The Use of Article III Case Law in Military Jurisprudence

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Overview:
A Three-Part Framework for Applying Article III Case Law to the Military Justice System

This article concerns the application of Article III[2] case law in the military justice system, with a focus on three issues. First, how does the military justice system treat federal case law construing a statute when the identical statute is at issue in a military case? Second, how does the military justice system treat federal case law construing a statute or rule when a similar statute or rule is at issue in a military case? Third, how does the military justice system treat federal case law dealing with constitutional rights?

Part I: Applying Article III Case Law When Construing the Same Statute

How does the military justice system apply the case law of an Article III court that has previously construed the same statute at issue in a military case? Part of the answer to this question is easy, but part is more difficult. There is a sharp distinction between the way military courts apply Supreme Court precedent and the way they apply precedent from other Article III courts. While Supreme Court opinions construing statutes are binding, other Article III case law is considered merely persuasive authority.

Supreme Court Precedent

First, the easy part. When the United States Supreme Court has construed a statute, military courts are bound by that construction. Under the doctrine of stare decisis, that precedent is uncontroverted. For example, in *United States v. Schuler*,[3] the Court of Appeals for the Armed Forces (CAAF) had to determine the consequences of a change to a punitive article in the Uniform Code of Military Justice (UCMJ). Before 1996, carnal knowledge, Article 120, was a strict liability offense in the military.[4] No matter how honest and reasonable a belief might have been that the victim was at least sixteen years old, a mistake of fact concerning the victim's age was not a defense.[5] That changed in 1996 when Congress amended Article 120 to provide that as long as the victim was at least twelve, a reasonable belief that the victim was sixteen or older would constitute a defense.[6] Schuler was convicted in 1994.[7] At that time, his providence inquiry indicated that he believed his victim was of college age.[8] She was actually fourteen.[9] Could Schuler invoke the 1996 amendment of Article 120 to retroactively challenge his 1994 conviction?

The CAAF held that he could not.[10] In reaching that conclusion, the CAAF relied on the federal "savings" statute,[11] which explains the retroactive application of a change in federal law.[12] The savings statute says, in part, that "[t]he repeal of any statute shall not have the effect to release or extinguish any penalty, forfeiture, or liability incurred under such statute,

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[1] Chief Judge, United States Court of Appeals for the Armed Forces. This article is based on speeches the author delivered on 16 September 2004, at the William S. Fulton, Jr., Appellate Military Judges Conference in Washington, D.C., and on 22 January 2005, at the Florida State Bar's Military Law and Legal Assistance Symposium in Miami, Florida. The author is grateful to his colleague, the Honorable James E. Baker, for suggesting that the remarks be published.

[2] U.S. CONST. art. III.

[3] 50 M.J. 254 (1999).

[4] *See generally id.* at 255.

[5] *Id.*

[6] *Id.*

[7] *Id.*

[8] *Id.*

[9] *Id.*

[10] *Id.* at 256.

[11] 1 U.S.C. § 109 (2000).

[12] *Schuler*, 50 M.J. at 255-56.

unless the repealing Act shall so expressly provide."[13] The UCMJ is, of course, a federal statute, so the savings statute governed the outcome of Schuler's case.[14] In applying the federal savings statute, the CAAF followed the Supreme Court's interpretation in *Pipefitters Local Union No. 562 v. United States*.[15] In *Pipefitters*, the Supreme Court held that the federal savings statute nullified the common law doctrine of abatement, at least to the extent that the successor statute "retains the basic offense" and does not "substitute a right for a crime."[16] The CAAF then directly applied *Pipefitters* to the 1996 amendment of Article 120.[17] The CAAF noted that the amendment "retained the basic offense of carnal knowledge. The amendment did not alter the elements of proof; nor did it substitute a right for a crime."[18] The CAAF did not analyze whether *Pipefitters* was applicable in the military justice system; the CAAF simply applied it as the governing case law.

Contrast that approach with the CAAF's recent decision in *United States v. Marcum*.[19] In *Marcum,* the CAAF expressly considered the applicability of the Supreme Court's *Lawrence v. Texas* decision[20] to the military justice system.[21] It is somewhat surprising that the Supreme Court's construction of statutes governs the CAAF's decisions to a greater extent than the Supreme Court's construction of the United States Constitution; yet that is the case. When the Supreme Court construes a statute, the CAAF is bound by its construction. When the Supreme Court construes the Constitution, however, the CAAF must consider the extent to which that constitutional provision applies to the military justice system.

Other Article III Precedent

A more complicated issue can arise when another federal appellate court or a United States district court has interpreted a statute at issue in a military justice case. Such case law is persuasive, but not binding, authority.[22] One particularly interesting application of Article III precedent to the military justice system is *Garrett v. Lowe*.[23]

Garrett v. Lowe involved a challenge to the sentence that was adjudged in a felony murder case.[24] Because Private First Class (PFC) Garrett was sentenced for felony murder in a non-capital proceeding, confinement for life was a mandatory portion of his sentence.[25] The military judge instructed the members that they need not vote on the confinement portion of the sentence, since confinement for life was mandatory.[26] The military judge instructed the members that each of the remaining portions of the sentence required a two-thirds vote.[27] Garrett's case proceeded through direct review and was affirmed in 1987.[28]

Garrett's co-conspirator, PFC Dodson, was also court-martialed.[29] Dodson was found guilty of felony murder, and his case remained death-eligible when it entered the sentencing stage.[30] The military judge instructed the members that there were two authorized sentences—death and confinement for life—and that a unanimous vote was required for a death

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[13] 1 U.S.C. § 109.

[14] *See Schuler*, 50 M.J. at 256.

[15] 407 U.S. 385 (1972).

[16] *Id.* at 435 (internal quotation and citation omitted).

[17] *Schuler*, 50 M.J. at 256.

[18] *Id.*

[19] 60 M.J. 198 (2004).

[20] 539 U.S. 558 (2003).

[21] *See generally Marcum*, 60 M.J. at 200-07; *see infra* notes 185-93 and accompanying text.

[22] *See* Garrett v. Lowe, 39 M.J. 293, 296 n.4 (C.M.A. 1994).

[23] 39 M.J. 293 , 297-98 (C.M.A. 1994) (Cox, J. & Gierke, J., each dissenting separately).

[24] *Id.* at 294.

[25] *See* UCMJ art. 118(e)(1) (2002).

[26] *Garrett*, 39 M.J. at 296.

[27] *Id.*

[28] *Id.* at 294.

[29] Dodson v. Zelez, 917 F.2d 1250 (10th Cir. 1990).

[30] *Id.*

sentence.[31] He instructed the members that if they did not unanimously vote for death, the outcome was confinement for life, since that was a mandatory sentence if death was not imposed.[32] The military judge did *not* tell the members that a three-fourths vote was required to adjudge a sentence of confinement for life.[33]

Dodson's case was appealed to the Navy-Marine Corps Court of Military Review[34] and the CAAF.[35] Except for a minor adjustment to the findings to cure a multiplicity issue,[36] the findings and sentence were affirmed. Then, surprisingly, in 1990 the Tenth Circuit granted him habeas relief in *Dodson v. Zelez*.[37] The relief was based largely on an interpretation of Article 52 of the UCMJ,[38] which requires a three-fourths vote of the members to impose a sentence greater than confinement for ten years. The Tenth Circuit held that compliance with that provision was mandatory and issued a writ of habeas corpus.[39]

No doubt inspired by his co-conspirator's success, Garrett then filed a petition for a writ of habeas corpus in federal district court in Kansas and sought a *writ of error coram nobis* from the CAAF.[40] In his pro se petition to the CAAF, Garrett argued that there was no need to address the legal merits of his Article 52 claim, since that issue had already been decided in his favor by the Tenth Circuit.[41] This argument provided the CAAF with an opportunity to address the effect of the Tenth Circuit's case law in the military justice system. Judge Wiss wrote for the Court:

> It should be clear . . . that it is our own analysis of the issues that has led us to our decision and that, as the Government retorts, this Court is not bound by the decision in *Dodson*. This appellate court of the United States[[42]] is as capable as is a Court of Appeals of the United States of analyzing and resolving issues of Constitutional and statutory interpretation. In fact, to the extent that an issue involves interpretation and application of the Uniform Code of Military Justice and the Manual for Courts-Martial in the sometimes unique context of the military environment, this Court may be better suited to the task.[43]

A majority of the CAAF granted relief on a slightly different basis than the *Dodson* decision.[44] The majority held that the military judge erred by failing to instruct the members that they must vote on confinement for life and that confinement for life required a three-fourths majority.[45] The CAAF's majority, however, chose not to address the issue of prejudice arising from this error, holding instead that the military judge erred by telling the members that their vote on the punitive discharge, forfeitures and reduction required a two-thirds majority, when it actually required a three-fourths majority.[46] The CAAF held that the members must vote on a sentence in its entirety.[47] Because confinement for life was one component of the sentence, the entire sentence required a three-fourths majority.[48]

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[31] *Id.* at 1261.

[32] *Id.*

[33] *Id.*

[34] United States v. Dodson, 16 M.J. 921 (N.M.C.M.R. 1983), *aff'd in part, rev'd in part*, 21 M.J. 237 (C.M.A. 1986), *adhered to on reconsideration*, 22 M.J. 257 (C.M.A. 1986).

[35] United States v. Dodson, 21 M.J. 237 (C.M.A. 1986), *adhered to on reconsideration*, 22 M.J. 257 (C.M.A. 1986).

[36] *See Dodson*, 21 M.J. at 238.

[37] 917 F.2d 1250 (10th Cir. 1990).

[38] 10 U.S.C. § 852 (2000).

[39] *Zelez*, 917 F.2d at 1262.

[40] Garrett v. Lowe, 39 M.J. 293 (C.M.A. 1994).

[41] *See id.* at 296 n.4.

[42] When the *Garrett* decision was announced on 15 June 1994, the CAAF court was named the United States Court of Military Appeals. On 5 October 1994, legislation renamed the CAAF court the United States Court of Appeals for the Armed Forces. *See* National Defense Authorization for Fiscal Year 1995, Pub. L. No. 103-337, 108 Stat. 2663, 2831 (codified at 10 U.S.C. § 941 (2000)). *See also* Special Session for Court Name Change, 41 M.J. LIII (1994).

[43] *Garrett*, 39 M.J. at 296.

[44] *Id.* at 297.

[45] *Id.* at 296.

[46] *Id.* at 296-97.

[47] *Id.*

[48] *Id.*

Judge Cox and I dissented.[49] Judge Cox viewed the petition for *writ of coram nobis* as, in essence, an untimely petition for reconsideration. More importantly, he viewed the petition's substance as "patently frivolous."[50] He wrote, "In my view, the chances that three-fourths of the court members then sitting might not have adjudged a dishonorable discharge, reduction to E-1, and total forfeitures are sufficiently infinitesimal as to not warrant the wholesale abrogation of finality of courts-martial."[51]

I agreed with the majority's decision to entertain the petition for extraordinary relief.[52] But like Judge Cox, I also viewed the likelihood that Garrett would not have received the maximum authorized sentence as infinitesimal given the fact that confinement for life was a mandatory sentence for Garrett's offense of felony murder.[53]

An interesting historical footnote to *Garrett* is that he was resentenced on 8 March 1995.[54] Garrett elected to be resentenced by a military judge alone—who predictably sentenced him to confinement for life, total forfeitures, reduction in grade to E-1, and a dishonorable discharge.[55] So the extensive collateral litigation in his case produced no change in Garrett's sentence.

One decision that remains pending before the CAAF from the 2004 term is *United States v. Martinelli*.[56] In that case, the CAAF specified the issue of whether the Child Pornography Protection Act (CPPA) has extraterritorial application.[57] As noted above, case law from Article III courts of appeals is persuasive, but not binding, authority. In the area of extraterritorial application of criminal statutes, the federal circuits have gone in different directions.[58] This provides a good example of why the military justice system should not simply defer to Article III case law to decide the issues that come before it. The CAAF must instead carefully evaluate Article III case law to determine if it is sound. To resolve the extraterritorial application issue that *Martinelli* presents, the CAAF must consider the relevant Article III cases and, to the extent that the CAAF finds any persuasive, use them to craft the resolution of the issue.

Another instance in which Article III courts and military courts construe the same statutes occurs in those rare instances when the Supreme Court grants certiorari to review a decision of the CAAF. The Supreme Court has had certiorari jurisdiction over CAAF cases only since 1984,[59] though before then military justice cases would sometimes make their way to the Supreme Court by way of collateral attacks filed by service members in Article III courts.[60] Since Congress gave the Supreme Court certiorari jurisdiction over the CAAF cases twenty-one years ago, certiorari petitions have been filed in 887 of the CAAF cases, though the actual number of certiorari petitions is somewhat smaller because in some instances, a single petition was filed combining more than one case from the CAAF.[61] The Supreme Court has granted fifteen certiorari petitions seeking review of CAAF decisions. In seven of these cases, the Court vacated the CAAF decision and remanded the case for further consideration in light of a newly-announced Supreme Court case.[62] The remaining eight were orally argued and resolved by authored opinions.

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[49] *Id.* at 297-98.

[50] *Id.* at 297 (Cox, J., dissenting).

[51] *Id.* at 297-98 (Cox, J., dissenting).

[52] *Id.* at 298 (Gierke, J., dissenting).

[53] *Id.* (Gierke, J., dissenting).

[54] *See* United States v. Garrett, No. 82-2670 (N-M. Ct. Crim. App. Nov. 27, 1996), *aff'd*, 48 M.J. 40 (1997).

[55] *See id*.

[56] United States v. Martinelli, 59 M.J. 211 (2003) (order granting review).

[57] *Id.*

[58] *See, e.g.*, United States v. Erdos, 474 F.2d 157, 158 (4th Cir. 1973) (holding that district court had jurisdiction over accused for crimes committed in American embassy located on foreign territory); United States v. Gatlin, 216 F.3d 207, 222-23 (2d Cir. 2000) (finding no jurisdiction over criminal acts committed extraterritorially); United States v. Corey, 232 F.3d 1166, 1171 (9th Cir. 2000) (finding jurisdiction over criminal acts of sexual assault committed in private apartment building in Japan); United States v. Vasquez-Velasco, 15 F.3d 833, 839-41 (9th Cir. 1994) (holding that statute applied extraterritorially to crimes committed by defendant in Mexico); United States v. Nippon Paper Indus. Co., 109 F.3d 1, 9 (1st Cir. 1997) (holding that Sherman Act could apply extraterritorially to prosecute crimes committed in violation of the Act).

[59] Military Justice Act of 1983, Pub. L. 98-209, 97 Stat. 1394 (1983) (codified as amended at 28 U.S.C. § 1259 (2000)). The effective date of the Military Justice Act of 1983 was 1 August 1984. *See* Pub. L. No. 98-209, § 12(a)(1), 97 Stat. at 1407.

[60] *See, e.g.*, Parker v. Levy, 417 U.S. 733 (1974); Noyd v. Bond, 395 U.S. 683 (1969); Jackson v. Taylor, 353 U.S. 569 (1957).

[61] This information is provided by the Court of Appeals for the Armed Forces' invaluable librarian, Agnes Kiang.

[62] O'Connor v. United States, 535 U.S. 1014 (2002) (remanding for further consideration in light of *Ashcroft v. Free Speech Coalition*, 535 U.S. 234 (2002)); United States v. Mobley, 523 U.S. 1056 (1998) (remanding for further consideration in light of *United States v. Scheffer*, 523 U.S. 303 (1998));

Some of the eight cases, like *Clinton v. Goldsmith*,[63] have concerned the construction of statutes. Others have dealt with constitutional issues. Here is a brief review of those eight cases.

The first came in 1987, when *Solorio* eliminated the service-connection requirement for subject-matter jurisdiction, at least in non-capital cases.[64] Interestingly, the Supreme Court had granted Solorio's certiorari petition asking whether a child abuse offense that occurred at an off-base home met *O'Callahan*'s[65] service connection requirement.[66] But a majority of the Court *sua sponte* went beyond the granted issue to overturn *O'Callahan*'s service-connection requirement for subject matter jurisdiction.[67]

Seven years passed before the Supreme Court heard its next military justice case—*Weiss v. United States*.[68] That case consolidated argument on two different decisions of the CAAF.[69] The Supreme Court resolved *Weiss* by agreeing with the CAAF that the method by which military trial and appellate judges were generally appointed did not violate the Appointments Clause.[70] The Court also agreed that the Due Process Clause did not prohibit military judges from serving without fixed terms of office.[71]

Also in 1994, the Supreme Court resolved *Davis v. United States*,[72] a split decision[73] that announced the rule that an "ambiguous or equivocal" reference to counsel during a custodial interrogation did not trigger the suspect's *Miranda* rights—or require any other response from law enforcement agents.[74] Only "an unambiguous or unequivocal request for counsel" has any legal effect.[75] One interesting aspect of the *Davis* case is the decision's reach. Before *Davis*, the federal appellate courts were split over the question of the effect of an ambiguous request for counsel.[76] Some courts said it had no effect.[77] Some said even an ambiguous reference to counsel required that all questioning cease.[78] In *Davis*, the military judge ruled that the suspect's statement that "Maybe I should talk to a lawyer" did not invoke his right to counsel.[79] The Naval Investigative Service agents who were interrogating Davis followed this ambiguous statement by "properly determin[ing]

Edmond v. United States, 516 U.S. 802 (1995) (remanding for further consideration in light of *Ryder v. United States*, 515 U.S. 177 (1995)); Carpenter v. United States, 515 U.S. 1138 (1995) (remanding for further consideration in light of *Ryder*); Clark v. United States, 515 U.S. 1138 (1995) (remanding for further consideration in light of *Ryder*); Jordan v. United States, 498 U.S. 1009 (1990) (remanding for further consideration in light of *Minnick v. Mississippi*, 498 U.S. 146 (1990)); Goodson v. United States, 471 U.S. 1063 (1985) (remanding for further consideration in light of *Smith v. Ilinois*, 469 U.S. 91 (1984)).

[63] 26 U.S. 529 (1999).

[64] Solorio v. United States, 483 U.S. 435 (1987).

[65] O'Callahan v. Parker**,** 395 U.S. 258 (1969).

[66] *See Solorio*, 483 U.S. at 436-38.

[67] *Id.* at 450-51.

[68] 510 U.S. 163 (1994).

[69] *Id.* at 165-66.

[70] *Id.* at 169-76.

[71] *Id.* at 176-81.

[72] 512 U.S. 452 (1994).

[73] The Supreme Court unanimously affirmed Davis's conviction. The Court split 5-4 on the issue of whether an ambiguous or equivocal reference to counsel required law enforcement agents to clarify the suspect's intent. Four concurring justices—Justices Souter, Blackmun, Stevens, and Ginsburg—concluded that an ambiguous or equivocal reference to counsel required law enforcement agents to clarify whether the suspect desired counsel, which the interrogating agents had done in the *Davis* case. *Id.* at 466-76 (Souter, J., concurring).

[74] *Id.* at 459, 461.

[75] *Id.* at 462.

[76] *See* United States v. Gotay, 844 F.2d 971, 975 (2nd Cir. 1988) (joining the First, Fourth, Fifth, and Ninth Circuits to hold that ambiguous requests for counsel require officers to cease all questioning except questions clarifying the ambiguity) (citing United States v. Porter, 776 F.2d 370 (1st Cir. 1985); United States v. Riggs, 537 F.2d 1219, 1222 (4th Cir. 1976); United States v. Cherry, 733 F.2d 1124, 1130-31 (5th Cir. 1984); United States v. Fouche, 833 F.2d 1284, 1289 (9th Cir. 1987)); *see also* United States v. March, 999 F.2d 456, 462 (10th Cir. 1993) (holding that equivocal request for counsel required officers to cease substantive questioning and limit further inquiries to clarify the ambiguity); United States v. Mendoza-Cecelia, 963 F.2d 1467, 1471-72 (11th Cir. 1992) (same).

[77] *See, e.g.*, United States v. Lame, 716 F.2d 515, 520-21 (8th Cir. 1983).

[78] *See, e.g.*, Maglio v. Jago, 580 F.2d 202, 205 (6th Cir. 1978); Howard v. Pung, 862 F.2d 1348, 1351 (8th Cir. 1988).

[79] 512 U.S. at 455.

that [the accused] was not indicating a desire for or invoking his right to counsel."[80] His subsequent admissions were, therefore, admissible.[81] The CAAF agreed with the military judge's middle ground approach and held that an ambiguous reference to counsel during an interrogation required the interrogator to clarify whether the suspect was actually requesting counsel.[82]

But a majority of the Supreme Court adopted a rule that was less protective of criminal suspects' rights than the approach that the military judge, the CAAF, and the other four Supreme Court justices took.[83] So Davis's certiorari petition, just like Solorio's, resulted in a net loss for the defense bar.

Davis is the only one of the eight military justice cases resolved by the Supreme Court that did not involve a military-specific issue, and therefore had much broader effect across all of the criminal justice systems in America.

Then came *Ryder v. United States*,[84] the first of two Supreme Court cases concerning the method by which civilian Coast Guard Court of Criminal Appeals judges were appointed—and the second of three military justice cases between 1994 and 1997 dealing with the previously-arcane area of Appointments Clause[85] law.[86]

At the time Ryder's appeal was decided, two of the Coast Guard court's judges were serving in that role in a civilian capacity.[87] They had been appointed to that position by the General Counsel of the Department of Transportation.[88] In *United States v. Carpenter*,[89] the CAAF had held that the method by which the civilian chief judge of the Coast Guard Court of Criminal Appeals (CGCCA) was appointed violated the Appointments Clause. Relying on *Buckley v. Valeo*,[90] the CAAF held that "the judicial acts of the Chief Judge are entitled to *de facto* validity."[91] The Supreme Court overturned this result in *Ryder*, issuing a very narrow opinion concluding that the civilian Coast Guard appellate judges' actions should not be given *de facto* validity.[92] The narrowness of the holding would require the Supreme Court to revisit this area of the law in *Edmond v. United States*.[93]

In 1996, the Supreme Court decided *Loving v. United States*, which unanimously upheld the method by which the CAAF current military death penalty system was created. [94] The following year, the Supreme Court decided *Edmond v. United States*, which held that the Department of Transportation (DOT) had corrected the Appointments Clause problem that *Ryder* had identified.[95] By the time of *Edmond*, the appointing authority for CGCCA judges had gone from the DOT's general counsel to the Secretary of Transportation.[96] Because the appointing authority was now a department head, the Supreme Court held that the Appointments Clause was satisfied.[97]

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[80] *Id.*

[81] *Id.*

[82] *Id.* at 456.

[83] *Id.* at 462 (Souter, J., joined by Blackmun, Stevens & Ginsburg, JJ., concurring in the judgment).

[84] 515 U.S. 177 (1995).

[85] U.S. CONST. art. II, § 2, cl. 2.

[86] *See also* Edmond v. United States, 520 U.S. 651 (1997); Weiss v. United States, 510 U.S. 163 (1994).

[87] *Ryder*, 515 U.S. at 179.

[88] *Id.*

[89] 37 M.J. 291 (C.M.A. 1993).

[90] 424 U.S. 1 (1976).

[91] *Buckley*, 37 M.J. at 295.

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

[93] 520 U.S. 651 (1997).

[94] 517 U.S. 748 (1996).

[95] *Edmond*, 520 U.S. at 666.

[96] *Id.* at 654-55.

[97] *Id.* at 666.

In 1998, the Supreme Court decided *United States v. Scheffer*.[98] *Scheffer* was a fragmented four-four-one decision overturning the CAAF holding that, despite Military Rule of Evidence (MRE) 707, a rule with no Federal Rule of Evidence (FRE) counterpart that bars polygraph evidence from courts-martial, the Sixth Amendment guaranteed an accused the right to at least attempt to lay a foundation to establish the admissibility of an exculpatory polygraph result.[99]

The CAAF court relied on *Daubert*'s[100] language emphasizing that the trial judge is a gatekeeper with a responsibility to determine the reliability of proffered evidence.[101] *Daubert* rejected the *Frye*[102] test, which required general acceptance in the relevant scientific community before novel scientific evidence would be admissible in evidence. The Supreme Court instead expressed confidence that "[v]igorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof" would allow juries to separate the scientific wheat from the chaff.[103] Interestingly for purposes of discussing *Daubert*'s interplay with MRE 707, Justice Blackmun's opinion for the Court in *Daubert* noted that the "*Frye* test has its origin in a short and citation-free 1923 decision concerning the admissibility of evidence derived from a systolic blood pressure deception test, a crude precursor to the polygraph machine."[104]

In *Scheffer*, the CAAF did not hold that polygraph evidence was admissible.[105] Rather, the CAAF simply held that the same process that governs the admissibility of any other scientific evidence should be followed for polygraph evidence as well.[106] But the Supreme Court disagreed, upholding the President's per se rejection of polygraph evidence.[107] Unlike any other area of scientific evidence, the Supreme Court has allowed the President to freeze into place the current state of technology.

Regardless of the merits of its holding, *Scheffer* was significant procedurally because it was the first case in which the Solicitor General ever asked the Supreme Court to grant certiorari to review one of the CAAF's decisions. But the following year, the Supreme Court heard another case in which the United States was seeking to overturn one of the CAAF's decisions.[108]

Clinton v. Goldsmith dealt with the CAAF jurisdiction in extraordinary relief cases.[109] This presented an issue of statutory interpretation—mainly concerning Article 67 and the All Writs Act.[110] In an opinion written by Justice Souter, a unanimous Supreme Court held that a three-judge majority of the CAAF was incorrect when it determined that it had jurisdiction to prevent the Air Force from dropping an officer from the rolls.[111] I had written a dissent, which Judge Crawford joined, arguing that dropping an officer from the rolls is an administrative personnel action over which the CAAF has no jurisdiction—extraordinary or otherwise.[112] The Supreme Court agreed. This created controlling Supreme Court precedent limiting the statutes that provide the CAAF with jurisdiction.

Clinton v. Goldsmith was a 1999 decision. In the five years that have passed since, the Supreme Court has not heard oral argument in any cases from the CAAF, though the Supreme Court did grant, vacate, and remand the CAAF decision in *United States v. O'Connor*[113] for further consideration in light of *Ashcroft v. Free Speech Coalition*.[114]

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[98] 523 U.S. 303 (1998).

[99] *Id.* at 317.

[100] Daubert v. Merrell Dow Pharm., 509 U.S. 579 (1993).

[101] United States v. Scheffer, 44 M.J. 442, 446-47 (1996), *rev'd*, 523 U.S. 303 (1998).

[102] Frye v. United States, 293 F. 1013 (D.C. Cir. 1923).

[103] *Daubert*, 509 U.S. at 596.

[104] *Id.* at 586.

[105] *See* 44 M.J. 442.

[106] *Id.* at 448.

[107] *Scheffer*, 523 U.S. at 315.

[108] Clinton v. Goldsmith, 526 U.S. 529 (1999).

[109] *Id.* at 531.

[110] *Id.* at 533-34.

[111] *Id.* at 540.

[112] Goldsmith v. Clinton, 48 M.J. 84, 91-92 (1998) (Gierke, J., dissenting), *rev'd*, 526 U.S. 529 (1999).

[113] 55 M.J. 157 (2001), *vacated*, 535 U.S. 1014 (2002).

[114] 535 U.S. 234 (2002.

Part II: Applying Article III Case Law When Construing a Similar Statute or Rule

Military courts often construe statutes or rules that are similar, though not identical, to statutes or rules applicable to federal civilian criminal law and procedure. This probably occurs most often in evidence cases, where the MRE generally mirror the FRE.

The *Manual for Courts-Martial*'s drafters give us their recommended approach: "While specific decisions of the Article III courts involving rules which are common both to the MRE and the FRE should be considered very persuasive, they are not binding."[115] This approach is consistent with Article 36's preference for court-martial rules that generally follow the rules used for trial of federal civilian criminal cases.[116]

The CAAF has twice quoted the drafters' recommended approach for using Article III precedent to construe the MRE.[117] The most recent occasion was my opinion for a four-judge majority in *United States v. Byrd*.[118]

Byrd was, like a depressingly large portion of the CAAF docket, a child abuse case.[119] Byrd was an Army sergeant who was charged with forcibly sodomizing his daughter.[120] He was originally confined by civilian authorities.[121] While confined, he wrote two letters to his wife.[122] The government presented those letters as evidence.[123] The government also called his wife to the stand to interpret the letters' meaning for the members.[124] The issue before us was whether Military Rule of Evidence 701 allows a lay witness to offer an opinion about the meaning of someone else's communications.[125]

To assist us in answering that question, the CAAF turned to federal circuit and district court decisions interpreting FRE 701.[126] The majority opinion noted, "Application of the lay witness opinion rule, M.R.E. 701, to interpretations of the meaning of another person's communications is an issue of first impression in military law. Accordingly, the CAAF will seek guidance from judicial interpretations of Federal Rule of Evidence 701, the model for its military counterpart."[127] The CAAF then quoted a Ninth Circuit case for the general proposition that "[l]ay witnesses are normally not permitted to testify about their subjective interpretations or conclusions as to what has been said."[128] The CAAF noted that five other circuits follow the Ninth Circuit's approach.[129] The CAAF also noted that the Sixth Circuit follows a different approach.[130] There a lay witness may generally "testify in the form of an opinion as to his understanding of a defendant's statement."[131]

The CAAF also cited *United States v. Dicker*,[132] which is one of the leading federal civilian cases in this area, where the Third Circuit recognized an exception to the general rule. The Third Circuit observed that it was permissible for a lay

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[115] MANUAL FOR COURTS-MARTIAL, UNITED STATES (2002) drafter's analysis, at A22-2 [hereinafter MCM].

[116] *See* UCMJ art. 36 (2002).

[117] *See* United States v. Byrd, 60 M.J. 4 (2004); United States v. Clemons, 16 M.J. 44, 46 (C.M.A. 1983).

[118] 60 M.J. 4 (2004).

[119] *Id.* at 5.

[120] *Id.*

[121] *Id.*

[122] *Id*.

[123] *Id.*

[124] *Id.* at 5-6.

[125] *Id.*

[126] *Id.* at 6-7.

[127] *Id.* at 6.

[128] *Id.* at 7 (quoting United States v. Cox, 633 F.2d 871, 875 (9th Cir. 1980)).

[129] *Id.* at 7 n.3 (citing United States v. Saccoccia, 58 F.3d 754 (1st Cir. 1995); United States v. Dicker, 853 F.2d 1103, 1108-09 (3d Cir. 1988); United States v. White, 569 F.2d 263, 267 (5th Cir. 1978); United States v. Marzano, 537 F.2d 257, 268 (7th Cir. 1976); DeLoach v. United States, 307 F.2d 653, 655 (D.C. Cir. 1962)).

[130] *Id.* (citing United States v. Graham, 856 F.2d 756 (6th Cir. 1988)).

[131] *Id.* (citing *Graham*, 856 F.2d at 759).

[132] 853 F.2d 1103 (3d Cir. 1988).

witness to interpret another person's communications that use "coded or code-like" language.[133] Then the CAAF recognized the Second Circuit's emphasis on "the foundational requirements that the proponent must satisfy before a witness's interpretation of the meaning of another person's communications becomes admissible."[134]

The CAAF evaluated the general rules laid out in these federal civilian cases and formed three case-specific rules that CAAF would apply to evaluate Mrs. Byrd's testimony: (1) Mrs. Byrd's opinions concerning portions of her husband's letters whose meaning was self-evident were inadmissible; (2) Mrs. Byrd's opinions concerning ambiguous portions of her husband's letters would be admissible only if supported by a foundation establishing that she had a basis for determining the passages' true meaning; and (3) Mrs. Byrd's testimony providing background information concerning references in the letters to other events was admissible.[135]

The CAAF then applied these rules to hold that the military judge had erred in allowing Mrs. Byrd's testimony concerning several of the passages at issue.[136] The CAAF held, however, that in light of the other evidence in the case, that error was harmless.[137]

Byrd was an example of examining federal case law interpreting an FRE, discovering the general federal interpretation and exceptions to that interpretation, evaluating the conflicting federal civilian cases, and then crafting the decisional rule. This is probably the manner in which the CAAF most often uses federal civilian precedent.

But there is another approach. On occasion, the CAAF has rejected civilian precedent as inapplicable to the military's unique justice system. Probably the starkest example of that approach since sitting on the bench was *United States v. Rodriguez*,[138] where the CAAF split three-two on the applicability of *Jaffee v. Redmond*,[139] the Supreme Court's 1996 decision recognizing a psychotherapist-patient privilege.

Rodriguez involved an Army Specialist who took the rather extreme step of shooting himself in the stomach with an automatic weapon.[140] To literally add insult to injury, he was found guilty of wounding himself without intent to avoid hazardous duty.[141]

At trial, the defense's theory was that while Rodriguez had planned to shoot himself, he changed his mind before doing so and that he then accidentally shot himself while attempting to recover his weapon.[142] Making an already-uphill climb considerably steeper, Rodriguez had admitted to a civilian psychiatrist that he had intentionally discharged the weapon in an attempt to win back his estranged wife.[143] This gives a new twist to the old saying that the way to a man's heart is through his stomach.

The defense challenged the admissibility of the civilian psychiatrist's testimony, arguing that it was protected by the federal psychotherapist-patient privilege that the Supreme Court recognized shortly before Rodriguez's trial.[144] A three-judge majority of the CAAF ruled that the privilege did not apply in courts-martial.[145] Judge Cox and I dissented.[146]

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[133] *Id.* at 1108 (internal quotation omitted).

[134] *Byrd*, 60 M.J. at 7 (citing United States v. Garcia, 291 F.3d 127 (2d Cir. 2002)).

[135] *Id.* at 7-8.

[136] *Id.* at 8-10.

[137] *Id.* at 10-11.

[138] 54 M.J. 156 (2000).

[139] 518 U.S. 1 (1996).

[140] *Rodriguez*, 54 M.J. at 156.

[141] *Id.*

[142] *Id.* at 157.

[143] *Id.*

[144] *See Jaffee*, 518 U.S. 1.

[145] *Rodriguez*, 54 M.J. at 161.

[146] *Id.* at 162-63 (Gierke, J., joined by Cox, S.J., dissenting).

There was no opinion for the CAAF. Rather, it was a two-one-two decision.[147] The lead opinion, by then-Chief Judge Crawford, first reviewed the history of privileges under the FRE.[148] While the FREs' initial draft recognized specific privileges, the final version simply stated that privileges are governed by federal common law.[149] The drafters of the MRE quite sensibly recognized that for practical reasons, including many occasions when non-lawyers are required to apply them, the MRE should provide more specific guidance concerning privileges.[150] The result is the series of FRE 501 through 513 with which the CAAF are all familiar. But FRE 501 includes the following catch-all provision: a privilege may arise under "[t]he principles of common law generally recognized in the trial of criminal cases in the United States district courts pursuant to rule 501 of the FRE insofar as the application of such principles in trials by courts-martial is practicable and not contrary to or inconsistent with the code, the rules, or [the] Manual."[151]

The lead opinion concluded that recognizing a psychotherapist-patient privilege would be inconsistent with MRE 501(d),[152] which states, "Notwithstanding any other provision of these rules, information not otherwise privileged does not become privileged on the basis that it was acquired by a medical officer or civilian physician in a professional capacity."[153] The lead opinion concluded that a "psychotherapist-patient privilege would be contrary to and inconsistent with Mil. R. Evid. 501(d). As the CAAF said, the term 'physician' includes a psychiatrist." [154] Judge Sullivan's separate concurring opinion took a similar approach.[155] Interestingly, the MRE's drafters took a different position. In 1999, after Rodriguez was tried but before the CAAF resolved his appeal, the President amended the *Manual* to create MRE 513, recognizing a psychotherapist-patient privilege.[156] The drafters' analysis explained that the new privilege that MRE 513 recognized was "not [a] physician-patient privilege" and it is not affected by MRE 501(d).[157]

Other recent cases where the CAAF distinguished military law from its federal civilian counterpart include *United States v. McElhaney*,[158] holding that the statute of limitations under the Victims of Child Abuse Act had not superseded Article 43, and *United States v. Spann*,[159] holding that the Victims' Rights and Restitution Act's sequestration provisions had not superseded MRE 615. Compare those cases with the CAAF's 1998 decision in *United States v. Dowty*.[160] In *Dowty*, the CAAF held that the Right to Financial Privacy Act's protections and statute of limitations tolling provision did apply to the military justice system.[161] However, the CAAF accompanied the holding with the following disclaimer: "We recognize that the Uniform Code of Military Justice is a special, well-integrated statute, and we exercise great caution in overlaying a generally applicable statute specifically onto the military system."[162]

Another recent example of applying Article III case law is the CAAF's most recent decision in *United States v. Dowty*,[163] a majority decision that I authored. *Dowty* concerned a unique method of finding members for courts-martial: through a solicitation in the "Plan of the Week."[164] In *Dowty*, the CAAF "embraced the approach" of a Fifth Circuit opinion dealing with volunteer jurors.[165] The Fifth Circuit held that volunteer jurors violated the letter and the spirit of the Federal Jury

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[147] *Id*. at 160-63.

[148] *Id.* at 157.

[149] *See* FED. R. EVID. 501.

[150] *See* MCM, *supra* note 115, MIL. R. EVID. 501 (Drafter's Analysis), app. 22, at A22-38.

[151] *Id.* MIL. R. EVID. 501(a)(4).

[152] *Rodriguez*, 54 M.J. at 160.

[153] MCM, *supra* note 115, MIL. R. EVID. 501(d).

[154] *Rodriguez*, 54 M.J. at 160.

[155] *Id.* at 161-62.

[156] Exec. Order No. 13,140, 64 Fed. Reg. 55,115 (Oct. 6, 1999), *reprinted in* MCM, *supra* note 115, app. 25, at A25-49, A-25-50.

[157] MCM, *supra* note 115, MIL. R. EVID. 513 (Drafter's Analysis), app. 22, at A22-44.

[158] 54 M.J. 120 (2000).

[159] 51 M.J. 89 (1999).

[160] 48 M.J. 102 (1998).

[161] *Id.* at 111.

[162] *Id.*

[163] 60 M.J. 163 (2004).

[164] *Id.* at 165. "Plan of the Week" is a naval term that appears to denote a document similar to the Army "training schedule."

[165] *Id.* at 173.

Selection and Service Act of 1968.[166] The CAAF found the Fifth Circuit's construction of the federal statute to be persuasive authority in interpreting Article 25's system for obtaining court-martial members.[167]

Byrd and *Rodriguez* probably represent the two extremes in how the CAAF applies federal civilian case law to the military justice system. The art of judging, of course, is to determine which of the two methods to use in any given case.

Part III: Using Article III Case Law When Applying the Constitution to the Military Justice System

Finally, this article examines the application of federal civilian cases construing the United States Constitution. The CAAF's general approach is to apply the Bill of Rights' protections to servicemembers absent a specific exemption for the military justice system or some demonstrated "military necessity that would require a different rule."[168] That standard comes from the 1976 CAAF decision in *Courtney v. Williams*,[169] and was repeated most recently in *United States v. Rendon*.[170]

There are two points about this approach that are particularly interesting. First, the CAAF has been far more willing to expressly recognize constitutional protections for members of the military than has the Supreme Court. Consider two examples.

The CAAF landmark opinion in *United States v. Matthews*,[171] which applied *Furman v. Georgia*[172] to the military justice system, expressly held that a service member is "entitled . . . under the Eighth Amendment to protection against 'cruel and unusual punishments.'"[173] The CAAF therefore applied the Supreme Court's civilian death penalty jurisprudence to the military justice system, while recognizing that "there may be circumstances under which the rules governing capital punishment of service members will differ from those applicable to civilians," particularly "with respect to offenses committed under combat conditions when maintenance of discipline may require swift, severe punishment, or in violation of the law of war e.g., spying."[174] Contrast that approach with the Supreme Court's decision in *Loving v. United States*.[175] Justice Kennedy's opinion for the Court went no further than to "assume that *Furman* and the case law resulting from it are applicable to the crime and sentence in question."[176] Justice Thomas's concurring opinion cast further doubt over the question by observing, "It is not clear to me that the extensive rules we have developed under the Eighth Amendment for the prosecution of civilian capital cases, including the requirement of proof of aggravating factors, necessarily apply to capital prosecutions in the military**,** and this Court has never so held."[177] On the other hand, in that same case Justice Stevens, joined by Justices Souter, Ginsburg, and Breyer, wrote, "[W]hen the punishment may be death, there are particular reasons to ensure that the men and women of the Armed Forces do not by reason of serving their country receive less protection than the Constitution provides for civilians."[178] What is a settled point under the CAAF jurisprudence—the general applicability of Supreme Court capital jurisprudence to the military justice system, subject to appropriate exceptions based on military necessity—seems to still be a point in contention at the Supreme Court level.

A second example demonstrating that the CAAF more readily recognizes servicemembers' constitutional rights than does the Supreme Court concerns the Fifth Amendment's protection against self-incrimination. Article 31 of the UCMJ predates *Miranda v. Arizona* by sixteen years.[179] Chief Justice Warren even cited Article 31 in his opinion for the Court in

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[166] United States v. Kennedy, 548 F.2d 608, 609 (5th Cir. 1977).

[167] *Dowty*, 60 M.J. at 173.

[168] Courtney v. Williams, 1 M.J. 267, 270 (C.M.A. 1976).

[169] *Id.* This approach had previously informed the decision in *United States v. Jacoby*, 29 C.M.R. 244, 346-47 (C.M.A. 1960) ("protections in the Bill of Rights, except those which are expressly or by necessary implication inapplicable, are available to members of our armed forces").

[170] 58 M.J. 221 (2003).

[171] 16 M.J. 354 (C.M.A. 1983).

[172] 408 U.S. 238 (1972).

[173] *Id.* at 368.

[174] *Id.*

[175] 517 U.S. 748 (1996).

[176] *Loving*, 517 U.S. at 755.

[177] *Id.* at 777 (internal citations omitted).

[178] *Id.* at 774.

[179] *Compare* UCMJ art. 31, UCMJ, Pub. L. No. 81-506, 64 Stat. 117, 118 (1950), *with Miranda v. Arizona*, 384 U.S. 436 (1966).

Miranda.[180] Article 31 is also broader than *Miranda* in that: (1) it requires warnings even if the suspect is not in custody; and (2) it requires the interrogator to inform the individual being interrogated of the suspected offense.[181] But in one respect, *Miranda* is broader than Article 31: Article 31 has no equivalent to *Miranda*'s requirement to tell suspects that they have the right to consult with counsel before deciding whether to answer any questions.[182] However, in *United States v. Tempia*,[183] the CAAF held that when *Miranda*'s protections exceed those of Article 31, the military is bound by both Article 31 and *Miranda*. Judge Ferguson's opinion of the Court noted, "The time is long since past . . . when this Court will lend an attentive ear to the argument that members of the armed services are, by reason of their status, *ipso facto* deprived of all protections of the Bill of Rights."[184] Judge Kilday's concurring opinion similarly observed:

> The decision of the Supreme Court on this constitutional question is imperatively binding upon us, a subordinate Federal court, and we have no power to revise, amend, or void any of the holdings of *Miranda,* even if we entertained views to the contrary or regarded the requirements thereof as onerous to the military authorities.[185]

Compare that sentiment with *Davis v. United States*,[186] where Justice O'Connor's opinion for the Court noted, "We have never had occasion to consider whether the Fifth Amendment privilege against self-incrimination, or the attendant right to counsel during custodial interrogation, applies of its own force to the military, and we need not do so here."[187]

A second important point about the CAAF's *Courtney* approach is that despite using the Bill of Rights as the starting point and putting the burden on a party urging a military exception, the CAAF has not been reluctant to find that military conditions do require a different rule.

Certainly the CAAF's most prominent recent application of federal constitutional precedent to the military justice system was the decision in *United States v. Marcum*.[188] *Marcum* provides a case study in both using civilian constitutional protections as a starting point and recognizing that military conditions can yield a different result.[189]

As mentioned above, *Marcum* dealt with *Lawrence v. Texas*'s[190] impact on Article 125, the UCMJ's sodomy provision.[191] The CAAF began by again recognizing that "[c]onstitutional rights generally apply to members of the armed forces unless by their express terms, or the express language of the Constitution, they are inapplicable."[192] But the CAAF still held that Technical Sergeant Marcum's act of sodomy could be criminally prosecuted.[193] The CAAF did so by recognizing the disparate power that exists between a senior noncommissioned officer (NCO) and a junior airman in his same chain of command.[194] This placed the junior airman within *Lawrence*'s exception for those "who might be . . . coerced or who are situated in relationships where consent might not easily be refused."[195] Prohibiting such relationships and protecting subordinates are valid military interests that removed Marcum's acts from the "zone of autonomy" for sexual activity that the Supreme Court recognized in *Lawrence v. Texas*.[196]

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[180] *Miranda*, 384 U.S. at 489 ("Similarly, in our country the Uniform Code of Military Justice has long provided that no suspect may be interrogated without first being warned of his right not to make a statement and that any statement he makes may be used against him.").

[181] *See* UCMJ art. 31 (2002).

[182] *Compare Miranda*, 384 U.S. at 444-45, *with* UCMJ art. 31.

[183] 37 C.M.R. 249 (C.M.A. 1967).

[184] *Id.* at 253.

[185] *Id.* at 261.

[186] 512 U.S. 452 (1994).

[187] *Id.* at 457 n.

[188] 60 M.J. 198 (2004).

[189] *See generally id.* at 202-27.

[190] 539 U.S. 558 (2003).

[191] *Marcum*, 60 M.J. at 199.

[192] *Id*. at 200.

[193] *Id.* at 208.

[194] *Id.* at 207-08.

[195] *Lawrence*, 539 U.S. at 578.

[196] *Marcum*, 60 M.J. at 208.

In one sense, *Marcum* was a direct application of *Lawrence*—*Lawrence* itself recognized that the liberty interest it recognized did not apply to those who might be coerced. But in another sense, it was a uniquely military result. What would happen if a civilian middle manager were criminally prosecuted for engaging in an act of non-forcible sodomy with an employee of the same company? Most likely the courts would rule that *Lawrence* prohibited that prosecution. But in the military, because an NCO exercises a great deal more control than does a civilian middle manager, the CAAF concluded that the military could criminalize an NCO's act of sodomy with a lower-ranking airman in his direct chain of command. Of course, the military could criminalize such a relationship regardless of the NCO's and lower-ranking service member's gender or particular act of sexual intimacy.

Interestingly, in two recent cases, the Army Court of Criminal Appeals applied *Marcum* to invalidate sodomy convictions for consensual heterosexual acts. One of the cases involved soldiers of the same pay grade[197] and the other involved a soldier and a civilian.[198]

Another area where the CAAF has applied Supreme Court precedent to the military justice system concerns child pornography cases—which make up a surprisingly large percentage of the CAAF docket. When the Supreme Court remanded *O'Connor* to the CAAF, [199] the CAAF applied the Supreme Court's holding in *Ashcroft v. Free Speech Coalition*[200] to invalidate a court-martial conviction based on the Child Pornography Prevention Act of 1996 (CPPA)[201] because the providence inquiry did not indicate whether the images were of real children or were, instead, "virtual" computer-generated images.[202]

In *United States v. Mason*[203] and *United States v. Irvin*,[204] the CAAF affirmed two child pornography convictions because the providence inquiries supported the conclusion that the misconduct was prejudicial to good order and discipline or was service discrediting, rather than because the conduct violated the CPPA. *Mason* is particularly interesting. Major Mason was an Air Force major (Maj.) assigned to the Defense Supply Center in Columbus, Ohio.[205] He committed various offenses on his government computer, including accessing child pornography Internet sites and downloading images of child pornography.[206] He was charged with, among other offenses, violating the CPPA.[207] This offense was charged as an Article 134, clause 3 offense, which prohibits "other crimes and offenses not capital."[208]

During the providence inquiry, the military judge did two things of note. First, he defined child pornography to include images that "appear to be" minors engaged in sexually explicit conduct.[209] In *Ashcroft v. Free Speech Coalition*, the Supreme Court struck down the portion of the CPPA that criminalized images appearing to be minors rather than of actual minors.[210] *Ashcroft* informed the CAAF's 2003 holding in *United States v. O'Connor*, which invalidated O'Connor's conviction under the CPPA because the military judge had used the constitutionally-impermissible "appears to be" standard when defining child pornography during the providence inquiry.[211]

The second thing of note that the military judge did in *Mason* was to conduct a providence inquiry into the additional element of whether Mason's conduct was prejudicial to good order and discipline or service discrediting.[212] In fact, the

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[197] United States v. Barber, No. 20000413 (Army Ct. Crim. App. Oct. 7, 2004) (unpublished).

[198] United States v. Bullock, No. 20030534 (Army Ct. Crim. App. Nov. 30, 2004) (unpublished).

[199] 55 M.J. 157 (2001), *vacated*, 35 U.S. 1014 (2002).

[200] 535 U.S. 234 (2002).

[201] Pub. L. No. 104-208, 121, 110 Stat. 3009, 3009-26 (codified as amended at 18 U.S.C. § 2256 (2000)).

[202] *See* 58 M.J. 450, 453-55 (2003).

[203] 60 M.J. 15 (2004).

[204] 60 M.J. 23 (2004).

[205] *Mason*, 60 M.J. at 16.

[206] *Id.*

[207] *Id.* at 17.

[208] UCMJ art. 134 (2002).

[209] *Mason*, 60 M.J. at 17.

[210] 535 U.S. 234, 249-51 (2002).

[211] United States v. O'Connor, 58 M.J. 450, 455 (2003).

[212] *Mason*, 60 M.J. at 17.

military judge in this case was exceptionally prescient. He told Major Mason that he was advising him about this final element in case it is "determine[d] [that] your plea to the . . . [charged offenses] is improvident."[213]

Judge Erdmann's opinion for the Court in *Mason* includes a particularly interesting discussion contrasting application of the First Amendment to the CPPA and to the uniquely military offenses embodied in clauses (1) and (2) of Article 134.[214] For CPPA purposes, the First Amendment protects "virtual" as opposed to "actual" images of child pornography.[215] However, the CAAF concluded that the "virtual" versus "actual" distinction did not limit prosecutions under clauses (1) and (2) of Article 134.[216] First, the CAAF noted that "[t]he receipt or possession of 'virtual' child pornography can, like 'actual' child pornography, be service-discrediting or prejudicial to good order and discipline."[217] The CAAF then noted that even if the images that Maj. Mason possessed had been "'virtual' in nature, this still involves a commissioned officer of the United States Air Force receiving and viewing such images on a government computer in his workplace."[218] Given those facts, "the distinction between 'actual' child pornography and 'virtual' child pornography does not alter the character of Mason's conduct as service-discrediting or prejudicial to good order and discipline."[219] The CAAF also quoted the Supreme Court's famous language from *Parker v. Levy*:

> 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. [220]

In other cases, the CAAF have provided greater protections to military accused than civilian defendants would enjoy. For example, in *United States v. Tulloch*,[221] the CAAF parted from the Supreme Court concerning the manner in which a prosecutor could overcome a *Batson* challenge.[222]

In *Purkett v. Elem*,[223] the Supreme Court held that after the defense had made a prima facie showing of racial discrimination in the use of peremptory challenges, the prosecutor was not required to offer "an explanation that is persuasive or even plausible."[224] The Court held that any race-neutral explanation, such as the prospective juror's long hair, was permissible and that there is no requirement for the prosecutor to offer "a reason that makes sense."[225] According to the Court, it is inappropriate to focus on "the reasonableness of the asserted nonracial motive" rather than on "the genuineness of the motive."[226]

But in *Tulloch*, the CAAF expressly adopted a "different standard for assessing the validity of trial counsel's proffered race-neutral explanation[s]."[227] The military justice system, with the convening authority's selection of members and the parties' single peremptory challenge, differs significantly from civilian systems.[228] In *Tulloch*, the CAAF held that unlike their civilian counterparts, military trial counsel may not offer an explanation that is "unreasonable, implausible, or that

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[213] *Id.* at 17-18.

[214] *Id.* at 19-20.

[215] *Id.* at 19.

[216] *Id.* at 19-20.

[217] *Id.* at 20.

[218] *Id.*

[219] *Id.*

[220] *Id.* (quoting Parker v. Levy, 417 U.S. 733, 758 (1974)).

[221] 47 M.J. 283 (C.A.A.F. 1997).

[222] *See* Batson v. Kentucky, 476 U.S. 79 (1986).

[223] 514 U.S. 765 (1995).

[224] *Id.* at 768.

[225] *Id.* at 769.

[226] *Id.*

[227] United States v. Tulloch, 47 M.J. 283, 287 (C.A.A.F. 1997).

[228] *Id.*

otherwise makes no sense."[229] In arriving at a different rule, Judge Effron's opinion for the court emphasized distinctions between the way that juries are selected and seated and the way that court-martial panels are selected and seated.[230] The opinion observed:

> *Purkett* reflects the Supreme Court's sensitivity to the fact that in civilian life – where there are virtually no qualifications for jury service—instinct necessarily plays a significant role in the use of peremptory challenges to ensure that both the Government and the accused are able to present the case to jurors capable of understanding it and rendering a fair verdict.[231]

In court-martial practice, on the other hand, there is a "less compelling need" for instinct-based challenges "because the convening authority already has taken" the members' qualifications "into account in exercising his responsibilities under Article 25 to select members on the basis of a 'best-qualified' standard."[232] The CAAF also noted "the importance of avoiding the use of stereotypes for any purpose within the court-martial system."[233]

So adjustments to constitutional rights in the military justice system are not made with a one-way ratchet. In some cases, military accused enjoy greater protections than their civilian counterparts.

Conclusion

According to the cliché, the law is a seamless web.[234] The cliché, of course, is wrong. If the law is a web, it is incredibly tangled—and sticky. In the common law system, where the law develops through judicial decisions, judges play the role of spiders spinning that web. Article III case law is one thread that is available to appellate judges in the military justice system as the CAAF expands the web through each written opinion. But the CAAF must be particularly careful when weaving with this thread, because its improper use might trap the spider rather than a fly.

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[229] *Id.*

[230] *Id.*

[231] *Id.*

[232] *Id.*

[233] *Id.* at 286 (citation omitted).

[234] That cliché is often attributed to the Nineteenth Century English legal historian Frederic W. Maitland. But Maitland actually used the phrase "seamless web" to describe history: "Such is the unity of all history that any one who endeavours to tell a piece of it must feel that his first sentence tears a seamless web." Frederic W. Maitland, *A Prologue to a History of English Law*, 14 LAW Q. REV. 13, 13 (1898).