Recent Developments in Substantive Criminal Law: A Continuing Education

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Introduction

> *As by the fires of experience, so by commission of crime you learn real morals. Commit all crimes, familiarize yourself with all sins, take them in rotation (there are only two or three thousand of them), stick to it, commit two or three every day, and by and by you will be proof against them. When you are through you will be proof against all sins and morally perfect. You will be vaccinated against every possible commission of them. This is the only way.*[1]

Most commanders and judge advocates would not advise soldiers to follow Mark Twain's advice on acquiring moral perfection. Yet, soldiers often learn what is reasonably acceptable behavior in the military when they commit crimes or see other soldiers crossing the line. "An incidental but very important function of the criminal law is to teach the difference between right and wrong."[2] The *Manual for Courts-Martial* (*MCM*) states that "[t]he purpose of military law is to promote justice, to assist in maintaining good order and discipline in the armed forces, to promote efficiency and effectiveness in the military establishment, and thereby to strengthen the national security of the United States."[3] In fulfilling its dual purposes of promoting justice and maintaining discipline, military law looks to the substantive crimes delineated by Congress in the punitive articles of the Uniform Code of Military Justice (UCMJ)[4] to teach soldiers what is intolerable. The opinions written by the Court of Appeals for the Armed Forces (CAAF) continue this education process by interpreting exactly what conduct Congress intended to proscribe in the punitive articles.

The decisions of the CAAF during the 2002 term[5] reflect four intriguing trends. First, the CAAF decided three cases involving indecency offenses.[6] The cases indicate that the court will closely scrutinize "consensual" sex offenses to ensure the evidence supports all the required elements. The court will pay particular attention to the elements that convert acceptable consensual sexual activity into criminal conduct, such as the indecent or open and notorious nature of the acts. The CAAF's decisions provide practitioners with a continuing education regarding its interpretation of what areas of sexual activity Congress and the President intend to proscribe under the punitive articles.[7]

Second, the CAAF provided guidance regarding the necessity of proving actual physical or mental harm to sustain convictions for some offenses.[8] While the first trend may signal the court's desire to limit the field of proscribed conduct in the area of consensual sexual activity, the second trend shows the court's willingness to expand the reach of some offenses even when an accused causes no actual physical or mental harm to a victim. Specifically, maltreatment under Article 93, UCMJ,[9] only requires an objective showing "that the accused's actions reasonably could have caused physical or mental harm or suffering."[10] Also, in one of its first cases of the 2003 term,[11] the

1. Mark Twain, Theoretical and Practical Morals, Address Before the New Vagabonds Club of London (June 29, 1899), *available at* http://www.boondocksnet.com/twaintexts/speeches/mts_theoretical.html.

2. ROLLIN M. PERKINS & RONALD N. BOYCE, CRIMINAL LAW 6 (3d ed. 1982).

3. MANUAL FOR COURTS-MARTIAL, UNITED STATES pt. I, ¶ 3 (2002) [hereinafter MCM].

4. UCMJ arts. 77-134 (LEXIS 2003).

5. The 2002 term began 1 October 2001 and ended 30 September 2002. *See* U.S. Court of Appeals for the Armed Forces, *Opinions and Digest*, *at* http://www.armfor.uscourts.gov/Opinions.htm (last visited March 3, 2002) [hereinafter CAAF Opinions Web Site].

6. United States v. Sims, 57 M.J. 419 (2002); United States v. Baker, 57 M.J. 330 (2002); United States v. Graham, 56 M.J. 266 (2002).

7. The President enumerates offenses under Article 134 that proscribe conduct that is prejudicial to good order and discipline or service discrediting. The President enumerates the offenses under the authority Congress granted him to set maximum punishments. UCMJ art. 56 (2002); *see* MCM, *supra* note 3, pt. IV, ¶¶ 61-113 (listing the enumerated offenses of the UCMJ).

8. United States v. Vaughn, No. 02-0313, 2003 CAAF LEXIS 108 (Jan. 24, 2003); United States v. Carson, 57 M.J. 410 (2002).

9. UCMJ art. 93.

CAAF affirmed a conviction for child neglect under Article 134, UCMJ.[12] The court again expressed a standard requiring only a showing that an "accused's actions reasonably could have caused physical or mental harm or suffering."[13]

The third and fourth trends seen in this year's CAAF opinions build on decisions discussed in last year's edition of the *Military Justice Symposium*.[14] The court definitively reiterated the principle touched on last year in *United States v. New*,[15] that military judges may properly decide whether orders are lawful as interlocutory questions of law.[16] The CAAF also added clarity to its previous rulings regarding multiplicity and conduct unbecoming an officer. The court reiterated its message to the field[17] that the government may not obtain multiplicious convictions under Article 133, UCMJ,[18] and another substantive offense for the same underlying misconduct.[19]

This article analyzes each of the four trends in detail. The decisions discussed reflect an understanding by the CAAF that it must continue to do its part to help teach soldiers and practitioners exactly what conduct is proscribed under military law. The article will start with the most contentious of the trends—the developing definition of when consensual sexual behavior becomes criminal conduct.

Indecent Sexual Activity Under Article 134

United States v. Baker: *Consent and Age Relevant to Indecency*

Eighteen-year-old Airman Basic (E-1) Bobby Baker began dating fifteen-year-old "KAS" during the summer of 1999. The dating relationship quickly became physical. Airman Baker consensually touched and kissed KAS's breasts and "gave her hickies on her stomach, upper chest, and back,"[20] but did nothing to KAS in public, other than hugging and kissing her. KAS was not offended by Airman Baker's conduct "because it comported with her ideas of normal activities within a boyfriend/girlfriend dating relationship."[21]

For his conduct with KAS, an officer and enlisted panel found Airman Baker guilty of committing indecent acts with a female under the age of sixteen.[22] In his closing argument, the assistant trial counsel argued that the relative ages of Airman Baker and KAS and the fact that she consented to the physical relationship were irrelevant.[23] Specifically, he argued:

> Now, one potential warning here. These two are, as the elements show, close in age. He

10. *Carson*, 57 M.J. at 415.

11. The 2003 term began 1 October 2002 and will end 30 September 2003. CAAF Web Site, *supra* note 5.

12. UCMJ art. 134.

13. *Vaughn*, 2003 CAAF LEXIS 108, at *20.

14. Major David D. Velloney, *Recent Developments in Substantive Criminal Law: Broadening Crimes and Limiting Convictions*, ARMY LAW., Apr. 2002, at 52-55, 57-59.

15. 55 M.J. 95 (2001).

16. United States v. Jeffers, 57 M.J. 13, 16 (2002).

17. *See generally* Velloney, *supra* note 14, at 59.

18. UCMJ art. 133 (2002).

19. United States v. Palagar, 56 M.J. 294 (2002); *see also* United States v. Frelix-Vann, 55 M.J. 329 (2001); United States v. Cherukuri, 53 M.J. 68 (2000); United States v. Timberlake, 18 M.J. 371 (C.M.A. 1984).

20. United States v. Baker, 57 M.J. 330, 331 (2002).

21. *Id*.

22. *Id*. at 330. The elements of Indecent Acts with a Child under Article 134, UCMJ:

> (a) That the accused committed a certain act upon or with the body of a certain person;
> (b) That the person was under 16 years of age and not the spouse of the accused;
> (c) That the act of the accused was indecent;
> (d) That the accused committed the act with intent to arouse, appeal to, or gratify the lust, passions, or sexual desires of the accused, the victim, or both; and
> (e) That, under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces.

MCM, *supra* note 3, pt. IV, ¶ 87b(1).

23. *Id*. at 331-32.

> was 18 and she was 15. Now, first of all, do you see anything in the elements that would show that it matters that these two are close in age? No, because there isn't anything like that. All the crime requires is that the recipient of the indecent act be under the age of 16, and in this case [KAS] was 15.
>
> Now, when a person is under 16, it means that they can't consent for themselves. So don't be deceived by the fact that [KAS] let him do these things in some kind of a boyfriend-girlfriend relationship. Consent is not an element. It's irrelevant. He groped her naked breasts with his hands. He kissed her naked body. She's under 16, that's indecent acts with a child, no matter how you look at it.[24]

Given the explanation in the *MCM* following the elements for indecent acts with a child, the assistant trial counsel appeared to be on solid ground. The *MCM* states that "[l]ack of consent to the act or conduct is not essential to this offense; consent is not a defense."[25] Yet, as discussed below, case law indicated that the panel should consider factual consent as well as the relative ages of the parties on the issue of indecency.[26] The defense counsel did not object to the assistant trial counsel's assertions but argued to the members that they should consider the ages of Airman Baker and KAS. He urged the panel not to "find the sexual contact between them to be indecent *per se*."[27]

The military judge gave standard instructions and definitions directly from the *Military Judges' Benchbook* for the offense of indecent acts with a child.[28] Because Airman Baker was also charged with forcible sodomy[29] of another young dependent, "CAB," the military judge also provided a mistake of fact as to consent instruction for the forcible element of the sodomy charge. The instruction directed the panel to "consider the accused's age, education, experience, prior contact with [CAB], the nature of any conversations between [appellant] and [CAB], along with the other evidence on this issue."[30] During the panel's deliberations, a member sent a question to the military judge asking whether or not they should consider Airman Baker's age, education, experience, and prior contact with KAS when determining if his acts were indecent.[31] The military judge responded with a "broad, unfocused, instruction to the members to consider 'all the evidence you have, and you've heard on the issue of what's indecent.'"[32]

In a three-to-two decision,[33] the CAAF held that the military judge committed plain error by not providing tailored instructions on the issue of indecency in response to the panel member's question.[34] The majority reasoned that the military judge "should have corrected the assistant trial counsel's misstatement of the law, and clearly instructed them that the charged sexual acts could not be found indecent solely on the basis that the alleged victim was under the age of 16."[35] Second, the CAAF held that the military judge should have told the panel to disregard the government counsel's arguments regarding the irrelevance of consent.[36] Third, the military judge should have "expressly instructed the members that the appellant's youthful age, the proximity in age between appellant and KAS, their prior relationship, and the alleged victim's factual consent were

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24. *Id*. at 332.

25. MCM, *supra* note 3, pt. IV, ¶ 87c(1).

26. *Baker*, 57 M.J. at 335-36 (citing United States v. Strode, 43 M.J. 29 (1995) (finding that twenty-two-year-old airman's plea to indecent acts with thirteen-year-old girl was improvident because he asserted that he thought she was at least sixteen years old); Pierson v. State, 956 P.2d 119 (Wyo. 1998)).

27. *Baker*, 57 M.J. at 332.

28. *Id*. at 332. The judge defined indecency using the following language from the *Military Judge's Benchbook*: "Indecent acts signify that form of immorality relating to sexual impurity which is not only grossly vulgar, obscene, and repugnant to common propriety, but tends to excite lust and deprave the morals with respect to sexual relations." *Id*. (quoting U.S. DEP'T OF ARMY, PAM. 27-9, LEGAL SERVICES: MILITARY JUDGE'S BENCHBOOK, ¶ 3-87-1d (30 Sept. 1996) [hereinafter BENCHBOOK]).

29. UCMJ art. 125 (2002).

30. *Baker*, 57 M.J. at 333.

31. *Id*. at 332-33.

32. *Id*. at 336.

33. *Id*. at 330. Chief Judge Crawford and Judge Baker dissented. *Id*. at 339-42.

34. *Id*. at 331.

35. *Id*. at 336.

36. *Id*.

circumstances that could be considered in deciding whether the charged acts were indecent."[37]

The majority pointed out that the court "has never held that all sexual conduct between a service person and a person under the age of 16 is *per se* indecent and therefore a crime."[38] In *United States v. Strode*,[39] the CAAF found a twenty-two-year-old airman's guilty plea to indecent acts with a thirteen-year-old girl improvident. The court based its ruling on the accused's assertions during his providence inquiry that he thought the girl was at least 16 years old.[40] The *Strode* opinion "observed that 'age is relevant to prove the elements that the act was indecent and service discrediting.'"[41] The majority in *Baker* also posited that the court has never held that sexual conduct "is indecent because the alleged victim is legally incapable of consenting to sexual acts."[42] Therefore, the assistant trial counsel's assertion that factual consent of the alleged victim was irrelevant on the issue of indecency was incorrect. The assistant trial counsel's misstatements of law and the military judge's failure to clear up the panel's resulting confusion adequately led the majority to reverse Airman Baker's conviction for indecent acts with a child.

Chief Judge Crawford and Judge Baker wrote stinging dissents. Chief Judge Crawford focused on the lack of plain error and argued that because indecency is case and fact-specific, the panel members properly heard the evidence and placed the accused's actions with KAS in context.[43] Judge Baker echoed Chief Judge Crawford's claims regarding plain error. He also added that "[t]he majority manufactures plain error in this case by coupling trial counsel's argument with the military judge's answer to a question regarding indecency."[44] Both dissenting opinions stressed that the military judge told the panel members to "consider all the evidence you have."[45] Chief Judge Crawford argued that the broad instruction unduly benefited the accused because the military judge essentially told the members that they "had to give appellant the benefit of the honest and reasonable mistake of fact instruction (which was not applicable to the offense of indecent acts)."[46] Judge Baker argued that "In essence, she told the members, 'Yes, you should consider the accused's age, education, experience, prior contact with KAS, and proximity of age. Consider all the evidence you have.'"[47]

The dissenting opinions offer well-reasoned critiques of the majority's use of the plain error doctrine to reach "an apparently result-oriented conclusion."[48] They both appear, however, to sidestep the reality that military officers and noncommissioned officers expect to receive, give, and follow specific guidance and orders. As the majority noted, the panel member's specific question deserved a specific response.[49]

The dissenting opinions also lose credibility by exhibiting their own orientation toward reaching a particular result rather than focusing solely on legal error. Chief Judge Crawford concluded her opinion by detailing all of the misconduct for which Airman Baker was tried, including his "dating" relations with all three young females and his disobedience of no-contact orders regarding KAS. She then used the facts regarding these other offenses to "bootstrap"[50] her own proposition regarding the legal sufficiency of the indecent acts specification. Chief Judge Crawford acknowledges that the "age of the 'child' is important and certainly element dispositive."[51] Her conclusions about what *Strode* teaches, however, seem to indicate that the government can prove the indecency element of the enumerated offense by simply showing the service-discrediting

37. *Id*.

38. *Id*. at 335.

39. 43 M.J. 29 (1995).

40. *Id*. at 32-33.

41. *Baker*, 57 M.J. at 335 (quoting *Strode*, 43 M.J. at 32).

42. *Id*. at 335.

43. *Id*. at 340 (Crawford, J., dissenting).

44. *Id*. at 342 (Baker, J., dissenting).

45. *Id*.

46. *Id*. at 339 (Crawford, J., dissenting).

47. *Id*. at 342 (Baker, J., dissenting).

48. *Id*. at 339 (Crawford, J., dissenting).

49. *Id*. at 334-35.

50. *Id*. Chief Judge Crawford used the word "bootstrap" to describe the majority's late discovery of error in the assistant trial counsel's argument to reach "an apparently result-oriented conclusion, while not straying too far afield from the plain error issue specified and argued." *Id*.

nature of the acts or that the acts would constitute foreplay to sodomy or carnal knowledge.[52] The indecent nature of the acts, however, constitutes an essential element specifically listed by the President, necessary to turn otherwise consensual sexual activity into proscribed criminal misconduct.[53]

The opening paragraph of Judge Baker's dissent signals his views on Airman Baker's conduct without regard to the legal issues in the case.

> Military service is a line of departure to adulthood. After taking the service oath, a young man or woman is no longer judged by the standards of an adolescent teenager, but rather as an adult by, among other things, the standards contained in the Uniform Code of Military Justice (UCMJ). Changes in maturity, discipline, and values may be less immediate.[54]

Judge Baker's opinion is well reasoned with respect to the plain error doctrine, but the fact that he begins his dissent with such unequivocal language regarding Airman Baker's adulthood colors his analysis at least as much as the relative ages of the parties seems to drive some of the majority's reasoning. Judge Baker goes to great lengths to emphasize that "[t]his is a plain error case," regarding the adequacy of the military judge's instructions.[55] Yet, he sidesteps the obvious error created by the assistant trial counsel's closing argument. He addresses the issue simply by citing to the military judge's standard instruction, admonishing members not to consider counsel's exposition of the law.[56] If the members fully understood the law of consent, age and indecency, then they would not have asked questions about it during their deliberations. The very fact that the members asked such a specific question indicates that the assistant trial counsel's argument had an impact on the panel. At least one member did not fully understand the law as originally instructed by the military judge. The member asked a specific question. The panel members needed clear guidance. They did not receive it.[57]

The importance of *Baker* from a substantive criminal law perspective is partially lost in the discussion of plain error and the military judge's instructions. On the issue of indecency, panel members should consider all relevant facts and circumstances, including the accused's youthful age, the proximity in age between the accused and alleged victim, any prior relationship, and the alleged victim's factual consent.[58] Government counsel should present evidence and structure arguments that show how the relevant factors actually assist panel members to conclude that the acts were indecent. Language from the beginning of Judge Baker's dissent may help government counsel structure such arguments if they are faced with a fact scenario similar to that in *Baker.* In other cases, the same factors that worked in Airman Baker's favor may hurt service members who try to dispute the indecency of their actions. Particularly in cases of consensual sexual activity, trial counsel must learn to craft arguments that use all the relevant circumstances in their favor to show why panel members should consider the conduct criminal.

Baker also illustrates how defense counsel can use consent as a "defense" in indecent act cases. Because the panel must consider factual consent on the issue of what constitutes indecent conduct, counsel have an opportunity to provide evidence of consent to the members and argue that it negates the indecency of the acts. *Baker* also provides a valuable lesson to defense counsel regarding substantive criminal law. Knowing the law, objecting when trial counsel misstates the law, and crafting tailored instructions can often make the difference between winning and losing at trial. Good defense counsel make solid, well-reasoned closing arguments. Great defense counsel tie their closing arguments to the military judge's instructions. Outstanding defense counsel craft their own instructions using the law to benefit their clients to the maximum extent possible.

United States v. Sims:
Sexual Contact Not "Open and Notorious" When in Private Bedroom with Door Closed but Not Locked

Staff Sergeant (SSG) Kendall Sims hosted a promotion party in his quarters while stationed in Riyadh, Saudi Arabia. About forty people attended the party. The attendees danced and ate

51. *Id*. at 340.

52. *Id*. (quoting United States v. Strode, 43 M.J. 29, 32 (1995) ("Sexual acts may be made the basis for an indecent-acts offense if the resulting conduct is service-discrediting or if the acts constitute foreplay to the ultimate criminal sexual acts of sodomy or carnal knowledge.")).

53. *See* MCM, *supra* note 3, pt. IV, ¶ 87

54. *Baker*, 57 M.J. at 341 (Baker, J., dissenting).

55. *Id*. at 343.

56. *Id*.

57. *Id*. at 333-34.

58. *Id*. at 336.

in two rooms next to SSG Sims's private bedroom.[59] SSG Sims "kept a supply of hard liquor in his bedroom . . . . He had also told the women present at the party that they could leave their purses and personal items in his bedroom."[60] At about 2400 hours, SSG Sims asked Private First Class (PFC) AB back to his bedroom for a private party, along with three other soldiers. The three soldiers left after five to ten minutes. After SSG Sims and PFC AB were alone in the bedroom, the accused consensually fondled PFC AB's breasts. During the sexual activity, "the door was closed but not locked . . . . [N]o one knocked on the door or came into the room."[61]

The accused pled guilty to committing an indecent act with PFC AB.[62] During the plea inquiry, the military judge explained the indecency requirement of the offense as follows:

> Consensual sexual conduct ordinarily—and in your case would ordinarily be—not a criminal offense if done in private. However, it can constitute an indecent act if done in public. And "public" includes that there is a substantial risk that your conduct—your activities could be viewed by another or it's reasonably likely that your conduct could be viewed by another. So I'm trying to figure out what is the indecent nature of the conduct and the contact you had with Private [AB] that would make this indecent, that is, that would make it likely or reasonably likely or a substantial risk that you could be discovered. So that's what I'm trying to find out. You're the guy pleading guilty, not anybody else.[63]

The accused admitted that someone could have discovered his activity because there was nothing preventing anyone from walking into the room at any time.[64]

The CAAF held that SSG Sims's plea to an indecent act was improvident and reversed the finding of guilty. The court found that there was an insufficient factual predicate to support the conclusion that it was reasonably likely under the circumstances that others would see the accused touching PFC AB's breasts. Therefore, the acts did not constitute "open and notorious" sexual conduct.[65]

In *United States v. Berry*,[66] the Court of Military Appeals (COMA)[67] established that criminalizing otherwise consensual and lawful sexual activity required that the act be done in the known presence of a third party.[68] In *United States v. Izquierdo*,[69] the CAAF accepted a broader rule of criminal liability. "*Izquierdo* clarified the *Berry* definition . . . by holding that it was not necessary to prove that a third person actually observed the act, but only that it was reasonably likely that a third person would observe it."[70] In *Izquierdo*, the court upheld the legal sufficiency of an indecent act specification "where the accused had sexual intercourse with a woman in his barracks room while his two roommates were in the room, even though he blocked their view by hanging up a sheet 'that substantially blocked his roommates' view of his side of the room.'"[71] In the same case, however, the CAAF reversed as legally insufficient

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59. United States v. Sims, 57 M.J. 419, 420 (2002).

60. *Id*.

61. *Id*.

62. *Id*. at 421. The elements of Indecent Acts with Another under UCMJ Article 134 are:

> (a) That the accused committed a certain wrongful act with a certain person;
> (b) That the act was indecent; and
> (c) That, under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces.

MCM, *supra* note 3, pt. IV, ¶ 90b.

63. *Sims*, 57 M.J. at 425.

64. *Id*. at 421.

65. *Id*. at 422.

66. 20 C.M.R. 325 (1956).

67. The Court of Military Appeals (COMA) is now referred to as the Court of Appeals for the Armed Forces (CAAF). U.S. Court of Appeals for the Armed Forces, *Establishment*, at http://www.armfor.uscourts.gov/Establis.htm (last visited Mar. 5, 2003).

68. *Sims*, 57 M.J. at 421 (citing *Berry*, 20 C.M.R. at 330).

69. 51 M.J. 421 (1999).

70. *Sims*, 57 M.J. at 422.

"an indecent act where the accused had sexual intercourse in a shared barracks room, with the door closed but unlocked and no one else present in the room."[72]

Although *Izquierdo* was a contested case, the CAAF used its closely analogous fact pattern to decide that SSG Sims's plea to an indecent act was improvident. The court reasoned that SSG Sims had a greater expectation of privacy in his private bedroom than Izquierdo had in his shared room and that neither SSG Sims nor PFC AB had disrobed. Additionally, the court expressed that the parties could have terminated the act quickly had anyone attempted to enter the room.[73] Thus, given the facts elicited by the military judge from SSG Sims, the sexual activity committed behind a closed but unlocked door was not enough to constitute an indecent act. Judge Sullivan concurred in the result, but he argued that dicta in *Izquierdo* did not establish a broader rule of criminal liability than that expressed in *Berry*. He eschews the majority's clear adoption of the *Izquierdo* standard.[74]

Chief Judge Crawford's dissent in *Sims* sheds significant light on her view of how the court has dealt with military sex offenses in recent years. The Chief Judge agrees with the majority that *Izquierdo* established the correct standard for analyzing what constitutes open and notorious conduct.[75] She differs from the majority, however, because she feels that it was reasonably likely that others would view SSG Sims's conduct.[76] She further argues that "[t]he majority opinion effectively establishes a *per se* rule that if a sexual act takes place behind a closed door without intrusion, the act cannot be 'indecent' as a matter of law."[77] After listing her recent dissenting opinions in cases involving sex offenses, the Chief Judge signals her increasing displeasure with the direction the court has taken regarding sex offenses. Particularly, she expresses serious concern about "the impact of the majority opinion on prevailing jurisprudence, the rights of victims, and the public perception of military justice."[78]

Sims is significant for military justice practitioners for three reasons. First, Chief Judge Crawford's dissent clearly shows her dissatisfaction with the court's recent decisions in sex cases. Although her concerns about victims' rights seem a bit unfounded in *Sims*, a case involving consensual acts,[79] trial and particularly appellate practitioners should remain aware of her established inclination to affirm convictions in sex cases whenever possible. Second, *Sims* clarifies that practitioners should refer to and use the *Izquierdo* standard for evaluating whether or not conduct meets the open and notorious requirement for criminality. Third, although *Sims* relies on the broader *Izquierdo* standard for criminal liability, the case appears to narrow the scope of the "reasonably likely that a third person would observe it" language. This narrowing is consistent with the CAAF's overall trend in cases involving consensual sexual activity. The court requires the government to pay particular attention to proving the element that makes the conduct criminal.

United States v. Graham:
Indecent Exposure in Bedroom Sufficient "Public View"

Corporal Quinton T. Graham asked his child's fifteen-year-old babysitter to come into the bedroom of his home. He then exposed himself to her by allowing a towel that was wrapped around his waist to fall to the floor. The babysitter was "completely unrelated to and uninvolved with him, and [she] neither invited nor consented to his conduct."[80] A panel of officer and enlisted members convicted the accused of indecent exposure.[81]

The CAAF affirmed the conviction for indecent exposure, holding that the accused's actions were in the "public view."[82] The court specifically stated its desire to "expressly make clear what was always implicit . . . regarding the definition of 'public view.'"[83] Because the facts were clear that the exposure was

71. *Id*. at 421 (quoting *Izquierdo*, 51 M.J. at 423).

72. *Id*.

73. *Id*. at 422.

74. *Id*. at 422-23 (Sullivan, J., concurring in the result).

75. *Id*. at 424 (Crawford, J., dissenting).

76. *Id*. at 427.

77. *Id*. at 423.

78. *Id*. Chief Judge Crawford cites her dissents in the following sex offense cases to support and illustrate her concerns: United States v. Baker, 57 M.J. 330, 337 (2002); United States v. Ayers, 54 M.J. 85, 95 (2000); United States v. Tollinchi, 54 M.J. 80, 83 (2000); United States v. Morrison, 52 M.J. 117, 124 (1999); United States v. Hoggard, 43 M.J. 1, 4 (1995); United States v. Cage, 42 M.J. 139, 147 (1995).

79. *Sims*, 57 M.J. at 421. The majority responded to Chief Judge Crawford's concerns in a footnote to its opinion. "The military judge's explanation clearly shows that this case is not about victim's rights, as the dissent suggests. Appellant pleaded guilty to a consensual act. The alleged unlawfulness of the act was based on its public nature, not the co-actor's lack of consent." *Id*. at 421 n.1.

80. United States v. Graham, 56 M.J. 266, 267 (2001).

willful and indecent, the court quickly turned its legal sufficiency analysis to whether the conviction should be "set aside because it occurred in his bedroom, as opposed to some other, more public location."[84]

In interpreting what definition of "public view" governs the Article 134 offense of indecent exposure, the CAAF differentiated between statutes that use the word "public" as an adjective and those that use it as a noun.

> "Public place" means a location that is public, and in that context, "public" is an adjective that describes the place as one "accessible or visible to the general public," to use the *Romero* court's definition. In our opinion, consistent with a focus on the victims and not the location of public indecency crimes, "public view" means "in the view of the public," and in that context, "public" is a noun referring to any member of the public who views the indecent exposure.[85]

Although Corporal Graham exposed himself in a non-public place, he did so in view of a member of the public. "[H]e made certain that an unsuspecting and uninterested member of the general population had no choice but to see him naked."[86]

Graham provides practitioners with clear guidance that the scope of misconduct covered by the offense of indecent exposure includes exposures that occur in privately owned homes and other nonpublic places. The case explicitly defines "public view" to mean in view of any unsuspecting and uninterested member of the public. It also summarizes the two distinct types of indecent exposure that the CAAF recognizes for military practice: "(1) exposure in a public place, the very fact of which tends to prove it was willful, and (2) exposure that does not occur in a public place . . . but . . . may still constitute the offense of indecent exposure if other evidence proves that it was."[87] As a practical matter, both trial and defense counsel should use the two-pronged summary to distinguish the type of exposure involved in their case. Then they can properly craft arguments based on relevant evidence and appropriate inferences.

Trends Regarding Consensual Sex Offenses: "Be Good and You Will Be Lonesome"[88]

Although *Graham* does not deal directly with the issue of indecency, the CAAF cites *Graham* in *Baker* to support its conclusion that "all the facts and circumstances of a case including the alleged victim's consent, must be considered on the indecency question."[89] The court makes reference to a brief section in *Graham* where it states,

> He did not expose himself to his spouse or girlfriend, or to a family member or other person involved with him in such a way that a given exposure might not be indecent. Appellant exposed himself to a fifteen-year-old girl who was completely unrelated to and uninvolved with him, and who neither invited nor consented to his conduct. Thus, appellant does not contest the legal sufficiency of the evidence relating to the indecency element of his offense, and we hold that the court below did not err in concluding appellant's exposure was indecent.[90]

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81. *Id*. at 266. The elements of Indecent Exposure under Article 134, UCMJ are:

> (a) That the accused exposed a certain part of the accused's body to public view in an indecent manner;
> (b) That the exposure was willful and wrongful; and
> (c) That, under the circumstances, the accused's conduct was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces.

MCM, *supra* note 3, pt. IV, ¶ 88b.

82. *Graham*, 56 M.J. at 266.

83. *Id*. at 266-67 (citing United States v. Shaffer, 46 M.J. 94 (1997)).

84. *Id*. at 267.

85. *Id*. at 269 (quoting State v. Romero, 710 P.2d 99, 102-03 (N.M. 1985)).

86. *Id*. at 268.

87. *Id*.

88. JOHN BARTLETT, FAMILIAR QUOTATIONS 527:21 (1992) (quoting MARK TWAIN, FOLLOWING THE EQUATOR 527 (1897)).

89. United States v. Baker, 57 M.J. 330, 336 (2002).

90. *Graham*, 56 M.J. at 267.

Thus, the CAAF either directly or indirectly signals in *Graham*, *Baker*, and *Sims* that it will closely scrutinize "consensual" sex offenses to ensure that the evidence supports all the required elements. The *Graham* fact pattern does not immediately suggest that it is a case about "consensual" sexual activity. Because the CAAF specifically cites the part of the case where indecent behavior is distinguished from acceptable behavior, however, practitioners can properly look to *Graham*, as well as *Baker* and *Sims*, for an idea of what standard of legal sufficiency the court will use in the future for "consensual" sex offenses.

In the April 2001 edition of *The Army Lawyer*, Major Timothy Grammel identified a trend regarding nonconsensual sex offenses after analyzing four CAAF opinions written during the 2000 term.[91] He wrote:

> Although the four CAAF opinions involved four different offenses, they have similarities that signal a trend. The CAAF will closely scrutinize this type of case to ensure the evidence supports all the elements of the offenses. As Judge Sullivan argued in his dissenting opinion in *Johnson*, it appears that the court is using a higher standard than the law provides for legal sufficiency.[92]

This year in *Sims*, Chief Judge Crawford cited her dissents in two of the cases discussed by Major Grammel (*Ayers*[93] and *Tollinchi*[94]), along with her dissent in *Baker*,[95] when expressing growing concerns about the negative impact of the majority's opinions.[96] Certainly, if the Chief Judge senses a pattern, then practitioners should also pay close attention to any trends apparent in the opinions.

In 2000, the factual issues in the nonconsensual sex cases were close calls.[97] This year, *Baker* and *Sims* present close consensual sex cases. In 2000, the CAAF decided the four cases together and reversed all four. This year, the CAAF decided *Baker* and *Sims* together and reversed them both.[98] The clear message in 2000 was that the CAAF "will not tolerate overcharging" in sex cases.[99] The court will closely scrutinize the evidence to see that it supports all the elements of the offenses. The message this year is similar. The court will not tolerate calling consensual sexual activity criminal unless the elements that make it criminal are clearly proven. Whether the pertinent elements refer to the indecent character of the conduct or its open and notorious nature, the CAAF wants any and all relevant factors considered and established before it will include consensual sexual activity within the scope of proscribed conduct.

Particularly in consensual sex cases, trial counsel must ensure they clearly meet their burden of proving each element beyond a reasonable doubt. The CAAF will hold the prosecution to that burden on appellate review. As seen in *Baker*, through the court's plain error analysis of the military judge's instructions, the majority may look beyond a normal legal sufficiency review to scrutinize these cases. Defense counsel should take every opportunity to preserve issues in sex cases by challenging whether or not the alleged misconduct even fits within the range of activity intended to be proscribed by Congress or the President. Appellate defense counsel should not let any opportunity pass to challenge the legal sufficiency of nonconsensual as well as consensual sex cases, especially given the majority's leanings in recent years.

Necessity of Proving Actual Physical or Mental Harm

United States v. Carson:
No Requirement of Actual Harm for Maltreatment Under Article 93, UCMJ[100]

Sergeant (SGT) Claude B. Carson was the supervising desk sergeant at the military police (MP) station in Vilseck, Germany. During an eighteen-month period, SGT Carson allegedly fraternized with, indecently exposed himself to, and maltreated

91. Major Timothy Grammel, *Justice and Discipline: Recent Developments in Substantive Criminal Law*, ARMY LAW., Apr. 2001, at 71 (analyzing United States v. Fuller, 54 M.J. 107 (2000); United States v. Ayers, 54 M.J. 85 (2000); United States v. Tollinchi, 54 M.J. 80 (2000); United States v. Johnson, 54 M.J. 67 (2000)).

92. *Id.* at 71 (citing *Johnson*, 54 M.J. at 70 (Sullivan, J., dissenting)).

93. 54 M.J. at 95.

94. 54 M.J. at 83.

95. 57 M.J. 330 (2002).

96. United States v. Sims, 57 M.J. 419, 423 (2002) (Crawford, J., dissenting). *See supra* note 78.

97. Grammel, *supra* note 91, at 71.

98. *Baker* and *Sims* were decided on 30 September 2002. *See Baker*, 57 M.J. at 330; *Sims*, 57 M.J. at 419. *Johnson* was decided on 7 September 2001, and *Ayers*, *Tollinchi*, and *Fuller* were all decided on 11 September 2001. *See* United States v. Johnson, 54 M.J. 67 (2000); United States v. Tollinchi, 54 M.J. 80 (2000); United States v. Ayers, 54 M.J. 85 (2000); United States v. Fuller, 54 M.J. 107 (2000).

99. Grammel, *supra* note 91, at 71.

several junior enlisted subordinates.[101] At trial, the military judge acquitted SGT Carson of many offenses, but she found him guilty of three specifications of indecent exposure and five specifications of maltreatment. The military judge sentenced SGT Carson to a bad-conduct discharge, confinement for forty-two months, and reduction to the lowest enlisted grade.[102]

One of SGT Carson's victims was PVT G, a twenty-year-old female MP who had been in the Army for less than one year. SGT Carson was also PVT G's duty supervisor. At about 1:00 a.m., during PVT G's shift, the accused twice exposed his penis to her. He made no effort to cover himself and expressly drew PVT G's attention to his penis while it was exposed. The accused did not touch PVT G or make any sexual comments to her. After PVT G's shift ended at 6:00 a.m., she told another young female MP what happened, but she did not report the misconduct until 4:00 or 5:00 p.m. At trial, "[s]he testified that she was 'shocked' and 'bothered' by the exposure, and felt like 'a victim.'"[103]

Sergeant Carson's defense counsel moved for a finding of not guilty[104] on all the maltreatment specifications at the conclusion of the government's case. The defense counsel argued:

> [T]he alleged victims have not experienced the anguish that the cases refer to. *Hanson* talks about mental suffering, mental cruelty, physical cruelty or suffering, and looking at the maltreatment standard would be some level of pain, some suffering that's caused, that simply hasn't been satisfied by any testimony or any evidence that we've heard presented by the Government today.[105]

The prosecution responded by citing to the definition of maltreatment provided in the *Manual for Courts-Martial*.[106] The trial counsel argued that the definition contemplates an objective standard for maltreatment, not a standard based on a victim's subjective beliefs. Thus, the government was not required to show that the accused actually harmed the victims emotionally or physically.[107] The military judge dismissed one maltreatment specification, but denied the motion with regard to the other specifications, including the one involving PVT G.[108]

The CAAF affirmed the maltreatment conviction. The court concluded "that in a prosecution for maltreatment under Article 93, UCMJ, it is not necessary to prove physical or mental harm or suffering on the part of the victim."[109] The CAAF reasoned that the legislative history surrounding Article 93 did not indicate that Congress intended to exclude misconduct meeting an objective standard. Further, "in other instances in which Congress intended actual harm to be an element of an offense under the UCMJ, the statute clearly expressed such a requirement."[110] To sustain a maltreatment conviction, the government must only show, "as measured from an objective viewpoint in light of the totality of the circumstances, that the accused's actions

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100. The elements of maltreatment under UCMJ Article 93 are:

> (a) That a certain person was subject to the orders of the accused; and
> (b) That the accused was cruel toward, or oppressed, or maltreated that person.

MCM, *supra* note 3, pt. IV, ¶ 17b.

101. United States v. Carson, 57 M.J. 410, 411 (2002).

102. *Id.* at 410.

103. *Id.* at 411.

104. MCM, *supra* note 3, R.C.M. 917.

105. *Carson*, 57 M.J. at 411.

106. The explanation section for Article 93 states, in pertinent part,

> *Nature of act*. The cruelty, oppression or maltreatment, although not necessarily physical, must be measured by an objective standard. Assault, improper punishment, and sexual harassment may constitute this offense. Sexual harassment includes influencing, offering to influence, or threatening the career, pay, or job of another person in exchange for sexual favors, and deliberate or repeated offensive comments or gestures of a sexual nature. The imposition of necessary or proper duties and the exaction of their performance does not constitute this offense even though duties are arduous or hazardous or both.

MCM, *supra* note 3, pt. IV, ¶ 17c(2).

107. *Carson*, 57 M.J. at 411.

108. *Id.* at 412.

109. *Id.* at 415.

110. *Id.*

reasonably could have caused physical or mental harm or suffering."[111]

The question of the necessity of proof of actual mental or physical pain or suffering was one of first impression for the CAAF.[112] In *United States v. Fuller*,[113] the court "noted with approval the Manual's use of an objective standard and the application of Article 93, UCMJ, to sexual harassment."[114] The new development in *Carson* was the court's additional step of specifically eliminating any need to show actual harm in maltreatment cases. Trial counsel must remain wary, however, of overcharging maltreatment in situations without actual harm, particularly if the misconduct could be categorized as consensual sexual activity. First, as the CAAF specifically noted in *Carson*, "[P]roof of such harm or suffering may be an important aspect of proving that the conduct meets the objective standard."[115] Second, *Fuller* indicates that even under the objective standard, the court will closely scrutinize cases involving consensual conduct.[116]

Interestingly, *Fuller* was one of the four cases from two years ago that signaled the CAAF's apparent use of a higher standard of legal sufficiency in sex cases.[117] The *Fuller* court approved the use of the broad objective standard for assessing criminal culpability in maltreatment cases with approval, but it still reversed the conviction. The charge in *Fuller* was based on consensual sexual relations, and the accused did not exercise sufficient "dominance and control" to coerce the alleged victim to have sex with him.[118] At first, one might conclude that the broader objective standard of liability affirmed in *Carson* signals a competing trend to the one mentioned earlier in the article regarding the CAAF's close scrutiny of the decisive elements in consensual sex cases. Practitioners, however, must read *Carson* in conjunction with *Fuller.* Despite the fact that the government does not have to prove actual harm for a maltreatment conviction, the CAAF will still not tolerate overcharging, particularly when it comes to consensual sexual relations. SGT Carson's actions objectively constituted nonconsensual maltreatment of an unsuspecting and uninterested subordinate. Thus, like the indecent exposure to the babysitter in *Graham*, the court affirmed the conviction. Practitioners should not read the second trend identified by this article as competing with the first trend. Rather, it shows the court's willingness to expand the scope of proscribed conduct[119] to protect clear victims, while continuing to closely scrutinize cases involving sexual activity.

United States v. Vaughan: *Child Neglect Constitutes a Cognizable Offense Under Article 134*

Early in the 2003 term, the CAAF affirmed another conviction where the misconduct in question caused no actual harm or suffering to the victim. In *United States v. Vaughan*,[120] the CAAF affirmed that child neglect that does not result in actual harm is a cognizable offense under the service-discrediting clause of Article 134, UCMJ.[121] The court specifically stated that its approach in *Vaughan* was consistent with its reasoning in *Carson* regarding maltreatment. By doing so, the CAAF identified its preference for adopting objective standards when assessing criminal culpability in situations where the accused has been entrusted to exercise due care with regard to the mental or physical health, safety, or welfare of the victim.[122] In maltreatment cases, the party entrusted to act reasonably is the senior in a senior-subordinate relationship. In child neglect cases, the parent must reasonably avoid the risk of harm.

Airman First Class Sonya Vaughan entered a conditional plea of guilty to child neglect in violation of Clause 2, Article 134, UCMJ.[123] The accused lived off-base with her baby daughter, SK, in Pickliessem, Germany. At the time of the

111. *Id.*

112. *Id*. at 414.

113. 54 M.J. 107, 110 (2000).

114. *Carson*, 57 M.J. at 414. The Drafter's Analysis states, "The example of sexual harassment was added because some forms of such conduct are nonphysical maltreatment." MCM, *supra* note 3, UCMJ art. 93 analysis, at A23-6.

115. *Carson*, 57 M.J. at 415.

116. *Fuller*, 54 M.J. at 111.

117. *See supra* note 92 and accompanying text.

118. *Fuller*, 54 M.J. at 111.

119. *See generally* Velloney, *supra* note 14.

120. No. 02-0313, 2003 CAAF LEXIS 108 (Jan. 24, 2003).

121. *Id.* at *2.

122. *Id*. at *19-20.

offense, SK was forty-seven days old.[124] The accused left SK "alone in her crib for six hours from 11:00 p.m. to 5:00 a.m. while she went to a club that was a 90-minute drive away."[125] Earlier in the day, SK's father agreed to watch the baby starting around 10:30 p.m., but when he did not arrive, the accused elected to go to the club anyway. Because of the father's previous failures, the accused did not actually believe that he would show up that night. SK suffered no actual harm during her mother's absence.[126]

The CAAF resolved a split of opinion with its decision in *Vaughan*. Before affirming the child neglect charge in *Vaughan*,[127] the Air Force Court of Criminal Appeals held in an unpublished opinion in 1990 that child neglect was chargeable as an Article 134 offense.[128] In 1991, the Army Court of Criminal Appeals held in *United States v. Wallace*[129] that "child neglect that does not result in harm is not an Article 134 offense absent a regulation clearly prohibiting the conduct."[130]

In affirming Airman Vaughan's conviction for neglect as an offense under Article 134, the CAAF held that she was on notice of the potential criminality of her conduct. First, state statutes generally served "to provide constructive notice that child neglect through absence of supervision or care, with an attendant risk of harm, can constitute a criminal offense."[131] Second, under a *Parker v. Levy*[132] analysis, military custom and usage may define the scope of proscribed conduct under Article 134. Third, several Department of Defense and service regulations provided notice that neglect was potentially criminal.[133] After specifically addressing notice, the CAAF also held that the military judge properly defined the specific elements of the offense by informing the accused that child neglect "requires culpable negligence and not just simple negligence."[134] Finally, the court refused to adopt a per se rule that child neglect constitutes service-discrediting conduct. The factual predicate elicited by the military judge, however, convinced the court that the accused's plea was provident regarding the service-discrediting element of the offense.[135]

Vaughan has significant ramifications for military justice practitioners, particularly overseas. As states have developed more comprehensive child protection laws, trial counsel stationed in the United States have had state child neglect statutes available to assimilate into the UCMJ under Article 134, clause 3.[136] Government counsel overseas, however, have had to rely solely on inconsistent service regulations and local directives from commanders to prosecute service members. After *Wallace*, prosecuting neglect without proving any resulting harm became especially difficult for Army counsel.

Now, trial counsel overseas have an additional alternative when parents or guardians act with reckless disregard for their children. Although some would argue that child neglect without resulting harm should not be proscribed conduct, *Vaughan*

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123. *Id*. at *1. The explanation of service-discrediting conduct (clause 2) under Article 134 states:

> *Conduct of a nature to bring discredit upon the armed forces (clause 2).* "Discredit" means to injure the reputation of. This clause of Article 134 makes punishable conduct which has a tendency to bring the service into disrepute or which tends to lower it in public esteem.

MCM, *supra* note 3, pt. IV, ¶ 60c(3).

124. *Vaughan*, 2003 CAAF LEXIS 108, at *2.

125. *Id*. at *2-3.

126. *Id*. at *3. The accused was also convicted of assaulting SK by "striking her in the face and stomach and burning the back of her legs with a hair dryer . . . [and] fracturing her child's leg by pulling, jerking, or wrenching it." United States v. Vaughan, 56 M.J. 706, 706 (A.F. Ct. Crim. App. 2001).

127. *Vaughan*, 56 M.J. at 706.

128. *Vaughan*, 2003 CAAF LEXIS 108, at *7-8 (citing United States v. Foreman, No. 28008, 1990 CMR LEXIS 622, at *2 (A.F.C.M.R. May 25, 1990) (unpublished)).

129. 33 M.J. 561 (A.C.M.R. 1991).

130. *Vaughan*, 2003 CAAF LEXIS 108, at *7 (quoting *Wallace*, 33 M.J at 563-64).

131. *Id.* at *9. In an appendix to the majority opinion, Judge Baker provides an excellent list of state statutes that make child neglect criminally punishable. *Id*. at *25-38.

132. 417 U.S. 733 (1974) (holding that UCMJ Articles 133 and 134 are constitutional).

133. *Vaughan*, 2003 CAAF LEXIS 108, at *9-12.

134. *Id*. at *19.

135. *Id*. at *23.

136. Article 134, clause 3 allows prosecution of noncapital offenses that violate federal law, including state law made applicable under the Federal Assimilative Crimes Act. *See* 18 U.S.C. § 13 (2000).

provides an example of the CAAF engaging in that "incidental function of the criminal law"—teaching the difference between right and wrong.[137] If lawmakers feel that child neglect should be criminalized in the military, however, then recognizing an offense under Article 134, clause 2 is not sufficient. The general article simply does not provide sufficient uniformity.[138] "The realistic response is [Department of Defense] action that expeditiously promulgates a punitive regulatory provision for child neglect and provides uniform standards for parental responsibilities."[139]

Consistent standards for dealing with criminal child neglect in the military may not exist for a number of years. The tension between protecting the safety of children and respecting family privacy can be troublesome. In the meantime, trial counsel should not read *Vaughn* as providing a license to prosecute questionable child neglect cases. The standard expressed in the case may not require harm, but it does require "culpably negligent conduct, unreasonable under the totality of the circumstances, that causes a risk of harm to the child."[140] Whenever possible, defense counsel should emphasize the reasonableness of their clients' actions and explain how the conduct does not rise above the level of simple negligence. Through its case law, the CAAF has recognized an additional offense under Article 134. Now, through trial practice and effective advocacy, trial and defense counsel will shape and test the boundaries of proscribed conduct.

Failure to Obey Lawful Orders

United States v. Jeffers:
Lawfulness of Orders Explicitly an Issue of Law for the Military Judge

In *United States v. Jeffers*,[141] the CAAF clarified the standard it expressed last year in *United States v. New.*[142] Military judges may properly decide issues regarding the lawfulness of orders as interlocutory questions of law.[143] Because lawfulness is not a discrete element in disobedience offenses, military judges—and not panels—determine whether or not orders are lawful.[144] Before discussing the significance of *Jeffers*, a brief review of *New* is necessary.[145]

A special court-martial convicted SPC New of failure to obey an order in violation of Article 92(2), UCMJ.[146] Specialist New's commander ordered him to wear a United Nations (UN) blue beret and other insignia as part of his uniform, in preparation for and during a deployment to the Former Yugoslav Republic of Macedonia.[147] At trial, SPC New challenged the legality of the order to wear the modified uniform with UN insignia as well as the legality of the deployment itself. He argued that his commander's order violated the Army uniform regulation.[148] With respect to the deployment, he claimed that "President Clinton misrepresented the nature of the deployment to Congress and failed to comply with the United Nations Participation Act."[149] Despite SPC New's objections, the military judge prevented panel members from deciding issues regarding

137. PERKINS & BOYCE, *supra* note 2, at 6.

138. *See generally* Major Lisa M. Schenck, *Child Neglect in the Military Community: Are We Neglecting the Child?*, 148 MIL. L. REV. 1 (1995); Major David T. Cluxton, *Military Child Neglect: Mucking out the Morass*, 51st Graduate Course Research Paper, The Army Judge Advocate General's School, Spring 2003 (on file with author).

139. Schenck, *supra* note 138, at 78.

140. *Vaughan*, 2003 CAAF LEXIS 108, at *21.

141. 57 M.J. 13 (2002).

142. 55 M.J. 95 (2001).

143. *Jeffers*, 57 M.J. at 16.

144. *New*, 55 M.J. at 100.

145. For more analysis of *New*, see Velloney, *supra* note 14, at 52-55.

146. *New*, 55 M.J. at 97. The elements of Failure to Obey and Order under UCMJ Article 92(2) are:

(a) That a member of the armed forces issued a certain lawful order;
(b) That the accused had knowledge of the order;
(c) That the accused had a duty to obey the order; and
(d) That the accused failed to obey the order.

MCM, *supra* note 3, pt. IV, ¶ 16b(2).

147. *New*, 55 M.J. at 98.

148. U.S. DEP'T OF ARMY, REG. 670-1, WEAR AND APPEARANCE OF ARMY UNIFORMS AND INSIGNIA (1 Sept. 1992).

lawfulness. He ruled that the challenge to the deployment's legality was a nonjusticiable political question. He then ruled that the order to wear the uniform with UN accouterments was lawful and instructed the panel that the order was lawful.[150]

In affirming the military judge's actions, the CAAF held that "lawfulness of an order, although an important issue, is not a discrete element of an offense under Article 92."[151] The military judge, therefore, properly considered lawfulness as a question of law.[152] Judges Sullivan and Everett wrote opinions concurring in the result because they considered lawfulness an essential element of the offense.[153] All five judges agreed with the military judge's decision to refrain from ruling on the deployment's legality, however, because it constituted a nonjusticiable political question.[154]

In his concurring opinion, Judge Effron cited consistency and reviewability as important reasons for allowing military judges, as opposed to panel members, to rule on lawfulness.

> Rather than producing the unity and cohesion that is critical to military operations, appellant's approach could produce a patchwork quilt of decisions, with some courts-martial determining that orders were legal and others determining that the same orders were illegal, without the opportunity for centralized legal review that is available for all other issues of law.[155]

By unanimously agreeing on the political question issue, the court as a whole indicated a preference for consistency and reviewability in high-profile cases. Service members should not be allowed to substitute their personal beliefs for that of their commanders or the President regarding the legality of orders. "An order requiring the performance of a military duty or act may be inferred to be lawful and it is disobeyed at the peril of the subordinate."[156]

Before the *New* case, practitioners faced conflicting guidance regarding who should decide factual issues pertinent to the legality of orders.[157] In fact, the *Military Judge's Benchbook* (*Benchbook*)[158] and the discussion in Rule for Courts-Martial (RCM) 801(e) still conflict. The discussion to RCM 801(e) contemplates the military judge ordinarily deciding the lawfulness of an order.[159] The *Benchbook* provides that panel members should decide factual disputes as to whether or not an order was lawful.[160]

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149. *New*, 55 M.J. at 107 (citing United States v. New, 50 M.J. 729, 736 (Army Ct. Crim. App. 1999)).

150. *Id.* at 97.

151. *Id.* at 100.

152. *Id.*

153. *Id*. at 115 (Sullivan, J., concurring in the result); *id*. at 130 (Everett, J., concurring in part and in the result).

154. *Id*. at 107.

155. *Id*. at 110 (Effron, J., concurring).

156. MCM, *supra* note 3, pt. IV, ¶ 14c(2)(a)(i).

157. *New*, 55 M.J. at 115 (Sullivan, J., concurring in the result); *id.* at 111-14 (Effron, J., concurring).

158. BENCHBOOK, *supra* note 28, ¶ 3-16-3.

159. MCM, *supra* note 3, R.C.M. 801(e)(5) discussion. The discussion states, in pertinent part:

> Questions of the applicability of a rule of law to an undisputed set of facts are normally questions of law. Similarly, the legality of an act is normally a question of law. For example, the legality of an order when disobedience of an order is charged, the legality of restraint when there is a prosecution for breach of arrest, or the sufficiency of warnings before interrogation are normally questions of law. It is possible, however, for such questions to be decided solely upon some factual issue, in which case they would be questions of fact. For example, the question of what warnings, if any were given by an interrogator to a suspect would be a factual question.

Id.

160. BENCHBOOK, *supra* note 28, ¶ 3-16-3 n. 3. According to note 3, the military judge should give the following instruction if the lawfulness of the order presents an issue of fact for the members:

> An order, to be lawful, must relate to specific military duty and be one that the member of the armed forces is authorized to give. An order is lawful if it is reasonably necessary to safeguard and protect the morale, discipline and usefulness of the members of a command and is directly connected with the maintenance of good order in the services . . . . You may find the accused guilty of failing to obey a lawful order only if you are satisfied beyond a reasonable doubt that the order was lawful.

Id.

At first glance, *New* appeared to establish a bright line rule settling any conflicting guidance. Yet, the plurality of opinions left open some question as to whether or not the court intended for military judges to rule on the lawfulness of *all* potential orders. *New* presented a unique set of facts, and the court could have intended to limit its holding to high-profile situations involving nonjusticiable political questions or those requiring absolute consistency and reviewability. With regard to routine or commonplace orders, are panel members or military judges better suited to evaluate if the directive passes the "military duty test?" [161] "[B]y reason of their age, education, training, experience, length of service, and judicial temperament,"[162] panel members seem uniquely qualified to determine if an order is "reasonably necessary to accomplish a military mission, or safeguard or promote the morale, discipline, and usefulness of members of a command."[163] In *Jeffers*, however, the CAAF cleared up any ambiguity created by *New*. The majority expressed its unequivocal view that military judges should decide all issues regarding the lawfulness of orders.[164]

In *Jeffers*, Captain (CPT) DeHaan ordered Specialist (SPC) Jeffers not to have social contact with Private (PVT) P. The company commander gave the no-contact order after discovering that SPC Jeffers, a married soldier stationed in Korea, was having an extramarital relationship with PVT P. Because SPC Jeffers and PVT P were members of the same company, only "official" contact was authorized. Specialist Jeffers violated the no-contact order twice. Private P visited SPC Jeffers's room on one occasion for fifteen to twenty minutes. On another occasion, SPC Jeffers had social contact with PVT P at the Navy Club on Yongsan Garrison.[165]

Among other charges, a court-martial convicted SPC Jeffers of two specifications of violating CPT DeHaan's no-contact order.[166] During the trial, the military judge instructed the members that "as a matter of law, the order in this case, if in fact there was an order, was lawful."[167] The defense counsel did not object to the instruction.[168] On appeal, SPC Jeffers asserted that the military judge's instruction violated his constitutional and statutory right to have the members determine whether or not the government proved every essential element of the offense beyond a reasonable doubt.[169] Specialist Jeffers specifically argued that the *New* case was "not dispositive because that case involved a question of law."[170] "Here . . . there was a factual issue raised as to whether the order issued by the company commander was 'reasonably necessary,' and that factual decision belonged to the members."[171]

In affirming SPC Jeffers's convictions for disobedience, the CAAF explicitly held that the military judge did not err by deciding the issue of lawfulness himself.[172] Regarding the rather routine and commonplace no-contact order, the majority explicitly held, "[L]awfulness is a question of law."[173] *Jeffers* clarifies for practitioners that the military judge is the gatekeeper regarding lawfulness of all orders, including those that are routine and involve multiple questions of fact. Therefore,

161. The "military duty" test found in the *MCM* states, in pertinent part:

> (iii) *Relationship to military duty.* The order must relate to military duty, which includes all activities reasonably necessary to accomplish a military mission, or safeguard or promote the morale, discipline, and usefulness of members of a command and directly connected with the maintenance of good order in the service. The order may not, without such a valid military purpose, interfere with private rights or personal affairs. However, the dictates of a person's conscience, religion, or personal philosophy cannot justify or excuse the disobedience of an otherwise lawful order.

MCM, *supra* note 3, pt. IV, ¶14c(2)(a)(iii).

162. *Id.* R.C.M. 502(a)(1).

163. *Id.* pt. IV, ¶ 14c(2)(a)(iii).

164. United States v. Jeffers, 57 M.J. 13, 16 (2002).

165. *Id.* at 14.

166. *Id.* at 13-14. The court-martial convicted SPC Jeffers, on mixed pleas, of failing to obey a lawful order (two specifications), rape, forcible sodomy, and adultery (four specifications). *Id*.

167. *Id.* at 15.

168. *Id.*

169. *Id.* at 14.

170. *Id.* at 15.

171. *Id.*

172. *Id.* at 16.

173. *Id.* (quoting United States v. New, 55 M.J. 95, 105 (2001)).

the military judge passes judgment on the nexus between the order and its relationship to military duty. *Jeffers* begs the question of whether or not the CAAF's broad pronouncement regarding all possible orders went too far. As Senior Judge Sullivan noted, military panels evaluate lawfulness as an element for many other offenses.[174] Because panel members are uniquely qualified to analyze the facts regarding the reasonableness and necessity of orders, perhaps they should be allowed to do so in routine cases regardless of any risks to consistency and reviewability.

Although the CAAF appears to have empowered military judges to make lawfulness determinations in all orders cases, defense counsel should continue to present evidence regarding lawfulness and ask for instructions that allow the members to decide whether or not orders reasonably relate to accomplishing a military mission. Counsel should try to analogize the military judge's initial ruling on lawfulness to a decision on the voluntariness of a confession. Even though the military judge rules that a confession is admissible,[175] defense counsel may still present evidence to the members regarding voluntariness.[176] Although significant modifications would be necessary because of the gravity of deciding lawfulness in some cases, a similar model may prove appropriate for allowing panel members to evaluate whether or not orders relate to military duty.

Jeffers provides clear guidance to the field. Military judges decide whether or not orders are lawful. As Judge Effron noted in *New*, however, "[U]nderlying these concerns is the question of which issues involving the legality of an order call for the expertise that a blue ribbon court-martial panel brings to the process and which call for the expertise that a military judge brings to the process."[177] Perhaps the time has come for the Joint Service Committee to address the issue itself and modify the guidance provided in the *MCM*. If practitioners are not satisfied or comfortable with military judges making final determinations of lawfulness, then the President should provide guidance to the field. The CAAF would likely give deference to such guidance.[178]

Although the temptation often is great—with good justification—to allow the law to develop through the process of litigating specific cases, this is an area in which many weighty questions affecting the fundamental rights and obligations of service members remain unanswered. In that context, a serious effort to address the questions concerning the process of adjudicating the legality of orders would appear to be in the best interest of our nation and our men and women in uniform.[179]

Multiplicity

United States v. Palagar: *Conduct Unbecoming and Larceny Multiplicious if Both Refer to the Same Misconduct*

During each of the past three years, the CAAF has decided an important case involving multiplicity and Article 133, UCMJ.[180] In light of this continuing trend, a look back at the legal landscape is appropriate. In 1984, the Court of Military Appeals (COMA) decided *United States v. Timberlake*.[181] In *Timberlake*, the government charged substantially the same misconduct as both conduct unbecoming under Article 133 and forgery under Article 123(2), UCMJ.[182] The COMA found that

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174. *Id.*

175. BENCHBOOK, *supra* note 28, ¶ 4-1 n. 1. Note 1 states:

> Upon timely motion to suppress or objection to the use of a pretrial statement of the accused or any derivative evidence there from, the military judge must determine admissibility by a preponderance of the evidence standard. Military Rules of Evidence 304 and 305 cover pertinent definitions and rules for admissibility. Absent a stipulation of fact, the judge shall make essential findings of fact.

Id.

176. *Id.* ¶ 4-1 n. 3. Note 3 states, in pertinent part:

> If a statement is admitted into evidence, the defense must be permitted to present evidence as to the voluntariness of the statement. The military judge in such a case must instruct the members to give such weight to the statement as it deserves under all the circumstances.

Id.

177. *New*, 55 M.J. at 114 (Effron, J., concurring).

178. *Id*.

179. *Id*.

180. The elements of Conduct Unbecoming an Officer and Gentleman under UCMJ Article 133 are:

> (a) That the accused did or omitted to do certain acts; and
> (b) That, under the circumstances, these acts or omissions constituted conduct unbecoming an officer and gentleman.

MCM, *supra* note 3, pt. IV, ¶ 59b.

the only difference between the two offenses was that the Article 133 charge required proof of unbecoming conduct. The court thus reasoned that it must dismiss the forgery charge as a lesser-included offense.[183] *Timberlake* appeared to establish clear guidance. The government cannot expect to gain a conviction for both a substantive offense and conduct unbecoming using the same underlying misconduct.

Despite the holding in *Timberlake*, many trial counsel continued to charge multiplicious Article 133 offenses whenever an officer committed misconduct. Occasionally, charging in the alternative was necessary. Yet, government counsel often contended that military judges should let both an Article 133 offense and another substantive offense stand for the same underlying misconduct. One cause for the practice was counsel legalistically following language from the explanation section for Article 133 that seemingly justified their actions. The drafters' non-binding explanation stated, "This article includes acts made punishable by any other article, provided these acts amount to conduct unbecoming an officer and a gentleman. Thus, a commissioned officer who steals property violates both this article and Article 121."[184]

During the 2000 term, the CAAF attempted to clarify how multiplicity standards apply to Article 133. In *United States v. Cherukuri*,[185] the court held that a conduct unbecoming specification was multiplicious with four specifications of indecent assault addressing the same underlying misconduct.[186] Then, in the 2001 term, the CAAF decided *United States v. Frelix-Vann*.[187] In *Frelix-Vann*, the accused pled guilty and was convicted one specification of larceny under Article 121 and one specification of conduct unbecoming under Article 133, for the same exact misconduct.[188] Consistent with *Cherukuri*, the CAAF held that the offenses were multiplicious for findings and remanded the case to the Army Court of Criminal Appeals (ACCA) to select which finding of guilt to affirm.[189]

By ruling that larceny under Article 121 and indecent assault under Article 134 were lesser-included offenses of conduct unbecoming,[190] the CAAF exhibited a clear dislike for using Article 133 to overcharge cases against officers.[191] In *United States v. Palagar*,[192] the court continued the effort begun in *Cherukuri* and *Frelix-Vann* to make its position on duplicative convictions abundantly clear. Only one conviction for the same underlying misconduct will withstand scrutiny by the court.

The accused, Chief Warrant Officer Two (CW2) Edwin Palagar, used an International Merchant Purchase Authorization Card (IMPAC) to purchase $2242 worth of merchandise for his personal use.[193] He submitted phony receipts to support the purchases. When an officer was appointed to investigate his suspected misuse of the IMPAC credit card, CW2 Palagar submitted additional phony receipts to the investigating officer. The accused pled guilty to "signing a false official record, larceny, obstructing justice by submitting altered receipts to the investigating officer, and conduct unbecoming an officer by making unauthorized purchases with the IMPAC card and concealing those purchases by creating phony receipts."[194] The defense moved to dismiss the larceny and obstruction of justice charges as multiplicious with the charge of conduct unbecoming an officer. The conduct unbecoming specification referred to facts that formed the basis for both the larceny and obstruct-

181. 18 M.J. 371 (C.M.A. 1984) (holding that, when forgery constitutes the underlying conduct required for conduct unbecoming an officer, Congress intended that forgery would become a lesser included offense of the conduct unbecoming offense); *see also* United States v. Waits, 32 M.J. 274 (C.M.A. 1991); United States v. Taylor, 23 M.J. 314 (C.M.A. 1987).

182. UCMJ art. 123(2) (2002).

183. *Timberlake*, 18 M.J. at 375.

184. MCM, *supra* note 3, pt. IV, ¶ 59c(2).

185. 53 M.J. 68 (2000).

186. *Id.* at 71-72.

187. 55 M.J. 329 (2001).

188. *Id.* at 330.

189. *Id.* at 333.

190. *Id.*

191. *See generally* Velloney, *supra* note 14, at 55-62; *see also* Major David D. Velloney, *Tactical Charging: Choosing Wisely the Terrain on Which You Want to Fight!*, ARMY LAW., Sept. 2002, at 56-57.

192. 56 M.J. 294 (2002).

193. *Id.* at 295.

194. *Id.*

ing justice specifications. The military judge denied the motion but announced that he considered the overlap between offenses when fashioning an appropriate sentence.[195]

The ACCA found that the obstruction of justice conviction and the conduct unbecoming conviction were multiplicious. The court did not find, however, that the larceny conviction was multiplicious with the conduct unbecoming conviction. The ACCA then allowed the government to elect whether to retain the obstructing justice conviction or the conduct unbecoming conviction. Government appellate counsel chose to retain the obstructing justice conviction but asked the court to also affirm the conduct unbecoming conviction, except for the language that formed the basis for the obstructing justice conviction. The court granted the government's request.[196]

The appellant next argued to the CAAF that the ACCA should have set aside the lesser-included offense of obstruction of justice instead of allowing all three convictions (larceny, obstructing justice, and conduct unbecoming) to stand. The CAAF held that the Army court's methodology was consistent with *Cherukuri* and *Frelix-Vann*, where the higher court remanded the cases to the service court to decided which conviction to retain.[197]

> Instead of dismissing the lesser-included offense, the lower court dismissed only so much of the greater offense as overlapped the lesser-included offense. This action was not inconsistent with the decisions of this Court. The error to be remedied is a double conviction for the same act. The lower court's decision eliminated the double conviction for obstructing justice. Thus, we hold that the lower court did not err by setting aside so much of the conviction of conduct unbecoming an officer as was included in the obstruction of justice.[198]

The CAAF also held, however, that the lower court did err by neglecting "to remedy the multiplicity of larceny and conduct unbecoming by committing larceny."[199] Instead of remanding to let the government make yet another election, the CAAF set aside the conviction for the lesser-included offense of larceny.[200]

Palagar shows that the CAAF will strictly prohibit the government from attaining duplicative convictions for conduct unbecoming and another substantive offense for the same underlying misconduct. Although *Palagar* allows government counsel to elect whether to retain the greater or lesser offense and affirms a government-friendly methodology for remedying multiplicious convictions, the case signals once again that the court will not tolerate overcharging using Article 133. Trial counsel must draft conduct unbecoming specifications that clearly indicate a separate factual basis for the charge. Otherwise, military judges or the appellate courts will force the government to exercise the election described above to remedy multiplicious convictions.

Although Chief Judge Crawford strongly dissents each time the majority strikes down another Article 133 conviction as multiplicious,[201] the CAAF's position has become firmly entrenched throughout the past three years. Practitioners must remain vigilant when charging officers and carefully choose whether to even charge conduct unbecoming. In many situations, a conviction for the substantive offense may more accurately reflect the culpability of the accused. Wise trial counsel will heed the court's warnings and limit use of conduct unbecoming to situations where the accused's opprobrious actions mandate drafting a novel specification under Article 133.

Conclusion

During the 2002 term, the CAAF continued to educate practitioners about the scope of acceptable behavior in the armed forces. The court's decisions in the area of substantive criminal law reflected four distinct trends. First, the court will closely scrutinize "consensual" sexual activity to ensure that charged acts meet the requisite requirements for converting acceptable behavior into criminally culpable conduct. Second, for maltreatment and child neglect cases, if an accused's actions reasonably could have caused physical or mental harm to a victim, actual harm is not required. Third, the court reaffirmed its position that military judges should decide whether orders are lawful. Fourth, the court continued its ongoing commitment to

195. *Id.*

196. *Id.*

197. *Id.* at 296.

198. *Id.* at 296-97.

199. *Id.* at 297.

200. *Id.*

201. *Id.* (Crawford, J., dissenting); United States v. Frelix-Vann, 55 M.J. 329, 333 (2001) (Crawford, J., dissenting); United States v. Cherukuri, 53 M.J. 68, 74-75 (2000) (Crawford, J., dissenting); *see also* United States v. Quiroz, 55 M.J. 334, 343-44 (2001) (Crawford, J., dissenting).

preventing duplicitous convictions for conduct unbecoming an officer under Article 133.

The CAAF once again demonstrated its dedication to the societal purposes of criminal law and the integrity of the military justice system. The court continued its important functions of refining the substantive criminal law and continuing to educate legal practitioners and soldiers regarding the scope of proscribed conduct under the punitive articles of the UCMJ. Following Mark Twain's road to moral perfection will probably land a soldier in confinement, but following the road paved by the CAAF's teachings will keep a soldier out of trouble. Perhaps the best way to conclude this year's discussion of substantive criminal law is with another of Mark Twain's quotes, "Always do right. This will gratify some people and astonish the rest."[202]

202. Greeting Card from Mark Twain to the Young People's Society, Green Point Presbyterian Church, Brooklyn (Feb. 16, 1901), *reprinted in* JOHN BARTLETT, FAMILIAR QUOTATIONS 528:3 (1992).