New Developments in Pretrial Procedures: Evolution or Revolution?

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Introduction

This article analyzes recent developments in the law relating to court-martial personnel, pleas and pretrial agreements, and voir dire and challenges. As in past installments of this annual review, most of the cases reviewed are from the Court of Appeals for the Armed Forces (CAAF), with a lesser focus on the service courts. Where possible, the article discusses the practical implications of recent developments for military justice practitioners trying cases in the field. This article attempts to look over the horizon and ask if we are experiencing a gradual, case-law-driven evolution or the beginning of a legislative, Cox Commission-inspired revolution in military pretrial practice.

Arguably, this year's most notable developments in court-martial practice came not from the courts, but from discussion and legislation fueled by the controversial Cox Commission Report.[1] The National Institute of Military Justice (NIMJ), a private non-profit organization, sponsored the Report to commemorate the 50th anniversary of the Uniform Code of Military Justice (UCMJ).[2] Walter T. Cox III,[3] Senior Judge of the Court of Appeal for the Armed Forces, chaired the Commission. The armed services did not participate in the proceedings.[4]

The Commission recommended action in four broad areas of court-martial practice and procedure. Three of the Commission's four recommendations pertain to pretrial practice. The fourth recommendation addresses the rape and sodomy provisions of the UCMJ and will not be discussed in this article.[5] The Commission made the following three recommendations regarding pretrial practice:

> 1. Modify the pretrial role of the convening authority in both selecting court-martial members and making other pre-trial legal decisions that best rest within the purview of a sitting military judge.
>
> 2. Increase the independence, availability, and responsibilities of military judges [including the creation of standing circuits staffed by tenured judges who serve fixed terms].
>
> 3. Implement additional protections in death penalty cases [including trial by twelve member panels and supplying counsel "qualified" to try capital cases].[6]

Beyond these three broad recommendations, the commissioners raised additional concerns. With regard to pretrial processing of courts-martial, the Report specifically addresses the proper role of staff judge advocates after preferral.[7]

Judge Cox sent the completed Report to the NIMJ on 25 May 2001.[8] The NIMJ then forwarded the Report to the Secretary of Defense, the Service Secretaries, the House and Senate Committees on Armed Services, and the Code Committee. Soon after, Congress passed legislation regarding the Commis-

1. REPORT OF THE COMMISSION ON THE 50TH ANNIVERSARY OF THE UNIFORM CODE OF MILITARY JUSTICE (May 2001) [hereinafter COX COMMISSION REPORT] (sponsored by the National Institute of Military Justice and commonly referred to as the Cox Commission Report), *available at* http://www.badc.org/html/militarylaw_cox.html.

2. *Id.* at 2.

3. Judge Cox, an Army veteran, was a judge on the South Carolina Circuit Court and an Acting Associate Justice of the Supreme Court of South Carolina. Before becoming a Senior Judge, he served on the U.S. Court of Military Appeals and the U.S. Court of Appeals for the Armed Forces, including four years as Chief Judge. *Id*. at 4-5.

4. *See id* at 5-6.

5. *Id.* Specifically, the Commission recommended the "repeal [of Title] 10 U.S.C. §§ 920 & 925, and the offenses specified under the general article, 10 U.S.C. § 134, that concern criminal sexual misconduct [to be replaced] with a comprehensive Criminal Sexual Conduct Article, such as is found in the Model Penal Code or Title 18 of the United States Code." *Id.*

6. *Id.* at 5.

7. *Id.* at 12.

8. Letter from Judge Walter T. Cox to Eugene R. Fidell, President of the NIMJ (May 25, 2001) (on file with author).

sion's recommendation to increase capital panel size from five members to twelve.[9] Some might view the codification of the Commission's capital panel recommendation as merely a coincidence. Others might see the change as a signal that Congress, and perhaps the President and the appellate courts, will seek to address other recommendations and concerns raised in the Report. Against the backdrop of the commissioners' recommendations, this article identifies, organizes, and analyzes new developments in the pretrial arena.

Court-Martial Personnel

This section discusses cases that define the roles and responsibilities of convening authorities, military judges, staff judge advocates, counsel, and experts within the military justice system. By and large, over the past year the courts looked past technical form to substantive matters and continued their deference to convening authorities, government counsel, and military judges.

Convening Authority Disqualification

Commanders, by statute, play a central role in the military justice system by convening, or "calling together" courts-martial.[10] Commanders may have their discretion as a convening authority limited, however, if they do not remain impartial.[11] For example, a convening authority who is an "accuser" is disqualified from referring a case to a special or general court-martial.[12] A convening authority may become an accuser by signing and swearing to charges, directing that charges nominally be signed and sworn to by another, or by having "other than an official" interest in the prosecution of the accused.[13]

9. National Defense Authorization Act of 2002, Pub. L. No. 107-107, § 582, 115 Stat. 1012 (2001) (amending 10 U.S.C. ch. 47, §§ 816(1)(A), 829(b)).

> SEC. 582. REQUIREMENT THAT COURTS-MARTIAL CONSIST OF NOT LESS THAN 12 MEMBERS IN CAPITAL CASES.
>
> (a) CLASSIFICATION OF GENERAL COURT-MARTIAL IN CAPITAL CASES.—Section 816(1)(A) of title 10, United States Code (article 16(1)(A) of the Uniform Code of Military Justice) is amended by inserting after ''five members'' the following: ''or, in a case in which the accused may be sentenced to a penalty of death, the number of members determined under section 825a of this title (article 25a)''.
>
> (b) NUMBER OF MEMBERS REQUIRED.—(1) Chapter 47 of title 10, United States Code (the Uniform Code of Military Justice), is amended by inserting after section 825 (article 25) the following new section:
>
> ''§ 825a. Art. 25a. Number of members in capital cases
>
> ''In a case in which the accused may be sentenced to a penalty of death, the number of members shall be not less than 12, unless 12 members are not reasonably available because of physical conditions or military exigencies, in which case the convening authority shall specify a lesser number of members not less than five, and the court may be assembled and the trial held with not less than the number of members so specified. In such a case, the convening authority shall make a detailed written statement, to be appended to the record, stating why a greater number of members were not reasonably available.''
>
> (2) The table of sections at the beginning of subchapter V of such chapter is amended by inserting after the item relating to section 825 (article 25) the following new item:
>
> ''825a. 25a. Number of members in capital cases.''
>
> (c) ABSENT AND ADDITIONAL MEMBERS—Section 829(b) of such title (article 29 of the Uniform Code of Military Justice) is amended—
>
> (1) by inserting ''(1)'' after ''(b)'';
>
> (2) by striking ''five members'' both places it appears and inserting ''the applicable minimum number of members''; and
>
> (3) by adding at the end the following new paragraph:
>
> ''(2) In this section, the term 'applicable minimum number of members' means five members or, in a case in which the death penalty may be adjudged, the number of members determined under section 825a of this title (article 25a).''
>
> (d) EFFECTIVE DATE—The amendments made by this section shall apply with respect to offenses committed after December 31, 2002.

Id.

10. UCMJ arts. 22-24 (2000).

11. United States v. Nix, 40 M.J. 6 (C.M.A. 1994).

12. MANUAL FOR COURTS-MARTIAL, UNITED, STATES, R.C.M 601(c) (2000) [hereinafter MCM] (implementing UCMJ article 22(b) and 23(b) for general courts-martial and special courts-martial, respectively).

A convening authority-accuser may be disqualified in either a "statutory" sense (for example, having sworn to the charges) or in a "personal" sense by virtue of having an "other than official" interest in the case.[14] Statutorily disqualified convening authorities are not, per se, disqualified from appointing an investigating officer to conduct an Article 32 pretrial investigation.[15] On the other hand, personally disqualified convening authorities may not appoint an investigating officer to conduct an Article 32 pretrial investigation.[16] Disqualified convening authorities may not refer a case to a general or a special court-martial.[17] They may, however, take lesser action[18] or forward the case to the next higher commander, noting their disqualification.[19]

The Cox Commission Report criticizes the central role that commanders play within the military justice system. According to the Report, "[T]he far-reaching role of commanding officers in the courts-martial process remains the greatest barrier to operating a fair system of criminal justice within the armed forces."[20] The Report recommends that "decisions on pretrial matters should be removed from the purview of the convening authority and placed within the authority of a military judge."[21]

Military appellate courts have struggled for many years to determine how much involvement a convening authority may have in a case before being disqualified. In 1952, the Court of Military Appeals (CMA), the predecessor to the CAAF, set a high standard when it decided *United States v. Gordon*.[22] The court held that convening authorities must be "free from any connection to the controversy."[23] At least one scholar has noted that since *Gordon*, the courts have given greater deference to commanders by broadening the range of acceptable behavior.[24] This long-term trend holds true in two recent cases, *United States v. Tittel*[25] and *United States v. Dinges*.[26]

In *United States v. Tittel*,[27] the CAAF addressed the personal disqualification of convening authorities who issue orders that are subsequently violated. In *Tittel*, the accused was convicted of shoplifting and several other offenses and processed for separation from military service. Consequently, the special court-martial convening authority signed an order barring the accused from entering any Navy Base Exchange (NEX). The accused was then caught shoplifting a second time from the NEX. At his second court-martial, Tittle pled guilty to violating the special court-martial convening authority's order.[28]

On appeal, the defense argued that the convening authority was not and could not be neutral because he was the victim of Tittle's willful disobedience. The CAAF disagreed, finding that the special court-martial convening authority's order to stay out of the NEX was a routine administrative directive. The court found that the convening authority was not an "accuser."[29] The court also found that the accused had waived the issue because it was not raised at trial.[30] Defense practitioners should

13. UCMJ art. 1(9); *see also* MCM, *supra* note 12, R.C.M. 601(c) discussion.

14. *See generally* UCMJ arts. 22-23.

15. McKinney v. Jarvis, 46 M.J. 870 (Army Ct. Crim. App. 1997).

16. United States v. Jeter, 35 M.J. 442 (C.M.A. 1992); *see also* United States v. Thomas, 22 M.J. 388, 394 (C.M.A. 1986) (listing examples of unofficial interests that disqualified convening authorities).

17. UCMJ arts. 22(b), 23(b).

18. *See* MCM, *supra* note 12, R.C.M. 1302(b) (accuser not disqualified from convening summary court-martial, or initiating administrative measures).

19. *Id*. R.C.M. 401(c)(2)(A), 601(c); *see* UCMJ arts. 22(b), 23(b).

20. Cox Commission Report, *supra* note 1, at 6.

21. *Id*. at 8.

22. 2 C.M.R. 161 (C.M.A. 1952).

23. *Id*. at 168.

24. Lieutenant Colonel John P. Saunders, *Hunting for Snarks: Recent Developments in the Pretrial Arena*, Army Law., Apr. 2001, at 15.

25. 53 M.J. 313 (2000).

26. 55 M.J. 308 (2001).

27. 53 M.J. 313 (2000).

28. *Id*. at 314.

29. *Id*.

take heed: failure to raise convening authority disqualification at trial may result in waiver.[31]

In *United States v. Dinges*,[32] the CAAF addressed the personal disqualification of a convening authority who, through his involvement in Boy Scouts, heard an allegation of consensual homosexual sodomy between an Air Force officer and a scout. The convening authority accepted a district governor position with the Boy Scouts of America (BSA). A BSA official contacted the convening authority because he was upset that Oklahoma officials would not prosecute the consensual (homosexual) relationship. The convening authority initiated an investigation, obtained command and special court-martial convening authority over the accused, appointed an Article 32 investigating officer, nominated a slate of members, and forwarded the case with a recommendation for general court-martial. At a general court-martial, Dinges was convicted of sodomy arising out of his activities as an assistant scoutmaster.[33]

In 1998, the CAAF ordered a *DuBay* hearing[34] to determine whether the convening authority had an "other than official interest" that would disqualify him.[35] Based on the facts gathered at the *DuBay* hearing, the CAAF held that the special court-martial convening authority did not become an accuser because "he did not have such a close connection to the offense that a reasonable person would conclude he had a personal interest in the case."[36]

Judge Effron and Judge Sullivan disagreed with the majority. They felt the majority applied the wrong standard to determine whether the commander exhibited bias or prejudice. They argued that the court should have focused on potential conflict of interest or "other than official" interest in the prosecution.[37] The dissent reasoned that due to the commander's potential conflict between his personal interest in the BSA and his statutory role as a convening authority, he should have been disqualified from acting as a convening authority in the case.[38]

Taken together, *Tittel* and *Dinges* show that the CAAF is willing to allow convening authorities more latitude than a strict reading of the UCMJ and Rules for Courts-Martial might suggest. This posture gives critics of the military justice system an argument that convening authorities have too much power and discretion. Despite the holdings in *Tittel* and *Dinges*, government counsel should remain vigilant and recommend that commanders disqualify themselves if they have a potential conflict of interest. At a minimum, this approach will minimize appellate issues. At a maximum, it protects the integrity of the military justice system.

Panel Member Selection

Panel member selection has also generated debate over the years. Congress, when it enacted Article 25, UCMJ, mandated that convening authorities personally, rather than randomly, select panel members. Congress requires that convening authorities select only those members who, in their opinion, are best qualified by virtue of their age, education, training, experience, length of service, and judicial temperament.[39]

In 1998, Congress directed the Secretary of Defense to study alternate methods of panel selection.[40] This mandate required

30. *Id.*

31. *See also* United States v. Voorhees, 50 M.J. 494 (1999) (stating that the convening authority did not become an accuser by threatening to "burn" the accused if the accused did not enter into a pretrial agreement; even if the convening authority did become an accuser, accused affirmatively waived issue at trial).

32. 55 M.J. 308 (2001).

33. *Id*. at 309-10.

34. A *DuBay* hearing occurs when an appellate court sends a matter back to a convening authority to take testimony in an adversarial setting. *See* United States v. DuBay, 37 C.M.R. 411 (C.M.A. 1967).

35. 48 M.J. 232 (1998). *United States v. Haagenson*, 52 M.J. 34 (1999) is a similarly postured case. In *Haagenson*, the CAAF examined the issue of a convening authority who seemed to have decided a case in advance. In *Haagenson*, the special court-martial convening authority (SPCMCA) originally referred the accused's case to a special court-martial, but withdrew it and forwarded it with recommendation for general court-martial. Contrary to her pleas, the accused was found guilty by a panel of a single specification of fraternization. The accused alleged on appeal that the case had been withdrawn and forwarded because the SPCMCA's superior yelled at the SPCMCA, "I want [the accused] out of the Marine Corps." *Id.* at 37 (Sullivan, J., concurring). After framing the issue as whether the SPCMCA had become an accuser, the CAAF remanded the case for a fact-finding proceeding. *Id*. at 37. In 1999, the accused filed a petition for review with the CAAF, *see* 52 M.J. 466 (1999), but nothing further has been published on this case.

36. *Dinges*, 55 M.J. at 311.

37. *Id.* at 316 (citing UCMJ art. 1(9)).

38. *Id.*

39. UCMJ art. 25 (2000).

40. *See* The Strom Thurmond National Defense Authorization Act for Fiscal Year 1999, Pub. L. No. 105-261, § 1, 112 Stat. 1920 (1998).

the Secretary of Defense to develop and report on a random selection method of choosing members to serve on court-martial panels.[41] The Department of Defense General Counsel requested that the Joint Service Committee (JSC) conduct a study and prepare a report on random selection.[42] The JSC sought opinions from each service and reviewed random court-martial selection practices in Canada and the United Kingdom. After considering six alternatives, the JSC concluded that the current practice "insures fair panels of court-martial members who are best qualified" and that there is "no evidence of systematic unfairness or unlawful command influence."[43]

The Cox Commission Report is at odds with the conclusions of the JSC. The Commission stated bluntly, "There is no aspect of military criminal procedures that diverges further from civilian practice, or creates a greater impression of improper influence, than the antiquated process of panel selection."[44] The Commission concluded, "There is no reason to preserve a practice that creates such a strong impression of, and opportunity for, corruption of the trial process by commanders and staff judge advocates."[45] The Commission called on Congress to immediately strip convening authorities of their responsibility to select panel members. The Commission recommended that members of courts-martial "should be chosen at random from a list of eligible servicemembers prepared by the convening authority, taking into account operational needs as well as the limitations on rank, enlisted or officer status, and same-unit considerations currently followed in the selection of members."[46]

The CAAF wrestled with Article 25's requirement that convening authorities personally select the best-qualified members of their command for duty on courts-martial in *United States v. Benedict*.[47] In *Benedict*, an administrative division sent a list of panel member nominees to the convening authority's Chief of Staff (CoS) with a note to *select* nine members. The CoS selected the members and submitted a final list to the convening authority for signature. Pretrial testimony from the CoS and the SJA indicated that the convening authority signed the convening order without asking any questions or making any changes. Both maintained that had he wanted to, the convening authority could have made changes to the list. Noting that it is common practice for convening authorities to rely upon staff assistance to select members, the CAAF held that the convening authority met the requirement of Article 25, UCMJ, by personally selecting the nine prospective members set forth by the CoS.[48] Of note, the CAAF relied on pretrial motion transcripts that did not include any testimony from the convening authority.[49]

The opinion, however, was not unanimous. Judge Baker (concurring) and Judge Effron (dissenting) both expressed concern about the failure of the convening authority to testify.[50] Further, Judge Effron's dissent presents a well-reasoned discussion of the history of Article 25. His dissent makes a strong argument for the idea that if convening authorities do not take their responsibilities under Article 25 seriously, they risk losing their central role in selecting panels under the UCMJ to another method, such as random selection.[51]

Challenges to Composition of the Panel

In the last several years, the CAAF has allowed the government greater latitude in selecting members. In *United States v. Bertie*,[52] *United States v. Upshaw*,[53] and *United States v. Roland*,[54] the CAAF upheld the military judges' denial of challenges to panels. The net result of these cases was to increase the burden on defense counsel to show improprieties in panel

41. *See* Major Guy P. Glazier, *He Called for His Pipe and He Called for His Bowl, and He Called for His Members Three—Selection of Juries by the Sovereign: Impediment to Military Justice*, 157 MIL. L. REV. 1 (1998).

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

43. *Id.* at 45.

44. COX COMMISSION REPORT, *supra* note 1, at 7.

45. *Id.*

46. *Id.*

47. 55 M.J. 451 (2001).

48. *Id.* at 454.

49. *See id.* at 452-55.

50. *Id.* at 455, 459.

51. *Id.* at 456-58.

52. 50 M.J. 489 (1999).

53. 49 M.J. 111 (1998).

selection. To prevail, counsel had to go beyond the black letter requirements of Article 25 and show specifically that the government acted in bad faith.

In *Bertie*,[55] the accused, a specialist (E-4), challenged the panel arrayed for his trial. The defense argued that the government improperly used rank as a selection criterion. The accused presented evidence showing that no officer below the grade of captain (O-3) and no enlisted person below the grade of sergeant first class (E-7) had been selected to serve as a panel member over the previous year. In upholding the panel selection, the CAAF held that no presumption of impropriety flowed from the composition of the panel. The CAAF noted that the "linchpin" of the accused's argument was that the composition of the panel created a presumption of court stacking.[56] The CAAF noted that the acting SJA had advised the convening authority of the Article 25 criteria and told him not to use rank or other criteria to systematically exclude qualified persons. Additionally, the convening authority stated in a memorandum that he had considered the criteria of Article 25 when making his panel selection.[57]

Upshaw,[58] like *Bertie*, was a case where the defense argued that the government improperly used rank as a selection criterion. In *Upshaw*, the SJA mistakenly believed the accused was an E-6, and as a result requested panel member nominees in the grade of E-7 and above. At trial the accused, an E-5, moved to dismiss for lack of jurisdiction based on the convening authority's exclusion of E-6s from consideration. The military judge denied this motion, holding that an innocent, good faith mistake on the part of the convening authority's subordinates did not imperil the panel selection absent a showing of prejudice.[59] The CAAF upheld this ruling, noting that the accused was not able to show prejudice.[60]

In *Roland*,[61] the SJA sent out a memorandum requesting nominees in the ranks of sergeant (E-5) to colonel (O-6). The defense challenged the panel selection based on the SJA's memorandum, arguing that the SJA deliberately failed to request nominees from otherwise-qualified groups of service members (those below the grade of E-5). The SJA claimed that she never intended to exclude groups of otherwise eligible nominees. She had simply identified other groups for consideration. In affirming, the CAAF characterized the relevant standard of proof as "[o]nce the defense comes forward and shows an improper selection, the burden is upon the Government to demonstrate that no impropriety occurred."[62] The CAAF held that the defense had not met its burden of showing "that there was command influence."[63]

In 2000, the CAAF marked the outer limit of deference the court would extend to the government. In *United States v. Kirkland*,[64] the SJA solicited nominees from subordinate commanders via a memorandum signed by the special court-martial convening authority. The memorandum asked for nominees in various grades and included a worksheet to fill in the names of nominees. The worksheet had a column for E-9, E-8, and E-7, but no place to list a nominee in a lower grade. To nominate E-6 or below, the nominating officer would have had to modify the form. No one below E-7 was nominated or selected for the panel. Although there was little difference between the facts of *Roland* and *Kirkland*, the CAAF reversed in *Kirkland*. The court stated that where there was an "unresolved appearance" of exclusion based on rank, "reversal of the sentence is appropriate to uphold the essential fairness . . . of the military justice system."[65]

If *Kirkland* signaled the CAAF's reluctance to continue to defer to the government when it appeared to use rank as a shortcut to select panel members, the Air Force Court of Criminal Appeals showed that the service courts will continue to defer to the government when non-Article 25 criteria (other than rank) are used to exclude qualified personnel from membership on courts-martial. In *United States v. Brocks*,[66] the staff judge

54. 50 M.J. 66 (1999).

55. 50 M.J. at 489.

56. *Id.* at 492.

57. *Id.* at 493.

58. 49 M.J. at 111.

59. *Id.* at 112.

60. *Id.* at 113.

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

62. *Id.* at 69.

63. *Id.*

64. 53 M.J. 22 (2000).

65. *Id.* at 25.

advocate and chief of justice at the base legal office intentionally excluded all officers in the Medical Group from the nominee list because all four alleged conspirators and many of the witnesses were assigned to that unit. Citing *United States v. Upshaw*,[67] the court held that because the exclusion of Medical Group officers did not constitute unlawful command influence, there was not reversible error.[68]

The results in recent panel member selection cases reflect the CAAF's reluctance to set aside cases absent evidence of bad faith by the convening authority. It seems that a majority of the CAAF will analyze a challenge to panel selection not only under Article 25, but also under Article 37, UCMJ. It is simply not enough for the defense to show that "qualified, potential members appear to be systematically excluded." Defense counsel must also show that this occurred in an attempt to "unlawfully influence" the court. While the CAAF's approach makes some sense in the context of commanders doing their best to comply with Article 25 in a dynamic, demanding setting, it may give critics of the military justice system ammunition in their fight to implement random panel member selection.

Military Judges

One of the overarching themes of the Cox Commission Report is a shift of judicial power from convening authorities to military judges. Commenting on the efficiency of the current system, the Report states, "Under the current system, neither defense counsel nor prosecutors have a judicial authority to whom to turn until very close to the date of trial. This creates delay, inefficiency, and injustice, or at a minimum, the perception of injustice . . . ."[69] The Commission members urge changes that will make sitting judges available after preferral, rather than referral, of charges.[70] To this end, the Report advocates the creation of standing judicial circuits, made up of tenured judges who are available to counsel immediately after preferral.[71] This change would allow military judges, rather than convening authorities, to control such pretrial matters as witness availability during Article 32 investigations, detailing of investigative and expert assistance, and directing the scientific testing of evidence.[72]

United States v. Johnson[73] illustrates how involving military judges early in the pretrial process could streamline the military justice system. In *Johnson*, the accused was convicted of assaults on his eight-month-old daughter, primarily through the testimony of his wife.[74] His wife had appeared at the Article 32, UCMJ, hearing pursuant to a German subpoena, which threatened criminal penalties if she did not comply; however, civilian witnesses cannot be subpoenaed to appear at investigations held pursuant to Article 32. At trial, the military judge found that the subpoena was unlawful and issued without apparent legal authority, but he also found that the accused was not prejudiced by having a witness illegally produced at the hearing.[75]

On appeal, 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. The CAAF concluded that the accused did not have standing to object to the use of the Article 32 testimony at trial because the evidence presented against him was reliable.[76] Arguably, if the military judge would have had judicial oversight at the time of the Article 32 investigation, the appellate issue could have been avoided by using judicial subpoena powers that do not otherwise exist at an Article 32 investigation.[77]

The UCMJ requires that military judges be properly qualified, certified by The Judge Advocate General of their service to perform judicial duties, and properly detailed to the court-

66. 55 M.J. 614 (A.F. Ct. Crim. App. 2001).

67. 49 M.J. 111, 113 (1998). "An element of unlawful court stacking is improper motive. Thus, where the convening authority's motive is benign, systematic inclusion or exclusion may not be improper." *Id.*

68. *Brocks*, 55 M.J. at 617.

69. COX COMMISSION REPORT, *supra* note 1, at 9.

70. *Id*. at 7.

71. *Id*. at 8-9.

72. *Id*. at 7.

73. 53 M.J. 459 (2000).

74. *Id*. at 459.

75. *Id.*

76. *Id*. at 462.

77. *See* MCM, *supra* note 12, R.C.M. 703(e)(2) (civilian witnesses—subpoena).

martial.[78] Further, the Rules for Courts-Martial require military judges to disqualify themselves in "any proceeding in which [their] impartiality might reasonably be questioned."[79]

United States v. Reed,[80] an Army Court of Criminal Appeals (ACCA) case, demonstrates how trial and appellate judges should react when they discover a potentially disqualifying issue during trial. In *Reed*, the accused pled guilty to conspiracy to commit larceny and to willfully and wrongfully damaging nonmilitary property in a scheme to defraud the United States Automobile Association (USAA) insurance company.[81] During sentencing, a USAA claims handler testified about fraudulent claims and their effect on the company's policy holder members. The military judge (himself a policy holder member) immediately disclosed his affiliation with USAA and stated this would not affect his sentencing decision.[82] The military judge allowed the defense an opportunity for voir dire. The military judge also allowed the defense an opportunity to challenge him for cause. The defense declined to challenge him.[83] The Army court, after *sua sponte* disclosing all judges of the ACCA are also policy holders of USAA,[84] held nothing was improper or erroneous in the judge's failure to disclose his policy holder status until a potential ground for his disqualification unfolded.[85] Further, the court found the military judge's financial interests so remote and insubstantial as to be nonexistent.[86]

The CAAF published *United States v. Quintanilla*[87] and *United States v. Butcher*[88] on the same day. Both cases raised the issue of the impartiality of the military judge. In *Quintanilla*, the military judge became involved in verbal out-of-court confrontations with a civilian witness that included profanity and physical contact.[89] The military judge also engaged in an ex parte discussion with the trial counsel on how to question this civilian witness about the scuffle.[90] The CAAF held the military judge's failure to fully disclose the facts on the record deprived the parties of the ability to effectively evaluate the issue of judicial bias.[91] As such, the court remanded the case for a *DuBay* hearing.[92]

In *Butcher*, the military judge, while presiding over a contested trial, went to a party at the trial counsel's house and played tennis with the trial counsel.[93] The CAAF reviewed whether the military judge abused his discretion by denying a defense request that the judge recuse himself.[94] The CAAF advised that under the circumstances the military judge should have recused himself.[95] The court held there was no need to reverse the case, however, because there was no need to send a message to the field—the social interaction took place after evidence and instructions on the merits, and public confidence was not in danger (the social contact was not extensive or intimate and came late in trial).[96]

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78. *See* UCMJ art. 26 (2000).

79. MCM, *supra* note 12, R.C.M. 902(a).

80. 55 M.J. 719 (Army Ct. Crim. App. 2001).

81. *Id.* at 719.

82. *Id.* at 720.

83. Under R.C.M. 902(b)(5), financial interest is not an issue the defense may waive. MCM, *supra* note 12, R.C.M. 902(b)(5).

84. *Reed*, 55 M.J. at 721 n.3.

85. *Id.* at 722.

86. *Id.* at 723.

87. 56 M.J. 37 (2001).

88. 56 M.J. 87 (2001).

89. *Quintanilla*, 56 M.J. at 40.

90. *Id.* at 40-41.

91. *Id.* at 80.

92. *Id.* at 85.

93. *Butcher*, 56 M.J. at 89.

94. *Id.* at 91.

95. *Id.* at 92.

Both *Quintanilla* and *Butcher* raised red flags relating to professional responsibility and are must-reads for members of the trial judiciary. The professional responsibility issues raised in these cases will be discussed at length in Major David Robertson's new developments article in next month's *The Army Lawyer.*

Staff Judge Advocates

Conventional wisdom suggests that staff judge advocates (SJAs) should strive to remain "above the fray." Staff judge advocates must maintain some detachment to be able to provide independent, impartial assessment of cases to their convening authority.[97] The tension between remaining neutral and detached and becoming a partisan advocate for the government can manifest itself in many ways. For example, SJAs may feel a responsibility to act as "gatekeepers" in screening actions for their convening authority.

In this vein, the Cox commissioners took the position that "[t]he impression that staff judge advocates (SJA's) possess too much authority over the court-martial process is nearly as damaging to perceptions of military justice as the over-involvement of convening authorities at trial."[98] To combat this impression, the Commission suggested, "Staff judge advocates, who act as counsel to commanding officers and not as independent authorities, should not exert influence once charges are preferred, should work out plea bargains only upon approval of the convening authority, and deserve a clear picture of what their responsibilities are."[99] The Commission also pointed out that there is a danger of unlawful command influence flowing from staff judge advocates as well as commanders. As such, the Commission recommended that "[t]he Code and the Manual for Courts-Martial should be amended to stress the need for impartiality, fairness and transparency on the part of staff judge advocates as well as all attorneys, investigators, and other command personnel involved in the court-martial process."[100]

Last term, the CAAF reviewed *United States v. Ivey.*[101] In the case, the defense alleged that the government failed to process the accused's immunity requests for four civilian witnesses. In *Ivey*, the convening authority did not act on the defense request for immunity until after trial or forward the defense request to the Department of Justice.[102] In addition, the military judge denied the defense request to grant immunity or to abate the proceedings to wait for convening authority action.[103] The CAAF noted that trial counsel and staff judge advocates do not have *de facto* authority to deny a request for immunity by withholding it from the convening authority. All requests for immunity, from either the prosecution or the defense, must be submitted to the convening authority for a decision.[104] The court held that the convening authority did not have to forward an immunity request for a civilian witness to the Attorney General, however, if the convening authority intended to deny that request.[105]

In reviewing the military judge's refusal to grant the defense request or abate the proceeding, the CAAF pointed out that a military judge may overrule a convening authority's decision to deny a request for immunity only if all three prongs of RCM 704(e) are met. These requirements are: (1) the witness intends to invoke the right against self-incrimination to the extent permitted by law if called to testify; (2) the government has engaged in discriminatory use of immunity to obtain a tactical advantage, or the government, through its own overreaching, has forced the witness to invoke the privilege against self-incrimination; and (3) the witness's testimony is material, clearly exculpatory, not cumulative, not obtainable from any other source and does more than merely affect the credibility of other witnesses. The CAAF held in *Ivey* that the military judge did not abuse his discretion by refusing to abate the proceedings (to wait for convening authority action) when he found there had been no discriminatory use of immunity or government overreaching, and proffered testimony was not clearly exculpatory.[106]

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96. *Id.* at 93 (citing *Liljeberg v. Health Servs. Acquisition Corp.*, 486 U.S. 847 (1988), for the three-part test laid out by the Supreme Court).

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

98. Cox Commission Report, *supra* note 1, at 12.

99. *Id.* at 12–13.

100. *Id.* at 13.

101. 55 M.J. 251 (2001).

102. *Id.* at 253-54.

103. *Id.* at 254.

104. *Id.* at 256 (citing R.C.M. 704(c)(3)).

105. *Id.* at 256 (interpreting R.C.M. 704(c)(2)).

106. *Id.* at 257 (citing R.C.M. 704(e)).

While *Ivey* is a complex opinion that addresses many issues, it sheds light upon the distinct roles that the convening authority, the staff judge advocate, and the military judge play when processing immunity requests. Clearly, the authority to take action rests with the convening authority. The CAAF stated that staff judge advocates and trial counsel should not usurp this authority by abusing their gatekeeper role.[107] Further, military judges have only limited power to review a convening authority's decision, in the sense that action can be taken only after specific findings of fact are made on the record.

The troublesome part of *Ivey* is that the convening authority took action on the defense immunity request post-trial. As such, the military judge could only review the defense motion by assuming the convening authority would disapprove the defense request. Given this sequence of events, it is difficult to imagine a situation where the convening authority would choose to grant immunity after-the-fact. In *Ivey* the convening authority knew the military judge had reviewed the denial decision (that had not yet been made) and found it to pass legal muster. What incentive remained for the convening authority to grant the defense request post-trial?

Counsel

Detailed trial and defense counsel must be qualified to try cases at courts-martial.[108] When an accused elects to hire a civilian defense counsel, such counsel must also be qualified to try cases at courts-martial.[109] Recently, the CAAF decided two cases concerning the qualification of civilian counsel, *United States v. Steele*[110] and *United States v. Beckley.*[111]

In *Steele*, the court addressed the issue of a civilian defense counsel (CDC) who was carried "inactive" by all state bars of which he was member.[112] This inactive status prohibited the CDC from practicing law in the jurisdictions where he was licensed. This was problematic because the Rules for Courts-Martial require a CDC to be a member of a bar of a federal court or bar of the highest court of the state, or a lawyer authorized by a recognized licensing authority to practice law (and determined by a military judge to be qualified to represent the accused).[113] The CAAF looked to federal case law, holding that neither suspension nor disbarment creates a per se rule that continued representation is constitutionally ineffective.[114] The CAAF also noted that a Navy instruction permits military counsel to remain "in good standing" even though they are "inactive."[115] Stating that counsel are presumed competent once licensed, the CAAF found no error.[116]

In the second case, *United States v. Beckley*,[117] the CAAF addressed the accused's right to retain civilian counsel of choice. In *Beckley*, the counsel in question was the member of a small firm who represented the accused's wife in a divorce action against the accused.[118] In an ugly set of motion hearings, the military judge denied the government's request to remove the CDC, but at a later session a second judge granted the CDC's request to withdraw.[119] The CAAF, comparing a qualified Sixth Amendment right to choose one's own counsel to a service member's qualified statutory right to choose one's own counsel,[120] determined that the CDC was disqualified. As a

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107. *Id.* at 256 ("The rule [RCM 704(c)(3)] contemplates that all requests for immunity, from either the prosecution or the defense, will be submitted to the convening authority for a decision.").

108. UCMJ arts. 27(b), 42(a) (2000). In accordance with UCMJ Articles 27(b) and 42(a), counsel must be certified as competent to perform such duties, and must take an oath to perform their duties faithfully. *Id. See id.* art. 27(b) (including the requirement that counsel be "a judge advocate who is a graduate of an accredited law school or is a member of the bar of a Federal court or of the highest court of a State"); *see also* MCM, *supra* note 12, R.C.M. 502(d) (certification of counsel), 807(b) (oaths).

109. *See* MCM, *supra* note 12, R.C.M. 502 (d)(3) (counsel must be a member of the bar of a federal court or the highest court of a state, or be authorized by a recognized licensing authority to practice law and be found by the military judge to be qualified to represent the accused).

110. 53 M.J. 274 (2000).

111. 55 M.J. 15 (2001).

112. *Steele*, 53 M.J. at 275.

113. *Id.* at 276 (citing R.C.M. 502(d)(3)(A)).

114. *Id.* at 278.

115. *Id.*

116. *Id.*

117. 55 M.J. 15 (2001).

118. *Id.* at 17.

119. *Id.* at 16-22.

result, the CAAF affirmed the ACCA, holding that the civilian counsel had an actual conflict of interest and was required to withdraw.[121]

Experts

Before employing an expert at government expense, a party must submit a request to the convening authority (with notice to the opposing party) to authorize the employment and to fix the compensation.[122] A denied request may be renewed before the military judge to determine if the testimony is relevant and necessary and whether the government has provided an adequate substitute.[123]

In *United States v. Gunkle*,[124] the CAAF examined whether the military judge abused his discretion in denying the defense expert assistance. In deciding the case, the CAAF noted a three-part test for determining the necessity for expert assistance provided by the government: (1) why is the expert needed, (2) what would the expert accomplish for the defense, and (3) why is the defense counsel unable to gather and present the evidence that the expert assistance would be able to develop.[125] When the CAAF applied this test to the facts of *Gunkle*, the court found that any error in denial of the defense request for pretrial expert assistance was rendered moot because the accused received the expert assistance he sought (at his own expense). Additionally, the military judge said he would reconsider the defense's request for production of the defense expert; the defense, however, failed to renew its request.[126]

The CAAF reached the issue of defense choice of expert in *United States v. McAllister.*[127] In *McAllister,* the accused was convicted of murder based in part upon the presence of DNA material underneath the fingernails of the victim. Before trial the defense requested and received a DNA expert from the convening authority.[128] During a pretrial session,[129] the defense asked the military judge to instruct the convening authority to release their current expert because he did not have the requisite knowledge and qualifications on Polymerase Chain Reaction testing, and to appoint an alternate expert (this alternate expert was recommended to the defense by the original convening authority-appointed DNA expert).[130] The military judge denied this request, but "left the door open" for the defense to make its request to the convening authority.[131] The military judge, however, denied the defense's request for a continuance to make its request to the convening authority.[132] Concluding that the military judge's focus on "holding the defense's feet to the fire" arbitrarily deprived the accused of the tools needed to defend his case, the CAAF ruled that the military judge abused her discretion.[133] As a remedy, the court remanded the case to the ACCA, ordered The Judge Advocate General to provide $5000 to the accused to employ an expert, and gave the defense ninety days to file supplemental pleadings.[134]

Pleas and Pretrial Agreements

One unique facet of the military justice system is that the accused does not have the right to plead guilty.[135] The military accused may not plead guilty unless he honestly and reasonably believes he is guilty, and is able to explain his guilt to the satisfaction of the military judge.[136] If the accused enters the plea of

120. *Id.* at 23 (discussing UCMJ arts. 27, 38; MCM, *supra* note 12, R.C.M. 506(c)).

121. *Id.* at 25.

122. *See* MCM, *supra* note 12, R.C.M. 703(d).

123. *Id.*

124. 55 M.J. 26 (2001).

125. *Id.* at 32 (citing United States v. Ford, 51 M.J. 445, 455 (1999)).

126. *Id.*

127. 55 M.J. 270 (2001).

128. *Id.* at 273.

129. This session was held in accordance with UCMJ Article 39(a).

130. *McCallister*, 55 M.J. at 273.

131. *Id.* at 274.

132. *Id.*

133. *Id.* at 276.

134. *Id.* at 277.

guilty "improvidently or through lack of understanding of its meaning and effect, or if he fails or refuses to plead, a plea of not guilty will be entered."[137] In a capital case, the accused may never enter a plea of guilty.[138]

Providence Inquiry

In *United States v. Fitzgerald*,[139] the ACCA found the military judge erred in accepting the accused's pleas because the providence inquiry did not establish violations of the punitive articles of the Code. The accused was charged with violating a lawful general regulation[140] by wrongfully possessing and transporting an unregistered firearm on Fort Gordon, Georgia. The ACCA found the accused's failure to admit how he violated the regulation fatal because it raised "a substantial, unresolved question of law and fact as to the providence."[141] Consequently, the ACCA set aside the findings of guilt based on the pleas in question.[142]

The CAAF addressed the military judge's burden to secure a voluntary and intelligent guilty plea from the accused in *United States v. Roeseler*.[143] Under the terms of Specialist Roeseler's pretrial agreement, he pled guilty to conspiracy to murder and attempted murder of a soldier in his unit, and of two people who, in fact, did not exist.[144] On appeal, the accused argued his guilty pleas regarding the fictitious individuals were improvident because the military judge failed to instruct on the defense of impossibility and because one of the conspirators knew the targets did not exist.[145] The CAAF agreed with the accused that guilty pleas must be both voluntary and intelligent and that the military judge has the responsibility of ensuring the accused understands the nature of the offenses to which he is pleading guilty. The court, however, disagreed that the accused was "entitled to a law school lecture on the difference between bilateral and unilateral conspiracy."[146] Reasoning that the trial judge must have some leeway concerning the exercise of her judicial responsibility to explain a criminal offense to an accused, the court held that the military judge's explanations in this case were sufficient.[147]

In *United States v. James*,[148] the accused attacked the constitutionality of his conviction for possessing and transporting child pornography. After pleading guilty, and enjoying the protection of the sentence limitation of his pretrial agreement, the accused argued that the statutory language in 18 U.S.C. § 2252A, which codifies the Child Pornography Prevention Act of 1996, was unconstitutionally overbroad.[149] The CAAF rejected this argument, holding that the factual circumstances on the record objectively supported the accused's guilty plea. Specifically, the court found that the accused pled guilty to a violation of the statute. The accused admitted that actual minors were portrayed in the charged pictures. He admitted he visited Web sites looking for pictures of pre-teens, and that he participated in chat rooms where pictures of minors were regularly requested. In addition, the photographic exhibits supported the accused's admissions, and the military judge explained the statutory requirement that the pictures were of minors.[150]

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135. *See* UCMJ art. 45 (2000); MCM, *supra* note 12, R.C.M. 910(d).

136. *See* United States v. Care, 18 C.M.A. 535 (1969).

137. UCMJ art. 45(a); *see also Care*, 18 C.M.A. at 535.

138. UCMJ art. 45(b).

139. No. 9801677 (Army Ct. Crim. App. Sept. 28, 2001) (unpublished).

140. U.S. Army Signal Center & Fort Gordon, Reg. 210-13, Control of Firearms, Ammunition, and Other Dangerous Weapons (1993).

141. *Fitzgerald*, No. 9801677, at 3.

142. *Id.*

143. 55 M.J. 286 (2001).

144. *Id.* at 286-87.

145. *Id.* at 288.

146. *Id.* at 289.

147. *Id.* at 290.

148. 55 M.J. 297 (2001).

149. *Id.* at 298.

150. *Id.* at 301.

The importance of *James* to government counsel prosecuting child pornography cases cannot be overstated. Appellate courts will look beyond the entry of pleas when evaluating a constitutional challenge. Trial counsel should put together a comprehensive stipulation of facts, including photographic evidence, to insulate the case from constitutional attack on appeal.

Pretrial Agreements

Military plea-bargaining differs significantly from its civilian counterpart.[151] One notable distinction is that military pretrial agreements are between the accused and the convening authority,[152] whereas civilian plea-bargaining is between the prosecution's office and the defendant. While the military accused has virtually an unfettered ability to withdraw from a pretrial agreement,[153] the convening authority may withdraw only before the accused begins performance of the agreement.[154]

In *United States v. Villareal*,[155] the CAAF examined a homicide case in which the convening authority withdrew from a pretrial agreement that limited confinement to five years. The convening authority withdrew after consulting with his superior general court-martial convening authority about how to console the victim's family, who felt the agreement was too lenient. The case was then transferred to a new general court-martial convening authority, without the pretrial agreement in force. Further entrenching its deference to convening authority discretion in the area of pretrial negotiations, the CAAF held that although the accused, who was sentenced to ten years' confinement, "certainly was placed in a different position by the convening authority's decision to withdraw from the agreement, this is not the type of legal prejudice that would entitle appellant to relief."[156]

The *Villareal* dissenters were troubled by the taint of unlawful command influence. They noted that convening authority discretion is not absolute and should give way to concerns about due process of law.[157] According to Judge Effron, military due process dictated that the accused's case should have been transferred to a new general court-martial convening authority with the pretrial agreement intact.[158]

Permissible Terms in Pretrial Agreements

The *Manual for Courts-Martial* recognizes the right of an accused to make certain promises or waive procedural rights as bargaining chips in negotiating a pretrial agreement.[159] There are, however, provisions that may not be waived.[160] For example, the *Manual* prohibits provisions that violate public policy.[161] In addition, the CAAF has sanctioned several pretrial agreement provisions that are not specified in the *MCM*.[162]

In *United States v. Clark*,[163] the accused submitted a false claim. He denied his guilt and submitted to a polygraph examination. When confronted with the results, Airman Clark admitted to lying and submitting a false claim.[164] He was charged and elected to plead guilty. The accused and the convening authority entered into a pretrial agreement that included a promise by the accused to enter into "reasonable stipulations concerning the facts and circumstances" of his case.[165] At trial, the military judge noticed the polygraph information in the stipulation, noted that the appellant had agreed to take a polygraph test, and that the "test results revealed deception."[166] There was

151. For a comprehensive discussion of the development of military plea-bargaining, see Major Mary M. Foreman, *Let's Make a Deal! The Development of Pretrial Agreements in Military Criminal Justice Practice*, 170 MIL. L. REV. 53 (2001).

152. MCM, *supra* note 12, R.C.M. 705(a).

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

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

155. 52 M.J. 27 (1999).

156. *Id.* at 30.

157. *Id.* at 32-33.

158. *Id.* at 33 (Effron, J., dissenting).

159. MCM, *supra* note 12, R.C.M. 705(c)(2).

160. *Id.* R.C.M. 705(c)(1).

161. *Id.* R.C.M. 705(d)(1) (providing that "the defense and government may propose any term or condition not prohibited by law or public policy").

162. *See, e.g.*, United States v. Gansemer, 38 M.J. 340 (1993) (holding that the accused may waive the right to a post-trial administrative separation board).

163. 53 M.J. 280 (2000).

164. *Id.* at 281.

no objection to the stipulation, and the trial judge admitted the stipulation into evidence. Applying MRE 707 and *United States v. Glazier*,[167] the CAAF held that it was plainly erroneous for the military judge to admit the evidence of the polygraph, even via a stipulation;[168] however, the facts of the case indicated that the accused suffered no prejudice because the military judge did not rely upon the stipulation to accept appellant's pleas as provident.[169]

Permissible Use of Pleas and Providence Inquiry

Once the military judge finds an accused's plea provident, the government may want to use the accused's plea and sworn statement made during the providence inquiry to prove greater or additional offenses, or as aggravation evidence during sentencing. Judges may not tell the members about guilty pleas until after findings are announced on any contested offenses unless the guilty plea was to a lesser-included offense and the government intends to prove the greater offense. As an exception to this rule, the accused may request that the members be informed of the accused's guilty plea.[170] The rules regarding the use of statements made by the accused during providency are even more restrictive than the rules regarding use of pleas. The government may not use the accused's statements made during the providence inquiry to prove additional charges. The accused's statements may, however, be used during the sentencing phase of trial.[171]

The use of the accused's statements made during the providence inquiry was at issue in *United States v. Grijalva*.[172] In *Grijalva*, the accused shot his wife in the back while she was sleeping.[173] At trial, the military judge rejected the accused's plea of guilty to attempted premeditated murder, but accepted his plea to the lesser-included offense of aggravated assault by intentional infliction of grievous bodily harm. On the merits of the greater offense, the military judge used the accused's guilty plea to the lesser offense and his admissions during the providence (or *Care*)[174] inquiry. The military judge then convicted the accused of attempted premeditated murder. Following precedent, the CAAF held that the military judge properly used the accused's plea to the lesser-included offense, but erred by considering statements made by the accused during the plea inquiry. Finding the judge's error harmless beyond a reasonable doubt, the CAAF affirmed.[175]

Unforeseen Consequences

Before 1999, when the CAAF decided *United States v. Mitchell*,[176] appellate courts that wrestled with the problem of regulations or statutes which limited the terms of a pretrial agreement generally found these issues to be collateral.[177] In *Mitchell*, the CAAF departed from settled case law. The accused, approaching the end of a six-year enlistment, agreed to extend his enlistment for nineteen months. Before he entered the extension period, he committed misconduct and faced trial. The accused and the convening authority signed a

165. *Id.*

166. *Id.*

167. 26 M.J. 268, 270 (C.M.A. 1988).

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

169. *Id.* at 283.

170. MCM, *supra* note 12, R.C.M. 913(a), 910(g) discussion.

171. United States v. Ramelb, 44 M.J. 625 (Army Ct. Crim. App. 1996). In *Ramelb*, the accused pled guilty to the lesser offense of wrongful appropriation, and the government went forward on the greater charge of larceny. *Id.* at 626. The military judge erred by permitting a witness to testify, on the merits of greater charges, about the accused's admissions during providency. *Id.* at 629.

172. 55 M.J. 223 (2001).

173. *Id.* at 224.

174. United States v. Care, 18 C.M.A. 535 (1969).

175. *Grijalva*, 55 M.J. at 226.

176. 50 M.J. 79 (1999).

177. *See, e.g.*, United States v. McElroy, 40 M.J. 368 (C.M.A. 1994) (holding that generally judges should not instruct on collateral, administrative consequences of sentences); United States v. Pajak, 29 C.M.R. 502 (C.M.A. 1968) (holding that a plea of guilty was not improvident when the appellant was unaware that legislation would have the effect of denying him retirement earned after twenty-five years of active service); United States v. Paske, 29 C.M.R. 505 (C.M.A. 1960) (ruling that an SJA did not err in failing to advise a convening authority of the adverse financial impact on sentence as a result of decision of comptroller general); United States v. Lee, 43 M.J. 518 (A.F. Ct. Crim. App. 1995) (holding that the general rule has been that collateral consequences of a sentence are not properly part of sentencing consideration).

pretrial agreement whereby the convening authority agreed to suspend any adjudged forfeiture of pay and allowances to the extent that such forfeiture would result in the accused receiving less than $700 per month.[178] The accused was tried five days before the beginning of the extension to his enlistment. Under Air Force personnel regulations, he lost his eligibility to extend and his entitlement to pay because he was confined. The defense argued that the unanticipated termination of this pay status reflected substantial misunderstanding of the effects of his pretrial agreement.[179]

The CAAF, in remanding the case for a *DuBay* hearing, focused on ensuring that the accused received the "benefit of his bargain." The court also signaled that when personal and financial regulations obviate the terms of a pretrial agreement, such impact will no longer be considered collateral. On rehearing, the Air Force Court of Criminal Appeals found that the approval of the accused's retirement was taken without regard to his pretrial agreement, but that, for a number of reasons, no further relief was required.[180] Despite the fact that Mitchell's retirement mooted the issue in his case, precedent was set. If the accused did not receive the benefit of his bargain, the CAAF would find the pleas improvident and set the findings aside.

The CAAF followed the precedent set in *Mitchell* when it decided *United States v. Williams* (*Williams I*)[181] and *United States v. Hardcastle*.[182] In *Williams I*, the accused was on legal hold after his term of service expired.[183] Neither the government nor the defense was aware of the Department of Defense (DOD) regulation that required a service member on legal hold and subsequently convicted of an offense to forfeit all pay and allowances. On appeal, the government conceded that the pretrial agreement, which required the convening authority to disapprove forfeitures, when none would exist after trial, invalidated the providence inquiry.[184] In *Hardcastle*, the accused's pretrial agreement required the convening authority to defer and waive forfeitures in excess of $400 per month. After his court-martial, the accused's enlistment expired, placing him in a no-pay status.[185] In both cases, the CAAF found that the accused had not received the benefit of his bargain and that the faulty provision had induced his pleas. The court set aside the guilty pleas, reversed the cases, and authorized rehearings.[186]

Last term, however, there was a shining example of how attention to detail can save the government from stepping on the unintended-consequences land mine. In *United States v. Williams* (*Williams II*),[187] the accused contended he was denied the benefit of his pretrial agreement because his pay and allowances ended with the expiration of his term of service (ETS).[188] Relying on *Williams I* and *Hardcastle*, he argued that this mutual misunderstanding rendered his guilty plea improvident.[189] The CAAF affirmed the Army court's decision that the pleas remained provident. The court distinguished *Williams I* and *Hardcastle*: in *Williams II*, there was no representation to entitlement of pay beyond the accused's ETS by the convening authority in the pretrial agreement, or by the trial counsel or military judge during trial. Further, in *Williams II* the military judge asked the defense counsel about the potential impact of the accused's pending ETS. The defense counsel assured the military judge that he had discussed the impact of the pending ETS with his client.[190]

The *Williams II* case offers some hope that attention to detail at trial can save what could become a fatal provision in the quantum portion of the pretrial agreement. Following *Williams II*, however, the CAAF was "once again faced with the unfortunate, if not inexcusable, situation where an accused was beyond

178. *Id.* at 80.

179. *Id*. at 81-82.

180. United States v. Mitchell, No. 31421, 2000 CCA LEXIS 150 (A.F. Ct. Crim. App. May 26, 2000) (unpublished).

181. 53 M.J. 293 (2000) (*Williams I*).

182. 53 M.J. 299 (2000).

183. *Id*. at 294-95; *see* MCM, *supra* note 12, R.C.M. 202(c) ("[T]he servicemember may be held on active duty over objection pending disposition of any offense for which held and shall remain subject to the code during the entire period.").

184. *Hardcastle*, 53 M.J.. at 295.

185. *Id*. at 299.

186. *Williams I*, 53 M.J. at 296; *Hardcastle*, 53 M.J. at 303.

187. 55 M.J. 302 (2001).

188. *Id.* at 303.

189. *Id.* at 306.

190. *Id.* at 307.

his ETS date at trial and, apparently, none of the participants recognized the significance of this important fact."[191]

In *United States v. Smith*,[192] the accused submitted RCM 1105 matters to the convening authority. In these matters, he pointed out that the convening authority had not ensured that pay and allowances went to the accused's dependents. In lieu of the bargained-for financial support, the accused requested early release from confinement so he could support his family. Although the convening authority only approved thirty-six of the accused's forty months' confinement, neither the convening authority nor his staff judge advocate commented upon the government's inability to defer and waive automatic forfeitures once the accused, who was on legal hold, was convicted. In reversing and remanding the case, the CAAF stated that the remedy "is either specific performance of the agreement or an opportunity for the accused to withdraw from the plea."[193] Citing to *Mitchell*, the CAAF also pointed out that the government "may provide alternative relief if it will achieve the objective of the agreement."[194]

Voir Dire and Challenges

Over the last several years, the area of voir dire and challenges has been marked by the CAAF's continuing deference to the role of the military judge in the trial process.[195] This trend flows in the same direction as the recommendations made in the Cox Commission Report.[196] No two cases more clearly illuminate this trend than *United States v. Dewrell*[197] and *United States v. Lambert*.[198] Both cases address the military judge's authority to reserve voir dire to the bench.

In *Dewrell*, an Air Force master sergeant with over nineteen-years' service was convicted by an officer panel for committing an indecent act upon a female less than sixteen-years old. The convening authority approved a sentence of dishonorable discharge, seven-years' confinement, and reduction to the grade of E-1. On appeal, the accused alleged that the military judge abused his discretion by refusing to allow any defense voir dire questions concerning the members' prior involvement in child abuse cases, or their notions regarding preteen-age girls' fabrications about sexual misconduct. The CAAF noted that the "military judge's questions properly tested for a fair and impartial panel and allowed counsel to intelligently exercise challenges."[199] The court upheld the trial judge's practice of having counsel submit written questions seven days before trial, not allowing either side to conduct group voir dire, and rejecting the defense counsel's request for case-specific questions.[200]

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191. United States v. Smith, 56 M.J. 271, 280 (2002) (Crawford, C.J., concurring in part and in the result).

192. *Id*. at 271.

193. *Id*. at 273.

194. *Id*. (citing United States v. Mitchell, 50 M.J. 79 (1999)).

195. *See* Major Gregory Coe, *On Freedom's Frontier: Significant Developments in Pretrial and Trial Procedure*, ARMY LAW., May 1999, at 1 n.8 (discussing the CAAF's "reaffirmation of power and respect" for the military judge).

196. COX COMMISSION REPORT, *supra* note 1, at 8-9.

197. 55 M.J. 131 (2001).

198. 55 M.J. 293 (2001).

199. *Dewrell*, 55 M.J. at 137.

200. *Id.*

In *Lambert*, the CAAF addressed judicial control of voir dire after the members were impaneled.[201] Immediately after the members returned a verdict of guilty to one specification of indecent assault, the accused's civilian defense counsel asked the military judge to allow voir dire of the members because one member took a book titled *Guilty as Sin* into the deliberation room. The military judge conducted voir dire of the member, but did not allow the defense an opportunity to conduct individual or group voir dire. Analyzing the issue under an abuse of discretion standard, the CAAF held that the military judge did not err by declining to allow the defense to voir dire the members. The court cited to its earlier opinion in *Dewrell*, in finding that "[n]either the UCMJ nor the *Manual* gives the defense the right to individually question the members."[202]

Taken together, *Dewrell* and *Lambert* demonstrate that the military judge has almost unlimited control of voir dire throughout the trial. Using an abuse of discretion standard and deferring to the trial judge, the CAAF clearly bolsters the authority and autonomy of military judges. Practitioners should recognize and heed the harsh message contained in *Dewrell* and *Lambert*. Counsel that do not take the time and energy to plan and prepare effective voir dire will not only miss an advocacy opportunity, but also invite the bench to foreclose participation in this critical stage of litigation.

Causal Challenges

After questioning has been completed and the military judge has sequestered the members, counsel are asked to exercise causal challenges.[203] If counsel show proper grounds for challenge, the military judge must grant the challenge.[204] If counsel argue that a member "[s]hould not sit as a member in the interest of having the court-martial free from substantial doubt as to legality, fairness, and impartiality,"[205] the military judge may decide to grant or deny the challenge based on whether the member has an actual or implied bias. Actual bias is a credibility test viewed through the subjective eyes of the trial judge, whereas implied bias is an appearance test viewed through the objective eyes of the public.[206]

In *United States v. Armstrong*,[207] the CAAF addressed whether counsel have to articulate if causal challenges are based on actual or implied bias. In *Armstrong*, a panel member, Lieutenant Commander T, stated during voir dire that he worked with Special Agent Cannon, the lead investigator in the accused's case. Special Agent Cannon sat at counsel's table as a member of the prosecution team during trial and testified on the merits. Lieutenant Commander T stated that he was in the intelligence field, not law enforcement, and that he had no personal involvement in the accused's case, but had heard it discussed in meetings.[208] Lieutenant Commander T said he could put all of the above aside when deciding the case. Finding no actual bias, the military judge denied the defense's challenge for cause.[209] On appeal, the defense alleged error because of implied bias. The Coast Guard Court of Criminal Appeals, exercising its *de novo* power of review, set aside the findings and sentence based upon the theory of implied bias.[210] The CAAF, noting a challenge for cause under RCM 912(f)(1)(N) encompasses both actual and implied bias, held that the Coast Guard Court of Criminal Appeals did not err in granting relief.[211]

Last term, the CAAF decided *United States v. New*.[212] Known as the "blue beret" case, *New* is most noted for resolving the issue of who decides the "legality" of an order; however, the case also addresses the military judge's denial of a defense challenge for cause. On appeal, the defense argued that the military judge erroneously denied a causal challenge of a member who previously ordered a subordinate to deploy to Macedonia.[213] The CAAF held that the trial judge did not err in denying this causal challenge.[214] First, the court deferred to the judge on the issue of actual bias.[215] Then, on the issue of

201. *Lambert*, 55 M.J. at 294.

202. *Id.* at 296 (citing *Dewrell*, 55 M.J. at 136).

203. *See* UCMJ art. 46 (2000); MCM, *supra* note 12, R.C.M. 912(f)(2).

204. MCM, *supra* note 12, R.C.M. 912(f)(1)(A)–(M).

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

206. United States v. Minyard, 46 M.J. 229 (1997).

207. 54 M.J. 51 (2000).

208. *Id.* at 52.

209. *Id.* at 53.

210. *Id.* (citing United States v. Armstrong, 51 M.J. 612, 615 (1999)).

211. *Id.* at 55.

212. 55 M.J. 95 (2001).

implied bias, the CAAF reasoned that "[i]t is unlikely that the public would view all . . . who have ever given an order as being disqualified from cases involving disobedience of orders that are similar to any they may have given in the past."[216]

In *New*, the CAAF did not discuss the causal challenge "liberal grant" mandate, but the issue caused the court to reverse the case of *United States v. Wiessen*.[217] An enlisted panel convicted Sergeant Wiessen of two specifications of attempted forcible sodomy with a child, indecent acts with a child, and obstruction of justice by an enlisted panel. He was sentenced to a dishonorable discharge, confinement for twenty years, total forfeitures, and reduction to the lowest enlisted grade.[218] During voir dire, Colonel (COL) Williams, a brigade commander and the senior panel member, identified six of the ten members as his subordinates. The defense, arguing implied bias, challenged COL Williams. The military judge denied this causal challenge. The defense then used their peremptory challenge to remove COL Williams, but preserved the issue for appeal by stating that "but for the military judge's denial of [our] challenge for cause against COL Williams, [we] would have peremptorily challenged [another member]."[219]

Judge Baker, writing for the majority, concluded, "Where a panel member has a supervisory position over six of the other members, and the resulting seven members make up the two-thirds majority sufficient to convict, we are placing an intolerable strain on public perception of the military justice system."[220] The CAAF held that "the military judge abused his discretion when he denied the challenge for cause against COL Williams."[221] Finding prejudice, the court reversed the ACCA, and set the findings and sentence aside.[222]

Although *Wiessen* did not change the substantive law in the area of peremptory challenges and implied bias, it is a landmark case. At a minimum, the bench and bar must give heightened scrutiny to whether two-thirds of the members work within the same chain of command. Savvy trial counsel should join defense challenges for cause of senior members who could be perceived (objectively by the public) of "controlling" enough members to convict.

Practitioners should remember that rehabilitation of members applies to actual bias, not necessarily to implied bias.[223] A recent illustration of this is *United States v. Napolitano*.[224] In *Napolitano*, a member filled out a written questionnaire, noting his disapproval of civilian defense counsel behavior. He stated that "they are freelance guns for hire, like Johnny Cochran."[225] The CAAF found that the military judge did not abuse his discretion in denying a defense challenge for cause.[226] The court reasoned that during voir dire the member, answering rehabilitative questions from the bench, retracted his opinion and stated he was not biased against the civilian defense counsel representing the accused in the current case.[227]

United States v. Rolle[228] provides another recent example of successful rehabilitation. The accused, a staff sergeant, pled guilty to the use of cocaine.[229] Much of voir dire focused on

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213. *Id.* at 97.

214. *Id.* at 100.

215. *Id.* at 99.

216. *Id.* at 100.

217. 56 M.J. 172 (2001).

218. *Id.* at 173.

219. *Id.* at 174.

220. *Id.* at 175.

221. *Id.* at 172.

222. *Id.* at 177.

223. This is because a challenge for cause based on actual bias is one of credibility as subjectively viewed by the military judge, whereas a challenge for cause based on implied bias is one of plausibility as objectively viewed by the public. *See generally* United States v. Minyard, 46 M.J. 229 (1997).

224. 53 M.J. 162 (2000).

225. *Id.* at 164.

226. *Id.* at 167.

227. *Id.* at 163-66.

228. 53 M.J. 187 (2000).

whether the panel members could seriously consider the option of no punishment, or whether they felt a particular punishment, such as a punitive discharge, was appropriate for the accused. One member, a command sergeant major, expressing his opinion that he would not let the accused stay in the military, said, "I am inclined to believe that probably there is some punishment in order there . . . . I very seriously doubt that he will go without punishment."[230] The command sergeant major did note, however, that there was a difference between a discharge and an administrative elimination from the Army.[231] Another member, a sergeant first class, stated: "I can't [give a sentence of no punishment] . . . because basically it seems like facts have been presented to me because he evidentially [sic] said that he was guilty."[232] The military judge denied the challenges for cause against both noncommissioned officers.[233] In affirming the trial judge's decision, the CAAF noted that the "[p]redisposition to impose some punishment is not automatically disqualifying.[234] 'The 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.'"[235]

Peremptory Challenges and Batson

Once the military judge has ruled on all government and defense causal challenges, each party may then exercise one peremptory challenge.[236] Under *Batson v. Kentucky*,[237] the Supreme Court eliminated racial discriminatory use of peremptory challenges by the government. The Supreme Court has never specifically applied *Batson* to the military; but, in *United States v. Santiago-Davila*,[238] the military's highest court applied *Batson* to the military through the Fifth Amendment.[239] The military courts have even gone beyond *Batson* and its progeny; military courts have been more protective of a member's right to serve on a panel than civilian courts have been of a civilian's right to serve on a jury. For example, in *United States v. Moore*,[240] the CAAF eliminated the need for the defense to make a prima facie showing of discrimination before requiring the government to provide a race-neutral reason for exercising a peremptory challenge.[241] Further, in *United States v. Tulloch*,[242] the CAAF went beyond Supreme Court case law established in *Purkett v. Elem*,[243] requiring the challenged party to provide a reasonable, race- and gender-neutral reason for exercising a peremptory challenge.[244] Against this backdrop, the CAAF continues to develop military case law relating to peremptory challenges.

In two cases decided in 2000, the CAAF seemed to back away from *Tulloch* and move toward the less-restrictive standard set by the Supreme Court in *Purkett*. In *United States v. Norfleet*,[245] the trial counsel challenged the sole female member of the court. In response to the defense counsel's request for a gender-neutral explanation, the trial counsel stated the member "had far greater court-martial experience than any other member" and would dominate the panel, and she had potential "animosity" toward the SJA office.[246] The CAAF ruled that the

229. *Id.*

230. *Id.* at 189.

231. *Id.* at 188.

232. *Id.* at 190.

233. *Id.*

234. *Id.* at 191 (citing United States v. Jefferson, 44 M.J. 312, 319 (1996); United States v. Tippit, 9 M.J. 106, 107 (C.M.A. 1980)).

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

236. UCMJ art. 41(b)(1) (2000); MCM, *supra* note 12, R.C.M. 912(g).

237. 476 U.S. 79 (1986).

238. 26 M.J. 380 (C.M.A. 1988).

239. U.S. CONST. amend. V.

240. 28 M.J. 366 (1989).

241. *Id.* at 368-69.

242. 47 M.J. 283 (1997).

243. 514 U.S. 765 (1995).

244. *Tulloch*, 47 M.J. at 288; *see also id.* at 289 (Crawford, J., dissenting) (noting that under *Purkett*, civilian counsel only need provide a genuine race- or gender-neutral reason for exercising a challenge).

245. 53 M.J. 262 (2000).

military judge's failure to ask the trial counsel to explain the "disputes" between the member and the SJA office was not an abuse of discretion.[247] Finding that the government responded to the *Batson* objection with a valid reason and a separate reason that was not inherently discriminatory and on which opposing party could not demonstrate pretext, the court upheld the denial of the defense's *Batson* challenge.[248]

The CAAF further limited *Tulloch* when it decided *United States v. Chaney*.[249] The trial counsel in *Chaney*, as in *Norfleet*, used a peremptory challenge against the sole female member. After a defense objection, trial counsel explained the reason for the challenge was "her profession, not her gender."[250] The member in question was a nurse. The military judge interjected that in his experience, trial counsel rightly or wrongly felt members of the medical profession were overly sympathetic, but that this was not a gender issue. The defense did not object to the judge's comment or request further explanation from the trial counsel.[251] The CAAF, noting that the military judge's determination is given great deference,[252] upheld the military judge's ruling which permitted the peremptory challenge.[253] The CAAF stated that it would have been better for the military judge to require a more detailed clarification by the trial counsel, but the defense failed to show that the trial counsel's occupation-based peremptory challenge was "unreasonable, implausible or made no sense."[254]

In *United States v. Hurn*,[255] the CAAF bucked the trend that the court appeared to set in *Chaney* and *Norfleet*. *Hurn* seems to favor the more restrictive, objective standard of reasonableness set when the court decided *Chaney* in 1997. In *Hurn*, the CAAF was confronted with the issue of whether playing the "numbers" game could survive a *Batson* challenge.[256] In *Hurn*, the defense objected after the trial counsel exercised the government's peremptory challenge against the panel's only non-Caucasian officer.[257] The trial counsel said his basis "was to protect the panel for quorum."[258] This answer made sense because causal challenges had reduced the panel to eight members—five officer and three enlisted. If the government did not remove an officer member, the defense could have delayed the proceeding by reducing the panel below the required one-third enlisted membership. The CAAF held that the reason proffered did not satisfy the underlying purpose of *Batson*, *Moore*, and *Tulloch*, which is to protect the participants in judicial proceedings from racial discrimination.[259] This was because the trial counsel did not explain why he removed the non-Caucasian officer as opposed to the four Caucasian officers. The CAAF returned the case to The Judge Advocate General for a *DuBay* hearing to take evidence regarding post-trial affidavits provided by the trial counsel.[260]

Conclusion

This article has reviewed significant new developments in the areas of court-martial personnel, pleas and pretrial agreements, and voir dire and challenges. It seems fair to say that the CAAF defers to convening authorities, staff judge advocates, and military judges by continuing to elevate substance over form. With regard to pleas and pretrial agreements, the CAAF seems to be fine-tuning the burden military judges shoulder during the providence inquiry and holding the government's feet to the fire with regard to unintended consequences in pretrial agreements. Finally, in the area of voir dire and challenges,

246. *Id.* at 271.

247. *Id.* at 272.

248. *Id.*

249. 53 M.J. 383 (2000).

250. *Id.* at 384.

251. *Id.*

252. *Id.* at 385.

253. *Id.* at 386.

254. *Id.*

255. 55 M.J. 446 (2001).

256. *Id.* at 448.

257. *Id.* at 447-48.

258. *Id.* at 448.

259. *Id.* at 449.

260. *Id.* at 450. These affidavits detail additional reasons the government exercised its peremptory challenge against the lone minority member. *Id.*

the court has ruled conclusively on trial judges' ability to control the questioning of members and continues to hold the military to a higher standard than the civilian bar with regard to answering *Batson* challenges.

Whether we have witnessed a quiet evolution or the beginning of a noisy revolution remains to be seen. The Cox Commission Report certainly fueled critical discussion at many levels and may have spurred Congress to require twelve-member capital panels. Will Congress legislate random selection of panel members? In the future, will military judges be detailed once charges are preferred, rather than after referral? Only time will tell. The center of gravity of this debate is, and will remain, the requirement of the military justice system to promote justice without adversely affecting the efficiency and effectiveness of the military establishment.[261]

261. MCM, *supra* note 12, at I-1, para. 3. In evaluating the current push to "civilianize" the military justice system, special attention should be paid to the balancing test expressed in Article 36, UCMJ. The President is charged with prescribing rules that "shall, so far as he considers *practicable* . . . apply the principles of law . . . generally recognized in the trial of criminal cases in the United States district courts." UCMJ art. 36 (2000) (emphasis added). Given an explicit goal of mirroring civilian practice to the extent practicable, it is no wonder that military panel selection draws harsh criticism; however, the military lines of cases interpreting *Batson* illustrate how the UCMJ manages to deliver due process to service members in a unique, but effective, manner. *See, e.g.*, UCMJ arts. 31 (the rough military equivalent of *Miranda* rights that preceded *Miranda* by a decade and offer the accused superior protections), 32 (the rough military equivalent to a grand jury that offers superior protections to the accused), 34 (the SJA's pretrial advice to the convening authority, which has no civilian equivalent and offers substantial protections to the accused). These subtle strengths of the Code may escape readers of the Cox Commission Report who are not intimately familiar with the military justice system. Those who take into consideration the strengths of the military justice system, as well as its weaknesses, may hesitate before jumping on the bandwagon to recast the military justice system in a more "civilian" mold.