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Military Justice Symposium

Articles

Foreword

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Welcome to the fourteenth annual *Military Justice Symposium*, analyzing the important cases and trends from the 2008 term of court. This year, we have moved the publication date to February and March to ensure the most relevant analysis makes it to the field as early as possible. This year's symposium contains articles on the Fourth, Fifth, and Sixth Amendments, as well as substantive criminal law, panel selection, voir dire, challenges, discovery, sentencing and advocacy.

In keeping with our tradition, the faculty has selected only the most significant cases from the Supreme Court, the Court of Appeals for the Armed Forces, and the service courts for analysis. Practitioners can find a complete review of all new cases in any given subject area by reviewing the *2008 Crimes and Defenses Deskbook*[1] or the *32d Criminal Law New Developments Deskbook*, both of which are located on JAGCNET.[2] If you are looking for advocacy assistance, be sure to obtain a copy of *The Advocacy Trainer*,[3] which was published in hardcopy by the Office of the Judge Advocate General in November 2008. It is an excellent resource with dozens of easily executable advocacy training exercises. We hope you find all of these materials helpful in your practice and we always welcome your questions and comments.

Finally, this symposium marks the final appearance of four excellent instructors in the Criminal Law Department. Our Vice Chair, Lieutenant Colonel Steve Stewart, USMC, and Lieutenant Colonels Nick Lancaster, Jim Varley, and Kwasi Hawks are all leaving this summer for new assignments. Each of these fine officers deserves recognition for their contributions to the symposium and to the practice of criminal law throughout the Department of Defense.

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[1] CRIMINAL LAW DEP'T, THE JUDGE ADVOCATE GENERAL'S LEGAL CTR. & SCH., JA 337, 2008 CRIMES & DEFENSES DESKBOOK (Nov. 2008), *available at* https://www.jagcnet.army.mil/JAGCNETPortals/Internet/DocLibs/tjaglcsdoclib.nsf.

[2] *See* CRIMINAL LAW DEP'T, THE JUDGE ADVOCATE GENERAL'S SCH., U.S. ARMY, 32ND CRIMINAL LAW NEW DEVELOPMENTS DESKBOOK (3–6 Nov 2008), *available at* https://www.jagcnet.army.mil/JAGCNETPortals/Internet/DocLibs/tjaglcsdoclib.nsf.

[3] *See* CRIMINAL LAW DEP'T, THE JUDGE ADVOCATE GENERAL'S SCH., THE ADVOCACY TRAINER, A MANUAL FOR SUPERVISOR (1999), *available at* https://www.jagcnet.army.mil/JAGCNETPortals/Internet/DocLibs/tjaglcsdoclib.nsf.

2008 New Developments in Self-Incrimination

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"No person . . . shall be compelled in any criminal case to be a witness against himself . . . ."[1]

Introduction

During the 2008 court term, four cases were decided that shed light on rarely examined, but exceptionally important, areas of self-incrimination law. The Court of Criminal Appeals (CAAF) case of *United States v. Freeman*[2] and Navy-Marine Court of Criminal Appeals (NMCCA) case of *United States v. Wheeler*[3] examined the issue of voluntariness of confessions that were indisputably preceded by knowing and intelligent waivers of Article 31, Uniform Code of Military Justice (UCMJ) and Military Rule of Evidence (MRE) 305 rights. In *Wheeler*, the NMCCA's analysis of when a trial defense counsel can use evidence of polygraph examinations taken during an accused's interrogation to attack the voluntariness of an accused's subsequent confession is especially valuable.[4] The outcome of this case may prove surprising in light of MRE 707's general, if not comprehensive, prohibition on the use of evidence that an accused took a polygraph for any reason.[5]

In addition, the Coast Guard Court of Criminal Appeals (CGCCA) case of *United States v. Bonilla*, addressed the circumstances under which government law enforcement agents may re-initiate the questioning of a suspect after he has invoked his Fifth Amendment right to counsel during a continuous custody situation.[6] Finally, the Army Court of Criminal Appeals (ACCA), in the case of *United States v. Matthews*, evaluated a trial judge's handling of a defense witness's invocation of his right against self-incrimination under cross-examination and the government trial counsel's comment upon that invocation during her closing argument on merits.[7] All four of these cases examine areas of self-incrimination that are infrequently litigated and too rarely understood by most military trial and defense counsel.

Voluntariness

The UCMJ recognizes four sources of self-incrimination law. These sources include the Fifth Amendment,[8] the Sixth Amendment,[9] Article 31(b), UCMJ[10] and the Common Law Doctrine of Voluntariness.[11] These sources of self-incrimination law are encompassed by MRE 301–306.[12] These rules represent a partial codification of the law relating to self-incrimination

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[1] U.S. CONST. amend. V.

[2] 65 M.J. 451 (C.A.A.F. 2008).

[3] 66 M.J. 590 (N-M. Ct. Crim. App. 2008).

[4] *Id.* at 592–95.

[5] MANUAL FOR COURTS-MARTIAL, UNITED STATES, MIL. R. EVID. 707 (2008) [hereinafter MCM].

[6] 66 M.J. 654 (C.G. Ct. Crim. App. 2008).

[7] 66 M.J. 645 (A. Ct. Crim. App. 2008).

[8] U.S. CONST. amend. V ("No person . . . shall be compelled in any criminal case to be a witness against himself . . . .").

[9] *Id.* amend. VI ("In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence.").

[10] UCMJ art. 31 (2008). Article 31(b) states:

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

Id.

[11] Hopt v. Utah, 110 U.S. 574 (1884) (recognizing that the common law requirement for voluntariness has been adopted into federal evidence law); *see generally* Fredric I. Lederer, *The Law of Confessions—The Voluntariness Dcotrine*, 74 MIL. L. REV. 67 (1976).

[12] MCM, *supra* note 5, MIL. R. EVID. sec. III, analysis, at A22-5.

as well as confessions and admissions.[13] These rules are only a partial codification of statutory and case law because they contain some gaps that may be filled by referring to rules of evidence recognized by U.S. district courts and, when consistent with the district courts' rules, the rules of evidence at common law.[14] This system of codification of the statutory and common law rules in the MRE is unique when compared to any other state or federal codes and often represent rules of criminal procedure as well as evidence.[15]

Military Rule of Evidence 304(c)(3) defines a statement as involuntary "if it is obtained in violation of the self-incrimination privilege or due process clause of the Fifth Amendment to the Constitution of the United States, Article 31, or through the use of coercion, unlawful influence, or unlawful inducement."[16] When a motion or objection to the use of an admission or confession by an accused is made by the defense, "the prosecution has the burden of establishing the admissibility of the evidence"[17] by a preponderance of the evidence.[18] The voluntariness of a confession is a question of law that is reviewed by appellate courts de novo.[19]

Trial judges or appellate courts examine the "totality of the circumstances" surrounding an accused's confession to determine "whether the confession is the product of an essentially free and unconstrained choice by its maker."[20] When attempting to determine whether a particular statement was voluntary or the result of an accused's will being overborne, the trial judge or appellate court looks at the characteristics of the accused and the circumstances surrounding the interrogation.[21] The courts have considered factors such as: the youth of the accused,[22] his lack of education,[23] or his low intelligence,[24] the lack of any advice to the accused of his constitutional rights,[25] the length of detention,[26] the repeated and prolonged nature of the questioning,[27] and the use of physical punishment such as the deprivation of food or sleep.[28] When analyzing these factors, trial judges or appellate courts examine the factual circumstances surrounding the confession or admission, assess the psychological impact on the accused, and evaluate the legal significance of how the accused reacted.[29] Armed with this basic understanding of the law, we will turn our attention to the CAAF case of *United States v. Freeman.*[30]

United States v. Freeman[31]

In this case, the CAAF reviewed a U.S. Air Force trial judge's failure to suppress an accused's confession at trial.[32] In *Freeman*, the accused, a twenty-three-year-old E-4, was questioned about an alleged aggravated assault by Special Agent

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[13] *Id.*

[14] *Id.* MIL. R. EVID. 101.

[15] STEPHEN A. SALTZBURG ET AL., MILITARY RULES OF EVIDENCE MANUAL 3-7, 3-8 (6th ed. 2006).

[16] 2008 MCM, *supra* note 5, MIL. R. EVID. 304(c)(3).

[17] *Id.* MIL. R. EVID. 304(e).

[18] *Id.* R.C.M. 304(e)(1); *see also* United States v. Bubonics, 45 M.J. 93 (C.A.A.F. 1996).

[19] Arizona v. Fulminante, 499 U.S. 279, 287 (1991); United States v. Bresnahan, 62 M.J. 137, 141 (C.A.A.F. 2005).

[20] *Bubonics*, 45 M.J. at 95.

[21] Schneckloth v. Bustamone, 412 U.S. 218, 226 (1973) .

[22] Haley v. Ohio, 332 U.S. 596 (1948).

[23] E.g., Payne v. Arkansas, 356 U.S. 560 (1958).

[24] *E.g.*, Fikes v. Alabama, 352 U.S. 191 (1957).

[25] *E.g.*, Davis v. North Carolina, 384 U.S. 737 (1966).

[26] *E.g.,* Chambers v. Florida, 309 U.S. 227 (1940).

[27] *E.g.*, Ashcraft v. Tennessee, 322 U.S. 143 (1944).

[28] *E.g.*, Reck v. Pate, 367 U.S. 433 (1961).

[29] Culombe v. Conneticut, 367 U.S. 568, 603 (1961).

[30] 65 M.J. 451 (C.A.A.F. 2008).

[31] *Id.*

[32] *Id.*

(SA) Bogle of the U.S. Air Force Office of Special Investigations (AFOSI).[33] After being advised of and waiving his rights, Senior Airman (SrA) Freeman personally prepared a seven-page statement in which he admitted having a relationship with the victim, but denied assaulting her or having any knowledge of the attack.[34] In addition to providing a written statement, SrA Freeman agreed to return to the AFOSI office for a polygraph examination at a later date.[35]

Almost two weeks later, SrA Freeman returned to the AFOSI office for the previously agreed upon polygraph examination.[36] Senior Airman Freeman arrived at 9:06 a.m., and a short while later he was advised of his rights by SA Larsen.[37] Senior Airman Freeman waived his rights and signed another form consenting to a polygraph which included an additional rights advice.[38] Over the course of ten hours, SrA Freeman was subjected to four polygraph examinations and questioned by both SA Larsen and SA Bogle.[39] By 6:10 p.m., SrA Freeman had admitted his role in the assault and was led to a room where, over the course of about an hour and a half, he personally prepared his written confession on a computer.[40]

At trial, SrA Freeman objected to the admission of his confession into evidence.[41] Senior Airman Freeman did not argue that he was not advised of his rights or that he did not knowingly and intelligently waive those rights.[42] Instead, he argued that his confession was involuntary because it was obtained by the interrogators' "use of coercion, unlawful influence or unlawful inducement" in violation of Article 31, UCMJ and MRE 304(c)(3).[43] The military judge overruled the defense objections to the admissibility of the confession and SrA Freeman was subsequently convicted of making a false official statement and aggravated assault.[44]

On appeal, SrA Freeman did not contest the military judge's findings of fact, but reopened his attack on the voluntariness of his confession and argued "that the military judge incorrectly applied the law to the facts of this case."[45] Specifically, SrA Freeman claimed that his will was overborne by the convergence of the following three factors: (1) the length of the interview; (2) the interrogators' physical intimidation by invading his personal space; (3) the interrogators use of lies, threats, and promises.[46]

Regarding the use of lies, threats, and promises, SrA Freeman alleged that the investigators threatened: (1) to tell Freeman's commander whether or not he cooperated; (2) that if he did not cooperate he would be turned over to civilian authorities; and (3) that civilian punishment would be harsher, especially since the victim was a civilian; and (4) that he could be sent to jail for a long time if he did not cooperate.[47] Senior Airman Freemen further alleged that the investigators lied that fingerprint evidence as well as witnesses contradicted his denials that he was with the victim that night, despite the fact that there really was no fingerprint evidence and no witnesses; and promised that the sooner they completed the interrogation, the sooner everybody could go home and Freeman could get on with his life.[48] The findings of fact supporting the military judge's decision to deny SrA Freeman's suppression motion confirmed the threats, lies, and promises alleged by the

[33] *Id.* at 454.

[34] *Id.*

[35] *Id.*

[36] *Id.*

[37] *Id.*

[38] *Id.*

[39] *Id.* (quoting MCM, *supra* note 5, MIL. R. EVID. 304(c)(3)).

[40] *Id.* at 455.

[41] *Id.* at 453–54

[42] *Id*. at 454.

[43] *Id.*

[44] *Id.* at 452–53.

[45] *Id.* at 454.

[46] *Id.*

[47] *Id.*

[48] *Id.*

defense.[49] While the military judge agreed that these acts occurred, he did not feel that SrA Freeman's will was overborne.[50] The U.S. Air Force Court of Criminal Appeals (AFCCA) agreed and affirmed.[51]

Reviewing the trial judge's and the AFCCA's opinions, the CAAF engaged in its own de novo review of the voluntariness of SrA Freeman's confession by using the two-part test developed in *Schneckloth v. Bustamonte*.[52] Looking first at the characteristics of the accused, the CAAF determined that the preponderance of evidence weighed in favor of voluntariness.[53] The court noted that SrA Freeman was a twenty-three-year-old who had been properly advised of his rights before providing a personally prepared seven-page typed confession.[54] Between his original interview in which he denied attacking the victim and his subsequent polygraph and written confession, the court observed that he had thirteen days to seek counsel or decline further interviews and he chose not to do so.[55] The court noted that SrA Freeman had completed high school, could read and write, and that there was no evidence that SrA Freeman was not of average intelligence, or was in any way mentally impaired.[56] Moreover, the court noted that SrA Freeman had testified that he had six hours of sleep before reporting for the polygraph and that he denied any fatigue, hunger, thirst, or other problems.[57] Finally, the court observed that SrA Freeman never asked for an attorney during his interview, he never asked to leave the interview, nor did he indicate in any way that he felt coerced into making a statement.[58]

Turning to the second part of the *Schneckloth* test, the court evaluated the details of the interrogation.[59] While stating that the facts of this case made this test less definitive than the first test, the CAAF still found that the facts favored a finding of voluntariness.[60] The court pointed out that the polygraph examiner, SA Larson, properly advised SrA Freeman of his rights before administering two twenty to thirty-five-minute polygraph examinations over the course of two hours.[61] The court also looked favorably upon the breaks SrA Freeman was given between the polygraph examinations and the non-confrontational interview techniques applied by SA Larson.[62] At the conclusion of the first thirty-two-minute polygraph, SrA Freeman was given a one-hour break and allowed to leave the interview room while SA Larson analyzed the charts.[63] When SrA Freeman returned, SA Larson informed him that the results of the polygraph were "indiscernible" and that he would have to retest.[64] After a second exam lasting twenty-nine minutes, the appellant was given a twenty minute break while SA Larson again reviewed the charts.[65] When SA Larson and SrA Freeman met again, SA Larson informed him that he had

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[49] *Id.* at 455.

> Over the course of the interview, SA Bogle suggested to the accused that everyone makes mistakes and the best thing to do is to admit it and get it behind you. He promised the accused that if he cooperated, they could tell his commander about it and it might help. On the other hand, he told the accused, if you don't tell the truth, the case will go downtown and with a civilian victim you could get five years in jail. When the accused denied being out that night, SA Bogle lied to him and told him a witness saw him out. He also told the accused that his fingerprints were found at the scene.

Id.

[50] *Id.* 453.

[51] United States v. Freeman, ACM No. 35822, 2006 CCA LEXIS 160 (A.F. Ct. Crim. App. June 13, 2006) (unpublished).

[52] 412 U.S. 218 (1973).

[53] *Freeman*, 65 M.J. at 454.

[54] *Id.*

[55] *Id.*

[56] *Id.*

[57] *Id.*

[58] *Id.*

[59] *Id*.

[60] *Id.*

[61] *Id.* at 454–55.

[62] *Id.*

[63] *Id.* at 454.

[64] *Id.* at 454–55.

[65] *Id.*

concluded that he was being deceptive about his knowledge of the victim's injuries.[66] At this point in the interview, SA Bogle took over the questioning and was soon joined by SA Mann.[67]

At about this point in the interview, the SAs' interview tactics become more aggressive. Prior to meeting with SrA Freeman and confronting him with his determination that he was being deceptive, SA Larson rearranged the furniture in the room so that SrA Freeman was sitting directly in front of him.[68] After SA Larson told SrA Freeman that the results of the polygraph indicated that he had been deceptive, the interview turned into more of a confrontational interrogation—although the testimony indicated that SA Bogle only raised his voice above a conversational tone once.[69] Over the next six and a half hours of interrogation, SrA Freeman was reminded of his rights once, given two breaks, and left alone in a room for one hour and twenty minutes to prepare his confession on a computer.[70]

In his findings of fact, the trial judge found that SA Bogle had told SrA Freeman that everyone makes mistakes, that the best thing SrA Freeman could do was admit it and put his mistake behind him, and that if SrA Freeman cooperated with SA Bogle he would tell his commander and that might help his situation.[71] The trial judge further found that SrA Freeman was told that if he didn't tell the truth, he would be turned over to civilian police and because the victim was a civilian, it might result in five years of confinement.[72] Finally, the trial judge found that in response to SrA Freeman's assertions that he wasn't out the night of the attack, SA Bogle lied to him by telling SrA Freeman that his fingerprints were found at the scene and witnesses had seen him out that night when this was not the case.[73]

The CAAF dismissed SrA Freeman's assertion that his confession should be suppressed as the result of SA Bogle's threats and promises.[74] Looking first at the promises of SA Bogle, the CAAF noted that since the 1991 case of *Arizona v. Fulminante*,[75] promises by law enforcement personnel are considered only one factor in the voluntariness equation.[76] Turning next to SA Bogle's lies (about the existence of SrA Freeman's fingerprints at the crime scene) and threats (that if he did not cooperate he would be turned over to harsher civilian law enforcement), the CAAF again pointed out that these tactics were not in themselves determinative.[77]

In determining that SrA Freeman's will was not overborne, the CAAF noted that although his interrogation may have lasted ten hours, SrA Freeman had several breaks during which he was allowed to leave the interrogation room, go outside, and smoke.[78] The CAAF also observed that he was provided food and declined offers of further food and drink.[79] Finally, while SA Bogle may have lied to SrA Freeman about his fingerprints and threatened him that he would be turned over to

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[66] *Id.* at 455.

[67] *Id.*

[68] *Id.*

[69] *Id.*

[70] *Id.*

[71] *Id.*

[72] *Id.*

[73] *Id.*

[74] *Id.*

[75] 499 U.S. 279 (1991). Prior to *Fulminante*, any confession "obtained by any direct or implied promises, however, slight," was not considered voluntary. Bram v. United States, 168 U.S. 532, 542–43 (1897).

[76] *Freeman*, 65 M.J. at 455. *See, e.g.*, United States v. Morris, 49 M.J. 227, 229–30 (C.A.A.F. 1998) (holding that an investigator telling the accused during an interrogation that "[i]f you help use, we will help you," did not, per se, amount to unlawful inducement).

[77] *Freeman*, 65 M.J. at 455. *See, e.g.*, United States v. Mendoza, 85 F.3d 1347, 1350–51 (8th Cir. 1996) (holding that an investigator's threat of immediate arrest if he did not cooperate did not overbear the accused's will); Ledbetter v. Edwards, 35 F.3d 1062, 1069–70 (6th Cir. 1994) (holding that an investigator's use of a series of psychological ploys, including lying about evidence, staging a phony identification, and showing charts and graphs allegedly linking the accused to the crime did not result in an involuntary confession); United States v. Davis, 6 M.J. 874, 879 (A.C.M.R. 1979) ("An investigator's use of artifice or some other form of deception is permissible as long as the artifice is not likely to produce an untrue confession.").

[78] *Freeman*, 65 M.J. at 456.

[79] *Id.*

civilian law enforcement if he did not confess, he was not physically abused or threatened with such abuse.[80] The CAAF concluded that under the totality of the circumstances, SrA Freeman's confession was voluntary.[81]

The most important lesson trial and defense counsel can take from *Freeman* is that the totality of circumstances test applied by military judges is highly fact dependent and susceptible to differing interpretations. Once voluntariness is put at issue, the de novo standard of appellate review requires both trial and defense counsel to thoroughly document the details of the particular characteristics of the accused and the details of the interrogation in the record of trial. In *Freeman*, the evidence that the AFOSI agents gave SrA Freeman several breaks, opportunities for refreshment, and did not engage in overly aggressive interrogation techniques was critical to both the trial judge and the appellate courts' determination that SrA Freeman's will was not overborne despite the length of the interview.

United States v. Wheeler[82]

From June through December 2002, Ship's Serviceman First Class (SH1) (E-6) Wheeler was a Sailor on the USS *Belleau Wood* during a deployment to the Western Pacific.[83] As storekeeper on the ship, SH1 Wheeler's responsibilities included tracking financial transactions, such as soft drink sales.[84] In keeping with good financial accounting systems, SH1 Wheeler handled the accounting of funds and another sailor, SH1 Jones, actually handled the cash collected from the soda machines.[85] At the end of the deployment an audit reconciling records of sodas sold verses cash received revealed more than a $10,000 deficit.[86]

Suspicion quickly led investigators to SH1 Wheeler, who described his accounting system but denied any wrongdoing.[87] Approximately eight months later, SH1 Wheeler's supervisors ordered him to report to the Naval Criminal Investigative Service for another interview regarding the theft.[88] During the course of a ten-hour interview with SA Meulenberg, SH1 Wheeler submitted to three or four polygraph examinations.[89] After each of the first two or three examinations, SA Meulenberg told Wheeler that the results of the polygraph were "inconclusive."[90] After the final polygraph, SA Meulenberg told SH1 Wheeler that the results of the examination revealed that he was being "deceptive."[91]

At this point, SA Meulenberg's interview techniques became more confrontational. Special Agent Meulenberg told SH1 Wheeler that he was lying.[92] Later, SH1 Wheeler claimed that SA Meulenberg led him to believe that he could be convicted upon the results of the failed polygraph even without any confession and that if he admitted his guilt SA Meulenberg could make things better for him.[93] Wheeler also claimed that SA Meulenberg told him the results of his polygraphs would not be given to his command if he confessed.[94] As a result of this interrogation, SH1 Wheeler signed a statement in which he

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[80] *Id.*; *see also* United States v. Ellis, 57 M.J. 375, 379 (C.A.A.F. 2002) (holding that a confession elicited after an investigator told the accused that there was sufficient evidence to arrest both he and his wife for child abuse and that their children might be removed from their home and placed in foster care was voluntary under the totality of the circumstances).

[81] *Freeman*, 65 M.J. at 457.

[82] 66 M.J. 590 (N-M. Ct. Crim. App. 2008).

[83] *Id.* at 591.

[84] *Id.*

[85] *Id.*

[86] *Id.*

[87] *Id.*

[88] *Id.*

[89] *Id.* The CAAF noted that the record is unclear whether SH1 Wheeler actually took three or four polygraph examinations. *Id.* at 591 n.2.

[90] *Id.* at 591.

[91] *Id.*

[92] *Id.*

[93] *Id.*

[94] *Id.*

admitted that he and SH1 Jones had stolen the soda funds and that he had personally received between $5000 and $6000 in stolen money.[95]

Prior to trial, SH1 Wheeler moved to suppress his confession as involuntary under Rule for Court-Martial (RCM) 906.[96] At the suppression hearing, SA Meulenberg denied telling SH1 Wheeler that he could be convicted based upon the results of his polygraph and that if he confessed the results would not be turned over to his chain of command.[97] Special Agent Muelenberg admitted that he told SH1 Wheeler that if he confessed he would be given the opportunity to apologize and "look like a good person that made a one-time mistake."[98] The trial judge denied SH1 Wheeler's motion to suppress.[99]

The defense then submitted a motion in limine to permit introduction of evidence related to the polygraph examinations at the trial before members for the purpose of demonstrating the involuntariness of the subsequent confession.[100] The defense argued that "information about the polygraph would not be admitted to find the truth or falsity" of the polygraph itself, but "to show what may have motivated a false confession."[101]

The prosecution opposed the defense motion in limine, arguing that MRE 707 prohibited the introduction of any evidence from a polygraph examination.[102] Specifically, the trial counsel pointed to the plain language of MRE 707(a), which states: "[n]otwithstanding any other provision of law, the results of a polygraph examination, the opinion of the polygraph examiner, or any reference to an offer to take, failure to take, or taking of a polygraph examination, shall not be admitted into evidence."[103] While the trial counsel conceded that SH1 Wheeler had "a right to discuss the circumstances of an interrogation," he maintained that MRE 707 prohibited any reference to the polygraph examination itself.[104] In the alternative, the Government argued that if SH1 Wheeler were allowed to discuss the polygraph examinations, the Government should have the right to present rebuttal evidence in the form of testimony from the polygraph examiner and the actual results.[105]

The military judge denied the defense motion and ruled that the polygraph evidence sought by SH1 Wheeler was inadmissible under MRE 707 and the Supreme Court case of *United States v. Scheffer*.[106] Describing his rationale in his findings of fact and conclusions of law, the military judge stated that admission of any "polygraph evidence to show its bearing on the accused's state of mind presents a double-edged sword, inviting rebuttal evidence concerning the scientific reliability of the test and the specific test results in this case, including the fact that the accused apparently failed the last test."[107] In response to the defense's argument that the reliability of the polygraph and the validity of the polygraph results were irrelevant to the voluntariness of SH1 Wheeler's confession, the military judge disagreed, stating that the "decision to provide a statement to explain adverse test results is probative only if he honestly believed that the test results were reliable."[108] In sum, the military judge held that any introduction of polygraph evidence would needlessly bog the trial down in questions surrounding the scientific reliability of polygraphs and infringe upon credibility assessments that were the province of the fact-finder.[109]

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[95] *Id.* at 591–92.

[96] MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 906 (2005) [hereinafter 2005 MCM].

[97] *Wheeler*, 66 M.J. at 591.

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

[99] *Id.* at 592.

[100] *Id.*

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

[102] *Id.*

[103] 2005 MCM, *supra* note 96, MIL. R. EVID. 707(a).

[104] *Wheeler*, 66 M.J. at 592.

[105] *Id.*

[106] 523 U.S. 303 (1998).

[107] *Wheeler*, 66 M.J. at 592.

[108] *Id.*

[109] *Id.*

The military judge did permit the defense to present evidence about non-polygraph circumstances surrounding SH1 Wheeler's confession, to include "a general reference to the accused belief that [SA Meulenberg] had confronted him with evidence of guilt which the accused felt was inaccurate and compelled him to dispute by making an 'absurd' confession."[110] The confession was the only direct evidence of SH1 Wheeler's guilt introduced by the Government at trial. Ship's Serviceman First Class Wheeler was duly convicted of conspiracy to commit larceny and larceny.[111]

Reviewing the trial judge's decision using an abuse of discretion standard, the NMCCA ruled that the military judge erred in denying SH1 Wheeler's motion in limine because MRE 707 was unconstitutional as applied "to the narrow circumstances presented in this case."[112] In providing its justification for its ruling, the NMCCA relied on the Supreme Court case of *United States v. Scheffer*.[113]

The facts of *Scheffer* involved an appellant who had sought to introduce evidence of an exculpatory polygraph and the opinion of a polygraph expert in order to bolster the credibility of his "innocent ingestion" defense to a charge of wrongful use of methamphetamines.[114] Relying on MRE 707, the trial judge excluded all evidence of the polygraph.[115] The CAAF overruled the trial judge's decision and held "[a] *per se* exclusion of polygraph evidence, offered by an accused to rebut an attack on his credibility . . . violates his Sixth Amendment right to present a defense"[116] The Supreme Court reversed the CAAF's decision and held that, while a defendant has a Sixth Amendment right to present a defense, that right "is subject to reasonable restrictions" imposed by state or federal rules in the form of rules "excluding evidence from criminal trials."[117] The Court held that the trial judges application of MRE 707 did not abridge Airman Scheffer's right to present a defense.[118]

The NMCCA noted that the *Scheffer* opinion was a deeply split Supreme Court opinion.[119] Justice Thomas, writing for a four-justice plurality, found that MRE 707 served three legitimate governmental interests[120]: (1) it helps exclude unreliable evidence (i.e., polygraph examinations);[121] (2) it preserved jurors' role as the sole determiners of credibility and guilt;[122] and (3) it avoided litigation over issues other than the guilt or innocence of the accused at trial (i.e., a battle of the experts over the reliability of polygraph evidence).[123] Comparing the plurality opinion with another four justices who agreed with the plurality's holding that MRE 707 was "not so arbitrary or disproportionate that it is unconstitutional,"[124] the NMCCA noted that the concurring justices doubted the wisdom of a per se prohibition on polygraph evidence.[125] The concurring justices specifically disavowed the plurality holding that allowing polygraph evidence would invade the province of the finder of fact or that allowing such evidence would lead to the litigation of collateral issues at trial.[126]

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

[111] *Id.* at 590. Wheeler's adjudged and approved sentence included five months of confinement, forfeiture of $500.00 pay per month for a period of ten months, reduction to E-1, and a bad-conduct discharge. *Id.*

[112] *Id.* at 593.

[113] 523 U.S. 303 (1998).

[114] *Id.* at 305.

[115] *Id.*

[116] *Id.* at 306 (quoting United States v. Scheffer, 44 M.J. 442, 445 (C.A.A.F. 1996)).

[117] *Id.* at 308.

[118] *Id.* at 317.

[119] United States v. Wheeler, 66 M.J. 590, 593 (N-M. Ct. Crim. App. 2008).

[120] *Scheffer*, 523 U.S. at 309. The four justices were Justices Thomas, Scalia, Souter, and Chief Justice Rehnquist. *Id.* at 305.

[121] *Id.* at 309.

[122] *Id.* at 313–14.

[123] *Id.*

[124] *Id.* at 318. The four justices were Justices Kennedy, O'Connor, Ginsburg, and Breyer. *Id.*

[125] United States v. Wheeler, 66 M.J. 590, 594 (N-M. Ct. Crim. App. 2008).

[126] *Id.* at 593–94.

Attempting to reconcile these divergent opinions, the NMCCA concluded that "it is clear that a majority of eight justices believed [MRE] 707 was not unconstitutional as applied to the facts of Scheffer's case."[127] Allowing for the lone dissenter, Justice Stevens,[128] the NMCCA stated that the *Scheffer* opinion left at least five justices who believed MRE 707 could be unconstitutional when applied to different facts.[129]

When applying the consistent thread of reasoning in the Supreme Court's differing opinions in *Scheffer* to the facts presented in *Wheeler*, the NMCCA found that the trial judge's application of MRE 707 to prevent the introduction of polygraph by the defense to demonstrate the involuntary nature of Wheeler's confession denied him his Sixth Amendment right to present a defense.[130] The court emphasized that, unlike *Scheffer*, SH1 Wheeler was unable to testify himself about relevant factual matters related to the polygraphs that led to his confession.[131] Also unlike the accused in *Scheffer*, SH1 Wheeler did not attempt to bolster his own credibility by introducing an exculpatory polygraph or a polygraph expert to explain the test results.[132] In short, because the military judge's application of MRE 707 prevented SH1 Wheeler from attacking the voluntariness of his own statement, the NMCCA found that the military judge's application of MRE 707 was "disproportionate to the purposes [the rule was] designed to serve."[133]

While the *Wheeler* decision is good news for Navy-Marine Corps defense counsel, its usefulness to the rest of the services will be in dispute until the CAAF explicitly addresses this use of polygraph evidence at trial. While defense counsel may find hope in the fact that the CAAF ruled in favor of allowing the defense to use exculpatory polygraphs in its 1996 *Scheffer* opinion (that was subsequently overturned by the Supreme Court in 1998),[134] none of those judges remain on the court. Until the CAAF resolves this issue, resourceful defense counsel will at least have an example of persuasive case law to argue in favor of the introduction of the existence of a polygraph examination to challenge the voluntariness or reliability of an accused's otherwise admissible statement.

Re-Initiation of Questioning after a Suspect Has Invoked His Miranda/Article 31 Rights

In 1966, the Supreme Court decided the landmark case of *Miranda v. Arizona*.[135] The Supreme Court held that prosecution could not use any statement stemming from a custodial interrogation unless it could show that the accused had made a knowing, voluntary and intelligent waiver of his rights against self-incrimination following an explicit warning that he had the right: (1) to remain silent, (2) to be informed that any statement made by him may be used as evidence against him, and (3) to the presence of an attorney.[136] This rights warning requirement, not previously required under the Fifth Amendment, was designed as a prophylactic device to protect a putative defendant's right against self-incrimination at trial by insuring that he understood his self-incrimination rights during the pre-trial investigative stage of a criminal prosecution.[137]

Despite similar protections provided to servicemembers under Article 31 of the UCMJ, in 1967 the Court of Military Appeals held that *Miranda* applied to military interrogations in the 1967.[138] Unlike the warnings required in *Miranda*,

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[127] *Id.* at 594.

[128] *Scheffer*, 523 U.S. at 318. Justice Stevens believed that there was a stark inconsistency between the Government's argument that polygraph results are inherently inaccurate one the one hand and their extensive use throughout the Government on the other.

[129] *Wheeler*, 66 M.J. at 594. The *Scheffer* concurrence stated that "I doubt, though, that the rule of *per se* exclusion is wise, and some later case might present a more compelling case for introduction of the testimony than this one does." *Scheffer*, 523 U.S. at 318.

[130] *Wheeler*, 66 M.J. at 594.

[131] *Id.*

[132] *Id.*

[133] *Id.* (quoting *Scheffer*, 523 U.S. at 315–15 (citation omitted)).

[134] *Scheffer*, 523 U.S. at 317.

[135] 384 U.S. 436 (1966).

[136] *Id.* at 444.

[137] *Id.* at 457–58.

[138] *See* United States v. Tempia, 37 C.M.R. 249 (C.M.A. 1967).

Article 31 does not give a suspect the right to counsel but does require that he be advised of the "nature of accusation."[139] Moreover, *Miranda* warnings are only required in custodial interrogation settings,[140] where as Article 31 warnings are required anytime a person subject to the UCMJ intends to "interrogate, or request any statement from, an accused or a person suspected of an offense."[141]

Whether a suspect's *Miranda* or Article 31 rights have been violated depends upon what right (i.e., the right to silence or right to counsel) was exercised by the suspect and the response of the law enforcement. When a suspect asserts his right to remain silent, "the interrogation must cease"[142] and the suspect's right to "cut off questioning"[143] must be "scrupulously honored."[144] However, while the suspect's right to end questioning must be honored, the Supreme Court has held that a mere assertion of the right to remain silent does not operate as a blanket prohibition on further questioning.[145] In the case of *Michigan v. Mosley*, the Supreme Court found that the suspect's right to end questioning was "scrupulously honored" when the arresting officer stopped questioning a robbery suspect after he invoked his *Miranda* right to remain silent and a little over two hours later, a second officer re-advised the suspect of his rights and when the suspect waived them, questioned him on the incident.[146]

In contrast, a suspect's invocation of his right to counsel requires that "the interrogation must cease until an attorney is present."[147] This requirement for counsel presence was further clarified in the Supreme Court case of *Edwards v. Arizona*.[148] In *Edwards*, the Court held that once a suspect has expressed his desire to deal with the police only through counsel, he "is not subject to further interrogation until counsel has been made available to him, unless the accused himself initiates further communication, exchanges, or conversations with the police."[149]

What constitutes the initiation of "further communication, exchanges, or conversations with the police" is a matter of some controversy and a great deal of subjective opinion based on the facts of a particular case. In the case of *Oregon v. Bradshaw*, the Supreme Court declared that:

> There are some inquiries, such as a request for a drink of water or a request to use a telephone that are so routine that they cannot be fairly said to represent a desire on the part of an accused to open up a more generalized discussion relating directly or indirectly to the investigation. Such inquiries, or statements, by either an accused or police officer, relating to routine incidents of the custodial relationship, will not generally "initiate" a conversation in the sense in which the word is used in *Edwards.*[150]

If the accused's conversation with law enforcement crosses the line set by *Bradshaw*, the *Edwards* rule still requires that any subsequent waiver of the right to counsel must be shown to "not only be voluntary, but also constitute a knowing and intelligent relinquishment or abandonment of a known right or privilege."[151] This brings us to the recent CGCCA case of *United States v. Bonilla.*[152]

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[139] UCMJ art. 31(b) (2008).

[140] *Miranda*, 384 U.S. at 444 (defining custodial interrogation as "questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way").

[141] *Id.*

[142] *Id.* at 474.

[143] Mosely v. Michigan, 423 U.S. 96, 103 (1975).

[144] *Id.* at 104.

[145] *Id.* at 103–04.

[146] *Id.* at 104–05.

[147] *Miranda*, 384 U.S. at 474.

[148] 451 U.S. 477 (1981).

[149] *Id.* at 484–85.

[150] 462 U.S. 1039, 1045 (1983).

[151] *Edwards*, 451 U.S. at 482.

[152] 66 M.J. 654 (2008).

United States v. Bonilla[153]

As the CGCCA opinion points out, the "[a]ppellant's short Coast Guard career was not without problems."[154] On 25 January 2005, Seaman (SN) (E-3) Bonilla found himself being interrogated by two agents of the Coast Guard Investigative Service (CGIS) at Coast Guard Sector New York.[155] The agents suspected him of using and distributing marijuana.[156] In March of 2005, charges were preferred alleging violations of Articles 86 and 112a.[157]

Before the charges could be brought to trial, the CGIS office in New York City received information that led them to believe that SN Bonilla had made threats to kill his senior chief at Sector New York.[158] Agents from CGIS called Coast Guard Police Department (CGPD) representatives at Sector New York and requested that they detain SN Bonilla until their arrival.[159] The CGPD officers were not told why they were being asked to detain SN Bonilla.[160]

The Sector New York CGPD officers quickly tracked down, apprehended, and handcuffed SN Bonilla and took him to the CGPD office.[161] Shortly after arriving at the CGPD office at 1700, CGPD Officer Hamel advised SN Bonilla of his Article 31, UCMJ rights.[162] During the advisement, Officer Hamel was unable to tell SN Bonilla what crime he was suspected of having committed because Officer Hamel had not been told.[163]

Officer Hamel later testified that he did not read Bonilla his rights in preparation for questioning him, but only because SN Bonilla kept making unsolicited statements.[164] Seaman Bonilla said he understood his rights and said that he wanted his lawyer and that he did not want to speak to Officer Hamel.[165] Despite his stated desire for an attorney and to remain silent, SN Bonilla repeatedly asked CGPD officers words to the effect of, "Why am I here?"[166] The CGPD officer replied that he did not know and that CGIS agents were on their way.[167]

When CGIS agents did arrive at approximately 1715, they did not immediately interview the accused.[168] Instead, the CGIS agents focused on interviewing potential witnesses to SN Bonilla's threats.[169] When the CGIS agents did make contact with SN Bonilla at 2154 hours, he had remained handcuffed and had not received any food or water since his apprehension, a period of almost five hours.[170]

When the two CGIS agents entered the room where SN Bonilla was being held, they knew he had been advised of his rights and had requested a lawyer.[171] Because of this, they did not direct any questions toward SN Bonilla.[172] Instead, they

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[153] *Id.*

[154] *Id.* at 656.

[155] *Id.*

[156] *Id.*

[157] *Id.*

[158] *Id.* at 657.

[159] *Id.*

[160] *Id.*

[161] *Id.*

[162] *Id.*

[163] *Id.*

[164] *Id.*

[165] *Id.*

[166] *Id.*

[167] *Id.*

[168] *Id.*

[169] *Id.*

[170] *Id.*

[171] *Id.*

engaged in idle conversation with each other about the case.[173] One of the agents later testified that they hoped their conversation would result in SN Bonilla reinitiating further discussions about his case.[174] Their hopes were soon rewarded when after about five minutes, SN Bonilla asked one of the agents, "Sir, can I ask what this is about?"[175]

The CGIS agents said they could not discuss the case unless he agreed to waive his rights.[176] Seaman Bonilla agreed to waive his rights and the agents prepared the necessary paperwork, which informed SN Bonilla of the offense he was alleged to have committed.[177] At 2219 hours, SN Bonilla read the rights waiver, said he understood what he was signing and signed the form.[178] The CGIS agents interviewed SN Bonilla until 0200 the following morning.[179] During the course of the interview, SN Bonilla was offered several opportunities to get food and a beverage and was unhandcuffed to take one or two smoke breaks.[180] Between 0200 and 0250 SN Bonilla completed a statement in which he admitted to communicating a threat toward a senior chief.[181]

At trial, SN Bonilla moved to suppress his confession claiming that the tactics used by the CGIS agents resulted in an unlawful interrogation or its functional equivalent.[182] Specifically, SN Bonilla felt that the CGIS agents violated his *Edwards* right to counsel by engaging in conduct that was likely to evoke an incriminating response.[183] In a reconsideration en banc, the CGCCA disagreed, finding that while the CGIS agents' conduct was borderline, the court could not conclude that it amounted to an unlawful interrogation.[184]

Ultimately, the CGCCA's determination of this case hung on the answers to two questions. First, did the CGIS agents' conversation in the presence of SN Bonilla after his request for counsel represent an "interrogation" within the definition of Article 31 and the Fifth Amendment?[185] Second, did Bonilla voluntarily waive his right to counsel as understood in *Edwards* and its progeny?[186]

Addressing the first question, the CGCCA acknowledged that while Government agents cannot engage in conduct reasonably likely to elicit an incriminating response, the court could not conclude that the CGIS agents crossed that line in SN Bonilla's case.[187] The court pointed to the fact that SN Bonilla was not threatened, no compelling pressure was placed on him beyond ordinary custody, and the CGIS agents used no pleas to conscience or ploys the CGIS agents knew would likely result in an incriminating response.[188] While the CGIS agents hoped their conduct would result in SN Bonilla re-initiating his conversation, the court reasoned that the determination of whether words or actions were reasonably likely to elicit an incriminating response turns on "the perceptions of the suspect, rather than the intent of the police."[189]

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[172] *Id.*

[173] *Id.*

[174] *Id.*

[175] *Id.*

[176] *Id.*

[177] *Id.*

[178] *Id.*

[179] *Id.*

[180] *Id.*

[181] *Id.*

[182] *Id.* at 656.

[183] *Id.*

[184] *Id.* 658. On February 2008, the CGCCA affirmed the findings and sentence, with one judge dissenting. Major Bonilla's request for reconsideration en banc resulted in this opinion. *Id.* at 656.

[185] *Id.* 658.

[186] *Id.*

[187] *Id.* at 659.

[188] *Id.*

[189] *Id.* (quoting Rhode Island v. Innis, 466 U.S. 291, 301 (1980)).

Turning to the second question, the CGCCA believed that all the evidence showed that SN Bonilla voluntarily, knowingly, and intelligently waived his rights before giving his confession.[190] The evidence the court relied upon included the fact that SN Bonilla signed a properly prepared rights advisement form which contained the crimes he was suspected of having committed as well as his rights under *Miranda*.[191] The court also looked at the particular characteristics of SN Bonilla and concluded that he was a mature man of twenty-two who possessed a general education development and a familiarity with the criminal investigative process based upon earlier problems with law enforcement found in the trial record.[192]

The three judges dissenting in SN Bonilla's case were highly critical of the majority's finding that the CGIS agents conduct in the interview room with SN Bonilla did not amount to interrogation.[193] The dissent focused in on the fact that, pursuant to the Supreme Court decision in *Rhode Island v. Innis*,[194] interrogation must be defined as words or actions, except those normally incident to arrest and custody, that law enforcement should know are reasonably likely to elicit an incriminating response.[195] Looking at the facts of this case, both the concurring and dissenting opinions agreed that the CGIS agents' self-avowed efforts to encourage SN Bonilla to re-initiate his conversations with law enforcement violated his rights under Article 31, UCMJ.[196]

Both the concurring and dissenting opinions pointed out that while the majority believed SN Bonilla's request to know why he had been arrested was a voluntary reinitiating of his conversations with law enforcement in accordance with *Innis*, the military character of the interrogation should have changed their analysis.[197] Both opinions pointed out that unlike civilians who are warned pursuant to *Miranda*, SN Bonilla was entitled to know what offense he was suspected of committing under Article 31, UCMJ.[198] When SN Bonilla was advised of his Article 31 rights by the arresting CGPD agent, he was not told of what he was accused of because the CGPD agent did not know.[199] As a result, when the CGIS agents later engaged in a conversation between themselves about SN Bonilla's case in SN Bonilla's presence, they were knowingly exploiting this prior defective Article 31 rights advisement.[200] When SN Bonilla obligingly asked, "Sir, can I ask what this is about?"[201] in response to the CGIS conversation, he was merely inquiring into what he should have already been told.[202] As a result of the defective rights advisement and its deliberate exploitation by the CGIS agents, both the concurrence and dissent believed SN Bonilla's subsequent statement should be considered the fruit of an unlawful interrogation.[203]

Claiming the Privilege Against Self-Incrimination During Cross-Examination

When an accused takes the stand voluntarily, he waives his privilege against self-incrimination with respect to the matters to which he testifies.[204] The accused does not, however, waive his privilege against self-incrimination with respect to uncharged misconduct at an entirely different time and place.[205] Despite the continuing right to assert the privilege against

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[190] *Bonilla*, 66 M.J. at 659.

[191] *Id.*

[192] *Id.*

[193] *Id.* at 660–62. Judge Felicetti and Jude Pepper wrote a separate dissent from Chief Judge McClellend's dissent on the suppression issue. *Id.* at 662–63.

[194] 446 U.S. 291 (1980).

[195] *Id.* at 301.

[196] *Bonilla*, 66 M.J. at 660–62

[197] *Id.*

[198] UCMJ, art. 31(b) (2008).

[199] *Bonilla*, 66 M.J. at 657.

[200] *Id.* at 660–62

[201] *Id.* at 657.

[202] *Id.* at 660–662.

[203] *Id.*

[204] MCM, *supra* note 5, MIL. R. EVID. 301(e).

[205] United States v. Castillo, 29 M.J. 145, 154 (C.M.A. 1989).

self-incrimination during trial, neither a testifying accused nor any other witness may use their invocation of the right against self-incrimination to thwart effective cross-examination, particularly on issues of credibility.[206]

Military Rule of Evidence 301(f)(2) states that "[i]f a witness asserts the privilege against self-incrimination on cross-examination, the military judge, upon motion, may strike the direct testimony of the witness in whole or in part, *unless the matters to which the witness refuses to testify are purely collateral.*"[207] If a witness does invoke his right against self-incrimination by refusing to ask a question on direct or cross-examination, MRE 301(f)(1) states that the witness's "refus[al] to answer [the] question cannot be considered as raising any inference unfavorable to either the accused or the government."[208] How these rules work in an actual court-martial is seldom seen in practice, but an Army Court of Criminal Appeals case from the last court term provides a good illustration of how the rules should be applied.

United States v. Matthews[209]

Specialist (SPC) Matthews's trouble with the law arose out of his suspicion that his wife was having an affair.[210] Conspiring with two other soldiers, Staff Sergeant (SSG) Gibson and Private First Class (PFC) Lozado, SPC Matthews confronted Sergeant (SGT) Freeman at SPC Matthews' home and accused him of facilitating his wife's affair with another Soldier.[211] When SGT Freeman denied SPC Matthews' allegations, SPC Matthews retrieved a pistol from under his living room couch.[212] When SGT Freeman attempted to hastily exit the residence he was grabbed by SSG Gibson and PFC Lazado, who pushed him back into the living room where SPC Matthews pistol whipped him from behind.[213] In the following altercation, SPC Matthews held his pistol to SGT Freeman's bleeding head and, ultimately, fired a shot that drew military police to the residence.[214] Specialist Mathews was subsequently arrested and charged with, among other things, an aggravated assault upon a non-commissioned officer.[215]

At his court-martial, before a military judge alone, SPC Matthews called SSG Gibson, one of his co-conspirators, as a witness during his case-in-chief.[216] Staff Sergeant Gibson testified under a grant of limited immunity for his participation in the events for which SPC Matthews was charged.[217] After testifying favorably toward the defense, SSG Gibson was cross-examined by the Government.[218]

The trial counsel attempted to impeach SSG Gibson's testimony by asking him a series of questions about his alleged involvement in previous misconduct unrelated to offenses for which SPC Matthews had been charged.[219] Specifically, trial counsel asked SSG Gibson three things. Had he falsified an academic transcript and altered a physical fitness scorecard to enhance his promotion packet?[220] Were charges ever preferred against him as a result?[221] Finally, had he submitted a request

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[206] *See* MCM, *supra* note 5, MIL. R. EVID. 301(e); United States v. Richardson, 15 M.J. 41, 46 (C.M.A. 1983) ("To allow an accused to offer evidence from witnesses whose veracity and powers of observation could not be tested adequately by cross-examination would grant him a privilege to mislead the trier of fact.").

[207] MCM, *supra* note 5, MIL. R. EVID. 301(f)(2) (emphasis added).

[208] *Id.* MIL. R. EVID. 301(f)(1).

[209] 66 M.J. 645 (C.A.A.F. 2008).

[210] *Id.* at 646.

[211] *Id.*

[212] *Id.*

[213] *Id.*

[214] *Id.* at 645.

[215] *Id.*

[216] *Id.* at 645–46.

[217] *Id.* at 647.

[218] *Id.* at 646–47.

[219] *Id.* at 647.

[220] *Id.* at 647 n.4.

[221] *Id.*

for discharge in lieu of court-martial which the convening authority had approved?[222] In response to each of these questions, SSG Gibson invoked his Fifth Amendment privilege against self-incrimination.[223]

Based upon SSG Gibson's assertion of his self-incrimination rights, the trial counsel argued that she could not conduct a meaningful cross-examination and asked the military judge to excuse the witness and strike his direct testimony from the record.[224] The military judge denied the trial counsel's request and the cross-examination continued with SSG Gibson invoking his Fifth Amendment privilege on thirteen occasions.[225]

The military judge, over defense objection, permitted the trial counsel to comment on SSG Gibson's invocation of his Fifth Amendment privilege against self-incrimination during her rebuttal argument on findings.[226] The military judge justified his decision by relying on the "interest of justice" exception to MRE 512(a)(2).[227] The military judge subsequently found SPC Matthews guilty of the aggravated assault.[228]

After the military judge announced his findings, he stated that in weighing different witnesses' testimony he found SSG Gibson's testimony, among others, to be untruthful.[229] The military judge described the methods he used to arrive at his opinion that SSG Gibson's testimony was untruthful and made no reference to SSG Gibson's repeated invocation of his Fifth Amendment privilege against self-incrimination.[230]

On appeal to the ACCA, SPC Mathews challenged the trial judge's decision to allow the trial counsel to comment on SSG Gibson's invocation of his self-incrimination rights.[231] Reviewing the judge's decision, the ACCA determined that the military judge referred to the wrong rule of evidence when determining that the trial counsel could comment on SSG Gibson's testimony.[232] The ACCA pointed out that while MRE 512 permits a military judge to allow comment on witness's invocation of a privilege "in the interests of justice,"[233] it only applies to the privileges enumerated in the MRE 500-series.[234] The ACCA declared that the military judge should have applied the more specific, and therefore move controlling, MRE 301.[235] Military Rule of Evidence 301 contains no "in the interests of justice" exception and requires an absolute prohibition on drawing any adverse inference from the invocation of an accused or witness's invocation of his Fifth Amendment protections.[236]

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[222] *Id.*

[223] *Id.* at 647.

[224] *Id.*

[225] *Id.*

[226] *Id.*

[227] 2005 MCM, *supra* note 96, MIL. R. EVID. 512(a)(2).

> The claim of a privilege by a person other than the accused whether in the present proceeding or upon a prior occasion normally is not a proper subject of comment by the military judge or counsel for any party. An adverse inference may not be drawn therfrom except when determined by the military judge to be required by the interests of justice.

Id.

[228] *Id.*

[229] *Id.*

[230] *Id.* at 647–48. Unfortunately for the appellate history of this case, the military judge did make an ex parte, off-the-record comment to the defense team that he had considered SSG Gibson's invocation in determining his credibility. This resulted in a post-trial *DuBay* hearing. *Id. at* 648.

[231] *Id.* Specialist Matthews also alleged that the military judge drew an adverse inference based on those comments, but that issue will not be addressed in this article.

[232] *Id.* at 650.

[233] 2005 MCM, *supra* note 96, MIL. R. EVID. 512(a)(2).

[234] *Matthews*, 66 M.J. at 651. The 500-series of the MREs include the lawyer-client privilege, the communications to clergy privilege, the husband-wife privilege, and the psychotherapist-patient privilege. *See* 2005 MCM, *supra* note 96, MIL. R. EVID. 501–512.

[235] *Matthews*, 66 M.J. at 651.

[236] *Id.*

The ACCA also found that the military judge should have granted the trial counsel's request that SSG Gibson's direct testimony be stricken from the record.[237] Looking to MRE 301, the court observed that a military judge may strike a witness's direct testimony if, under cross-examination, the witness asserts his Fifth Amendment privilege and the matters on which the witness refuses to testify are not purely collateral.[238] The term "purely collateral" is not defined within the rule, but has been defined in case law as either issues that are not germane to the accused's trial or matters of trustworthiness and credibility.[239] In other words, the *Matthews* court reiterated the fact that "[c]ourts have consistently held credibility issues are not collateral matters for either party, but rather key concerns of the truth seeking process."[240]

In SPC Matthews's case, the ACCA determined that SSG Gibson's credibility as a witness was certainly not collateral.[241] Trial counsel's questions to SSG Gibson regarding his falsification of academic transcript and the alteration of his physical fitness results for a promotion packet, if true, would be central to his character for truthfulness and therefore, patently not collateral.[242] As a result, the court held that the trial judge should have granted the trial counsel's request to strike SSG Gibson's direct testimony.[243]

The *Matthews* case provides an excellent review of the rules surrounding the invocation of the right against self-incrimination by an accused or witness on cross-examination. As the ACCA emphasized in its opinion, military judges must insure that neither the defense nor prosecution are allowed to use the Fifth Amendment or, in the case of the defense, the Sixth Amendment's Due Process Clause, to present testimony and block cross-examination in such a way that only a half-truth is presented to the fact-finder.[244] The other lesson that can be drawn from the *Matthews* case is that "questions relating to offenses that reflect on the credibility and veracity as a witness" are never collateral matters.[245] Finally, *Matthews* reiterates MRE 301(f)(1)'s absolute prohibition on commenting on or drawing any negative inference from a witness's decision to invoke his Fifth Amendment right against self-incrimination. The only permissible remedy in such a situation is striking some or all of a witness's direct testimony in accordance with MRE 301.

Conclusion

While the past court term was not generous in the number of self-incrimination cases decided, the quality of issues presented by those cases more than made up for the lack of quantity. Continuing to watch the CAAF's approach in the cases of *Wheeler*,[246] *Bonilla*,[247] and *Matthews*,[248] will hopefully provide further guidance in self-incrimination law over the next year.

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[237] *Id.* at 651 n.11.

[238] MCM, *supra* note 5, MIL. R. EVID. 512(a)(2).

[239] United States v. Moore, 36 M.J. 329 (C.M.A. 1993); United States v. Richardson, 15 M.J. 41, 44 (C.M.A. 1983) ("And as long as the subject matter of cross-examination is germane to the direct examination or relates to the witness' credibility, cross-examination may extend to areas of self incrimination.").

[240] *Matthews*, 66 M.J. at 649.

[241] *Id.* at 651.

[242] *Id.*

[243] *Id.*; *see also* Davis v. Alaska, 415 U.S. 308, 316 (1974) ("Cross-examination is the principle means by which the believability of a witness and the truth of his testimony are tested."). *Id.* at 316; Chambers v. Mississippi, 410 U.S. 284 (1973) (holding that to prevent cross-examination "calls into question the ultimate 'integrity of the fact-finding process.'"). *Id.* at 295.

[244] *Matthews*, 66 M.J. at 650 n.10.

[245] *Id.* at 651.

[246] 66 M.J. 590 (N-M. Ct. Crim. App. 2008).

[247] 66 M.J. 654 (C.G. Ct. Crim. App. 2008).

[248] 66 M.J. 645 (A. Ct. Crim. App. 2008) .

New Developments in Sixth Amendment Confrontation and Jurisdiction

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Introduction

This year's Sixth Amendment and jurisdiction cases do not break new ground as much as they simply confirm our understanding of the law. In *United States v. Pack*, the Court of Appeals for the Armed Forces (CAAF) decided *Maryland v. Craig*[1] remains the standard for permitting the live remote testimony of a child witness.[2] In *Giles v. California*, the Supreme Court interpreted the forfeiture by wrongdoing doctrine consistently with the language of Federal Rule of Evidence (FRE) 803(6).[3] In *United States v. Hart*, the CAAF used the existing standard to determine when personal jurisdiction over servicemembers comes to an end.[4] One area where there is still uncertainty in Confrontation Clause law is the admissibility of lab reports, and this issue was addressed by the CAAF this term in *United States v. Harcrow*,[5] and by the Air Force Court of Criminal Appeals (AFCCA) in *United States v. Blazier*.[6]

This article begins with a brief overview of current Sixth Amendment Confrontation Clause jurisprudence, before considering two cases from last term that address the admissibility of lab reports in light of the U.S. Supreme Court's decision in *Crawford v. Washington*.[7] Next, it covers Sixth Amendment cases that confirm our understanding of Confrontation Clause law. Finally, it discusses the single jurisdiction case decided by the CAAF last term, *United States v. Hart*, a case that adheres closely to established precedent, yet shows possible cracks in the foundation as a split decision.

Crawford Background

The law governing the admission of hearsay statements changed abruptly with the Supreme Court's decision in *Crawford*.[8] Before *Crawford*, admission of hearsay statements was based primarily on reliability and governed by the analysis laid out in *Ohio v. Roberts*.[9] Under *Roberts*, a hearsay statement could be admitted under the Confrontation Clause if it possessed adequate indicia of reliability.[10] This could be shown by either fitting the statement into a firmly rooted hearsay exception, or showing that it possessed "particularized guarantees of trustworthiness."[11] The latter could be shown using a set of nonexclusive reliability factors from *Idaho v. Wright*,[12] or *United States v. Ureta*.[13] Importantly, when looking at the trustworthiness of a statement, the court was limited to considering the circumstances surrounding the making of the statement, and was not permitted to use extrinsic evidence.[14]

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[1] 497 U.S. 836 (1990).

[2] United States v. Pack, 65 M.J. 381, 382 (C.A.A.F. 2007).

[3] 128 S. Ct. 2678 (2008).

[4] 66 M.J. 273 (C.A.A.F. 2008).

[5] 66 M.J. 154 (C.A.A.F. 2008).

[6] No. 36988, 2008 CCA LEXIS 314 (A.F. Ct. Crim. App. Sept. 8, 2008).

[7] 541 U.S. 36 (2004).

[8] *Id.*

[9] 448 U.S. 56 (1980).

[10] *Id.* at 66.

[11] *Id.*

[12] 497 U.S. 805, 821 (1990) (providing factors for use in analyzing the reliability of hearsay statements made by child witnesses in child sexual abuse cases).

[13] 44 M.J. 290, 296 (1996) (giving examples of factors to consider when looking at the circumstances surrounding the making of a hearsay statement when the declarant is unavailable).

[14] *Wright*, 497 U.S. at 819–24. This can be confusing, since this limit on extrinsic evidence only applied to the Confrontation Clause analysis. Once a statement passed the Confrontation Clause hurdle, extrinsic evidence is perfectly acceptable for analysis under the hearsay rules. Another source of

Crawford divided the world of hearsay statements into two categories: testimonial and nontestimonial.[15] Testimonial statements can only be admitted if the declarant is unavailable and there has been a prior opportunity for cross-examination. On the other hand, nontestimonial statements are still considered under the Confrontation Clause in the military using the *Roberts* analysis described above.[16] The Supreme Court has made it clear that nontestimonial statements no longer require Confrontation Clause analysis at all;[17] however, the CAAF has yet to follow suit.[18] For the time being, *Roberts* provides the required analysis for nontestimonial statements in the military.[19]

Crawford itself did not define the term "testimonial,"[20] and neither did the next Confrontation Clause case decided by the Court two years later, *Davis v. Washington*.[21] Nonetheless, based on the holding and reasoning in both *Crawford* and *Davis*, the CAAF has developed a framework for deciding whether a statement should be considered testimonial or nontestimonial. In *United States v. Rankin*, the CAAF identified three questions relevant in distinguishing between testimonial and nontestimonial hearsay:

> First, was the statement at issue elicited by or made in response to law enforcement or prosecutorial inquiry? Second, did the "statement" involve more than a routine and objective cataloging of unambiguous factual matters? Finally, was the primary purpose for making, or eliciting, the statements the production of evidence with an eye toward trial?[22]

Military courts have used the CAAF's three-question *Rankin* analysis to categorize statements as testimonial or nontestimonial in the context of verbal and written statements: however, the issue of lab reports has proven contentious.

The admission of lab reports as nontestimonial business records has received significant attention in military courts. The *Crawford* opinion itself contains language suggesting that business records are by nature nontestimonial.[23] Nonetheless, courts have categorized lab reports as testimonial in some situations.[24] *United States v. Magyari* was the first CAAF case to address this issue.[25] In *Magyari* the CAAF held that in the case of random urinalyses, lab reports are nontestimonial and may be admitted as business records.[26] Although the lab reports at issue in *Magyari* were held nontestimonial, the opinion mentions other situations where a lab report might be considered testimonial.[27] This term, the CAAF decided *United States*

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confusion in military case law is the fact that the CAAF has stretched the meaning of circumstances surrounding the making of the statement to include statements made close in time, yet before the actual making of a particular statement in at least one case. *See Ureta*, 44 M.J. 290.

[15] Crawford v. Washington, 541 U.S. 36 (2004).

[16] The last time the CAAF addressed the issue was in *United States v. Rankin*, where it clearly required the *Roberts* analysis for a nontestimonial statement. 64 M.J. 348 (C.A.A.F. 2007).

[17] *See* Whorton v. Bockting, 549 U.S. 406 (2007).

[18] *See Rankin*, 64 M.J. 348.

[19] This issue was discussed at length in last year's symposium article. *See* Lieutenant Colonel Nicholas F. Lancaster, *If It Walks Like a Duck, Talks Like a Duck, and Looks Like a Duck, Then It's Probably Testimonial*, ARMY LAW., June 2008, at 16, 24–27.

[20] The Court specifically states in *Crawford*, "We leave for another day any effort to spell out a comprehensive definition of 'testimonial.'" *Crawford*, 541 U.S. at 68.

[21] 547 U.S. 813 (2006). The Court held:

> Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.

Id. at 822.

[22] *Rankin*, 64 M.J. at 352.

[23] *See Crawford*, 541 U.S. at 56 ("Most of the hearsay exceptions covered statements that by their nature were not testimonial—for example, business records or statements in furtherance of a conspiracy.").

[24] *See, e.g.*, United States v. Williamson, 65 M.J. 706 (A. Ct. Crim. App. 2007); United States v. Harcrow, 66 M.J. 154 (C.A.A.F. 2008).

[25] 63 M.J. 123 (C.A.A.F. 2006).

[26] *Id.* at 124–25.

[27] *Id.* at 128.

v. Harcrow, which directly presents the situation considered in dicta in *Magyari*.[28] *Harcrow* involved a lab report not produced as the result of a urinalysis, and under the circumstances the CAAF found the report to be testimonial.[29]

Where *Magyari* and *Harcrow* represent opposite ends of the lab report admissibility continuum, *United States v. Blazier* presents an issue closer to the middle.[30] *Blazier* involves two urinalysis lab reports. One was a random urinalysis and is clearly covered by *Magyari*, however, the other was based on probable cause, and is not as clearly nontestimonial.[31] The Navy-Marine Corps Court of Criminal Appeals (NMCCA) considered the issue of probable cause urinalyses recently in *United States v. Harris*, and determined that *Magyari* still applies because the testing procedures for random and probable cause urinalyses are identical.[32] The opinion in *Blazier* considers the issue in more detail, and compares the facts and reasoning in *Magyari* with the facts and reasoning in *Harcrow* before deciding in agreement with the NMCCA that both lab reports should be considered nontestimonial.[33] The difference between *Harris* and *Blazier* is that there was a strong dissent in *Blazier*, laying out the reasons probable cause urinalyses should be considered testimonial.[34] This is a significant issue in Confrontation Clause law, highlighted by the fact there is currently a case on the Supreme Court docket that considers the issue of how to categorize forensic lab reports.[35]

United States v. Harcrow[36]

United States v. Harcrow was mentioned above as the CAAF case that overruled the NMCCA in finding a lab report nontestimonial despite the fact that the evidence in the report was sent to the lab after being seized at the appellant's home during his arrest.[37] The case is important as the first CAAF case to find a lab report inadmissible as a testimonial statement rather than admissible as a nontestimonial business record.[38]

Lance Corporal (LCpl) Harcrow was found guilty of use and manufacture of various illegal drugs among other offenses.[39] The Navy Criminal Investigative Service and local law enforcement officials arrested him at his house in Stafford County, Virginia pursuant to a warrant issued on probable cause that he was manufacturing methamphetamine at his residence.[40] While searching the house, plastic bags and metal spoons were seized as evidence consistent with the manufacture of methamphetamine.[41] The plastic bags and spoons were subsequently tested by the Virginia forensic science lab and found to contain heroin and cocaine residue.[42] The Government introduced the lab reports against LCpl Harcrow at trial and the defense counsel did not object.[43] This trial took place prior to *Crawford v. Washington*[44] but reached the

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[28] United States v. Harcrow, 66 M.J. 154 (C.A.A.F. 2008).

[29] *Id*.

[30] No. 36988 2008 CCA LEXIS 314 (A.F. Ct. Crim. App. Sept. 8, 2008).

[31] *Id.* at *2.

[32] 66 M.J. 781 (N-M. Ct. Crim. App. 2008).

[33] *Blazier*, No. 36988, 2008 CCA LEXIS 314, at *7.

[34] *Id.*

[35] *See* Commonwealth v. Melendez-Diaz, 870 N.E.2d 676 (Mass. App. Ct. 2007) (unpublished), *cert. granted*, 2008 U.S. LEXIS 7205 (U.S. Oct. 6, 2008) (No. 07-591).

[36] 66 M.J. 154 (C.A.A.F. 2008). The lower court opinion in this case can be located at *United States v. Harcrow*, No. 200401923, 2006 CCA LEXIS 285 (N-M. Ct. Crim. App. 2006) (unpublished).

[37] *Harcrow*, 66 M.J. 154.

[38] *Id.* at 155.

[39] *Id.*

[40] *Id.*

[41] *Id.*

[42] *Id.*

[43] *Id.* at 156.

[44] *Id.*

NMCCA after *Crawford* was decided. The NMCCA held the lab reports were admissible as nontestimonial business records under *Crawford*.[45]

The issue for the CAAF's decision was whether the lower court erred by finding that the state forensic laboratory reports were nontestimonial hearsay under *Crawford*.[46] The CAAF held that the laboratory reports in this case were testimonial hearsay evidence not admissible as business records, but the error was harmless beyond a reasonable doubt. [47]

The court first addressed whether the *Crawford* issue had been waived since the defense counsel had not objected to admission of the reports at trial.[48] Since *Crawford* was not decided at the time of trial, and there is a presumption against the waiver of Constitutional rights, the court found that the issue was not waived.[49] Instead, the court found that the issue had been forfeited, triggering a plain error analysis.[50] To succeed under a plain error analysis, appellant would have to show that (1) there was an error, (2) it was plain or obvious, and (3) the error materially prejudiced a substantial right.[51]

The CAAF easily concluded there was error in that the lab reports constituted testimonial hearsay.[52] The court used its three factor analysis from *United States v. Rankin*, including: (1) whether the statement was elicited by or made in response to law enforcement or prosecutorial inquiry, (2) whether the statement involved more than a routine and objective cataloging of unambiguous factual matters, and (3) whether the primary purpose of making or eliciting the statement was the production of evidence with an eye toward trial.[53] In *Magyari*, the CAAF wrote, "lab results or other types of routine records may become testimonial where a defendant is already under investigation, and where the testing is initiated by the prosecution to discover incriminating evidence"[54] In *Harcrow*, the evidence was discovered as part of a search executed in conjunction with arresting LCpl Harcrow, and was sent to the lab for the purpose of developing evidence to use against LCpl Harcrow at trial.[55] The documents produced by the lab referred to LCpl Harcrow as the "suspect."[56] Accordingly, the court found that the lab reports were testimonial and that their admission was error.[57]

The CAAF then considered whether the error was plain or obvious. The court cited *Johnson v. United States*,[58] for the proposition that when the law at the time of trial differs from the law at the time of appeal, the law at the time of appeal governs. The CAAF determined that the error was plain and obvious.[59] The CAAF cited its decision in *Magyari* and noted that the facts of this case were clearly anticipated by the dicta in that case suggesting other situations where a lab report might be considered testimonial.[60]

Lastly, the CAAF looked for prejudice. Since this case involves constitutional error, the standard for prejudice is whether the Government has shown that the error was harmless beyond a reasonable doubt.[61] The court found there was plenty of other evidence without the lab reports, including admissions by the accused, and the observations by the arresting

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[45] *Id.*

[46] *Id.* at 155.

[47] *Id.*

[48] *Id.* at 156–58.

[49] *Id.* at 158.

[50] *Id.*

[51] *Id.*

[52] *Id.* at 155.

[53] *Id.* at 158–59 (citing United States v. Rankin, 64 M.J. 348 (C.A.A.F. 2007)).

[54]. *Id.* at 159 (citing United States v. Magyari, 63 M.J. 123, 127 (C.A.A.F. 2006)).

[55] *Id.*

[56] *Id.*

[57] *Id.*

[58] 520 U.S. 461 (1997).

[59] *Harcrow*, 66 M.J. at 159.

[60] *Id.*

[61] *Id.* at 160.

officers.[62] Therefore, although the lab reports should not have been admitted, the error was harmless beyond a reasonable doubt, and the decision of the NMCCA was affirmed.[63]

In light of *Harcrow*, Judge Advocates need to determine early on whether a lab report is likely to be categorized as testimonial. If so, counsel will need to bring the lab technicians who tested the evidence to testify in court about the results, rather than bringing a single representative from the lab and admitting the report as a nontestimonial business record.

United States v. Blazier[64]

Senior Airman (SrA) Blazier's urine was tested as part of a random urinalysis on 5 June 2006.[65] Several weeks later, after being questioned by the Air Force Office of Special Investigations (AFOSI), SrA Blazier consented to another urinalysis on 10 July 2006.[66] He was found guilty by an officer panel of negligent dereliction of duty and wrongful use of ecstasy, methamphetamine, and marijuana, and sentenced to a bad conduct discharge, forty-five days confinement, and reduction to E-3.[67] At trial, his counsel objected to admission of both urinalyses; however, the military judge found the lab reports to be nontestimonial and admitted them under the business records exception.[68]

The AFCCA considered whether the results of both urinalyses should have been admitted as nontestimonial business records. In a 2–1 ruling the AFFCA held that the military judge did not abuse his discretion and that the lab reports were properly admitted as business records.[69] The AFCCA reasoned that since the testing procedures were the same for both samples, and identical to the procedure the CAAF considered favorably in *Magyari*, the lab reports were properly admitted as business records.[70] An objective look at the totality of the circumstances indicated that the statements contained in the lab reports involved nothing more than a routine and objective cataloguing of unambiguous factual matters.[71]

The result in this case is the same as in a NMCCA case discussed in last year's symposium article:[72] the urinalysis lab report based on probable cause was nonetheless considered nontestimonial and admissible under the business records exception. However, this opinion contains a well-considered concurrence and dissent.[73] Judge Jackson concurred with the result as to the random urinalysis, but dissented on the consent urinalysis. He reasoned that the majority focused too much on the viewpoint or intent of the declarant (lab technicians).[74] Instead, or in addition, he looked at the Government's purpose in securing the consent urinalysis.[75] Judge Jackson argued that even though the lab technicians may have been neutral (cataloguing unambiguous factual matters), the Government's purpose was gathering evidence for use at trial.[76] The statements were prepared at the request of AFOSI for the potential prosecution of appellant, requested while appellant was being investigated, functioned as the equivalent of testimony on the identification of the THC found in appellant's urine, and used at trial to prove appellant had used marijuana.[77]

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[62] *Id.*

[63] *Id.* at 155.

[64] United States v. Blazier, No. 36988, 2008 CCA LEXIS 314 (A.F. Ct. Crim. App. Sept. 8, 2008).

[65] *Id.* at *2.

[66] *Id.*

[67] *Id.*

[68] *Id.*

[69] *Id.* at *6–7.

[70] *Id.* (citing United States v. Magyari, 63 M.J. 123, 127 (C.A.A.F. 2006)).

[71] *Id.* at *5 (citing United States v. Harcrow, 66 M.J. 154, 158 (C.A.A.F. 2008)).

[72] *See* Lancaster, *supra* note 19 (discussing United States v. Harris. 66 M.J. 781 (N-M. Ct. Crim. App. 2008)).

[73] *Blazier*, No. 36988, 2008 CCA LEXIS 314, at *7–12.

[74] *Id.*

[75] *Id.*

[76] *Id.*

[77] *Id.* at *9.

This case is important for Judge Advocates because it sets up the arguments for and against urinalysis lab reports admissibility as nontestimonial business records, an issue military courts have been struggling with since *Crawford* was decided in 2004. The CAAF decided the random urinalysis issue in *Magyari* in 2006,[78] and considered lab reports on evidence outside the urinalysis context this term in *Harcrow*;[79] however, the CAAF has yet to address admission of a urinalysis lab report in a probable cause situation.

The Supreme Court is scheduled to decide a case directly addressing the issue whether forensic lab reports should be considered testimonial or nontestimonial business records this term in *Melendez-Diaz v. Massachusetts*.[80] Some of the arguments advanced in the briefs for *Melendez-Diaz* are identical to those accepted by the NMCCA and AFCCA in *Harris* and *Blazier*, as well as those made in dissent by Judge Jackson.[81]

Aside from the two cases discussed above considering how lab reports should be categorized, the remaining Confrontation Clause cases generally confirm our understanding of existing law. The case of *United States v. Pack* addresses the continued viability of the *Maryland v. Craig* standard for allowing remote live testimony by a child victim/witness.

United States v. Pack[82]

United States v. Pack confirms for Judge Advocates that *Maryland v. Craig* still provides the correct analysis for live remote testimony of child witnesses following the Court's decision in *Crawford v. Washington*.[83] Over defense objection, a military judge allowed a ten-year-old victim of sexual assault to testify from a location outside the courtroom via one-way closed-circuit television, after making findings on the record required by Military Rule of Evidence (MRE) 611(d) and *Craig*.[84]

The question presented was whether, in light of *Crawford*, appellant was denied his Sixth Amendment right to confront his accuser when the military judge allowed the victim to testify from a remote location via one-way closed-circuit television.[85] The CAAF held that even after *Crawford*, *Craig* continues to control the questions whether, when, and how, remote testimony by a child witness in a criminal trial is constitutional.[86]

In *Craig*, the Supreme Court held that in the case of a child witness, one-way closed-circuit testimony could satisfy the Confrontation Clause if the judge found it necessary to protect the welfare of the child; the child witness would be traumatized not by the courtroom generally, but by the presence of the defendant; and that the emotional distress suffered by the child would be more than de minimis.[87]

In *Crawford v. Washington*, the Court held that testimonial hearsay cannot be admitted unless the declarant is unavailable and there has been a prior opportunity for cross-examination.[88] *Crawford* was concerned specifically with out of court statements, rather than face-to-face confrontation at trial; however, the opinion traced the roots of the confrontation right and rejected reliability as the test for admissibility.[89] Specifically, the opinion rejected the *Ohio v. Roberts* reliability test for the admissibility of testimonial hearsay statements.[90] The opinion in *Craig* also focused on reliability, but it addressed reliability in the context of the adversarial process as a whole.[91]

Gunnery Sergeant Pack argued that since *Crawford* rejected reliability as the test, and required instead a particular method of confrontation, i.e. cross-examination, the foundation of *Craig* had been undermined and should no longer apply as the test for child witness remote live testimony.[92] The opinion in *Crawford* was written by Justice Scalia, who also authored a strong dissent in *Craig*. It is clear from reading the two opinions that Justice Scalia believes face-to-face confrontation is

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[78] United States v. Magyari, 63 M.J. 123 (C.A.A.F. 2006).

[79] 66 M.J. 154 (C.A.A.F. 2008).

[80] *See* Commonwealth v. Melendez-Diaz, 870 N.E.2d 676 (Mass. App. Ct. 2007) (unpublished), *cert. granted*, 2008 U.S. LEXIS 7205 (U.S. Oct. 6, 2008) (No. 07-591).

[81] *See id.* Brief for the Petitioner; *id.*Brief for the Respondent.

[82] 65 M.J. 381, 382 (C.A.A.F. 2007).

[83] *Id.* at 382 (citing Crawford v. Washington, 541 U.S. 36 (2004)).

[84] *Id.* (citing MANUAL FOR COURTS-MARTIAL, UNITED STATES, MIL. R. EVID. 611(d) (2008) [hereinafter MCM]; Maryland v. Craig, 497 U.S. 836 (1990)).

require. However the opinion in *Crawford* does not mention *Craig*, and overruling by implication is generally disfavored.[93] As such, CAAF held that *Crawford* did not overrule *Craig*. Therefore, *Craig* still controls child witness testimony by remote live means.[94]

This opinion is important for Judge Advocates because it validates the use of MRE 611(d) and Rule for Court-Martial (RCM) 914A, in combination with *Craig* as a guide for the findings necessary by the military judge in order to allow remote live testimony by a child witness.[95]

While the CAAF confirmed the post-*Crawford* viability of *Craig* in *Pack*, in *Giles v. California* the Supreme Court interpreted the doctrine of forfeiture by wrongdoing consistent with FRE 804(b)(6).[96]

Giles v. California[97]

Giles v. California was the first opportunity for the Supreme Court to squarely consider the doctrine of forfeiture by wrongdoing after *Crawford*, which mentioned the principle as a situation where the Confrontation Clause would not require cross examination.[98]

Giles shot and killed his ex-girlfriend outside his grandmother's house.[99] There were no eyewitnesses to the shooting; however, his grandmother and a niece heard the shots and ran outside to find Giles standing over the victim with a gun in his hand.[100] At trial, Giles claimed self-defense, though the victim was found with no weapon, and had been shot six times.[101] The Government introduced statements the victim had made to police three weeks earlier after they responded to a domestic violence incident between her and Giles.[102] The statements included that Giles had accused the victim of cheating and had grabbed and punched her as well as threatening to kill her if he discovered her cheating.[103] The Government introduced the statements under a California evidentiary rule that allows admission of out of court statements in a domestic violence context when the declarant is unavailable to testify at trial and the statements are deemed trustworthy.[104] After the trial, *Crawford* was decided, requiring unavailability and a prior opportunity for cross examination for admission of testimonial hearsay

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[85] *Id.*

[86] *Id.*

[87] *Craig*, 497 U.S. 836.

[88] *Crawford*, 541 U.S. 36.

[89] *Id.*

[90] *Id.* (citing Ohio v. Roberts, 448 U.S. 56 (1980)).

[91] *Craig*, 497 U.S. 836.

[92] United States v. Pack, 65 M.J. 381, 382 (C.A.A.F. 2007).

[93] *Id.* at 384, 385.

[94] *Id.* at 382.

[95] *Id.*; *see* MCM, *supra* note 84, MIL. R. EVID. 611(d), R.C.M. 914A; *see also* United States v. McCollum, 58 M.J. 323 (C.A.A.F. 2003) (describing how the requirements of MRE 611(d), RCM 914A, and Maryland v. Craig must be synthesized to make the findings necessary before allowing remote live testimony of a child victim/witness).

[96] 128 S. Ct. 2678 (2008).

[97] *Id.*

[98] *Id.*

[99] *Id.* at 2681.

[100] *Id.*

[101] *Id.*

[102] *Id.*

[103] *Id.* at 2682.

[104] *Id.*

statements.[105] The California Court of Appeals considered *Crawford*, but held that admission of the statements in *Giles* did not violate the Confrontation Clause, since the *Crawford* opinion itself recognized the doctrine of forfeiture by wrongdoing.[106] The court found the doctrine was satisfied since Giles had killed the victim, thus making her unavailable to testify against him.[107]

The issue for decision in *Giles* was whether an accused forfeits his Sixth Amendment right to confront a witness against him when a judge determines that a wrongful act by the defendant made the witness unavailable to testify at trial.[108] The Supreme Court's opinion focuses on the intent of the accused, and holds that the doctrine of forfeiture by wrongdoing only applies where the accused intended to make the witness unavailable for trial when he committed the wrongful act.[109]

The opinion (written by Justice Scalia) begins by considering whether forfeiture by wrongdoing was a founding era exception to the confrontation right.[110] The *Crawford* decision recognized that there were two exceptions to confrontation recognized at the time of the founding—dying declarations and forfeiture by wrongdoing.[111] Forfeiture by wrongdoing meant admitting the statement of one who was kept away from trial by the efforts of the defendant.[112] The issue is whether the defendant is required to commit a wrongful act for the purpose of keeping the witness from testifying, or if the fact that the witness is prevented by the wrongful act from testifying is enough on its own.[113] Justice Scalia writes that at the time of the founding and since, there has always been an intent requirement.[114] It is not enough that the wrongful act of the accused results in the witness' unavailability.[115] The accused must engaged in conduct designed to prevent the witness from testifying.[116]

Justice Scalia cites common law precedent, *Reynolds v. United States*,[117] and FRE 804(b)(6)[118] for the proposition that the proponent of a statement must show the declarant had the intent to keep the witness from testifying before the statement could be admitted.[119] Both the old cases and historical treatises make clear that the accused must have the purpose of keeping the witness away in mind.[120] The *Reynolds* case relies upon the old cases and common law principles and agrees that intent is required.[121] Federal Rule of Evidence 804(b)(6), approved by the Supreme Court in 1997, clearly includes an intent element: "forfeiture by wrongdoing," applies when the accused "engaged or acquiesced in wrongdoing that was intended to, and did, procure the unavailability of the declarant as a witness."[122]

The decision in *Giles* was a 6–3 decision, including multiple concurrences and a dissent. [123] The key to the opinion is the requirement for the Government to show that the accused intended to make the witness unavailable when he committed the

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[105] Crawford v. Washington, 541 U.S. 36 (2004).

[106] *Giles*, 128 S. Ct. at 2682 (citing *Crawford*, 541 U.S. at 62).

[107] *Id.*

[108] *Id.* at 2681.

[109] *Id.* at 2693.

[110] *Id.* at 2684–93.

[111] *Id.* at 2682–83.

[112] *Id.* at 2683.

[113] *Id.*

[114] *Id.* at 2683–84.

[115] *Id.* at 2684.

[116] *Id.*

[117] Reynolds v. United States, 98 U.S. 145 (1879).

[118] FED. R. EVID. 804(b)(6).

[119] *Giles*, 128 S. Ct. at 2687–88.

[120] *Id.* at 2683–93.

[121] *Id.* at 2687–88.

[122] *Id.* at 2687 (quoting FED. R. EVID. 804(b)(6)).

[123] *Id.*

act that rendered the witness unavailable. The California law at issue did not specify this intent requirement, instead only requiring that the witness was in fact unavailable due to the accused's misconduct.[124] In many cases this will make little difference because the Government will often be able to argue that there is some evidence of the accused's intent to make the witness unavailable. One example discussed in the opinion is where an accused engages in a pattern of isolating the victim before committing a criminal act against her.[125] In such cases, there may often be evidence that the accused has purposefully made the victim unavailable as a witness.

The doctrine of forfeiture by wrongdoing is important for Judge Advocates to understand as a means to admit testimonial hearsay evidence that would otherwise be excluded under *Crawford*. The Supreme Court has made it clear that intent is a necessary element of the forfeiture by wrongdoing doctrine as codified in MRE 804(b)(6), taken directly from the Federal Rule of the same nomenclature. Interestingly, the ACCA recently decided a case involving the doctrine, where it cited *Giles* and recognized the intent requirement in the MRE.[126] The case was *United States v. Marchesano*, but it was decided in the current term, so more detailed treatment will await next year's symposium.[127]

The last case discussed in this article conforms to the theme of following established precedent as in *Pack* and *Giles*, but this time in the realm of jurisdiction. *United States v. Hart* recaps the existing requirement for a valid discharge ending personal jurisdiction over a servicemember; however, as a 3–2 decision, it also highlights the fact that the three accepted requirements are not necessarily planted in concrete.[128]

United States v. Hart[129]

> Two days after Airman First Class Dustin M. Hart received his Discharge from Active Duty (DD Form 214), but before he received separation pay, his command stopped processing the computation of his final pay and revoked his DD Form 214. Several weeks later various drug charges were preferred against him.[130]

Airman First Class (A1C) Hart began working as a confidential informant for AFOSI after confessing to several drug offenses on 2 January 2004.[131] Unbeknownst to AFOSI, a medical evaluation board (MEB) found him unfit for service on 8 January 2004.[132] Although the legal office had sent a memo to personnel asking for A1C Hart to be placed on administrative hold for 120 days, the separations section began his outprocessing sometime in January 2004.[133] On 24 February 2004, A1C Hart finished his outprocessing checklist and provided the information necessary for calculation of his final pay to the finance office.[134] Two days later, an initial calculation of his final pay was entered into the Defense Finance and Accounting System (DFAS).[135] On 3 March, A1C Hart was issued his Department of Defense (DD) Form 214.[136] A few days later, his squadron commander, AFOSI, and the legal office discovered that Hart had received his discharge certificate.[137] The legal office immediately directed finance to stop calculating his final pay, and his squadron commander requested that his DD 214 be revoked.[138] On 9 March 2004, A1C Hart went AWOL and he was arrested and returned to military control on 18 March 2004.[139] Charges were preferred on 23 March 2004.[140] Airman First Class Hart was charged with wrongful possession, and use, and distribution of illegal drugs.[141] Prior to trial the defense made a motion to dismiss for lack of personal jurisdiction.[142] The motion was denied by the trial judge, who found that there had not been a final accounting of pay, since there were steps remaining in the process of calculating A1C Hart's final pay.[143] The Court of Criminal Appeals agreed with the trial judge that there was personal jurisdiction since there was no final accounting of pay.[144]

The CAAF considered whether there is personal jurisdiction over a servicemember who has received his DD 214 and completed outprocessing, but whose final pay had not been delivered.[145] They held that personal jurisdiction continues until the servicemember's final pay or a substantial portion is ready for delivery.[146]

Article 2 of the Uniform Code of Military Justice (UCMJ) says generally that members of the armed forces are subject to military jurisdiction until they have been discharged.[147] The UCMJ does not specifically describe the point in time where

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[124] *Id.* at 2682, 2693.

[125] *Id.* at 2693.

[126] *See* United States v. Marchesano, No. 20060388 (A. Ct. Crim. App. Oct. 2, 2008).

[127] *Id.*

[128] 66 M.J. 273 (C.A.A.F. 2008).

discharge is effective; however, there is a personnel statute that military courts have relied on to answer that question since at least 1985.[148] The statute is 10 U.S.C. sections 1168(a) and 1169 (2000).[149] The three requirements for a valid discharge have been described as follows:

> We read these statutes as generally requiring that three elements be satisfied to accomplish an early discharge. First, there must be delivery of a valid discharge certificate. . . . Second, there must be a final accounting of pay made. This is an explicit command set forth by Congress in 10 U.S.C. section 1168(a). . . . Third, appellant must undergo the "clearing" process required under appropriate service regulations to separate him from military service.[150]

The key to this case was whether there had been a final accounting of pay before appellant's discharge was revoked.[151] Whether there was personal jurisdiction is a question of law reviewed by appellate courts using a de novo standard.[152] However, courts accept the military judge's findings of fact unless they are clearly erroneous or unsupported by the record.[153] Here there was no claim of factual error, and so the military judge's factual findings were accepted.[154] The military judge found that there were at least seven steps required under DFAS and finance office procedures in order to effect a final accounting of pay.[155] In Hart's case, only step one had been accomplished.[156] The military judge also found that the local finance office had twenty days to complete the initial calculations and forward them to DFAS.[157] Here the discharge was

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[129] *Id.*

[130] *Id.*

[131] *Id.* at 274.

[132] *Id.*

[133] *Id.*

[134] *Id.*

[135] *Id.*

[136] *Id.* (citing U.S. Dep't of Defense, DD Form 214, Certificate of Release or Discharge from Active Service (2000)).

[137] *Id.*

[138] *Id.*

[139] *Id.*

[140] *Id.*

[141] *Id.*

[142] *Id.*

[143] *Id.* at 274–75.

[144] *Id.* at 275.

[145] *Id.* at 274.

[146] *Id.*

[147] *Id.* at 275 (citing UCMJ art. 2 (2008)).

[148] *Id.* at 275–76.

[149] 10 U.S.C. §§ 1168(a), 1169 (2000).

[150] *Hart*, 66 M.J. at 276 (quoting United States v. King, 27 M.J. 327, 329 (C.M.A. 1989) (citations omitted)).

[151] *Id.* at 274.

[152] *Id.* at 276.

[153] *Id.*

[154] *Id.*

[155] *Id.*

[156] *Id.* at 277.

[157] *Id.*

revoked well within the twenty day window.[158]

This was a 3–2 decision, with Chief Judge Effron and Judge Stucky dissenting.[159] The thrust of the dissent was that the court's ruling makes it difficult if not impossible to know with certainty when a discharge has become effective.[160] Even though a servicemember has received a valid DD 214, and completed final outprocessing, including the finance office, they still are not completely released from military status until such time as their final pay is calculated and ready for delivery.[161]

It is important for Judge Advocates to recognize the continued validity of the three requirements from *King*: delivery of a valid DD 214, final accounting of pay, and a clearing process.[162] However, it is equally important for Judge Advocates to recognize that this was a split decision (3–2), where one vote could cause a different result in a future case.

Conclusion

This term included cases that generally confirmed our understanding of existing law, rather than significant change. The only exception was the admissibility of lab reports considered in *United States v. Harcrow* and *United States v. Blazier*, an issue that may ultimately be decided in the near future by the Supreme Court in *Melendez-Diaz v. Massachusetts*.

The CAAF confirmed that *Maryland v. Craig* is still good law after *Crawford*, and the Supreme Court interpreted the doctrine of forfeiture by wrongdoing consistently with the plain language of FRE 804(b)(6), which is identical to MRE 804(b)(6). *United States v. Hart* continued the trend by adhering to established precedent for determining the existence of personal jurisdiction. However, the split decision in that case also demonstrates the potential flexibility of appellate jurisprudence.

[158] *Id.*

[159] *Id.* at 277–80.

[160] *Id.*

[161] *Id.* at 279.

[162] United States v. King, 27 M.J. 327, 329 (C.M.A. 1989).

Building a Better Mousetrap or Just a More Convoluted One?:
A Look at Three Major Developments in Substantive Criminal Law

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Build a better mousetrap and the world will beat a path to your door.[1]

Introduction

While it may be a bit pedestrian to compare the Uniform Code of Military Justice (UCMJ) to a mousetrap, the analogy seems to fit when looking at the 2008 developments in substantive criminal law. Over the past several years, Congress and the President have embarked on a steady effort to modernize the UCMJ to more effectively address certain criminal conduct in the military.[2] Performing its role as the primary civilian oversight for the military justice system,[3] the Court of Appeals of the Armed Forces (CAAF) has reviewed some of these attempts and provided some modernization of its own.

As usual, the 2008 term of court was replete with cases from the service courts and the CAAF addressing a wide array of substantive criminal law issues. This article will focus on three areas of particular note from this term: false official statements, the statute of limitations for child abuse offenses, and child pornography. The first part of this article will address the impacts of *United States v. Day* (*Day II*) on the law of false official statements under Article 107, UCMJ.[4] False official statements generate a notable volume of appellate caselaw and with *Day II*, the CAAF has provided a more structured framework for analyzing whether a particular statement is "official." The second part of this article discusses *United States v. Lopez de Victoria* (*Lopez de Victoria II*), a landmark case addressing the impact of a 2003 amendment to Article 43, UCMJ, which purported to extend the statute of limitations for child offenses. Finally, the third part of this article discusses two child pornography cases involving complex computer distribution methods.[5] During this term, several major cases have addressed various aspects of crimes involving child pornography.[6] However, in two particular cases, *United States v. Navrestad*[7] and *United States v. Ober*,[8] the CAAF applies the relevant law to the facts before the court and provides more guidance in applying the Child Pornography Prevention Act (CPPA)[9] and Article 134, UCMJ to conduct involving the various forms of child pornography and the many different methods of its distribution. These three areas allow us to take a look at military substantive criminal law and ask whether Congress, the President, and the courts are building a better mousetrap—or just a more convoluted one.

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[1] BrainyQuote.com, http://www.brainyquote.com/quotes/quotes/r/ralphwaldo136905.html (last visited Feb. 9, 2008) (attributing the quote to Ralph Waldo Emerson).

[2] *See, e.g.*, UCMJ art. 119a (2008) (Death or injury of an unborn child), art. 120 (Rape, sexual assault, and other sexual misconduct), art. 120a (Stalking); MANUAL FOR COURTS-MARTIAL, UNITED STATES pt. IV, ¶¶ 68a, 97, 100a, 109 (2008) [hereinafter MCM] (listing child endangerment, patronizing a prostitute, reckless endangerment, and threat or hoax (expanded from threat or hoax: bomb), respectively, as offenses under Article 134, UCMJ).

[3] UCMJ art. 67; *see also* Major Bradley J. Huestis, *You Say You Want a Revolution: New Developments in Pretrial Procedures*, ARMY LAW., Apr./May 2003, at 17, 18.

[4] 66 M.J. 172 (C.A.A.F. 2008).

[5] 66 M.J. 67 (C.A.A.F. 2008).

[6] *See, e.g.*, United States v. Williams, 128 S. Ct. 1830 (2008) (holding that an amendment to the federal child pornography scheme that prohibits the solicitation and pandering of child pornography is constitutional); United States v. Medina, 66 M.J. 21 (C.A.A.F. 2008) (addressing the relationship between the three clauses of Article 134 in a case involving child pornography); United States v. Campbell, 66 M.J. 578 (N-M. Ct. Crim. App. 2008) (addressing multiplicity and unreasonable multiplication of charges as it applies to the same images possessed on three different types of computer media); United States v. Raynor, 66 M.J. 693 (A.F. Ct. Crim. App. 2008) (holding that unreasonable multiplication of charges can occur over successive prosecutions in a case involving the possession and creation of child pornography); United States v. Brown, No. 36695 (A.F. Ct. Crim. App. Nov. 16, 2007) (unpublished) (upholding a conviction under Clause 2 of Article 134 for possessing child pornography).

[7] 66 M.J. 262 (C.A.A.F. 2008).

[8] 66 M.J. 393 (C.A.A.F. 2008).

[9] Pub. L. No. 104-208, § 121, 110 Stat. 3009 (codified in scattered sections of Title 18 U.S.C. (2000)).

It is a tantalizing charge: a servicemember has lied to a civilian police detective during the course of an investigation. The lie frustrated the investigation and has destroyed the accused servicemember's credibility. Why not add it to the charge sheet? As recent caselaw has shown, a false official statement charge under Article 107, UCMJ can be deceptively difficult.[10] In just the last two years, there have been five published military appellate opinions addressing issues arising from Article 107, with four trying to divine whether a particular false statement made to a civilian government employee is official or not.[11] This year, *Day II* attempts to make that line a little brighter, but leaves the unfortunate impression that this area of the law will continue to generate issues.[12]

Teffeau *and the Line of Duty*

Article 107 of the UCMJ, prohibits, among other things, making a "false official statement knowing it to be false."[13] This provision has its historical roots in the Articles of War and has not been changed since it was drafted into the UCMJ in 1950.[14] While there is a comparable federal offense in 18 U.S.C. § 1001, Article 107 is more broad in scope as "the primary purpose of military criminal law—to maintain morale, good order, and discipline—has no parallel in civilian law."[15]

It is the requirement that the statement be "official" that creates issues both at trial and on appeal. As Part IV of the *Manual for Courts-Martial* (*MCM*) explains, "Official documents and official statements include all documents and investigations made in the line of duty."[16] Prior to the 2008 term, the CAAF's most recent proclamation on what constitutes an "official statement" came in 2003 in *United States v. Teffeau*.[17] In that case, a Marine recruiter made false statements to a civilian investigator during the course of an investigation into a tragic car accident that took the life of a Marine recruit.[18] Despite the invitation, the court refused to craft an absolute rule that "statements to civilian law enforcement officials can never be official."[19] In holding that the false statements made to the civilian investigators were "official" for purposes of Article 107, the court found that the "entire incident and investigation bore a direct relationship to [Staff Sergeant Teffeau's] duties and status as a Marine Corps recruiter."[20] Furthermore, the circumstances "reflect[ed] a substantial military interest in the investigation."[21]

After *Teffeau*, the service courts had several opportunities to probe the nature of "official" statements for purposes of Article 107. In three recent cases, servicemembers made false statements to civilian law enforcement officials during civilian investigations.[22] In deciding these three cases, the service courts focused on the connection, or lack thereof, between the false

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[10] UCMJ art. 107 (2008).

[11] *See Day II*, 66 M.J. 172 (C.A.A.F. 2008); United States v. Wright, 65 M.J. 373 (C.A.A.F. 2007) (holding that a statement that was misleading but true was false for purposes of Article 107); United States v. Holmes, 65 M.J. 684 (N-M. Ct. Crim. App. 2007) (holding that, under the facts, false statements to customs officials and civilian police officers were not official); United States v. Morgan, 65 M.J. 616 (N-M. Ct. Crim. App. 2007) (holding that, under the facts, false statements to civilian police detectives were not official); United States v. Caballero, 65 M.J. 674 (C.G. Ct. Crim. App. 2007) (holding that, under the facts, false statements to civilian police officers were not official).

[12] 66 M.J. at 172.

[13] UCMJ art. 107.

[14] *See* COLONEL FREDERICK BERNAYS WIENER, THE UNIFORM CODE OF MILITARY JUSTICE 214 (1950).

[15] United States v. Teffeau, 58 M.J. 62, 68–69 (C.A.A.F. 2003) (quoting United States v. Solis, 46 M.J. 31, 34 (C.A.A.F. 1997)); *see* 18 U.S.C.S. § 1001 (LexisNexis 2009).

[16] MCM, *supra* note 2, pt. IV, ¶ 31c(1).

[17] *Teffeau*, 58 M.J. at 68–69.

[18] *Id.* at 63.

[19] *Id.*

[20] *Id.* at 69.

[21] *Id.*

[22] *See* United States v. Holmes, 65 M.J. 684 (N-M. Ct. Crim. App. 2007) (a Marine stole a car from the base lemon lot and made false statements regarding the car to a border patrol officer and a California State Highway Patrol officer); United States v. Caballero, 65 M.J. 674 (C.G. Ct. Crim. App. 2007) (a member of the Coast Guard made a false statement to civilian police detectives investigating a shooting that had occurred off-post); United States v. Morgan, 65 M.J. 616 (N-M. Ct. Crim. App. 2007) (while on leave, a seaman recruit made a false statement to civilian police officers investigating the death of a civilian).

statement and the military duties or status of the servicemember. In all three cases, the courts concluded that the statements were not "official" under Article 107 because the circumstances of the statements lacked sufficient nexus between the statements and the military duties or status of the servicemember. A fourth case, though, would lead to CAAF's latest attempt to describe what statements are official for purposes of Article 107.

Day II*: CAAF's Attempt at Building a Better Mousetrap?*

The facts surrounding *Day II*[23] are heart-rending. While his wife was out for the evening, Airman Basic Rodger Day put his two young children to bed in their on-post quarters at Little Rock Air Force Base, Arkansas.[24] The youngest was just nine weeks old at the time.[25] The baby woke up at about 0400 hours, and the accused performed the usual fatherly duties: changing the diaper, putting ointment on the diaper rash, and giving the baby a bottle.[26] However, some may find it unusual that the father then propped the bottle in the baby's mouth using a teddy bear.[27] After doing so, the accused covered the child with blankets and a quilt and went back to his room to go to sleep.[28] At 0900 hours, surprised that the child did not wake him earlier, the accused went to check on the baby and found him lying on his back with his nose and mouth covered by a quilt.[29] After checking for signs of life, changing the baby's diaper, and changing his own clothes, the accused dialed 911.[30] He reported to the civilian 911 operator that he had found his son lying face down.[31] The 911 operator instructed the accused to perform CPR, which the accused did until two civilian firemen from the base fire department arrived.[32] Upon their arrival, the accused also informed the two firemen that he found his son lying face down in the crib.[33] The firemen performed CPR until the paramedics arrived.[34] The child was then transported to the hospital where he was pronounced dead.[35]

The accused was charged, in relevant part, with one specification of making a false official statement in violation of Article 107, UCMJ.[36] This single specification alleged two separate false statements.[37] The first allegation addressed the statement to the off-post civilian 911 operator and the second allegation addressed the statement to the base civilian firemen.[38] A panel of officer members found the accused guilty of the specification.[39] On appeal, the Air Force Court of Criminal Appeals (AFCCA) affirmed the case, citing *Teffeau* and summarily concluding that both statements were official for purposes of Article 107.[40]

On appeal to the CAAF, the defense challenged the official nature of the statements at issue, arguing that both statements: (1) were made to civilians, (2) were made while the accused was off-duty, and (3) were unrelated to the accused's military duties.[41] In addressing these three factors, the court reframed the *Teffeau* standard for officiality, stating

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[23] *Day II*, 66 M.J. 172 (C.A.A.F. 2008).

[24] United States v. Day (*Day I*), No. 36423, 2007 CCA LEXIS 202 (A.F. Ct. Crim. App. May 9, 2007) (unpublished).

[25] *Id.*

[26] *Id.*

[27] *Id.*

[28] *Id.*

[29] *Id.*

[30] *Id.*

[31] *Id.*

[32] *Id.*

[33] *Id.*

[34] *Id.*

[35] *Id.*

[36] *Id.*

[37] *Day II*, 66 M.J. 172, 173 (C.A.A.F. 2008). Neither the Air Force Court of Criminal Appeals nor the CAAF mention the duplicitous nature of the pleading in this case. *See* MCM, *supra* note 2, R.C.M. 307(c)(4), R.C.M. 307(c)(3) discussion.

[38] *Day II*, 66 M.J. at 173.

[39] *Day I*, No. 36423, 2007 CCA LEXIS 202.

[40] *Id.* (citing United States v. Teffeau, 58 M.J. 62 (C.A.A.F. 2003)).

[41] *Day II*, 66 M.J. at 174.

that the key question is "whether the statements relate to the official duties of either the speaker or the hearer, and whether those official duties fall within the UCMJ's reach."[42] Immediately after providing this refined standard for officiality, the court quotes *Teffeau* as an example where statements to civilian law enforcement were official because they "bore a direct relationship to [his] duties and status as a Marine Corps recruiter."[43] In doing so, the court makes clear that it is not overruling *Teffeau*, but clarifying it.

In providing this standard, the court makes two points. First, the CAAF once again declines to make an absolute rule that statements to civilian officials can never be official, stating that the civilian or military status of the listener is not dispositive for purposes of Article 107.[44] Second, the court ratified the language from Part IV of the *MCM*: "false official statements *are not limited to* line of duty statements."[45] As the court observed, "[t]here are any number of determinations made outside of a servicemember's particular duties that nonetheless implicate official military functions."[46]

With this refined framework in place, the CAAF came to different conclusions regarding the two statements at issue in this case. First, the court held that the statements to the civilian firemen from the on-post fire department were official, finding a direct link between the role of the fireman and an "on-base military function."[47] As the CAAF observed, "These personnel were providing on-base emergency services pursuant to the commander's interest in and responsibility for the health and welfare of dependents residing in base housing over which [the base commander] exercised command responsibility."[48]

However, the CAAF distinguished the civilian off-post 911 operator from the on-post firemen, but with a reservation. The court found the evidence insufficient to conclude that the statement to the 911 operator was official, but provided a caveat in a footnote: "In theory, statements made to an off-base 911 operator might implicate Article 107, UCMJ, in situations where . . . there is a predictable and necessary nexus to on-base persons performing *official* military functions on behalf of the command."[49] From the language in this footnote, the court seems willing to conclude that the statement to the 911 operator was official, but was unable to affirm this aspect of the specification because there simply was not enough evidence in the record to do so. As such, the court affirmed only the language in the specification governing the false statement to the on-base civilian firemen.[50]

Footnote 4 provides a cryptic post-script to the opinion in *Day II.* The footnote does not cite to *Teffeau* or provide any other source for its choice of language. Nor does it provide any examples. In looking at the facts in *Day II*, it looks like the call to the civilian 911 operator triggered a logical and immediate response from on-base emergency personnel. Was the issue that there was simply no evidence in the record linking the 911 operator to the on-base emergency personnel? Or was the issue that it is not predictable or necessary that a 911 operator responding to an emergency call from post might call on-base police or fire personnel to respond? Either way, practitioners and courts are left to guess what might meet the CAAF's definition of a "predictable and necessary nexus."[51] The next section discusses one court's attempt to define these parameters.

United States v. Cofer*: Applying the Day II Framework*

With *Day II*, the CAAF expanded *Teffeau* and Part IV of the *MCM* to provide lower courts and practitioners with a more refined framework for analyzing statements falling under Article 107, UCMJ. However, whether a statement is official for

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[42] *Id.*

[43] *Id.* (quoting *Teffeau*, 58 M.J. at 69).

[44] *Id.*

[45] *Id.* (emphasis added); *see also* MCM, *supra* note 2, pt. IV, ¶ 31c(1) ("[O]fficial statements include all . . . statements made in the line of duty.").

[46] *Day II*, 66 M.J. at 174.

[47] *Id.*

[48] *Id.* at 175.

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

[50] *Id.*

[51] *Id.*

purposes of Article 107 is still a question that hinges on the unique facts of each case.[52] It remains to be seen whether *Day II* actually provided a useful framework for analyzing the official nature of statements to civilians. In *United States v. Cofer*,[53] the AFCCA applies the *Day II* framework and reaches a result that certainly tests the limits of "officiality."

The facts in *Cofer* are remarkable. Senior Airman (SrA) Taureen Cofer set his car on fire with the intent to file a false insurance claim.[54] Unfortunately, while setting the fire at an off-post location, SrA Cofer burned himself severely.[55] While recovering from his injuries, he discovered that the local police were investigating the fire and he feared that he would be a logical suspect with the burns he sustained.[56] In order to divert suspicion away from himself, he concocted a story claiming that "he was kidnapped by three armed men who forced him to burn his car."[57] During the course of the investigation, he was interviewed by a civilian detective from the Glendale Police Department, a community near Luke Air Force Base, Arizona where he was stationed.[58] Although the Glendale Police Detective interviewed SrA Cofer, an agent from the Air Force Office of Special Investigations (AFOSI) watched from a room next door.[59] During the interview, SrA Cofer told the detective his false story, but by the conclusion of the interview, he admitted that he was not actually kidnapped.[60] The detective then turned the case over to the AFOSI.[61] In a subsequent interview with the AFOSI agent, the accused once again told his false story, but fully confessed to his scheme by the end of the interview.[62] He was eventually charged with, among other things, making a false official statement to the civilian police detective.[63] Senior Airman Cofer accused pled guilty to the charge and the military judge accepted his plea.[64]

On appeal, the AFCCA upheld the conviction, concluding that the statement to the civilian detective was official for purposes of Article 107.[65] The court held that the statement to the off-post civilian police detective related to the official duties of both the accused and the civilian police detective.[66] Furthermore, the court held that the duties of the civilian detective fell within the reach of the UCMJ.[67] The AFCCA found that the SrA Cofer's statements related "both to injuries requiring him to be put on convalescent leave and his employment of an unsuspecting fellow airman in perpetrating his crime."[68] The court then found that the detective was aware of the accused's military status and aware that the case "might be of interest to the military."[69] The court noted that he turned the case over to the AFOSI immediately after the interview.[70]

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[52] Neither the courts nor the *MCM* are clear as to whether "officiality" is a question of fact or a question of law. Even the *Benchbook* acknowledges that the question has issues of both fact and law. *See* U.S. DEP'T OF ARMY, PAM. 27-9, MILITARY JUDGES' BENCHBOOK Instr. 3-31-1 (15 Sept. 2002) (C2, 1 July 2003) [hereinafter BENCHBOOK].

[53] 67 M.J. 555 (A.F. Ct. Crim. App. 2008).

[54] *Id.* at 556.

[55] *Id.*

[56] *Id.*

[57] *Id.*

[58] *Id.*

[59] *Id.*

[60] *Id.*

[61] *Id.*

[62] *Id.*

[63] *Id.* at 555.

[64] *Id.* at 556–57. However, after accepting his plea, the military judge re-opened the providence inquiry to "flesh out additional details for the record" on this issue. *Id.* 557. This additional inquiry covered seventeen pages in the record. *Id.* at 557 n.3.

[65] *Id.* at 558 (citing United States v. Hardeman, 59 M.J. 389, 391 (C.A.A.F. 2004)).

[66] *Id.*

[67] *Id.* (citing *Day II*, 66 M.J. 172, 174 (C.A.A.F. 2008)).

[68] *Id.* (citing *Day II*, 66 M.J. at 174; United States v. Teffeau, 58 M.J. 62, 69 (C.A.A.F. 2003)). The accused had a staff sergeant transport him to work and then to a rental car agency while he was in the course of executing his scheme. *Id.* at 556.

[69] *Id.* (citing *Day II*, 66 M.J. at 174; *Teffeau*, 58 M.J. at 69).

[70] *Id.* (citing *Day II*, 66 M.J. at 174; *Teffeau*, 58 M.J. at 69).

Next, the AFCCA held that there is "a predictable and necessary nexus"[71] between the statements to the detective and "official functions of on-base military personnel."[72] In so holding, the court found that his false report would be "of great concern to the base commander and other on-base personnel responsible for the morale, health, and welfare of personnel assigned to the base."[73] In finding such a nexus, the court recognized the gravity of the purported crime (i.e., armed kidnapping involving injury), the fact that the purported crime involved a servicemember, and the proximity of the alleged crime to the installation.[74] Based on their two holdings, the AFCCA found no substantial basis in law or fact to question SrA Cofer's guilty plea and affirmed the case.[75]

False Official Statements: Charting the Course Forward

Although it seems that CAAF's intent with *Day II* was to clarify the circumstances where false statements to civilians may be punishable as false official statements, *Cofer* shows that practitioners and lower courts will likely struggle with the definition of "official" for purposes of Article 107. The problem lies in the second prong: whether the official duties of the speaker or listener "fall within the scope of the UCMJ's reach."[76] As the UCMJ has a very far reach,[77] the key question is what sort of link the CAAF will require between the statement and the military. Footnote 4 of the *Day II* opinion seems to provide the more helpful divining rod: whether "there is a predictable and necessary nexus to on-base persons performing *official* military functions."[78] For trial and appellate practitioners, footnote 4 is a necessary addendum to the second prong of the *Day II* framework.

Nonetheless, the strength of the required link remains an open question. The court in *Day II* uses this language to distinguish between the civilian off-base 911 operator and the civilian on-base firemen, even where it appears that the call to the 911 operator set in motion a chain of events that resulted in the arrival of the on-base fire personnel.[79] In *Cofer*, the AFCCA held that there was "a predictable and necessary nexus"[80] between the statements to the detective and "official functions of on-base military personnel."[81] In so holding, the court relied on the interest that the command may have in the reported crime based on the gravity of the incident and its proximity to the base.[82] While there were other links between the statement and the official duties of on-base military personnel (e.g., the AFOSI agent's presence at the interview, the immediate transfer of the case to the military, and the accused's use of servicemembers in his scheme), the court chose to articulate one based on the somewhat speculative reaction of the command.[83] While footnote 4 has value in providing a clearer test to articulate a link between a particular false statement and the UCMJ, the limits of this language remain to be seen. *Cofer* has likely established, if not exceeded, them.

Along with footnote 4, it also appears that *Teffeau* is still helpful in discerning whether a statement is official for purposes of Article 107, UCMJ. Under *Teffeau*, the statements to the civilian police were official because they bore a "clear and direct relationship to [Teffeau's] duties as a recruiter."[84] The court further found that there was a "substantial military interest in the investigation."[85] In *Day II*, the CAAF uses *Teffeau*'s "clear and direct relationship" test to augment its test for

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[71] *Id.* (quoting *Day II*, 66 M.J. at 175 n.4).

[72] *Id.* (citing *Day II*, 66 M.J. at 174).

[73] *Id.* (citing *Day II*, 66 M.J. at 174).

[74] *Id.* (citing *Day II*, 66 M.J. at 174).

[75] *Id.*

[76] *Day II*, 66 M.J. at 174.

[77] *See, e.g.*, Solorio v. United States, 483 U.S. 435 (1987) (holding that court-martial jurisdiction of a court-martial only depends on the accused's status as a servicemember and not on the "service connection" of the offense charged).

[78] *Day II*, 66 M.J. at 175 n.4.

[79] *Id.*

[80] *Cofer*, 67 M.J. at 558 (quoting *Day II*, 66 M.J. at 175 n.4).

[81] *Id.*

[82] *Id.*

[83] *Id.*

[84] United States v. Teffeau, 58 M.J. 62, 69 (C.A.A.F. 2003).

[85] *Id.*

official statements.[86] The court in *Cofer* seems to refer to *Teffeau*'s "substantial military interest in the investigation" test when describing the facts which support the conclusion that the civilian detective's official duties fall within the scope of the UCMJ's reach.[87] While *Day II* provides the framework, practitioners and courts should still look to *Teffeau* to help define the requisite nexus between the false statement and the military.

The more systemic impact of *Day II* is that the *Military Judge's Benchbook* instructions governing false official statements will need to be updated to reflect the key principles governing whether a statement is official for purposes of Article 107, UCMJ. As the Coast Guard Court of Criminal Appeals (CGCCA) observed in *United States v. Caballero*, "The *Benchbook* . . . is not helpful in fully addressing the factual predicate necessary to provide the nexus between the circumstances surrounding the making of the statement at issue, and the official nature of the statement necessary for an Article 107 violation . . . ."[88] Note 2 to Instruction 3-31-1 reiterates the standard outlined in *Teffeau*.[89] However, the *Day II* opinion draws a brighter line and using that framework for an improved instruction that should aid trial courts in determining which statements are official.[90]

Day II also reminds practitioners that not every false statement is "official" for purposes of Article 107, UCMJ. The CAAF has made clear that there are some false statements that are simply not false "official" statements under Article 107. When pleading and proving a false official statement charge, trial counsel must be careful to establish the facts surrounding the statement, demonstrate the link between the statement and the official duties of either the speaker or the listener, and show how those official duties fall within the scope of the UCMJ. From footnote 4 in *Day II*, it appears logical that a statement to a civilian 911 operator that triggered a response by on-base emergency personnel to assist a servicemember's dependent child living in on-post quarters would qualify as an official statement.[91] Nonetheless, the facts before the court did not allow it to reach that conclusion.[92] As *Cofer* and *Day II* show, the trial and appellate courts will have to be rigorous in separating mere false statements from false official statements. Such sorting begins, and in some cases ends, with the facts.

Despite CAAF's best efforts in *Day II*, it is likely that identifying "official" statements will continue to be a challenge for practitioners and the courts. The *Cofer* opinion offers at least one example of how a court will use the refined test. Although appellate courts did not seem to have a significant problem using *Teffeau* to divine the line between "official" and "not official" for purposes of Article 107, the framework from *Day II* will at least force a more systematic, factually driven analysis as lower courts address false official statements. With *Day II*, CAAF has shown that it is willing to continue to adjust the framework to ensure that Article 107 ensnares only those statements that are truly "official." In the next section, it is Congress who is adjusting the proverbial mousetrap.

The Statute of Limitations for Child Abuse Offenses: Mousetrap or Rat's Nest?

For those keeping track, the statute of limitations for child abuse offenses has changed twice since 2003. Prior to 2003, child abuse offenses had no special status under Article 43, UCMJ and as such, the statute of limitations was five years.[93] However, effective 24 November 2003, Congress amended Article 43 to bring the statute of limitations for child abuse

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[86] *Day II*, 66 M.J. 172, 174 (C.A.A.F. 2008).

[87] *Cofer*, 67 M.J. at 558 ("For his part, Detective H was aware of the appellant's military status, he was aware that the case might be of interest to the military, and he turned the investigation over to his military counterpart . . . immediately following his interview of the appellant." (citing *Day II*, 66 M.J. at 174; *Teffeau*, 58 M.J. at 69)).

[88] United States v. Caballero, 65 M.J. 674, 676 (C.G. Ct. Crim. App. 2007).

[89] BENCHBOOK, *supra* note 52, Instr. 3-31-1 (with approved interim update to Note 2, Instr. 3-31-1).

[90] Additionally, rather than a note within the instruction, the instruction should provide a definition of "official." For example, the instruction could read:

> "Official statements" include, but are not limited to, those statements made in the line of duty. In order for a statement to be "official," the statement at issue must relate to the official duties of either the person making the statement ("the speaker") or the person receiving the statement ("the listener" or "the hearer"). Additionally, the official duties of the person making the statement ("the speaker") or the person receiving the statement ("the listener" or "the hearer") must fall within the scope of the UCMJ's reach. In other words, there must be some predictable and necessary nexus between the military and the official duties of either the person making the statement or the person receiving the statement. Whether the statement was made to a civilian or a military member is not alone dispositive of their official nature. Also, it is not dispositive that the statement was made outside of the accused's particular military duties.

[91] *Day II*, 66 M.J. at 175 n.4.

[92] *Id.* at 175.

[93] *See* Major Jeffrey C. Hagler, *Duck Soup: Recent Developments in Substantive Criminal Law,* ARMY LAW., July 2004, at 79, 81.

offenses in line with the federal scheme established in the Violent Crime Control and Law Enforcement Act of 1994.[94] The National Defense Authorization Act for Fiscal Year 2004 (NDAA 2004) provided that a child abuse offense[95] could be tried by court-martial as long as the sworn charges were received by the summary court-martial convening authority before the victim reached the age of twenty-five.[96] Unfortunately, that same year, Congress changed the federal statute of limitations for child abuse offenses and provided that any child abuse offense may be tried during the "life of the child."[97] In 2006, Congress revised the federal scheme once again to state that an offense involving physical or sexual abuse of a child or kidnapping of a child, may be tried at any time "during the life of the child, or for ten years after the offense, whichever is longer."[98] With these changes to the federal scheme, Congress amended Article 43, UCMJ once more to align the statute of limitations for child abuse offenses with its federal counterpart. Effective 6 January 2006, Article 43 allows an individual to be tried for a child abuse offense as long as the summary court-martial convening authority receives the sworn charges "during the life of the child or within five years after the date on which the offense was committed, whichever provides a longer period."[99]

Predictably, these changes in the statute of limitations for child abuse offenses raised the question whether these amendments would work to extend a statute of limitations that had not yet expired. In 2003, in *Stogner v. California*, the Supreme Court held that an amendment to a statute of limitations could not revive a statute of limitations that had already expired.[100] A statute that purported to do so violated the *Ex Post Facto* Clause of the Constitution.[101] However, the Court did not decide whether an amendment could extend a statute of limitations that had not yet expired.[102] Two federal courts addressing amendments to the federal statute of limitations for child abuse offenses had held that 18 U.S.C. § 3283 *did* extend statutes of limitation that had not yet expired.[103] Commentators seemed to agree that the amendments to Article 43 would similarly extend a statute of limitations period that had not yet expired in a case involving one of the specified types of child abuse.[104]

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[94] Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, § 330018(a), 108 Stat. 1796, 2149 (codified at 18 U.S.C. § 3283 (1994)).

[95] Article 43, UCMJ currently defines a "child abuse offense" as:

> [A]n act that involves abuse of a person who has not attained the age of 16 years and constitutes any of the following offenses:
>
> (i) Any offense in violation of section 920 of this title (article 120).
>
> (ii) Maiming in violation of section 924 of this title (article 124).
>
> (iii) Sodomy in violation of section 925 of this title (article 125).
>
> (iv) Aggravated assault or assault consummated by a battery in violation of section 928 of this title (article 128).
>
> (v) Kidnapping; indecent assault; assault with intent to commit murder, voluntary manslaughter, rape, or sodomy, or indecent acts or liberties with a child in violation of section 934 of this title (article 134).
>
> (C) In subparagraph (A), the term 'child abuse offense' includes an act that involves abuse of a person who has not attained the age of 18 years and would constitute an offense under chapter 110 or 117, or under section 1591, of title 18.

See UCMJ art. 43(b)(2)(B), 43(b)(2)(C) (2008).

[96] National Defense Authorization Act for Fiscal Year 2004, Pub. L. No. 108-136. § 551, 117 Stat. 1392, 1481 (2003) [hereinafter NDAA 2004] (amending Article 43, UCMJ effective 24 November 2003).

[97] Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today Act of 2003, Pub. L. No. 108-21 § 202, 117 Stat. 650, 660 (amending 18 U.S.C. § 3283 to read, "No statute of limitations that would otherwise preclude prosecution for an offense involving the sexual or physical abuse, or kidnaping, of a child under the age of 18 years shall preclude such prosecution during the life of the child").

[98] 18 U.S.C.S. § 3283 (LexisNexis 2009).

[99] National Defense Authorization Act for Fiscal Year 2006, Pub. L. No. 109-163, § 553, 119 Stat. 3136, 3264 [hereinafter NDAA 2006] (codified at 10 U.S.C. § 843) (amending Article 43, UCMJ as of 6 January 2006). *See* Violence Against Women and Department of Justice Reauthorization Act of 2005, Pub. L. No. 109-162, § 3298(c), 118 Stat. 2960, 3126 (2006) (amending 18 U.S.C. § 3283 to read "during the life of a child or for ten years after the offense, whichever is longer").

[100] 539 U.S. 607, 632–33 (2003).

[101] *Id.*; U.S. CONST. art I, § 9, cl. 3 ("No . . . ex post facto Law shall be passed."). There are actually two *Ex Post Facto* clauses in the Constitution. Article I, section 9, clause 3 applies to the Federal Government and Article I, section 10, clause 1 applies to States. *Stogner* addressed the Ex Post Facto Clause applicable to the States. *See id.* art I, § 10, cl. 1 ("No State shall . . . pass any . . . ex post facto law . . ."); *see also Stogner*, 539 U.S. at 610.

[102] *Stogner*, 539 U.S. at 618.

[103] *See Lopez de Victoria II*, 66 M.J. 67, 73 (C.A.A.F. 2008) (citing United States v. Chief, 438 F.3d 920, 923–24 (9th Cir. 2006); United States v. Jeffries, 405 F.3d 682, 684–85 (8th Cir. 2005)).

[104] *See* Lieutenant Colonel Mark L. Johnson, *Forks in the Road: Recent Developments in Substantive Criminal Law*, ARMY LAW., June 2006, at 23, 24; Hagler, *supra* note 93, at 82.

Enter Sergeant (SGT) Eric Lopez de Victoria. Segeant Lopez de Victoria was charged with sexually molestingd his young stepdaughter on numerous occasions between November 1998 and June 1999.[105] Unfortunately, the offenses were not reported until more than seven years after the molestation had ended.[106] Applying the 2003 amendments to Article 43, UCMJ the Government preferred charges alleging indecent acts and liberties with a child under Article 134 on divers occasions between 24 November 1998 and 1 June 1999.[107] At trial, sua sponte, the military judge questioned whether the statute of limitations barred trial for these offenses but then ruled that Article 43 had extended the statute of limitations for child abuse offenses and allowed the trial to continue.[108] However, prior to proceeding with the trial, the military judge ordered that the charge sheet be amended so that the first date of the offenses was 25 November 1998.[109] After SGT Lopez de Victoria was convicted and sentenced, the military judge held a post-trial Article 39a session and reversed his earlier ruling.[110] The military judge set aside the charges relating to the sexual offenses involving the stepdaughter, holding that the amendments to Article 43 were not retroactive and that the statute of limitations barred trial for these offenses.[111] The Government appealed the case to the Army Court of Criminal Appeals (ACCA) under Article 62, UCMJ.[112]

On appeal, the ACCA reversed the military judge's ruling, holding that there was no violation of the *Ex Post Facto* Clause.[113] The court addressed the changes to 18 U.S.C. § 3283 and how the federal courts had applied those changes.[114] The court also analyzed the legislative history and Congress' intent to "mirror[]" the federal scheme and "to expand the reach of the law to those who sexually abuse children."[115] The court also decided that it should liberally construe the amendments rather than apply the strict construction normally accorded to substantive changes in criminal laws.[116] In holding that the 2003 Article 43 amendment applied retroactively, the ACCA concluded that such a result was consistent with federal precedent and legislative intent.[117]

Considering almost the exact same sources, the CAAF reached the opposite conclusion and reversed the ACCA.[118] The CAAF began its analysis of the effect of these amendments to Article 43 by clarifying that, at the time that the accused committed these offenses, the applicable statute of limitations under Article 43 was five years.[119] If the 24 November 2003 amendments to Article 43 did not apply to these offenses, trial was barred by the statute of limitations.[120] If, however, the amendments extended the statute of limitations for those offenses for which the applicable period had not expired, then the trial could continue.

The CAAF then referred to its decision in *United States v. McElhaney* where the court specifically declined to apply the more extensive statute of limitations for child abuse offenses under 18 U.S.C. § 3283 to child abuse crimes committed by servicemembers.[121] The court noted that the amendments to Article 43 were a direct result of the *McElhaney* decision and

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[105] United States v. Lopez de Victoria (*Lopez de Victoria I*), 65 M.J. 521, 523 (A. Ct. Crim. App. 2007).

[106] *Id.* at 523.

[107] *Id.* at 522–23.

[108] *Id.* at 523.

[109] *Id.* As the statute of limitations was extended effective 24 November 2003, the military judge concluded that any offenses on 24 November 2003 or earlier were barred by the *Ex Post Facto* Clause and the ACCA noted this finding with approval. *See id.*; *see also* Stogner v. California, 539 U.S. 607, 632–33 (2003).

[110] *Lopez de Victoria II*, 66 M.J. 67, 68 (C.A.A.F. 2008).

[111] *Id.*

[112] *Lopez de Victoria I*, 65 M.J. at 522; UCMJ art. 62(a)(1) (2008) (allowing the Government to appeal a ruling which terminates the proceedings regarding a charge or specification).

[113] *Lopez de Victoria I*, 65 M.J. at 530.

[114] *Id.* at 527–28 (describing United States v. Chief, 438 F.3d 920, 923-24 (9th Cir. 2006); United States v. Jeffries, 405 F.3d 682, 684–85 (8th Cir. 2005)).

[115] *Id.* at 529.

[116] *Id.* at 528.

[117] *Id.* at 529–30.

[118] *See generally Lopez de Victoria II*, 66 M.J. 67 (C.A.A.F. 2008). Their decision was unanimous on the statute of limitations issue. *Id.*

[119] *Id.* at 71.

[120] *Id.* This is because five years had passed between the last date of the alleged offenses and the date the sworn charge sheet was received by the summary court-martial convening authority.

[121] *Id.* at 72 (citing United States v. McElhaney, 54 M.J. 120 (C.A.A.F 2000)).

created a "new section of Article 43" with a "separate statute of limitations for child abuse offenses."[122] The court then observed that both the NDAA 2004 and its accompanying report are silent as to whether Congress intended the amendments to apply retroactively.[123]

Congress has the power under the Constitution, within the limits of the *Ex Post Facto* Clause, to apply legislation retroactively.[124] However, such "retroactive application of statutes is normally not favored."[125] The CAAF specifically limited the applicability of the Supreme Court's opinion in *United States v. Stogner*, as well as two subsequent federal cases, to *Lopez de Victoria II*.[126] First, the CAAF noted that, in *Stogner*, the Supreme Court specifically declined to address whether the California statute purporting to extend an unexpired statute of limitations violated the *Ex Post Facto* Clause.[127] Second, because Article 43, UCMJ, is a different statute than 18 U.S.C. § 3283, the court distinguished *Lopez de Victoria II* from two federal cases that had held that 18 U.S.C. § 3283 extended statute of limitation periods that had not expired before it became effective.[128] As such, the CAAF treated the issue as a question of statutory construction that it would decide de novo.[129]

The CAAF first distinguished 18 U.S.C. § 3283 from Article 43 and the 2004 NDAA.[130] In amending the federal statute of limitations for child offenses, Congress first recodified 18 U.S.C. § 3509(k) as 18 U.S.C. § 3283, and then "precluded the previous limitation from applying."[131] Additionally, without quoting the exact legislative history, the CAAF noted that there was some legislative history supporting the conclusion that Congress intended 18 U.S.C. § 3283 to apply retroactively.[132] In contrast, the court found no similar evidence, in either the text of the NDAA or in Article 43, of an intent that the amendments to Article 43 should apply retroactively.[133] Next, the court rejected arguments that changes to statutes of limitation are merely procedural. Rather, the court found that such changes are substantive and therefore "subject to the presumption against retroactivity that applies to substantive changes in the law."[134]

After establishing these underlying principles, the CAAF's reasoning was relatively straight forward. The CAAF found no expression of congressional intent to apply the amendments to Article 43 retroactively and followed both "the general presumption against retrospective legislation in the absence of such an indication, [as well as] the general presumption of liberal construction of criminal statutes of limitation in favor of repose."[135] Accordingly, the CAAF reversed the ACCA and held that the 2003 amendment to Article 43 did not apply to those "cases which arose prior to the amendment of the statute."[136]

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[122] *Id.* This phraseology is important because later in the opinion the CAAF distinguishes the amendments to Article 43 from Congress' change of the statute of limitations for child abuse offenses. Moving them from 18 U.S.C. § 3509(k) to 18 U.S.C. § 3283, the court says that the latter "recodified" 18 U.S.C. § 3509(k) and "precluded the previous limitation from applying." *Id.* at 73.

[123] *Lopez de Victoria II*, 66 M.J. at 72 (citing NDAA 2004, *supra* note 96; S. REP. NO. 108-46, at 317 (2003)).

[124] *Id*.

[125] *Id.*

[126] *Id.* at 73.

[127] *Id.* (citing Stogner v. California, 539 U.S. 607, 618 (2003)).

[128] *Id.* (citing United States v. Chief, 438 F.3d 920, 923–24 (9th Cir. 2006); United States v. Jeffries, 405 F.3d 682, 684–85 (8th Cir. 2005)).

[129] *Id.*

[130] *Id.*

[131] *Id.*; *see also* 18 U.S.C. § 3283 (2006) ("No *statute of limitations* that would otherwise preclude prosecution for an offense involving the sexual or physical abuse, or kidnapping, of a child under the age of 18 years *shall preclude* such prosecution during the life of the child, or for ten years after the offense, whichever is longer." (emphasis added)).

[132] *Lopez de Victoria II*, 66 M.J. at 73 (citing *Chief*, 438 F.3d. at 923–24).

[133] *Id.*

[134] *Id.* at 73–74.

[135] *Id.* at 74.

[136] *Id.*

The *Lopez de Victoria II* opinion acknowledged, but did not specifically address, the 2006 amendments to Article 43. However, those amendments are phrased almost exactly the same way as the 2004 amendments. As such, it is likely that a court would interpret *Lopez de Victoria II* to also preclude retrospective extension of the 2006 amendments to Article 43. Therefore, as child victims begin to turn twenty-five, there may be some offenses that occurred between 25 November 2003 and 6 January 2006 that will be barred if the law remains as enacted by Congress and as interpreted by the CAAF.

This case had an immediate impact on the 2008 *MCM*. After the 2003 amendments took effect, the Navy-Marine Corps Court of Criminal Appeals (NMCCA) was the first court to address whether the amendments extended limitations periods that had not yet expired. In *United States v. Ratliff* (*Ratliff I*) the NMCCA aligned itself with the ACCA opinion in *Lopez de Victoria I*, and held that "the extended statute of limitations contained in Article 43, UCMJ, which is applicable to child abuse offenses, applies retrospectively to all offenses for which the original statute had not expired when the extensions were enacted."[137] The Analysis to RCM 907 cites *Ratliff I*, stating: "At least one court has ruled that the new statute of limitations applied retrospectively to all offenses for which the original statute had not expired on the date when the extensions were enacted."[138] *Lopez de Victoria II* overruled *Ratliff I* and the CAAF has since summarily reversed the case.[139] As such, the Analysis to RCM 907, which addresses the statute of limitations for child abuse offenses, is now obsolete.

Under *Lopez de Victoria II*, the statute of limitations for child abuse offenses is the one in effect at the time of the criminal acts. For offenses that occurred prior to 24 November 2003, the applicable period is five years.[140] For offenses that occurred after 24 November 2003, but before 6 January 2006, the summary court-martial convening authority must receive the charges before the child-victim reaches the age of twenty-five.[141] For offenses after 6 January 2006, the charges alleging child abuse or kidnapping must be received by the summary court-martial convening authority during the life of the child, or within five years of the date of the offense, whichever is longer. Therefore, with the 2003 and 2006 amendments, there may be a case with conduct spanning this time period that will have three separate statutes of limitation.

It can be extraordinarily difficult to determine the exact dates of offenses that involve the physical or sexual abuse of young children. As such, trial counsel will have to link the dates in the specifications to the dates effectuating the applicable statute of limitations. Stated another way, no specification should cross a date where the statute of limitations was amended. For example, assume that an accused began a pattern of child sexual abuse on 1 October 2003 and ended the pattern of abuse on 1 February 2006. Assume also that the summary court-martial convening authority received the sworn charges on 30 September 2008.[142] After *Lopez de Victoria II*, a simple way to charge this ongoing pattern of abuse is through the use of three separate specifications. Consider these examples:

> Specification 1: . . . on divers occasions between on or about 1 October 2003 and 24 November 2003 . . . .
>
> Specification 2: . . . on divers occasions between 25 November 2003 and 6 January 2006 . . . .
>
> Specification 3: . . . on divers occasions between 7 January 2006 and on or about 1 February 2006 . . . .

There are several items of note from these model specifications. First, note that there are six dates on these charges, but only two come from the facts in the hypothetical. The other four relate to the date the amendments to Article 43 became effective and the date after the amendments became effective.[143] Note also that although it is acceptable to use "on or about" when alleging offenses, these examples use "on or about" only when using the dates from the facts.[144] The other dates are firm and are based on the dates of the amendments. Finally, note that each specification has a separate statute of limitations.

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[137] 65 M.J. 806, 809–10 (N-M. Ct. Crim. App. 2007), *rev'd*, 67 M.J. 2 (C.A.A.F. 2008).

[138] MCM, *supra* note 2, R.C.M. 907 analysis, at A21-56 to A21-57 (citing *Ratliff I*, 65 M.J. 806).

[139] *See* United States v. Ratliff (*Ratliff II*), 67 M.J. 2 (C.A.A.F. 2008).

[140] Hagler, *supra* note 93, at 81.

[141] NDAA 2004, *supra* note 96; NDAA 2006, *supra* note 99.

[142] Selecting this date avoids any issue of the offenses being time-barred by the five-year statute of limitations applicable to child abuse offenses before 24 November 2003.

[143] This determination applies the principle from the trial judge's ruling in *Lopez de Victoria I* (and approved by ACCA) that offenses committed on the *same day* that the legislation took effect fall under the *old* statute of limitations. *See Lopez de Victoria I*, 65 M.J. 521, 523 (A. Ct. Crim. App. 2007).

[144] *See* MCM, *supra* note 2, R.C.M. 307(c)(3) discussion ¶ D(ii).

Specification 1 has a statute of limitations of five years. The statute of limitations expires for Specification 2 when the victim reaches the age of twenty-five. Lastly, the statute of limitations for Specification 3 is the life of the child or five years, whichever is longer. While this may not be necessary in all cases where the applicable statute of limitations is easy to determine, this method can be useful in a case with an ongoing pattern of abuse spanning 2003 and 2006 in order to assist a court in applying the correct statute of limitations to the offenses at issue.

While the decision in *Lopez de Victoria II* was likely a surprise to many (the ACCA, the NMCCA, and the Joint Service Committee to name a few), the CAAF's opinion provides a rare bright-line rule for practitioners and trial judges alike. The issue that remains is whether it is possible for Congress to actually effectuate what it likely intended—extending the statute of limitations for all child abuse offenses from five years to the life of the child-victim. Congress came about as close as it could to mirroring what was done in 18 U.S.C. § 3283. The only omission was an express statement of intent to extend statute of limitations periods that had not yet expired. For now, there remains a gap where certain offenses committed between 2003 to 2006 have a varying statute of limitations. In the next section, CAAF is reviewing the limits of another federal statutory scheme: those federal laws proscribing certain conduct involving child pornography.

Navrestad and *Ober*: Addressing Modern Internet Distribution Networks for Child Pornography

According to former Senator Joe Biden, "[T]he Internet has facilitated an exploding, multi-billion dollar market for child pornography, with 20,000 new images posted every week."[145] During the week of 27 October 2008, a tipline at the National Center for Missing and Exploited Children received 1282 reports of suspected child pornography.[146] Since the project began in 1998, the tipline has received 556,542 reports.[147] In the ten-year period between 1995 and 2005, the Department of Justice reported a 1300% increase in convictions for child pornography trafficking and enticing children online.[148] In 2005, there were 1576 federal prosecutions for violations of the various federal child exploitation laws.[149] In the Army, the number of child pornography cases referred to court-martial shows a steadily increasing trend as well: from thirty-five referred cases in fiscal year 2003 to 66 in fiscal year 2008.[150]

The nature and effects of child pornography are horrifying. In one study, 83% of the pornographic images depicted children between the ages of six and twelve; 39% of the images depicted children between the ages of three and five; and 19% of the images depicted toddlers or infants younger than three.[151] One study showed that of those arrested for child pornography crimes:

> 92% had images of minors focusing on genitals or showing explicit sexual activity; 80% had pictures showing the sexual penetration of a child, including oral sex; 71% possessed images showing sexual contact between an adult and a minor, defined as an adult touching the genitals or breasts of a minor or vice-versa; 21% had child pornography depicting violence such as bondage, rape, or torture and most of those involved images of children who were gagged, bound, blindfolded, or otherwise enduring sadistic sex; and 79% also had what might be termed "softcore" images of nude or semi-nude minors, but only 1% possessed such images alone.[152]

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[145] 153 CONG. REC. S8,709 (daily ed. June 28, 2007) (statement of Sen. Biden, Del.).

[146] CyberTipline Fact Sheet, National Center for Missing and Exploited Children, http://www.missingkids.com/en_US/documents/CyberTiplineFactSheet.pdf (last visited Feb. 19, 2009) (on file with the author).

[147] *Id.*

[148] DREW OOSTERBAAN, *INTRODUCTION*, U.S. DEP'T OF JUSTICE, EXECUTIVE OFFICE FOR U.S. ATT'YS, 54 U.S. ATT'YS' USA BULL., NO. 7, INTERNET PORNOGRAPHY AND CHILD EXPLOITATION 1 (2006) (on file with the author).

[149] *Id.*

[150] E-mail from Homan Barzmehri, Mgmt. Program Analyst, Office of the Clerk of Court, U.S. Army Court of Criminal Appeals, to the author (Oct. 17, 2008, 13:15:00 EST) (on file with author).

[151] Child Pornography Fact Sheet, The CyberTipline, National Center for Missing and Exploited Children, http://www.missingkids.com/missingkids/servlet/PageServlet?LanguageCountry=en_US&PageId=2451 (last visited Feb. 19, 2009) (citing JANIS WOLAK ET AL., CHILD-PORNOGRAPHY POSSESSORS ARRESTED IN INTERNET-RELATED CRIMES: FINDINGS FROM THE NATIONAL JUVENILE ONLINE VICTIMIZATION STUDY 4 (Alexandria, Va: Nat'l Ctr. for Missing & Exploited Children, 2005)) (on file with the author).

[152] *Id.* (citing WOLAK ET AL., *supra* note 151, at 5).

As expected, the impacts on the child-victims are devastating. Effects range from physical injury suffered during the course of abuse, to psychological issues such as depression and eating disorders that may continue into adulthood.[153] Perhaps equally damaging, the record of the abuse is permanent with the images doomed to roam cyberspace for eternity.[154]

Defining child pornography for purposes of criminal sanction is not easy. Section 2256 of Title 18 United States Code provides the definition of child pornography for purposes of federal law.[155] However, pictures depicting children vary greatly in terms of stages of undress, degree of sexual activity, and extent of abuse.[156] Anime, morphed images, and virtual child pornography also continue to perplex lawmakers and law enforcement personnel.[157] Additionally, the methods of distribution are limited only by the technology and the ingenuity of those with an interest in distributing images of child pornography. Those investigating, prosecuting, defending, and deciding child pornography cases must quickly learn and understand the technical variations between websites, e-mail, e-groups, newsgroups, bulletin board systems, chat rooms, and peer-to-peer file sharing networks.[158]

Given the pervasive, injurious, and offensive nature of child pornography, it is not surprising that commanders would seek to punish those servicemembers involved in its production, possession, transportation, and distribution. In the military, trial counsel must use Article 134, UCMJ to try these cases and doing so has generated significant appellate litigation.[159] No UCMJ article expressly covers offenses involving child pornography and the President has not yet listed an offense under Article 134 that specifically criminalizes conduct involving child pornography.[160] As such, the three clauses of Article 134 are used to charge the various child pornography crimes. First, conduct involving child pornography can be charged under Clause 1 as conduct prejudicial to good order and discipline or under Clause 2 as service-discrediting conduct.[161] Second, the Government may use Clause 3 of Article 134 (crimes and offenses not capital) to charge the applicable federal code provisions criminalizing conduct involving, among other things, the production, possession, transportation, and distribution

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[153] *Id.* (citing EVA J. KLAIN ET AL., CHILD PORNOGRAPHY: THE CRIMINAL-JUSTICE-SYSTEM RESPONSE 10 (Alexandria, Va. Nat'l Ctr. for Missing & Exploited Children (Mar. 2001)).

[154] *Id.*

[155] *See* 18 U.S.C.S. § 2256(8) (LexisNexis 2009). For purposes of the Child Pornography Protection Act, "child pornography" is defined as:

> any visual depiction, including any photograph, film, video, picture, or computer or computer-generated image or picture, whether made or produced by electronic, mechanical, or other means, of sexually explicit conduct, where—
> (A) the production of such visual depiction involves the use of a minor engaging in sexually explicit conduct;
> (B) such visual depiction is a digital image, computer image, or computer-generated image that is, or is indistinguishable from, that of a minor engaging in sexually explicit conduct; or
> (C) such visual depiction has been created, adapted, or modified to appear that an identifiable minor is engaging in sexually explicit conduct.

Id. "Minor," "visual depiction," "sexually explicit conduct," and other key terms for the criminalization of conduct involving child pornography crimes are defined in other subparagraphs of 18 U.S.C. § 2256.

[156] RICHARD WORTLEY & STEPHEN SMALLBONE, CHILD PORNOGRAPHY ON THE INTERNET 7 (U.S. Dep't of Justice, Office of Community Oriented Policing Servs., Problem-Oriented Guides for Police, Problem-Specific Guides Series No. 41 (2006)).

[157] Ashcroft v. Free Speech Coalition, 535 U.S. 234, 241 (2002) ("Although morphed images may fall within the definition of virtual child pornography, they implicate the interests of real children"); *see also* United States v. Handley, 564 F. Supp. 2d 996, 999 (S.D. Iowa 2008).

> The . . . indictment describes the images at issue . . . as "a copy of a book containing visual depictions, namely drawings and cartoons, that depicted graphic bestiality including sexual intercourse, between human beings and animals such as pigs, monkeys, and others.' Defendant states all of the images . . . are drawings from Japanese anime comic books that were produced either by hand or by computer, and the drawings depict fictional characters.

Id.

[158] WORTLEY & SMALLBONE, *supra* note 156, at 10–11.

[159] *See, e.g.*, United States v. O'Connor, 58 M.J. 450 (C.A.A.F. 2003) (applying Ashcroft v. Free Speech Coalition, 535 U.S. 234 (2002), and its requirement that the images involve "actual children," to the military); United States v. Martinelli, 62 M.J. 52 (C.A.A.F. 2005) (holding that the CPPA is not extraterritorial); United States v. Reeves, 62 M.J. 88 (C.A.A.F. 2005) (also holding that the CPPA is not extraterritorial); United States v. Medina, 66 M.J. 21 (C.A.A.F. 2008) (re-framing the interrelation between Clauses 1, 2, and 3 of Article 134 in a case involving child pornography); United States v. Mason, 60 M.J. 15 (C.A.A.F. 2004) (affirming failed Clause 3 offense alleging a violation of the CPPA as a Clause 1 and 2 offense); United States v. Irvin, 60 M.J. 23 (C.A.A.F. 2004) (holding that possession of child pornography may be charged as a Clause 1 or Clause 2 offense).

[160] *See* MCM, *supra* note 2, pt. IV, ¶ 60c(6)(c).

[161] *See* United States v. Irvin, 60 M.J. 23 (C.A.A.F. 2004) (holding that possession of child pornography may be charged as a Clause 1 or Clause 2 offense), *see also* United States v. Medina, 66 M.J. 21, 29 n.1 (Stucky, J., dissenting) ("It is a mystery to me why, after this [c]ourt's ten-year history of invalidating convictions for child pornography offenses under clause 3, and of upholding convictions for such offenses under clause 2, we continue to see cases charged under clause 3.").

of child pornography.[162] The Child Pornography Prevention Act of 1996 (CPPA 1996) ushered in the modern era of child pornography prosecution with a comprehensive scheme for identifying and criminalizing computer-related child pornography.[163] The crimes under the CPPA 1996, as updated by Congress and charged using Clause 3 of Article 134, UCMJ, provide another means of charging child pornography crimes.[164]

But it is without question that those who distribute child pornography are growing more sophisticated with their methods.[165] Unlike public websites which can be discovered and shut down, child pornography is now distributed using complex and ethereal computer networks that test conventional understandings of words like "possession" and "distribution."[166] During this term, the CAAF had an opportunity to look at distribution and possession of child pornography through two of these complex Internet distribution networks: the Yahoo! Briefcase and KaZaA. The remainder of this section will focus on these two cases and their contribution to the military jurisprudence governing child pornography.

United States v. Navrestad*, Child Pornography, and the Yahoo! Briefcase Hyperlink*

In *United States v. Navrestad*,[167] the CAAF analyzed a distribution method called the Yahoo! Briefcase, which is a service where users can store files on Yahoo! servers and then make those files public or keep them private.[168] Army Specialist (SPC) Joshua Navrestad was stationed in Vilseck, Germany and used a public computer terminal at a U.S. Army morale, welfare, and recreation center on base.[169] Over the course of several days, SPC Navrestad engaged in Internet chat sessions with an individual who he believed was a fifteen-year-old boy.[170] However, SPC Navrestad was actually talking to a New Hampshire police officer.[171] During the chat sessions, the police officer posing as "Adam" requested pictures of boys between the ages of ten and thirteen.[172] Seeking to oblige the request, SPC Navrestad located several publicly accessible Yahoo! Briefcases containing child pornography.[173] After locating these Briefcases, the accused opened the Briefcases, confirmed that they contained child pornography, and sent "Adam" the hyperlinks to the Briefcases containing the images.[174] Opening the files on the public computer and then sending the hyperlinks constituted the extent of the record of SPC Navrestad's conduct involving the child pornography.[175] Although the Internet sites were automatically being saved on the

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[162] *See* MCM, *supra* note 2, pt. IV, ¶ 60c(6)(c)(4); *see also* 18 U.S.C.S. § 2251 (LexisNexis 2009) (sexual exploitation of children, including the use of children to produce child pornography); § 2252 (certain activities involving the sexual exploitation of minors, including the possession, receipt, transportation, distribution, and accessing with the intent to view certain kinds of child pornography); § 2252A (covering certain other activities relating to material constituting or containing child pornography, including possession, receipt, transportation, distribution, accessing with the intent to view, soliciting, and pandering certain kinds of child pornography).

[163] Pub. L. No. 104-208, § 121, 110 Stat. 3009-26 (codified at various sections of Title 18 U.S.C.).

[164] Since their passage, the federal code provisions governing child pornography have been amended numerous times. In 2008, Congress passed two laws which impacted the statutory scheme governing child pornography. *See* Effective Child Pornography Prosecution Act of 2007, Pub. L. No. 110-358, § 103, 122 Stat. 4001, 4002–4003 (2008) [hereinafter ECPPA 2007] (amending the various U.S. Code provisions involving child pornography to include language that more specifically involves "using any means or facility of interstate or foreign commerce"); Enhancing the Effective Prosecution of Child Pornography Act of 2007 (EEPCPA 2007), Pub. L. No. 110-358, § 201–203, 122 Stat. 4001, 4003–4004 (2008) [hereinafter EEPCPA 2007] (amending 18 U.S.C. § 2252A to include "knowingly accesses with intent to view"); Providing Resources, Officers, and Technology to Eradicate Cyber Threats to Our Children Act of 2008, Pub. L. No. 110-401, §§ 301–304, 122 Stat. 4229, 4242–4243 (2008) [hereinafter PROTECT Our Children Act of 2008] (including an amendment to U.S.C. § 2251 that prohibits the broadcast of live images of child abuse and an amendment to 18 U.S.C. § 2256 that prohibits the adapting or modifying an image of an identifiable minor to produce child pornography).

[165] WORTLEY & SMALLBONE, *supra* note 156, at 27.

[166] *Id.* at 43, 47–49.

[167] 66 M.J. 262 (C.A.A.F. 2008).

[168] *Id.* at 264 n.4; *see also* Yahoo! Briefcase Basics, *What is Yahoo! Briefcase?*, http://help.yahoo.com/l/us/yahoo/briefcase/basics/index.html (last visited Feb. 19, 2009). Incidentally, Yahoo! will discontinue this service on 30 March 2009. *See* Stephen Lawson, Yahoo's Briefcase Storage Service to Close March 30, ComputerWorld, Jan. 31, 2009, http://www.computerworld.com/action/article.do?command=viewArticleBasic&articleId=9127099&source=rss_news.

[169] *Navrestad*, 66 M.J. at 264.

[170] *Id.*

[171] *Id.*

[172] *Id.*

[173] *Id.*

[174] *Id.*

[175] *Id.*

hard drive, the opinion stated that there is nothing to indicate that he was aware that the computer was doing so.[176] Specialist Navrestad did not deliberately save the child pornography to any form of portable media and did not print any of the images.[177]

For these actions, SPC Navrestad was charged, in relevant part, with distributing and possessing child pornography under Clause 3, Article 134 (crimes and offenses not capital), applying the relevant portions of the CPPA of 1996.[178] Contrary to his pleas, the military judge convicted SPC Navrestad of both specifications.[179] On appeal, the ACCA set aside the specification involving possession of child pornography in violation of the CPPA because the conduct occurred in Germany.[180] However, the ACCA affirmed the conviction for possession under Clauses 1 and 2 of Article 134.[181]

Upon appeal, in a 3–2 decision, the CAAF set aside the convictions for possession and distribution of child pornography.[182] The majority first addressed whether the evidence was legally sufficient to constitute distribution of child pornography.[183] Applying the definition of "child pornography" under the CPPA to the facts of the case, the court held that "the sending of a hyperlink to a Yahoo! Briefcase does not constitute the distribution of 'child pornography' as that term is defined in 18 U.S.C. § 2256(5) and (8)."[184] The court reasoned that a hyperlink is more like a street address and sending the hyperlink alone does not itself transfer any files or documents from one location to another.[185] When the police officer clicked on the link that SPC Navrestad sent, he was taken to another directory that listed the files and had to select individual files in the directory in order to view the images.[186] The court found that the hyperlink itself did not contain any data that was "capable of conversion into any type of visual image."[187]

The CAAF also held that the evidence was not legally sufficient to support a conviction for "possession" of child pornography under Clauses 1 and 2 of Article 134.[188] Though SPC Navrestad viewed the images on the public computer, the majority found that he "lacked the dominion and control necessary to constitute 'possession' of the child pornograph[y]."[189] Both parties and the court applied the definition of "possess" for drug offenses, contained in the *MCM* provisions accompanying Article 112a, UCMJ.[190] The explanation to Article 112a states, "Possession inherently includes the power or authority to preclude control by others."[191] In ruling that SPC Navrestad did not "possess" these images, the court noted several factors. First, SPC Navrestad simply viewed the images and did not download, save, or print the images.[192] Second, SPC Navrestad did not have the ability to control access to the Yahoo! Briefcase he was viewing.[193] Third, even though the images were saved to temporary Internet files, SPC Navrestad did not have access to those temporary Internet files because he used a public computer and the record contains no evidence that he knew that the images were being saved on the

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[176] *Id.*

[177] *Id.*

[178] *Id.* at 263. The CAAF observed that the Government charged distribution of child pornography under 18 U.S.C.S. § 2252A(a)(1) (LexisNexis 2009) which actually prohibits mailing and transportation, when the correct reference is 18 U.S.C.S. § 2252A(a)(2).

[179] *Navrestad*, 66 M.J. at 263.

[180] *Id.* Two CAAF opinions have held that the CPPA is not extraterritorial. *See* United States v. Martinelli, 62 M.J. 52 (C.A.A.F. 2005) (holding that the CPPA is not extraterritorial); United States v. Reeves, 62 M.J. 88 (C.A.A.F. 2005) (also holding that the CPPA is not extraterritorial).

[181] *Navrestad*, 66 M.J. at 263. After arraignment, language invoking Clauses 1 and 2 of Article 134 was added to the Clause 3 specifications. *Id.*; *see also* United States v. Medina, 66 M.J. 21 (C.A.A.F. 2008).

[182] *Navrestad*, 66 M.J. at 262, 268.

[183] *Id.* at 264

[184] *Id.* at 267.

[185] *Id.* at 265–66.

[186] *Id.* at 266.

[187] *Id.* at 265 (quoting the definition of "visual image" from 18 U.S.C. § 2256(5) (2000)).

[188] *Id.* at 268.

[189] *Id.*

[190] *Id.* at 267.

[191] *Id.* (citing MCM, *supra* note 2 pt. IV, ¶ 37.c.2).

[192] *Id.*

[193] *Id.*

computer.[194] Lastly, sending the hyperlink alone does not demonstrate that SPC Navrestad had either dominion or control over the contents of the Briefcase.[195] Considering these factors, the court concluded that simply viewing the images was not possession sufficient to support a conviction under these facts.[196]

Although unwilling to affirm a lesser included offense or closely related offense, the majority does offer a salve to prosecutors who will likely be frustrated by the conclusion in this case: other theories of liability. The court first suggests that an attempt theory of liability might effectively criminalize the accused's behavior in this case, distinguishing the facts and charges in *Navrestad* from an unpublished Eleventh Circuit case where the defendant sent a hyperlink to his own Yahoo! Briefcase containing child pornography.[197] Second, although the court was unable to affirm on a theory of liability not presented at trial, the majority suggests that an aiding and abetting theory of liability might also effectively criminalize this misconduct.[198]

Chief Judge Effron's dissenting opinion, which Judge Stucky joined, is very thoroughly reasoned and seems to be crafted as a competing majority opinion.[199] While the majority opinion focuses on a strict and technical reading of the statutory language of the CPPA and the definition of possession as borrowed from Article 112a, Chief Judge Effron's opinion focuses on the facts and a more practical approach both distribution and possession.

Chief Judge Effron begins with a recitation of the facts, highlighting the number of Internet chats between Adam and SPC Navrestad, the deliberate nature of SPC Navrestad's delivery of child pornography, and the fact that the detective testified at trial that "the hyperlink provides a superior method of sending pictures."[200] In addressing the legal sufficiency of the distribution specification, the opinion references a Second Circuit case involving the improper trafficking of copyrighted material.[201] In that opinion, the Second Circuit concluded that the statutory prohibition against trafficking should apply to hyperlinks because of the "'functional capability' of the hyperlink . . . [which] has the functional capacity to bring the content of the linked webpage to the user's computer screen."[202] Accordingly, Chief Judge Effron concludes that the hyperlink enabled the accused in this case to "distribute[] child pornography by electronic means capable of conversion into images within the meaning of [the CPPA], and accomplished his distribution in a manner far more expeditions and efficient than if he had done so through traditional mail or by attaching individual files to an e-mail."[203] According to the dissenting opinion, SPC Navrestad deliberately and effectively distributed child pornography.[204]

The dissent applies a similar functional analysis to the facts in this case and concludes that the accused "possessed" child pornography in a manner legally sufficient to sustain a conviction. Chief Judge Effron explains that the accused did not just view the images but "accessed the website displaying the images, . . . used hyperlinks to capture specific images, and transmitted the images via the hyperlinks to another party."[205] As such, the dissent concludes that the accused in this case "exercised sufficient dominion and control over the images to select personally the pictures he wished to transmit."[206]

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[194] *Id.*

[195] *Id.* at 267–68.

[196] *Id.* at 268.

[197] *Id.* at 266 (citing United States v. Hair, 178 F. App'x 879 (11th Cir. 2006) (unpublished)). In *Hair*, the Eleventh Circuit affirmed the defendant's convictions under 18 U.S.C. § 2252A(1) for attempting to transport and transporting child pornography where the accused sent a hyperlink to his own Yahoo! Briefcase which contained child pornography. *Hair*, 178 F. App'x at 881. In the case, the prosecutors presented an aiding and abetting theory of transportation, which the Government did not do in *Navrestad.* *Id.*

[198] *Navrestad*, 66 M.J. at 268.

[199] *Id.* (Effron, J., dissenting).

[200] *Id.* at 268–69. The detective's testimony went on to explain, "[Y]ou can send hundreds of pictures with a single transmission, whereas if you actually send the individual files, it's going to take more time, and they have to be sent one at a time." *Id.*

[201] *Id.* at 270 (quoting Universal City Studios, Inc. v. Corley, 273 F.3d. 429 (2d. Cir. 2001)). The majority rejects this analogy because *Corley* was a civil case and "does not suggest, let alone hold, that a hyperlink sends or distributes data that 'is capable of conversion,' into child pornography." *Id.* at 266 n.10.

[202] *Id.* (quoting *Corley*, 273 F.3d. at 456).

[203] *Id.* at 271.

[204] *Id.*

[205] *Id.* at 272.

[206] *Id.*

Although the majority opinion provides the law of prospective application in this case, *Navrestad* provides a set of facts that provide fertile ground for a debate on what it means to "possess" digital imagery and what it means to "distribute" such imagery. Specialist Navrestad knew exactly where to access child pornography and was able to do so at will. Yet he was able to escape liability simply because he was on a public computer and neither printed the images nor saved them onto a form of portable media.

Similarly, SPC Navrestad knew exactly how to transmit this child pornography. In one click, he was able to transmit a portal that delivered another user directly to a repository containing fifty-two images.[207] Nonetheless, the majority concluded that under the facts, his conduct deftly evaded the statutory provisions criminalizing such distribution.[208]

Practitioners must be alert to the technical nuances of the various means that servicemembers can use for viewing and distributing child pornography. Despite the abhorrent nature of the crime of child pornography, the court has continually shown that with certain technology and certain conduct it is difficult to shoehorn the facts into the elements and definitions provided in the CPPA. The court will reverse convictions where child pornography offenses have been improperly pled and proven.[209]

As a final note, in the fall of 2008, Congress passed legislation that made several changes to the laws affecting child exploitation and child pornography.[210] Specifically, Congress amended 18 U.S.C. § 2252A in a manner that seems to close the loopholes that the majority identified in *Navrestad*, assuming that the federal law applies in the location of the conduct. First, the possession provisions of both 18 U.S.C. § 2252(a)(4) and 18 U.S.C. § 2252A(a)(5) now both include language prohibiting "knowingly access[ing] with the intent to view" child pornography.[211] This appears to resolve the issue of using a public computer to seek out and view child pornography, as was done in this case. Second, Congress amended the definition of 18 U.S.C. § 2256(5) so that it now reads as follows:

> "[V]isual depiction" includes undeveloped film and videotape, data stored on computer disk or by electronic means which is capable of conversion into a visual image, and data which is capable of conversion into a visual image that has been transmitted by any means, whether or not stored in a permanent format . . . .[212]

Although there is no case law yet applying this new provision, the definition of "visual depiction" appears broadened in a way that may now reach hyperlinks. The next section discusses a case that involves the use of another Internet tool used to satiate cravings for child pornography and help others to do the same.

United States v. Ober*: Transporting Child Pornography via KaZaA*

KaZaA is yet another means by which servicemembers and others obtain child pornography. Basically, KaZaA is a "peer-to-peer file sharing program" that enables users to share their files with others via the Internet and also allows users to obtain files from other users.[213] Should a KaZaA user wish to obtain certain files, he will enter the search terms in the program and KaZaA will return a list of files available through the KaZaA network.[214] The user will then select the files that he wants to obtain and the KaZaA program will "upload" the files onto the network from the computer where they are located.[215] Then, the program will then "download" the files from the network onto the user's computer.[216]

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[207] *Id.* at 269.

[208] *Id.* at 268.

[209] *See, e.g.*, United States v. Martinelli, 62 M.J. 52 (C.A.A.F. 2005) (holding that the CPPA is not extraterritorial); United States v. Reeves, 62 M.J. 88 (C.A.A.F. 2005) (also holding that the CPPA is not extraterritorial); United States v. Medina, 66 M.J. 21 (C.A.A.F. 2008) (re-framing the interrelation between Clauses 1, 2, and 3 of Article 134 in a case involving child pornography).

[210] *See* ECPPA 2007, *supra* note 163; EEPCPA 2007, *supra* note 163; PROTECT Our Children Act of 2008, *supra* note 163.

[211] EEPCPA 2007, *supra* note 163, § 203, 122 Stat. 4003-4004 (amending 18 U.S.C. § 2251(a)(4), 18 U.S.C. § 2252A(a)(5)(A)&(B) to include "knowingly accesses with intent to view").

[212] PROTECT Our Children Act of 2008, *supra* note 163, § 302.

[213] United States v. Ober, 66 M.J. 393, 395 (C.A.A.F. 2008).

[214] *Id.*

[215] *Id.*

[216] *Id.* at 395–96.

Army SPC Andrew Ober admitted to using KaZaA to obtain approximately forty images of child pornography, although a forensic analysis identified 592 files containing possible child pornography on his hard drive with 460 of the files located in his KaZaA folder.[217] The accused was charged, in relevant part with "knowingly and wrongfully caus[ing] to be transported in interstate commerce child pornography by uploading pictures of child pornography to a shared [I]nternet file named 'KAZAA', in violation of 18 U.S.C [§]2252A(a)(1)" using Clause 3 (crimes and offenses not capital) of Article 134.[218] During the trial, both sides presented testimony from computer forensics experts who testified about the nature of the KaZaA and the process through which such images could make their way onto the accused's computer.[219] The defense did not challenge whether the images were on the computer or whether KaZaA was used to put them there.[220] Rather, SPC Ober claimed that other individuals in the barracks had access to his computer and used KaZaA to download the images.[221] A panel of officer and enlisted members convicted the accused and the ACCA affirmed the conviction.[222]

On appeal to CAAF, the important issue for child pornography jurisprudence was whether the evidence was legally sufficient to support a conviction for transporting child pornography in interstate commerce.[223] Unlike *Navrestad*, the court concluded relatively quickly that SPC Ober's conduct indeed constituted transportation of child pornography.[224] In essence, SPC Ober admitted to using KaZaA to acquire child pornography through the Internet.[225] Furthermore, both experts testified that when a user selects files that KaZaA has identified as available, the program causes the host computer to upload the desired file into the KaZaA network from the host computer's shared files.[226] The KaZaA program then downloads the program onto the KaZaA user's computer.[227] "[B]y entering search terms into the KaZaA program, reviewing a list of shared file names and descriptions generated by the search, and initiating a process that uploaded files from the host computer and downloaded them to [the accused's own] computer," the accused transported child pornography in interstate commerce for purposes of 18 U.S.C. § 2252A(a)(1).[228] Accordingly, the CAAF confirms for future cases that obtaining child pornography through KaZaA constitutes transporting child pornography for purposes of 18 U.S.C. § 2252A(a)(1), even if SPC Ober did not send any files out from his own computer.

Despite its ease in affirming the legal sufficiency of the transporting conviction, the *Ober* opinion seems to indicate that the case was somewhat difficult to plead and prove. As stated above, SPC Ober was charged with transporting child pornography in interstate commerce by "by uploading pictures of child pornography to a shared Internet file named 'KAZAA'."[229] In his opening statement, though, the prosecutor described two different ways that the accused transported child pornography: (1) downloading child pornography to his computer through KaZaA, and (2) allowing other KaZaA users to download child pornography from his computer through KaZaA as a host.[230] During trial, however, the Government's own computer forensic expert stated that the accused's KaZaA program was set so that others could not pull child pornography from his computer, but that by downloading child pornography via the KaZaA program, the accused caused the file to be uploaded from the host computer.[231] Based on this testimony, the prosecutor's theory of "transportation" during the

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[217] *Id.* at 396. According to the defense, numerous individuals with an interest in pornography had access to his computer which he frequently left logged on and unattended. *Id.* at 397. Furthermore, SPC Ober did not keep his password secure and was away from his room quite often between field assignments and convalescent leave for injuries from a fall out of his third story window. *Id.* at 399.

[218] *Id.* at 396–97.

[219] *Id.* at 397–98.

[220] *Id.* at 403–04.

[221] *Id.*; *see supra* note 217 and accompanying text.

[222] *Ober*, 66 M.J. at 394.

[223] *Id.*

[224] *Id.* at 404.

[225] *Id.* at 396, 404.

[226] *Id.* at 398, 400–01, 404.

[227] *Id.*

[228] *Id.* at 404.

[229] *Id.* at 396–97.

[230] *Id.* at 397.

[231] *Id.* at 398.

closing argument was the uploading theory.[232] On appeal, the ACCA affirmed the accused's conviction on the theory that the "use of peer-to-peer file sharing constituted transportation by uploading."[233]

Ober demonstrates how difficult it can be to identify and explain the criminal nature of an accused's conduct in obtaining child pornography. Indeed, one of the prosecutor's theories appears to have been disproved at trial by the government's own witness. At the end of the day, the pleadings and the proof lined up well. However, had the government not understood the nuances of "uploading" and "downloading" (and had an expert who could explain them), the case may have met the same fate as *Navrestad.*

Child Pornography: Track the Technology

The court's opinions in both *Navrestad* and *Ober* delve into the specific nature of the technology at issue, addressing the finer points of digital imagery, software capability, commercial Internet services, hyperlinks, temporary Internet files, and uploading versus downloading. The practitioner who does not understand the nature of the child pornography, its location on the computer, and how it got there, is at real risk of losing the case. As both opinions show, computer forensic experts are indispensible for child pornography cases.

In a way, child pornography is like larceny.[234] Charging that that accused "did steal" an item of value is easy; it is much more difficult to explain what was taken from whom, and how it was taken. Indeed, the three theories under larceny—taking, obtaining, and withholding—are different, and disaster can result for the Government when it proceeds on one theory and the facts support an entirely different one.[235] The same is true for child pornography. Identifying exactly how the accused obtained or distributed the child pornography, and using precise terminology to plead and prove the criminal conduct, are essential to success in trying child pornography cases. The defense must similarly understand the conduct at issue and, when the facts do not support the Government's theory, be prepared to demonstrate and explain why. A logical flaw in the theory of criminal liability will likely result in a ripe appellate issue.

These cases also show that the federal statutory framework lags behind the pace of technological innovation in child pornography dissemination. If the crime is charged using a federal statute, the CAAF is limited to interpreting that statute. The CAAF appears unwilling to stretch the statutory language to reach innovative and ethical methods of possession and distribution. Accordingly, the CAAF is carefully scrutinizing the facts of each child pornography case and the underlying theory of criminal liability. Using tried and true theories confirmed through appellate opinions, as well as alternative theories, will ensure that criminal conduct does not slip through one of the many holes in the "mousetrap" that is the CPPA and CAAF's Article 134 jurisprudence. Child pornography has proven to be an elusive crime and the cases seem to be increasing in number. As stated above, its prevalence is limited only by the appetite of those who seek it, the depravity of those who produce it, and the ingenuity of those who distribute it. With continued amendments to the federal scheme, a proposal for a specific Article 134 offense covering conduct involving child pornography,[236] and more cases making their way to trial and appeal, it is likely that child pornography will continue to be a scourge not only on society, but on the courts as well.

Conclusion

While substantive criminal law always provides a large volume and wide variety of issues to discuss, the areas selected for this article were selected for their impact on three significant areas of the military justice system. With *Day II*, the CAAF expanded *Teffeau* and provided a legal framework for analysis for determining whether a false statement is official for purposes of Article 107, UCMJ. The sheer number of appellate cases where this issue arises warranted a clearer rule.

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[232] *Id.* at 403.

[233] *Id.* at 405 (citing United States v. Ober, No. 20040081, slip op. at 4 (A. Ct. Crim. App. May 25, 2007) (unpublished)).

[234] UCMJ art. 121 (2008).

[235] *See* MCM, *supra* note 2, pt. IV, ¶ 46c(1)(a),(b); *see also* United States v. Navrestad, 66 M.J. 262, 266–67, 267 n.11 (C.A.A.F. 2008) (reciting the fundamental principle from Chiarella v. United States, 445 U.S. 222, 236–37 (1980) and United States v. Riley, 50 M.J. 410, 415 (C.A.A.F. 1999) that an appellate court may not affirm a case on a theory of criminal liability not presented to the trier of fact); *Ober*, 66 M.J. at 405 (same).

[236] Manual for Courts-Martial; Proposed Amendments, 73 Fed. Reg. 54,387, 54,389 (proposed Sept. 19, 2008) (proposing a listed Article 134 offense for child pornography). This proposal was withdrawn on 29 December 2008. *See* Manual for Courts-Martial; Proposed Amendments, 73 Fed. Reg. 79, 453 (29 Dec. 2008).

Whether it will be effective in narrowing the field of false statements that are truly "official" remains to be seen. In *Lopez de Victoria II*, the CAAF provided clear guidance for interpreting and applying the recent changes to the statute of limitations for child abuse offenses. In doing so, practitioners are on notice for how the three different statutes of limitations will apply to their child abuse cases. Finally, the CAAF continues to review child pornography cases, and in two opinions, provided important jurisprudence for how the CPPA and Article 134 apply to various forms of viewing, transporting, and distributing child pornography. While not discussed in depth in this article, the *Medina* case will also have significant implications on how child pornography cases are charged in future cases.[237]

But with the 2008 Term of Court in the past, practitioners can look forward to the next year and its promise of more substantive criminal law developments. Child pornography promises continued work for the appellate courts.[238] Also, as sexual assault cases charged under the new Article 120[239] begin to make their way to the appellate courts, practitioners can look forward to some appellate jurisprudence answering some of the many questions that arise any time there is a new substantive criminal law provision. Finally, it is likely that the CAAF will continue to clarify the offense-relation doctrines, providing critical guidance to practitioners and the courts in this complicated and often confused area.[240]

The process of updating the UCMJ to ensure that it is relevant and useful to commanders in the modern world is constant. This task falls upon Congress and the President most heavily, and as changes are made, military practitioners must take those changes and apply them to the cases at hand. In the end, however, the question of how well the "mousetrap" is constructed is left to the courts to answer. As the 2008 term has shown, the courts will not only evaluate the structure, but will also provide plenty of input for the design.

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[237] *See* United States v. Medina, 66 M.J. 21 (C.A.A.F. 2008) (stating that the government should add language invoking Clauses 1 and 2 when charging a Clause 3 offense to ensure that Clauses 1 and 2 are available as lesser-included offenses or alternative theories of guilt); *see also id.* at 29 n.1 (Stucky, J., dissenting) ("It is a mystery to me why, after this Court's ten-year history of invalidating convictions for child pornography offenses under clause 3, and of upholding convictions for such offenses under clause 2, we continue to see cases charged under clause 3.").

[238] *See* United States v. Kuemmerle, No. 08-0448 (C.A.A.F. Jan. 8, 2009).

[239] UCMJ art. 120 (containing sweeping changes to the military sexual assault scheme, effective 1 October 2007).

[240] *See* United States v. Conliffe, No. 08-0158 (C.A.A.F. Jan. 7, 2009); United States v. Thompson,, No. 08-0334 (C.A.A.F. Jan. 5, 2009); Major Howard H. Hoege, III, *Flying Without a Net:* United States v. Medina *& Its Implications for Article 134 Practice*, ARMY LAW., June 2008, at 37, 49.

"Planning is Everything"
Purpose Driven Trial Preparation

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The American system of criminal justice is an adversarial system. As a society, we have determined that the best way to obtain a reliable result in a criminal trial is through an adversarial process.[1] In this adversarial process, the prosecutor and the defense counsel test the strengths and weaknesses of the evidence in the crucible of the courtroom.[2] The trier of fact observes the adversarial contest and passes judgment in the form of a verdict of guilty or not guilty. However, because our system is adversarial, the reliability of the verdict rests heavily on the strength of the advocacy of the opposing counsel.[3] If counsel for either side are incompetent, unprepared, or otherwise fail to zealously advocate for their client, then the result is unreliable and the system fails. Therefore, it is incumbent upon counsel to be equipped to perform at their optimal level every time they set foot in a courtroom.

Preparation is one means to ensure your advocacy meets the standards demanded by our adversarial system. Most cases are decided, not by what is done in the courtroom, but by careful preparation beforehand.[4] Moreover, pre-trial preparation is like Samuel Colt's revolver of Old West fame, it is the "Great Equalizer." If you find yourself outmatched by a more experienced or more talented opponent, preparation provides the means to close that capability gap. Regardless of law school rank, regardless of training opportunities, regardless of courtroom experience, anyone can work hard, and anyone can work harder than their opponent. Famed distance runner Steve Prefontaine, once said: "Somebody may beat me, but they are going to have to bleed to do it."[5] This is the attitude counsel should adopt with regards to trial preparation.

There is no shortage of text and articles dedicated to helping counsel improve their trial advocacy and many of them provide valuable insight and instruction.[6] Unfortunately, few dedicate any meaningful discussion to pre-trial preparation.[7] At best they provide general guidance for organizing a case or assembling a trial notebook. This dearth of specific guidance on pre-trial preparation is understandable because effective trial preparation is very subjective. All counsel are different and each case is different. What works to prepare one counsel in a given case, simply may not work for another. Trial advocacy resources provide a good starting point, but ultimately, each counsel must find a system that works best for him.[8]

Nonetheless, there are certain overarching objectives for trial preparation which benefit every counsel and every case. This article will discuss two of those overarching objectives, clarity and flexibility. This article defines clarity and flexibility in terrns of trial preparation and discusses the benefits of preparation focused on those two objectives. Finally, this article demonstrates how these goals can shape your preparation for three key advocacy tasks: opening statements, cross-examination, and direct examination.

All counsel prepare for trial. It would be impossible, if not unethical, to attempt to try a criminal case without some level of preparation.[9] The real issue is whether counsel are doing the right things, and enough of the right things, to prepare

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[1] Earl J. Silbert et al., *State of the Prosecution: Under Pressure to Catch the Crooks: The Impact of Corporate Privilege Waivers on the Adversarial System*, 43 AM. CRIM. L. REV. 1225 (Summer 2006).

[2] *Id.*; THOMAS A. MAUET, TRIAL TECHNIQUES 483 (7th ed. 2007).

[3] STEVEN LUBET, MODERN TRIAL ADVOCACY: ANALYSIS AND PRACTICE (3d ed. 2004).

[4] Lieutenant Colonel Pete Masterton, *The Defense Function: The Role of the U.S. Army Trial Defense*, ARMY LAW., Mar 2001, at 22.

[5] StevePre.com, Great Quotes from a Great Runner, http://www.stevepre.com/quotes.html (last visited Feb. 10, 2009).

[6] *See, e.g.*, MAUET, *supra* note 2; LUBERT, *supra* note 3; CHARLES H. ROSE, III, FUNDAMENTAL TRIAL ADVOCACY (Thomas-West American Casebook Series 2007).

[7] Mauet is an exception. While his chapter on *Preparation and Trial Strategy* begins with the trite observation that, "[t]he 'secret' to effective trial preparation is no secret at all. Its preparation, preparation, and more preparation!" MAUET, *supra* note 2, at 483. The remainder of the chapter contains some useful suggestions for organizing most aspects of a case. *Id.*

[8] *Id.* at 487.

[9] U.S. DEP'T OF ARMY, REG. 27-26, RULES OF PROFESSIONAL CONDUCT FOR LAWYERS R. 1.1 cmt. (1 May 1992).

effectively. Preparation is not an ends in and of itself. Digging a ditch is certainly hard work, but it is a waste of effort if the ditch serves no purpose. So it is with pre-trial preparation. To fully realize its potential, trial preparation must be guided by a purpose.[10] While that purpose will vary with the specifics of each case, there are two overarching objectives which should drive the preparation in all cases because they benefit every case, regardless of the facts. The objectives are clarity and flexibility.

Clarity is defined as "the quality or state of being clear."[11] For advocates, clarity is the art of conveying key points of fact or law in a coherent, easily retainable fashion.[12] The practical objective of trial advocacy is to convince the trier of fact to accept your version of the case.[13] The trier of fact is much more likely to accept your version of the case if it is presented in a manner that is easy to understand and retain.[14] As such, whether the trier of fact is a judge or a panel, the advocate who organizes his case, questions his witnesses, and presents his arguments in the most clear and logical fashion is best positioned to win over the trier of fact. This is clarity in action.

The value of clarity makes particular sense if you consider the court-martial from the perspective of a panel member. To the panel member, a court-martial can be a confusing thing. Witnesses relay competing versions of events, their testimony is tainted by suggestion of bias and inaccuracy, objections are sustained with the charge that the panel should disregard what they have just heard, and opposing counsel conclude by arguing contrary meaning to the same set of facts. The panel is then besieged with a confusing blizzard of instructions which they are expected to apply to a set of facts they heard over the course of several days. Under these circumstances, the strength of a key argument or the significance of a crucial fact might easily be lost. Clarity is the objective of shaping your case in a manner that ensures the key points are understood, retained, and utilized by the panel.

A closely related and equally important objective of preparation is to promote flexibility. Flexibility is the capacity to successfully adjust to rapidly changing circumstances.[15] It is a trait that is lauded among military leaders.[16] A flexible commander successfully adapts to those inevitable changes on the ground while constantly driving onward towards his objective.[17] When Eisenhower said "[p]lans are nothing, planning is everything,"[18] he recognized the universal truth of operational planning; "[n]o plan survives intact once contact is made."[19] Time spent planning, rehearsing, and internalizing the battlefield gives commanders the flexibility to successfully adjust their plans as the situation develops.

The same is often true of courts-martial. Despite your best efforts, no case will ever go exactly as you have planned it. Human beings are involved on both sides and no one can possibly predict their behavior with 100% accuracy. Witnesses become confused or otherwise testify poorly, unanticipated rulings may limit the admissibility of key evidence. Any number of factors can disrupt the course of a case. If you cannot effectively adapt, the curveballs inherent in any case will muddle your presentation and distract the panel from your objective. Clarity will be overtaken by confusion, which may translate to doubt. To avoid this result, counsel must acquire the flexibility to adjust effectively to the unexpected turns inherent in the adversarial process.

Preparation is essential to ensuring maximum clarity and flexibility. First, thorough preparation allows you to build clarity into every aspect of you case. What you say and how you say it matters every time you speak before to the trier of

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[10] David Broad, *Trial Preparation*, http://www.siskinds.com/content/Articles/Trial_Preparation.pdf (last visited Feb. 10, 2009).

[11] WEBSTER'S TENTH NEW COLLEGIATE DICTIONARY 211 (1999).

[12] Linda L. Morkan, *Clarity is an Absolute for Effective Advocacy*, 48 FOR THE DEFENSE No. 3, at 74–75 (Mar. 2006).

[13] *See, e.g.*, LUBERT, *supra* note 3.

[14] "It makes no sense to communicate if the listeners do not retain the essence of what has been communicated. . . . Trial lawyers need to understand that memory is indeed fleeting, and must use strategies to improve jurors' retention of the key information presented during a trial " MAUET, *supra* note 2, at 20.

[15] WEBSTER'S TENTH NEW COLLEGIATE DICTIONARY 445 (1999).

[16] U.S. DEP'T OF ARMY, FIELD MANUAL 1, THE ARMY para. 3-38 (14 June 2005); U.S. DEP'T OF ARMY, FIELD MANUAL 6-22, ARMY LEADERSHIP: COMPETENT, CONFIDENT, AND AGILE paras. 6-3, 9-11 (12 Oct. 2006); ROBERT S. FROST, THE GROWING IMPERATIVE TO ADOPT "FLEXIBILITY" AS AN AMERICAN PRINCIPLE OF WAR 1–3 (1999) (Strategic Studies Institute, U.S. Army War College); Antulio J. Echevarria, II, *Moltke and the German Military Tradition: His Theories and Legacies*, 26 PARAMETERS NO. 1 (Spring 1996).

[17] *See* U.S. DEP'T OF ARMY, FIELD MANUAL 6-0, MISSION COMMAND: COMMAND AND CONTROL OF ARMY FORCES para. 6-87 (11 Aug. 2003).

[18] Dwight D. Eisenhower Quotes, http://www.brainyquote.com/quotes/quotes/d/dwightdei149111.html (last visited Feb. 10, 2009).

[19] FM 6-0, *supra* note 17, para. 4-46.

fact. You must take the time to choose your words carefully and ensure they convey your themes and key points with absolute clarity. The organization of your case also impacts the clarity of your presentation. You must carefully consider, not just who you call as a witness, but also when you should call them. Likewise you must evaluate your evidence and select the most effective time to present each piece in order to provide the trier of fact with a logical, readily understood, and easily retained version of your case.

Thorough preparation is also essential to developing flexibility. First, preparation is your best opportunity to identify potential problem areas in your case and develop branch plans to respond. Further, thorough preparation relieves some of the stress of otherwise intimidating advocacy tasks, such as argument and cross-examination, leaving you free to focus on addressing new developments as they occur. Most importantly, preparation provides you with the detailed mastery of the facts and law necessary to allow you to adapt to unanticipated changes and readily place them within the context of your case without losing clarity.

The mutually supporting objectives of clarity and flexibility should shape your preparation for all aspects of your case. However, clarity and flexibility offer their greatest potential as counsel prepare for the post-referral phase of the court-martial process. The post-referral phase consists of the preparation of your case for presentation to the trier of fact. Regardless of the facts of your particular case or your personal level of experience, your preparation for trial will benefit from a focus on clarity and flexibility.

The first step towards achieving clarity and flexibility is organization. If information is to be digested and retained, it must be presented in an ordered and logical fashion. A good starting point for preparation in the litigation phase is a simple outline listing all of the events necessary to the execution of your case. Since most cases are preceded by at least a brief R.C.M. 802 session with the military judge, that should be the first item on the outline.[20] There will likely be motions, followed by voir dire, opening statements, witnesses, and so on up through sentencing arguments and instructions. Each of these litigation tasks should be included in your outline in chronological order.[21] Once you have an ordered list of all the tasks you have to plan for, you should begin to fill in the details related to each item on the list using subparagraphs.

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[20] MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 802 (2008) [hereinafter MCM].

[21] Your list should look something like this;

A. R.C.M. 802 Sessions

B. Motions

C. Voir Dire

D. Opening Statements

E. Gov't Witnesses

F. Gov't Evidence

G. Defense witnesses

H. Defense Evidence

I. Instructions

J. Gov't Argument

K. Defense Argument

L. Gov't Rebuttal

M. Gov't Sentencing Evidence

N. Gov't Sentencing Witnesses

O. Defense Sentencing Witnesses

P. Defense Sentencing Evidence

Q. Sentencing Instructions

R. Gov't Sentencing Argument

S. Defense Sentencing Argument

Your list will ultimately contain many tasks, each of which is important to the successful presentation of your case. Prepare each task in accordance with the facts and objectives of your particular case, while always keeping an eye towards clarity and flexibility. Rather than discuss each task in detail, the remainder of this article will demonstrate the value of these two points while focusing preparation towards the key litigation tasks of opening statements, cross-examination, and direct examination.

Opening statements are one of the most pivotal events in the presentation of your case. Research suggests that most panel members make up their minds about a case very early on.[22] Likewise, the theory of primacy and recency dictates that a person is most likely to remember what they hear first and what they hear last before making an important decision.[23] Your opening statement covers half of that equation.

Panel members will also use your opening statement as a frame of reference through which they digest the evidence later presented.[24] Witnesses are nervous and do not always make themselves clear. They are subject to cross-examination, which may defuse their impact or distract the panel from important points.[25] Your opening statement is an invaluable opportunity to create a favorable context in which panel members can place the potentially confusing testimony that is soon to follow.[26]

Additionally, the attention span of the average panel member is relatively limited, about twenty minutes at best.[27] Given the critical importance of your first words to the panel and the limited time in which you have to deliver them, it is essential that you choose your words carefully. That is why you must write them out. Develop a theme that is both supportable and easy to remember.[28] Tinker with the language, choose your words to ensure that your key points are both easy to understand and easily retained. Organize your opening statement in a logical fashion that tracks the order in which you will present your case.[29] Identify the potentially confusing aspects of your case and formulate explanations that set them out clearly.[30] Avoid objection by ensuring that you are not arguing, but rather simply stating what the evidence will show.[31] You can best accomplish all of these objectives by writing out your opening statement word for word.

When you have drafted a clear and logically organized opening statement, take the time to memorize and rehearse it. Reading an opening statement or constantly referring to notes detracts from the force of your presentation.[32] Rehearse until you are comfortable with the words, then practice adding emphasis or slowing down at the appropriate points. This will increase the clarity of your presentation. Your comfort and confidence with the facts will also reassure the panel.[33] Additionally, if you have rehearsed and memorized your opening statement, you don't have to worry about it anymore. Having one key part of the presentation of your case sewn up early-on allows you maximum flexibility to deal with any other issues that develop as your case unfolds. The time spent developing your themes and framing key issues will also give you the deep level of understanding of your case necessary to allow you to easily adapt to the unforeseen.

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[22] MAUET, *supra* note 2, at 61.

[23] LAUBERT, *supra* note 3, at 16.

[24] *Id.* at 411.

[25] MAUET, *supra* note 2, at 62.

[26] For example, if you have a witness with a complicated relationship to the facts of the case, you should explain that relationship in your opening. In this example, Ms. Smith is a witness to the robbery of a convenience store. Ms. Smith was not employed by the store but she was close friends with the clerk and spent a considerable amount of time in the store. However, other witnesses presume she is also a clerk. Relatively minor confusions such as this have the potential to slow the pace of your case and clutter other relevant testimony. Therefore, you should clarify the issue in your opening statement. "You will hear from Ms. Samantha Smith, she was often mistaken as an employee of the 7-11 because she spent a lot of time there and often helped out the night clerk, however, she did not actually work there. Ms. Smith will tell you she was in the store at the time of the robbery." This provides an explanation for the testimony of other witnesses who assumed Mrs. Smith was one of the clerks.

[27] MAUET, *supra* note 2, at 19–20.

[28] "Themes are the psychological anchors that jurors instinctively create to distill and summarize what the case is about . . . [g]ood themes are based upon universal truths about people and events we learn during our lives." *Id.* at 62–63.

[29] JAMES W. MCELHANEY, MCELHANEY'S TRIAL NOTEBOOK 126 (ABA 3d. ed. 1994).

[30] *Id.* ("[E]very case has a number of points you must make clear—otherwise the jury may find against you.").

[31] Opening statements state only facts. If you characterize the evidence, draw conclusions, or make pronouncements on the credibility of witnesses, then you are subject to objection for arguing on opening statements. MAUET, *supra* note 2, at 68. The amount of leeway you have depends largely on the military judge. Be familiar with the practice in your jurisdiction and craft your opening to avoid any argument.

[32] ROSE, *supra* note 6, at 56.

[33] MCELHANEY, *supra* note 29, at 127.

The same reasoning applies to preparing cross-examinations. Cross-examination is often referred to as an art. This suggests that success in cross-examination is based upon the inherent gifts of the questioner. This is certainly not the case.[34] Any counsel can conduct an effective cross-examination provided they expend the time and effort to prepare. Such preparation consists of more than just reviewing prior statements and interviewing witnesses. Few counsel are capable of completely freelancing a cross-examination. As with opening statements, successful cross-examinations are developed, question for question, and word for word, in advance of the trial.

The form of the question is extremely important to effective cross-examination.[35] A well-formed question asked on cross forces the witness to provide the answer you want while at the same time allowing you to reinforce central themes of your case.[36] The Rules for Courts-Martial allow counsel to lead on cross-examination.[37] Leading questions are those which suggest an answer and are designed to elicit only a yes or no response. However, not every leading question will elicit the yes or no answer you desire, particularly if the witness wants to avoid that answer.[38] To be successful, you have to word your questions carefully so as to leave the witness no choice but to provide the answer you desire.

In addition to suggesting an answer, the questions you ask on cross-examination also communicate important information to the panel. A yes or no answer is meaningless without context. The counsel asking the questions supplies the context with his or her questions. A good cross-examination is really a series of propositions, which you already know to be true (or false), with which the witness agrees or disagrees.[39] In effect, the counsel is testifying while the witness nods in agreement. Therefore, it is the questions, as much as the answers, which you want the panel to focus upon.[40] That being the case, counsel must ensure that the key points of his or her "testimony" are accurate, well-organized, and easy to understand. There are many techniques, such as looping or using tags, that magnify the effect of cross-examination.[41] You should study and experiment with these techniques to determine if they can enhance the clarity of your cross.

To ensure you are achieving the maximum benefit from your questions, it is important that you write them out in advance.[42] This is not to suggest that you read your prepared questions when the witness is actually on the stand. The best cross-examinations are undertaken with little or no reference to notes.[43] Nonetheless, you should write your questions out to find the best possible wording. Ask whether the question will allow only the answer you desire? What does the content of your questions say to the panel? Have you properly employed cross-examination techniques? Are your questions grouped and organized in the most effective manner to build logically towards your ultimate point? [44] Does each group of questions

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[34] Lieutenant Colonel Bradley J. Huestis, *Cross-Examination by the Numbers*, ARMY LAW., Oct. 2007, at 76.

[35] ROSE, *supra* note 6, at 135.

[36] Heustis, *supra* note 34, at 76.

[37] MCM, *supra* note 20, MIL. R. EVID. 611.

[38] For example, if you want to demonstrate a witness's poor eye sight, simply asking: "You have poor eye sight don't you?" suggests and answer, but may not elicit the answer you want. For starters, your question is actually a conclusion. Conclusions are best left to the panel. Likewise, your witness may be loathe to admit that his eye sight is not good. A better approach would be to interview the witness so you know the answers and then ask:

> "You wear glasses don't you?"
>
> "You wear glasses because you are nearsighted?"
>
> "You have been wearing glasses for fifteen years?"
>
> "And you have had your prescription adjusted three times during those fifteen years"
>
> "That is because your eyes get worse over time?"
>
> "It has been more than three years since you had your prescription adjusted"

[39] ROSE, *supra* note 6, at 122–24.

[40] MCELHANEY, *supra* note 29, at 382 ("*Cross-examination is the art of honest innuendo*.").

[41] ROSE, *supra* note 6, at 122–26, 135. Professor Rose's book contains excellent examples of effective looping.

[42] LUBET, *supra* note 3, at 103.

[43] *Id.*

[44] MCELHANEY, *supra* note 29, at 382 ("If cross-examination can be likened to surgery, then the form of the question is the way the knife is held. But it is the organization of the cross-examination that tells where to make the cut.") There are a variety of rules for organizing a cross-examination such as: enforcing primacy and recency by placing important topics at the beginning and end; saving impeachment questions until after you have elicited all of the necessary favorable information; and revisiting direct only to orient the witness. Heustis, *supra* note 34, at 79.

support a readily identifiable theme? The best way to answer these questions is by developing and studying a draft cross-examination.

Once you have prepared a draft of your questions, you should take the time to plan for the inevitable uncooperative witness. If a witness gives the wrong answer to a particular question how will you steer them back on course or otherwise demonstrate, with clarity, that their answer is wrong or tainted by bias or inaccurate perception? Preparation and practice is the only way to ensure your point will not be lost to the equivocations of a reluctant witness.[45] If you have a prior statement from the witness, you should use it to keep the witness in check. Know the foundation for a prior inconsistent statement, write it out, memorize it, practice it.[46] Highlight the relevant portions of that statement and package it in your trial notebook so that it can be quickly accessed to bring your witness back in line. Undertake the same preparation process for impeachment by omission or any of the other techniques available for managing resistant witnesses.

Preparing your cross-examinations in this manner will give you a greater level of comfort with an otherwise intimidating advocacy task. It will also free you up to deal with the inevitable contingencies. The human dimension ensures that no cross will go exactly according to plan. You must train yourself to develop effectively worded questions on the spot. The more you have practiced, the more time you have spent parsing your words, arranging your questions, and practicing your delivery, the better prepared you will be to adapt your cross with confidence and clarity.

Direct examination is another area upon which you should focus your preparation to develop clarity and flexibility. Direct is the opportunity for your witnesses to favorably tell the story of you case in his or her own words. You want their testimony to be as clear and understandable as possible. Unfortunately, effective direct examination is not an easy task. The Rules require counsel to use open-ended, who, what why, when, where, and how questions on direct.[47] Open ended questions leave the witness free to wander off course. As such, success on direct depends largely on how well the witness responds to your open-ended question. Therefore, it is critical that you draft thoughtful questions and that you prepare your witnesses.

A good practical approach is to begin with a list of the key points you have to get from each witness on direct.[48] Use that list as you interview and rehearse with the witness. Practice stopping the witnesses' narrative responses to inject new, more focused questions. When it comes time for trial, keep the checklist in hand and do not sit down until you have checked off all of the key points on the list.

Great care should also go into the questions you ask on direct. If you slip up and use leading questions, opposing counsel can object. Objections undermine clarity by delaying and confusing the presentation of information. They may also cause the panel to question the credibility of counsel. To avoid objection, you must practice using non-leading questions. Your non-leading questions should be drafted to add clarity to your case. Again, wording is important. Draft and redraft you questions until you are comfortable phrasing questions so that they point the witness in the right direction without suggesting an answer.[49]

Inevitably, you will encounter situations where a witness on direct does not provide the desired answer. Practice and preparation are the best means to ensure you can continue to prod the witness without using leading questions. Redirect presents a similar challenge. Depending upon the strength of your opponent's cross, you may be required to get very specific rehabilitative information from a witness. You may be tempted to use leading questions, however, if opposing counsel is paying attention you will draw an objection.[50] Instead, you have to plan for redirect in advance and develop non-leading questions designed to elicit the necessary rehabilitative information.

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[45] Professor Rose suggests that counsel "develop a toolbox of control techniques" for dealing with difficult witnesses. ROSE, *supra* note 6, at 129. Create and practice a few universal responses to steer a witness back under your control. *Id.* Think of prior statements as anchors which fix the witness to a particular position that benefits your case. The standard foundations for prior consistent and inconsistent statements are the chains you use to link the witness inextricably to the anchor of his prior statement.

[46] *See* MAUET, *supra* note 2, at 285–97.

[47] MCM, *supra* note 20, MIL. R. EVID. 611.

[48] MCELHANEY, *supra* note 29, at 10.

[49] LUBET, *supra* note 3, at 65–76.

[50] In more than ten years of observing and participating in courts-martial and advocacy exercises, I have consistently seen counsel fall into the trap of using leading questions on redirect. Consistently, opposing counsel inexplicably fail to object.

If you are using exhibits or offering physical evidence, then you must prepare with a view towards clarity and flexibility. Your exhibits should convey your point clearly to the panel. They must also be easy to use and understand for the sponsoring witness. Ensure that your question encompass all of the foundational elements necessary for the exhibit or piece of evidence. Practice with the witness. Make sure they understand how to use the exhibit.

Finally, you should remember that whatever is done with the exhibit or piece of evidence in the courtroom must be described for the record by counsel. That is, whenever a witness marks on an exhibit or makes a demonstration with a piece of evidence, the witness's actions must be placed on the record. Therefore, you should practice describing a witness's actions for the record. Nothing is more frustrating than watching unprepared counsel's awkward attempt to describe something into the record. Don't risk your key point being lost as you struggle to describe something for the record. Incorporate this obligation into your preparation for the rest of your direct.

Thorough preparation for direct allows you to build clarity into this key aspect of your case. Rehearsing with witnesses and preparing your examination in advance ensures your witnesses convey the correct information in a retainable manner. Detailed preparation of the form of your questions will also improve your flexibility by training your brain to form appropriate questions. This will allow you to effectively adapt and add new questions to deal with redirect or witnesses who are somehow thrown off-track.

Although it is time consuming and may even seem tedious, thorough preparation is an essential obligation of counsel in an adversarial system. Remember that preparation is the one aspect of your case that you control completely. It is also a tool that can help you overcome almost any disadvantage you may face as an advocate. The benefits of preparation are limited only by your capacity to utilize it. Understand that regardless of the specific objectives of your case, all preparation should focus on building clarity and flexibility. Constantly refer to these mutually supporting objectives as you prepare for each phase of the court-martial process. The quality of your advocacy is certain to improve and you are much more likely to receive a favorable result, Most importantly, remember that only results derived from the zealous advocacy of thoroughly prepared counsel are fit to wear the title of justice in our adversarial system. Win, lose, or draw, the strength of your effort validates the result.

CLE News

1. Resident Course Quotas

a. Attendance at resident continuing legal education (CLE) courses at The Judge Advocate General's Legal Center and School, U.S. Army (TJAGLCS), is restricted to students who have confirmed reservations. Reservations for TJAGSA CLE courses are managed by the Army Training Requirements and Resources System (ATRRS), the Army-wide automated training system. If you do not have a confirmed reservation in ATRRS, attendance is prohibited.

b. Active duty service members and civilian employees must obtain reservations through their directorates training office. Reservists or ARNG must obtain reservations through their unit training offices or, if they are non-unit reservists, through the U.S. Army Personnel Center (ARPERCOM), ATTN: ARPC-OPB, 1 Reserve Way, St. Louis, MO 63132-5200.

c. Questions regarding courses should be directed first through the local ATRRS Quota Manager or the ATRRS School Manager, Academic Department at 1 (800) 552-3978, extension 3307.

d. The ATTRS Individual Student Record is available on-line. To verify a confirmed reservation, log into your individual AKO account and follow these instructions:

> Go to Self Service, My Education. Scroll to Globe Icon (not the AARTS Transcript Services). Go to ATTRS On-line, Student Menu, Individual Training Record. The training record with reservations and completions will be visible.
>
> If you do not see a particular entry for a course that you are registered for or have completed, see your local ATTRS Quota Manager or Training Coordinator for an update or correction.

e. The Judge Advocate General's School, U.S. Army, is an approved sponsor of CLE courses in all states that require mandatory continuing legal education. These states include: AL, AR, AZ, CA, CO, CT, DE, FL, GA, ID, IN, IA, KS, KY, LA, ME, MN, MS, MO, MT, NV, NH, NM, NY, NC, ND, OH, OK, OR, PA, RI, SC, TN, TX, UT, VT, VA, WA, WV, WI, and WY.

2. TJAGLCS CLE Course Schedule (2008—September 2009) (http://www.jagcnet.army.mil/JAGCNETINTERNET/HOMEPAGES/AC/TJAGSAWEB.NSF/Main?OpenFrameset (click on Courses, Course Schedule))

ATTRS. No.	Course Title	Dates
	GENERAL	
5-27-C22	57th Judge Advocate Officer Graduate Course	11 Aug 08 – 22 May 09
5-27-C22	58th Judge Advocate Officer Graduate Course	10 Aug 09 – 20 May 10
5-27-C20	178th JAOBC/BOLC III (Ph 2)	20 Feb – 6 May 09
5-27-C20	179th JAOBC/BOLC III (Ph 2)	17 Jul – 30 Sep 09
5F-F1	206th Senior Officer Legal Orientation Course	23 – 27 Mar 09
5F-F1	207th Senior Officer Legal Orientation Course	8 – 12 Jun 09
5F-F3	15th RC General Officer Legal Orientation	11 – 13 Mar 09
5F-F52	39th Staff Judge Advocate Course	1 – 5 Jun 09
5F-F52S	12th SJA Team Leadership Course	1 – 3 Jun 09
600-BNCOC	4th BNCOC Common Core (Ph 1)	9 – 27 Mar 09
600-BNCOC	5th BNCOC Common Core (Ph 1)	12 – 29 May 09
600-BNCOC	6th BNCOC Common Core (Ph 1)	3 – 21 Aug 09

512-27D30	4th Paralegal Specialist BNCOC (Ph 2)	1 Apr – 5 May 09
512-27D30	5th Paralegal Specialist BNCOC (Ph 2)	1 Jun – 8 Jul 09
512-27D30	6th Paralegal Specialist BNCOC (Ph 2)	26 Aug – 30 Sep 09
512-27D40	2d Paralegal Specialist ANCOC (Ph 2)	2 Apr – 2 May 09
512-27D40	3d Paralegal Specialist ANCOC (Ph 2)	1 Jun – 8 Jul 09
512-27D40	4th Paralegal Specialist ANCOC (Ph 2)	26 Aug – 30 Sep 09
WARRANT OFFICER COURSES		
7A-270A1	20th Legal Administrators Course	15 – 19 Jun 09
7A-270A2	10th JA Warrant Officer Advanced Course	6 – 31 Jul 09
ENLISTED COURSES		
512-27D/20/30	20th Law for Paralegal NCO Course	23 – 27 Mar 09
512-27D-BCT	11th BCT NCOIC/Chief Paralegal NCO Course	20 – 24 Apr 09
512-27D/DCSP	18th Senior Paralegal Course	15 – 19 Jun 09
512-27DC5	28th Court Reporter Course	26 Jan – 27 Mar 09
512-27DC5	29th Court Reporter Course	20 Apr – 19 Jun 09
512-27DC5	30th Court Reporter Course	27 Jul – 25 Sep 09
512-27DC6	9th Senior Court Reporter Course	14 – 18 Jul 09
512-27DC7	11th Redictation Course	30 Mar – 10 Apr 09
ADMINISTRATIVE AND CIVIL LAW		
5F-F202	7th Ethics Counselors Course	13 – 17 Apr 09
5F-F21	7th Advanced Law of Federal Employment Course	26 – 28 Aug 09
5F-F22	62d Law of Federal Employment Course	24 – 28 Aug 09
5F-F23	64th Legal Assistance Course	30 Mar – 3 Apr 09
5F-F24	33d Administrative Law for Installations Course	16 – 20 Mar 09
5F-F29	27th Federal Litigation Course	3 – 7 Aug 09
CONTRACT AND FISCAL LAW		
5F-F10	162d Contract Attorneys Course	20 – 31 Jul 09
5F-F103	9th Advanced Contract Law Course	16 – 20 Mar 09
5F-F12	80th Fiscal Law Course	11 – 15 May 09
5F-F13	5th Operational Contracting Course	4 – 6 Mar 09
5F-DL12	3d Distance Learning Fiscal Law Course	19 – 22 May 09

CRIMINAL LAW		
5F-F301	12th Advanced Advocacy Training Course	27 – 29 May 09
5F-F31	15th Military Justice Managers Course	24 – 28 Aug 09
5F-F33	52d Military Judge Course	20 Apr – 8 May 09
5F-F34	32d Criminal Law Advocacy Course	14 – 25 Sep 09
INTERNATIONAL AND OPERATIONAL LAW		
5F-F41	5th Intelligence Law Course	22 – 26 Jun 09
5F-F43	5th Advanced Intelligence Law Course	24 – 26 Jun 09
5F-F44	4th Legal Issues Across the IO Spectrum	13 – 17 Jul 09
5F-F47	51st Operational Law of War Course	23 Feb – 6 Mar 09
5F-F47	52d Operational Law of War Course	27 Jul – 7 Aug 09
5F-F47E	2009 USAREUR Operational Law CLE	27 Apr – 1 May 09
5F-F48	2d Rule of Law	6 – 10 Jul 09

3. Naval Justice School and FY 2008 Course Schedule

For information on the following courses, please contact Jerry Gallant, Registrar, Naval Justice School, 360 Elliot Street, Newport, RI 02841 at (401) 841-3807, extension 131.

Naval Justice School Newport, RI		
CDP	**Course Title**	**Dates**
0257	Lawyer Course (020) Lawyer Course (030) Lawyer Course (040)	26 Jan – 27 Mar 09 26 May – 24 Jul 09 3 Aug – 2 Oct 09
0258	Senior Officer (030) (Newport) Senior Officer (040) (Newport) Senior Officer (050) (Newport) Senior Officer (060) (Newport) Senior Officer (070) (Newport) Senior Officer (080) (Newport)	9 – 13 Mar 09 (Newport) 4 – 8 May 09 (Newport) 15 – 19 Jun 09 (Newport) 27 – 31 Jul 08 (Newport) 24 – 28 Aug 09 (Newport) 21 – 25 Sep 09 (Newport)
2622	Senior Officer (Fleet) (030) Senior Officer (Fleet) (040) Senior Officer (Fleet) (050) Senior Officer (Fleet) (060) Senior Officer (Fleet) (070) Senior Officer (Fleet) (080) Senior Officer (Fleet) (090) Senior Officer (Fleet) (100) Senior Officer (Fleet) (110)	2 – 6 Mar 09 (Pensacola) 23 – 27 Mar 09 (Pensacola) 27 Apr – 1 May 09 (Pensacola) 27 Apr – 1 May 09 (Naples, Italy) 8 – 12 Jun 09 (Pensacola) 15 – 19 Jun 09 (Quantico) 22 – 26 Jun 09 (Camp Lejeune) 27 – 31 Jul 09 (Pensacola) 21 – 25 Sep 09 (Pensacola)

BOLT	BOLT (030) BOLT (030) BOLT (040) BOLT (040)	30 Mar – 3 Apr 09 (USMC) 30 Mar – 3 Apr 09 (USN) 27 – 31 Jul 09 (USMC) 27 – 31 Jul 09 (USN)
961A (PACOM)	Continuing Legal Education (020)	27 – 28 Apr 09 (Naples, Italy)
900B	Reserve Lawyer Course (010) Reserve Lawyer Course (020)	22 – 26 Jun 09 21 – 25 Sep 09
850T	SJA/E-Law Course (010) SJA/E-Law Course (020)	11 – 22 May 09 20 – 31 Jul 09
4044	Joint Operational Law Training (010)	27 – 30 Jul 09
4046	SJA Legalman (010) SJA Legalman (020)	23 Feb – 6 Mar 09 (San Diego) 11 – 22 May 09 (Norfolk)
627S	Senior Enlisted Leadership Course (Fleet) (070) Senior Enlisted Leadership Course (Fleet) (080) Senior Enlisted Leadership Course (Fleet) (090 Senior Enlisted Leadership Course (Fleet) (100) Senior Enlisted Leadership Course (Fleet) (110) Senior Enlisted Leadership Course (Fleet) (120) Senior Enlisted Leadership Course (Fleet) (130) Senior Enlisted Leadership Course (Fleet) (140) Senior Enlisted Leadership Course (Fleet) (150) Senior Enlisted Leadership Course (Fleet) (160)	17 – 19 Mar 09 (San Diego) 23 – 25 Mar 09 (Norfolk) 13 – 15 Apr 09 (Bremerton) 27 – 29 Apr 09 (Naples) 26 – 28 May 09 (Norfolk) 26 – 28 May 09 (San Diego) 30 Jun – 2 Jul 09 (San Diego) 10 – 12 Aug 09 (Millington) 9 – 11 Sep 09 (Norfolk) 14 – 16 Sep 09 (Pendleton)
748A	Law of Naval Operations (010)	14 – 18 Sep 09
748B	Naval Legal Service Command Senior Officer Leadership (010)	6 – 19 Jul 09
748K	USMC Trial Advocacy Training (020) USMC Trial Advocacy Training (030) USMC Trial Advocacy Training (040)	11 – 15 May 09 (Okinawa, Japan) 18 – 22 May 09 (Pearl Harbor) 14 – 18 Sep 09 (San Diego)
786R	Advanced SJA/Ethics (010) Advanced SJA/Ethics (020)	23 – 27 Mar 09 20 – 24 Apr 09
846L	Senior Legalman Leadership Course (010)	20 – 24 Jul 09
846M	Reserve Legalman Course (Ph III) (010)	4 – 15 May 09
850V	Law of Military Operations (010)	1 – 12 Jun 09
932V	Coast Guard Legal Technician Course (010)	3 – 14 Aug 09
961J	Defending Complex Cases (010)	11 – 15 May 09
961M	Effective Courtroom Communications (020)	6 – 10 Apr 09 (San Diego)
525N	Prosecuting Complex Cases (010)	18 – 22 May 09
03RF	Legalman Accession Course (020) Legalman Accession Course (030)	12 Jan – 27 Mar 09 11 May – 24 Jul 09

049N	Reserve Legalman Course (Ph I) (010)	6 – 17 Apr 09
056L	Reserve Legalman Course (Ph II) (010)	20 Apr – 1 May 09
4040	Paralegal Research & Writing (010) Paralegal Research & Writing (020)	15 – 26 Jun 09 (Norfolk) 13 – 24 Jul 09 (San Diego)
5764	LN/Legal Specialist Mid-Career Course (020)	4 – 15 May 09
7485	Classified Info Litigation Course (010)	5 – 7 May 09 (Andrews AFB)
7487	Family Law/Consumer Law (010)	6 – 10 Apr 09
7878	Legal Assistance Paralegal Course (010)	6 – 11 Apr 09
NA	Iraq Pre-Deployment Training (010) Iraq Pre-Deployment Training (020) Iraq Pre-Deployment Training (030) Iraq Pre-Deployment Training (040)	6 – 9 Oct 09 5 – 8 Jan 09 6 – 9 Apr 09 6 – 9 Jul 09

NA	Legal Specialist Course (020) Legal Specialist Course (030) Legal Specialist Course (040)	5 Jan – 5 Mar 09 30 Mar – 29 May 09 26 Jun – 21 Aug 09
NA	Speech Recognition Court Reporter (020) Speech Recognition Court Reporter (030)	5 Jan – 3 Apr 09 25 Aug – 31 Oct 09
Naval Justice School Detachment Norfolk, VA		
0376	Legal Officer Course (040) Legal Officer Course (050) Legal Officer Course (060) Legal Officer Course (070) Legal Officer Course (080) Legal Officer Course (090)	2 – 20 Mar 09 30 Mar – 17 Apr 09 27 Apr – 15 May 09 1 – 19 Jun 09 13 – 31 Jul 09 17 Aug – 4 Sep 09
0379	Legal Clerk Course (040) Legal Clerk Course (050 Legal Clerk Course (060) Legal Clerk Course (070))	2 – 13 Mar 09 20 Apr – 1 May 09 13 – 24 Jul 09 17 – 28 Aug 09
3760	Senior Officer Course (040) Senior Officer Course (050) Senior Officer Course (060) Senior Officer Course (070)	23 – 27 Mar 09 18 – 22 May 09 10 – 14 Aug 09 14 – 18 Sep 09
Naval Justice School Detachment San Diego, CA		
947H	Legal Officer Course (040) Legal Officer Course (050) Legal Officer Course (060) Legal Officer Course (070) Legal Officer Course (080)	23 Feb – 13 Mar 09 4 – 22 May 09 8 – 26 Jun 09 20 Jul – 7 Aug 09 17 Aug – 4 Sep 09

947J	Legal Clerk Course (040) Legal Clerk Course (050) Legal Clerk Course (060) Legal Clerk Course (070) Legal Clerk Course (080)	30 Mar – 10 Apr 09 4 – 15 May 09 8 – 19 Jun 09 27 Jul – 7 Aug 09 17 Aug – 4 Sep 08
3759	Senior Officer Course (040) Senior Officer Course (050) Senior Officer Course (060) Senior Officer Course (070) Senior Officer Course (080)	30 Mar – 3 Apr 09 (San Diego) 13 – 17 Apr 09 (Bremerton) 27 Apr – 1 May 09 (San Diego) 1 – 5 Jun 09 (San Diego) 14 – 18 Sep 09 (Pendleton)

4. Air Force Judge Advocate General School Fiscal Year 2008 Course Schedule

For information about attending the following courses, please contact Jim Whitaker, Air Force Judge Advocate General School, 150 Chennault Circle, Maxwell AFB, AL 36112-5712, commercial telephone (334) 953-2802, DSN 493-2802, fax (334) 953-4445.

Air Force Judge Advocate General School, Maxwell AFB, AL	
Course Title	**Dates**
Judge Advocate Staff Officer Course, Class 09-B	17 Feb – 17 Apr 09
Paralegal Craftsman Course, Class 09-02	24 Feb – 1 Apr 09
Paralegal Apprentice Course, Class 09-03	3 Mar – 14 Apr 09
Area Defense Counsel Orientation Course, Class 09-B	30 Mar – 3 Apr 09
Defense Paralegal Orientation Course, Class 09-B	30 Mar – 3 Apr 09
Environmental Law Course, Class 09-A	20 – 24 Apr 09
Military Justice Administration Course, Class 09-A	27 Apr – 1 May 09
Paralegal Apprentice Course, Class 09-04	28 Apr – 10 Jun 09
Reserve Forces Judge Advocate Course, Class 09-B	2 – 3 May 09
Advanced Labor & Employment Law Course, Class 09-A	4 – 8 May 09
CONUS Trial Advocacy Course, Class 09-A (Off-Site, location TBD)	11 – 15 May 09
Operations Law Course, Class 09-A	11 – 21 May 09
Negotiation and Appropriate Dispute Resolution Course, Class 09-A	18 – 22 May 09
Environmental Law Update Course (DL), Class 09-A	27 – 29 May 09
Reserve Forces Paralegal Course, Class 09-A	1 – 12 Jun 09

Staff Judge Advocate Course, Class 09-A	15 – 26 Jun 09
Law Office Management Course, Class 09-A	15 – 26 Jun 09
Paralegal Apprentice Course, Class 09-05	23 Jun – 5 Aug 09
Judge Advocate Staff Officer Course, Class 09-C	13 Jul – 11 Sep 09
Paralegal Craftsman Course, Class 09-03	20 Jul – 27 Aug 09
Paralegal Apprentice Course, Class 09-06	11 Aug – 23 Sep 09
Trial & Defense Advocacy Course, Class 09-B	14 – 25 Sep 09

5. Civilian-Sponsored CLE Courses

For additional information on civilian courses in your area, please contact one of the institutions listed below:

AAJE:
American Academy of Judicial Education
P.O. Box 728
University, MS 38677-0728
(662) 915-1225

ABA:
American Bar Association
750 North Lake Shore Drive
Chicago, IL 60611
(312) 988-6200

AGACL:
Association of Government Attorneys in Capital Litigation
Arizona Attorney General's Office
ATTN: Jan Dyer
1275 West Washington
Phoenix, AZ 85007
(602) 542-8552

ALIABA:
American Law Institute-American Bar Association
Committee on Continuing Professional Education
4025 Chestnut Street
Philadelphia, PA 19104-3099
(800) CLE-NEWS or (215) 243-1600

APRI:
American Prosecutors Research Institute
99 Canal Center Plaza, Suite 510
Alexandria, VA 22313
(703) 549-9222

ASLM:
American Society of Law and Medicine
Boston University School of Law
765 Commonwealth Avenue
Boston, MA 02215
(617) 262-4990

CCEB:
Continuing Education of the Bar
University of California Extension
2300 Shattuck Avenue
Berkeley, CA 94704
(510) 642-3973

CLA:	Computer Law Association, Inc. 3028 Javier Road, Suite 500E Fairfax, VA 22031 (703) 560-7747
CLESN:	CLE Satellite Network 920 Spring Street Springfield, IL 62704 (217) 525-0744 (800) 521-8662
ESI:	Educational Services Institute 5201 Leesburg Pike, Suite 600 Falls Church, VA 22041-3202 (703) 379-2900
FBA:	Federal Bar Association 1815 H Street, NW, Suite 408 Washington, DC 20006-3697 (202) 638-0252
FB:	Florida Bar 650 Apalachee Parkway Tallahassee, FL 32399-2300 (850) 561-5600
GICLE:	The Institute of Continuing Legal Education P.O. Box 1885 Athens, GA 30603 (706) 369-5664
GII:	Government Institutes, Inc. 966 Hungerford Drive, Suite 24 Rockville, MD 20850 (301) 251-9250
GWU:	Government Contracts Program The George Washington University National Law Center 2020 K Street, NW, Room 2107 Washington, DC 20052 (202) 994-5272
IICLE:	Illinois Institute for CLE 2395 W. Jefferson Street Springfield, IL 62702 (217) 787-2080
LRP:	LRP Publications 1555 King Street, Suite 200 Alexandria, VA 22314 (703) 684-0510 (800) 727-1227
LSU:	Louisiana State University Center on Continuing Professional Development Paul M. Herbert Law Center Baton Rouge, LA 70803-1000 (504) 388-5837

MLI:	Medi-Legal Institute 15301 Ventura Boulevard, Suite 300 Sherman Oaks, CA 91403 (800) 443-0100
NCDA:	National College of District Attorneys University of South Carolina 1600 Hampton Street, Suite 414 Columbia, SC 29208 (803) 705-5095
NDAA:	National District Attorneys Association National Advocacy Center 1620 Pendleton Street Columbia, SC 29201 (703) 549-9222
NITA:	National Institute for Trial Advocacy 1507 Energy Park Drive St. Paul, MN 55108 (612) 644-0323 in (MN and AK) (800) 225-6482
NJC:	National Judicial College Judicial College Building University of Nevada Reno, NV 89557
NMTLA:	New Mexico Trial Lawyers' Association P.O. Box 301 Albuquerque, NM 87103 (505) 243-6003
PBI:	Pennsylvania Bar Institute 104 South Street P.O. Box 1027 Harrisburg, PA 17108-1027 (717) 233-5774 (800) 932-4637
PLI:	Practicing Law Institute 810 Seventh Avenue New York, NY 10019 (212) 765-5700
TBA:	Tennessee Bar Association 3622 West End Avenue Nashville, TN 37205 (615) 383-7421
TLS:	Tulane Law School Tulane University CLE 8200 Hampson Avenue, Suite 300 New Orleans, LA 70118 (504) 865-5900

UMLC:	University of Miami Law Center P.O. Box 248087 Coral Gables, FL 33124 (305) 284-4762
UT:	The University of Texas School of Law Office of Continuing Legal Education 727 East 26th Street Austin, TX 78705-9968
VCLE:	University of Virginia School of Law Trial Advocacy Institute P.O. Box 4468 Charlottesville, VA 22905

6. Phase I (Non-Resident Phase), Deadline for RC-JAOAC 2010

The suspense for submission of all RC-JAOAC Phase I (Non-Resident Phase) requirements is ***NLT 2400, 1 November 2009***, for those Judge Advocates who desire to attend Phase II (Resident Phase) at TJAGLCS in January 2010. This requirement includes submission of all writing exercises

This requirement is particularly critical for some officers. The 2010 JAOAC will be held in January 2010, and is a prerequisite for most Judge Advocate captains to be promoted to major, and, ultimately, to be eligible to enroll in Intermediate-Level Education (ILE).

A Judge Advocate who is required to retake any subcourse examinations or "re-do" any writing exercises must submit the examination or writing exercise to the Distributed Learning Department, TJAGLCS for grading by the same deadline (1 November 2009). If the student receives notice of the need to re-do any examination or exercise after 1 October 2009, the notice will contain a suspense date for completion of the work.

Judge Advocates who fail to submit Phase I Non-Resident courses and writing exercises by 1 November 2009 will not be cleared to attend the 2010 JAOAC resident phase.

If you have any additional questions, contact LTC Jeff Sexton, commercial telephone (434) 971-3357, or e-mail jeffrey.sexton@hqda.army.mil

7. Mandatory Continuing Legal Education

Judge Advocates must remain in good standing with the state attorney licensing authority (i.e., bar or court) in at least one state in order to remain certified to perform the duties of an Army Judge Advocate. This individual responsibility may include requirements the licensing state has regarding continuing legal education (CLE).

To assist attorneys in understanding and meeting individual state requirements regarding CLE, the Continuing Legal Education Regulators Association (formerly the Organization of Regulatory Administrators) provides an exceptional website at www.clereg.org (formerly www.cleusa.org) that links to all state rules, regulations and requirements for Mandatory Continuing Legal Education.

The Judge Advocate General's Legal Center and School (TJAGLCS) seeks approval of all courses taught in Charlottesville, VA, from states that require prior approval as a condition of granting CLE. For states that require attendance to be reported directly by providers/sponsors, TJAGLCS will report student attendance at those courses. For states that require attorneys to self-report, TJAGLCS provides the appropriate documentation of course attendance directly to students. Attendance at courses taught by TJAGLCS faculty at locations other than Charlottesville, VA, must be self-reported by attendees to the extent and manner provided by their individual state CLE program offices.

Regardless of how course attendance is documented, it is the personal responsibility of each Judge Advocate to ensure that their attendance at TJAGLCS courses is accounted for and credited to them and that state CLE attendance and reporting requirements are being met. While TJAGLCS endeavors to assist Judge Advocates in meeting their CLE requirements, the ultimate responsibility remains with individual attorneys. This policy is consistent with state licensing authorities and CLE administrators who hold individual attorneys licensed in their jurisdiction responsible for meeting licensing requirements, including attendance at and reporting of any CLE obligation.

Please contact the TJAGLCS CLE Administrator at (434) 971-3309 if you have questions or require additional information.

Current Materials of Interest

1. The Judge Advocate General's Fiscal Year 2009 On-Site Continuing Legal Education Training.

Date	Region	Location	Units	ATRRS Number	POC
6–8 Mar 09	NCR	Ft. Belvoir Officer's Club (Bldg. 20) 5500 Schulz Rd. Ft. Belvoir, VA 22060	151st LSO 10th LSO 153d LSO	Course: JAO-1 Class: 005	MAJ Mark Vetter (703) 870-1024 mark.vetter@yahoo.com SSG Waskewich (703) 960-7393, ext. 7420 michael.waskewich@usar.army.mil
13–15 Mar 09	Western	Sheraton Carlsbad Resort & Spa 5480 Grand Pacific Drive Carlsbad, CA 92008	78th LSO 75th LSO 87th LSO	Course: JAO-1 Class: 003	Ms. Antonia Roman, 714 229 3701; antonia.roman@usar.army.mil SFC Willie Watkins, 714 229 3703: willie.watkins@usar.army.mil
3–5 Apr 09	Midwest	Cincinnati, OH	9th LSO 91LSO 139th LSO	Course: JAO-1 Class: 006	CPT Steve Goodin (910) 396-7014 (office) Steven.Goodin@us.army.mil SSG Williams 614-692-7593 adrian.m.williams@usar.army.mil
17–19 Apr 09	Heartland	New Orleans, LA	8th LSO 1st LSO 2d LSO 214th LSO	Course: JAO-1 Class: 007	MSG Larry Barker larry.r.barker@us.army.mil SSG Dale Herman 816.836.0005 x2156 dale.herman@usar.army.mil
19–25 Apr 09	Southeast Functional Exercise	Ft. Jackson, SC	7th LSO (Lead) 12th LSO 174th LSO (Support)	TBD	TBD
15–19 Jun 09	Midwest Functional Exercise	Ft. McCoy, WI	7th LSO	TBD	TBD

2. The Judge Advocate General's School, U.S. Army (TJAGSA) Materials Available Through the Defense Technical Information Center (DTIC).

Each year, TJAGSA publishes deskbooks and materials to support resident course instruction. Much of this material is useful to Judge Advocates and government civilian attorneys who are unable to attend courses in their practice areas, and TJAGSA receives many requests each year for these materials. Because the distribution of these materials is not in its mission, TJAGSA does not have the resources to provide these publications.

To provide another avenue of availability, some of this material is available through the DTIC. An office may obtain this material through the installation library. Most libraries are DTIC users and would be happy to identify and order requested material. If the library is not registered with the DTIC, the requesting person's office/organization may register for the DTIC's services.

If only unclassified information is required, simply call the DTIC Registration Branch and register over the phone at (703) 767-8273, DSN 427-8273. If access to classified information is needed, then a registration form must be obtained, completed, and sent to the Defense Technical Information Center, 8725 John J. Kingman Road, Suite 0944, Fort Belvoir, Virginia 22060-6218; telephone (commercial) (703) 767-8273, (DSN) 427-8273, toll-free 1-800-225-DTIC, menu selection 2, option 1; fax (commercial) (703) 767-8228; fax (DSN) 426-8228; or e-mail to reghelp@dtic.mil.

If there is a recurring need for information on a particular subject, the requesting person may want to subscribe to the Current Awareness Bibliography (CAB) Service. The CAB is a profile-based product, which will alert the requestor, on a biweekly basis, to the documents that have been entered into the Technical Reports Database which meet his profile parameters. This bibliography is available electronically via e-mail at no cost or in hard copy at an annual cost of $25 per profile. Contact DTIC at www.dtic.mil/dtic/current.html.

Prices for the reports fall into one of the following four categories, depending on the number of pages: $7, $12, $42, and $122. The DTIC also supplies reports in electronic formats. Prices may be subject to change at any time. Lawyers, however, who need specific documents for a case may obtain them at no cost.

For the products and services requested, one may pay either by establishing a DTIC deposit account with the National Technical Information Service (NTIS) or by using a VISA, MasterCard, or American Express credit card. Information on establishing an NTIS credit card will be included in the user packet.

There is also a DTIC Home Page at http://www.dtic.mil to browse through the listing of citations to unclassified/unlimited documents that have been entered into the Technical Reports Database within the last twenty-five years to get a better idea of the type of information that is available. The complete collection includes limited and classified documents as well, but those are not available on the web.

Those who wish to receive more information about the DTIC or have any questions should call the Product and Services Branch at (703)767-8267, (DSN) 427-8267, or toll-free 1-800-225-DTIC, menu selection 6, option 1; or send an e-mail to bcorders@dtic.mil.

Contract Law

AD A301096 Government Contract Law Deskbook, vol. 1, JA-501-1-95.

AD A301095 Government Contract Law Desk book, vol. 2, JA-501-2-95.

AD A265777 Fiscal Law Course Deskbook, JA-506-93.

Legal Assistance

A384333 Servicemembers Civil Relief Act Guide, JA-260 (2006).

AD A333321 Real Property Guide—Legal Assistance, JA-261 (1997).

AD A326002 Wills Guide, JA-262 (1997).

AD A346757 Family Law Guide, JA 263 (1998).

AD A384376 Consumer Law Deskbook, JA 265 (2004).

AD A372624 Legal Assistance Worldwide Directory, JA-267 (1999).

AD A360700 Tax Information Series, JA 269 (2002).

AD A350513 Uniformed Services Employment and Reemployment Rights Act (USAERRA), JA 270, Vol. I (2006).

AD A350514 Uniformed Services Employment and Reemployment Rights Act (USAERRA), JA 270, Vol. II (2006).

AD A329216 Legal Assistance Office Administration Guide, JA 271 (1997).

AD A276984 Legal Assistance Deployment Guide, JA-272 (1994).

AD A452505 Uniformed Services Former Spouses' Protection Act, JA 274 (2005).

AD A326316 Model Income Tax Assistance Guide, JA 275 (2001).

AD A282033 Preventive Law, JA-276 (1994).

Administrative and Civil Law

AD A351829 Defensive Federal Litigation, JA-200 (2000).

AD A327379 Military Personnel Law, JA 215 (1997).

AD A255346 Financial Liability Investigations and Line of Duty Determinations, JA-231 (2005).

AD A452516 Environmental Law Deskbook, JA-234 (2006).

AD A377491 Government Information Practices, JA-235 (2000).

AD A377563 Federal Tort Claims Act, JA 241 (2000).

AD A332865 AR 15-6 Investigations, JA-281 (1998).

Labor Law

AD A360707 The Law of Federal Employment, JA-210 (2000).

AD A360707 The Law of Federal Labor-Management Relations, JA-211 (2001).

Criminal Law

AD A302672 Unauthorized Absences Programmed Text, JA-301 (2003).

AD A302674 Crimes and Defenses Deskbook, JA-337 (2005).

AD A274413 United States Attorney Prosecutions, JA-338 (1994).

International and Operational Law

AD A377522 Operational Law Handbook, JA-422 (2005).

* Indicates new publication or revised edition.
** Indicates new publication or revised edition pending inclusion in the DTIC database.

3. The Legal Automation Army-Wide Systems XXI—JAGCNet

a. The Legal Automation Army-Wide Systems XXI (LAAWS XXI) operates a knowledge management and information service called JAGCNet primarily dedicated to servicing the Army legal community, but also provides for Department of Defense (DOD) access in some cases. Whether you have Army access or DOD-wide access, all users will be able to download TJAGSA publications that are available through the JAGCNet.

b. Access to the JAGCNet:

(1) Access to JAGCNet is restricted to registered users who have been approved by the LAAWS XXI Office and senior OTJAG staff:

(a) Active U.S. Army JAG Corps personnel;

(b) Reserve and National Guard U.S. Army JAG Corps personnel;

(c) Civilian employees (U.S. Army) JAG Corps personnel;

(d) FLEP students;

(e) Affiliated (U.S. Navy, U.S. Marine Corps, U.S. Air Force, U.S. Coast Guard) DOD personnel assigned to a branch of the JAG Corps; and, other personnel within the DOD legal community.

(2) Requests for exceptions to the access policy should be e-mailed to:

LAAWSXXI@jagc-smtp.army.mil

c. How to log on to JAGCNet:

(1) Using a Web browser (Internet Explorer 6 or higher recommended) go to the following site: http://jagcnet.army.mil.

(2) Follow the link that reads "Enter JAGCNet."

(3) If you already have a JAGCNet account, and know your user name and password, select "Enter" from the next menu, then enter your "User Name" and

"Password" in the appropriate fields.

(4) If you have a JAGCNet account, *but do not know your user name and/or Internet password*, contact the LAAWS XXI HelpDesk at LAAWSXXI@jagc-smtp.army.mil.

(5) If you do not have a JAGCNet account, select "Register" from the JAGCNet Intranet menu.

(6) Follow the link "Request a New Account" at the bottom of the page, and fill out the registration form completely. Allow seventy-two hours for your request to process. Once your request is processed, you will receive an e-mail telling you that your request has been approved or denied.

(7) Once granted access to JAGCNet, follow step (c), above.

4. TJAGSA Publications Available Through the LAAWS XXI JAGCNet

The TJAGSA, U.S. Army, Charlottesville, Virginia continues to improve capabilities for faculty and staff. We have installed new computers throughout TJAGSA, all of which are compatible with Microsoft Windows XP Professional and Microsoft Office 2003 Professional.

The TJAGSA faculty and staff are available through the Internet. Addresses for TJAGSA personnel are available by e-mail at jagsch@hqda.army.mil or by accessing the JAGC directory via JAGCNET. If you have any problems, please contact LTMO at (434) 971-3257. Phone numbers and e-mail addresses for TJAGSA personnel are available on TJAGSA Web page at http://www.jagcnet.army.mil/tjagsa. Click on "directory" for the listings.

For students who wish to access their office e-mail while attending TJAGSA classes, please ensure that your office e-mail is available via the web. Please bring the address with you when attending classes at TJAGSA. If your office does not have web accessible e-mail, forward your office e-mail to your AKO account. It is mandatory that you have an AKO account. You can sign up for an account at the Army Portal, http://www.jagcnet.army.mil/tjagsa. Click on "directory" for the listings.

Personnel desiring to call TJAGSA can dial via DSN 521-7115 or, provided the telephone call is for official business only, use the toll free number, (800) 552-3978; the receptionist will connect you with the appropriate department or directorate. For additional information, please contact the LTMO at (434) 971-3264 or DSN 521-3264.

5. TJAGSA Legal Technology Management Office (LTMO)

The TJAGSA, U.S. Army, Charlottesville, Virginia continues to improve capabilities for faculty and staff. We have installed new computers throughout TJAGSA, all of which are compatible with Microsoft Windows XP Professional and Microsoft Office 2003 Professional.

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For students who wish to access their office e-mail while attending TJAGSA classes, please ensure that your office e-mail is available via the web. Please bring the address with you when attending classes at TJAGSA. If your office does not have web accessible e-mail, forward your office e-mail to your AKO account. It is mandatory that you have an AKO account. You can sign up for an account at the Army Portal, http://www.jagcnet.army.mil/tjagsa. Click on "directory" for the listings.

Personnel desiring to call TJAGSA can dial via DSN 521-7115 or, provided the telephone call is for official business only, use the toll free number, (800) 552-3978; the receptionist will connect you with the appropriate department or directorate. For additional information, please contact the LTMO at (434) 971-3264 or DSN 521-3264.

6. The Army Law Library Service

Per *Army Regulation 27-1*, paragraph 12-11, the Army Law Library Service (ALLS) must be notified before any redistribution of ALLS-purchased law library materials. Posting such a notification in the ALLS FORUM of JAGCNet satisfies this regulatory requirement as well as alerting other librarians that excess materials are available.

Point of contact is Mr. Daniel C. Lavering, The Judge Advocate General's Legal Center and School, U.S. Army, ATTN: ALCS-ADD-LB, 600 Massie Road, Charlottesville, Virginia 22903-1781. Telephone DSN: 521-3306, commercial: (434) 971-3306, or e-mail at Daniel.C.Lavering@us.army.mil.