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Articles

Book Review

Revitalizing the Last Sentinel: The Year in Unlawful Command Influence

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Sirs, take your places and be vigilant.
If any noise or soldier you perceive
Near to the walls, by some apparent sign
Let us have knowledge at the court of guard.

* * *

Thus are poor servitors,
When others sleep upon their quiet beds,
Constrain'd to watch in darkness, rain, and cold.[1]

Introduction

Congress established the Court of Appeals for the Armed Forces (CAAF) as a bulwark against unlawful command influence.[2] The court, in turn, views the military judge at trial as "the last sentinel protecting an accused from unlawful command influence."[3] The CAAF reinvigorated military judges' vital role in maintaining the integrity of the military justice system last term in *United States v. Gore*,[4] in which the court upheld the military judge's decision to dismiss all charges and specifications with prejudice due to the convening authority's interference in the case. The rarity of the remedy of dismissal with prejudice for unlawful command influence,[5] coupled with the CAAF's unanimous vote upholding the military judge's application of that remedy in *Gore* reminds the judiciary of its responsibilities and rejuvenates its function as the guardians against the "mortal enemy of military justice."[6] In addition, both *Gore* and a second CAAF case involving alleged unlawful

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[1] WILLIAM SHAKESPEARE, KING HENRY VI, pt. I, act 2, sc. 1.

[2] United States v. Thomas, 22 M.J. 388, 393 (C.M.A. 1986) (citing *A Bill to Unify Consolidate, Revise, and Codify the Articles of War, the Articles for the Government of the Navy, and the Disciplinary Laws of the Coast Guard, and to Enact and Establish a Uniform Code of Military Justice: Hearing on H.R. 2498 Before a Subcomm. of the House Comm. on Armed Services*, 81st Cong., 1st Sess. 608 (1949)). UCMJ art. 37 (2002) prohibits unlawful command influence. Article 37 states, in pertinent part:

> Art. 37. Unlawfully influencing action of court
>
> (a) No [convening] authority, nor any other commanding officer, may censure, reprimand, or admonish the court or any member, military judge, or counsel thereof, with respect to the findings or sentence adjudged by the court, or with respect to any other exercise of its or his functions in the conduct of the proceeding. No person subject to this chapter . . . may attempt to coerce or, by any unauthorized means, influence the action of a court-martial or any other military tribunal or any member thereof, in reaching the findings or sentence in any case, or the action of any convening, approving, or reviewing authority with respect to his judicial acts. . . .

UCMJ art. 37(a). Article 37 is not a punitive article. It is enforced through the provisions of Article 98, UCMJ, which states, in pertinent part, that "Any person . . . who knowingly and intentionally fails to enforce or comply with any provision of this chapter regulating the proceedings before, during, or after trial of an accused, shall be punished as a court-martial may direct." UCMJ art. 98(b).

[3] United States v. Rivers, 49 M.J. 434, 443 (1998).

[4] 60 M.J. 178 (2004).

[5] *Gore* marks the first time in seven years that a reported opinion of the CAAF or any service court set aside a case due to unlawful command influence. Both the CAAF and the Navy-Marine Court of Criminal Appeals (NMCCA) set aside findings and sentence due to unlawful command influence issues in cases in 1997. *See* United States v. Bartley, 47 M.J. 182 (1997) (setting aside findings and sentence, but allowing rehearing, where court was not convinced beyond a reasonable doubt that command influence issue did not induce appellant's guilty plea, and where a *sub rosa* agreement existed to preclude the defense from raising an unlawful command influence motion); United States v. Plumb, 47 M.J. 771, 781 (N-M. Ct. Crim. App. 1997) (setting aside findings and sentence, but authorizing rehearing where unlawful command influence "permeated" appellant's trial and the court could not find beyond a reasonable doubt that neither findings nor sentence were tainted). Dismissal with prejudice due to unlawful command influence is exceedingly rare. "[A] rehearing is ordinarily the appropriate remedy for unlawful command influence." United States v. Baum, 30 M.J. 626, 631 (N.M.C.M.R. 1990) (citing United States v. Thomas, 22 M.J. 388, 400 (C.M.A. 1986)). One other case dismissing the charges and specifications with prejudice due to unlawful command influence is United States v. Hunter, 13 C.M.R. 53, 53 (C.M.A. 1953) (convening authority unlawfully influenced members by holding a "pretrial conference" in which the convening authority expressed the opinion that "a previous court-martial had adjudged a much too meagre [sic] punishment").

[6] *Thomas*, 22 M.J. at 393.

command influence, *United States v. Stirewalt*,[7] remind practitioners and military judges of the importance of detailed findings of fact and standards of review in the appellate litigation of these issues.

The CAAF decided a third case last term in addition to *Gore* and *Stirewalt* that included unlawful command influence allegations,[8] and the Navy-Marine Court of Criminal Appeals (NMCCA) decided two cases as well, one of which is now pending before the CAAF.[9] Neither *Stirewalt* nor the additional trio of opinions granted any relief for the unlawful command influence alleged. In fact, three of the four cases determined that the defense failed even to raise the issue with sufficient evidence to merit government rebuttal of the allegations.

This article begins with a review of the basic framework for analysis of unlawful command influence issues as set forth by the CAAF in *United States v. Biagase.*[10] Next, the article discusses two NMCCA opinions, *United States v. Toohey*[11] and *United States v. Harvey*,[12] where the court determined the defense did not present sufficient evidence to even raise unlawful command influence as an issue. Third, the article examines the CAAF's finding in *United States v. Taylor*[13]—a case involving an allegation that the convening authority was not acting impartially in carrying out his post-trial duties— that the defense did not present sufficient evidence in an issue related to unlawful command influence. Fourth, the article dissusses *United States v. Stirewalt*,[14] a case alleging unlawful command influence by the convening authority's interference with the independent discretion of a lower commander. Fifth and finally, the article discusses *Gore* and its unanimous affirmance of a military judge fulfilling his critical role as the last sentinel.

Framework for Analysis: United States v. Biagase

The CAAF clearly set forth the framework to analyze unlawful command influence issues in its 1999 decision in *United States v. Biagase*.[15] The military judge's assessment of the issue at trial, and the appellate courts' assessment of the issue on appeal, both follow a two-stage inquiry focusing first on the defense requirement to properly raise the issue, and then, if necessary, shifting the burden to the government to rebut the issue.[16]

The defense bears the initial burden of raising an unlawful command influence issue.[17] The threshold to raise the issue is low, but is more than a mere allegation or speculation.[18] The defense must produce "some evidence"[19] of facts which, if true, "constitute unlawful command influence, and that the alleged unlawful command influence has a logical connection to the court-martial in terms of its potential to cause unfairness in the proceedings,"[20] or, if raised on appeal, that the proceedings were unfair.[21]

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[7] 60 M.J. 297 (2004).

[8] United States v. Taylor, 60 M.J. 190 (2004). *See infra* notes 84-116 and accompanying text.

[9] United States v. Toohey, 60 M.J. 703 (N-M. Ct. Crim. App. 2004); United States v. Harvey, 60 M.J. 611 (N-M. Ct. Crim. App. 2004), *pet. granted*, 2005 CAAF LEXIS 281 (Mar. 9, 2005). *See infra* notes 28-83 and accompanying text.

[10] 50 M.J. 143 (1999).

[11] *Toohey,* 60 M.J. at 703.

[12] *Harvey,* 60 M.J. at 611.

[13] *Taylor,* 60 M.J. at 190.

[14] 60 M.J. 297 (2004).

[15] 50 M.J. 143 (1999).

[16] *See generally id*.

[17] *Id*. at 150 (citing United States v. Stombaugh, 40 M.J. 208, 213 (C.M.A. 1994)).

[18] *Id*. (citing United States v. Johnston, 39 M.J. 242, 244 (C.M.A. 1994)).

[19] The court described this evidentiary standard for raising the issue as the same as required to raise an issue of fact. *Id*. (citing United States v. Ayala, 43 M.J. 296, 300 (1995)).

[20] *Id*.

[21] *Id*.

Once raised, the burden shifts to the government to show either there was no unlawful command influence or the unlawful command influence will not affect the proceedings or, if raised on appeal, did not affect the proceedings.[22] According to *Biagase*, the government may carry its burden in any one of three ways. First, the government may "disprove[e] the predicate facts on which the allegation of unlawful command influence is based."[23] Second, the government can "persuad[e] the military judge or the appellate court that the facts do not constitute unlawful command influence."[24] Third, at the trial level, the government can "produc[e] evidence proving that the unlawful command influence will not affect the proceedings;"[25] on appeal, the government can "persuad[e] the appellate court that the unlawful command influence had no prejudicial impact on the court-martial."[26] Regardless of which of the three options the government chooses, its burden of persuasion is the same at trial and on appeal: beyond a reasonable doubt.[27]

Raising the Issue: United States v. Toohey *and* United States v. Harvey

The NMCCA issued two published opinions last term, *United States v. Toohey*[28] and *United States v. Harvey,*[29] examining the question of whether the defense produced "some evidence" sufficient to raise the issue of unlawful command influence. In both cases, the court determined the defense did not successfully raise the issue. Accordingly, the burden never shifted to the government to prove there was no unlawful command influence or that any influence would not affect the proceedings, or if on appeal, did not affect the proceedings.

United States v. Toohey involves an allegation of unlawful command influence in the deliberation room.[30] As part of the appellant's post-trial matters, his trial defense counsel submitted an affidavit in which the counsel related a conversation he had with one of appellant's panel members.[31] Prepared more than one year after trial, the affidavit claimed that one of the members, a major, stated that, prior to determining the announced adjudged sentence, the members originally voted for a

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[22] *Id*. at 151.

[23] *Id*.

[24] *Id*.

[25] *Id*.

[26] *Id*.

[27] *Id*.

[28] 60 M.J. 703 (N-M. Ct. Crim. App. 2004). In *Toohey*, a general court-martial composed of officer and enlisted members convicted the appellant, contrary to his pleas, of rape and assault consummated by a battery, in violation of UCMJ articles 120 and 128 (2002). The members sentenced the appellant to a dishonorable discharge, confinement for twelve years, forfeiture of all pay and allowances, and reduction to E-1, and the convening authority approved the adjudged sentence. *Id*. at 705. In addition to the allegation of unlawful command influence discussed here, the appellant also alleged on appeal that:

> (1) the evidence is factually and legally insufficient to sustain his conviction on the rape charge; (2) that evidence of the invocation of his right to counsel was unfairly presented to and argued before the members; (3) that the military judge erred in ruling that the appellant's possession of child pornography could be used to rebut evidence of the appellant's peacefulness; . . . and [(4)] that he is entitled to relief based upon the doctrine of "cumulative error." . . . In addition, the appellant, both through counsel and *pro se*, has raised several issues regarding the conditions of pretrial and post-trial confinement and the delays in the post-trial processing of his case.

Id. (citation omitted).

[29] 60 M.J. 611 (N-M. Ct. Crim. App. 2004), *pet. granted*, 2005 CAAF LEXIS 281 (Mar. 9, 2005).

[30] In the normal course, no party may pierce the panel members' deliberative veil, and "a member may not testify as to any matter or statement occurring during the course of the deliberations . . . ." MANUAL FOR COURTS-MARTIAL, UNITED STATES, MIL. R. EVID. 606(b) (2002) [hereinafter MCM]. There are three exceptions to this general rule. Panel members may testify concerning: "whether extraneous prejudicial information was improperly brought" to a member's attention; "whether any outside influence was improperly brought to bear upon any member"; and "whether there was unlawful command influence." *Id*.

[31] *Toohey*, 60 M.J. at 718.

lighter sentence.[32] Following that vote, the member at issue said, "If you don't reconsider this, I'm leaving."[33] The record of trial disclosed that the members requested instructions on reconsideration from the military judge.[34]

Based on this evidence, the NMCCA held that the defense failed to even "raise the specter of unlawful command influence."[35] Restating the *Biagase* test to raise unlawful command influence on appeal—(1) show facts which, if true, constitute unlawful command influence; (2) show that the proceedings were unfair; and (3) show that the unlawful command influence was the cause of the unfairness—the court found that "taken at face value, [the major's] comments merely show that the sentencing deliberations became somewhat heated. This is insufficient to raise the issue of unlawful command influence."[36]

The court focused on three facts to support its conclusion. First, the major's threat was "empty" because the court-martial was his place of duty and the court was "quite skeptical that he would have left his appointed place of duty without authority."[37] Second, the major was not the senior member, and he did not write or provide input into any other member's fitness report.[38] Third, and "most important, there is no indication that [the] [m]ajor . . . attempted to use his grade, or invoke the grade of some higher authority, to influence the other members."[39]

An interesting contrast to *Toohey* is the CAAF's decision two terms ago in *United States v. Dugan.*[40] In *Dugan,* the CAAF found just the opposite of the NMCCA in *Toohey*, and provides guidance for defense counsel seeking to produce "some evidence" of unlawful command influence in the deliberation room.

In *Dugan*, the appellant was convicted of wrongful use of the drug ecstasy, unauthorized absence, failing to pay a just debt, and several other miscellaneous military offenses.[41] After trial, the junior panel member provided defense counsel a clemency letter.[42] Among other concerns, the panel member stated the panel discussed a recent "Commander's Call" the convening authority held in which he discussed "the increasing problem of Ecstasy use."[43] The junior panel member claimed that, during sentencing deliberations, another member reminded the venire that the convening authority would review their sentence and they needed to "send[] a consistent message."[44] In addition, "another member pointed out that we needed to make sure it didn't look like we took the charges too lightly because those reviewing our sentence wouldn't necessarily be aware of the mitigating factors. [This] was especially important because our names would be identified as panel members."[45] Defense counsel requested a post-trial Article 39(a) session to conduct *voir dire* of the members on the issues the letter raised; the military judge denied the request.[46] The Air Force Court of Criminal Appeals found no abuse of discretion in the military judge's decision and affirmed the findings and sentence.[47]

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[32] *Id.*

[33] *Id.*

[34] *Id.*

[35] *Id.*

[36] *Id*.

[37] *Id*.

[38] *Id*.

[39] *Id*.

[40] 58 M.J. 253 (2003). *See* Lieutenant Colonel James F. Garrett, *Recent Developments in Unlawful Command Influence*, ARMY LAW., May 2004, at 8.

[41] United States v. Dugan, 58 M.J. 253-54 (2003). *See* UCMJ arts. 112a, 86, and 134 (2002). The panel sentenced the appellant to a bad-conduct discharge, confinement for nine months, total forfeitures, and reduction to E-1, and the convening authority reduced the forfeitures but otherwise approved the adjudged sentence. *Dugan*, 58 M.J. at 254.

[42] *Dugan*, 58 M.J. at 255.

[43] *Id*.

[44] *Id*.

[45] *Id*.

[46] *Id*. *See* UCMJ art. 39(a).

[47] United States v. Dugan, No. 34477, 2002 CCA LEXIS 69, *6-12 (A.F. Ct. Crim. App. 2002) (unpub.), *set aside and remanded*, 58 M.J. 253 (2003).

The CAAF held that the defense successfully raised the issue of unlawful command influence, set aside the sentence, and remanded the case for an additional fact finding hearing pursuant to *United States v. DuBay*, or if that proved impractical, a sentence rehearing.[48] Specifically, the CAAF found that "to the extent that the military judge and the Court of Criminal Appeals concluded Appellant did not meet his initial burden of raising the issue of unlawful command influence, they erred."[49] The court found that the member's letter

> contain[ed] assertions which, if true, suggest[ed] that members of Appellant's court-martial who attended the Commander's Call unfairly based his sentence, at least in part, on a concern they would be viewed unfavorably by the convening authority (their commanding officer) if they did not impose a sentence harsh enough to be "consistent' with the convening authority's "message" at the Commander's Call that drug use is incompatible with military service."[50]

The CAAF refused to ignore this possibility in *Dugan*, finding it "exactly this type of command presence in the deliberation room—whether intended by the command or not—that chills the members' independent judgment and deprives an accused of his or her constitutional right to a fair and impartial trial."[51]

Unlike the allegations in *Toohe*y, the CAAF found the member's comments in *Dugan* were more than "mere speculation because it is 'detailed' and 'based on her own observations.'"[52] In contrast, the affidavit in *Toohey* was a defense counsel's hearsay recounting of a statement made without including more than the barest context or surrounding circumstances.[53] Most importantly, the member's statement in *Toohey* did not bring the convening authority (or any member's commanding officer) into the deliberations room.

United States v. Harvey[54] is the second case from the NMCCA last term to examine the issue of whether the defense successfully raised the issue of unlawful command influence and answer it in the negative. In *Harvey*, a special court-martial convicted the appellant of various drug offenses, false official statement, conspiracy, and communicating a threat.[55] On appeal, the appellant contended that the court-martial convening authority who convened her court, a major, engaged in apparent and actual unlawful command influence by sitting in the courtroom during a portion of the proceedings.[56] The military judge *sua sponte* noted the convening authority's presence during counsel's closing arguments for the record.[57] The trial defense counsel immediately requested a mistrial "because of his presence . . . ."[58] The defense counsel contended that it was "obvious during the whole closing argument that the panel was looking over our shoulder."[59] The military judge replied that he "didn't see that," and denied the request for a mistrial, but offered to give a limiting instruction to the members and to

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[48] *Dugan*, 58 M.J. at 260. *See* United States v. DuBay, 37 C.M.R. 411 (C.M.A. 1967).

[49] *Dugan*, 58 M.J. at 258.

[50] *Id*.

[51] *Id*. A military judge conducted a factfinding hearing, after which she ordered a sentence rehearing. The AFCCA affirmed the findings and sentence adjudged at the rehearing, and the CAAF recently affirmed the AFCCA. United States v. Dugan, No. 34477 (A.F. Ct. Crim. App. Oct. 25, 2004) (Opinion of the Court Upon Further Review) (unpub.), *aff'd*, 2005 CAAF LEXIS 261 (Mar. 8, 2005) (summary disposition).

[52] *Dugan*, 58 M.J. at 259 (citing United States v. Baldwin, 54 M.J. 308, 311 (2001)).

[53] *See* United States v.Toohey, 60 M.J. 703, 718 (N-M. Ct. Crim. App. 2004).

[54] 60 M.J. 611 (N-M. Ct. Crim. App. 2004), *pet. granted*, 2005 CAAF LEXIS 281 (Mar. 9, 2005).

[55] *Id*. at 612. *See* UCMJ arts. 112a, 107, 81, and 134 (2002). The members sentenced appellant to confinement for sixty days, reduction to E-1, forfeiture of $639.00 per month for two months, and a bad-conduct discharge. *Harvey*, 60 M.J. at 612.

[56] *Harvey*, 60 M.J. at 612-13. The officer in the courtroom, a major, was the convening authority when the appellant's court-martial was convened and the charges referred. "He signed the convening order, detailing five officer members. He also signed the amendment to the convening order detailing four enlisted members and removing an officer member. After challenges, one officer and three enlisted members remained to hear the case." *Id.* at 613. By the time of trial, the major was no longer the convening authority; he was the convening authority's executive officer. *Id*.

[57] *Id*.

[58] *Id*.

[59] *Id*.

allow the defense to *voir dire* any of the members.[60] The defense rejected both offers, and declined any other remedy as well.[61]

The NMCCA held that the defense did not meet its initial burden of raising the issue of unlawful command influence.[62] "The threshold for raising [unlawful command influence,] a showing of 'some evidence', is low . . . . While the threshold is low, it requires more than a speculative allegation . . . ."[63] The presence of the convening authority alone was not enough to raise the issue in the court's view, and the "trial defense counsel's motion for a mistrial amounted to nothing more than an unsupported allegation," which, when "subjected to scrutiny, is dependent on speculation, buttressed by further speculation."[64] In particular, the defense failed to set forth any evidence that any of the members saw the convening authority, or recognized him as the convening authority.[65] Most importantly, the defense presented no evidence that the convening authority unfairly influenced the members.[66] While the court "encouraged" the military judge to "inquire into these matters and make appropriate findings of fact"[67] based on the state of the record, "any suggestion that the members were focused on [the convening authority] is just that, a suggestion, assumption or speculation without deeper meaning and not supported by the record."[68] Because the defense failed to meet the threshold test to raise unlawful command influence, the court refused to order further inquiry.[69]

One judge vociferously dissented on this issue and would order a factfinding hearing on the issue.[70] He concluded that the defense counsel's statement that the panel was "looking over his shoulder" was sufficient evidence on its own to raise the issue of unlawful command influence, placing faith in the declarations of the defense counsel.[71] "When an officer of the court tells the military judge that he has seen something in the courtroom, I consider that something more than mere speculation."[72] Unfortunately to the dissenting judge, once the defense raised this allegation, "neither the trial defense counsel nor the military judge tried to get to the bottom of the factual issues inherent in this specter of unlawful command influence in the courtroom."[73]

The dissenter, in contrast to the majority, put the onus on the sentinel—the military judge—to flesh out the facts when they indicate that unlawful command influence "might have occurred under the very nose of the military judge in his courtroom."[74] Relying on pre-*Biagase* precedent, *United States v. Rosser*,[75] the dissent argued that the military judge has the duty to uncover the facts once an allegation of unlawful command influence in the courtroom is raised and a motion for mistrial made.[76]

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[60] *Id*.

[61] *Id*.

[62] *Id*. at 614.

[63] *Id*.

[64] *Id*.

[65] *Id*.

[66] *Id.*

[67] *Id*. at 614 n.2.

[68] *Id.* at 614.

[69] *Id*.

[70] *Id*. at 617 (Price, J., concurring in part and dissenting in part).

[71] *Id.* at 617-18 (Price, J., concurring in part and dissenting in part).

[72] *Id*. at 618 (Price, J., concurring in part and dissenting in part).

[73] *Id*. (Price, J., concurring in part and dissenting in part).

[74] *Id*. at 619 (Price, J., concurring in part and dissenting in part).

[75] 6 M.J. 267 (C.M.A. 1979).

[76] *Harvey*, 60 M.J. at 618-19 (Price, J., concurring in part and dissenting in part).

Rosser, in turn, involved a company commander, the accuser in the case, who, among other activities, "eavesdropped" on the court-martial proceedings by stationing himself outside the door "and at one point looking in the courtroom window" where witnesses for both the government and defense observed his conduct.[77] The military judge at trial denied a motion for a mistrial which the Court of Military Appeals (COMA), the CAAF's predecessor, held was an abuse of discretion, finding that the judge was "insensitive to the delicate sphere of appearances at stake . . . ."[78] In particular, the COMA declared that the military judge's "inquiry into the particular facts and circumstances . . . was so perfunctory as to provide an inadequate factual basis for his decision."[79] Further, the COMA found the judge "remiss in his affirmative responsibilities to avoid the appearance of evil in his courtroom and to foster public confidence in court-martial proceedings."[80]

The majority in *Harvey* distinguished *Rosser*. The majority described the company commander's actions in *Rosser* as "patent meddling in the proceedings," and his presence, including looking through the courtroom window, as "ubiquitous."[81] These facts, according to the majority in *Harvey*, would meet even the *Biagase* test to raise the issue of unlawful command influence.[82] In contrast, "the only undisputed fact" in *Harvey*, "is that the officer who convened the court-martial was present in the courtroom during closing arguments."[83]

Both sides of the argument are joined, and the CAAF, which granted review of the unlawful command influence issue in *Harvey*, will weigh in soon. The CAAF could conceivably reach a middle ground, reaffirming the military judge's duty to flesh out the facts when the defense alleges unlawful command influence in the courtroom, but only after the moving party, the defense, sets forth the bare *Biagase* minimum—*some evidence* of those facts beyond a mere allegation. The defense's failure in *Harvey* to accept the military judge's offer to *voir dire* the members on the issue could prove critical—and fatal—to the defense.

Inflexible Attitude Toward Post-Trial Duties: United States v. Taylor

The convening authority is the centralized power that exercises three critical functions in the military justice system: he exercises prosecutorial discretion when he refers cases to trial by court-martial; he selects the members who will render a verdict in the case and, if necessary, adjudge a sentence; and he acts impartially to review the findings and sentence.[84] This consolidation of power is historically a lightning rod for criticism of the military justice system.[85]

"In the performance of post-trial duties, a convening authority acts in a "role . . . similar to that of a judicial officer."[86] The accused's right to an individualized and impartial review of his sentence "is violated where a convening authority cannot or will not approach post-trial responsibility with the requisite impartiality. Under such circumstances, a convening authority must be disqualified from taking action on a record of court-martial."[87] Convening authorities are disqualified from performing their post-trial duties for two reasons: first, if the convening authority is an "accuser" (the person who preferred

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[77] *Rosser*, 6 M.J. at 269-70.

[78] *Id*. at 273.

[79] *Id*.

[80] *Id*.

[81] *Harvey*, 60 M.J. at 614 (citing *Rosser*, 6 M.J. at 271-72).

[82] *Id*.

[83] *Id*.

[84] *See, e.g*., MCM, *supra* note 30, R.C.M. 407, 503, and 1107. *See also* UCMJ arts. 22-25, 60 (2002).

[85] *See, e.g*., United States v. Crossley, 10 M.J. 376 (C.M.A. 1981):

> Among the most vehement complaints against military justice are those which concern the role of the military commander, who has the responsibility for maintaining discipline and yet appoints the court-martial members and reviews the findings and sentence. Congress has made the determination that in this situation a commander may "carry water on both shoulders."

Id. at 379 (Everett, C.J., concurring).

[86] United States v. Fernandez, 24 M.J. 77, 78 (C.M.A. 1987) (citing United States v. Boatner, 43 C.M.R. 216 (C.M.A. 1971)).

[87] United States v. Davis, 58 M.J. 100, 102 (citing *Fernandez*, 24 M.J. at 79, United States v. Howard, 48 C.M.R. 939, 944 (C.M.A. 1974)).

the charges, ordered another to prefer the charges, or has an other than official interest in the outcome of the case);[88] second, if he "display[s] an inelastic attitude toward the performance of [his] post-trial responsibility."[89] This is not a pure unlawful command influence issue; however it merits discussion with other unlawful command influence cases due to its nature—inflexibility on the part of the convening authority that results in unfairness to the accused.

United States v. Taylor[90] concerns the latter reason for convening authority post-trial disqualification—an allegation that the convening authority should be disqualified from acting post-trial because he displayed an inelastic attitude toward those duties. *Taylor* reinforces the principle that the convening authority may disavow attempts to impute such an attitude to him.

During appellant's sentencing hearing for his conviction for viewing pornography on a government computer and dereliction of duty,[91] the military judge refused to admit adverse personnel records due to administrative mistakes in their preparation.[92] Eight days later, the trial counsel published an article in the base newspaper warning commands of the consequences of shoddy personnel records.[93] The trial counsel stated that "In a recent court-martial the panel was not given a complete picture of the member's military service record including numerous adverse actions . . . ."[94] The trial counsel continued:

> The interests of justice were clearly not met . . . the members were never informed of the full measure of [the accused's] previous [involvement with the UCMJ]. Further, they were not informed that he was not a good candidate for rehabilitation as evidenced by his failure to properly respond to lesser forms of corrective measures." The article then reiterated, "Justice was not served."[95]

Although the article did not specifically name the appellant, the proceeding described in the article was easily tied to the appellant's trial.[96] The defense sought to disqualify the staff judge advocate (SJA) and the convening authority from participating in post-trial review of the case if the article could be imputed to either party.[97] While the SJA conceded that the article could be imputed to him, he nonetheless failed to disqualify himself from providing the post-trial recommendation to the convening authority.[98] The convening authority failed to recuse himself, and took two additional actions.[99] First, prior to taking action on the case, the convening authority signed an indorsement to the SJA recommendation stating that he was "neither involved in the writing of, nor has my action been influenced in any way by the newspaper article" at issue.[100] Second, after he took action on the case approving the adjudged sentence, he executed an affidavit stating that, prior to the defense calling his attention to the trial counsel's article, he was "unaware of its existence" and "played no role in the preparation or publication of the article."[101] Finally, the convening authority stated in the affidavit that he "did not allow any information in the article brought to my attention by the defense to influence my decision."[102]

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[88] *Id.* (citing United States v. Voorhees, 50 M.J. 494 (1999); United States v. Crossley, 10 M.J. 376 (C.M.A. 1981); United States v. Conn, 6 M.J. 351 (C.M.A. 1979); United States v. Jackson, 3 M.J. 153 (C.M.A. 1977)). *See also* UCMJ art. 1(9).

[89] *Davis,* 58 M.J. at 102 (citing *Fernandez*, 24 M.J. at 79; *Howard***,** 48 C.M.R. at 944)).

[90] 60 M.J. 190 (2004).

[91] *See* UCMJ art. 92. The members sentenced the appellant to a bad-conduct discharge and reduction to E-1. *Taylor*, 60 M.J. at 191.

[92] *Taylor*, 60 M.J. at 191.

[93] *Id.* at 191-92.

[94] *Id.*

[95] *Id*. at 192 (quoting trial counsel's article in the base newspaper).

[96] *Id.*

[97] *Id*. As to the convening authority, the defense counsel noted that he "is the first person named as part of the [newspaper] Editorial Staff." *Id*.

[98] *Id*.

[99] *Id.* at 192-93.

[100] *Id*.

[101] *Id*. at 193.

[102] *Id*.

The CAAF held that the convening authority was not disqualified from participating in the post-trial review.[103] The SJA was disqualified, however, as he candidly admitted the article could be imputed to him.[104] Accordingly, the CAAF remanded the case for a new post-trial review and action by a different staff judge advocate.[105] While the court applied a *de novo* standard of review to the question of whether the SJA or convening authority were disqualified, the defense "has the initial burden of making a prima facie case" for disqualification.[106] Based on the convening authority's uncontradicted affidavit denying knowledge or imputation of the trial counsel's article, the defense did not carry that burden.[107]

Practitioners should compare last term's CAAF decision in *Taylor* to *United States v. Davis,* decided two terms ago.[108] Davis was convicted of absence without leave and drug use.[109] Defense counsel submitted a post-trial affidavit objecting to the convening authority taking action on the case, citing several earlier statements the convening authority made, including that "people caught using drugs would be prosecuted to the fullest extent, and if they were convicted, they should not come crying to him about their situations or their families[']."[110] Despite the defense objection, the convening authority took action, approving the sentence as adjudged.[111] Of note, the SJA's addendum was silent as to the objection and alleged comments.[112] The CAAF set aside the action and remanded the case for a new review and action before a different convening authority, finding that the convening authority's comments were the "antithesis to the neutrality required . . . ."[113]

In *Taylor*, the CAAF referred to *Davis* as an example of a case where a convening authority was disqualified due to his remarks reflecting "an inflexible attitude toward the proper fulfillment of post-trial responsibilities."[114] "Concern for both fairness and integrity suggests that these neutral roles cannot be filled by someone who has publicly expressed a view prejudging the post-trial review process's outcome."[115] The difference in *Taylor* is that the convening authority did not make the questionable remarks nor could they be imputed to him, did not endorse the remarks, and specifically disavowed that the remarks influenced his action in the case. The convening authority's steps to disavow and distance himself from the article "disprove[d] the very premise on which the defense's challenge . . . was based."[116]

Interfering with Lower Commander's Independent Discretion: United States v. Stirewalt

One of the basic principles of the military justice system is that every commander at every level must exercise independent discretion in military justice matters.[117] "A superior commander may not limit the discretion of a subordinate commander to act on cases over which" the superior has not withheld jurisdiction.[118] This basic principle often collides with

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[103] *Id*. at 194.

[104] *Id*.

[105] *Id.* at 196.

[106] *Id*. at 194 (citing United States v. Wansley, 46 M.J. 335, 337 (1997)).

[107] *Id.*

[108] 58 M.J. 100 (2003).

[109] *Id*. at 101. *See* UCMJ arts. 86 and 112a (2002). The members sentenced him to a bad-conduct discharge and confinement for three months. *Davis*, 58 M.J. at 101.

[110] *Davis*, 58 M.J. at 102-03.

[111] *Id.* at 102.

[112] *Id.*

[113] *Id*. at 104.

[114] United States v. Taylor, 60 M.J. 190, 193 (2004) (citing *Davis*, 58 M.J. at 103).

[115] *Id*.

[116] *Id*. at 194.

[117] MCM, *supra,* note 30, R.C.M. 306(a). *See also id.* R.C.M. 401(a) (discussion); United States v. Hawthorne, 22 C.M.R. 83 (C.M.A. 1956).

[118] MCM, *supra*, note 30, R.C.M. 306(a).

the duty of superiors to mentor their subordinates in all matters germane to command, including maintaining good order and discipline in their units.

> The fine line between lawful command guidance and unlawful command control is determined by whether the subordinate commander, though he may give consideration to the policies and wishes of his superior, fully understands and believes that he has a realistic choice to accept or reject them. If all viable alternatives are foreclosed as a practical matter, the superior commander has unlawfully fettered the discretion legitimately placed with the subordinate commander.[119]

In *United States v. Stirewalt*,[120] the CAAF faced the issue of whether a commander "unlawfully fettered" his subordinate's discretion. Under the facts of the case, the CAAF answered that question in the negative, although the practitioner is left wondering whether that is the correct result.

The CAAF opinion in *Stirewalt* is the fourth in a somewhat unusual path of appellate review. A general court-martial originally convicted Stirewalt of numerous consensual and nonconsensual sexual offenses, including maltreatment by sexual harassment, rape, forcible sodomy, assault consummated by a battery, and adultery, and sentenced him, *inter alia*, to ten years confinement and a dishonorable discharge.[121] The Coast Guard Court of Criminal Appeals (CGCCA) set aside the conviction for some of the offenses, including rape, forcible sodomy, assault consummated by a battery, and indecent assault, due to the military judge's erroneous exclusion of evidence under Military Rule of Evidence 412.[122]

On rehearing for the offenses the CGCCA set aside and resentencing for the remaining original offenses, Stirewalt moved to dismiss all charges and specifications due to unlawful command influence.[123] Specifically, Stirewalt contended, among other allegations,[124] that unlawful command influence tainted the original decision to order an Article 32 investigation of the charges.[125]

> Although the military judge denied Stirewalt's motion to dismiss, he did order several remedial measures that he characterized as "necessary to ensure that the accused receives a fair trial and to restore the public confidence in the present case." The military judge found no unlawful command influence in terms of the initial referral of the charges or any "taint" of the member pool, but he did conclude that the Government had failed to demonstrate beyond a reasonable doubt that improper interference with witnesses had not occurred. He also found that the Article 32 investigating officer "was not aggressive enough in his attempts to shield himself from subsequent action on the same case that he served as the [investigating officer]."
>
> In light of those conclusions the military judge ordered that certain steps be taken to ensure full access to witnesses by the defense and that the convening authority designate a new place of trial. He also ordered that the Article 32 investigating officer take no further steps with regard to the case and remove himself from the rating chain of the assistant trial counsel.[126]

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[119] United States v. Rivera, 45 C.M.R. 582 (A.C.M.R. 1972) (citations omitted).

[120] 60 M.J. 297 (2004).

[121] *Id*. at 298. *See* UCMJ arts. 93, 120, 125, 128, and 134 (2002).

[122] *Stirewalt*, 60 M.J. at 299. *See* United States v. Stirewalt, 53 M.J. 583 (C.G. Ct. Crim. App. 2000).

[123] *Stirewalt*, 60 M.J. at 299.

[124] Stirewalt contended that four actions of the command constituted unlawful command influence:

> (1) the original decision to request an investigation of the charges pursuant to Article 32, UCMJ, 10 U.S.C. § 832 (2000) was tainted by unlawful command influence; (2) witnesses had been discouraged from coming forward on his behalf; (3) actions of the command had tainted the member pool; and (4) the Article 32 investigating officer lacked independence and later improperly acted as the staff judge advocate in providing advice on the case.

Id.

[125] *Id*.

[126] *Id*.

The military judge addressed the issue as to whether higher commanders unlawfully interfered with the decision to order the Article 32 investigation in some detail.[127] He determined that, prior to ordering an Article 32 investigation, the commander who ordered the investigation and subsequently recommended referral of the charges to a general court-martial, a lieutenant commander (O-4), was involved in a four-way conversation with his immediate supervisor, a captain (O-6), that officer's immediate supervisor—another captain, and a third captain in the chain of command.[128] During that conversation, one of the captains "very clearly and forcefully" told the lieutenant commander "that the allegations were too serious to go to captain's mast and that they warranted an airing at an Article 32."[129] The military judge also determined that, during this same discussion, another of the captains made it clear to the lieutenant commander "that the decision as to the disposition of the case was his to make."[130]

Although neither the captain who made the "very clear[] and forceful[]" statements nor the lieutenant commander could specifically recall the conversation, one of the other captains who participated in the conversation testified that he "did not view [the] statement as constituting any constraint on [the] [l]ieutenant [c]ommander," and the lieutenant commander was "'obviously' the decision maker in regard to the necessity of an Article 32 investigation."[131]

The military judge denied the defense motion to dismiss, and the defense filed a petition for extraordinary relief in the nature of a writ of *mandamus* with the CGCCA.[132] The CGCCA denied the writ.[133] Stirewalt ultimately pled guilty to consensual sodomy, and, pursuant to his pretrial agreement, the government dismissed the rape, forcible sodomy, assault, and indecent assault charges with prejudice.[134] "At that point, Stirewalt stood convicted of sexual harassment, adultery, and indecent assault from his first trial and of sodomy from the rehearing. The military judge sentenced Stirewalt to 90 days' confinement, reduction in pay grade to E-4, and a reprimand. The convening authority approved the sentence."[135] In the course of Stirewalt's Article 66 appeal, the CGCCA affirmed the findings and sentence.[136]

The CAAF affirmed the CGCCA's decision.[137] The CAAF reviewed the military judge's findings of fact, described above, for clear error, and found none.[138] Moreover, the facts the military judge found did not support a *de novo* conclusion that unlawful command influence occurred.[139] "There is nothing inherently suspect about an officer in [the] [l]ieutenant [c]ommander's . . . position electing to consult with his chain of command concerning potential investigative and procedural options when faced with allegations of serious misconduct."[140] Additionally, the subordinate officer, the lieutenant commander initiated the conversation.[141] Although the statement that the allegations were too serious to go to a captain's mast, while "viewed in a void could be seen as unlawful command influence," the military judge filled that void "with

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[127] *Id*. at 301.

[128] *Id*.

[129] *Id*.

[130] *Id*.

[131] *Id*.

[132] *Id*. at 299. *See* Stirewalt v. Pluta, 54 M.J. 925, 927 (C.G. Ct. Crim. App. 2001). The defense requested that the court order the convening authority to withdraw and dismiss the charges "or, alternatively, that the convening authority be disqualified and a substitute general court-martial convening authority be appointed." *Id.* at 926.

[133] *Pluta*, 54 M.J. at 927.

[134] *Stirewalt*, 60 M.J. at 299.

[135] *Id*.

[136] *Id*. at 300. *See* United States v. Stirewalt, 58 M.J. 552 (C.G. Ct. Crim. App. 2003). *See also* UCMJ art. 66 (2002). Interestingly, Stirewalt's ultimate sentence would not normally entitle him to full appellate review before the court of criminal appeals, the jurisdiction of which is limited to service members with an approved sentence that includes a discharge and/or confinement for one year or more. *Id*. art. 66(b)(1).

[137] *Stirewalt*, 60 M.J. at 298.

[138] *Id*. at 300. "Where the issue of unlawful command influence has been litigated on the record, we review the military judge's findings of fact under a clearly erroneous standard. United States v. Johnson, 54 M.J. 32, 34 (2000). The question of command influence flowing from those facts, however, is a question of law that we review de novo." *Id*.

[139] *Id*.

[140] *Id*. at 301.

[141] *Id*.

extensive factfinding regarding the context in which it was made and a thorough legal analysis" resulting in the determination that no unlawful command influence occurred.[142]

While at first blush, the CAAF's opinion seems obvious, the defense argument gains traction when one examines what remained of the government's case at the end of the day. What began as a case involving allegations of rape, forcible sodomy, and indecent assault, ended as a mixed plea to consensual sodomy, adultery, maltreatment by sexual harassment, and indecent assault, which resulted in a sentence beneath the jurisdictional appellate review authority of the courts of criminal appeals. The offenses of which the appellant ultimately stood guilty could legitimately be disposed of at a forum less than a general court-martial. In this context, the defense argument that unlawful command influence tainted the decision to order an Article 32 investigation is more persuasive. This interference also could not help but taint the same commander's decision to forward the original charges instead of taking action at his level, and resulted in the original trial by general court-martial. Those original charges ultimately fizzled to leave offenses that, on their own, may not merit a pretrial investigation and general court-martial.

On the other hand, one can agree with the CAAF that the military judge's inquiry into the matter and detailed findings of fact dispelled the defense contention. Those findings of fact, however, were based in part on the testimony of one of the higher ranking officers involved in the conversation that allegedly influenced the lieutenant commander who ordered the Article 32 investigation, specifically that higher ranking officer's opinion that the statements did not constrain the lieutenant commander's discretionary exercise of authority.[143] This type of self-serving testimony should not carry much weight. When one takes into account the other shenanigans the military judge found the command and SJA engaged in throughout this proceeding,[144] there is hardly resounding proof—beyond a reasonable doubt—that unlawful command influence did not taint this trial.

Witness Intimidation: United States v. Gore

The military judge's extensive factfinding also took center stage in *United States v. Gore.*[145] In *Gore*, the CAAF issued a unanimous decision affirming the power of the military judge to dismiss charges and specifications with prejudice in the face of unlawful command influence, despite the fact that the appellant negotiated a pretrial agreement prior to the facts which gave rise to the unlawful command influence. In so doing, the court clarified the appellate standards of review of the military judge's actions when faced with allegations of unlawful command influence, and reaffirmed the role of the military judge as the "last sentinel" to protect a court-martial from unlawful command influence. The military judge's use of compelling and descriptive findings of fact, particularly in describing the specific demeanor of witnesses that led him to conclude that certain witnesses were and were not worthy of belief, resulted in the CAAF's affirmance of the judge's remedy of dismissal with prejudice.

The government charged Gore with desertion (two specifications) and unauthorized absence.[146] He negotiated a pretrial agreement whereby he agreed to plead guilty.[147] The unlawful command influence involved a "commanding officer who ordered a senior enlisted chief petty officer not to testify in support of Appellant and may have deterred others at the command from testifying on behalf of Appellant."[148]

A couple of days prior to trial the defense traveled to Gore's unit to obtain sentencing witnesses.[149] The defense counsel went to the chief petty officer's (chief) office, where the chief "immediately said, 'Well, I'll testify. Do you need me to

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[142] *Id*.

[143] *Id*.

[144] *See supra* note 126 and accompanying text.

[145] 60 M.J. 178 (2004).

[146] *Id*. at 179. *See* UCMJ arts. 85 and 86 (2002).

[147] *Gore*, 60 M.J. at 179.

[148] *Id*. at 178-79.

[149] *Id*. at 180.

testify? I'll testify.'" [150] The chief opined that he thought the Appellant "was a really nice guy . . . [and that he] should be retained."[151] The chief also identified three senior enlisted personnel who "felt the same way" about Gore, agreed to distribute additional questionnaires to other potential defense witnesses, and arranged for the defense counsel to return the next day for the questionnaires.[152]

On the afternoon of the day before trial, the defense returned to the unit and contacted the chief, concerned that he had not contacted the defense or provided the questionnaires.[153] The chief met the defense counsel and told him, "I can't help you . . . I'm not testifying . . . My skipper said no way. He said that I can't help Constructionman Gore."[154] The chief "also refused to testify telephonically."[155] As to the questionnaires the chief agreed to distribute, the defense counsel testified that the chief stated, "[M]y CO said we cannot help Constructionman Gore. End of story," and that the conversation should remain "between me and you."[156]

The defense counsel left and returned shortly with his supervising officer-in-charge, and the following conversation ensued:

> [The chief] stated that neither he, nor anyone else in his command, would testify on behalf of Appellant in light of the order by the commanding officer, Commander Morton. [The chief] "alluded to negative ramifications that would stem from testifying and terminated the meeting . . . ." He reinforced this point when he grabbed his collar device and stated that he attained his present grade of chief in 11 years when he was expected to make it in 16 years and that one gets ahead by not bucking the system.[157]

Based on these events, the defense counsel "prepared a Motion to Dismiss due to unlawful command influence and informed trial counsel of this issue." [158] The chief ultimately arrived at the trial location and the defense counsel thought that the command resolved the "problem and [the chief] would testify favorably for the defense as he had initially indicated he would."[159] Accordingly, the defense counsel met with the chief one more time to discuss his testimony.[160] The chief once again told the defense counsel that he would not help them, so the defense proceeded with its motion to dismiss, and detailed defense counsel became the first witness. [161] The defense counsel testified that the chief told him:

> "Lieutenant, I'm here. The CO told me to be here, but I'm not going to be any help to you. The CO told me to toe the line and that's what I'm doing. I'm not testifying." [The chief] further stated that the accused was going to be released within 30 days and the accused was not worth risking his career. He conceded that the commanding officer did exert pressure over his prospective testimony. [Defense counsel] also testified that [the chief] told him that "he had to recognize that the Commanding Officer authorized his fitness reports."[162]

The defense counsel continued, testifying that the chief also said that:

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[150] *Id*.

[151] *Id*.

[152] *Id*.

[153] *Id*.

[154] *Id*.

[155] *Id*.

[156] *Id*.

[157] *Id*. at 181.

[158] *Id*.

[159] *Id*.

[160] *Id*.

[161] *Id*.

[162] *Id.*

> "Even if the CO is exposed, he's going to get a slap on the wrist. He's . . . either going to make Captain or he's a Captain-select. That's the way it works, Lieutenant." Finally, [the defense counsel] testified that [the chief] stated that the commanding officer had called him on the telephone the night before trial and told him "You're going to Pensacola and you know what the . . . command's position is on this matter." According to [the defense counsel], [the chief] said that if he did testify that he would "testify consistent with the command's wishes." [The chief] informed [the defense counsel] that there would be repercussions if he testified in support of Appellant. [The chief] did not state that the commanding officer threatened that, rather, he indicated that he believed he "would never make Senior [chief]" if he testified. [The defense counsel] testified that in a final conversation, shortly before the court-martial began, [the chief] stated that he had "a family to protect . . . [and he is] going to say exactly what the command wants [him] to say."[163]

The defense counsel's supervisor also sat in on this meeting, and testified consistent with the defense counsel.[164] The chief also took the stand.[165] He claimed that he thought he was there as a "command representative" and not as a witness, because he had "nothing positive to say" about Gore.[166] He was extremely uncomfortable testifying, and repeatedly contradicted and denied the details of his conversations with the defense counsel and the defense counsel's supervisor.[167] This included denying initially telling the defense that he would testify; in fact the chief "denied any knowledge of even being a witness."[168]

The government called the convening authority as a witness. The convening authority agreed he told the chief he was not going to go to appellant's trial, but that it was because he was upset that the defense counsel came into his "spaces, approaching one of my [c]hiefs without my knowledge, and asking them or ordering them to come to [the trial] [to testify]. So, I told the [c]hief I didn't want him to go . . . and . . . that was all there was to it."[169] Further, the convening authority testified that he thought once a pretrial agreement was arranged, the proceeding was a "done deal."[170] The convening authority denied he "did anything to influence the court-martial proceedings."[171]

Following this hearing into the substance of the defense motion, the military judge found that the defense carried its burden "by a rather exceeding [sic] level," of producing "some evidence" that unlawful command influence occurred, and that it had the potential to cause unfairness in the proceedings.[172] The military judge also determined that the government did not carry its burden of refuting the evidence, or of proving that it would not affect the proceedings beyond a reasonable doubt.[173] Accordingly, based on the egregious nature of the unlawful command influence, the military judge dismissed the charges and specifications with prejudice.[174]

Specifically, as the CAAF framed the issue:

> The contradictory testimony of the witnesses presented a credibility issue for the military judge. His detailed findings explain his reasons for believing the original defense counsel and [his supervisor] and for not believing [the chief] and the [convening authority]. The military judge found that, "the command acted

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[163] *Id*.

[164] *Id*. at 182-83.

[165] *Id*. at 181.

[166] *Id*. at 182.

[167] *Id*.

[168] *Id*.

[169] *Id*. at 183.

[170] *Id*.

[171] *Id*. at 184.

[172] *Id*. at 183. The military judge made this determination following the testimony of the defense counsel, the defense counsel's supervisor, and the chief. The defense rested on the motion following the testimony of those three witnesses, the judge entered his ruling on the "some evidence" issue, and then the prosecution called the convening authority as its only witness. *Id*.

[173] *See generally id*. at 184.

[174] *Id*.

> in a manner which would constitute unlawful command influence" and dismissed the case with prejudice, stating, "The carcinoma that is undue command influence must be cut out and radically disposed of."
>
> The judge reasoned that the [convening authority] improperly "controlled" a prospective defense sentencing witness. This resulted in changing the witness's anticipated testimony that Appellant should be retained into testimony that only supported the command decision to court-martial Appellant. In fashioning a remedy of dismissal with prejudice, the military judge stated that "the evil here spreads far beyond the four corners of this case . . . ."[175]

The government appealed the military judge's decision to the NMCCA under the provisions of Article 62, UCMJ.[176] The NMCCA remanded the case with instructions for the military judge to prepare additional findings of fact and conclusions of law concerning the decision to dismiss with prejudice.[177] The military judge complied with the order, and "reaffirmed his initial evaluation of the unlawful command influence and its impact on the case,"[178] finding that "there could not be a more crystalline example of unlawful command influence"[179] and that "the only remedy that addressed the rabid form of unlawful command influence placed before the court was dismissal with prejudice."[180]

On further review, the NMCCA agreed that there was unlawful command influence, but concluded that the military judge abused his discretion in fashioning a remedy, because the illegality only affected the sentence.[181] Accordingly, the NMCCA ordered the military judge to "select an appropriate remedy, short of dismissal of the charges, commensurate with the degree and extent of the unlawful command influence."[182] Gore appealed the NMCCA decision to CAAF.

The CAAF unanimously reversed the NMCCA and reinstated the military judge's ruling dismissing the charges with prejudice.[183] The court reviewed the military judge's findings of fact for *clear error*,[184] and the selection of an appropriate remedy for an *abuse of discretion*.[185]

This selection of an abuse of discretion standard of review appeared at first glance to depart from the court's prior analysis of unlawful command influence issues on appeal. Not so, according to the court.

> Simply stated, our prior cases have addressed only what a military judge can do, not what the military judge must do, to cure (dissipate the taint of the unlawful command influence) or to remedy the unlawful command influence if the military judge determines it cannot be cured. This distinction has an important impact as to the standard of review in the analysis of a command influence issue.[186]

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[175] *Id*. (citation omitted).

[176] *Id*. at 179. *See* UCMJ art. 62 (2002).

[177] *Gore*, 60 M.J. at 179 (citing United States v. Gore, NMCM No. 200202409, slip op. at 2 (N-M. Ct. Crim. App. 2002) (unpub.)).

[178] *Id*. at 184.

[179] *Id*.

[180] *Id*.

[181] *Id*. *See* United States v. Gore, 58 M.J. 766, 788 (N-M. Ct. Crim. App. 2003). The lower court listed other possible remedies the military judge could employ. *Id*. at 787.

[182] *Gore*, 58 M.J. at 788 (quoted in *Gore*, 60 M.J. at 184).

[183] *Gore*, 60 M.J. at 189.

[184] *Id*. at 185. Although the court deferred to the military judge's findings of fact in the absence of clear error because it was reviewing the propriety of a government appeal under Article 62, UCMJ, the court nonetheless applies the same standard in other contexts. For example, even where the court applies a *de novo* standard of review, it defers to the trial judge's findings of fact in the absence of clear error. *See, e.g.*, United States v. Melanson, 53 M.J. 1 (2000) (resolving a question of jurisdiction, a classic *de novo* issue, primarily by deferring to trial judge's findings of fact). On other issues of command influence, where the military judge does not dismiss the case, the court also "reviews the military judge's findings of fact under a clearly-erroneous standard, but we review *de novo* 'the question of command influence flowing from those facts.'" United States v. Argo, 46 M.J. 454, 457 (1997) (quoting United States v. Wallace, 39 M.J. 284, 286 (C.M.A. 1994)). *See also* United States v. Stirewalt, 60 M.J. 297, 300 (2004) ("Where the issue of unlawful command influence has been litigated on the record, we review the military judge's findings of fact under a clearly erroneous standard. United States v. Johnson, 54 M.J. 32, 34 (2000). The question of command influence flowing from those facts, however, is a question of law that we review de novo").

[185] *Gore*, 60 M.J. at 187.

[186] *Id*. at 186.

Where the military judge takes corrective action and concludes that the taint of unlawful command influence is purged, the court reviews the judge's actions *de novo*.[187] "Our task on appeal [in such cases is] . . . to determine beyond a reasonable doubt if the military judge was successful in purging any residual taint from the unlawful command influence."[188] In those cases, the court's *de novo* review "ensure[s] that the unlawful command influence had no prejudicial impact on the court-martial."[189]

Here in contrast, the military judge terminated the proceedings, so there was no need for the court to review *de novo* whether any prejudice remained—obviously where no case remains no prejudice remains either. The issue is whether the military judge "erred in fashioning the remedy for the unlawful command influence that tainted the proceedings."[190] The CAAF determined this issue is reviewed for an abuse of discretion.[191]

The abuse of discretion standard of review "recognizes that a judge has a range of choices and will not be reversed so long as the decision remains within that range."[192] While the court has long held that dismissal is a drastic remedy for unlawful command influence, "dismissal of charges is appropriate when an accused would be prejudiced or no useful purpose would be served by continuing the proceedings."[193] The CAAF found that the military judge "precisely identified the extent and negative impact of the unlawful command influence in his findings of fact."[194] The military judge explained in detail why he found the testimony of the defense counsel and his supervisor credible and the testimony of the chief petty officer incredible, and buttressed that explanation with extensive findings of fact concerning the witness' demeanor.[195] "The military judge further concluded that the Government failed to prove that the unlawful influence had no impact on the proceedings."[196]

The judge also explained why he determined any remedy less than dismissal with prejudice was insufficient. Dismissal without prejudice and allowing for a re-referral was insufficient because it "would not have removed the pool of prospective witnesses from the firm grasp of an interloping commanding officer who, as [the chief] noted, writes the fitness reports of prospective witnesses."[197] The military judge rejected other remedies as well, concluding that there was no chance for a fair trial and "the only available remedy was dismissal with prejudice."[198]

In particular, the CAAF noted that Gore's negotiation of a pretrial agreement did not undermine the military judge's conclusions, because the existence of a pretrial agreement "does not mean that he is not entitled to a fair trial . . . Appellant had not yet entered pleas and remained free to plead not guilty. We view the possible future guilty plea of Appellant as irrelevant."[199] A "negotiated future guilty plea did not afford the commanding officer license to violate the mandate of Article 37, UCMJ, prohibiting unlawful command influence."[200]

What should practitioners and military judges conclude from *Gore*? More importantly, what should practitioners and military judges *not* conclude from *Gore*? Certainly, the CAAF's opinion sends the message that the court will "watch the back" of military judges who exercise their considerable discretion and conclude that dismissal is the appropriate remedy for

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[187] *Id*. (citing United States v. Biagase, 50 M.J. 143, 151 (1999); United States v. Rivers, 49 M.J. 434, 443 (1998)).

[188] *Id*.

[189] *Id*.

[190] *Id*. at 186-87.

[191] *Id*. at 187.

[192] *Id*.

[193] *Id*. (citations omitted).

[194] *Id*.

[195] *Id*. at 187-88.

[196] *Id*. at 188.

[197] *Id*. at 189.

[198] *Id*.

[199] *Id*.

[200] *Id*.

unlawful command influence. As *Gore* demonstrates, in order to merit the CAAF's affirmance, the military judge must back up that exercise of discretion with detailed and comprehensive findings of fact.

Gore, however, does *not* stand for the principle that the CAAF *agrees* with the military judge's action in the case. Dismissal is a last resort—even where a military judge finds unlawful command influence occurred. At its essence, the CAAF's opinion is a resounding affirmance of the *standard of review* it determined applied in the case—abuse of discretion.

The standard of review, that is, the amount of deference accorded a trial judge's decision, is the key to understanding the CAAF's opinion in *Gore* and is the enduring legacy of the case. As the court stated,

> An abuse of discretion means that 'when judicial action is taken in a discretionary matter, such action cannot be set aside by a reviewing court unless it has a definite and firm conviction that the court below committed a clear error of judgment in the conclusion it reached upon a weighing of the relevant factors.'[201]

In another context, the court described the abuse of discretion standard of review as follows: "To reverse for an abuse of discretion involves far more than a difference in . . . opinion. . . . The challenged action must . . . be found to be 'arbitrary, fanciful, clearly unreasonable,' or 'clearly erroneous,' in order to be invalidated on appeal."[202]

In applying an abuse of discretion standard of review, the court accepted the military judge's findings of fact in the absence of clear error. This "clearly erroneous" standard is also extremely broad. "A frequently quoted definition of this standard of review is this colorful description: 'At least one court has defined the clearly-erroneous standard by stating that 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.'"[203]

The CAAF applied the abuse of discretion standard of review, including finding no clear error in the military judge's findings of fact, "mindful that as to this sensitive issue, the judge's evaluation of the demeanor of the witnesses is most important."[204] The military judge's findings of fact were very comprehensive in this regard, describing in very specific detail the chief petty officer's demeanor while testifying. As found by the military judge:

> "[The chief's] demeanor continued to betray dishonesty, both in the ashen tone of his skin, which varied as his testimony continued, and his constant movement in the witness box." Also, "his face was red and head bowed when answering the question," he appeared to be "acutely uncomfortable," and "his eyes were averted from the direction of the Court." [The chief] appeared to the court as being under "considerable duress." He was a man desperate to please his commanding officer. He impressed the court as a witness "who did not feel free to express his true opinions or accurately recount what he knew to be true." The chief, "under rather intense questioning from the Court finally conceded that he had been told by the commanding officer that he was not going to testify in the case." The military judge found that this concession ran "afoul of the chief's testimony that he did not know that he was desired as a witness." He conceded to the court that "he did in fact tell detailed defense counsel that it was unwise to buck the system," which caused the court to further question why he testified that he did not believe he would be called as a witness.[205]

Because the military judge's findings of fact were not clearly erroneous, and because the CAAF strictly applied the abuse of discretion standard of review that the court held applied to its review of the military judge's decision, the court reinstated the military judge's decision in the case. As the CAAF concluded, "[The military judge's] findings of fact were supported by the evidence and his decision to dismiss with prejudice was in the range of remedies available and not otherwise a clear error of judgment."[206]

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[201] *Id*. at 187 (quoting United States v. Houser, 36 M.J. 392, 397 (C.M.A. 1993)).

[202] United States v. Travers, 25 M.J. 61, 62 (C.M.A. 1987) (quoting United States v. Yoakum, 8 M.J. 763 (A.C.M.R. 1980)). *See* Lieutenant Colonel Patricia A. Ham, *Making the Appellate Record: A Trial Defense Attorney's Guide to Preserving Objections—the Why and How,* ARMY LAW., Mar. 2003, at 17-20.

[203] Ham, *supra* note 202, at 17 (quoting United States v. French, 38 M.J. 420, 425 (C.M.A. 1993) (citing Parts & Elec. Motors, Inc. v. Sterling Elec., Inc., 866 F.2d 228, 233 (7th Cir. 1988)).

[204] *Gore*, 60 M.J. at 187 (citation omitted).

[205] *Id*. at 188.

[206] *Id*. at 189.

Conclusion

This past term of court, the CAAF continued its primary role as the bulwark against unlawful command influence. While the court did not issue any earth-shattering pronouncements on the issue, the CAAF signaled very clearly that it will support military judges who stand guard protecting the accused from the unlawful interference of the command in courts-martial proceedings. More importantly, the CAAF will "watch the backs" of military judges who, in their role as the "last sentinel," fully and thoroughly document a decision to dismiss a case due to unlawful command influence.

What's Done is Done:[1] Recent Developments in Self-Incrimination Law

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Introduction

> It follows that police do not violate a suspect's constitutional rights (or the *Miranda* rule) by the negligent or even deliberate failures to provide the suspect with the full panoply of warnings prescribed by *Miranda*. Potential violations occur, if at all, only upon the admission of unwarned statements into evidence at trial. And, at that point, "the exclusion of unwarned statements . . . is a complete and sufficient remedy" for any perceived *Miranda* violation.[2]

In making such a bold statement in the plurality opinion in *United States v. Patane*,[3] Justice Thomas attempted to shut the door on the unresolved issue of whether the fruit of the poisonous tree doctrine[4] applies to evidence derived from an unwarned, yet voluntary, statement.[5] According to the *Patane* plurality, an unwarned, yet voluntary, statement is not a poisonous tree.[6] Therefore, its fruit should not be excluded as tainted in a criminal trial.[7] What's done is done and the complete remedy for a *Miranda* violation is the exclusion of the unwarned statement itself[8]—any further extension of the Fifth Amendment's automatic exclusionary rule is unnecessary and unjustified.[9]

Patane is one of five Supreme Court cases decided last year in self–incrimination law.[10] Only one of these cases—*Fellers v. United States*[11]—was decided by a unanimous court. The other four cases, the Supreme Court decided by 5-4 majorities, two of which involved plurality opinions.[12] Furthermore, these two plurality opinions, released on the same day,[13] pushed the envelope in the area of self-incrimination law. In one case, *Missouri v. Seibert*, the plurality established a new standard for determining the admissibility of statements taken after *Miranda* violations.[14] In the other case, *Patane*, a different plurality made the bold assertion that police violate neither the Constitution nor the *Miranda* rule itself when they merely fail to warn.[15]

The military courts also decided numerous cases in the area of self-incrimination law last year. Unlike the Supreme Court cases, none of these military cases established new law. Rather, the military courts simply applied the recognized rule of law to the issue. Most of these cases involved the admissibility of properly warned statements that are obtained following

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[1] *Cf.* WILLIAM SHAKESPEARE, MACBETH, act 3, sc. 2 ("Things without all remedy. Should be without regard: what's done is done.").

[2] United States v. Patane, 124 S. Ct. 2620, 2629 (2004).

[3] *Id.*

[4] *See* Wong Sun v. United States, 371 U.S. 471 (1963) (introducing the "fruit of the poisonous tree" doctrine and applying it to the Fourth Amendment). The Fourth Amendment protects against unreasonable searches and seizures. U.S. CONST. amend. IV.

[5] *See* Lieutenant Colonel David H. Robertson, *Self-Incrimination: Big Changes in the Wind*, ARMY LAW., May 2004, at 44-46 (providing a general overview of the admissibility of derivative evidence resulting from *Miranda* violations).

[6] *Patane*, 124 S. Ct. at 2630.

[7] *Id.* at 2624.

[8] In *Miranda*, the Supreme Court held that prior to any custodial interrogation, the police must warn a suspect that he has a right to remain silent, that any statement he makes may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed. If the police do not administer these rights warnings, any subsequent confession is *per se* involuntary and, therefore, inadmissible in court. Miranda v. Arizona, 384 U.S. 436, 479 (1966).

[9] *Patane*, 124 S. Ct. at 2630.

[10] Hiibel v. Sixth Judicial Dist. Court of Nevada, Humboldt County, et al., 54 U.S. 177 (2004); Missouri v. Seibert, 124 S. Ct. 2601 (2004); Yarborough v. Alvarado, 541 U.S. 652 (2004); Fellers v. United States, 540 U.S. 519 (2004).

[11] *Fellers*, 540 U.S. at 519.

[12] *See* Missouri v. Seibert, 124 S. Ct. 2601 (2004) (plurality opinion); United States v. Patane, 124 S. Ct. 2620, 2629 (2004) (plurality opinion).

[13] The Court decided both *Seibert* and *Patane* on 28 June 2004.

[14] *Seibert*, 124 S. Ct. at 2601.

[15] *Patane*, 124 S. Ct. at 2629.

a statement taken in violation of Article 31,[16] Uniform Code of Military Justice (UCMJ), the Fifth Amendment,[17] or the voluntariness doctrine.[18]

This article aims to assist the military practitioner in evaluating the new developments in self-incrimination law. Because these cases involve various aspects of self-incrimination law, this article first provides a brief overview of self-incrimination law. This overview outlines the basic framework military practitioners should use when evaluating any self-incrimination issue in the military. The article then proceeds to review each of the five Supreme Court cases and the significant military cases in the area of self-incrimination law last term.

Self-Incrimination Law

In the military justice system, the area of self-incrimination law encompasses Article 31, UCMJ, the Fifth and Sixth Amendments,[19] and the voluntariness doctrine.[20] Each source of law provides unique protections triggered by distinct events. Therefore, when analyzing a self-incrimination issue, it is imperative that the practitioner categorize the analysis.[21] First, determine the relevant source(s) of law. Next, evaluate the situation and decide if the protections afforded under the source of law have been triggered. If so, determine if there has been a violation of those protections. Typically, a challenge to a confession involves more than one source of self-incrimination law and, therefore, requires several steps of analysis. The confession or admission is admissible when the rights afforded under each source of applicable law have been observed.[22] If those rights have been violated, however, the statement will be inadmissible unless one of the limited exceptions applies.[23] Furthermore, the practitioner must evaluate the admissibility of any evidence derived from an inadmissible statement.

Scope of Protections

The privilege against self-incrimination under the Fifth Amendment and Article 31, UCMJ, applies only to evidence that is testimonial, communicative, and incriminating in nature.[24] Consequently, oral and written statements are protected.[25] Furthermore, verbal acts are protected.[26] Physical characteristics, such as bodily fluids[27] and handwriting samples,[28] are not protected.

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[16] UCMJ art. 31(b) (2002). Article 31(b) states:

> No person subject to this chapter may interrogate, or request any statement from an accused or a person suspected of an offense without first informing him of the nature of the accusation and advising him that he does not have to make any statement regarding the offense of which he is accused or suspected and that any statement made by him may be used as evidence against him in a trial by court-martial.

Id.

[17] U.S. CONST. amend. V. The Fifth Amendment states, "No person . . . shall be compelled in any criminal case to be a witness against himself . . . ." *Id.*

[18] The voluntariness doctrine embraces the common law voluntariness, due process voluntariness, and Article 31(d). *See* Captain Frederic I. Lederer, *The Law of Confessions—The Voluntariness Doctrine*, 74 MIL. L. REV. 67 (1976) (detailing historical account of the voluntariness doctrine).

[19] U.S. CONST. amend VI. The Sixth Amendment states, in part, that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence." *Id*.

[20] *See* Lederer, *supra* note 18, at 67.

[21] *See generally* Lieutenant Colonel David H. Robertson, *Bless Me Father For I Have Sinned: A Year in Self-Incrimination Law*, ARMY LAW., Apr./May 2003, at 116-18.

[22] MANUAL FOR COURTS-MARTIAL, UNITED STATES, MIL. R. EVID. 304(a) (2002) [hereinafter MCM].

[23] *Id*.

[24] *See* United States v. Hubbell, 530 U.S. 27 (2000); *see also* United States v. Williams, 23 M.J. 362 (C.M.A. 1987).

[25] *See* Pennsylvania v. Muniz, 496 U.S. 582 (1990) ("Whenever a suspect is asked for a response requiring him to communicate an express or implied assertion of fact or belief, the suspect confronts the 'trilemma' of truth, falsity, or silence and hence the response (whether based on truth or falsity) contains a testimonial component.").

[26] *See Hubbell*, 530 U.S. at 27.

[27] Schmerber v. California, 384 U.S. 263 (1967) (holding that blood samples are not protected); Murray v. Haldeman, 16 M.J. 74 (C.M.A. 1983) (holding urine samples are not protected); United States v. Armstrong, 9 M.J. 374 (C.M.A. 1980) (holding that blood samples are not protected).

[28] Gilbert v. California, 388 U.S. 263 (1967); United States v. Harden, 18 M.J. 81 (C.M.A. 1984).

In 2004, the Supreme Court and the Army Court of Criminal Appeals (ACCA) decided cases addressing the scope of protections against self-incrimination. In *Hiibel v. Sixth Judicial District Court of Nevada*,[29] the Supreme Court determined that, under most circumstances, a person's identity is not protected under the Fifth Amendment; therefore, it upheld a Nevada "stop and identify" statute[30] requiring a person to identify himself during the course of a valid *Terry*[31] stop. In *United States v. Hammond*, the ACCA found that the requirement under Article 134, UCMJ,[32] for a soldier to remain at the scene of an accident does not violate the protections afforded under either Article 31 or the Fifth Amendment.[33]

In *Hiibel*, someone called the sheriff's department to report seeing a man assault a woman in a truck[34] Responding to this report, a deputy sheriff arrived at the scene to find Hiibel standing by a truck, with a young woman inside.[35] The officer observed skid marks behind the truck, leading him to believe that the truck had come to a sudden stop.[36] He also observed that Hiibel appeared to be intoxicated.[37] After explaining to Hiibel that he was investigating a reported fight, the officer asked for proof of identity from Hiibel eleven separate times, warning Hiibbel that he would arrest him if he did not comply.[38] Hiibel refused each request and taunted the officer "by placing his hands behind his back and telling the officer to arrest him and take him to jail."[39] The officer then arrested Hiibel for violating a Nevada statute requiring individuals to identify themselves to officers investigating criminal activity.[40]

Convicted for violating the "stop and identify" statute, Hiibel challenged his conviction under the Fourth[41] and Fifth Amendments.[42] After determining that neither the officer's conduct nor the Nevada statute violated the Fourth Amendment, the Court turned its attention to the self-incrimination issue raised by Hiibel.[43]

The Court first noted that the Self-Incrimination Clause of the Fifth Amendment only protects communications that are "testimonial, incriminating, and compelled."[44] For a communication to qualify as incriminating, the witness must reasonably believe that his communication could be used in a criminal prosecution against him or could provide a link to other evidence that might be so used.[45] Providing personal identification is normally insignificant, the Court reasoned, and would be incriminating in only the most unusual circumstances.[46] In this case, Hiibel failed to show that his refusal to comply with the

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[29] Hiibel v. Sixth Judicial Dist. Court of Nevada, Humboldt County, et al., 124 S. Ct. 2451 (2004).

[30] *Id.* at 2455-6. NEV. REV. STAT. (NRS) § 171.123 (2004) provides in relevant part:

> 1. Any peace officer may detain any person whom the officer encounters under circumstances which reasonably indicate that the person has committed, is committing or is about to commit a crime.
> . . . .
>
> 3. The officer may detain the person pursuant to this section only to ascertain his identity and the suspicious circumstances surrounding his presence abroad. Any person so detained shall identify himself, but may not be compelled to answer any other inquiry of any peace officer.

Id.

[31] Terry v. Ohio, 392 U.S. 1 (1968) (holding that a police officer's reasonable suspicion that a person may be involved in criminal activity permits the officer to stop the person for a brief time and investigate further).

[32] UCMJ art. 134 (2002) (fleeing scene of accident).

[33] United States v. Hammond, 60 M.J. 512, 513 (Army Ct. Crim. App. 2004).

[34] *Hiibel*, 124 S. Ct. at 2455.

[35] *Id.*

[36] *Id.*

[37] *Id.*

[38] *Id.*

[39] *Id.*

[40] *Id*.

[41] U.S. CONST. amend. IV. The Fourth Amendment states, "The right of the people to be secure . . . against unreasonable searches and seizures, shall not be violated . . . ." *Id.*

[42] *Hiibel*, 124 S. Ct. at 2460.

[43] *Id*.

[44] *Id*. (citing United States v. Hubbell, 530 U.S. 27 (2000)).

[45] *Id*. at 2461.

[46] *Id*. The Supreme Court noted that "even witnesses who plan to invoke the Fifth Amendment privilege answer when their names are called to take the stand." *Id*.

officer's requests was based on a real fear that his identity would incriminate him or lead to evidence that could be used against him.[47] Finding that Hiibel's identity was not incriminating and, therefore, the disclosure of which was not protected under the Fifth Amendment, the Court upheld Hiibel's conviction.[48]

The case's ultimate significance does not lie in the Supreme Court's specific holding that Hiibel's identity was not protected under these circumstances. Rather, this case is significant because the Court refused to hold that a person's identity is *per se* outside the scope of Fifth Amendment protections.[49] First, the Court declined to resolve the case on the basis that a person's identity is nontestimonial and, thus, always outside the scope of the privilege against self-incrimination.[50] The Court noted instead that "to be testimonial, an accused's communication must itself, explicitly or implicitly, relate a factual assertion or disclose information" and that "stating one's name may qualify as an assertion of fact relating to identity."[51] In other words, furnishing one's identity could qualify as both communicative and testimonial. Second, the Court carefully limited the reach of its decision by focusing on the lack of reasonable danger of incrimination in this particular case.[52] Thus, the Court concluded its opinion by leaving open the possibility of a case arising when requiring an individual to furnish identification would lead to evidence needed to convict the individual of a separate offense and, therefore, be protected by the Fifth Amendment.[53]

The Army court addressed a similar issue in *United States v. Hammond*.[54] In this case, Specialist Hammond was driving with his wife on Fort Gordon, Georgia. Specialist Hammond and his wife began to fight, and as he pulled to the side of the road, his wife jumped out and rolled free of the moving vehicle.[55] Specialist Hammond turned around, accelerated to approximately thirty-five miles per hour, hit his wife, and fled the scene.[56] Specialist Hammond was convicted of, among other things, leaving the scene of a collision in violation of Article 134, UCMJ.[57]

Reasoning that any requirement for him to remain at the scene would "necessarily compel incriminating responses," Hammond argued that punishing him for fleeing the scene of the collision violated his Fifth Amendment privilege against self-incrimination and his Article 31, UCMJ, rights.[58] The ACCA disagreed, affirming Hammond's conviction.[59] The Army court first looked to the Supreme Court's decision in *California v. Byers*,[60] which addressed a California "hit and run" statute requiring those involved in car accidents to stop and identify themselves.[61] In that case, a plurality concluded that revealing one's name in such circumstances is not, by itself, incriminating.[62] Justice Harlan, concurring in judgment, stated that "the statute did not violate the Fifth Amendment because it had the 'noncriminal governmental purpose' of gathering information to ensure financial responsibility for accidents, self-reporting was a necessary means of securing the information, and minimal disclosure was required."[63]

Next, the ACCA looked to the *United States v. Heyward* decision,[64] a case in which the Court of Military Appeals (CMA)[65] held that an otherwise valid Air Force regulation requiring its members to report drug abuse of other members

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[47] *Id*.

[48] *Id*.

[49] *Id*. at 2460.

[50] *Id*.

[51] *Id*.

[52] *Id*. at 2461.

[53] *Id*.

[54] 60 M.J. 512 (Army Ct. Crim. App. 2004).

[55] *Id.* at 514.

[56] *Id.*

[57] *Id*.

[58] *Id*. at 517.

[59] *Id.* at 520.

[60] 402 U.S. 424, 425 (1971) (plurality opinion).

[61] *Hammond,* 60 M.J. at 517.

[62] The *Byers* plurality explained: "Although identity, when made known, may lead to inquiry that in turn leads to arrest and charge, those developments depend on different factors and independent evidence." *Id.* (quoting *Byers*, 402 U.S. at 434).

[63] *Id*. (quoting *Byers*, 402 U.S. at 440, 458).

[64] 22 M.J. 35 (C.M.A. 1986).

violated the privilege against self-incrimination when applied to members who are also using drugs at the time the duty to report arises.[66] In *Heyward*, the CMA distinguished *Byers* because, unlike the California "hit and run" statute, the "drug reporting requirement was directed at an 'essentially criminal area of inquiry' and that disclosure of the drug use had a more significant 'incriminating potential' than, for example, merely staying at the scene of an accident."[67] The CMA used a balancing test between the "important governmental purpose in securing . . . information"[68] and a servicemember's privilege against self-incrimination.[69]

Applying this balancing test in *Hammond*, the Army court found that the requirement of stopping and identifying oneself at the scene of an accident does not implicate the privilege against self-incrimination in the same manner as in *Heyward*.[70] The court pointed out that "although staying at the scene 'may lead to inquiry that in turn leads to arrest and charge, those developments depend on different factors and independent evidence.'"[71] Thus, the ACCA held that Hammond's conviction violated neither the Fifth Amendment nor Article 31.[72]

What do *Hiibel* and *Hammond* mean for the practitioner? Essentially, they mean that under typical situations, "hit and run" and "stop and identify" statutes do not violate an individual's privilege against self-incrimination. Both courts, however, left the door open for those atypical cases for advocates to distinguish. The scope of protections analysis remains the same: if evidence is testimonial, communicative, and directly incriminating in nature, then the privilege against self-incrimination, under both the Fifth Amendment and Article 31, applies.

The *Miranda* Trigger: Custodial Interrogation

Custodial interrogation triggers the requirement for *Miranda* warnings, because of "the compulsion inherent in custodial surroundings."[73] The test for custody is an objective one determined from the perspective of the person being interrogated: Would a reasonable person feel that they were in custody or deprived of movement in any significant way?[74] The test for interrogation is also an objective one, but is determined from the perspective of the interrogator: Would a reasonable interrogator view his words or actions as likely to elicit an incriminating response?[75]

The Supreme Court addressed the specific issue of determining when someone is in custody in *Yarborough v. Alvarado*.[76] In this case, Alvarado, five months short of his eighteenth birthday, was at a Los Angeles County mall with a group of teenagers.[77] One of the others in the group, Paul Soto, decided to steal a truck and Alvarado agreed to assist him.[78]

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[65] The United States Court of Military Appeals was renamed the United States Court of Appeals for the Armed Forces effective 5 October 1994.

[66] *Hammond*, 60 M.J. at 517.

[67] *Id*.

[68] *Id*.

[69] *Id*.

[70] *Id*.

[71] *Id*. (quoting California v. Byers, 402 U.S. 424, 434 (1971)).

[72] *Id*.

[73] Miranda v. Arizona, 384 U.S. 436, 457-58 (1966).

[74] Berkemer v. McCarty, 468 U.S. 420 (1984). In *Thompson v. Keohane*, the Supreme Court further elaborated on this objective test:

> Two discrete inquiries are essential to the [custody] determination: first, what were the circumstances surrounding the interrogation; and second, given those circumstances, would a reasonable person have felt he or she was not at liberty to terminate the interrogation and leave. Once the scene is set and the players' lines and actions are reconstructed, the court must apply an objective test to resolve the ultimate inquiry: was the formal arrest or restraint on freedom of movement of the degree associated with a formal arrest.

516 U.S. 99, 112 (1996).

[75] Rhode Island v. Innis, 446 U.S. 291 (1980). Note that the definition of interrogation is the same for both Fifth Amendment purposes and Article 31 purposes. *See infra* note 106.

[76] Yarborough v. Alvarado, 541 U.S. 652, 660 (2004).

[77] *Id.* at 656.

[78] *Id*.

When the driver refused Soto's demands for money and the keys to the truck, Soto shot and killed the driver.[79] Alvarado helped Soto hide his gun.[80]

About a month later, the lead detective in the murder investigation contacted Alvarado's mother and informed her that she wished to speak with her son.[81] Alvarado's parents took him to the police station and waited in the lobby while the detective took Alvarado to a separate room.[82] The detective interviewed Alvarado for approximately two hours, but never informed him of his *Miranda* rights.[83] During this two hour recorded interview, Alvarado eventually admitted to his involvement in the attempted robbery and murder.[84] Although the detective never told Alvarado during the course of the interview that he was free to leave, she offered him two breaks, which he declined, and after the interview she returned him to his parents, who drove him home.[85]

At Alvarado's trial for murder and attempted robbery, the court denied his motion to suppress his admissions to the detective, holding that the interview was noncustodial.[86] In affirming Alvarado's conviction, the state appellate court ruled that Alvarado had not been in custody during the interview; therefore, *Miranda* warnings were not required.[87] Alvarado subsequently filed a writ for habeas relief in federal district court under the Antiterrorism and Effective Death Penalty Act of 1996,[88] which authorizes a federal court to grant habeas relief when a state-court adjudication "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal Law, as determined by the Supreme Court of the United States."[89] Although the federal district court agreed with the state court, the Ninth Circuit Court of Appeals reversed, ruling that the state court unreasonably applied clearly established law when it held that Alvarado was not in custody for *Miranda* purposes.[90] The Ninth Circuit held that Alvarado's age and experience must be considered for the *Miranda* custodial inquiry and that it was "simply unreasonable to conclude that a reasonable seventeen-year-old, with no prior history of arrest or police interviews, would have felt that he was at liberty to terminate the interrogation and leave."[91]

The Supreme Court reversed the Ninth Circuit.[92] The Court noted that the facts of this case could lead fair-minded jurists to disagree over whether Alvarado was "in custody" for Miranda purposes.[93] Facts supporting the conclusion that he was in custody were: (1) police asked Alvarado's parents to bring him in for questioning, but never obtained his direct consent for the interview; (2) police never informed Alvarado that he was free to leave; (3) police refused the parents' request to be present during the interrogation; and (4) the interrogation lasted two hours.[94] Facts supporting the conclusion that Alvarado was not in custody were: (1) police did not bring him to the station; (2) police did not threaten him with arrest and prosecution if he did not cooperate, instead they appealed to his interest in being truthful and helpful; (3) Alvarado's parents remained in the lobby during the interview, suggesting that the interview would be brief; (4) during the interview, police primarily focused on the culpability of Alvarado's accomplice; (5) twice, police asked Alvarado if he would like a break from the interrogation; and (6) at the conclusion of the interview, he was allowed to go home.[95] For these reasons, when the Court applied the required deferential habeas corpus review standard, it found that the state court's application of clearly established law was reasonable.[96]

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[79] *Id*.

[80] *Id*.

[81] *Id.*

[82] *Id.*

[83] *Id.*

[84] *Id.*at 657-58.

[85] *Id*. at 658.

[86] *Id*.

[87] *Id*. at 659.

[88] 28 U.S.C. § 2254(d) (2000).

[89] *Id*.

[90] Alvarado v. Hickman, 316 F.3d 841 (2002), *rev'd*, *Alvarado*, 541 U.S. at 652.

[91] *Alvarado*, 541 U.S. at 660 (quoting *Alvarado*, 316 F.3d at 854–55).

[92] *Id*. at 668.

[93] *Id.* at 664.

[94] *Id*.

[95] *Id*. at 665.

[96] *Id*.

Most importantly, the Supreme Court specifically rejected the Ninth Circuit's holding that juvenile status is a factor that must be considered when applying the *Miranda* custody inquiry.[97] The Court noted that *Miranda* and its progeny established an objective test for custody, designed to give clear guidance to police.[98] Whereas "age and inexperience with law enforcement" are individual characteristics of a suspect, which if required to be considered for a custody determination, would create a subjective test.[99]

As one commentator noted, *Yarborough v. Alvarado* has little, if any, precedential value.[100] First, this case was a deferential-review habeas corpus case and the court merely stated that the state court reasonably applied the law.[101] Second, the four dissenters concluded that a suspect's age should be considered if it is known by police, as it was known in this case, because it is "a widely shared characteristic that generates commonsense conclusions about behavior and perception."[102] Requiring consideration of age, therefore, would not complicate the "clear guidance to police" in determining when to administer *Miranda* warnings.[103] Finally, in her concurring opinion, Justice O'Connor did not completely disagree with the dissent, conceding that "there may be cases in which a suspect's age will be relevant," but this was not such a case because Alvarado was so close to the age of majority and it would be difficult to expect police to recognize a suspect is a juvenile in such circumstances.[104]

If this case will have little impact in the civilian world, it will have even less of an impact in the military justice system. First and foremost, Article 31 rights are required regardless of the custody determination.[105] Therefore, few military cases are decided by a *Miranda* custody determination. Second, there are very few instances in the military where a suspect is a juvenile. Regardless of this minimal impact, military interrogators and judge advocates should always be aware of the circumstances of a prior interrogation by civilian police. If such an interrogation was a custodial interrogation, any statements given are inadmissible if *Miranda* warnings are not given, and, as the next section discusses, may impact the admissibility of any subsequent statements given to military interrogators after *Miranda* warnings were provided.

Article 31—Interrogation

As previously noted, few military cases are resolved based on a *Miranda* custody inquiry, because Article 31 rights are triggered by official interrogation regardless of whether the suspect is in custody. The admissibility of many unwarned statements, however, frequently hinges on an "interrogation inquiry." The definition of interrogation is the same for both *Miranda* and Article 31 purposes: words or actions that a reasonable interrogator would see as likely to elicit an incriminating response.[106]

In *United States v. Traum*,[107] the Court of Appeals for the Armed Forces (CAAF) ruled that a request to take a polygraph did not amount to interrogation and, therefore, did not have to be preceded by an Article 31 rights warning.[108] In this case, Senior Airman Traum called emergency medical personnel to report that her eighteen-month-old daughter was not breathing.[109] Following extensive attempts to revive the toddler, medical personnel pronounced her dead.[110] Approximately

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[97] *Id*. at 667.

[98] *Id*.

[99] *Id*. at 668.

[100] *See* WAYNE R. LAFAVE, JEROLD H. ISRAEL, & NANCY J. KING, CRIMINAL PROCEDURE § 6.6(c) (4th ed. Supp. 2004).

[101] *Alvarado*, 541 U.S. at 664-65.

[102] *Id*. at 674 (Breyer, J., dissenting).

[103] *Id*. at 668.

[104] *Id*. at 669 (O'Connor, J., concurring).

[105] Article 31 requires a warning to a suspect or an accused. It does not limit this warning requirement to situations involving custodial interrogation. UCMJ art. 31(b)(2002).

[106] Rhode Island v. Innis, 446 U.S. 291 (1980) (defining interrogation for *Miranda* purposes as words or actions reasonably likely to elicit an incriminating response). Military Rule of Evidence 305(b)(2) requires Article 31 warnings for "any formal or informal questioning in which an incriminating response either is sought or is a reasonable consequence of such questioning." MCM, *supra* note 22, MIL. R. EVID. 305(b)(2).

[107] United States v. Traum, 60 M.J. 226 (2004). The court also determined that the appellant's statement, "she did not want to talk about the details of [that] night . . .," was not an unequivocal invocation of her right to remain silent, but instead left open the possibility that she would be willing to take the polygraph or talk about other aspects of the case. *Id*. at 230. Therefore, agents were not required to cease conversations with her. Instead, agents proceeded with the polygraph and interrogation only after having read, and secured a waiver of, the appellant's Article 31(b) rights. *Id*.

[108] *Id*.

[109] *Id*. at 228.

three weeks later, Traum called Air Force Office of Special Investigations (AFOSI) to request an update on the investigation into the death of her daughter.[111] Having already focused their investigation on Traum, the agents requested that she go to the AFOSI office to discuss the investigation.[112] Traum voluntarily went to the AFOSI office and told the special agent that she needed her daughter's autopsy report and death certificate in order to process her humanitarian assignment.[113] At some point during their conversation, the agent, without administering Article 31 warnings, asked Traum if she would be willing to take a polygraph.[114] Traum eventually agreed to take a polygraph test.[115] Prior to administering the test, the polygraph examiner read Traum her Article 31(b) rights and informed her that she was not required to take the test.[116] Traum waived her rights and took the polygraph test.[117] During a post-polygraph interview, Traum admitted that she intentionally suffocated her daughter.[118]

The CAAF held that the agent was not required to read Article 31 rights prior to asking the appellant if she would be willing to take a polygraph, since an incriminating response was neither sought nor was it a reasonable consequence of the agent's inquiry.[119] Instead, the reasonable consequence from the agent's question was a "yes" or "no" response from Traum.[120] Therefore, since there was not an interrogation, neither the requirements for *Miranda* warnings nor for Article 31 were triggered.[121]

Derivative Evidence of *Miranda* Violations

Out of the five cases reviewed by the Supreme Court in 2004 involving the privilege against self-incrimination, three of them involved the admissibility of derivative evidence of unwarned, yet otherwise voluntary, statements.[122] This section will provide a brief background of this area of law and then examine the three Supreme Court cases.

In 1966, the Supreme Court held, in the landmark case of *Miranda v. Arizona*,[123] that prior to any custodial interrogation, a subject must be warned of certain rights. In establishing this warning requirement, the Court sought to counter the inherently coercive environment of a police dominated, incommunicado interrogation and, thus, protect persons against compelled self-incrimination.[124] If the police do not administer the *Miranda* rights warnings, any subsequent confession is *per se* involuntary and, therefore, inadmissible in court.[125]

The Court, however, has never extended the *Miranda* exclusionary rule to cover derivative evidence obtained through the use of unwarned, yet otherwise voluntary, statements.[126] Rather, the Court has specifically held that, although the unwarned statements themselves are inadmissible, certain derivative evidence of otherwise voluntary statements may be

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[110] *Id*.

[111] *Id*.

[112] *Id*.

[113] *Id*.

[114] *Id*.

[115] *Id*.

[116] *Id*.

[117] *Id*.

[118] *Id*.

[119] *Id*. at 229.

[120] *Id*.

[121] *Id*.

[122] Observing that the Supreme Court had granted *certiorari* in all these cases by this time last year, Lieutenant Colonel David Robertson provided a detailed overview and analysis of this area of self-incrimination law in last year's symposium article. Robertson, *supra* note 5, at 44-46.

[123] 384 U.S. 436 (1965).

[124] *Id*. at 457.

[125] *Id*. at 479. The Supreme Court, however, has recognized two exceptions to this exclusionary rule. A statement taken in violation of Miranda may be used to cross examine a defendant. Harris v. New York, 401 U.S. 222 (1971). Furthermore, the Court recognized an emergency exception to the *Miranda* warnings requirement. New York v. Quarles, 467 U.S. 649 (1984).

[126] Robertson, *supra* note 5, at 45.

admissible. First, in *Michigan v. Tucker*,[127] the Court held that although a statement was taken in violation of *Miranda* and is therefore inadmissible, the testimony of a witness identified in the unwarned statement did not also fall within the *Miranda* exclusionary rule. Next, in *Oregon v. Elstad*,[128] the Court held that the exclusionary rule does not apply to a voluntary, warned confession merely because it was obtained after an earlier unwarned, yet voluntary, statement. The *Elstad* Court stated, "The relevant inquiry is whether, in fact, the second statement was also voluntarily made. . . . A suspect who has once responded to unwarned yet uncoercive questioning is not thereby disabled from waiving his rights and confessing after he has been given the requisite *Miranda* warnings."[129]

Derivative Evidence: Subsequent Warned Statement

Two of the Supreme Court's decisions regarding the derivative evidence of *Miranda* violations involved subsequent warned statements. In *Fellers v. United States*,[130] the Supreme Court remanded the case to the Eighth Circuit Court of Appeals, acknowledging that the Supreme Court had yet to determine whether the *Elstad* rationale applies when the initial violation involved the Sixth Amendment right to counsel instead of the Fifth Amendment right against self-incrimination. In the other derivative statement evidence case, *Missouri v. Seibert*,[131] rather than applying *Elstad*, the Court distinguished it, and thus, set a new standard for determining the admissibility of certain statements made after the administration of *Miranda* warnings.

In *Fellers*, a grand jury indicted Fellers for conspiracy to distribute drugs,[132] thus triggering his Sixth Amendment right to counsel. Under this indictment, police went to Fellers' home to arrest him.[133] During the arrest, and without reading Fellers his *Miranda* rights, the police "deliberately elicited" incriminating statements from Fellers.[134] The officers then arrested Fellers and took him to the police station, where they gave him the appropriate *Miranda* warnings.[135] Fellers waived his *Miranda* rights and, during the subsequent interrogation, repeated his earlier incriminating statements.[136]

The trial court suppressed the unwarned statements, but admitted the warned statements under *Elstad*, because Fellers "knowingly and voluntarily waived his *Miranda* rights before making the statements."[137] The Eighth Circuit Court of Appeals, cursorily finding that the Sixth Amendment was not violated, "for the officers did not interrogate Fellers at his home,"[138] affirmed the trial court's determination that the statements at the police station were nevertheless admissible under *Elstad*.[139] Noting that the Eighth Circuit incorrectly applied the Fifth Amendment's "interrogation" standard, rather than the Sixth Amendment's "deliberate elicitation" standard,[140] the Supreme Court, in a unanimous opinion, ruled that the police violated Fellers' post-indictment Sixth Amendment right to counsel when they "deliberately elicited" information without

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[127] 417 U.S. 433 (1974).

[128] 470 U.S. 298 (1985).

[129] *Id*. at 318.

[130] 540 U.S. 519 (2004).

[131] 124 S. Ct. 2601 (2004).

[132] *Fellers*, 540 U.S. at 521.

[133] *Id*.

[134] *Id*.

[135] *Id*.

[136] *Id*. at 522.

[137] *Id*.

[138] United States v. Fellers 285 F.3d 721, 724 (8th Cir. 2002), *aff'd in part and remanded in part*, United States v. Fellers, 397 F.3d 1090, 1092 (8th Cir., 2005).

[139] *Id*.

[140] *See generally* Robertson, *supra* note 5, at 47–48. The *Fellers* Court:

> [R]eiterated that the test for violations of the Sixth Amendment were separate and distinct from those of the Fifth Amendment. Whereas Fifth Amendment analysis applies a "custodial-interrogation" standard, government agents violate the Sixth Amendment when they "deliberately elicit" information from an individual against whom judicial proceedings have been initiated. The Supreme Court noted that the Eighth Circuit erred when it incorrectly applied the Fifth Amendment's "interrogation" standard, instead of the Sixth Amendment's "deliberate-elicitation" standard. The Eighth Circuit compounded this error when they evaluated the petitioner's subsequent warned statement, given at the jail house – under the standards set forth in *Oregon v. Elstad*, a Fifth Amendment based case.

Id. at 47.

first securing a waiver of counsel.[141] The Court, however, did not rule on the admissibility of the warned statements taken later.[142] Acknowledging that it had never decided whether the rationale of *Elstad* applies to Sixth Amendment right to counsel claims, the Court remanded the case for the Eighth Circuit to address this unresolved issue.[143]

Regardless of the ultimate determination of *Elstad*'s applicability to the Sixth Amendment's right to counsel violations, *Fellers* "serves as a reminder to practitioners of the importance of carefully identifying and applying the correct legal standards"[144] when analyzing self-incrimination issues. The Supreme Court has made it clear that "the standards for each self-incrimination protection are separate and distinct, and that failure to identify or apply them correctly constitutes reversible error."[145] Therefore, practitioners should always apply the analysis set forth in this article's introduction when analyzing the complex and often overlapping sources of self-incrimination law.

In *Seibert*, the lower court arguably applied the correct law set forth in *Elstad*.[146] Nevertheless, a plurality of the Supreme Court created a new standard for determining the admissibility of certain statements made after *Miranda* violations.[147] In this case, Patrice Seibert lived in a mobile home with her five sons and a mentally ill teenager, Donald.[148] Seibert's twelve-year old son, Jonathan, who was severely afflicted with cerebral palsy, died in his sleep.[149] Fearing charges of neglect because Jonathan was covered with bedsores, Seibert conspired with two of her teenaged sons and their two friends to conceal the circumstances of Jonathan's death by burning their mobile home.[150] To avoid the appearance that they left Jonathan unattended, they planned to leave Donald sleeping in the mobile home to die in the fire.[151] Seibert's son, Darian, and his friend set the home on fire.[152] Donald died in the fire, and Darian, who suffered serious burns to his face, was hospitalized.[153]

Five days after the fire, police awakened Seibert at 3 a.m. at the hospital where Darian was being treated.[154] The lead investigator, Officer Hanrahan, specifically instructed the arresting officer not to administer *Miranda* warnings.[155] At the police station, Officer Hanrahan intentionally withheld *Miranda* warnings and interrogated Seibert for approximately forty minutes, continually squeezing her arm and repeating, "Donald was to die in his sleep."[156] Seibert finally admitted that Donald was supposed to die in the fire.[157] After obtaining this admission, Officer Hanrahan gave Seibert a "20-minute coffee and cigarette break."[158]

Following this short break, Officer Hanrahan resumed the interrogation.[159] He turned on a tape recorder, gave Seibert her *Miranda* warnings and obtained a signed rights waiver from her.[160] During this second stage of the interrogation, Officer

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[141] *Fellers,* 540 U.S. at 524.

[142] *Id*. at 525.

[143] *Id*.

[144] *Robertson*, *supra* note 5, at 47.

[145] *Id*. at 48.

[146] State v. Seibert, 93 S.W. 3d 700 (Mo., 2002), *aff'd,* 124 S. Ct. 2601 (2004).

[147] Missouri v. Seibert, 124 S. Ct. 2601 (2004) (plurality opinion).

[148] *Seibert*, 124 S. Ct. at 2605.

[149] *Id*.

[150] *Id*.

[151] *Id*.

[152] *Id*. at 2606.

[153] *Id*.

[154] *Id*.

[155] *Id*.

[156] *Id*.

[157] *Id*.

[158] *Id*.

[159] *Id*.

[160] *Id*.

Hanrahan referred back to the first stage and confronted Seibert with her earlier unwarned admissions.[161] Seibert eventually repeated her earlier admissions.[162]

Before trial, Seibert sought to exclude both the unwarned admission and the warned tape-recorded admission.[163] At the suppression hearing, Officer Hanrahan testified that he intentionally withheld *Miranda* warnings, thus resorting to an interrogation technique promoted by numerous police organizations: question first, obtain an admission, then give warnings and resume questioning until the suspect repeats their prior admission.[164] The trial court suppressed the first unwarned admission, but admitted the tape recorded admission under *Elstad*.[165]

Distinguishing this case from *Elstad*, the Supreme Court held that the warned confession should have been suppressed also.[166] Rather than focusing on the voluntariness of the suspect's rights waiver, as the *Elstad* Court had, the plurality focused on the effectiveness of the *Miranda* warnings in the first place.[167] It found that the police "question-first" tactic of deliberately withholding *Miranda* warnings and eliciting an initial confession undermines the "comprehensibility and efficacy" of the subsequent *Miranda* warnings. [168] Thus, the plurality stated that the threshold issue is whether warnings administered in such circumstances can function effectively as *Miranda* requires.[169] It set forth the following factors as relevant in making such a determination: (1) the timing and setting of the two interrogations; (2) the completeness and detail of the first round of interrogation; (3) the continuity of police personnel; (4) the degree to which the interrogator referred back to the first interrogation; and (5) the overlapping content of the two elicited statements.[170]

Considering these factors, the plurality distinguished the circumstances in this case from those in *Elstad*, which actually involved two separate and distinct interrogations.[171] Under the circumstances of this case, the Court concluded that it would have been reasonable for Seibert to regard the two phases of the interrogation as a continuum, especially since the officer referred back to the earlier admissions.[172] The mere recital of *Miranda* warnings in the middle of this continuous interrogation was not sufficient to separate the two phases in Seibert's mind: she would not have understood that she had a choice about continuing to talk and repeating the same information previously elicited.[173] Therefore, *Miranda* warnings were never effectively given, and any subsequent statements were presumed involuntary and inadmissible.[174]

Practitioners should be aware that even though the *Seibert* Court established a new additional standard to be applied in the area of self-incrimination law, *Elstad* is still good law. The plurality even stated so in a footnote to its opinion.[175] *Seibert* just adds a new standard for those cases when the warnings are given in the midst of one continuous interrogation.

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[161] *Id*.

[162] *Id*.

[163] *Id*.

[164] *Id*.

[165] *Id*.

[166] *Id*. at 2606-13.

[167] *Id*.

[168] *Id*. at 2610. The plurality stated:

> The threshold issue when interrogators question first and warn later is thus whether it would be reasonable to find that in these circumstances the warnings could function "effectively" as *Miranda* requires. Could the warnings effectively advise the suspect that he had a real choice about giving an admissible statement at that juncture? Could they reasonably convey that he could choose to stop talking even if he had talked earlier? For unless the warnings could place a suspect who has been interrogated in a position to make such an informed choice, there is no practical justification for accepting the formal warnings as compliance with *Miranda*, or for treating the second stage of interrogation as distinct from the first, unwarned and inadmissible segment.

Id.

[169] *Id*.

[170] *Id*. at 2612.

[171] *Id*.

[172] *Id*. at 2613.

[173] *Id*.

[174] *Id*.

[175] *Id.* at 2610 n.4.

Derivative Evidence: Physical Evidence

Does the Fruit of the Poisonous Tree Doctrine Apply to the Physical Fruits?

Before the 2004 term, the Supreme Court had never determined the admissibility of derivative physical evidence of *Miranda* violations.[176] In 2004, it finally had an opportunity to answer the question of whether physical evidence obtained solely and directly through the use of unwarned statements is admissible. The answer? An unwarned, yet otherwise voluntary, statement is not a poisonous tree. Therefore, its fruit should not be excluded.

In *United States v. Patane*,[177] police were notified that Patane violated a restraining order by attempting to call his ex-girlfriend and by illegally possessing a gun. Two police officers went to Patane's house and, after asking Patane about his attempts to call his ex-girlfriend, placed him under arrest.[178] Patane, however, interrupted the rights advisement, stating that he knew his rights.[179] Consequently, Patane never received a complete rights warning as required by *Miranda*.[180] The officers then asked Patane about his gun.[181] After some initial reluctance, Patane told the officers where the gun was located and, per their request, gave the officers permission to enter his home and seize it.[182]

Distinguishing this case (involving physical evidence) from *Elstad* and *Tucker*, the lower court ruled that the gun must be suppressed under the fruit of the poisonous tree doctrine.[183] The Supreme Court disagreed, stating, "[T]he *Miranda* rule protects against violations of the Self-Incrimination Clause, which in turn, is not implicated by the introduction at trial of physical evidence resulting from voluntary statements."[184] The Court noted that "[u]nlike the Fourth Amendment's bar on unreasonable searches, the [Fifth Amendment's] Self-Incrimination Clause is self-executing."[185] In other words, the "victims" of *Miranda* violations have, in the *Miranda* exclusionary rule, an automatic protection from the use of their unwarned statements in court.[186] The Court reasoned, however, that creating a blanket suppression rule of the fruit of unwarned, yet voluntary, statements does not serve the Fifth Amendment's goals of "assuring trustworthy evidence" or deterring police misconduct.[187] Thus, five members of the Court held that failure to give a suspect *Miranda* warnings does not require suppression of the physical fruits of the suspect's unwarned but voluntary statements.[188]

> In a sequential confession case, clarity is served if the later confession is approached by asking whether in the circumstances the *Miranda* warnings given could reasonably be found effective. If yes, a court can take up the standard issues of voluntary waiver and voluntary statement [under *Elstad*]; if no, the subsequent statement is inadmissible for want of adequate *Miranda* warnings, because the earlier and later statements are realistically seen as parts of a single, unwarned sequence of questioning.

Id.

[176] Note that *Elstad* involved subsequent voluntary statements and *Tucker* involved witness testimony.

[177] United States v. Patane, 124 S. Ct. 2620 (2004) (plurality opinion).

[178] *Id*. at 2624, 2625.

[179] *Id*. at 2625.

[180] *Id*.

[181] *Id*.

[182] *Id*.

[183] United States v. Patane, 304 F.3d 1013 (10th Cir. 2002), *rev'd and remanded by* United States v. Patane, 124 S. Ct. 2620 (2004).

[184] *Patane*, 124 S. Ct. at 2624.

[185] *Id*. at 2628.

[186] *Id*.

[187] *Id*. at 2629.

[188] *Id*. at 2630. The three person plurality went as far as stating that the protections of *Miranda* are not violated when officers fail to give warnings, regardless of whether the failure is negligent or intentional. Instead, *Miranda's* protections are violated only when unwarned statements are admitted at trial. Suppression of unwarned statements is a complete remedy to protect this fundamental "trial right." *Id*. at 2629. Therefore, there is no reason to apply the "fruit of the poisonous tree" doctrine. Although the two justices concurring in judgment agreed with the majority that the rationale of both *Elstad* and *Tucker* is even more applicable in this case, they found it "unnecessary to decide whether the detective's failure to give Patane his full Miranda warnings should be characterized as a violation of the Miranda rule itself, or whether there is 'anything to deter' so long as the unwarned statements are not later introduced at trial. *Id*. at 2632.

When analyzing the admissibility of a statement, it is imperative to categorize the analysis. As the *Fellers* Court emphasized, this is also true when analyzing the admissibility of derivative evidence gained through the use of that statement.[189] Although the Supreme Court's decisions regarding derivative evidence will have a major impact on cases involving *Miranda* violations, these decisions will have far less of an impact on military cases. This is because military practitioners must take one additional step in the self-incrimination law analysis—consider the admissibility of derivative evidence resulting from statements taken in violation of Article 31, UCMJ.

In the military, the admissibility of statements resulting from Article 31 violations is governed by Military Rule of Evidence (MRE) 304.[190] Military Rule of Evidence 304(a) states that "an involuntary statement or any derivative evidence therefrom may not be received in evidence . . . ."[191] Military Rule of Evidence 304(b)(3) provides one exception to this rule: "Evidence that is challenged under this rule as derivative may be admitted . . . if the statement was made voluntarily, that the evidence was not obtained by the use of the statement, or that the evidence would have been obtained even if the statement had not been made."[192]

The CAAF's analysis of derivative statement evidence has always been more stringent than the Supreme Court's analysis in *Elstad*.[193] Consequently, the holding in *Seibert* will have less of an impact in the military than it will in the civilian courts. More importantly, although the Supreme Court held in *Patane* that the fruit of the poisonous tree doctrine does not apply to the physical fruits of *Miranda* violations, the practice in the military remains otherwise when it comes to statements resulting from Article 31 violations: such statements will only be admissible if the government can prove by a preponderance of evidence that the alleged physical fruits of that statement were not obtained by the use of the statement or would have been obtained even if the statement had not been made.[194]

In two of its cases last year, the CAAF grappled with the issue of admissibility of derivative statement evidence gained from a previous unwarned statement: *United States v. Seay*[195] and *United States v. Cuento*.[196] In *United States v. Torres*, the Air Force Court of Criminal Appeals (AFCCA) also dealt with a slightly different twist of this issue: What standard applies when the previous statement resulted from coercive police tactics and not just from a mere *Miranda* violation?[197]

In *United States v. Seay*, Sergeant (SGT) Seay and another sergeant murdered a fellow soldier.[198] After watching the local media coverage of the murder, SGT Seay's wife informed civilian police that she suspected her husband was involved in the murder.[199] A civilian detective then contacted SGT Seay, informed him that he was investigating the murder, and asked him to go to the police station for an interview.[200] At the police station, SGT Seay waived his *Miranda* rights and agreed to the interview.[201] When the detective informed SGT Seay that his co-conspirator was suspected of the murder, however, SGT Seay invoked his right to remain silent.[202] After SGT Seay terminated the interview and returned to his

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[189] Fellers v. United States, 540 U.S. 519, 524 (2004).

[190] MCM, *supra* note 22, MIL. R. EVID. 304.

[191] *Id.* MIL. R. EVID. 304(a).

[192] *Id.* MIL. R. EVID. 304(b)(3).

[193] *See* United States v. Phillips, 32 M.J. 76, 81 (C.M.A. 1991) (holding that

> [C]onsidering all the circumstances—there must be a showing that the admission was not made as a result of the questioner's using earlier, unlawful interrogations. Thus, most precisely, our task under the circumstances of this case is to determine whether the government has shown by a preponderance of the evidence that Phillip's admissions . . . were not obtained by use of the earlier statements.).

[194] MCM, *supra* note 22, MIL. R. EVID. 304(b)(3).

[195] 60 M.J. 73 (2004).

[196] 60 M.J. 106 (2004).

[197] United States v. Torres, 60 M.J. 559 (A.F. Ct. Crim. App. 2004).

[198] United States v. Seay, 60 M.J. 73, 75 (2004).

[199] *Id*.

[200] *Id*.

[201] *Id*.

[202] *Id*.

apartment, the detective arranged for SGT Seay's wife to make recorded phone calls in an attempt to get him to confess.[203] Over the course of three phone calls with his wife, SGT Seay did not confess to the murder, but made a number of references as to whether he should get a lawyer.[204] Following these phone calls, the Criminal Investigation Command (CID) took over the investigation from the civilian police.[205]

Concerned for the wife's safety, CID arranged a meeting between the accused and his wife at the CID office.[206] Sergeant Seay voluntarily went to the CID office, where CID informed him that his conversation with his wife would be recorded.[207] Monitoring the conversation from another room, CID terminated the meeting when the wife began asking SGT Seay potentially incriminating questions.[208] The CID then told SGT Seay that his cooperation would be appreciated, advised him that anything he said previously would not be used against him, and informed him of his Article 31 rights.[209] Sergeant Seay agreed to cooperate, waived his Article 31 rights, and provided a detailed narrative of the murder.[210] He later gave a second sworn confession and a videotaped statement describing the murder after being readvised of his Article 31 rights.[211]

The CAAF held that SGT Seay's confession was properly admitted against him at trial.[212] First, the court held that SGT Seay's references to counsel during his conversation with his wife did not constitute an invocation of his right to counsel because these references were ambiguous and nevertheless anticipatory, because they did not occur during custodial interrogation.[213] Second, the court sidestepped the issue of whether the government violated SGT Seay's Fifth Amendment and Article 31 rights by continuing to question him through the pretextual phone calls despite his invocation of his right to silence at the police station.[214] Instead, the court held that, even assuming the government had violated SGT Seay's rights, his eventual confession was untainted, for it did not derive from either the initial interview with civilian police or the "pretextual phone calls."[215] Noting that SGT Seay confessed to the murder after voluntarily driving to CID and meeting his wife, the court held that the CID agent's administration of new rights warnings, as well as a cleansing warning, purged any possible taint:

> In short, immediately prior to [SGT Seay's] confession, "he was thus reminded again that he could remain silent and could consult with a lawyer, and was carefully given a full and fair opportunity to exercise these options.' [SGT Seay] waived those rights anew, and in so doing created a clean slate for his confession."[216]

In *United States v. Cuento*,[217] Aviation Structural Mechanic Second Class (E–5) Cuento sexually assaulted his daughter.[218] Following his daughter's molestation allegation, the local civilian police initiated an investigation and twice interrogated Cuento.[219] During the interrogations, Cuento denied intentionally fondling his daughter.[220] According to Cuento, he had accidentally caught his hand in her underwear and penetrated her vagina while they were wrestling.[221]

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[203] *Id*.

[204] *Id*. at 76.

[205] *Id*.

[206] *Id*.

[207] *Id*.

[208] *Id*.

[209] *Id*.

[210] *Id*.

[211] *Id*.

[212] *Id*. at 77.

[213] *Id*. at 78.

[214] *Id*.

[215] *Id*.

[216] *Id*. at 79.

[217] 60 M.J. 106 (2004).

[218] *Id*.

[219] *Id.* at 107.

[220] *Id.* at 108.

[221] *Id.* at 107.

Although the local district attorney declined prosecution, Cuento was removed from the family home and restrained from contacting his children.[222]

The state Child Protective Service, in coordination with the Navy Family Advocacy Program, devised a family reunification plan whereby Cuento could rejoin his family following the successful completion of the plan's requirements.[223] One of these requirements was for Cuento to admit to molesting his daughter.[224] Cuento faithfully participated in group counseling as required by the reunification plan.[225] Seventeen months later, having been questioned by the police and counseled on numerous occasions and having never admitted to intentionally assaulting his daughter, Cuento finally confessed to his psychotherapist.[226] About a week later, Navy Criminal Investigative Service (NCIS) called Cuento and invited him to the NCIS office for questioning.[227] After being advised of and waiving his rights, Cuento gave the same version of the events that he had initially given to the civilian police.[228] When the NCIS agent expressed disbelief, Cuento admitted to the molestation and signed a written confession.[229]

In determining the admissibility of Cuento's confession to NCIS, the CAAF assumed, *arguendo*, that his statements to the counselors were involuntary, resulting from the coercive effect of the reunification plan's requirements.[230] Under such circumstances, any "subsequent confession [was] presumptively tainted as a product of the earlier one."[231] Nevertheless, the subsequent admission was admissible if the government could prove by a preponderance of evidence that it "was not obtained by use of the [coerced] statement, or that the evidence would have been obtained even if the statement had not been made."[232] Under the facts of this case, the court found that the government carried its burden of demonstrating that Cuento's confession to NCIS was both untainted and voluntary.[233] At the time of Cuento's confession to NCIS, seven days had elapsed since his admission to his psychotherapist—"a significant time for cool reflection and consultation with an attorney."[234] Cuento, thirty-seven years old with eighteen years of service, voluntarily went to NCIS and was told he was free to leave at any time.[235] Although they did not administer cleansing warnings, NCIS did not refer to Cuento's statements to his counselors or to the requirements of the family reunification plan.[236] Finally, NCIS made no promises, inducements, or threats during the interrogation.[237] Therefore, the court found Cuento's confession admissible.[238]

In *United States v. Torres*,[239] civilian police found Airman First Class Torres and two runaway girls asleep in a parked stolen car.[240] The police arrested Torres and in the subsequent search of the car found, among other things, a box containing marijuana and methamphetamine.[241] The police transported Torres to the police station for interrogation by a police detective.[242] During the interrogation, Torres invoked his right to remain silent numerous times.[243] Nevertheless, the

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[222] *Id.*

[223] *Id.*

[224] *Id.*

[225] *Id.*

[226] *Id.*

[227] *Id*. at 108.

[228] *Id.*

[229] *Id.*

[230] *Id.* at 109.

[231] *Id.* at 108-09 (quoting United States v. Phillips, 32 M.J. 76, 79 (C.M.A. 1991)).

[232] *Id.* (quoting *Phillips*, 32 M.J. at 79).

[233] *Id.* at 110.

[234] *Id*. at 109.

[235] *Id.*

[236] *Id*.

[237] *Id.*

[238] *Id*.

[239] 60 M.J. 559 (A.F. Ct. Crim. App. 2004).

[240] *Id.* at 561.

[241] *Id.* at 562.

[242] *Id.* at 565.

[243] *Id.* at 566.

detective continued to question Torres without pause,[244] finally convincing him to fully cooperate by explaining the consequences of making the police do things the "hard way."[245] Air Force Office of Special Investigations agents were present at the police station, but did not participate in the detective's interrogation of Torres.[246] Immediately following the initial interrogation, the AFOSI agents interviewed Torres in a different room.[247] Not knowing that he had previously invoked his right to remain silent, the agents did not provide him with a cleansing warning, but otherwise properly advised Torres of his Article 31 rights.[248] Torres waived his rights and provided a confession.[249]

After finding that the search of the car was lawful,[250] the Air Force Court of Criminal Appeals found that Torres' statements to the civilian detective were not just the result of a technical violation of *Miranda* warnings, but the product of deliberate coercion and improper tactics and were, therefore, involuntary.[251] Consequently, as in *Cuento* above, Torres' confession to the AFOSI agents was presumptively tainted and inadmissible, unless the government could prove by a preponderance of evidence that the taint was sufficiently attenuated at the time the statement was made.[252] Because of the close temporal proximity of the two interrogations, the fact that they occurred at the same location (albeit different rooms), and the flagrant nature of the detective's actions, the court found that the government failed to overcome the presumptive taint.[253] Thus, unlike *Cuento*, the confession to AFOSI was tainted and was inadmissible.[254]

Conclusion

Last year was an exciting year in the area of self-incrimination law. Although most cases involved the application of established law to new facts, the admissibility of derivative evidence gained from *Miranda* violations proved to be an area of contention among the Supreme Court justices. The pluralities in both *Patane* and *Seibert* pushed the envelope in their attempts to establish new law. Instead of adding clarity to this area of law, however, this split in the Supreme Court simply provides trial advocates on both sides with ammunition to contest any future cases involving evidence gained from *Miranda* violations.

Because of the unique extra protection afforded service members through Article 31, these Supreme Court cases should have minimal impact on the military justice system. Nevertheless, the military practitioner should be aware of these issues, especially in cases investigated in whole or in part by civilian authorities. As demonstrated in *Torres*, a mistake made by civilian law enforcement can have major ramifications on the latter prosecution of servicemembers.

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[244] *Id.* The detective testified at trial that "[u]ntil they tell me they want a lawyer, I don't have to quit asking questions, and even then I do not have to quit asking them questions." *Id.*

[245] *Id.*

[246] *Id.*

[247] *Id.*

[248] *Id.*

[249] *Id*

[250] *Id.* at 565.

[251] *Id.* at 568.

[252] *Id.*

[253] *Id.* at 568-69.

[254] *Id.* at 569.

Counsel Should Provide More Fury, Less Nothing: 2004 Developments in Professional Responsibility

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"To-morrow, and to-morrow, and to-morrow,
Creeps in this petty pace from day to day,
To the last syllable of recorded time;
And all our yesterdays have lighted fools
The way to dusty death. Out, out, brief candle!
Life's but a walking shadow; a poor player,
That struts and frets his hour upon the stage,
And then is heard no more: it is a tale
Told by an idiot, full of sound and fury,
Signifying nothing..."[1]

Introduction

Several years have passed since the *Military Justice Symposium* included an article that deals with the issues surrounding the ethics of lawyers. Last year, Major Robert Best's Sixth Amendment *Symposium* article covered most topics associated with attorney ethics.[2] This year, however, the Sixth Amendment article focused on the recent explosion of cases involving testimonial immunity within the context of *Crawford v. Washington*.[3] Therefore, this year sees the return of an article dealing with attorney ethics. This article will specifically address the ethical issues of ineffective assistance of counsel, confidentiality, and prosecutorial misconduct.

Ineffective Assistance of Counsel: What is the Correct Standard to Apply?

More than twenty years ago, the Supreme Court rendered its decision in *Strickland v. Washington*.[4] At that time, the Court announced that all future ineffective assistance of counsel claims must be analyzed using a two-prong test.[5] First, a convicted individual must show that his or her attorney's performance was so deficient that counsel did not meet the requirements of the Sixth Amendment.[6] Whether or not counsel was deficient is judged by using a reasonableness standard, looking at the facts and circumstances of the individual case.[7] Courts that review ineffective assistance claims must be highly deferential to the counsel's decisions and view the case without the benefit of hindsight.[8] The court must evaluate the counsel's performance and determine if the choices made were within the wide range of available, reasonable, and professional judgments at the time.[9] If the performance and choices were reasonable, then counsel's representation does not violate *Strickland*'s first prong, and the analysis ends.[10]

If the court determines that counsel's performance was unreasonable, it must then decide *Strickland's* second prong. *Strickland's* second prong requires a showing of actual prejudice.[11] Actual prejudice results when there is not a fair trial with

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[1] WILLIAM SHAKESPEARE, MACBETH, *available at* http://www.allshakespeare.com/258 (last visited Jan. 26, 2005).

[2] *See* Major Robert Best, *2003 Developments in the Sixth Amendment: Black Cat on Strolls*, ARMY LAW., July 2004, at 55.

[3] 541 U.S. 36 (2004).

[4] 466 U.S. 668 (1984).

[5] *Id*. at 687.

[6] *Id*.

[7] *Id*. at 688.

[8] *Id*.

[9] *Id*.

[10] *Id*.

[11] *Id*. at 690.

a reliable verdict.[12] The burden is on the convicted individual to establish actual prejudice by showing there is a reasonable probability that, but for the attorney's acts or omissions, the result of the trial would have been different.[13]

The Supreme Court in *Strickland* also addressed the issue of when a court should presume that representation is ineffective without conducting an analysis in accordance with the two-prong *Strickland* test. The Court noted that presuming prejudice without analyzing the facts of the particular case should only be done when the "[p]rejudice in these circumstances is so likely that a case-by-case inquiry . . . is not worth the cost."[14] The Court declined to provide further significant guidance.

Is there a Presumption of Ineffectiveness When Counsel Concedes Guilt?

The Supreme Court recently decided a case based on the above question. In that case, *Florida v. Nixon*,[15] Mr. Joe Elton Nixon faced capital charges for kidnapping a woman from a shopping mall parking lot and murdering her.[16] Nixon met Ms. Jeanne Bickner on 12 August 1984, at a local mall parking lot in Tallahassee, Florida.[17] He asked for her assistance in starting his car.[18] Ms. Bickner agreed to assist him by giving him a ride in her vehicle.[19] He convinced her to drive to a remote location, attacked her, tied her to a tree with jumper cables, and robbed her.[20] After robbing her, he began to burn some of her belongings.[21] Ms. Bickner pled for her life and offered to give Nixon money if he spared her.[22] Because Mr. Nixon feared Ms. Bickner might identify him, he burned her alive while she was tied to the tree.[23] On August 13, 1984, a passerby found her badly burned corpse.[24]

Mr. Nixon was charged with capital murder after the State established he had committed the heinous crime.[25] The state's evidence was overwhelming against Nixon. The evidence included several confessions made by Mr. Nixon to friends and relatives.[26] There were also numerous items of physical evidence that linked him to the crime.[27]

An assistant public defender represented Mr. Nixon.[28] The public defender, after examining the evidence, concluded that Mr. Nixon's guilt was not "subject to any reasonable dispute."[29] He then attempted to negotiate a plea agreement with the state that would prevent Mr. Nixon from facing the death penalty.[30] No plea ensued as the state would not recommend a sentence other than death.[31]

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[12] *Id*.

[13] *Id*.

[14] *Id*. at 692.

[15] 125 S. Ct. 551 (2004).

[16] *Id*. at 556.

[17] *Id*..

[18] *Id*.

[19] *Id*.

[20] *Id*.

[21] *Id*.

[22] *Id*.

[23] *Id*.

[24] *Id*. at 555.

[25] *Id*. at 556.

[26] *Id*.

[27] *Id*.

[28] *Id*.

[29] *Id*.

[30] *Id*. at 556-57.

[31] *Id*. at 557.

During the public defender's investigation, he uncovered powerful mitigation evidence, including evidence that Mr. Nixon had an incredibly terrible childhood.[32] Based on this information, the public defender decided the best strategy at trial was to concede guilt and focus on the sentencing phase.[33] The public defender believed that by conceding guilt he could maintain credibility for the sentencing phase and have the best chance to save Mr. Nixon's life.[34]

Mr. Nixon did not agree or disagree with this strategy.[35] On at least three occasions, the public defender discussed this strategy with Mr. Nixon and each time Mr. Nixon ignored the proposal.[36] The public defender, lacking any assistance or direction from Mr. Nixon in preparing the case, decided to concede guilt without Mr. Nixon's consent.[37] Mr. Nixon disrupted the trial during jury selection by pulling off his clothing and shouting at the judge and was consequently not in the courtroom during the remainder of the trial.[38]

During the merits' phase, the public defender conceded his client's guilt in his opening statement.[39] He stated, "In this case there won't be any question, none whatsoever, that my client, Joe Elton Nixon, caused Jeannie Bickner's death."[40] The defense counsel conducted very limited cross-examination of the State's witnesses, objected to several crime scene photos and objected to some of the proposed jury instructions.[41] He did not present any evidence during the defense case-in-chief.[42] Mr. Nixon was convicted of capital murder.[43]

During the sentencing phase, the public defender presented testimony from Mr. Nixon's friends and relatives.[44] These witnesses testified about Mr. Nixon's difficult childhood and recent erratic behavior.[45] The public defender then called a psychiatrist and a psychologist to address "Nixon's antisocial personality, his history of emotional instability and psychiatric care, his low IQ, and the possibility that at some point he possibly suffered brain damage."[46] The state relied mainly on the merits phase evidence during sentencing.[47] The state, however, introduced evidence, over the defense's objection, that Mr. Nixon removed the victim's undergarments "in order to terrorize her."[48] In his sentencing argument, the public defender highlighted the mitigating evidence and asked the jury to spare the respondent from the death penalty.[49] The jury deliberated for three hours and recommended a sentence of death.[50] The trial court followed the jury's recommendation and imposed the death penalty.[51]

The Florida Supreme Court held that the public defender was presumed ineffective when he conceded Mr. Nixon's guilt without the latter's express consent.[52] The Court relied upon *United States v. Cronic*[53] and presumed prejudice without conducting a *Strickland* analysis.[54]

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[32] *Id*.

[33] *Id*.

[34] *Id*.

[35] *Id.*

[36] *Id.*

[37] *Id.*

[38] *Id.*

[39] *Id.*

[40] *Id.*

[41] *Id.* at 558.

[42] *Id.*

[43] *Id*.

[44] *Id*.

[45] *Id*.

[46] *Id*.

[47] *Id*.

[48] *Id*.

[49] *Id*.

[50] *Id*.

[51] *Id*.

[52] *Id*. at 559. *See* Nixon v. Singletary, 758 So. 2d 618 (Fla. 2000).

The United States Supreme Court reversed and held that, while an attorney must consult with and obtain the client's consent regarding the exercise or waiver of basic trial rights, counsel is not obliged to obtain consent for "every tactical decision."[55] Although the decision whether to plead guilty is a basic trial right, the public defender's concession of his client's guilt was not the equivalent of a guilty plea because, the Court reasoned, Mr. Nixon retained all the rights of a defendant in a criminal trial.[56] Furthermore, the state retained the burden of proving the respondent's guilt beyond a reasonable doubt with admissible evidence.[57]

According to the Court, the public defender fulfilled his obligation to Mr. Nixon by explaining the proposed trial strategy to him on several occasions.[58] He was not additionally required to secure the client's express consent before proceeding.[59] Given Mr. Nixon's failure to assist his counsel, the public defender's decision to concede guilt and focus on punishment was reasonable based on the evidence available at the time.[60]

Finding that the concession of guilt by the public defender did not amount to a guilty plea, the Court held the Florida Supreme Court's use of the *Cronic* standard, which does not require a showing of prejudice, was incorrect.[61] According to the Court the proper standard for evaluating counsel's performance in this case was the *Strickland* standard.[62]

Practitioners in the military should note that the *Nixon* case was specifically decided in the context of a capital trial. The Court was quick to note that concession of guilt without a client's consent might be a much closer question in a "run-of-the-mine" case.[63] Rare is the case indeed that a defense counsel will face such an unresponsive client. Counsel should discuss this ethical issue with a supervisor (senior defense counsel or regional defense counsel) and determine the best course of action based on all available evidence. Regardless, the Supreme Court made it clear in *Nixon* that future ineffective assistance claims must be analyzed using the *Strickland* standard.

Article 32 Waiver Plus Tunnel Vision Equal Ineffective Assistance in *Garcia*

While the *Nixon* case deals with a defense counsel conceding guilt without a client's approval; *United States v. Garcia*,[64] addresses the issue of what a defense counsel must discuss with a client prior to the client conceding guilt. The appellant, Staff Sergeant Fernando Garcia, was charged with robbery, conspiracy, housebreaking, receiving stolen property, and other offenses.[65] The charges were based on a crime spree with several co-conspirators that included carjackings, armed robberies, and burglary.[66]

After being apprehended, the appellant hired a civilian defense counsel and a military counsel was detailed to represent him.[67] The civilian defense counsel advised the appellant that he should not accept any pretrial agreement that allowed for more than six years of confinement.[68] At the same time, the military defense counsel advised the appellant he could face

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[53] 466 U.S. 648 (1984) (holding there could be some circumstances where an attorney's performance was so deficient that prejudice to the client could be presumed).

[54] *Nixon*, 125 S. Ct. at 560.

[55] *Id*. at 560 (quoting Taylor v. Illinois, 484 U.S. 400, 417-18 (1988)).

[56] *Id*. at 561.

[57] *Id*.

[58] *Id*.

[59] *Id*.

[60] *Id*.

[61] *Id*. at 562.

[62] *Id*.

[63] *Id*.

[64] 59 M.J. 447 (2004)

[65] *Id*. at 448.

[66] *Id*. at 449.

[67] *Id*.

[68] *Id*.

more than forty years of confinement if convicted on all charges.[69] The military defense counsel also informed the appellant that the government would likely agree to a pretrial agreement that would limit his confinement from twenty to twenty-five years.[70] The appellant chose to believe his civilian defense counsel and refused to enter into a plea agreement.[71]

Prior to trial, the appellant's civilian defense counsel unconditionally waived the Article 32, UCMJ, investigation without consulting the appellant.[72] Approximately three weeks before trial, the civilian defense counsel withdrew from the case.[73] During the government's case-in-chief, the military defense counsel informed the appellant that things were going terribly for the appellant.[74] Based on that discussion, the appellant disclosed his full involvement in the criminal conduct to his assigned military defense counsel.[75] The defense counsel suggested that the appellant confess his involvement to the members of the court during the defense case-in-chief.[76] The defense counsel did not discuss any other options with the appellant.[77] The options that were possible "include[ed] exploring the possibility of a plea agreement, changing his plea to guilty, having Garcia remain silent, or having Garcia confess and throw himself on the mercy of the court without changing his plea."[78] The appellant took the only advice given, took the stand, confessed, and threw himself on the mercy of the court.[79]

The appellant was found guilty of all charges. During the sentencing phase, the trial counsel requested a sentence that included a fine of $23,000 and confinement for eighty-six years.[80] The panel returned a sentence of one hundred twenty-five years confinement, a dishonorable discharge, total forfeiture of all pay and allowances, a fine of $60,000, and reduction to the pay grade of E-1.[81]

The Court of Appeals for the Armed Forces (CAAF) held that the appellant received ineffective assistance of counsel when his civilian defense counsel waived the Article 32 investigation without his consent and when his military defense counsel failed to advise him of the range of options available after the appellant revealed the full extent of his involvement.[82] The court agreed with the appellant that the right to an Article 32 investigation is a personal right, which in most cases, cannot be waived without an accused's informed consent.[83] The appellant suffered prejudice because if he had seen the strength of the government's case against him at the Article 32 hearing, he "might have sought a plea agreement" which would have limited his sentence.[84]

The CAAF could not find a reasonable explanation for the defense counsel's failure to explain the full range of options available to the appellant before deciding that the appellant should confess his guilt during their case-in-chief.[85] Further, the tack taken did not evidence any sound trial strategy.[86] During the appellant's direct, the defense counsel did not elicit any expressions of remorse or contrition.[87] Another example of the inexplicable was the defense's sentencing argument which included the following language: "Was he three-and-a-half-pounds of trigger pull away from [killing or injuring someone]?

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[69] *Id*.

[70] *Id*. Based on a review of the record of the case the appellant faced a maximum of two hundred sixty years confinement. *Id*.

[71] *Id*. at 449-50.

[72] *Id*. at 449.

[73] *Id*. at 450.

[74] *Id*.

[75] *Id*.

[76] *Id*. at 452. *See also* U.S. DEP'T OF THE ARMY, REG. 27-26, RULES OF PROFESSIONAL CONDUCT FOR LAWYERS R.1.4(b) (1 May 1992) [hereinafter AR 27-26]. "A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions about the representation." *Id*.

[77] *Id*.

[78] *Id*.

[79] *Id*.

[80] *Id*. at 448.

[81] *Id*.

[82] *Id*. at 452.

[83] *Id*. at 451.

[84] *Id*. *See* United States v. Grigoruk, 56 M.J. 304 (2002).

[85] *Garcia*, 59 M.J. at 452.

[86] *Id*.

[87] *Id*.

Yes."[88] The sentence, in the opinion of the court was strong evidence of the prejudicial impact of the defense counsel's lack of sound trial strategy; therefore, there was a reasonable probability of a different result at trial.[89]

The decision in *Garcia* serves as an important reminder for both civilian and military defense counsel in three key areas. First, the defense counsel must obtain a client's consent in writing or on the record for a waiver of the Article 32 hearing. Second, trial counsel must ensure it is the client that has waived the Article 32 hearing and not the attorney. Third, defense counsel must explain all options available to his client at each stage of the proceeding. From a practical standpoint, if, after discussing all available options, the client's decision is similar to the approach in *Garcia* it is best to memorialize that decision and all advice given in writing.

Concession and Credibility During Defense Sentencing Arguments

Many defense counsel struggle with the question of how to maintain credibility during sentencing after a client's conviction for serious crimes. Such was the question faced by the defense counsel in *United States v. Quick*.[90] The appellant, Private Spencer W. Quick, pled guilty to rape, wrongful appropriation, robbery, assault with intent to inflict grievous bodily harm, and kidnapping pursuant to a pretrial agreement.[91] In the quantum portion of the pretrial agreement, the convening authority agreed to suspend all confinement in excess of thirty years for a period of twelve months following the appellant's release from confinement.[92]

The guilty plea resulted from events occurring on June 2, 1999. After a night of drinking at an "adult establishment," the appellant hailed a cab driven by a young woman.[93] After an unsuccessful attempt to locate a friend, the appellant, while beginning to exit the cab, saw a rock on the floor.[94] He grabbed the driver by the neck, pulled her into the backseat, and struck her several times in the head with the rock.[95] The appellant then drove the cab to a rural area off-base where he raped the driver.[96] He drove the cab until it ran out of gas and then took one hundred and ten dollars that he found in the cab and abandoned the cab and victim.[97]

The defense counsel, in sentencing, argued that a dishonorable discharge was appropriate in the case.[98] Additionally, the defense counsel stated that confinement in excess of forty years would be excessive.[99] The military judge sentenced the appellant to a dishonorable discharge, sixty-five years confinement, and total forfeitures of all pay and allowances.[100] Pursuant to the pretrial agreement, the convening authority suspended all confinement in excess of thirty years for twelve months and approved the remainder of the sentence.[101]

On appeal, the appellant argued that his defense counsel rendered ineffective assistance of counsel when he conceded the appropriateness of the dishonorable discharge and confinement up to forty years.[102] The CAAF held that the appellant failed to show prejudice.[103] The CAAF noted that the lower court correctly concluded that the defense counsel improperly conceded the appropriateness of a dishonorable discharge when the record was silent on whether the appellant agreed to that

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[88] *Id.*

[89] *Id*. at 453.

[90] 59 M.J. 383 (2004).

[91] *Id*.

[92] *Id*. at 384.

[93] *Id*.

[94] *Id*.

[95] *Id*.

[96] *Id*.

[97] *Id*.

[98] *Id*.

[99] *Id*. at 385.

[100] *Id*. No reduction was adjudged because the appellant was already in the grade of E-1.

[101] *Id*.

[102] *Id*.

[103] *Id*. at 387.

strategy.[104] The CAAF did not address the appropriateness of counsel's concession on the amount of confinement because the lower court did not.

The CAAF resolved this case solely using the prejudice prong of the *Strickland* test.[105] The CAAF held that the lower court used the wrong standard in assessing the prejudice prong of *Strickland* even though there was a concession of a punitive discharge without the appellant's agreement.[106] The lower court incorrectly applied a standard measuring whether the sentence adjudged was "reasonably likely" rather than whether there is a reasonably probability that, but for counsel's errors, there would have been a different result at trial.[107] Therefore, *Strickland* is the proper standard to test prejudice in a case where ineffective assistance of counsel is raised based on a defense counsel's concession of a punitive discharge.[108] Given the nature of the crimes at issue in this case, the CAAF held that there was no reasonable probability that the result would have been different.[109]

This case provides the basis for excellent practical advice for all three participants in a court-martial. Foremost, the defense counsel must ensure that their client agrees with the strategy of conceding a punitive discharge during the sentencing argument. Additionally, the trial counsel and military judge must listen to the defense sentencing argument carefully. When the trial counsel or military judge hears a defense concession of a punitive discharge, they have a duty to preserve the record and ensure that the accused agrees with the strategy on the record.

Cuts Like a Knife:[110] *Adams* and Ineffective Assistance in the Appellate Process

In *United States v. Adams*, the appellant, Specialist Brian Adams, retained a civilian counsel to represent him in the post-trial process.[111] The civilian counsel submitted Rule for Courts-Martial (RCM) 1105 matters claiming the military judge's ruling allowing the admission of the appellant's pretrial statement to law enforcement was in error.[112] Appellant's military defense counsel became aware that the appellant would be represented by a civilian defense counsel, but the civilian defense counsel never filed a notice of appearance with Army Court of Criminal Appeals.[113] After the first military appellate counsel left active duty, another military appellant counsel took over, but he did not make contact with the appellant or the civilian defense counsel.[114] A third military appellate counsel, Captain Carrier, then took over the case and made contact with the appellant.[115] During this initial conversation, the appellant did not mention that he was represented by a civilian defense counsel.[116] Captain Carrier submitted the case on its merits, which included a footnote asking the Army Court of Criminal Appeals to consider the issues raised in the RCM 1105 matters.[117] The Army Court of Criminal Appeals affirmed the trial court noting that the court considered the issues personally specified by the appellant.[118]

The military appellate counsel filed a petition for review with the CAAF.[119] After filing the petition, the military appellate counsel became aware of the civilian defense counsel's involvement with the case and that the civilian defense

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[104] *Id*. at 386.

[105] *Id*.

[106] *Id*.

[107] *Id.* at 386-387.

[108] *Id.* at 387. *See* United States v. Pineda, 54 M.J. 298 (2001) (holding that concession of a punitive discharge without a client's consent equates to deficient performance).

[109] *Id*.

[110] BRYAN ADAMS, CUTS LIKE A KNIFE (A&M Records 1983). The author is not aware of any familial relationship between the artist, Bryan Adams, and the appellant, Brian Adams.

[111] 59 M.J. 367, 368 (2004). Specialist Brian P. Adams, convicted of rape and adultery, was sentenced at trial to a bad-conduct discharge, confinement for fourteen months, total forfeitures, and reduction to E-1. *Id*.

[112] *Id*. at 368.

[113] *Id*..

[114] *Id*. at 369.

[115] *Id*.

[116] *Id*.

[117] *Id*.

[118] *Id*.

[119] *Id*.

counsel's pleading had not been filed with Army Court of Criminal Appeals.[120] Thereafter, the military appellate counsel requested to withdraw the petition, which the CAAF granted.[121] The appellant then filed a motion for leave to file an out of time request for reconsideration with Army Court of Criminal Appeals.[122] The Army Court of Criminal Appeals denied the motion.[123]

The CAAF declined to decide if the following constituted deficient performance: the civilian defense counsel's failure to file a notice of appearance, the lack of communication among the various military appellate counsel, and the failure of the civilian defense counsel to file his brief with the Army Court of Criminal Appeals.[124] Instead, the CAAF assumed deficient performance and analyzed the case based on the prejudice prong of the *Strickland* test.[125]

The CAAF, finding no prejudice, noted the brief eventually attached to the paperwork, only addressed the admissibility of the appellant's pretrial statement.[126] The brief, the CAAF observed, did not add significantly to the matters fully litigated at trial.[127] Furthermore, there was no indication that the Army Court of Criminal Appeals failed to perform its duties to review the legal issue raised at trial.[128] Also, defense counsel represented the appellant before Army Court of Criminal Appeals at all times.[129] Foremost, the merits brief specifically directed Army Court of Criminal Appeals' attention to the appellant's post-trial matters.[130] Those matters were prepared by the civilian defense counsel and specifically challenged the voluntariness of the appellant's statements.[131] Even if the matters presented by the civilian defense counsel were before Army Court of Criminal Appeals, the CAAF declared its confidence that Army Court of Criminal Appeals would have reached the same result it reached earlier in affirming the case.[132]

What Can a Lawyer Disclose When His Client Is AWOL from Trial?

The appellant in *United States v. Marcum*[133] was charged with and found guilty of several offenses including forcible sodomy, indecent acts, and indecent assault.[134] After reaching findings, the court-martial recessed overnight.[135] At some time during the overnight recess the appellant went absent without leave.[136]

After several recesses and over defense objection, the sentencing proceedings began and ended without appellant being present.[137] The appellant's civilian defense counsel presented a twenty-page document as an unsworn statement that the appellant prepared prior to trial.[138] The unsworn statement was a typed document of notes prepared by the appellant for his civilian defense counsel.[139] The statement had six sections referencing each male airman with whom the appellant was

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[120] *Id.* at 369-70.

[121] *Id*.

[122] *Id*. at 370.

[123] *Id*.

[124] *Id*. at 371. *See* AR 27-26, *supra* note 76, R. 1.4(a). "A lawyer shall keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information." *Id.*

[125] *Id*.

[126] *Adams*, 59 M.J. at 372.

[127] *Id*.

[128] *Id*.

[129] *Id*.

[130] *Id*.

[131] *Id*.

[132] *Id.* at 373.

[133] 60 M.J. 198 (2004).

[134] *Id*. at 199.

[135] *Id.* at 208.

[136] *Id*.

[137] *Id*.

[138] *Id*.

[139] *Id*.

alleged to have had sexual contact.[140] The document contained "graphic descriptions of the charged and uncharged sexual contact between Appellant and each airman."[141]

The appellant argued on appeal that the document was covered by the attorney client privilege and should not have been released without the accused's consent.[142] The CAAF agreed with the appellant and held that the document was confidential, subject to the attorney-client privilege, and that the appellant did not waive his privilege.[143] The CAAF notes that although defense counsel may refer to evidence presented at trial during his sentencing argument, he may not offer an unsworn statement containing material subject to the attorney-client privilege without the client's waiver.[144] The CAAF goes on to say that although some of the appellant's trial testimony, during his direct examination, reflected what was in the statement, the tone and substance of the sentencing statement was more explicit.[145] Finally, the appellant did not waive his confidentiality through his trial testimony.[146]

Prosecutorial (Mis)Conduct?

The appellant in *United States v. Rodriguez*[147] pled guilty to conspiracy to commit larceny, making false official statements, wrongfully selling and disposing of military property, wrongful appropriation, and larceny.[148] During the sentencing argument, the trial counsel stated "[t]hese are not the actions of somebody who is trying to steal to give bread so his child doesn't starve, sir, some sort of a [L]atin movie here. These are actions of somebody who is showing that he is greedy."[149] The comment was referencing the appellant's "Mexican descent."[150] The defense counsel objected to the trial counsel's use of the term "steal" and on the ground that trial counsel was commenting on pretrial negotiations.[151] The defense counsel did not object to the reference to "[L]atin movie."[152] The Navy-Marine Court of Criminal Appeals (NMCCA) could discern no logical basis for the comment and found "the comment improper and erroneous."[153] The court also stated that the comment was merely a gratuitous reference to race, not an argument based on racial animus, nor likely to evoke racial animus.[154] Based on defense counsel's lack of an objection, the NMCCA tested the ethnic reference for plain error and found none.[155]

The CAAF based its decision on the specific facts of the case—the nature of the improper argument and that it occurred before a military judge alone during sentencing—and found no prejudice to a substantial right of the appellant.[156] While race *is* different, the CAAF declined appellant's invitation to adopt a *per se* prejudice rule for arguments involving unwarranted references to race.[157] Where there is no prejudice to an appellant, it's readily apparent that the CAAF will not forsake society's interests in timely and efficient administration of justice, the victim's interest in justice, and in the military context, the potential impact on national security.[158]

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[140] *Id*.

[141] *Id*.

[142] *Id*. at 209. *See* AR 27-26, *supra* note 76, R. 1.6(a). "A lawyer shall not reveal information relating to representation of a client unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation." *Id.*

[143] *Id.* at 210.

[144] *Id*.

[145] *Id*

[146] *Id*.

[147] 60 M.J. 87 (2004).

[148] *Id*. at 87-88.

[149] *Id.* at 88.

[150] *Id*.

[151] *Id*.

[152] *Id*.

[153] *Id*.

[154] *Id*.

[155] *Id*.

[156] *Id*. at 90.

[157] *Id*. at 89-90.

[158] *See id.*

All counsel must scrupulously avoid unwarranted references to race or ethnicity. The CAAF is clear when it notes "[r]ace is different."[159] The result in future cases will be different if the circumstances surrounding the use of a racially unacceptable argument are changed. For example, the CAAF recognizes that in a case before members such comments are magnified regardless of motivation.[160]

Conclusion

The best way to learn is not by making mistakes, but from observing other people's mistakes. A sampling of last year's professional responsibility cases provides practitioners with examples of missteps, miscommunication, and mismanagement during and after the trial. Counsel and military judges would do well to read these cases and avoid the same ethical pitfalls.

[159] *Id*. at 90.

[160] *Id*.

Out, Damned Error Out, I Say!
The Year in Court-Martial Personnel, Voir Dire and Challenges, and Pleas and Pretrial Agreements

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Introduction

Shakespeare's Lady Macbeth uttered the infamous words "Out, damned spot out, I say!" in response to blood stains covering her murderous hands.[1] In the areas of court-martial personnel, voir dire and challenges, and pleas and pretrial agreements, this year's cases are bloody with the stain of error from the unwitting hands of military judges and counsel.[2] This bloodshed is forcing appellate courts to reverse findings, sentences, or both and, in the words of Lady Macbeth, these holdings shout "Out, damned error out, I say!"

This article discusses recent developments related to court-martial personnel, voir dire and challenges, and pleas and pretrial agreements. This article, as did former annual review articles, focuses on opinions from the Court of Appeals for the Armed Forces (CAAF) and service courts and attempts to discern trends and practical implications for the field.[3] The most notable decision in the area of court-martial personnel involves the CAAF's refusal to use its supervisory powers to overhaul the panel member selection process under Article 25, Uniform Code of Military Justice (UCMJ), if the selection method is inclusive, the convening authority's motive is proper, and the selection complies with Article 25's "best qualified criteria." In the area of voir dire and challenges, the CAAF and the Navy and Marine Court of Criminal Appeals (NMCCA), which usually review the propriety of a denied defense challenge for cause, focused on a new factual twist—whether a military judge abuses his discretion by granting a government challenge for cause based on a member's pro-defense sentencing philosophy. In the pleas and pretrial agreements arena, the appellate courts continued to reverse numerous findings, sentences, or both, because of a lack of attention to detail by military judges and counsel. Prevalent providence inquiry errors include, among others, the failure to advise the accused of his rights, the failure to advise the accused of the elements of the offense, the failure to establish a factual predicate for the accused's plea, and the failure to clarify a potential defense raised by the accused's statements.

Court-Martial Personnel

Convening Authority—Panel Member Selection under Article 25, UCMJ

A convening authority must personally select the best qualified panel members based on the following Article 25, UCMJ criteria: age, education, experience, training, length of service, and judicial temperament.[4] Scholars and military critics debate whether this selection power, combined with a convening authority's ability to refer a case to court-martial and to

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[1] William Shakespeare (1564-1616), MACBETH, act v, sc. i, l. 38.

[2] The most recent article in this area noted that the opinions from the CAAF and the service courts "reflected and bemoaned an alarming lack of attention to detail by participants in the military justice process, especially the military judge and trial counsel." *See* Lieutenant Colonel Patricia A. Ham, *Crossing the I's and Dotting the T's: The Year in Court-Martial Personnel, Voir Dire and Challenges, and Pleas and Pretrial Agreements*, ARMY LAW., July 2004, at 10.

[3] *See generally id.* at 10-40 (discussing opinions from the CAAF and service courts from 2003 to 2004 in court-martial personnel, voir dire and challenges, and pleas and pretrial agreements); *see also* Major Bradley J. Huestis, *You Say You Want a Revolution: New Developments in Pretrial Procedures, Army Law*., Apr./May 2003, at 17 [hereinafter Huestis, *Revolution*]; Major Bradley J. Huestis, *New Developments in Pretrial Procedures: Evolution or Revolution?,* ARMY LAW., Apr. 2002, at 20 [hereinafter Huestis, *Evolution*].

[4] *See* UCMJ art. 25 (2002). Article 25(d)(2), UCMJ states "the convening authority shall detail . . . such members of the armed forces as, in his opinion, are best qualified for the duty by reason of age, education, training, experience, length of service, and judicial temperament." *Id.* Rule for Courts-Martial 502(a)(1) states the following:

> each [panel] member shall be on active duty with the armed forces and shall be: (A) a commissioned officer; (B) a warrant officer, except when the accused is a commissioned officer; or (C) an enlisted person if the accused is an enlisted person and has made a timely request under R.C.M. 503(a)(2).

MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 502(a)(1) (2002) [hereinafter MCM].

grant post-trial clemency, is too encompassing.[5] While these challengers exist, Article 25 remains untouched by Congress. In its last term, the CAAF refused an invitation to craft a judicially created panel selection system.[6]

Under the current system, the convening authority normally obtains member nominations from subordinate commanders, applies the Article 25 criteria, and selects the best qualified members from the recommended nominees or unit roster.[7] Subordinate commanders, involved staff members, and the convening authority cannot arbitrarily exclude a certain group or class from panel member selection.[8] Frequently, defense counsel allege that a convening authority improperly excluded certain groups from panel membership.[9] This year the CAAF and the Air Force Court of Criminal Appeals (AFCCA) addressed a defense claim that a convening authority improperly excluded individuals from the panel selection process.[10]

In *United States v. Dowty*, the assistant staff judge advocate (ASJA) applied a "novel approach" to panel member selection by soliciting volunteers in a unit bulletin "help wanted" advertisement.[11] From a compiled volunteer pool of over twenty officers, the ASJA nominated nine officers for panel member selection to the convening authority.[12] The convening authority selected eight of the nine ASJA nominated volunteer officers.[13] At trial, the defense moved to stay the proceedings, under Rule for Courts-Martial (RCM) 912, alleging the convening authority improperly selected panel members.[14] Defense argued the sole use of volunteers improperly excluded a category of "otherwise eligible service members, that is, non-volunteers."[15] This systematic exclusion of non-volunteers from the selection process constituted impermissible court packing.[16] Further, the defense alleged that the convening authority did not personally select the members, as required by Article 25 because the solicitation process gave the volunteers the power of self-selection.[17] The trial judge denied defense's motion and found that the convening authority personally selected the nominated volunteers and no systematic exclusion existed.[18] The case proceeded to a contested court-martial before an officer panel consisting of, after challenges, three volunteer and four non-volunteer officers.[19]

In affirming the case, the NMCCA held the convening authority did not systematically exclude a specified group of members from panel selection.[20] The court rejected the accused's argument that "non-volunteers are a discrete group that

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[5] *See* Major Christopher W. Behan, *Don't Tug on Superman's Cape: In Defense of Convening Authority Selection and Appointment of Court-Martial Panel Members,* 176 MIL. L. REV. 190 (2003); Honorable Walter T. Cox, III *et al*., Report of the Commission on the 50th Anniversary of the Uniform Code of Military Justice (May 2001) (on file with author); Huestis, *Revolution*, *supra* note 3, at 17; Huestis, *Evolution*, *supra* note 3, at 20; Major Guy P. Glazier, *He Called for His Pipe and He Called for His Bowl, and He Called for His Members Three—Selection of Juries by the Sovereign: Impediment to Military Justice*, 157 MIL. L. REV. 1 (1998).

[6] *See* United States v. Dowty, 60 M.J. 163 (2004).

[7] *Id.* at 164-65.

[8] *See* MCM, *supra* note 4, R.C.M. 912(b) Discussion. Certain groups, however, are excluded per statute, case law, or regulation. Excluding a member junior to the accused is permitted by statute. *See* UCMJ art. 25(d)(1); MCM, *supra* note 4, R.C.M. 912(f)(1)(K). *See also* United States v. Yager, 7 M.J. 171 (C.M.A. 1979) (holding the exclusion of E1s and E2s from panel membership is sanctioned because of the remote possibility that such grades meet the Article 25, UCMJ criteria). Exclusion of chaplains, inspector generals, nurses, medical, dental, and veterinary officers is authorized per regulation. *See* U.S. DEP'T OF ARMY, REG. 27-10, MILITARY JUSTICE ch. 7 (27 Apr. 2005).

[9] *See* MCM, *supra* note 4, R.C.M. 912(b)(1). Rule for Courts-Martial 912(b)(1) states "a party may move to stay the proceedings on the ground that members were improperly selected." *Id. See also* United States v. Kirkland, 53 M.J. 22 (2000) (holding E7s and below were improperly excluded from the nomination process).

[10] *See Dowty*, 60 M.J. at 163; United States v. Fenwrick, 59 M.J. 737 (A.F. Ct. Crim. App. 2003).

[11] *Dowty*, 60 M.J. at 166.

[12] *Id.* The ASJA did not disclose to the convening authority that a volunteer solicitation process was used to obtain the nominees. *Id.* Additionally, the written legal advice provided to the convening authority on membership selection failed to list education and experience as required criteria determinations under Article 25, UCMJ. *Id.*

[13] *Id.* at 167.

[14] *Id.*

[15] United States v. Dowty, 57 MJ 707, 714 (2002).

[16] *Dowty*, 60 M.J. at 168-69.

[17] *Dowty*, 57 M.J. at 714.

[18] *Id.* The trial judge concluded that "the convening authority made personal selections of the members in this case and that he did so understanding that he could choose from the entirety of his command . . ." and while "soliciting volunteers was 'both novel and potentially troubling' . . . there was no effort to unlawfully deny consideration of a 'class of individuals.'" *Id.*

[19] *Dowty*, 60 M.J. at 168. The defense did not challenge any member based on their volunteer status. *Id.* A challenge for cause against one volunteer was granted on a non-related issue and two additional volunteers were peremptorily challenged. *Id.*

[20] *Dowty*, 57 M.J. at 714.

cannot be excluded without violating [an accused's] substantial rights."[21] The volunteers' self-selection for duty, combined with the ASJA's nominee recommendations, did not otherwise undermine the controlling fact that the convening authority personally selected the best qualified members based on his application of the Article 25, UCMJ criteria.[22] The defense failed to show that the convening authority selected members to reach a particular result, instead, members were selected in an attempt to acquire a qualified, fair, and impartial panel.[23] While the selection process was "potentially troubling" no material prejudice accrued to the accused.[24]

The CAAF, affirming, identified three, non-exhaustive, factors to use in determining the propriety of a convening authority's panel selection process.[25] The CAAF described these three factors stating:

> First, we will not tolerate an improper motive to pack the member pool. Second, systematic exclusion of otherwise qualified potential members based on an impermissible variable such as rank is improper. Third, the court will be deferential to good faith attempts to be inclusive and to require representatives so that court-martial service is open to all segments of the military community.[26]

The court held the convening authority did not improperly pack the court or exclude members based on an impermissible variable; however, it was error to inject the "irrelevant variable" of volunteering into the selection process.[27] Then, placing the burden on the government to show the error did not materially prejudice the accused, the court determined prejudice did not exist because the convening authority personally selected the panel after applying the Article 25 criteria.[28]

Recently the AFCCA considered whether the non-selection of junior officers constituted improper systematic exclusion. In *United States v. Fenwrick*, the AFCCA set aside and remanded a case where the trial judge dismissed, with prejudice, the accused's case for lack of jurisdiction because the convening authority allegedly systematically excluded lieutenants from court-martial membership.[29] At trial, the defense raised a RCM 912 motion, as in *Dowty*, alleging the convening authority improperly excluded lieutenants from court-martial selection.[30] After receiving evidence on the motion, the military judge ruled the convening authority systematically excluded lieutenants because he selected only one lieutenant to serve in the fourteen court-martials referred that fiscal year.[31] The government filed a motion for reconsideration arguing that in the four months prior to the current fiscal year, the convening authority selected a lieutenant to serve in six of the fifteen referred court-martials.[32] The convening authority testified that he selected the best qualified members based on Article 25 criteria and he "rarely . . . determined that an individual more junior in age, time in service, education and experience is better qualified to sit."[33] After this testimony, the military judge ordered the convening authority to select a new panel free from the systematic exclusion of lieutenants.[34] The convening authority selected a new panel without lieutenants, causing the military judge to dismiss the case with prejudice, and leading to the government's appeal under Article 62, UCMJ.[35]

On appeal, the AFCCA reversed, holding that the convening authority's consideration, not his selection, of junior officers is the key.[36] The AFCCA posed two questions: (1) was the selection process proper; and (2) if proper, did the

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[21] *Id.*

[22] *Id. See* United States v. Benedict, 55 M.J. 451 (2001) (holding a convening authority may rely on his staff to nominate members).

[23] *Dowty*, 57 M.J. at 715.

[24] *Id*. The court especially considered the defense's comprehensive voir dire of each member regarding their volunteer status to determine that no prejudice accrued.

[25] *Dowty*, 60 M.J. at 171.

[26] *Id.*

[27] *Id.* at 172. The court held volunteering is an "irrelevant variable" creating error because federal criminal practice prohibits the use of volunteers. *Id*. at 172-73 (citing Jury Selection and Service Act of 1968, 28 U.S.C. § 1861-1869; United States v. Kennedy, 548 F.2d 608 (5th Cir. 1977)).

[28] *Id.* at 173-75.

[29] United States v. Fenwrick, 59 M.J. 737 (A.F. Ct. Crim. App. 2003), *pet. denied*, 60 M.J. 118 (2004).

[30] *Id.* at 739. Instead of referring cases to a standing panel the convening authority selected a panel for each acussed's court-martial. *Id*.

[31] *Id.*

[32] *Id.*

[33] *Id*. at 740.

[34] *Id.*

[35] *Id.* at 742.

[36] *Id*. at 744.

statistics otherwise infer a systematic exclusion?[37] Before answering these questions, the AFCCA noted that the CAAF "has always focused its review on the process of putting together lists of nominees," as opposed to the court's ultimate composition.[38] The process used to solicit nominees from the subordinate commanders and the convening authority's consideration of those nominees was proper.[39] The convening authority has the prerogative to select members who are, "'in his opinion,'" the best qualified under Article 25 and "[t]his is a subjective determination."[40] As to statistical data, the AFCCA required the defense to "clearly indicate" the existence of systematic exclusion.[41] "While a military judge may rely on statistical evidence to discern a 'subconscious' desire by the convening authority to improperly exclude certain grades, such statistical evidence must clearly indicate such an exclusion."[42] The court declined to define "clearly indicate" but ruled the presented statistics did not suffice.[43]

For practitioners, *Dowty* and *Fenwrick* show that the likelihood of raising error and establishing prejudice based on alleged improper panel selection is slight if the process includes all required groups, the convening authority lacks an improper motive, and his personal selection of members complies with Article 25's "best qualified" criteria. Defense attorneys, however, should continue to raise RCM 912 motions if any evidence exists for a military judge to rule that the statistical data "clearly indicated" systematic exclusion by the convening authority. While *Dowty* is likely limited to its "novel" facts, the two following impacts exist: (1) the CAAF's articulation of three factors to use to determine the propriety of the convening authority's selection process; and, most importantly, (2) the CAAF's unwillingness to adopt the proposed amicus position inviting the court to use its supervisory powers to overhaul the Article 25 selection process. *Dowty* potentially signals a halt to what some scholars and critics argue has been an era of recent judicial activism by the CAAF to rewrite Article 25.[44] The court, in *Dowty*, clarified its position stating "[b]ut long ago regarding this matter of members selection, we stated 'this Court sits as a judicial body which must take that law as it finds it, and that any substitution of a new system of court selection must come from the Congress.'"[45]

Accused's Rights—Article 32, UCMJ Hearing

On an issue of first impression, the CAAF decided whether the waiver of an Article 32, UCMJ, investigation is an accused's personal right.[46] In *Garcia*, the accused's civilian defense counsel, Mr. Bruce J. Cockshoot, signed a written waiver unconditionally waiving the Article 32 hearing.[47] The case proceeded to a contested members' court-martial with the accused's ultimate conviction for numerous charges, mainly related to robbery and other larceny offenses, and a sentence of, among other things, a dishonorable discharge, confinement for one hundred and twenty-five years, and a sixty thousand dollar fine.[48] On appeal, the accused asserted that he was unaware of the Article 32 waiver until after his court-martial, he

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[37] *Id.* at 743-44.

[38] *Id.* (citing United States v. Kirkland, 53 M.J. 22 (2000); United States v. Roland, 50 M.J. 66 (1999); United States v. Bertie, 50 M.J. 489 (1999); United States v. White, 48 M.J. 251 (1998)). The evidence showed the subordinate commanders provided the convening authority with "ample choices of lieutenants for selection." *Id*. The convening authority testified he would personally select members from the unit roster if the suggested nominees were not the "best qualified." *Id.* at 740.

[39] *Id*.

[40] *Id.* at 744.

[41] *Id.*

[42] *Id.*

[43] *Id.*

[44] *See* United States v. Wiesen, 56 M.J. 172 (2001). In *Weisen*, the court held the military judge erred by failing to grant a defense challenge for cause based on implied bias against the board president who had an actual or potential command relationship over six of the other nine members of the panel. *Id.* at 56. Because the president and the six other members formed the two-thirds majority to convict the CAAF determined an "intolerable strain [was placed on the] public perception of the military justice system." *Id.* Some scholars intepret *Wiesen* as a limit on the convening authority's power to select members. *See* Behan, *supra* note 5 at 269-76 (stating *Wiesen* "effectively rewrites UCMJ Article 25(d)(2), burdening convening authorities with a requirement to consider actual and potential command and supervisory relationships when appointing panel members"); Information Paper, Criminal Law Division, U.S. Army, Office of the Judge Advocate General, subject: Rationale for Rule Changes in Light of *Armstrong* and *Wiesen* (6 Dec. 2002) (on file with author).

[45] United States v. Dowty, 60 M.J. 163, 176 (2004) (quoting United States v. Kemp, 46 C.M.R. 152 (1973)).

[46] *See* United States v. Garcia, 59 M.J. 447 (2004).

[47] *Id.* at 449.

[48] *Id.* at 450. Three days into the government's case-in-chief the defense counsel advised the accused that they were "getting 'killed' by the Government evidence." *Id.* The defense strategy then turned to the accused confessing to the offenses during the defense case-in-chief in the "hope that the members would be lenient if Garcia candidly accepted responsibility." *Id.* The CAAF also reviewed whether the defense counsel's advice to provide confessional testimony constituted ineffective assistance of counsel. *Id.* at 452-53.

"would not have authorized it had he known," and his counsel's unadvised waiver constituted ineffective assistance of counsel.[49]

In determining if the waiver constituted ineffective assistance of counsel, the CAAF noted the right at stake determines whether an attorney can waive the issue without the accused's knowledge and consent.[50] While some decisions are routine and within a lawyer's sole discretion, other decisions are so fundamental to the accused's rights that his active participation is required.[51] The court held the waiver of an Article 32 hearing is not a routine decision but "rather, a decision fundamentally impacting a 'substantial pretrial right' of the accused."[52] The CAAF reasoned the right is personal to the accused because, during a guilty plea, a military judge is required to ensure any Article 32 waiver by the accused is voluntary and knowing.[53] The court carved a narrow category of circumstances which could justify an uncounseled waiver, "for example[,] where there is good cause for the failure to obtain personal consent, a sound tactical decision, or a lack of resultant prejudice."[54] Mr. Cockshoot's wavier, however, lacked good cause or a sound tactical reason.[55] The lack of an Article 32 hearing prejudiced the accused because he did not see the strength of the government's case prior to court-martial, which might have otherwise led him to attempt to enter into a favorable pretrial agreement.[56]

After *Garcia*, what constitutes a proper personal waiver by the accused? The court declined to specify a "precise form or procedure for a waiver."[57] Absent additional guidance from the CAAF, the safest approach is to require a signed waiver from the accused and, at a minimum, to obtain the accused's oral consent to the waiver on the record.

Accused's Rights—Forum Election

Article 25 and RCM 903(b)(1) require any "request for membership of the court-martial to include enlisted persons [to] be in writing and signed by the accused or [to] be made orally on the record" by the accused.[58] In *United States v. Andreozzi*, the accused failed to orally request on the record or in writing his desire for a one-third enlisted member panel.[59] At arraignment, the military judge explained the various forum election rights but the accused, through counsel, deferred forum selection.[60] At trial, the member's names and ranks were announced, the members wore uniforms with their names and ranks visible, and the civilian defense counsel not only conducted voir dire with the members, including individual voir dire with some enlisted members, but also consulted the accused concerning member challenges.[61] The accused, however, never stated on the record or in writing his desire for enlisted members.[62]

The CAAF's previous rulings in this area held "procedural non-compliance with [these] statutory provisions" is not jurisdictional error and the test is whether the accused's substantial rights were materially prejudiced.[63] Based on this standard, the Army Court of Criminal Appeals (ACCA) ordered two *Dubay* hearings to determine, not withstanding the procedural defects, whether the accused's actions substantially complied with Article 25 so as to remove the taint of material

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[49] *Id*. at 449. The accused's assertions remained unrebutted on appeal. *Id.* Attempts to contact Mr. Cockshoot were unsuccessful and the detailed military counsel was unable to remember the specific details. *Id.*

[50] *Id.* at 451.

[51] *Id.* Chief Judge Crawford, in dissent, stated the majority erred by failing to adopt the practice of the federal criminal system which allows counsel to waive a preliminary hearing or grand jury indictment. *Id*. at 453 (Crawford, C.J. dissenting).

[52] *Id*. at 451 (citing United States v. Chuculate, 5 M.J. 143, 145 (C.M.A. 1978)).

[53] *Id.*

[54] *Id*.

[55] *Id.*

[56] *Id.* at 451-52.

[57] *Id.* at 451.

[58] MCM, *supra* note 4, R.C.M. 903(b)(1); UCMJ art. 25(c)(1) (2002).

[59] United States v. Andreozzi, 60 M.J. 727 (Army Ct. Crim. App. 2004).

[60] *Id*. at 730.

[61] *Id.*

[62] *Id.*

[63] *Id*. at 733 (citing United States v. Morgan, 57 M.J. 119 (2002); United States v. Townes, 52 M.J. 275 (2000); United States v. Turner, 47 M.J. 348 (1997); United States v. Mayfield, 45 M.J. 176 (1996)).

prejudice.[64] The substantial compliance test is based on whether the accused directs the forum election.[65] The ACCA, affirming, held under the totality of the circumstances that the accused personally directed the election of an enlisted panel.[66] Because of the accused's substantial compliance with Article 25, his rights were not materially prejudiced.[67]

While *Andreozzi* provides a list of circumstances equaling substantial compliance, the ACCA did not mandate any particular factor's existence to find substantial compliance. Recently the NMCCA, however, held a military judge must advise the accused of his forum rights in order to find substantial compliance with Article 16, UCMJ.[68] In *Goodwin*, the military judge failed to advise the accused of his forum rights and failed to obtain the accused's personal election in writing or orally on the record as required by Article 16.[69] The NMCCA, as the ACCA did in *Andreozzi*, first analyzed the CAAF's precedent on forum election error to find "[t]he common denominator in all of the cases discussed . . . is a proper advisement of forum rights."[70] Absent a military judge's official notice to the accused of his forum rights, the NMCCA, in setting aside the case, hesitated to presume substantial compliance with Article 16 stating "'we should not settle for inference and presumption when certainty is so readily obtained.'"[71]

The obvious fix to a forum selection problem is to ensure the accused submits a personally signed written request to the court or advises the military judge on the record of his election choice. Every party to the court-martial is responsible for forum election as the ACCA observed "[t]he military judge was not alone, however, in his error by omission. Appellant's trial defense counsel erred by failing to state on the record that appellant desired a court including enlisted members, and trial counsel erred by failing to call this omission to the military judge's attention."[72] Even if this process is skipped at court-martial, the military judge could convene a post-trial Article 39, UCMJ, session to clarify any omission.[73]

Staff Judge Advocate Disqualification

In its last term the CAAF reviewed a staff judge advocate's (SJA) disqualification during the post-trial phase.[74] In *Taylor*, during the pre-sentencing phase, the military judge excluded portions of the accused's adverse personnel records because of numerous clerical errors.[75] Eight days after the accused's court-martial, the trial counsel published an article in the base newspaper warning commanders to properly prepare adverse personnel records.[76] The article, although omitting the accused's name, stated "'[j]ustice was not served'" because the panel failed to receive a "'complete picture'" of the accused's negative service record so they lacked information "'that he was not a good candidate for rehabilitation.'"[77] After the article, the accused's defense counsel demanded the SJA and the convening authority's disqualification from post-trial action.[78]

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[64] *Id.* at 729 (citing United States v. Lanier, 50 M.J. 772, 780 (Army Ct. Crim. App. 1999)). The initial *Dubay* did not provide sufficient facts because the trial counsel and military judge did not testify in person or by affidavit. *Id.*

[65] *Id.*

[66] *Id.* The circumstances indicating the accused's personal selection included: the military judge's explanation of the accused's forum rights at arraignment; the defense counsel's written submission for trial by enlisted members to the military judge; the defense counsel's testimony that his normal practice was to discuss and explain forum rights to the accused and to follow the accused's wishes, the accused's presence in the courtroom when the panel was assembled and voir dired, the accused's age, education, and intelligence; and the accused's active participation in his own defense. *Id*. at 730-33.

[67] *Id*. at 733.

[68] United States v. Goodwin, 60 M.J. 849 (N-M. Ct. Crim. App. 2005). Article 16, UCMJ, as well as Article 25, UCMJ, requires the accused to state orally on the record or in writing his desire for the case to be tried by military judge alone. UCMJ art. 16 (2002).

[69] *Goodwin*, 60 M.J. at 850.

[70] *Id*. at 851 (discussing United States v. Townes, 52 M.J. 275 (2000); United States v. Seward, 49 M.J. 369 (1998); United States v. Turner, 47 M.J. 348 (1997); United States v. Mayfield, 45 M.J. 176 (1996)). The only evidence of the accused's intent existed in a single sentence in his pretrial agreement that agreed to request trial by military judge alone. *Id.* The military judge, however, also failed to discuss this pretrial agreement term with the accused. *Id.*

[71] *Id*. (quoting United States v. Hansen, 59 M.J. 410, 413 (2004)). *See also* United States v. Follord, No. 20020350 (Army Ct. Crim. App. Feb. 15, 2005) (unpub.) (holding that numerous errors in apprising the accused of his rights to a five member officer panel constituted a lack of compliance with Article 16).

[72] *Andreozzi*, 60 M.J. at 733.

[73] *See Mayfield*, 45 M.J. at 177-78 (holding that a post-trial advisement of the accused's forum rights by the military judge is authorized).

[74] United States v. Taylor, 60 M.J. 190 (2004).

[75] *Id*. at 191. The military judge stated "'if the [unit] can't comply with dates on when [sic] they issue letters, honestly, the only way that gets brought to their attention is if the judge says that kind of stuff is not acceptable.'" *Id.*

[76] *Id.* at 192. The article also outlined the possible trial ramifications of non-compliance. *Id.*

[77] *Id.*

[78] *Id.* The defense counsel imputed the trial counsel's article to the SJA as the supervisor of the legal office. *Id*. The defense counsel imputed the article to the convening authority because he was the first person listed in the paper as a member of the base newspaper staff. *Id.*

The CAAF, reviewing the case *de novo*, stressed the importance of a participant's neutrality in the post-trial process to ensure fairness to the accused and to uphold the integrity of the system.[79] The convening authority, who "'was unaware of the article'" prior to the defense's notification and signed an affidavit specifying that he did not consider the article in his post-trial action, was not disqualified.[80] The SJA, however, in his addendum recommendation, "acknowledged that the article may be imputed to him," which, for practical purposes, meant he adopted[81] all the article's sentiments, to include that the accused "'was not a good candidate for rehabilitation.'"[82] The SJA's acknowledgement created the appearance that he had prejudged the accused's clemency. [83]

All justices agreed that the SJA's failure to disqualify himself constituted error; the court split three to two, however, on whether the error created "some colorable showing of possible prejudice" to the accused.[84] The majority held the accused met this low standard of "colorable possible prejudice" and remanded the case to a new convening authority for a recommendation from a non-disqualified SJA.[85] In finding prejudice, the majority focused on the court's inability to predict the convening authority's action had he received advice from a neutral SJA.[86] Two separately filed dissents, by Chief Judge Crawford and Judge Baker, stated the error was harmless because only the remotest possibility existed that the original convening authority would have granted clemency or that a new convening authority would grant clemency based on the nature of the accused's offenses and sentence.[87]

The CAAF's finding of error is predictable when the SJA forthrightly acknowledgs his disqualification. Any SJA who notes his own disqualification should cease further action on a case instead of risking reversal, as in *Taylor*. The more difficult question for the government arises when an arguable disqualification exists, which the SJA does not clearly acknowledge, but which an appellate court could later rule is a disqualification constituting error and requiring reversal. While *Taylor* does not address this situation, the majority's analysis whether "possible colorable prejudice" accrues to the accused centers on the government's failure to follow a defined process as opposed to, but for the error, the case's likely outcome. If the court rules that the SJA is disqualified, it is likely the court will also find "some colorable prejudice" to the accused based on the government's inability to comply with the integrity of the process concerned.[88] Ultimately a SJA's decision to act will depend on the nature of the alleged disqualification, the ease of replacing the SJA, an assessment of the validity of the issue on appeal, and the SJA's level of risk aversion. Likewise, *Taylor* encourages defense counsel to raise a SJA disqualification issue as soon as possible because the CAAF cited, during its prejudice analysis, that the accused's counsel quickly raised the issue and urged disqualification as a cure.[89]

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[79] *Id.* at 193.

[80] *Id.* at 193-94.

[81] *Id.* at 194.

[82] *Id.*

[83] *Id.*

[84] *Id.* at 195.

[85] *Id.*

[86] *Id*. at 196.

[87] *Id*. at 196-97 (Crawford, C.J., Baker, J., dissenting). The accused was convicted of reviewing pornographic material on a government computer while at work and willful dereliction of his hospital respiratory technician duties by failing to give patient's appropriate medication and erroneously annotating medical charts. *Id*. The accused had previously received Article 15, UCMJ punishment for three assaults, drunk and disorderly conduct, and communicating a threat. *Id.* at 196. At court-martial the accused received a bad conduct discharge, no confinement, and reduction to the lowest enlisted grade. *Id.* at 197.

[88] *Id.* at 196. The majority stated that the SJA did not do his job and

> [r]emanding the case for a new convening authority action will ensure that Appellant is not prejudiced by that failure. It will also ensure that, regardless of the new action's outcome, that the military justice system's integrity will be protected from a disqualified individual influencing the outcome of Appellant's post-trial review.

Id.

[89] *Id.* at 195.

Challenges for Cause

The Sixth Amendment right to trial by "an impartial jury of the State" does not apply to the military.[90] As previously discussed, the convening authority selects a "jury" (panel) based on Article 25, UCMJ, criteria.[91] The Sixth Amendment right to "impartial" members does apply to the military through the Fifth Amendment due process clause.[92] This right "is the cornerstone of the military justice system."[93] A member should not serve where "the interest of having the court-martial free from substantial doubt as to legality, fairness, and impartiality" is questioned.[94] Voir dire is the process used to obtain information regarding a member's impartiality so counsel can intelligently exercise challenges.[95] Both sides are entitled to unlimited challenges for cause and one peremptory challenge.[96]

A challenge for cause under RCM 912(f)(1)(N) encompasses two grounds: (1) actual bias; and (2) implied bias.[97] "The test for actual bias is whether any bias is such that it will not yield to the evidence presented and the judge's instructions."[98] Actual bias is based on the military judge's subjective determination of the member's credibility.[99] The CAAF has given "the military judge great deference when deciding whether actual bias exists because it is a question of fact, and the judge has observed the demeanor of the challenged member."[100] Implied bias, however, is an objective standard "viewed through the eyes of the public, focusing on the appearance of fairness."[101] While a military judge's ruling on actual bias is reviewed for an abuse of discretion; "[b]y contrast, issues of implied bias are reviewed under a standard less deferential than abuse of discretion but more deferential than *de novo*."[102]

While either party may seek a member's challenge for cause, the military judge may *sua sponte* excuse a member in the interest of justice.[103] The CAAF recently explored a military judge's duty to excuse an unchallenged member based on implied bias grounds.[104] In *Strand*, the acting convening authority's son served as panel president after challenges.[105] During voir dire, First Lieutenant (1LT) Olson answered questions regarding his potential impartiality because of his familial relationship with Colonel Olson, the acting convening authority.[106] After voir dire, the defense challenged four officers for cause but did not challenge 1LT Olson.[107] The defense did not allege error with 1LT Olson's panel membership during RCM

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[90] United States v. Witham, 47 M.J. 297, 301 (1997). "[T]he Sixth Amendment right to trial by jury with accompanying considerations of constitutional means by which juries may be selected has no application to the appointment of members of courts-martial." United States v. Kemp, 22 C.M.A 152, 154 (1973).

[91] *See* United States v. Dowty, 60 M.J. 163, 169 (2004) (discussing Congress' power under Article I, Section 8, Clause 14 to establish the court-martial system).

[92] United States v. Downing, 56 M.J. 419, 421 (2002); United States v. Wiesen, 56 M.J. 172, 174 (2001); United States v. Roland, 50 M.J. 66, 68 (1999).

[93] United States v. Hilow, 32 M.J. 439, 442 (C.M.A. 1991).

[94] MCM, *supra* note 4, at R.C.M. 912(f)(1)(N).

[95] *Id.* R.C.M. 912(d) Discussion. Counsel's voir dire "should be used to obtain information for the intelligent exercise of challenges." *Id.* "The reliability of a verdict depends upon the impartiality of the court members. Voir dire is fundamental to a fair trial." United States v. Jefferson, 44 M.J. 312, 321 (1996).

[96] UCMJ art. 41(a)(1) (2002). A military judge should liberally grant challenges for cause because of a counsel's limited ability to use a peremptory challenge. *Downing*, 56 M.J. at 422.

[97] United States v. Armstrong, 54 M.J. 51 (2000).

[98] *Wiesen*, 56 M.J. at 174.

[99] *Id.*

[100] United States v. Napolitano, 53 M.J. 162, 166 (2000).

[101] United States v. Rome, 47 M.J. 467, 469 (1998).

[102] *Downing*, 56 M.J. at 422.

[103] MCM, *supra* note 4, R.C.M. 912(f)(4). The rule states "[n]otwithstanding the abscene of a challenge or waiver of a challenge by the parties, the military judge may, in the interest of justice, excuse a member against whom a challenge for cause would lie." *Id.*

[104] United States v. Strand, 59 M.J. 455 (2004).

[105] *Id.* at 456. Colonel Olson's only action in the case involved signing a modified court-martial convening order because the accused requested courts-martial before one-third enlisted members. *Id*. at 458. Colonel Olson relieved eight officer members from panel membership leaving only his son and one other officer from the originally selected list of ten officers. *Id*. at 456.

[106] *Id.* at 458. First Lieutenant Olson's answers did not suggest a potential bias besides the mere existence of the familial relationship. *Id*. at 456-57.

[107] *Id*. at 457. Defense challenged one officer because his father was a police officer in New York. *Id.* After defense's challenges, the trial counsel raised the potential conflict with LT Olson's panel membership to the military judge. *Id.* The military judge responded "[w]ell neither side challenged for cause

1105 matters.[108] On appeal, the defense asserted that the military judge committed plain error for failing to *sua sponte* excuse 1LT Olson.[109]

In affirming, the CAAF reviewed the totality of the circumstances to determine 1LT Olson's membership "did not raise a significant question of legality, fairness, impartiality, to the public observer pursuant to the doctrine of implied bias."[110] A member's familial relationship with the convening authority does not per se constitute implied bias.[111] Significantly, the CAAF focused on the defense's opportunity to question and refusal to challenge 1LT Olson in light of defense's other four challenges for cause, including a challenge to a member whose father served as a police officer.[112] Although the implied bias test turns on public perception, the CAAF appears hesitant to impose a *sua sponte* duty on the military judge to excuse members absent an objection of bias lodged directly by defense. Additionally, the CAAF, in reviewing implied bias, considered the member's demeanor and responses, an actual bias factor, citing 1LT Olson's disclaimer of bias as a relevant consideration.[113] The CAAF noted a member's demeanor is not dispositive on the issue of implied bias but "[n]onetheless, a 'member's unequivocal statement of a lack of bias can . . . carry weight' when considering the application of implied bias."[114] *Strand* did not address whether a particular set of circumstances would ever mandate a military judge's *sua sponte* duty to dismiss a member for implied bias.

A military judge's responsibility, as opposed to a *sua sponte* duty, is more clearly defined when a party challenges a member for cause. A military judge must make a ruling whether to grant or deny the challenge based on actual or implied bias or both.[115] Recently, the NMCCA affirmed a case even though the military judge failed to fully consider implied bias when ruling on the defense's challenges for cause.[116] In *Richardson*, a contested officer member's case for wrongful possession and distribution of marijuana, the military judge and the defense counsel questioned members during group and individual voir dire regarding their relationship with the trial counsel.[117] After extensive group and individual voir dire, the defense counsel asked to again individually question three members regarding their interactions with the trial counsel.[118] The military judge denied defense's request.[119] Defense then challenged four members for cause based on their alleged special relationship with the trial counsel.[120] The military judge granted one challenge for cause; however, his findings were based on an actual bias standard and did not include a clear-cut implied bias determination.[121] As to the denied challenges, the military judge stated "in making that [causal] determination, I specifically relied upon their answers here in court and they're demeanor as I observed it in their answering. I believe that they said they could follow the instructions as I gave them. And they would not give deference to either side."[122]

The NMCCA affirmed and held that the record "does not clearly show that the military judge applied the correct objective standard for implied bias" but more importantly a factual predicate did not exist to grant any challenge under the implied bias theory.[123] In finding that implied bias did not exist, the court reasoned that "the trial counsel provided advice to

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or peremptorily challenged First Lieutenant Olson . . . so I see no need to make further findings as to the matter. His answers were fairly – quite clear and direct on individual voir dire." *Id.*

[108] *Id.*

[109] *Id.* at 458.

[110] *Id.* at 460. The court determined an actual bias challenge did not exist based on 1LT Olson's voir dire responses. *Id.*

[111] *Id*.

[112] *Id.* at 459.

[113] *Id*. at 460.

[114] *Id.* (quoting United States v. Youngblood, 47 M.J. 338, 341 (1997)) (citations omitted).

[115] United States v. Armstrong, 54 M.J. 51 (2000) (holding that a challenge for cause asserts both an actual and implied bias basis).

[116] United States v. Richardson, No. 200101917, 2003 CCA LEXIS 180 (N-M Ct. Crim. App. Aug. 22, 2003) (unpub.), *pet. granted*, 60 M.J. 124 (2004).

[117] *Id.* at *2-3.

[118] *Id.* at *3-4. The record contained ninety-two pages of individual voir dire. *Id.*

[119] *Id.* at *4.

[120] *Id.* at *4-5.

[121] *Id*. at *9-10. The military judge granted the one casual challenge because of the member's extensive drug interdiction experiences and "to a very lesser degree his dealings with the trial counsel." *Id.* at *9.

[122] *Id.* at *10.

[123] *Id.* at *11 (citing United States v. Downing, 56 M.J. 419, 422 (2002)).

these [challenged] members strictly in their official capacities as commanding officer, operations officer, and executive officer, respectively."[124] Mere official legal representation, without additional factors, between a member and a trial counsel does not constitute an implied bias challenge.[125] The court cautioned military judges to provide a "clear signal" that any challenge for cause ruling incorporates both an actual and implied bias determination.[126]

Although the warning to military judges to apply both tests is solid advice, the rest of the NMCCA's *Richardson* decision is subject to revision based on the CAAF's decision to review whether the military judge erred by limiting defense's individual voir dire of the members or by failing to apply the "implied bias" test or both.[127] Any attempt to predict the CAAF's impeding ruling is like traveling barefoot on a dark, steep, snow covered mountain pass. It is noteworthy, however, that the CAAF has traditionally deferred to a military judges' authority to control the voir dire process and to limit additional requests for individual voir dire.[128] The more consequential issue is the CAAF's potential ruling on whether official legal interaction between a trial counsel and a member warrants an implied bias challenge for cause.[129] The frequency of courts-martial, tried before members who receive official legal representation from the in-court trial counsel, underlines the importance of the CAAF's impeding decision and its future application to practitioners.

Challenges for Cause—Sentencing Philosophy

A member should not sit if they exhibit an "inelastic opinion concerning an appropriate sentence for the offenses charged."[130] The test is whether a member's bias will yield to the evidence presented and the military judge's instructions.[131] In a death penalty case, the test is whether the member's view would "prevent or substantially impair the performance of his duties as a [member] in accordance with his instructions and his oath."[132] An inflexible member is disqualified; a tough member is not.[133] The CAAF has frequently ruled on cases involving a member who exhibits a pro-government sentencing philosophy.[134] This year presented a new factual twist—whether a military judge errs by granting a government challenge for cause based on a member's pro-defense sentencing philosophy. Two cases addressed this issue—one is awaiting potential CAAF review,[135] and another is pending the CAAF's ruling.[136]

In *Quintanilla*, a death penalty case, the NMCCA overturned the findings and sentence because the military judge erroneously granted a government challenge for cause against one member.[137] The government challenged two members, Lieutenant Colonel D'Ambra and Master Sergeant (MSgt) Buckham, based on their religious beliefs and alleged inability to

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[124] *Id.* at *6.

[125] *Id.* at *11.

[126] *Id.*

[127] United States Court of Appeals for the Armed Forces, *Scheduled Hearings*, *at* http://www.armfor.uscourts.gov/Nov2004.htm#9 (last visited Apr. 28, 2005) (providing a list of scheduled hearings, including *United States v. Richardson* on November 9, 2004).

[128] *See* United States v. Dewrell, 55 M.J. 131 (2001) (affirming military judge's discretion to control voir dire by restricting either party from conducting group voir dire); United States v. Lambert, 55 M.J. 293, 296 (2001) (holding that "neither the UCMJ not the [MCM] gives the defense the right to individually question the members"); United States v. Belflower, 50 M.J. 306 (1999) (finding a military judge's decision to deny individual voir dire is reviewed for an abuse of discretion).

[129] *See* United States v. Hamilton, 41 M.J. 32 (C.M.A. 1994) (affirming a military judge's denial of challenges for cause against members who were prior legal assistance clients of the trial counsel).

[130] MCM, *supra* note 4, R.C.M. 912 (f) Discussion.

[131] United States v. Reynolds, 23 M.J. 292 (C.M.A. 1987).

[132] Gray v. Mississippi, 481 U.S. 648 (1987) (quoting Wainwright v. Witt, 469 U.S. 412 (1985)).

[133] *See* United States v. Giles, 48 M.J. 60 (1998) (determining the military judge clearly abused his discretion by failing to grant a challenge for cause against a member who categorically stated that anyone who distributed drugs should receive a bad conduct discharge); *Cf.* United States v. Schlamer, 52 M.J. 80 (1999) (holding that a member who states "you take a life, you owe a life" is not per se disqualified if she agrees to review the evidence and follow the military judge's instructions).

[134] United States v. Rolle, 53 M.J. 187 (2000); United States v. Schlamer, 52 M.J. 80 (1999); United States v. Giles, 48 M.J. 60 (1998); United States v. Dale, 42 M.J. 384 (1995).

[135] United States v. Quintanilla, 60 M.J. 852 (N-M. Ct. Crim. App. 2005).

[136] United States v. James, 2003 CCA LEXIS 298 (A.F. Crim. Ct. App. Dec. 10, 2003) (unpub.), *pet. granted*, 60 M.J. 124 (2004).

[137] *Quintanilla*, 60 M.J. at 854. The accused was convicted of killing his battalion executive officer and seriously wounding his battalion commander. *Id*.

consider the death penalty.[138] The military judge granted both challenges ruling "that based on [the members'] strongly held religious beliefs they will have difficulty in considering the entire range of punishments."[139] First, the NMCCA determined the military judge erroneously applied an incorrect legal standard for his ruling.[140] "The test for removal of a court-martial member based on opposition to the death penalty is whether the member's view would 'prevent or substantially impair the performance of his duties as a [member] in accordance with his instructions and his oath.'"[141] Based on rehabilitative questions by the defense counsel, MSgt Buckham responded that he could consider the death penalty.[142] The military judge applied not only the incorrect legal standard but also clearly erred in his factual findings.[143] Master Sergeant Buckham's voir dire responses did not indicate a substantial impairment to the performance of his panel duties.[144] The court noted that military judges are usually afforded "great discretion" on granting challenges for actual bias but in a death penalty case "we are not willing to allow . . . 'great' deference."[145]

The court presumed prejudice to the accused based on the court's inability to determine if MSgt Buckham's vote would have changed the outcome.[146] In light of the court's presumption of prejudice, the government argued that prior Supreme Court decisions favored affirming the findings of guilt and approving a lesser sentence of life without parole.[147] In rejecting the government's argument, the court quoted the accused's brief:

> The improper exclusion of a member is particularly harmful in a military capital case, where a death sentence requires three unanimous votes, one during the findings stage and two during the sentencing stage, after which every member still retains the complete discretion to reject the death sentence. Thus, the improperly-granted challenge had the practical consequence of ceding a vote to the government at each of the four death penalty gates. . . . We will never know [how the voting might have been different] because the military judge erroneously excluded MSgt Buckham from the panel.[148]

The majority, distinguishing the government's cited Supreme Court authority, relied on recent military opinions reversing not only sentences but also findings in cases involving an improperly denied challenge for cause against a member based on their sentencing philosophy.[149]

Several factors make *Quintanilla* ripe for the CAAF's review. The first, and most obvious, factor is the case's nature—the reversal of a death penalty sentence and murder conviction. Secondly, the NMCCA articulates a new standard of review for actual bias challenges in a death penalty case by failing to afford the military judge "great deference."[150] The court fails to cite a military or Supreme Court decision for this new standard instead relying solely on a fifth circuit decision.[151] Before extending this test's applicability beyond NMCCA cases, Air Force and Army practitioners, based on the limited cited authority, should wait for the CAAF's full endorsement of this new standard. Lastly, the majority's refusal to apply Supreme Court precedent and reliance on more recent military cases to overturn the findings is subject to debate as

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[138] *Id*. at 856. Lieutenant Colonel D'Ambra stated as far as he knew the Catholic church was against the death penalty and that he would have to wrestle with considering the death penalty. *Id.* at *10-11. Master Sergeant Buckham stated that as a Baptist he would make the decision whether to vote for the death penalty a matter of prayer. *Id*. at 856-57.

[139] *Id.* at 856.

[140] *Id.* at 860.

[141] *Id*. at 860 (citing Gray v. Mississippi, 481 U.S. 648 (1987)) (quoting Wainwright v. Witt, 469 U.S. 412 (1985)).

[142] *Id.* at 858. The defense asked MSgt Buckham "If the [military judge] tells you the death penalty may be authorized in this case, and this [is] an authorized punishment, you have to be able to consider using the death penalty or ordering the death penalty. Can you do that?" *Id.* Master Sergeant Buckham responded "Yes, I can, sir." *Id.*

[143] *Id.* at 861.

[144] *Id.* "MSgt Buckham indicated, without equivocation or reservation, that he could consider imposing the death penalty." *Id.*

[145] *Id.* at 859 (citing United States v. Gonzalez-Balderas, 11 F.3d 1218, 1222 (5th Cir. 1994)).

[146] *Id.* at 862.

[147] *Id.* (citing Adams v. Texas, 448 U.S. 38 (1980); Gray v. Mississippi, 481 U.S. 648 (1987)).

[148] *Id.*

[149] *Id*. at 862-63 (citing United States v. Giles, 48 M.J. 60 (1998) (holding that the improper denial of a challenge for cause based solely on a member's sentencing philosophy warranted setting aside the sentence and the findings); United States v. Pritchett, 48 M.J. 609 (N-M. Ct. Crim. App. 1998) (stating "the reason prejudice is presumed from such an error of law is that this Court has no way to determine how the ineligible member voted or whether his vote may have controlled the sentence imposed by the court.")). The dissent argued to affirm the findings and authorize a sentence rehearing stating that the majority failed to adequately distinguish the Supreme Court cases cited by the government. *Id.* at 868-69. (Ritter, S.J., dissenting).

[150] *Id.* at 859.

[151] *Id.* (citing United States v. Gonzalez-Balderas, 11 F.3d 1218, 1222 (5th Cir. 1994)).

discussed in the dissent.[152] Senior Judge Ritter, dissenting, states "the majority fails to distinguish this binding [Supreme Court] precedent . . . [and] neither [cited military] case involved a member being dismissed because of his views concerning the death penalty, as occurred in this case and the two United States Supreme Court cases."[153] More persuasively, Senior Judge Ritter distinguishes the facts of the majority's military cases as "the military judge improperly allow[ing] a member who should have been dismissed to remain on the panel" in contrast to the case at bar where "the military judge's error left no member on the panel who harbored an actual bias against the [accused]."[154]

With final resolution to *Quintanilla* pending, the CAAF recently heard argument in an Air Force case involving a member with pro-defense sentencing sentiments.[155] *James* involves a guilty plea for use and distribution of ecstasy before an officer panel for sentencing.[156] During voir dire the trial counsel questioned a member, Major (MAJ) W, regarding her views on punishment in drug cases.[157] Major W responded that

> it almost feels like it is a one shot deal . . . everyone has seen the Air Force Times showing the big drug bust in the Virginia area and all the [accused], and what sentences they have received . . . and it was kind of shocking to me . . . I just thought, wow, these guys made a mistake and look at the punishment for this.[158]

Major W told the military judge that she would feel uncomfortable sitting on the case and that a "young person shouldn't be probably kicked out and put in jail or whatever."[159] Major W, however, stated she could perform her court member duties and be fair to both sides.[160] The military judge granted the government's challenge for cause against MAJ W finding she would have an extremely difficult time considering the entire range of punishments.[161]

The AFCCA, affirming, found that the military judge did not abuse his discretion in determining that MAJ W's responses amounted to actual bias.[162] "The military judge's assessment of her demeanor and the tenor of her responses to voir dire questions viewed as a whole establish a rational basis for granting the challenge."[163] While this holding is not unreasonable, it remains undecided what significance, if any, the CAAF will give MAJ W's statement that she could perform her duties and be fair to both sides. Based on this statement, the CAAF could hold that the military judge abused his discretion by granting a challenge for cause against a defense oriented member. Both *Quintanilla* and *James*, more importantly, emphasize to defense counsel the significance of asking rehabilitative questions to defense favorable members to force the military judge to make a more difficult challenge for cause ruling and to preserve potential error for appeal.

Pleas

Introduction

In *United States v. Care*, the Court of Military Appeals, the CAAF's predecessor, established guilty plea requirements based on Supreme Court case law interpreting the Constitution.[164] A guilty plea providence inquiry must:

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[152] *Id.* at 868-69 (Ritter, S.J., dissenting).

[153] *Id.* (Ritter, S.J., dissenting).

[154] *Id.* at 869. (Ritter, S.J., dissenting).

[155] United States Court of Appeals for the Armed Forces, *Scheduled Hearings*, *at* http://www.armfor.uscourts.gov/Nov2004.htm (last visited Apr. 28, 2005) (providing a list of scheduled hearings, including *United States v. James* on November 8, 2004).

[156] United States v. James, 2003 CCA LEXIS 298, at *1 (A.F. Crim. Ct. App. Dec. 10, 2003) (unpub.), *petition granted* 60 M.J. 124 (2004).

[157] *Id.* at *9. The decision did not provide MAJ W's full name. *Id.*

[158] *Id.* at *9-10. In response to MAJ W, the trial counsel stated "I don't read the Air Force Times, so I don't know what articles you are talking about." *Id.* at *10. Major W stated "Actually there was a big drug bust in Virginia . . . I saw all their sentences and I was shocked, I was taken back." *Id.*

[159] *Id.* at *9-10.

[160] *Id.* at *10.

[161] *Id*. at *11.

[162] *Id.* at *12.

[163] *Id.* As evidence of the military judge's impartiality, the court noted that the military judge denied an additional government challenge for cause and granted two defense challenges for cause. *Id.* at *13.

[164] United States v. Care, 40 C.M.R. 247 (C.M.A. 1969) (citing Boykin v. Alabama, 395 U.S. 238 (1969); Halliday v. United States, 394 U.S. 831 (1969); McCarthy v. United States, 394 U.S. 459 (1969)).

> reflect not only that the elements of each offense charged have been explained to the accused but also that the military trial judge . . . has questioned the accused about what he did or did not do, and what he intended (where this is pertinent), to make clear the basis for a determination by the military trial judge . . . whether the acts or the omissions of the accused constitute the offense or offenses to which he is pleading guilty.[165]

In 1984, RCM 910, generally based on Article 45, UCMJ, and the Federal Rules of Criminal Procedure (FRCP) 11 (Pleas), codified the *Care* requirements.[166] "The Military Judge's Benchbook provides a detailed script for the military judge to follow to ensure that the mandates of *Care* and subsequent case law expanding the required colloquy are scrupulously followed."[167] This year's cases mark a continuing trend of military judges failing to follow the script, failing to obtain a factual basis for the accused's plea, and failing to resolve matters or defenses inconsistent with the accused's plea.[168] Trial counsel are failing to advise military judges of these omissions and errors. In 2004, the CAAF imposed a stiff burden on military judges and trial counsel to scrupulously follow the script or risk reversal even if the defense fails to object to the omission or error at court-martial.[169] This CAAF imposed government burden contrasts with Supreme Court precedent which places the burden on defense counsel to object or the issue is waived absent a showing of plain error.[170] In July 2004, the Supreme Court further clarified this defense imposed burden in *United States v. Benitez*.[171]

Advice Concerning Rights Waived by Plea

In *Benitez*, the trial judge, without objection from either counsel, failed to discuss with the accused a pretrial agreement term in violation of FRCP 11.[172] The government agreed to make a safety valve recommendation to the sentencing court to lower the accused's confinement below an otherwise mandatory ten year minimum.[173] The pretrial agreement stated that the accused could not withdraw his guilty plea if the sentencing court rejected the government's safety valve recommendation.[174] Between the accused's accepted guilty plea and his sentence hearing, the probation office discovered that the accused possessed convictions under an alias making him ineligible for the safety valve reduction regardless of the government's recommendation.[175]

On appeal, the accused alleged that the judge's failure to advise him of his rights under FRCP 11 warranted reversal.[176] The Supreme Court ruled when a FRCP 11 error is raised on appeal, to which the accused failed to object at trial, the defense must show the error is "plain" and "a reasonable probability that, but for the error, the [accused] would not have plead guilty."[177] Based on the evidence against the accused and the warning provided in the pretrial agreement, the Court ruled that the FRCP 11 error "tends to show that [it] made no difference to the outcome" of the accused's case.[178] The Court provided

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[165] *Care*, 40 C.M.R. at 250.

[166] *See* MCM, *supra* note 4, R.C.M. 910 analysis, at A21-58; 2 FRANCES A. GILLIGAN & FREDRIC LEDERER, COURT-MARTIAL PROCEDURE § 19-022.20 (2nd ed. 1999).

[167] Ham, *supra* note 2, at 32. "Because there are potential dangers in the abuse of [an] abbreviated method of disposing of charges, a number of safeguards have been included" for a military providence inquiry. United States v. Felder, 59 M.J. 444, 445 (2004) (citing DAVID A. SCHLEUTER, MILITARY CRIMINAL JUSTICE 372 (5th ed. 1999)).

[168] Ham, *supra* note 2, at 32.

[169] United States v. Hansen, 59 M.J. 410 (2004). In *Hansen*, the military judge failed to advise the accused of his right against self incrimination, his right to a trial of the facts, and his right to confrontation witnesses as required by RCM 910(c)(3). *Id.* at 412. Neither defense or trial counsel objected to the military judge's omission. *Id.* The CAAF held "we will not presume or imply that a military accused understood [his rights] and waived them, absent a demonstrable showing in the record that he did in fact do so." *Id*. at 414.

[170] *See* United States v. Vonn, 535 U.S. 55 (2002) (holding that if an accused is late in raising a FRCP 11 error reversal is not required unless the error is plain and affects the accused's substantial rights, as proven by the defense, upon review of the entire record). *See also* Ham, *supra* note 2, at 32-34 (providing a thorough discussion on *Hansen* and *Vonn* and the application of these rulings to military providence inquires).

[171] United States v. Benitez, 124 S. Ct. 2333 (2004).

[172] *Id.*at 2337.

[173] *Id.* at 2336. The accused was charged with possession of more than five hundred grams of methamphetamine with intent to distribute which carried a mandatory minimum sentence of ten years confinement. *Id.*

[174] *Id*. at 2337.

[175] *Id*.

[176] *Id.* at 2338.

[177] *Id.* at 2340.

[178] *Id.* at 2341. The evidence against the accused included a controlled drug buy to an informant and a confession. *Id.* The Supreme Court stated "one can fairly ask a[n] [accused] seeking to withdraw his plea what he might ever have thought he could gain by going to trial." *Id.*

three policy reasons for placing this burden on the defense: (1) it "encourages timely objections"; (2) it "reduce[s] wasteful reversals by demanding strenuous exertion to get relief on unpreserved error"; and, (3) it places "particular importance of the finality of guilty pleas, which usually rest, after all, on the [accused's] profession of guilt in open court [and which] is indispensable in the operation of the modern criminal system."[179]

Although *Benitez* and its 2002 predecessor *Vonn* clearly place a burden on defense to object to providence inquiry error, the CAAF, however, as demonstrated in *Hansen*, appears unwilling to apply this standard to military guilty pleas. The *Hansen* majority did not cite or otherwise distinguish *Vonn* even though RCM 910 is based on FRCP 11.[180] The lone discussion of Supreme Court precedent occurred in Chief Judge Crawford's *Hansen* dissent when she urged the CAAF to "follow our superior court and hold that even where there is a failure to make a full inquiry, the failure of the defendant to object constitutes waiver absent plain error."[181] Chief Judge Crawford's request, however, fell on apparent deaf ears. The CAAF continues to closely monitor not only a military judge's failure to advise the accused of his constitutional rights but also a military judge's failure to advise the accused of the elements or definitions of the offense to which the accused is pleading guilty.

Factual Basis for Plea—Failure to Discuss Elements and Definitions

The military judge must explain the elements of the offense to the accused.[182] "If the military judge fails to do so, he commits reversible error, unless 'it is clear from the entire record that the accused knew the elements, admitted them freely, and pleaded guilty because he was guilty.'"[183] The CAAF, on review, "rather than focusing on a technical listing of the elements of an offense, [will] look at the context of the entire record to determine whether an accused [was] aware of the elements, either explicitly or inferentially."[184] A military judge's failure to discuss the elements of a complex offense generally results in reversal whereas a military judge's failure to discuss the elements of a simple offense, while erroneous, is not per se prejudicial to the accused's rights if he expresses a belief in his own guilt and admits the facts necessary to sustain the element.[185] Last year's decisions reveal this trend's continuation with the CAAF reversing a complex offense case[186] and affirming a simple offense case.[187]

In *Negron*, the accused pleaded guilty to depositing obscene matters in the mail in violation of Article 134, UCMJ.[188] During the providence inquiry the military judge failed to advise the accused of the definition of "obscene" as required by a depositing obscene matters in the mail charge.[189] The correct definition of obscene reads: "indecent language is that which is grossly offensive to modesty, decency, or propriety, or shocks the moral sense, because of its vulgar, filthy, or disgusting nature, or its tendency to incite lustful thought." Language is indecent if it tends reasonably to corrupt morals or incite libidinous thoughts.[190] The CAAF held an accused is not provident to an offense when the military judge uses a substantially different definition of "obscene" from that proscribed by the offense charged.[191] The definitional error tainted the entire

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[179] *Id*. at 2340.

[180] *See* Ham, *supra* note 2, at 32-34. The majority also did not discuss the Supreme Court's grant of certiorari and pending decision in *Benitez*. United States v. Hansen, 59 M.J. 410 (2004). *Hansen* was decided on 28 April 2004. *Id.* The Supreme Court decided *Benitez* on 14 June 2004. *Benitez*, 124 S. Ct. at 2333.

[181] *Hansen*, 59 M.J. at 415 (Crawford, C.J., dissenting).

[182] United States v. Faircloth, 45 M.J. 172 (1996); United States v. Davenport, 9 M.J. 364 (C.M.A. 1980). *See* MCM, *supra* note 4, R.C.M. 910 (e) Discussion (stating "the accused must admit every element of the offense(s) to which the accused pleaded guilty. Ordinarily, the elements should be explained to the accused.").

[183] United States v. Redlinski, 58 M.J. 117, 119 (2003) (quoting United States v. Jones, 34 M.J. 270, 272 (C.M.A. 1992)).

[184] *Id.* at 119.

[185] *See id.* (recognizing that an attempt offense crime is more complex unlike some simple military offenses).

[186] United States v. Negron, 60 M.J. 136 (2004).

[187] United States v. Barton, 60 M.J. 62 (2004).

[188] *Negron*, 60 M.J. at 136-37. The accused, a postal clerk, stole one thousand five hundred and forty dollars from the postal safe. *Id.* at 137. The accused also wrote a bad check for five hundred dollars and attempted to obtain a bank loan to replenish his checking account. *Id.* After being denied the loan, the accused wrote a letter to the bank as follows: "Oh, yeah, by the way y'all can kiss my ass too!! Worthless bastards! I hope y'all rot in hell you scumbags. Maybe when I get back to the states, I'll walk in your bank and apply for a blowjob, a nice dick sucking, I bet y'all are good at that, right?" *Id.*

[189] *Id.* at 137-38. The military judge's definition of obscene was largely taken from the offense of an indecent act with another which states "'Indecent' signifies 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. See* MCM, *supra* note 4, pt. IV, para. 90c.

[190] MCM, *supra* note 4, pt. IV, para. 89c.

[191] *Negron*, 60 M.J. at 142.

hearing because it "focus[ed] the providency inquiry on the indecent nature of the acts that were the subject of [the accused's] language rather than [the accused's] 'planned' and 'intended' result from the use of his language."[192] The accused stated he wrote the letter out of anger and to offend the reader, but he failed to state that he planned to engage in or solicit sexual acts or to excite sexual thoughts in others as required to sustain a conviction for depositing obscene matters in the mail.[193]

In *Barton,* in contrast to *Negron*, the accused pleaded guilty to three specifications of conspiracy to commit larceny.[194] The military judge advised the accused of the larceny elements for the first specification but did not restate the elements for the second and third specifications.[195] While discussing the second specification, the military judge asked the accused if he understood the previously provided larceny elements to which the accused affirmatively responded.[196] This cross-reference would not have been problematic but for the fact that the accused failed to state, and the stipulation of fact failed to mention, that the value of the stolen property in specification two exceeded one hundred dollars.[197] The only admission regarding value existed in the accused's acknowledgement that he understood the cross-referenced larceny elements provided by the military judge in the first specification.[198]

The CAAF, affirming, reasoned a value determination is not a complex legal concept and "an understanding of the element does not require an intricate application of the law to fact."[199] The CAAF held the accused knowingly and voluntarily pled guilty to conspiring to steal property in an amount over one hundred dollars, as charged in specification two.[200] The accused followed the charge sheet as the military judge read the elements, stated he understood the larceny elements for specification one, and he did not ask for a restatement of the elements for specification two in response to the military judge's direct question if he desired such.[201] Although the CAAF affirmed, the court issued a warning that it "may have doubts that a similar methodology of cross-reference will work generally" to sustain a specification.[202] This warning reminds military judges and counsel of the necessity for the accused to affirmatively state on the record the facts establishing his guilt.

Failure to Establish a Factual Predicate or to Resolve an Inconsistent Matter or Defense

A military judge may not accept an accused's guilty plea without inquiring into its factual basis.[203] Rule for Court-Martial 910(e) mandates that a "military judge shall not accept a plea of guilty without making such inquiry of the accused as shall satisfy the military judge that there is a factual basis for the plea."[204] The accused must be convinced of his guilt and articulate all the facts necessary to establish guilt.[205] "Mere conclusions of law recited by an accused are insufficient to provide a factual basis for a guilty plea."[206] An accused may not merely answer "yes" or "no" in response to a military judge's legally conclusive questions.[207] Additionally, the military judge must resolve any inconsistent matter or defense

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[192] *Id.*

[193] *Id.* at 142-43. The accused stated "I wasn't paying so much attention to the technical definition of what it was, sir, I just threw the word out to offend them." *Id.* at 142.

[194] United States v. Barton, 60 M.J. 62 (2004).

[195] *Id.* at 63-64. The military judge also advised the accused to follow along on his copy of the charge sheet while the elements were discussed. *Id.* at 63.

[196] *Id.* Additionally, the accused did not ask for a restatement of the elements in direct response to that specific question by the military judge. *Id.*

[197] *Id.* at 64. This case was tried prior to the 2002 presidential executive order changing the aggravating larceny value from one to five hundred dollars. *See* MCM, *supra* note 4, pt. IV, para. 46e.

[198] *Id.* at 65.

[199] *Id*.

[200] *Id.*

[201] *Id.*

[202] *Id.*

[203] UCMJ art. 45 (2002); United States v. Care, 40 C.M.R. 247 (C.M.A. 1969).

[204] MCM, *supra* note 4, R.C.M. 910(e).

[205] *Id.* R.C.M. 910(e) Discussion.

[206] United States v. Outhier, 43 M.J. 326, 331 (1996).

[207] *Id.* at 330-32 (ruling the accused's affirmative responses to the military judge that his actions could have produced grievous bodily harm are not sufficient to sustain a guilty plea to the offense of aggravated assault by a means or force likely to produce death or grievous bodily harm when the actual facts elicited from the accused do not establish the factual predicate for the charged offense). *See also* United States v. Jordan, 57 M.J. 236 (2002) (determining an accused's mere "Yes" response to the military judge's question as to whether his conduct was prejudicial to good order and discipline or service discrediting does not sustain a plea if the factual circumstances revealed by the accused do not objectively support that element).

raised either by the accused or by any other witness or evidence presented during the court-martial.[208] Article 45, UCMJ, states the following:

> [i]f an accused, . . . after a plea of guilty[,] sets up matter inconsistent with the plea, or if it appears that he has entered the plea of guilty improvidently or through lack of understanding of its meaning and effect . . . a plea of not guilty shall be entered in the record, and the court shall proceed as though he had pleaded not guilty.[209]

An accused need not have personal recollection of the facts establishing his guilty plea but must "be convinced of, and able to describe all the facts necessary to establish guilt."[210]

A guilty plea will only be overturned if the record of trial, in its entirety, shows a substantial basis in law and fact for questioning the plea.[211] Under this high standard, however, this past year the CAAF and the service courts, in published and unpublished opinions, reversed numerous findings because a review of the entire record failed to establish a factual predicate for the accused's plea or left unresolved an inconsistent matter or defense raised during the court-martial. Numerous Article 86, UCMJ, absent without leave (AWOL) and failure to report (FTR), cases exemplify the magnitude of opinions discussing a trial court's failure to obtain a factual predicate or failure to resolve an inconsistent matter or defense.[212] In 2004, the CAAF reversed two cases for faulty AWOL providence inquires.[213]

In *Hardeman*, the accused received a bad conduct discharge (BCD), confinement for four months, and reduction to the pay grade of E-1 after pleading guilty to one FTR specification and one AWOL specification from 1 November 2001 to 14 December 2001.[214] During the providence inquiry, the accused failed to state a definitive commencement date for the AWOL.[215] The accused admitted at some point between 1 November 2001 and 14 December 2001 he knew he was AWOL but "the providence inquiry [did] not ultimately reveal the date on which [the accused] was willing to admit he absented himself without authority."[216] Although the accused never provided a specific commencement date, the military judge accepted his plea to the entire forty-three day AWOL.[217] The CAAF, reversing, stated "[a] definitive inception date is indispensable to a successful prosecution for unauthorized absence [and] [m]oreover, the MCM authorizes increased punishment based upon, among other things, the duration of the absence."[218] In *Hardeman*, the inception date was particularly significant because the forty-three day AWOL conviction was the only specification authorizing the accused's

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[208] *Outhier*, 45 M.J. at 331. "[A]n accused servicemember cannot plead guilty and yet present testimony that reveals a defense to the charge." United States v. Clark, 28 M.J. 401, 405 (C.M.A. 1989). *See also* United States v. Brown, No. 35837, 2004 CCA LEXIS 209 (A.F. Ct. Crim. App. Aug. 30, 2004) (unpub.) (holding that the military judge erred by failing to advise the accused on the defense of involuntary intoxication during his court-martial for the use of cocaine when the prosecutor presented witness statements during the pre-sentencing phase stating that the accused was "'too drunk' to feel any other effects of the cocaine" and where the accused, during his unsworn statement, stated he was "pretty buzzed").

[209] UCMJ art. 45(a) (2002).

[210] MCM, *supra* note 4, R.C.M. 910(e) Discussion; United States v. Moglia, 3 M.J. 216 (C.M.A. 1977). *See also* United States v. Parker, 60 M.J. 666 (N-M. Ct. Crim. App. 2004) (holding that the rejection of the accused's plea to missing movement was improper where the military judge erroneously focused on the credibility of the information the accused relied upon when the record otherwise established the accused's actual knowledge of the unit's movement).

[211] *Jordan*, 57 M.J. at 238 (citing United States v. Prater, 32 M.J. 433, 436 (C.M.A. 1991)).

[212] *See* United States v. Pinero, 60 M.J. 31 (2004); United States v. Hardeman, 59 M.J. 389 (2004). *See also* United States v. Le, 59 M.J. 859 (Army Ct. Crim. App. 2004) (ruling the military judge erred by failing to resolve the conflict between the accused's plea of guilty to desertion and statements indicating that the accused deserted under duress); United States v. Scott, 59 M.J. 718 (Army Ct. Crim. App. 2004) (holding an AWOL plea from 16 August 2002 through November 2002 improvident because the accused signed in with his unit on 11 September 2002); United States v. Banks, No. 20021302 (Army Ct. Crim. App. Sept. 7, 2004) (unpub.) (failing to have the accused state in his own words why he failed to report to formation); United States v. Boyd, No. 20021264 (Army Ct. Crim. App. June 16, 2004) (unpub.) (reasoning the military judge erred by accepting accused's plea without explaining the inability defense); United States v. Gonzalez, No. 20020744 (Army Ct. Crim. App. July 21, 2004) (unpub.) (determining a missing movement through neglect plea was not provident where the facts conflicted as to whether the accused possessed authority to change his flight).

[213] United States v. Pinero, 60 M.J. 31 (2004); United States v. Hardeman, 59 M.J. 389 (2004).

[214] *Hardeman*, 59 M.J. at 389-90.

[215] *Id.* at 390. The accused reported to a new base on October 22, 2001. *Id*. The accused was required to attend mandatory base training from 22 October 2001 to 29 October 2001 prior to joining his unit. *Id.* At the end of the training, the accused alleged his supervisor did not give him a specific date to report to his unit and he was expecting a phone call telling him when to report. *Id.*

[216] *Id.* at 392.

[217] *Id.* at 391.

[218] *Id.*

receipt of a BCD.[219] If the accused's AWOL commenced on or after November 14, 2001, a BCD could not have been imposed.[220]

In *United States v. Pinero*,[221] the CAAF faced a similar *Hardeman* situation. In *Pinero*, the accused pleaded guilty to a fifty-three day AWOL from 23 October 2000 to 15 December 2000.[222] During the providence inquiry the accused stated that in mid-November 2000, prior to Thanksgiving, a member of his command came to his house and ordered him to participate in a command directed urinalysis.[223] After the urinalysis the accused returned home, but he failed to report to duty the following day as ordered by the command representative.[224] The accused remained AWOL until his apprehension at his home on 15 December 2000.[225] Based on these elicited facts, the military judge granted a short fact finding recess but neither counsel could confirm or deny the accused's story or his presence at the military medical center.[226] Even with these inconsistent matters on the record, the military judge, ruling that the accused's presence at the medical center constituted a mere "de minimis interruption," accepted the plea to the fifty-three day AWOL.[227]

The CAAF, reversing, defined the military specific reasons requiring a close scrutiny of a servicemember's plea:

> The military justice system takes particular care to test the validity of guilty pleas because the facts and the law are not tested in the crucible of the adversarial process. Further, there may be subtle pressures inherent to the military environment that may influence the manner in which servicemembers exercise (and waive) their rights. The providence inquiry and a judge's explanation of possible defenses are established procedures to ensure servicemembers knowingly and voluntarily admit to all elements of a formal criminal charge.[228]

This statement reaffirms the CAAF's burden placed on military judges, and likewise trial counsel, to ensure the accused's plea is knowing and voluntary. The military judge in *Pinero*, after ruling the accused submitted to a five hour urinalysis on an unspecified date in November, 2000, erroneously affirmed the accused's plea to one continuous fifty-three day AWOL.[229] The court affirmed an AWOL from 23 October 2000 to 1 November 2000, described as the "earliest date the accused could have terminated his absence based on the plea colloquy."[230] The court, even though the accused admitted he was AWOL immediately after his urinalysis until 15 December 2000, did not affirm an additional AWOL because the record lacked an inception date for the second AWOL.[231]

Both *Hardeman* and *Pinero* underline the military judge's burden to ensure that the accused's statements establish a factual predicate for the plea and do not raise an inconsistent matter or defense. While this mission is easier said than done, in reviewing these types of cases, the courts frequently affirm, and cite approvingly, when a military judge conducts an intentionally slow and deliberative providence inquiry with the accused.[232]

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[219] *Id.* 389. *See* MCM, *supra* note 4, pt. IV, para 10.e (outlining the maximum punishment for AWOL based on duration).

[220] MCM, *supra* note 4, pt. IV, para 10.e. Only an AWOL that exceeds thirty days authorizes a discharge. *Id.*

[221] United States v. Pinero, 60 M.J. 31 (2004).

[222] *Id.* at 32.

[223] *Id.* The accused stated he put on his uniform, proceeded to the military medical center with his unit's escort, provided his urinalysis sample, and returned home. *Id.*

[224] *Id.*

[225] *Id.*

[226] *Id.*

[227] *Id.* at 33.

[228] *Id.*

[229] *Id.* at 34.

[230] *Id.* at 35.

[231] *Id*. (citing United States v. Harris, 45 C.M.R. 364. 367-68 (C.M.A. 1972)). *Accord* United States v. Hardeman, 59 M.J. 389 (2004).

[232] *See* United States v. McCrimmon, 60 M.J. 145 (2004) (affirming a bribery conviction based, to a degree, on the detailed dialogue between the military judge and the accused regarding bribery and its intent element); United States v. Gosselin, 60 M.J. 768 (A.F. Ct. Crim. App. 2004) (sustaining a plea to wrongful introduction of mushrooms containing a hallucinogen onto a base the AFCCA constantly referenced the military judge's methodical and pressing inquiry of the accused (twenty-two pages of a hundred page transcript) including the military judge's action of asking the accused to repeatedly describe the original purpose of the trip off base and twice adjourning a recess for the accused to discuss vicarious liability with his counsel).

Permissible & Impermissible Pretrial Agreement Terms

"While pretrial agreements are considered beneficial and acceptable components of military justice practice, if left unchecked, various provisions therein might well undermine the military justice system and render a particular court-martial an empty ritual."[233] Pretrial agreements terms, therefore, may not violate appellate case law, public policy, or the military judge's notion of fairness.[234] "Pretrial agreement provisions are contrary to 'public policy' if they interfere with court-martial fact-finding, sentencing, or review functions or undermine public confidence in the integrity and fairness of the disciplinary process."[235] Rule for Courts-Martial 705(c)(2) provides a list of permissible terms, to include: a promise to enter into a stipulation of fact, a promise to testify as a witness in the trial of another person, a promise to pay restitution, a promise to conform the accused's conduct to certain conditions, a promise to waive the Article 32, UCMJ, investigation, or waive the right to a trial by members, or waive the right to the personal appearance of witnesses at sentencing proceedings.[236] Rule for Courts-Martial 705(c)(1) provides a list of impermissible terms, to include: an agreement to deprive the accused of "the right to counsel, the right to due process, the right to challenge the jurisdiction of the court-martial, the right to a speedy trial, the right to complete sentencing proceedings, or the complete and effective exercise of post-trial and appellate rights."[237] "Even though it is clear that the military justice system may place some limits on the provisions permitted to be included in a valid pretrial agreement, it is recognized that the extent of those limits is not well-defined."[238] This past year, the Coast Guard Court of Criminal Appeals (CGCCA) tackled whether a pretrial agreement term requiring the accused to attend a sexual offender treatment program violated public policy.[239]

In *Cockrell*, the accused pleaded guilty to receiving, possessing, and watching child pornography, among other offenses, pursuant to a pretrial agreement.[240] The pretrial agreement required the accused to enroll in a sexual offender treatment program after his release from confinement.[241] The term imposed numerous conditions, to include, the accused's promise to cover treatment costs, the convening authority's pre-approval of the program, the program's use of polygraph exams, and the accused's promise to waive his privacy rights so the convening authority could discuss the case with the treatment provider.[242] The term also stated "[f]ailure to enroll in an approved treatment program within two weeks following [the accused's] release from confinement OR failure to remain compliant with treatment SHALL constitute a violation of this condition of [the accused's] pretrial agreement with the convening authority."[243]

At trial, the military judge failed to discuss the pretrial agreement term requiring the accused to enroll in a sexual offender treatment program and any possible adverse ramifications for non-compliance.[244] The court stated:

> [t]he record does not give us a clue as to the understanding of [the accused] and the Convening Authority on what may be done if [the accused] fails to comply with the treatment clause, or whether the Convening Authority's discretion in determining what constitutes noncompliance is limited in any manner, or, for that matter, whether any protections in this regard are afforded [the accused].[245]

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[233] United States v. Cummings, 38 C.M.R. 174, 177 (C.M.A. 1968).

[234] United States v. Green, 1 M.J. 453, 456 (C.M.A. 1976).

[235] United States v. Cassity, 36 M.J. 759, 762 (N.M.C.M.R. 1992) (citing United States v. Mitchell, 15 M.J. 238, 240-241 (C.M.A. 1983); United States v. Green, 1 M.J. 453, 456 (C.M.A. 1976); United States v. Foust, 25 M.J. 647, 649 (A.C.M.R. 1987)). *See also* United States v. Thomas, 60 M.J. 521 (N-M. Ct. Crim. App. 2004) (ruling if an accused's sentence could include death and required a mandatory minimum of confinement for life for a premeditated murder conviction any pretrial agreement provision precluding the accused from accepting clemency from the service secretary or president, if offered, was beyond the convening authority's power and violated public policy); United States v. Schmelzle, No. 200400007, 2004 CCA LEXIS 148 (N-M. Ct. Crim. App. July 14, 2004) (unpub.) (holding if an accused is eligible for retirement a pretrial agreement term requiring the accused to agree to not request a transfer to the reserve, if a bad conduct discharge was not adjudged, violated public policy).

[236] MCM, *supra* note 4, R.C.M. 705(c)(2).

[237] *Id*. R.C.M. 705(c)(1)(B).

[238] *Schmelzle*, 2004 CCA LEXIS at *151.

[239] United States v. Cockrell, 60 M.J. 501 (C.G. Ct. Crim. App. 2004).

[240] *Id.* at 502.

[241] *Id.* at 503. The term was located at paragraph twenty-one of the pretrial agreement and is over a page in length in the reported decision. *Id.* at 503-04.

[242] *Id.* at 503.

[243] *Id.*

[244] *Id*. at 504.

[245] *Id.* at 505.

Because of this unresolved ambiguity the court struck the term and ruled the convening authority could not take adverse action against the accused based on any non-compliance with the sexual offender treatment program.[246]

While the ramifications for failing to comply with the sexual offender treatment program were unclear in the pretrial agreement, and left unexplained by the military judge, the court did not rule that enrollment in a treatment program is a per se impermissible term.[247] While the term is potentially feasible, the uncertainty of drafting clear conditions to withstand later appellate scrutiny, and the effort required to monitor the accused's compliance, puts into doubt the wisdom of entering into such a term. Practitioners, who consider proposing such a term, should closely review the *Cockrell* pretrial agreement and remember to establish simple, clear-cut terms. *Cockrell* also underlines a military judge's duty to discuss the pretrial agreement with the accused and to clarify any ambiguous terms with both parties.

Military Judge's Pretrial Agreement Inquiry

A military judge must inquire into the terms of any pretrial agreement to ensure that the accused understands the agreement and that the parties agree to the terms.[248] Failure to discuss the pretrial agreement brings into question the legitimacy of the accused's knowing and voluntary plea. Military judges and counsel play a critical role to "ensure that the record reflects a clear, shared understanding of the terms of any pretrial agreement between the accused and the convening authority."[249] Trial and defense counsel must "confirm[] that the written agreement encompasse[s] all of the understandings of the parties, and that the judge's interpretation of the agreement comport[s] with their understanding both as to the meaning and effect of the plea bargain."[250] This past year the CAAF and the ACCA, respectively, issued opinions regarding a military judge's failure to discuss a pretrial agreement[251] and failure to resolve an ambiguous term.[252]

In *Felder*, the accused, in his pretrial agreement, agreed to request trial by military judge alone, to enter into a stipulation of fact, to use stipulations of expected testimony in lieu of the personal appearance of non-local witnesses, and to waive any motions for sentence credit based on Article 13 or restriction tantamount to confinement or both.[253] The court stated "[t]he accused must know and understand not only the agreement's impact on the charges and specifications which bear on the plea, the limitation on the sentence, but also other terms of the agreement, including consequences of future misconduct or waiver of various rights."[254] While the military judge's failure to discuss the pretrial agreement constituted error, to obtain relief, the accused must show his material rights were prejudiced by the error.[255]

Although the pretrial agreement was not discussed, the military judge, during separate inquires, established that the accused's forum selection and entrance into the stipulation of fact were knowing and voluntary.[256] Further, the accused did not offer any stipulations of expected testimony nor did he allege on appeal that he would have but for the pretrial agreement's restriction.[257] The significant issue was whether the military judge's failure to discuss the accused's waiver of any Article 13 or restriction tantamount to confinement motions materially prejudiced the accused's rights.[258] The CAAF, in finding no material prejudice, relied on the defense counsel's statement to the military judge that no punishment occurred

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[246] *Id.* at 507. Striking the ambiguous term negated the issue whether the accused's plea was knowing and voluntary. *Id.*

[247] *Id.*

[248] MCM, *supra* note 4, R.C.M. 910(f); United States v. King, 3 M.J. 458 (C.M.A. 1977). *See also* United States v. Green, 1 M.J. 453 (C.M.A. 1976) (reasoning the military judge must establish "on the record that the accused understands the meaning and effect of each provision in the pretrial agreement").

[249] United v. Felder, 59 M.J. 444, 445 (2004).

[250] *King*, 3 M.J. at 461.

[251] *Felder*, 39 M.J. at 455.

[252] United States v. Dunbar, 60 M.J. 748 (Army Ct. Crim. App. 2004).

[253] *Felder*, 39 M.J. at 455.

[254] *Id.*

[255] *Id.*

[256] *Id*. at 446.

[257] *Id.*

[258] *Id*. at 445. *See also* United States v. McFadyen, 51 M.J. 289 (1999) (holding an accused may agree to waive any Article 13, UCMJ, or restriction tantamount to confinement credit in a pretrial agreement).

under Article 13 or restriction tantamount to confinement grounds in the accused's case.[259] While the CAAF affirmed *Felder*, the ACCA reversed a case where the military judge failed to resolve an ambiguous pretrial agreement term.[260]

In *Dunbar*, the accused's quantum portion of his pretrial agreement stated:

> Any adjudged confinement of three (3) months or more shall be converted into a [BCD], which may be approved; any adjudged confinement of less than three (3) months shall be disapproved upon submission by the accused of an administrative separation in lieu of court-martial IAW AR 635-200, Chapter 10 . . . with a handwritten annotation [on the side] stating 'with an Other Than Honorable (OTH) discharge.'[261]

After accepting the accused's plea to larceny and making false claims, the military judge sentenced the accused to a BCD, two months confinement, and reduction to private first class (PFC) E-3.[262] The military judge then reviewed the pretrial agreement's quantum portion and announced that the convening authority could approve the adjudged BCD and reduction to PFC.[263] A dispute ensued as to whether the convening authority could approve the BCD.[264] Defense counsel argued that the convening authority could not approve the BCD.[265] The government asserted that the accused could submit a Chapter 10 and the convening authority had to disapprove the two months confinement, but the pretrial agreement did not require the convening authority to approve the Chapter 10.[266] The military judge did not ask the accused for his understanding of the term or otherwise resolve the discrepancy.[267]

The ACCA held the pretrial agreement was ambiguous and, while it was not specifically stated, "there [was] a strong inference that if [the accused] received less that three months confinement the convening authority would approve a Chapter 10 discharge in lieu of the [BCD]."[268] Where a mutual misunderstanding as to a material term exists, which denies the accused of his benefit of the bargain, the military judge should attempt to resolve the inconsistency.[269] Rule for Courts-Martial 910(h)(3) provides, after the sentence is announced, if the parties disagree with the pretrial agreement terms the military judge "shall conform, with the consent of the Government, the agreement to the accused's understanding or permit the accused to withdraw the plea."[270] The ACCA, reversing the plea, did not conform the pretrial agreement to the accused's understanding because the government did not consent to the change instead requesting the court to set aside the findings and sentence.[271] While RCM 910(h)(3) discusses an accused's withdrawal from a pretrial agreement, a recent CAAF opinion discusses the government's authority to withdraw from a pretrial agreement.[272]

Government's Withdrawal from a Pretrial Agreement

The President set forth circumstances in RCM 705(d)(4)(B) authorizing a convening authority to withdraw from a pretrial agreement.[273] Rule for Courts-Martial 705(d)(4)(B) states:

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[259] *Id.* at 446.

[260] United States v. Dunbar, 60 M.J. 748 (2004).

[261] *Id.* at 749. A pretrial agreement's quantum portion contains all sentence limitations and is not reviewed until after the sentence is announced. *Id. See also* U.S. DEP'T OF ARMY, REG. 635-200, PERSONNEL SEPARATIONS: ENLISTED PERSONNEL ch. 10 (1 Nov. 2000) (Discharge in Lieu of Trial by Court-Martial) (discussing the procedures for the convening authority to accept the accused's administrative discharge and to dismiss the court-martial charges).

[262] *Id*. at 748-49.

[263] *Id.* at 749.

[264] *Id.*

[265] *Id.* Defense counsel asked "how could we have an other than honorable discharge at the same time we have a bad[-]conduct discharge?" *Id.* "The military judge responded that the pretrial agreement did not expressly require the convening authority to disapprove the bad-conduct discharge" upon the accused's submission of a Chapter 10. *Id.*

[266] *Id.*

[267] *Id*. at 750.

[268] *Id.* at 751.

[269] *Id.*

[270] MCM, *supra* note 4, R.C.M. 910(h)(3).

[271] *Dunbar*, 60 M.J. at 752.

[272] United States v. Williams, 60 M.J. 360 (2004).

[273] MCM, *supra* note 4, R.C.M. 705(d)(4)(B).

> [A] convening authority may withdraw from a pretrial agreement at any time before the accused begins performance of promises contained in the agreement, upon the failure by the accused to fulfill any material promise or condition in the agreement, when inquiry by the military judge discloses a disagreement as to a material term in the agreement . . .[274]

In *Williams*, the accused was charged with two specifications of larceny, seven specifications of forgery, and one specification of opening the mail.[275] The pretrial agreement required the accused to reimburse his victim(s) "once those individuals and the amounts owed have been ascertained."[276] Prior to court-martial, the defense counsel advised the government that the accused might not be able to make restitution prior to trial.[277] On the day of the court-martial the government withdrew from the pretrial agreement stating, under RCM 705(d)(4)(B), that the accused's failure to reimburse his victim(s) prior to trial constituted a material breach of the pretrial agreement.[278] Defense counsel argued that the accused did not breach the agreement because the material term failed to establish a time limit for performance; therefore, the accused could still perform his contractual obligations by providing restitution after trial.[279] Requesting the military judge to order the government's specific performance, the defense argued, also under RCM 705(d)(4)(B), that the accused's execution of a stipulation of fact constituted his performance and he had not otherwise breached his obligations.[280] The military judge, however, allowed the government to withdraw from the pretrial agreement ruling that the accused's failure to provide restitution prior to the court-martial constituted a breach of a material term.[281]

The CAAF stated "whatever else the record reflects in this case, the exchange between the parties and the military judge plainly demonstrates something far short of 'a clear, shared understanding' of the disputed restitution provision."[282] Based on this misunderstanding, the court declined to rule whether the accused's entrance into the stipulation of fact equaled performance or whether the accused's failure to provide restitution prior to trial constituted a breach of the agreement.[283] The CAAF, focusing on the parties' failure to establish a meeting of the minds, held, under RCM 705(d)(4)(B), that the government validly withdrew from the agreement when the military judge "disclose[d] a disagreement as to a material term in the agreement."[284] The court clarified for the future that the government could not withdraw from a pretrial agreement by merely alleging a disagreement absent a military judge's review and finding of fact as to the mutual misunderstanding.[285]

For practitioners, the *Williams*' lesson is to draft defined, clear-cut pretrial agreement terms. The government should mandate a specific timeframe for the accused's performance for any restitution clause. Likewise, a specific statement as to the victims' identities and the amount owed, if at all possible, is recommended to ensure a meeting of the minds between the parties. After trial, absent a mutual misunderstanding, the government is required to comply with the pretrial agreement and ensure that the accused receives the benefit of his bargain. In its past term, the CAAF addressed available remedies when the government fails to comply with a term of a pretrial agreement.[286]

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[274] *Id.*

[275] *Williams*, 60 M.J. at 360.

[276] *Id*. at 361. In the agreement the convening authority agreed to disapprove any confinement in excess of six months. *Id.*

[277] *Id.*

[278] *Id.*

[279] *Id.*

[280] *Id. See also* United States v. Parker, 60 M.J. 666, 669 (N-M. Ct. Crim. App. 2004) (stating "[h]aving found that the military judge committed error in rejecting the accused's plea . . . the rejection of the guilty plea was not a 'failure of the accused' to fulfill any material promise or condition in the agreement; therefore, the convening authority was not at liberty to withdraw from the pretrial agreement").

[281] *Id.* The accused then pleaded guilty without a pretrial agreement and received seven months confinement. *Id.* at 362. On appeal, the accused did not ask the court to reject his plea but requested credit for the one month confinement difference between his pretrial agreement sentence limitation of six months confinement and the adjudged seven months confinement. *Id.*

[282] *Id.* at 362-63.

[283] *Id.*

[284] *Id.*

[285] *Id.*

[286] United States v. Lundy, 60 M.J. 52 (2004).

"The nightmare issue of unintended consequences versus mutual misunderstanding has been haunting military practitioners" since 1999.[287] The issue of unintended consequences, as opposed to a mutual misunderstanding, involves the government's failure to comply with an unambiguous pretrial agreement term. These terms typically involve the convening authority's inability to defer or suspend automatic or adjudged forfeitures because of a regulatory restriction.[288] "If the Government does not fulfill its promise, even through inadvertence, the accused is 'entitled to the benefit of any bargain on which his guilty plea was premised.'"[289] The following remedial options exist for the government's non-compliance: (1) the government's specific performance, (2) the accused's withdrawal from the plea, or (3) the government's provision of alternative relief, as agreed to by the accused.[290]

In *Lundy*, the accused entered into a pretrial agreement term, whereby the convening authority agreed to defer any reduction and forfeitures until the sentence was approved and agreed to, at action, suspend any adjudged and to waive any automatic reduction and forfeitures.[291] For sexually assaulting his children, the accused, a staff sergeant (SSG) (E6), was sentenced to a dishonorable discharge, confinement for twenty-three years, and a reduction to the pay grade of E-1.[292] Per Article 58a, UCMJ, and Article 58b, UCMJ, the imposed discharge and confinement in excess of six months subjected the accused to automatic reduction and forfeitures.[293] At action, the convening authority attempted to suspend the accused's automatic reduction to provide the accused's family with waived forfeitures at the E-6, as opposed to the E-1, rate as provided for in the pretrial agreement.[294] The parties, however, overlooked *Army Regulation* (*AR*) *600-8-19*,[295] which precluded the convening authority from suspending an automatic reduction unless the convening authority also suspended the confinement and the discharge triggering the automatic reduction.[296] The convening authority did not suspend the accused's confinement or discharge causing the accused's family to receive forfeitures at the E-1 rate per *AR 600-8-19*.[297]

The CAAF, reversing the ACCA, held that the following three options exist if the government fails to comply with a material pretrial agreement term: the government's specific performance of the term; the accused's withdrawal from the pretrial agreement; or alternative relief, if the accused consents to such relief.[298] "Because [the AR 600-8-19] regulatory impediment resulted from a departmental action rather than a statutory mandate . . . the Army was free to modify the regulation, create an exception, or grant a waiver."[299] The court remanded the case so the ACCA could determine if the government could specifically perform by receiving a waiver to *AR 600-8-19* or if the parties could agree to an alternate form of relief.[300]

On remand, the ACCA affirmed the convening authority's specific performance.[301] On 3 January 2005, the Secretary of the Army (SA) granted an exception to *AR 600-8-19* allowing the convening authority to suspend the accused's rank reduction without requiring the convening authority to suspend the discharge or the confinement triggering that automatic

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[287] Huestis, *Revolution*, *supra* note 3, at 34.

[288] *See* United States v. Mitchell, 50 M.J. 79 (1999) (holding if the convening authority agrees to suspend forfeitures the accused fails to receive the benefit of his bargain if payment of the forfeitures does not occur because of a regulatory restriction). *Accord* United States v. Perron, 58 M.J. 78 (2003); United States v. Smith, 56 M.J. 271 (2002); United States v. Williams, 53 M.J. 293 (2000); United States v. Hardcastle, 53 M.J. 299 (2000).

[289] *Smith*, 56 M.J. at 272 (quoting United States v. Bedania, 12 M.J. 373, 375 (C.M.A. 1982)).

[290] *Perron*, 58 M.J. at 82.

[291] *Lundy*, 60 M.J. at 56.

[292] *Id.* at 53. The pretrial agreement limited the accused's confinement to eighteen years. *Id.* at 56.

[293] UCMJ arts. 58a, 58b (2002).

[294] *Lundy*, 60 M.J. at 55.

[295] *Id. See* U.S. DEP'T OF ARMY, REG. 600-8-19, ENLISTED PROMOTIONS AND REDUCTIONS para. 7-1d (1 May 2000).

[296] *Lundy*, 60 M.J. at 55.

[297] *Id*. at 57.

[298] *Id. See* United States v. Lundy, 58 M.J. 802 (Army Ct. Crim. App. 2003) (affirming the ACCA held that the convening authority technically erred but that no material prejudice accrued to the accused that would require the government's remedial action because the accused's family was adequately compensated with transitional compensation which the ACCA determined the accused's family was not entitled to because they were receiving waived forfeitures during the same time period).

[299] *Lundy*, 60 M.J. at 58. Additionally, the CAAF held an accused's family could receive transitional compensation while also receiving either deferred or waived forfeitures if the receipt of transitional compensation was based on the accused's discharge. *Id.* at 58-60.

[300] *Id.* at 61.

[301] *See* United States v. Lundy, 60 M.J. 941 (Army Ct. Crim App. 2005).

reduction.[302] This exception permitted the government to provide the accused's family forfeitures at the E-6 rate. [303] The accused, however, alleged that the government's specific performance was impossible in 2005 because his family needed the agreed upon support at the time of his initial incarceration in May 2000.[304] The ACCA succinctly stated "[a]lthough [the accused] argues that specific performance at this late date is, in actuality, a form of alternative relief because the timing of payments is a material provision of his pretrial agreement, he has failed to demonstrate such materiality."[305] The government failed to seek approval for an interest payment of the difference between the E-6 and E-1 amount.[306] The ACCA ruled it did not have the authority to provide the approximately three thousand dollars in interest owed on the original amount to the accused.[307] The ACCA remanded the case for the SA to approve the interest payment or to otherwise return the case for the ACCA to set aside the findings and sentence.[308]

The three separate *Lundy* opinions demonstrate the confusion and problems that arise when the government agrees to a pretrial agreement provision in contravention of a controlling regulation. While easier said than done, practitioners should attempt to determine if any regulatory restriction could affect a proposed pretrial agreement term. This guidance is particularly relevant when the convening authority agrees to defer, waive, or suspend, as applicable, certain automatic or adjudged forfeitures or reduction. As exemplified by the *Lundy* cases, a pre-2000 pretrial agreement term can still create turmoil in 2005. Whether *Lundy* is laid to final rest depends on whether the SA decides to approve an interest payment and whether the CAAF decides to grant an additional review of the ACCA's newest decision. In her *Lundy* concurrence, Chief Judge Crawford advised the ACCA to "determine the materiality of the [payment's] timing and whether the [*Lundy*] case is different from *United States v. Perron*."[309] While the ACCA ruled that the timing of the payment was not material in *Lundy*,[310] the CAAF may decide to grant review to further clarify this issue based on an appellate service court split. The AFCCA, in contrast to the ACCA's *Lundy* decision, recently held that the government could not specifically perform at a later date after failing to provide the accused's dependants with waived forfeitures during the accused's confinement as provided for in the pretrial agreement.[311]

In *Sheffield*, the accused, who pleaded guilty to numerous military specific offenses, received a BCD, four months confinement, and reduction to the pay grade of E-1.[312] In the pretrial agreement the convening authority agreed to "waive automatic forfeitures in the amount of five hundred dollars, which sum was to be paid to the guardian appointed by the accused to care for his minor dependants."[313] The staff judge advocate's recommendation (SJAR) failed to mention the forfeiture term and the convening authority failed to pay the five hundred dollars to the accused's dependents.[314] During RCM 1105 submissions, however, the defense counsel and the accused failed to comment on the SJAR's omission.[315]

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[302] *Id*. at 943.

[303] *Id.*

[304] *Id.* at 942-43.

[305] *Id.* at 944.

[306] *Id.*

[307] *Id.* at 945.

[308] *Id.*

[309] United States v. Lundy, 60 M.J. 52, 61 (2004) (Crawford, C.J., concurring). *See* United States v. Perron, 58 M.J. 78, 79 (2003) (holding that the timing of payment to the accused's family was a material term which the government could not specifically perform at a later date particularly when the accused alleged immediately after the convening authority's action that his "family [could not] survive financially without the aid"); *see also* United States v. Morrison, No. 30359, 2004 CCA LEXIS 203 (A.F. Ct. Crim. App. Aug. 18, 2004) (unpub.) (finding that the government could not specifically perform where time was of the essence and the convening authority agreed, but failed to waive, at action, any mandatory forfeitures for four months or until the accused's release from confinement, whichever was sooner, so that the accused's dependents failed to receive any of the agreed upon money during the accused's confinement).

[310] In *Perron*, the accused's family received no money as opposed to SSG Lundy's family who received forfeitures at the E-1 rate. *Lundy*, 60 M.J. at 61. Similarly, SSG Lundy did not immediately demand payment from the convening authority or allege that his family could not make it financially absent payment as had Boatswain's Mate Second Class Perron. *Id.*

[311] United States v. Sheffield, 60 M.J. 591 (A.F. Ct. Crim. App. 2004).

[312] *Id*.

[313] *Id.* at 592. The military judge clarified that the five hundred dollars was per month during any confinement period. *Id.*

[314] *Id.*

[315] *Id.* Defense's failure to object to the SJAR subjects any later claim of error to a "plain error" analysis. United States v. Kho, 54 M.J. 63 (2000). The government conceded that the error at issue constituted "plain error." *Sheffield*, 60 M.J. 593.

On appeal, the accused requested the court to disapprove his adjudged BCD, or in the alternative, to allow him to withdraw from his plea.[316] The government contended specific performance was appropriate by "simply pay[ing] the [accused] what is owed now."[317] The AFCCA, reversing the findings and relying heavily on *Perron*, held the government could not specifically perform because the accused did not receive the benefit of his pretrial agreement bargain—for his dependents to receive five hundred dollars per month during his incarceration.[318] The court also declined to grant the accused's request to disapprove his BCD because the government did not agree to this alternative relief.[319] The AFCCA's ruling appears to interpret *Perron* to hold that specific performance by the government is never appropriate if the accused's dependants are initially denied receipt of the waived forfeitures.[320] While any final decision as to the AFCCA and the ACCA's interpretation of *Perron* awaits review and sanction from the CAAF, practitioners can best avoid this issue by ensuring that the government complies, as soon as possibly required, with any pretrial agreement term.

Conclusion

The CAAF and the service courts were very active this past year in the areas of court-martial personnel, voir dire and challenges, and pleas and pretrial agreements. The fields of the appellate courts were bloody with the dismissal of findings, the reversal of sentences, or both. This year's cases reaffirmed the CAAF and the service courts' generally paternalistic approach to the military courts-martial process, as compared to civilian criminal practice. Based on subtle, or perceived, pressures placed on a servicemember before, during, and after a court-martial, the appellate courts closely monitor the courts-martial process to ensure compliance with the accused's due process rights.[321] Omissions or errors committed prior, during, and after courts-martial by the government, military judges, and sometimes even the defense creates a burden for the government because of this close scrutiny. The government must rise to the occasion and meet its burden or risk reversal. A large number of this year's opinions sustain a recurring theme—a lack of attention to detail by the parties, in particular military judges and trial counsel. While some errors are inescapable, many errors are likely avoidable if the trial counsel or the military judge or both pay closer attention to detail. Additionally, trial counsel, chiefs of justice, staff judge advocates, and convening authorities should sometimes consider whether joining the defense's position is a viable course of action, in light of the importance of the issue, and the magnitude of any reversal on appeal. Imagine the unenviable task faced by a government representative in the *Quintanilla* case—calling the deceased battalion executive officer's family to tell them the accused's conviction was reversed because one court-martial member erroneously sat on the case.

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316 *Id.*

317 *Id.*

318 *Id.* at 594.

319 *Id*.

320 *Id.*

321 United States v. Pinero, 60 M.J. 31 (2004) (providing a discussion of the military specific reasons for imposing a close review of court-martial cases).

Measure for Measure: Recent Developments in Substantive Criminal Law

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Introduction

We must not make a scarecrow of the law,
Setting it up to fear the birds of prey,
And let it keep one shape, till custom make it
Their perch, and not their terror.[1]

The military justice system, like any common law jurisdiction, continually adapts to the changing customs of our society and the needs of the military mission. Simultaneously, it responds to change by affirming military members' individual rights, maintaining a proper balance between discipline and fairness. Last year's symposium addressed measures that altered our substantive law to capture conduct that—while punishable in a civilian jurisdiction—might otherwise escape liability under the Uniform Code of Military Justice (UCMJ).[2] The past year's developments continue that trend, but in a different way: they criminalize acts by Soldiers that might be constitutionally protected if done by a civilian. At the same time, military appellate courts have continued to affirm measures that protect Soldiers, by preventing unwarranted intrusion into private sexual conduct, ensuring the providency of guilty pleas, and extending the protections afforded by affirmative defenses.

Unlike the previous symposium, which covered developments of diverse origin—from legislation amending the UCMJ, to landmark pronouncements from the U.S. Supreme Court, to far-reaching decisions from the Court of Appeals for the Armed Forces (CAAF)[3]—this year's topics come exclusively from the more familiar source: military appellate court opinions. These decisions, however, build upon several of the themes from the previous symposium and will have an immediate impact in the future shape of military justice.

This article focuses primarily on the CAAF's recent holdings in cases involving sodomy,[4] child pornography,[5] and absence offenses.[6] It also covers notable decisions on these topics from the service courts of criminal appeals.[7] Since these issues are addressed in multiple cases, this article identifies trends and offers suggestions to counsel who are likely to encounter the issues in their practice. Next, the article discusses military appellate decisions in other areas of substantive criminal law,[8] including kidnapping,[9] involuntary manslaughter,[10] obscene mail material,[11] and the defenses of duress,[12] accident, and defense of another.[13] In doing so, the article points out potential issues and attempts to provide useful guidance to practitioners.

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[1] WILLIAM SHAKESPEARE, MEASURE FOR MEASURE, act 2, sc. 1.

[2] *See* Major Jeffrey C. Hagler, *Duck Soup: Recent Developments in Substantive Criminal Law*, ARMY LAW., July 2004, at 79 (discussing statutory UCMJ changes that added Article 119a, which created liability for acts that cause death or injury to unborn children, and extended the Article 43 statute of limitations for child abuse offenses; the article also addressed cases that affirmed convictions for child neglect and stalking in overseas locations).

[3] *Id*.

[4] United States v. Marcum, 60 M.J. 198 (2004); United States v. Stirewalt, 60 M.J. 297 (2004).

[5] United States v. Mason, 60 M.J. 15 (2004); United States v. Irvin, 60 M.J. 23 (2004).

[6] United States v. Hardeman, 59 M.J. 389 (2004); United States v. Pinero, 60 M.J. 31 (2004).

[7] *See, e.g.*, United States v. Myers, 2005 CCA LEXIS 44 (N-M. Ct. Crim. App. Feb. 10, 2005) (unpublished); United States v. Avery, 2005 CCA LEXIS 59 (N-M. Ct. Crim. App. Feb. 28, 2005) (unpublished); United States v. Barber, No. 20000413 (Army Ct. Crim. App. Oct. 7, 2004) (unpublished); United States v. Bullock, No. 20030534 (Army Ct. Crim. App. Nov. 30, 2004) (unpublished); United States v. Scott, 59 M.J. 718 (Army Ct. Crim. App. 2004); United States v. Rogers, 59 M.J. 584 (Army Ct. Crim. App. 2003).

[8] Most of these topics are the subject of only one recent reported case, so their discussion is less robust than that of the previously listed topics. Nevertheless, counsel encountering these issues will gain much insight by reading and considering the military appellate courts' most recent holdings.

[9] United States v. Seay, 58 M.J. 42 (2003).

[10] United States v. Stanley, 58 M.J. 42 (2003).

[11] United States v. Negron, 58 M.J. 42 (2003).

[12] United States v. Le, 58 M.J. 42 (2003).

[13] United States v. Jenkins, 58 M.J. 42 (2003).

Last year's symposium article discussed in some detail the Supreme Court's landmark decision in *Lawrence v. Texas*.[14] In *Lawrence*, the Court reversed a conviction under a Texas law prohibiting homosexual sodomy.[15] The Court also expressly overruled *Bowers v. Hardwick*,[16] which had served as the basis for the constitutionality of Article 125, the UCMJ's prohibition of sodomy.[17] But *Lawrence* was not a military case, so it did not squarely answer whether and to what extent Article 125 would remain a viable offense.[18] The CAAF specifically answered these questions in two decisions during its 2004 term.

The CAAF Responds to Lawrence: Marcum *and* Stirewalt

Following the Supreme Court's decision in *Lawrence*, military appellate courts received numerous petitions from appellants, who claimed *Lawrence* invalidated their sodomy convictions. On 29 August 2003, the CAAF granted review of its first post-*Lawrence* sodomy case, *United States v. Marcum*.[19] The court heard oral argument on 7 October 2003 and rendered a decision on 23 August 2004.[20]

Staff Sergeant (SSgt) Eric Marcum supervised junior airmen newly assigned to his flight at Offut Air Force Base, Nebraska.[21] He often socialized with his subordinates, who sometimes spent the night at his off-post home after parties.[22] One such night, Senior Airman (SrA) Harrison, an enlisted airman under the accused's supervisory authority, awoke to find SSgt Marcum orally sodomizing him.[23] Marcum was charged, *inter alia*, with forcible sodomy under Article 125. At trial, SSgt Marcum admitted to kissing SrA Harrison's penis twice—but not to "oral sex"—and to committing other acts with SrA Harrison he described as consensual.[24] On cross examination, SSgt Marcum testified he knew that sexual relationships between noncommissioned officers (NCOs) and junior enlisted airmen were prohibited by Air Force regulations.[25] Harrison testified that the oral sodomy was not consensual but admitted that he and SSgt Marcum had salsa danced and kissed "in the European custom of men."[26] Perhaps due to this testimony, the officer panel convicted SSgt Marcum, by exceptions and substitutions, of the lesser included offense of non-forcible sodomy.[27] After the Air Force Court affirmed SSgt Marcum's

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[14] *See* Hagler, *supra* note 2, at 82-4 (discussing Lawrence v. Texas, 539 U.S. 558 (2003)). A 6-3 majority of the Court found the Texas homosexual sodomy law unconstitutional as applied to adults engaged in consensual sodomy in a private setting. The Due Process Clause gives consenting adults the right to engage in private sexual conduct without government intervention, and in the majority's view, the Texas statute furthered no legitimate state interest to justify its intrusion into an individual's personal and private life. The language of the decision is expansive, although the Court did narrow its reach at one point. Noting the case did not involve public conduct, prostitution, minors, persons who might be injured or coerced, or those who might not easily refuse consent, the Court apparently left the door open to prosecution in those areas. *See id*.

[15] *Lawrence*, 539 U.S. at 579.

[16] *Id.* at 578 (citing Bowers v. Hardwick, 478 U.S. 186 (1986)).

[17] *See* United States v. Henderson, 34 M.J. 174, 177 (C.M.A. 1992).

[18] *See* Hagler, *supra* note 2, at 83 (noting that the Supreme Court has recognized the increased regulation of individual rights in the military, a separate society requiring good order and discipline, and that the privacy and liberty interests identified in *Lawrence* may not exist to the same extent in military society).

[19] United States v. Marcum, 60 M.J. 198, 201 (2004).

[20] *Id*. at 198. During this interim period, the Coast Guard Court responded to a *Lawrence* challenge. The appellant pled guilty to non-forcible sodomy for acts occurring in the women's berthing area of a USCG cutter. The court affirmed the sodomy conviction, holding that notwithstanding *Lawrence*, it would follow the then-current precedent, *United States v. Henderson*, 34 M.J. 174 (C.M.A. 1992), until otherwise modified by the CAAF. Even so, the court found the appellant's misconduct "a far cry" from the private, consensual act in *Lawrence*. The appellant unlawfully entered the berthing area, a location which provides little privacy and where other women were present. The court concluded that the Coast Guard has a legitimate military interest that justifies its intrusion into sexual matters on board ship. *See* United States v. Abdul-Rahman, 59 M.J. 924 (C.G. Ct. Crim. App. 2004), *aff'd*, No. 04-0612/CG, 2005 CAAF LEXIS 203 (Feb. 18, 2005).

[21] *Marcum*, 60 M.J. at 200.

[22] *Id*.

[23] *Id*.

[24] *Id*. at 200-01.

[25] *Id*. at 201 (citing U.S. DEP'T OF AIR FORCE, INSTR. 36-2909, PROFESSIONAL AND UNPROFESSIONAL RELATIONSHIPS (1 May 1996)).

[26] *Id*.

[27] *Id*.

conviction, the Supreme Court reached its decision in *Lawrence*.[28] The appellant then challenged his conviction, claiming Article 125 was unconstitutional under *Lawrence*.[29]

The CAAF held that as applied to the appellant and in the context of his conduct, Article 125 is constitutional.[30] At the outset, the court considered whether the liberty interest identified in *Lawrence*—the right of consenting adults to engage in private sexual activity—was a fundamental right.[31] If so, the appellant argued, then a law restricting that right must be narrowly tailored to meet a compelling government interest.[32] On the other hand, if it was not a fundamental right, as the government argued, then Article 125 must only have a rational basis, which in this case was to promote morale, good order, and discipline in the armed forces.[33] Since the Supreme Court declined to identify the interest as a fundamental right in *Lawrence*, the CAAF reasoned, it would not presume it to be so. Instead, the court determined that *Lawrence* required "searching constitutional inquiry."[34]

Next, the CAAF rejected the government's contention that the *Lawrence* liberty interest did not apply to the military, stating, "Constitutional rights identified by the Supreme Court generally apply to members of the military unless by text or scope they are plainly inapplicable."[35] The court, however, determined that Article 125 challenges should receive contextual, as-applied review, rather than a review of the statute on its face.[36] The court then set out a three-part test to determine whether sodomy may be constitutionally prohibited in the context of the charged conduct:

> First, was the conduct that the accused was found guilty of committing of a nature to bring it within the liberty interest identified by the Supreme Court [in *Lawrence*]? Second, did the conduct encompass any behavior or factors identified by the Supreme Court as outside the analysis in *Lawrence*?[37] Third, are there additional factors relevant solely in the military environment that affect the nature and reach of the *Lawrence* liberty interest?[38]

The court assumed, without deciding, that the appellant's conduct involved private sodomy between consenting adults, thus satisfying the first prong of the test.[39] Nevertheless, the court found the appellant's conduct met *Marcum*'s second prong.[40] Specifically, the appellant was the airman's supervising NCO and knew his behavior was prohibited by service regulations concerning improper senior-subordinate relationships.[41] Because the situation involved a person "who might be coerced" and a "relationship where consent might not easily be refused"—facts the Supreme Court specifically said were absent in *Lawrence*—the appellant's conduct was outside the liberty interest recognized in *Lawrence.*[42] Consistent with a contextual,

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[28] *Id*.

[29] *Id*. at 202.

[30] *Id*. at 200.

[31] *Id*. at 202.

[32] *Id*.

[33] *Id*. (citing 10 U.S.C. § 654(a)(15) (2000) (stating the congressional finding that homosexual conduct "create[s] an unacceptable risk to the high standards of morale, good order and discipline, and unit cohesion" in the military)). *See infra* note 72 and accompanying text.

[34] *Id*. at 205. The opinion did not specifically define "searching constitutional inquiry." The court did state that by identifying certain situations that were outside the *Lawrence* liberty interest, the Supreme Court "held open the door" for lower courts to further define the scope and nature of the interest in light of "contexts and factors" not addressed in *Lawrence*. *See id*.

[35] *Id*. at 206. The government argued that Congress found homosexuality "incompatible with military service" in 10 U.S.C. § 654; thus, the court should defer to Congress's exercise of its Article I authority. In response, the CAAF noted that Congress enacted the statute before *Lawrence* and that the Supreme Court did not preclude *Lawrence*'s application to the military. *Id*.

[36] *Id*. (citing Sabri v. United States, 541 U.S. 600, 608 (2004) ("[F]acial challenges to criminal statutes are 'best when infrequent' and are 'especially to be discouraged'")).

[37] Did the conduct involve public acts, prostitution, minors, persons who might be injured or coerced or who might not easily refuse consent? *See* Lawrence v. Texas, 539 U.S. 558, 578 (2003).

[38] *Marcum*, 60 M.J. at 206-7. Unlike the first and second prongs of the *Marcum* test, which collectively ask whether the charged conduct is outside the factual boundaries of *Lawrence*, the court's basis for the third prong is not explicitly clear. Presumably, it comes from the body of Supreme Court case law holding that "constitutional rights may apply differently to members of the armed forces" and the Court's recognition of the need for discipline and order in the military. *See id*. at 205 (citing Parker v. Levy, 417 U.S. 733 (1974); United States v. Priest, 21 C.M.A. 564 (1972); United States v. McCarthy, 38 M.J. 398 (C.M.A. 1993)).

[39] *Id*. at 207.

[40] *Id*. at 208.

[41] *Id*.

[42] *Id*.

case-by-case review, the CAAF expressly declined to decide whether Article 125 would be constitutional in other situations.[43] Significantly, the court chose not to address the third prong of the test: whether military considerations could limit the reach of *Lawrence*.[44]

One month after *Marcum*, the CAAF addressed this question in its second post-*Lawrence* sodomy case, *United States v. Stirewalt*.[45] Petty Officer Second Class (PO2) Darrell Stirewalt was originally convicted for maltreatment, rape, forcible sodomy, battery, adultery, and indecent assault of female crew members assigned to his Coast Guard cutter, to include Lieutenant Junior Grade (LTJG) B.[46] On review, the Coast Guard court set aside the convictions for rape, forcible sodomy, battery and indecent assault of LTJG B, because the military judge improperly excluded certain testimony under the "rape shield" provisions of MRE 412.[47] At a second trial, PO2 Stirewalt pled guilty to non-forcible sodomy, and the government dismissed the remaining charges that had been set aside.[48] On appeal to the CAAF, the appellant claimed his sodomy conviction was unconstitutional under *Lawrence*. The CAAF affirmed the conviction, holding that as applied to the appellant and in the context of his conduct, Article 125 is constitutional.[49]

After reviewing *Marcum*'s "tripartite framework" for addressing *Lawrence* challenges in the military, the court assumed that the appellant's conduct satisfied the first two parts of the *Marcum* test.[50] The court then found the facts "squarely implicate[d] the third prong," noting that the appellant's conduct with his commissioned department head, while both were assigned to the same cutter, violated Coast Guard regulations.[51] These regulations prohibited improper relationships between members of different ranks and reflected the Coast Guard's "clear military interests of discipline and order" in regulating the appellant's conduct.[52] Thus, his acts of sodomy fell outside any liberty interest recognized in *Lawrence*.[53]

Taken together, *Marcum* and *Stirewalt* provide important guidance on the lawful scope of Article 125 in light of *Lawrence*, as well as practical tips to counsel dealing with potential sodomy offenses. First, and perhaps most significantly, the cases firmly establish that the liberty interests identified in *Lawrence* do apply to military members—although not to the same extent as to civilians—and the cases provide a straightforward, three-part test for dealing with Article 125 challenges. Second, *Marcum* and *Stirewalt* show that challenges to Article 125 are reviewed on a case-by-case, as-applied basis, rather than by facial challenge. This means counsel will be limited to the facts of a specific case—not hypothetical situations—in arguing whether a sodomy charge is constitutional. Third, the cases support Article 125 as a viable charge in situations involving force, coercion, prostitution, public conduct and minor victims. Likewise, they affirm that Article 125 may apply to "relationships where consent might not easily be refused,"[54] although the precise contours of such relationships are left notably vague. In light of this, counsel for both sides should introduce evidence and argue whether an accused's conduct fits these categories and thus, satisfies the second prong of *Marcum*. Fourth, the cases establish that military considerations may affect the nature and reach of *Lawrence*, under the facts of each case. Again, counsel should offer evidence and argue whether that the military has a legitimate interest in punishing an accused's activity, such as its impact on good order and discipline or on the public's perception of the armed forces.[55]

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[43] *Id*.

[44] Specifically, the CAAF declined to consider the potential impact of Congressional findings in 10 U.S.C. § 654 that homosexuality was incompatible with military service. *See supra* note 35; *infra* note 72.

[45] United States v. Stirewalt, 60 M.J. 297 (2004).

[46] *Id*. at 298.

[47] *Id*. at 298-9.

[48] After the rehearing, the appellant stood convicted of sexual harassment, adultery, and indecent assault from the first trial and sodomy from the second trial. *Id*. at 299

[49] *Id*. at 304.

[50] "[W]e will assume without deciding that Stirewalt's conduct falls within the liberty interest identified by the Supreme Court and does not encompass behavior or factors outside the *Lawrence* analysis." *Id*.

[51] *Id*. (citing U.S. DEP'T OF TRANSPORTATION, COAST GUARD PERSONNEL MANUAL ¶ 8.H.2.f. (C26, 1988)).

[52] *Id*.

[53] *Id*.

[54] United States v. Marcum, 60 M.J. 198, 208 (2004).

[55] Some may argue *Marcum* and *Stirewalt* effectively "convert" Article 125 sodomy to an Article 134 offense, requiring the conduct to be prejudicial to good order or service-discrediting. This claim, however, ignores the categories of conduct that are beyond the reach of *Lawrence* (*i.e*., conduct involving force, coercion, minors, public acts, prostitution, or relationships where consent might not easily be refused). In these situations, there is no need for the sodomy to be prejudicial or service-discrediting, as the result in *Marcum* shows, because such evidence tends to implicate only the third prong of the *Marcum* test. Even so, trial counsel are well-advised to plead and prove the conduct's prejudicial or service-discrediting nature as an element of the offense.

Defense counsel may find it appropriate to challenge an Article 125 charge at several stages of a court-martial. During the pretrial investigation and pretrial negotiations, counsel should consider raising the issue to influence the convening authority's decision on disposition. The defense should also consider motions to dismiss for failure to state an offense or for a bill of particulars to make the government reveal how it believes the conduct satisfies the *Marcum* test. At trial, the defense should address the test in a motion for a finding of not guilty and in discussions with the military judge on proposed instructions. For government counsel, the implication of *Marcum* is clear: if the evidence fails the test, do not proceed any further. During a contested trial, be prepared to satisfy the *Marcum* test at any stage of the proceedings. In a guilty plea, counsel must ensure that the accused admits to sufficient facts during his providence inquiry that would satisfy the test on appeal.

Finally, it is worth noting that both *Marcum* and *Stirewalt* involved conduct independently prohibited by relevant service regulations. In *Marcum*, the CAAF applied this evidence to the second prong of its test; in *Stirewalt*, the court considered the evidence under *Marcum*'s third prong. In any event, given the CAAF's strong reliance on this evidence in both cases, counsel should offer evidence of any regulations governing an accused's conduct, or highlight the lack of any such prohibition.

The Service Courts Tackle Marcum

The service Courts of Criminal Appeals have applied the *Marcum* test in several opinions, and predictably, given the nature of *Marcum*'s case-by-case-approach, the results have been mixed. Although the following decisions are all unpublished, counsel may gain further insight from the service courts' treatment of *Lawrence* challenges.

In *United States v. Myers*, a junior enlisted Marine was convicted for committing consensual sodomy with the wife of a Navy petty officer, in the petty officer's on-base quarters, while the petty officer was standing duty.[56] The Navy-Marine court affirmed, finding the appellant's conduct had a "detrimental impact on military interests and order" and thus satisfied the third prong of *Marcum*.[57]

Similarly, in *United States v. Avery*, a separate panel of the Navy-Marine court affirmed a married male Sailor's conviction for extra-marital, consensual sodomy with two female Japanese civilians.[58] The conduct occurred in the appellant's barracks room on a U.S. Navy base in Japan.[59] The court found that the appellant's conduct was open and notorious, was known to his subordinates, and was known to members of the local Japanese community, to include the appellant's estranged Japanese wife.[60] Finding "direct and obvious impacts on both the command structure and the armed forces reputation in the local community. . . ," the court concluded the appellant's conduct implicated *Marcum*'s third prong and was not constitutionally protected.[61]

In contrast, the Army Court applied the *Marcum* test to two cases and found that the appellants' acts of sodomy were protected under *Lawrence*. In *United States v. Barber*, the court set aside and dismissed a noncommissioned officer's sodomy convictions, finding Article 125 unconstitutional as applied to his conduct.[62] The appellant pled guilty to consensual sodomy on two separate occasions with two female Soldiers in his barracks room.[63] Both partners were of "equivalent rank" as the appellant, and there was no apparent duty connection between them and the appellant.[64] One of the Soldiers was married, however, and the appellant videotaped their sexual acts without her knowledge or consent.[65] Applying the *Marcum*

If an appellate court later disagrees with the trial judge's conclusion that the accused's conduct was beyond the reach of *Lawrence*, that court could still affirm a conviction under the third prong of *Marcum*.

[56] United States v. Myers, 2005 CCA LEXIS 44 (N-M. Ct. Crim. App. Feb. 10, 2005) (unpublished).

[57] *Id*. at 5.

[58] United States v. Avery, 2005 CCA LEXIS 59 (N-M. Ct. Crim. App. Feb. 28, 2005) (unpublished).

[59] *Id*. at 2.

[60] *Id*. at 2-3.

[61] *Id*. at 5.

[62] United States v. Barber, No. 20000413 (Army Ct. Crim. App. Oct. 7, 2004) (unpublished), *rev. denied*, 60 M.J. 418 (Dec. 7, 2004).

[63] *Id*. at 10. The appellant was also convicted, contrary to his pleas, of indecent assault and extortion. *Id*. at 1.

[64] *Id*. at 12. At the time of the charged sodomy offenses, the appellant held the rank of specialist (E4). *Id*. at n.10.

[65] *Id*. at 10.

test, the court found the appellant's conduct was "squarely within" the *Lawrence* liberty interest, it did not fall into any of the categories of conduct cited in *Lawrence*, and the providence inquiry revealed no military considerations that might affect the reach of *Lawrence*.[66] Consequently, the appellant's conviction was unconstitutional under *Marcum*.[67]

In a similar case, *United States v. Bullock*, the court set aside and dismissed a male Soldier's conviction for consensual sodomy with a female civilian in the appellant's barracks room.[68] After finding the first two prongs of *Marcum* satisfied, the court found "no military connection other than that [the sodomy] occurred in a barracks room."[69] The court found this fact and the remainder of the record were not enough to satisfy the third prong of *Marcum*, so the appellant's providency inquiry was insufficient to support his guilty plea.[70]

What lessons may counsel draw from the service courts' applications of the *Marcum* test? All four cases primarily turned on *Marcum*'s third prong: the presence or absence of military factors that affect the nature and reach of *Lawrence*. The Navy-Marine court cases both contained evidence of the conduct's impact on good order and discipline or its service-discrediting nature, and the court found this evidence sufficient to limit the reach of *Lawrence* in a military context. The Army court found no such evidence in its cases, even when the sodomy occurred in the barracks and with a married woman whose sexual acts were videotaped without her consent. It is difficult to draw trends from only four unpublished cases, which do not serve as binding precedent, particularly under the case-by-case approach mandated by *Marcum*. Nevertheless, it is clear that the result in many future cases will turn on the strength of the evidence showing the conduct's prejudice to good order and discipline or its service-discrediting nature. It is equally uncertain how the CAAF will weigh the military's interest in prohibiting extra-marital sodomy, sodomy in military barracks, or sodomy that is known to the local community and to members of an accused's unit.

What's Next for Article 125?

Looking ahead, counsel should note that aside from *Marcum*, the above cases all involved sodomy between different-sex partners. Will the courts treat homosexual sodomy any differently? Given the result in *Lawrence*, the broad language of the opinion, and its emphatic overruling of *Bowers*, there is no principled distinction between hetero- and homosexual sodomy, at least in civilian society.[71] But under *Marcum*'s third prong, there may still be room to argue that homosexual sodomy in a military context raises issues that may affect the reach of *Lawrence*. In *Marcum*, the government offered evidence of congressional findings regarding homosexuality in the military to support its unsuccessful contention that *Lawrence* did not apply to military members.[72] The CAAF, however, judiciously dodged the question of how these findings might impact the

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[66] *Id*. at 11-2.

[67] *Id*. at 2.

[68] United States v. Bullock, No. 20030534 (Army Ct. Crim. App. Nov. 30, 2004) (unpublished), *petition for rev. filed*, No. 05-0239/AR (Jan. 14, 2005).

[69] *Id*. at 5.

[70] *Id*.

[71] In reaching its decision, the Court expressly declined to rely upon the petitioners' Equal Protection argument, stating, "Were we to hold the statute invalid under the Equal Protection Clause some might question whether a prohibition would be valid if drawn differently, say, to prohibit the conduct both between same-sex and different-sex participants." Lawrence v. Texas, 539 U.S. 558, 575 (2003). The Georgia statute affirmed in *Bowers* prohibited sodomy whether or not the participants were of the same sex. *See id*. at 566.

[72] *See supra* notes 35, 44. In 1993, Congress made specific findings to support a policy excluding homosexuals from military service, including the following:

> (8) Military life is fundamentally different from civilian life in that—
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> (A) the extraordinary responsibilities of the armed forces, the unique conditions of military service, and the critical role of unit cohesion, require that the military community, while subject to civilian control, exist as a specialized society; and
> (B) the military society is characterized by its own laws, rules, customs, and traditions, including numerous restrictions on personal behavior, that would not be acceptable in civilian society.
>
> ….
>
> (12) The worldwide deployment of United States military forces, the international responsibilities of the United States, and the potential for involvement of the armed forces in actual combat routinely make it necessary for members of the armed forces involuntarily to accept living conditions and working conditions that are often spartan, primitive, and characterized by forced intimacy with little or no privacy.
>
> (13) The prohibition against homosexual conduct is a longstanding element of military law that continues to be necessary in the unique circumstances of military service.
>
> ….

third prong of the *Marcum* test by deciding the case under second prong, so the question remains unanswered. Future decisions may turn on whether these findings—although not specific to any one case—represent a military interest in regulating the accused's charged homosexual conduct, and whether this interest alone is sufficient to limit the scope of *Lawrence*. Under an as-applied analysis, this will be a difficult burden for the government to meet, absent concrete evidence of some detriment to military readiness or discipline caused by the accused's conduct.[73]

Child Pornography: How Do You Solve a Problem Like *O'Connor*?

As discussed in last year's symposium, the Supreme Court's 2002 decision in *Ashcroft v. Free Speech Coalition*[74] and the CAAF's subsequent decision in *United States v. O'Connor*[75] potentially affected all pending and future child pornography cases charged as violations of the federal Child Pornography Prevention Act (CPPA).[76] In the wake of *O'Connor*, military appellate courts scrambled to address the issues created when trial judges used CPPA definitions that were deemed unconstitutional under *Free Speech Coalition*.[77] The most common of these issues was whether the images of child pornography depicted actual minors or were merely computer-generated "virtual" children.[78] For future child pornography offenses charged as CPPA violations, this issue will not arise if the judge instructs the panel using the proper definitions, and the government proves or the accused admits the images depict actual children.[79] Still, the CAAF decided two recent cases that provide additional guidance to counsel dealing with child pornography offenses charged under Article 134.[80]

Child Pornography as a Lesser Included Offense Under Article 134, Clauses 1 and 2: United States v. Mason[81]

Major (Maj.) Robert Mason pled guilty to receipt of child pornography under Article 134, Clause 3, in violation of the CPPA.[82] During the providence inquiry, the military judge defined child pornography, in part using statutory language later declared unconstitutional in *Free Speech Coalition*.[83] The military judge also discussed with the appellant an additional

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> (15) The presence in the armed forces of persons who demonstrate a propensity or intent to engage in homosexual acts would create an unacceptable risk to the high standards of morale, good order and discipline, and unit cohesion that are the essence of military capability.

10 U.S.C. § 654(a) (2000).

[73] In *Marcum*, the CAAF downplayed the relevance of 10 U.S.C. § 654, noting that it was enacted before *Lawrence* and while *Bowers* was the controlling precedent. *See supra* note 35 and accompanying text.

[74] *See* Ashcroft v. Free Speech Coalition, 535 U.S. 234 (2002) (finding that portions of the definition of child pornography in the Child Pornography Prevention Act (CPPA) violated the First Amendment, specifically those portions addressing images that "appear[] to be" minors or that are "advertised, promoted, presented, described, or distributed in such a manner that conveys the impression" that they depict minors). *Id.* at 245, 258 (citing 18 U.S.C. § 2256(8)(B), (D)).

[75] United States v. O'Connor, 58 M.J. 450 (2003). The appellant pled guilty to possession of child pornography, in violation of the CPPA, charged under Article 134, Clause 3. The CAAF found the appellant's plea improvident and set aside the conviction, because the military judge used definitions from the CPPA that were later found to be unconstitutional. After *Ashcroft v. Free Speech Coalition*, the distinction between "virtual" and "actual" images of child pornography has constitutional significance. *See id*.

[76] 18 U.S.C. § 2252A. *See* Hagler, *supra* note 2, at 92. In 2003, Congress amended or deleted the portions of the statute found unconstitutional in *Free Speech Coalition*. In sum, the prohibition of images that appeared to be minors was changed to cover digital images that are "indistinguishable from" minors, and the reference to images promoted or advertised as child pornography was deleted. *See* 18 U.S.C. § 2256(8).

[77] *See* Hagler, *supra* note 2, at 93.

[78] *See*, *e.g.*, United States v. Lee, 59 M.J. 261 (2004); United States v. Harrison, 59 M.J. 262 (2004); United States v. Mathews, 59 M.J. 263 (2004).

[79] *See id*. (noting that after *O'Connor*, the "actual" character of the visual depictions was a factual predicate to any plea of guilty under the CPPA and by extension, an element of an offense charged as a violation of the CPPA).

[80] Article 134, UCMJ, has three clauses, each of which represents a separate theory of liability. Clause 1 covers conduct prejudicial to good order and discipline. Clause 2 covers conduct of a nature to bring discredit upon the armed forces. Clause 3 incorporates non-capital federal crimes, to include state law violations adopted under the Federal Assimilative Crimes Act, 18 U.S.C. § 13. *See* MANUAL FOR COURTS-MARTIAL, UNITED STATES, pt. IV, para. 60.c. (2002) [hereinafter MCM].

[81] United States v. Mason, 60 M.J. 15 (2004).

[82] *See* MCM, *supra* note 80, pt. IV, para. 60.c.(4). The elements of an Article 134, Clause 3 offense are drawn from the charged federal statute or assimilated state statue. Clause 3 offenses do not require proof of the conduct's prejudice to good order and discipline or of its service-discrediting nature. *See id*. pt. IV, ¶ 60.c.(6)(b).

[83] *Mason*, 60 M.J. at 18.

element: whether his conduct was prejudicial to good order and discipline or service-discrediting.[84] Major Mason admitted his conduct satisfied the additional element, and the military judge found him guilty.[85] On appeal to the CAAF, Maj. Mason claimed his plea was improvident under *O'Connor*.[86] The CAAF agreed, but found the plea provident to a lesser included offense under Article 134, Clauses 1 and 2.[87] Notably, the court affirmed that the distinction between "virtual" and "actual" images was of constitutional significance for a CPPA violation, but not for Clause 1 and 2 offenses.[88] In contrast, the nature of the images was not dispositive as to whether receiving such images was prejudicial to good order and discipline or service-discrediting, because it did not "alter the character of Mason's conduct."[89] Quoting from the Supreme Court's opinion in *Parker v. Levy*, the court noted:

> While the members of the military are not excluded from the protections granted by the First Amendment, the different character of the military community and of the military mission requires a different application of those protections. The fundamental necessity for obedience, and the consequent necessity for imposition of discipline, may render permissible within the military that which would be constitutionally impermissible outside it.[90]

Even if the case involved only "virtual" images, the court held, the appellant could still be convicted of the "uniquely military" Clause 1 and 2 offenses.[91] The CAAF made this distinction between the CPPA and Article 134 even more explicit in a decision it rendered the same day as *Mason*.

Child Pornography as a Charged Offense Under Article 134, Clause 1 or 2: United States v. Irvin[92]

Master Sergeant (MSgt) Kent Irvin pled guilty to possession of child pornography, charged as a violation of Article 134, Clauses 1 and 2 (conduct prejudicial to good order and discipline and reflecting discredit upon the armed forces).[93] At the time of the charged offense, MSgt Irvin was attached to Geilenkirchen Air Base, Germany.[94] The images in question were seized from his off-base residence.[95] Perhaps due to concerns about the extraterritorial application of the CPPA, the government did not charge MSgt Irvin under Article 134, Clause 3. Instead, he was charged with possession of "visual depictions of minors engaging in sexually explicit conduct," in violation of Clauses 1 and 2.[96] During the providence inquiry and in the stipulation of fact, MSgt Irvin admitted that the images depicted minors engaging in sexually explicit conduct, and that his conduct was prejudicial to good order and discipline and of a nature to bring discredit upon the armed forces, and the military judge accepted his guilty plea.[97] On appeal, MSgt Irvin challenged his conviction, citing *Free Speech Coalition* and *O'Connor*.[98]

The CAAF affirmed the conviction, finding that the military judge had used none of the improper language from the CPPA; rather, he described the offense using language derived from the specification and from definitions in the federal law left untouched by *Free Speech Coalition*.[99] Consequently, there was no basis under *O'Connor* to question the plea, as the

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[84] *Id.* at 17. According to the court, this discussion provided "what was missing in *O'Connor*": a basis in the record to affirm a lesser included offense. *Id.* at 19.

[85] *Id*. at 18.

[86] *Id*. at 16.

[87] *Id*. For information on Art. 134, clauses 1 and 2, see *supra* note 80.

[88] *Id*. at 19-20.

[89] *Id*. at 20.

[90] *Id*. (citing Parker v. Levy, 417 U.S. 733, 758 (1974)).

[91] *Id*.

[92] United States v. Irvin, 60 M.J. 23 (2004).

[93] *Id*. at 23.

[94] *Id*. at 24.

[95] *Id*.

[96] *Id*. at 25.

[97] *Id*.

[98] *Id*.

[99] *Id*. at 25-6.

appellant's conduct was measured by the "different yardsticks" provided by Clauses 1 and 2.[100] Moreover, there was no basis in the record to question the validity of the plea as conduct prejudicial to good order and discipline or service-discrediting conduct, because the appellant explained how his conduct satisfied both of these elements.[101]

Taken together with *O'Connor*, the *Mason* and *Irvin* decisions provide clear direction to military practitioners. First, in future cases, counsel should rely only on the constitutional portions of the CPPA and should treat the "actual" nature of the images as an element of the offense when charged as a violation of the CPPA under Article 134, Clause 3.

Second, it makes sense for the government to add language to the specification indicating that the accused's conduct was prejudicial to good order, service-discrediting, or both. Adding these elements provides notice to the accused, preserves lesser included offenses under Clauses 1 and 2, and further reminds counsel to introduce evidence of these elements or to address them in a guilty plea providence inquiry.

Third, the cases show that in a military context, it is legitimate to charge child pornography offenses directly under Clauses 1 and 2, without regard to the CPPA. At first glance, this may look like the simplest approach, but counsel should consider the potential long-term impact of this charging technique on the accused. Because the CPPA is a well-recognized federal crime, its violation would label the accused as a child sex offender under many state registration schemes.[102] A conviction under Clause 1 or 2, on the other hand, may not trigger some states' registration requirements. Even if it does, state officials who are unfamiliar with the UCMJ may not recognize the charge as a qualifying conviction. Counsel should keep in mind these collateral consequences when making recommendations on charging and disposition.

Absence Offenses

If the Dates Don't Fit, You Must Acquit:[103] Hardeman *and* Pinero

Recently, there has been an increase in the number of reported appellate decisions on absence offenses.[104] Perhaps this trend simply follows an increase in the overall number of unauthorized absences,[105] or it reflects commanders' perception that absence without leave (AWOL)[106] and desertion are more serious offenses in times of armed conflict, or it results from changes in how the Army handles absent Soldiers who have been dropped from the rolls.[107] Whatever the cause, counsel should be prepared to deal with some of the recurring issues that arise in the prosecution of absence offenses. The CAAF decided two noteworthy absence cases during the past year, and although neither case changed the substantive law, they clearly illustrate some of these recurring issues and the perils of not properly addressing them at trial.

In the first of these cases, SrA Stanley Hardeman failed to report for training at Tinker Air Force Base.[108] Three days later, his supervisor, SSgt Andrew, called SrA Hardeman at home and told him to report the following morning.[109] The next

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[100] *See id.* at 25.

[101] *Id*. at 26.

[102] Each state and the District of Columbia maintains a sex offender registry governed by its own set of regulations and qualifying offenses. *See* Federal Bureau of Investigation (FBI), *Investigative Programs, Crimes Against Children*, *at* http://www.fbi.gov/hq/cid/cac/states.htm (State Sex Offender Registry Web Sites) (last visited Apr. 13, 2005). In addition, the FBI's Crimes Against Children Unit has implemented the National Sex Offenders Registry (NSOR). *See id. at* http://www.fbi.gov/hq/cid/cac/registry.htm (National Sex Offender Registry) (last visited Apr. 13, 2005).

[103] This reference to the late Johnnie Cochran's famous statement in the O.J. Simpson trial—one of the many "Trials of the Century" occurring in the 20th Century—is not entirely correct, but it certainly sounds better than the more accurate, yet non-rhyming alternative: "If the accused doesn't admit to a definitive date, the military judge must reject his plea as improvident."

[104] In addition to the cases addressed in this section, *see*, *e.g*., United States v. Le, 59 M.J. 859 (Army Ct. Crim. App. 2004); United States v. Whiteside, 59 M.J. 903 (C.G. Ct. Crim. App 2004); United States v. Hudson, 59 M.J. 357 (2004).

[105] *See* U.S. Army Judiciary, Office of the Clerk of Court, *AWOL/Desertion Statistics from FY 2001 thru FY 2005 Q1* (14 Jan. 2004) (copy on file with author). The Army tried the following numbers of absence cases during each listed fiscal year (FY): FY 2001—52 desertion and 177 AWOL; FY 2002—153 desertion and 361 AWOL; FY 2003—171 desertion and 356 AWOL; FY 2004—176 desertion and 336 AWOL; FY 2005 (first quarter)—29 desertion and 89 AWOL. *See id*.

[106] For simplicity, this article uses the term AWOL in describing absence offenses under Article 86, UCMJ, despite the fact that other armed services and several case opinions may refer to such offenses as unauthorized absences (UA).

[107] In October, 2001, the Army changed its policy for handling deserters. Instead of receiving administrative discharges, the majority of these Soldiers were returned to their parent units for disposition. *See* U.S. DEP'T ARMY, REG. 630–10, ABSENCE WITHOUT LEAVE, DESERTION, AND ADMINISTRATION OF PERSONNEL INVOLVED IN CIVILIAN COURT PROCEEDINGS ch. 4 (22 Dec. 2003). Examining the statistics cited above, it is not difficult to see a correlation between the policy change and the number of absence offenses prosecuted. *See supra* note 105.

[108] United States v. Hardeman, 59 M.J. 389, 390 (2004).

week, SSgt Andrew released him from the training, and SrA Hardeman remained absent until he was apprehended forty-three days later.[110] At trial, he pled guilty to AWOL for the entire period.[111] The stipulation of fact stated that SSgt Andrew would testify he told SrA Hardeman to report for duty on a specific date.[112] During the providence inquiry, however, SrA Hardeman said he did not recall SSgt Andrew giving him a report date, and he was expecting a phone call advising him when to report.[113] The military judge accepted his plea and found him guilty as charged.[114] The CAAF reversed, finding the appellant's plea improvident.[115] The court held that a definitive date is necessary both to prove an AWOL offense and to determine its maximum punishment.[116] Here, the providence inquiry did not clearly establish the date on which the appellant would admit he absented himself without authority.[117] It confirmed only that after several weeks passed, the appellant knew better and should have contacted his unit.[118] Because the record did not contain the appellant's concession that his absence began on the charged date, there was a substantial basis to question his plea.[119]

In a second CAAF case with similar facts, Petty Officer Second Class (PO2) Jaime Pinero pled guilty to a single-specification, fifty-three-day AWOL terminated by apprehension.[120] During the providence inquiry, PO2 Pinero admitted he went AWOL on 23 October and was apprehended at his home on 15 December.[121] About mid-November, Pinero testified, a petty officer came to his off-base house and ordered him to participate in a command-directed urinalysis screening.[122] After dressing in his uniform and going to the urinalysis with the petty officer, PO2 Pinero returned to his residence.[123] His submission to military control lasted about five hours, although Pinero testified he never intended to terminate his absence.[124] For some unexplained reason, the trial counsel could not establish in the record the date of the urinalysis.[125] Nevertheless, the military judge accepted the accused's plea to a single AWOL for the entire period.[126] In affirming the conviction, the Navy-Marine court found that the five-hour period was a *de minimis* interruption; the appellant's participation in the urinalysis did not terminate his AWOL because he lacked the required intent.[127]

The CAAF set aside the conviction, finding that the appellant's return to military control for the urinalysis did terminate his AWOL, so he could not have been absent for the charged fifty-three-day period.[128] While noting that "the quantum of proof is less than that required at a contested trial," the court held that the military judge must clarify the basis for his determination that the accused's acts constituted a single AWOL.[129] Based on the appellant's statements, the military judge needed to resolve any conflicting facts to determine the duration of the two periods of absence; the failure to establish the date of the urinalysis left these dates unresolved.[130] Consequently, the record supported only a single, nine-day AWOL.[131]

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[109] *Id*.

[110] *Id*.

[111] *Id.* at 389-90

[112] *Id*. at 390.

[113] *Id*.

[114] *Id.* at 391

[115] *Id*.

[116] *Id*. at 391-2.

[117] *Id*. at 392.

[118] *Id*.

[119] *Id*.

[120] United States v. Pinero, 60 M.J. 31, 32 (2004).

[121] *Id*.

[122] *Id*.

[123] *Id*.

[124] *Id*.

[125] *Id*.

[126] *Id*.

[127] *Id*. at 33 (citing United States v. Pinero, 58 M.J. 501, 503 (N-M. Ct. Crim. App. 2003) (en banc)).

[128] *Id*. at 35. The court remanded the case for a new Article 66 review, consistent with its decision in United States v. Jenkins, 60 M.J. 27 (2004). *Id*. at 32.

[129] *Id*. at 34, 35. (citing United States v. Care, 40 C.M.R. 247 (C.M.A. 1969))

[130] *Id*. at 34.

Taken together, *Hardeman* and *Pinero* show the absolute need to establish the start and end dates of any AWOL period. As the CAAF noted, the dates are necessary to prove AWOL and to determine the maximum authorized punishment,[132] considerations which naturally impact the "voluntary and knowing" nature of an accused's plea.[133] The fact that both cases were guilty pleas makes a further point: evidence that might be sufficient to allow a panel to convict an accused in a contested case may not be sufficient to allow an accused to plead guilty. While this may seem at odds with the familiar claim that a guilty plea is "the strongest form of proof known to the law,"[134] it highlights the fundamentally unique nature of a guilty plea in the military justice system. To sustain a guilty plea conviction, the record must not only contain sufficient evidence of the accused's guilt, it must show that the accused affirmatively admits that this evidence is true. So the lesson from these cases is clear: the accused cannot plead guilty unless he is prepared to admit, with some degree of precision, the dates his AWOL began and ended, and the dates of any intervening terminations of his absence.[135] Furthermore, a stipulation of fact stating that a witness "would testify" he told the accused to report does nothing if the accused will not admit he at least heard the witness. The bottom line is that if an accused will not admit he had no authority for his absence, then he is not provident to plead guilty, even if a panel might conclude he had no authority at a contested trial.

Casual Presence or Voluntary Termination? Rogers *and* Scott

The Army court also rendered two recent decisions concerning some the most regularly recurring issues in absence offenses. As is often the case with longer absences, an AWOL Soldier may return to a military installation—or even to his unit—and then depart shortly afterwards. In such cases, the question becomes whether there are there multiple absences interspersed with "voluntary terminations," as in *Pinero*, or there is a single, longer absence, during which the accused was only "casually present" on post.

In the first of these cases, Private (PV2) Latonya Rogers pled guilty, *inter alia*, to multiple AWOL specifications.[136] She testified during the providence inquiry that she was "sometimes" on post during the charged periods and that she even went to her unit and encountered NCOs who knew she was AWOL.[137] Nevertheless, PV2 Rogers maintained, she "wanted out of the Army" and did not turn herself in to her unit.[138] The military judge accepted her plea and found her guilty as charged.[139] The Army Court affirmed the conviction, noting that military courts have long accepted the notion that "casual presence at a military installation does not, without more, terminate an unauthorized absence."[140] Here, the appellant's casual presence on post for personal reasons did not terminate her AWOL.[141] Laying out a four-part test for voluntary termination, the court found the appellant's admissions and her failure to express an intent to return to military duty showed there was no termination.[142] In support of its conclusion, the court noted that PV2 Rogers never overtly submitted to military control and that nobody attempted to exert military control over her.[143]

In the second Army court case, Specialist (SPC) Shayla Scott left Fort Hood, Texas without authority on 16 August.[144] She returned on 11 September, signed into her unit, and went to her off-post apartment.[145] After learning she had been

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[131] *Id*. at 35.

[132] United States v. Hardeman, 59 M.J. 389, 391-92 (2004).

[133] *Compare* MCM, *supra* note 80, pt. IV, para. 10.e.(2)(b) (AWOL for more than three but not more than thirty days has a maximum punishment of six months confinement and no discharge), *with* para. 10.e.(2)(d) (AWOL for more than thirty days and terminated by apprehension has a maximum punishment of eighteen months confinement and a dishonorable discharge).

[134] *See* U.S. DEP'T OF ARMY, PAM 27-9, LEGAL SERVICES: MILITARY JUDGES' BENCHBOOK ch. 2, § II, ¶ 2-2-1 (Guilty Plea Introduction) (15 Sept. 2002) [hereinafter BENCHBOOK].

[135] An accused's admission to an "on or about" date should suffice, so long as there is no dispute whether this non-specific date would trigger the enhanced punishments for longer AWOLs.

[136] United States v. Rogers, 59 M.J. 584 (Army Ct. Crim. App. 2003).

[137] *Id*. at 585.

[138] *Id*.

[139] *Id*.

[140] *Id*. at 586 (citing United States v. Jackson, 2 C.M.R. 96, 98 (C.M.A. 1952)).

[141] *Id*. (citing United States v. Coglin, 10 M.J. 670, 673 (A.C.M.R. 1981)).

[142] *Id*. at 586-8.

[143] *Id*. at 588 (citing United States v. Vaughan, 36 M.J. 645, 648 (A.C.M.R. 1992)).

[144] United States v. Scott, 59 M.J. 718, 720 (Army Ct. Crim. App. 2004).

dropped from the unit's personnel rolls, SPC Scott did not return to work the next day, but she eventually returned to military control on 5 November.[146] At trial, SPC Scott pled guilty, *inter alia*, to a single-specification AWOL for the entire eighty-one-day period.[147] During the providence inquiry, SPC Scott agreed with the military judge's conclusion that she never terminated her AWOL, because her "return was so brief that [she] never really did return to military control."[148] The military judge accepted her plea and found her guilty as charged, but the Army court found the plea improvident and set aside the conviction.[149] The court characterized the appellant's "perfunctory" agreement with the judge's statements as insufficient to show her admission that there was no voluntary termination.[150] Instead, the judge should have explained the *Manual for Courts-Martial*'s (*Manual*) three-part test for voluntary termination of AWOL, thus ensuring the appellant understood why she did not do enough to satisfy the test.[151] Rather than returning the case to the convening authority, however, the court divided the eighty-one-day period of absence into two shorter AWOLs under the same specification and affirmed the findings and sentence.[152]

Rogers and *Scott* offer three practical lessons for counsel. First, these cases set out the criteria that distinguish voluntary termination from casual presence and highlight the need to explain these requirements to an accused who pleads guilty to AWOL under such circumstances. Of particular note to practitioners, the *Rogers* opinion contains a pattern instruction for AWOL voluntary termination issues.[153]

Second, *Rogers* points out an often-overlooked *Manual* provision that allows findings of multiple AWOLs within one specification, so long as they are within the charged period, and the accused is not misled by the findings.[154] Government counsel should take advantage of this provision when charging longer AWOL periods, especially those involving "termination vs. casual presence" issues that may not be resolved until trial. By charging AWOL for the entire period, then allowing the factual issues to be resolved at trial or by pretrial agreement, counsel may employ more simplified pleadings and avoid potential variance issues.

Third, combined with *Hardeman* and *Pinero*, these cases show why counsel should be extra alert in assessing the effectiveness of a providence inquiry in an AWOL guilty plea. Whether or not the cases dispute the claim that a guilty plea is the "strongest form of proof know to the law," the accused's own statements most often raise these matters, and attentive counsel may keep many of them from becoming legitimate appellate issues.

Notable Decisions Involving Other Offenses

Kidnapping: United States v. Seay[155]

Sergeant (SGT) Bobby Seay II and SGT Darrell Shelton brought a drunken Private First Class (PFC) Jason Chafin back to SGT Seay's apartment after Chafin got in a fight in the barracks at Fort Carson, Colorado.[156] Shortly afterward, the three men left in SGT Seay's truck and drove to a remote area.[157] While PFC Chafin was in the front passenger seat, SGT Seay

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[145] *Id*.

[146] *Id*. at 721.

[147] *Id* at 720.

[148] *Id*. at 721.

[149] *Id*. at 722.

[150] *Id*.

[151] *Id*. (citing MCM, *supra* note 80, pt. IV, para. 10.c.(10)(a) (requiring presentation to any military authority, notification of the Soldier's AWOL status, and submission or demonstration of a willingness to submit to military control)).

[152] *Id* at 723; *See* MCM, *supra* note 80, pt. IV, para. 10.c.(11).

[153] *See* United States v. Rogers, 59 M.J. 584, 588-9 (Army Ct. Crim. App. 2003).

[154] MCM, *supra* note 80, pt. IV, para. 10.c.(11).

[155] 60 M.J. 73 (2004).

[156] *Id*. at 74.

[157] *Id*.

tried to strangle him from behind with a cord.[158] Chafin fled the truck, but SGT Shelton pinned him to the ground, and both men took turns stabbing him to death.[159] The appellant was convicted, *inter alia*, of kidnapping and murder.[160]

On appeal, SGT Seay claimed the kidnapping conviction was legally insufficient. The CAAF disagreed and affirmed the conviction.[161] After listing the elements of kidnapping, the court discussed six factors to consider in assessing whether asportation, or "carrying away" a victim, satisfies an element of kidnapping or is merely an incidental or momentary detention.[162] Here, the court noted, the men drove Chafin several miles to a secluded location, where the appellant confined Chafin and held him against his will by strangling him.[163] Shelton then held Chafin to the ground while the appellant stabbed him.[164] The court found these acts occurred prior the murder, and they exceeded the acts inherent in the commission of murder.[165] Further, because the men could have killed Chafin at the appellant's apartment or in his truck, their acts created additional risk for Chafin,[166] who was less likely to find help in the secluded location.[167]

At first glance, *Seay* appears to be a boon for the government, although it does offer lessons for counsel from both sides. First, it reiterates factors the courts should consider when evaluating kidnapping as a separate offense. Notably, the *Benchbook*'s elements and definitions do not address all these factors, so counsel may employ them to craft proposed instructions or during argument on a motion to dismiss.[168] By the same token, the government should consider the factors in its charging decision. For example, when an accused moves a victim, either by physical force or trickery and thereby places the victim in greater danger, then the accused may have committed kidnapping.[169] Of course, some may question the need to charge kidnapping in a case like *Seay*, where a brutal murder was clearly the gravamen of the offense. There may be cases, however, where the maximum punishment for the "other" offense is not as serious (*e.g.*, manslaughter, assault, indecent assault or liberties, and maiming), and the addition of kidnapping is necessary to reflect the accused's culpability. On the other hand, the defense may properly highlight *Seay*'s requirement for both holding and moving the victim, or the lack of additional risk to the victim, in arguing against a kidnapping charge. In other words, because *Seay* contains an objective list of factors, counsel for either side may use them to their advantage under the facts of a specific case.

Involuntary Manslaughter: United States v. Stanley[170]

In a case with very timely[171] but tragic facts, SrA Edward Stanley's wife arrived home from a short trip to a local video store to find her husband holding their apparently lifeless six-week-old son, Timothy.[172] They rushed the infant to the emergency room, and Timothy was soon transferred to pediatric intensive care at a children's hospital.[173] There, doctors

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[158] *Id*.

[159] *Id*. at 74-5.

[160] *Id*. at 74.

[161] *Id*. at 80-1.

[162] *Id*. The court addressed the following factors: (1) the occurrence of both an unlawful carrying away and a holding for a period of time; (2) the duration of the acts (*i.e*., asportation and detention); (3) whether the acts occurred during the commission of another crime; (4) whether the acts were inherent in the commission of that type of crime, given the location where the accused first encountered the victim; (5) whether the acts exceeded those inherent in the separate offense and showed the accused's intent to move or detain the victim more than was necessary to commit the offense in the first location; and (6) the creation of additional risk to the victim by moving him from the first location. *Id*. (citing United States v. Santistevan, 22 M.J. 538, 543 (N.M.C.M.R. 1986) and United States v. Newbold, 45 M.J. 109 (1996)).

[163] *Id*.

[164] *Id*.

[165] *Id*.

[166] The opinion states, "*The appellant* experienced an increased risk as a result of these acts. . . ," an apparent typographical error. *See id*. (emphasis added).

[167] *Id*.

[168] *See* BENCHBOOK, *supra* note 134, ¶ 3-92-1.

[169] *See id*.

[170] 60 M.J. 622 (A.F. Ct. Crim. App. 2004)

[171] This case is particularly timely, given the recent national attention paid to the Terri Schiavo case, a dispute over the decision to withhold feeding and hydration support from Mrs. Shiavo, who was in a persistent vegetative state for fifteen years. *See Terri Schiavo Case: Legal Issues Involving Healthcare Directives, Death, and Dyin**g***, *at* http://news.findlaw.com/legalnews/lit/schiavo/ (last visited May 25, 2005).

[172] *Stanley*, 60 M.J. at 623.

[173] *Id*.

diagnosed the child's condition as "shaken baby syndrome," involving traumatic injuries to the bones, eyes, and brain.[174] The baby also showed fractures to his extremities and his ribs.[175] Because Timothy lacked a gag response and suck reflex, doctors placed him on artificial life support, consisting of intravenous fluids for nutrition and hydration, and although he could breathe on his own, he was kept on a respirator.[176] After further examination, doctors determined Timothy was "neurologically devastated" and in a "persistent vegetative state" from which he would never recover.[177] His mother sought to remove the artificial life support, and when SrA Stanley opposed this move, she obtained an order from the state court giving her sole authority to make medical decisions for Timothy, to include a "do not resuscitate" directive.[178] On this authority, the mother ordered her baby's artificial life support removed, and Timothy died eight days afterward.[179] In a trial by judge alone, SrA Stanley was found guilty of involuntary manslaughter by culpable negligence.[180] On appeal, the defense challenged the factual and legal and sufficiency of the conviction, arguing SrA Stanley's acts were not the proximate cause of his son's death; rather, the removal of artificial life support was a superseding and intervening cause of death.[181]

The Air Force Court of Criminal Appeals (AFCCA) disagreed and affirmed the appellant's conviction.[182] The court first noted that that a "proximate" cause need not be the sole, nor even the most immediate cause, so long at it played a "material role" in the victim's death.[183] Further, another's negligence may intervene between the accused's conduct and a fatal result and completely eliminate the accused's acts as the proximate cause, but only when "the second act of negligence looms so large in comparison with the first, that the first is not to be regarded as a substantial factor in the final result."[184] Medical treatment may serve as an intervening cause, but under most circumstances an accused is still criminally liable, even though better treatment might have prolonged or saved the victim's life.[185] Citing legal commentators, however, the court held that only "grossly erroneous" treatment of a comparatively slight injury would loom so large as to relieve an accused of responsibility.[186] The court concluded that the appellant inflicted serious and dangerous injuries on Timothy, and any medical treatment, to include the lawful removal of life support, was a foreseeable result of his conduct.[187] Thus, it did not rise to the level of an intervening cause sufficient to relieve the appellant of criminal liability.[188] The appellant's wrongful acts "set in motion an unbroken, foreseeable chain of events" and were the proximate cause of his infant son's death.[189]

Stanley gives practitioners specific guidance on the issue of intervening cause, particularly when it involves allegedly negligent medical treatment. Although issues of causation seldom arise in intentional homicides,[190] they may often come into play in involuntary manslaughter and negligent homicide offenses.[191] In these cases, *Stanley* sets the bar high, as it requires gross medical negligence in treating relatively minor injuries caused by the accused to relieve him of liability.

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[174] *Id*.

[175] *Id*.

[176] *Id*.

[177] *Id*. at 624.

[178] *Id*. at 624-25.

[179] *Id*. at 625.

[180] *Id*. at 622.

[181] *Id*. at 624.

[182] *Id*. at 623.

[183] *Id*. at 626 (citing United States v. Cooke, 18 M.J. 152, 154 (C.M.A. 1984)).

[184] *Id*. (quoting *Cooke*, 18 M.J. at 154).

[185] *Id*. at 626 (citing United States v. Taylor, 44 M.J. 254 (1996)).

[186] *Id*. (citing R. PERKINS & R. BOYCE, CRIMINAL LAW 801-03 (3d ed. 1982)).

[187] *Id*. at 628.

[188] *Id*.

[189] *Id*.

[190] *But see* United States v. Gomez, 15 M.J. 954 (A.C.M.R. 1983) (rejecting appellant's claim that removal of life support from an intentional assault victim was an intervening cause of the victim's death).

[191] *See*, *e.g.*, United States v. Riley, 58 M.J. 305 (2003); United States v. Oxendine, 55 M.J. 323 (2001); United States v. Henderson, 23 M.J. 77 (C.M.A. 1986).

Obscene or Indecent? United States v. Negron[192]

When his loan application was rejected, Corporal (Cpl) Wesley Negron wrote a letter to the offending credit union, containing the following statements:

> Oh, yeah, by the way y'all can kiss my ass too!! Worthless bastards! I hope y'all rot in hell you scumbags. Maybe when I get back to the states, I'll walk in your bank and apply for a blowjob, a nice dick sucking, I bet y'all are good at that, right?[193]

Corporal Negron pled guilty, *inter alia*, to depositing obscene matter in the mail, charged under Article 134, UCMJ.[194] During the providence inquiry, the military judge defined "obscene" using terms that focused on the indecent, sexual nature of the acts described in Cpl Negron's letter.[195] Negron agreed that his writing satisfied this definition, yet he maintained he wrote the letter because he was angry and frustrated, and he selected his words to offend the reader.[196] The military judge accepted Cpl Negron's plea and found him guilty as charged.[197] A panel of the Navy-Marine court set aside the findings, but on reconsideration, the court affirmed the conviction *en banc*.[198] The majority found the language in the letter was legally obscene by community standards, it was "calculated to corrupt morals or excite libidinous thoughts," and it did not fall within an exception applicable to immediate, angry confrontations.[199]

The CAAF reversed and set aside the conviction, holding that under the "narrow definition" provided by current case law, the language used by the appellant was not obscene.[200] The judge's definition improperly focused on the indecent nature of the acts described in the letter rather than the appellant's intended result from using that language.[201] In the court's view, the providence inquiry showed that Cpl Negron was expressing his outrage, not his intent to "corrupt morals or excite lustful thoughts" in the minds of the letter's readers.[202] Further, because the judge's leading questions elicited only conclusory statements from the appellant—instead of factual information necessary to establish an offense—the CAAF declined to affirm any lesser included offense.[203]

Negron is significant for military practitioners because it resolves a potential conflict between the language of the *Manual* and prevailing First Amendment case law. The term "obscene" has constitutional implications with a long line of Supreme Court precedent.[204] When the Drafters composed the *Manual* provisions regarding obscene mail matter, they apparently had these cases in mind.[205] Thus, it may be problematic to argue that "obscene" means one thing under First Amendment law and something different under the UCMJ. Further, the case points out the internal inconsistency of the *Manual*'s definitions of "indecent" acts and language and the confusion that may follow using these definitions in a

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[192] 60 M.J. 136 (2004).

[193] *Id*. at 137.

[194] *Id*. at 136-37. *See* MCM, *supra* note 80, pt. IV, para. 94.

[195] *See id*. at 137-38. The court speculated that the judge erroneously attempted to "blend" this definition from paragraphs of the *Manual* addressing indecent acts and obscene mail matter. *Id*. at 141-2. (citing MCM, *supra* note 80, pt. IV, paras. 90.c. and 94.c.).

[196] *Id*. at 137-9.

[197] *Id*. at 139.

[198] *Id*. at 137.

[199] *Id*. at 140 (citing United States v. French, 31 M.J. 57 (C.M.A. 1990); United States v. Brinson, 49 M.J. 360 (1998)).

[200] *Id*. at 142-43 (citing United States v. Brinson, 49 M.J. 360 (1998)).

[201] *Id*. at 142.

[202] *Id*. at 143.

[203] *Id*.

[204] *See*, *e.g*., Ashcroft v. ACLU, 159 L. Ed. 2d 690 (2004):

> Material is legally obscene if: "(a) . . . 'the average person, applying contemporary community standards' would find that the work, taken as a whole, appeals to the prurient interest . . .; (b) . . . the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) . . . the work, taken as a whole, lacks serious literary, artistic, political, or scientific value."

Id. at 709 (citing Miller v. California, 413 U.S. 15, 24 (1973)).

[205] *See* MCM, *supra* note 80, app. 23, Analysis of Punitive Articles (citing Hamling v. United States, 418 U.S. 87 (1974) and *Miller*, 413 U.S. 15 (1973)).

providence inquiry.[206] Finally, *Negron* underscores the fact that speech offenses will receive additional scrutiny on review, so counsel should use extra care when considering whether to charge them.[207] In the court's words, "When the Government makes speech a crime, the judges on appeal must use an exacting ruler."[208]

Defenses

This year's symposium includes fewer cases on defenses than last year, simply because there were fewer noteworthy decisions on defenses from military appellate courts. Even so, counsel may draw important lessons from these opinions. The first case ties in with this article's previous discussion of absence offenses and highlights an issue that, like termination and casual presence, often arises in AWOL cases. The second case involves the standard for raising affirmative defenses.

Duress and Desertion: United States v. Le[209]

Sergeant Phong Le left his unit at Fort Lewis, Washington, and was apprehended fourteen months later while attempting to cross the border at Tijuana, Mexico.[210] He pled guilty to desertion.[211] During his providence inquiry, SGT Le stated his primary reason for leaving was fear that his girlfriend's ex-boyfriend, a purported gang member, would kill or harm him.[212] In response to the military judge's questions, SGT Le repeatedly said he did not fear "immediate" death or serious bodily injury, but he did not know when the ex-boyfriend would come after him.[213]

The Army court found the appellant's guilty plea was improvident, because he raised the defense of duress, and the military judge failed to resolve the apparent inconsistency.[214] The court likened Sergeant Le's conclusory responses that he did not fear immediate harm to a "spectacle, where both counsel take hold of appellant's arms while the judge grabs the ankles and together they drag appellant across the providence finish line. . . ."[215] Noting that duress has long been recognized as a defense to absence offenses, the court held it applies only so long as the accused surrenders at the earliest possible opportunity.[216] Thus, the appellant's claim of duress could apply only while his reasonably grounded fear still existed.[217] Once away from the source of the fear, the threat lost its coercive force.[218] Instead of wholly setting aside the conviction, then, the court modified the findings to eliminate the first four days of the appellant's absence and affirmed the modified findings and sentence.[219]

The *Le* case is noteworthy because it points out another issue that frequently arises in guilty pleas involving desertion and absence offenses. During many providence inquiries, accused Soldiers will often tell their story in a favorable manner, offering sympathetic reasons for their absence. Because these reasons may raise a legal defense and invalidate the accused's plea, counsel and military judges should note the need for further questions to resolve any inconsistencies. The bottom line is that an accused cannot plead guilty to an AWOL or desertion if he maintains that he left for fear of some type of physical harm. If he cannot disclaim this belief on the record, then he must plead not guilty and attempt to persuade a factfinder.

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[206] *See id.* pt. IV, paras. 89.c. and 90.c. *See generally* Major Steven Cullen, *Prosecuting Indecent Conduct in the Military: Honey, Should We Get a Legal Review First?*, 179 MIL. L. REV. 128 (2004).

[207] The maximum punishment for depositing obscene material in the mail includes a dishonorable discharge and five years confinement, compared to a bad conduct discharge and six months confinement for indecent language and four months confinement for simple disorderly conduct. *See* MCM, *supra* note 80, pt. IV, paras. 73.e.(1), 89.e., and 94.e. Considering the increased punishment for obscene mail matter and its First Amendment implications, the charge will likely receive close scrutiny in the future.

[208] *Negron*, 60 M.J. at 140 (citing *Brinson*, 49 M.J. at 361).

[209] 59 M.J. 859 (Army Ct. Crim. App. 2004).

[210] *Id*. at 860.

[211] *Id*.

[212] *Id*. at 860-61.

[213] *Id*.

[214] *Id*. at 864.

[215] *See id*. (quoting United States v. Pecard, No. 9701940, (Army Ct. Crim. App. Dec. 7, 2000) (unpublished)).

[216] *Id*. at 863-64.

[217] *Id*..

[218] *Id*. at 865.

[219] *Id*.

Accident & Defense of Another: United States v. Jenkins[220]

Specialist (SPC) Alton L. Jenkins and several fellow Soldiers drove to another unit's barracks area to resolve a dispute.[221] Specialist Jenkins took with him a loaded handgun, which he passed to a friend to hold.[222] A fight erupted between a Soldier in SPC Jenkins' group and a Soldier from the opposing faction.[223] Specialist Jenkins retrieved his pistol and fired three shots; the third shot struck PFC Davis and caused the loss of his kidney.[224] At trial, SPC Jenkins testified he fired the pistol twice in the air to prevent further injury to his friend, whom he believed was unconscious and unable to defend himself.[225] The third shot, SPC Jenkins testified, occurred accidentally as he was lowering the weapon to put it away.[226] Defense counsel requested instructions on defense of another, which the military judge gave, and on accident and withdrawal as reviving the right to self-defense, which the judge denied.[227] In denying the accident instruction, the judge found that SPC Jenkins' conduct in firing a pistol in a garrison environment was "wanton and reckless" and thus did not satisfy the requirement that the accused act without simple negligence.[228] The officer and enlisted panel found SPC Jenkins guilty of conspiracy and aggravated assault by intentional infliction of grievous bodily harm.[229]

On appeal, the Army court set aside the aggravated assault conviction, holding the military judge erred in refusing to give the requested instructions.[230] Noting that an accused's testimony alone may be sufficient to raise an affirmative defense, the court set out a novel approach to determine whether to instruct: "Trial judges should view the standard used to decide whether to give an instruction on an affirmative defense as a 'mirror image' of that used to decide whether to grant a motion for a finding of not guilty."[231] In other words, judges should view the evidence "in the light most favorable to the [defense], without an evaluation of the credibility of the witnesses."[232] The court then found evidence in the record that the appellant showed due care in firing his pistol to prevent further injury to his friend and that his failure to engage the safety was "not so clearly negligent" as to bar the accident instruction.[233] Second, when the appellant's friend became unconscious during the fight, he effectively withdrew from the mutual affray, giving the appellant the right to defend him.[234] Finally, the court dismissed the government's argument that the finding of guilt for intentional assault showed the panel's implicit rejection of the accident defense.[235] Instead, the court found the military judge's comment that he had "ruled out" the accident defense discouraged the panel from considering the possibility that the shooting was an accident or unintentional.[236]

Military practitioners may draw important lessons from *Jenkins*. First, the Army court's new formulation of the standard for instructing on an affirmative defense—the RCM 917 "mirror image" standard—dictates that the judge should not evaluate the credibility of witnesses. Even though the military judge's decision in *Jenkins* was not based on the credibility of witnesses, but on his conclusion that SPC Jenkins was objectively negligent, the court admonished the judge for displaying the "entirely human tendency to . . . invade the province of the fact finders."[237] Further, the opinion makes no mention of a judge's duty to instruct on defenses "reasonably raised by the evidence," a phrase the courts have commonly used describe

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[220] 59 M.J. 893 (Army Ct. Crim. App. 2004).

[221] *Id*. at 895.

[222] *Id*. at 896.

[223] *Id*.

[224] *Id*.

[225] *Id*.

[226] *Id*.

[227] *Id*. at 895-96.

[228] *Id*. at 896.

[229] *Id*. at 895.

[230] *Id*.

[231] *Id*. at 898.

[232] MCM, *supra* note 80, R.C.M. 917(d).

[233] *Id*. at 899.

[234] *Id*. at 900.

[235] *Id*. at 902.

[236] *Id*.

[237] *Id*. at 898 (quoting United States v. Thornton, 41 C.M.R. 140, 144 (C.M.A. 1969)).

this standard.[238] Apparently, the court avoided this language in a conscious attempt to further discourage judges from weighing the evidence in deciding whether to instruct on defenses. Taken together, these elements of the *Jenkins* decision send a strong signal to prudent trial counsel and military judges: they should consider the risks of contesting or denying affirmative defense instructions, especially when the defense specifically requests them. If an appellate court later finds the judge's findings of fact and rationale to be insufficient, then the conviction is jeopardized. Essentially, *Jenkins* says that if the accused testifies the result of his conduct was an unintentional "accident," then the military judge should instruct and let the panel determine whether the elements of the defense are met.

Conclusion

Examining the past year's developments as a whole, we can identify several trends. First, the CAAF's decisions on sodomy and child pornography offenses have reshaped the military justice system in areas where the Supreme Court has found criminal prohibitions to be unconstitutional in a civilian setting. The child pornography decisions find strong precedent in *Parker v. Levy*, but the sodomy decisions find less direct support.[239] It may be that to satisfy *Marcum* and *Lawrence*, Article 125 will effectively become an Article 134 offense, requiring that the accused's conduct be prejudicial to good order or service-discrediting, aside from the categories of conduct specifically addressed in *Lawrence*.

At the same time, the CAAF's absence cases and *Negron* show the court's ongoing commitment to Article 45, UCMJ, by ensuring an accused knowingly and voluntarily pleads guilty.[240] These decisions may cut both ways, however. An accused cannot expect to plead guilty by making half-hearted or self-serving admissions during providency or by merely acquiescing to a military judge's leading questions. He must admit to facts that fully establish his commission of the offense and disclaim the applicability of any defenses, or he will risk losing the benefits of his guilty plea.

While last year's developments tended to bring military justice more in line with civilian norms, this year's decisions show CAAF is willing to apply the Supreme Court's "military as a separate society" jurisprudence to other offenses, recognizing that they may have a distinct impact in the military.[241] Even so, several of these developments leave significant questions unanswered. What is the future of Article 125's prohibition of sodomy? How will homosexual sodomy be treated under the third prong of the *Marcum* test? If asked, how will the Supreme Court rule on the CAAF's decisions in *Marcum*, *Mason*, and *Irvin*? Naturally, the answers to these questions will contribute to the future shape of military justice and maintain the proper measures of discipline and fairness in our system.

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[238] *See*, *e.g.*, United States v. Hibbard, 58 M.J. 71, 75 (2003); United States v. Washington, 57 M.J. 394, 401 (2002); United States v. McDonald, 57 M.J. 18, 20 (2002); United States v. Davis, 53 M.J. 202, 205 (2000); United States v. Smith, 50 M.J. 451, 455 (1999).

[239] Parker v. Levy, 417 U.S. 733 (1974) (upholding UCMJ Articles 133 and 134 against First and Fifth Amendment challenges). Like *Levy*, the *Mason* and *Irvin* cases involved challenges based on the First Amendment. In weighing a challenge to Article 125 based on the liberty interest identified in *Lawrence*, the Supreme Court may not give the same deference to the military.

[240] *See* UCMJ art. 45 (2002).

[241] *See* Captain Heather J. Fagan, *The Military as a Separate Society—Second-class Citizen Soldiers?* (2005) (currently unpublished manuscript, on file with author) (tracing the history of the "military deference doctrine").

Just a Little Down the Track: 2004 Developments in the Sentencing

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And what makes robbers bold but too much lenity?[1]

At the Start/Finish Line

The biggest news in sentencing this year surrounded a U.S. Supreme Court opinion that, in all likelihood, has no application to sentencing in the military—*Blakely v. Washington*.[2] Nonetheless, there is much else to discuss in military sentencing this year. Like last year's article,[3] this one also covers a potpourri of sentencing issues: sentencing evidence, sentencing argument, fines and contingent confinement, and the effective date of life without the possibility of parole. The lessons to be drawn are discussed after each case. Whether military practitioners take the same lessons is immaterial to the ultimate goal—educating the adversaries in the "pits"[4] so that either side may ultimately prevail in obtaining a sentence that meets the ends of justice.[5] While the cases as a whole do not break much new ground, practitioners must still understand them, because each case, in its own way, pushes the car of justice just a little further down the track.

On the Pole: Prior Convictions

As a trial counsel, almost nothing has a greater impact on sentencing argument than a convicted Soldier's prior criminal conviction. Offering such evidence will most assuredly give the trial counsel's case the extra push needed to get a higher sentence than would be possible without such evidence. As a general matter, prior convictions are admissible in sentencing under Rule for Courts-Martial (RCM) 1001(b)(3).[6] A question, however, is just how much information about the prior conviction may be admissible? *United States v. Malhiot*[7] dealt with this very issue. Prefacing its opinion, the Air Force Court of Criminal Appeals noted that because the military's sentencing scheme "operates within a narrow range of admissible evidence,"[8] evidence that is logically relevant may not be legally relevant.[9] This case demonstrates the difficulty of distinguishing between the two concepts.[10]

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[1] WILLIAM SHAKESPEARE, HENRY THE SIXTH, pt. iii, act II, sc. vi.

[2] 124 S. Ct. 2531 (2004). The Court declared unconstitutional Washington's Sentencing Reform Act to the extent that trial judges were able to increase a sentence without an admission by the defendant or a finding of fact by a jury that the facts supporting an increase were true beyond a reasonable doubt. *See id*. at 2543. This case should not have any impact on courts-martial, because the sentencing authority makes no findings of fact and arrives at a sentence only after the presentation of evidence from both sides.

[3] Major Jan E. Aldykiewicz, *Recent Developments in Sentencing: A Sentencing Potpourri from Pretrial Agreement Terms Affecting Sentencing to Sentence Rehearings*, ARMY LAW., July 2004, at 100.

[4] Professor John B. Neibel, University of Houston Law Center, (referencing a favorite phrase of my first-year property teacher when discussing trying a case).

[5] The accused has been convicted, so the question is what shall the sentence be? The members are instructed:

> You should bear in mind that our society recognizes five principal reasons for the sentence of those who violate the law. They are rehabilitation of the wrongdoer, punishment of the wrongdoer, protection of society from the wrongdoer, preservation of good order and discipline in the military, and deterrence of the wrongdoer and those who know of his/her crime(s) and his/her sentence from committing the same or similar offenses.

U.S. DEP'T OF ARMY, PAM., 27-9, MILITARY JUDGE'S BENCHBOOK ch. 2, § V, para. 2-5-21, at 61 (15 Sept. 2002).

[6] MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 1001(b)(3) [hereinafter MCM].

[7] 60 M.J. 695 (A.F. Ct. Crim. App. 2004).

[8] *Id.* at 696.

[9] *Id.*

[10] *See id.*

After accepting Malhiot's guilty plea to three drug specifications,[11] the military judge held an Article 39(a)[12] session to review proposed sentencing evidence.[13] The trial counsel offered evidence of a civilian conviction from a Georgia state court that the appellant received for attempting to elude, reckless driving, driving under the influence, and failing to have proof of insurance.[14] These offenses occurred a few weeks after the investigation began into the offenses for which the accused stood convicted.[15] The trial counsel offered, without defense counsel objection, two exhibits: a certified copy of the state court conviction[16] and a letter of reprimand issued to the appellant by his command regarding the conviction.[17] The trial counsel then offered the police cruiser's videotape showing the appellant's erratic driving while the police officer followed in hot pursuit, as well as the events that occurred after appellant crashed his vehicle in a residential neighborhood.[18] The trial counsel offered the videotape as evidence of the appellant's lack of rehabilitation potential[19] and as evidence that fully explained the circumstances of his prior conviction.[20]

The defense counsel objected to the videotape's admission because: (1) the tape was outside the scope of RCM 1001(b); (2) it was cumulative of the record of conviction and the letter of reprimand; and (3) it was more prejudicial than probative under Military Rule of Evidence (MRE) 403.[21] Aside from a foundational objection, the defense counsel argued that RCM 1001(b)(5) permits admission of an *opinion* regarding rehabilitative potential.[22] The military judge conducted an *in camera* review of the disputed evidence; after which, he admitted the tape conditioned on the trial counsel's being able to lay a proper foundation.[23] The military judge found that the tape was not cumulative because it "fully explains the events and circumstances that occurred that evening."[24] In response to the MRE 403 objection, even though the military judge stated that the evidence was "real, real, real bad for the defense," the military judge ruled the evidence had "significant probative value" of the appellant's rehabilitation potential.[25] The military judge did not address the defense's objections to the form of the evidence.[26]

During its sentencing case-in-chief, the trial counsel called the arresting officer, who laid a proper foundation for the tape, including numerous details about the aggravated nature of the car chase.[27] The defense counsel did not specifically

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[11] *Id.* The appellant admitted to using marijuana and ecstasy three times each and distributing small amounts of ecstasy on two occasions. *Id*.

[12] *See* UCMJ art. 39(a) (2002).

[13] *Malhiot*, 60 M.J. at 696. The sentencing authority in this case was a panel of officers. *Id*.

[14] *Id.*

[15] *Id.*

[16] *Id.* at 697. In addition to documenting the pleas and findings, the record contained the appellant's sentence, which included confinement for forty-eight months (all but thirty days was probated), a fine of $1,625, court-ordered restitution of $11,000, performance of forty hours of community service, and submission to drug and alcohol testing. *Id*.

[17] *Id.* The trial counsel offered the reprimand under RCM 1001(b)(2), which permits the admission of personnel records of the accused. MCM, *supra* note 6, R.C.M. 1001(b)(2).

[18] *Id.*

[19] A witness's opinion as to a service member's rehabilitation potential or lack thereof, is admissible under RCM 1001(b)(5). *See* MCM, *supra* note 6, R.C.M. 1001(b)(5). As a point of interest to military justice practitioners, in this space last year, Major Aldykiewicz discussed *United States v. Griggs*, 59 M.J. 712 (A.F. Ct. Crim. App. 2004), *review granted*, 60 M.J. 315 (2004), and the Air Force Court's conclusion that the military judge did not abuse his discretion in applying RCM 1001(b)(5) to defense evidence. Aldykiewicz, *supra* note 3, at 110-12 (concluding that "the rationale used by the *Griggs* court . . . that rehabilitative potential opinions are limited in scope, regardless of which side seeks the opinion, is compelling). Since that article's publication, the Court of Appeals for the Armed Forces (CAAF) granted review on the issue of whether the military judge abused his discretion in applying RCM 1001(b)(5) to defense evidence. *Griggs*, 60 M.J. at 315. The reasons for restricting a witness's testimony regarding whether an accused should remain in the military are, as pointed out by the *Griggs* court, applicable to the defense—the risk of confusion regarding an element of punishment (discharge) and retention in the military (appropriateness of continued service) and the usurpation of the sentencing authority's role. *Griggs*, 59 M.J. at 714. These concerns are compelling reasons for the CAAF to hold that witness's opinion about the appropriateness of a service member's discharge is not legally relevant evidence under RCM 1001(c).

[20] *Malhiot*, 60 M.J. at 697.

[21] *Id.*

[22] *Id.* Indeed, the rule states: "(A) In general. The trial counsel may present, by testimony or oral deposition in accordance with R.C.M. 702(g)(1), evidence in the form of *opinions* concerning the accused's previous performance as a servicemember and potential for rehabilitation." MCM, *supra* note 6, R.C.M. 1001(b)(5)(A) (emphasis added).

[23] *Malhiot*, 60 M.J. at 697.

[24] *Id.* (quoting the military judge).

[25] *Id.* (quoting the military judge).

[26] *Id.*

[27] *Id.*

object to the details of the chase, but maintained his remaining objections.[28] Later, the trial counsel called the appellant's first sergeant to testify about the appellant's duty performance.[29] During the colloquy with the trial counsel, the witness discussed, over defense objection, Malhiot's poor duty performance, including specific instances of conduct when he was not where he was supposed to be while on duty as a bay orderly.[30] The witness also opined, without further defense objection, on the futility of undertaking additional rehabilitation efforts to get the appellant to comply with duty requirements.[31]

After sentencing proceedings, the panel of officers sentenced Malhiot to a bad conduct discharge, confinement for one year, and reduction to the grade of E-1.[32] In light of the evidence admitted, the Air Force court had to determine whether the military judge abused his discretion when he admitted the videotape and the first sergeant's testimony, and whether the military judge committed plain error in admitting the detailed testimony about the events on the videotape.[33]

The court held that "[i]t was clearly error to admit the videotape and to allow the police officer to testify about the events on the videotape as *rehabilitation* evidence."[34] Although the evidence at issue may have been logically relevant in fashioning an appropriate sentence,[35] the court reasoned that RCM 1001(b)(5) strictly limits the evidence's legal relevance to *opinion* evidence, which neither the videotape nor the police officer's testimony was.[36] Just because evidence may not be admissible under one rule, however, does not mean that the same evidence may not be admissible under another.[37] The court, therefore, looked at whether the evidence was admissible under RCM 1001(b)(3) as evidence of a conviction, because, as the court noted, the rule does not address how much detail about the prior conviction the trial counsel may present.[38] Relying on the logic of its opinion in *United States v. Douglas*,[39] the court determined that the evidence was also not admissible as a prior conviction.[40] In *Douglas*, the court concluded, "We believe the clear import of the President's rule is to limit the evidence that prosecution can introduce under R.C.M. 1001(b)(3) to a document that reflects the fact of a conviction, including a description of the offense, the sentence, and any action by appellate or reviewing authorities."[41] Based on its own decision in *Douglas* and the CAAF review of that case, the Air Force court held that the evidence was also not admissible under RCM 1001(b)(3).[42] In this case, the underlying details were not necessary to explain the nature of the prior conviction[43] because the "offenses are clearly listed–and are understandable as written–in the Lowndes County court documents and the letter of reprimand."[44] The court, therefore, held that the military judge erred when he admitted the videotape and plainly erred when he admitted the police officer's testimony regarding the aggravating circumstances of the chase.[45]

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[28] *Id.*

[29] *Id.* at 699.

[30] *Id.* A bay orderly assists the dorm manager in maintaining the dormitory's grounds and common areas. *Id*.

[31] *Id.* at 700.

[32] *Id.* at 696.

[33] The court used a plain error analysis with respect to the detailed testimony because the defense counsel did not object to its introduction. *Id*. at 697.

[34] *Id.* at 697.

[35] *See id.* at 698.

[36] *See id*. at 697-8.

[37] United States v. Ariail, 48 M.J. 285, 287 (1998) (holding that appellant's answers on a U.S. Department of Defense Form 398-2, National Agency Questionnaire, regarding traffic offenses, were not evidence of prior convictions, but were admissible as a part of a personnel record under RCM 1001(b)(2)).

[38] *Malhiot*, 60 M.J. at 698.

[39] 55 M.J. 563 (A.F. Ct. Crim. App. 2001), *aff'd*, 57 M.J. 270 (2002) (holding that a stipulation of fact from a previous court-martial was not admissible as evidence of a conviction under RCM 1001(b)(3) but was admissible as part of a personnel record under RCM 1001(b)(2)).

[40] *Malhiot*, 60 M.J. at 698.

[41] *Id.* (quoting United States v. Douglas, 55 M.J. 563, 566 (A.F. Ct. Crim. App. 2001).

[42] *Id.*

[43] The court noted that Judge Baker in his concurrence in *Douglas* observed that the Air Force court "went too far in holding that the underlying details of a prior conviction are not admissible under RCM 1001(b)(3), even when necessary to explain the nature of the offense." *Id.* (quoting *Douglas*, 57 M.J. at 273 (Baker, J. concurring in result)). Thus, Judge Baker would permit details of the underlying conviction when the document showing the conviction "does not clearly state the prior offense," but that document *cannot* "be used as a vehicle to develop the facts behind the prior conviction." *Id.* (quoting *Douglas*, 57 M.J. at 274 (Baker, J. concurring in result)).

[44] *Id.*

[45] *Id.* at 699.

With respect to the testimony from the appellant's first sergeant, the Air Force court analyzed the issue as one of uncharged misconduct because the witness described specific instances of misconduct.[46] The court held that the testimony ran afoul of RCM 1001(b)(5)(D) because the evidence, while logically relevant, was not legally relevant.[47] The court looked to the rule's discussion, which states that when rendering an opinion on the magnitude or quality of rehabilitation potential, a witness "generally may not further elaborate on the accused's rehabilitation potential, such as describing the particular reasons for forming the opinion."[48] The witness's testimony, the court observed, "exceeded the bounds" of the rule by offering specific instances of misconduct and by discussing ineffective additional rehabilitation efforts.[49] The court noted that testimony regarding an accused's previous performance must be in the form of an opinion unless such evidence is submitted in the form of a document, "in which case the document must come from the 'personnel records of the accused' as required by R.C.M. 1001(b)(2)."[50] The court, therefore, concluded the military judge also abused his discretion in admitting the first sergeant's testimony.[51]

After analyzing for prejudice using the factors from *United States v. Kerr*,[52] the court determined that the strength of both sides' evidence was a draw–both were moderately strong.[53] Calling the case "a textbook example of the risk of unfair prejudice, confusion of the issues, and the needless presentation of cumulative evidence," the court held that the military judge's cumulative errors materially prejudiced the appellant's substantial rights under RCM 1001.[54] Rather than return the case for rehearing, the court reassessed the sentence in accordance with *United States v. Sales*,[55] approving a sentence of a bad conduct discharge, confinement for eight months, total forfeiture of all pay and allowances for eight months, and reduction to the grade of E-1.[56]

Although this case is from the Air Force, its lessons to Army judge advocates are no less important. If the trial counsel has evidence of a prior conviction, the government is unlikely to succeed at getting the details of the underlying conviction into evidence under RCM 1001(b)(3). By its terms, the rule contemplates evidence of the *fact* of a conviction and nothing else.[57] If trial counsel wants to get other detailed information regarding a conviction into evidence, this case offers no support. At best, trial counsel could try to rely on Judge Baker's concurrence in *Douglas*, but that support is limited. Although the underlying fact of a prior conviction may be powerful evidence of the accused's lack of rehabilitation, such evidence is simply not *legally* relevant in the current sentencing scheme.

On the Outside Pole: Evidence in Aggravation

The engine for a trial counsel's sentencing case is aggravation evidence. Rule for Courts-Martial 1001(b)(4) permits the trial counsel to "present evidence as to any aggravating circumstances directly relating to or resulting from the offenses of which the accused has been found guilty."[58] Generally, this rule "only require[s], as a threshold, a reasonable linkage between the offense and alleged effect thereof."[59] The difficulty, of course, is in determining the range of what effect is

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[46] *Id.*

[47] *Id.* at 700.

[48] *Id.* at 699 (quoting MCM, *supra* note 6, RCM 1001(b)(5)(D) discussion).

[49] *Id.* at 700.

[50] *Id.*

[51] *Id.*

[52] 51 M.J. 401, 405 (1999) (listing the factors as: "(1) the strength of the Government's case, (2) the strength of the defense case, (3) the materiality of the evidence in question, and (4) the quality of the evidence in question").

[53] *See Malhiot*, 60 M.J. at 700.

[54] *Id.* at 702.

[55] 22 M.J. 305 (C.M.A. 1986) (holding that if the court of criminal appeals can determine that in the absence of any error, the sentence would have been of a certain magnitude, it can cure any error by reassessing the sentence; if the error is of constitutional magnitude, the court must be satisfied beyond a reasonable doubt that its reassessment cured any error).

[56] *Malhiot*, 60 M.J. at 702. There appears to be a discrepancy between the punishment listed in the beginning of the opinion, which does not list any forfeitures, and the punishment as reassessed, which included total forfeiture of all pay and allowances for eight months.

[57] "The trial counsel may introduce evidence of military or civilian convictions of the accused." MCM, *supra* note 6, R.C.M. 1001(b)(3)(A).

[58] *Id.* R.C.M. 1001(b)(4).

[59] United States v. Witt, 21 M.J. 637 (A.C.M.R. 1985).

"directly relating to or resulting from" the offense.[60] A case that illustrates the breadth of that range is *United States v. Anderson*,[61] a case that involved the admission of a U.S. Senate Report as aggravation evidence.

A military judge sitting at a general court-martial convicted Anderson of various offenses involving child pornography, including transporting child pornography in interstate commerce.[62] During sentencing and over defense objection, the military judge admitted as RCM 1001(b)(4) aggravation evidence a portion of a U.S. Senate Report prepared in conjunction with amendments to the Child Pornography Prevention Act of 1995.[63] The evidence at issue specifically addressed the impact of child pornography on the victimized children, particularly the physical and psychological harm they experience.[64] The evidence also addressed the impact on society as a whole, the danger to children by sexualizing minors, and "the resulting unwholesome environment that affects the psychological and emotional development of children in general."[65] Lastly, the report addressed the impact of such pornography on, and its illicit use by, pedophiles, child molesters, and child pornographers.[66] The defense counsel argued that the report was "too attenuated" to qualify as aggravation evidence, and even if the evidence were admissible under RCM 1001(b)(4), the evidence's probative value was substantially outweighed by its prejudicial effect under MRE 403.[67]

The Air Force court perceived three different questions that needed to be answered:

> (1) Are the children depicted in pornographic images properly classified as "victims" for the purposes of the application of the R.C.M. 1001(b)(4)? (2) If so, does the fact that these children are not specifically identified preclude consideration of impact evidence? (3) Is the admitted portion of the Senate Report sufficiently "direct" to qualify for admission as impact evidence under R.C.M. 1001(b)(4)?[68]

The court agreed with the majority of federal courts that the children depicted in pornography are the direct victims of such offenses because they suffer direct psychological and emotional harm through the invasion of their privacy.[69] Regarding the second question, the court agreed with the Coast Guard Court of Criminal Appeals in *United States v. Marchand*,[70] which held that RCM 1001(b)(4) does not require child pornography victims to be identified particularly "for the sentencing authority to properly benefit from impact testimony relating to the increased risk of behavioral problems."[71] With respect to the last question, the court observed that although the relationship of the appellant's offenses must be direct, "there is no requirement that the impact be limited to matters that have already occurred."[72] In very clear language, the court observed, "[t]he increased predictable risk that child pornography victims may develop psychological or behavioral problems is precisely the kind of information the sentencing authority needs to fulfill" its function of discerning a proper sentence.[73]

The court also discussed the rule's limit. The court determined that in the context of Anderson's case, the "impact upon the children used in the production of the pornography is sufficiently direct" and could assist the sentencing authority in evaluating the consequences of the appellant's behavior.[74] The court did not specifically analyze Anderson's argument that the impact of child pornography on society and children in general, and the impact on and uses made of child pornography by

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[60] For example, in *United States v. Rust*, 41 M.J. 472 (1995), the CAAF held that the lower Air Force court's determination that a murder-suicide note's admission fell outside RCM 1001(b)(4) ambit because the connection between appellant's dereliction of duty and a murder-suicide was "too indirect" to qualify as an effect directly related to or resulting from the appellant's misconduct. *Rust*, 41 M.J. at 478.

[61] 60 M.J. 548 (A.F. Ct. Crim. App. 2004), *review denied*, 60 M.J. 403 (2004).

[62] *Id.* at 549.

[63] *Id.* at 555.

[64] *Id.* at 556.

[65] *Id.*

[66] *Id.*

[67] *Id.*

[68] *Id.* at 555.

[69] *Id.*

[70] 56 M.J. 630 (C.G. Ct. Crim. App. 2001).

[71] *Anderson*, 60 M.J. at 556.

[72] *Id.*

[73] *Id.*

[74] *Id.* at 557.

other offenders, was "too much to lay at his feet."[75] Perhaps as a signal to the field, however, the court did state, that it did not necessarily agree with his argument.[76] Nonetheless, because the military judge, at the invitation of the trial counsel, restricted his consideration of the evidence at issue to only the impact on the children depicted, and not on society, the court held that the military judge gave the evidence its proper weight.[77] With respect to the required MRE 403 balancing test, the court was satisfied that the military judge did conduct that test by virtue of his stated reliance on *United States v. Witt*.[78]

The exploding number of child pornography cases within the military justice system makes *Anderson* a case of great import.[79] If trial counsel want to introduce similar evidence, *Anderson* is strong support for that proposition. The question of how far counsel can push the envelope to include evidence of impact on children or society at large is not answered definitively. The *Anderson* court certainly gives ammunition to the government to push that limit in its discussion regarding how much can be laid at an accused's feet.[80] If a child does not have to be identified with any degree of particularity to argue future impact, is there a principled distinction for forbidding admission of impact evidence on society at large? Is not such general impact evidence as speculative as the "increased predictable risk that child pornography victims *may* develop psychological or behavioral problems"?[81] Given the CAAF's refusal to grant review on *Anderson*, Army practitioners can point to the case to support admission of the Senate Report or similar evidence. Nonetheless, in seeking such evidence's admission or in deciding to offer societal impact evidence, counsel must always be aware of the possible impact on the case on review. Trial counsel should always ask, "Do I really need to get this evidence admitted to secure a fair and just sentence?"

Switching from victim impact evidence to unit impact evidence, the Coast Guard Court of Criminal Appeals in *United States v. Fay*,[82] addressed several alleged impacts on Fay's unit as a result of his drug involvement. A military judge sitting as a special court-martial convicted Fay of wrongfully distributing ecstasy and MET, a Schedule II controlled substance, and wrongful possession of marijuana.[83] At the presentencing stage, the trial counsel called the command's port services branch chief, who testified that the appellant had been assigned to the unit for approximately six months.[84] Without defense objection, the witness further testified that the nature of the appellant's offenses had a negative impact on the unit's mission by causing the command to devote thirty to forty man-hours working on a better way of managing people to prevent similar acts in the future.[85] The witness also testified that the appellant's crimes had an adverse impact on the efficiency of the unit because of lowered morale among permanently assigned personnel who expressed concern about being lumped together with disciplinary-problem personnel.[86] Further, the unit used close supervision to ensure that the appellant was doing his job, including five musters per day and more frequent inspections of his room for cleanliness.[87] Because the defense did not object to the admission of any of this testimony, Fay alleged that the military judge committed plain error in admitting it.[88] Fay argued that the evidence did not "show any specific impact caused by or resulting from Appellant's actions."[89] The court made short work of the appellant's allegation. The court found that of the evidence offered, only the testimony regarding the need for close supervision, musters, and inspections "might be clear or obvious error."[90] Nonetheless, in the court's view, the testimony had little, if any, impact on the sentence, and the court rejected appellant's assignment of error.[91]

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[75] *Id.*

[76] *Id.*

[77] *Id.*

[78] 21 M.J. 637 (A.C.M.R. 1985) (holding that if an objection is made under MRE 403, the military judge must apply MRE 403's balancing test).

[79] A LEXIS-NEXIS search using the search terms "child pornography" with a two-year date restriction within the Armed Forces Court of Appeals and the Courts of Criminal Appeals source returned 108 cases.

[80] *See supra* note 75 and accompanying text.

[81] *Anderson*, 60 M.J. at 548 (emphasis added).

[82] 59 M.J. 747 (C.G. Ct. Crim. App. 2004), *review denied*, 60 M.J. 46 (2004).

[83] *Id.*

[84] *Id.* at 748.

[85] *Id.*

[86] *Id.*

[87] *Id.*

[88] *Id.*

[89] *Id.* Rule for Courts-Martial 1001(b)(4) does permit the government to introduce "evidence of significant adverse impact on the mission, discipline, or efficiency of the command directly and immediately resulting from the accused's offense." MCM, *supra* note 6, R.C.M. 1001(b)(4).

[90] *Fay*, 59 M.J. at 748.

[91] *Id.*

Although the Coast Guard court made rather short work of the assignment of error, the case shows the line that must be drawn between the effects of a Soldier's misconduct on the unit and the administrative consequences that flow from that misconduct. Courts have found that evidence such as reduced unit efficiency,[92] the emotional reaction to the unauthorized wearing of uniform patches, badges, and tabs,[93] and the revocation of a required security clearance[94] is directly related to or resulting from the misconduct and, therefore, admissible. On the other hand, however, musters, inspections, and close supervision do not result from the misconduct, but are independent command reactions thereto. As shown below, the same is true for the administrative consequences of a court-martial itself.

United States v. Stapp,[95] is a case that decided whether it was proper for a Soldier's first sergeant to testify concerning the effects of the court-martial itself as aggravation evidence under RCM 1001(b)(4). The appellant was found guilty of various offenses involving a teenage runaway who hid in the barracks at Fort Lewis.[96] At trial, the military judge admitted, over defense objection, the first sergeant's testimony that the unit was unable to recover properly from a field exercise because of the court-martial.[97] He also testified that several other noncommissioned officers were involved in the court-martial and had to leave their duties to attend the trial.[98] Further, the first sergeant testified that his presence had an adverse impact on unit morale because a subordinate noncommissioned officer had to stand in for him at a training meeting while the he testified.[99]

Beginning its analysis, the court framed its premise succinctly: While "evidence of the natural and probable consequences of the offenses of which an accused has been found guilty is ordinarily admissible at trial," the accused is not responsible for "*every* circumstance or consequence of misconduct," and such evidence is not admissible.[100] Further, the court pointed out that the offense "must play a material role in bringing about the effect at issue."[101] Absent such a connection, the military judge "should not admit evidence of an alleged consequence if an independent, intervening event played the only important part in bringing about the effect."[102]

Applying that analytical framework to the case here, the court found that the military judge erred when he permitted the first sergeant to testify concerning the administrative effects of the court-martial itself.[103] Because the discretion to allow or direct a Soldier to attend a court-martial as either a witness or a spectator belongs to the unit commander and the discretion to order production of witnesses at trial during presentencing belongs to the military judge, the court reasoned that the exercise of such discretion cannot be attributed to an accused.[104] Further, "evidence of the administrative burden of the court-martial process is ordinarily not" proper unit impact evidence admissible under RCM 1001(b)(4).[105] The court buttressed its conclusion with the probable consequence of permitting such evidence: "If we were to conclude otherwise, trial counsel would be able to argue to the sentencing authority at trial that an accused may be punished more harshly for the inconvenience of the trial."[106]

Also as part of the government's case, the runaway girl's mother testified to her daughter's emotional state and need for professional counseling and to her difficulty in retrieving her daughter's belongings from the barracks.[107] On cross-examination, the defense counsel sought to test the mother's credibility and basis for her opinions by asking whether she had

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[92] United States v. Key, 55 M.J. 537 (A.F. Ct. Crim. App. 2001) (holding that impact on unit efficiency caused by removal of the appellant and a co-accused were a direct result of the charged misconduct).

[93] United States v. Armon, 51 M.J. 83 (1999).

[94] United States v. Thornton, 32 M.J. 112 (C.M.A 1991).

[95] 60 M.J. 795 (Army Ct. Crim. App. 2004).

[96] *Id.* at 796-97.

[97] *Id.* at 799.

[98] *Id.*

[99] *Id.*

[100] *Id.* at 800.

[101] *Id.* at 800-01.

[102] *Id.* at 801.

[103] *Id.*

[104] *Id.*

[105] *Id.*

[106] *Id.* Perhaps a weightier argument in a deployed setting.

[107] *Id.* at 800.

been aware that her daughter was hiding in the barracks and attempting to avoid detection.[108] The military judge prevented the defense counsel from doing so.[109] The court held that the military judge abused his discretion on several points.[110] First, the court found no evidence that the appellant had anything to do with the mother's difficulty in retrieving her daughter's belongings.[111] Additionally, the military judge's refusal to permit cross-examination of the mother was error because the evidence being sought was logically and legally relevant to determining an appropriate sentence.[112] The court noted that such evidence was relevant to the defense's impeachment effort because the mother's awareness of her daughter's efforts to evade detection and her willingness to stay at Fort Lewis "may have indicated a motive for [the mother] to fabricate or exaggerate certain aspects of her testimony to paint [her daughter] in a more favorable light."[113] The mother's ignorance of such facts could have, in the court's judgment, "undercut the weight given her testimony concerning the psychological and physical effects" on the daughter.[114] As a result of the military judge's cumulative errors and the partial improvidence of the appellant's guilty plea, the court reassessed the sentence.[115]

Fay and *Stapp* should serve as stop signs for overly aggressive trial counsel offering aggravation evidence. *Anderson*, however, offers support for a wide RCM 1001(b)(4) scope. The Army and Coast Guard's courts' approaches are conservative and tied to the text of RCM 1001(b)(4). The Air Force court's tack, while acknowledging the apparent limit of the rule's language, offers support for a more aggressive approach, at least with respect to child pornography cases. This more expansive approach could be explained by the lack of a "victim" who can come into court and testify about the personal effects of child pornography. If a witness testifies, the appellate courts will apparently apply a stricter approach and require a direct connection. For the Army practitioner, the Army court's admonition that the offense "must play a material role in bringing about the effect at issue"[116] should serve as bright red light through which counsel jumps at his own peril.[117]

Bringing up the Rear: Sentencing Argument

Before the sentencing authority fashions a sentence, counsel for both sides have the opportunity under RCM 1001(g) to argue for an appropriate sentence.[118] The limits of proper argument have been much discussed in various court opinions.[119] *United States v. Rodriguez*[120] addresses an important facet of proper argument: whether racial references during a sentencing argument are subject to a prejudice analysis.[121]

Before a military judge at a general court-martial, Rodriguez pled guilty to conspiracy to commit larceny, making false official statements, wrongfully selling and disposing of military property, wrongful appropriation, and larceny.[122] During her sentencing argument, the trial counsel stated: "These are not the actions of somebody who is trying to steal to give bread so his child doesn't starve, sir, some sort of a Latin movie here. These are actions of somebody who is showing that he is greedy."[123] The defense counsel objected to the trial counsel's use of the term "steal" and to the trial counsel's apparent comment on pretrial negotiations,[124] but the defense counsel did not object to the reference to a Latin movie[125] The Navy-

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[108] *Id.*

[109] *Id.*

[110] *Id.* at 802.

[111] *Id.*

[112] *Id.*

[113] *Id.*

[114] *Id.*

[115] *Id.* at 803.

[116] *Id.* at 800-01.

[117] During an airborne operation, a red light indicates that a jump should not be made. If a jumper intends to exit the aircraft anyway, the jumpmaster will not prevent him from doing so. U.S. DEP'T OF ARMY, FIELD MANUAL 57-220, STATIC LINE PARACHUTING TECHNIQUES AND TRAINING 10-12a. (19 Aug. 1996).

[118] MCM, *supra* note 6, R.C.M. 1001(g).

[119] *See, e.g.*, Aldykiewicz, *supra* note 3, at 123-27 (cataloguing last year's cases concerning argument).

[120] 60 M.J. 87 (2004).

[121] *Id.* at 88.

[122] *Id.* at 87.

[123] *Id.* at 88.

[124] *Id.*

Marine court could discern no logical basis for the comment and found the comment improper and erroneous.[126] The court also stated that the comment was a gratuitous reference to race, not argument based on racial animus, nor argument likely to evoke racial animus.[127] The lower court then tested for prejudice and found none.[128] The Navy Judge Advocate General certified the issue whether the lower court erred when it found that the portion of the trial counsel's sentencing argument comparing Private Rodriguez' actions to a Latin movie was "merely a 'gratuitous' reference to race" as opposed to an argument based upon racial animus and therefore did not require reversal of the sentence.[129]

The CAAF found that the parties framed a different question: Whether such an argument should be tested for prejudice.[130] The government argued that like other improper arguments, the improper reference to race or ethnicity should be tested for prejudice.[131] Rodriguez, however, pointed out that a statement about race is different, and any argument with such a statement should be deemed *per se* prejudicial.[132] The CAAF did not adopt the appellant's point, noting that the majority of federal jurisdictions test for prejudice in such cases.[133] Where there is no prejudice to an accused, the CAAF noted that it will not forsake society's other interests in the timely and efficient administration of justice, the interests of victims, and in the military context, the potential impact on national security.[134] Based on the specific facts of the case, including the nature of the improper argument and that it occurred before a military judge alone during presentencing, the CAAF held that there was no prejudice to a substantial right of the accused.[135] The CAAF did note that "it is the rare case indeed, involving the most tangential allusion, where the unwarranted reference to race or ethnicity will not be obvious error."[136]

The CAAF's decision not to adopt a *per se* rule in this area of the law is well-reasoned and strikes a fair balance of interests at stake. Had the argument been made before members, the finding of no prejudice might have very well been different.[137] The lesson for counsel, however, is very clear: do not make unwarranted, racially-based prosecutorial arguments. Should a trial counsel make a racially-based argument, the burden likely will be overwhelming on appeal.

At the Finish Line: Fines and Contingent Confinement

The CAAF addressed the issue of fines and contingent confinement in *United States v. Palmer*.[138] In this case, the appellant separately conspired with two employees of the Navy Exchange to steal automotive parts and tires from the Exchange, which the appellant would then use or sell in his private business.[139] The aggregate value of the illegally obtained items exceeded $100,000.[140] The court-martial found Palmer guilty of conspiracy and larceny and fined him $30,000, which if not paid would result in an additional period of twelve months confinement (on top of the thirty months of adjudged confinement).[141] After approving the sentence on 31 December 2000, the convening authority notified Palmer that he had thirty days to pay the fine and after thirty days, the fine would be considered delinquent.[142] On 29 January 2001, the

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[125] *Id.*

[126] *Id.*

[127] *Id.*

[128] *Id.*

[129] *Id.*

[130] *Id.*

[131] *Id.* at 89.

[132] *Id.*

[133] *Id.* (citing several federal cases).

[134] *Id.* at 89-90.

[135] *Id.* at 90.

[136] *Id.*

[137] *Id.* ("Our concern with unwarranted statements about race and ethnicity are magnified when the trial is before members.").

[138] 59 M.J. 362 (2004).

[139] *Id.*

[140] *Id.*

[141] *Id.* at 363.

[142] *Id.*

appellant requested an additional thirty days to pay the fine.[143] The convening authority granted an extension until 9 February 2001.[144] On that date, appellant paid $5,000.[145] On 13 February 2001, he paid $17,175, leaving a $7,825 balance.[146] Because the appellant had not paid the fine by the extension date, the convening authority ordered a hearing under the provisions of RCM 1113(d)(3)[147] to determine whether the contingent confinement should be executed.[148] On 14 February 2001, the hearing officer determined by a preponderance of evidence that appellant was delinquent; failed to show he was indigent or that he made good faith efforts to pay; and that there was evidence that he had the intent to hide assets.[149] The hearing officer recommended that the appellant be given until 1 March 2001 to pay the balance and, if not paid, to serve an additional ninety-five days of confinement.[150] On 28 February 2001, the convening authority informed Palmer that he adopted the hearing officer's recommendations.[151] On 8 March 2001, when no further monies were received, the convening authority remitted the remaining balance and ordered executed the additional ninety-five days of confinement.[152] On 9 March 2001, Palmer paid $3,000 to the Hickham Air Force Base Finance and Accounting Office.[153] On 22 March 2001, the convening authority rejected the $3,000 and informed the appellant that the remission and execution of confinement had not changed.[154] The issues on appeal were whether the Air Force court erred in its treatment of the appellant's failure to pay his debt, his 9 March 2001 partial payment, or the execution of the contingent confinement.[155] The CAAF affirmed the lower court and found that the convening authority's action were proper.[156]

The CAAF began its analysis by noting that RCM 1003(b)(3) provides that "a fine may be accompanied by a provision in the sentence that, in the event the fine is not paid, the person fined shall, in addition to any period of confinement adjudged, be further confined until a fixed period considered an equivalent punishment to the fine has expired."[157] The court noted that there was no dispute that the appellant received all the due process rights to which he was entitled.[158] Nonetheless, Palmer argued that he was entitled to consideration of something short of contingent confinement because he made good faith efforts to pay the fine.[159] He further asserted that the government's acceptance of the $3,000 payment was a constructive waiver of the 1 March 2001 deadline and a constructive retraction of the convening authority's 8 March 2001 order.[160] Regarding the first argument, the CAAF observed that there was a substantial basis in the record to support the hearing officer's finding that the appellant did not make good faith efforts to pay the fine.[161] The court noted that the record supported a finding that the appellant tried to remove assets from his control and did not take reasonable steps to liquidate assets to make timely payment.[162] Further, the appellant's payment history supported the finding that he did not make good

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[143] *Id.*

[144] *Id.*

[145] *Id.*

[146] *Id.*

[147] Rule for Courts-Martial 1113(d)(3) provides:

> (3) Confinement in lieu of fine. Confinement may not be executed for failure to pay a fine if the accused demonstrates that the accused has made good faith efforts to pay but cannot because of indigency, unless the authority considering imposition of confinement determines, after giving the accused notice and opportunity to be heard, that there is no other punishment adequate to meet the Government's interest in appropriate punishment.

MCM, *supra* note 6, R.C.M. 1113(d)(3).

[148] *Palmer*, 59 M.J. at 363.

[149] *Id.*

[150] *Id.* at 363-64. The days of confinement represented the proportional amount of fine remaining to be paid. *Id*. at 364 n3.

[151] *Id.* at 364.

[152] *Id.*

[153] *Id.*

[154] *Id.* The CAAF noted that the Commander, 15th Air Base Wing, Hickham Air Force Base, took all the actions relevant to the issue under various authorities granted and delegated to him. *Palmer*, 59 M.J. at 364 n.5.

[155] *Id.* at 363.

[156] *Id.*

[157] *Id.* at 364 (quoting MCM, *supra* note 6, RCM 1003(b)(3)).

[158] *Id.* at 365.

[159] *Id.*

[160] *Id*.

[161] *Id.*

[162] *Id.*

faith efforts to pay the fine.[163] The CAAF also found support in the record to conclude that Palmer was not indigent.[164] Under these circumstances, the court held that the convening authority was not obligated to withdraw or amend his 8 March 2001 action when the appellant paid $3,000.[165] Finally, the court noted that after the convening authority remitted the balance on the fine, there was no fine to which to apply the $3,000 payment.[166] Finally, the court declared that absent indigence, the appellant's unilateral efforts to make partial payment did not create any obligation on the convening authority to accept payment or amend his prior action remitting the fine and executing the contingent confinement.[167]

For counsel who have concerns about how to implement RCM 1003(b)(3)'s provision for increasing confinement based on the nonpayment of a fine, *Palmer* serves to dissipate some of the fog. To be sure, a fine as an element of punishment may be relatively rare, but in the right case, such as in *Palmer*, it can be an effective motivation for a convicted servicemember to express remorse for his misconduct.

Effective Date of Life Without Eligibility for Parole (LWOP)

The last case on last year's hit parade is *United States v. Ronghi*.[168] This case involved the effective date of the punishment of confinement for LWOP, which was part of the National Defense Authorization Act for Fiscal Year 1998, signed into law on 18 November 1997, and incorporated into the *Manual* on 11 April 2002.[169]

On 13 January 2000, Ronghi indecently assaulted, forcibly anally sodomized, and murdered with premeditation an eleven year-old girl while deployed with the 82d Airborne Division in Kosovo.[170] At trial, both the defense counsel and the appellant agreed that the maximum authorized punishment included LWOP.[171] On 1 August 2000, a court-martial panel of officer members sentenced appellant to LWOP, a dishonorable discharge, forfeiture of all pay and allowances, and reduction to the lowest enlisted grade.[172] The convening authority approved the sentence as adjudged.[173] The CAAF granted review to determine if LWOP was an authorized punishment at the time of appellant's court-martial.[174] The CAAF affirmed the case.[175] The court observed that absent a clear direction by Congress to the contrary, a law takes effect on the date of its enactment; therefore, the punishment was authorized for an appropriate offense on 19 November 1997, the day after its enactment.[176] The executive order which incorporated the punishment also stated that it would apply only to offenses committed after 18 November 1997.[177] Further, the court found that there was no conflict between the *2000 Manual for Courts-Martial* and the statute authorizing LWOP.[178] Indeed, as the court noted, the punishment was not a new type of punishment outside those authorized by RCM 1003, but was an authorized longer term of confinement.[179] The court, therefore, held that LWOP was an authorized punishment at the time of appellant's court-martial and for appellant's offenses.[180]

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[163] *Id.* The court noted that he made his first payment on the last day of the first extension (and then only one-sixth of the amount owed); his second payment was after the extension (leaving a substantial unpaid balance); his last payment was a month beyond the deadline. *Id*.

[164] *Id.* The court observed that the appellant did not contend that he was indigent and his appellate defense counsel conceded that he was "technically" not indigent. *Id*.

[165] *Id.*

[166] *Id.* at 366.

[167] *Id.*

[168] 60 M.J. 83 (2004).

[169] *Id.* at 83.

[170] *Id.* at 84.

[171] *Id.*

[172] *Id.*

[173] *Id.*

[174] *Id.*

[175] *Id.* at 86.

[176] *Id.*

[177] *Id.* at 85.

[178] *Id.*

[179] *Id.*

[180] *Id.* at 86.

Conclusions

The cases in sentencing this year clarified some issues while leaving others unresolved. Because sentencing occurs in the vast majority of courts-martial, counsel in the "pits" are well-advised to keep abreast of the newest developments in this areas of the law. The price of failure may be a rehearing with all the attendant costs, psychological (for any victims) or financial (for the government). Although rule-driven, the outer limits of RCM 1001(b) remain to be fixed. In any case, the trial counsel is well-advised to employ a reasoned, strategic approach to the introduction of evidence that may be close to the line. While *Anderson* and *Fay* are cases where counsel may have employed such analysis, *Malhiot*, *Stapp* and *Rodriguez* are reminders of the pitfalls that await counsel. Trial counsel, who will no doubt be long gone from the assignment that gave rise to the issue, must nonetheless take the long view and ensure that justice is done at that trial on that date and for all time.

Book Review

FOUNDING MOTHERS: THE WOMEN WHO RAISED OUR NATION[1]

REVIEWED BY MAJOR MARY E. CARD[2]

> *But as I got to know these women, reading their letters and their recipes (I've decided not to dress a whole head of cow, but Harry Choke Pie is delicious), I came to the conclusion that there's nothing unique about them. They did—with great hardship, courage, pluck, prayerfulness, sadness, joy, energy, and humor—what women do. They put one foot in front of the other in remarkable circumstances. They carried on. They truly are our Founding Mothers.*[3]

I. Introduction

Despite using a wide range of historical primary sources[4] and providing short biographies of famous and not so famous women of the fourteen-year period surrounding the Revolutionary War, Cokie Roberts fails to glorify the women who raised our nation. Instead, Ms. Roberts minimizes the contributions of these women by stating, for example, there was "nothing unique about them"[5] and concluding the women should be praised because they "made the men behave."[6] Additionally, while Ms. Roberts provides a wealth of historical information, she fails to provide much analysis or meaningful insight into the lives of the women she profiles and often adds anti-feminist commentary in the form of "glib quips or superfluous recapitulations."[7] Ms. Roberts's thesis is that the success of the new nation was due to the efforts of the women, mostly married with children, whom she defines as the founding mothers.[8] Yet, at the conclusion of her book, she still identifies and defines these women by their "male attachments"[9] and offensively provides recipes.

A fair reading of this book can yield not only pride in the accomplishments of the women profiled, but also a sense of anger that these trail-blazing women are still defined by the recipes they contributed. This review will discuss the author's background and the book's organization and content; it will also analyze several of the book's weaknesses and strengths, including its modern day applicability to military families.

II. Background

Ms. Roberts graduated with a degree in political science in 1964 from prestigious Wellesley College. The mission of Wellesley College is to "provide an excellent liberal arts education for women who will make a difference in this world."[10] It can be assumed that Wellesley is a bastion for the empowerment of women and advancing feminist world views.[11] After graduation, Ms. Roberts, the daughter of two representatives of Congress, became a congressional journalist and public policy analyst.[12] For the last twenty years, Ms. Roberts has served as a correspondent for American Broadcasting

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[1] COKIE ROBERTS, FOUNDING MOTHERS: THE WOMEN WHO RAISED OUR NATION (2004).

[2] U.S. Army. Written while assigned as a student, 53d Judge Advocate Officer Graduate Course, The Judge Advocate General's Legal Center and School, U.S. Army, Charlottesville, Virginia.

[3] ROBERTS, *supra* note 1, at xx (Introduction).

[4] *Id.* at 290-348 (citing to multiple primary sources such as personal letters, pamphlets, military records, songs, poems, and recipes).

[5] *Id.* One could interpret Ms. Roberts as saying that these women represent millions of women, famous and not so famous, who serve their country and their families everyday. The overall impression that the book leaves with the reader, however, is more along the lines of diminishing the value of these women as opposed to lauding their significant and vast achievements.

[6] *Id.* at xvii.

[7] Amanda Fortini, *Books In Brief: Nonfiction*, N.Y. TIMES, May 9, 2004, *available at* http://www.nytimes.com/ 2004/05/09/books/review/0509books-briefs.html?ex=1115438400&en=0dbf0af9a7c0d012&ei=5070.

[8] ROBERTS *supra* note 1, at 277.

[9] *Id.* at 279.

[10] *See* Wellesley College, Mission Statement, *at* http://www.wellesley.edu/Welcome/college.html (last visited Sept. 9, 2004).

[11] *See generally id.* (outlining the mission of Wellesley and describing the college as a distinguished leader in the education of women). The term "feminist" is used throughout this paper. "[A] precise, or even meaningful, definition of feminism has perplexed many lexicographers, writers both female and male, and feminists themselves." JANE MILLS, WOMAN WORDS: A DICTIONARY OF WORDS ABOUT WOMEN 87 (1989). Therefore, for the purposes of this paper, feminist is defined as a person who believes in political, economic, and social equality for women and in eradicating gender discrimination.

[12] *See* Women's Equity Resource Center, *Cokie Roberts Biography*, *available at* http://www/edc.org/WomensEquity/women/roberts.htm (last visited Sept. 11, 2004).

Corporation News and National Public Radio (NPR).[13] She is a prolific writer and has received fifteen honorary degrees.[14] Ms. Roberts has received many distinguished awards including the Edward R. Murrow Award and was the first broadcast journalist to win the Everett McKinley Dirksen Award.[15] Overall, she has an impressive background and a history of profound thought and award winning analysis.

II. Organization and Content

Noting the analytical background of the author, it is disappointing that her book did not take the analysis of the founding women of our nation to a deeper level. Organizationally and stylistically, however, the book has many merits. The work is neatly organized in a chronological format beginning with the road to revolution and the time period before 1775. It then moves on to trace the contributions of women through independence, war and peace, and concludes with the drafting of the constitution and the first election. The purpose of the work as stated in the introduction and ultimately in the conclusion is that "a new nation had been fought for, on the field of battle and in the forum of free debate, and it would survive. And its success was in no small part due to the efforts of the women."[16] Ms. Roberts attempts to achieve this purpose by profiling many women including: Eliza Lucas Pinckney, Kitty Greene, Deborah Franklin, Molly Pitcher, Margaret Corbin, Mercy Otis Warren, Abigail Adams, Martha Washington, Sarah Livingston Jay, Mary White Morris, and Dolley Madison.[17] To the author's credit, many of these women are famous for the contributions they made on their own, without a nexus to their famous spouses. The author, however, gives far more pages of text to famous mothers such as Abigail Adams and Martha Washington than she does to less famous yet fearless female Soldiers and mothers such as Margaret Corbin and Molly Pitcher.[18]

Additionally, the author does not assume too much knowledge on the part of the reader in terms of the women profiled and does provide essential context and historical background for the reader to evaluate. The author assumes, however, that the women most deserving of note were, for the most part, married women and mothers. This is ironic as one of the few single women profiled, Eliza Pinckney, exemplified that "her legal rights were considerably greater than those of married women."[19] Ms. Roberts missed the opportunity to point out that single women had greater opportunity to trail-blaze than their married counterparts.[20] The primary criticism of this work is that the book is mostly short stories full of facts, but lacks much analysis, teaching points, or lessons learned.

One of the single women profiled was actually a widow, Margaret Corbin, who fought bravely as a Soldier after her husband's death. It is unknown if the stories of single women are lost or non-existent or if the author selectively discounted any stories of a woman who was not literally, as well as figuratively, a mother. Therefore, the scope of this book is very limited and does not offer much in the way of inspiration to single women or women without children.

Finally, due to the chronological organization, it is difficult to see the major themes or issues addressed. The book contains many examples of issues that founding mothers faced and the issues that women still face today. The author's themes, however, were buried in each of the chapters. It would have been more effective if Ms. Roberts outlined the book by topic. For example, the author could have chosen to write chapters on how women raised families alone, fought as Soldiers, endured separations, and advocated a myriad of issues through written publication. To her credit, the author relies almost exclusively on primary sources and thoroughly researched the material before writing the book. She also provides some supplementary materials in the form of sketches of the women profiled. The author also included offensive supplementary materials that completely detract from the overall message of the book. By including recipes, Ms. Roberts subtly intimated

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[13] *Id.*

[14] *Id.*

[15] *See* NPR People, *Cokie Roberts, NPR Biography*, *at* http://www.npr.org/about/people/bios/croberts.html (last visited Sept. 18, 2004). The Edward R. Murrow Award is the highest honor in public radio and the Everett McKinley Dirksen Award is for outstanding coverage of Congress. *Id.*

[16] ROBERTS, *supra* note 1, at 277. Ironically, the last line of the book is a quote from George Washington recognizing the contributions of the founding mothers. It is curious that the final words of a book on the founding mothers comes from a founding father. It would perhaps have been more powerful for the author to end with a female voice as opposed to using a male one to ratify her purpose.

[17] *Id.*

[18] *Id.*

[19] *Id.* at 11. Ms. Roberts merely states that Ms. Pinckney had considerably greater legal rights as a single or widowed woman, but does not provide any additional explanation.

[20] Ms. Roberts provides a cursory view of single women and did not emphasize that at that time single women did not have as many distractions or responsibilities as their married counterparts.

that a woman's place then and perhaps now is still in the kitchen. Even worse, was the inclusion of a "cast of characters"[21] where the author pitifully apologizes for defining "these wonderful women by their male attachments"[22] and states that they are "recognizable only because of the men in their lives."[23] For example, the author states that John Adams was the "husband of Abigail Smith Adams."[24] The author could have, and should have, defined these women by their own achievements: Abigail Smith Adams could have been defined as the Champion of the Education of Women.[25] Ms. Roberts seems to say these women are founding mothers based solely on their marital relationship to the founding fathers, rather than in their own right and due to their own accomplishments.

III. Analysis

One of the major flaws of this book is that the author, while having a feminist minded education and over twenty years of analytical experience in her avowed profession, has written an anti-feminist and non-analytical book. Some may argue that the purpose of this book might not be to advance the cause of feminism, but how can it not be? When one adopts the purpose of writing on the women who built our nation, feminism must be a part of the discussion. Including recipes and defining a woman by her husband is contrary to forward feminist minded thinking.

One of the most inspirational profiles in the book is of Mercy Otis Warren.[26] Mercy Warren took on the most controversial issue of her time—British laws—and entered into the exclusively male dominated world of political propaganda and activism. She also kept up a "lively private correspondence with some of the great men of the era" [27] and became the "bard of revolutionary ideals."[28] She essentially provided inspiration for the war and clearly played the role of "calling men to arms."[29] Instead of praising this female advocate, Ms. Roberts instead writes, "[i]t would be a mistake to see Mercy Warren as some latter-day feminist; she regularly defended the 'domestic sphere' as the proper place for women. While she was plotting and propagandizing she was also pursuing the 'womanly arts.'"[30] Ms. Roberts explains that Mercy Warren wrote that it was possible to both "raise proper children and write profound chapters as long as you arranged your time sensibly."[31]

Ms. Roberts must not understand feminism if she thinks that a woman who balances a demanding career and takes care of her family cannot be classified as a feminist. Ms. Roberts does not define feminism, yet she still decides who is and is not a feminist. Defending the domestic sphere is about defending the rights of women to choose to engage in the activities that have traditionally been undervalued and viewed as "women's work." Feminism itself is about having the choice of focusing solely on a career, or solely on pursuing the domestic arts, or tackling both. Renowned feminist Catharine McKinnon stated that feminists stand for "an end to enforced subordination, limited options, and social powerlessness"[32] and that feminists do not seek dominance over men as "it is a male notion that power means someone must dominate."[33] A feminist seeks "transformations in the terms and conditions of power itself."[34] Mercy Warren exercised the options available to her at the time and was a transformative woman whose power rested in the fact that she was, by choice, an activist and also a domestic artist.[35]

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[21] *See id.* at 279-82. Some of these women include: Abigail Smith Adams, Betsy Ross, Dolley Madison, Martha Washington, and Martha Jefferson.

[22] *Id.* at 279.

[23] *Id.*

[24] *Id*.

[25] *Id.* at 12.

[26] *Id.* at 45-54.

[27] *Id.*

[28] *Id*. at 48.

[29] *Id*. at 53.

[30] *Id*. at 49.

[31] *Id*.

[32] CATHARINE A. MACKINNON, FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW 22 (1987).

[33] *Id.* at 23.

[34] *Id.*

[35] Domestic artist is a term of art used by Ms. Roberts throughout her book, but is not defined.

Contrasting the description of Mercy Warren with that of "feminist" Judith Murray, it is difficult to understand the distinction. Judith Murray, similar to Mercy Warren, was also an accomplished and prolific writer. Ms. Murray wrote an essay on equality in 1779 and challenged that "the law acknowledged no separate act of a married woman."[36] Ms. Roberts affixed the label of "feminist"[37] to Judith Murray. It is curious whether Ms. Roberts is of the opinion that you can only be a feminist if you write articles solely on women's issues and do not practice the domestic arts.

Ms. Roberts neither understands feminism nor glorifies the contributions of women. Statements such as "making the men behave" and the women not being unique contribute to an underlying theme that the women only have an identity by virtue of whom they married. The cast of characters Ms. Roberts chose to write on seems to confirm this view. *Founding Mothers* seems to reinforce the Feminine Mystique[38] and not a modern day feminist ideal.

IV. Modern Day Applicability

Ms. Roberts's work is not entirely without use however, and can be used to extrapolate lessons learned for one specific community, that of the military spouse. A finely woven theme throughout this book is the impact of the preparations for war and war itself on the lives of the founding mothers. During current times in our "herstory"[39] and our many military operations, this book is useful from the standpoint of inspiring those women and men who are left behind as their spouses engage in varied deployments. Military spouses can perhaps take comfort in reading about both the shared challenges of corresponding with deployed spouses—doubling of roles, enduring the separation of families, and making difficult choices—and also women's impact on their military spouses.

The background and content for this book is the correspondence that took place in the form of letters between those separated due to the preparations for the Revolutionary War. In current times it is arguable that electronic forms of communication are the modern day equivalent of capturing the personal history and herstory of those impacted by war. While many spouses face the difficulty of phone and e-mail contact during deployments, the book details that one year passed between written correspondence between John and Abigail Adams.[40] The book is rather inspirational in that it shows the plight of the separated spouse and the many ways throughout the history of our nation that spouses and families have overcome periods of great trials and tribulations during war time.

The book also highlights the tremendous ways women stepped in to take care of families, finances, and estates while their husbands were away. Deborah Franklin is highlighted as one such heroine. She described herself as being forced to be both "father and mother"[41] which is a role that many spouses play during times of deployment. Additionally, Abigail Adams was profiled as a woman of courage who faced childbirth alone just as many modern day military spouses do.[42]

Separation of families is also a constant theme throughout the book and is exemplified by Abigail Adams statement regarding her husband that "in the 12 years we have been married I believe we have not lived together more than six."[43] Another example provided is that of George Washington traveling to see his wife Martha so they could spend their first Christmas together in four years.[44] There is comfort in shared experiences, and many modern day spouses of military members can relate to multiple holidays spent apart.

The book also highlights the difficult choices that Revolutionary War spouses made between choosing duty to family and duty to spouse. Martha Washington is profiled as having to make a difficult choice of caring for her family at home and

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[36] *Id*. at 252.

[37] *Id*. (stating in full, "Not only was Judith Murray a guest at a reception in the president's home, but Martha Washington paid a surprise call on the feminist a few days later so they could talk some more"). Even the use of the word "feminist" in the sentence sounds awkward and critical. It would have been helpful for Ms. Roberts to define feminism especially since she made a feminist determination on two of the leading characters in her work. Yet again, the book fails to achieve the next level of analysis.

[38] *See* BETTY FRIEDMAN, FEMININE MYSTIQUE (1962). Essentially "feminine mystique" is a theory that states the highest value and the only commitment for women is the fulfillment of their own femininity and that the only way for a woman to be a true heroine is to subscribe to the "housewife" and mother track only. *Id.*

[39] "Herstory" is intentionally used to replace the conventional use of the word history and to symbolize that most history is in fact the story of men's lives.

[40] ROBERTS, *supra* note 1, at 156.

[41] *Id.* at 33.

[42] *Id*. at 97.

[43] *Id*. at 70.

[44] *Id*. at 115.

balancing her duty to her husband who was stationed elsewhere.[45] Martha chose her husband over her family in much the same way that military spouses often pick up and leave parents and siblings to follow their spouses today. The book also serves to highlight the tremendous impact of women on their military spouse and their critical roles as advisor and confidant. John Adams went so far as to articulate this view by stating "I believe the two Howes [British Generals] have not very great women for wives . . . . A smart wife would have put Howe in possession of Philadelphia a long time ago."[46]

All of these examples can serve as inspiration and a historical perspective of the common struggles that the founding mothers and current military spouses and mothers (and fathers) share. Ms. Roberts offers neither much insight into how the women survived these struggles and challenges nor what coping mechanisms they perhaps employed, but merely offers the examples of the struggle. Nonetheless, examples of commonalities and shared struggles can inspire meaningful conversations and thus the book is an important work for military spouses.

V. Conclusion

In many ways Ms. Roberts completely misses the mark on the women who made such a permanently lasting mark on our nation. Either intentionally or unintentionally Ms. Roberts does not strongly and forcefully advocate that these women were truly unique and were worthy of an identity aside from that of "wife" and literal "mother" and cook. This book will probably earn its rightful place in Revolutionary War history as a solid, albeit, cursory look at the women who helped build our nation. This book will not earn a place among forward thinking and analytical feminist theory. Finally, it can certainly be inspirational for the women and men who are serving in the roles of both father and mother while their spouses are deployed. Essentially, the truly unique founding mothers of our nation were also the founding mothers of feminism and did so much more than simply "make the men behave."[47]

[45] *Id*. at 94.

[46] *Id.* at 101.

[47] *Id.* at xvii.

1. Resident Course Quotas

Attendance at resident continuing legal education (CLE) courses at The Judge Advocate General's School, U.S. Army (TJAGSA), is restricted to students who have confirmed reservations. Reservations for TJAGSA CLE courses are managed by the Army Training Requirements and Resources System (ATRRS), the Army-wide automated training system. If you do not have a confirmed reservation in ATRRS, you do not have a reservation for a TJAGSA CLE course.

Active duty service members and civilian employees must obtain reservations through their directorates of training or through equivalent agencies. Reservists must obtain reservations through their unit training offices or, if they are non-unit reservists, through the U.S. Army Personnel Center (ARPERCEN), ATTN: ARPC-OPB, 1 Reserve Way, St. Louis, MO 63132-5200.Army National Guard personnel must request reservations through their unit training offices.

Questions regarding courses should be directed to the Deputy, Academic Department at 1-800-552-3978, dial 1, extension 3304.

When requesting a reservation, please have the following information:
TJAGSA Code—181
Course Name—155th Contract Attorneys Course 5F-F10
Course Number—155th Contract Attorneys Course 5F-F10
Class Number—155th Contract Attorneys Course 5F-F10

To verify a confirmed reservation, ask your training office to provide a screen print of the ATRRS R1 screen, showing by-name reservations.

The Judge Advocate General's School, U.S. Army, is an approved sponsor of CLE courses in all states that require mandatory continuing legal education. These states include: AL, AR, AZ, CA, CO, CT, DE, FL, GA, ID, IN, IA, KS, KY, LA, ME, MN, MS, MO, MT, NV, NH, NM, NY, NC, ND, OH, OK, OR, PA, RI, SC, TN, TX, UT, VT, VA, WA, WV, WI, and WY.

2. TJAGSA CLE Course Schedule (August 2004 - September 2006)

Course Title	Dates	ATTRS No.
GENERAL		
53d Graduate Course	16 August 04—25 May 05	5-27-C22
54th Graduate Course	15 August 05—25 May 06	5-27-C22
167th Basic Course	31 May—23 June 05 (Phase I—Ft. Lee)	5-27-C20
	24 June—1 September 05 (Phase II—TJAGSA)	5-27-C20
168th Basic Course	13 September—6 October 05 (Phase I—Ft. Lee)	5-27-C20
	7 October—15 December 05 (Phase II—TJAGSA)	5-27-C20
169th Basic Course	3—26 January 06 (Phase I—Ft. Lee)	5-27-C20
	27 January—7 April 06 (Phase II—TJAGSA)	5-27-C20
170th Basic Course	30 May—22 June (Phase I—Ft. Lee)	5-27-C20
	23 June—31 August (Phase II—TJAGSA)	5-27-C20
171st Basic Course	12 September 06—TBD (Phase I—Ft. Lee)	5-27-C20

10th Speech Recognition Training	17—28 October 05	512-71DC4
17th Court Reporter Course	25 April—24 June 05	512-27DC5
18th Court Reporter Course	1 August—5 October 05	512-27DC5
19th Court Reporter Course	31 January—24 March 06	512-27DC5
20th Court Reporter Course	24 April—23 June 06	512-27DC5
21st Court Reporter Course	31 July—6 October 06	512-27DC5
6th Court Reporting Symposium	31 October—4 November 05	512-27DC6
187th Senior Officers Legal Orientation Course	13—17 June 05	5F-F1
188th Senior Officers Legal Orientation Course	12—16 September 05	5F-F1
189th Senior Officers Legal Orientation Course	14—18 November 05	5F-F1
190th Senior Officers Legal Orientation Course	30 January—3 February 06	5F-F1
191st Senior Officers Legal Orientation Course	27—31 March 06	5F-F1
192d Senior Officers Legal Orientation Course	12—16 June 06	5F-F1
193d Senior Officers Legal Orientation Course	11—15 September 06	5F-F1
12th RC General Officers Legal Orientation Course	25—27 January 06	5F-F3
35th Staff Judge Advocate Course	6—10 June 05	5F-F52
36th Staff Judge Advocate Course	5—9 June 06	5F-F52
8th Staff Judge Advocate Team Leadership Course	6—8 June 05	5F-F52S
9th Staff Judge Advocate Team Leadership Course	5—7 June 06	5F-F52S
2006 JAOAC (Phase II)	8—20 January 06	5F-F55
36th Methods of Instruction Course	31 May—3 June 05	5F-F70
37th Methods of Instruction Course	30 May—2 June 06	5F-F70
2005 JAG Annual CLE Workshop	3—7 October 05	5F-JAG
16th Legal Administrators Course	20—24 June 05	7A-270A1
17th Legal Administrators Course	19—23 June 06	7A-270A1
3d Paralegal SGM Training Symposium	6—10 December 2005	512-27D-50
17th Law for Paralegal NCOs Course	27—31 March 06	512-27D/20/30
16th Senior Paralegal NCO Management Course	13—17 June 05	512-27D/40/50
9th Chief Paralegal NCO Course	13—17 June 05	512-27D- CLNCO
4th 27D BNCOC	20 May—17 June 05	
5th 27D BNCOC	23 July—19 August 05	
6th 27D BNCOC	10 September—9 October 05	
3d 27D ANCOC	24 July—16 August 05	
4th 27D ANCOC	17 September—9 October 05	
12th JA Warrant Officer Basic Course	31 May—24 June 05	7A-270A0
13th JA Warrant Officer Basic Course	30 May—23 June 06	7A-270A0
JA Professional Recruiting Seminar	12—15 July 05	JARC-181
JA Professional Recruiting Seminar	11—14 July 06	JARC-181
6th JA Warrant Officer Advanced Course	11 July—5 August 05	7A-270A2

7th JA Warrant Officer Advanced Course	10 July—4 August 06	7A-270A2
ADMINISTRATIVE AND CIVIL LAW		
4th Advanced Federal Labor Relations Course	19—21 October 05	5F-F21
59th Federal Labor Relations Course	17—21 October 05	5F-F22
56th Legal Assistance Course (Family Law focus)	16—20 May 05	5F-F23
57th Legal Assistance Course (Estate Planning focus)	31 October—4 November 05	5F-F23
58th Legal Assistance Course (Family Law focus)	15—19 May 06	5F-F23
2005 USAREUR Legal Assistance CLE	17—21 October 05	5F-F23E
30th Admin Law for Military Installations Course	13—17 March 06	5F-F24
2005 USAREUR Administrative Law CLE	12—16 September 05	5F-F24E
2006 USAREUR Administrative Law CLE	11—14 September 06	5F-F24E
2005 Maxwell AFB Income Tax Course	12—16 December 05	5F-F28
2005 USAREUR Income Tax CLE	5—9 December 05	5F-F28E
2006 Hawaii Income Tax CLE	TBD	5F-F28H
2005 USAREUR Claims Course	28 November—2 December 05	5F-F26E
2006 PACOM Income Tax CLE	9—13 June 2006	5F-F28P
23d Federal Litigation Course	1—5 August 05	5F-F29
24th Federal Litigation Course	31 July—4 August 06	5F-F29
4th Ethics Counselors Course	17—21 April 06	5F-F202
CONTRACT AND FISCAL LAW		
7th Advanced Contract Attorneys Course	20—24 March 06	5F-F103
155th Contract Attorneys Course	25 July—5 August 05	5F-F10
156th Contract Attorneys Course	24 July—4 August 06	5F-F10
7th Contract Litigation Course	20—24 March 06	5F-F102
2005 Government Contract & Fiscal Law Symposium	6—9 December 05	5F-F11
72d Fiscal Law Course	2—6 May 05	5F-F12
73d Fiscal Law Course	24—28 October 05	5F-F12
74th Fiscal Law Course	24—28 April 06	5F-F12
75th Fiscal Law Course	1—5 May 06	5F-F12
2d Operational Contracting Course	27 February—3 March 06	5F-F13
12th Comptrollers Accreditation Course (Hawaii)	26—30 January 04	5F-F14
13th Comptrollers Accreditation Course (Fort Monmouth)	14—17 June 04	5F-F14
7th Procurement Fraud Course	31 May —2 June 06	5F-F101

2006 USAREUR Contract & Fiscal Law CLE	28—31 March 06	5F-F15E
2006 Maxwell AFB Fiscal Law Course	6—9 February 06	
CRIMINAL LAW		
11th Military Justice Managers Course	22—26 August 05	5F-F31
12th Military Justice Managers Course	21—25 August 06	5F-F31
48th Military Judge Course	25 April—13 May 05	5F-F33
49th Military Judge Course	24 April—12 May 06	5F-F33
24th Criminal Law Advocacy Course	12—23 September 05	5F-F34
25th Criminal Law Advocacy Course	13—17 March 06	5F-F34
26th Criminal Law Advocacy Course	11—15 September 06	5F-F34
29th Criminal Law New Developments Course	14—17 November 05	5F-F35
2006 USAREUR Criminal Law CLE	9—13 January 06	5F-F35E
INTERNATIONAL AND OPERATIONAL LAW		
5th Domestic Operational Law Course	24—28 October 05	5F-F45
84th Law of War Course	11—15 July 05	5F-F42
85th Law of War Course	30 January—3 February 06	5F-F42
86th Law of War Course	10—14 July 06	5F-F42
44th Operational Law Course	8—19 August 05	5F-F47
45th Operational Law Course	27 February—10 March 06	5F-F47
46th Operational Law Course	7—18 August 06	5F-F47
2004 USAREUR Operational Law Course	29 November—2 December 05	5F-F47E

3. Civilian-Sponsored CLE Courses

For addresses and detailed information, see the March 2005 issue of *The Army* Lawyer.

4. Phase I (Correspondence Phase), RC-JAOAC Deadline

The suspense for submission of all RC-JAOAC Phase I (Correspondence Phase) materials is ***NLT 2400, 1 November 2005***, for those judge advocates who desire to attend Phase II (Resident Phase) at TJAGLCS in the year 2006 ("2006 JAOAC"). This requirement includes submission of all JA 151, Fundamentals of Military Writing, exercises.

This requirement is particularly critical for some officers. The 2006 JAOAC will be held in January 2006, and is a prerequisite for most judge advocate captains to be promoted to major.

A judge advocate who is required to retake any subcourse examinations or "re-do" any writing exercises must submit the examination or writing exercise to the Non-Resident Instruction Branch, TJAGLCS, for grading by the same deadline (1 November 2005). If the student receives notice of the need to re-do any examination or exercise after 1 October 2005, the notice will contain a suspense date for completion of the work.

Judge advocates who fail to complete Phase I correspondence courses and writing exercises by 1 November 2005 will not be cleared to attend the 2006 JAOAC. If you have not received written notification of completion of Phase I of JAOAC, you are not eligible to attend the resident phase.

If you have any additional questions, contact Lieutenant Colonel JT. Parker, telephone (434) 971-3357, or e-mail

JT.Parker@hqda.army.mil.

5. Mandatory Continuing Legal Education Jurisdiction and Reporting Dates

Jurisdiction	Reporting Month
Alabama**	31 December annually
Arizona	15 September annually
Arkansas	30 June annually
California*	1 February annually
Colorado	Anytime within three-year period
Delaware	Period ends 31 December; confirmation required by 1 February if compliance required; if attorney is admitted in even-numbered year, period ends in even-numbered year, etc.
Florida**	Assigned month every three years
Georgia	31 January annually
Idaho	31 December, every third year, depending on year of admission
Indiana	31 December annually
Iowa	1 March annually
Kansas	Thirty days after program, hours must be completed in compliance period
Kentucky	1 July to June 30 10 August; completion required by 30 June
Louisiana**	31 January annually; credits must be earned by 31 December
Maine**	31 July annually
Minnesota	30 August annually
Mississippi**	15 August annually; 1 August to 31 July reporting period
Missouri	31 July annually; reporting year from 1 July to 30 June
Montana	1 April annually
Nevada	1 March annually
New Hampshire**	1 August annually; 1 July to 30 June reporting year

New Mexico	30 April annually; 1 January to 31 December reporting year
New York*	Every two years within thirty days after the attorney's birthday
North Carolina**	28 February annually
North Dakota	31 July annually for year ending 30 June
Ohio*	31 January biennially
Oklahoma**	15 February annually
Oregon	Period end 31 December; due 31 January
Pennsylvania**	Group 1: 30 April Group 2: 31 August Group 3: 31 December
Rhode Island	30 June annually
South Carolina**	1 January annually
Tennessee*	1 March annually
Texas	Minimum credits must be completed and reported by last day of birth month each year
Utah	31 January annually
Vermont	2 July annually
Virginia	31 October completion deadline; 15 December reporting deadline
Washington	31 January triennially
West Virginia	31 July biennially; reporting period ends 30 June
Wisconsin*	1 February biennially; period ends 31 December
Wyoming	30 January annually

* Military exempt (exemption must be declared with state).
**Must declare exemption.

1. The Judge Advocate General's On-Site Continuing Legal Education Training and Workshop Schedule (2004-2005).

14 - 15 May 05	Nashville, TN 81st RRC	Contract Law, Administrative and Civil Law	CPT Kenneth Biskner (205) 795-1511 kenneth.biskner@us.army.mil
14 - 15 May 05	Chicago (Oakbrook) IL 91st LSO	Administrative and Civil Law, International and Operational Law	CPT Frank W. Ierulli (309) 999-6316 Frank.ierulli@us.army.mil
20 - 22 May 05	Kansas City, MO 89th RRC	Criminal Law, Administrative and Civil Law, Claims	MAJ Anna Swallow (800) 892-7266, ext. 1228 (316) 681-1759, ext. 1228 lynette.boyle@us.army.mil

2. The Legal Automation Army-Wide Systems XXI—JAGCNet

a. The Legal Automation Army-Wide Systems XXI (LAAWS XXI) operates a knowledge management and information service called JAGCNet primarily dedicated to servicing the Army legal community, but also provides for Department of Defense (DOD) access in some cases. Whether you have Army access or DOD-wide access, all users will be able to download TJAGSA publications that are available through the JAGCNet.

b. Access to the JAGCNet:

(1) Access to JAGCNet is restricted to registered users who have been approved by the LAAWS XXI Office and senior OTJAG staff:

(a) Active U.S. Army JAG Corps personnel;

(b) Reserve and National Guard U.S. Army JAG Corps personnel;

(c) Civilian employees (U.S. Army) JAG Corps personnel;

(d) FLEP students;

(e) Affiliated (U.S. Navy, U.S. Marine Corps, U.S. Air Force, U.S. Coast Guard) DOD personnel assigned to a branch of the JAG Corps; and, other personnel within the DOD legal community.

(2) Requests for exceptions to the access policy should be e-mailed to:

LAAWSXXI@jagc-smtp.army.mil

c. How to log on to JAGCNet:

(1) Using a Web browser (Internet Explorer 6 or higher recommended) go to the following site: http://jagcnet.army.mil.

(2) Follow the link that reads "Enter JAGCNet."

(3) If you already have a JAGCNet account, and know your user name and password, select "Enter" from the next menu, then enter your "User Name" and "Password" in the appropriate fields.

(4) If you have a JAGCNet account, *but do not know your user name and/or Internet password*, contact the LAAWS XXI HelpDesk at LAAWSXXI@jagc-smtp.army.mil.

(5) If you do not have a JAGCNet account, select "Register" from the JAGCNet Intranet menu.

(6) Follow the link "Request a New Account" at the bottom of the page, and fill out the registration form completely. Allow seventy-two hours for your request to process. Once your request is processed, you will receive an e-mail telling you that your request has been approved or denied.

(7) Once granted access to JAGCNet, follow step (c), above.

3. TJAGSA Publications Available Through the LAAWS XXI JAGCNet

For detailed information of TJAGSA Publications Available Through the LAAWS XXI JAGCNet, see the March 2005 issue of *The Army Lawyer*.

4. TJAGLCS Legal Technology Management Office (LTMO)

The TJAGLCS, U.S. Army, Charlottesville, Virginia continues to improve capabilities for faculty and staff. We have installed new computers throughout TJAGLCS, all of which are compatible with Microsoft Windows XP Professional and Microsoft Office 2003 Professional.

The TJAGLCS faculty and staff are available through the Internet. Addresses for TJAGLCS personnel are available by e-mail at jagsch@hqda.army.mil or by accessing the JAGC directory via JAGCNET. If you have any problems, please contact LTMO at (434) 971-3257. Phone numbers and e-mail addresses for TJAGLCS personnel are available on TJAGLCS Web page at http://www.jagcnet.army.mil/tjagsa. Click on "directory" for the listings.

For students who wish to access their office e-mail while attending TJAGLCS classes, please ensure that your office e-mail is available via the web. Please bring the address with you when attending classes at TJAGLCS. If your office does not have web accessible e-mail, forward your office e-mail to your AKO account. It is mandatory that you have an AKO account. You can sign up for an account at the Army Portal, http://www.jagcnet.army.mil/tjagsa. Click on "directory" for the listings.

Personnel desiring to call TJAGLCS can dial via DSN 521-7115 or, provided the telephone call is for official business only, use the toll free number, (800) 552-3978; the receptionist will connect you with the appropriate department or directorate. For additional information, please contact the LTMO at (434) 971-3264 or DSN 521-3264.

5. The Army Law Library Service

Per *Army Regulation 27-1*, paragraph 12-11, the Army Law Library Service (ALLS) must be notified before any redistribution of ALLS-purchased law library materials. Posting such a notification in the ALLS FORUM of JAGCNet satisfies this regulatory requirement as well as alerting other librarians that excess materials are available.

Point of contact is Mrs. Dottie Evans, The Judge Advocate General's School, U.S. Army, ATTN: CTR-MO, 600 Massie Road, Charlottesville, Virginia 22903-1781. Telephone DSN: 521-3278, commercial: (434) 971-3278, or e-mail at Dottie.Evans@hqda.army.mil.

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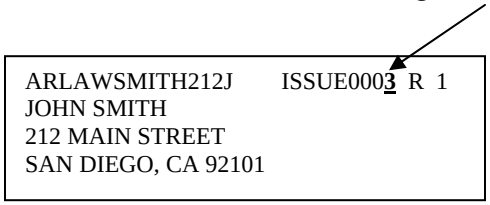

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