Fourth Amendment and Urinalysis Update: "A Powerful Agent Is the Right Word"[1]

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Introduction

> *A word is not a crystal, transparent and unchanging, it is the skin of a living thought and may vary greatly in color and content according to the circumstances and time in which it is used.*
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> —Oliver Wendell Holmes, Jr.[2]

In the last year, the law of search and seizure remained mostly unchanged. There were no cases from the Supreme Court or military appellate courts that made headlines. The year consisted of cases that merely reiterated existing law applied to different facts, a few opinions that broadened the scope of some well-established standards, and a handful of decisions that brought other legal tests into clearer focus. This fine-tuning of Fourth Amendment law covered a wide variety of search and seizure issues.

On the other hand, significant legislative changes and executive branch initiatives in the wake of 11 September 2001 have reshaped legal practice and procedure under the Fourth Amendment. The search and seizure landscape continued to transform this year, fueled by the War on Terrorism. Only time will tell when or even if this transformation will end. As the transformation continued over the last year, a groundswell of criticism gathered strength. Concerned voices arose from the entire political spectrum.[3]

At least for military practitioners, few of the changes and subsequent criticism have had much impact on courts-martial. Furthermore, the changes and fallout are overshadowed by more immediate challenges posed by the war in Iraq and the increase in operational tempo worldwide. Military practitioners must still remain aware of the potential impact of certain provisions of this post-11 September legislation and the new initiatives sponsored by a variety of government agencies.[4]

The Internet provides the most readily accessible resource for current information on changes that have occurred or have been proposed. Specifically, the Department of Justice released a field guide that covers changes made by the USA PATRIOT Act of 2001.[5] The Department of Justice also updated its *Search and Seizure Manual* in July 2002.[6] The manual is a valuable tool for practitioners confronted with search and seizure questions dealing with computers and electronic communications. Finally, the Library of Congress Web site has current information on legislative and executive materials related to the War on Terrorism.[7]

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1. Mark Twain, *William Dean Howells*, *available at* http://www.twainquotes.com/Word.html. (last visited Apr. 1, 2003).

2. Towne v. Eisner, 245 U.S. 418, 425 (1918). Although they were spoken over eighty-five years ago, the words of Justice Holmes have not lost any of their luster or importance. This quote reflects the challenge facing lawmakers today. All branches of the government are involved in the War on Terrorism and the direction they take in shaping the law will have lasting effects for many years to come.

3. John D. Hutson, President and Dean of the Franklin Pierce Law Center, Twenty-Fourth Edward H. Young Lecture, The Judge Advocate General's School, U.S. Army, Charlottesville, Virginia (Feb. 19, 2003). Dean Hutson's lecture was in two parts. He spoke briefly about leadership and then discussed his concerns about the erosion of privacy rights since 11 September 2001. Although he did not believe there was an immediate threat to privacy, he stressed that there were certainly some "yellow lights" flashing. "Big brother" was a prominent reference during his lecture, as was the challenge facing lawmakers tasked with drafting laws that adequately protect our society from terrorism. Dean Hutson is a retired U.S. Navy Rear Admiral. He served as The Judge Advocate General of the Navy from 1997 to 2000. He admitted during the lecture that he considered himself a political "conservative." *Id. See also* Courtney Dashiell, *Thermal Imaging: Creating a "Virtual" Space*, 34 U. TOL. L. REV. 351 (2003) (commenting on the rapid passage of the wiretap amendment to the Foreign Intelligence Surveillance Act (FISA), 50 U.S.C. §§ 1801-1829, and the Supreme Court's role in diminishing privacy rights); John W. Whitehead & Steven H. Aden, *Forfeiting "Enduring Freedom" for "Homeland Security:" A Constitutional Analysis of the USA PATRIOT Act and the Justice Department's Anti-Terrorism Initiatives*, 51 AM. U. L. REV. 1081 (2002) (commenting on the unintended consequences of the new tools to combat terrorism, and the danger that they may trample individual privacy).

4. *See, e.g.*, The Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT) Act of 2001, Pub. L. No. 107-56, 115 Stat. 272; Homeland Security Act of 2002, Pub. L. No. 107-296, 116 Stat. 2135.

5. U.S. Dep't of Justice, Computer Crime and Intellectual Property Section (CCIPS), *Field Guidance on New Authorities That Relate to Computer Crime and Electronic Evidence Enacted in the USA Patriot Act of 2001* (Nov. 5, 2001), *at* http://www.cybercrime.gov/PatriotAct.htm.

6. U.S. DEP'T OF JUSTICE, CRIMINAL DIVISION, COMPUTER CRIME AND INTELLECTUAL PROPERTY DIVISION, SEARCH AND SEIZURE MANUAL, SEARCHING AND SEIZING COMPUTERS AND OBTAINING ELECTRONIC EVIDENCE IN CRIMINAL INVESTIGATIONS (July 2002), *available at* http://www.usdoj.gov/criminal/cybercrime/s&smanual2002.pdf.

> A man can still control a small part of his environment, his house; he can retreat thence from outsiders, secure in the knowledge that they cannot get at him without disobeying the Constitution. That is still a sizable hunk of liberty—worth protecting from encroachment. A sane, decent, civilized society must provide some such oasis, some shelter from public scrutiny, some insulated enclosure, some enclave, some inviolate place which is a man's castle.[8]

The home is one place the Supreme Court has consistently protected from government intrusions. No other zone of privacy is "more clearly defined than when bounded by the unambiguous physical dimensions of an individual's home—a zone that finds its roots in clear and specific constitutional terms: 'The right of the people to be secure in their . . . houses . . . shall not be violated.'"[9] Even in recent years, the Court has not wavered from its firm commitment to protect individual privacy in the home.[10] Furthermore, the Court does not alter its perspective when the purpose of an entry into a home is for the seizure of property. "In terms that apply equally to seizures of property and to seizures of persons, the Fourth Amendment has drawn a firm line at the entrance to the house. Absent exigent circumstances, that threshold may not reasonably be crossed without a warrant."[11] This year, the Court reaffirmed its commitment to protecting the sanctity of the home. The Court of Appeals for the Armed Forces (CAAF) did the same, at least to an extent.

Kirk v. Louisiana[12]

In *Kirk*, the Court sent a clear message. The Court's per curiam opinion left no doubt about where it draws the line in terms of government intrusions into the home. Police officers entered Kirk's home to arrest him, without an arrest or search warrant.[13] The arrest followed an anonymous tip and police observation of several drug sales taking place at the home. After police stopped one of the buyers leaving Kirk's apartment, they were concerned evidence would be destroyed. Based on this concern, officers knocked on the door, entered the apartment, arrested Kirk, and searched him. They found a vial of cocaine on him and other contraband in plain view.[14]

At trial, Kirk moved to suppress the evidence obtained during the warrantless entry of his apartment. The Louisiana trial court denied the motion, and Kirk was convicted of possession of cocaine with the intent to distribute.[15] He was sentenced to fifteen years' confinement. The Louisiana Court of Appeal affirmed the conviction, concluding that the officer's entry into Kirk's home was lawful because there was probable cause to arrest him. The Louisiana Supreme Court denied review, but the U.S. Supreme Court granted Kirk's petition for a writ of certiorari and reversed the Court of Appeal's decision.[16]

Emphasizing the lack of an arrest warrant for Kirk or a search warrant for his home, the Supreme Court criticized the Court of Appeal's conclusion that the entry was lawful based solely on the existence of probable cause to arrest Kirk.[17] Despite the officers' concern about the possible destruction of evidence, the Court of Appeal did not consider whether exigent circumstances existed to enter the home. Noting this critical flaw in the Court of Appeal's analysis, the Supreme Court stated, "As *Payton* makes plain, police officers need either a warrant or probable cause plus exigent circumstances in order to make a lawful entry into a home. The Court of Appeal's ruling to the contrary, and consequent failure to assess whether

7. U.S. Library of Congress, *Thomas, Legislation Related to the Attack of September 11, 2001* (Oct. 30, 2002), *at* http://thomas.loc.gov/home/terrorleg.htm.

8. United States v. On Lee, 193 F.2d 306, 315-16 (2d Cir. 1951) (Frank, J., dissenting), *aff'd*, 343 U.S. 747 (1952).

9. Payton v. New York, 445 U.S. 573, 589 (1980) (quoting U.S. CONST. amend. IV).

10. *See, e.g.*, Kyllo v. United States, 533 U.S. 27 (2001) (finding that the warrantless use of a thermal imaging device by law enforcement officials to scan the defendant's home was unreasonable); Illinois v. McArthur, 531 U.S. 326 (2001) (holding that police officers acted reasonably by briefly detaining the defendant while they sought a warrant to search his home).

11. *Payton*, 445 U.S. at 590.

12. 536 U.S. 635 (2002).

13. *Id*. at 636.

14. *Id*.

15. *Id*.

16. *Id*. at 637.

17. *Id*.

exigent circumstances were present in this case, violated *Payton*."[18]

The bright line established by *Payton* and the Court's clear and unanimous decision in *Kirk* leave little room for interpretation. For the military, this line is made even clearer for apprehensions in private dwellings. Rule for Courts-Martial (RCM) 302(e)(2)[19] gives specific guidance for military practitioners. Had Kirk been a service member who lived in a private dwelling off of a military installation, military authorities would have needed an arrest warrant issued by competent civilian authority to apprehend him in his apartment.[20] Had he not been a resident in the home, military authorities would have needed both an arrest warrant *and* a search warrant, *each* issued by competent civilian authority.[21] The importance of understanding the requirements of RCM 302(e)(2) is highlighted in the next case.

United States v. Khamsouk[22]

Agents from the Naval Criminal Investigative Service (NCIS) began an investigation into several fraudulent checks. Seaman Apprentice Khamsouk, U.S. Navy, soon became a suspect.[23] The agents learned that Khamsouk had been absent without authority from his unit for several days, and his commander later issued a Department of Defense (DD) Form 553, listing him as a deserter.[24] An informant told the agents that the appellant was staying at Hospital Corpsman Second Class (HM2) Guest's home off the installation. The informant also said the appellant was leaving the residence at a particular time. The agents knew from other witnesses that Khamsouk carried around a black knapsack with stolen credit cards and receipts. The agents went to HM2 Guest's house for surveillance and to wait for the appellant to leave. Although they had a copy of the appellant's DD Form 553, the agents believed they needed a search warrant to enter HM2 Guest's home. The agents waited until HM2 Guest and another man left the house. The agents asked HM2 Guest for consent to enter the home, but HM2 Guest declined. He did offer to try to get the appellant out of his home.[25]

One agent stood outside the entrance while HM2 Guest entered the house and called for the appellant.[26] Although there was a dispute as to precisely what happened next, it was clear that the agent at the front door entered the house when he saw the appellant. The agents apprehended the appellant and read him his Article 31, Uniform Code of Military Justice (UCMJ), rights. The appellant consented to a search of his "personal bags, knapsack(s), and other luggage."[27] Eventually, the agents obtained a confession from the appellant that he used the stolen credit cards and credit card numbers found during the consensual search. At trial, the appellant moved to suppress all evidence the agents found following their entry into HM2 Guest's home. The appellant claimed that the agent's entry violated the Fourth Amendment and RCM 302. The military judge determined that the DD Form 553 was the equivalent of an arrest warrant, that the appellant was not a "resident" under RCM

18. *Id*.

19. MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 302(e)(2) (2002) [hereinafter MCM].

20. *Id*. R.C.M. 302(e)(2)(D)(i).

21. *Id*. R.C.M. 302(e)(2)(D)(ii) (emphasis added).

22. 57 M.J. 282 (2002); *see* Major Michael R. Stahlman, *New Developments in Search and Seizure: A Little Bit of Everything*, ARMY LAW., May 2001, at 29 [hereinafter Stahlman 2001] (discussing the lower court's published decision). The CAAF's subsequent review of—and disagreement with—the service court's opinion illustrates the drawbacks of discussing service court decisions before CAAF review.

23. *Khamsouk*, 57 M.J. at 284.

24. U.S. Dep't of Defense, DD Form 553, Deserter/Absentee Wanted by the Armed Forces (Sept. 1989) [hereinafter DD Form 553]. The current edition of DD Form 553 is dated November 2002. The "information" page of the form describing the authority to apprehend in the appellant's case is the same as the current form. The paragraph reads:

> Any civil officer having authority to apprehend offenders under the laws of the United States, or of a State, territory, commonwealth, possession, or the District of Columbia may summarily apprehend deserters from the Armed Forces of the United States and deliver them into custody of military officials. Receipt of this form and a corresponding entry in the FBI's NCIC Wanted Person File, or oral notification from military officials or Federal law enforcement officials that the person has been declared a deserter and that his/her return to military control is desired, is authority for apprehension.

U.S. Dep't of Defense, DD Form 553, Deserter/Absentee Wanted by the Armed Forces (Nov. 2002).

25. *Khamsouk*, 57 M.J. at 284.

26. *Id*. at 285.

27. *Id*. Hospital Corpsman Second Class (HM2) Guest also consented to a search of his home, but only after the NCIS agent had entered the home without HM2 Guest's permission. *Id*.

302, and that the appellant's consent to the search following his apprehension was valid.[28]

The Navy-Marine Corps Court of Criminal Appeals (NMCCA) agreed with the military judge that the DD Form 553 was the equivalent of a civilian arrest warrant.[29] The court limited this determination to cases involving apprehension for desertion only. This determination, however, was short-lived. In a deeply fractured opinion, the CAAF found that the form was not the equivalent of a civilian arrest warrant.[30]

Unfortunately for military practitioners, the lack of consensus in *Khamsouk* dilutes its value as precedent.[31] An in-depth analysis of all five separate opinions would not be helpful. On the other hand, one aspect of the opinion worth discussion is the majority outcome on the question of the DD Form 553 as an arrest warrant and its practical implications. First, military authorities clearly cannot use the form to enter private off-post dwellings to apprehend service members, regardless of whether the member sought is a "resident" of the dwelling under RCM 302(e)(2).[32] Second, the court's holding that the "DD Form 553 is not the functional equivalent of a civilian arrest warrant in the context of entering a civilian home" goes beyond limiting just military officials.[33] The holding applies with the same force to civilian officials using the DD Form 553 as the sole basis for apprehension or arrest. As the NMCCA noted, deserters and absentees are routinely apprehended with just the DD Form 553, commonly referred to as a "military warrant," in private homes.[34] Accordingly, judge advocates in all the services must ensure that both military and civilian officials executing "military warrants" are aware that they do not authorize entry into private homes. At the very least, they must still obtain arrest warrants from competent civilian authorities. If the service member is not a resident of the private dwelling, they will also have to obtain a search warrant in addition to the arrest warrant, both from a competent civilian authority.[35] In addition, although the CAAF limited its holding to "off-base civilian homes," a strong argument can be made that *Khamsouk* applies with equal weight to housing under military control, on or off an installation.[36]

The last significant implication of *Khamsouk* that deserves attention relates to what the court did not say. What should the NCIS agents have done to enter HM2 Guest's home to apprehend the appellant? Four agents were involved in the surveillance of the home.[37] After they intercepted HM2 Guest and his companion, they had more than enough agents to prevent the appellant from escaping. They also had more than enough information about the appellant's illegal activities to seek both search and arrest warrants from the civilian authorities. With these warrants, they could have lawfully entered HM2 Guest's home to search for the appellant and evidence of his crimes, depending on the scope of the warrant issued. They could also have lawfully apprehended the appellant in HM2 Guest's home. Although coordinating this would have taken time and some effort, the agents would have saved themselves from having to account for their actions in court later.[38] At the very least, their efforts to go the extra yard would have enhanced the govern-

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28. *Id*. at 286.

29. United States v. Khamsouk, 54 M.J. 742, 747 (N-M. Ct. Crim. App. 2001).

30. *Khamsouk*, 57 M.J. at 289-90. On the issue of whether the DD Form 553 was the equivalent of a civilian arrest warrant, three judges said "no" (Judges Baker, Geirke, and Effron) and two judges said "yes" (Chief Judge Crawford and Senior Judge Sullivan). Judge Baker wrote the court's opinion and the remaining judges all filed separate opinions, concurring in part and dissenting in part. The case was remanded for analysis of post-trial processing delay in light of *United States v. Tardif*, 57 M.J. 219 (2002).

31. The CAAF did cite *Louisiana v. Kirk*, 536 U.S. 635 (2002). In *Kirk*, the Supreme Court reversed the Louisiana Court of Appeal because the lower court concluded "that *exigent circumstances* were not required to justify the officer's conduct." *Id*. at 637 (emphasis added). In *Khamsouk*, the CAAF seemed to brush aside the possibility that the NCIS agent's entry into HM2 Guest's home was justified by exigent circumstances. Chief Judge Crawford, however, did not have to address the DD Form 553 issue because she concluded that exigent circumstances were present. *Khamsouk*, 57 M.J. at 295. Despite Chief Judge Crawford's convincing analysis, it appears that Judge Baker, writing for the court, did not want to disturb the military judge's ruling that exigent circumstances did not exist at the time of the agent's entry into HM2 Guest's home. *Id*. at 293.

32. *Khamsouk*, 57 M.J. at 289-90.

33. *Id*.

34. *Khamsouk*, 54 M.J. at 747 n.2. To a limited extent, the CAAF concurred, commenting that "[t]he DD Form 553, or its predecessor, has long been used to authorize civilian law enforcement to apprehend the named individual as a deserter under Article 8, UCMJ," but the court emphasized that there is no authority that "stands for the proposition that either military or civilian officials acting pursuant to a request to apprehend a military absentee, may do so by entering a civilian residence without a civilian warrant." *Khamsouk*, 57 M.J. at 289 (citations omitted).

35. *Khamsouk*, at 289. The CAAF noted that its opinion does not disturb the authority of military and civilian officials to apprehend a service member in a *public* place using just a DD Form 553. *Id.* at 290 n.11.

36. *Id*. at 289-90. This argument becomes even stronger when one considers the language in RCM 302(e)(2) defining "private dwellings." The definition does not make a distinction between dwellings on or off an installation. *See* MCM, *supra* note 19, R.C.M. 302(e)(2).

37. *Khamsouk*, 57 M.J. at 284.

ment's position regarding the appellant's consent following the agents' unlawful entry of the home.

Khamsouk's main lesson for military practitioners is simple to state, but much harder to implement. Law enforcement officials must understand and strictly follow the requirements of *Payton* and RCM 302(e)(2) involving entry into private homes. The difficult part of this lesson lies with its implementation. Judge advocates providing legal advice to military investigators and military police must incorporate *Khamsouk*, *Kirk*, and RCM 302(e)(2) into their training for law enforcement personnel. More importantly, when an investigation has the potential to reach into a civilian home, a legal advisor must take affirmative steps to highlight the need for coordination with civilian authorities, even if surveillance is all that is contemplated.[39]

Suspicionless Searches and Seizures

Buses: United States v. Drayton[40]

In *Drayton*, the Supreme Court confronted the question of whether bus passengers were "seized" under the Fourth Amendment during a routine drug interdiction by police officers. In particular, the Court addressed whether there was a "*per se* rule that evidence obtained during suspicionless drug interdiction efforts aboard buses must be suppressed unless the officers advise passengers of their right not to cooperate and to refuse consent to search."[41]

The defendants, Brown and Drayton, were on a Greyhound bus traveling from Florida to Detroit, Michigan.[42] During a scheduled stop, three Tallahassee police officers boarded the bus as part of a routine interdiction effort. The officers were armed but in plain clothes with their badges displayed. One officer went to the back of the bus and remained facing to the front, a second sat kneeling and facing passengers on the driver's seat, while the third went to the back of the bus. The third officer began asking passengers questions about their travels and whether they had luggage in the overhead compartment above their seats. He continued from the back of the bus toward the front. He avoided blocking the aisle while he spoke with passengers. While he had informed passengers of their right to refuse to cooperate on several earlier occasions, he did not do so on this occasion.[43]

The third officer approached Drayton, who was seated on the aisle with Brown in the window seat next to him. Standing behind them and about a foot away, the officer informed them who he was and that the officers were there to attempt to deter the illegal trafficking of drugs and weapons.[44] He also asked if they had any bags on the bus. Both responded by pointing to a single green bag in the overhead compartment. They allowed the officer to check the bag. The officer searched the bag, but did not find any contraband. The officer noticed that both Drayton and Brown were wearing heavy, baggy clothing that was unusual for the warm weather. Brown agreed to allow the officer to "check" his person. The officer felt several hard objects on the inside of Brown's thighs that he believed were drug packages based on his prior experience. The officers then handcuffed Brown and escorted him off the bus. The officer then asked Drayton for permission to "check" his person also. Drayton also consented, and the officer felt similar hard objects along his inner thighs. The packages on both Drayton and Brown turned out to be bundles of cocaine taped to their boxer shorts.[45]

The government charged Brown and Drayton with conspiracy to distribute and possession with the intent to distribute cocaine. At trial, both defendants moved to suppress the cocaine, claiming that their consent to search was invalid.[46] The United States District Court for the Northern District of Florida (District Court) denied both motions. The court found nothing coercive about the officers' actions and held that the defendants' consent was voluntary. The United States Court of Appeals for the Eleventh Circuit (Eleventh Circuit) disagreed; it reversed and remanded the cases to the District Court with directions to grant the motions. The Eleventh Circuit felt bound

38. In *Illinois v. McArthur*, 531 U.S. 326 (2001), two police officers were faced with circumstances similar to the facts in *Khamsouk*. The difference was that the police officers in *McArthur* obtained a search warrant before they entered a private home to search for evidence. *See* Stahlman 2001, *supra* note 22, at 27 (discussing *McArthur* and its practical implications).

39. The CAAF stressed the important limitations imposed on military law enforcement by noting the long-standing congressionally mandated restrictions under the Posse Comitatus Act (PCA), 18 U.S.C. § 1385 (2000). *Khamsouk*, 57 M.J. at 289 n.10.

40. 536 U.S. 194 (2002).

41. *Id*. at 251-52.

42. *Id*. at 197.

43. *Id*. at 198.

44. *Id*.

45. *Id*. at 199.

46. *Id*. at 199-200.

by precedent "that bus passengers do not feel free to disregard police officers' requests to search absent 'some positive indication that consent could have been refused.'"[47] The Supreme Court granted certiorari and reversed the Eleventh Circuit, concluding that the defendants "were not seized and [that] their consent to the search was voluntary."[48]

The Supreme Court found that the lower court misapplied *Florida v. Bostick*.[49] In *Bostick*, the Court established a framework for analyzing seizures in bus cases: (1) whether the officer removed his weapon and used it in a threatening way; and (2) whether the officer advised passengers that they could refuse to consent.[50] By relying as it did on this second factor, the Eleventh Circuit created a *per se* rule that officers must inform passengers of their right to refuse to cooperate. The Court, applying *Bostick*, concluded that "the police did not seize [Drayton and Brown] when they boarded the bus and began questioning passengers."[51]

The Court then turned to the question of whether the defendants' consent to the suspicionless search was voluntary.[52] Relying on most of the same facts it applied to the seizure issue, the Court again determined that the lower court erred by focusing on the officers' failure to advise passengers that they could refuse to cooperate or consent to be searched. Looking to its own well-established precedent, the Court "rejected in specific terms the suggestion that police officers must always inform citizens of their right to refuse when seeking permission to conduct a warrantless consent search."[53] The notification of this right to refuse is just one factor to consider. The proper test is whether the consent to search is voluntary under the totality of the circumstances; courts should not give extra weight to whether officers advised the suspect about his right to refuse consent. The Court held that "[a]lthough [the officers] did not inform [the defendants] of their right to refuse the search, [they] did request permission to search, and the totality of the circumstances indicates that their consent was voluntary, so the searches were reasonable."[54]

Although few military practitioners will ever encounter a bus case, *Drayton* is still important because it offers valuable insight into the Court's perspective on suspicionless interactions between police and the public. Police officers routinely encounter citizens for a wide variety of reasons. Whether they are keeping the peace, conducting routine street patrols, or just curious, police officers "do not violate the Fourth Amendment's prohibition of unreasonable seizures merely by approaching individuals on the street or in other public places and putting questions to them if they are willing to listen."[55] These routine encounters are a necessary tool for police to be able to protect the public. To hold otherwise would severely limit police from performing their vital function of protecting the public.

As the Court made clear, the proper measure for determining when an encounter becomes an unlawful seizure is whether the defendant's cooperation is induced by police coercion. Did the police officer draw his weapon? Was the citizen's freedom of movement restricted by force or the threat of force? How long was the encounter and where did it occur? The essential test is, "If a reasonable person would feel free to terminate the encounter, then he or she has not been seized."[56] Here, the Court's

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47. *Id*. at 200 (quoting United States v. Washington, 151 F.3d 1354, 1357 (11th Cir. 1998)).

48. *Id*.

49. 501 U.S. 429 (1991).

50. *Drayton*, 536 U.S. at 203-04.

51. *Id*. The Court noted:

> The officers gave the passengers no reason to believe that they were required to answer the officers' questions. When [the third officer] approached [the defendants], he did not brandish a weapon or make any intimidating movements. He left the aisle free so that [the defendants] could exit. He spoke to passengers one by one and in a polite, quiet voice. Nothing he said would suggest to a reasonable person that he or she was barred from leaving the bus or otherwise terminating the encounter.

Id.

52. *Id*. at 206.

53. *Id*. (citing Ohio v. Robinette, 519 U.S. 33, 39-40 (1996); Schneckloth v. Bustamonte, 412 U.S. 218, 227 (1973)).

54. *Id*. at 207.

55. *Id*. at 200.

56. *Id*. Although *Drayton* was not a unanimous decision, six justices formed the majority (Chief Justice Rehnquist, and Justices Kennedy, O'Connor, Scalia, Thomas, and Breyer). There were no separate concurring opinions. The three dissenting justices (Justices Souter, Stevens, and Ginsburg) believed that this encounter amounted to a seizure. Had the officers been performing their "interdiction" effort in an airport, the dissenting justices suggested that they would have joined the majority. Distinguishing this case from suspicionless police activity in airports, the dissent states, "The commonplace precautions of air travel have not, thus far, been justified for ground transportation, however, and no such conditions have been placed on passengers getting on trains or buses." *Id*. at 208.

determination was that a reasonable person would not have felt that his freedom was restricted to the extent that he was "seized" under the Fourth Amendment.[57]

Inspections: United States v. Green[58]

Gate inspections and roadblocks inside military installations are rarely the central focus of published opinions from military appellate courts. Commanders have broad inherent authority to protect government personnel and property. Military Rule of Evidence (MRE) 313(b) codifies this broad authority.[59] Whenever a commander's authority to conduct any type of administrative inspection is questioned, particularly by federal or state courts, judge advocates pay attention. In *Green*, the United States Court of Appeals for the Fifth Circuit scrutinized Fort Sam Houston's checkpoint program.[60]

Emma Lucille Green (Green) was stopped by military police operating a "Force Protection Vehicle Checkpoint," at Fort Sam Houston in San Antonio, Texas.[61] The general purpose of the checkpoint was for security of the installation and traffic safety.[62] The military police followed standard operating procedures and stopped Green's vehicle because it was the sixth vehicle to pass the checkpoint. They asked for her driver's license and proof of insurance; she could not produce either, in violation of Texas law. When the military police checked her license plate number and name, the military police found that Green was not the registered owner of the car and had no driver's license. The military police asked Green to get out of the car, but she attempted to flee instead. The military police then apprehended her, impounded the car, and conducted a standard inventory search of the car. The inventory search yielded rocks of crack cocaine on the front seat of the car. The government charged Green with possession of cocaine with intent to distribute. At trial, she moved to suppress the cocaine, but the court denied the motion. Green was convicted and sentenced to twenty-four months' confinement.[63]

On appeal to the Fifth Circuit, Green claimed the checkpoint seizure was unreasonable and tainted the subsequent inventory search by military police.[64] The court initially stressed that it was only addressing whether the purpose of the checkpoint was lawful. Following the Supreme Court's latest guidance on

57. *Id*. The Court added:

> There was no application of force, no intimidating movement, no overwhelming show of force, no brandishing of weapons, no blocking of exits, no threat, no command, not even an authoritative tone of voice. It is beyond question that had this encounter occurred on the street, it would be constitutional.

Id. at 204.

58. 293 F.3d 855 (5th Cir. 2002), *cert. denied*, 123 S. Ct. 403 (2002).

59. MCM, *supra* note 19, MIL. R. EVID. 313(b). Under the rule, "inspection" is defined as:

> [A]n examination of the whole or part of a unit, organization, installation, vessel, aircraft, or vehicle, including an examination conducted at entrance and exit points, conducted as an incident of command the primary purpose of which is to determine and to ensure the security, military fitness, or good order and discipline of the unit, organization, installation, vessel, aircraft, or vehicle.

Id. In *United States v. Gudmundson*, 57 M.J. 492 (2002), the CAAF did not grant review of an inspection issue considered by the Air Force Court of Criminal Appeals (AFCCA). In its unpublished opinion, the AFCCA looked at a urinalysis inspection program at Little Rock Air Force Base. United States v. Gudmundson, No. S29944, 2001 CCA LEXIS 349 (A.F. Ct. Crim. App. Dec. 6, 2001) (unpublished). Dubbed "Operation Nighthawk 2000," the inspection program required the first one hundred service members entering the base from 0300 to 0600 on a Saturday morning to submit to urinalysis testing. The commander ordering the inspection was concerned about the increase in the use of illegal drugs at off-base "rave" parties during weekends. The AFCCA ultimately determined that the inspection's primary purpose, "to ensure the security, military fitness, or good order and discipline of the Little Rock AFB and personnel assigned there," was proper under MRE 313(b). *Id.* at *4. Considering the rise in popularity of ecstasy and other illegal drugs at "rave" parties, the Air Force commander's novel approach is commendable. Many new illegal drugs like ecstasy have a very short detection window. Conducting such short-notice inspections, particularly over weekends, is a lawful and effective means to curb the current rise in certain illegal drugs like ecstasy. *See* Miguel Navrot, *Kirtland Adding Drug Tests*, ALBUQUERQUE J., Aug. 28, 2002, at 1, *available at* http://ebird.dtic.mil/Aug2002/s20020830kirtland.htm.

60. *Green*, 293 F.3d at 856.

61. *Id*. When Ms. Green was stopped, the post was an "open base." Although this was a consideration weighing on its decision, the court commented that "while we might agree that on an open military base the range of law enforcement activity that does not violate the Fourth Amendment is *narrowed* as compared to a closed base, that does not mean that the security of the installation and its personnel are not a substantial government interest." *Id.* at 861 (emphasis added). Fort Sam Houston is now a "closed base." *Id.*

62. *Id.* at 859. Specifically, the "goals" of the checkpoint program were to: "1. protect national security by deterring domestic and foreign acts of terrorism; 2. maintain readiness and effectiveness; 3. deter the entrance of persons carrying explosives; 4. protect federal property; and 5. ensure the safety of soldiers, civilian employees, retirees and family members on the installation." *Id.* at 858.

63. *Id*. at 856-57.

64. *Id*. at 857 n.5.

roadblocks in *Indianapolis v. Edmond*,[65] the court stated, "To be valid a checkpoint, then, must reach beyond general crime control—either targeting a special problem such as border security or a problem peculiar to the dangers presented by vehicles."[66] Distinguishing the purpose of the checkpoint in *Green* from the improper purpose of the roadblock in *Edmond*, the court determined there were two substantial differences between them:

> First, the protection of the nation's military installations from acts of domestic or international terrorism is a unique endeavor, akin to policing our borders, and one in which a greater degree of intrusiveness may be allowed. Second, those cases focusing not on unique, national challenges, but instead on road safety, are concerned with dangers specifically associated with vehicles and therefore justify suspicionless checkpoint procedures. Since we know from painful experience that vehicles are often used by terrorists to transport and deliver explosives in the form of "car bombs," and that military installations have historically faced greater risk than civilian communities of such a bombing, vehicles pose a special risk.[67]

After determining that the checkpoint's purpose was proper and distinct from general law enforcement, the court turned to the question of whether the procedures used were reasonable under the Fourth Amendment.[68] Whether or not the checkpoint procedures complied with Fourth Amendment requirements, the court looked "to balance the objective and subjective intrusion on the individual against the Government interest and the extent to which the program can reasonably be said to advance that interest."[69] Specifically, the court found that the initial stop by military police met the objective prong in that it lasted only three to five minutes, and that the police only asked for Green's license and proof of insurance. The subjective prong was likewise met in that there was little potential for the checkpoint procedure to generate "fear and surprise."[70] The checkpoint was clearly marked, everyone entering the post was warned, and Green was not singled out or otherwise treated differently from other individuals who were stopped by the military police.

The court balanced the level of the intrusion with the military's interest in conducting the checkpoint inspections and then measured the "reasonable effectiveness" of the checkpoint procedure.[71] First, the minimal intrusion on Ms. Green was no more intrusive than many routine roadway license checkpoints that other federal circuits have held to be constitutional.[72] Second, the court found a substantial government interest to balance against the minimal intrusion, finding the "additional reasons the military may wish to conduct such suspicionless stops [weighed] even more strongly in favor of the reasonableness of the search [as compared to other state license checkpoints]."[73] Finally, after finding that the balancing test favored the military's significant interests, the court considered whether the checkpoint procedure reasonably advanced the purpose for the program. Noting the deference courts traditionally give the military, the court found that the checkpoint's procedure "reasonably advance[d] the purposes of the checkpoint because it deter[red] individuals from driving while unlicensed and or transporting weapons and thereby endangering base personnel."[74]

Green provides military practitioners with a strong, well-reasoned opinion that reviews an existing checkpoint program. The court's clear and methodical reasoning left no stone unturned. When the Supreme Court decided *Indianapolis v. Edmond*, there was some concern in military circles that current installation inspection programs might not pass muster. *Green*'s application of *Edmond* put most, if not all, of those concerns to rest. Still, judge advocates in a position to review installation inspection or roadblock procedures should ensure

65. 531 U.S. 32 (2000). *See* Lieutenant Colonel Michael R. Stahlman, *New Developments in Search and Seizure: More than Just a Matter of Semantics*, ARMY LAW., May 2002, at 40; Stahlman 2001, *supra* note 22, at 25.

66. *Green*, 293 F.3d at 858.

67. *Id.* at 859 (citations omitted).

68. *Id*. at 860.

69. *Id*. (citing Michigan Dep't of State Police v. Sitz, 496 U.S. 444 (1990)).

70. *Id*. (citing *Sitz*, 496 U.S. at 452).

71. *Id.* at 860.

72. *Id.* at 861 (citing United States v. Davis, 270 F.3d 977, 980 (D.C. Cir. 2001); United States v. Brugal, 209 F.3d 353, 357 (4th Cir. 2000); United States v. Galindo-Gonzales, 142 F.3d 1217, 1222 (10th Cir. 1998); United States v. Trevino, 60 F.3d 333, 335-36 (7th Cir. 1995); Merrett v. Moore, 58 F.3d 1547, 1551 (11th Cir. 1995)).

73. *Id*. Regarding the military's interest, Ms. Green attempted to claim there was a constitutional difference between inspections conducted at entry points to a military installation and similar inspections or roadblocks inside an installation. The court dismissed her position, showing that the cases she raised made no such distinction. *Id*.

74. *Id*. at 862.

that the underlying purpose for such programs is distinguishable from the general interest in controlling crime. As *Green* shows, installation security is an administrative purpose that can pass constitutional scrutiny. This is particularly significant today because of the increased threat of terrorist activity within our borders.[75]

Consent

Scope of Consent: United States v. Greene[76]

Greene was the subject of a government interlocutory appeal to the NMCCA. In a pretrial motion hearing, the defense moved to suppress images of child pornography found on the accused's laptop computer and storage discs. Agents from the NCIS seized the computer after the accused signed a consent form giving NCIS agents permission to search his property. Although the agents never viewed any images of child pornography during the search, they seized the computer and numerous discs. Government experts took nearly three months to review the evidence and make their report. The accused never requested that the government return his property. The military judge determined that the government "greatly and unreasonably exceeded the consent to search given them by the accused," and granted the defense motion to suppress.[77]

After adopting the military judge's detailed findings of fact, the NMCCA focused on the consent form the accused signed. The form stated, "I hereby give [the agents] my permission to remove and retain any property or papers found during the search which are desired for investigative purposes."[78] The court found that the military judge erred by focusing on the language of the form that gave the agents permission to search his property on the date the form was signed. The court concluded the accused's consent was voluntary and the search and subsequent seizure were reasonable.[79]

Although *Greene* provides no "new developments" in terms of search and seizure law, it does have important practical implications. The court declined to draw a bright line, but warned that "an excessively long period of retention, following a lawful seizure, could be unreasonable."[80] The court recognized the problem posed in this case, where assets available to conduct forensic analysis on the computer and related evidence were limited. A significant backlog in computer cases requiring forensic analysis compounded the problem.[81] This problem is nothing new in any of the services. Accordingly, military practitioners need to be watchful in cases needing computer forensic analysis, particularly when seized evidence is retained beyond three months. At the very least, government counsel should keep track of reasons for excessive delay well before it becomes a problem.

Location of the Consenting Party: United States v. Garcia[82]

In a case of first impression, the NMCCA held that "an accused's presence and explicit refusal to consent is 'constitutionally insignificant,' so long as the consenting co-tenant has equal access or control over the premises to be searched."[83] Naval Criminal Investigative Service agents apprehended Staff Sergeant Garcia (Sgt.) outside his home based on information that he was involved in several armed robberies at or near Camp Lejeune, North Carolina. The agents took him inside the house with his consent because they were attracting too much attention outside. The agents did a brief security sweep of the home and then asked the accused for permission to conduct a thorough search. He declined. Later that day, the agents obtained consent to search the home from the accused's wife, whom city police arrested at her work place. She consented to another search about a week after the initial search. Evidence found during the searches led to the discovery of stolen property and weapons used in the armed robberies. Staff Sergeant Garcia moved to suppress the evidence from the searches; the court

75. Another, more subtle, message lies with the court's deference to the military. Although military deference has a strong tradition in federal and state courts, *Green* adds one more stone to its foundation. *See id.* at 862 n.2 (citing Dep't of the Navy v. Egan, 484 U.S. 518, 530 (1988)).

76. 56 M.J. 817 (N-M. Ct. Crim. App. 2002), *petition for rev. denied*, 57 M.J. 463.

77. *Id*. at 822.

78. *Id*.

79. *Id*. at 824. In a very similar case, a federal district court came to the same conclusion regarding the scope of consent following seizure of a computer and related evidence. United States v. Al-Marri, 230 F. Supp. 2d 535 (S.D.N.Y. 2002).

80. *Greene*, 56 M.J. at 823 n.4.

81. *Id*. at 823-24. Based on the testimony of two NCIS agents, the court noted that there were only two forensic experts covering a twenty-two state area and that "[s]tandard procedure in such investigations calls for shutting the computer down, transporting it to the forensic analysis site, copying the hard drive, and then conducting careful forensic analysis. All of this must be done by, or under the supervision of, a trained computer forensic analyst." *Id.* The court also looked at federal cases where the same technical problems and backlog exist. *See* Guest v. Leis, 255 F.3d 325 (6th Cir. 2001); United States v. Upham, 168 F.3d 532 (1st Cir. 1999); United States v. Scott-Emuakpor, No. 1:99-CR-138, 2000 U.S. Dist. LEXIS 3118, slip op. at 19 (W.D. Mich. Jan. 25, 2000)).

82. 57 M.J. 716 (N-M. Ct. Crim. App. 2002).

83. *Id*. at 719-20.

denied the motion, convicted him, and sentenced him to 125 years' confinement, a dishonorable discharge, forfeiture of all pay and allowances, a $60,000 fine, and reduction to E-1. On appeal, SSgt. Garcia claimed the evidence found during the searches should have been suppressed. He claimed that because he was present at the home at the time of the search, his refusal to give consent nullified his wife's consent.[84]

The NMCCA tested for "plain error" because the trial defense counsel did not raise this particular objection at trial.[85] Finding no error, the court said, "There is no reasonable expectation of privacy to be protected under [these] circumstances. We cannot see how the additional fact of Appellant's initial refusal to consent in any way lessened the risk assumed that his co-occupant would consent."[86] Specifically, SSgt. Garcia claimed his on-premises denial of permission to search controlled over his wife's off-premises consent, but conceded she had the same authority over the home. He cited *United States v. Matlock*,[87] in which the Supreme Court found "that the consent of one who possesses common authority over premises or effects is valid as against the absent, nonconsenting person with whom that authority is shared."[88] Unfortunately for Staff Sergeant Garcia, the NMCCA did not agree that the converse of *Matlock* was the law[89] and affirmed the findings and sentence.[90]

It would be difficult to overstate the impact of *Garcia* for judge advocates and military criminal investigators. Although the CAAF has yet to grant review, *Garcia* sends a clear signal that at least one service court believes government agents may seek permission to search from an off-premises co-tenant after an on-premises co-tenant refuses. Based on the considerable support the NMCCA used to fortify its decision, the CAAF will likely agree with the lower court.[91]

Military Drug Testing[92]

> *To be clearly erroneous, "it must be 'more than just maybe or probably wrong; it must . . . strike us as wrong with the force of a five-week-old, unrefrigerated dead fish.'"*[93]

All was relatively quiet in the area of military drug testing this year. Certainly, there were no new cases that had the impact of *Campbell*[94] or *Green*.[95] Except for the discussion on permissive inferences in urinalysis cases below, the rest of the section touches on military drug testing through the Military Rules of Evidence.

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84. *Id.* at 718-19. At trial, the appellant argued that the agents entered his home without his permission, that neither he nor his wife consented, and that even if she did, the agents exceeded the scope of her consent. The military judge found that Staff Sergeant Garcia's wife consented to the searches, that the agents did not exceed the scope of the consent, and that the evidence would have been inevitably discovered absent the consent. *Id.*

85. *Id*. at 719.

86. *Id*. at 720 (quoting United States v. Sumlin, 567 F.2d 684, 687 (6th Cir. 1977)).

87. 415 U.S. 164 (1974).

88. *Garcia*, 57 M.J. at 719 (quoting *Matlock*, 415 U.S. at 170).

89. *Id*. at 720.

90. *Id*. at 732.

91. This, of course, assumes that the CAAF grants review. The NMCCA found that a majority of appellate cases directly or indirectly supported its opinion, citing fifteen different cases from the same number of state and federal jurisdictions. *Id*. at 720 (citing United States v. Morning, 64 F.3d 531, 536 (9th Cir. 1995); United States v. Donlin, 982 F.2d 31, 33 (1st Cir. 1992); United States v. Baldwin, 644 F.2d 381, 383 (5th Cir. 1981); United States v. Hendrix, 595 F.2d 883, 885 (D.C. Cir. 1979); United States v. Sumlin, 567 F.2d 684, 687 (6th Cir. 1977); Charles v. Odum, 664 F. Supp. 747, 751-52 (S.D.N.Y. 1987); People v. Sanders, 904 P.2d 1311 (Colo. 1995); Cranwell v. Mesec, 890 P.2d 491, 501 n.16 (Wash. Ct. App. 1995); State v. Ramold, 511 N.W.2d 789, 792-93 (Neb. Ct. App. 1994); Laramie v. Hysong, 808 P.2d 199 (Wyo. 1991); State v. Douglas, 498 A.2d 364, 370 (N.J. Super. Ct. App. Div. 1985); People v. Haskett, 640 P.2d 776, 786 (Cal. 1982); *In re* Anthony F., 442 A.2d 975, 978-79 (Md. 1982); State v. Frame, 609 P.2d 830, 833 (Or. Ct. App. 1980); People v. Cosme, 397 N.E.2d 1319, 1322 (N.Y. 1979)).

92. The Supreme Court decided one drug testing case last year. In *Board of Education v. Earls*, 536 U.S. 822 (2002), the Court broadened the scope of authority for public schools to require drug testing of students. Previously, the Court had only allowed drug testing of athletes. *See* Veronia School Dist. 47J v. Acton, 515 U.S. 646 (1995). In *Earls*, the Court held that it was reasonable to require all students participating in competitive extracurricular activities to submit to drug testing. Although this article does not discuss *Earls* at length, the decision is still significant in that it gives military practitioners another example of the Court's willingness to approve testing programs that fall under the "special needs" category of cases. Like drug testing in public schools, administrative inspections in the military have been characterized under "special needs." *See, e.g.*, United States v. Taylor, 41 M.J. 168, 171 (C.M.A. 1994).

93. United States v. Brinton, No. 200001971, 2002 CCA LEXIS 307, at *4 (N-M. Ct. Crim. App. Dec. 19, 2002) (quoting Parts and Elec. Motors Inc. v. Sterling Elec., Inc., 866 F.2d 228, 233 (7th Cir. 1993)). In *Brinton*, the NMCCA held that "[a] command's pre-existing policy to conduct a urinalysis on all returning unauthorized absentees is a valid inspection under [MRE] 313." *Id.* at *6.

94. United States v. Campbell, 50 M.J. 154 (1999) [hereinafter *Campbell I*], *supplemented on reconsideration*, 52 M.J. 386 (2000) [hereinafter *Campbell II*]; *see* Lieutenant Commander David A. Berger & Captain John E. Deaton, Campbell *and its Progeny: The Death of the Urinalysis Case*, 47 NAV. L. REV. 1 (2000); Major Walter M. Hudson & Major Patricia A. Ham, United States v. Campbell*: A Major Change for Urinalysis Prosecutions?*, ARMY LAW., May 2000, at 38.

For the Army, there were some changes concerning administrative separations and urinalysis testing procedures. The most important of these changes involved clarification of a conflict between *AR 600-85, The Army Substance Abuse Program* (ASAP),[96] and both *AR 635-200, Enlisted Separations*,[97] and *AR 135-178, Enlisted Administrative Separations*.[98] The current *AR 600-85* requires that all Active and Reserve Component soldiers who test positive for illegal drug use be processed for administrative separation, without exception.[99] No such requirement currently exists in the two separation regulations.[100] The clarification came from a Department of the Army message stating that "commanders will follow the guidance in *AR 600-85*. In this regard, it is emphasized that *AR 600-85* requires initiation of separation proceedings, but does not mandate discharge."[101] The other significant change was to the *Commander's Guide and Unit Prevention Leader (UPL) Urinalysis Collection Handbook*, dated 1 June 2002.[102] Many of the changes were made based on *AR 600-85*, which was updated on 1 October 2001.[103] The new handbook can be downloaded at the Army's Center for Substance Abuse Programs (ACSAP) Web site.[104]

Corroboration: United States v. Grant[105]

Staff Sergeant Grant was found unconscious at Incirlik Air Base, Turkey. He was taken to the military hospital, where urine was drawn from him to determine whether any intoxicating substance had caused his condition. Such tests were standard protocol in similar situations. The attending physician observed the collection of the urine and ordered hospital lab personnel to test it. The physician believed he would receive the results within hours; he was unaware that the urine had to be sent to the United States for testing. Eventually, the physician determined that SSgt. Grant was suffering from acute alcohol intoxication. The hospital treated him and released him the next day. After several weeks, the results of SSgt. Grant's urine sample arrived at the hospital. His urine tested positive for cannabinoids. He later confessed to military investigators that he used marijuana on several occasions. At trial, he objected to the government's offer of the positive urinalysis report as a business record under MRE 803(6).[106] Over defense objection, the military judge admitted the report for corroboration of the confession. Staff Sergeant Grant was convicted of wrongful use of a controlled substance in violation of Article 112a, UCMJ. The AFCCA affirmed, and the CAAF granted review. On appeal, SSgt. Grant claimed "that the drug screen report from the Armstrong lab was not admissible as a business record, and that the military judge should have treated the report in the same fashion as urinalysis reports admitted in the 'standard urinalysis case.'"[107]

The court first addressed whether there was a proper foundation for the report under MRE 803(6). The CAAF noted that it "has yet to address the foundation necessary to admit under [MRE 803(6)] a business record created by a third party not before the trial court, that is incorporated into the business records of the testifying party."[108] After reviewing authority from other federal jurisdictions, the CAAF concluded that "a record incorporated by a second entity may be admitted under [MRE 803(6)] on the testimony of a 'qualified witness' of the incorporating entity alone if certain criteria are met."[109]

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95. United States v. Green, 55 M.J. 76 (2001); *see* Lieutenant Colonel Michael R. Stahlman, *New Developments on the Urinalysis Front: A* Green *Light in Naked Urinalysis Prosecutions?*, ARMY LAW., Apr. 2002, at 14.

96. U.S. DEP'T OF ARMY, REG. 600-85, ARMY SUBSTANCE ABUSE PROGRAM (ASAP) (1 Oct. 2001) [hereinafter AR 600-85].

97. U.S. DEP'T OF ARMY, REG. 635-200, ENLISTED PERSONNEL (1 Nov. 2000) [hereinafter AR 635-200].

98. U.S. DEP'T OF ARMY, REG. 135-178, ENLISTED ADMINISTRATIVE SEPARATIONS (3 Dec. 2001) [hereinafter AR 135-178].

99. AR 600-85, *supra* note 96, para. 5-5a.

100. AR 635-200, *supra* note 97, para. 14-12c(2); AR 135-178, *supra* note 98, para. 12-1d.

101. Message, 161152Z Sep 2002, U.S. Dep't of Army (DAPE-MPE), subject: Clarifying Enlisted Separation Policy for Illegal Drug Abuse.

102. U.S. DEP'T OF ARMY, ARMY CENTER FOR SUBSTANCE ABUSE PROGRAMS, COMMANDER'S GUIDE AND Unit Prevention Leader (UPL) URINALYSIS COLLECTION HANDBOOK (1 June 2002).

103. *See* AR 600-85, *supra* note 96.

104. Army Center for Substance Abuse Programs Web site, *at* http://www.acsap.org (last visited Apr. 29, 2003).

105. 56 M.J. 410 (2002).

106. *Id.* at 413 (citing MCM, *supra* note 19, MIL. R. EVID. 803(6)).

107. *Id*.

108. *Id*. at 413-14.

Next, the court determined the relevance of the drug report. The appellant claimed that the government should have presented expert testimony to interpret the results of the report.[110] The CAAF disagreed, finding that the report was not offered or admitted for substantive proof. The government merely offered the report to corroborate SSgt. Grant's confession. To ensure the members understood this, the military judge instructed them that they should consider the report only for the limited purpose of corroborating the confession and not as substantive evidence. A related concern was the limited chain-of-custody evidence the government presented. The only witness who testified about the sample's chain of custody was the attending physician in Turkey. The court found that the "members were free to either accept or reject this evidence in determining the weight to be given the confession."[111]

Finally, the CAAF looked at SSgt. Grant's claim that the report was insufficient evidence to corroborate his confession under MRE 304(g).[112] Finding no error in admitting the report, the court held "that the independent evidence of recent marijuana ingestion contained in the Armstrong lab report raised a sufficient inference of truth so as to corroborate appellant's confessed use of marijuana."[113]

For trial counsel, *Grant* is a gold mine. Most trial counsel have encountered a urinalysis case where there were problems with the chain of custody or other evidentiary "issues" with the urinalysis report. *Grant* will help trial counsel plug evidentiary holes in urinalysis cases that no one else would have touched previously, at least when the accused admits to using a controlled substance.

Hair Analysis: United States v. Cravens[114]

In another "evidence" case, the CAAF confirmed its holding in an earlier decision that scientific analysis of hair is admissible.[115] Air Force SSgt. Cravens was pulled over by police in Whittier, California, for a minor traffic violation. As one officer approached the driver's side window, he noticed what he believed was a weapon bulging out of SSgt. Cravens' shirt. As he asked SSgt. Cravens some questions, the officer noticed that SSgt. Cravens was extremely nervous. The officer's training and experience led him to believe that SSgt. Cravens was under the influence of a stimulant. As the officer began to administer a field test based on his suspicion, SSgt. blurted out that he "did a line earlier."[116] Based on his observations and SSgt. Cravens's admission, the officer arrested him and took him to the sheriff's station for booking. At the station, SSgt. Cravens refused to provide a urine sample. Several days later, the sheriff's office informed agents from the Air Force Office of Special Investigations (AFOSI) of the arrest. The agents believed they did not have probable cause to obtain authorization for a urinalysis because of the passage of time. Instead, they sought a search authorization for a sample of SSgt. Cravens's hair. A military magistrate granted the search authorization. The sample tested positive for methamphetamine.[117]

On appeal to the CAAF, SSgt. Cravens claimed the AFOSI agents seized his hair without probable cause, and the government had not shown at trial that the hair analysis was relevant or reliable.[118] He also claimed the AFOSI agents provided false and misleading information to the magistrate about the accuracy of hair analysis. The court quickly dismissed this claim, relying on the military judge's determination, which was supported by the evidence.[119] Next, the court addressed the defense

109. *Id.* at 414 (quoting MCM, *supra* note 19, MIL. R. EVID. 803(6)). As to this criterion, the court explained, "First, the incorporating entity must obviously procure and keep the record in the normal course of its business. Second, the entity must show that it relies on the accuracy of the incorporated record in its business. Finally, there must be 'other circumstances indicating the trustworthiness of the document.'" *Id*. (quoting Air Land Forwarders, Inc. v. United States, 172 F.3d 1338, 1343 (Fed. Cir. 1999)).

110. *Id*. at 415.

111. *Id.* at 416.

112. *Id.*

113. *Id*. at 417.

114. 56 M.J. 370 (2002). There was another hair analysis case decided this year by a military appellate court, *United States v. Will*, No. 9802134, 2002 CCA LEXIS 218 (N-M. Ct. Crim. App. Sept. 27, 2002) (unpublished). In *Will*, the court held the military judge erred by not allowing the defense to present exculpatory evidence in the form of a negative hair analysis. *Id*. at *23.

115. *See* United States v. Bush, 47 M.J. 305 (1997).

116. *Cravens*, 56 M.J. at 372.

117. *Id*. at 371.

118. *Id*. at 374.

119. *Id*. at 375. The court refused to re-litigate whether the agent "knowingly and intentionally, or with reckless disregard for the truth, misled the military magistrate that a single use of drugs could be detected by hair analysis and that scientific and legal authorities supported the admission of such evidence." *Id*. (citing MCM, *supra* note 19, MIL. R. EVID. 311(g)(2)).

claim that there was no "substantial basis" for the magistrate's probable cause determination. Again, the court took little time to conclude that this claim lacked merit. The magistrate had been informed of SSgt. Cravens's admission, his behavior during the traffic stop that was consistent with stimulant use, and the scientific evidence that drug metabolites were detectable in hair.[120]

The court then turned to SSgt. Cravens's assertion that the hair analysis was not admissible under MRE 401 and 403.[121] His hair sample was taken four weeks after he allegedly used methamphetamine, and it was not properly segmented. Segmentation of hair for analysis allows a rough estimation of the date of ingestion. Staff Sergeant Cravens argued, therefore, that the analysis only determined that the alleged wrongful use occurred sometime during the previous four to five months. Accordingly, SSgt. Cravens argued that the hair analysis result was not relevant to the allegation he used the drug on or about the date charged in the specification. The court disagreed, finding the hair analysis provided sufficient proof which was proximate in time and was, "at the very least, relevant to corroborate his confession."[122]

Finally, SSgt. Cravens argued under MRE 403 that the science of hair analysis was too "nebulous" because the laboratory did not use a cutoff value. He claimed this allowed the forensic toxicologist analyzing his hair sample to guess whether it tested positive. Unfortunately, he did not have any legal authority to support his viewpoint. The court pointed to evidence in the record showing there was a "reporting limit set by the National Medical Services which undermines the key factual component of his scientific validity argument."[123]

Read together, *Cravens* and *Grant* provide a treasure trove of useful tools and ideas for trial counsel. Although in each case the accused confessed, most trial counsel understand that confessions alone are often not enough to guarantee convictions. Even if there is enough evidence to corroborate a confession under MRE 304(g), panel members may not necessarily give much weight to confessions, especially when the defense provides a plausible explanation for the accused to give a false confession. When, as in *Cravens*, the passage of time prevents investigators from showing sufficient probable cause to obtain a urine sample, hair analysis may provide the solution. At the very least, a positive hair analysis test result will buttress a weak confession. For defense counsel, *Cravens* is confirmation that hair testing is admissible in courts-martial and—assuming the result is negative—can be enough to plant the "reasonable doubt" seed in the minds of the fact finders.

The Permissive Inference Is Still Alive: United States v. Barnes[124]

On its fourth visit to the NMCCA, *Barnes* was finally affirmed.[125] The third visit resulted in the court setting the conviction aside.[126] After the CAAF decided *United States v. Green*,[127] however, the court returned the case to the NMCCA for another look.[128]

At trial, the government's only evidence was SSgt. Barnes's positive urinalysis result. The government laid a foundation for the report with a forensic chemist, the command's urinalysis coordinator, and the observer for the appellant's urinalysis. There was no other evidence of wrongfulness or knowledge during the government's case-in-chief. Staff Sergeant Barnes testified in his own defense. On cross-examination, he denied asking his neighbor for marijuana. The defense then offered the testimony of two officers and a non-commissioned officer to establish SSgt. Barnes's good military character and character for truthfulness. In rebuttal, SSgt. Barnes's neighbor testified that he smoked marijuana in SSgt. Barnes's presence, and that SSgt. Barnes had asked him for marijuana on two occasions. Staff Sergeant Barnes was convicted of wrongful use of marijuana and sentenced to receive a bad-conduct discharge.[129]

On this latest visit to the NMCCA, the court followed the CAAF's directive to apply *Green*, and held that the evidence

120. *Id*. at 375-76 ("This information constituted a legally sufficient basis for finding probable cause, as defined by [MRE] 315(f)(2) and our case law.").

121. *See* MCM, *supra* note 19, MIL. R. EVID. 401, 403.

122. *Cravens*, 56 M.J. at 376.

123. *Id*.

124. 57 M.J. 626 (N-M. Ct. Crim. App. 2002).

125. *Id*. at 628. In its lengthy and tortured history, *Barnes* lingered in the post-trial process for almost nine years. *See id*.

126. United States v. Barnes, 53 M.J. 624 (N-M. Ct. Crim. App. 2000). The NMCCA set aside the conviction based on the CAAF's holding in *Campbell I*, 50 M.J. 154 (1999).

127. 55 M.J. 76 (2001).

128. United States v. Barnes, 55 M.J. 236 (2001) (summary disposition).

129. *Barnes*, 57 M.J. at 628.

was both legally and factually sufficient to affirm the conviction.[130] The importance of the opinion lies in the court's interpretation of *Green*. The NMCCA emphasized three significant points from *Green*. First, the court noted the key role of the military judge as the gatekeeper. In this regard, the NMCCA quoted the CAAF's determination that "[a] urinalysis properly admitted under the standards applicable to scientific evidence, when accompanied by expert testimony providing the interpretation required . . . , provides a legally sufficient basis upon which to draw the permissive inference of knowing, wrongful use, *without testimony on the merits concerning the physiological effects*."[131] The importance of this point cannot be overstated. When the two *Campbell* decisions came out, all of the service courts interpreted them to mean that the permissive inference could not be based solely on a positive urinalysis report. There had to be some other evidence, which would include expert testimony on the physiological effects of the controlled substance used in the particular case. Despite this unanimity among the service courts, the CAAF said in *Green*, as quoted above, that the fact-finder could rely solely on a positive urinalysis to draw the permissive inference.[132]

Second, the testing procedure used in *Barnes* has been the Department of Defense (DOD) standard procedure for well over a decade. The NMCCA stated the test "did not involve a novel scientific procedure. Rather, the evidence introduced was produced from a set of testing procedures well-established within the scientific and legal communities as reliable when properly employed."[133] This second point is significant in the sense that it highlights that the CAAF did not expressly reverse its decision in *Campbell*. If and when the DOD begins using new testing procedures, *Campbell* will apply. What this means for practitioners is that they need to stay abreast of changes in DOD testing procedures. Trial counsel must be prepared to do more than just rely on a positive urinalysis report when the laboratory uses a new procedure. This is significant because the NMCCA is saying that the government may not get the benefit of the permissive inference when the testing procedure is novel and there is no "other" evidence to prove wrongfulness.

Third, the NMCCA pointed to the fact that Staff Sergeant Barnes did not object to the result of the urinalysis or the testimony of the government's expert.[134] In *Green*, the appellant likewise did not move to exclude either at trial.[135] For defense counsel, the message is clear; absent a properly preserved objection to expert testimony or the urinalysis report, military appellate courts will consider the issue to be forfeited on appeal, unless there is plain error. If the government employs a novel testing procedure, the failure of the defense counsel to object becomes even more significant. The defense counsel in *Campbell* did move to exclude the urinalysis report and the expert's testimony, which involved a novel testing procedure.[136] In *Campbell*, the CAAF found error and reversed.[137]

Conclusion

> *A powerful agent is the right word . . . . Whenever we come upon one of those intensely right words in a book or a newspaper the resulting effect is physical as well as spiritual, and electrically prompt: it tingles exquisitely around through the walls of the mouth and tastes as tart and crisp and good as the autumn-butter that creams the sumac-berry.*
>
> —Mark Twain[138]

New developments in Fourth Amendment law last year represented a smorgasbord of search and seizure topics. Although there were only a few changes—and these were minor adjustments to existing case law—they covered a wide variety of issues. On the other hand, legislative changes and executive branch initiatives spurred by the War on Terrorism continued the transformation of Fourth Amendment jurisprudence. To many, this transformation threatens basic rights at the heart of the Constitution.

The challenge for the government in this time of conflict is tremendous. The right of every citizen to be protected from

130. *Id.* at 633.

131. *Id.* at 630 (quoting *Green*, 55 M.J. at 81; United States v. Bond, 46 M.J. 86, 89 (1997); citing United States v. Murphy, 23 M.J. 31 (C.M.A. 1987)) (emphasis added).

132. *Id.*

133. *Id.* at 631.

134. *Id.*

135. *Green*, 55 M.J. at 81.

136. *Id.* at 79.

137. *Campbell I*, 50 M.J. 154, 162 (1999).

138. Mark Twain, *William Dean Howells*, *at* http://www.twainquotes.com (last visited Apr. 1, 2003).

unwarranted government intrusions must be zealously protected. On the other hand, terrorism threatens the very existence of the nation. Without new and effective tools to fight the War on Terrorism, government officials tasked with protecting our vast society will be powerless. These tools, in the form of carefully crafted legislation and directives or initiatives from the executive branch, must maintain a delicate balance between individual liberty and national security.[139] A powerful agent in this war is law that strikes the right balance.

139. Senator Jack Reed, Address at the U.S. Naval Justice School, Newport, Rhode Island (Dec. 13, 2002), *available at* http://www.jag.navy.mil/html/whats_new.htm (restricted access). In part, Senator Reed stated:

> We are living in tumultuous times. September 11th left no doubt about that. The fight against terrorism and its role in the larger context of protecting American security should be foremost in our minds . . . . Not surprisingly, we find ourselves wrestling with and redefining the balance between respect for individual liberties and the need to protect our country from threats to our peace and our security. We must continue to seek a delicate balance between the need for security and respect for individual rights; the right to privacy versus the need to gather intelligence to prevent and deter terrorist acts; the right to equal protection versus identifying legitimate terrorist suspects. This is a daunting task, and the decisions we make today will have historical repercussions for decades to come.

Id. The challenge facing our courts is just as pivotal. The United States District Court for the Southern District of New York recently assessed the challenge as follows:

> In another case arising from the tragic events of September 11, 2001, this Court acknowledged the monumental challenges the courts will confront as the United States grapples to formulate an appropriate domestic response to the unique threats the nation has encountered in the wake of the terrorist attacks perpetrated on American soil. This task . . . will test our ability to balance national security interests with the nation's profound reverence for order and freedom and its enduring defense of individual liberties. Thus, the Court is mindful that special times call for special vigilance, and bid us all to summon our best to function at higher grades of performance in the face of ever greater risks and larger stakes. Insofar as we do not exhaust our stores of courage and continue to pay unremitting respect to America's founding values, we honor the task, serve our traditions, and leave undiminished the legacy under which our nation has flourished over the years: that of freedom guaranteed and guarded by the rule of law.

United States v. Al-Marri, 230 F. Supp. 2d 535, 536 (S.D.N.Y. 2002).