Practicing What the Court Preaches[1]—2007 New Developments in Fourth Amendment Search and Seizure Law

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The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.[2]

Introduction

If last year's new developments in search and seizure law were one of anticipation, then this year's should be known as one of implementation.[3] The implementation and impact of last year's decisions within the military justice system were pronounced within the service courts of criminal appeals[4] and the Court of Appeals for the Armed Forces (CAAF)[5] this term.[6] In other words, the collective military courts were simply applying the rudder, and aligning the course,[7] of Fourth Amendment jurisprudence in terms of a reasonable expectation of privacy in computers and digital media,[8] as well as scope of consent.[9] On the other hand, the U.S. Supreme Court avoided any "sharp rudder steers" in terms of defining Fourth Amendment jurisprudence, seeking refinement in its October 2006 term[10] by addressing the issues of reasonableness—while executing a valid search warrant,[11] and standing—whether a vehicle passenger has standing to challenge a search incident to a lawful traffic stop.[12]

Therefore, this year's symposium article should, and needs to, be viewed as the next in a series of articles regarding the continuing evolution of Fourth Amendment law. In this regard, Part I addresses the two search and seizure cases the Supreme Court decided in its 2006 term of court.[13] Part II addresses cases by the CAAF as it interprets precedent set in past

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[1] A play on the common idiom meaning "do things the way you tell others to do them . . . ." GoEnglish.com, *Practice What You Preach*, *available at* http://www.goenglish.com/PracticeWhatYouPreach.asp (last visited June 17, 2008). In this article, the Court of Appeals for the Armed Forces (CAAF) and the respective service courts have spent the term of court applying the law decided from the previous term of court in respect to Fourth Amendment law.

[2] U.S. CONST. amend. IV.

[3] Last year's article focused on several pregnant issues, specifically regarding: reasonable expectation of privacy in Government e-mail (*Long II*); scope of consent by co-tenants (*Randolph II*). *See* Lieutenant Colonel Stephen R. Stewart, *Katy Bar the Door—2006 New Developments in Fourth Amendment Search and Seizure Law*, ARMY LAW., June 2007, at 1.

[4] *See generally* UCMJ art. 66 (2008); *see also* MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 1203 (2008) [hereinafter MCM].

[5] *See generally* UCMJ art. 67; *see also* MCM, *supra* note 4, R.C.M. 1204.

[6] The CAAF 2007 term of court began on 1 October 2006 and ended 30 September 2007. *See* U.S. Court of Appeals for the Armed Forces, Opinions & Digest, http://www.armfor.uscourts.gov/2007Term.htm (last visited June 19, 2008); *infra* sec. II, United States v. Larson (*Larson I*); 64 M.J. 559 (A.F. Ct. Crim. App. 2006); United States v. Rader, 65 M.J. 30 (2007); United States v. Gallagher, 65 M.J. 601 (N-M. Ct. Crim. App. 2007); United States v. Weston, 65 M.J. 774 (N-M. Ct. Crim. App. 2007).

[7] One Fourth Amendment critic describes "Fourth Amendment case law [as] a sinking ocean liner—rudderless and badly off course." Akhil Reed Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757, 759 (1994).

[8] *See Larson I*, 64 M.J. 559.

[9] *See Rader*, 65 M.J 30.

[10] The U.S. Supreme Court's October 2006 Term began on 2 October 2006 and ended 30 September 2007. *See* Supreme Court of the United States, 2006 Term Opinions of the Court, http://www.supremecourtus.gov/opinions/06slipopinion.html (last visited June 19, 2008).

[11] *See* Los Angeles County, California v. Rettele, 127 S. Ct. 1989 (2007).

[12] *See* Brendlin v. California, 127 S. Ct. 2400 (2007).

[13] *See id.*; *Rettele*, 127 S. Ct. at 1989.

year's terms of court vis-à-vis *Georgia v. Randolph*,[14] and *United States v. Bethea*.[15] Finally, Part III looks ahead to the 2008 term of court and the impact *United States v. Long*[16] will have on *United States v. Larson*.[17]

I. 2006 Term U.S. Supreme Court Cases—Refining the Concept of Fourth Amendment Reasonableness and Standing

A. Reasonableness

The touchstone of the Fourth Amendment is reasonableness.[18] This foundational proposition has proven itself difficult to define and conceptually awkward.[19] For example, what is a reasonable search when looking at the prohibition against unreasonable searches within the Fourth Amendment context? What about reasonableness in executing a warrant? Last year, the Supreme Court addressed the historic perception of reasonableness within the context of the common law "knock and announce" rule in *Hudson v. Michigan*.[20] The knock and announce rule describes "[t]he requirement that the police knock at the door and announce their identity, authority, and purpose before entering a residence to execute an arrest or search warrant."[21] In *Hudson*, the question addressed by the Court was whether a violation of the knock and announce rule, while police executed a lawful warrant, would result in the application of the exclusionary rule.[22] While the court decided that a violation of the knock and announce rule, without more (i.e. egregious behavior), would not result in a per se application of the exclusionary rule, it did affirm that the rule remained a part of the reasonableness analysis in the execution of a search warrant.[23]

This term of court, the Supreme Court again addresses the issue of reasonableness while executing a lawful search warrant. In *Los Angeles County, California v. Rettele*, the Supreme Court addresses the issue of whether law enforcement

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[14] *Randolph II*, 547 U.S. 103 (2006).

[15] 61 M.J. 184 (2005).

[16] 64 M.J. 57 (2006).

[17] *Larson I*, 64 M.J. 559 (2006), *petition granted*, United States v. Larson, 65 M.J. 253 (2007).

[18] The majority opinion in *Florida v. Jimeno* states that "[t]he touchstone of the Fourth Amendment is reasonableness." 500 U.S. 248, 250 (1991) (citing Katz v. United States, 389 U.S. 347, 360 (1967)). See also the Court's analysis in *Wyoming v. Houghton*:

> In determining whether a particular governmental action violates [the Fourth Amendment], we inquire first whether the action was regarded as an unlawful search or seizure under the common law when the Amendment was framed. Where that inquiry yields no answer, we must evaluate the search or seizure under traditional standards of reasonableness by assessing, on the one hand, the degree to which it intrudes upon an individual's privacy and, on the other, the degree to which it is needed for the promotion of legitimate governmental interests.

526 U.S. 295, 299–300 (1999) (citations omitted).

[19] The Fourth Amendment can be reduced to two clauses: The Reasonableness Clause and Warrant Clause.

> The first clause of the Fourth Amendment (the Reasonableness Clause) provides that 'the right of the people to be secure . . . against unreasonable searches and seizures shall not be violated.' The Amendment's second clause (the Warrant Clause) states that "no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

JOSHUA DRESSLER & ALAN MICHAELS, UNDERSTANDING CRIMINAL PROCEDURE 167 (4th ed. 2006).

[20] 126 S. Ct. 2159 (2006). For further discussion of the knock and announce rule in the context of *Hudson*, see Stewart, *supra* note 3, at 4–7.

[21] BLACK'S LAW DICTIONARY 876 (7th ed. 1999).

[22] *Hudson*, 126 S. Ct. at 2162. The exclusionary rule is defined as "[a]ny rule that excludes or suppresses evidence obtained in violation of an accused person's constitutional rights." BLACK'S LAW DICTIONARY 587.

> The deterrence of unreasonable searches and seizures is a major purpose of the exclusionary rule. . . . But the rule serves other purposes as well. There is, for example. . . .' the imperative of judicial integrity,' namely, that the courts do not become 'accomplices in willful disobedience of a Constitution they are sworn to uphold.' . . . A third purpose of the exclusionary rule . . . is that of 'assuring the people—all potential victims of unlawful government conduct—that the government would not profit from its lawless behavior, thus minimizing the risk of seriously undermining popular trust in the government.'

Id. (citing WAYNE R. LAFAVE & JEROLD H. ISRAEL, CRIMINAL PROCEDURE § 3.1, at 107 (2d ed. 992) (quoting Elkins v. United States, 364 U.S. 206, 222–23 (1960); United States v. Calandra, 414 U.S. 338, 576–78 (1974) (Brennan, J., dissenting)).

[23] *Hudson*, 126 S. Ct. at 2168; *see also* Stewart, *supra* note 3, at 7.

officers acted reasonably when they searched a house with a valid warrant, but were unaware that the criminal suspects had moved out several months ago.[24]

This case represents an embarrassing case of mistaken identity. Here, the Los Angeles County deputies obtained a valid warrant to search a house for three criminal suspects who were African American.[25] It was reported that one suspect owned a registered handgun.[26] When the deputies entered the residence, they discovered Rettele and Sadler, who were Caucasian, naked in bed.[27] They were ordered out of the bed for one to two minutes as the deputies searched for suspects and the firearm.[28] Upon realizing their mistake, the deputies had Rettele and Sadler dress, and apologized.[29] Subsequently, Rettele brought suit against the city, the sheriff's department, and department officers, alleging that the officers conducted an unlawful and unreasonable search and detention.[30] The district court granted summary judgments to all named defendants.[31] However, the Court of Appeals for the Ninth Circuit reversed, and concluded that the deputies violated the Fourth Amendment and were not entitled to qualified immunity because a reasonable deputy would have stopped the search upon discovering that respondents were of a different race than the suspects, and, therefore, a reasonable deputy would not have ordered respondents out of bed.[32]

In reviewing the Ninth Circuit's decision under a grant of certiorari, the Supreme Court finds the test of reasonableness under the Fourth Amendment in the context of executing a search warrant is an objective one.[33] In executing a search warrant officers may take reasonable action to secure the premises and to ensure their own safety and the efficacy of the search.[34] Unreasonable actions include the use of excessive force or restraints that cause unnecessary pain or are imposed for a prolonged and unnecessary period of time.[35]

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[24] 127 S. Ct. 1989 (2007).

[25] *Id*. at 1991. The warrant was obtained pursuant to a fraud and identity-theft crime ring investigation. Additionally, the warrant authorized a search of two houses in Lancaster, California where the sheriffs believed they would find the criminal suspects. *Id*. at 1990–91.

[26] *Id*. ("[Los Angeles County Sheriff's Department Deputy Dennis] Waters informed [the deputies] they would be searching for three African-American suspects, one of whom owned a registered handgun.").

[27] *Id*. at 1990.

[28] *Id*. at 1991.

> The deputies' announcement awoke Rettele and Sadler. The deputies entered their bedroom with guns drawn and ordered them to get out of their bed and to show their hands. They protested that they were not wearing clothes. Rettele stood up and attempted to put on a pair of sweatpants, but deputies told him not to move. Sadler also stood up and attempted, without success, to cover herself with a sheet. Rettele and Sadler were held at gunpoint for one to two minutes before Rettele was allowed to retrieve a robe for Sadler. He was then permitted to dress. Rettele and Sadler left the bedroom within three to four minutes to sit on the couch in the living room

Id.

[29] *Id*.

> By that time the deputies realized they made a mistake. They apologized to Rettele and Sadler, thanked them for not becoming upset, and left within five minutes. They proceeded to the other house the warrant authorized them to search, where they found the three suspects. Those suspects were arrested and convicted.

Id.

[30] *Id.* Rettele and Sadler filed suit under 42 U.S.C. § 1983 for a violation of their Fourth Amendment right to be free from unreasonable search and seizure. *Id*.

[31] *Id*.

[32] *Id. See* Rettele v. L.A. County, 186 Fed. App'x. 765 (9th Cir. Cal. 2006). In this unpublished opinion the majority held that:

> because (1) no African-Americans lived in [respondents'] home; (2) [respondents], a Caucasian couple, purchased the residence several months before the search and the deputies did not conduct an ownership inquiry; (3) the African-American suspects were not accused of a crime that required an emergency search; and (4) [respondents] were ordered out of bed naked and held at gunpoint while the deputies searched their bedroom for the suspects and a gun, we find that a reasonable jury could conclude that the search and detention were "unnecessarily painful, degrading, or prolonged," and involved "an undue invasion of privacy."

Rettele, 127 S. Ct. at 1991–92 (quoting Franklin v. Foxworthy, 31 F.3d 873, 876 (9th Cir. 1994)).

[33] *Id*. at 1992 (citing Graham v. Conner, 490 U.S. 386, 397 (1989)). *Graham* addresses the "reasonableness of a seizure of a person." *Id*.

[34] *Id*. (citing Muehler v. Mena, 544 U.S. 93, 98–100 (2005)).

[35] *Id*. at 1993 (citing *Muehler*, 544 U.S. at 100).

In this analysis, the Court adopts a common sense approach in evaluating the law enforcement conduct. Consequently, the Court finds the "orders of the [deputies] to the occupants, in this context of the lawful search, were permissible, and perhaps necessary, to protect the safety of the deputies."[36] Underscoring this point, the Court acknowledges that blankets and bedding can conceal a weapon—especially since one of the criminal suspects reportedly owned a firearm.[37]

However, in *Michigan v. Summers*, the Court recognizes that "special circumstances, or possibly a prolonged detention" might render a search unreasonable.[38] This was not the case here. There was no evidence indicating the deputies prevented Sadler and Rettele from dressing any longer than necessary to protect their individual safety—they were naked for less than two minutes.[39] In fact, the record indicates that Sadler testified that after the deputies searched the room "they wanted us to get dressed and they were pressing us really fast to hurry up and get some clothes on."[40] Ultimately, the Court recognizes a fact of life in law enforcement: "[o]fficers executing search warrants on occasion enter a house when residents are engaged in private activity; and the resulting frustration, embarrassment, and humiliation may be real, as was true here."[41]

Objectively, the Supreme Court concludes that when officers execute a valid warrant and act in a reasonable manner, as in this case, the Fourth Amendment is not violated.[42] The applicability of this case to military justice is to remind Judge Advocates and military law enforcement that the standard of reasonableness applied to search or seizure authorizations is an objective one, and one that is based on common sense.[43]

B. Standing

Similar to *Rettele*, in *Brendlin v. California*, the Supreme Court focuses on the Fourth Amendment touchstone of reasonableness.[44] Reasonableness in whether a passenger is seized, as is a driver of a car, when a police officer makes a traffic stop and therefore has standing to challenge the constitutionality of the stop.[45] This issue of Fourth Amendment constitutional standing for a vehicle passenger, albeit inferred in dicta by the Supreme Court, remained unresolved.[46] Now, *Brendlin* seeks to clarify whether a vehicle passenger has constitutional standing.

The facts of this case arise from a simple, unjustified traffic stop. Police officers stopped a car to check its registration, as it had temporary registration tags properly displayed on the car, even though it was being operated lawfully.[47] As the officer questioned the driver, the passenger was recognized as one of the Brendlin brothers, Scott or Bruce, who had absconded from parole supervision.[48] During the inquiry, the passenger falsely identified himself as "Bruce Brown." The officer returned to his police vehicle and verified that Bruce Brendlin was a parolee at large and had an outstanding no-bail warrant for his arrest.[49] Brendlin was placed under arrest.[50] During the search incident to arrest, police discovered drug

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[36] *Id.*

[37] *Id.* The Court notes that "[t]he Constitution does not require an officer to ignore the possibility that an armed suspect may sleep with a weapon within reach. . . . [R]eports are replete with accounts of suspects sleeping close to weapons." *Id.* The Court cites several cases which are replete with accounts of suspects sleeping with weapons; e.g. "suspect kept a 9-millimeter Luger under his pillow while he slept" (citing United States v. Jones, 33 F.3d 245, 348 (.3d Cir. 2003); "officers 'pulled back the bed covers and found a .38 caliber Model 10 Smith and Wesson revolver located near where defendant's left hand had been" (citing State v. Willis, 843 So.2d 592, 595 (La. Ct. App. 2007)). *Id.*

[38] *See* 452 U.S. 692, 705 n.21 (1981).

[39] *Rettele*, 127 S. Ct. at 1993.

[40] *Id.*

[41] *Id.*

[42] "Unreasonable actions include the use of excessive force or restraints that cause unnecessary pain or are imposed for a prolonged and unnecessary period of time." *Id.* (citing Muehler v. Mena, 544 U.S. 93, 100 (2005); Graham v. O'Connor, 490 U.S. 386, 396–99 (1989)).

[43] *Id.* (citing *Graham*, 490 U.S. at 397).

[44] 127 S. Ct. 2400 (2007).

[45] *Id.* at 2403.

[46] *Id.* at 2406 (citing Delaware v. Prouse, 440 U.S. 648, 653 (1979)).

[47] *Id.* at 2404 ("The officers decided to pull the Buick over to verify that the permit matched the vehicle, even though, as [the police officer] admitted later, there was nothing unusual about the permit or the way it was affixed.").

[48] *Id.* The driver was Karen Simeroth, and when the officer asked for her license he saw Bruce Brendlin sitting in the front seat. *Id.*

[49] *Id.*

[50] *Id.*

paraphernalia on him.[51] A patdown search of the driver also yielded syringes and drugs, and a further search of the car produced methamphetamine-manufacturing paraphernalia.[52] "Brendlin was charged with possession and manufacture of methamphetamine."[53]

Subsequently, Brendlin "moved to suppress the evidence obtained in the searches of his person and the car as fruits of an unconstitutional seizure, arguing that the officers lacked probable cause or reasonable suspicion to make the traffic stop."[54] The trial court determined that he had not been seized within the meaning of the Fourth Amendment until the police officer took him into custody, and therefore, lacked standing to suppress the items seized from the vehicle.[55] The California Court of Appeals reversed holding that a traffic stop necessarily results in detention, and hence a seizure.[56] The California Supreme Court reversed emphasizing that unless the passenger of a vehicle was the subject of the traffic stop investigation, or show of authority, he is not seized.[57]

The Supreme Court granted certiorari to determine whether a traffic stop subjects a passenger, as well as the driver, to Fourth Amendment seizure. The Court looks to *Florida v. Bostick* in determining that a person is seized by the police and thus entitled to challenge the government's action under the Fourth Amendment when the officer, "'by means of physical force or show of authority' terminates or restrains his freedom of movement."[58] Therefore, a "traffic stop entails a seizure of the driver 'even though the purpose of the stop is limited and the resulting detention quite brief.'"[59]

The seminal question then becomes whether a reasonable person in Brendlin's position when the car was stopped would have believed himself free to "terminate the encounter" between the police and himself.[60] The Court says no: "We think that it in these circumstances any reasonable passenger would have understood the police officers to be exercising control to the point that no one in the car was free to depart without police permission."[61] The Court recognizes in their past opinions the "societal expectation of 'unquestioned [police] command' at odds with any notion that a passenger would feel free to leave, or to terminate the personal encounter any other way, without advance permission."[62]

Therefore, Brendlin was indeed seized. The Supreme Court finds that "Brendlin was seized from the moment the [driver's] car came to a halt on the side of the road, and it was error to deny his suppression motion on the ground that seizure occurred only at the formal arrest."[63] For the military justice practitioner, this case highlights not only the holding of the case, but also the principle of reasonableness as the touchstone of the Fourth Amendment.[64] The Court articulates reasonableness in the form of the "societal expectations" which it considers in crafting their decision.[65] Although some

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[51] *Id.* Police found an orange syringe cap when they searched Brendlin. *Id.*

[52] *Id.* The search of Simeroth "revealed syringes and a plastic bag of a green leafy substance." *Id.* The search of the car found "tubing, a scale, and other things used to produce methamphetamine." *Id.*

[53] *Id.*

[54] *Id.*

[55] *Id.* ("[Brendlin] did not assert that his Fourth Amendment rights were violated by the search of Simeroth's vehicle, but claimed only that the traffic stop was an unlawful seizure of his person."(citation omitted)).

[56] *Id. See* People v. Brendlin, 115 Cal. Rptr. 3d 882 (Cal. Ct. App. 2004).

[57] *Id.* The California Supreme Court reversed by a narrow majority. *See* People v. Brendlin, 136 P.3d 845, 846 (2006).

[58] *Brendlin*, 127 S. Ct. at 2405 (quoting Florida v. Bostick, 501 U.S. 429, 434 (1991)).

[59] *Id.* (quoting Delaware v. Prouse, 440 U.S. 648, 653 (1979)).

[60] *Id.* at 2406 (citing *Bostick*, 501 U.S. at 436).

[61] *Id.* at 2406–07.

> A traffic stop necessarily curtails the travel a passenger has chosen just as much as it halts the driver, diverting both from the stream of traffic to the side of the road, and the police activity that normally amounts to intrusion on "privacy and personal security" does not normally (and did not here) distinguish between passenger and driver.

Id. at 2407 (citing United States v. Martinez-Fuerte, 428 U.S. 543, 554 (1976)).

[62] *Id.* (quoting Maryland v. Wilson, 519 U.S. 408 (1997)).

[63] *Id.* at 2410. The court also finds solace in their conclusion since it "comports with views of all nine Federal Courts of Appeals, and nearly every state court, to have ruled on" this particular question. *Id.* at 2407–08.

[64] *See* Katz v. United States, 389 U.S. 347, 360 (1967).

[65] *See generally Randolph II*, 547 U.S. 103 (2006).

critics may see this as a loose foundation in which to consider Fourth Amendment decisions, the sum effect is a common sense approach to Constitutional law.[66]

II. The 2007 CAAF Term of Court—Staying the Course by Using Precedent as a Rudder

A. Consent

The issue of societal expectations within the context of Fourth Amendment law gained prominence last year in the Supreme Court's decision in *Georgia v. Randolph*.[67] In *Randolph*, the Court stated that "[t]he constant element in assessing Fourth Amendment reasonableness in the consent cases, then, is the great significance given to widely shared social expectations. . . ."[68] This theme continues this term in the military courts over the issue of apparent consent.[69]

The CAAF addresses the issue of apparent consent in a case that typifies modern military living arrangements.[70] In *United States v. Rader*, the appellant and two other servicemembers rented an apartment in an off-base apartment complex.[71] As sometimes happens in these living arrangements—items and property were shared or purchased among roommates.[72] In this case, Airman (Amn) Rader agreed to purchase a computer from his roommate, Airman First Class (A1C) Davis.[73] The computer was located in A1C Davis's bedroom due to ventilation problems in Amn Rader's room, and was left there with the knowledge and consent of Amn Rader after he purchased it.[74] Additionally, A1C Davis performed routine maintenance on the computer every two weeks as the computers owned by all the roommates were joined together by a local access network (LAN) for the purpose of playing games and sharing files.[75]

While performing routine maintenance on Amn Rader's computer, A1C Davis discovered child pornography.[76] Airman First Class Davis opened a folder entitled "My Music" where he noticed thumbnails that appeared to be images of children engaging in sex acts.[77] Neither the folder, nor the computer, was password protected.[78] Airman Rader never prohibited A1C Davis from accessing the computer or any files within it.[79] Subsequently, A1C reported what he had seen on Amn Rader's computer to his first sergeant.[80] The Air Force Office of Special Investigations (AFOSI) began an investigation, and with a Judge Advocate from the local legal office, the agents gained voluntary consent from A1C Davis to enter and search the apartment and the computer.[81] The AFOSI agents accessed the computer's files and obtained the child pornography images.[82]

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[66] *Id.* at 129. *See generally* Justice Roberts and Scalia's joint dissent regarding the criticism of using "societal expectations" as a foundation for deciding common authority consent cases. *Id.* at 127–42.

[67] *Id.* at 103.

[68] *Id.* at 111.

[69] United States v. Rader, 65 M.J. 30 (2007).

[70] *Id.* at 31.

[71] *Id.* ("Between May and October 2003, Appellant and two other servicemembers, Airman Thacker and Airman First Class (A1C) Davis, rented an apartment in an off-base apartment complex in Layton, Utah.").

[72] *Id.* "In May or June, the Appellant agreed to purchase A1C Davis' computer." *Id.* "Both A1C Davis and Airman Thacker used Appellant's computer to play computer games." *Id.*

[73] Rader was in the process of purchasing the computer from A1C Davis but had not finished paying for it. *Id.* at 32.

[74] *Id.* at 31.

[75] *Id.* A local area network (LAN) is "[a] system that links computers and related equipment to form a network, as within an office." AM. HERITAGE DICTIONARY 477 (4th ed. 2001).

[76] *Radar*, 65 M.J. at 31.

[77] *Id.*

[78] *Id.*

[79] "Although A1C Davis had never used the LAN to access the Appellant's 'My Music' folder, A1C Davis believed that each of the roommates could access all of the files on the other roommates' computers via the LAN." *Id.* at 31–32.

[80] *Id.* at 32.

[81] *Id.*

[82] *Id.*

Airman Rader moved to suppress the child pornography images on the basis that A1C Davis had insufficient access over the computer to give valid consent to its search.[83] The trial judge denied the motion to suppress,[84] and Amn Rader conditionally pled guilty[85] and was convicted of three specifications related to the use of his computer and an interactive computer service to receive child pornography in violation of Uniform Code of Military Justice (UCMJ) Article 134.[86] The Air Force Court of Criminal Appeals (AFCCA) affirmed.[87] The CAAF reviewed the denial of a motion to suppress, and asks "whether Appellant's roommate had sufficient access and control of Appellant's computer to consent to the search and seizure of certain unencrypted files in Appellant's non-password-protected computer."[88]

The issue of third party consent to search property is well-established in the law. Typically, the search of a home, to include items inside the home like a computer, is prohibited absent a warrant.[89] Military Rule of Evidence (MRE) 314(e)(2) recognizes that a third party "may grant consent to search property when the person exercises control over that property."[90] The consent may even be valid in instances when the nonconsenting person with whom that authority is shared is absent.[91] "Common authority" for purposes of validity to third party consent to search is "'mutual use of the property by persons generally having joint access or control for most purposes, so that it is reasonable to recognize that any of the co-inhabitants has the right to risk that one of their number might permit' the search."[92]

The issue of whether A1C Davis had sufficient access and control of Rader's computer to authorize consent to search is fact-specific.[93] The CAAF agrees with the military judge that it would be "difficult to imagine how there could have been a greater degree of joint access, mutual use, or control."[94] Several factors considered by the court did not favor Rader's assertion of A1C Davis's limited access to his computer: (1) "the Appellant did nothing to communicate a restriction regarding access to his computer files";[95] (2) any understanding "regarding restricted access to Appellant's computer was tacit and unclear, as evidenced by A1C Davis and Airman Thacker's use of the computer," as well as, the lack of surprise by Appellant when (via telephone call) A1C Davis informed him that he had been looking at Appellant's files and saw "porn";[96] (3) that "neither the computer nor any of its files were password protected, encrypted, or subject to any other technological

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[83] *Id.*

[84] *Id.* ("[T]he military judge's conclusion of law was that the Government had established by clear and convincing evidence that A1C Davis had sufficient access over the computer to give valid consent to its search.").

[85] *See* MCM, *supra* note 4, R.C.M. 910(a)(2).

> With the approval of the military judge and the consent of the Government, an accused may enter a conditional plea of guilty, reserving the right, on further review or appeal, to review of the adverse determination of any specified pretrial motion. If the accused prevails on . . . appeal, the accused shall be allowed to withdraw the plea of guilty.

Id. See also United States v. Lawrence, 43 M.J. 677 (A.F. Ct. Crim. App. 1995) (discussing the policy reasons behind conditional guilty pleas).

[86] *Rader*, 65 M.J. at 30.

[87] *Id. See* United States v. Rader, No. ACM 36133, 2006 CCA LEXIS 164 (A.F. Ct. Crim. App. June 20, 2006).

[88] *Rader*, 65 M.J. at 30.

[89] *Id.* at 32 (citing U.S. CONST. amend. IV; *Randolph II*, 547 U.S. 103 (2006); United States v. Conklin, 63 M.J. 333, 337 (2006) (reaffirming expectation of privacy in the contents of a personal computer)).

[90] *Id. See* MCM, *supra* note 4, MIL. R. EVID. 314(e)(2).

[91] *Radar*, 65 M.J. at 32. The court cites *United States v. Matlock*, 415 U.S. 164, 171 (1974), as well as *Randolph II*, 547 U.S. at 116. *Randolph II* "reaffirm[s] the constitutional sufficiency of third party consent absent the objection of a present, nonconsenting person with whom the authority is shared." *Rader*, 65 M.J. at 32–33.

[92] *Radar*, 65 M.J. at 33 (quoting *Matlock*, 415 U.S. at 171 n.7).

[93] *Id.* ("The control of a third party exercises over property or effects is a question of fact.").

> In this case, the findings of fact include the following: (1) Appellant's computer was physically "located in [A1C] Davis' bedroom,"; (2) "[N]either the accused's computer nor the My Music folder on the accused's computer was protected by a password"; (3) "[T]he accused never told Davis not to access his computer or any files within the computer"; (4) A1C Davis and Airman Thacker "used the accused's computer to play computer games" with Appellant's "knowledge and consent"; (5) A1C Davis "accessed the accused's computer approximately every two week[s] to perform routine maintenance on that computer"; and (6) Appellant "never told Davis not to access his computer or any files within the computer."

Id.

[94] *Id.* at 34.

[95] *Id.*

[96] *Id.*

impediment to review by a person at Appellant's computer";[97] and (4) simply, the record does not indicate that "Appellant never told his roommates not to access his computer or any of its files outside of his presence."[98]

The CAAF conclusively agrees with the trial court and the Air Force Court of Military Appeals that the Government met its clear and convincing burden of persuasion: "A1C Davis had sufficient access to and control over the computer to give valid consent to its search, and that Appellant assumed the risk that he might do so."[99] This case stands out not so much for the affirmation of the principle of third party consent, but for the reminder how the Fourth Amendment analysis is fact-dependent. If any admonishment is to be interpreted from the CAAF to the military justice practitioner it is to develop your facts and place them on the record when addressing Fourth Amendment issues involving consent. Had the trial judge not recorded the comprehensive findings of fact, the CAAF would have been disadvantaged in their review of the record.

B. Probable Cause

The CAAF continues to refine and reinforce their holdings regarding the sufficiency of evidence to support probable cause for a search authorization. *United States v. Bethea* was the CAAF's most recent iteration on this issue in the 2005 term of court.[100] In *Bethea*, the court addressed whether a positive urinalysis result was sufficient evidence to establish probable cause for a search authorization "to seize a hair sample from Appellant to test it for evidence of drug use."[101] The CAAF's decision "changed military jurisprudence with regard to the definition of probable cause."[102] By refusing to be ambushed by a "semantic" analysis of the military judge's conclusion, the court provided military justice practitioners and judges assurance that the "totality of the circumstances"[103] test for probable cause really means a totality of the circumstances.[104] The CAAF boldly reasserted this by stating that probable cause is a "flexible, common sense standard"[105] and does not "require a showing that an event is more than 50% likely."[106] Now, two terms later, the CAAF readdresses the issue of probable cause in *United States v. Leedy*.[107]

Where CAAF in *Bethea* addresses probable cause in the context of totality of the circumstances, the CAAF in *Leedy* addresses probable cause in the context of how a military magistrate develops and interprets the totality of the circumstances. Airman First Class Leedy appealed his conviction[108] for possessing and/or receiving child pornography, and the CAAF granted review of the following issue: "Whether the military judge erred in denying Appellant's motion to suppress the evidence seized from Appellant's computer where the affidavit in support of the search did not contain any description of the substance of the images suspected in to depict 'sexually explicit conduct.'"[109] In other words: "when, if at all, can computer file titles, absent further description of file contents, serve as probable cause to search for child pornography."[110] Airman

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[97] *Id*.

[98] *Id*.

[99] *Id*. (citing Matlock v. United States, 415 U.S. 164, 171 n.7 (1974)).

[100] 61 M.J. 184 (2005).

[101] *Id*. at 184.

[102] Lieutenant Colonel M. K. Jamison, USMC, *New Developments in Search and Seizure Law*, ARMY LAW., Apr. 2006, at 9, 23.

[103] *Bethea*, 61 M.J. at 187 (quoting Illinois v. Gates, 462 U.S. 213, 230, 239 (1983)).

[104] Jamison, *supra* note 102, at 23.

[105] *Bethea*, 61 M.J. at 187 (quoting Texas v. Brown, 460 U.S. 730, 742 (1983)).

[106] *Id*. (citing United States v. Olson, No. 03-CR-51-S, 2003 U.S. Dist. LEXIS 24607, at *16 (W.D. Wis. July 11, 2003)); *see also* Ostrander v. Madsen, Nos. 00-35506, 00-35538, 00-35541, 2003 U.S. App. LEXIS 1665, at *8 (9th Cir. Jan. 28, 2003) ("Probable cause is met by less than a fifty percent probability, so that even two contradictory statements can both be supported by probable cause."); Samos Imex Corp. v. Nextel Commc'ns, Inc., 194 F.3d 301, 303 (1st Cir. 1999) ("The phrase 'probable cause' is used, in the narrow confines of Fourth Amendment precedent, to establish a standard less demanding than 'more probable than not.'"); United States v. Burrell, 963 F.2d 976, 986 (7th Cir. 1992) ("'Probable cause requires more than bare suspicion but need not be based on evidence sufficient to support a conviction, nor even a showing that the officer's belief is more likely true than false.'") (quoting Brinegar v. United States, 338 U.S. 160, 175 (1949)).

[107] 65 M.J. 208 (2007).

[108] *Id*. at 210. Leedy plead not guilty to "possessing and/or receiving child pornography in violation of Article 134, Uniform Code of Military Justice (UCMJ)." *Id*. He was "convicted and sentenced to a bad-conduct discharge, confinement for eight months, total forfeiture of all pay and allowances, and reduction to airman basic." *Id*. "The Air Force Court of Criminal Appeals affirmed the findings and sentence." *Id*.

[109] *Id*.

[110] *Id*.

First Class Leedy contends that the computer file name "14 year old Filipino girl" listed in the probable cause affidavit was not enough, without a description of the file contents, to authorize a search of his computer.[111]

The computer file name "14 year old Filipino girl" came to be recognized through the physical clumsiness of A1C Leedy's roommate, A1C Winkler. Airman First Class Winkler claims to have bumped into Leedy's computer which caused the screen saver to disengage.[112] The computer screen then displayed the Window's Media Player that contained a list of recently played files with names that included "three white guys and one black girl" and "a 14 year old Filipino girl."[113] Based on the title of the files, A1C Winkler suspected these were pornographic files; and at least one of them he perceived to be child pornography.[114] About a month later, A1C Winkler reports his suspicion to the AFOSI.[115] Special Agent (SA) Spring investigates and is told by A1C Winkler that he suspected, but never saw any pornographic images on A1C Leedy's computers.[116]

Despite the dearth of evidence beyond A1C Winkler's statements, SA Spring sought a search authorization.[117] He met with the chief of military justice who believed there was probable cause to search A1C Leedy's computer.[118] "The affidavit consisted of two primary sections."[119] The first section provided SA Spring's background and expertise in the area of child pornography.[120] The second section provided the facts and circumstances supporting the search authorization, and a contextual explanation for them; to wit: SA Spring, based on his background and experience, identified a number of "characteristics" of people involved in viewing and collecting child pornography, and that the file names observed on Leedy's computer by his roommate, A1C Winkler, comported with those characteristics.[121]

The military magistrate, Colonel Byers, found probable cause.[122] Colonel Byers testified during the motion to suppress hearing that he based his probable cause on several factors.[123] First, he closely read the affidavit.[124] Second, he questioned SA Spring about the matter for more than twenty minutes (raising many of the questions that Leedy echoes in his appeal).[125] For example:

> Col[onel] Byers voiced his trepidations about whether A1C Winkler could be trusted, the length of time between A1C Winkler's finding of the files and his report to AFOSI, that no one had actually seen any pornography played on Appellant's computer, and about whether the file names provided were actually pornographic.[126]

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[111] *Id*. at 211. He also contends that probable cause was not met for several reasons:

> A1C Winkler was unknown to AFOSI and had no track record of providing any information to the office; the only evidence A1C Winkler provided the magistrate was stale (over a month had elapsed between A1C Winkler seeing Appellant's files and his report to AFOSI); no one had ever seen any pornography of any sort on Appellant's computer; the sole direct link between Appellant and child pornography was the title of a file: "14 year old Filipino Girl", and there was nothing in the title, nor in A1C Winkler's description of the other files, that necessarily suggested lasciviousness or portrayals of "sexually explicit conduct."

Id.

[112] *Id.*

[113] *Id*. at 215.

[114] *Id*.

[115] *Id*.

[116] *Id*. at 211.

[117] *Id*.

[118] *Id*.

[119] *Id*. at 214.

[120] *Id.*

[121] *Id*. at 216.

[122] *Id.* at 218.

[123] *Id.*

[124] *Id*. at 217.

[125] *Id*. at 218.

[126] *Id*.

Importantly, the magistrate "explicitly, and properly, relied," but did not defer to, SA Spring's expertise.[127] Third, "he proceeded to speak with others including A1C Winkler's and Appellant's commanding officer to gain further insight about whether there was any motive for A1C Winkler to fabricate charges against Appellant."[128] Only after this investigation, did the magistrate issue the authorization.[129]

In light of the magistrate's authorization to search A1C Leedy's computer, the CAAF focuses its analysis on the magistrate's actions in order to reach a decision regarding its certified issue for review; i.e. the lack of a description of the substance of the images suspected to depict "sexually explicit conduct."[130] The CAAF draws upon a broad range of federal precedent to lay the foundation in evaluating the magistrate's conduct. The court attempts to "contain" the amorphous concept of probable cause by defining what it is not. For instance, probable cause "is not a 'technical' standard, but rather is based on 'the factual and practical considerations of everyday life on which reasonable and prudent [people], not legal technicians act.'"[131] Additionally, the evidence presented in support of a search need not be sufficient to support a conviction, nor even to demonstrate than an investigator's belief is more likely true than false.[132] And, finally, "there is no specific probability required, nor must the evidence lead one to believe that it is more probable than not that contraband will be present."[133]

Therefore, in viewing the evidence under the totality of the circumstances as established by *Illinois v. Gates*, the CAAF sees three distinct points in support of the magistrate's decision to find probable cause. First, the court is skeptical of Leedy's narrow focus on the computer file title "14 year old Filipino girl" in his appeal. Although acknowledging the title could be innocent, the court notes that the title does not appear in isolation, and is not the sole predicate fact.[134] Moreover, the court seeks to view this in context of the "professional lens . . . presented to the magistrate."[135]

Hence, what illuminates the facts provided is the second point the court identifies: SA Spring's training and experience.[136] Special Agent Spring's experience was useful to the magistrate by filtering evidence not only through his experience, but skepticism toward A1C Leedy's roommate. Through his professional judgment and common sense, he provided useful information and context to the magistrate to confirm probable cause to search A1C Leedy's computer.[137] While noting that the "Supreme Court has repeatedly directed reviewing courts to apply common sense, and practical considerations" in probable cause cases, the CAAF concludes that the gloss SA Spring applied to A1C Leedy's file titles was well founded.[138]

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[127] *Id*.

> [S]tating, for instance, that he concurred with SA Spring's assessment that there was a substantial basis to believe that the file names were pornographic based upon "[SA Spring's] experience and some cases that he's had and the evidence that those type [sic] of titles taken in context . . . was that [those files]could be pornographic in nature."

Id.

[128] *Id.*

[129] *Id*. "Investigators searched Appellant's computer and found pornographic files (video clips and still photos), more than thirty of which depicted sexually explicit acts involving minors." *Id*. at 211.

[130] *Id*. at 210. This is a rather eclectic case that on first blush appears about the sufficiency of evidence to support probable cause, but closer scrutiny reveals the CAAF treatment focuses on the magistrate's calculus in arriving at probable cause.

[131] *Id.* at 213 (quoting Brinegar v. United States, 338 U.S. 160, 175 (1949)).

[132] *Id*. (citing United States v. Burrell, 963 F.2d 976, 986 (7th Cir. 1992)).

[133] *Id*. (citing United States v. Bethea, 61 M.J. 184, 187 (2005) (holding that the standard is a "flexible, common-sense" one)).

[134] *Id*. at 215. As an initial factor, the title is included on a sequential play list alongside titles that A1C Winkler (A1C Leedy's roommate) understood to identify sex acts. *Id*.

[135] *Id*.

[136] *Id*. at 216.

[137] *Id*. ("SA Spring stated that staleness concerns are usually misapplied in child pornography, that in his experience individuals who enjoy child pornography are invariably 'collectors,' almost always keeping their material permanently.").

[138] *Id*. at 217.

> We acknowledge that relying upon expertise too heavily, at the expense of hard facts, can be troubling and is open to abuse. However, such blind faith reliance is not present here, either by SA Spring or the magistrate. It is evident that SA Spring did not simply rest on his training, passively filtering any evidence through his experience. SA Spring was actively skeptical about A1C Winkler's claims and did not immediately accept his concerns as legitimate. When A1C Winkler presented his information to the AFOSI, SA Spring performed an in-depth interview of the airman to assess his credibility. SA Spring questioned the airman about whether there was an ulterior motive behind his report and clearly established the limits of what was known and what was not. It was

The CAAF's third and final point is that ultimately, the law and the CAAF, do not want a magistrate to act as a "rubber stamp."[139] The court wants a magistrate that acts "in light of his own investigation of the facts, and pays heed to the circumstances in which he learned of the facts."[140] Such is the case here. The magistrate only expressed confidence in SA Spring's affidavit when, pursuant to his own inquiry, he was convinced that the requirements had been met.[141]

In conclusion, this case is less about defining totality of the circumstances for a probable cause determination, but more about what it means to be a neutral and detached magistrate who applies "common sense and practical considerations" to the facts of a search authorization request.[142] The holding in *Leedy* is important for the proposition that:

> [p]robable cause is founded not on the determinative features of any particular piece of evidence provided an issuing magistrate—nor even solely based upon the affidavit presented to a magistrate by an investigator wishing search authorization—but rather upon the overall effect or weight of all factors presented to the magistrate.[143]

III. Looking Ahead to CAAF's 2008 Term of Court: Reasonable Expectation of Privacy in Government Computers

Last year's symposium article[144] focused considerably on the expectation of privacy in government e-mail communications as decided by the CAAF in *United States v. Long*.[145] In *Long*, the CAAF upheld the "Navy-Marine Corps Court of Criminal Appeals holding that a naval servicemember has a reasonable expectation of privacy in government e-mail stored on a government server, making it binding upon all service courts."[146] The significance of the *Long* case continues to reverberate not only within the Department of Defense,[147] but also within the CAAF as it prepares to hear *United States v. Larson* in its 2008 term of court.[148]

The *Larson* (*Larson I*) case addresses the reasonable expectation of privacy in a government computer.[149] The court notes that in military jurisprudence, the focus of Fourth Amendment litigation involving computers has primarily been on the

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> only once SA Spring had assessed the information and was confident that A1C Winkler's concerns were bona fide and that he had no "axe to grind" against Appellant that SA Spring presented the collected material to the base Chief of Military Justice for her assessment as to the existence of probable cause. After obtaining a judge advocate's assent, SA Spring wrote up a comprehensive affidavit to be presented to the magistrate requesting search authorization. The affidavit included both information about A1C Winkler's claims and SA Spring's professional judgment (based on his education and experience) linking the claims to a likelihood that contraband would be present.

Id. at 216–17.

[139] *Id*. at 217.

[140] *Id*. at 218.

[141] *Id*.

[142] *Id*. "The constitutional propriety of SA Spring's behavior also comports with common sense." *Id*. at 217.

[143] *Id*. at 213. The CAAF also cites *United States v. Cravens*:

> [The c]ourt adopted the military judge's finding that a magistrate appropriately fulfilled his role as a neutral and detached magistrate, and that his decision was clearly his own after he asked responsible questions, considered the views of the investigators and judge advocate advisor and only then made his decision.

Id. at 218 (citing United States v. Cravens, 56 M.J. 30, 373, 376 (2002)).

[144] *See* Stewart, *supra* note 3, at 7–17.

[145] *Long II*, 64 M.J. 57 (2006).

[146] *See* Stewart, *supra* note 3 (citing United States v. Long (*Long I*), 61 M.J. 539, 541 (N-M. Ct. Crim. App. 2005)).

[147] *Id*. at 7–17.

[148] *Larson I*, 64 M.J. 559 (A.F. Ct. Crim. App. 2006), *rev. granted*, United States v. Larson (*Larson II*), 65 M.J. 253 (2007). The CAAF granted review of several issues, but the issue for review of interest to this article is: "[W]hether the Air Force Court of Criminal Appeals erred in holding that Appellant had no reasonable expectation of privacy in his government computer despite this court's ruling in U*nited States v. Long*, 64 M.J. 57 (2006)." *Larson II*, 65 M.J. at 253.

[149] *Larson I*, 64 M.J. at 559

expectation of privacy afforded e-mail.[150] However, the search here did not focus on that type of communications, and is therefore a case of first impression.[151] The search focused on

> certain data files, created as part of the 'normal operation procedure' of the Microsoft Windows operation system, which record the date, time and Internet address of web sites visited by the computer user, as well as information about the user account in use on the computer at the time the sites were visited.[152]

Although the legal issue is one of first impression for the AFCAA, the facts are typical.[153] Major (MAJ) Larson was a thirty-six-year-old reserve officer on extended active duty at Schriever Air Force Base in Colorado Springs, Colorado temporarily filling in for a deployed officer.[154] Major Larson's assigned office was the same one assigned to the deployed officer, and still contained that officer's personal belongings.[155] It contained a government computer, connected to the government network, which included the Internet.[156] The computer displayed a logon banner "stating it was government equipment and that users consented to monitoring."[157]

Major Larson used his government computer to access the Internet.[158] He used an instant-messaging (IM) program from a commercial Internet company which permitted him to select a user "user name and to input data about [himself], including [his] real name, age, location, gender and hobbies."[159] Accordingly, MAJ Larson: "identified himself as 'Skeeler' and his location as Colorado Springs."[160] Major Larson did not use his real name but stated "his true age" and "his sole hobby as 'Public sex.'"[161]

Through the IM program, MAJ Larson met someone on-line.[162] He met "Kristin" who "was 14 years old, lived in Colorado Springs, and up until recently, owned a pet hamster."[163] Their conversation turned to sex, and after a few days MAJ Larson asked if they could meet.[164] He suggested they go to a park where they could have sex without being seen.[165] Over the course of a week the conversation turned more explicit, and "Kristin" finally agreed to "hook up with him."[166] The court wryly notes that "[a]s fate would have it . . . his duty schedule intervened and he was unable to meet [her] as planned."[167] He apologized, and after more sexually explicit IM messages, arranged another meeting.[168]

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[150] *Id*. at 563 (citing e.g., *Long II*, 64 M.J. at 57; United States v. Monroe, 52 M.J. 326 (2000)).

[151] *Id*.

[152] *Id*. ("Such files are like a 'documentary history of [the user's] travels on the Internet.") (quoting United States v. Romm, 455 F.3d 990, 994 n.5 (9th Cir. 2006)).

[153] *See, e.g.*, Associated Press, *Pastor: Minister Arrested in Sex Sting Resigned*, http://www.foxnews.com/printer_friendly_story/0,3566,356519,00.html (last visited May 18, 2008).

[154] *Larson I*, 64 M.J. at 561.

[155] *Id*.

[156] *Id*.

[157] *Id*.

[158] *Id*.

[159] *Id*.

[160] *Id*.

[161] *Id*.

[162] *Id.*

[163] *Id*.

[164] *Id*.

[165] *Id*.

[166] *Id*.

> Over the course of the next week or so, the appellant urged Kristin to masturbate and to touch her anus, to describe those acts to him after the fact, and also to describe various aspects of her anatomy to him. As these discussions progressed, the appellant repeatedly discussed his desire to engage in sexual intercourse with Kristin, and asked if she would perform oral sodomy on him and allow him to anally sodomize her.

Id.

[167] *Id*.

Major Larson kept this rendezvous.[169] When he arrived, he was quickly apprehended by the local police, and arrested.[170] "Kristin" was not a fourteen-year-old girl, but instead an undercover Colorado Springs police officer.[171] In the search incident to his arrest, the police "discovered in [his] pocket a receipt for a package of condoms purchased just 15 minutes prior to his arrest."[172]

After his arrest, the military authorities were notified and began their own parallel investigation.[173] Major Larson's commander authorized the AFOSI to enter his locked office and seize his government computer.[174] During a forensic search of his computer, data files, stored automatically by the Microsoft Windows operating system during MAJ Larson's Internet browsing sessions, were recovered indicating that he used the computer to search the Internet for sexually-related material and obtain sexually-explicit images.[175]

At trial, MAJ Larson sought to suppress the results of the warrantless search of his government computer as it violated his reasonable expectation of privacy under the Fourth Amendment.[176] The military judge denied the motion and found that reasonable expectation of privacy was compromised by the fact his office was accessible by several others, to include his commander, various administrators, and other personnel assigned to the unit.[177] Additionally, it was not MAJ Larson's office. The deployed officer, for whom MAJ Larson was filling in, would return to his office, which contained his computer, and his personal belongings.[178]

The AFCCA reasonable expectation of privacy analysis focuses less on the issue of office accessibility, but rather on the data files on the government computer.[179] Citing precedent, the court concludes:

> There is no evidence the appellant was aware the Internet history files existed, and we are unconvinced the appellant could entertain a subjective expectation of privacy in them without such knowledge. Moreover, we conclude such an expectation, even if it existed, would on these facts not be reasonable. The data in question was recorded automatically, not for law enforcement purposes, but as part of the computer's operating system. The appellant could not expect to keep private automatically-recorded data stored on government property he would reasonably have known would be turned over to another officer on that officer's return from deployment.[180]

As identified earlier in this article's analysis of *Larson I*, the CAAF finds this case attractive for further appellate review for its interest in re-addressing its decision in *United States v. Long*.[181] The *Long* case has generated its share of controversy by upending conventional wisdom that in light of log-on banners, and government computer and a network's inherent nature

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[168] *Id.*

[169] *Id*.

[170] *Id*.

[171] *Id*. The police officer kept verbatim transcripts of all Larson's IM conversations with "Kristin." *Id*.

[172] *Id*. at 562.

[173] *Id*.

[174] *Id*.

[175] *Id*.

[176] *Id.*

[177] *Id*.

[178] *Id*.

[179] *Id*.

[180] *Id*. at 563.

> See, e.g. *United States v. Conklin*, 63 M.J. 333, 337 (C.A.A.F. 2006) (finding only a "limited" expectation of privacy in a government computer in a government office); *United States v. Tanksley*, 54 M.J. 169, 172 (C.A.A.F. 2000), *overruled in part on other grounds by United States v. Inong*, 58 M.J. 460, 465 (C.A.A.F. 2003) (finding "at best" a "reduced" expectation in personal computer data kept in a government office).

Id.

[181] United States v. Long, 64 M.J. 57 (2006).

as government property, that any servicemember would be able to demonstrate a reasonable expectation of privacy in it.[182] So the question becomes whether the CAAF will expand their interpretation of reasonable expectation of privacy to include, as the AFCCA saw as a case of first impression, data files created as part of the "normal operating procedure" of the Microsoft Windows operating system.[183] The CAAF has therefore framed the issue for review as thus: "Whether the Air Force Court of Criminal Appeals erred in holding that appellant had not reasonable expectation of privacy in his government computer despite this court's ruling in *United States v. Long*, 64 M.J. 57 (C.A.A.F. 2006)."[184]

IV. Conclusion

This year's term of court could definitely be described as one of yeoman's work of implementing last year's Fourth Amendment decisions and precedents. The Supreme Court, the CAAF, and the service court of criminal appeals remind us that the touchstone of Fourth Amendment law is: Reasonableness. It is reasonableness that guided their decisions in *Rettele*,[185] *Brendlin*,[186] *Rader*,[187] *Leedy*,[188] and *Larson*.[189] And, it is reasonableness that will guide their next term of court, and will "resupply" the continuing offensive for Fourth Amendment clarity.

[182] *See generally* Stewart, *supra* note 3, at 7–17.

[183] *Larson I*, 64 M.J. 559, 563 (A.F. Ct. Crim. App. 2007).

[184] United States v. Larson (*Larson II*), 65 M.J. 253 (2007). At the time of publication, CAAF has already ruled on this granted issue for review, and finds that the Air Force Court of Criminal Appeals did not abuse his discretion "in concluding that [Larson] had no expectation of privacy in the government computer." United States v. Larson (*Larson III*), 66 M.J. 212 (2008) (quoting *Larson I*, 64 M.J. at 563). The next symposium article will provide detail analysis on the CAAF's holding.

[185] Los Angeles County, California v. Rettele, 127 S. Ct. 1989 (2007).

[186] Brendlin v. California, 127 S. Ct. 2400 (2007).

[187] United States v. Rader, 65 M.J. 30 (2007).

[188] United States v. Leedy, 65 M.J. 208 (2007).

[189] *Larson I*, 64 M.J. 559 (A.F. Ct. Crim. App. 2006).