, United States v. Montgomery, 11 C.M.R. 308 (A.B.R. 1953) (holding that "Keep your Goddamn mouth shut, you field grade son-of-a-bitch or I'll tear you apart; I'll beat you to death you . . . ; I'll bite your . . . off, you punk you" constituted disrespect).

106. *See, e.g.*, United States v. Ferenczi, 27 C.M.R. 77 (C.M.A. 1958) (holding that turning from and leaving the presence of an officer while the officer was talking to the accused constituted disrespect).

107. Instructors at The Judge Advocate General's School, U.S. Army, Charlottesville, Virginia, including the author, taught this rule to students for over a decade. It was such a trap for the unwary that the author made a special effort to highlight it.

108. SCHLUETER, *supra* note 3, § 2-3(B). After *Najera*, Professor Schlueter amended his treatise to reflect that the CAAF overruled *Wasson*. *Id.* § 2-3(B) (Supp. 2000).

109. 26 M.J. 894 (A.F.C.M.R. 1988).

110. *Id.* at 896.

held that, in language-only cases, courts cannot consider evidence of the manner in which the words were spoken.[112] The court found that the word "crap" was not inherently disrespectful, so it held that the words as alleged failed to state an offense.[113]

Wasson was not a well-reasoned opinion. For example, the AFCMR interpreted the *MCM* provision stating that "disrespect by words may be conveyed by abusive epithets or other contemptuous or denunciatory language" as meaning "the words *must* contain abusive epithets, or contemptuous or denunciatory language in order to constitute an offense."[114] The court gave no explanation of how it read "may" as meaning "must." That interpretation contributed to the court's determination that, in a language-only case, the alleged words must be inherently disrespectful.

In *Wasson*, the Air Force court stated that "[b]y using the words 'was disrespectful in language toward . . .' in the specification, the drafter identified this as a language case, rather than one involving deportment." That assumed too much. The model specification for Article 89, in the *MCM*, does not contain the word "language" or "deportment."[115] The drafter of the specification in *Najera* very likely just followed the model specification and alleged the words Najera spoke to his commander.

The *Wasson* limitation on prosecution evidence in language-only disrespect cases was not necessary. In cases involving other offenses, the prosecution is not barred from presenting evidence of the circumstances surrounding words. For example, the fact-finder can consider the circumstances in determining whether language constitutes a solicitation[116] or is indecent.[117] If the concern is that the accused is misled as to the exact conduct he must defend against, adequate protections already exist. If the prosecutor presents evidence of disrespectful behavior that is not fairly implied in the specification, then the accused could object on the grounds of a fatal variance between the pleadings and the evidence presented at trial.[118] In most cases, however, an accused and his counsel should be on notice that the fact-finder will consider the context and manner in which the accused used the language alleged in the specification.

Many military justice practitioners, even those not in the Air Force and not bound by the holding in *Wasson*, have followed the rule set out in *Wasson*. Therefore, when disrespectful behavior included words and the way in which they were said, cautious judge advocates have alleged that the accused "was disrespectful in language and deportment." The CAAF never addressed this rule until it decided *Najera* last year.

The CAAF Overrules Wasson *and Puts the Law of Disrespect Back on Track in* Najera

Private Najera, U.S. Marine Corps, was serving confinement in the brig after a previous court-martial. He requested early release, so he could return to training. His company commander supported the request, and the convening authority released Najera.[119] After his release, Najera told his first sergeant that he would not participate in the training with the rest of the company. Unable to persuade Najera to train, the first sergeant told him to talk to the company commander. The com-

111. The AFCMR quoted the *MCM*'s explanation of disrespect under Article 89:

> Disrespectful behavior is that which detracts from the respect due the authority and person of a superior commissioned officer. It may consist of acts or language, however expressed, and it is immaterial whether they refer to the superior as an officer or as a private individual. Disrespect by words may be conveyed by abusive epithets or other contemptuous or denunciatory language. Truth is no defense. Disrespect by acts includes neglecting the customary salute, or showing a marked disdain, indifference, insolence, impertinence, undue familiarity, or other rudeness in the presence of the superior officer.

Id. (quoting MANUAL FOR COURTS-MARTIAL, UNITED STATES, pt. IV, ¶ 13c(3) (1984)).

112. *Id.* at 897.

113. *Id.* at 897-98.

114. *Id.* at 896 (emphasis added). Also, when explaining why the word "crap" was not inherently disrespectful, the AFCMR acknowledged that "[t]he conditions surrounding the use of the word are important." *Id*. at 897.

115. *See* MANUAL FOR COURTS-MARTIAL, UNITED STATES, pt. IV, ¶ 13f (1998) [hereinafter 1998 MCM]. The same is true for the model specification in the Army's *Military Judges' Benchbook*. U.S. DEP'T OF ARMY, PAM. 27-9, LEGAL SERVICES: MILITARY JUDGES' BENCHBOOK, para. 3-13-1b (30 Sept. 1996) [hereinafter DA PAM. 27-9].

116. *See, e.g.*, United States v. Williams, 52 M.J. 218, 220-21 (2000) (holding that an implicit invitation to join in the accused's international drug smuggling operation, when considering the context of the statement, constituted solicitation).

117. *See, e.g.*, United States v. French, 31 M.J. 57, 59-61 (1990) (holding that asking a fifteen year-old stepdaughter for permission to climb into bed with her constituted indecent language).

118. The test for whether a variance is fatal focuses on prejudice to the accused: "(1) has the accused been misled to the extent that he has been unable adequately to prepare for trial; and (2) is the accused fully protected against another prosecution for the same offense." United States v. Lee, 1 M.J. 15, 16 (C.M.A. 1975).

mander ordered him to return to training and explained that, otherwise, he could get a bad-conduct discharge at a special court-martial. In the presence of two non-commissioned officers and while smirking, Najera said he wanted a dishonorable discharge and out of the Marine Corps. He told the commander that he refused to train and "you can't make me go."[120]

Private Najera was charged with absence without leave, willful disobedience of a superior commissioned officer, and disrespect toward the same superior commissioned officer. He pled guilty to the unauthorized absence and disobedience charges, but he pled not guilty to a specification alleging, under Article 89, that he "did . . . behave himself with disrespect towards [the commander] . . . by saying to him, 'you can't make me, you can give me any type of discharge you want, you can give me a dishonorable discharge, I would rather have a dishonorable discharge than return to training, I refuse,' or words to that effect."[121] The commander and first sergeant testified that Private Najera was smirking while making the statement, and his demeanor was cocky and sarcastic.[122] Private Najera made the statement in the presence of two non-commissioned officers. A military judge sitting alone convicted Najera of disrespect.[123]

On appeal, the accused argued that the evidence was factually and legally insufficient to support the disrespect charge. The Navy-Marine Court of Criminal Appeals (NMCCA) began by commenting that, because of the "curious declination by the Government to charge disrespect in both language *and* deportment,"[124] the court would limit the evidence it considered. In adherence to the rule set out in *Wasson*, the court did not consider evidence of the smirking, or cocky and sarcastic manner in which the words were spoken, because it fell under the rubric of deportment and was thus not useable in a language-only case.[125] The Navy court did consider, however, the context in which the words were used. The court pointed out that it is impossible to remove the utterance from its context.[126] The true nature of words can only be determined in the context of the circumstances of their utterance. The Navy court found that these words, spoken in the presence of two non-commissioned officers, conveyed more than a refusal to obey. They reflected a "total disdain for that officer's ability to compel him to comply with the order and to hold appellant accountable for his misconduct."[127] The court was convinced beyond a reasonable doubt that Najera was guilty of disrespect toward a superior commissioned officer.[128]

The CAAF considered the legal sufficiency of the evidence of disrespect.[129] The accused argued that because the specification alleged disrespect in "language" rather than "language and deportment," the prosecution was required to show the language was disrespectful on its face. He further argued that the NMCCA could not affirm the conviction based on the context or manner in which the words were used.[130] The CAAF rejected these arguments.

The CAAF held that a language-only specification did not bar the prosecution from showing the circumstances surrounding the language that contribute to its disrespectful nature.[131] The court supported its holding with three points. First, it pointed out that Article 89 makes no distinction between language and deportment.[132] Second, the court pointed out that it had generally held in past cases that "all the circumstances of a case can be considered in determining whether disrespectful

119. United States v. Najera, 52 M.J. 247, 248 (2000).

120. *Id.*

121. *Id.*

122. *Id.* at 250.

123. *Id.* at 248. The military judge sentenced him to a bad-conduct discharge, confinement for one hundred days, and forfeiture of $200 per month for three months. Pursuant to a pretrial agreement, the convening authority suspended the confinement in excess of sixty days. *Id.*

124. No. 9800155, 1998 CCA LEXIS 451, at *3 (N-M. Ct. Crim. App. Nov. 19, 1998) (unpublished) (emphasis in original).

125. *Id.* at *3 n.2.

126. *Id.* at *5.

127. *Id.* at *5-6.

128. *Id.* at *6.

129. United States v. Najera, 52 M.J. 247, 248-49 (2000).

130. *Id.* at 249. As stated above, the NMCCA considered the context of the words, but it intentionally did not consider the manner in which the words were spoken. *See supra* notes 121-23 and accompanying text.

131. *Najera*, 52 M.J. at 250.

132. *Id.* at 249.

behavior in violation of Article 89 had occurred."[133] Third, the CAAF noted that the *MCM* does not limit the offense of disrespect toward a superior commissioned officer, because it merely says that "disrespect by words *may* be conveyed by abusive epithets or other contemptuous or denunciatory language."[134] The court further noted that the *MCM* lists one of the elements of the offense as, "*under the circumstances*, the behavior or language was disrespectful to that commissioned officer."[135] Thus, the *MCM*'s list of the types of disrespectful words is not exclusive, and the circumstances surrounding the words may be considered.

The CAAF specifically addressed the AFCMR's holding in *Wasson* that an appellate court cannot consider evidence of the manner in which words are spoken unless the specification alleged disrespect in language and deportment. The court stated that it had never held that *Wasson* was good law. For the reasons stated above, the CAAF specifically overruled *Wasson*.[136] The Navy court felt constrained by *Wasson* from considering the manner in which the words were spoken, but it did consider the context of the words. The CAAF freely considered evidence of both the context and the manner in which Najera spoke the words. The CAAF had no problem finding that the evidence was legally sufficient to support the conviction for disrespect toward a superior commissioned officer.[137]

In *Najera*, the CAAF moved the law of disrespect back on the right path. *Wasson* led practitioners down a path that held traps for the unwary. Words have some inherent meaning, but the context and manner in which words are used can be as important as the words themselves in conveying a message. In disrespect cases, the ultimate question is whether the conduct of the accused "detracts from the respect due the authority and person of a superior commissioned officer." When making this determination, a court should consider all the circumstances surrounding the statement. In *Najera*, the CAAF took the blinders off courts, allowing the them to consider the true meaning of alleged language.

Open Question: Application of Najera *to Article 91(3)*

One may wonder whether *Najera* applies to Article 91(3). The opinion stated that Article 89 does not distinguish between "disrespect in language or deportment," but it indicated that Article 91 might make such a distinction.[138] Article 91(3) punishes a service member who "treats with contempt or is disrespectful in *language or deportment* toward a warrant officer, noncommissioned officer, or petty officer while that officer is in the execution of his office."[139] It is also worth noting that the model specification for Article 91(3), unlike that for Article 89, does suggest that the drafter allege whether the accused was disrespectful in language or deportment.[140]

Despite these differences, the CAAF's holding in *Najera* should apply to Article 91 for two reasons. First, the *MCM* does not define "disrespect" in its explanation of Article 91. It instead specifically refers to the definition of "disrespect" in the paragraph explaining Article 89, which is the *MCM* provision the CAAF analyzed in *Najera*. Therefore, the CAAF's interpretation of that provision would apply to Article 91. Second, *Wasson* involved a violation of Article 91(3). Although *Najera* involved a violation of Article 89, the CAAF specifically overruled *Wasson*.[141] The CAAF obviously sees the rationale in *Najera* as applying to Article 91 cases.

Advice for Practitioners

The holding in *Najera* enables the government to get all the relevant evidence to the decision-maker. Reliance on *Najera*, however, should remain a last resort. When drafting charges, trial counsel should continue to allege, when appropriate, that the accused was disrespectful in both language and deportment. This practice gives full notice to the defense of the conduct against which it must defend. It avoids unnecessary litigation over whether a variance is fatal. It also allows the specification on the flyer that the members of the panel see to truly reflect the disrespectful nature of the accused's behavior. Also, and perhaps most importantly, this practice reminds the trial counsel to present evidence of the context and demeanor.

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133. *Id.*

134. *Id.* (emphasis in original) (quoting 1998 MCM, *supra* note 115, pt. IV, ¶ 13c(3) (emphasis added)). The language in the current *MCM* is identical to the language in the 1984 edition, which the AFCMR relied on in *Wasson*. *See supra* note 111 and accompanying text.

135. *Najera*, 52 M.J. at 249 (emphasis in original) (quoting 1998 MCM, *supra* note 115, pt. IV, ¶ 13b(5) (emphasis added)).

136. *Id.* at 250.

137. *Id.*

138. *Id.* at 249 ("[Article 89] makes no distinction between 'disrespect in language or deportment' (*but cf.* Art. 91(3), UCMJ, 10 USC § 891(3)) . . . ."). The introductory signal "*But cf.*" is used to cite authority that "*supports a proposition analogous to the contrary* of the main proposition." THE BLUEBOOK: A UNIFORM SYSTEM OF CITATION 23 (17th ed. 2000) (emphasis in original).

139. UCMJ art. 89 (2000) (emphasis added).

140. *See* MCM, *supra* note 2, pt. IV, ¶ 15f(3); DA PAM. 27-9, *supra* note 115, para. 3-15-3b.

United States v. Diggs:
Multiple Issues Involving Offenses Against Military Order

While *Najera* discussed a single issue, *Diggs* raised three different issues involving offenses against military order. Staff Sergeant (SSG) Diggs was stationed at Rose Barracks in Vilseck, Germany. Some soldiers from Rose Barracks, including Sergeant (SGT) Vaden, deployed to Bosnia. Sergeant Vaden's unit returned from Bosnia unexpectedly.[142] Sergeant Vaden had been in the Army for eight years, and he had been married to Chung Sun Vaden for six years. When SGTVaden, who was in his battle dress uniform (BDUs), arrived home, he unlocked the door and went inside. He went upstairs and saw his wife come out of the bedroom in a teddy. She was surprised and said, "What are you doing home?"[143] Sergeant Vaden went into the bedroom, turned on the light, looked around, and opened the closet door. He saw SSG Diggs naked and crouched down on the floor of the closet. Staff Sergeant Diggs said, "Oh my God," and SGT Vaden hit SSG Diggs three or four times in the side and on the arm. Sergeant Vaden's wife got between them. Staff Sergeant Diggs came out of the closet and told SGT Vaden to calm down, he had been caught, and he would turn himself in. Sergeant Vaden said, "Yes, you're caught and you're going to turn yourself in. You are coming with me and we are both going to go to the MP station together."[144] After SSG Diggs put his BDUs on, they both went down the stairs and out the door. Staff Sergeant Diggs pushed SGT Vaden to the ground and ran away.[145]

A special court-martial composed of officer and enlisted members convicted SSG Diggs of an unenumerated service disorder under Article 134 by being naked in a fellow NCO's bedroom with the other NCO's wife, resisting apprehension under Article 95, and assaulting a NCO under Article 91.[146] On appeal, the CAAF considered the legal sufficiency of the evidence to support resisting apprehension and assaulting a NCO,[147] and it affirmed the convictions.[148]

The CAAF first addressed resisting apprehension. The *MCM* lists the elements of the offense as: (1) a certain person attempted to apprehend the accused; (2) that person was authorized to apprehend the accused; and (3) the accused actively resisted the apprehension.[149] The issue before the court concerned the state of mind of the accused. The court stated that "[t]here was no dispute that the prosecution was required to prove that appellant had clear notice of the apprehension which he was charged with resisting."[150] The notice does not have to be oral or written; it may be implied by the circumstances.[151]

The accused argued that there was insufficient evidence that he had "clear notice" that SGT Vaden was attempting to place him in custody, before he pushed SGT Vaden and ran away. This was a question of fact. The majority opinion, written by Judge Sullivan, called the facts of this case an "extraordinary situation." The majority relied on three facts in finding "clear notice" of apprehension: (1) the accused's being caught during an offense (the service disorder under Article 134 by being naked in a fellow NCO's bedroom with the other NCO's wife); (2) the accused's admission of wrongdoing and statement of

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141. Overruling *Wasson* was a sound decision. Although Article 91(3) states that disrespect can be in "language or deportment," Congress's use of the disjunctive does not indicate an intent to make them distinct bases of disrespect, which the specification must specifically allege.

142. United States v. Diggs, 52 M.J. 251, 252 (2000).

143. *Id*.

144. *Id*. at 252-53.

145. *Id*. at 253-54.

146. *Id*. at 252. The members adjudged a sentence of a bad-conduct discharge, confinement for three months, forfeiture of $600 per month for three months, and reduction to the grade of E1.

147. The CAAF did not consider the Article 134 offense. It is a good example of using Clause 1 of Article 134 for misconduct that the President did not specifically enumerate in the *MCM* as an offense under Article 134. Having a sexual relationship with a deployed soldier's wife is directly and palpably "to the prejudice of good order and discipline in the armed forces." UCMJ art. 134 (2000).

148. *Diggs*, 52 M.J. at 257.

149. MCM, *supra* note 2, pt. IV, ¶ 19b(1).

150. *Diggs*, 52 M.J. at 255.

151. *Id*. The court discussed three prior cases where the circumstances did not constitute clear notice of apprehension. In *United States v. Garcia-Lopez*, 16 M.J. 229 (C.M.A. 1983), military authorities entering the accused's barracks room and announcing they were going to search his room and ordering him to stay in that room did not constitute clear notice of apprehension under Article 95. *Id*. at 231-32. In *United States v. Sanford*, 12 M.J. 170 (C.M.A. 1981), a sergeant's statement to an enlisted soldier, "Lieutenant Young wants to see you[,]" and following the soldier to the commander's office was not an apprehension for purpose of the Fourth Amendment. *Id.* at 173-74. Also, in *United States v. Kinane*, 1 M.J. 309 (C.M.A. 1976), the court affirmed a lower court's finding that bringing a service member to the crime scene, reading him his rights, and questioning him was not an apprehension for purposes of determining whether a search incident to custodial arrest was authorized. *Id*. at 311-14.

intent to turn himself in; and (3) SGT Vaden's insistence that the senior NCO subject himself to the junior NCO's control. According to Judge Sullivan "[t]his was not a routine military practice or operation in any way."[152] The court held that the evidence was sufficient for a rational fact-finder to find beyond a reasonable doubt that SSG Diggs had "clear notice" of apprehension by SGTVaden.

The court next addressed two issues involving the offense of assaulting a NCO. Article 91(1) of the UCMJ prohibits any enlisted member from striking or assaulting a NCO "while that officer is *in the execution of his office*."[153] On appeal, the accused argued that SGT Vaden was not protected by Article 91 for two different reasons—SGT Vaden was not in the execution of his office, and SGT Vaden divested himself of the protection of his office.[154]

According to the *MCM*, a NCO is in the execution of his office "when engaged in any act or service required or authorized by treaty, statute, regulation, the order of a superior, or military usage."[155] Noncommissioned officers have the authority to take corrective actions, including apprehension, when another soldier's conduct violates good order and discipline.[156] The accused argued on appeal that SGT Vaden was acting as an "avenging cuckold" rather than as a NCO executing his office. This was a question of fact. The court held that the members had a sufficient evidentiary basis to find that SGT Vaden was in the execution of his office and not on a personal "frolic" of revenge.[157]

The last issue was "divestiture." An officer or NCO whose actions depart substantially from the required standards appropriate to his rank or position loses his protected status.[158] In *Diggs*, the CAAF addressed a new issue of whether an officer or NCO, after divesting himself, can regain his protected status. The court acknowledged that SGT Vaden committed a battery against SSG Diggs, and he could have been prosecuted under Article 128 for that crime. The court found that such misconduct divested SGT Vaden of his authority as a NCO for purposes of immediate physical responses by the accused. The court found, however, that SGT Vaden regained his protected status after he "desisted in his illegal conduct and, thereafter, attempted to resolve this matter within appropriate military channels."[159] The concept of regaining protected status after misconduct serves two purposes. First, it encourages officers to stop their misconduct. Also, it avoids unnecessarily narrowing the broad protections afforded officers in the execution of their legitimate duties.[160] As Judge Sullivan pointed out in a footnote, the military judge gave an appropriate divestiture instruction. After considering all the evidence, however, the members still found the accused guilty of assault on a NCO. The CAAF found the evidence to be legally sufficient.

Judges Gierke and Effron disagreed with the majority's holding that the evidence was legally sufficient to support resisting apprehension and assault on a NCO. First, no rational fact-finder could find beyond a reasonable doubt that SSG Diggs knew that SGT Vaden was exercising his authority as a NCO to apprehend him.[161] The accused was attacked by an enraged husband, who was a junior NCO, and stopped only when his wife intervened. The accused assured SGT Vaden he would turn himself in. Sergeant Vaden agreed to the offer and stated he would go along to ensure it happened. The dissent found that SGT Vaden never said or did anything to indicate he was exercising his authority as a NCO to apprehend SSG Diggs.[162]

152. *Diggs*, 52 M.J. at 255.

153. UCMJ art. 91(1) (2000) (emphasis added).

154. Note that under Article 91 the victim does not have to be superior in rank to the accused. MCM, *supra* note 2, pt. IV, ¶ 15b(1). If the victim is a superior NCO of the accused, then it is an aggravating factor that increases the maximum confinement from one year to five years. *Id*. pt. IV, ¶ 15e(2), (3). By contrast, superior status is an element of the offense of assaulting a superior commissioned officer under Article 90(1). *Id*. pt. IV, ¶ 14b(1).

155. *Id*. pt. IV, ¶ 14c(1)(b) (explaining "execution of office" for assaulting a superior commissioned officer under Article 90). The *MCM* cross-references to that provision to explain the meaning of "in the execution of office" under Article 91(1). *Id*. pt. IV, ¶ 15b(3).

156. UCMJ art. 7(c) (2000) (authorizing officers and NCOs to "quell quarrels, frays, and disorders among persons subject to this chap ter and to apprehend persons subject to this chapter who take part therein"). The Army policy is that "leaders in the Army, *whether on or off duty or in a leave status*, will [t]ake action consistent with Army regulation in any case where a soldier's conduct violates good order and military discipline." AR 600-20, *supra* note 9, para. 4-4a (emphasis added).

157. *Diggs*, 52 M.J. at 256.

158. *See* United States v. Richardson, 43 C.M.R. 333 (C.M.A. 1971) (reversing conviction of assaulting a superior commissioned officer be cause the officer victim challenged the accused to fight); *see also* MCM, *supra* note 2, pt. IV, ¶¶ 13c(5), 14c(1)(d).

159. *Diggs*, 52 M.J. at 257.

160. *Id*.

161. *Id*. (Gierke, J., dissenting).

162. *Id*. at 257-58 (Gierke, J., dissenting).

The dissent offered another basis for reversing the conviction for resisting apprehension. If SGTVaden did exercise his authority as a NCO to apprehend SSG Diggs, then the apprehension was completed when SSG Diggs submitted to SGT Vaden's control, which would have been in the bedroom. After that point, SSG Diggs was in custody. As quoted by the dissent, the *MCM* states that "attempts to escape from custody after the apprehension is complete do not constitute the offense of resisting apprehension."[163] Therefore, under the reasoning of the majority, the accused would not be guilty of resisting apprehension.

The dissent also found the evidence legally insufficient to support assault on a NCO. The evidence was that SGTVaden was acting in a personal capacity rather than an official capacity.[164] This was demonstrated by his physical assault on SSG Diggs. After he committed a battery upon SSG Diggs, SGT Vaden did nothing to invoke his status as a NCO.[165] The dissent stated that divestiture was not an issue, because SGT Vaden neither held nor invoked any position of authority over SSG Diggs, of which he could divest himself.[166] The two dissenting judges agreed with the majority opinion only as far as it affirmed the conviction of conduct prejudicial to good order and discipline under Article 134.[167]

The CAAF affirmed the convictions in *Diggs* by a vote of three to two. Considering the facts, the dissenting opinion appears to present the more compelling argument. Judge Sullivan even stated, in a footnote, that he found merit in the dissent's arguments.[168] He pointed out, however, the difference between being on the jury at trial and reviewing a case for legal sufficiency as an appellate court. Judge Sullivan expressed trust in the American jury system, especially the court-martial panel, stating that "[t]he jury in the United States military justice system is one of the best in the world."[169] The court appears to be even more deferential to the court-martial members' verdict in a case involving military issues, stating:

> More importantly, the jury in the military is expert at sorting out military issues such as the functioning between the rank structure (sergeant E-5 and staff sergeant E-6) and the responsibilities of noncommissioned officers, even in the extraordinary circumstances of the present case – a soldier unexpectedly returns home from a deployment to Bosnia and finds his wife with a naked man in his own bedroom.[170]

The members have the responsibility to judge credibility, draw inferences, and to weigh all the evidence. Unless the appellate court finds that, after viewing the evidence in the light most favorable to the prosecution, no rational factfinder could have found the elements of the offense beyond a reasonable doubt, the appellate court has no legal basis to overturn the members' decision.[171] While the dissent presented a persuasive argument that evidence in this case did not meet that low standard for legal sufficiency, the majority apparently is reluctant to second-guess the decision of the court-martial members when it comes to military issues.

Trends

Military discipline is vital to mission accomplishment, and the *MCM* lists it as one of the purposes of military law. It distinguishes a military unit from an armed mob.[172] Over the last year, the CAAF demonstrated that it is mindful of the importance of military discipline. In *Najera*, the CAAF turned the law of disrespect in the right direction. Courts can consider the manner in which the accused spoke the words alleged in a language-only disrespect specification to determine whether the accused's behavior was disrespectful under Article 89. In *Diggs*, a majority of the court was reluctant to overturn the members' factual findings on military issues. As long as the evidence, viewed in the light most favorable to the government, is sufficient for *some* rational factfinder to find the accused

163. *Id.* at 258 (Gierke, J., dissenting) (quoting 1998 MCM, *supra* note 115, pt. IV, ¶ 19c(1)(c)).

164. *Id.*

165. *Id.*

166. *Id.*

167. *Id.* at 257 (Gierke, J., dissenting). Although not stated, the dissent would apparently also affirm a conviction for assault consummated by a battery, in violation of Article 128, as a lesser-included offense to assault on a NCO.

168. *Id.* at 256 n.2.

169. *Id.*

170. *Id.*

171. *See* Jackson v. Virginia, 443 U.S. 307, 319 (1979).

172. *See supra* note 1 and accompanying text.

guilty, the verdict must stand. As the court strives to ensure justice in military law, it has not forgotten the importance of military discipline.

Defining the Bounds of the "Darling of the Prosecutor's Nursery"

> *O conspiracy!*
> *Sham'st thou to show thy dangerous brow by night,*
> *When evils are most free?*[173]

The criminalization of conspiracy serves two different purposes in the criminal law. First, it protects society from the danger of concerted criminal activity.[174] As Julius Caesar understood, the concerted activity of a conspiracy is much more dangerous than the acts of individuals. The criminal enterprise is more difficult to detect because of its secrecy, is more likely to succeed because of the combination of strengths and resources of its members, and may continue to exist even after the initial object of the conspiracy has been achieved.[175] Second, the criminal law punishes the agreement to engage in a criminal venture as an anticipatory or inchoate offense, because the likelihood of the commission of a crime is sufficiently great and the criminal intent is sufficiently well-formed.[176] The grave dangers of a conspiracy justify punishing conduct at an earlier stage on the spectrum from mere preparation to consummation of the underlying offense. The inchoate offense of attempt requires an act that is more than mere preparation and must be a direct movement toward the commission of the offense.[177] However, the offense of conspiracy requires merely that, while the agreement is in existence, one of the co-conspirators does an act to effect the object of the conspiracy, no matter how preliminary or preparatory in nature.[178]

Besides proscribing conspiracy as a criminal offense, the criminal law has recognized special substantive, procedural, and evidentiary rules for cases involving conspiracy. For example, under the Military Rules of Evidence, a statement made by a co-conspirator "during the course and in furtherance of the conspiracy" is exempted from the definition of hearsay.[179] Also, the accused can be convicted and punished separately for both the conspiracy and the underlying offense that is the object of the conspiracy.[180] Furthermore, courts have held each co-conspirator criminally liable for the acts of the others in furtherance of the conspiracy.[181] In 1925, Judge Learned Hand referred to conspiracy as "the darling of the modern prosecutor's nursery."[182] Conspiracy is adored by prosecutors no less today, and commentators have questioned whether all these different rules give an undue advantage to the prosecutor and unfairly burden the conspiracy defendant.[183]

It is important for the law to clearly define the offense of conspiracy and the parameters of the special rules it brings with it. Over the last year, the CAAF addressed the nature of the crime of conspiracy in *United States v. Valigura*[184] and *United States v. Pereira*.[185] It also addressed, in *United States v. Browning*,[186] the issue of whether vicarious liability of co-conspirators applied in military law. In *Valigura*, the court refused to depart from the traditional "bilateral theory" of conspiracy, which requires a meeting of the minds between at least two culpable parties. In *Pereira*, the court reiterated the longstanding rule that a single conspiracy to commit multiple crimes is but a

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173. WILLIAM SHAKESPEARE, JULIUS CAESAR act 2, sc. 1.

174. United States v. Feola, 420 U.S. 671, 693 (1975).

175. United States v. Rabinowich, 238 U.S. 78, 88 (1915).

176. *Feola*, 420 U.S. at 694.

177. MCM, *supra* note 2, pt. IV, ¶ 4c(2).

178. *Id.* ¶ 5c(4).

179. *Id*. MIL. R. EVID. 801(d)(2)(E).

180. *Id*. pt. IV, ¶ 5c(8). *See* ROLLIN M. PERKINS & RONALD N. BOYCE, CRIMINAL LAW 687-88 (3d ed. 1982) [hereinafter PERKINS & BOYCE].

181. The applicability of this common law rule to military law will be addressed in the discussion of *United States v. Browning*. *See infra* text accompanying notes 231-45; MCM, *supra* note 2, pt. IV, ¶ 5c(5); United States v. Pinkerton, 328 U.S. 640 (1946).

182. Harrison v. United States, 7 F.2d 259, 263 (2d Cir. 1925) (questioning the appropriateness of cumulative sentences when it appeared that the prosecutor used crafty draftsmanship, including adding a count for conspiracy, to increase the sentence in a cocaine distribution case).

183. 2 WAYNE R. LAFAVE & AUSTIN W. SCOTT, SUBSTANTIVE CRIMINAL LAW § 6.4(b) (1986) [hereinafter 2 LAFAVE & SCOTT].

184. 54 M.J. 187 (2000).

185. 53 M.J. 183 (2000).

186. 54 M.J. 1 (2000).

single conspiracy. In *Browning*, the court, even in the absence of specific language in the UCMJ, held that vicarious liability of co-conspirators does apply in military law. This article discusses each of these three cases individually to explain how the CAAF looked at the intent of Congress, and the federal common law upon which it relied, to define the boundaries of the offense of conspiracy and its special rules.

United States v. Valigura: *"Bilateral Theory" of Conspiracy*

The first case, *Valigura*, had a very common fact pattern. Private (PV2) Audrey Valigura encountered an undercover military police investigator. Private Valigura agreed to sell marijuana to the undercover agent. Pursuant to the agreement, she did transfer marijuana to the agent and received payment.[187] Private Valigura was charged not only with distribution of marijuana, but also with conspiracy to do so. The only two co-conspirators listed in the conspiracy specification were the accused and the undercover agent. The accused was convicted of, inter alia, the distribution and conspiracy charges.[188]

The issue on appeal was whether PV2 Valigura's transactions with the undercover agent constituted a conspiracy. Before analyzing that issue, some background discussion is necessary. Congress has prohibited criminal conspiracy in Article 81 of the UCMJ: "Any person subject to this chapter who conspires with any other person to commit an offense under this chapter shall, if one or more of the conspirators does an act to effect the object of the conspiracy, be punished as a court-martial may direct."[189] According to the *Manual for Courts-Martial*, there are two elements of conspiracy: (1) agreement with one or more persons to commit an offense under the UCMJ and (2) an overt act by any co-conspirator in furtherance of the conspiracy.[190] The gravamen of the offense of conspiracy is the agreement.[191] The agreement is the required actus reus.[192] The agreement is also part of the mens rea, which is the intent to both enter into an agreement with another and to accomplish the substantive offense.[193]

Traditionally, under the "bilateral theory" of conspiracy, the co-conspirators must share in the criminal purpose of the conspiracy. At least one other person must have a culpable mind.[194] As part of a recent trend, the Model Penal Code and a number of states have adopted a "unilateral theory" of conspiracy, in which the culpability of the other parties to the "agreement" is immaterial.[195] As long as the accused believed that he had agreed with another person to commit a crime, then he is guilty of conspiracy, even if the other person did not share in the criminal purpose.[196] The issue in *Valigura* was whether the military followed the traditional "bilateral theory" or the modern "unilateral theory" of conspiracy. Under a "bilateral theory," PV2 Valigura was clearly not guilty of conspiracy; but, under a "unilateral theory," she was.

The ACCA held that the offense of conspiracy in military law requires an actual agreement to commit an offense between the accused and another person who shares the requisite criminal intent.[197] The Army court set aside the conspiracy conviction but upheld the lesser-included offense of attempted conspiracy.[198] At the encouragement of the dissenting opinion,[199] The Judge Advocate General for the Army certified the issue for CAAF's review.[200] The CAAF held that the Army court correctly applied the "bilateral theory" of conspiracy and upheld its ruling.[201]

187. *Valigura*, 54 M.J. at 188.

188. *Id*. The accused was also charged with the unrelated offenses of failure to go to her appointed place of duty and failure to obeya lawful order. She pled guilty to the distribution and disobedience charges, and she pled not guilty to the conspiracy and failure to repair charges. After be ing found guilty of all the charges, she received a sentence of a bad-conduct discharge (BCD), confinement for six months, total forfeitures, and reduction to the gradeof E1.

189. UCMJ art. 81 (2000).

190. MCM, *supra* note 2, pt. IV, ¶ 5b.

191. Iannelli v. United States, 420 U.S. 770, 777 n.10 (1975).

192. *See, e.g.*, United States v. Shabani, 513 U.S. 10, 16 (1994) ("the criminal agreement itself is the *actus reus*").

193. 2 LaFave & Scott, *supra* note 183, § 6.4(e)(1).

194. *Id*. § 6.5; Perkins & Boyce, *supra* note 180, at 694.

195. 2 LaFave & Scott, *supra* note 183, § 6.5; Perkins & Boyce, *supra* note 180, at 694.

196. Model Penal Code § 5.04(1) (1985).

197. United States v. Valigura, 50 M.J. 844, 848 (Army Ct. Crim. App. 1999). The Army court overruled its opinion of ten years prior in *United States v. Tuck*, 28 M.J. 520 (A.C.M.R. 1989), that the military followed the "unilateral theory" of conspiracy and the culpability of the other alleged co-conspirators is of no consequence. Staff Sergeant Tuck had argued that, because his co-conspirator was insane and incapable of entering into an agreement, his pleaof guilty to conspiracy was improvident. In *Tuck*, the Army court had held that you need two persons, but not two criminals, to conspire. *Id*. at 521.

198. *Valigura*, 50 M.J. at 848. The Army court affirmed the sentence. *Id*. at 849.

Unfortunately, two previous CAAF opinions caused confusion over whether the military followed the "unilateral theory" or the "bilateral theory" of conspiracy. In 1983, in *United States v. Garcia*,[202] the Court of Military Appeals (CMA)[203] refused to adhere to the "consistency of verdicts" doctrine. A month after Garcia was convicted of conspiracy to commit larceny and several other offenses, his only co-conspirator was acquitted of the same conspiracy charge. Under the common law doctrine of "consistency of verdicts," the acquittal of one of two co-conspirators required the acquittal of the other.[204] The CMA found that under the present system, logic and the law do not require such "foolish consistency."[205] It held that the military does not follow the "consistency of verdicts" doctrine.[206] The opinion caused confusion because it discussed the trend from the "bilateral theory" to the "unilateral theory" of conspiracy,[207] which was not necessary for the rationale of its holding.

In 1995, in *United States v. Anzalone*,[208] the CAAF held that an agreement with an undercover agent to commit espionage could constitute the offense of *attempted conspiracy*.[209] In the majority opinion, Judge Crawford stated that "[i]n *Garcia* we adopted the American Law Institute's Model Penal Code 'Unilateral Approach' to conspiracy."[210] That pronouncement was unnecessary, because the issue before the court was attempted conspiracy and not conspiracy. A majority of the judges took issue with Judge Crawford's pronouncement. Judge Wiss stated that it was wrong, because a meeting of the minds was required for a conspiracy.[211] Judge Gierke, joined by Judge Cox, indicated that he would not invalidate the "bilateral theory" of conspiracy, especially when the issue had not yet been briefed and argued before the court.[212]

In *Valigura*, the CAAF rejected the "unilateral theory" and adhered to the "bilateral theory" of conspiracy. Central to the CAAF's holding was the recognition of its proper role:

> For this Court retroactively to introduce an entirely new theory of conspiracy that was not contemporaneously in the minds of the legislators or discussed by them would seem to cross the line between judicial interpretation and improper judicial lawmaking and cannot be justified by the "public policy" considerations advanced in Chief Judge Crawford's dissent.[213]

The CAAF did not engage in a discussion of which one of the two competing theories was more sound.[214] It stated it would not be proper for the court to engage in "the policy-making prerogative that belongs to Congress."[215]

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199. *Id*. (Squires, S.J., dissenting).

200. *Id.* at 188.

201. *Id*.

202. 16 M.J. 52 (C.M.A. 1983).

203. The United States Court of Military Appeals was renamed the Court of Appeals for the Armed Forces on 5 October 1994.

204. LAFAVE & SCOTT, *supra* note 183, § 6.5(g)(1); PERKINS & BOYCE, *supra* note 180, at 693-94.

205. *Garcia*, 16 M.J. at 57.

206. *Id*.

207. *Id*. at 54-55.

208. 43 M.J. 322 (1995).

209. *Id*. at 323.

210. *Id*. at 325.

211. *Id.* at 328 (Wiss, J., concurring).

212. *Id*. at 326 (Gierke, J., concurring).

213. United States v. Valigura, 54 M.J. 187, 190 (2000).

214. The lower court also recognized that "[t]he power to define criminal offenses is entirely legislative." United States v. Valigura, 50 M.J. 884, 847 (Army Ct. Crim. App. 1999). The decision of whether to adopt a "unilateral theory" of conspiracy is a decision for Congress to make. The Army court, unlike the CAAF, did briefly discuss the merits of the "unilateral theory." The Army court stated that it was not necessary to further the purposesof the offense of conspiracy. With a "solo conspirator" there is no "group" criminal activity, so there is no increased danger in a feigned conspiracy. Also, other inchoate offenses, such as attempted conspiracy and solicitation, will usually cover such misconduct. *Id*. at 848.

215. *Id*. at 191.

In fulfilling its role of interpreting the Code, the court looked at the statutory text, legislative intent, and precedent. While the Model Penal Code uses the word "agrees" in its definition of conspiracy,[216] Congress used the word "conspires" in Article 81 of the UCMJ. Congress also used the word "conspire" in the federal conspiracy statute, 18 U.S.C. § 371.[217] When Congress used that word when drafting the UCMJ fifty years ago, its meaning in common law was well-established. In 1934, Justice Cardozo stated, "In California as elsewhere conspiracy imports a corrupt agreement between not less than two with guilty knowledge on the part of each."[218] That clear meaning continued for decades. In 1964, the CMA stated that "it is well settled that there can be no conspiracy when a supposed participant merely feigns acquiescence with another's criminal proposal in order to secure his detection."[219] Also, Senior Judge Everett pointed out in the majority opinion that "[i]n the federal courts, a conspiracy conviction still requires at least two persons who genuinely wish to accomplish the ostensible goal of the purported conspiracy."[220]

The CAAF did not abandon the "bilateral theory" of conspiracy in its previous opinions. *Garcia* was based on the established principle that inconsistent results may be reached in different trials. The judges' separate opinions in *Anzalone* demonstrated that four of the five judges did not think that the "bilateral theory" had been abandoned.[221] Lastly, the majority pointed out that, even under the "bilateral theory," the accused's misconduct does not go unpunished. A person who attempts to agree with an undercover agent to commit a crime is guilty of attempted conspiracy, and the court affirmed a conviction of that offense.[222]

As alluded to by the majority, Chief Judge Crawford's main argument in the dissenting opinion is public policy. The heightened danger of conspiracies for military society, particularly in drug cases and classified cases, needs to be addressed.[223] What the majority calls "improper judicial lawmaking," the dissent calls "an attempt to account for 'changing conditions in military society.'"[224] The dissenting opinion is surprisingly open about the extent of its reliance on public policy to engage in judicial lawmaking. "[T]here is case law that supports the unilateral theory. But even if this point is not conceded, public policy does justify implementation of a unilateral approach to conspiracy."[225] According to the dissent, as times change, judicial interpretation of legal documents should shift accordingly.[226] In support of this concept, the dissent cited cases calling the United States Constitution and Article 31 of the UCMJ "living documents."[227] The problem with the argument is that those documents are not criminal statutes defining the definition of substantive crimes. Even in the dissent's quotation from the 1819 *McCulloch v. Maryland* opinion, Chief Justice Marshall stated: "In considering this question, we must never forget that it is a *constitution* we are expounding."[228] The dissent's liberal interpretation of Article 81 based on public policy would appear to be improper judicial lawmaking.

United States v. Pereira: *Conspiracy To Commit Multiple Offenses*

The next case, *Pereira*, also discussed the nature of the offense of conspiracy. Lance Corporal (LCpl) Pereira and three other marines formed an agreement to assault, kidnap, rob, and kill another marine. Lance Corporal Pereira pled guilty to conspiracy to commit premeditated murder, conspiracy to commit robbery, conspiracy to commit aggravated assault, conspiracy to commit kidnapping, premeditated murder, robbery, aggravated assault, kidnapping, and carrying a concealed weapon.[229]

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216. MODEL PENAL CODE § 5.03(1) (1985).

217. Under the United States Code, a conspiracy exists "[i]f two or more persons conspire . . . to commit any offense against the Uni ted States . . . and one or more of such persons do any act to effect the object of the conspiracy." 18 U.S.C. § 371 (2000).

218. Morrison v. California, 291 U.S. 82, 92 (1934).

219. United States v. LaBossiere, 32 C.M.R. 337, 340 (C.M.A. 1962).

220. *Valigura*, 54 M.J. at 189.

221. *Id.* at 190.

222. *Id.* at 191-92.

223. *Id.* at 196-98 (Crawford, C.J., dissenting).

224. *Id.* at 199 (Crawford, C.J., dissenting).

225. *Id.*

226. *Id.*

227. *Id.* at 198-99 (Crawford, C.J., dissenting).

228. *Id.* at 198 (Crawford, C.J., dissenting) (emphasis in original).

In the stipulation of fact and during the providence inquiry, LCpl Pereira consistently stated that he and his co-conspirators formed only one agreement to commit all of the underlying offenses. The CAAF considered the issue of whether, under these facts, the accused was guilty of one or more than one conspiracy.[230]

The court looked at the nature of the offense of conspiracy. "[T]he critical aspect of conspiracy is the agreement, not the object of the conspiracy."[231] The law punishes the agreement, regardless of whether the object of the conspiracy is achieved and regardless of whether there are one or several objects of the conspiracy. The CAAF held that, because there was only one agreement between LCpl Pereira and his co-conspirators, there was only one conspiracy. It merged the separate specifications of conspiracy into a single specification.[232]

United States v. Browning: *Vicarious Liability of Co-Conspirators*

The next case, *Browning*, touches on a different aspect of conspiracy. The CAAF looked at whether or not vicarious liability of co-conspirators applies in the military. Staff Sergeant Browning was the noncommissioned officer-in-charge of the 3d Armored Cavalry Regiment Comptroller's Office. The prosecution's theory was that SSG Browning and other soldiers participated in a travel fraud scheme. The accused or one of his subordinates would authorize bogus travel orders or create bogus travel receipts. As part of the scheme, several soldiers used the bogus documents to claim reimbursement for travel expenses.[233]

The accused was charged with twelve specifications of larceny and ten specifications of filing fraudulent claims. He was not charged with conspiracy. The prosecution presented evidence that SSG Browning was part of a conspiracy, that he personally committed some of the larcenies and fraudulent claims, and that the other larcenies and false claims were committed by other members of the conspiracy.[234] The defense theory was that the accused was being framed by one of the alleged co-conspirators, who testified for the prosecution.[235] After the presentation of the evidence and before deliberation on findings, the military judge instructed the members that the accused could be found guilty if he personally committed the crimes, aided and abetted another to commit the crimes, or was a member of a conspiracy and a co-conspirator committed the crime in furtherance of the conspiracy. The military judge provided the following instruction:

> If you're satisfied, beyond a reasonable doubt, that at the time this offense was committed, Staff Sergeant Browning entered into and continued to be a member of an unlawful conspiracy, as I've defined that for you, and if you find, beyond a reasonable doubt, that this offense was committed while the conspiracy continued to exist and in furtherance of an unlawful conspiracy, or was an object of that conspiracy, then you may find Staff Sergeant Browning guilty of this offense, as a co-conspirator, even though he was not the person who actually committed the criminal offense.[236]

The members found the accused guilty of the several specifications of larceny and filing fraudulent claims.[237]

On appeal, the accused asserted that the military judge improperly amended the charges by admitting evidence of an uncharged conspiracy and instructing the members that they could find him guilty based on vicarious liability.[238] There are really two parts to the issue: (1) does military law recognize vicarious liability of co-conspirators, and (2) whether the conspiracy must be charged for the prosecution to rely on that theory of criminal liability.

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229. United States v. Pereira, 53 M.J. 183 (2000). The military judge sentenced the accused to confinement for life, reduction to the grade of E-1, and a dishonorable discharge. The Navy-Marine Corps Court of Criminal Appeals dismissed the conspiracy to commit aggravated assault based on the military judge's finding that it was multiplicious for sentencing with the conspiracy to commit murder. The Navy-Marine Corps court affirmed the rest of the findings and sentence. *Id.*

230. *Id.* at 183-84.

231. *Id.* at 184.

232. *Id.*

233. United States v. Browning, 54 M.J. 1, 3 (2000).

234. *Id.* at 4.

235. *Id.* at 3.

236. *Id.* at 6.

237. *Id.* at 3. The general court-martial, composed of officer and enlisted members, adjudged a sentence of a dishonorable discharge, confinement for ten years, total forfeitures, and reduction to the grade of E1. *Id.*

238. *Id.* at 6-7.

The UCMJ does not specifically state that co-conspirators are vicariously liable. It is not mentioned in either Article 81, which proscribes conspiracy, nor in Article 77,[239] which provides the different theories by which an accused can be criminally liable as a principal. Article 77 states:

> Any person punishable under this chapter who
> (1) commits an offense punishable by this chapter, or aids, abets, counsels, commands, or procures its commission; or
> (2) causes an act to be done which if directly performed by him would be punishable by this chapter; is a principal.[240]

The CAAF held, without much discussion, that military law recognizes vicarious liability, citing its 1986 opinion in *United States v. Jefferson*: "Although Article 77 does not specifically deal with the vicarious liability of a coconspirator, we believe that the language of Article 77(1) is broad enough to encompass it."[241]

The CAAF held that the prosecution could prove some of the offenses on a theory of vicarious liability, even though conspiracy was not specifically alleged on the charge sheet.[242] In support of its holding, the court cited federal cases in which the defendant was not charged with conspiracy but the judge instructed the members on vicarious liability under the conspiracy theory.[243] This is consistent with the military practice of charging principals. All principals are charged as if they were the actual perpetrator.[244] Thus, an accused who is vicariously liable for larcenies and fraudulent claims committed by co-conspirators should be charged, under Articles 121 and 132, as if he personally committed the crimes. Also, military law does not require the prosecution to elect a specific theory of liability, and the case may be presented to the members on multiple theories.[245] The court found that there was no error,[246] and affirmed the convictions.[247]

Trends

Over the last year, the CAAF clarified the nature of the offense of conspiracy and the concept of vicarious liability. On one hand, in *Valigura*, the court refused to adopt the "unilateral theory" of conspiracy, which would broaden the scope of the offense of conspiracy. It adhered to the "bilateral theory" of conspiracy, which requires at least two persons with the necessary mental state—genuine intent to accomplish the object of the purported conspiracy. Also, as the court held in *Pereira*, the number of conspiracy convictions cannot be multiplied based on the number of crimes that are the object of the conspiracy. The conspiracy is defined by the agreement, and a single agreement will only support one conspiracy conviction. On the other hand, in *Browning*, the court interpreted Article 77(1) broadly and allowed the prosecution to rely on vicarious liability of co-conspirators, even though conspiracy was not alleged on the charge sheet. In these different cases, the court appears to be strictly defining the crime of conspiracy but allowing the prosecution to take full advantage of the traditional special rules that come with conspiracy. The common thread in these apparently divergent holdings is the court's reliance on the intent of Congress and federal common law when interpreting conspiracy under the UCMJ. Practitioners researching future issues involving the "darling of the prosecutor's nursery" can expect the CAAF to follow this trend.

Conclusion

In the last term, the CAAF sought to both ensure justice and promote military discipline. In some cases, achieving both goals was challenging. As a result of the balance struck by the court, we see trends in three areas. First, if an accused NCO, in an improper relationship with a subordinate, is charged with a nonconsensual crime against the subordinate, the court will closely scrutinize the case. It will ensure the evidence proves all the elements, especially lack of consent. Second, the court recognizes the importance of military discipline. It will interpret the UCMJ to give full effect to Congress's intent to protect

239. UCMJ art. 77 (2000).

240. *Id.*

241. 22 M.J. 315, 324 (C.M.A. 1986). In *Jefferson*, the accused asked another soldier's assistance in robbing a cab driver and handed the other soldier a loaded handgun. Although no mention was made of the handgun, the other soldier shot and killed the cab driver during the robbery. The CMA affirmed the accused's conviction for felony-murder. *Id.*

242. *Browning*, 54 M.J. at 8.

243. *Id.* at 7.

244. MCM, *supra* note 2, R.C.M. 307(c)(3) discussion (H)(i).

245. *See* United States v. Vidal, 23 M.J. 319, 324-25 (C.M.A. 1987).

246. *Browning*, 54 M.J. at 8.

247. *Id.* at 10.

military discipline. It also will not overturn the members' decisions on factual issues involving military discipline, unless the evidence fails to meet the low standard required for legal sufficiency. Third, the CAAF clarified conspiracy under the UCMJ. It defined the crime narrowly, but it gave the prosecution the full benefit of the broad special rules that come with the crime of conspiracy. The court based its different interpretations of conspiracy law on the intent of Congress. Although one may disagree with the court's decisions in particular cases, the CAAF is serving the military justice system well by striving to achieve both justice and military discipline, without unnecessarily sacrificing one for the sake of the other.

Rank Relationships: Charging Offenses Arising from Improper Superior-Subordinate Relationships and Fraternization

Major Charles H. Rose III
Professor, Criminal Law Department
The Judge Advocate General's School, United States Army
Charlottesville, Virginia

Introduction

You stare at the phone on your desk as its strident rings rouse you from contemplating the final Criminal Investigation Division (CID) report. Something about the sound of that ring fills you with dread. As you raise the receiver to your ear you wince in response to the impassioned words flowing from the earpiece. "Yes sir. Right away sir. I'm on my way now sir. I'll be there in five minutes." Grabbing the CID report in one hand and your Army beret in the other, you head for the door and a meeting with one of your brigade commanders. As you hurry over to the commander's office you quickly review the facts surrounding the scenario laid out in the final CID report.

The brigade commander's unit has had more than its fair share of improper superior-subordinate relationships and fraternization problems over the last six months. One company commander in the support battalion has fallen in love with one of his subordinate noncommissioned officers and he has requested permission to marry her. The married first sergeant in another company is having a sexual relationship with one of his platoon sergeants. The platoon sergeant claims that the sex was consensual, but that she expected to avoid additional duties as a result of her relationship with the first sergeant. All of the other platoon sergeants in the company are aware of her affair with the first sergeant. Another soldier in the same first sergeant's company has accused him of threatening to send her to Korea if she did not have sex with him. Finally, the executive officer for the support battalion is sharing living accommodations with the battalion sergeant major and they have formed a business partnership selling refurbished computers in their spare time.

The brigade commander is facing some crucial decisions. He asks you to review the CID report one final time before recommending the various ways he can hold the relevant parties accountable for their misconduct. He recently attended the Senior Officer Legal Orientation Course at The Judge Advocate General's School, U.S. Army, Charlottesville, Virginia, and he is particularly interested in how the Army Command Policy[1] applies. Fortunately, you have reviewed the relevant regulations and relevant portions of the Uniform Code of Military Justice (UCMJ). You believe that you clearly understand the possible charging alternatives when dealing with this type conduct. As you hurry across the parade field toward the brigade commander's office, you quickly review the history of the Army's improper superior-subordinate relationship policy.

The above scenario sounds familiar to any judge advocate that has been fortunate enough to serve as a trial counsel. This article is designed to prepare judge advocates for the day that they walk across that parade field for a meeting with a commander about these types of issues. It discusses how the Army policy on improper superior-subordinate relationships has changed, outlines the current Army policy, suggest ways to address violations of the regulation, and discusses the most recent case law in the area.[2]

How the Current Army Policy Developed

The current Army policy on improper superior-subordinate relationships and fraternization has been in effect since 2 March 1999.[3] Over the last two years, the Army has developed and implemented training programs designed to educate commanders and soldiers about their responsibilities under the new policy.[4] *Army Regulation (AR) 600-20* now contains punitive provisions,[5] and sufficient time has passed for the vast majority of soldiers on active and reserve duty to have been exposed and educated on the new standards imposed by those punitive sections of the regulation.[6] Judge advocates in the field have

1. U.S. DEP'T OF ARMY, REG. 600-20, ARMY COMMAND POLICY (15 July 1999) [hereinafter AR 600-20].

2. This article addresses these issues from an Army perspective, specifically discussing the requirements of *Army Regulation 600-20* and the guidance provided to commanders through *Department of the Army Pamphlet 600-35*. For a comprehensive look at the current application of the law regarding improper superior-subordinate relationships in the other branches of the service, see Major Paul Turney, *Relations Among the Ranks: Observations of and Comparisons Among the Service Policies and Fraternization Case Law, 1999*, ARMY LAW., Apr. 2000, at 97. *See generally* U.S. DEP'T OF AIR FORCE, SECRETARY OF THE AIR FORCE INSTR. 36-2909 (1 May 1999); CHIEF OF NAVAL OPERATIONS INSTR. 5370.2B, para. 3 (27 May 1999); MARINE CORPS MANUAL, para. 1100.4 (C3, 13 May 1996); U.S. COAST GUARD PERSONNEL MANUAL, ch 8.H.2.c (C26, 3 Feb. 1997).

3. Message, 020804Z Mar 99, Headquarters, Dep't of Army, DAPE-HR-L, subject: Revised Policy on Relationships Between Soldiers of D ifferent Ranks (2 Mar. 1999) [hereinafter DA Message]. For an excellent background discussion and analysis of the changed policy, see Major Michael J. Hargis, *The Password Is "Common Sense": The Army's New Policy on Senior-Subordinate Relationships*, ARMY LAW., Feb. 1999, at 12.

4. Turney, *supra* note 2, at 99.

developed and applied a cohesive pattern of analysis to these types of offenses, using common sense, an in-depth understanding of the law, and knowledge of the different ways in which similar types of misconduct can be charged and proven at court-martial. This extensive training program is a direct result of the substantive change in policy implemented in July of 1998.

Prior to July 1998, the Army applied an effects-based test when determining whether or not a relationship between superior and subordinate personnel was improper.[7] That test was based on years of experience, and reflected an understanding of the way in which relationships develop within the service.[8] *Army Regulation 600-20* addressed this type of conduct and was not punitive. When confronted with a possible improper superior-subordinate relationship, the commander first determined whether or not the relationship created one of the adverse effects listed in the regulation. If it fell into one of the defined adverse-effects categories, the commander could affirmatively order an individual to cease the conduct that formed the basis of the improper relationship. Failure to follow that direct order could then result in an offense under the UCMJ.[9] The Secretary of Defense changed that process in July 1998.

Secretary of Defense William Cohen issued a mandate on 29 July 1998,[10] requiring all of the services within the Department of Defense (DOD) to establish policies that prohibit certain relationships among the ranks and, specifically, between officer and enlisted members.[11] The Secretary of Defense identified several substantive differences between the policies of the various branches of the DOD and established a requirement "to eliminate as many differences in disciplinary standards as possible and to adopt uniform, clear and readily understandable policies."[12] He issued his mandate after reviewing the findings of a task force that spent the prior year examining instances of improper superior-subordinate relationships in the different branches of DOD. He noted the lack of an across-the-board standard for what constituted misconduct in such situations. The Secretary of Defense determined the different branches of the DOD should adopt and enforce uniform policies in this area, irrespective of service-specific issues. He concluded that the men and women serving in America's armed forces deserved clear, concise guidelines on superior-subordinate relationships.[13]

This mandate required the Army to substantively change the way it defined and addressed improper superior-subordinate relationships. The Army chose to modify portions of *AR 600-20* and draft a new version of *Department of the Army (DA) Pamphlet 600-35*[14] to satisfy the directive of the Secretary of Defense. The Department of the Army issued a message directing the implementation of the revised Army policy in response to the mandate issued by the Secretary of Defense, and the new policy became effective on 2 March 1999.[15] The revised *AR 600-20*[16] governing command policy contains the changes called for in the DA message.[17]

Details of the Current Army Policy

5. AR 600-20, *supra* note 1, paras. 4-14 through 4-16.

6. For example, the new regulation had a one-year grace period for business relationships and personal relationships between enlisted personnel and officer personnel. *Id.* para. 4-14.c(1). Relationships that were appropriate under the old regulation were in some instances now found to be inappropriate. *See id.* para. 4-14. The new policy acknowledged the difficulty in changing Army society overnight, and provided for a one-year grace period for the effected personnel to terminate the relationships that violated the new policy. That period expired on 1 March 2000. *Id.* para. 4-14.c(2). All Army personnel, without exception, have been operating under the current regulation for one calendar year as of the date of this article. *Id.*; *see also* DA Message, *supra* note 3.

7. U.S. DEP'T OF ARMY, PAM. 600-35, RELATIONSHIPS BETWEEN SOLDIERS OF DIFFERENT RANKS, para. 1-5 (7 Dec. 1993) [hereinafter DA PAM 600-35 (1993)] ("The authority or influence one soldier has over another is central to any discussion of the propriety of a particular relationship between soldiers of different rank."). DA PAM 600-35 (1993) reflected the previous effects-based orientation of any command analysis of a relationship between individuals of different rank in the Army.

8. *Id.* para. 1-5(e) (stating that "Army policy does not hold dating or most other relationships between soldiers [of different ranks] as improper, barring the adverse effects listed in AR 600-20.").

9. MANUAL FOR COURTS-MARTIAL, UNITED STATES, pt. IV, ¶16b (2000) [hereinafter MCM].

10. Memorandum, Secretary of Defense, to Service Secretaries, Chairman of the Joint Chiefs of Staff, and Under Secretaries of Defense, subject: Good Order and Discipline (29 July 98) [hereinafter SECDEF Memo].

11. *Id.*

12. *Id.*

13. *Id.*

14. DA PAM 600-35 (1993), *supra* note 7.

15. DA Message, *supra* note 3.

16. AR 600-20, *supra* note 1.

17. DA Message, *supra* note 3.

The current policy is punitive[18] and is premised on a three-part analysis. First, commanders must determine if the relationship is prohibited between and among the ranks.[19] This reflects the Secretary of Defense's guidance that specific types of relationships are per se prohibited based on the status of the individuals involved in the relationship. This is markedly different from the previous version of *AR 600-20*,[20] which focused on the effect of the relationship when determining whether or not a particular relationship between a superior and subordinate was improper.[21] The previous regulation looked to the impact of the relationship on the unit and its ability to accomplish its mission.[22] Absent one of the three adverse impacts outlined in the regulation, the relationship was not improper, and could continue.

The new regulation employs a status-based test. Various types of relationships are prohibited based solely on the status of the parties.[23] The status-based prohibitions include ongoing business relationships,[24] personal relationships,[25] gambling,[26] recruit-recruiter relationships, and trainer-trainee relationships.[27] These bright-line tests establish clear prohibitions based upon status, but the regulation goes on to adopt and expand upon the former effects-based test for those relationships that do not fall into specific status-based categories. If the relationship is not per se prohibited, then the commander must apply the additional effects-based tests found in *AR 600-20*.[28] The current *AR 600-20* adopted the three previous effects-based tests from the old regulation and added two additional effects-based tests dealing with trainer-trainee relationships and recruit-recruiter relationships.[29]

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18. AR 600-20, *supra* note 1, para. 4-16 ("[V]iolations of paragraph 4-14b, 4-14c, and 4-15 may be punished under Article 92, UCMJ, as a violation of a lawful general regulation.").

19. *Id.* para. 4-14c.

20. U.S. DEP'T OF ARMY, REG. 600-20, ARMY COMMAND POLICY, para. 4-14 (30 Mar. 1988).

21. *Id.* The previous regulation established the following effects-based test: "Relationships between soldiers of different rank that involve, or give the appearance of, partiality, preferential treatment, or the improper use of rank or position for personal gain, are prejudicial to good order, discipline, and high unit morale. It is Army policy that such relationships will be avoided." *Id.*

22. *Id.*

23. AR 600-20, *supra* note 1, para. 4-14c.

24. *Id.* para. 4-14c(1). *See* Turney, *supra* note 2, at 99. Turney states:

> Prohibited business relationships are off-limits if they can be described as "on-going" yet several exceptions allow for limited relationships and for one-time transactions. The borrowing or lending of money is prohibited and the regulation lists no exigent circumstances or excuses for a debtor-creditor relationship, of any degree, to exist between officers and enlisted. Commercial solicitation and any other financial relationship is similarly disallowed.

Id.

25. AR 600-20, *supra* note 1, para. 4-14c(2). *See* Turney, *supra* note 2, at 99 ("In the realm of personal relationships, "dating, shared living accommodations other than those directed by operational requirements, and intimate or sexual relationships between officers and enlisted personnel" are prohibited. Again, several exceptions exist that serve to keep a relationship within policy compliance.").

26. AR 600-20, *supra* note 1, para. 4-14c(3). *See* Turney, *supra* note 2, at 99. ("Officers and enlisted members are further prohibited from gambling with each other and there are no exceptions to this prohibition under the new policy.").

27. AR 600-20, *supra* note 1, para. 4-15. *See* Turney, *supra* note 2, at 100. Turney states:

> Two additional types of relationships are strictly prohibited by the new Army policy. Now, "any relationship between permanent party personnel and IET trainees not required by the training mission" is off-limits. Additionally, any relationship "not required by the recruiting mission" is prohibited as between members of the U.S. Army Recruiting Command and "potential prospects, applicants, members of the delayed entry program (DEP), or members of the delayed training program (DTP)."

Id.

28. AR 600-20, *supra* note 1, para. 4-14b. Paragraph 4-14b prohibits senior-subordinate relationships if they: (1) compromise, or appear to compromise, the integrity of supervisory authority or the chain of command; (2) cause actual or perceived partiality or unfairness; (3) involve, or appear to involve, the improper use of rank or position for personal gain; (4) are, or are perceived to be, exploitative or coercive in nature; or (5) create an actual or clearly predictable adverse impact on discipline, authority, morale, or the ability of the command to accomplish its mission. *Id.*

29. *Id.*

Suggested Methodology for Addressing Violations of the Policy

How does the trial counsel walking across the parade field in our opening scenario assist the commander in addressing violations of the policy? Certain key issues should be addressed in each instance. Trial counsel should ensure that their commanders understand that the change in the command policy does not create a definitive requirement to take judicial action against a soldier who violates the policy.[30] The entire range of options is still available to the commander and should be considered on a case-by-case basis for each possible violation.[31]

Options include counseling and education, administrative actions, nonjudicial punishment, and court-martial. The goal is to use the response that is warranted, appropriate, and fair given the surrounding circumstances. *Department of the Army Pamphlet 600-35* advises commanders that they should pay particular attention to the potential for problems in supervisory relations and potentially influential relationships.[32] Commanders should also consider the fact that "[t]he appearance of impropriety can be as damaging to morale and discipline as actual misconduct."[33] Finally, counsel should consider the other possible charges that may arise from the types of conduct normally associated with violations of the improper superior-subordinate relationship policy.[34]

Well, you have finished your meeting with the brigade commander and you fully understand his intent regarding the substantive misconduct. You have your marching orders and, as you hurry back to your office to draft some charge sheets, you realize that you must consider how charging violations of Articles 92 and 133 will play out at trial. You need guidance on the interplay between these two articles of the UCMJ. How will you prove that the conduct of the officers violated Article 133? Will there be some interplay between *AR 600-20* and Article 133? Can you charge violations of both Article 92 and Article 133 when the substantive misconduct arises from the same incident? You ponder these questions as you slide into the chair at your desk and fire up your computer for some much-needed research. Fortunately, the appellate courts have begun to address these issues, and some guidance is already out there to assist you in making your charging decisions.

Case Law Update

"When Is Asking for a Date Conduct Unbecoming an Officer?"

In *United States v. Brown*,[35] Captain (CPT) Brown contested his conviction for violations of Articles 89 and 133 of the UCMJ. In an unpublished opinion, the Air Force Court of Criminal Appeals affirmed his conviction. Captain Brown worked in a staff office with several other officers. He solicited dates from several of the other company grade officers working in his office. At some point, his chain of command became convinced that these requests for dates were not appropriate conduct for a captain in the Air Force. They preferred charges for violations of Articles 89 and 133. The panel found CPT Brown guilty of one of three specifications of disrespect towards a superior officer, in violation of Article 89, and six of ten specifications of conduct unbecoming an officer and a gentleman, in violation of Article 133.[36] He received a dismissal and fourteen days confinement. The appellate decision does not indicate any evidence of threats or abuse regarding the request for dates and it is also silent concerning any particular acts that the government may have relied upon in charging CPT Brown with a violation of Article 133. The opinion also does not indicate whether CPT Brown's defense counsel requested and received a bill of particulars prior to trial.

On appeal, the Air Force court addressed the judge's admission at trial, over defense objection, of *Air Force Pamphlet (AFPAM) 36-2705, Discrimination and Sexual Harassment.*[37] Captain Brown argued that the admission of this pamphlet invited the members to improperly consider official Air Force policy in adjudging findings and sentence. The court relied on the limiting instruction provided by the military judge in holding that the admission of the pamphlet was not error. They took note of the fact that the cover letter of the pamphlet, written and signed by the Air Force Chief of Staff and addressed to the entire Air Force, was removed before it was admitted into evi-

30. U.S. DEP'T OF ARMY, PAM. 600-35, RELATIONSHIPS BETWEEN SOLDIERS OF DIFFERENT RANKS, preface (21 Feb. 2000) [hereinafter DA PAM 600-35] ("The leader must be counted on to use good judgment, experience, and discretion to draw the line between relationships that are 'destructive' and those that are 'constructive.'").

31. *Id.* para. 1-4c. ("Absent the strictly prohibited categories, Army policy "judge[s] the results of relationships and not the relationships themselves.").

32. *Id.* para. 1-5c.

33. *Id.* para. 1-5a.

34. Counsel should consider the full range of charging options based upon the substantive conduct. While the available charges are situationally dependent, at a minimum violations of Articles 92 and 133 should be considered. Additionally, Article 134, Fraternization, is usually a possible charge as well. For recent developments in the possible multiplicity issues that may arise from charging violations of both Article 133 and Article 134, see Turney, *supra* note 2, at 97.

35. ACM 32906, 1999 CCA LEXIS 324, *1 (A.F. Ct. Crim. App. Dec. 27, 1999) (unpublished).

36. *Id.*

37. U.S. DEP'T OF AIR FORCE, PAM. 36-2705, DISCRIMINATION AND SEXUAL HARASSMENT (28 Feb. 1995).

dence. They held that the government could use a copy of the non-punitive pamphlet regarding unprofessional relationships as evidence of an appropriate standard for the panel to use when determining whether or not CPT Brown's conduct violated Article 133.[38]

In *Brown*, the Air Force court did not sufficiently address the issue of notice and opportunity to defend against the substantive misconduct relied upon to prove the Article 133 specifications. It is not clear from the appellate record whether the defense contested the issue of what conduct constituted the basis for the Article 133 charges. If they did so, then the failure of the trial counsel to adequately provide a bill of particulars or to correctly specify the conduct at issue should be a fatal flaw.

A recent decision by the CAAF addressing this issue calls the Air Force court's *Brown* decision into question. In *United States v. Rogers*,[39] the CAAF held that the use of an instructional pamphlet to prove the custom of the service was not necessary. Some type of notice to the defense is required, but previously trial counsel have not sought to use non-binding, non-punitive pamphlets to establish the types of conduct considered violative of Article 133. The choice to use that pamphlet could very well result in an interpretation by the CAAF that CPT Brown did not have sufficient notice and an adequate opportunity to defend against the substantive basis of the Article 133 violations. While Article 133 is broad in scope, some types of conduct simply do not fall under its umbrella.

At issue now is whether the CAAF will allow the Air Force court to interpret the interplay between Article 133 and the non-punitive Air Force pamphlet on improper relationships in a manner that allows a non-punitive instructional pamphlet to identify conduct that violates Article 133. For the present, counsel should carefully consider the ramifications of relying on such materials when proving violations of Article 133. The current DOD standard for defining improper relationships is now covered under each service's applicable regulation. Trial counsel should use those service regulations as a guide for what constitutes misconduct, rather than seeking to expand the bounds of Article 133 regarding improper relationships. While other forms of conduct may be boorish or in poor taste, that does not mean such conduct should be charged as a violation of Article 133.

"Romance in Italy!"

In *Rogers*, the CAAF examined a specification under Article 133, UCMJ, that alleged an unprofessional relationship "of inappropriate familiarity" between a squadron commander and a subordinate officer.[40] Lieutenant Colonel (LTC) Rogers served as the squadron commander for the 90th Fighter Squadron, based at Elmendorf Air Force Base, Alaska. He initially met First Lieutenant (1Lt) Julie Clemm while on temporary duty in Korea in April or May 1995. First Lieutenant Clemm approached him about a possible position in his unit, and he approved her application. Five months later the two of them, along with the rest of the squadron, deployed to Italy in October 1995. Beginning on 21 November 1995, the two started an unprofessional relationship that lasted for a period of nearly a month.[41]

The relationship began when LTC Rogers pursued the intoxicated lieutenant at a squadron Thanksgiving party, changing his weekend travel plans so that he could be "in the mountains with a beautiful woman."[42] They traveled together between the squadron and his hotel, worked out together in the gym, and ate together at local restaurants.[43] Over the next two weeks, the executive officer of the squadron became concerned about LTC Rogers' relationship with 1Lt Clemm. He confronted LTC Rogers, who became combative and attacked the loyalty of the subordinate who thought his relationship with 1Lt Clemm was unprofessional. Eventually LTC Rogers gave the executive officer a poker chip with the squadron's emblem on it, telling the executive officer to cash it in after five years when LTC Rogers would tell him the truth of everything that had been happening.[44]

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38. The Court of Appeals for the Armed Forces (CAAF) has granted review on the issues surrounding the Article 133 specifications. *See* United States v. Brown, No. 00-0295/AF, 2000 CAAF LEXIS 632, at *1 (C.A.A.F. June 12, 2000). The issues the CAAF has agreed to hear include: whether the military judge abused his discretion in denying appellant's request for a special instruction to ensure a proper verdict by a vote of two-thirds of the members; whether the military judge erred by admitting *AFPAM 36-2705*, which prejudicially invited the members to consider official "Air Force Policy" in adjudging findings and sentence; and whether various specifications of charge II and the additional charge were supported by legally sufficient evidence. *Id.*

39. 54 M.J. 244 (2000).

40. *Id.* at 245.

41. *Id.* at 249.

42. *Id.* at 249-50.

43. *Id.* at 250.

44. *Id.* at 252. Commander's coins or emblems are often used to denote accomplishments by particular individuals within the unit. It is interesting to note that LTC Rogers' promise to tell his executive officer the truth after five years had passed could mean that the statue of limitations would have tolled for any possible offenses committed by LTC Rogers while in Italy.

The executive officer later caught the lieutenant returning to her room very early one morning. He confronted her about her unprofessional relationship with the squadron commander and she admitted that she was having an affair with LTC Rogers.[45] Although First Lieutenant Clemm promised the executive officer that she would break off the relationship, she instead changed rooms in the hotel where the unit was lodged, so that she was residing directly next to LTC Rogers' room. The executive officer informed the higher command and LTC Rogers was removed as the squadron commander.[46] Lieutenant Colonel Rogers contested his guilt at court-martial and was convicted of a violation of Article 133. He lost on his appeal at the Air Force Court of Criminal Appeals,[47] and later raised two substantive issues regarding the Article 133 specification to the CAAF.

Lieutenant Colonel Rogers argued that the Article 133 specification failed to state an offense, since it did not allege specific acts amounting to "inappropriate familiarity," and it failed to specifically identify a relevant custom or regulation prohibiting relationships between officers.[48] The CAAF disagreed with both assertions and affirmed, holding that Article133 does not require proof of a custom or of a regulation prohibiting the type of conduct committed by the appellant.[49] The CAAF did, however, rely on an Air Force instruction when determining whether or not LTC Rogers was on notice that his conduct violated Article 133. *Air Force Instruction (AFI) 36-2909*[50] was a non-punitive instruction addressing improper relationships between the ranks and was in force at the time of LTC Rogers' misconduct.[51] Paragraph A1.3.1 of the instruction stated:

> Personal relationships between members of different grades or positions within an organization or chain of command can easily become unprofessional. Dating and indebtedness commonly get out of hand because they appear to create favoritism or partiality. Consequently, senior members should not date or become personally obligated or indebted to junior members. This is also because seniors have, or are perceived to have, authority to influence the junior member's career.[52]

Air Force Instruction 36-2909 served as the Air Force equivalent to *AR 600-20* regarding improper superior-subordinate relationships. It was not punitive, but did provide specific guidelines for defining and identifying appropriate and inappropriate conduct between ranks.

When addressing whether or not Article 133 required proof of a custom or regulation prohibiting the conduct that formed the basis for the charge, the CAAF focused on the issue of notice to LTC Rogers. They relied in part on paragraph A1.3.1 in deciding that he was on notice that the behavior in question was potentially criminal in nature.[53] The court went on to address whether or not Article 133 requires allegation of specific acts constituting an unprofessional relationship within the specification itself. The court determined that there is no such requirement and that the model specification is not void for vagueness.[54] The court noted that the accused received a bill of particulars from the government and that the defense counsel at trial substantively addressed each issue raised by the bill.[55] The court concluded that there was no lack of notice regarding what substantive facts the government would use to prove the Article 133 violation.[56]

At the time of LTC Rogers' misconduct, the Air Force defined "unprofessional relationships" in their former senior-subordinate relationship policy.[577] Since *AFI 36-2909* was not punitive, the command did not have the option of charging an Article 92 offense and chose instead to use Article 133. Trial

45. *Id.* at 252-53.

46. *Id.* at 254.

47. United States v. Rogers, 50 M.J. 805 (A.F. Ct. Crim. App. 1999).

48. *Rogers*, 54 M.J. at 245.

49. *Id.* at 255-57.

50. U.S. DEP'T OF AIR FORCE, SECRETARY OF THE AIR FORCE INSTR. 36-2909, para. A.1.3.1 (20 Feb. 1995) [hereinafter AFI 36-2909].

51. The misconduct addressed in *Rogers* occurred before the adoption of the current improper superior-subordinate relationship policy now in effect throughout the Air Force. For an excellent analysis of the Air Force's current policy, see Turney, *supra* note 2.

52. AFI 36-2909, *supra* note 50, para. A.1.3.1.

53. *Rogers*, 54 M.J. at 257.

54. *Id.* at 257-58.

55. *Id.*

56. *Id.*

counsel facing similar charging decisions now can use both Article 92 and Article 133 when disposing of cases similar in nature to the ones discussed above. While Article 133 does not require language within the specification alleging specific acts by the accused, the CAAF has sent a clear signal in Rogers that they are going to closely review the issue of notice to the accused in these cases. This is particularly true in cases involving what might otherwise be considered dating or other types of normal social interaction between the sexes. When counsel choose to charge violations of both Article 92 and Article 133, they should make certain that, where applicable, they use the substantive language of the service-specific improper superior-subordinate relationship policy to establish the type of misconduct upon which the Article 133 violation is based. Additionally, trial counsel should provide the defense counsel with a bill of particulars outlining the specific conduct upon which the government will rely when proving the Article 133 violation at trial.

Conclusion

Over the last year we have begun to see the first reported cases dealing with the issue of improper superior-subordinate relationship policies and their interplay with Article 133. The trial counsel in *Brown* used a non-punitive, non-binding pamphlet to establish notice to CPT Brown of what constituted violation of Article 133. The trial counsel in *Rogers* used an Air Force instruction to establish that same notice, and provided a bill of particulars to defense counsel, thereby satisfying the notice requirement for what conduct the government would use to prove the violation of Article 133. While the use of pamphlets to establish notice for possible violations of Article 133 has not yet been affirmed by the CAAF, trial counsel should take notice of the standard found in *Rogers* and consider citing to the appropriate service regulation when arguing that conduct violates Article 133. They should stick to the model specification for Article 133 violations and ensure that adequate notice is given to the defense counsel as to the type of conduct that substantively forms the basis for the Article 133 violation. Defense counsel should consider the CAAF's holding in *Rogers* when making trial strategy decisions regarding notice, discovery, and requests for bills of particulars.

Both of these cases occurred prior to the change in the DOD improper superior-subordinate relationship policy. Still, they assist counsel in defining what military personnel should consider as appropriate conduct between the ranks. They also exemplify ways that military personnel are placed on notice regarding those service norms. Finally, they provide substantive guidance on the requirements for a valid Article 133 violation, at least concerning what constitutes notice of the substantive misconduct and how the applicable service regulations apply to improper relationship issues.

Future cases should address shortcomings in the generic benchbook instruction for Article 92 violations[588] in light of the need for a more closely-tailored instruction based on *AR 600-20, DA Pamphlet 600-35,* and other service-specific regulations, instructions and directives. As long as there are soldiers, one can rest assured that trial counsel will be briefing, developing, and charging these types of offenses.

57. AFI 36-2909, *supra* note 50, para. A.1.3.

58. U.S. DEP'T OF ARMY, PAM. 27-9, MILITARY JUDGE'S BENCHBOOK, para. 3-16-1 (1 Apr. 2001).

CLE News

1. Resident Course Quotas

Attendance at resident continuing legal education (CLE) courses at The Judge Advocate General's School, United States Army (TJAGSA), is restricted to students who have confirmed reservations. Reservations for TJAGSA CLE courses are managed by the Army Training Requirements and Resources System (ATRRS), the Army-wide automated training system. If you do not have a confirmed reservationin ATRRS, you do not have a reservation for a TJAGSA CLE course.

Active duty service members and civilian employees must obtain reservations through their directorates of training or through equivalent agencies. Reservists must obtain reservations through their unit training offices or, if they are nonunit reservists, through the United States Army Personnel Center (ARPERCEN), ATTN: ARPC-ZJA-P, 9700 Page Avenue, St. Louis, MO 63132-5200. Army National Guard personnel must request reservations through their unit training offices.

When requesting a reservation, you should know the following:

TJAGSA School Code—181

Course Name—133d Contract Attorneys Course 5F-F10

Course Number—133d Contract Attorney's Course 5F-F10

Class Number—133d Contract Attorney's Course 5F-F10

To verify a confirmed reservation, ask your training office to provide a screen print of the ATRRS R1 screen, showing by-name reservations.

The Judge Advocate General's School is an approved sponsor of CLE courses in all states that require mandatory continuing legal education. These states include: AL, AR, AZ, CA, CO, CT, DE, FL, GA, ID, IN, IA, KS, LA, MN, MS, MO, MT, NV, NC, ND, NH, OH, OK, OR, PA, RH, SC, TN, TX, UT, VT, VA, WA, WV, WI, and WY.

2. TJAGSA CLE Course Schedule

2001

April 2001

2-6 April	25th Admin Law for Military Installations Course (5F-F24).
9-13 April	3d Basics for Ethics Counselors Workshop (5F-F202).
23-27 April	FY 2001 USAREUR Legal Assistance CLE (5F-F23E).
23-26 April	2001 Reserve Component Judge Advocate Workshop (5F-F56).
30 April-4 May	12th Law for Legal NCOs Course (512-71D/20/30).
30 April-11 May	146th Contract Attorneys Course (5F-F10).

May 2001

7 - 25 May	44th Military Judge Course (5F-F33).
14-18 May	48th Legal Assistance Course (5F-F23).

June 2001

4-7 June	4th Intelligence Law Workshop (5F-F41).
4-8 June	166th Senior Officers Legal Orientation Course (5F-F1).
4 June-13 July	8th JA Warrant Officer Basic Course (7A-550A0).
4-15 June	6th RC Warrant Officer Basic Course (Phase I) (7A-550A0-RC).
5-29 June	155th Officer Basic Course (Phase I, Fort Lee) (5-27-C20).
6-8 June	Judge Advocate Recruiting Conference (JARC-181).
11-15 June	31st Staff Judge Advocate Course (5F-F52).
18-22 June	5th Chief Legal NCO Course (512-71D-CLNCO).

July 2001

8-13 July	12th Legal Administrators Course (7A-550A1).
9-10 July	32d Methods of Instruction Course (Phase I) (5F-F70).
16-20 July	76th Law of War Workshop (5F-F42).
16 July-10 August	2d JA Warrant Officer Advanced Course (7A-550A2).

16 July- 31 August	5th Court Reporter Course (512-71DC5).
30 July- 10 August	147th Contract Attorneys Course (5F-F10).

August 2001

6-10 August	19th Federal Litigation Course (5F-F29).
13 August- 23 May 02	50th Graduate Course (5-27-C22).
20-24 August	7th Military Justice Managers Course (5F-F31).
20-31 August	36th Operational Law Seminar (5F-F47).

September 2001

10-14 September	2d Court Reporting Symposium (512-71DC6).
10-14 September	2001 USAREUR Administrative Law CLE (5F-F24E).
10-21 September	16th Criminal Law Advocacy Course (5F-F34).
17-21 September	49th Legal Assistance Course (5F-F23).
18 September- 12 October	156th Officer Basic Course (Phase I, Fort Lee) (5-27-C20).
24-25 September	32d Methods of Instruction Course (Phase II) (5F-F70).

October 2001

1-5 October	2001 JAG Annual CLE Workshop (5F-JAG).
1 October- 20 November	6th Court Reporter Course (512-71DC5).
12 October- 21 December	156th Officer Basic Course (Phase II, TJAGSA) (5-27-C20).
15-19 October	167th Senior Officers Legal Orientation Course (5F-F1).
23-26 October	FY 2002 USAREUR Legal Assistance CLE (5F-F23E).
29 October- 2 November	61st Fiscal Law Course (5F-F12).

November 2001

12-16 November	25th Criminal Law New Developments Course (5F-F35).
26-30 November	55th Federal Labor Relations Course (5F-F22).
26-30 November	168th Senior Officers Legal Orientation Course (5F-F1).
26-30 November	2001 USAREUR Operational Law CLE (5F-F47E).

December 2001

3-7 December	2001 USAREUR Criminal Law Advocacy CLE (5F-F35E).
3-7 December	2001 Government Contract Law Symposium (5F-F11).
10-14 December	5th Tax Law for Attorneys Course (5F-F28)

2002

January 2002

2-5 January	2002 Hawaii Tax CLE (5F-F28H).
7-11 January	2002 PACOM Tax CLE (5F-F28P).
7-11 January	2002 USAREUR Contract & Fiscal Law CLE (5F-F15E).
7 January- 26 February	7th Court Reporter Course (512-71DC5).
8 January- 1 February	157th Officer Basic Course (Phase I, Fort Lee) (5-27-C20).
15-18 January	2002 USAREUR Tax CLE (5F-F28E).
16-18 January	8th RC General Officers Legal Orientation Course (5F-F3).
20 January- 1 February	2002 JAOAC (Phase II) (5F-F55).

28 January- 1 February	169th Senior Officers Legal Orientation Course (5F-F1).

February 2002

1 February- 12 April	157th Officer Basic Course (Phase II, TJAGSA) (5-27-C20).
4-8 February	77th Law of War Workshop (5F-F42).
4-8 February	2001 Maxwell AFB Fiscal Law Course (5F-F13A).
25 February- 1 March	62d Fiscal Law Course (5F-F12).
25 February- 8 March	37th Operational Law Seminar (5F-F47).

March 2002

4-8 March	63d Fiscal Law Course (5F-F12).
18-29 March	17th Criminal Law Advocacy Course (5F-F34).
25-29 March	4th Contract Litigation Course (5F-F103).
25-29 March	170th Senior Officers Legal Orientation Course (5F-F1).

April 2002

1-5 April	26th Admin Law for Military Installations Course (5F-F24).
15-19 April	4th Basics for Ethics Counselors Workshop (5F-F202).
15-19 April	13th Law for Legal NCOs Course (512-71D/20/30).
22-25 April	2002 Reserve Component Judge Advocate Workshop (5F-F56).
29 April- 10 May	148th Contract Attorneys Course (5F-F10).
29 April- 17 May	45th Military Judge Course (5F-F33).

May 2002

13-17 May	50th Legal Assistance Course (5F-F23).

June 2002

3-7 June	171st Senior Officers Legal Orientation Course (5F-F1).
3-14 June	7th RC Warrant Officer Basic Course (Phase I) (7A-550A0-RC).
3 June- 12 July	9th JA Warrant Officer Basic Course (7A-550A0).
4-28 June	158th Officer Basic Course (Phase I, Fort Lee) (5-27-C20).
10-14 June	32d Staff Judge Advocate Course (5F-F52).
17-21 June	13th Senior Legal NCO Management Course (512-71D/40/50).
17-22 June	6th Chief Legal NCO Course 512-71D-CLNCO).
17-28 June	7th RC Warrant Officer Basic Course (Phase II) (7A-550A0-RC).
24-26 June	Career Services Directors Conference.
28 June- 6 September	158th Officer Basic Course (Phase II, TJAGSA) (5-27-C20).

July 2002

8-9 July	33d Methods of Instruction Course (Phase I) (5F-F70).
8-12 July	13th Legal Administrators Course (7A-550A1).
15 July- 9 August	3d JA Warrant Officer Advanced Course (7A-550A2).
15-19 July	78th Law of War Workshop (5F-F42).
15 July- 30 August	8th Court Reporter Course (512-71DC5).
29 July- 9 August	149th Contract Attorneys Course (5F-F10).

August 2002

5-9 August	20th Federal Litigation Course (5F-F29).

12 August-May 2003	51st Graduate Course (5-27-C22).
19-23 August	8th Military Justice Managers Course (5F-F31).
19-30 August	38th Operational Law Seminar (5F-F47).

September 2002

4-6 September	2002 USAREUR Legal Assistance CLE (5F-F23E).
9-13 September	2002 USAREUR Administrative Law CLE (5F-F24E).
9-20 September	18th Criminal Law Advocacy Course (5F-F34).
11-13 September	3d Court Reporting Symposium (512-71DC6).
16-20 September	51st Legal Assistance Course (5F-F23).
23-24 September	33d Methods of Instruction Course (Phase II) (5F-F70).

3. Civilian-Sponsored CLE Courses

6 April ICLE	Criminal Law Clayton State College Atlanta, Georgia
12 April ICLE	Appellate Practice Ritz Carlton Downtown Atlanta, Georgia
19 April ICLE	Practical Discovery Atlanta, Georgia
15-19 Oct	Military Administrative Law Conference and The Honorable Walter T. Cox, III, Military Legal History Symposium Spates Hall, Fort Myer, Virginia

4. Mandatory Continuing Legal Education Jurisdiction and Reporting Dates

Jurisdiction	**Reporting Month**
Alabama**	31 December annually
Arizona	15 September annually
Arkansas	30 June annually
California*	1 February annually
Colorado	Anytime within three-year period
Delaware	31 July biennially
Florida**	Assigned month triennially
Georgia	31 January annually
Idaho	December 31, Admission date triennially
Indiana	31 December annually
Iowa	1 March annually
Kansas	30 days after program
Kentucky	30 June annually
Louisiana**	31 January annually
Maine**	31 July annually
Minnesota	30 August
Mississippi**	1 August annually
Missouri	31 July annually
Montana	1 March annually
Nevada	1 March annually
New Hampshire**	1 August annually
New Mexico	prior to 30 April annually
New York*	Every two years within thirty days after the attorney's birthday
North Carolina**	28 February annually
North Dakota	31 July annually
Ohio*	31 January biennially
Oklahoma**	15 February annually

Oregon	Anniversary of date of birth—new admittees and reinstated members report after an initial one-year period; thereafter triennially
Pennsylvania**	Group 1: 30 April Group 2: 31 August Group 3: 31 December
Rhode Island	30 June annually
South Carolina**	15 January annually
Tennessee*	1 March annually
Texas	Minimum credits must be completed by last day of birth month each year
Utah	31 January
Vermont	2 July annually
Virginia	30 June annually
Washington	31 January triennially
West Virginia	30 June biennially
Wisconsin*	1 February biennially
Wyoming	30 January annually

* Military Exempt

** Military Must Declare Exemption

For addresses and detailed information, see the March 2001 issue of *The Army Lawyer.*

5. Phase I (Correspondence Phase), RC-JAOAC Deadline

The suspense for first submission of all RC-JAOAC Phase I (Correspondence Phase) materials is ***NLT 2400, 1 November 2001***, for those judge advocates who desire to attend Phase II (Resident Phase) at The Judge Advocate General's School (TJAGSA) in the year 2001 (hereafter "2001 JAOAC"). This requirement includes submission of all JA 151, Fundamentals of Military Writing, exercises.

Any judge advocate who is required to retake any subcourse examinations or "re-do" any writing exercises must submit the examination or writing exercise to the Non-Resident Instruction Branch, TJAGSA, for grading with a postmark or electronic transmission date-time-group ***NLT 2400, 30 November 2001***. Examinations and writing exercises will be expeditiously returned to students to allow them to meet this suspense.

Judge advocates who fail to complete Phase I correspondence courses and writing exercises by these suspenses will not be allowed to attend the 2001 JAOAC. To provide clarity, all judge advocates who are authorized to attend the 2001 JAOAC will receive written notification. Conversely, judge advocates who fail to complete Phase I correspondence courses and writing exercises by the established suspenses will receive written notification of their ineligibility to attend the 2001 JAOAC.

If you have any further questions, contact Lieutenant Colonel Dan Culver, telephone (800) 552-3978, ext. 357, or e-mail Daniel.Culver@hqda.army.mil. Lieutenant Colonel Goetzke.

Current Materials of Interest

1. The Judge Advocate General's On-Site Continuing Legal Education Training and Workshop Schedule (2000-2001 Academic Year)

DATE	TRAINING SITE AND HOST UNIT	AC GO/RC GO	SUBJECT	ACTION OFFICER
22-25 Apr	Charlottesville, VA OTJAG		RC Workshop	
28-29 Apr	Newport, RI 94th RSC	MG Huffman COL (P) Walker	Fiscal Law; Administrative Law	POC: MAJ Jerry Hunter (978) 796-2143 Jerry.Hunter@usarc-emh2.army.mil ALT: NCOIC-SGT Neoma Rothrock (978) 796-2143
5-6 May	Gulf Shores, AL	BG Marchand COL (P) Pietsch	Administrative and Civil Law; Environmental Law; Contract Law	POC: MAJ John Gavin (205) 795-1512 1-877-749-9063, ext. 1512 (toll-free) John.Gavin@se.usar.army.mil
18-20 May	St. Louis, MO 89th RSC, 6025th GSU 8th MSO	BG Romig COL (P) Pietsch	Legal Assistance; Military Justice	POC: LTC Bill Kumpe (314) 991-0412, ext. 1261

2. TJAGSA Materials Available through the Defense Technical Information Center (DTIC)

For a complete listing of TJAGSA Materials Available through DTIC, see the March 2001 issue of *The Army Lawyer.*

3. Regulations and Pamphlets

For detailed information, see the March 2001 issue of *The Army Lawyer.*

4. Articles, Comments, and Notes

The following articles, comments, and notes may be useful to judge advocates.

Rachel Canty, *Developing Use of Force Doctrine: A Legal Case Study of the Coast Guard's Airborne Use of Force*, 31 U. MIAMI INTER-AM. L. REV. 357 (Winter 2000).

Douglas B. Maddock, Jr., *Federal Rules of Evidence: Raising the Bar on Admissibility of Expert Testimony: Can Your Expert Make the Grade After Kumho Tire Co. v. Carmichael?* 53 OKLA. L. REV. 507 (Fall 2000).

Charles H. Whitebread, *Recent Criminal Decisions of the United States Supreme Court: The 1999-2000 Term*, 37 CT. REV. (Fall 2000).

5. The Legal Automation Army-Wide Systems XXI—JAGCNet

a. The Legal Automation Army-Wide Systems XXI (LAAWS XXI) operates a knowledge management and information service called JAGCNet primarily dedicated to servicing the Army legal community, but also provides for Department of Defense (DOD) access in some case. Whether you have Army access or DOD-wide access, all users will be able to download the TJAGSA publications that are available through the JAGCNet.

b. Access to theJAGCNet:

(1) Access to JAGCNet is restricted to registered users, who have been approved by the LAAWS XXI Office and senior OTJAG staff.

(a) Active U.S. Army JAG Corps personnel;

(b) Reserve and National Guard U.S. Army JAG Corps personnel;

(c) Civilian employees (U.S. Army) JAG Corps personnel;

(d) FLEP students;

(e) Affiliated (that is, U.S. Navy, U.S. Marine Corps, U.S. Air Force, U.S. Coast Guard) DOD personnel assigned to a branch of the JAG Corps; and, other personnel within the DOD legal community.

(2) Requests for exceptions to the access policy should be e-

mailed:

LAAWSXXI@jagc-smtp.army.mil

c. How to logon to JAGCNet:

(1) Using a web browser (Internet Explorer 4.0 or higher recommended) go to the following site: http://jagcnet.army.mil.

(a) Follow the link that reads "Enter JAGCNet."

(b) If you already have a JAGCNet account, and know your user name and passwor, select "Enter" from the next menu, then enter your "User Name" anbd "password" in the appropriate fields.

(c) If you have a JAGCNet account, *but do not know your user name and/or Internet password*, contact your legal administrator or e-mail the LAAWS XXI HelpDesk at LAAWSXXI@jagc-smtp.army.mil.

(d) If you do not have a JAGCNet account, select "Register" from the JASGCNet Intranet menu.

(e) Follow the link "Request a New Account" at the bottom of the page, and fill out the registration form completely. Allow seventy-two hours for your request to process.' Once your request is processed, you will receive an e-mail telling you that your request has been approved or denied.

(f) Once granted access to JAGCNet, follow step (b), above.

6. TJAGSA Publications Available Through the LAAWS XXI JAGCNet

For detailed information, see the March 2001 issue of *The Army Lawyer.*

7. TJAGSA Legal Technology Management Office (LTMO)

The Judge Advocate General's School, United States Army, continues to improve capabilities for faculty and staff. We have installed new computers throughout the Sch o o l.We are in the process of migrating to Microsoft Windows 2000 Professional and Microsoft Office 2000 Professional throughout the School.

The TJAGSA faculty and staff are available through the MILNET and the Internet. Addresses for TJAGSA personnel are available by e-mail at jagsch@hqda.army.mil or by calling the LTMO at (804) 972-6314. Phone numbers and e-mail addresses for TJAGSA personnel are available on the School's web page at http://www.jagcnet.army.mil/tjagsa. Click on directory for the listings.

All students that wish to access their office e-mail, please ensure that your office e-mail is web browser accessible prior to departing your office. Please bring the address with you when attending classes at TJAGSA. If your office does not have web accessible e-mail, you may establish an account at the Army Portal http://ako.us.army.mil and then forward your office e-mail to this new account during your stay at the School. The School classrooms and the Computer Learning Center do not support modem usage.

Personnel desiring to call TJAGSA can dial via DSN 934-7115 or provided the telephone call is for official business only, use our toll free number, (800) 552-3978; the receptionist will connect you with the appropriate department or directorate. For additional information, please contact our Legal Technology Management Office at (804) 972-6264. CW3 Tommy Worthey.

8. The Army Law Library Service

Per *Army Regulation 27-10*, paragraph 12-11, the Army Law Library Service (ALLS) Administrator, Ms. Nelda Lull, must be notified prior to any redistribution of ALLS-purchased law library materials. Posting such a notification in the ALLS FORUM of JAGCNet satisfies this regulatory requirement as well as alerting other librarians that excess materials are available.

Ms. Lull can be contacted at The Judge Advocate General's School, United States Army, ATTN: JAGS-CDD-ALLS, 600 Massie Road, Charlottesville, Virginia 22903-1781. Telephone DSN: 934-7115, extension 394, commercial: (804) 972-6394, facsimile: (804) 972-6386, or e-mail: lullnc@hqda.army.mil.

9. 2000 Edition of the *Manual for Courts-Martial* (*MCM*)

The 2000 edition of the *MCM* commemorating the 50th Anniversary of the Uniform Code of Military Justice was published in Fiscal Year 2000. The *MCM* is available in hardcopy from the Government Printing Office at their website http://www.gpo.gov or by telephone at (202) 512-1800; fax e at (202) 512-2250. The 2000 edition of the *MCM* is also available electronically at http://www.usapa.army.mil (Army Administrative Electronic Publications, EPubs, Search for a Publication). Ms. Lull can be contacted at The Judge Advocate General's

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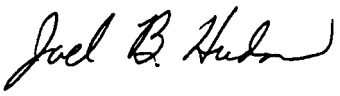

JOEL B. HUDSON
Administrative Assistant to the
Secretary of the Army
0110803

Department of the Army
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US Army
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