You Say You Want a Revolution:[1] New Developments in Pretrial Procedures

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Introduction

The media paid considerable attention to the military justice system this year.[2] This resulted, in part, from the possibility of military tribunals playing a role in America's Global War on Terror, and to lingering debates on the merits of the Cox Commission Report.[3] Civilian commentators focused not only on sensational cases, but also on the process of how the military handles justice. In particular, these articles gravitated to pretrial procedure issues such as convening authority discretion to select panels, refer cases to the courts they convene, and bind the government to pretrial agreements.

Criticism of the military's pretrial process is not new.[4] Four years ago, Congress expressed concern about the panel selection process in the National Defense Authorization Act of 1999.[5] This law required the Secretary of Defense to develop a plan for random selection of members of court-martial panels as a potential replacement for the current selection process. The result, The Joint Service Committee Report (JSC Report),[6] concluded that the current practice of senior commanders personally selecting members best suits the unique needs of the military.[7] Two years later, the National Institute of Military Justice (NIMJ)[8] sponsored a commission to write a report on the state of military justice to commemorate the fiftieth anniversary of the Uniform Code of Military Justice (UCMJ).[9] Senior Judge Walter T. Cox III chaired this effort.[10] The commission's

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1. The Beatles, *Revolution 1*, *on* The White Album (Apple Records 1968).

> You say you want a revolution;
> Well you know,
> We all want to change the world;
> You tell me that it's evolution;
> Well you know,
> We all want to change the world;
> But when you talk about destruction,
> Don't you know you can count me out-in;
> Don't you know it's gonna be alright . . . .

Id.

2. *See, e.g.*, Beth Hillman, *Chains of Command: The U.S. Court-Martial Constricts the Rights of Soldiers—And That Needs to Change*, Legal Affairs, May/June 2002, at 50-52; Edward T. Pound, *Unequal Justice*, U.S. News & World Rep., Dec. 16, 2002, at 19-30.

3. National Institute of Military Justice, Report of the Commission on the 50th Anniversary of the Uniform Code of Military Justice (May 2001) [hereinafter Cox Commission Report], *available at* http://www.badc.org/html/militarylaw_cox.html.

4. *See, e.g.*, Major John P. Saunders, *Hunting for Snarks: Recent Developments in the Pretrial Arena*, Army Law., Apr. 2001, at 14; Major Gregory Coe, *On Freedom's Frontier: Significant Developments in Pretrial and Trial Procedure*, Army Law., May 1999, at 1.

5. Strom Thurmond National Defense Authorization Act for Fiscal Year 1999, Pub. L. No. 105-261, § 562, 112 Stat. 1920, 1925 (1998).

6. U.S. Dep't of Defense, 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 JSC Report].

7. *See* Manual for Courts-Martial, United States pt. I, ¶ 3 (2002) [hereinafter MCM] ("The purpose of military law is to promote justice, to assist in maintaining good order and discipline in the armed forces, to promote effectiveness in the military establishment, and thereby to strengthen the national security of the United States.").

8. The NIMJ is a private non-profit organization based in Washington, D.C. The NIMJ Web site is at http://www.nimj.com.

9. *See* 10 U.S.C.S. §§ 801-946 (LEXIS 2003).

10. Cox Commission Report, *supra* note 3, at 4-5. 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.*

report sharply disagreed with the JSC Report. With regard to panel selection, Judge Cox's Commission observed, "[T]here 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."[11] The Cox Commission called on Congress to modify the pretrial role of the convening authority in selecting court members and making other pretrial legal decisions.[12]

This year's twist to the debate came in the form of mass media focus on military justice. Two articles, Beth Hillman's *Chains of Command*[13] and Edward Pound's *Unequal Justice*,[14] echoed many of the findings and recommendations of the Cox Commission Report. At least with regard to Professor Hillman's article, this was no great surprise; because she served as the Cox Commission's reporter.[15]

Dramatic changes did affect the military justice system this year; however, they were not the fundamental changes called for by Hillman and Pound. Further, these changes came not from Congress, but from the executive branch in the form of a Presidential Executive Order (EO)[16] and an Army Regulation (AR).[17] Taken together, these regulatory changes go far beyond superficially tinkering with the military justice system. They expand rather than limit the role of the convening authority within the military justice system. Specifically, they greatly enhance the authority of Army special court-martial convening authorities (SPCMCAs).[18] Against this turbulent backdrop, the Court of Appeals for the Armed Forces (CAAF)[19] heard cases, wrote opinions, and provided civilian oversight of the military justice system.[20]

This article discusses the media attacks upon the UCMJ, the significant regulatory changes to the *Manual for Courts-Martial* (*MCM*) and *AR 27-10*, and new pretrial developments flowing from service court and CAAF case law. These cases touched on issues regarding court-martial convening authorities, panel member selection, counsel voir dire of members, causal and preemptory challenges, staff judge advocate responsibilities, providence of guilty pleas, and the terms of pretrial agreements.

Media Scrutiny

Chains of Command and *Unequal Justice*[21] both generated considerable discussion among military justice practitioners and scholars. Many of those familiar with trials by court-mar-

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11. *Id.* at 5. The Cox Commission recommended action in four broad areas of court-martial practice and procedure. Three of the recommendations pertain to 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].
> 4. [R]epeal 10 U.S.C. §§ 920 [and] 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. Soon after the publication of this report, Congress passed legislation regarding the commission's recommendation to increase capital panel size from five members to twelve. National Defense Authorization Act for Fiscal Year 2002, Pub. L. No. 107-107, § 582, 115 Stat. 1012 (2001) (amending 10 U.S.C. ch. 47, §§ 816(1)(A), 829(b)).

12. Judge Cox sent the completed report to the NIMJ on 25 May 2001. Letter from Judge Walter T. Cox to Eugene R. Fidell, President of the NIMJ (May 25, 2001) (on file with author). The report was then forwarded to the Secretary of Defense and members of Congress on 5 September 2001. Letter from Eugene Fidell, President, National Institute of Military Justice, to Hon. Donald Rumsfeld, Secretary of Defense (Sept. 5, 2001) (on file with author).

13. Hillman, *supra* note 2.

14. Pound, *supra* note 2.

15. Hillman, *supra* note 2, at 52.

16. *See* MCM, *supra* note 7, A25-54.

17. U.S. Dep't of Army, Reg. 27-10, Military Justice (6 Sept. 2002) [hereinafter AR 27-10].

18. UCMJ art. 23 (2002).

19. *See* UCMJ arts. 141-145.

20. UCMJ art. 67.

21. *See supra* note 2.

tial, to include the collective senior leadership of the Judge Advocate General's Corps,[22] strongly disagree with Hillman and Pound's ultimate conclusion that the military justice system fails to protect due process of law for those in uniform. The military justice system, like any system of justice, certainly has room for improvement. The Hillman and Pound articles, however, mislead readers by failing to acknowledge the positive aspects of military practice. Those who understand 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.

In evaluating Professor Hillman and Mr. Pound's call to civilianize the military justice system, readers should give special attention to the balancing test expressed by Congress in 10 U.S.C. § 836 (Article 36, UCMJ). Under this statute, Congress charged the President with prescribing rules for courts-martial 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."[23] Given the explicit statutory goal of mirroring civilian practice to the extent practicable, it is no wonder that military panel selection draws harsh criticism. Stopping the analysis short, however, leads to inaccurate conclusions.

With regard to seating panel members, it is important to note that military counsel exercise causal and peremptory challenges. This right is grounded in 10 U.S.C. § 841 (Article 41, UCMJ). Further, military cases interpreting *Batson v. Kentucky*[24] illustrate how the UCMJ delivers due process to service members in a unique and effective manner. The CAAF chose to move beyond *Batson* and its progeny by being more protective of a member's right to serve on a court-martial panel than a civilian's right to serve on a jury. For example, in *United States v. Moore*,[25] 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.[26] In *United States v. Tulloch*,[27] the CAAF went beyond the Supreme Court's holding in *Purkett v. Elem*,[28] requiring the challenged party to provide not just a genuine, but also a reasonable, race- and gender-neutral reason for exercising a peremptory challenge.[29]

Examples of enhanced UCMJ protections of accused service members' due process rights abound. For example, 10 U.S.C.

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22. The DOD General Counsel and the service TJAGs wrote to *U.S. News and World Report* to express their displeasure with Mr. Pound's article. *U.S. News and World Report* chose not to publish the first paragraph, which read,

> Your December 16 cover article, "Unequal Justice," insults your publication as well as the military justice system. Its lack of balance and objectivity also insults the public. We regret that your article did not treat the topic with the same fairness that the military justice system accords service members.

The portion of the letter that *U.S. News and World Report* did publish states:

> "Unequal Justice" leaves the reader with the impression that "lawmakers" have not reviewed the Uniform Code of Military Justice in over 30 years and that civilian oversight of the system does not exist. Every year, the military and civilian leadership of the Department of Defense formally reviews the UCMJ and proposes improvements. In each of the past six years, the Congress and the President have "fine-tuned" the UCMJ. The Court of Appeals for the Armed Forces (five civilian judges appointed by the President and confirmed by the Senate) and the Supreme Court of the United States also oversee and review the military justice system. Military justice proceedings are not "shrouded in secrecy." Unlike the much more secretive grand jury system used in most states and federal courts, the equivalent military procedure allows the defendant and defense lawyer to participate fully, an extraordinary right in comparison with American civilian systems of justice. Other aspects of the UCMJ compare equally favorably with our civilian judicial system. For example, the UCMJ provides defendants with more rights against self-incrimination, broader discovery prior to trial, highly qualified defense counsel at no expense, and a host of other protections that defendants and defense attorneys would love to have in the civilian sector. As Sen. Patrick Leahy, chairman of the Senate Judiciary Committee, observed: "American military justice is the best in the world and includes open trials, right to counsel, and judicial review." It works well every day in vastly different operational settings. It holds the 1.4 million men and women of the armed forces accountable for their actions, but it also treats them fairly and with dignity and respect.

Letter from William J. Haynes II, General Counsel of the Department of Defense; Rear Admiral Michael F. Lohr, Judge Advocate General of the Navy; Major General Thomas J. Romig, Judge Advocate General of the Army; Major General Thomas J. Fiscus, Judge Advocate General of the Air Force; Rear Admiral Robert F. Duncan, Chief Counsel, United States Coast Guard; and Brigadier General Kevin M. Sandkuhler, Staff Judge Advocate to the Commandant, U.S. Marine Corps, to the Editor, U.S. News and World Report (Dec. 23, 2002) [hereinafter Letter to the Editor] (on file with author).

23. UCMJ art. 36 (emphasis added).

24. 476 U.S. 79 (1986) (holding that a party alleging that an opponent was exercising a peremptory challenge for the purpose of obtaining a racially-biased jury must make a prima facie showing of such intent before the party exercising the challenge is required to explain the reasoning behind the challenge).

25. 28 M.J. 366 (1989).

26. *Id.* at 368-69.

27. 47 M.J. 283 (1997).

28. 514 U.S. 765 (1995).

§ 831 (Article 31, UCMJ) codifies the military equivalent of *Miranda*[30] rights. This statute preceded the Supreme Court's decision in *Miranda v. Arizona* by a decade. To this day, the statute offers the military accused superior protections, such as notice of the offense and the requirement that any person subject to the Code give the warnings before questioning a military suspect. In the military, merely being a suspect triggers the Article 31 warnings; civilians' *Miranda* rights are not triggered until they are subject to *custodial* interrogation.[31]

Another example of expansive military due process is 10 U.S.C. § 832 (Article 32, UCMJ), which codifies the military equivalent of grand juries. These military pretrial hearings offer superior protections for the accused, including the right to be present during the taking of evidence; the right to representation by counsel; the right to call, question, and cross-examine witnesses; and the right to remain silent, testify, or make an unsworn statement.[32] As a result, the military pretrial investigation serves as an engine of pretrial discovery for the defense—a right that the civilian defense bar does not enjoy.

In his *U.S. News & World Report* article, Pound cited patently misleading court-martial conviction statistics,[33] choosing not to explain the enhanced set of rights soldiers enjoy when they "cut a deal" and enter into a pretrial agreement. First, service members do not have the right to pled guilty. They may not pled guilty unless they honestly and reasonably believe they are guilty and are able to explain their guilt to the satisfaction of the military judge.[34] Despite entering into a pretrial agreement with the convening authority, service members are still entitled to a full sentencing hearing. And, if the accused "beats" the deal by getting a lower sentence from a judge or panel, the accused benefits by receiving the lesser punishment.[35]

Mr. Pound implies that a commander acting on the findings and sentence of a court-martial is a bad thing. What he fails to explain is that when the commander acts on a court-martial sentence under the authority of 10 U.S.C. § 860 (Article 60, UCMJ), the commander has the option of disapproving, disapproving in part, or approving the findings and sentence, but may *never* increase a punishment adjudged by a court-martial. Thus, every military member who is convicted of an offense gets "a second bite at the apple" in the form of commander clemency before appellate review. Although convening authorities retain great power, they may never change findings of not guilty to guilty, or increase punishments.[36]

The military justice system, like the civilian criminal justice system, must continue to evolve. Contrary to Hillman's observations, the military has not turned a blind eye to the differences between civilian and military practice or the recommendations of the Cox Commission Report.[37] Hillman and Pound both risk throwing the baby out with the bath water. They both reach flawed conclusions because they fail to acknowledge the unique strengths of the military justice system. The center of gravity in the debate about the future of the military justice system is—and must remain—the requirement to promote justice without adversely affecting the efficiency and effectiveness of the military establishment.

The 2002 Amendments

On 11 April 2002, President Bush signed an executive order (EO) enacting the 2002 Amendments to the MCM.[38] These amendments took effect on 15 May 2002. The last EO had been published almost three years earlier.[39] As a result, the 2002 Amendments addressed a backlog of issues, bringing many

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

30. Miranda v. Arizona, 384 U.S. 435 (1966) (requiring rights warnings prior to custodial interrogation).

31. *See* UCMJ art. 31 (2002).

32. *See* 10 U.S.C. § 832(b) (2000).

33. Pound, *supra* note 2, at 29. In a shadow box titled "Slam Dunk," Pound states, "[F]or every 1 acquittal, military prosecutors win more than 9 convictions." He lays out the service conviction rates as: Air Force—92% between 1992 and 2001, Army—92% between 1997 and 2001, and Navy/Marine Corps—96% between 1997 and 2001. *Id.* As presented, these statistics are particularly misleading because they do not break out the number of convictions that resulted from guilty pleas. Between fiscal years 2000 and 2002, 76.9% of Army general courts-martial were guilty pleas. Excluding these cases, the conviction rates for contested Army general courts-martial were 79.1% in 2000, 82.6% in 2001, and 82.5 % in 2002. U.S. Dep't of Army, *Army Court of Criminal Appeals, at* http://www.jagcnet.army.mil/ACCA (last visited Mar. 25, 2003).

34. MCM, *supra* note 7, R.C.M. 910.

35. *Id*. R.C.M. 705.

36. *See* UCMJ art. 60 (2002).

37. *See* Major General (Ret.) Michael J. Nardotti, *Military Commissions*, ARMY LAW., Mar. 2002, at 1 (explaining the unique need for a military justice system); Major Bradley J. Huestis, *New Developments in Pretrial Procedures: Evolution or Revolution?*, ARMY LAW., Apr. 2002, at 20 (analyzing recent case law through the lens of the Cox Commission Report).

38. Exec. Order No. 13,262, 67 Fed. Reg. 18,773 (Apr. 17, 2002), *reprinted in* MCM, *supra* note 7, app. 25, at A25-54 to -73.

minor changes to the practice of military law, and several sweeping changes as well.

The EO amended RCM 201(f)(2)(B), expanding special court-martial (SPCM) jurisdiction to authorize up to one year of confinement and forfeitures of pay. In effect, this increased the SPCM maximum punishment from six months to one year.[40] An amendment to RCM 1003(b)(3) also authorizes SPCMs to impose fines in lieu of or in addition to forfeitures. These changes give SPCMAs greater flexibility to handle misconduct at their own command level. They also align SPCMs more closely with misdemeanor offenses[41] and general courts-martial with felony offenses.[42] Other changes fine-tuned issues affecting discovery, crimes and defenses, protective orders, definitions of prior convictions, and sentencing. The EO also modified rules pertaining to preparing and maintaining records of trial, and post-trial processing.[43]

The EO almost immediately generated one published appellate case, *Taylor v. Garaffa*.[44] In *Taylor*, the accused used cocaine before the EO's effective date, 15 May 2002, but his court-martial was convened and his case referred after 15 May 2002. The defense argued that an internal Navy memorandum, designating the date of commission of an offense as the cut-off for expanded SPCM jurisdiction, should bind the court. The Navy-Marine Court of Criminal Appeals (NMCCA) denied his motion for relief, holding that the cut-off date for the expanded SPCM jurisdiction was the date the convening authority convened the court-martial. Because the SPCM convened Taylor's court-martial after the effective date of the EO, the NMCCA held that the maximum punishment at his special court-martial included confinement and forfeitures for up to twelve months.[45]

The passage of time makes the holding of *Taylor* less important to counsel actively trying cases, but any practitioner who tries cases before a standing panel should still double-check the date the special court-martial was convened. When the offense, investigation, preferral, and referral all take place after 15 May 2002, the lower jurisdictional limits might still apply. This bizarre situation could occur if the court-martial was convened—that is, the members selected—before the effective date of the EO, and the trial judge follows the holding of *Taylor.*

AR 27-10

The Department of the Army published a revised *AR 27-10* on 6 September 2002, with an effective date of 14 October 2002.[46] Paragraph 5-27b now authorizes Army SPCMCAs to refer cases to SPCMs empowered to adjudge bad-conduct discharges (BCD).[47] This change greatly increases the authority of Army commanders who serve as SPCMCAs[48] by deleting previous regulatory restrictions that effectively prevented them from referring cases to BCD SPCMs. For SPCMs involving confinement for more than six months, forfeitures of pay for more than six months, or BCDs, however, the servicing staff judge advocate (SJA) must prepare a pretrial advice, "following generally the format of R.C.M. 406(b)."[49] Consequently, Army SJAs should prepare Article 34-type pretrial advice for all SPCMs. In addition, SJAs must ensure court reporters are detailed to all SPCMs. The rules governing the requirements for verbatim records of trial remain unchanged.[50]

Other changes to *AR 27-10* affected nonjudicial punishment, automatic reductions pursuant to court-martial convictions, national security coordination, automatic suspension of favor-

39. *See* Exec. Order No. 13,140, 64 Fed. Reg. 55,115 (Oct. 26, 1999), *reprinted in* MCM, *supra* note 7, at A25-49 to -53.

40. 67 Fed. Reg. at 18773; *see* MCM, *supra* note 7, app. 25, at A25-54. This change implemented the amendment to 10 U.S.C. § 819 (Article 19, UCMJ) contained in section 577 of the National Defense Authorization Act for Fiscal Year 2000, Pub. L. No. 106-65, 113 Stat. 512 (1999).

41. BLACK'S LAW DICTIONARY 1014 (7th ed. 1999) ("A crime that is less serious than a felony and is usu[ally] punishable by fine, penalty, forfeiture, or confinement (usu[ally] for a brief term) in a place other than prison (such as a county jail).").

42. *Id*. at 633 ("A serious crime usu[ally] punishable by imprisonment for more than one year or death.").

43. *See infra* app. I and II (Summary of Amendments to Punitive Articles and Summary of Amendments to the Rules for Courts-Martial).

44. 57 M.J. 645 (N-M. Ct. Crim. App. 2002).

45. *Id.* at 653.

46. AR 27-10, *supra* note 17.

47. *See id.* para. 5-27. No authority prohibits Navy or Air Force SPCMCAs from exercising their full authority under the *MCM* to send cases to BCD SPCMs. *See* UCMJ art. 19 (2002). Under the previous version of *AR 27-10*, however, Army SPCMCAs did not have the full authority of their counterparts in other services. U.S. DEP'T OF ARMY, REG. 27-10, MILITARY JUSTICE para. 5-25 (20 Aug. 1999); *cf.* AR 27-10, *supra* note 17, para. 5-27b.

48. *See* UCMJ art. 23 (defining SPCMCAs and their authority). In the Army, brigade-level commanders (O-6 level officers) usually serve as SPCMCAs. Compare this to the Marine Corps, where battalion commanders (O-5 level officers) serve as SPCMCAs. *See* U.S. DEP'T OF NAVY, JUDGE ADVOCATE GENERAL INSTR. 5800.7C, MANUAL OF THE JUDGE ADVOCATE GENERAL § 0120b(1) (27 July 1998) (authorizing commanding officers of Marine Corps battalions to convene special courts-martial); *see also* UCMJ art. 23(a)(7).

49. AR 27-10, *supra* note 17, para. 5-27b. This new quasi-Article 34 pretrial advice requirement applies at SPCMs involving confinement in excess of six months, forfeiture of pay for more than six months, or BCDs. *Id.*

able personnel actions, personal privacy protected in the record of trial, personnel records admissibility, records of trial, military magistrate review, court-martial policy in the reserve component, sexual offender registration, and changes impacting the relationship between the Trial Defense Service and SJAs.[51]

Court-Martial Personnel

New case law has further defined the roles and responsibilities of convening authorities, staff judge advocates, panel members, and counsel. Military appellate courts generally continue to look past technical form to substantive matters. If there is any over-arching pattern, it is the courts' continuing deference to convening authorities, government counsel, and military judges.

Convening Authorities—Who May Convene Courts-Martial?

Convening authorities are commanders whom Congress has empowered to convene or assemble a particular level of court-martial, send soldiers' cases to that level of court-martial, and act on the findings and sentence of courts-martial at that level.[52] The result of the court-martial is not final until the convening authority approves the result. Convening authorities have broad authority to approve, disapprove, or modify the findings and sentence, but may never change a finding from not guilty to guilty or increase a punishment.[53]

There were four noteworthy convening authority cases this year; two were interesting and two were disquieting. The interesting cases were *United States v. Hundley*[54] and *United States v. Brown*.[55] They were particularly interesting because they help define who may properly act as a convening authority.

In *Hundley*, the defense challenged the authority of the accused's battalion commander to convene a SPCM empowered to adjudge a BCD. The commander was a Marine Corps major in charge of a training battalion. The NMCCA declined to perform a functional analysis of whether the convening authority commanded a "separate" battalion and upheld the case because the Secretary of the Navy had designated all Marine Corps battalion commanders as SPCMCAs.[56] Under Article 23(7), UCMJ, therefore, the battalion's commanding officer had the authority to convene a special court-martial.[57]

In *Brown*, the issue was whether the proper convening authority took post-trial action in the accused's case. One SPCMCA convened and referred the accused's case to trial. A second SPCMCA approved the sentence. The NMCCA held that this was error because the action violated the terms of Article 60(c)(1), UCMJ, and RCM 1107(a). The court rejected the government's argument that the accused needed to demonstrate material prejudice to obtain relief. Noting that the clemency stage was the accused's best opportunity to obtain sentence relief, the court held that the government was required to follow the statutory and regulatory scheme as written.[58]

The disquieting convening authority cases were *United States v. Davis*[59] and *United States v. Gudmundson*.[60] They were disquieting because they confront the insidious issue of commander bias in exercising convening authority responsibilities.

Davis, like *Brown*, dealt with the convening authority's duty to approve the findings and sentences of courts-martial, but unlike *Brown*, *Davis* focused on convening authority bias in carrying out these duties. In *Davis*, the convening authority said those caught using illegal drugs would be prosecuted. He also warned those convicted of drug offenses, "[D]on't come crying to me about your situation or your families."[61] The accused asserted in his clemency matters and on appeal that the convening authority should be disqualified because of his "unwillingness to impartially listen to clemency petitions by those convicted of illegal drug use."[62] The CAAF reviews claims of convening authority disqualification to take post-trial action de novo.[63] If the CAAF finds the convening authority is "an accuser, has a personal interest in the outcome of the case, or has a personal bias toward the accused," or "display[s] an

50. AR 27-10, *supra* note 17, para. 5-11a.

51. *See generally* AR 27-10, *supra* note 17; *infra* app. III.

52. UCMJ arts. 22-24.

53. UCMJ art. 60(c); *see also* MCM, *supra* note 7, R.C.M. 1107(b)(4), (c), (d)(1).

54. 56 M.J. 858 (N-M. Ct. Crim. App. 2002).

55. 57 M.J. 623 (N-M. Ct. Crim. App. 2002).

56. *Hundley*, 56 M.J. at 859.

57. *Id*. at 859 (citing UCMJ art. 23(7)).

58. *Brown*, 57 M.J. at 626.

59. 58 M.J. 100 (2003).

60. 57 M.J. 493 (2002).

inelastic attitude toward the performance of [his] post trial responsibility," the court will disqualify him.[64] The CAAF found that the convening authority's direct reference to those convicted of using illegal drugs reflected an inflexible attitude toward the fulfillment of his post-trial responsibilities. Noting that the convening authority's attitude was "the antithesis of the neutrality required," the court reversed the Air Force Court of Criminal Appeals (AFCCA) and returned the case to the Judge Advocate General of the Air Force for action by a different convening authority.[65]

In *United States v. Gudmundson*,[66] the accused also questioned the convening authority's handling of a drug use case. Unlike *Davis*, however, the CAAF ultimately rejected the defense arguments and affirmed the accused's conviction and sentence.

In *Gudmundson*, the convening authority in question ordered that the first one hundred airmen entering the base between 0300 and 0600 hours must provide a urine sample. Airman Gudmundson was one of these airmen and his urine tested positive for lysergic acid diethylamide (LSD). When the defense attempted to suppress the urinalysis evidence as the result of an unlawful search, the convening authority was called to testify to defend his motive for ordering the "inspection" of Gudmundson's urine. The military judge found the urinalysis result was the product of a valid inspection. The same convening authority later took post-trial action on Gudmundson's case. The accused did not raise the issue of convening authority disqualification at trial or in his clemency submission, raising it for the first time on appeal. The CAAF, noting that the defense was aware of the convening authority's involvement, held that Airman Gudmundson waived the issue by failing to object.[67] Defense counsel take heed: raise convening authority disqualification issues at trial or in clemency, or risk waiver![68]

Staff Judge Advocates

Staff judge advocates play a critical role in the pretrial process and must maintain a degree of detachment to be able to provide independent, impartial assessments of cases to their convening authorities.[69] The tension between remaining neutral and detached and becoming partisan advocates for the government, however, may overwhelm SJAs who normally would strive to remain "above the fray." Some SJAs, for example, may feel a responsibility to act as stalwart "gatekeepers" in screening actions for their convening authorities. This principle, when taken to extremes, may lead SJAs to usurp convening authorities' power by holding or delaying defense submissions they view as non-meritorious.

The Cox Commission took the extreme position that "[t]he impression that [SJAs] 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."[70] 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 responsibil-

61. *Davis*, 58 M.J. at 102. The convening authority's approach was not unlike that expressed by Mark Twain over 100 years ago. Mr. Twain, commenting on pardons, said:

> I have had no experience in making laws or amending them, but still I cannot understand why, when it takes twelve men to inflict the death penalty upon a person, it should take any less than twelve more to undo their work. If I were a legislature, [and] had just been elected [and] had not had time to sell out, I would put the pardoning [and] commuting power into the hands of twelve able men instead of dumping so huge a burden upon the shoulders of one poor petition-persecuted individual.

Letter from to Mark Twain to Whitelaw Reid (Mar. 7, 1873), *available at* http://www.twainquotes.com. The problem is not the attitude alone, but the fact that a legislature (Congress) put the clemency power into the hands of the convening authority alone.

62. *Davis*, 58 M.J. at 106-07.

63. *Id.* (citing United States v. Conn, 6 M.J. 351, 353 (C.M.A. 1979)).

64. *Id.* (citations omitted).

65. *Id.* at 113-14.

66. 57 M.J. 493 (2002).

67. *Id*. at 494. The convening authority, in his capacity as installation commander, ordered "Operation Nighthawk" on the night after a "rave." In his motion to suppress, the accused unsuccessfully argued that Operation Nighthawk was a pretext for an illegal search. *Id*.

68. *See also* Lieutenant Colonel Patricia A. Ham, *Making the Appellate Record: A Trial Defense Attorney's Guide to Preserving Objections—The Why and How*, ARMY LAW., Mar. 2003, at 10 (noting that the CAAF has abandoned past paternalistic tendencies and that very few issues are not subject to waiver).

69. *See, e.g.*, UCMJ art. 34 (2002).

70. COX COMMISSION REPORT, *supra* note 3, at 12.

ities are."[71] The Commission also pointed out that there is a danger that unlawful command influence could flow from SJAs 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."[72]

Some SJA duties, such as providing Article 34, UCMJ, pretrial advice, require the independent exercise of legal judgment.[73] Other tasks, such as processing defense immunity requests, are more administrative in nature. The CAAF examined both roles when it decided *United States v. Gutierrez*[74] and *United States v. Ivey.*[75]

In *Gutierrez*, the CAAF examined the limits of SJA bias as it relates to the exercise of independent legal judgment.[76] The case turned on whether the SJA, who also served as the chief of justice (COJ), was disqualified from giving the convening authority post-trial advice. Before entry of pleas, the accused moved to dismiss all charges and specifications for alleged violations of his speedy trial rights. The COJ testified in opposition to the motion, claiming that the government processed the accused's case diligently. The military judge denied the motion and accepted the accused's guilty pleas to multiple specifications of larceny, conspiracy to commit larceny, robbery, conspiracy to commit robbery, and receiving stolen property. The court then sentenced Gutierrez to forfeiture of all pay and allowances, reduction to E-1, confinement for five years, and a dishonorable discharge. Afterwards, the COJ assumed duties as the SJA and prepared the post-trial recommendation (PTR) in the appellant's case.[77]

The defense objected, claiming that the COJ should be disqualified from preparing the PTR because of her involvement in the case, based on her testimony in opposition to the speedy trial motion. Since the COJ, as a government counsel, assumed a prosecutorial role in appellant's case before her appointment as SJA, she was disqualified from preparing the SJA post-trial recommendation, which involved evaluating the prosecution.[78] Resolving the issue in favor of the defense, the CAAF held that a staff legal officer who merely gives general advice is not disqualified; however, when the same advisor becomes a participant in the prosecution, she is disqualified.[79]

Gutierrez is especially important because in the future, Army SJAs will be called upon to exercise independent legal judgment more often when carrying out their pretrial duties. Although the UCMJ and the *MCM* only require Article 32, UCMJ, investigations and Article 34, UCMJ, pretrial advice before referral to general courts-martial, new language in *AR 27-10* now requires Article 34-type advice from SJAs to SPCMCAs before referral to a BCD SPCM.[80] This means that SJAs who currently provide Article 34, UCMJ, pretrial advice only to their GCMCAs will now have to provide similar written advice to SPCMCAs within their GCMCA jurisdictions.[81]

In *United States v. Ivey,*[82] the CAAF examined the more mundane and administrative side of the SJA role. At issue was whether the government failed to properly process the accused's requests for immunity for four civilian witnesses. Three days prior to trial the defense requested that the convening authority grant four alleged co-conspirators testimonial immunity. Because these potentially exculpatory witnesses were civilians, the request would ultimately go to the Department of Justice (DOJ) for final approval by the Attorney General. The convening authority did not take action on the defense request before trial. The defense counsel asked the trial judge to grant the requested immunity, or in the alternative, to abate the proceedings pending action by the convening authority. The military judge denied both defense requests. After the

71. *Id.* at 12-13.

72. *Id.* at 13.

73. *See* UCMJ art. 34.

74. 57 M.J. 148 (2002).

75. 55 M.J. 251 (2001).

76. *Gutierrez*, 57 M.J. at 148.

77. *Id.* at 149.

78. *See id.* (citing United States v. Lynch, 39 M.J. 223, 229 (C.M.A. 1994); United States v. Willis, 46 C.M.R. 112, 114 (C.M.A. 1973)).

79. *Id.* at 149-50.

80. AR 27-10, *supra* note 17, para. 5-27b. In Army SPCMs involving confinement in excess of six months, forfeitures of pay for more than six months, or BCDs, the "servicing staff judge advocate will prepare a pretrial advice, following generally the format of [RCM] 406(b)." *Id.*

81. *See id.*

82. 55 M.J. 251 (2001).

accused was convicted at trial, the convening authority took action and denied the defense request.[83]

Addressing the issue on appeal, the CAAF expressly noted that government counsel do not have the authority to de facto deny requests for immunity by withholding them from convening authorities. The court noted that SJAs must submit all requests for immunity, whether from the prosecution or the defense, to the convening authority for decision.[84] With regard to immunity for civilian witnesses, the CAAF held that convening authorities do not have to forward requests they intend to deny to the Attorney General.[85]

In *Ivey*, the CAAF found no discriminatory use of immunity or government overreaching, and found that the proffered testimony was not clearly exculpatory. The court held that the military judge did not abuse his discretion by refusing to order the immunity or abate the proceedings to wait for action by the convening authority.[86]

Convening a Court-Martial—Panel Member Selection

Convening authorities have a statutory duty to personally select panel members according to specific criteria, rather than randomly.[87] Congress requires that convening authorities select members who, in their opinion, are best qualified by virtue of their "age, education, training, experience, length of service, and judicial temperament."[88]

In 2001, the CAAF wrestled with the requirement that convening authorities personally select members for court-martial duty in *United States v. Benedict*.[89] Although this case has been on the books for two years, it remains an important reminder of the responsibilities the UCMJ and the *MCM* place upon commanders exercising court-martial convening authority. In *Benedict*, a Coast Guard admiral's Chief of Staff (COS) selected nine members from a pool of approximately thirty nominees submitted by subordinate commanders.[90] The COS then submitted this list to his convening authority for signature. Shockingly, a majority of the CAAF voted to affirm, noting that it is common practice for convening authorities to rely upon staff assistance to select members. The court held that the convening authority had met the requirements of Article 25, UCMJ, by "personally" selecting the members set forth by his COS.[91]

The majority relied upon pretrial motion transcripts to conclude the convening authority did not completely abandon his responsibility.[92] Judge Baker, concurring, and Judge Effron, dissenting, both raised concerns about the trial court's failure to call the convening authority to testify.[93] To students of the "randomly selected" versus "blue ribbon" panel debate, Judge Effron's dissent contains a valuable discussion of the policies and history behind Article 25. It discusses the legislative ratio-

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83. *Id*. at 254.

84. *Id*. at 256.

85. *Id*.

86. *Id*. at 257.

87. UCMJ art. 25 (2002).

88. *Id*. 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. *See, e.g.*, United States v. Upshaw, 49 M.J. 111, 113 (1998) (holding that the good faith administrative error resulting in exclusion of otherwise eligible members, E-6s, was not error). The reasoning of *Upshaw* has been applied by the Air Force and Army service courts of appeal in *United States v. Brocks*, 55 M.J. 614 (A.F. Ct. Crim. App. 2001), and *United States v. Simpson*, 55 M.J. 674 (Army Ct. Crim. App. 2001). In both cases, the convening authority, who excluded members of particular units from consideration for panel member duty, did not err because his motive was to find an unbiased and objective panel. The court remains vigilant, however, when convening authorities appear to use rank as a selection criteria. *See, e.g*., United States v. Kirkland, 53 M.J. 22 (2000). The SJA in *Kirkland* used a memo signed by the SPCMCA to solicit nominees from subordinate commanders. The memo sought nominees in various grades. The chart had a column for E-9s, E-8s, and E-7s, but no place to list nominees in lower grades. To nominate an E-6 or other nominee of lower rank, the nominating officer would have had to modify the form. The convening authority did not nominate or select anyone below E-7 for the panel. The CAAF held that where there was an "unresolved appearance" of exclusion based on rank, "reversal of the sentence is appropriate to uphold the essential fairness and integrity of the military justice system." *Id*. at 25 (quoting United States v. McClain, 22 M.J. 124, 133 (Cox, J., concurring in the result)).

89. 55 M.J. 451 (2001).

90. *Id*. at 452.

91. *Id*. at 454.

92. *Id*. at 454-55.

93. *Id*. at 455, 459. 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 do so, the convening authority could have made changes to the list. The CAAF did not order a *DuBay* hearing, but instead relied on pretrial motion transcripts that did not include any testimony from the convening authority. *See id*. at 452-55.

nale behind Article 25 and explains the recommendations within the JSC Report. Most importantly, it communicates the idea that if commanders abdicate their convening authority responsibility to personally select the "best qualified" members, they risk losing their central role in the military justice system.[94]

It is noteworthy that the nominee system the convening authority used in *Benedict* is grounded neither in the UCMJ nor the *MCM*. It is simply a child of tradition. In *United States v. Dowty*,[95] the Assistant Judge Advocate used a novel approach to solicit a pool of court-martial panel nominees; he placed the functional equivalent of a "help wanted" advertisement in a command news bulletin. In the advertisement, the command requested volunteers for panel member duty. Neither the trial judge nor the NMCCA endorsed this practice, but did not reverse it, concluding that the nominee system is preferred, but not required.[96] Given the increased punishments that SPCMs may now dispense, the *Dowty* case takes on greater importance. *Dowty* reminds practitioners that commanders may carry out their duty to personally select members with little or no staff assistance. While it is unlikely that corps or division commanders would welcome this approach, brigade commanders may feel comfortable sitting down with a unit roster and selecting members without the assistance of nominee rosters provided by their staffs or subordinate commanders. *Dowty* stands for the proposition that novel approaches may not curry judicial favor, but will pass legal muster when they fall within the limits of Article 25.

Court Members—Voir Dire and Challenges

Voir dire and challenge case law has highlighted the CAAF's continuing deference to the role of the military judge in the trial process.[97] This trend flows in the same direction as the recommendations of the Cox Commission Report[98] and recent media attacks on the UCMJ.[99] As a result, practice before courts-martial increasingly resembles that in federal district courts. No two cases more clearly illuminate this trend than *United States v. Dewrell*[100] and *United States v. Lambert*.[101] Both cases affirmed military judges' authority to control the conduct of voir dire from the bench. Taken together, these cases demonstrate that military judges have almost unlimited power to control voir dire.[102]

Master Sergeant Dewrell was convicted of committing an indecent act upon a female less than sixteen-years old. On appeal, the defense 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 pre-teen girls' fabrications about sexual misconduct. Analyzing the issue under an abuse of discretion standard, the CAAF 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.[103] The court reasoned that the military judge did not abuse his discretion because his questions properly tested for a fair and impartial panel and allowed counsel to intelligently exercise challenges.[104]

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94. *Id.* at 456-58.

95. 57 M.J. 707 (N-M. Ct. Crim. App. 2002).

96. *Id.* at 715.

97. *See* Coe, *supra* note 4, at 1 n.8 (discussing the CAAF's "reaffirmation of power and respect" for the military judge).

98. COX COMMISSION REPORT, *supra* note 3, at 6-12.

99. *See, e.g.*, Hillman, *supra* note 2; Pound, *supra* note 2.

100. 55 M.J. 131 (2001).

101. 55 M.J. 293 (2001).

102. *See Dewrell*, 55 M.J. at 131; *Lambert*, 55 M.J. at 293.

103. *Dewrell*, 55 M.J. at 131.

104. *Id.* at 137.

In *Lambert*, the CAAF addressed judicial control of voir dire after an allegation of member misconduct.[105] After the members announced a verdict of guilty to one specification of indecent assault, the accused's civilian defense counsel told the military judge that a member took a book entitled *Guilty as Sin*[106] into the deliberation room. The military judge asked if anyone had the book during deliberations. The military judge conducted voir dire of the member, who identified herself, but did not allow the defense counsel an opportunity to conduct individual or group voir dire. The CAAF noted that "[n]either the UCMJ nor the [*MCM*] gives the defense the right to individually question the members."[107] Analyzing the issue under an abuse of discretion standard, the court held that the military judge did not err by refusing to allow the defense to question the members.[108]

What message should the field take from *Dewrell* and *Lambert*? First, counsel who 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. Second, the failure of military counsel to prepare effective voir dire creates the risk that military counsel will become silent observers of voir dire, like civilian attorneys who try cases in federal courts.[109] This would be a step backward, because trial and defense counsel are in a far better position to know their cases than military judges. Counsel can and should assist the court in ferreting out actual and implied bias.[110] Fortunately, the most recent amendments to the *Military Judges' Benchbook* leave the voir dire script unchanged. The script continues to prompt military judges to invite counsel questioning of the members.[111] Hopefully, this practice will continue. The fact that trial judges in federal district court generally foreclose counsel participation in voir dire does not mean it is the best way to try a court-martial case.

Causal Challenges

After questioning has been completed and the military judge has sequestered the members, counsel have the opportunity to exercise causal challenges.[112] If counsel show proper grounds for challenges, military judges must grant those challenges.[113] 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,"[114] the military judge may decide to grant or deny the challenge based on whether the member has an actual or implied bias.[115] Actual bias is a credibility test, viewed through the subjective eyes of the trial judge. Implied bias is an appearance test, viewed through the objective eyes of the public.[116]

United States v. Wiesen[117] did not change the substantive law in the area of peremptory challenges and implied bias, but it is nevertheless a landmark case. A panel of officer and enlisted members convicted Sergeant Wiesen of two specifications of attempted forcible sodomy with a child, indecent acts with a child, and obstruction of justice. He was sentenced to a dishonorable discharge, confinement for twenty years, total forfeitures, and reduction to the lowest enlisted grade.[118] 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

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

106. *See generally* TAMI HOAG, GUILTY AS SIN (1997).

107. *Lambert*, 55 M.J. at 296 (citing *Dewrell*, 55 M.J. at 136).

108. *Id*.

109. MCM, *supra* note 7, R.C.M. 912(d), at A21-61 ("Examination of Members. This subsection is based on Fed. R. Crim. P. 24(a).").

110. United States v. Weisen, 56 M.J. 72, 73 (2001) ("[A] member shall be excused in cases of actual bias and implied bias.").

111. U.S. DEP'T OF ARMY, PAM. 27-9, LEGAL SERVICES: MILITARY JUDGES' BENCHBOOK 45-46 (1 Apr. 2001). Change 1 was published after *Dewrell* and *Lambert* on 1 September 2002. According to the script—which did not change—the military judge asks the members twenty-eight standardized questions and then asks, "Do counsel for either side desire to question the court members?" *Id*. The note then states, "TC and DC will conduct voir dire if desired and individual voir dire will be conducted if required." *Id.*

112. *See* UCMJ art. 46 (2002); MCM, *supra* note 7, R.C.M. 912(f)(2).

113. MCM, *supra* note 7, R.C.M. 912(f)(1)(A)–(M).

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

115. *Id.*

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

117. 56 M.J. 172 (2001) [hereinafter *Weisen I*], *petition for recons. denied*, 57 M.J. 48 (2002) [hereinafter *Weisen II*].

118. *Weisen I*, 56 M.J. at 173.

COL Williams. The military judge denied this causal challenge. The defense then used its peremptory challenge to remove Colonel Williams, but preserved the issue for appeal by stating that "but for the military judge's denial of [the defense] challenge for cause against [COL] Williams, [the defense] would have peremptorily challenged [another member]."[119]

On appeal, a three-judge majority of the CAAF concluded that "[w]here 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."[120] The court held that "the military judge abused his discretion when he denied the challenge for cause against [COL] Williams."[121] Finding prejudice, the court reversed the Army Court of Criminal Appeals (ACCA) and set the findings and sentence aside.[122]

Although *Wiesen* did not change the substantive law in the area of implied bias, it expanded the doctrine to include inter-panel chain-of-command issues. Although all members of the panel made credible disclaimers as to their impartiality, the majority of the CAAF found that the public would objectively view command relationships among members as unfair. Chief Judge Crawford railed against the majority's reasoning in two strong dissenting opinions.[123] She was in complete disagreement with the majority's analysis, which reviewed the trial judge's ruling from the objective point-of-view of the public.[124] In the wake of *Wiesen*, trial judges and counsel must give heightened scrutiny to whether two-thirds of the members work within the same chain of command. If the trial judge denies a defense causal challenge, trial counsel should consider joining the defense challenge to avoid reversal on appeal.

Notwithstanding *Wiesen*, the CAAF recently rejected a defense argument that a military judge abused his discretion by denying a causal challenge against a panel member who admitted that she vacationed with and bought a car from the trial counsel prosecuting the case at bar. In *United States v. Downing*,[125] the court held that "an objective observer . . . would distinguish between officers who are professional colleagues and friends based on professional contact and those individuals whose bond of friendship might improperly find its way into the members deliberation room."[126] While *Downing* did not directly contradict the court's holding in *Wiesen*, because the cases turned on different issues, *Downing* does show the court's reluctance to slide down the slippery slope of implied bias as a basis for reversal. Arguably, an objective public would have more difficulty with a member with close social ties to one of the counsel (*Downing*) than a member with merely professional ties to the senior panel member (*Wiesen*).[127]

Peremptory Challenges—Batson[128]

Once the military judge has ruled on all government and defense causal challenges, each party may then exercise one peremptory challenge.[129] Under *Batson v. Kentucky*, the Supreme Court eliminated racially discriminatory use of peremptory challenges by the government.[130] The Supreme Court has never specifically applied *Batson* to the military, but in *United States v. Santiago-Davila*,[131] the CAAF applied *Batson* to the military through the Fifth Amendment.[132] The mili-

119. *Id.* at 174.

120. *Id.* at 175.

121. *Id.* at 172.

122. *Id.* at 177.

123. *Wiesen II*, 57 M.J. at 50; *Weisen I*, 56 M.J. at 177. Judge Sullivan also filed separate dissenting opinions. *See Weisen II*, 57 M.J. at 56; *Weisen I*, 56 M.J. at 181.

124. *Wiesen II*, 57 M.J. at 50; *Weisen I*, 56 M.J. at 177. A quote from Mark Twain, although not used in any of the opinions, captures the spirit of the twin dissents: "We all do no end of feeling and we mistake it for thinking. And out of it we get an aggregation which we consider a boon. Its name is public opinion. It is held in reverence. It settles everything. Some think it is the voice of God." Mark Twain, *Corn-pone Opinions*, *available at* http://www.twainquotes.com/Public_opinion.html (last visited Mar. 13, 2003).

125. 56 M.J. 419 (2002).

126. *Id*. at 423.

127. *Id.* (Crawford, C.J., concurring in part and in the result), and 424 (Sullivan, S.J., concurring in the result).

128. Batson v. Kentucky, 476 U.S. 79 (1986) (holding that a party alleging racially discriminatory use of a peremptory challenge must make a prima facie showing of such intent; opponent must then explain the racially neutral reasoning behind the challenge).

129. UCMJ art. 41(b)(1) (2002); MCM, *supra* note 7, R.C.M. 912(g).

130. *Batson*, 476 U.S. at 100.

131. 26 M.J. 380 (C.M.A. 1988).

tary courts have even gone beyond *Batson* and its progeny by being 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*,[133] 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.[134] In *United States v. Tulloch*,[135] the CAAF went beyond the Supreme Court decision in *Purkett v. Elem*,[136] requiring the challenged party to provide a reasonable, race- and gender-neutral reason for exercising a peremptory challenge.[137] 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 the Supreme Court set in *Purkett*. In *United States v. Norfleet*,[138] 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 that she had potential "animosity" toward the SJA office.[139] The CAAF ruled that the 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.[140] The CAAF upheld the denial of the defense's *Batson* challenge, finding that the government responded to the objection with a valid reason and a separate reason that was not inherently discriminatory, and for which the defense could not demonstrate any pretext.[141]

The CAAF further limited *Tulloch* when it decided *United States v. Chaney*.[142] The trial counsel in *Chaney*, as in *Norfleet*, used a peremptory challenge against the sole female member. After a defense objection, trial counsel explained that the reason for the challenge was "her profession, not her gender."[143] 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.[144] The CAAF, noting that the military judge's determination is given great deference,[145] upheld the military judge's ruling permitting the peremptory challenge. The CAAF stated that it would have been better for the military judge to require a more detailed clarification by the trial counsel, but that the defense failed to show that the trial counsel's occupation-based peremptory challenge was "unreasonable, implausible or made no sense."[146]

In 2001, the CAAF confronted the issue of whether playing the "numbers game" could survive a *Batson* challenge in *United States v. Hurn*.[147] In *Hurn*, the defense objected after the trial counsel exercised a peremptory challenge against the panel's only non-caucasian officer.[148] The trial counsel said that his basis "was to protect the panel for quorum."[149] The CAAF

132. U.S. CONST. amend. V.

133. 28 M.J. 366 (C.M.A. 1989).

134. *Id.* at 368-69.

135. 47 M.J. 283 (1997).

136. 514 U.S. 765 (1995).

137. *Tulloch*, 47 M.J. at 288. *But see 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).

138. 53 M.J. 262 (2000).

139. *Id.* at 271.

140. *Id.* at 272.

141. *Id.*

142. 53 M.J. 383 (2000).

143. *Id.* at 384.

144. *Id.*

145. *Id.* at 385.

146. *Id.* at 386.

147. 55 M.J. 446 (2001). The "numbers game" refers to the use of challenges to manipulate the number of members who sit on the panel and ultimately cast votes for the court's findings and sentence. Although most findings of guilt require a "guilty" vote by at least two-thirds of the members, the de facto percentage required is significantly higher when the panel is composed of five, seven, or eight members. *See* MCM, *supra* note 7, R.C.M. 921(c)(2)(B).

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.[150] With this decision, the CAAF appeared to reverse the deferential trend set in *Chaney* and *Norfleet*. *Hurn* seems to favor the more restrictive, objective standard of reasonableness the court applied in *Chaney* in 1997.

Pleas and Pretrial Agreements

Pleas and pretrial agreements are an area where appellate courts are likely to hold military judges and convening authorities accountable for errors that might be deemed harmless in other areas.[151] This conservative approach might be explained by the fact that military plea-bargaining is not grounded in statute, and has only been formally recognized by the President in RCM 705 since 1984.[152] During this term, Judge Baker clearly articulated the CAAF's continued cautious approach in this area:

> Courts have long recognized that the decision to pled guilty is a serious and consequential decision. . . . [It] is also a sobering decision because it involves the waiver of a number of individual constitutional rights . . . . These concerns are no less important in our military system of justice . . . . To ensure that the requirements of due process are complied with, the federal civilian system and the military system have created a number of protective measures to ensure that pleas are entered into voluntarily and knowingly. . . . The military justice system imposes even stricter standards on military judges with regards to guilty pleas than those imposed on federal civilian judges. . . . [M]ilitary judges, unlike civilian judges, [are required] to resolve inconsistencies and defenses during the providence inquiry . . . . In *United States v. Care*, this Court imposed an affirmative duty on military judges, during providence inquires, to conduct a detailed inquiry into the offenses charged, the accused's understanding of the elements of each offense, the accused's conduct, and the accused's willingness to pled guilty.[153]

The CAAF's approach is clear; any differences between the civilian and military law regarding pleas and pretrial agreements accrue in favor of the military accused. For example, the military system goes to great lengths to avoid convicting the innocent. As a result, service members do not have the right to pled guilty.[154] They may not pled guilty unless they honestly and reasonably believe that they are guilty, and can explain their guilt to the satisfaction of the military judge.[155] If service members attempt to enter guilty pleas "improvidently or through lack of understanding of [their] meaning and effect," or if they fail or refuse to pled, "a plea of not guilty will be entered."[156] In capital cases, the accused may never pled guilty.[157]

Last term, the CAAF addressed the military judge's burden to secure a voluntary and intelligent guilty plea from the accused in *United States v. Roeseler*.[158] Under the terms of Specialist Roeseler's pretrial agreement, he pled guilty to conspiracy to murder a soldier in his unit and attempted murder of two people who did not exist.[159] On appeal, the accused argued that

148. *Id.* at 447-48.

149. *Id.* at 448.

150. *Id.* at 449 (reversing the NMCCA and remanding the case for a *DuBay* hearing to address the issue of the trial counsel's post-trial affidavits). These affidavits detail additional reasons the government exercised its peremptory challenge against the lone minority member. *Id.* at 450. This spring, after the *DuBay* hearing, the CAAF affirmed on grounds unrelated to the "protecting quorum" rationale given by government counsel at trial. 58 M.J. 199 (2003).

151. In particular, military judges need to be careful to ensure the accused is truly provident before accepting a guilty plea. *See, e.g.*, United States v. Care, 18 C.M.R. 535 (C.M.A. 1969). In addition, convening authorities must avoid stepping on the unintended consequences landmine by refusing to enter into pretrial agreements whose terms might be beyond the convening authorities' power. *See, e.g.*, United States v. Mitchell, 50 M.J. 79 (1999).

152. 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).

153. United States v. Perron, 58 M.J. 781 (2003) (citing *Care*, 18 C.M.R. at 535).

154. *See* UCMJ art. 45 (2002); MCM, *supra* note 7, R.C.M. 910(d).

155. *See Care*, 18 C.M.R. at 535.

156. UCMJ art. 45(a). *See also Care*, 18 C.M.R. at 535.

157. UCMJ art. 45(b).

158. 55 M.J. 286 (2001).

159. *Id.* at 286-87.

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 that the targets did not exist.[160] The CAAF agreed with the accused that guilty pleas must be both voluntary and intelligent and that the military judge has the responsibility to ensure that 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."[161] Reasoning that the trial judge must have some leeway concerning the exercise of her responsibility to explain a criminal offense to an accused, the court held that the military judge's explanations in this case were sufficient.[162]

This term, the CAAF again looked at the military judge's duty to ensure that an accused's plea is knowing and voluntary. In *United States v. Redlinski*,[163] the CAAF examined a record of trial to determine whether the military judge erred by failing to adequately explain the elements of attempted distribution of marijuana to Seaman Apprentice Redlinski, thereby rendering his pleas of guilty improvident. Reversing the Coast Guard Court of Criminal Appeals (CGCCA), the CAAF held that the *Care* inquiry conducted at trial was inadequate. Although the military judge accurately told Redlinski the elements of the offense, he failed to explain any of them explicitly. In other words, the record recited the four elements of attempt, but failed to demonstrate the accused understood any of the concepts involved.[164]

Redlinski does not overrule *Roeseler*; it stands for the proposition that for a guilty plea to be provident, the record of trial must show that the military judge adequately explained the elements of each offense. If the military judge fails to do so, there is reversible error, unless it is clear from the entire record that the accused knew the elements, admitted them freely, and pled guilty because he was guilty. *Roeseler* continues to stand for the proposition that the accused is not entitled to a "law school lecture" on the technicalities of the law.[165] Taken together, both opinions show that the CAAF will look at the context of the entire record to determine whether an accused is aware of the elements, either explicitly or inferentially, rather than focusing on a technical listing of the elements of an offense.

It is important to note that in *Roeseler* and *Redlinski*, the court focused more on the adequacy of the trial judge's explanations than on the factual predicate for the accused's pleas. The CAAF's decisions during its last term continue to follow this paternalistic view.

Factual Predicate for Guilty Plea

In *United States v. Sims*,[166] the accused pled guilty to committing an indecent act by momentarily touching the breast of a female service member after she lifted her shirt up for him. Staff Sergeant Sims and the "victim" were in his bedroom with the door closed (but unlocked) during a party at his assigned military quarters. The CAAF held that the consensual sexual act was not open and notorious, as required to establish an indecent act based on otherwise lawful conduct. The CAAF reasoned that under the circumstances, the touching was not reasonably likely to be seen by others; therefore, there was no factual predicate for Staff Sergeant Sims's conclusory stipulation that there was a substantial risk that persons entering the room would discover his activity. The CAAF held that the guilty plea was improvident and reversed the case.[167]

In *United States v. Jordan*,[168] the accused pled guilty to unlawfully entering a houseboat. The basis of the charge was that the accused leaned over the gunwale of a civilian boat. He admitted doing so, stating that he also lost his balance and that his feet momentarily lifted from the dock. The CAAF reversed the accused's conviction for unlawful entry under Article 134, UCMJ, because the providence inquiry did not sufficiently establish that his conduct was prejudicial to good order and discipline, or that it was of a nature to bring discredit upon the armed forces.[169]

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160. *Id.* at 288.

161. *Roeseler*, 55 M.J. at 289.

162. *Id.* at 290.

163. 58 M.J. 117 (2003).

164. *Id.* at 119.

165. *Id.*

166. 57 M.J. 419 (2002).

167. *Id.* at 422.

168. 57 M.J. 236 (2002).

169. *Id.* at 240.

The question in *United States v. Bullman*[170] was whether the providence inquiry established the necessary factual predicate to support a guilty plea to dishonorable failure to pay a just debt. Captain Bullman, an Air Force officer stationed in Korea, pled guilty to failure to pay a debt to the Army and Air Force Exchange Service (AAFES). The majority of the CAAF found his guilty plea improvident because the trial judge failed to define dishonorable conduct with respect to an AAFES debt, failed to elicit a factual predicate for dishonorable conduct regarding the debt, and failed to resolve inconsistencies which indicated an inability to pay the debt and a lack of deceit or evasion. The CAAF concluded that a mere failure to pay a debt does not establish dishonorable conduct; a negligent failure to pay a debt is not dishonorable. The term "dishonorable" connotes a state of mind amounting to gross indifference or bad faith, and is "characterized by deceit, evasion, false promises, denial of indebtedness, or other distinctly culpable circumstances."[171]

Chief Judge Crawford filed feisty dissents in each of the three cases discussed above.[172] In each dissent, she argued that the majority should look beyond the accused's responses to the totality of the record in deciding whether a factual predicate exists for each and every element of each specification. The majority opinions nevertheless illustrate that military judges must be extremely careful to elicit facts from the accused to support guilty pleas. Military judges must be meticulous and, if necessary, take extra time on the record to clarify potential issues—or even reject improvident pleas at trial—rather than invite further litigation on appeal.

Permissible Use of Pleas and Providence Inquiry

The application of the rules concerning the use of guilty pleas took center stage as the CAAF reversed the ACCA in *United States v. Kaiser.*[173] In *Kaiser*, the reversible error resulted from the military judge's decision to inform the members that the accused had pled guilty to some offenses, but not others.[174] *Kaiser* and cases such as *United States v. Grijalva*[175] serve as important reminders of how to try a mixed-plea case.

Before discussing the facts of *Kaiser*, a review of the general rules concerning the use of an accused's pleas and providence inquiry admissions is appropriate. Once the military judge finds an accused's guilty plea provident, the government may try 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.[176] As a general rule, military judges should defer informing court members about the offenses to which the accused pled guilty until after the announcement of findings on the contested offenses.[177] There are two exceptions to this general rule: (1) when the accused asks the court to inform the members about the earlier guilty plea; and (2) when the guilty plea is to a lesser-included offense and the government intends to prove the greater offense.[178] Unless the exceptions apply, trial judges may not tell the members about guilty pleas until after the announcement of findings on any contested offenses.[179] The rules regarding the use of the accused's statements during the providence inquiry are even more restrictive than the rules regarding the use of pleas. The government may not use the accused's statements from the providence inquiry to prove additional offenses. The

170. 56 M.J. 377 (2002).

171. *Id.* at 382-83 (quoting MCM, *supra* note 7, pt. IV, ¶ 71c).

172. *Sims*, 57 M.J. at 423; *Jordan*, 57 M.J. at 243; *Bullman*, 56 M.J. at 383. Senior Judge Sullivan also wrote dissenting opinions in *Jordan*, 57 M.J. at 244, and *Bullman*, 56 M.J. at 384.

173. 58 M.J. 146 (2003).

174. *Id.* at 149-150.

175. 55 M.J. 223 (2001). In *Grijalva*, the accused shot his sleeping wife in the back. At trial, the accused described the shooting, but vacillated in his response to the question of whether he actually wanted to kill his wife. As a result, 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. The government then elected to "prove up" the greater offense. On the merits, tried before the military judge alone, the trial judge used not only the accused's plea to the lesser offense, but also his admissions during the providence inquiry. The military judge convicted the accused of attempted premeditated murder. The CAAF held that the trial 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. Although it found error, the CAAF found that the error was harmless beyond a reasonable doubt and affirmed. *Id.* at 228.

176. *See* MCM, *supra* note 7, R.C.M. 913(a) discussion.

177. *Id.* (stating that, if the accused has entered mixed pleas, the military judge should ordinarily defer informing the members of the offenses to which the accused pled guilty until after the members have announced their findings on the remaining contested offenses); *see also* United States v. Smith, 23 M.J. 118, 120 (C.M.A. 1987); United States v. Hamilton, 36 M.J. 723 (A.C.M.R. 1993) (observing that it was inappropriate to so advise court members; testing for prejudice and finding that remedial measures were needed).

178. MCM, *supra* note 7, R.C.M. 913(a) discussion; United States v. Irons, 34 M.J. 807 (N.M.C.M.R. 1992) (holding that the military judge committed error in not cleaning up the flyer, which reflected the greater offense to which the accused pled not guilty and which the government did not intend to pursue; holding that the accused's failure to object did not waive this issue).

government may, however, use the accused's statements as aggravation evidence during the sentencing phase of trial.[180]

In *Kaiser*, the accused was a married training non-commissioned officer assigned to the Defense Language Institute. Sergeant Kaiser pled guilty to two of four specifications alleging that he disobeyed his commander's order to refrain from forming non-professional relationships with trainees. He also pled guilty to two of three charged adultery specifications.[181] At a trial before members, in which the government sought to prove the remaining, contested specifications, the government gave the court a flyer that included the specifications to which Sergeant Kaiser had pled guilty. Cutting off a defense objection, the military judge said, "If you take a look at Page 46 of *DA Pam 27-9* [the *Military Judges' Benchbook*], you'll note that the members are informed that that has occurred. That's why those specifications remain on it. Okay?"[182] The CAAF noted that the *Benchbook* "does not contain such a requirement."[183] The *Benchbook*, RCM 913(a), and the discussion under RCM 910(g), all contain the same guidance: Do not inform the members about a guilty plea unless the defense requests or it involves a lesser-included offense. Concluding that the military judge's decision was prejudicial error, the CAAF reversed and set aside the panel's findings of guilty.[184]

Permissible and Impermissible Terms in Pretrial Agreements

The *MCM* recognizes the right of an accused to make certain promises or waive certain procedural rights as bargaining chips in negotiating a pretrial agreement.[185] There are, however, provisions that an accused may not waive.[186] For example, the *MCM* prohibits provisions that violate public policy.[187] In addition to disapproving the use of certain terms, the CAAF has sanctioned the use of several pretrial agreement provisions that are not specified in the *MCM*.[188]

This year, the CAAF heard *United States v. Edwards*,[189] in which the accused argued that a provision of the pretrial agreement impermissibly waived his right to litigate an issue pertaining to his Sixth Amendment right to counsel.[190] This was an issue of first impression for the CAAF.[191]

Airman Edwards was prosecuted for wrongful use of LSD.[192] After his defense counsel provided notice to military investigators that all requests for questioning must go through counsel, the Air Force Office of Special Investigations interrogated the accused without providing notice to the defense counsel. As part of a negotiated pretrial agreement, the defense agreed to drop constitutional arguments that the interrogation violated the Sixth Amendment.[193] The CAAF noted that it would strike any term that violated public policy from a pretrial

179. MCM, *supra* note 7, R.C.M. 910(g). Typically, the military judge will enter findings immediately after acceptance of a plea. *Id.* When the accused pleads guilty to a lesser included offense, however, and the prosecution intends to go forward on the contested charge, (1) the military judge should *not* enter findings after the accused pleads guilty to the uncontested offenses, *id.* R.C.M. 910(g)(2), and (2) before commencement of trial on the merits, the military judge must instruct the members that they should "accept as proved the matters admitted in the plea, but must determine whether the remaining elements are established." *Id*. R.C.M. 920(e) discussion.

180. 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 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.

181. United States v. Kaiser, 58 M.J. 146 (2003).

182. *Id*. at 147.

183. *Id*. at 149-50.

184. *Id.* at 150-54.

185. MCM, *supra* note 7, R.C.M. 705(c)(2).

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

187. *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").

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

189. 58 M.J. 49 (2003).

190. *Id*. at 58.

191. *Id.*

192. *Id*. at 50.

193. *Id*. at 54.

agreement, but held that this particular waiver did not violate public policy.[194]

The CGCCA also heard a case of first impression last term. In *United States v. Libecap*,[195] the accused contended that his pretrial agreement, which required him to request a BCD at trial, was unenforceable. The CGCCA concluded that RCM 705(c)(1) prohibited the provision because it deprived the accused of a complete sentencing proceeding by negating the value of putting on a defense sentencing case. The requirement to request a BCD also improperly placed the accused in the position of either giving up a favorable pretrial agreement or foregoing a complete sentence proceeding.[196] For similar reasons, the CGCCA also held that this provision was against public policy. The court held that this provision prejudiced the accused, even though he had not requested a BCD at trial, because it still precluded him from telling the military judge that he wanted a second chance and from arguing for a sentence that did not include a punitive discharge. Since the accused had specifically stated that the error did not affect the voluntariness of his pleas, the appellate court determined that the appropriate remedy was a rehearing on sentence.[197]

Unintended Consequences

The nightmare issue of unintended consequences versus mutual misunderstanding has been haunting military practitioners for the last four years. Simply stated, a guilty plea entered pursuant to a pretrial agreement is not provident unless the accused receives the benefit for which he bargained. The impact of this principle is often delayed, and thus devastating to the government's case. For example, if the accused has bargained for his pay to go to his family post-trial and the convening authority is unable to direct pay and allowances to his family, the appellate courts will set aside the underlying conviction. This may occur years after the accused enters his original guilty pleas.

In cases spanning from 1960 to 1995, military appellate courts found such issues to be collateral and did not consider them sufficient justification to upset prior guilty pleas.[198] Four years ago, however, the CAAF decided *United States v. Mitchell*.[199] In *Mitchell*, the court departed from settled military case law and applied a 1971 Supreme Court case, *Santobello v. New York*,[200] to military practice. The heart of *Santobello* is the idea that "when a plea rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, such a promise must be fulfilled."[201]

By applying the holding of *Santobello* to the facts of *Mitchell*,[202] the CAAF focused on ensuring that the accused received the "benefit of his bargain."[203] 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.

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194. *Id.* at 59-63.

195. 57 M.J. 611 (C.G. Ct. Crim. App. 2002).

196. *Id.* at 615.

197. *Id.* at 618.

198. *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) (holding 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).

199. 50 M.J. 79 (1999).

200. 404 U.S. 257 (1971).

201. *Id.* at 262.

202. Mitchell, approaching the end of a six-year enlistment, agreed to voluntarily 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 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. 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. *Mitchell*, 50 M.J. at 80. The defense argued that the unanticipated termination of this pay status reflected substantial misunderstanding of the effects of his pretrial agreement. *Id.* at 81-82. The CAAF remanded the case for a *DuBay* hearing. 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. United States v. Mitchell, No. 31421, 2000 CCA LEXIS 150 (A.F. Ct. Crim. App. May 26, 2000) (unpublished). Despite the fact that Mitchell's retirement mooted the issue in his case, the decision set a precedent. If the accused did not receive the benefit of his bargain, the CAAF would find the pleas improvident and set the findings aside.

203. *Mitchell*, 57 M.J. at 80-82.

The CAAF followed the precedent set in *Mitchell* when it decided *United States v. Williams* (*Williams I*)[204] and *United States v. Hardcastle*.[205] In both cases, the CAAF found that the accused had not received the benefit of his bargain, and that the faulty provision was material in that it had induced the pleas. As a result, the CAAF set aside the guilty pleas, reversed the cases, and authorized rehearings.[206]

In *United States v. Smith*,[207] the CAAF vented its frustration at practitioners for their failure to avoid stepping on the unintended consequences landmine. In a concurring opinion, Chief Judge Crawford wrote, "We are once again faced with the unfortunate, if not inexcusable, situation where an accused was beyond his ETS date at trial and, apparently, none of the participants recognized the significance of this important fact."[208] In reversing and remanding *Smith*, the CAAF stated that the remedy "is either specific performance of the agreement or an opportunity for the accused to withdraw from the plea."[209] The CAAF, citing *Mitchell*, also noted that the government "may provide alternative relief if it will achieve the objective of the agreement."[210]

An ounce of prevention is worth a pound of cure, but what can the government do if an issue is missed at trial and pokes through the post-trial muck years later, like an unmarked landmine? Could "alternative relief" defuse this fatal situation? That was precisely the issue that the CAAF faced in *United States v. Perron*.[211] In *Perron*, the accused agreed to pled guilty in exchange for sentence limitations, including a waiver of forfeitures in favor of his family. Before the trial, however, the accused's term of service expired. After his conviction, the accused entered a no-pay status. In his clemency request, the defense counsel asked the convening authority to release the accused from confinement "to gain immediate employment . . . to allow for the financial relief his family desperately needs."[212] The convening authority did not grant the request, opting instead to grant alternative relief.[213]

A tortured set of appeals and remands followed, in which counsel argued over the adequacy of the alternative relief.[214] The issue that finally reached the CAAF was whether convening authorities and appellate courts may "fashion an alternative remedy of [their] own choosing" against the accused's wishes.[215] The CAAF responded that they may not. The court first reasoned, "It is fundamental to a knowing and intelligent plea that where an accused pleads guilty in reliance on the promises made by [the] Government in a pretrial agreement, the voluntariness of that plea depends on the fulfillment of

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204. 53 M.J. 293 (2000) [hereinafter *Williams I*]. In *Williams I*, the accused was on legal hold after his term of service expired. *Id.* at 294-95; *see* MCM, *supra* note 7, 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."). 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. *Williams I*, 53 M.J. at 295.

205. 53 M.J. 299 (2000). 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. *Id*.

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

207. 56 M.J. 271 (2002). In *Smith*, 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 months of the accused's forty-month sentence of confinement, neither the convening authority nor his staff judge advocate commented on the government's inability to defer and waive automatic forfeitures once the accused, who was on legal hold, was convicted. *Id*. at 275-77. As a result, the government's failure to fulfill the material term of the pretrial agreement made the accused's pleas improvident. *Id*. at 279-80.

208. 56 M.J.271, 280 (2002) (Crawford, C.J., concurring in part and in the result).

209. *Id*. at 273.

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

211. 58 M.J. 78 (2003).

212. *Id*. at 80.

213. *Id*.

214. United States v. Perron, 53 M.J. 774, 777 (C.G. Ct. Crim. App. 2000) (finding that none of the trial participants realized the appellant would enter a no-pay status upon confinement, that the financial term was material, and remanding to the convening authority to set aside findings or grant alternative relief). The appellant argued that the convening authority's alternative relief of disapproving confinement, which allowed the pay center to pay the appellant, was ineffective because the back pay was too late to assist his family. The CGCCA then set aside the appellant's reduction, reasoning that the difference in pay should exceed any "reasonable interest calculation." United States v. Perron, 57 M.J. 597, 599 (C.G. Ct. Crim. App. 2001). The appellant, continuing to argue that his pleas were improvident, appealed to the CAAF. *Perron*, 58 M.J. 78.

215. *Id.* at 81.

those promises by the Government."[216] The court ultimately concluded that "imposing alternative relief on an unwilling appellant to rectify a mutual misunderstanding of a material term in a pretrial agreement violates the appellant's Fifth Amendment right to due process."[217]

What should government counsel do? First, they must stay alert and prevent their convening authorities from entering into agreements they cannot fulfill. Next, they must remain vigilant throughout trial. A recent case illustrates how attention to detail can save the government from stepping on the unintended consequences landmine.

In *United States v. Williams* (*Williams II*),[218] the accused contended that he was denied the benefit of his pretrial agreement because his pay and allowances ended with the expiration of his term of service (ETS).[219] Relying on *Williams I* and *Hardcastle*, the accused argued that this mutual misunderstanding rendered his guilty plea improvident.[220] The CAAF affirmed the ACCA's decision that the pleas remained provident. The court distinguished *Williams I* and *Hardcastle*; in *Williams II*, the pretrial agreement made no representations about entitlements to pay beyond the accused's ETS date. Neither the trial counsel nor the military judge made any such representations during trial. In *Williams II*, the military judge even 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.[221]

Williams II shows that attention to detail at trial can save a case from possible reversal over a fatal defect in the quantum portion of the pretrial agreement. Does it also open the door for specific language in the pretrial agreement itself? What if the agreement contained disclaimers that the defense counsel had discussed the potential impact of pending ETS with the accused? What if the quantum portion explicitly stated, for example, that the convening authority would exercise "due diligence to direct all pay and allowances to the maximum extent allowed by law and regulation, to the accused's family?" While *Williams II* did not address these questions, potential solutions flow from the reasoning of the opinion.

The CAAF's opinion in *Perron* also seems to offer potential solutions to convening authorities who attempt to navigate the unintended consequences minefield. Although the CAAF did not permit the appellate courts and convening authorities to fashion alternative relief unilaterally, the appellate defense counsel did argue that "[t]he proper remedy is either specific performance, withdrawal of plea, or another remedy agreeable to the accused."[222] The holding of *Perron* thus encourages post-trial negotiations between the accused and the convening authority.

Another possible solution is working its way through the appellate process. In *United States v. Bayle*,[223] a Coast Guard boatswain's mate bargained for waiver of the automatic forfeitures of his pay. Because the accused entered a no-pay status after his conviction, the convening authority was unable to fulfill a term required by the pretrial agreement. On appeal, however, the CGCMA asserted the court's implicit authority to waive the forfeitures. This novel and direct approach may remedy situations where the timeliness of pay and allowances was not a material issue that induced the accused to enter into the pretrial agreement, but may fall short in cases that parallel *Perron*. Only time—and further litigation—will tell whether this approach will be effective.

With regard to military pleas and pretrial agreements, one thing remains certain: "The military justice system imposes even stricter standards on military judges with regard to guilty pleas than those imposed on federal civilian judges."[224] Counsel, trial judges, and appellate courts must apply Supreme Court cases like *Santobello* to the unique facts, procedures, and issues that face the military justice system. In doing so, practitioners should be creative, conservative, and attentive to the delicate balance between good order and discipline and the due process rights of the accused.[225]

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216. *Id.* at 85.

217. *Id*. at 88.

218. 55 M.J. 302 (2001).

219. *Id.* at 303.

220. *Id.* at 306.

221. *Id.* at 307.

222. United States v. Perron, 58 M.J. 78, at 82 (2003).

223. 56 M.J. 762 (C.G. Ct. Crim. App. 2002), *petition for review denied*, 57 M.J. 107.

224. *Perron*, 58 M.J. at 80.

225. *See* United States v. Santobello, 404 U.S. 257 (1971).

Conclusion

There is no doubt that 2002 marked a minor revolution in military justice. Several years had passed since the last EO had amended the *MCM*. President Bush cleared the resulting backlog of needed improvements when he signed EO 13,262.[226] More sweeping changes came when the Department of the Army published a revised *AR 27-10*.[227] These executive and regulatory changes generally cut against the grain of the observations made in popular media articles written in the wake of the Cox Commission Report, and they most certainly did not mark the beginning of the revolution for which Hillman and Pound called.

Media critics did succeed in fueling discussion of the merits of the military justice system. Although they may have moved Congress to require twelve-member capital panels, other issues they raise are less likely to see change in the short term. For example, will Congress ever require the random selection of panel members? Will military judges ever be detailed after preferral, rather than after referral, in order to more tightly control the pretrial process? Both changes would move the military justice system more closely in line with practice in federal district courts, but both would likely face stiff opposition from the military services. One constant remains: the center of gravity for this debate should continue to be the national security requirement that the military justice system must "promote justice" and maintain "good order and discipline" without adversely affecting the "efficiency and effectiveness" of the armed forces.[228]

Against this backdrop, the CAAF continues to elevate substance over form, in exercising primary civilian oversight over the military justice system. The end result is deference to convening authorities, staff judge advocates, and military judges. Appellate courts have shown a strong inclination to forgive these court-martial personnel for technical errors that do not affect the reliability of the outcome. One area where this trend does not hold true is the liberal granting of challenges for cause based on implied bias.[229] The CAAF also showed little deference toward the conduct of providence inquiries[230] or the impact of unintended consequences in pretrial agreements.[231] As appellate courts continue to fine-tune the military justice system, their opinions stand as evidence of a healthy, maturing system that strives to hold "the 1.4 million men and women of the armed forces accountable for their actions," while also treating them "fairly and with dignity and respect."[232]

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226. *See* MCM, *supra* note 7, at A25-54 to –60.

227. *Id.*

228. MCM, *supra* note 7, pt. I, ¶ 3.

229. United States v. Weisen, 56 M.J. 172 (2001), *petition for recons. denied*, 57 M.J. 48 (2002).

230. United States v. Redlinski, 58 M.J. 117 (2003).

231. United States v. Perron, 58 M.J. 78 (2003).

232. Letter to the Editor, *supra* note 22.

Appendix I—Summary of Amendments to Punitive Articles[233]

Article	Summary of Change
103—Captured or Abandoned Property	Increases the dollar amount triggering the sentence aggravator from greater than $100 to greater than $500.
107—False Official Statements	The new amendments delete explanatory language pertaining to "Statements made during an interrogation."
108—Sale, Loss, Damage, Destruction or Wrongful Disposition of Military Property of the United States	Increases the dollar amount triggering the sentence aggravator from greater than $100 to greater than $500.
109—Waste, Spoilage, or Destruction of Property Other Than Military Property of the United States	Increases the dollar amount triggering the sentence aggravator from greater than $100 to greater than $500.
118—Murder	Mandatory minimum punishment for premeditated murder is now life with the possibility of parole.
120—Rape and Carnal Knowledge	New maximum punishment is life without parole.
121—Larceny and Wrongful Appropriation	Paragraph 46c(1)(h) is amended by adding a paragraph discussing "Credit, Debit, and Electronic Transactions," which clarifies the nature of these offenses (wrongful obtaining) and the victim (the entity delivering the goods, i.e., store or bank, rather than the card holder). Increases the dollar amount triggering the sentence aggravator from greater than $100 to greater than $500.
123a—Making, Drawing, or Uttering Check, Draft or Order Without Sufficient Funds	Increases the dollar amount triggering the sentence aggravator from greater than $100 to greater than $500.
125—Sodomy	New maximum punishments for forcible sodomy and sodomy with a child under twelve is life without parole.
126—Arson	Increases the dollar amount triggering the sentence aggravator from greater than $100 to greater than $500.
132—Frauds Against the United States	Increases the dollar amount triggering the sentence aggravator from greater than $100 to greater than $500.
134—Adultery	Paragraph 62c is amended to include a discussion of the nature of the offense of adultery, factors to be considered in connection with the prosecution of the offense, and describing the defense of mistake of fact as applied to adultery.
134—Kidnapping	New maximum punishment is life without parole.
134—Knowingly Receiving, Buying, or Concealing Stolen Property	Increases the dollar amount triggering the sentence aggravator from greater than $100 to greater than $500.
134—Obtaining Services Under False Pretenses	Increases the dollar amount triggering the sentence aggravator from greater than $100 to greater than $500.

233. MCM, *supra* note 7, pt. IV; *cf.* MANUAL FOR COURTS-MARTIAL, UNITED STATES pt. IV (2000) [hereinafter 2000 MCM].

Appendix II—Summary of Amendments to the Rules for Courts-Martial[234]

RCM	Summary of Change
701(b)(4)	The amendments narrow the scope of the reports, tests, and examination results that the defense counsel must disclose under certain circumstances, to exclude materials covered by the psychotherapist privilege.
806	Explicitly authorizes military judges to issue protective orders limiting extrajudicial statements.
1001(b)(3)(A)	A conviction is now defined as "any disposition following an initial judicial determination or assumption of guilt, such as when guilt has been established by guilty plea, trial, or plea of nolo contendere, regardless of the subsequent disposition, sentencing procedure, or final judgment. However, a 'civilian conviction' does not include a diversion from the judicial process without a finding or admission of guilt; expunged convictions; juvenile adjudications; minor traffic violations; foreign convictions; tribal court convictions; or convictions reversed, vacated, invalidated or pardoned because of errors of law or because of subsequently discovered evidence exonerating the accused."
1003(b)(7)	Now provides that "when confinement for life is authorized, it may be with or without eligibility for parole."
1004(e)	Amends the rules pertaining to other punishments that may be imposed in a capital case.
1006(d)(4)(b)	Amends the rules pertaining to the three-fourths voting requirement.
1009(e)(3)(B)(ii)	Pertaining to the more than one-fourth voting requirement for reconsideration.
1103(b)(2)(B)(i) 1103(c)(1)	Under the 2002 amendments, a verbatim record of trial is now required in a general court-martial when "[a]ny part of the sentence adjudged exceeds six months confinement, forfeiture of pay greater than two-thirds pay per month, or any forfeiture of pay for more than six months or other punishments that may be adjudged by a special court-martial."
1103(c)(1)	A verbatim record is now also required in a SPCM in which a BCD, confinement for more than six months, or forfeiture of pay for more than six months, has been adjudged.
1103(f) 1107(d)(4)	The amendments have modified the rules concerning the limitations on sentences that convening authorities may approve in the case of loss of notes or recordings of proceedings or other non-verbatim proceedings.
1104(a)(2)(A)	Amends the rules concerning which SPCM records of trial must be authenticated by the military judge.
1104(e) 1106(a)	Now requires a post-trial recommendation by the SJA "before the convening authority takes action under [RCM] 1107 on a record of trial by special court-martial that includes a sentence to a BCD or confinement for one year."
1107(d)(5)	This new subparagraph limits the sentence the convening authority may approve when the "cumulative impact of the fine and forfeitures, whether adjudged or by operation of Article 58b, would exceed the jurisdictional maximum dollar amount of forfeitures that may be adjudged at that court-martial."

234. MCM, *supra* note 7, pt. II; *cf.* 2000 MCM, *supra* note 233, pt. II.

1109(e) 1109(e)(1)	The convening authority must now hold a hearing before vacating the suspension of a SPCM punishment that does not include a BCD or confinement for one year.
1109(f) 1109(f)(1)	The convening authority must now comply with RCM 1109(d) before vacating the suspension of a SPCM punishment that includes a BCD or confinement for one year.
1110(a)	The accused may now waive or withdraw appellate review in a SPCM in which the approved sentence includes a BCD or confinement for one year.
1111(b)	The TJAG must now review all records of trial in a SPCM in which the approved sentence includes either a BCD or confinement for one year.
1112(a)(2)	A judge advocate must now review all records of trial in SPCMs in which the approved sentence includes neither a BCD nor confinement for one year.
1305(d)(2)	Provides that "the original and one copy of the record of trial [in a SCM] shall be forwarded to the convening authority" after service on the accused.

Appendix III—Summary of Changes to *AR 27-10*[235]

Para. 2-7	**National Security Cases Coordination**. Requires SJAs to provide an unclassified EXSUM via E-mail to the Office of The Judge Advocate General (OTJAG) for cases having national security implications before the preferral of charges.
Para. 3-18g(1)	**Nonjudicial Punishment (NJP)**. Clarifies that within the limitations of *AR 27–26*, judge advocates may attend Article 15 proceedings and provide advice to clients (often an SJA advising a general officer imposing an Article 15). Advice should be provided during a recess in the proceedings. When defense counsel, military or civilian, attend Article 15 hearings, they do so as spokespersons for the accused and not in a representative capacity.
Para. 3-35, Para. 3-37b(1)(a)	**Filing Determination for Non-Judicial Punishment**. Appellate authorities may now change filing determinations, but only to the advantage of the appealing soldier.
Para. 3-39	**Records of Non-Judicial Punishment**. Mandates use of DA Form 5110-R, Article 15 Reconciliation Log, to insure proper execution of reductions and forfeitures by finance offices. Logs must be maintained for two years and inspected at least annually by CLNCO or designee. Also requires CLNCO or designee to verify quarterly, with PERSCOM, proper filing in the OMPF of soldiers when such filing is directed.
Para. 5-11a	**Court Reporters and Clerical Personnel**. SJAs must detail court reporters at all SPCMs; in addition, they should detail clerical personnel to them as needed to prepare a record of the proceedings.
Para. 5-15b	**Automatic suspension of favorable personnel actions (FLAGS)**. Upon the preferral of any charge, the Charge Sheet (DD Form 458) automatically suspends all favorable personnel actions, including discharge, promotion, and reenlistment. Any action purporting to discharge or separate a soldier, and any issuance of a discharge certificate, is void until the charge is dismissed, or the convening authority takes initial action on the case; all other favorable personnel actions taken under these circumstances are voidable.
Para. 5-26, Para. 12-5b	**Personal Privacy Protected in the Record of Trial**. Home addresses and social security numbers will not be used to identify witnesses. Social security numbers, other than the accused's, will only be used to verify that the members actually detailed by the convening authority are present. Thereafter, no documents that include social security numbers, other than documents related to the accused, will be maintained in the record of trial.
Para. 5-27	**Power to Convene BCD SPCM**. Army SPCMCAs may now refer cases to BCD SPCMs.
Para. 5-27b	**Pretrial Advice for Special Courts-Martial**. In Army SPCMs involving confinement in excess of six months, forfeitures of pay for more than six months, or BCDs, the "servicing staff judge advocate will prepare a pretrial advice, following generally the format of [RCM] 406(b)."
Para. 5-28	**Personnel Records Admissibility**. Under RCM 1001(b)(2), the trial counsel may present a personnel record made or maintained under departmental regulations as sentencing evidence at a court-martial. Personnel records now include, but are not limited to, local NJP files, corrections files, and records contained in the Official Military Personnel File (OMPF) or Career Management Information File (CMIF).
Para. 5-28e	**Automatic Reduction Under Article 58a, UCMJ**. The automatic reduction to E-1 mandated by Article 58a now applies only to enlisted soldiers with an approved sentence that includes a punitive discharge or more than six months of confinement.

235. AR 27-10, *supra* note 17; *cf*. U.S. DEP'T OF ARMY, REG. 27-10, MILITARY JUSTICE (24 June 1996).

Para. 5-40	**Records of Trial**. Materials related to pretrial confinement (including, but not limited to, a copy of the commander's checklist and the military magistrate's memorandum) must be inserted as part of the record of trial.
Para. 5-40b	**Documentation of Speedy Trial Compliance**. SJA offices are required to annotate the time from initiation of investigation of most serious arraigned offense to the date of arraignment for that offense on DD Forms 490 and 491 (Record of Trial and Summarized Record of Trial Chronology Sheet).
Para. 5-46a.	**Maintenance of Summarized Records of Trial**. Records of trial for SCMs and SPCMs that do not involve a BCD or confinement in excess of six months will be maintained under *AR 25-400-2, The Modern Army Record Keeping System*, for a period of ten years after final action.[236]
Para. 6-4h	**Changes Impacting the Trial Defense Service/SJA Relationship**. Expands guidance to SJAs on the provision of administrative and logistical support to Trial Defense Service offices. Enlisted clerical and support personnel will be under the direct supervision of the senior defense counsel and will be rated or senior rated by the senior defense counsel, or sole defense attorney in the case of a one-attorney office. Assigned enlisted and support personnel normally will not be assigned legal duties within the local legal office and normally will be assigned to a USATDS office for at least one year in order to provide a stable defense work environment. The adequacy of support provided by host installations will be a subject of special interest to TJAG in making his or her statutory visits under Article 6, UCMJ.
Para. 6-5	**Funding of Trial Defense Services**. Under the previous edition of *AR 27-10*, the U.S. Army Legal Services Agency (USALSA) paid for the travel of defense counsel to depart their installations and represent accused at GCMs, SPCMs, or Article 32 Investigations. The new provision shifts responsibility to Commander, USALSA, to fund defense counsel travel expenses related to interviewing the accused or any witness, taking depositions, and case investigation. Convening authorities will continue to fund all other authorized costs related to judicial and administrative proceedings, including, those related to the employment of expert witnesses.
Para. 6-7a	**Remote Installations and Trial Defense Services**. Encourages the use of appropriate technology (e.g., telephones, desktop video teleconferencing) at installations where defense services are unavailable.
Para. 9-5b(1)	**Military Magistrate Review**. Eliminates government "appeal" of magistrate decision to release soldier from pretrial confinement. This change reflects current case law.
Para. 13-12	**Representation in Capital Cases**. Provides habeas corpus assistance in death penalty cases, allowing TJAG to appoint military counsel to assist counsel appointed by the U.S. District Court or individually retained counsel throughout the appellate process.
Para. 21-8, Para. 21-12, Appendix E	**Courts-Martial Policy in the Reserve Component**. Allows GCMs or SPCMs of Reserve Component (RC) soldiers only while serving on active duty (AD). Continues the policy of withholding authority of most RC commanders to convene courts-martial, but as an exception, authorizes all commanders of USAR Regional Support Commands (RSC) with full-time judge advocates available to convene SPCMs for members of their organizations and all units that report to them. Additionally, USAR units that do not report to a RSC may convene SPCMs when they have access to a full-time judge advocate. Finally, the regulation establishes military justice area support responsibilities based on the geographic location of RC units and activities.
Chapter 24	**Sex Offender Registration**. Implements the requirements of 42 U.S.C. § 14071 by requiring trial counsel to provide notice of registration requirement to those convicted of a covered offense that are not sentenced to confinement.

236. *See* U.S. Dep't of Army, Form 4430, Result of Trial (18 Mar. 2002). This form has also been modified to include two new entries, to reflect (1) whether the convicted service member must submit to DNA processing, 10 U.S.C. § 1565, and (2) whether the conviction requires sex offender registration under 42 U.S.C. § 14071.