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.