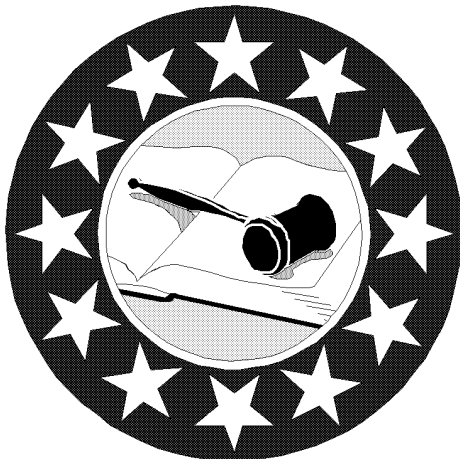

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Military Justice Symposium

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Military Justice Symposium

Articles

Annual Review of Developments in Instructions—2008

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Introduction

This annual installment of developments on instructions covers cases decided by the Court of Appeals for the Armed Forces (CAAF) during its 2008 term,[1] and it focuses on crimes and defenses. It is written for military trial practitioners and frequently refers to the relevant paragraphs in the *Military Judges' Benchbook* (*Benchbook*).[2] The *Benchbook* remains the primary resource for drafting instructions.

Crimes

Attempted Voluntary Manslaughter as a Lesser Included Offense

The first three cases deal with lesser included offenses. In *United States v. Miergrimado*, CAAF addressed the standard for determining whether the military judge should instruct the members on a particular lesser included offense.[3] Although the case reiterates the standard that already existed, a discussion of this common issue is beneficial for trial practitioners. In addition, the elements for the offense of attempted voluntary manslaughter will be discussed, because an understanding of the unique offense of voluntary manslaughter is crucial to correctly instructing the members.

Marine Corporal (Cpl) Miergrimado got into several verbal and physical altercations with Cpl Eichenberger over keys to a military vehicle in Kuwait.[4] Corporal Miergrimado testified that, towards the end of the fight, he felt the hardest hit he had ever felt in his life and he was "terrified for his life."[5] He "automatically switched" into preservation mode and pointed his rifle at Cpl Eichenberger who had struck him.[6] Corporal Eichenberger pushed the rifle away and gave Cpl Miergrimado another hard throw.[7] Corporal Miergrimado regained his balance, saw Cpl Eichenberger coming at him and shot him.[8]

Corporal Miergrimado was charged with attempted premeditated murder.[9] At trial, the defense counsel planned to use an "all or nothing" approach and objected when the trial counsel tried to elicit testimony relevant to the lesser included offense of attempted unpremeditated murder.[10] The defense counsel argued that, because the defense waived any instruction on lesser included offenses, it was inappropriate to instruct the members on any lesser included offense.[11] The military judge

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[1] The 2008 term began on 1 October 2007 and ended on 31 August 2008. *See* U.S. Court of Appeals for the Armed Forces, 2008 Term of Court Opinions, http://www.armfor.uscourts.gov/2008Term.htm (last visited Mar. 5, 2009). This term was only eleven months long, because the Court of Appeals for the Armed Forces changed the end date of the term from 30 September to 31 August, beginning in 2008.

[2] U.S. DEP'T OF ARMY, PAM. 27-9, MILITARY JUDGES' BENCHBOOK (15 Sept. 2002) (C2, 1 July 2003) [hereinafter BENCHBOOK].

[3] 66 M.J. 34 (C.A.A.F. 2008).

[4] *Id*. at 35.

[5] *Id*. at 37.

[6] *Id*.

[7] *Id*.

[8] *Id*.

[9] *Id*. at 35.

[10] *Id*.

[11] *Id*.

overruled the objection and indicated he would instruct on lesser included offenses.[12] After receiving all the evidence, the military judge instructed on the lesser included offenses of attempted unpremeditated murder, attempted voluntary manslaughter, and aggravated assault with intent to inflict grievous bodily harm with a loaded firearm.[13] The members found the accused guilty of the lesser included offense of attempted voluntary manslaughter.[14]

On appeal, Cpl Miergrimado's written brief was not based on the trial defense counsel's nonmeritorious argument that the defense's "all or nothing" strategy and waiving instructions on lesser included offenses rendered instructions on lesser included offenses inappropriate.[15] Instead, he argued that the military judge should not have given the instruction on attempted voluntary manslaughter as a lesser included offense, because none of the factual elements that distinguish attempted premeditated murder from attempted voluntary manslaughter were in dispute.[16] During oral argument, Cpl Miergrimado's argument, which changed again, was that the evidence was legally insufficient to support a finding that the crime was committed in the heat of sudden passion caused by adequate provocation.[17]

The military judge has a sua sponte duty to instruct the members on all lesser included offenses reasonably raised by the evidence.[18] A lesser included offense is reasonably raised by the evidence if "the greater offense requires the members to find a disputed factual element which is not required for conviction of the lesser violation."[19] This standard applies equally to lesser included offenses requested by the Government as well as the defense.[20]

Attempted premeditated murder requires the element of a premeditated design to kill, which is not required for attempted voluntary manslaughter.[21] In *Miergrimado*, the CAAF stated that it had no difficulty concluding that that element was disputed in the evidence presented at trial.[22] During the trial, the defense counsel even moved for a finding of not guilty because the Government had not presented sufficient evidence of premeditation, arguing that it "might be attempted voluntary manslaughter but it clearly isn't an attempted premeditated murder."[23] Based on the evidence, including the testimony of the accused, premeditation was disputed at trial. Therefore, the lesser included offense of attempted voluntary manslaughter was raised by the evidence.

The CAAF also addressed Cpl Miergrimado's argument that the evidence was legally insufficient to find beyond a reasonable doubt that the crime was committed in the heat of sudden passion caused by adequate provocation.[24] After considering the evidence presented at trial, the court held that the evidence was legally sufficient for the trier of fact to find beyond a reasonable doubt that the crime was committed in the heat of sudden passion caused by adequate provocation.[25] However, the court did not even need to address that argument, because it lacks merit. The heat of sudden passion caused by adequate provocation is not an element of voluntary manslaughter.[26] Therefore, it is not an element of attempted voluntary manslaughter. The elements of attempt are:

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[12] *Id*.

[13] *Id*.

[14] *Id*.

[15] *Id*. at 36.

[16] *Id*.

[17] *Id*.

[18] *See* United States v. Wells, 52 M.J. 126, 129 (C.A.A.F. 1999) (reversing conviction for premeditated murder, because the military judge did not give instruction on lesser included offense of voluntary manslaughter, even though neither party requested the instruction); MANUAL FOR COURTS-MARTIAL, UNITED STATES R.C.M. 920(e)(2) (2008) [hereinafter MCM].

[19] *Miergrimado*, 66 M.J. at 36.

[20] *Id*.

[21] BENCHBOOK, *supra* note 2, ¶ 3-4-2.

[22] *Miergrimado*, 66 M.J. at 37.

[23] *Id*.

[24] *Id*.

[25] *Id*.

[26] United States v. Schap, 49 M.J. 317, 320 (C.A.A.F. 1998) ("[H]eat of sudden passion caused by adequate provocation], though part of the statutory definition of the offense, is neither an element that the Government must prove nor an affirmative defense that the defense must prove.").

(1) That the accused did a certain overt act;

(2) That the act was done with the specific intent to commit a certain offense under the code;

(3) That the act amounted to more than mere preparation; and

(4) That the act apparently tended to effect the commission of the intended offense.[27]

The elements of the intended offense, voluntary manslaughter, are:

(1) That a certain named or described person is dead;

(2) That the death resulted from the act or omission of the accused;

(3) That the killing was unlawful; and

(4) That, at the time of the killing, the accused had the intent to kill or inflict great bodily harm upon the person killed.[28]

The elements for voluntary manslaughter are virtually identical to the elements of unpremeditated murder.[29] However, conduct that would otherwise constitute murder, if committed in the heat of sudden passion caused by adequate provocation, is mitigated to voluntary manslaughter.[30] The only burden of proof applicable to the heat of sudden passion caused by adequate provocation is that, when murder is charged and sudden passion caused by adequate provocation is raised by the evidence, the Government must disprove it beyond a reasonable doubt for a conviction of the greater offense of murder.[31] The Government does not need to prove sudden passion caused by adequate provocation to convict the accused of voluntary manslaughter or attempted voluntary manslaughter.

It might assist in understanding the unique concept of the burden of proof for sudden passion caused by adequate provocation by thinking of it as a partial defense. Like a defense, when sudden passion caused by adequate provocation is raised by the evidence, the military judge must instruct on it and the Government must disprove it beyond a reasonable doubt to convict of murder. If the Government does not disprove it beyond a reasonable doubt, and if all the elements of murder are otherwise proven beyond a reasonable doubt, then the accused may be found guilty of no more than voluntary manslaughter. However, the Government does not have to prove it beyond a reasonable doubt for a conviction of voluntary manslaughter. The same is true when dealing with attempted voluntary manslaughter.[32]

The main lesson to be gleaned from *Miergrimado* is the standard for determining whether to instruct the members on a certain lesser included offense. It may assist practitioners to break the analysis into two steps: first, whether it is a lesser included offense; and, second, whether it was raised by the evidence. First, after comparing the elements of the greater and lesser offenses, does the greater offense require proof of a factual element that the lesser offense does not require?[33] Second, did the evidence at trial put that element in dispute? In other words, was there some evidence admitted, without regard to its source or credibility, upon which the members could rationally find the accused guilty of the lesser offense and acquit of the

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[27] MCM, *supra* note 18, pt. IV, ¶ 4b.

[28] *Id.* ¶ 44b(1).

[29] In the *MCM*, one difference is that the intent in the last element is toward "the person killed" for voluntary manslaughter and toward "a person" for unpremeditated murder. *Compare id.* ¶ 43b(2), *with* ¶ 44b(1). However, for both offenses, the statute has the same language, which is "a human being." UCMJ art. 118 (2008); *id.* art. 119(a).

[30] *Schap*, 49 M.J. at 320.

[31] *Id*.

[32] *See* MCM, *supra* note 18, pt. IV, ¶ 4d.

[33] *See* United States v. Weymouth, 43 M.J. 329 (C.A.A.F. 1995); United States v. Foster, 40 M.J. 140 (C.A.A.F. 1994); United States v. Teters, 37 M.J. 370 (C.A.A.F. 1993).

greater offense?[34] If the answer to these questions is "yes," then the military judge should instruct the members on that lesser included offense.[35]

An additional lesson from *Miergrimado* is the unique nature of the elements and burden of proof for the offenses of voluntary manslaughter and attempted voluntary manslaughter. As a caveat to the standard for whether to instruct on a lesser included offense, when the evidence raises heat of sudden passion caused by adequate provocation in a murder trial or an attempted murder trial, the military judge should instruct the members on voluntary manslaughter or attempted voluntary manslaughter as a lesser included offense.

Alternate Factual Scenarios for Indecent Assault

In *United States v. Brown*, CAAF considered, in a case where there were multiple acts that could constitute indecent assault, whether the military judge must instruct the members that they must agree on the act or acts by the required concurrence.[36] In this unclear area, any guidance is welcomed. The CAAF provided a standard for determining when the members must agree on the act or acts. However, there will likely be just as much uncertainty in the application of the standard.

Army Staff Sergeant (SSG) Brown, a drill sergeant, was charged with raping a female trainee.[37] Because the alleged offenses predated 1 October 2007, the recent amendments to Article 120 were not applicable. At trial, there was evidence that SSG Brown entered the female trainee's barracks room and started kissing her.[38] He sat in a chair, told her to come to him, "pulled down her pants, sat her on his lap, and inserted his fingers into her vagina."[39] When she stood up to pull up her pants, SSG Brown walked up behind her and inserted his penis into her vagina for fifteen to twenty-one seconds.[40] Staff Sergeant Brown withdrew and then left the barracks room to get a condom.[41] The trainee testified that she felt that she had to have sex with SSG Brown or she might not graduate.[42] When SSG Brown returned, she acquiesced to sexual intercourse with him.[43]

At trial, the defense did not request instructions on lesser included offenses, because the defense theory on the rape was "all or nothing."[44] The Government requested instructions on lesser included offenses, including indecent assault.[45] The military judge found sufficient evidence to instruct on indecent assault, because the members could find that sexual intercourse, insertion of fingers into the vagina, or both constituted indecent assault.[46]

The military judge discussed with counsel whether the findings worksheet should require the members, if they were to find the accused guilty of the lesser included offense of indecent assault, to specify on which one of the three factual scenarios their finding was based.[47] The trial counsel originally wanted the members to specify the separate acts on the

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[34] *See* United States v. Wells, 52 M.J. 126, 129–30 (C.A.A.F. 1999).

[35] The military judge may accept a waiver of the instruction from both parties. An accused may seek to waive an instruction on a lesser included offense in order to pursue an "all or nothing" trial strategy, and the Government may acquiesce in the defense's "all or nothing" strategy. *See* United States v. Upham, 66 M.J. 83, 87 (C.A.A.F. 2008); *cf.* United States v. Gutierrez, 64 M.J. 374 (C.A.A.F. 2007) (holding that defense can affirmatively waive affirmative defense instructions).

[36] 65 M.J. 356 (C.A.A.F. 2007).

[37] *Id*. at 357.

[38] *Id.*

[39] *Id.*

[40] *Id.*

[41] *Id*.

[42] *Id*.

[43] *Id*.

[44] *Id*.

[45] *Id*.

[46] *Id*.

[47] *Id*.

findings worksheet, but the defense counsel did not.[48] After discussion, the trial counsel agreed that the findings worksheet should be left deliberately vague and should not specify the separate acts.[49]

When instructing the members on the lesser included offense of indecent assault, the military judge instructed them that they could find the accused guilty of indecent assault "by inserting his fingers and penis, or fingers, or penis into [her] vagina."[50] There was no objection to this instruction.[51] The members found the accused guilty of the lesser included offense of indecent assault.[52]

On appeal, SSG Brown argued that the military judge erred by not requiring the members to vote on each factual scenario and specify the factual basis of their findings.[53] First of all, the CAAF addressed whether its holding in *United States v. Walters*[54] applied, and it concluded that it did not.[55] In *Walters*, the CAAF had held that a finding that excepted the words "divers occasions" from a drug use specification, without specifying the one occasion that formed the basis of the conviction, was ambiguous and could not support a factual sufficiency review under Article 66, which required setting aside the conviction.[56] In *Brown*, the court reiterated that the application of its holding in *Walters* is limited to cases where a "divers occasions" specification is converted to a "one occasion" specification through exceptions and substitutions without specifying the one occasion.[57] In *Brown*, the specification alleged one occasion of rape at a specific time and place.[58] The Government treated all the acts in the barracks room as a continuing course of conduct over a short period of time. In this case, CAAF concluded that there was nothing ambiguous about the findings.[59]

The court next addressed the main issue of whether the military judge was correct, based on the evidence and the theories of the parties, by instructing the members that they could find the accused guilty of indecent assault by any of the three different ways at the alleged time and place.[60] This would permit a conviction even if the members did not have a two-thirds concurrence on any one of the factual scenarios. In deciding this issue, the CAAF applied a standard that comes from precedent in federal and military law: "The crux of the issue is whether a fact constitutes an element of the crime charged, or a method of committing it."[61] A court-martial panel normally returns a general verdict, without explaining how the law applies to the facts.[62] The general verdict resolves the issue presented to the members, which is whether the accused committed the charged offense or a lesser included offense beyond a reasonable doubt.[63] In *Griffin v. United States*, the Supreme Court held that a general verdict may be returned, even when the offense could have been committed by two or more means, as long as the evidence supports at least one of the means beyond a reasonable doubt.[64]

In *United States v. Vidal*, the Court of Military Appeals (COMA) held that court-martial panels do not have to have two-thirds agreement on one theory of liability, as long as two-thirds agree that all the elements have been proven.[65] In *Vidal*, there was evidence that Private First Class (PFC) Vidal and another Soldier grabbed a young German woman, dragged her

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[48] *Id*.

[49] *Id*. at 357–58.

[50] *Id*. at 358.

[51] *Id*.

[52] *Id*.

[53] *Id*.

[54] 58 M.J. 391 (C.A.A.F. 2003).

[55] *Brown*, 65 M.J. at 358.

[56] *Walters*, 58 M.J. at 396–97.

[57] *Brown*, 65 M.J. at 358.

[58] *Id*.

[59] *Id*.

[60] *Id*.

[61] *Id*. at 359.

[62] *Id*.

[63] *Id.*

[64] 502 U.S. 46, 49–51 (1991).

[65] 23 M.J. 319 (C.M.A. 1989).

into a car, struck her, and drove to a wooded area.[66] In the back seat, one of the two Soldiers inserted his penis into her vagina, and then the other Soldier climbed into the back seat and did the same.[67] Private First Class Vidal was charged with one specification of rape.[68] In accordance with the common practice, the specification did not specify whether he was charged as the perpetrator or as an aider and abettor.[69] During the trial, the military judge instructed the members in a manner that allowed them to convict the accused of rape if he was either the perpetrator or an aider and abettor.[70] The military judge did not require the members to consider the two theories separately.[71] The issue on appeal was whether the military judge erred by not requiring the prosecution or the members to elect whether the accused was a perpetrator or an aider and abettor.[72] The COMA held that the military judge properly declined to compel the Government to elect between the theories of liability for the rape.[73]

> If two-thirds of the members of the court-martial were satisfied beyond a reasonable doubt that at the specified time and place, appellant raped [AB]—whether he was the perpetrator or only an aider and abettor—the findings of guilty were proper. It makes no difference how many members chose one act or the other, one theory of liability or the other. The only condition is that there be evidence sufficient to justify a finding of guilty on any theory of liability submitted to the members.[74]

Although the two acts of penetration were separate offenses and the military judge should normally require the Government to elect which offense is being prosecuted, it is not required when the offenses are so closely connected in time as to constitute a single continuous transaction.[75]

Applying the standard to *Brown*, the CAAF concluded that the elements for the offense of indecent assault do not require the specification of the particular acts.[76] The court held that the military judge correctly instructed the members.[77] Application of the standard in this case warrants further discussion. Because the alleged conduct occurred well before 1 October 2007, indecent assault still fell under Article 134. The President listed the elements for the offense of indecent assault in the MCM:

> (1) That the accused assaulted a certain person not the spouse of the accused in a certain manner;
>
> (2) That the acts were done with the intent to gratify the lust or sexual desires of the accused; and
>
> (3) That, under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces.[78]

The court focused on the second element. It requires that the act was done with the intent to gratify. It does not require specification of the particular act.[79] However, that element concerns the mens rea requirement for the offense. The element at issue is really the first element, which concerns the actus reus requirement for the offense. The Government must prove

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[66] *Id*. at 320.

[67] *Id*. at 320–21.

[68] *Id.* at 322.

[69] *Id*. at 324.

[70] *Id*. at 322.

[71] *Id*.

[72] *Id*. at 320.

[73] *Id*. at 326.

[74] *Id*. at 325.

[75] *Id*.; *see also* United States v. Holt, 33 M.J. 400, 404 (C.M.A. 1991).

[76] United States v. Brown, 65 M.J. 356, 360 (C.A.A.F. 2007).

[77] *Id*.

[78] MANUAL FOR COURTS-MARTIAL, UNITED STATES pt. IV, ¶ 63b (2005) [hereinafter 2005 MCM].

[79] *Brown*, 65 M.J. at 360.

beyond a reasonable doubt that the accused assaulted the victim in a certain manner.[80] The type of assault is not an element, and the particular manner of the assault is not an element. The particular act or acts constituting the assault are merely a method of committing the assault element of indecent assault. Therefore, to convict of indecent assault, two-thirds of the members do not have to agree on the act, as long as two-thirds of the members are satisfied beyond a reasonable doubt that, at the specified time and place, the accused assaulted the alleged victim, along with all the other elements.

Although the indecent assault offense in *Brown* is no longer in effect for conduct on or after 1 October 2007, the lesson from *Brown* can be applied when instructing the members on the elements of other offenses. When there is an issue of whether the members must concur on a certain fact, it will depend on whether the fact is an element or a method of committing an element.[81] With this standard for analysis, the military judge can accurately instruct the members on the elements of the offenses and on the procedures for deliberations and voting.

Aggravated Assault and HIV

In *United States v. Upham*, CAAF looked at two issues involving instructions at the appellate level: whether an appellate court should apply a harmless-error analysis or a structural-type analysis when there is an instructional error of constitutional dimension; and whether an appellate court can affirm a conviction of a lesser included offense where both parties affirmatively waived an instruction on the lesser included offense and the military judge did not instruct the members on the lesser included offense.[82] Those issues will be addressed, but the underlying instructional error in this case will also be discussed because it involves an issue that occasionally arises.

Coast Guard Lieutenant (LT) Upham was charged with aggravated assault for engaging in unprotected sexual intercourse with a female officer without informing her that he was infected with the Human Immunodeficiency Virus (HIV).[83] The specification alleged that LT Upham committed "an assault upon a female by wrongfully having unprotected vaginal intercourse with a means likely to produce death or grievous bodily harm, to wit: unprotected vaginal intercourse while knowing he was infected with the Human Immunodeficiency Virus."[84] At trial, the prosecution presented evidence that LT Upham was HIV-positive, that he knew he could transmit the virus through sexual contact, that he had sexual intercourse with the alleged victim on two occasions without informing her of his HIV-positive status, and what the effects of an HIV infection were.[85] During the defense case, LT Upham testified and admitted to engaging in unprotected sex with the alleged victim without informing her of his HIV-positive status, of which he was aware.[86] He admitted that he had no justification for his conduct and that his conduct caused her great mental anguish.[87] However, he denied that this was a means likely to produce death or grievous bodily harm.[88] He testified that his viral load was so low as to be undetectable.[89] He had not

[80] "Assault" is defined in Article 128. "Any person subject to this chapter who attempts or offers with unlawful force or violence to do bodily harm to another person, whether or not the attempt or offer is consummated, is guilty of assault and shall be punished as a court-martial may direct." UCMJ art. 128(a) (2008).

[81] Although alternate acts that are not elements can be proven in the disjunctive, they cannot be alleged in the disjunctive in the specification. Alternate acts must be alleged in the conjunctive in the specification. "One specification should not allege more than one offense, either conjunctively (the accused 'lost and destroyed') or alternatively (the accused 'lost or destroyed'). However, if two acts or a series of acts constitute one offense, they may be alleged conjunctively." MCM, *supra* note 18, R.C.M. 307(c)(3) discussion (G)(iv). Instructing the members on variance and on findings by exception will result in the required concurrence on each act not excepted out. The issue in *Brown* arose because indecent assault was a lesser included offense of rape, so there was no alleged act or acts in a specification. Although the result should be the same whether the offense was a charged offense or a lesser include offense, the rules for drafting specifications that the President put in the Rules for Courts-Martial may cause a different result. When instructing on a lesser included offense in a situation like that in *Brown* but it is close as to whether the fact is an element or a method of committing an element, the military judge can avoid any issues by instructing in the conjunctive and giving a variance instruction.

[82] 66 M.J. 83, *recon. denied*, 66 M.J. 369 (C.A.A.F. 2008).

[83] *Id*. at 84.

[84] *Id.* at 84–85.

[85] *Id*. at 85.

[86] *Id.*

[87] *Id.*

[88] *Id.*

[89] *Id.*

experienced any symptoms or limitations from his HIV infection.[90] Although not a zero risk, he did not believe that he was going to infect her.[91]

When discussing instructions, the military judge asked the parties if they wanted him to instruct the members on the lesser included offense of assault consummated by a battery, and both parties sides agreed to waive it.[92] When instructing the members on the elements of aggravated assault, the military judge provided the following instruction.

> You are advised that a person who engages in unprotected sexual intercourse with another person, knowing that he is HIV positive, without informing his sexual partner that [he has] HIV and without using a condom has committed an offensive touching of that person. Also a person who willfully and deliberately exposes a person to seminal fluid containing HIV without informing that person of his HIV positive status and without using a condom has acted in a manner likely to produce death or grievous bodily harm.[93]

The defense counsel objected to this instruction, arguing that it stated that LT Upham was per se guilty of aggravated assault.[94] The military judge overruled the objection, on the basis that it accurately stated the law.[95]

On appeal, the Coast Guard Court of Criminal Appeals (CGCCA) concluded that the above instruction was erroneous, because it improperly removed the issues of "offensive touching" and "means likely to result in death or grievous bodily harm" from consideration by the members.[96] It also concluded that the error was prejudicial as to aggravated assault.[97] However, it concluded that the error was not prejudicial as to the lesser included offense of assault consummated by a battery.[98] Because it found that the absence of an instruction on the lesser included offense at trial did not preclude it, the CGCCA affirmed a conviction for the lesser included offense of assault consummated by a battery.[99]

As stated earlier, the CAAF looked at two issues. First of all, the analysis for structural error, which requires mandatory reversal, applies when the error affects the framework in which the trial was conducted, and not just an error within the trial process itself.[100] Otherwise, the harmless error test is applied to determine if the error is harmless beyond a reasonable doubt.[101] The harmless error test can be applied to error in the instructions on the elements, even when the instructions omit elements or incorrectly describe or presume elements.[102] In this case, as pertains to the lesser included offense of assault consummated by a battery, the instruction improperly directed the members to presume offensive toughing, if they found certain predicate facts. The Government still had the burden to prove the predicate facts beyond a reasonable doubt. The court found that this was not so intrinsically harmful to be a structural error and require automatic reversal, so the court applied the harmless error test.[103] In applying the harmless error test, the court looked at two factors: whether the element was contested; and whether the element was supported by overwhelming evidence.[104] Because LT Upham did not contest the offensive touching aspect of the aggravated assault and there was overwhelming evidence of offensive touching, including the testimony of the accused, the CAAF concluded that the error was harmless.[105]

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[90] *Id.*

[91] *Id.*

[92] *Id.*

[93] *Id.* (alteration in original).

[94] *Id.*

[95] *Id.*

[96] *Id.*

[97] *Id.*

[98] *Id.* at 86.

[99] *Id.*

[100] *Id.*

[101] *Id.*

[102] *Id.*

[103] *Id.* at 87.

[104] *Id.*

[105] *Id.*

Next the CAAF looked at whether the CGCCA could approve a conviction for the lesser included offense of assault consummated by a battery, when both parties waived it and the military judge did not instruct the members on it.[106] The courts of criminal appeals have the statutory authority to approve only so much of a finding as includes a lesser included offense.[107] Also, the COMA has held that an appellate court "may substitute a lesser-included offense for the disapproved findings. This is true even if the lesser-included offense was neither considered nor instructed upon at the trial of the case."[108] Based on legislation and case law, the CAAF concluded that the CGCCA was not precluded from approving a conviction for the lesser included offense of assault consummated by a battery.[109]

Although it was not necessary for the CAAF to address the underlying instructional error, it warrants discussion, because counsel often request instructions that are similarly erroneous. The instruction apparently came from a long line of cases affirming convictions of aggravated assault for engaging in sexual intercourse while knowingly HIV-positive. However, the language comes from appellate opinions that were considering sufficiency of the evidence or the providence of a guilty plea.[110] The appellate courts were not creating a rule of law or a mandatory presumption. However, the language in those appellate opinions may confuse counsel.

For example, in *United States v. Schoolfield*, the COMA stated, "Of course, in *United States v. Joseph*, 37 M.J. at 395–96, this Court recently held that protected or unprotected sexual intercourse by an HIV-infected soldier with another person *without informing* that person of the disease constituted an intentional offensive touching under Article 128 (an assault)."[111] In *Joseph*, the COMA had stated, "We hold that a rational fact finder could find, beyond a reasonable doubt, that appellant's conduct amounted to an assault consummated by a battery on Petty Officer W."[112]

Also, in *United States v. Bygrave*, the CAAF stated:

> This Court has made clear on numerous occasions that an HIV-positive servicemember commits an aggravated assault by having unprotected sexual intercourse with an uninformed partner. . . . Accordingly, we have held that any time a servicemember "willfully or deliberately" exposes another person to HIV, that servicemember may be found to have acted in a manner "likely to produce death or grievous bodily harm."[113]

The court cited to *Joseph*, which stated, "Depending on the circumstances of a particular case, we believe a fact finder could rationally find even ostensibly protected intercourse to be a 'means . . . likely to produce death or grievous bodily harm.'"[114]

Taking this language out of context, as counsel sometimes do when requesting instructions, results in an instruction that removes elements from consideration by the court members, if the predicate facts are proven. When counsel request a specific instruction that takes the holding of an appellate court out of context, the military judge should refuse to give the instruction, because it is incorrect.[115]

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[106] *Id.*

[107] *See* UCMJ art. 59(b) (2008).

[108] United States v. McKinley, 27 M.J. 78, 79 (C.M.A. 1988).

[109] *Upham*, 66 M.J. at 88.

[110] *See* United States v. Dacus, 66 M.J. 235 (C.A.A.F. 2008) (holding that the accused's pleas of guilty to aggravated assault for engaging in sexual intercourse with partners without informing them of his HIV-positive condition were provident, even though his low viral low made the risk of transmission low); United States v. Bygrave, 46 M.J. 491 (C.A.A.F. 1997) (holding evidence of the accused's unprotected sexual intercourse, with partner who knew the accused was infected with the HIV virus and consented, was legally sufficient for aggravated assault with a means likely to cause death or grievous bodily harm); United States v. Klauck, 47 M.J. 24 (C.A.A.F. 1997) (holding that evidence that the accused's sexual intercourse with partner whom he did not inform of his HIV-positive status was legally sufficient for conviction of aggravated assault, despite use of a condom); United States v. Schoolfield, 40 M.J. 132 (C.M.A. 1994) (holding that evidence of unprotected sexual intercourse by accused, who is knowingly infected with the HIV virus is legally sufficient for conviction of aggravated assault); United States v. Joseph, 37 M.J. 392 (C.M.A. 1993) (holding that evidence of ostensibly protected sexual intercourse, without informing partner of HIV infection, was legally sufficient for conviction of aggravated assault with a means likely to cause death or grievous bodily harm).

[111] *Schoolfield*, 40 M.J. at 136.

[112] *Joseph*, 37 M.J. at 396.

[113] 46 M.J. at 492 (quoting *Joseph*, 37 M.J. at 396).

[114] *Id.* (quoting *Joseph*, 37 M.J. at 396).

[115] *See* United States v. Zamberlan, 45 M.J. 491, 492 (C.A.A.F. 1997); United States v. Eby, 44 M.J. 425, 428 (C.A.A.F. 1996); United States v. Damatta-Olivera, 37 M.J. 474, 478 (C.M.A. 1993).

Military justice practitioners can learn lessons for both the appellate level and the trial level from *Upham*. On the appellate level, determining the standard to be applied could be critical in deciding whether instructional error requires reversal of the conviction. Also, an appellate court can approve a conviction for a lesser included offense, even if both parties at trial waived an instruction on it and the members never considered it. On the trial level, practitioners need to read appellate opinions in context, and not propose instructions that improperly remove consideration of issues from the court members.

Gambler's Defense

In *United States v. Falcon*,[116] the CAAF considered the viability of the "Gambler's Defense."[117] Postal Clerk Seaman (SN) Falcon pled guilty to three specifications of making and uttering checks without sufficient funds, in violation of Article 123a, UCMJ, and other offenses.[118] In all, SN Falcon wrote forty-nine checks for $4300.00 to two enlisted clubs.[119] After cashing these checks, SN Falcon used the money to play the slot machines located near the cash cages in the clubs.[120] Seaman Falcon did not have enough money in his checking account to cover the checks.[121] The military judge accepted SN Falcon's plea without discussing the "Gambler's Defense" with him.[122] On appeal, SN Falcon claimed his plea was improvident because the judge failed to advise him of this defense.[123]

The COMA has refused to "act as the 'strong arm' of a collection scheme for gamblers within the service in order to intimidate payment by 'debtors' of void gambling debts."[124] The early cases involve illegal gambling; at that time, all gambling was illegal.[125] The "Gambler's Defense" was extended to transactions related to legal gambling in *United States v. Wallace*.[126]

In *United State v. Wallace*, Major (MAJ) Wallace was convicted of wrongfully and dishonorably failing to place and maintain sufficient funds in his checking account to cover checks that he had written, as a violation of Article 134, UCMJ.[127] He was also convicted of a similar offense charged as a violation of Article 133, UCMJ.[128] Major Wallace was a frequent patron of the officers' club, where he played the slot machines.[129] He wrote checks to the club to get rolls of quarters, which he used to play the slot machines.[130] When individual checks were returned, the club would add the amount of the check to Major Wallace's monthly club account.[131] Major Wallace would then pay the monthly bill with another check.[132] If that check bounced, the amount of the check would be added to the next month's balance.[133] Major Wallace was a member of the

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[116] 65 M.J. 386 (C.A.A.F. 2008).

[117] *See* United States v. Wallace, 36 C.M.R. 148 (C.M.A. 1966).

[118] *Falcon*, 65 M.J. at 387.

[119] *Id.*

[120] *Id.*

[121] *Id.*

[122] *Id.* at 387.

[123] *Id.* at 387–88.

[124] United States v. Walter, 23 C.M.R. 274, 278 (C.A.A.F. 1957); *see also* United States v. Lenton, 25 C.M.R. 194 (C.M.A. 1958).

[125] "There is no doubt that gambling is illegal in the great majority of jurisdictions in the United States either by statute or by judicial interpretation of the public policy." *Walter*, 23 C.M.R. at 276.

[126] 36 C.M.R. 148.

[127] *Id.*

[128] *Id.*

[129] *Id.* at 149.

[130] *Id.*

[131] *Id.*

[132] *Id.*

[133] *Id.*

club's Board of Governors, and club personnel were well aware of his routine and character.[134] No one was concerned that the debt would not be paid, but the debt was discovered when the club's records were audited.[135]

In *Falcon*, the CAAF first considered whether the "Gambler's Defense" applied to violations of Article 123a.[136] Earlier cases, like *Wallace*, involved the dishonorable failure to maintain sufficient funds in violation of Article 134. The court noted the difference in the elements of the different bad check offenses. The bad check offense under Article 134 requires that the accused dishonorably fail to maintain funds in his checking account after the check is written.[137] This offense requires only bad faith or gross indifference on the part of the accused, not a specific intent to defraud.[138] The bad check offenses under Article 123a, on the other hand, require knowledge by the accused that he did not or would not have sufficient funds or credit with the bank at the time of the check's presentment, and either the intent to defraud or the intent to deceive.[139] The CAAF used this difference to distinguish *Wallace.* The court compared the bad check offenses and noted that the conduct of the payee could not affect the accused's specific intent, whereas the payee could affect the mens rea required for Article 134 bad check offense, like in *Wallace.*[140] Based on these differences, the court concluded that the defense did not extend to offenses under Article 123a, UCMJ, and the military judge properly accepted Falcon's plea.[141]

The CAAF, however, did not stop there. Even though it was not necessary to decide the issue presented, the CAAF decided to revisit the *Wallace* decision.[142] The Gambler's Defense was initially created to prevent the courts from enforcing debts created by illegal gambling.[143] *Wallace* extended the Gambler's Defense to legal gambling because "[w]hether gaming is legal or illegal, transactions involving the same or designed to facilitate it are against public policy, and the courts will not lend their offices to enforcement of obligations arising therefrom."[144] The CAAF reviewed the change in gambling's popularity and acceptance over the last forty years and came to the conclusion that *Wallace* should be overturned.[145]

The lessons for military justice practitioners are pretty straight-forward. First, the Gambler's Defense was not extended to bad check offenses under Article 123a. Second, the Gambler's Defense is no longer available for bad check offenses under Article 134 if the bad checks were written to pay *legal* gambling debts. This part of the court's decision can be characterized as *dicta,* but it is very clear *dicta.* Finally, the *Falcon* decision does not affect debts created by *illegal* gambling.[146] Counsel should be aware that the impact of *Falcon* has been captured in an approved interim change to the *Benchbook.*[147]

Mistake of Fact Defense

In *United States v. Wilson* the CAAF considered whether the mistake of fact as to age defense is available when the accused is charged with sodomy with a child under sixteen.[148] Private (PVT) Wilson pled guilty to carnal knowledge and

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[134] *Id.*

[135] *Id.* at 148–49.

[136] United States v. Falcon, 65 M.J. 386, 388–89 (C.A.A.F. 2008).

[137] UCMJ art. 134 (2008).

[138] *Id.*

[139] *Id.* art. 123a. Article 123a contains two separate offenses. The first offense proscribes making, drawing, uttering or delivering a bad check for the procurement of any article or thing of value, with the intent to defraud. *Id.* The second offense proscribes making, drawing, uttering or delivering a bad check for the payment of any past due obligation, or for any other purpose, with the intent to deceive. *See id.* It is very important to match the specific intent with the correct purpose. *See* United States v. Hardsaw, 49 M.J. 256 (C.A.A.F. 1998); United States v. Wade, 34 C.M.R. 287 (C.M.A. 1964).

[140] In *Wallace*, the club employees knew MAJ Wallace and his check-writing habits. *Wallace*, 36 C.M.R. at 149. This had an impact on whether MAJ Wallace's conduct was dishonorable. *See supra* note 103 and accompanying text.

[141] *Falcon*, 65 M.J. at 389.

[142] *Id.*

[143] *See* United States v. Walter, 23 C.M.R. 274 (C.M.A. 1957); United States v. Lenton, 25 C.M.R. 194 (C.M.A. 1958).

[144] *Wallace*, 36 C.M.R. at 149.

[145] *See Falcon*, 65 M.J. at 390.

[146] *Id.* at 390 n.6.

[147] *See* App.

[148] 66 M.J. 39, 40 (C.A.A.F. 2008).

sodomy with a fifteen-year-old girl. During the providence inquiry, the accused told the military judge that at their first meeting the girl told him that she was eighteen.[149] When explaining the offenses to PVT Wilson, the military judge told him that ignorance or mistake of the girl's true age is not a defense.[150] The Army Court of Criminal Appeals affirmed the military judge's decision to accept the plea.[151]

The court began its analysis with the general rule that a mistake of fact defense is available when the mistaken fact negates a required mental state.[152] The court also noted that even when statutes do not provide a mens rea to a particular element, the court can infer an intent to effectuate the common law rule favoring mens rea.[153] If there is an explicit or implicit intent, Rule for Courts-Martial (RCM) 916(j)(1) allows a mistake of fact of defense.[154] In addition, an appropriate policy-maker can create a mistake of fact defense even when the statute does not explicitly or implicitly require a mens rea for a particular fact.[155]

Noting that sodomy between consenting adults may be constitutionally protected, the court examined the second element of sodomy—that the girl was under the age of sixteen—to determine whether it contained a mens rea requirement, that is, that the accused knew that she was under sixteen.[156] The court points out that this element is not included in the text of Article 125; Congress did not include an explicit intent or knowledge requirement for that offense.[157] The second element was added by the President using his authority under Article 56, UCMJ to provide a factor that may be pled and proven to increase the maximum punishment, but, the court found, the President did not include an explicit mens rea when he added this element.[158]

Moving to the second part of the analysis, the CAAF declined to imply a mens rea for this fact based on the "the age of the child in sexual offenses involving children" exception to the common law rule favoring mens rea.[159] The court surveyed other jurisdictions and noted that "[i]n those jurisdictions that have departed from the historical treatment of sexual offenses involving children and permitted a mistake of fact defense with respect to the age of the child, the changes have almost always been made by the appropriate policymakers, not the judiciary."[160] The CAAF was unwilling to infer a *mens rea* for the age of the child when so many other courts that considered the issue did not.

Finally, the CAAF concluded that neither Congress nor the President created a mistake of fact as to age of the child defense.[161] The court discussed the disparate treatment of this defense created by the differences between Articles 120 and 125, UCMJ.[162] The court also examined executive action and concluded that the President had several opportunities to add a mistake of fact defense for sodomy with a child, but did not.[163] The court rejected the idea that Congress or the President intended to harmonize all sexual offenses, but simply overlooked Article 125.[164]

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[149] The accused must have learned the girl's true age before engaging with sexual intercourse with her because the accused pled guilty to carnal knowledge and mistake of fact as to age was not an issue. *Id.*

[150] *Id.*

[151] *Id.* at 47.

[152] *Id.* at 40.

[153] *Id.*

[154] *Id.*

[155] *Id.* at 40–41.

[156] *Id.* at 41.

[157] *Id.* at 41–42.

[158] *Id.* at 42.

[159] *Id.* at 43.

[160] *Id.* at 44.

[161] *Id.* at 45–47.

[162] Article 120 includes a limited mistake of fact defense, where Article 125 does not. *See* UCMJ arts. 120, 125 (2008).

[163] *Mitchell*, 66 M.J. at 47.

[164] *Id.*

> We decline to redraft Article 125, UCMJ, to include a defense that Congress might have added, but did not. . . .
>
> . . . .

The lesson for military justice practitioners is simple: "there is no mistake of fact defense as to the child's age for [sodomy with a child under the age of sixteen]."[165] Mistake of fact as to age is a defense to aggravated sexual assault of a child, aggravated sexual abuse of a child, abusive sexual contact with a child and indecent liberty with a child if the accused had an honest and reasonable belief that the child had attained the age of sixteen and the child was over twelve.[166]

Aider and Abettor Liability

In *United States v. Mitchell*, the CAAF addressed a subtle nuance of aider and abettor liability: what mens rea is required for an aider and abettor of a specific intent crime? [167] Corporal (Cpl) Mitchell was convicted of several offenses, including indecent assault as an aider and abettor.[168] He pled guilty to indecent assault, and the military judge explained aider and abettor liability to him using the standard instructions from the *Benchbook*.[169] The judge also advised the accused of the elements of indecent assault, including the element that the act be "done with the intent to gratify lust or sexual desires."[170] The judge did not specify whether Cpl Mitchell had to intend to gratify his lust or sexual desires or the perpetrator's lust or sexual desires.[171] The plea colloquy and the stipulation of fact amply established that Cpl Mitchell acted with the intent to gratify the lust or sexual desires of the perpetrator.[172] On appeal, the defense argued that this was insufficient based on interpretive guidance from the Manual for Courts-Martial that suggests that an aider and abettor must have same specific intent as the perpetrator.[173] The court considered "whether a person can be convicted as a principal by aiding and abetting absent proof that the person possessed the intent required of the actual perpetrator of the offense."[174]

The court pointed out that the military evolution of aiding and abetting is consistent with its common law development.[175] Further, the court made it clear that when interpretive guidance like the MCM conflicts with the court's precedent, the court will follow its precedent unless there is some indication that the President sought to alter the state of the law.[176] The court reminds us that "aiding and abetting requires proof of the following: '(1) the specific intent to facilitate the commission of a crime by another; (2) guilty knowledge on the part of the accused; (3) that an offense was being committed by someone; and (4) that the accused assisted or participated in the commission of the offense.'"[177] Applying these requirements to the facts of the case, the court found that the plea colloquy and stipulation of fact established each of these requirements, and the court held that the trial judge properly accepted the accused's guilty plea.[178]

> While legislative or executive inaction is not dispositive, the fact that neither Congress nor the President have acted with respect to Article 125, UCMJ, or the *MCM*, while specifically adding, and then maintaining, a mistake of fact defense with respect to the age of the child for Article 120, UCMJ, cuts against the suggestion that either Congress or the President intended to harmonize the legislative scheme.

Id.

[165] *Id*.

[166] UCMJ art. 120(o)(2).

[167] 66 M.J. 176 (C.A.A.F. 2008).

[168] *Id.* at 177.

[169] *Id.* at 178.

> The military judge stated that "an aider and abettor must knowingly and willfully participate in the commission of the crime as something he wishes to bring about and must aid, encourage, or excite the person to commit the criminal act." In addition, the military judge informed Appellant that he must have "consciously share[d] in the perpetrator's actual criminal intent" but did not have to "agree with or even have knowledge of the means by which [the perpetrator] carried out that criminal intent."

Id.

[170] *Id.* at 179.

[171] *Id.*

[172] *Id.* at 179–80.

[173] "When an offense charged requires proof of a specific intent or particular state of mind as an element, the evidence must prove that the accused had that intent or state of mind, whether the accused is charged as a perpetrator or an 'other party' to crime." *Id.* at 179; *see also* MCM, *supra* note 18, para. 1.b.(4).

[174] *Mitchell*, 66 M.J. at 178.

[175] *Id.* at 179.

[176] *Id.*

[177] *Id.* at 180 (citing United States v. Pritchett, 31 M.J. 213, 217 (C.M.A. 1990)).

[178] *Id.*

The lesson for military justice practitioners is that paragraph 1.b.(4) of Part IV of the *MCM* is not a correct summary of the law on this point. The CAAF precedent does not require that an aider and abettor possess the same specific intent as the perpetrator. An aider and abettor must have the specific intent to facilitate the commission of a crime by the perpetrator. When drafting elements for instructions or a guilty plea, the military judge should draft the elements of the offense committed with the perpetrator's name, including the specific intent element if the offense is a specific intent crime. The judge should then add the additional element or elements for aider and abettor liability drafted with the accused as the subject.[179]

Conclusion

This article will help criminal law practitioners stay current with legal developments that affect instructions. The *Benchbook* remains the primary resource for instructions. The *Benchbook*, however, is only the first step for writing instructions, preparing for providence inquiries, or conducting legal research. As this article illustrates, the law develops and the instructions must keep up.

[179] Instruction 7-1 of the *Benchbook* provides a good example that incorporates all of the requirements of aider and abettor liability into one element. *See* BENCHBOOK, *supra* note 2, instr. 7-1. A judge could, however, add the elements listed in *United States v. Pritchett*, to the elements of the committed offense. *See supra* note 177 and accompanying text.

REPLACE NOTE 4 of Instruction 3-49-1. CHECK, WORTHLESS, WITH INTENT TO DEFRAUD (ARTICLE 123a), with the following new NOTE 4:

NOTE 4: Gambling debts and checks for gambling funds. In United States v. Falcon, 65 M.J. 386 (C.A.A.F. 2008), the CAAF overruled its historical position that public policy prevents using the UCMJ to enforce debts incurred from legal gambling and checks written to obtain proceeds with which to gamble legally (commonly called the "gambler's defense"). See United States v. Wallace, 36 C.M.R. 148 (C.M.A. 1966), United States v. Allberry, 44 M.J. 226 (C.A.A.F. 1996); United States v. Green, 44 M.J. 828 (Army Ct. Crim. App. 1996).

Note that the CAAF in Falcon declined to apply "a sweeping defense based on public policy" to allegations that third-party complicity negates a required element of an offense, stating the issue would be addressed on a case-by-case basis. The CAAF reiterated that the government maintains the burden of proving each element beyond a reasonable doubt and the accused remains free to raise such facts that show his conduct does not satisfy a necessary element. Falcon, 65 M.J. at 390 n.4.

The CAAF also specifically declined to address the ongoing validity of United States v. Walter, 23 C.M.R. 275 (C.M.A. 1957), and United States v. Lenton, 25 C.M.R. 194 (C.M.A. 1958), because Falcon dealt with legal gambling and Walter and Lenton dealt with illegal gambling. Falcon, 65 M.J. at 390 n.6. Until the CAAF specifically addresses the ongoing validity of Walter and Lenton, if there is an issue whether the check was used to pay a debt from illegal gambling or the check was used to obtain funds to gamble illegally, the first paragraph of the instruction below should be given. If there is an issue that some but not all of the check arose from an illegal gambling debt or was used to obtain funds for illegal gambling, the fourth paragraph of the instruction below should also be given.

The evidence has raised the issue whether the check(s) in question (was)(were) written to (pay a debt from gambling illegally)(obtain funds with which to gamble illegally). The UCMJ may not be used to enforce worthless checks used to (pay a debt from gambling illegally)(obtain funds with which to gamble illegally) when the purported victim (or payee of the check) was a party to, or actively facilitated, the gambling.

To find the accused guilty of the offense in specification(s) _____ of Charge(s) _____, you must be convinced beyond reasonable doubt that the check(s) in question (was)(were) not used to (pay a debt from gambling illegally)(obtain funds with which to gamble illegally). Even if the check(s) (was)(were) used to (pay a debt from gambling illegally)(obtain funds with which to gamble illegally), if you are convinced beyond reasonable doubt that the purported victim (or payee of the check) was not a party to or did not actively facilitate the illegal gambling, or otherwise did not have knowledge of the illegal gambling-related purpose of the check, you may find the accused guilty when all other elements of the offense have been proven beyond a reasonable doubt.

(Also, if you find beyond reasonable doubt that the accused intentionally, that is, purposely, avoided the check-cashing facility's efforts to discover that (he)(she) was on a dishonored or "bad check" list, you may find the accused guilty notwithstanding the UCMJ limitation I mentioned, when all other elements of the offense have been proven beyond a reasonable doubt.)

(The evidence has also raised the issue whether all or only part of the check(s) in question (was)(were) used to (pay a debt from gambling illegally)(obtain funds with which to gamble illegally). The UCMJ limitation I mentioned only extends to that part of the check's(s') proceeds that (was)(were) used to (pay a debt from gambling illegally)(obtain funds with which to gamble illegally). If you find this is the case and all other elements of the offense have been proven beyond a reasonable doubt, you may find the accused guilty by exceptions and substitutions only to that part of the check(s) which you are convinced beyond a reasonable doubt was not used to (pay a debt from gambling illegally)(obtain funds with which to gamble illegally). You do this by excepting the value(s) alleged in the specification(s) and substituting (that)(those) value(s) of which you are convinced beyond a reasonable doubt (was)(were) not used to (pay a debt from gambling illegally)(obtain proceeds to gamble illegally).)

REPLACE NOTE 2 of Instruction 3-49-2. CHECK, WORTHLESS, WITH INTENT TO DECEIVE (ARTICLE 123a), with the following new NOTE 2:

NOTE 2: Gambling debts and checks for gambling funds. In United States v. Falcon, 65 M.J. 386 (C.A.A.F. 2008), the CAAF overruled its historical position that public policy prevents using the UCMJ to enforce debts incurred from legal gambling and checks written to obtain proceeds with which to gamble legally (commonly called the "gambler's

defense"). See United States v. Wallace, 36 C.M.R. 148 (C.M.A. 1966), United States v. Allberry, 44 M.J. 226 (C.A.A.F. 1996); United States v. Green, 44 M.J. 828 (Army Ct. Crim. App. 1996).

Note that the CAAF in Falcon declined to apply "a sweeping defense based on public policy" to allegations that third-party complicity negates a required element of an offense, stating the issue would be addressed on a case-by-case basis. The CAAF reiterated that the government maintains the burden of proving each element beyond a reasonable doubt and the accused remains free to raise such facts that show his conduct does not satisfy a necessary element. Falcon, 65 M.J. at 390 n.4.

The CAAF also specifically declined to address the ongoing validity of United States v. Walter, 23 C.M.R. 275 (C.M.A. 1957), and United States v. Lenton, 25 C.M.R. 194 (C.M.A. 1958), because Falcon dealt with legal gambling and Walter and Lenton dealt with illegal gambling. Falcon, 65 M.J. at 390 n.6. Until the CAAF specifically addresses the ongoing validity of Walter and Lenton, if there is an issue whether the check was used to pay a debt from illegal gambling or the check was used to obtain funds to gamble illegally, the first paragraph of the instruction below should be given. If there is an issue that some but not all of the check arose from an illegal gambling debt or was used to obtain funds for illegal gambling, the fourth paragraph of the instruction below should also be given.

The evidence has raised the issue whether the check(s) in question (was)(were) written to (pay a debt from gambling illegally)(obtain funds with which to gamble illegally). The Uniform Code of Military Justice may not be used to enforce worthless checks used to (pay a debt from gambling illegally)(obtain funds with which to gamble illegally) when the purported victim (or payee of the check) was a party to, or actively facilitated, the gambling.

To find the accused guilty of the offense in specification(s) _____ of Charge(s) _____, you must be convinced beyond reasonable doubt that the check(s) in question (was)(were) not used to (pay a debt from gambling illegally)(obtain funds with which to gamble illegally). Even if the check(s) (was)(were) used to (pay a debt from gambling illegally)(obtain funds with which to gamble illegally), if you are convinced beyond reasonable doubt that the purported victim (or payee of the check) was not a party to or did not actively facilitate the illegal gambling, or otherwise did not have knowledge of the illegal gambling-related purpose of the check, you may find the accused guilty when all other elements of the offense have been proven beyond a reasonable doubt.

(Also, if you find beyond reasonable doubt that the accused intentionally, that is, purposely, avoided the check-cashing facility's efforts to discover that (he)(she) was on a dishonored or "bad check" list, you may find the accused guilty notwithstanding the UCMJ limitation I mentioned, when all other elements of the offense have been proven beyond a reasonable doubt.)

(The evidence has also raised the issue whether all or only part of the check(s) in question (was)(were) used to (pay a debt from gambling illegally)(obtain funds with which to gamble illegally). The UCMJ limitation I mentioned only extends to that part of the check's(s') proceeds that (was)(were) used to (pay a debt from gambling illegally)(obtain funds with which to gamble illegally). If you find this is the case and all other elements of the offense have been proven beyond a reasonable doubt, you may find the accused guilty by exceptions and substitutions only to that part of the check(s) which you are convinced beyond a reasonable doubt was not used to (pay a debt from gambling illegally)(obtain funds with which to gamble illegally). You do this by excepting the value(s) alleged in the specification(s) and substituting (that)(those) value(s) of which you are convinced beyond a reasonable doubt (was)(were) not used to (pay a debt from gambling illegally)(obtain proceeds to gamble illegally).)

REPLACE NOTE 1 of Instruction 3-68-1. CHECK—WORTHLESS—MAKING AND UTTERING—BY DISHONORABLY FAILING TO MAINTAIN SUFFICIENT FUNDS (ARTICLE 134), with the following new NOTE 1:

NOTE 1: Gambling debts and checks for gambling funds. In United States v. Falcon, 65 M.J. 386 (C.A.A.F. 2008), the CAAF overruled its historical position that public policy prevents using the UCMJ to enforce debts incurred from legal gambling and checks written to obtain proceeds with which to gamble legally (commonly called the "gambler's defense"). See United States v. Wallace, 36 C.M.R. 148 (C.M.A. 1966), United States v. Allberry, 44 M.J. 226 (C.A.A.F. 1996); United States v. Green, 44 M.J. 828 (Army Ct. Crim. App. 1996).

Note that the CAAF in Falcon declined to apply "a sweeping defense based on public policy" to allegations that third-party complicity negates a required element of an offense, stating the issue would be addressed on a case-by-case basis. The CAAF reiterated that the government maintains the burden of proving each element beyond a reasonable

doubt and the accused remains free to raise such facts that show his conduct does not satisfy a necessary element. Falcon, 65 M.J. at 390 n.4.

The CAAF also specifically declined to address the ongoing validity of United States v. Walter, 23 C.M.R. 275 (C.M.A. 1957), and United States v. Lenton, 25 C.M.R. 194 (C.M.A. 1958), because Falcon dealt with legal gambling and Walter and Lenton dealt with illegal gambling. Falcon, 65 M.J. at 390 n.6. Until the CAAF specifically addresses the ongoing validity of Walter and Lenton, if there is an issue whether the check was used to pay a debt from illegal gambling or the check was used to obtain funds to gamble illegally, the first paragraph of the instruction below should be given. If there is an issue that some but not all of the check arose from an illegal gambling debt or was used to obtain funds for illegal gambling, the fourth paragraph of the instruction below should also be given.

The evidence has raised the issue whether the check(s) in question (was)(were) written to (pay a debt from gambling illegally)(obtain funds with which to gamble illegally). The UCMJ may not be used to enforce worthless checks used to (pay a debt from gambling illegally)(obtain funds with which to gamble illegally) when the purported victim (or payee of the check) was a party to, or actively facilitated, the gambling.

To find the accused guilty of the offense in specification(s) _____ of Charge(s) _____, you must be convinced beyond reasonable doubt that the check(s) in question (was)(were) not used to (pay a debt from gambling illegally)(obtain funds with which to gamble illegally). Even if the check(s) (was)(were) used to (pay a debt from gambling illegally)(obtain funds with which to gamble illegally), if you are convinced beyond reasonable doubt that the purported victim (or payee of the check) was not a party to or did not actively facilitate the illegal gambling, or otherwise did not have knowledge of the illegal gambling-related purpose of the check, you may find the accused guilty when all other elements of the offense have been proven beyond a reasonable doubt.

(Also, if you find beyond reasonable doubt that the accused intentionally, that is, purposely, avoided the check-cashing facility's efforts to discover that (he)(she) was on a dishonored or "bad check" list, you may find the accused guilty notwithstanding the UCMJ limitation I mentioned, when all other elements of the offense have been proven beyond a reasonable doubt.)

(The evidence has also raised the issue whether all or only part of the check(s) in question (was)(were) used to (pay a debt from gambling illegally)(obtain funds with which to gamble illegally). The UCMJ limitation I mentioned only extends to that part of the check's(s') proceeds that (was)(were) used to (pay a debt from gambling illegally)(obtain funds with which to gamble illegally). If you find this is the case and all other elements of the offense have been proven beyond a reasonable doubt, you may find the accused guilty by exceptions and substitutions only to that part of the check(s) which you are convinced beyond a reasonable doubt was not used to (pay a debt from gambling illegally)(obtain funds with which to gamble illegally). You do this by excepting the value(s) alleged in the specification(s) and substituting (that)(those) value(s) of which you are convinced beyond a reasonable doubt (was)(were) not used to (pay a debt from gambling illegally)(obtain proceeds to gamble illegally).)

REPLACE NOTE 1 of Instruction 3-71-1. DEBT, DISHONORABLY FAILING TO PAY (ARTICLE 134), with the following new NOTE 1:

NOTE 1: Gambling debts. In United States v. Falcon, 65 M.J. 386 (C.A.A.F. 2008), the CAAF overruled its historical position that public policy prevents using the UCMJ to enforce debts incurred from legal gambling and checks written to obtain proceeds with which to gamble legally (commonly called the "gambler's defense"). See United States v. Wallace, 36 C.M.R. 148 (C.M.A. 1966), United States v. Allberry, 44 M.J. 226 (C.A.A.F. 1996); United States v. Green, 44 M.J. 828 (Army Ct. Crim. App. 1996).

Note that the CAAF in Falcon declined to apply "a sweeping defense based on public policy" to allegations that third-party complicity negates a required element of an offense, stating the issue would be addressed on a case-by-case basis. The CAAF reiterated that the government maintains the burden of proving each element beyond a reasonable doubt and the accused remains free to raise such facts that show his conduct does not satisfy a necessary element. Falcon, 65 M.J. at 390 n.4.

The CAAF also specifically declined to address the ongoing validity of United States v. Walter, 23 C.M.R. 275 (C.M.A. 1957), and United States v. Lenton, 25 C.M.R. 194 (C.M.A. 1958), because Falcon dealt with legal gambling and Walter and Lenton dealt with illegal gambling. Falcon, 65 M.J. at 390 n.6. Until the CAAF specifically addresses the ongoing validity of Walter and Lenton, if there is an issue whether the debt(s) arose from illegal gambling, the first

two paragraphs of the instruction below should be given. If there is an issue that some but not all of the debt(s) arose from illegal gambling, the third paragraph of the instruction below should also be given.
The evidence has raised the issue whether the debt(s) in question (was)(were) from gambling illegally. The UCMJ may not be used to enforce debts from gambling illegally when the purported victim was a party to, or actively facilitated, the gambling.

To find the accused guilty of the offense in specification(s) _____ of Charge(s) _____, you must be convinced beyond reasonable doubt that the debt(s) in question (was)(were) not (a) debt(s) from gambling illegally. Even if the debt(s) (was)(were) from gambling illegally, if you are convinced beyond reasonable doubt that the purported victim was not a party to or did not actively facilitate the illegal gambling, or otherwise did not have knowledge of the illegal gambling-related purpose of the debt, you may find the accused guilty when all other elements of the offense have been proven beyond a reasonable doubt.

(The evidence has also raised the issue whether all or only part of the debt(s) in question (was)(were) (a) debt(s) from gambling illegally. The UCMJ limitation I mentioned only extends to that part of the debt(s) that (was)(were) from gambling illegally. If you find this is the case and all other elements of the offense have been proven beyond a reasonable doubt, you may find the accused guilty by exceptions and substitutions only to that part of the debt(s) which you are convinced beyond a reasonable doubt (was)(were) not from gambling illegally. You do this by excepting the sum(s) alleged in the specification(s) and substituting (that)(those) sum(s) of which you are convinced beyond a reasonable doubt (was)(were) not from gambling illegally.)

"Damn the Torpedoes! Full Speed Ahead!"[1]—Fourth Amendment Search and Seizure Law in the 2008 Military Appellate Term of Court

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

Introduction

This year's new developments in search and seizure jurisprudence saw the military appellate courts "comfortable in their own skin" as they handed down opinions on Fourth Amendment law as it related to computers and electronic media. This development is significant since over the past several years the courts have been circumspect in their decisions on computer related search and seizure issues.[3] This year's decisions from the Court of Appeals of the Armed Forces (CAAF)[4] and the service courts of criminal appeals[5] were confident and sure. If last year's term of court was viewed as "the collective military courts . . . applying the rudder, and aligning the course, of Fourth Amendment jurisprudence in terms of reasonable expectation of privacy in computers and digital media, as well as, scope of consent,"[6] then this was the year of "Damn the torpedoes! Full speed ahead!"[7]

If the military courts of appeals were considered dynamic this term of court, then the U.S. Supreme Court was somnolent.[8] The Supreme Court did not "damn" anything this year, and proceeded at about "quarter" speed in regard to the Fourth Amendment with a single case: *Virginia v. Moore*.[9] However, the coming October Term 2008 is truly exciting and should make up for the 2007 term with the following cases: *Pearson v. Callahan*,[10] *Arizona v. Gant*,[11] *Arizona v. Johnson*,[12] and *Herring v. United States*.[13]

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[1] During the Civil War Battle of Mobile Bay in 1864, Rear Admiral Farragut rallied his fleet by uttering the words: "Damn the Torpedoes! Full Speed Ahead!" *See* National Park Service, David Glasgow Farragut, http://www.nps.gov/archive/vick/visctr/siteblt n/farragut.htm (last visited Feb. 11, 2009).

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

[3] *See, e.g.*, United States v. Long, 64 M.J. 57 (C.A.A.F. 2006).

[4] The CAAF 2008 term of court began on 1 October 2007 and ended 31 August 2008. *See* U.S. Court of Appeals for the Armed Forces, Opinions & Digest, http://www.armfor.uscourts.gov/Opinions.htm (last visited Feb. 11, 2009); *see infra* sec. II (discussing United States v. Larson, 64 M.J. 559 (A.F. Ct. Crim. App. 2006); United States v. Rader, 65 M.J. 30 (C.A.A.F. 2007); United States v. Gallagher, 65 M.J. 601 (N-M. Ct. Crim. App. 2007); United States v. Weston, 65 M.J. 774 (N-M. Ct. Crim. App. 2007)).

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

[6] Lieutenant Colonel Stephen R. Stewart, *Practicing What the Court Preaches—2007 New Developments in Fourth Amendment Search and Seizure Law*, ARMY LAW., June 2008, at 1, 2; *see, e.g.*, *Larson*, 64 M.J. 559: *Rader*, 65 M.J 30.

[7] *Supra* note 1.

[8] The U.S. Supreme Court's October 2007 term began on 1 October 2007 and ended 30 September 2008. *See* Supreme Court of the United States 2007 Term Opinions of the Court, http://www.supremecourtus.gov/opinions/07slipopinion.html (last visited Feb. 16, 2009).

[9] 128 S. Ct. 1598 (2008). The *Moore* case, although not insignificant in its own right, addressed whether the police violated the Fourth Amendment "when they made an arrest that was based on probable cause but prohibited by state law, or when they performed a search incident to arrest." *Id.* at 1600. This case arose after Mr. Moore was pulled over and arrested for driving on a suspended license. *Id.* at 1601. He was searched incident to apprehension and sixteen grams of crack cocaine and $516 in cash was discovered on his person. *Id.* Under state law, Mr. Moore should have been issued a citation instead of arrested. *Id.* at 1602. Consequently, Mr. Moore argued that the evidence should be suppressed under the Fourth Amendment. *Id.* The Virginia Supreme Court agreed with Mr. Moore and reasoned "that since the arresting officers should have issued Moore a citation under state law, and the Fourth Amendment does not permit search incident to citation, the arrest search violated the Fourth Amendment." *Id.* at 1602. The U.S. Supreme Court overturned the Supreme Court of Virginia stating that "linking Fourth Amendment protections to state law would cause them to 'vary from place to place and from time to time.'" *Id.* at 1607 (citing Whren v. United States, 517 U.S. 806, 815 (1996)). Therefore, the Court ruled that "[w]hen officers have probable cause to believe that a person has committed a crime in their presence, the Fourth Amendment permits them to make an arrest, and to search the suspect in order to safeguard evidence and ensure their own safety." *Id.* at 1608.

[10] 129 S. Ct. 808 (2009). This case "raises the question of whether police officers may enter a home without a warrant immediately after an undercover informant buys drugs inside, and whether qualified immunity protects officers from civil rights claims arising from such searches." Kimberly Atkins, *October Term of U.S. Supreme Court Term Set to Begin*, LAWREADER, Sept. 29, 2008, http://news.lawreader.com/?p=2012.

This article is divided into two-parts and carries the same admonishment as stated in last year's article: "this year's symposium article should, and needs to, be viewed as the next in a series of articles regarding the continuing evolution of Fourth Amendment law."[14] Part I of this article addresses the new confidence demonstrated by the CAAF and the Air Force Court of Criminal Appeals (AFCCA) in applying search and seizure law in the context of computers.[15] Part II looks ahead to the 2008 Supreme Court term of court and the possible effect *Herring v. United States*[16] may have on the Exclusionary Rule.[17]

I. Computers and Search and Seizure Law

A. Introduction

Evidence that involves computers, or is derived from computers, can cause the most nimble legal mind to freeze when determining its admissibility. Whether it is the fear of technology, or the cognitive dissonance that occurs when a military court rules that a servicemember has a reasonable expectation of privacy in a government computer system,[18] the Fourth Amendment practitioner inevitably pauses to consider how search and seizure law is applied to new technology. Consequently, the advent of computer crime law helps us compartmentalize, organize, and analyze these seemingly nascent issues.

Computer crime law is fundamentally no different than typical criminal law. It is merely recognition of a shift from physical crimes to digital crimes.[19] The changes can be found in the facts of how and where crimes are committed as well as how and where evidence is collected.[20] Hence, computer crime law is bifurcated into two areas: substantive computer crime law and procedural computer crime law.[21]

Substantive computer crime law is the law governing the use of a computer to commit a crime.[22] It can be divided into two basic categories: computer misuse crimes and traditional crimes.[23] "Computer misuse crimes are a new type of criminal

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[11] No. 07-542 (U.S. filed Oct. 24, 2007). The "Court will consider whether the Fourth Amendment requires law enforcement officers to demonstrate a threat to their safety or a need to preserve evidence related to the crime before conducting a warrantless search of a car after the occupants have been detained and removed from the vehicle." Atkins, *supra* note 10.

[12] 129 S. Ct. 781 (2009). "The justices will decide whether an officer conducting a pat-down after a stop for a minor traffic violation can search a passenger he believes to be armed and dangerous, even if he has no basis for believing the passenger is committing, or has committed, a criminal offense." Atkins, *supra* note 10.

[13] 129 S. Ct. 695 (2009). "The Court will consider whether evidence must be suppressed when an officer obtained the evidence in an arrest and car search relying solely upon seemingly credible—but factually erroneous—information negligently provided by another law enforcement agent." Atkins, *supra* note 10.

[14] Stewart, *supra* note 6, at 1.

[15] *See* United States v. Wallace, 66 M.J. 5 (C.A.A.F. 2008) (computers and the scope of consent); United States v. Larson, 66 M.J. 212 (C.A.A.F. 2008) (computers and the reasonable expectation of privacy); United States v. Michael, 66 M.J. 78 (C.A.A.F. 2008) (computers and the reasonable expectation of privacy in mislaid property and the reasonableness of a search); United States v. Osorio, 66 M.J. 632 (A.F. Ct. Crim. App. 2008) (computers and the scope of search vis-à-vis the execution of a valid search warrant).

[16] *Herring*, 129 S. Ct. at 695.

[17] The exclusionary rule is defined as "[a]ny rule that excludes or suppresses evidence obtained in violation of an accused person's constitutional rights." BLACK'S LAW DICTIONARY 587 (7th ed. 1999). There is academic debate on the import of the *Herring* decision on the Exclusionary Rule. Chief Justice Roberts, writing for the majority, stated that "unlawful police conduct should not require the suppression of evidence if all that was involved was isolated carelessness." Adam Liptak, *Justices Step Closer to Repeal of Evidence Ruling*, N.Y. TIMES, Jan. 31, 2009, at A1, *available at* http://www.nytimes.com/2009/01/31/washington/31scotus.html.

[18] United States v. Long, 64 M.J. 57 (C.A.A.F. 2006). In *Long*, the CAAF found that Corporal Long possessed a reasonable expectation of privacy in her government e-mail account on very specific facts supporting her subjective expectation of privacy. *Id.* at 66. Anecdotally, a number of Judge Advocates have expressed amazement that there would even be consideration of any expectation of privacy in government computer networks and systems as the networks and systems are used by the servicemember for the benefit of the government.

[19] ORIN S. KERR, COMPUTER CRIME LAW 1 (2006) ("There are two reasons to label criminal conduct a computer crime. First, an individual might use a computer to engage in a criminal activity. Second, the evidence needed to prove a criminal case might be stored in computerized form.").

[20] *Id.* "When the facts change, the law must change with it. Old laws must adapt and new laws must emerge to restore the function of preexisting law." *Id.* at 3. "Computer crime law is the search for and study of new answers to timeless questions of criminal law when the facts switch from a physical environment to a digital environment." *Id.*

[21] *Id.* at 1.

[22] *Id.*

offense involving intentional interference with the proper functioning of computers,"[24] whereas "traditional crimes are traditional criminal offenses facilitated by computers."[25]

Procedural computer crime law is the law governing the collection of computerized evidence.[26] Like its substantive aspect, procedural computer crime law consists of two discrete areas: statutory privacy law and the Fourth Amendment.[27] Where statutory privacy law addresses the law regulating digital evidence collection,[28] the Fourth Amendment aspect of procedural computer crime law measures the constitutional limits on digital evidence collection.[29]

The constitutional limits may be measured in the form of three questions: "When is retrieving evidence from a computer a search?"[30] "When is it a seizure?"[31] "When is the search or seizure reasonable?"[32] It is this last question that preoccupied the CAAF and the AFCCA this past term of court.

Four of the eight published Fourth Amendment cases in the collective military term of court addressed procedural computer crime law. These cases touched upon a plethora of seminal issues involving search and seizure law. For instance, *United States v. Wallace* addressed the issue of consent;[33] *United States v. Larson* revisited the issue of reasonable expectation of privacy in government computer systems;[34] *United States v. Michael* concerned the reasonableness of a search regarding misplaced property;[35] and *United States v. Osorio* analyzed the reasonableness of the execution of a valid search warrant.[36] These cases deserve a full discussion.

B. Computers and the Scope of Consent

The *Wallace* case illustrates the complexity of procedural computer crime law in regard to the issue of consent in computer searches.[37] Staff Sergeant (SSgt) Wallace, United States Air Force (USAF), was investigated for a sexual relationship he pursued with a fifteen-year-old female military dependent.[38] The Air Force Office of Special Investigations

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[23] *Id.*

[24] *Id.* ("Examples include hacking offenses, virus crimes, and denial of services attacks. These offenses punish interference with the intended operation of computers, either by exceeding a user's privileges (e.g. hacking) or by denying privileges to others (e.g. denial of service attack).").

[25] *Id.* ("Examples include internet fraud schemes, online threats, distributing digital images of child pornography, and theft of trade secrets over the internet.").

[26] *Id.* at 2.

[27] *Id.*

[28] *Id.* ("[T]he law regulating digital evidence collection derives from three privacy statutes: The Wiretap Act, the Pen Register statute, and the Stored Communications Act."). "The Wiretap Act, Stored Communications Act, and Pen Register statute are complex surveillance statutes that were enacted to create a statutory form of the Fourth Amendment applicable to computer networks." *Id.* at 178. The Wiretap Act is shorthand for 18 U.S.C. § 2511—Interception and Disclosure of Wire, Oral, or Electronic Communications Prohibited. 18 U.S.C. § 2511 (2006). The criminal provision of the Wiretap Act penalizes one who "intentionally intercepts, endeavors to intercept, or procures any other person to intercept or endeavor to intercept, any wire, oral or electronic communication." KERR, *supra* note 19, at 179 (citing 18 U.S.C. § 2511(1)(a)). "[T]he Pen Register statute is violated when a person obtains in real time the dialing, routing, addressing, and signaling information relating to an individual's telephone calls or Internet Communications." *Id.* (citing 18 U.S.C. § 3121). The Stored Communications Act is a "prohibition [of] a specific type of unauthorized access law, punishing one who 'intentionally accesses without authorization a facility through which an electronic communication while it is in electronic storage in such system." *Id.* at 179–80 (citing 18 U.S.C. § 2701(a)).

[29] KERR, *supra* note 19, at 2.

[30] *Id.*

[31] *Id.*

[32] *Id.*

[33] 66 M.J. 5 (C.A.A.F. 2008).

[34] 66 M.J. 212 (C.A.A.F. 2008).

[35] 66 M.J. 78 (C.A.A.F. 2008).

[36] 66 M.J. 632 (A.F. Ct. Crim. App. 2008).

[37] *Wallace*, 66 M.J. 5.

[38] *Id.* at 6.

(AFOSI) conducted the investigation.[39] Staff Sergeant Wallace was questioned by the AFOSI agents where he was read his Article 31 rights,[40] and agreed to speak with the agents without the presence of a lawyer.[41]

During and after the course of questioning, several dispositive actions by the AFOSI agents were taken to facilitate SSgt Wallace's cooperation. First, the agents informed SSgt Wallace "their investigation would reveal enough evidence to sentence [him] to confinement for life and would require [him] to register as a sex offender."[42] Staff Sergeant Wallace acknowledged that he had contacted the minor via e-mail and instant messenger.[43] Consequently, the agents sought and received SSgt Wallace's consent to search his personal computer and home for evidence.[44] After giving his consent, SSgt Wallace was escorted to his home by the agents, and they were joined by another AFOSI agent, SSgt Wallace's first sergeant, and a chaplain.[45] Staff Sergeant Wallace's wife arrived shortly thereafter, and SSgt Wallace and his wife then objected to the seizure of their home computer since it had "their life on it."[46] Finally, despite the protests of SSgt Wallace and his wife, the agents insisted that "they had to take [the computer]," leading SSgt Wallace to consent to its removal.[47] These actions led to the crux of the voluntariness issue, which the court considered.

The trial court and AFCCA were unsympathetic to SSgt Wallace's motion to suppress evidence which was "obtained from the search of [Wallace's] computer on the theory that [Wallace] involuntarily consented in the first place or, alternatively, revoked consent when he told agents not to take the computer."[48] The trial court denied the motion and found that SSgt Wallace freely consented, and that, in the alternative, if he had revoked his consent, the Government would have inevitably discovered[49] the images "because there was probable cause to search for e-mails and instant messages related to [Wilson's] relationship with the minor."[50] Staff Sergeant Wallace was found guilty at a general court-martial of carnal knowledge, sodomy, and possessing child pornography.[51] The CAAF addressed three issues in the context of voluntariness: (1) whether SSgt Wallace's initial consent to search his residence included seizure of his computer;[52] (2) whether SSgt Wallace's ultimate consent to seizure of his computer at his residence after revocation of his initial consent to do so was voluntary;[53] and (3) whether the doctrine of inevitable discovery was applicable to render admissible evidence of child pornography found on SSgt Wallace's computer subsequent to its illegal seizure pursuant to SSgt Wallace's involuntary

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[39] *Id.*

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

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

Id.

[41] *Wallace*, 66 M.J. at 6 ("He agreed to proceed without a lawyer when investigators could not make contact with the Area Defense Counsel.").

[42] *Id.*

[43] *Id.*

[44] *Id.* ("Appellant signed an AF Form 1364, entitled, 'Consent for Search and Seizure,' and consented to the general search of his home and computer.").

[45] *Id.*.

[46] *Id.* Staff Sergeant Wallace stated:

> [The computer] has our life on it. It has our photo albums on it. It's got our banking on it. All of our financial stuff is on there. You know, I use it to do all of our bill paying and everything else. Our online business is on there. I was like "You can't take it." Then my wife even started going nuts at that time.

Id.

[47] *Id.* ("[F]orensic analysis revealed the e-mail and chat traffic between [Wallace] and [the minor].").

[48] *Id.* at 7.

[49] *See* MCM, *supra* note 5, MIL. R. EVID. 311(b)(2) ("Evidence that was obtained as a result of an unlawful search or seizure may be used when the evidence would have been obtained even if such unlawful search or seizure had not been made.").

[50] *Wallace*, 66 M.J. at 7.

[51] *Id.*

[52] *Id.* at 5.

[53] *Id.*

consent.[54] As with most Fourth Amendment issues involving voluntariness, the facts and circumstances of this case are dispositive.[55]

Voluntariness is derived from all the circumstances,[56] or, as the Supreme Court has applied it, "totality-of-the-circumstances."[57] Hence, the CAAF applied this standard to two of the three claims SSgt Wallace made regarding his consent.[58] Staff Sergeant Wallace's first argued that his consent to the search of his home should have been limited in scope, especially after he revoked consent to seize his computer and then acquiesced to the AFOSI agents' authority.[59] The court recognized that SSgt Wallace could limit the scope of any search,[60] and found that the "argument [did] not fit the facts of this case."[61] The court simply looked to the "Consent for Search and Seizure" form which showed SSgt Wallace's explicit consent and the broad permission for investigators to "take any letters, papers, materials, articles or other property they consider to be evidence of an offense."[62] The interpretation the court gave this document is based on "objective reasonableness of the consent—not [Wallace's] supposed impression—that controls."[63] So, based on the "typical reasonable person," the court concluded that the AFOSI investigators were within their right to not only search, but to "remove the computer from the premises."[64] Staff Sergeant Wallace, however, did not concede the point. He argued that his wife's objection to the computer's removal constituted consent revocation.[65]

Staff Sergeant Wallace insisted his wife's objection constituted consent revocation based on the Supreme Court's holding in *Georgia v. Randolph*.[66] The CAAF is unconvinced. *Randolph* stands for the proposition that a "warrantless search of a shared dwelling for evidence over the express refusal of consent by a physically present resident cannot be justified as reasonable as to him on the basis of consent given to the police by another resident."[67] Whereas SSgt Wallace saw his circumstances in the same light as *Randolph*, the CAAF interpreted *Randolph* as not permitting a "non-accused co-resident to supersede the wishes of the accused co-resident."[68] In simpler words, the CAAF shut down this argument because "Fourth Amendment rights 'are personal rights which, like some other constitutional rights, may not be vicariously asserted.'"[69] Staff Sergeant Wallace, however, found his stride on his third argument regarding consent.

The CAAF agreed with SSgt Wallace that his second "so-called" consent amounted to mere "passive acquiescence to the color of authority" when the AFOSI agents informed him that "'they would have to take the computer' as 'a matter of routine.'"[70] The significance of this finding is the CAAF's formal adoption of the AFCCA non-exhaustive six *Murphy* factors in determining voluntariness under *Schneckloth's* totality of the circumstances analysis.[71] The factors are:

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[54] *Id.*

[55] MCM, *supra* note 5, MIL. R. EVID. 314(e)(4) ("To be valid, consent must be given voluntarily. Voluntariness is a question to be determined from all the circumstances.").

[56] *Id.*

[57] *Wallace*, 66 M.J. at 8.

[58] *Id.*

[59] *Id.* at 7.

[60] *Id.* The CAAF looks to MRE 314(e)(3) which states that "consent to search may be limited in any way by the person granting consent, including limitations in terms of time, place, or property and may be withdrawn at any time." *Id.* (citing MCM, *supra* note 5, MIL. R. EVID. 314(e)(3)).

[61] *Id.*

[62] *Id.* at 7–8.

[63] *Id.* at 8.

[64] *Id.*

[65] *Id.*

[66] *Id.* (citing Georgia v. Randolph, 547 U.S. 103 (2006)). *See generally* Lieutenant Colonel Stephen R. Stewart, *Katy Bar the Door—2006 New Developments in Fourth Amendment Search and Seizure Law*, ARMY LAW., June 2007, at 2–4.

[67] *Wallace*, 66 M.J. at 9 (citing *Randolph*, 547 U.S. at 120).

[68] *Id.*

[69] *Id.* (citing Alderman v. United States, 394 U.S. 165, 174 (1969)).

[70] *Id.*

[71] *Id.* (citing United States v. Murphy, 36 M.J. 732, 734 (A.F.C.M.R. 1992); Schenckloth v. Bustamonte, 412 U.S. 218, 226–27 (1973)).

> (1) the degree to which the suspect's liberty was restricted; (2) the presence of coercion or intimidation; (3) the suspect's awareness of his right to refuse based on inferences of the suspect's age, intelligence, and other factors; (4) the suspect's metal state at the time; (5) the suspect's consultation, or lack thereof, with counsel; and (6) the coercive effects of any prior violations of the suspect's rights.[72]

According to the CAAF, four of the six factors were met.[73] First, SSgt Wallace "clearly faced restrictions on his liberty" with "three individuals escort[ing Wallace] from the AFOSI building to his home—the two AFOSI agents . . . and [Wallace's] first sergeant."[74] The court concluded that if Wallace "faced no restrictions on his liberty," then his first sergeant as an "escort would have been unnecessary."[75] Second, "the facts of the escort and the presence of several authority figures also created a coercive and intimidating atmosphere."[76] Third, despite the fact Wallace was "a twenty-six-year-old staff sergeant with nearly eight years of service, it is doubtful that he knew he could withdraw consent once given."[77] Additionally, Article 31, UCMJ, warnings do not provide a disclaimer indicating that consent, once given, can be withdrawn, and the agents commented that they "'would have to take the computer' as a matter of routine" left SSgt Wallace believing that he could not refuse consent.[78] Finally, SSgt Wallace "never consulted counsel throughout his questioning and the subsequent search."[79] Consequently, SSgt Wallace's "ultimate consent to the seizure of the computer was not a valid consent, but rather mere acquiescence to the color of authority."[80] Despite this conclusion, the CAAF still supported the military judge in denying SSgt Wallace's motion to suppress.

The CAAF relied on the doctrine of inevitable discovery to admit the evidence discovered on SSgt Wallace's computer. This doctrine "creates an exception to the exclusionary rule allowing admission of evidence that, although obtained improperly, would have been obtained by other lawful means."[81] Military Rule of Evidence (MRE) 311(b)(2) articulates this exception as "[e]vidence that was obtained as a result of an unlawful search or seizure may be used when the evidence would have been obtained even if such unlawful search or seizure had not been made."[82] The CAAF, therefore, relied on SSgt Wallace's statements made to the AFOSI agents prior to giving his consent to search as the basis for applying the inevitable discovery exception.

Staff Sergeant Wallace's admission of a "sexual relationship with a young girl with whom he communicated mostly via e-mail and instant messenger" to the AFOSI agents provided the foundation in which the inevitable discovery doctrine rests.[83] This statement "encouraged investigators to focus on the computer as a source of evidence and created sufficient probable cause to allow AFOSI to obtain an authorization to search for, and seize e-mails and messages between [Wallace] and [the minor child]."[84] As a result, "the files containing child pornography would have been inevitably discovered" through a valid search.[85]

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[72] *Id.* (citing *Murphy*, 36 M.J. at 734).

[73] *Id.* at 10.

[74] *Id.* at 9.

[75] *Id*.

[76] *Id*. The authority figures were the first sergeant and the chaplain. *Id*.

[77] *Id*.

[78] *Id*.

[79] *Id*. at 10.

[80] *Id*.

[81] *Id*. (citing Nix v. Williams, 467 U.S. 431, 444 (1984)); *see supra* note 19.

[82] MCM, *supra* note 5, MIL. R. EVID. 311(b)(2).

[83] *Wallace*, 66 M.J. at 10.

[84] *Id*.

[85] *Id*. Judge Baker concurs in the result, but sees things differently than the majority. *Id*. at 10–11 (Baker, J., concurring). He calls the majority approach "could have-would have." *Id.* at 11 (Baker, J., concurring). He further cites: "As the Fourth Circuit has held, the inevitable discovery doctrine 'cannot rescue evidence obtained via an unlawful search simply because probable cause existed to obtain a warrant when the government presents *no* evidence that the police would have obtained a warrant. Any other rule would emasculate the Fourth Amendment.'" *Id*. at 11 (Baker, J., concurring) (citing United States v. Allen, 159 F.3d 832, 842 (4th Cir. 1998)). Additionally, Judge Baker, "balance[s] the factors differently than the majority and conclude[s] that [Wallace] did not merely acquiesce to authority in consenting to the search of his computer." *Id*. at 12 (Baker, J., concurring).

Wallace illustrates the effect computers, or rather digital media, has in the application of Fourth Amendment jurisprudence in issues of consent. Although a computer may be a 13" x 9" x 1" plastic and metal box, it may exponentially yield as much evidence as a modest size home in toto. Therefore, the impact and implications of consenting to search a computer appear initially benign, but quickly grow more complicated as the reality of the consent settles on the owner. Consequently, motions practice to suppress evidence contained in the computer becomes more aggressive as *Wallace* demonstrates. However, if *Wallace* illustrates complexity within Fourth Amendment law, then the *Larson* case illustrates the CAAF's straightforward approach in applying it.

C. Computers and the Reasonable Expectation of Privacy

United States v. Larson was a much-anticipated decision.[86] The *Larson* case is the second case by the CAAF addressing the reasonable expectation of privacy in a government computer system.[87] The anticipation in this case rested on the premise of whether the CAAF's previous holding in *United States v. Long* would be overturned.[88] The *Long* case caused much consternation due to its holding that Corporal Long enjoyed a reasonable expectation of privacy in her government e-mail stored on a government server and, therefore, evidence derived from the search of her computer without a proper search authorization was excluded.[89] Thus, *Long* turned the common perception that there was no reasonable expectation of privacy in government e-mail upside down. In *Larson*, the CAAF did not deliver a definitive, black-letter, decision on a reasonable expectation of privacy in government computer systems, but instead simply reaffirmed the analysis to determine a reasonable expectation of privacy.

The facts of the case are straightforward. Air Force Major (Maj) Larson used his "government computer in his military office to obtain sexually explicit material, to include pornographic images and video, from the Internet and to initiate instant message conversations with 'Kristin,' someone he believed to be a fourteen-year-old girl."[90] "Kristin," however, was "a civilian police detective working to catch online sexual predators."[91] Major Larson arrived at a pre-arranged meeting place to see Kristin and was arrested in the sting operation.[92] The AFOSI, while working in cooperation with the civilian police, initiated its own investigation upon Maj Larson's arrest.[93]

During the course of the investigation, AFOSI seized and searched Larson's government computer without a search authorization.[94] The search of the computer's hard drive yielded "pornographic material, a web browser history that showed [Larson] visited pornographic websites and engaged in sexually explicit chat sessions in his office on his government computer, and other electronic data implicating [Larson] in the charged offenses."[95] Major Larson moved to suppress this evidence at trial.[96] The military judge ruled against him, stating:

> [T]he Government had established by a preponderance of the evidence that Appellant had no reasonable expectation of privacy in the government computer because the computer had "consent to monitoring" banner that had to be acknowledged with each log on, the system administrator had access to every part of the computer, including the hard drive, and the computer was government property.[97]

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[86] *See* 66 M.J. 212 (C.A.A.F. 2008); Stewart, *supra* note 6, at 12–15.

[87] 64 M.J. 57 (C.A.A.F. 2006).

[88] *Id*. at 59. The certified issue is: "WHETHER THE AIR FORCE COURT OF CRIMINAL APPEALS ERRED IN HOLDING THAT APPELLANT HAD NO REASONABLE EXPECTATION OF PRIVACY IN HIS GOVERNMENT COMPUTER DESPITE THIS COURT'S RULING IN UNITED STATES V. LONG, 64 M.J. 57 (C.A.A.F. 2006)." *Larson*, 66 M.J. at 213.

[89] *See* Stewart, *supra* note 66, at 7–17.

[90] *Larson*, 66 M.J. at 214.

[91] *Id*.

[92] *Id*.

[93] *Id*.

[94] *Id*. ("[Larson's] commander, using a master key to the government office occupied by [Maj Larson], allowed AFOSI agents to enter and to seize the government computer in the office.").

[95] *Id*.

[96] *Id.*

[97] *Id*. at 215.

The AFCCA affirmed the decision by the trial judge, and Maj Larson appealed the decision to the CAAF on the belief that he enjoyed the same reasonable expectation of privacy in his government computer as Corporal Long did in hers as decided in *United States v. Long*.[98] Major Larson, unfortunately, failed to recognize the narrow scope of the *Long* holding, and that CAAF is not a rubber stamp.

The CAAF got straight to the point. The court focused on the rebuttable presumption that Maj Larson had no expectation of privacy in a government computer provided for official use based on Military Rule of Evidence (MRE) 314(d). It states:

> Government property may be searched under this rule unless the person to whom the property is issued or assigned has a reasonable expectation of privacy therein at the time of the search. Under normal circumstances, a person does not have a reasonable expectation of privacy in government property that is not issued for personal use; but the determination as to whether has a reasonable expectation of privacy in government property issued for personal use depends on the facts and circumstances at the time of the search.[99]

The court analyzed whether Maj Larson was able to prove a reasonable expectation of privacy based on the totality of the circumstances.[100] First, the CAAF looked to whether Maj Larson could prove he actually had a subjective expectation of privacy in the government computer.[101]

At trial, Maj Larson presented no evidence that he had a subjective expectation of privacy in his government computer.[102] Instead, he offered only the holding in *Long* as proof of his expectation of privacy.[103] This was insufficient. Not only did he not testify as to his subjective expectation of privacy, but also the following facts were dispositive.[104] First, the computer Maj Larson used had a log on banner identifying "that it was a DOD computer."[105] Second, the computer "[was] for official use, [and] not to be used for illegal activity."[106] Third, "[i]t also had a statement that users of the computer consent to monitoring."[107] Finally, Maj Larson's commander and the military judge's findings of fact established both monitoring of and command access to the government computer."[108] The sum of these facts led the CAAF to conclude that Maj Larson has no expectation of privacy in the government computer despite their holding in *Long*.[109]

The court distinguished the *Long* holding and found that Maj Larson's reliance on it is misplaced.[110] *Long* was "rooted in the 'particular facts of that case.'"[111] Specifically, the "testimony of the network administrator [as to the agency practice of recognizing the privacy interests of users in their e-mail] is the most compelling evidence in supporting the notion that [Long] had a subjective expectation of privacy."[112] The significance of this case is that "*Long* does not control the decision here."[113]

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[98] *Id.*

[99] *Id.* (citing MCM, *supra* note 5, MIL. R. EVID. 314(d)).

[100] *Id.* (citing Samson v. California, 547 U.S. 843, 848 (2006)).

[101] *Id.*

[102] *Id.* ("There is no evidence appellant had a subjective expectation of privacy in the government computer, and he did not testify that he did.").

[103] *Id.*

[104] *Id.* at 215–16 (citing United States v. Flores, 64 M.J. 451, 454 (C.A.A.F. 2007)) ("[F]actoring into the reasonable expectation of privacy analysis the fact that the accused did not testify on the motion to suppress.").

[105] *Id.*

[106] *Id.*

[107] *Id.*

[108] *Id.*

[109] *Id.*

[110] *Id.*

[111] *Id.* (quoting United States v. Long, 64 M.J. 57, 63 (C.A.A.F. 2006)).

[112] *Id.* (citing *Long*, 64 M.J. at 63).

[113] *Id.* at 216.

Larson represents a model approach to Fourth Amendment issues involving government property, vis-à-vis government computers. Simply, and brilliantly, CAAF applied MRE 314(d).[114] This approach may be summarized as a brilliance-in-the-basics methodology as it removes any preconceived bias applying a Fourth Amendment analysis to government property. It solely emphasized the rebuttable presumption that there is no expectation of privacy in government property.[115] Therefore, the burden shift to the moving party simplifies a perceived complex Fourth Amendment analysis regarding government computers. Fortunately, the CAAF took this straightforward approach to in its Fourth Amendment treatment of a mislaid laptop computer in *United States v. Michael*.[116]

D. Computers and the Reasonable Expectation of Privacy in Mislaid Property and the Reasonableness of a Search

The *Michael* case is one of first impression for the CAAF in addressing reasonable expectation of privacy in mislaid property.[117] What makes this case even more compelling is the nature of the mislaid property—a laptop computer.[118] This seems like a straightforward issue when you consider identifying this type of property until you realize that unlike a book, or piece of gear, the owner's name isn't going to be on the inside cover, or conspicuously marked. Instead, it may entail powering the computer up and opening files to determine ownership. Thus, the crux of the *Michael* case is: how far may the government go to identify mislaid property and does the owner have a reasonable expectation of privacy in that mislaid property in terms of evidence discovered during the course of identification.

Photographer's Mate Airman Recruit (AR) Michael mislaid his laptop computer.[119] This was unknown to him or his shipmates.[120] At the Defense Information School, in which AR Michael was attending, "a student found a laptop computer while cleaning the male lavatory of the Navy student barracks."[121] "The laptop was closed, in the off mode, and had no outward markings identifying the owner."[122] The student turned the computer into the military training instructors (MTIs) on staff duty that morning.[123] Since there were no identifying outward marks on the laptop, one of the MTIs started the computer in an attempt to identify the owner.[124] The log-on identified a single name: "Josh."[125] The computer was not password protected so the MTI went to the desktop, opened "control panel" and then "system properties" where the singe name—"Josh"—was listed as the registered owner.[126] Methodical in his examination, the MTI then went to the student roster where he identified three sailors with the name "Josh."[127] The MTI returned to the desktop computer and "navigated to 'Recent Documents' tab" in the hopes of finding recent school work with the owner's full name.[128] Instead, the tab displayed "files with names suggesting they might contain child pornography."[129] The MTI turned the computer to the legal office which identified AR Michael as the owner.[130]

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[114] *Id*.

[115] *Id*.

[116] 66 M.J. 78 (C.A.A.F. 2008).

[117] *Id*. at 81.

[118] *Id*. at 79.

[119] *Id.*

[120] *Id.*

[121] *Id*.

[122] *Id*.

[123] *Id*.

[124] *Id.*

[125] *Id*.

[126] *Id*.

[127] *Id*.

[128] *Id*.

[129] *Id.*

[130] *Id.*

Airman Recruit Michael moved to suppress the evidence.[131] According to AR Michael, the MTI's actions taken in identifying the laptop could have been done by less intrusive means and were entirely "avoidable, unnecessary, and accordingly, unreasonable."[132] The Navy-Marine Corps Court of Criminal Appeals (NMCCA) reversed.[133] Like the *Larson* case, the CAAF took a straightforward approach in its analysis.

The CAAF addressed this search by relying on the touchstone of Fourth Amendment analysis: reasonableness.[134] The court importantly noted that the "Fourth Amendment does not protect against all searches," just unreasonable ones.[135] It also distinguished what a search is under military law: "a government intrusion into an individual's reasonable expectation of privacy."[136] Using this definition as a stepping-stone, the CAAF analyzed the expectation of privacy that AR Michael may have in mislaid property.[137] Although mislaid property "is that which is intentionally put into a certain place and later forgotten,"[138] an owner "retains some expectations of privacy" in it.[139] This expectation, however, is "outweighed by the interest of law enforcement officials in identifying and returning such property to the owner."[140] This balance between privacy interest and governmental interest, to be decided by "reasonableness" of the search, is a case of first impression for the CAAF.[141]

The reasonableness of the search is decided not on "whether less intrusive means were available,"[142] but rather, whether AR Michael had an objectively reasonable subjective expectation of privacy in the mislaid laptop.[143] The CAAF turns not, per se, to the item searched, but rather the location of that item when found and "nature and scope of the government intrusion."[144] Buoyed by its recent precedent in *United States v. Conklin*, the CAAF saw the restroom differently than a barracks or dormitory room.[145] The public restroom, "does not provide the same sanctuary as the threshold of a private room."[146] Airman Recruit Michael's expectation of privacy is therefore diminished in his laptop due to where it was discovered.[147] Next, the court addressed whether the MTI had a good reason for powering up Michael's computer to identify ownership.

The CAAF found that "the legitimate governmental interest in identifying the owner of mislaid property and safekeeping it until its return to the owner outweighed the interest [Michael] retained in his mislaid and subsequently found laptop."[148] There are two parts to this determination.[149] First, a repudiation of the trial judge's "could have-would have" approach to reasonableness. The subtlety lies in whether the Fourth Amendment requires such steps, and which CAAF determines there

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[131] *Id.*

[132] *Id.*

[133] *Id.* at 79–80.

[134] *Id.* at 79. "The ultimate standard set forth in the Fourth Amendment is reasonableness." *Id.* (citing Cady v. Dombrowski, 413 U.S. 433 (1973)).

[135] *Id.*

[136] *Id.* (citing United States v. Daniels, 60 M.J. 69, 71 (C.A.A.F. 2004)).

[137] *Id.* ("Here, the military judge's findings indicate that under the circumstances of its recovery, the computer could appropriately have been characterized as mislaid property.").

[138] *Id.* (citing AM.JUR.2D *Abandoned, Lost, and Unclaimed Property* § 14 (2007)).

[139] *Id.*

[140] *Id.* at 80.

[141] *Id.*

[142] *Id.* at 81.

[143] *Id.*

[144] *Id.*

[145] *Id.* (citing United States v. Conklin, 63 M.J. 333, 337 (C.A.A.F. 2006)); *see* Stewart, *supra* note 66, at 14–17 (providing a detailed discussion of the *Conklin* decision).

[146] *Michael*, 66 M.J. at 81.

[147] *Id.* ("In this case, on these facts, Appellant possessed a diminished expectation of privacy in his personal computer that was mislaid in a common area.").

[148] *Id.*

[149] *Id.* The court relies on the Supreme Court holding in *Illinois v. Lafayette*, in which the issue of reasonableness: "The reasonableness of any particular governmental activity does not necessarily or invariably turn on the existence of alternative 'less intrusive' means." *Id.* (citing Illinois v. Lafayette, 462 U.S. 640, 647 (1983)). "Rather, it depends on whether [Michael] had a subjective (actual) expectation of privacy in the property searched that was objectively reasonable." *Id.* (citing *Conklin*, 63 M.J. at 337).

is no "less intrusive means" requirement.[150] Second, a focus on the government intrusion, and a determination that "[i]n the military context, it was reasonable for the MTI to seek to determine the ownership of the computer and do so by powering it up and performing a cursory examination of folders likely to reveal the owner's identity."[151]

The *Michael* case is straightforward, but yet complex in the "soul-searching" that occurs by CAAF in determining reasonableness. The context of a mislaid computer search illustrates how computer crime challenges the court to determine subjective expectation of privacy, as well as the objective reasonableness of government actions within the scope of that search. What would the Constitutional Framers think of such a context for the Fourth Amendment? What, however, remains true throughout the *Michael*'s case is one principle the Constitutional Framers may have been proud of: "brilliance in the basics."

E. Computers and the Scope of Search vis-à-vis the Execution of a Valid Search Warrant

If "brilliance in the basics" is a tool for success within Fourth Amendment analysis, then the AFCCA should take pride in their analysis for *United States v. Osorio*.[152] The AFCCA addressed the issue of the scope of a computer search warrant.[153] Again, the scope of what may be searched seems straightforward in a search warrant, but yet acquires Fourth Amendment complexity and subtlety when a search warrant includes a computer. The analysis is without pretense and provides a concise Fourth Amendment methodology, as well as, valuable proscriptions for the military practioner.[154]

Senior Airman (SrA) Osorio did more than attend a party where strip poker ensued.[155] He also took photos.[156] This became an important fact when the AFOSI began investigating an alleged sexual assault that occurred at the party.[157] When questioned by AFOSI, SrA Osorio "told the agents he had saved the pictures on his laptop."[158] They then went to his off-base apartment to view the photos.[159] Senior Airman Osorio offered to give copies of the photos to the AFOSI agents, but would not consent to turning over his computer to them.[160] After viewing the photos, the agents sought and received an oral search authorization to search SrA Osorio's off-base apartment.[161]

The agents then seized the laptop and a digital memory card since they contained possible evidence.[162] A short time later, SrA Osorio dropped off a power cord for his laptop to the agents, and an external hard drive which he explained he used with his laptop.[163] After acknowledging that he was not a suspect in the investigation, SrA Osorio signed a consent form permitting the search of his external hard drive.[164]

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[150] "Whether [MTI's] search was reasonable or unreasonable in this case does not hinge on whether less intrusive means were available." *Id*. at 80–81.

[151] *Id*. The MTI "testified that his duties s an MTI included receiving and securing valuable personal effects of the students depending on what 'phase' of training the students had entered." *Id*. at 81.

[152] 66 M.J. 632 (A.F. Ct. Crim. App. 2008).

[153] *Osorio* raised four issues on appeal, three of them relate to the search of his laptop computer:

> (1) whether the military judge erred in failing to suppress evidence of images found on the appellant's laptop computer hard drive; (2) whether the military judge erred in failing to suppress the evidence of images found on the appellant's external hard drive; (e) whether the military judge erred in failing to suppress the appellant's oral and written confessions and the additional evidence obtained during a search of the appellant's apartment as fruit of the poisonous tree.

Id. at 633.

[154] *Id*. at 634.

[155] *Id*.

[156] *Id*. The photos included "partially nude people who attended the party." *Id*.

[157] *Id*. Osorio "was not the suspect of the alleged assault." *Id*.

[158] *Id*.

[159] *Id.*

[160] *Id*.

[161] *Id*. The agents explained that they would provide him with written authorization later." *Id*.

[162] *Id*.

[163] *Id*.

[164] *Id*.

The following week the AFOSI agents realized they had executed an off-base search improperly, and sought a valid search authorization from a U.S. magistrate.[165] The magistrate narrowly authorized the search for "one Toshiba laptop computer and one digital memory card used to record photographs taken on February 12, 2005."[166] No mention of the external hard drive was made in the warrant.[167] Nor was there any communication to the forensic investigator on the limited parameters of the authorized search.[168]

The AFOSI forensic investigator, Special Agent (SA) JL was a victim of her own forensic methodology, ignorance, and initiative. The forensic methodology for examining computer hard drives required SA JL to make a mirror image of the hard drives and use forensic software to view all photos at once as thumbnails.[169] Once SA JL made the mirror image of the hard drives she had fulfilled her technical requirement.[170] However, having completed her task, and unaware of the limitations placed upon the actual investigative agents in their search of the hard drives, she opened up thumbnails that she had noticed might contain nude persons to see if they were "contraband."[171] After some examination, she concluded that the nude persons were indeed nude minors.[172] She brought this to the attention of the AFOSI agents who then questioned SrA Osorio.[173]

Senior Airman Osorio confessed to downloading and possessing child pornography.[174] Additionally, he consented to a search of his apartment where several compact disks were seized.[175] The AFOSI agents also exacted an additional, separate search authorization for his laptop and memory card.[176] Full forensic examination of the laptop, memory card, external hard drive, and compact disks revealed images believed to be child pornography.[177]

In examining SrA Osorio's appeal of error by the military judge in failing to suppress this evidence, the AFCCA examined the lawfulness of the search in terms of the validity and execution of the search warrant. Precedent dictates that "[s]earch warrants must be specific and specificity has two aspects, particularity and breadth."[178] The federal warrant, "despite the initial problem of going to the wrong search authority," was valid and sufficiently specific, to the items to be search (computer and digital memory card), the items sought (photographs), and when (taken on February 12, 2005).[179] The execution of this valid warrant, however, is problematic.

The AFCCA found that the AFOSI forensic investigator, SA JL, exceeded the scope of the search warrant.[180] The court relied on the persuasive holding in *United States v. Carey*, in which an investigator was found to have exceeded the scope of the warrant when he continued to examine a computer for child pornography when his original search was for records of drug distribution.[181] Likewise, in *Osorio* SA JL was only authorized to make a copy of the digital media, and exceeded her authority and scope of search when she clicked on the nude persons identified by her in the thumbnail images.[182]

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[165] *Id*. ("The first warrant was obtained from the installation's military magistrate, despite the fact the appellant's apartment was not on the base.").

[166] *Id*.

[167] *Id*.

[168] *Id*.

[169] *Id*. at 635.

[170] *Id*.

[171] *Id*.

[172] *Id*.

[173] *Id*.

[174] *Id*.

[175] *Id*.

[176] *Id*. The Defense Computer Forensic Laboratory, "recognizing that the same computer was being used for two different cases, contacted OSI and requested a separate search authorization to search the media for child pornography prior to their analysis of the laptop and memory card." *Id*.

[177] *Id*.

[178] *Id*. (citing United States v. Hill, 459 F.3d 966, 973 (9th Cir. 2006)).

[179] *Id*. at 635–36.

[180] *Id.*

[181] *Id*. at 636 (citing United States v. Carey, 172 F.3d 1268 (10th Cir. 1999)).

[182] *Id.*

Furthermore, the court looked to SA JL's intent in determining the issue of scope.[183] Her intent in "clicking on the nude photographs was . . . to determine 'contraband' and child pornography."[184] Hence, she was conducting a general search much like the investigator in *Carey*, and "searching beyond the date exceeded the warrant's scope."[185] The AFCCA used this determination as a case study for the military justice practitioner.

Again, the AFCCA relied on the Federal Tenth Circuit for guidance. In *United States v. Walser*, a similar situation as in *Osorio* occurred, but with a better outcome.[186] Here, an investigator came across a file that happened to be child pornography.[187] But, unlike in *Osorio*, "as soon as he found the first suspect file, beyond the scope of his search authority, he suspended his search and went to the magistrate for a *new warrant for child pornography*."[188] Hence a lesson and an admonition the *Osorio* court segues nicely for the military law practioner.

The lesson the Tenth Circuit provides is insightful. "[C]omputers make tempting targets in searches for incriminating information, and electronic storage is likely to contain a greater quantity and variety of information than any previous storage methods."[189] So,

> [w]here officers come across relevant documents so intermingled with irrelevant documents that they cannot feasibly be sorted at the site, the officers may seal or hold the documents pending approval by a magistrate of the conditions and limitations on a further search through the documents. The magistrate should then require officers to specify in a warrant what types of files are sought.[190]

Just as practicable, the *Osorio* AFCCA court has turned this lesson into a useful admonition:

> This court finds that when dealing with search warrants for computers, there must be specificity in the scope of the warrant which, in turn, mandates specificity in the process of conducting the search. Practitioners must generate specific warrants and search processes necessary to comply with that specificity and then, if they come across evidence of a different crime, stop their search and seek a new authorization.[191]

In finding the search invalid, the AFCCA explored and discounted six exceptions to the Fourth Amendment probable cause[192] and exclusionary rule[193] requirements: plain view doctrine,[194] good faith exception,[195] consent,[196] inevitable

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[183] *Id.*

[184] *Id.*

[185] *Id.*

> SA JL testified that at the time of her search she did not know the terms of the warrant. We recognized this oversight was probably due to the fact that her job was not to investigate the computer data, instead it was to make a mirror image of the hard drive; however, as an OSI agent, when she began to search for contraband, she should have become familiar with the terms of the warrant.

Id.

[186] 275 F.3d 981 (10th Cir. 2001).

[187] *Osorio*, 66 M.J. at 636 (citing *Walser*, 275 F.3d at 987).

[188] *Id.* (citing *Walser*, 275 at 987).

[189] *Id.* at 637 (citing United States v. Carey, 172 F.3d 1268, 1275 (10th Cir. 1999)).

[190] *Id.* (citing *Carey*, 172 F.3d at 1275).

[191] *Id.*

[192] "Probable cause is a reasonable belief that the person, property, or evidence sought is located in the place or on the person to be searched." MCM, *supra* note 5, MIL. R. EVID. 315(f).

[193] *See* Weeks v. United States, 232 U.S. 383 (1914) (holding that evidence obtained directly or indirectly through illegal government conduct is inadmissible); Mapp v. Ohio, 376 U.S. 643 (1961) (finding that exclusionary rule is a procedural rule that has no bearing on guilt, only in respect for dignity or fairness).

[194] *Osorio*, 66 M.J. at 637. Under the plain view doctrine, property may be seized when: the property is in plain view, the person observing the property is lawfully present, and the person observing the property has probable cause to seize it. *See* MCM, *supra* note 5, MIL. R. EVID. 316(d)(4)(c); United States v. Fogg, 52 M.J. 144 (C.A.A.F. 1999); Arizona v. Hicks, 480 U.S. 321 (1987).

[195] *Osorio*, 66 M.J. at 637. The good faith exception means that evidence is admissible when obtained by police relying in good faith on a facially valid warrant that later is found to lack probable cause or is otherwise defective. *See* MCM, *supra* note 5, MIL. R. EVID. 311(b)(3); United States v. Leon, 468 U.S. 897 (1984).

discovery,[197] the independent source doctrine,[198] and attenuation of a taint.[199] First, the court addressed the government's argument that the "discovery of the images on the laptop could be saved because the images were in plain view when discovered."[200] The "act of SA JL opening the thumbnails to see if they were images of child pornography"[201] "exceeded the authorized scope of the authorized search."[202] Citing the Supreme Court, "the plain view doctrine may 'not be used to extend a general exploratory search from one object to another until something incriminating emerges"[203]

Next, the AFCCA dismissed the Government's notion that the "good faith exception applies to justify admission of the child pornography on the laptop."[204] As *United States v. Leon* states, "[t]he good faith exception applies only when police rely on the terms of the warrant."[205] Here, SA JL did not rely on the terms of the warrant, and therefore the good faith exception does not apply.[206]

Likewise, where the Government exceeded the scope of the search warrant of SA Osorio's computer and memory card, the Government also exceeded SrA Osorio's consent to search his external hard drive.[207] Senior Airman Osorio's consent to search his external hard drive was limited to the party pictures from 12 February 2005.[208] The court considered what the reasonable person would have understood as the exchange between SrA Osorio and the AFOSI agents.[209] Based on the exchange between the parties, the AFCCA believed the record supports a finding that consent was limited to "searching for the party pictures from 12 February 2005 and not to a general search of the external hard drive."[210]

Regardless, the Government believed that the Defense Computer Forensic Laboratory (DCFL) would have inevitably discovered the child pornography on either the laptop or the external hard drive.[211] The AFCCA remained unconvinced. The "DCFL could and would have limited themselves to the warrant or consent parameters."[212] Additionally "all the child pornography images on the laptop were contained in hidden folders or were contained in hidden folders or were in deleted files that were only recovered through the use of forensic software."[213] For these reasons, the AFCCA did not find that the "inevitable discovery doctrine would have validated the ultimate seizure of the child pornography images from the laptop or the external hard drive."[214]

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[196] *Osorio*, 66 M.J. at 638. A consent search applies when a person voluntarily consents to a search of his person or property under his control, no probable cause or warrant is required. *See* MCM, *supra* note 5, MIL. R. EVID. 314(e). Consent may be limited to certain places, property and times. *Id.* MIL. R. EVID. 314(e)(3); United States v. Rittenhouse, 62 M.J. 504 (A. Ct. Crim. App. 2005).

[197] *Osorio*, 66 M.J. at 639. As a general rule, the inevitable discovery doctrine applies when illegally obtained evidence is admissible if it inevitably would have been discovered through independent, lawful means. *See* MCM, *supra* note 5, MIL. R. EVID. 311(b)(2); Nix v. Williams, 467 U.S. 431 (1984).

[198] *Osorio*, 66 M.J. at 639. The independent source doctrine applies when evidence discovered through a source independent of illegality is admissible. *See* MCM, *supra* note 5, MIL. R. EVID. 311(e)(2); Murray v. United States, 487 U.S. 533 (1988); *Fogg*, 52 M.J. at 144, 151; United States v. Camanga, 38 M.J. 249 (C.M.A. 1993).

[199] *Osorio*, 66 M.J. at 639–40. The attenuation of a taint exception concerns evidence that would not have been found but for official misconduct and is admissible if the causal connection between the illegal act and the finding of the evidence is so attenuated as to purge that evidence of the primary taint. *See* MCM, *supra* note 5, MIL. R. EVID. 311(e)(2); Wong Sun v. United States, 371 U.S. 471, 484–87 (1963) (holding that the unlawful arrest did not taint subsequent confession where it was made after appellant's arraignment, released on his own recognizance, and voluntary return to the police station several days later).

[200] *Osorio*, 66 M.J. at 637.

[201] *Id*.

[202] *Id*.; *see* United States v. Conklin, 63 M.J. 333 (C.A.A.F. 2006).

[203] *Osorio*, 66 M.J. at 637 (citing Arizona v. Hicks, 480 U.S. 321, 328 (1987)).

[204] *Id*.

[205] *Id*. (citing United States v. Leon, 468 U.S. 897, 922–23 (1984)).

[206] *Id*.

[207] *Id*. at 639.

[208] *Id*. at 638.

[209] *Id*. The AFCCA considered eight significant specifics of that exchange. *Id*.

[210] *Id*. at 639.

[211] *Id*.

[212] *Id*.

[213] *Id*.

[214] *Id*.

Moreover, the court discounted the independent source doctrine as a remedy for the illegal search. "The only source of information regarding the possession of child pornography appeared as a result of the unlawful search conducted by SA JL . . . ."[215] Therefore, the AFCCA determined that the search authorization for child pornography, "required by DCFL and authorized by the military magistrate, has no independent source."[216]

Lastly, the AFCCA shut the door on the Government's final attempt to introduce the fruits of the illegal search under the attenuation of a taint exception.[217] The court applied the *Brown* test to determine whether SrA Osorio's consent was an "independent act of free will, breaking the causal chain between the consent and the constitutional violation."[218] In applying the three prong test the court determined the factors all favor SrA Osorio.[219] So, the confession and the consent were not sufficiently attenuated from the taint of the illegal search of the laptop.[220] Therefore, "all derivative evidence, to include [Osorio's] admission, the full search of the external hard drive, and the CDs are fruit of the poisonous tree and therefore not admissible."[221]

Osorio is a standout case. Although only a service court case, it highlights an important aspect of procedural computer crime law—search authorizations and warrants. Additionally, the case stands out for its application and discussion of probable cause and exclusionary rule exception within the context of a computer search. But, the most important aspect of *Osorio* is Judge Heimann's prescription to military law practitioner's to "generate specific warrants and search processes" for computer searches.[222]

II. Next Term of Court Search and Seizure Cases

A. The Supreme Court Examines the Exclusionary Rule

If the military service courts fully embraced Fourth Amendment methodology, then the U.S. Supreme Court started to push back. The next, or rather, the current term of court for the Supreme Court, has several important Fourth Amendment cases under consideration or already published: *Herring v. United States*,[223] *Arizona v. Gant*,[224] *Arizona v. Johnson*,[225] and

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[215] *Id*.

[216] *Id*.

[217] *Id*. at 639–40.

[218] *Id.* at 640 (citing Brown v. Illinois, 422 U.S. 590 (1975); U.S. v. Conklin 63 M.J. 333, 338–39 (C.A.A.F. 2006)).

> To determine whether the defendant's consent was an independent act of free will, breaking the causal chain between the consent and the constitutional violation, we must consider three factors: (1) the temporal proximity of the illegal conduct and the consent; (2) the presence of intervening circumstances; and (3) the purpose and flagrancy of the initial misconduct.

Id.

[219] *Id*.

> First, the illegal search of the computer was relatively close in time to the OSI actions which led to the additional evidence. . . . Second, there were no intervening circumstances sufficient to remove the taint from the initial search. . . .
>
> In regard to the third factor, while we find no improper motive on behalf of the government agents in this case, we do find that their actions were unnecessary and unwise.

Id.

[220] *Id*.

[221] *Id*. at 639.

[222] *Id*. at 637.

[223] *See* DEPARTMENT OF HOMELAND SECURITY, THE FEDERAL LAW ENFORCEMENT TRAINING CENTER, LEGAL TRAINING DIVISION, THE FEDERAL LAW ENFORCEMENT INFORMER (Nov. 2008) [hereinafter INFORMER], *available at* Dep't of Homeland Security, Federal Law Enforcement Training Ctr., www.fletc.gov/legal; Herring v. United States, 129 S. Ct. 695 (2009). Does the Fourth Amendment require suppression of evidence found during a search incident to an arrest when the arresting officer conducted the arrest and search in sole reliance upon facially credible but erroneous information negligently provided by another law enforcement agent? INFORMER, *supra.*

[224] INFORMER, *supra* note 223; Arizona v. Gant, No. 07-542 (U.S. filed Oct. 24, 2007). Does the Fourth Amendment require law enforcement officers to demonstrate a threat to their safety or a need to preserve evidence related to the crime of arrest in order to justify a warrantless vehicular search incident to arrest conducted after the vehicle's recent occupants have been arrested and secured? INFORMER, *supra* note 223.

Pearson v. Callahan.[226] Although these cases will be left for the next symposium article, one particular case deserves brief attention in this current article.

The Supreme Court's holding in *Herring v. United States* represents a continuing shift in the application of the exclusionary rule.[227] Three years ago in *Hudson v. Michigan*, the Court ruled, "a violation of the Fourth Amendment knock-and-announce rule, without more, will not result in suppression of evidence at trial." Similarly, three years later in *Herring*, the Court held that "when police mistakes are the result of negligence [based on erroneous and carelessly maintained information], rather than systemic error or reckless disregard of constitutional requirements," the exclusionary rule does not apply.[228] The holding in *Herring* can be read broadly or narrowly.[229] A broad reading of this decision by lower courts could mean "the death of the exclusionary rule as a practical matter."[230] The most debated shift though, is from requiring suppression of physical evidence due to police misconduct[231] to "other ways to deter police wrongdoing directly, including professional discipline, civil lawsuits and criminal prosecution."[232] This approach, is a major shift of Fourth Amendment jurisprudence in place since 1961 when the exclusionary rule was applied to the states through the Fourteenth Amendment in *Mapp v. Ohio*.[233]

III. Conclusion

This year's term of court was an affirmative year for the military courts of appeals. Where past years' terms of court have been pregnant with anticipation, the courts, especially the CAAF, handled this year's cases with confidence. If past years' symposium articles have concluded with an admonition seeking Fourth Amendment clarity, this year's conclusion can be summarized as wanting more of these confident and affirmative decisions from the military appellate courts. Therefore: "Damn the torpedoes! Full speed ahead!"[234]

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[225] INFORMER, *supra* note 223; Arizona v. Johnson, 129 S. Ct.781 (2009). In the context of a vehicular stop for a minor traffic infraction, may an officer conduct a pat-down search of a passenger when the officer has an articulable basis to believe the passenger might be armed and presently dangerous, but has no reasonable grounds to believe that the passenger is committing, or has committed, a criminal offense? INFORMER, *supra* note 223.

[226] INFORMER, *supra* note 223; Pearson v. Callahan, 129 S. Ct. 808 (2009). Can a police officer enter a home without a warrant immediately after an undercover informant buys drugs inside, or does the warrantless entry in such circumstances violate the Fourth Amendment? INFORMER, *supra* note 223.

[227] Hudson v. Michigan, 126 S. Ct. 2159 (2006); *see* Stewart, *supra* note 66, at 7 (citation omitted); *Herring*, 129 S. Ct. at 695; *see also Hudson*, 126 S. Ct. at 2165.

[228] *Herring*, 129 S. Ct. at 704.

[229] Liptak, *supra* note 17.

[230] *Id.*

[231] *See* Weeks v. United States, 232 U.S. 383 (1914).

[232] Liptak, *supra* note 17.

[233] *See* 367 U.S. 643 (1961).

[234] *Supra* note 1.

Discovery and Sentencing—2008 Update

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Introduction

As in years past, the 2008 Court of Appeals for the Armed Forces (CAAF) reviewed the full spectrum of military criminal law issues in sixty-five published cases.[1] Several of those cases involved discovery and sentencing issues. This article examines the CAAF cases as well as several service court cases. Part one addresses discovery, particularly the issue of post-trial evidence, the destruction of evidence, *in-camera* review and defense access to evidence. Part two briefly highlights the two main CAAF cases addressing presentencing issues concerning aggravation evidence and rebuttal evidence.

Discovery

"The trial counsel, the defense counsel, and the court-martial shall have equal opportunity to obtain witnesses and other evidence in accordance with such regulations as the President may prescribe."[2] Article 46, Uniform Code of Military Justice (UCMJ) is the heart and soul of the military discovery system.[3] The military courts have stated that Article 46 provides more extensive rights of discovery than even the Constitution.[4] Rule for Courts-Martial (RCM) 701 implements Article 46 and explicitly includes items that are material to the preparation of the defense.[5]

In *United States v. Webb*, the CAAF provides guidance to counsel regarding the post-trial discovery of material evidence, prior to authentication of the record, and a military judge's options.[6] In addition to *Webb*, the service courts had several instructive cases this past term. The Air Force Court of Criminal Appeals (AFCCA) published two cases pertaining to discovery. In *United States v. Terry*[7] the AFCCA decided an issue involving the destruction of evidence and in *United States v. Cossio*[8] the court considered whether a writ of *error coram vobis* was the appropriate forum to request post trial relief for an alleged *Brady*[9] violation. In *United States v. Wuterich* (*Wuterich II*), the CAAF reviewed the 2008 Navy-Marine Corps Court of Criminal Appeals (NMCCA) decision involving in camera review procedure.[10] Lastly, in *United States v. Walker* the NMCCA discussed the issue of defense access to evidence.[11]

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[1] *See* Court of Appeals for the Armed Forces, 2008 Term of Court Opinions, http://www.armfor.uscourts.gov/2008Term.htm (last visited Mar. 13, 2009).

[2] UCMJ art. 46 (2008).

[3] *Id.* art. 46.

[4] *See* United States v. Eshalomi, 23 M.J. 12, 24 (C.M.A. 1986); United States v. Adens, 56 M.J. 724, 731 (A. Ct. Crim. App. 2002); United States v. Guthrie, 53 M.J. 103, 105 (C.A.A.F. 2000).

[5] MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 701(a)(2) (2008) [hereinafter MCM]. The Supreme Court in *Brady v. Maryland* held that due process under the U.S. Constitution requires the Government to disclose to defense evidence that is material to either guilt or punishment, irrespective to the good faith or bad faith of the prosecution. 373 U.S. 83, 87 (1963). Other Supreme Court cases expanded the rule to include evidence that is favorable to the accused or impeaches a government witness. *See* Banks v. Dretke, 540 U.S. 668 (2004); Strickler v. Greene, 527 U.S. 263, 281 (1999); Kyles v. Whitley, 514 U.S. 419 (1995); United States v. Bagley, 473 U.S. 667 (1985); Giglio v. United States, 405 U.S. 150 (1972).

[6] 66 M.J. 89 (C.A.A.F. 2008).

[7] 66 M.J. 514 (A.F. Ct. Crim. App. 2008).

[8] No. 36206 2008 CCA LEXIS 70 (A.F. Ct. Crim. App. Feb. 15, 2008).

[9] *Brady*, 373 U.S. at 87 (holding that the government suppression of evidence favorable to an accused violates due process where the evidence is material to either guilt or to punishment, irrespective of the good faith or bad faith of the prosecution).

[10] 67 M.J. 63 (C.A.A.F. 2008).

[11] 66 M.J. 721 (N-M. Ct. Crim. App. 2008).

Post-Trial Discovery

In some cases, intentional or non-intentional government suppression of evidence may prevent defense counsel from discovering favorable evidence until after the completion of trial. Once defense counsel becomes aware of the evidence, he must decide how to respond. In cases where the court-martial convening authority has not approved the record of trial, defense counsel may petition the military judge to consider the evidence and request a new trial. Specifically, a military judge may, under RCM 1102,[12] call an Article 39(a)[13] session "for the purpose of inquiring into, and when appropriate, resolving any matter that arises after trial that substantially affects the legal sufficiency of any findings of guilty or the sentence."[14] A military judge may do this anytime prior to authentication of the record.[15]

This issue arose in *United States v. Webb* where Defense became aware of the existence of evidence they requested from the Government after sentencing but prior to the authentication of record.[16] Staff Sergeant (SSgt) Webb, U.S. Air Force, consented to a urinalysis.[17] Technical Sergeant (TSgt) Herring observed SSgt Webb provide the sample.[18] The sample tested positive for a metabolite of cocaine.[19] Based on the results of the urinalysis, the Government charged SSgt Webb with a single use of cocaine.[20] Prior to trial, defense requested discovery of any evidence that affected any witness's credibility, this request included prior disciplinary actions.[21] In preparation for trial, the Government counsel interviewed TSgt Herring and discovered that he previously received nonjudicial punishment under Article 15, UCMJ.[22] The trial counsel neither requested any additional information about the nonjudicial punishment nor disclosed this information to defense.[23]

During the trial on the merits, trial counsel offered a stipulation of expected testimony from TSgt Herring as part of the Government's case-in-chief to establish the custody of the urine specimen.[24] Based on this and other evidence, a general court-martial convicted SSgt Webb of using cocaine.[25] Approximately two weeks after trial, the trial counsel received information that TSgt Herring had previously received nonjudicial punishment for making a false official statement, making a false claim, and larceny.[26] The trial counsel disclosed the information to defense the following day.[27]

Upon receiving the evidence, defense counsel moved for a post-trial hearing under Article 39(a), UCMJ and for a new trial.[28] Defense argued that this evidence was material to their defense in that it impeached the credibility of TSgt Herring, a key Government witness.[29] The military judge granted the defense motions for the post-trial hearing and for a new trial.[30]

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[12] MCM, *supra* note 5, R.C.M. 1102(b)(2).

[13] UCMJ art. 39 (2008).

[14] MCM, *supra* note 5, R.C.M. 1102(b)(2).

[15] *Id.* After authentication of the record, UCMJ Article 73 permits an accused to petition the Judge Advocate General for a new trial on the grounds of newly discovered evidence or fraud on the court. UCMJ art. 73. This article applies after the convening authority approves a court-martial sentence.

[16] 66 M.J. 89 (C.A.A.F. 2008).

[17] *Id.* at 90.

[18] *Id.*

[19] *Id.*

[20] *Id.*

[21] *Id.*

[22] *Id.*

[23] *Id.*

[24] *Id.*

[25] *Id.*

[26] *Id.*

[27] *Id.*

[28] *Id.*

[29] *Id.* at 91.

[30] *Id.*

The military judge made his ruling prior to authentication of the record.[31] The Government appealed under Article 62, UCMJ.[32]

Both the AFCCA and CAAF agreed with the military judge's ruling.[33] The CAAF held "that the military judge had authority to consider the request for a new trial" and that the "military judge did not abuse her discretion in ordering a new trial."[34] When discussing the issue, the CAAF looked to *United States v. Scaff* where they noted that Article 39(a), UCMJ allowed a military judge "to take such action after trial and before authenticating the record as may be required in the interest of justice."[35] In *Scaff*, the court stated "that, until the military judge authenticates the record of trial, he may conduct a post-trial session to consider newly discovered evidence and, in proper cases, may set aside findings of guilty and the sentence."[36] In *Webb*, the CAAF held that Article 39(a), UCMJ grants the military judge the authority to resolve matters that arise after trial that "substantially affect the legal sufficiency of any findings of guilty."[37] Specifically, the CAAF stated "We confirm our conclusion in *Scaff*. Prior to authentication, a military judge has authority under Article 39(a), UCMJ, 'to convene a post-trial session to consider newly discovered evidence and to take whatever remedial action is appropriate.'"[38]

The CAAF held that not only did the military judge have the authority to order a new trial, but also that the military judge did not abuse her discretion.[39] As discussed previously, the Government must disclose evidence favorable to the accused.[40] Favorable evidence is evidence material to the guilt or punishment of the accused[41] and includes evidence that impeaches a Government witness.[42] Furthermore, the language of RCM 701(a)(2)(A) specifically states that upon request, trial counsel must allow the defense to inspect any documents, within military control, that are "*material to the preparation of the defense*."[43] Material to the preparation of the defense includes evidence "that would assist the defense in formulating a defense strategy."[44]

Since the Government charged SSgt Webb with a single specification of using cocaine based solely on a urinalysis, the Government had to prove that the urine sample tested was in fact SSgt Webb's by showing a continuous chain of custody.[45] This requirement highlights the importance of TSgt Herring's testimony as the observer. Evidence of TSgt Herring's previous untruthful conduct could have established reasonable doubt as to the guilt of SSgt Webb.[46] Based on this evidence, the defense counsel may have altered his trial strategy such as recommending the accused not testify.[47] Accordingly, the CAAF held that the Government's failure to disclose the evidence undermined the confidence in the outcome of the trial and the error was not harmless beyond a reasonable doubt.[48]

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[31] *Id.*

[32] *Id.*; United States v. Webb, No. 2007-01 (A.F. Ct. Crim. App. May 10, 2007).

[33] *Webb*, 66 M.J. at 91.

[34] *Id.* (citing *Webb*, No. 2007-01, at *4).

[35] 29 M.J. 60, 65 (C.M.A. 1989) (citing United States v. Griffith, 29 M.J. 42 (C.M.A. 1988)) (holding that a military judge could grant a motion for a finding of not guilty post trial if he decided the evidence was legally insufficient).

[36] *Id.* at 65.

[37] *Webb*, 66 M.J. at 91 (quoting MCM, *supra* note 5, R.C.M. 1102(b)(2)). The court also reaffirmed that Article 73, UCMJ, does not apply prior to authentication of the record. *Id.*

[38] *Id.* at 92 (citing *Scaff*, 29 M.J. at 66).

[39] *Id.*

[40] Brady v. Maryland, 373 U.S. 83, 87 (1963).

[41] *Id.*

[42] United States v. Bagley, 473 U.S. 667, 676 (1985).

[43] *Webb*, 66 M.J. at 92 (quoting MCM, *supra* note 5, R.C.M. 701(a)(2)(A) (emphasis added)).

[44] *Id.*

[45] *Id.*

[46] *Id.*

[47] *Id.*

[48] *Id.* at 93.

As demonstrated in *Webb*, a post-trial hearing under Article 39(a) is a proper venue to address a discovery violation prior to the authentication of the record.[49] Through this venue a military judge may take necessary remedial action. In *United States v. Cossio*, the AFCCA addressed the options available to the accused when the discovery violation does not become apparent until after authentication of the record of trial.[50] In *Cossio*, the AFCCA looked at a similar potential discovery violation that came to the defense attention after the completion of appellate review of the record of trial.[51]

A military judge found Airman First Class Jose Cossio, Jr. guilty of stealing U.S. currency, improperly obtaining another person's social security number with intent to use that number to commit larceny, and communicating a threat at a general court-martial.[52] The AFCCA affirmed the conviction in 2006 and the CAAF denied review in January 2007.[53] On 14 November 2007, the defense petitioned the AFCCA to issue a writ of *error coram vobis*,[54] claiming a *Brady* violation[55] by Government during the initial trial.[56] The Government failed to disclose that a Government witness, Senior Airman (SrA) MHT, pled *nolo contendere* to four separate misdemeanor worthless check charges under Florida law prior to the accused's trial.[57] Defense argued that SrA MHT's *nolo contendere* pleas were material evidence and the Government's failure to disclose was an error of constitutional dimension warranting relief.[58]

The AFCCA began by determining the standard of review. The AFCCA found authority to issue an extraordinary writ in the All Writs Act.[59] A writ of *coram nobis*[60] does not substitute for an appeal.[61] The basis for granting a writ of *coram nobis* is a demonstration of error of fact unknown at the time of trial, that is fundamentally unjust in character and which would probably have altered the outcome of the trial had it been known.[62] Defense argued that Government's failure to disclose SrA MHT's nolo contendere pleas rose to this standard.[63] The court stated that for the accused to obtain relief under the writ of *coram vobis* the court "must find a 'probability' the outcome of the challenged proceedings would have been different had the trial defense counsel been aware of the pleas in question."[64]

The AFCCA then reviewed the record of trial and found overwhelming evidence of the accused's guilt.[65] In particular, the court found that defense counsel's primary trial strategy focused on minimizing the accused's conduct.[66] In addition, the court found that the defense did significantly undermine SrA MHT's credibility by highlighting his admission to repeated larcenies by fraud.[67] The AFCCA held that even though defense counsel could have used the unrelated *nolo contendere* pleas

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[49] *Id.* at 92.

[50] No. 36206, 2008 CCA LEXIS 70, at *2 (A.F. Ct. Crim. App. Feb. 15, 2008).

[51] *Id.*

[52] *Id.* at *1.

[53] *Id.* at *2, *review denied*, 66 M.J. 381 (C.A.A.F. 2008).

[54] *Error coram vobis* means "Error in the proceedings 'before you'; words used in a writ of error directed by an appellate court to the court which tried the cause." BLACK'S LAW DICTIONARY 377 (abr. 6th ed. 1991). *Error coram nobis* means "Error committed in the proceedings 'before us.'" *Id*. At the appellate level, writs of *error coran vobis* and writs of *error coran nobis* are used almost interchangeably. *Cossio*, 2008 LEXIS 70, at *3 n.2.

[55] *See* Brady v. Maryland, 373 U.S. 83 (1963). Defense argued that the Government failed to disclose evidence that was material to the guilt or punishment of the accused. *Id.* This is now referred to as a *Brady* violation.

[56] *Cossio*, 2008 LEXIS 70, at *3.

[57] *Id.*

[58] *Id.*

[59] 28 U.S.C. § 1651(a) (2006).

[60] The court uses the terms *nobis* and *vobis* interchangeably. *See Cossio*, 2008 LEXIS 70, at *3.

[61] *Id.* (citing United States v. Frischholz, 36 C.M.R. 306, 309 (C.M.A. 1966)).

[62] *Id.* at *5.

[63] *Id.*

[64] *Id.* at *6.

[65] *Id.*

[66] *Id.*

[67] *Id.* at *7.

to four bad checks to further attack the credibility of SrA MHT, the "evidence would not have 'probably' altered the findings or the sentence."[68] The AFCCA denied the defense writ of *error coram vobis*.[69]

Although a writ of *error coram vobis* is a proper venue to address a discovery violation after the completion of appellate review, the defense must overcome a significant evidentiary standard to obtain relief—that the probability of the outcome of the trial would have been different.[70] Cossio failed to meet that standard and the court denied his writ. But what happens when the appellate courts send a case back down for a new trial and the evidence was inadvertently destroyed? The AFCCA considered this issue in *United States v. Terry*.[71]

Lost or Destroyed Evidence

The duty to disclose evidence implies a duty to preserve the evidence.[72] In *United States v. Kern*, the Court of Military Appeals stated that "[t]he Government has a duty to use good faith and due diligence to preserve and protect evidence and make it available to an accused."[73] The court further stated that when "the evidence is not 'apparently' exculpatory, the burden is upon the accused to show that the evidence possessed an exculpatory value that was or should have been apparent to the Government before it was lost or destroyed."[74] The accused must also show that he could not "obtain comparable evidence by other reasonably available means."[75] Later in *United States v. Manuel*, the CAAF stated that a military judge must also address whether a regulatory standard applied and if that standard was intended to confer a substantial right on the servicemember.[76] The previous case law dealt with cases where evidence was lost or destroyed prior to trial. In *United States v. Terry*, the Government lost and destroyed the evidence in question after the trial but prior to the completion of the appellate review.[77]

A general court-martial convicted SSgt Keith M. Terry of violating a lawful no-contact order and raping a female Airman.[78] The CAAF found error on an unrelated issue, set aside the findings and sentence, and authorized a rehearing.[79] Prior to the rehearing, in an Article 39(a) session the military judge granted a defense motion to dismiss the rape charge and specification because the evidence had been destroyed or otherwise disposed of.[80] The Government appealed the decision pursuant to Article 62, UCMJ.[81]

The victim accused SSgt Terry, a medical technician, of raping her during an ultrasound examination.[82] During the first trial, the defense primarily argued that the victim consented to the sexual intercourse.[83] During the initial investigation into the rape allegations, the Air Force Office of Special Investigations (AFOSI) took several items of forensic evidence into

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[68] *Id.*

[69] *Id.* at *8; United States v. Cossio, No. 36206 2008 CCA LEXIS 70 (A.F. Ct. Crim. App. Feb. 15, 2008), *review denied*, 66 M.J. 381 (C.A.A.F. 2008).

[70] *See Cossio*, 2008 LEXIS 70, at *4.

[71] 66 M.J. 514 (A.F. Ct. Crim. App. 2008).

[72] 1 FRANCIS A. GILLIGAN & FREDRIC I. LEDERER, COURT-MARTIAL PROCEDURES 11–55 (3d ed. 2007).

[73] 22 M.J. 49, 51 (C.M.A. 1986); *see also* California v. Trombetta, 467 U.S. 479, 489 (1984).

[74] *Kern*, 22 M.J. at 51–52; *see also Trombetta*, 467 U.S. at 489.

[75] *Kern*, 22 M.J. at 52; *see also Trombetta*, 467 U.S. at 489.

[76] 43 M.J. 282, 288 (C.A.A.F. 1995). The CAAF stated that the destruction of the accused's positive urine sample one month after testing violated an Air Force regulation and a Department of Defense directive. *Id.* The lower court did not abuse their discretion when they suppressed the positive results and concluded that the standards for preserving samples conferred a substantial right on the accused. *Id.* The CAAF also noted that the urinalysis result was the only evidence of the accused's wrongful use of cocaine, and that the urine sample was of central importance to the defense. *Id.* Furthermore, the court noted that the loss of this evidence was particularly significant due to the controversy as to the nanogram level in the specimen. *Id.*

[77] 66 M.J. 514 (A.F. Ct. Crim. App. 2008).

[78] *Id.*

[79] *Id.* at 515.

[80] *Id.*

[81] *Id.*

[82] *Id.*

[83] *Id.*

custody.[84] The AFOSI agents also took photographs from the surveillance system which they returned to the surveillance system custodian prior to the first trial when they found no evidentiary value in them.[85] Also during the initial investigation, the investigators sent the victim's underwear and a vaginal swab taken from her to the Nebraska State Patrol Crime Lab for testing.[86] The laboratory identified semen on both the vaginal swab and the underwear; the DNA matched the semen to the accused.[87] The suspected bodily fluids taken from the scene were also tested (the whole sample was consumed in the testing) and found to have the accused's DNA.[88] The AFOSI agents destroyed or otherwise disposed of these items prior to the second trial.[89]

At the pretrial Article 39(a) session, the military judge found that the Government had not acted in "bad faith" when AFOSI agents destroyed and disposed of the evidence.[90] But, the military judge did conclude that the lack of due diligence to preserve and protect the evidence and to make it available to the accused resulted in the accused being denied his discovery rights and thus denied his constitutional right to a fair trial.[91] As a result, the military judge granted the defense motion to dismiss the rape charge and specification.[92] The military judge stated that he could not determine if the missing evidence contained exculpatory material.[93]

The Government appealed the military judge's ruling under Article 62(a)(1), UCMJ.[94] Upon review, the AFCCA held that the military judge abused his discretion by granting the motion to dismiss.[95] The AFCCA agreed with the military judge that the evidence may have contained exculpatory material, but found that the evidence on its face was only potentially useful, not clearly exculpatory.[96] The court determined that because the Government did not act in bad faith and that the items were not clearly exculpatory; the destruction of the items did not violate the accused's constitution right to due process.[97]

Next, the AFCCA considered whether the Government's suppression violated RCM 703(f)(2).[98] Rule for Court-Martial 703(f)(2) does not require the Government to have acted in bad faith.[99] "An accused need only to establish that such evidence 'is of such central importance to an issue that it is essential to a fair trial' and 'there is no adequate substitute for such evidence.'"[100] The court applied RCM 703(f)(2) to each individual piece of evidence that was lost or destroyed. With each piece of evidence, the court determined that the evidence was either too speculative to be of central importance to an

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[84] *Id.* at 516. The forensic evidence included specimens from a clean sweep of the crime scene consisting of a cotton swab and glass vial; a sexual assault protocol kit, clothing of the victim obtained from a sexual assault protocol kit; a cardboard box containing suspected bodily fluids taken from the chair at the end of the examination table in the room where the alleged assault occurred; one sexual assault kit taken from the victim; a cardboard box containing suspected bodily fluids taken on a cotton swab and one glass vial; clothing items seized from the accused; three condoms; and a three page handwritten document. *Id.*

[85] *Id.*

[86] *Id.*

[87] *Id.*

[88] *Id.*

[89] *Id.*

[90] *Id.*

[91] *Id.* at 517.

[92] *Id.*

[93] *Id.*

[94] *Id.* The court in an Article 62 appeal may only review matters of law. UCMJ art. 62 (2008). The appellate court is bound by the factual determination of the military judge except if the determination is unsupported by the record or clearly erroneous. *Terry*, 66 M.J. at 517.

[95] *Terry*, 66 M.J. at 520.

[96] *Id.* at 517.

[97] *Id* at 518; *see also* California v. Trombetta, 467 U.S. 479 (1984); Arizona v. Youngblood, 488 U.S. 51 (1988). The Court articulated three criteria an accused must meet to establish a violation of his due process rights under the 14th Amendment: (1) the evidence must possess an exculpatory value that was apparent before the evidence was destroyed; (2) the evidence must be of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means; and (3) the accused must show that law enforcement acted in bad faith when they lost or destroyed such evidence. *Terry*, 66 M.J. at 517.

[98] MCM, *supra* note 5, R.C.M. 703(f)(2).

[99] *Terry*, 66 M.J. at 518.

[100] *Id.* (quoting United States v. Madigan, 63 M.J. 118 (C.A.A.F. 2006)).

issue essential to a fair trial (e.g. the lost surveillance photos), or the accused could obtain comparable evidence by other reasonably available means (e.g. clothing, underwear, vaginal swab, condoms, and bodily fluids taken from the chair).[101] Additionally, the AFCCA stated that the defense failed to provide a reasonable theory to show how the individual pieces of evidence could have benefitted Terry's case.[102] When AFCCA made their decision, they took into account that the accused admitted to three different witnesses that he had sexual intercourse with the victim.[103] In addition, the court found that the main dispute at trial was whether the sexual intercourse was without consent and by force.[104] Under those facts, the court found that the lost or destroyed evidence only confirmed that sexual intercourse occurred and were therefore not of central importance to the trial.[105]

Subsequently, the AFCCA decided whether the loss of so much evidence was in and of itself so detrimental that the accused could not obtain a fair trial.[106] On these facts, the court after reviewing the written briefs, hearing arguments, and researching and reflecting on the issues, found that dismissal of the charges was not appropriate.[107] The AFCCA determined that the lost and destroyed evidence was not of central importance to an issue of the trial and that there was adequate substitute for some of the lost and destroyed evidence so that the impact of the collective loss did not rise to a prejudicial impact on the accused.[108] The AFCCA vacated the military judge's ruling and sent the case back for further proceedings.[109]

The important take-away from this case is that the court will consider each piece of destroyed or lost evidence individually and then in the context of all the evidence. Defense counsel must establish that the evidence is of central importance to an element in the case and that there is no adequate substitute.[110]

In Camera Review

Rule for Court-Martial 701(f) states that privileges and protections set forth in other rules (e.g. Military Rules of Evidence (MRE) 301) are not subject to disclosure.[111] The military judge may conduct an in camera inspection to determine whether counsel must disclose that evidence to the opposing party.[112] Courts rely on the in camera review to balance the government's interest in maintaining the confidentiality of records of certain categories with the accused's right to present a defense and confront witnesses. Courts use the in camera review when they consider medical treatment records, disciplinary records, records of minors, even an Inspector General's report of inquiry.[113] In *United States v. Rivers* the CAAF noted that defense is not entitled to unrestricted access to government information.[114] The CAAF stated that "[w]here a conflict arises between the defense search for information and the Government's need to protect information, the appropriate procedure is '*in camera* review' by a judge."[115] In *Wuterich II*, the CAAF reviewed the issue of whether a military judge abused his discretion when he granted the news agency's request to quash the subpoena without conducting an *in camera* review of evidence.[116]

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[101] *Id.* at 519.

[102] *Id.*

[103] *Id.*

[104] *Id.*

[105] *Id.*

[106] *Id.* at 520.

[107] *Id.* The AFCCA stated that they would not hesitate to approve a dismissal of the charges or to make such a ruling in the appropriate case. *Id.*

[108] *Id.*

[109] United States v. Terry, 66 M.J. 514 (A.F. Ct. Crim. App. 2008), *review denied*, 66 M.J. 380 (C.A.A.F. 2008).

[110] *Id.* at 519.

[111] MCM, *supra* note 5, R.C.M. 701(f) ,701(f) analysis, at A21-34.

[112] *See id.* R.C.M. 701(g), 703(f)(4)(c).

[113] *See* United States v. Reece, 25 M.J. 93, 95 (C.M.A. 1987); United States v. Sanchez, 50 M.J. 506 (A.F. Ct. Crim. App. 1999).

[114] 49 M.J. 434, 437 (C.A.A.F. 1998).

[115] *Id.*

[116] *Wuterich II*, 67 M.J. 63, 65 (C.A.A.F. 2008).

The Government charged SSgt Frank Wuterich with dereliction of duty and voluntary manslaughter of Iraqi civilians during military operations in Haditha, Iraq.[117] After the preferral of charges, the accused participated in an interview with a *CBS News* correspondent.[118] CBS aired the interview on a *60 Minutes* broadcast.[119] During this interview, SSgt Wuterich described the events before, during, and after the explosion of the roadside bomb.[120] The Government issued a subpoena to *CBS News* for "any and all video and/or audio tape(s) to include outtakes and raw footage."[121] In response, CBS provided the Government with the publicly aired footage, but refused to provide any audio-video material that had not been broadcast citing a "news-gathering" privilege under the First Amendment and subsequently filed a motion to quash the subpoena.[122] Without having the other non-broadcasted video/audio tapes to review, the military judge concluded that these videos/audio (referred to as outtake tapes) were not necessary and cumulative of the evidence already in the government's possession.[123] The military judge granted CBS's motion to quash the subpoena.[124] Based on the military judge's ruling, the Government filed an interlocutory appeal pursuant to Article 62, UCMJ.[125]

The NMCCA vacated the military judge's ruling and remanded the case for further proceedings.[126] Both SSgt Wuterich and *CBS Broadcasting* appealed the NMCCA ruling and the CAAF granted review.[127] The CAAF held that the NMCCA erred when they declined to consider SSgt Wuterich's filings on the grounds that he had no standing to participate in the government's appeal.[128] As a result, the CAAF vacated the NMCCA decision and directly reviewed the decision of the military judge.[129]

The CAAF reviewed the military judge's decision to quash the subpoena on CBS by considering that the outtake material contained the majority of SSgt Wuterich's discussion with CBS of the events surrounding charged offenses and only CBS possesses those tapes.[130] The CAAF stated that what CBS might find to be relevant and important may not be what the parties and court find to be relevant and necessary at trial.[131] The court found that the outtakes of the CBS interview "constitute a potentially unique source of evidence that is not necessarily duplicated by any other material."[132] As a result, the CAAF determined that the military judge abused his discretion when he granted *CBS*'s motion to quash the subpoena without conducting an in camera review of the outtake tapes.[133] The CAAF did not determine whether a qualified newsgathering privilege protected the outtake material.[134]

The CAAF stated that even if a qualified privilege exists, it "would not preclude an in *camera* review pursuant to RCM 703(f)(4)(C) under the circumstances" of this case.[135] In this case, the military judge is prevented from making a proper

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[117] *Id.*

[118] *Id.*

[119] *Id.*

[120] *Id.* Although the record does not indicate how long the interview lasted it does reflect that it lasted for several hours of which only approximately thirty minutes were broadcasted. *Id.*

[121] *Id.*

[122] *Id.* at 66.

[123] *Id.* at 67.

[124] *Id.*

[125] *Id.*

[126] *Wuterich I*, 66 M.J. 685, 691–92 (N-M. Ct. Crim. App. 2008).

[127] *Wuterich II*, 67 M.J. 63, 64.

[128] *Id.* at 69.

[129] *Id.* at 79. The CAAF first reviewed whether the government could appeal the military judge's decision under Article 62, UCMJ and determined that they could because the military judge's decision had a "direct effect on whether the outtakes would be excluded from consideration at the court-martial." *Id.* at 40.

[130] *Id.* at 76.

[131] *Id.*

[132] *Id.* at 78.

[133] *Id.*

[134] *Id.*

[135] *Id.* at 79.

evaluation of necessity "without reviewing the outtakes for content and context."[136] As such, the CAAF held that before the military judge may entertain any further hearing on the motion to quash "the military judge alone will inspect the requested materials *in camera*."[137] At that time the military judge may consider whether a qualified newsgathering privilege exists under MRE 501(a)(4)[138] and if it does whether it would apply to this case.[139] As in past cases, an in camera review is the proper mechanism for resolving an evidentiary dispute involving a claim of privilege.

In *Wuterich II*, the CAAF considered issues surrounding government access to evidence. In *United States v. Walker*, the NMCCA considered issues surrounding defense access to evidence.[140]

Defense Expert Witness' Access to Evidence

As stated in the beginning of this article, the UCMJ specifically states that the Defense and Government will have an equal opportunity to speak with witnesses and examine evidence.[141] Rule for Court-Martial 701(a)(1) identifies which items the Government must provide copies to the defense and RCM 701(a)(2) identifies which items the Government must permit the defense to inspect. Specifically, RCM 701(a)(2)(B) requires the Government to provide defense with the opportunity to inspect any scientific test or experiments.[142] The rule does not articulate a requirement for Government to provide defense with the opportunity to conduct their own test. The remaining question is whether the language of Article 46 grant, the accused an inherent right to conduct such tests. The NMCCA considered this issue in *United States v. Walker*.[143]

A general court-martial convicted Lance Corporal (Lcpl) Wade Walker of premeditated murder and other related charges and sentenced him to death.[144] Lance Corporal Walker was charged with murdering two Marines with a shotgun on two different days.[145] Defense counsel requested access to the physical evidence for defense expert testing but the trial counsel denied the request.[146] Defense sought relief from the military judge who also denied the request stating that the defense must demonstrate that there was some flaw in the Government's testing procedure.[147] The Government allowed the defense experts look at the evidence but did not allow them to handle it.[148]

The NMCCA addressed the issue of whether the military judge's refusal to allow the defense experts to conduct independent testing of the physical evidence denied Lcpl Walker equal access to the evidence in violation of Article 46, UCMJ.[149] The NMCCA held that the military judge erred, and the error affected the accused's constitutional due process rights.[150] However, the court held the error in this case was harmless beyond a reasonable doubt.[151]

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[136] *Id.*

[137] *Id.*

[138] MCM, *supra* note 5, MIL. R. EVID. 501(a)(4) (stating a person may claim a privilege provided within the principles of common law that are generally recognized in the federal district courts under Federal Rule of Evidence 501 so long as the rule is practicable and not contrary or inconsistent with the rules in the military justice system).

[139] *Wuterich II*, 67 M.J. at 79.

[140] 66 M.J. 721 (N-M. Ct. Crim. App. 2008).

[141] UCMJ art. 46 (2008).

[142] MCM, *supra* note 5, R.C.M. 701(a)(2)(B).

[143] 66 M.J. at 721.

[144] *Id.* at 723.

[145] *Id.*

[146] *Id.*

[147] *Id.*

[148] *Id.* at 742.

[149] *Id.*

[150] *Id.* at 743.

[151] *Id.* at 747.

The NMCCA looked both to Article 46, UCMJ and to the federal courts who have ruled that the Constitution requires that the Government provide defense with the opportunity to perform independent testing of the physical evidence.[152] The court also looked to *United States v. Robinson*[153] where CAAF affirmed a military judge's denial of a defense request to make the government retest evidence.[154] In *Robinson*, the CAAF noted that the evidence had been made available to the defense for independent testing by their experts.[155]

In *Walker*, the NMCCA found that the military judge clearly erred by holding the defense to an incorrect standard.[156] The court then determined that the forensic evidence was material and relevant to the case and the defense experts should have been afforded equal access absent a showing by the Government as to why that could or should not be allowed.[157] The NMCCA stated that "[t]o affirm the impacted findings we must conclude that the testimony of the Government experts regarding the physical evidence introduced at trial was of minimal or no consequence in light of the testimony of the other Government witnesses."[158]

To that end, the NMCCA found that the government based their case almost entirely on eye witness testimony and circumstantial evidence corroborating that testimony and placing the accused at the scene of the conspiracy and at the scene of the murders.[159] The court stated that after viewing the case in its entirety, "and even under the heightened scrutiny afforded in a death penalty case, the circumstantial evidence of the appellant's guilt to these offenses was overwhelming,"[160] and that the forensic evidence had little impact on the findings.[161]

The court also noted that the defense failed to state how retesting of the physical evidence in this case would have helped the accused overcome the overwhelming evidence of his guilt of both offenses.[162] "[E]ven though 'death is different,' not even speculation has been offered as to how such retesting might have produced results that could have altered the members' findings."[163] Accordingly, the NMCCA held that the Government's denial of retesting was clearly improper, but that the error was harmless beyond a reasonable doubt because the circumstantial evidence was overwhelming; the forensic evidence was not central to the Government's case; and the accused's defense did not rely upon the Government's forensic evidence.[164]

Given the high standard of review, that the error must be harmless beyond a reasonable doubt, Government should grant defense experts an opportunity to conduct their own testing on forensic evidence unless they have solid grounds to object. For example, if defense does not articulate why the testing is material and relevant or if government needs the entire sample for their own testing.

The CAAF and service court cases discussing discovery emphasized the importance of trial counsel following through on discovery requests. *Webb*,[165] *Cossio*,[166] *Terry*,[167] and *Walker*[168] all deal with evidence within the Government's control

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[152] *Id.* at 742. *See generally* Warren v. State, 288 So.2d 826 (Ala. 1973); Barnard v. Henderson, 514 F.2d 744, 746 (5th Cir. 1975) ("Fundamental fairness is violated when a criminal defendant . . . is denied the opportunity to have an expert of his choosing . . . examine a piece of critical evidence . . . .").

[153] 39 M.J. 88 (C.M.A. 1994).

[154] *Id.* at 90; *Walker*, 66 M.J. at 743.

[155] *Robinson*, 39 M.J. at 90; *Walker*, 66 M.J. at 743.

[156] *Walker*, 66 M.J. at 743.

[157] *Id.* at 744.

[158] *Id.*

[159] *Id.*

[160] *Id.*

[161] *Id.*

[162] *Id.* at 746.

[163] *Id.* at 747.

[164] *Id.*

[165] United States v. Webb, 66 M.J. 89 (C.A.A.F. 2008).

[166] United States v. Cossio, No. 36206, 2008 CCA LEXIS 70 (A.F. Ct. Crim. App. 2008).

[167] United States v. Terry, 66 M.J. 514 (A.F. Ct. Crim. App. 2008).

[168] *Walker*, 66 M.J. at 721.

that was either suppressed or not made available to defense. These cases highlight the importance of Government due diligence in dealing with evidence and discovery. *Wuterich II*[169] demonstrates the importance and usefulness of in camera review. It is an essential tool in a military judge's kit bag and both parties have an interest in ensuring the MJ conduct such review in appropriate cases. Next this article highlights the two important CAAF cases regarding sentencing.

Sentencing

This past term the CAAF looked at two cases involving presentencing issues. Their holdings are similar to last year in that they re-emphasize the law. In the first case, *United States v. Maynard*,[170] the CAAF decided an issue concerning aggravation evidence, and the second case, *United States v. Bridges*,[171] the court addressed an issue involving rebuttal evidence.

Aggravation Evidence

The purpose of Government aggravation evidence is to show the charged offense in the most serious light.[172] Rule for Court-Martial 1001(b)(4) permits the Government to present evidence of aggravating circumstances that directly relate to or result from the offenses for which the accused has been found guilty.[173] Last year, in *United States v. Hardison*, the CAAF stated that "[t]he meaning of 'directly related' under R.C.M. 1001(b)(4) is a function of both what evidence can be considered and how strong a connection that evidence must have to the offense of which the accused has been convicted."[174] To keep aggravation evidence out, defense counsel must either object on the basis that the evidence is not directly related to or resulting from the crimes the accused was convicted or that the evidence violates MRE 403.[175] If defense does not make the objection, then on appellate review the court will only look for plain error. In *United States v. Maynard*, the court reviewed an issue regarding aggravation evidence under the plain error doctrine because defense counsel did not make an objection on the record.[176]

Pursuant to Specialist (SPC) Robert Maynard's pleas, a military judge sitting alone convicted him of absence without leave.[177] Specialist Maynard voluntarily returned after a thirteen month absence without leave (AWOL).[178] During the government's presentencing case, SPC Maynard's platoon sergeant testified that while he was inventorying SPC Maynard's room, the only personal property he came across was a display of two items.[179] One item was a pin that said "I hate my job."[180] And the other was a "piece of paper with some [a]nti-American propaganda, 'I hate Bush, the Commander-in-Chief' and 'Fahrenheit 9/11' stuff."[181] Defense counsel did not object and the military judge did not provide any limiting instructions.[182] On recross, the witness testified that he never heard the accused make any anti-American statements or display any images or signs about President Bush.[183]

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[169] *Wuterich II*, 67 M.J. 63 (C.A.A.F. 2008).

[170] 66 M.J. 242 (C.A.A.F. 2008).

[171] 66 M.J. 246 (C.A.A.F. 2008).

[172] *See* United States v. Hardison, 64 M.J. 279, 283 (C.A.A.F. 2007).

[173] MCM, *supra* note 5, R.C.M. 1001(b)(4).

[174] *Hardison*, 64 M.J. at 281.

[175] MCM, *supra* note 5, MIL. R. EVID. 403 ("Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the members, or by consideration of undue delay, waste of time or needless presentation of cumulative evidence.").

[176] 66 M.J. 242, 244 (C.A.A.F. 2008).

[177] *Id.* at 242.

[178] *Id.* at 243.

[179] *Id.*

[180] *Id.*

[181] *Id.* (quoting First Sergeant Guerrero).

[182] *Id.*

[183] *Id.*

Staff Sergeant Brian Nelson, a defense witness on mitigation, testified during Government's cross-examination that he had a political conversation with SPC Maynard and that SPC Maynard made the statement that the President had lied to him.[184] Defense counsel did not object and the military judge did provide any limiting instructions to the panel.[185] During SPC Maynard's unsworn statement he told the panel that "while he enjoyed politics and liked to have conversations about politics, his feelings about the President went no farther than conversation. He stated that he was 'not anti-American, by no means' and agreed that he was not involved with 'staging any rallies or flags or any of those things.'"[186] He informed the panel that he went AWOL because he could not handle the stress that he attributed to his platoon sergeant's leadership style.[187]

During sentencing arguments, trial counsel argued that the accused went beyond making political statements because he went AWOL and left the piece of paper that had anti-American statements on it.[188] Defense did not object but requested an Article 39(a), UCMJ session.[189] During the Article 39(a) session, defense counsel told the military judge that he did not make an objection during the Government's argument because he wanted to avoid placing an emphasis on the uncharged misconduct.[190] The trial concluded without the defense counsel making an objection or requesting a limiting instruction.[191]

The military judge determined that trial counsel elicited proper aggravation testimony and that his comments during argument were proper.[192] As such, the military judge did not comment on the Government's aggravation evidence. However, the military judge did issue an instruction reminding the panel to only sentence the accused for the offense of which he had been found guilty.[193]

On appeal, defense counsel argued that evidence of SPC Maynard's political beliefs did not directly relate to his AWOL offense and was therefore not proper aggravation evidence.[194] Defense also argued that the evidence did not meet the standards of MRE 403 in that the evidence was more prejudicial than probative.[195] Government argued that the evidence "directly related to Maynard's attitude towards his crime and his lack of rehabilitative potential."[196]

Using the plain error standard, the CAAF assumed, without deciding, that even if SPC Maynard was correct as to his allegation of error, the error was not clear and obvious. The court took into account the defense counsel's decision not to object to the testimony.[197] Furthermore, the court found that defense counsel addressed the issue on cross examination, re-direct, and during the accused's unsworn testimony.[198] However, the CAAF acknowledged defense counsel's tactical decision in declining to make an objection during the Article 39(a) session.[199]

The CAAF held that SPC Maynard failed to establish that the testimony elicited from the witnesses concerning his political beliefs was obviously erroneous, if erroneous at all.[200] Because the court did not find error, they did not address the prejudice prong.[201] The CAAF affirmed the decision of the Army Court of Criminal Appeals.[202]

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[184] *Id.*

[185] *Id.*

[186] *Id.* at 243–44.

[187] *Id.* at 244.

[188] *Id.*

[189] *Id.*

[190] *Id.*

[191] *Id.*

[192] *Id.* Since defense counsel did not make an objection and the military judge did not raise an issue sua sponte, the military judge did not conduct an MRE 403 balancing test. *Id*. at 244 n.3.

[193] *Id.* at 244.

[194] *Id.*

[195] *Id.*

[196] *Id.* at 245.

[197] *Id.*

[198] *Id.*

[199] *Id.*

[200] *Id.*

Maynard provides a good example of the necessity for defense counsel to make their objection on record and the necessity to request that the military judge conduct an MRE 403 balancing. Although the CAAF did not specifically address whether government presented proper aggravation evidence, the evidence does appear to directly relate to or result from SPC Maynard's AWOL.

Rebuttal Evidence

Just as in the case-in-chief, during sentencing, the defense counsel must keep in mind that Government can present evidence to rebut matters presented by the defense.[203] Rule for Court-Martial 1001(d) also provides defense the opportunity to present surrebuttal.[204] The military judge has the discretion to decide how long rebuttal and surrebuttal may continue.[205] Defense witnesses, to include the accused, may "open the door" for the government to present evidence that would otherwise be inadmissible.[206] When defense counsel "opens the door" they are permitting expansive rebuttal which can include evidence of specific past acts of misconduct, otherwise inadmissible records of nonjudicial punishment, and adverse duty performance.[207] The key for government rebuttal evidence is that it must actually "explain, repel, counteract or disprove the evidence introduced by the opposing party."[208] The Government may also rebut statements of fact made by the accused in an unsworn statement.[209] In *United States v. Bridges* (*Bridges II*), the court reviewed an issue of Government evidence used to rebut defense mitigation evidence.[210]

A special court-martial convicted the accused, Fireman Machinery Technician Carl Bridges pursuant to his pleas of insubordinate conduct toward a superior petty officer, wrongful use of controlled substances, and breaking restriction.[211] The defense presentencing case consisted of the accused's unsworn statement and letters offered in mitigation from family and friends who wrote favorably regarding the accused's character and rehabilitative potential.[212]

During the accused's unsworn statement, he told the military judge that "I learned more about life in the past year and the time that I've spent in the Coast Guard than any other part of my life."[213] In one of the letters entered as mitigation evidence, the accused's father wrote that

> although his son had "made some poor choices and used bad judgment on more than one occasion," he had "grow[n] up quite a bit over the last several months." The [accused's] father added that "[t]he whole experience of being in the Coast Guard (even in the brig) has helped him grown and develop as a man."[214]

In rebuttal, the Government offered a letter from the officer-in-charge of the brig where the accused was in pretrial confinement.[215] The officer-in-charge wrote that the accused "had 'displayed a negative attitude while in confinement,

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[201] *Id.* The court did not address whether the evidence's probative value outweighed its prejudicial effect under MRE 403. *See* MCM *supra* note 5, MIL R. EVID. 403. *Maynard*, 66 M.J. at 245.

[202] *Id.*

[203] MCM, *supra* note 5, R.C.M. 1001(d).

[204] *Id.* R.C.M. 1001(d).

[205] *Id.* R.C.M. 1001(d).

[206] 2 GILLIGAN & LEDERER, *supra* note 72, at 23–72.

[207] *Id.*

[208] United States v. Wirth, 18 M.J. 214, 218 (C.M.A. 1984) (quoting United States v. Shaw, 26 C.M.R. 47 (C.M.A. 1958) (Ferguson, J. dissenting)).

[209] *See* United States v. Manns, 54 M.J. 164, 165 (C.A.A.F. 2000). "I have tried throughout my life, even during childhood, to stay within the laws and regulations of this country," was held to be a statement of fact and could be rebutted by evidence of the accused's admission to marijuana use. *Id*. *Compare* United States v. Cleveland, 29 M.J. 361 (C.M.A. 1990), *with Manns*, 54 M.J. at 166 ("Although I have not been perfect, I feel that I have served well and would like an opportunity to remain in the service . . . ."). The court determined that the statement was more in the nature of an opinion, "indeed, an argument;" therefore, not subject to rebuttal. *Id*.

[210] 66 M.J. 246 (C.A.A.F. 2008).

[211] *Id.*

[212] *Id.* at 247.

[213] *Id.*

[214] *Id.*

consistently displaying an uncooperative attitude toward Brig staff as well as appearing to have a negative influence on his peers.'"[216] The letter further mentioned that the discipline and review board recently determined that the accused had violated several prison regulations.[217] Lastly the letter writer mentioned that the brig staff placed the accused in segregation for disobedience, disrespect, staff harassment, and provoking words and gestures.[218] Defense counsel objected to this letter on the grounds that the letter was not proper rebuttal evidence, that it contained improper aggravation evidence, and that the prejudicial value significantly outweighed any probative value.[219] The military judge admitted the letter without comment.[220]

On appeal, the Coast Guard Court of Criminal Appeals (CGCCA) held that the military judge did not err in admitting the letter.[221] The lower court concluded that the letter was proper rebuttal evidence because it put the father's letter "in perspective by offering a different viewpoint."[222] The court also determined that probative value was not outweighed by the danger of unfair prejudice to the accused.[223] The CGCCA affirmed the findings and sentence. The CAAF granted review on the issue of whether the military judge abused his discretion by admitting on rebuttal extrinsic evidence of specific acts of misconduct.[224] The CAAF held, without deciding whether the brig letter was erroneously admitted, that the letter was not prejudicial under Article 59(a), UCMJ.[225] This case demonstrates just one way defense "opens the door" to Government rebuttal.

Many times defense counsel is faced with a double edge sword regarding defense sentencing evidence. The attorney must weigh the benefits of certain evidence with the risk of that evidence opening the door to unwanted otherwise inadmissible evidence. *Bridges II* provides a good example of those circumstances.[226] When preparing their sentencing case, defense counsel must always take into account potential government rebuttal. If defense counsel elect not to present certain evidence to avoid opening the door on rebuttal, that decision should be memorialized in a memorandum for record. This will protect defense counsel from later challenges on appeal.

Conclusion

This year the court reminds us of the importance that discovery plays in ensuring justice. The courts continue to remind counsel that Government must be duly diligent in their duties and that military judges have the necessary tools to ensure justice ensues. This year's CAAF cases regarding sentencing demonstrate the issues defense counsel must weigh when preparing their sentencing case. As always, preparation, whether you are trial counsel or defense counsel, is the key to a solid case.

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[215] *Id.*

[216] *Id.*

[217] *Id.*

[218] *Id.*

[219] *Id.*

[220] *Id.*

[221] United States v. Bridges (*Bridges I*), 65 M.J. 531, 534–35 (C.G. Ct. Crim. App. 2007), *aff'd* 66 M.J. 246 (C.A.A.F. 2008).

[222] *Id.* at 534.

[223] *Id.*

[224] *Bridges II*, 66 M.J. at 247.

[225] UCMJ art. 60 (2008) ("The findings and sentence of a court-martial shall be reported promptly to the convening authority after the announcement of the sentence. Any such submission shall be in writing.").

[226] *Bridges II*, 66 M.J. at 246.

The More Things Change, the More They Stay the Same: Has the Scope of Military Appellate Courts' Jurisdiction Really Changed since *Clinton v. Goldsmith*?

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I. Introduction

It's official . . . well, as good as official. Last year was proclaimed to be "The Year of Jurisdiction."[1] In honor of that proclamation, it is only fitting to address the latest cases defining the scope of appellate jurisdiction. In 2008, the Court of Appeals for the Armed Forces (CAAF) and the courts of criminal appeals took a rather broad view of their jurisdiction.[2] But while the cases are new, the trend is old. It is the same trend that the Supreme Court intended to reverse in 1999 in its landmark decision, *Clinton v. Goldsmith*.[3]

In 1998, the CAAF reviewed *Goldsmith v. Clinton*, which involved the administrative consequences of a court-martial sentence.[4] The CAAF found that Congress intended the court to have broad jurisdiction in military justice matters.[5] In a 3–2 decision, the CAAF asserted jurisdiction and granted Major (Maj) Goldsmith his requested relief.[6] In 1999, the Supreme Court reviewed the case in *Clinton v. Goldsmith* and found that the CAAF's view of its jurisdiction was far too expansive.[7] Furthermore, the Supreme Court stated that the jurisdiction of military appellate courts is "narrowly circumscribed."[8] That is, statutorily created Article I courts have only that authority given to them by statute.[9] This year, when faced with jurisdictional dilemmas[10] involving the scope of their jurisdiction under the All Writs Act[11] and the scope of their jurisdiction in cases involving government appeals, the courts failed to take the narrow road.

Congress passed the All Writs Act in 1948, granting appellate courts jurisdiction over cases that are "in aid" of their jurisdiction.[12] "The All Writs Act is not an independent grant of appellate jurisdiction"[13] but is a source of residual authority.[14] Stated differently, appellate courts can only invoke the All Writs Act when doing so is in aid of their *actual* jurisdiction.[15] In *Noyd v. Bond*, the Supreme Court specifically found that the All Writs Act applies in military cases.[16]

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[1] Posting of Dwight Sullivan to CAAFlog, https://www.blogger.com/comment.g?blogID=34853720&postID=1877241590194968336 (June 21, 2008, 21:12) [hereinafter Sullivan Post].

[2] *Id*. ("[T]the outcome construed the relevant court's jurisdiction broadly. This may be just coincidence, it may reflect a jurisprudential philosophy, or it may be the product of a simple human trait to want to retain the option of playing.").

[3] 526 U.S. 529 (1999).

[4] 48 M.J. 84, 90–91 (1998). Contrary to his pleas, Major (Maj) Goldsmith was found guilty, among other things, of several specifications of assault. *Id.* at 85. Though Goldsmith was sentenced to lengthy confinement, he was not sentenced to a punitive discharge. *Id.* Pursuant to newly enacted legislation, President Clinton dropped Maj Goldsmith from the Air Force rolls. *Id.*at 86 (citing 10 U.S.C. 1161(b)(2). On appeal, Maj Goldsmith claimed the President's action of dropping him from the rolls violated the Double Jeopardy and Ex Post Facto prohibitions. *Id*. at 89–90.

[5] *Id.* at 87.

[6] *Id.* at 90–91. Judge Effron did not participate in this decision.

[7] 526 U.S. at 536.

[8] *See id*. at 535 ("We have already seen that the CAAF's independent statutory jurisdiction is narrowly circumscribed. To be more specific, the CAAF is accorded jurisdiction by statute . . . ."); *see also id*. at 534 ("Despite these limitations [found in Article 67, UCMJ] the CAAF asserted jurisdiction and purported to justify reliance on the All Writs Act . . . .").

[9] *Id.* at 535. Unlike federal courts which derive their powers from Article III of the Constitution, military courts, both trial and appellate, are established by Congress pursuant to its "power to govern and regulate the Armed Forces" under Article I of the Constitution. *See* Clinton v. Goldsmith, 526 U.S. 529, 534 (1999). Hence, military appellate courts are often referred to as Article I courts, and federal appellate courts are often referred to as Article III courts. See *Article: The Thirty-Fifth Hodson Lecture,* 193 MIL. L. REV. 178, 193–95 (2007) (describing the application of "Article III Precedent in an Article I Court.").

[10] This is a term of art coined by the author to describe those cases where jurisdiction is not specifically granted by statute.

[11] 28 U.S.C. § 1651(a) (2006).

[12] 28 U.S.C. 1651(a) ("[A]ll courts established by Act of Congress [to] issue all writs necessary or appropriate in aid of their respective jurisdiction . . . .").

[13] *Goldsmith*, 526 U.S. at 535 (quoting 16 C. WRIGHT, A. MILLER & E COOPER, FEDERAL PRACTICE AND PROCEDURE § 3932, at 470 (2d ed. 1996).

[14] United States v. Reinert, No. 20071195 (A. Ct. Crim. App. Aug. 7, 2008) (unpublished) (quoting Loving v. United States, 62 M.J. 235, 247 (C.A.A.F. 2005)).

[15] *Goldsmith*, 526 U.S. at 534–35. Actual jurisdiction is that jurisdiction granted to the appellate court by statute under Articles 62, 66, 67, 69, or 73, UCMJ.

In 1983, Congress enacted the Military Justice Act of 1983 which amended Article 62, UCMJ to afford the Government the right to appeal a military judge's ruling that "terminated proceedings with respect to a charge or specification or that excluded evidence that was substantial proof of a material fact."[17] On its face, Article 62 only grants jurisdiction to the courts of criminal appeals to consider a government appeal.[18] The UCMJ does not specifically grant the CAAF jurisdiction to review the decisions of the service appellate courts on government appeals. However, the CAAF has reviewed the court of criminal appeals' decisions in government appeals since the amended Article 62's enactment over twenty-five years ago.[19] This year—The Year of Jurisdiction—the government challenged the CAAF's authority to review government appeals.

Section two of this article discusses *Goldsmith*—the case that the Supreme Court intended to change the scope of appellate jurisdiction. Section three examines five 2008 appellate jurisdictional dilemmas—testaments that the courts' assertion of jurisdiction has seemingly remained unchanged since *Goldsmith*. Section four previews the future and discusses whether clarification of the scope of appellate jurisdiction is on the horizon.

II. *Clinton v. Goldsmith*[20]

Appellate courts have long struggled over the scope of their jurisdiction. *Goldsmith* was one such struggle. *Goldsmith* has both specific application as well as general application—specific in that it scolded the CAAF for exceeding its jurisdiction under the All Writs Act—general in that it reminds all Article I courts that their jurisdiction is narrow and mandates that the CAAF and the courts of criminal appeals act solely within the confines of their statutorily-given authority.[21]

Having been convicted of willful disobedience and assault, Maj Goldsmith requested extraordinary relief under the All Writs Act to stop the President from dropping him from the Air Force rolls.[22] Infected with HIV, Maj Goldsmith had been ordered by his superior officers to tell his sexual partners of his infection and to take precautions to prevent the spread of his infection.[23] He disobeyed the order twice.[24] In 1994, he was tried and convicted of willful disobedience and assault.[25] The panel sentenced Maj Goldsmith to six years confinement and partial forfeitures, but the panel did not sentence him to a dismissal.[26] The Air Force Court of Criminal Appeals (AFCCA) affirmed the findings and the sentence, and Maj Goldsmith did not petition the CAAF for further review of his case.[27] In 1995, the convening authority took final action on Maj Goldsmith's case.[28]

Approximately a year later, as part of the National Defense Authorization Act for Fiscal Year 1996, Congress empowered the President to drop any officer from the rolls whose sentence had become final, and who had been sentenced to more than six months confinement, and had served at least six months of the confinement.[29] In 1996, Maj Goldsmith received notice that he was being dropped from the Air Force rolls.[30]

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[16] *Goldsmith*, 526 U.S. at 534 (citing Noyd v. Bond, 395 U.S. 683 (1969)).

[17] United States v. Lopez de Victoria, 66 M.J. 67, 68 (C.A.A.F. 2008).

[18] UCMJ art. 62(b) (2008) ("In ruling on an appeal under this section, the Court of Criminal Appeals may act only . . . .").

[19] *See Lopez de Victoria*, 66 M.J. at 71.

[20] 526 U.S 529 (1999).

[21] *See id.*at 533–35.

[22] *Id*. at 531.

[23] *Id.*

[24] *Id.*

[25] *Id.*

[26] *Id.* at 531–32.

[27] *Id*. at 532.

[28] *Id.*

[29] *Id*. (citing NDAA 1996, *supra* note 19, § 1141(a)).

[30] *Id*.

In December 1996, Maj Goldsmith petitioned the AFCCA for extraordinary relief—but not regarding being dropped from the rolls. Major Goldsmith alleged that the confinement facility, the Fort Leavenworth Disciplinary Barracks, had been denying him his HIV medication and that his life was endangered.[31] The AFCCA denied his petition.[32] Major Goldsmith then filed an extraordinary writ to the CAAF, appealing the AFCCA's decision and making the additional argument that being dropped from the rolls violated the double jeopardy and ex post facto prohibitions.[33]

The Government initially argued that Maj Goldsmith's petition for extraordinary relief was outside of the CAAF's jurisdiction because he never petitioned the CAAF for discretionary review under Article 67, UCMJ.[34] The CAAF found that the Government's interpretation of the All Writs Act was too narrow and that "Congress intended for this Court to have *broad* responsibility with respect to the administration of military justice."[35] The Government also argued that Maj Goldsmith's being dropped from the rolls was an "administrative" matter and not punishment.[36] The CAAF found that the practical effect of Maj Goldsmith being dropped from the rolls was akin to punishment and violated the spirit of the ex post facto and double jeopardy prohibitions.[37] The CAAF enjoined the President from dropping Maj Goldsmith from the rolls.[38]

In 1999, the Supreme Court reviewed the CAAF's decision. Its analysis was simple and straightforward. The CAAF is created by Congress. Congress has limited the CAAF's jurisdiction to reviewing only the "findings and sentence as approved by the [court-martial's] convening authority and as affirmed or set aside as incorrect in law by the Court of Criminal Appeals."[39] Hence, the CAAF's jurisdiction is "narrowly circumscribed."[40] Dropping Maj Goldsmith from the rolls constituted neither a finding nor a sentence since there was no change in the findings and sentence of his court-martial.[41] The Supreme Court unanimously found that the CAAF took action over a purely administrative matter, and hence, its action enjoining the President was clearly outside the CAAF's jurisdiction.[42]

While the Supreme Court's analysis was straightforward and direct, their intent to rein the appellate courts back into the confines placed upon them by Congress was even more direct. Major Goldsmith urged the Supreme Court to adopt the CAAF's broad view of its jurisdiction. The Supreme Court emphatically responded "This we cannot do."[43] Again and again, the Supreme Court reminded the CAAF of the confines of its jurisdiction stating, "We have already seen that the CAAF's independent statutory jurisdiction is narrowly circumscribed. To be more specific, the CAAF is accorded jurisdiction by statute . . . ."[44]

> [T]he CAAF is not given authority, by the All Writs Act or otherwise, to oversee all matters arguably related to military justice, ... Simply stated, there is no source of continuing jurisdiction for the CAAF over all actions administering sentences that the CAAF at one time had the power to review.[45]

As previously stated, the Supreme Court intended its holding in *Goldsmith* to have both specific application as well as general application. It is against this backdrop that we take a look at five 2008 The Year of Jurisdiction cases.

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[31] Goldsmith v. Clinton, 48 M.J. 84, 86 (1998).

[32] *Id.* at 86.

[33] *Id.* at 89–90. By the time that time of his appeal to the CAAF, Goldsmith's claim regarding his medical treatment had been mooted by his release from confinement. *Id*. at 88.

[34] *Id*. at 86.

[35] *Id.* at 86–87 (emphasis added).

[36] *Id*. at 90.

[37] *Id.*

[38] *Id*.

[39] Clinton v. Goldsmith, 526 U.S. 529, 534 (1999).

[40] *Id*. (alteration in original) (quoting 10 U.S.C. § 867(c)).

[41] *Id*. at 535–36.

[42] *Id*. at 535 ("[T]he elimination of Goldsmith from the rolls appears straightforwardly to have been beyond the CAAF's jurisdiction to review and hence beyond the 'aid' of the All Writs Act in reviewing it.").

[43] *Id*. at 534.

[44] *Id.* at 535.

[45] *Id.* at 536.

III. The Year of Jurisdiction: Five New Developments with an Old, Familiar Theme

Goldsmith has been described as having had "a chilling effect . . . in which the Court of Appeals has had chalk on its jurisdictional spikes."[46] But did it?

United States v. Denedo[47]

The 3–2 decision in *Denedo* is probably the most debatable CAAF decision of the year.[48] The issue in *Denedo* was whether the Navy-Marine Corps Court of Criminal Appeals (NMCCA) had jurisdiction to grant extraordinary relief under the All Writs Act in a case that had been final for over seven years.[49] Despite the Supreme Court's holding in *Goldsmith* that there is "no continuing source of jurisdiction," the NMCCA and the CAAF asserted jurisdiction.[50]

In 1998, Mess Management Specialist Second Class, (MS2) Denedo was found guilty, in accordance with his pleas, of conspiracy and larceny.[51] The military judge sentenced him to three months confinement, reduction to E-1, and a punitive discharge.[52] The convening authority approved the sentence as adjudged.[53] The NMCCA affirmed the findings and sentence in MS2 Denedo's case.[54] Like Maj Goldsmith, MS2 Denedo did not petition the CAAF for further review. The Navy discharged MS2 Denedo in May 2000.[55] In 2006, the Government initiated deportation proceedings against Denedo based on his special-court martial conviction.[56]

Approximately ten years after his conviction, Denedo filed an extraordinary writ with the NMCCA alleging ineffective assistance of counsel.[57] Denedo, a lawful permanent resident from Nigeria, claimed that his defense counsel assured him during plea negotiations that "if he agreed to plead guilty at a special court-martial he would avoid any risk of deportation."[58] He claimed that his main concern was separation from his family.[59]

The Government filed a motion to dismiss the writ based on lack of jurisdiction.[60] The NMCCA denied the Government's motion but also considered and denied the Denedo's writ for extraordinary relief.[61] Denedo then filed a writ for extraordinary relief with the CAAF.[62] The Government again asserted that the NMCCA erred in considering Denedo's petition in the first place.[63]

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[46] Eugene R. Fidell, *Zen and Jurisprudence of the United States Court of Appeals for the Armed Forces*, 46 MIL. L. & L. OF WAR REV. 393, 396 (2007) (based on Remarks presented at the Washington College of Law, American University: Current Issues in Military Law: A Program for Teachers (Nov. 17–18, 2006)).

[47] 66 M.J. 114 (C.A.A.F. 2008).

[48] Sullivan Post, *supra* note 1 (describing *Denedo* as the CAAF's most famous and controversial jurisdictional case of the year).

[49] *See Denedo*, 66 M.J. at 119.

[50] *Id.* at 120.

[51] *Id.* at 118.

[52] *Id.*

[53] *Id.*

[54] *Id*.

[55] *Id*.

[56] *Id*.

[57] *Id*.

[58] *Id*.

[59] *Id.*

[60] *Id*. at 118–19.

[61] *Id.*

[62] *Id.* at 119.

[63] *Id.*

The CAAF began its analysis by considering whether the writ was "in aid of" the NMCCA's existing jurisdiction. The CAAF found that the writ is "in aid of" the existing jurisdiction of the NMCCA despite finality under Article 76.[64] The CAAF hung its jurisdictional hat on *Schlesinger v. Councilman*.[65] In *Schlesinger*, the Supreme Court stated that "Article 76 provides a prudential constraint on collateral review, not a jurisdictional limitation. . . . Article 76 'does not expressly effect any change in the subject-matter jurisdiction of *Article III* courts.'"[66] Despite the holding in *Goldsmith* that Article I courts do not have the same powers as Article III courts,[67] the majority cursorily reasoned that it could apply the same rationale found in *Schlesinger*, a case involving an Article III court, to Denedo, a case involving an Article I court.[68] The CAAF found that Article 76 UCMJ was not an impediment to the NMCCA's subject matter jurisdiction[69] and that the NMCCA has jurisdiction under Article 66 to review Denedo's sentence because it included a punitive discharge and because Denedo's ineffective assistance of counsel claim attacked the validity of the findings and sentence in his court-martial.[70] The CAAF concluded that the writ was "in aid of" the NMCCA's jurisdiction.[71] Though the CAAF found that the NMCCA had jurisdiction under the All Writs Act to issue a writ, it returned the case to the NMCCA to give the Government the opportunity to get affidavits from Denedo's defense counsel concerning his claim before deciding whether the NMCCA erred in not issuing the writ.[72] Judges Stucky and Ryan disagreed.

Though Judge Stucky agreed with much of Judge Ryan's dissent[73] in which she argues that the CAAF does not have jurisdiction in Denedo's case (discussed below), he felt that Denedo's case fell on the merits stating that deportation proceedings are a collateral consequence of a court-martial conviction and is completely outside the military justice system.[74] Judge Ryan argued that the CAAF did not have jurisdiction in Denedo's case because Denedo had severed all relationship with the military and that the UCMJ did not provide for the court's jurisdiction over former servicemembers.[75] She disagreed with the majority's rationale in interpreting Article 76 in light of the Supreme Court's holding in *Schlesinger*.[76] Instead, she plainly read Article 76 to provide that the finding and sentence in Denedo's case are final and conclusive subject to very limited exceptions and faulted the majority for failing to "recognize that there is a difference between what is 'prudential' for an Article III court, and what is a statutory directive for an Article I, legislatively created court."[77] Judge Ryan reminded the majority of the Supreme Court's holding in *Goldsmith* by stating,

> When the Supreme Court overturned this Court's *Goldsmith* opinion, it made it clear that this Court occupied only a small plot of the judicial landscape, and that that plot was circumscribed by statute.

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[64] *Id.* at 120–21. Article 76, UCMJ provides

> The appellate review of records of trial provided by this chapter, the proceedings, findings, and sentences of courts-martial as approved, reviewed, or affirmed as required . . . and all dismissals and discharges carried into execution under sentences by courts-martial following approval, review, or affirmation . . . are final and conclusive.

Id.

[65] 420 U.S. 738 (1975).

[66] *Denedo*, 66 M.J. at 120 (quoting *Schlesinger*, 420 U.S. at 749).

[67] *See generally* Clinton v. Goldsmith, 526 U.S. 529, 534–35 (1999).

[68] *See Denedo*, 66 M.J. at 121–23. The only explanation that the majority gave concerning why it could apply the same rationale in *Schlesinger* to its analysis in *Denedo* was that the Supreme Court seemingly approved of the CAAF's action in reviewing *United States v. Frischholz*, 36 C.M.R. 306 (C.M.A. 1966), a post-Article 76 case, by citing to it in *Schlesinger*. *Id*. at 123. According to Judge Ryan in her dissent, "The majority conclusorily asserts that it has jurisdiction . . . ." *Id*. at 134.

[69] *Id*. at 121. The court furthered reasoned that Article76 simply means that the decision has res judicata effect and will stand unless the decision is challenged. *Id.* For example, the hearing officer in Denedo's deportation proceedings would have to recognize Denedo's court-martial conviction as final. *Id*. at 127.

[70] *Id*. at 120.

[71] *Id*.

[72] *Id.* at 130.

[73] *Id*. (Stucky, J., dissenting).

[74] *Id*. at 131 (Stucky, J., dissenting).

[75] *Id.* at 135 (Ryan, J., dissenting) ("Denedo is a *former* servicemember lawfully discharged from military service pursuant to a court-martial conviction. He has no current relationship with the military . . . .").

[76] *Id*. at 138 (Ryan, J., dissenting).

[77] *Id.* (Ryan, J., dissenting). The limitations under Article 76, UCMJ include only a petition for a new trial or action by the service Secretary or the President.

> Inexplicably, this Court appears determined not to heed the Supreme Court's unequivocal directive that it stay squarely within the express limits of statutory jurisdiction.[78]

As Judge Ryan's dissent highlights, the CAAF's perception of the expansiveness of its jurisdiction has seemingly remained unchanged in spite of *Goldsmith*.[79]

The similarities between *Goldsmith* and *Denedo* are striking. First, the procedural postures of the cases are similar. Both *Goldsmith* and *Denedo* involved cases that were final. Major Goldsmith's case had been final for approximately three years while MS2 Denedo's case had been final for over seven years. [80]

Second, the CAAF's rationale for asserting jurisdiction is similar in both cases. In *Goldsmith*, the CAAF found that it had "continuing jurisdiction" based on the false notion that it had broad supervisory powers over any matter pertaining to military justice.[81] In *Denedo*, the CAAF essentially made the same argument, that the NMCCA had "continuing jurisdiction," by asserting that finality under Article 76 is only a "prudential constraint" and not an impediment to the NMCCA's jurisdiction.[82]

Third, the dissents in *Goldsmith* and *Denedo* are similar. In 1998 when the CAAF reviewed *Goldsmith*, Judge Gierke wrote a dissenting opinion in which Judge Crawford joined, stating that Maj Goldsmith being dropped from the rolls "pertains to a collateral administrative consequence . . . that may or may not occur."[83] Judge Stucky made the same argument in *Denedo*.[84] Judge Gierke concluded his dissenting opinion in *Goldsmith* by stating that the CAAF had no jurisdiction to interfere in the Air Force's dropping Goldsmith from the rolls.[85] Naturally, Judge Ryan advanced a similar dissent in *Denedo*.

Fourth, both *Goldsmith* and *Denedo* leave the same questions unanswered: "What is the scope of the CAAF's jurisdiction?" and "When does it end?" In *Goldsmith*, the Supreme Court emphatically stated that the CAAF has no source of "continuing jurisdiction"[86] but it did not address when exactly the CAAF's jurisdiction ends. Since in *Denedo* the CAAF found that finality under Article 76 does not affect the NMCCA's jurisdiction,[87] *Denedo* also leaves the question "When does Article I jurisdiction end?" Or better yet, if finality under Article 76 is not the end of the Article I jurisdiction, at what point does Article III jurisdiction begin?

What is for certain is that the impact of *Denedo* is farther reaching than it appears at first blush. There is nothing precluding a former servicemember whose case is final under Article 76 from petitioning a court of criminal appeals for extraordinary relief.[88] What is clear from the Supreme Court's holding in *Goldsmith* is that Congress did not intend for Article I courts to have the same broad powers as Article III courts.[89] Inexplicably, the CAAF ignored the holding in *Goldsmith* and affirmed the NMCCA's authority to hear the writ.[90] The court's holding in *Denedo* is in keeping with its pre-*Goldsmith* expansive view of its jurisdiction.

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[78] *Id.* at 140 (Ryan, J., dissenting) (citing Clinton v. Goldsmith, 526 U.S. 529, 533–35 (1999).

[79] *Id*. at 139 (Ryan, J., dissenting) ("But the majority's justification is troubling not so much because it is misplaced, but because it is highly reminiscent of the position of this Court prior to the Supreme Court's decision in *Clinton v. Goldsmith*.").

[80] S*ee Goldsmith*, 526 U.S. at 531; *Denedo*, 66 M.J. at 118.

[81] *See Goldsmith*, 526 U.S. at 536.

[82] *See Denedo*, 66 M.J. at 121.

[83] Goldsmith v. Clinton, 48 M.J. 84, 91 (1998) (Gierke & Crawford, JJ., dissenting).

[84] *See Denedo*, 66 M.J. at 131 (Stucky, J., dissenting).

[85] *Goldsmith*, 48 M.J. at 92 (Gierke & Crawford, JJ., dissenting).

[86] *Goldsmith*, 526 U.S. at 536.

[87] *Denedo*, 66 M.J. at 121.

[88] Posting of Cloudesley Shovell to CAAFlog, https://www.blogger.com/comment.g?blogID=34853720&postID=1877241590194968336 (June 23, 2008, 14:00 EDT) (*Denedo* "opens the doors of the CCAs to all manner of extremely stale claims, because now CCAs have continuing jurisdiction over all cases meeting the Art. 66(b) threshold, no matter how old, no matter how thoroughly reviewed, and no matter how final. All you need is an appellant who is still alive.").

[89] *See Denedo*, 66 M.J. at 138; Honorable Robinson O. Everett, *The Twenty-Ninth Kenneth J. Hodson Lecture on Criminal Law*, 170 MIL. L. REV. 178, 195 (2001); John W. Winkle III & Gary D. Solis, *CAAF Roping at the Jurisdictional Rodeo:* Clinton v. Goldsmith, 162 MIL. L. REV. 219, 224 (1999).

[90] *Denedo*, 66 M.J. at 130.

United States v. Lopez de Victoria[91]

Lopez de Victoria presented the CAAF with another jurisdictional dilemma during this year's term. The issue in *Lopez de Victoria* was whether the CAAF had the authority to review the decisions of the courts of criminal appeals' in government appeals.[92]

A panel convicted Sergeant (SGT) Lopez de Victoria of indecent acts with a child and making false official statement.[93] He was sentenced to a dishonorable discharge, reduction to E-1, total forfeitures, and confinement for four years.[94] During a post-trial 39(a) session, the military judge found that the statute of limitations barred SGT Lopez de Victoria's convictions for indecent acts with a child.[95] The judge set aside the findings for indecent acts and ordered a sentence rehearing.[96] Pursuant to Article 62, UCMJ, the Government appealed the military judge's ruling.[97] The Army Court of Criminal Appeals (ACCA) granted the Government's appeal and reversed.[98] Sergeant Lopez de Victoria petitioned the CAAF for review of the ACCA's decision.[99]

The CAAF specified the additional issue, "Whether this Court [the CAAF] has statutory authority to exercise jurisdiction over decisions of the courts of criminal appeals rendered pursuant to Article 62, UCMJ."[100] The Government argued that the CAAF did not have jurisdiction to review the ACCA's decision since Article 67(c) provides that the CAAF "may act only with respect to the findings and sentence as approved by the convening authority and as affirmed or set aside as incorrect in law by the Court of Criminal Appeals."[101] Since the ACCA had not acted on the findings and sentence in this case, the Government argued that the CAAF was without jurisdiction.[102]

In a 3–2 decision, the majority paid homage to *Goldsmith* and recognized that the CAAF is a court of limited jurisdiction,[103] but further stated,

> However, this principle [of limited jurisdiction] does not mean that our jurisdiction is to be determined by teasing out a particular provision of a statute and reading it apart from the whole. . . . "We believe it axiomatic that Article 67 must be interpreted in light of the overall jurisdictional concept intended by Congress, and not through the selective narrow reading of individual sentences within the article."[104]

The CAAF then noted that Article 67(a)(3) provides that it has jurisdiction over "'all cases reviewed by a Court of Criminal Appeals' in which the accused's petition establishes good cause."[105] In analyzing whether it had jurisdiction to review government appeals, the CAAF took three considerations into account.

First, the CAAF considered Congress's intent in enacting the UCMJ and the Military Justice Act of 1983 (statutes providing for appellate review): to promote uniformity in the Code's application between the services.[106] The majority reasoned that if "all cases" did not include government appeals, then the very purpose of the statutes would be defeated.[107]

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[91] 66 M.J. 67 (C.A.A.F. 2008).

[92] *Id.* at 68.

[93] *Id.*

[94] *Id.*

[95] *Id.*

[96] *Id.*

[97] *Id.*

[98] *Id.*

[99] *Id.*

[100] *Id.*

[101] *Id.* at 69 (quoting UCMJ 67(c) (2008)).

[102] *See id.*

[103] *Id.*

[104] *Id.* (quoting United States v. Leak, 61 M.J. 234, 239 (C.A.A.F. 2005)).

[105] *Id.* at 71 (quoting UCMJ art. 67(a)(3)).

[106] *Id.* at 70.

Second, the CAAF considered the "judicial backdrop" under which Congress amended Article 62.[108] Prior to being able to submit an appeal under Article 62, the Government had only the extraordinary writ process to appeal a military judge's interlocutory ruling.[109] The majority found that Congress intended "to replace the cumbersome extraordinary writ procedure" in allowing government appeals under Article 62.[110] At the time that Congress amended Article 62, the CAAF took a "broad reading of jurisdiction over 'cases'" and considered petitions for extraordinary writs certified by the Government or submitted by an accused.[111] Hence, the majority reasoned that Congress did not intend to limit the CAAF's review of government appeals under the amended Article 62 since it had previously reviewed government appeals submitted as requests for extraordinary relief.[112]

Lastly, the majority considered stare decisis—the fact that the CAAF had been reviewing the decisions of the courts of criminal appeals' in government appeal cases since the amended Article 62 had been enacted.[113] They noted that the Supreme Court had never discouraged the CAAF from asserting jurisdiction in its review of Article 62 cases.[114] Hence, the CAAF found that it had the statutory authority to exercise jurisdiction over the courts of criminal appeals' decisions in Article 62 cases.[115]

Once again, Judge Ryan dissented, this time joined by Judge Erdmann. Again, she began her analysis with *Goldsmith*'s proscription that the CAAF's "independent statutory jurisdiction is narrowly circumscribed."[116] In keeping with her dissent in *Denedo*, Judge Ryan took a "plain-read approach" and found that Article 62 on its face states that only the courts of criminal appeals can consider government appeals,[117] while Article 67 plainly reads that the CAAF only has jurisdiction to review "the findings and sentence as approved by the convening authority and as affirmed or set aside as incorrect in law by the Court of Criminal Appeals."[118] Because Article 62 appeals are always interlocutory, there are never any findings and sentences approved by the convening authority when appealed to the courts of criminal appeals.[119] Moreover, she also reminded the majority that:

> [W]e must be mindful that the Supreme Court has consistently held that "[where] Congress includes particular language in one section of a statute but omits it in another section . . . it is generally presumed that Congress acts intentionally and purposely in the disparate . . . exclusion."[120]

Consequently, Judge Ryan argued that nothing in the plain language of Articles 62 or 67 or any other statute grants the CAAF the statutory authority to review an Article 62 appeal and that the majority erred in considering SGT Lopez de Victoria's appeal.[121]

As with *Denedo*, *Lopez de Victoria* raises more questions than it answers. Based on the majority's uniformity rationale in *Lopez de Victoria*, what precludes the CAAF from asserting jurisdiction in every case not specifically addressed by statute based on the rationale that they are promoting uniformity among the service courts? Should the CAAF and the courts of

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[107] *Id.*

[108] *Id.*

[109] *Id.* at 68.

[110] *Id.* at 70.

[111] *Id*.

[112] *See id.*

[113] *Id*.

[114] *Id*. at 70–71. The majority cited to *Solorio v. United States*, 483 U.S. 435 (1987), the case in which the Supreme Court overturned the service-connection doctrine delineated in *O'Callahan v. Parker*, 395 U.S. 258 (1969). *Id.* The majority noted that the Supreme Court never stated that the CAAF had erred in considering *Solorio*, a government appeal. *Id.*

[115] *Id*. at 71. The CAAF ultimately reversed the ACCA's decision. *Id*. at 74.

[116] *Id.* at 75 (Ryan & Erdmann, JJ., dissenting).

[117] *Id.* at 76 (Ryan & Erdmann, JJ., dissenting).

[118] *Id.* at 75 (Ryan & Erdmann, JJ., dissenting) (quoting UCMJ art. 67(c) (2008)).

[119] *Id.* (Ryan & Erdmann, JJ., dissenting).

[120] *Id.* at 75 (Ryan & Erdmann, JJ., dissenting) (quoting Russello v. United States, 464 U.S. 16, 23 (1983)).

[121] *Id.* at 74 (Ryan & Erdmann, JJ., dissenting).

criminal appeals weigh stare decisis more heavily than the rules of statutory construction? Most importantly, should the CAAF and the courts of criminal appeals continue to rely on pre-*Goldsmith* cases in analyzing the scope of this jurisdiction?[122]

United States v. Dossey[123]

The CAAF was not alone in taking a broad view of its jurisdiction this year. The NMCCA and the ACCA also took an expansive view. When faced with a jurisdictional dilemma in *United States v. Dossey*, the NMCCA first took the narrow road. Then upon reconsideration, the NMCCA took the broad road after all. The issue in *Dossey* was whether the court had jurisdiction under Article 62 to review a military judge's declaration of a mistrial.[124]

Hull Maintenance Technician Third Class (HT3) Dossey was charged with using government computers to access child pornography.[125] The military judge granted a defense motion, in part, to exclude evidence obtained from a search of a government computer.[126] The Government later introduced evidence to the panel that violated the military judge's ruling.[127] The military judge declared a mistrial to the affected charge and specification without asking for counsels' comments regarding the need for a mistrial.[128]

Pursuant to Article 62, the Government appealed the military judge's ruling declaring a mistrial.[129] At first, the NMCCA denied the government appeal finding that it did not have jurisdiction under Article 62.[130] The NMCCA reasoned that the military judge's declaration of a mistrial was not a ruling that "terminates the proceedings."[131] The Government requested reconsideration en banc and also filed an extraordinary writ of mandamus. The court denied both the en banc reconsideration and the extraordinary writ but granted the Government's request for panel reconsideration.[132]

The NMCCA reconsidered the issue of whether a mistrial is a ruling that actually "terminates the proceedings," an issue of first impression.[133] It noted that the practical effect of a mistrial is the withdrawal of the particular charge and specification. However, the convening authority could re-refer the charge and specification.[134] Therefore, a mistrial may, but does not always, terminate all the proceedings on a charge.[135]

The NMCCA then took a look at the UCMJ's treatment of "proceedings" in other Articles and found that when "proceedings" is used in other places it is primarily used to describe a "happening before a particular court-martial."[136] In light of the UCMJ's treatment of the word "proceedings," the court concluded that "terminates the proceeding" means "to terminate the proceedings *before the particular court-martial* to which a charge has been referred."[137] Superimposing that

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[122] *Id*. at 71 (citing United States v. Solorio, 21 M.J. 251 (C.M.A. 1986); United States v. Tucker, 20 M. J. 52 (C.M.A. 1985)).

[123] 66 M.J. 619 (N-M. Ct. Crim. App. 2008).

[124] *Dossey*, 66 M.J. at 621.

[125] *Id*.

[126] *Id*.

[127] *Id*.

[128] *Id.*

[129] *Id.*

[130] *Id.*

[131] *Id.* Under Article 62, the Government may appeal a military judge's adverse ruling if it is (1) "An order or ruling of the military judge which terminates the proceedings with respect to a charge or specification," (2) "An order or ruling which excludes evidence that is substantial proof of a fact material in the proceeding," or (3) involves the disclosure or nondisclosure of classified evidence. UCMJ art. 62(a) (2008).

[132] *Id.*

[133] *Id.* at 623.

[134] *Id*. at 622. There are two limited instances when the government is precluded from re-referring the affected charge and specification once a mistrial has been declared: jeopardy has attached and the declaration was (1) "[a]n abuse of discretion and without the consent of the defense" or (2) "[t]he direct result of intentional prosecutorial misconduct designed to necessitate a mistrial." MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 915 (2008).

[135] *Dossey*, 66 M.J. at 622.

[136] *Id.* at 623–24.

[137] *Id.* at 624.

definition into Article 62, the court found that a mistrial does, in fact, terminate the proceedings and asserted jurisdiction.[138] Furthermore, the NMCCA found that their reading the phrase "terminates the proceedings" provided "a *broader* range of orders appealable than the alternate reading, and effectuates the Congressional intent that the Government should enjoy a *broad* right to appeal."[139] The NMCCA concluded that the military judge erred in declaring a mistrial and reinstated the charge and specification.[140]

Senior Judge Vollenweider dissented from the NMCCA's opinion.[141] Judge Vollenweider argued that the NMCCA did not have jurisdiction since a mistrial only terminates the trial but not the final prosecution.[142] Furthermore, Judge Vollenweider found the majority's argument that "Congress intended Article 62 to be interpreted and applied in the same manner as the federal Criminal Appeals Act . . ." to be unpersuasive since Congress did not use the same wording in Article 62 as it did in Article 62's federal counterpart.[143]

After the NMCCA's ruling, HT3 Dossey petitioned the CAAF for a grant of review but his petition was dismissed because the Government opted to administratively separate him in lieu of court-martial.[144] Accordingly, the question remains open whether the NMCCA solved this jurisdictional dilemma correctly.

United States v. Wuterich[145]

Wuterich was less controversial (finally a 3–0 decision)[146] than the other jurisdictional issues that have been presented, but again, it illustrates the trend of appellate courts taking an expansive view of their jurisdiction. The jurisdictional issue posed in *Wuterich* was whether the NMCCA had jurisdiction under Article 62 to review a military judge's ruling quashing a government subpoena?[147]

Staff Sergeant (SSgt) Wuterich was one of the Marines charged in the Haditha killings.[148] After dereliction of duty and voluntary manslaughter charges were preferred against SSgt Wuterich, he gave an interview to a *CBS* correspondent.[149] In that interview, he described the bombing of his convoy and the circumstances of the killings.[150] The Government requested all video and audiotapes taken during the interview. *CBS* turned over only the material that it broadcasted.[151] Citing a "news-gathering" privilege under the First Amendment, *CBS* refused to turn over any material that had not been publically broadcasted and *CBS* moved to quash the subpoena.[152] The military judge viewed the publically broadcasted material and found it to be relevant and material.[153] Despite this finding, the military judge granted the motion to quash the Government subpoena stating that the material was cumulative of other information that the Government had available.[154] The military

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[138] *Id*.

[139] *Id.* (emphasis added).

[140] *Id*. at 625.

[141] *Id.* at 626 (Vollenweider, J., dissenting).

[142] *Id.* at 628 (Vollenweider, J., dissenting).

[143] *Id*. (Vollenweider, J., dissenting).

[144] CAAFlog: *Dossey Explained*, http://caaflog.blogspot.com/search?updated-max=2008-10-13T21%3A14%3A00-04%3A00&max-results=50 (Sept. 23, 2008, 17:39).

[145] 66 M.J. 685 (N-M. Ct. Crim. App. 2008).

[146] Unlike the NMCCA, the CAAF found *Wuterich* to be just as debatable and controversial as *Lopez de Victoria* and *Denedo*. *See infra* note 168.

[147] *Wuterich*, 66 M.J. at 687.

[148] *Id.* at 686.

[149] *Id.*

[150] *Id.*

[151] *Id.*

[152] *Id.*

[153] *Id*. at 686–87.

[154] *Id.* at 687.

judge never viewed the material that had not been broadcasted.[155] The Government appealed the military judge's ruling pursuant to Article 62.[156]

The NMCCA reasoned that that a court of criminal appeals has jurisdiction under Article 62 over a government appeal from an order or ruling which excludes evidence "that is substantial proof of a fact material in the proceeding"[157] and that Congress intended that Article 62 be applied in the same manner as its federal counterpart is applied in federal criminal courts of appeals.[158] Federal courts use an "effects test" which asks whether the order quashing "effectively 'suppresses or excludes evidence' . . . in a criminal proceeding"?[159] If so, then the federal court has jurisdiction over the government appeal.[160] In keeping with the practice of federal courts, the NMCCA ruled that it had jurisdiction in this case and granted the Government's appeal but remanded the case for further fact-finding.[161] *CB*S and SSgt Wuterich appealed the NMCCA's decision to the CAAF. Unlike the NMCCA, the CAAF found *Wuterich* to be just as debatable and controversial as *Lopez de Victoria* and *Denedo*. On 17 November 2008, the CAAF, 3–2, agreed with the NMCCA's application of the "effects test" and found that military judge's decision quashing the subpoena had the direct effect of "excluding evidence."[162] Hence, the CAAF found that the NMCCA had jurisdiction to consider the government appeal.[163]

United States v. Reinert[164]

When faced with a jurisdictional dilemma involving both its jurisdiction under the All Writs Act and its jurisdiction under Article 62, UCMJ the ACCA was admittedly perplexed. Like the CAAF and its NMCCA sister court, the ACCA, with trepidation, took the broad road. The issue in *Reinert* was whether the court had jurisdiction under the All Writs Act to issue a writ that does not fall within the specific statutory language in Article 62 or 66?[165]

A military judge[166] sitting as a special court-marital convicted Private (PVT) Gipson, pursuant to his pleas, of conspiracy to commit housebreaking and larceny, absence without leave, disobeying a superior commissioned officer, disobeying a superior noncommissioned officer, larceny, housebreaking, and communicating a threat.[167] During PVT Gipson's court-martial, the military judge found that PVT Gipson had been subjected to illegal pretrial punishment in violation of Article 13, UCMJ.[168] The Government conceded that PVT Gipson should be granted twenty days of confinement credit.[169] The military judge accepted the Government's concession, but he also ordered the Government to ensure that the offending noncommissioned officer's were counseled and that installation-wide training regarding Article 13 be conducted.[170] Should the Government fail to comply with his order, the military judge stated that he would award PVT Gipson five additional days of confinement credit.[171] The military judge sentenced PVT Gipson to a bad-conduct discharge, confinement for seven

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[155] *Id.*

[156] *Id.*

[157] *Id*. (quoting Article 62 (a)(1)(B) (2008)).

[158] *Id.*

[159] *Id*. (quoting United States v. Wilson, 420 U.S. 332, 337 (1975)).

[160] *Id.*

[161] *Id.* at 688.

[162] United States v. Wuterich, 67 M.J. 63, 75–77 (C.A.A.F. 2008). Judge Ryan, joined by Judge Erdmann, dissented from the opinion finding that the majority's holding conflicted with the court's decision in *United States v. Browers*. *Id.* at 58–59 (Ryan & Erdmann, JJ., dissenting) (quoting *Browers*, 20 M.J. 356, 360 (C.M.A. 1985) (defining "excludes evidence" as "a ruling made at or before trial that certain testimony, documentary evidence, or real evidence is inadmissible")).

[163] *Id*.

[164] No. 20071195 (A. Ct. Crim. App. Aug. 7, 2008) (unpublished).

[165] *Id*. at 8.

[166] Colonel Patrick Reinert was the military judge sitting as a special court-martial and is the respondent in this matter. *Id.*

[167] *Id.* at 2.

[168] *Id.* at 3–4.

[169] *Id.* at 4.

[170] *Id.*

[171] *Id.* at 4–5.

months, and forfeiture of $867 pay per month for seven months.[172] He also granted PVT Gipson twenty days confinement credit for illegal pretrial punishment.[173]

The Government failed to conduct installation-wide training, and PVT Gipson filed a motion for appropriate relief.[174] The Government admitted that installation-wide training had not been conducted. Based on that information, the military judge supplemented his ruling and awarded PVT Gipson five additional days of confinement credit.[175]

The Government argued that the military judge exceeded his authority, and after the military judge refused to reconsider his ruling, the Government requested that the ACCA provide extraordinary relief to prohibit the military judge from awarding PVT Gipson the five additional days of confinement credit.[176] Based on the advice of his staff judge advocate to refrain from taking action until the matter was settled, the convening authority did not take action on PVT Gipson's case.[177] In return, PVT Gipson filed an extraordinary writ of mandamus requesting the ACCA to order the convening authority to act on his case.[178]

The ACCA reasoned that this case did not fall under Article 66, UCMJ because the findings and the sentence had not been approved by the convening authority.[179] Nor did this case fall under Article 62. The military judge's ruling did not terminate any charges or specifications, nor did it exclude important evidence, nor did it involve the disclosure or nondisclosure of classified evidence. Hence, it did not have jurisdiction under Article 62.[180]

The ACCA then examined its jurisdiction under the All Writs Act.[181] Like the other courts, the ACCA began with the Supreme Court's proscription in *Goldsmith* that the jurisdiction of Article I courts is narrowly defined and that the All Writs Act does not enlarge the court's jurisdiction.[182] The ACCA stated that "[i]f *Goldsmith* was the only case interpreting the All Writs Act, we would conclude there is no jurisdiction because neither Article 62 nor 66, UCMJ, provide for this court's review of the government appeals under the All Writs Act."[183] The ACCA further questioned its authority to issue relief under the All Writs Act based on the CAAF's recent decision in *Lopez de Victoria* where the CAAF stated that Article 62 was intended to replace the Government's right to submit an interlocutory appeal under the All Writs Act.[184]

Nevertheless, the ACCA reasoned that the CAAF has asserted jurisdiction in cases that did not fall under Article 67, and that they were "bound to follow precedent established by [the] superior court."[185] The ACCA, with "significant concerns," found that it had jurisdiction.[186] The ACCA further concluded that the military judge's order was an "extraordinary matter"[187] since there was no other way to address the order and that the military judge exceeded his authority because there is nothing in the *Manual for Courts-Martial* to suggest that he had the authority "to advance the interests of justice beyond the existing proceeding."[188]

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[172] *Id.* at 2.

[173] *Id.*

[174] *Id.* at 5.

[175] *Id*.

[176] *Id.*

[177] *Id.*

[178] *Id.* at 6.

[179] *See id.* at 7.

[180] *Id.* at 7–8.

[181] *Id.* at 8.

[182] *Id.* at 7–9.

[183] *Id.* at 9.

[184] *Id.* at 10.

[185] *Id*. at 11; *see, e.g.*, United States v. Suzuki, 14 M.J. 491, 492–93 (C.M.A. 1983); United States v. Caprio, 12 M.J. 30, 30–33 (C.M.A. 1981); United States v. Redding, 11 M.J. 100, 104–06 (C.M.A. 1981); Dettinger v. United States, 7 M.J. 216, 218 (C.M.A. 1979).

[186] *Id.*

[187] *Id*. at 14.

[188] *Id.* at 15.

Although the lengthy opinion was unpublished, the ACCA deserves some kudos for saying what we've all been thinking—What exactly is the scope of appellate jurisdiction in light of *Goldsmith*?

IV. The Future

A survey of the cases decided by the CAAF and the courts of criminal appeals during "The Year of Jurisdiction" have yielded results that are arguably inconsistent with the Supreme Court's intent in *Goldsmith*. Almost all of the cases acknowledged *Goldsmith*'s holding that their jurisdiction is narrowly circumscribed, but in the end, both the CAAF and the courts of criminal appeals effectively broadened their jurisdiction. What is interesting about the CAAF's rationale in asserting jurisdiction in these cases is that its analytic framework is contrary to both the Supreme Court's decision in *Goldsmith* and the CAAF's own decision early this year in the case *United States v. Custis*.[189]

The issue in *Custis* was whether the military judge erred in applying a common law exception (i.e., "the joint crime participant" exception) to the marital privilege codified in Military Rule of Evidence (MRE) 504.[190] The facts are not as interesting as the CAAF's holding. The CAAF recognized that, while every federal court that has considered the issue has recognized the joint crime participant exception, the exception is not included in MRE 504.[191] The CAAF further reasoned that "the authority to add exceptions to the codified privileges within the military justice system lies not with this Court or the Courts of Criminal Appeal, but with the policymaking branches of government."[192] Hence, the military judge and the AFCCA erred in applying the exception.[193] Such an approach is inconsistent with the CAAF's approach in its jurisdictional cases where in the absence of a specific grant of authority, the CAAF nonetheless asserted authority.

The courts of criminal appeals seem simply perplexed on the jurisdictional issue. The ACCA flatly stated, "We have significant concerns . . ." about the scope of its jurisdiction.[194] While the NMCCA was not as vocal about their uncertainty, their vacillations tell the story. First, the NMCCA said it did not have jurisdiction in *Dossey*, and then it found that it did.[195]

After the current court term, the Supreme Court's holding in *Goldsmith* has increased the uncertainty and dissension about the scope of appellate jurisdiction. Quite simply, both the CAAF and the courts of criminal appeals need more clarity.

But, as the title of this article suggests, the more things change, the more they stay the same. The need for clarification of the scope of appellate jurisdiction within the military courts of appeal is not new. Senior Judge Robinson Everett, the author of the CAAF's opinion in *Goldsmith*, noted the uncertainty that the Supreme Court's holding in *Goldsmith* would create concerning the scope of the CAAF's authority and suggested that Congress should clarify the CAAF's powers.[196] In 2001, the Cox Commission Report[197] also recognized the need for clarification.[198] To date, there has been no clarification by either the Supreme Court or Congress.

However, Congress has recently shown interest in matters pertaining to military jurisdiction. Specifically, in the case *United States v. Stevenson*.[199] In his appeal to the CAAF, Hospital Corpsman Third Class (HM3) Stevenson made two

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[189] 65 M.J. 366 (C.A.A.F. 2007).

[190] *Id*. at 367.

[191] *Id.* at 369.

[192] *Id.*

[193] *Id.*

[194] United States v. Reinert, No. 20071195 at 11 (A. Ct. Crim. App. Aug. 7, 2008) (unpublished).

[195] United States v. Dossey, 66 M.J. 619, 621 (N-M. Ct. Crim. App. 2008).

[196] Everett, *supra* note 94, at 195. Judge Everett also believed that the CAAF should broaden its powers so that it could grant extraordinary relief in any court-martial or Article 32 investigation. *Id*.

[197] REPORT OF THE COMMISSION ON THE 50TH ANNIVERSARY OF THE UNIFORM CODE OF MILITARY JUSTICE (2001) [hereinafter COX REPORT], *available at* http://www.nimj.org/documents/Cox_Comm_Report.pdf. The Honorable Walter T. Cox III led a commission to conduct a survey regarding the fairness of the military justice system. *Id.* This report contains the commission's findings and recommendations. *Id.*

[198] Honorable H.F. "Sparky" Gierke, *The Thirty-Fifth Kenneth J. Hodson Lecture on Criminal Law*, 193 MIL. L. REV. 178, 193 (2007) (citing the COX REPORT, *supra* note 202).

[199] 66 M.J. 15 (2008). In 1997, investigators suspected Hospital CorpsmanThird Class (HM3) Stevenson of raping a military dependent in 1992. *Id.* at 16. By the time that he became a suspect, HM3 Stevenson, who suffered from diabetes, had been assigned to the temporary disability retired list. The investigators learned that HM3 Stevenson routinely had his blood drawn at a Veteran's Affairs hospital as part of his diabetes treatment and asked the

arguments. First, HM3 Stevenson challenged the military court's jurisdiction, claiming that the courts did not have jurisdiction over him since he was assigned to the temporary disability retired list.[200] Second, HM3 Stevenson argued that his Fourth Amendment rights had been violated.[201] On 14 February 2008, the CAAF set aside the NMCCA's decision based on HM3 Stevenson's Fourth Amendment argument and remanded the case.[202] The CAAF declined to review HM3 Stevenson's lack of jurisdiction argument.[203] Hospital Corpsman Third Class Stevenson subsequently petitioned the Supreme Court, arguing that the military courts lacked jurisdiction.[204] In turn, the Government argued that the Supreme Court lacked jurisdiction because the CAAF declined to review HM3 Stevenson's jurisdictional argument.[205]

In the meantime, on 27 September 2008, the House passed the Equal Justice for Our Military Act of 2007 which would grant the Supreme Court jurisdiction to consider military cases like HM3 Stevenson's regardless of the CAAF's disposition of the appeal.[206] The companion bill to the Equal Justice for Our Military Act of 2007 is pending in the Senate.[207] Unfortunately for HM3 Stevenson, the Supreme Court denied certiorari on 6 October 2008.[208] Four days after the Supreme Court denied HM3 Stevenson's petition, the Congressional Research Service compiled a report on the Supreme Court's jurisdiction in military court cases and referenced *Stevenson* in particular stating that "[i]f this measure became law, it would make moot the question highlighted by *United States v. Stevenson* regarding the Supreme Court's jurisdiction over specific issues that the CAAF had declined to review."[209]

The question remains, considering Judge Everett's recommendation that Congress clarify the scope of appellate jurisdiction coupled with the fact that Congress has been responsive to other military jurisdictional issues, what does Congress's inaction tell us? Is Congress laboring under a misconception that the scope of military appellate jurisdiction is clear? Perhaps. The same Congressional Research report that discussed *Stevenson*, found that "it is clear that military courts' jurisdiction extends to military veterans only when a veteran maintains at least some current relationship with the military."[210] That's not what the CAAF and the NMCCA held in *Denedo*.

Clarification from the Supreme Court, if not from Congress, may be on next year's horizon. The acting solicitor general filed a petition for certiorari in the *Denedo* case, presenting the question "Whether an Article I military appellate court has jurisdiction to entertain a petition for a writ of error coram nobis filed by a former service member to review a court-martial conviction that has become final under the Uniform Code of Military Justice, 10 U.S.C. 801 et seq."[211] According to the acting solicitor general, *Denedo* is just one of the latest cases where the CAAF has expanded "its role beyond its congressionally prescribed jurisdiction to 'review . . . specified sentences imposed by courts-martial.'"[212]

In closing, Judge Cox when asked about *Goldsmith* back in 2000 summed it up best:

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medical personnel to draw an additional vial of blood so that they could determine his DNA. *Id*. The medical personnel drew the extra vial of blood without informing HM3 Stevenson. *Id.* at 17. Subsequently, HM3 Stevenson was found guilty of rape. *Id*. at 16. On appeal, HM3 Stevenson alleged that the court did not have jurisdiction to try him, a temporary disabled retiree. *Id.* at 17; ANNA C. HENNING, CONG. RESEARCH SERV. REPORT SUPREME COURT APPELLATE JURISDICTION OVER MILITARY COURT CASES, RL 34697, at CRS-7 (2008). Hospital CorpsmanThird Class Stevenson also alleged that the Government violated his Fourth Amendment rights by not obtaining a warrant for the withdrawal of the extra vial of his blood. *Stevenson*, 66 M.J. at 17; HENNING, *supra*.

[200] *Stevenson*, 66 M.J. at 17..

[201] *Id.*

[202] *Id.* at 20.

[203] HENNING, *supra* note 201, at CRS- 7.

[204] *Id*.

[205] *Id*. at CRS-8-9.

[206] *Id.* at CRS-8.

[207] *See id.* at CRS-8-9.

[208] Stevenson v. United States, 129 S. Ct. 69 (2008).

[209] HENNING, *supra* note 184, at CRS-9.

[210] *Id.* at CRS-2 (citing Toth v. Quarles, 350 U.S. 11, 14–15 (1955) ("It has never been intimated by this Court . . . that Article I military jurisdiction could be extended to civilian ex-soldiers who had severed all relationship with the military and its institution.")).

[211] Brief on behalf of Petitioner, United States v. Denedo, 66 M.J. 114 (2008).

[212] *Id.* (quoting Clinton v. Goldsmith, 526 U.S. 529, 534 (1999)).

> [W]e've had a lot of interesting talks around the court about [*Goldsmith*]. Some scholars and others think *Goldsmith* was probably an aberration because the services were so concerned about us reaching into the administrative business of the secretaries of the departments. Others think it was a good left hook to the chin on the court as far as limitations of jurisdiction. We'll just have to wait until the next case and see what the court does.[213]

Was *Goldsmith* an aberration or was it really meant to be a "left hook to the chin?" Maybe we'll find out next term.[214] If so, perhaps next year will be proclaimed as "The Year of Clarification."

[213] Walter Hudson, *Two Senior Judges Look Back and Look Ahead: An Interview with Senior Judge Robinson O. Everett and Senior Judge Walter T. Cox, III*, 165 MIL. L. REV. 42, 68 (2000).

[214] The Supreme Court has granted certiorari in *Denedo* and will hear oral argument on 25 March 2009. Supreme Court Argument Calendar, http://www.supremecourtus.gov/oral_arguments/argument_calendars/MonthlyArgumentCalMarch2009.pdf (last visited Mar. 24, 2009).

Whose Side Are You On?

Conflict, Argument, and Disqualification in Last Year's Court Term

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In the most recent court term, the Court of Appeals for the Armed Forces (CAAF) court confronted the various conflicts that arise from confusion of the roles of parties to the court-martial process. Specifically, what is the impact on the trial if the staff judge advocate (SJA) who advised the convening authority sits as the military judge of the accused?[1] The court also examined the limits of the right to counsel when the accused hires a civilian attorney who was a former military prosecutor.[2] The court also examined the ethical quandary of a defense counsel who simultaneously wears the hat of a prosecutor.[3] Finally, the court examined whether a defense counsel can ethically argue against his client's innocence.[4] The term revealed no global rule for resolving matters of apparent conflict other than perhaps a rule of common sense. Where conflict was illusory and remote, the court ordered no relief.[5] Where conflict was obvious and threatened the credibility of proceedings, the court upheld action to sever it.[6] Where it was unclear, the court sought more clarity.[7]

I'll Be Seeing You In All the Old Familiar Places . . . [8]

Rule for Courts-Martial 1106(c) and the Definition of Same Courts-Martial

In *United States v. Moorefield*, Sergeant (SGT) Daqric Moorefield, was convicted contrary to his pleas of making a false official statement, insubordination, attempting to strike a military policeman, disorderly conduct, soliciting a crime, communicating a threat, impersonating a non-commissioned officer, and five specifications of assault.[9] For his crimes he was sentenced to two years confinement and a bad conduct discharge.[10] At some point, SGT Moorefield realized the SJA who advised the convening authority before his trial and prepared the post-trial review was familiar to him.[11] The SJA had sat as a military judge on SGT Moorefield's earlier unrelated court-martial.[12]

The court examined whether prior service as a military judge disqualified the SJA from taking action for this accused.[13] Sergeant Moorefield relied on the provisions of RCM 1106 (b).[14] This rule provides that:

> No person who has acted as member, military judge, trial counsel, assistant trial counsel, defense counsel, associate or assistant defense counsel, or investigating officer in any case may later act as a staff judge advocate or legal officer to any reviewing or convening authority in the same case.[15]

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[1] United States v. Moorefield, 66 M.J. 170 (C.A.A.F. 2008).

[2] United States v. Rhoades, 65 M.J. 393 (C.A.A.F. 2008).

[3] United States v. Lee, 66 M.J. 387 (C.A.A.F. 2008).

[4] United States v. Larson (*Larson II*), 66 M.J. 212 (C.A.A.F. 2008).

[5] *See, e.g.*, *Moorefield*, 66 M.J. 170.

[6] *See, e.g.*, *Rhoades*, 65 M.J. 393.

[7] *See, e.g.*, *Lee*, 66 M.J. 387.

[8] I'LL BE SEEING YOU, *in* RIGHT THIS WAY (1938).

[9] *Moorefield*, 66 M.J. at 170.

[10] *Id.*

[11] *Id.*

[12] *Id.*

[13] *Id.* at 171.

[14] *Id.*

[15] MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 1106 (2008).

Sergeant Moorefield also referred to Article 6(c), UCMJ, which provides the statutory basis for RCM 1106(b).[16] The CAAF pointed out that the Navy-Marine Corps Court of Appeals (NMCCA) keyed-in on the final line of the RCM that a person shall not serve in dual capacity "in the same case."[17] Two courts-martial brought at different times against the same accused can constitute the same case.[18] In *Moorefield* the court looked to the facts that the courts-martial were years apart, and that they involved different facts, victims, and evidence.[19] The CAAF also noted that there was no allegation that the SJA in this case had acquired any specialized knowledge as military judge that would impact his decision as SJA.[20] The court was finally persuaded by the absence of any prejudice to the accused by the SJA's prior assignment.[21]

The CAAF was very clear that the rule barring service in the "same case" should be applied with common sense and not with an extremely expansive view.[22] Rules for Professional Conduct 1.1, 1.7, and 1.12 should put counsel on notice that the duty to be a zealous advocate would preclude having two roles in the same trial.[23] These prohibitions do not prevent the counsel from crossing paths with former parties as part of the ordinary assignment rotations.

You Cannot Serve Two Masters[24]

My Enemy's Enemy is My Friend. So Who Are You?[25]

Clearly there is no conflict when different facts and several years separate a counsel's assignment to roles on different sides of a court-martial. But what occurs when there isn't a great separation in time? In *United States v. Lee*, Captain (Capt) Jonathan Lee, USMC, complained that his assigned defense counsel labored an undisclosed and un-waived conflict of interest as he was a working prosecutor on another case while serving as the Capt Lee's defense counsel.[26]

Captain Lee entered a mixed plea and was subsequently tried on the contested charges.[27] He was convicted of three specifications of burglary, conduct unbecoming an officer, three specifications of fraternization, and five specifications of indecent assault.[28] The court sentenced him to three years confinement and a dismissal.[29] He received some appellate relief from the NMCCA in dismissal of a fraternization and allied conduct unbecoming charge and concordant sentence re-assessment.[30]

After his court-martial, Capt Lee became aware of the book *Warlord: No Better Friend, No Worse Enemy.*[31] The book details the high profile investigation and Article 32 examination of then Marine Second Lieutenant (2ndLt) Ilario Pantano,

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[16] 47 U.S.C. § 806(c) (2006).

[17] *Moorefield*, 66 M.J. at 171.

[18] Charges dismissed without prejudice that are later retried, companion cases or later retrial on related charges, or cases that otherwise have significant overlapping facts may be substantially the same matter requiring disqualification of the SJA.

[19] *Moorefield*, 66 M.J. at 171.

[20] *Id.*

[21] *Id.*

[22] *Id.*

[23] U.S. DEP'T OF ARMY, REG. 27-26, RULES OF PROFESSIONAL CONDUCT Rules 1.1, 1.7, 1.12 (1 May 1992). Rule 1.1 requires competent representation. *Id.* R. 1.1. Rule 1.7 requires that a lawyer avoid conflicts of interest. *Id.* R. 1.7. Rule 1.12 prevents a person who has served as a judge or arbitrator from representing a party in the case that they were responsible for adjudicating. *Id.* R. 1.12.

[24] *Matthew* 6:24.

[25] Wikipedia. http://en.wikipedia.org/wiki/The_enemy_of_my_enemy_is_my_friend (last visited Mar. 11, 2009) (derived from the Arab proverb "The Enemy of my enemy is my friend."); *Exodus* 23:22 ("I will be an enemy to your enemies.").

[26] United States v. Lee, 66 M.J. 387 (C.A.A.F. 2008).

[27] *Id.* at 387.

[28] *Id.*

[29] *Id.*

[30] *Id.*

[31] *Id.* at 388; *see generally* ILARIO PANTANO & MALCOLM MCCONNELL, WARLORD: NO BETTER FRIEND, NO WORSE ENEMY (2006).

who was charged with the premeditated murder of two Iraqis.[32] Captain Lee discovered that while his defense counsel was representing him at his court-martial, he was also working on the prosecution team of 2ndLt Pantano.[33] The book also revealed that the lead prosecutor in 2ndLt Pantano's case was also the lead prosecutor in Capt Lee's case, such that Capt Lee's defense counsel was simultaneously opposing Capt Lee's prosecutor in one case and assisting him as second chair in another.[34] The apparent conflict was mitigated by the fact that Capt Lee had hired a civilian counsel who was apparently without conflict.[35]

The CAAF began by affirming the legal precept that the right to counsel necessarily includes the right to conflict-free counsel.[36] They then turned to the idea that an accused may retain a conflicted counsel, if and only if their waiver is knowing and voluntary.[37] The court then looked at the nature of the conflict.[38] First, should there be a general prohibition against simultaneous service as a prosecutor and defense counsel?[39] The court looked at an opinion of the Office of Legal Counsel within the Department of Justice (DoJ) which held "it is considered unethical for an active prosecutor to represent criminal defendants in his or her own or another jurisdiction."[40] The opinion cited "'subliminal or concealed' influences on the attorney's loyalty."[41] The court also cited two ABA informal ethics opinions for the proposition that no counsel should be defense and prosecutor in the same case.[42]

The CAAF then looked to the case law of numerous jurisdictions for guidance.[43] The Fourth Circuit rejected a per se prejudice rule where a defense counsel worked in a neighboring jurisdiction as a part time prosecutor.[44] The Ninth Circuit required an appellant to demonstrate some impact on the quality of representation when the defense counsel was simultaneously working as a prosecutor.[45] The Ninth Circuit's holding suggested that a timely objection by the appellant might obviate the need to demonstrate impact.[46] The Court of Military Appeals had touched the issue tangentially in rejecting a per se finding of prejudice where the trial counsel wrote or endorsed the personnel evaluations of the defense counsel.[47]

Captain Lee alleged that while he was aware that his defense counsel would transition into working as a prosecutor, he was not informed when that would occur.[48] The allegation raised three questions for the CAAF.[49] First, was there an actual conflict of interest due to simultaneous service as trial and defense counsel; second, was the defense counsel supervised in one case by the trial counsel he opposed in another case; and finally, to the extent there was waiver by the accused, was it knowing and voluntary.[50] In other words did the accused know exactly when his lawyer began serving as a prosecutor and

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[32] Connie Fletcher, BOOKLIST, *available at* http://www.amazon.com/Warlord-Better-Friend-Worse-Enemy/dp/1416524266 (reviewing PANTANO & MCCONNELL, *supra* note 31).

[33] *Lee*, 66 M.J. at 388.

[34] *Id.*

[35] *Id.*

[36] *Id.*; *see also* Wood v. Georgia, 450 United States, 261, 271 (1981).

[37] *Lee*, 66 M.J. at 388; *see also* United States v. Davis, 3 M.J. 430, 433 (C.M.A 1977).

[38] *Lee*, 66 M.J. at 388.

[39] *Id.*

[40] *Id.* (quoting 1 Op. Off. Legal Counsel 110, 112 (1977)).

[41] *Id.*. at 388 (quoting 1 Op. Off. Legal Counsel at 112).

[42] *Id.* at 389; *see also* ABA Comm. on Ethics and Prof'l Responsibility, Informal Ops. 1235 (1972); ABA Comm. on Ethics and Prof'l Responsibility, Informal Ops. 1474 (1982).

[43] *Lee*, 66 M.J. at 389.

[44] *Id.*; *see also* Beaver v. Thompson, 93 F.3d 1186, 1193 (4th Cir. 1996).

[45] *Lee*, 66 M.J. at 389; *see also* Garcia v. Bunnell, 33 F.3d 1193, 1198 (9th Cir. 1994).

[46] *Lee*,, 66 M.J. at 389; *see also Garcia*, 33 F.3d at 1198.

[47] *Lee*, 66 M.J. at 389; *see also* United States v. Nicholson, 15 M.J. 436, 438 (C.M.A. 1983); United States v. Hubbard, 20 C.M.A. 482, 484 (1971).

[48] *Lee*, 66 M.J. at 389.

[49] *Id.*

[50] *Id.*

did the accused know the extent of his lawyer's duties as a prosecutor, to include that he would be supervised by the person prosecuting him?[51]

The CAAF remanded the case for further fact finding on those issues.[52] In contrast, the DoJ issued an opinion alleging simultaneous service as defense and trial counsel is unethical.[53] The CAAF signaled that a close reading of the facts is necessary before issuing a final ruling.[54] This is a welcome outcome given the practical realities of Active and Reserve assignment policies within the Judge Advocate General Corps.

Judge Advocates (JAs) may be re-assigned from one criminal law function to another.[55] Safeguards are often employed to limit the ethical conflicts that arise from direct transfer from trial counsel to defense counsel or vice-versa.[56] Some reserve JAs may hold civilian employment that technically conflicts with their assigned military duty.[57] A per se rule against all cases of a person performing opposing roles in different jurisdictions, would require a sizeable percentage of practicing JAs to change reserve assignments. Such a rule would also disrupt the flexibility that our assignments officers have in staffing missions filled by reservists. While the court will make some ruling on the issue in the future it seems likely the court will have the more practical approach against per se rules found in several federal circuits.[58]

An Inside Job

Everything Has Limits[59]

The court's prior rulings suggest a person can simultaneously be a prosecutor in one jurisdiction and a defense counsel in another.[60] The court was also asked whether a person can oversee the prosecution and then switch sides, particularly when the appellant's right to counsel is at stake.[61] In *United States v. Rhoades*, Specialist (SPC) Rhoades faced courts-martial for three specifications of willful disobedience of a superior commissioned officer.[62] In preparing for his trial at Fort Huachuca, SPC Rhoades hired Mr. R, a former JA who had just left active duty.[63] Mr. R's final active duty position was as the Chief of Justice at Fort Huachuca.[64] After appearing at trial on SPC Rhoades behalf, the Government moved to disqualify Mr. R. as counsel due to his prior government service.[65]

The Sixth Amendment gives accused the right to counsel of their choice, though the right is not absolute.[66] The "need for fair, efficient, and orderly administration of justice may outweigh the interest of the accused" in their selection of counsel.[67] The right may be abrogated due to a previous relationship with another party in the case, even if that party is the

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[51] *Id.*

[52] *Id.* at 390.

[53] 1 Op. Off. Legal Counsel 110, 112 (1977).

[54] *Id.* at 388, 390.

[55] Anecdotal evidence compiled by the author.

[56] Safeguards include refraining from assigning departing TDS counsel, new cases within three months of their prospective PCS, so that they have no lingering representations after departing TDS; and the construction of "Chinese walls" to insulate a counsel from potentially learning information which would create an irresolvable conflict. Interview with Major Tyesha Lowery, Criminal Law Dep't, The Judge Advocate General's Sch., in Charlottesville, Va. (Mar. 19, 2009).

[57] Some JA's assigned to Trial Defense Service Legal Service Offices are active civilian prosecutors. Some reserve military judges are practicing criminal lawyers. Some reserve command JAs whose duties include prosecution functions are private criminal defense attorneys.

[58] *See generally Lee*, 66 M.J. at 387–89; Beaver v. Thompson, 93 F.3d 1186, 1193 (4th Cir. 1996); Garcia v. Bunnell, 33 F.3d 1193, 1198 (9th Cir. 1994).

[59] Attributed to Mark Twain (1835–1910).

[60] *See generally Lee*, 66 M.J. at 388–90.

[61] United States v. Rhoades, 65 M.J. 393 (C.A.A.F. 2008).

[62] *Id.*

[63] *Id.* at 394.

[64] *Id.*

[65] *Id.*

[66] *Id.*; *see* Wheat v. United States, 486 U.S. 153, 159 (1988).

[67] *Rhoades*, 65 M.J. at 394 (quoting United States v. Campbell, 491 F.3d 1306, 1310 (11th Cir. 2007)).

Government.[68] While a judge is afforded broad discretion in ruling on motions for disqualification, a court should recognize a presumption favoring allowing an accused their counsel of choice.[69]

In this case the military judge considered 18 U.S.C. § 207(a)(1) a federal law that mandates that a former federal employee can not undertake post-government employment in connection with a matter which the person participated "personally and substantially."[70] The military judge also considered 18 U.S.C. § 207(a)(2) which mandates a two year ban on post-government employment in connection with particular matters under official responsibility.[71] There was no evidence in the record that Mr. R had substantial personal involvement with SPC Rhoades's court-martial prior to his release from active duty.[72]

The military judge then looked to the definition of matters pending "under official responsibility."[73] The statute was clear that a matter had to be actually "referred to or under consideration by persons within the employee's area of responsibility." In other words, it was not enough to show that a matter could have come under the former employee's purview.[74]

The government in its motion for disqualification submitted an affidavit from the SJA detailing then Captain (CPT) R's duties as the Chief of Justice, an affidavit from a CID agent discussing his agency's interaction with the former prosecutor, and an opinion from the post ethics counselor.[75] Mr. R. countered with an affidavit describing his involvement with the case prior to his termination of military service and a "Waiver of Conflict of Interest" signed by SPC Rhoades.[76]

The judge heard argument and ruled in favor of the Government disqualifying Mr. R.[77] The judge pointed to then CPT R's duties supervising the counsel who were now trying the case, advice to the CID and command regarding disposition of the case, and the clear fact that the case was being actively investigated for months, with the knowledge and assistance of the military justice section, while CPT R was the chief.[78] The trial court enumerated an e-mail chain started by SPC Rhoades' commander sent to CPT R, seeking advice on the issue of the investigation, and forwarded by the now defense counsel to a junior prosecutor.[79] Mr. R also briefed the incoming chief of justice about the strength of the case that in a month he would take on as defense counsel and, while on terminal leave, advised CID on elements of the investigation which would give rise to Specialist Rhoades being charged with kidnapping.[80]

The appellate court reviewed the judge's decision under an abuse of discretion standard.[81] The CAAF pointed out the judge's inquiry did not amount to a judicial finding that Mr. R committed a criminal violation of 18 U.S.C. § 207(a)(2).[82] Rather the appellate court reviewed whether the judge's decision to disqualify was within his discretion.[83] It was.[84] The CAAF found a reasonable likelihood that Mr. R's continued representation of SPC Rhoades would have violated a federal

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[68] *Rhoades*, 65 M.J. at 394; *see also Wheat*, 486 U.S. at 159.

[69] *Rhoades*, 65 M.J. at 395; *see also Wheat*, 486 U.S. at 164.

[70] *Rhoades*, 65 M.J. at 395; *see also* 18 U.S.C. § 207(a)(1) (2006).

[71] *Rhoades*, 65 M.J. at 396; *see also* 18 U.S.C. § 207(a)(2).

[72] *Rhoades*, 65 M.J. at 396.

[73] *Id.*

[74] *Id.* (citing 10 U.S.C. § 207(a)(2)).

[75] *Id.*

[76] *Id.*

[77] *Id.*

[78] *Id.* at 397.

[79] *Id.*

[80] *Id.*

[81] *Id.*

[82] *Id.*

[83] *Id.*

[84] *Id.*

law whose purpose was to safeguard the integrity of the trial process.[85] The CAAF cited the holding in a civil case, *Kessenich v. Commodity Futures Trading Commission*, for the proposition that "the possibility that continued representation may be illegal militates strongly in favor disqualification."[86] The CAAF thereby ruled that the military judge did not abuse his discretion in disqualifying Mr. R., and that an appellant's right to counsel of their choice could be abrogated by the prospect of continued representation being illegal.[87]

Nothing Disarms a Doubting Thomas Like Honesty[88]

Failing to Succeed in Courts-Martial

We've examined the court's rulings when participants in the court-martial process switch sides at some point before, during, or after the proceeding. We now look at the court's rulings when a defense counsel's argument suggests they've switched sides.[89] Major (Maj) John Larson was court-martialed on various charges arising from the allegations that he used his government computer to download pornography and attempted to set up a sexual tryst with a minor.[90] Major Larson apparently established a rendezvous with what he believed was a fourteen year old girl named "Kristin."[91] Kristin was actually a civilian police detective who arrived at the rendezvous and arrested the major.[92]

In his opening statement and closing argument of the contested members trial, Maj Larson's civilian attorney conceded guilt on the issue of misuse of the computer.[93] Major Larson argued that these and similar statements during closing argument constituted ineffective assistance of counsel because he pled not guilty to the charge of violation of a lawful general

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[85] *Id.*

[86] *Id.* at 398 (quoting, 684 F.2d 88, 99 (D.C. Cir. 1982)).

[87] *Id.*

[88] BARRY MAHER, FILLING THE GLASS: THE SKEPTICS GUIDE TO POSITIVE THINKING IN BUSINESS 185 (2001).

[89] *Larson II*, 66 M.J. 212 (C.A.A.F. 2008).

[90] *Id.*

[91] *Id.*

[92] *Id.* at 214.

[93] *Id.* at 216. During his opening statement the Appellant's attorney told the members:

> You're going to see that Major Larson was employed and used his computer in an inappropriate fashion. There's no question about that. That's not going to be an issue in this case. It's going to be conceded. Major Larson took his computer and used it inappropriately.
>
> You're going to hear that there is a regulation or rule that you are not to use your computer for particular purposes. . . . It's not going to be the defense contention in this case that Major Larson—that it was ever intended for Major Larson to gent on the computer and start going into profiles and contacting individuals in chat rooms, and profiles, and downloading photos. . . . That is not going to be an issue in this case.

Id. Appellant's attorney concluded his opening statement with:

> But when it gets down to the truth of this case—and I'm not going to get up here and try to represent something to you that's not true-Major Larson is guilty of misusing his computer because it was never anticipated by [Appellant's superiors] that he was to use that computer for those reasons. It wasn't and he shouldn't have done that. . . . But he certainly never attempted to do what they're claiming he did. And we're going to ask you at the conclusion of this case to find him not guilty of these charges and specifications.

Id. at 216–17. The closing argument on behalf of the Appellant included:

> I said to you in the opening that he violated-he did not obey a lawful order and that's viewing sexually explicit material over the internet.
>
> . . . There's a lot of thing s that I've forgotten and there are a lot of issues that I won't necessarily raise and bring up and for that I'm sorry. And I apologize to my client if I forgot to mention things that are important, certainly, that you might feel they're important. But I know that I each and every one [of] you are dedicated, your service here and I know that each one of you believe that it in order to make sure this officer, and yes, an officer that made bad choices and bad decisions, and he disobeyed his lawful orders, and certainly communicated indecent language and he did things, and thinking this was in the privacy of his own office, but certainly took advantage of that and brought, I think, discredit upon the service, you know, a disreputable situation and for that I'm sure you can—you know that this man is embarrassed and sorry for that.

Id. at 217.

regulation.[94] On appeal, Maj Larson alleged that he was surprised by his counsel's tactic of conceding guilt and that his chosen counsel was ineffective for not consulting him and thereby limiting his right to select his plea or testify in his defense.[95]

The Air Force Court of Appeals directed the civilian defense counsel to describe his consultation with the accused.[96] The civilian counsel never answered the courts inquiry, yet the court found that counsel was not constitutionally deficient anyway.[97]

The issue of ineffective assistance of counsel turned on two legal questions. First, is it ineffective for counsel to concede guilt contrary to the pleas of their client?[98] Second, if counsel may concede guilt for tactical advantage in the case of multiple charged offenses, must they obtain prior consent of their client before doing so.[99]

In answering both questions the court looked at somewhat analogous Supreme Court precedent, the case of *Florida v. Nixon*.[100] In *Nixon*, a defense counsel in a capital case consulted with his client and counseled that they concede guilt during the merits phase of the trial, in order to retain credibility during the punishment or sentencing phase of the trial.[101] The defendant in that case was generally unresponsive during meetings with his counsel and never consented to the strategy.[102] The Court reversed the Florida Supreme Court, and found that it was constitutionally permissible for a defense counsel to proceed with his strategy to concede guilt when a non-responsive client neither objects nor consents.[103] The Court and numerous federal courts have held consistently that conceding guilt to one charge to bolster the case for innocence on remaining charges is a valid trial strategy.[104]

While it was clear that a lawyer may tactically concede guilt, and needn't have the express permission of the client to do so, in *Larson* the CAAF made it clear that a counsel should consult the client before undertaking that course.[105] Absent a clear record that there was prior consultation, the court presumed deficient conduct on the part of the civilian defense counsel in failing to consult with his client before conceding guilt.[106] The court then turned to a *Strickland* analysis of prejudice in deciding whether relief was appropriate for the ineffective assistance rendered by the counsel.[107] The court held that Maj Larson had not met his burden of showing prejudice from his counsel's unwarned concession in argument.[108]

The CAAF found the evidence of guilt was overwhelming, that Maj Larson never offered a plausible defense to the charge of misusing his government computer, and the core defense strategy was unaffected by his counsel's concession.[109] The CAAF concluded with a quote from *United States v. Cronic*, that while an accused may want his counsel to engage in a "useless charade" of innocence in the face of overwhelming evidence, he suffered no prejudice from his counsel's failure to

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[94] *Id.* at 219.

[95] *Id.*

[96] *Id.* at 217.

[97] *Id.*; *see also* United States v. Larson (*Larson I*), 64 M.J. 559, 564 (A.F. Ct. Crim. App. 2006).

[98] *Larson II*, 66 M.J. at 213.

[99] *Id.*

[100] *Id.* at 218; *see also* Florida v. Nixon, 543 U.S. 175, 181 (2004).

[101] *Nixon*, 543 U.S. at 182.

[102] *Id.* at 183.

[103] *Id.* at 193.

[104] *Larson II*, 66 M.J. at 218; *see also Nixon*, 543 U.S. at 188; United States v. Holman, 314 F.3d 837, 840 (7th Cir. 2002); United States v. Swanson, 943 F.2d 1070, 1075–76 (9th Cir. 1991).

[105] *Larson II*, 66 M.J. at 218–19; *see* Davenport v. Diguglelmo, 215 Fed. Appx 175, 181 (3d Cir. 2007).

[106] *Larson II*, 66 M.J. at 219.

[107] *Id.* at 219; *see also* Strickland v. Washington, 466 U.S. 668, 688 (2004). The *Strickland* analysis is the prevailing norm for judging cases of ineffective assistance of counsel: (1) Did counsel's performance fall below the norm of reasonable conduct? (2) Is there a justification for the deficient conduct? (3) If not, did the Appellant suffer prejudice that could reasonably have impacted on the outcome of the trial? *Id.* at 697.

[108] *Larson II*, 66 M.J. at 219.

[109] *Id.* The court was persuaded by the amount and clarity of sexually explicit photographs and chat sessions seized from the Appellant's computer and that the accused bought condoms just fifteen minutes before his intended rendezvous with "Kristin." *Id.* Larson's core defense was that he was unaware that "Kristin" was underage. *Id.*

do so.[110] Defense and government counsel must remember that when an accused pleads not guilty, the onus remains on the government to produce evidence that proves the accused guilt beyond a reasonable doubt, regardless of the defense's argument or posturing.[111]

Conclusion

What we've got here is failure to communicate . . . .[112]

Perhaps the most vexing area of professional responsibility is sorting out conflicts of interest at the margins. It is easy to figure out what is right when there are two clear clients with diametrically opposed interests. But when the conflict is remote and often somewhat academic, guidance is needed. In four cases this term, the CAAF has provided some guidance. Counsel must first understand that the rules are based on common sense and not intended to prevent the occasional coincidence of a party who served in one capacity in a trial involving the accused from ever serving in a different role with the same accused in a later trial. Counsel should always keep in mind that "when in doubt, talk it out." Full and free disclosure about any roles, relationships, or tactical choices that might be meaningful to a client is always the best course. Finally, all sides must remember that the Army is a client and as such is entitled to conflict free representation and loyalty from its counsel.

[110] *Id.* (quoting 466 U.S. 648, 656 n.19 (1984)).

[111] *Id.*

[112] COOL HAND LUKE (Warner Brothers 1967).

There's More to the Game than Shooting: Appellate Court Coaching of Panel Selection, Voir Dire, and Challenges for Cause

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Introduction

In the movie *Hoosiers*, a former college basketball coach ends up at a small high school in Hickory, Indiana.[1] During his first practice, Coach Norm Dale is running drills with the five players on the team, ordering them to run back and forth across the court and dribble around folding chairs.[2] The players complain about the monotony and ask when they can play a scrimmage.[3] Coach Dale shoots back that they will play when he knows they are ready: "I've seen you guys can shoot but there's more to the game than shooting. There's fundamentals and defense."[4] Criminal law practitioners have similar dreams of sinking the big shot in the courtroom, from the brilliant opening statement to the carefully-crafted cross-examination and the game-changing closing argument. In preparing their cases, trial practitioners can easily lose sight of the fundamentals and defense that are so vital to court-martial practice.

In the last term, military courts highlighted both fundamentals and defense in pretrial procedures. Looking at fundamentals, the Court of Appeals for the Armed Forces (CAAF) issued *United States v. Bartlett*,[5] a case hinging on a strict reading of Article 25 of the Uniform Code of Military Justice (UCMJ). The CAAF similarly discussed the fundamentals of voir dire in *United States v. Nieto*.[6] In an on-going attempt to explain the fundamentals of implied bias in challenges for cause, the CAAF issued three inconsistent opinions.[7] As set forth below, the courts spent the last term coaching practitioners and military judges in the fundamentals, even when those fundamentals questioned long-held beliefs of the law.

Know the Fundamentals: Panel Selection After *Bartlett*

> *The general grant of authority to the Secretary to run the Army, broad and necessary as it is, cannot trump Article 25, UCMJ, which is narrowly tailored legislation dealing with the precise question in issue.*[8]

The CAAF returned to fundamentals of panel selection this term in two significant cases. In *United States v. Bartlett*[9] the court found the Secretary of the Army (SECARMY) exceeded his authority in issuing a service regulation that exempted chaplains; medical, dental, and veterinary officers; and inspectors general from serving on court-martial panels.[10] This case is notable for reversing a decades-long Army policy of exempting special branches from court-martial panels.[11] In *United States v. Townsend*[12] the court affirmed that law enforcement personnel and Judge Advocates (groups not addressed in *Bartlett*) are not per se disqualified from serving as panel members.

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[1] HOOSIERS (Metro Goldwyn Mayer 1986).

[2] *Id.*

[3] *Id.*

[4] *Id.* (quoting Gene Hackman as Coach Norm Dale).

[5] 66 M.J. 426 (C.A.A.F. 2008).

[6] 66 M.J. 146 (C.A.A.F. 2008).

[7] *See* United States v. Elfayoumi, 66 M.J. 354 (C.A.A.F. 2008); United States v. Bragg, 66 M.J. 325 (C.A.A.F. 2008); United States v. Townsend, 65 M.J. 460 (C.A.A.F. 2008).

[8] *Bartlett*, 66 M.J. at 429.

[9] 66 M.J. 426.

[10] *Id.*

[11] *See* United States v. Bartlett, 64 M.J. 641, 645 (A. Ct. Crim. App. 2007) ("[T]his court recognized more than fifty-five years ago that the Secretary of the Army has the authority to exempt persons assigned to a particular branch from court-martial service.") (citing United States v. Neville, 7 C.M.R. 180, 192 (A.B.R. 1952)), *rev'd*, 66 M.J. 426.

[12] 65 M.J. 460.

Article 25 of the UCMJ governs selection of panel members for courts-martial.[13] Article 25(d)(2) directs the convening authority to personally select members who are "best qualified" based on six criteria: "age, education, training, experience, length of service, and judicial temperament."[14] Given the broad power of the convening authority, courts have long ruled that the Article 25 criteria must be strictly applied.[15] The CAAF has provided three general principles for convening authorities selecting panels. First, a convening authority cannot have an "improper motive" to "stack" a panel to obtain a certain result.[16] Panel stacking normally involves a convening authority selecting members who are likely to give harsh sentences.[17] Second, "systematic exclusion of otherwise qualified potential members" because of an improper factor (like rank) is improper.[18] Finally, courts will be "deferential to good faith attempts" to select members who are representative of the military community.[19]

In *Bartlett*, an Army lieutenant colonel pled guilty to the unpremeditated murder of his wife.[20] An officer panel sentenced the accused to a dismissal and confinement for twenty-five years.[21] Before the guilty plea, the defense filed a motion for the convening authority to select a new panel, arguing that the SECARMY exceeded his authority by exempting certain groups of officers from court-martial service by Army regulation.[22] Chapter 7 of Army Regulation (AR) 27-10[23] expressly exempted the following special branches from serving on court-martial panels: chaplains; medical, dental, and veterinary officers; and inspectors general.[24] Mirroring the language of AR 27-10, the staff judge advocate's advice for panel selection read that the convening authority could not "detail officers assigned to the Medical Corps, Medical Specialist Corps, Army Nurse Corps, Dental Corps, Chaplain Corps, Veterinary Corps, [or] those detailed to Inspector General duties as courts-martial panel members."[25] On appeal, the defense argued the SECARMY exceeded his authority by exempting certain branches of officers in AR 27-10.[26]

The Army Court of Criminal Appeals (ACCA) affirmed the trial court's denial of the defense motion, reasoning that the SECARMY had appropriately exercised his authority under 10 U.S.C. § 3013 to "assign, detail, and prescribe duties of members of the Army."[27] For the ACCA, the SECARMY was deciding the "*feasibility* of their service under Army policy, not their *eligibility* for service under the law."[28] The court reasoned that Article 25, UCMJ does not expressly limit the power of the SECARMY to exempt personnel from serving as members, so a "gap" existed between the broad authority under 10 U.S.C. § 3013 and the binding guidance for selecting panels under a separate statute, Article 25.[29] When such a gap exists

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[13] UCMJ art. 25 (2008).

[14] *Id.* art. 25(d)(2).

[15] *See generally* United States v. Kirkland, 53 M.J. 22, 25 (C.A.A.F. 2000) (reversing case in which panel selection process limited enlisted nominees to the grade of E-7 and above); United States v. Daigle, 1 M.J. 139, 140–41 (C.M.A. 1975) (rejecting a convening authority's use of rank as a factor in selecting members and noting "[d]iscrimination in the selection of court members on the basis of improper criteria threatens the integrity of the military justice system and violates the Uniform Code").

[16] United States v. Dowty, 60 M.J. 163, 171 (C.A.A.F. 2004).

[17] United States v. McClain, 22 M.J. 124, 132 (C.M.A. 1986) (reversing sentence because convening authority selected members "less disposed to lenient sentences").

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

[19] *Id.*

[20] 66 M.J. 426, 427 (C.A.A.F. 2008).

[21] *Id.*

[22] *Id.*

[23] At the time of the accused's trial, the 1996 version of AR 27-10 was in effect. U.S. DEP'T OF ARMY, REG. 27-10, MILITARY JUSTICE (24 June 1996). United States v. Bartlett, 64 M.J. 641, 644 n.2 (A. Ct. Crim. App. 2007). The current version of AR 27-10 retained the same exemptions as the 1996 version. *Id.* n.3 (citing U.S. DEP'T OF ARMY, REG. 27-10, MILITARY JUSTICE (16 Nov. 2005).

[24] *Bartlett*, 66 M.J. at 427 (quoting Memorandum from Garrison Staff Judge Advocate to Garrison Commander, Fort Meade, Md. (18 July 2002)). The CAAF noted that AR 27-10, Chapter 7, "is a collection of substantive prohibitions applicable to particular branches and duties and contained in individual personnel management regulations." *Id.* at 428 n.1 (citing U.S. DEP'T OF ARMY, REG. 165-1, CHAPLAIN ACTIVITIES IN THE UNITED STATES ARMY para. 4-3e(2) (Mar. 25, 2004); U.S. DEP'T OF ARMY, REG. 40-1, COMPOSITION, MISSION, AND FUNCTIONS OF THE ARMY MEDICAL DEPARTMENT ch. 2 (July 1, 1983); U.S. DEP'T OF ARMY, REG. 20-1, INSPECTOR GENERAL ACTIVITIES AND PROCEDURES para. 2-6 (Feb. 1, 2007)).

[25] *Id.* at 427. The advice cited AR 27-10, Chapter 7 as authority for this section. *Id.*

[26] *Id.*

[27] *Bartlett*, 64 M.J. at 644.

[28] *Id.* at 645.

[29] *Id.* at 646. Article 25, UCMJ, was passed by Congress as 10 U.S.C. § 825 (2000). *Bartlett*, 66 M.J. at 427.

between two statutes, the ACCA noted "the Supreme Court instructs that we are 'not [to] substitute [our] own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency.'"[30] The ACCA then determined the SECARMY reasonably interpreted the statute.[31] On further appeal, the CAAF, while affirming the outcome of the lower court's decision, found the SECARMY had exceeded his authority.[32]

The CAAF held the SECARMY "impermissibly contravened the provisions of Article 25, UCMJ," by enacting the sections of AR 27-10 that exempt certain special branches from court-martial duty.[33] The CAAF held that convening authorities must consider officers in these special branches when applying Article 25 to select panel members.[34] The CAAF reasoned that Article 25 is a statute specifically addressing panel selection, while 10 U.S.C. § 3013 provides broad, general discretion to the SECARMY for personnel decisions.[35] The court noted, "Congress did not see fit to include in Article 25, UCMJ, any limitations on court-martial service by any branch, corps, or occupational specialty among commissioned officers of the armed forces."[36] To the contrary, Article 25(a) allows for any active duty commissioned officer to serve on any court-martial.[37] Along with the "broad and inclusive terms" of Article 25, Congress added specific limits in the statute by "prohibiting only certain members of the armed forces from acting as members of courts-martial."[38] Given the strict and comprehensive parameters of Article 25, the CAAF rejected the lower court's decision and its reliance on an inapposite Supreme Court case.[39]

Bartlett also focused on the President's "nonrestrictive view" for panel membership in the Rules for Courts-Martial (RCM).[40] Rule for Courts-Martial 502(a) provides "basic qualifications" (in the court's words) for panel members and does not modify the statutory language of Article 25.[41] Similarly, RCM 912(f) addresses the disqualification of potential members, and does not prohibit classes of personnel from duty but instead centers on challenges for cause.[42] The CAAF noted that Congress (in Article 25) and the President (in RCM 502(a) and RCM 912(f)) created only two "disqualifying factors."[43] First, a member is disqualified for "actual involvement in the case," like serving as an investigating officer.[44] Second, a member may be disqualified for "formal distinctions of grade or rank," like the prohibition that a warrant officer

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[30] *Bartlett*, 64 M.J. at 646 (quoting Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 844 (1984)) (alterations in original).

[31] *Id.* ("The question then becomes whether the Secretary of the Army's decision to exempt a grouping of Army personnel from service on court-martial panels due to the nature of their duties is a reasonable interpretation of the statute. We conclude that it is.").

[32] *Bartlett*, 66 M.J. at 431.

[33] *Id.* at 427. The standard of review for claims of error in panel selection is de novo, as questions of law. *Id.* (citing United States v. Dowty, 60 M.J. 163, 171 (C.A.A.F. 2004); United States v. Kirkland, 53 M.J. 22, 24 (C.A.A.F. 2000)).

[34] *Id.* at 428.

[35] *Id.* Later in the opinion, the court applied "the accepted principle of statutory construction" that a specific statute, like Article 25, will override a general statute, like 10 U.S.C. § 3013(g), when in "direct conflict." *Id.* at 429.

[36] *Id.* at 428.

[37] The CAAF emphasized the broad classes of personnel who were eligible for serving as panel members:

> Rather, it cast the eligibility of such officers to serve in broad and inclusive terms in Article 25(a), UCMJ (emphasis added): "*Any* commissioned officer on active duty is eligible to serve on *all* courts-martial for the trial of *any* person who may lawfully be brought before such courts for trial." Within that broad class, the convening authority of a court-martial is to detail those members who, "in his opinion, are best qualified for the duty by reason of age, education, training, experience, length of service, and judicial temperament."

Id. at 428–29 (quoting UCMJ art. 25(d)(2)).

[38] The CAAF recited that a member may not sit on a case in which he is the accused or a prosecution witness, or acted as an investigating officer or counsel. *Id.* at 429 (citing UCMJ art. 25(d)(2)). Also, a panel hearing the case of a commissioned officer may not include a warrant officer or enlisted servicemember. *Id.* (citing UCMJ art. 25(b), (c)(1)). Finally, unless unavoidable, no member shall be junior in rank or grade to the accused. *Id.* (citing UCMJ art. 25(d)(1)).

[39] The CAAF noted that "*Chevron* is inapposite to this case." *Id.* at 427. *Chevron* addressed the "deference" afforded an administrative agency in interpreting "a regulatory statute, the administration of which has been committed to it by Congress." *Id.* at 427–28 (citing Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 839 (1984)). By contrast, Congress passed Article 25 with specific guidance for selecting panel members, while also authorizing "broad general powers" for the Secretary of the Army in 10 U.S.C. § 3013. *Id.* at 428.

[40] *Id.* at 429. *See generally* UCMJ art. 36(a) (2008) (delegating to the President the authority to promulgate rules for "[p]retrial, trial, and post-trial procedures").

[41] *Bartlett*, 66 M.J. at 429.

[42] *Id.*

[43] *Id.*

[44] *Id.*

cannot sit on a commissioned officer's case.[45] From these rules, the CAAF concluded that the President and Congress intended that convening authorities exercise broad discretion in selecting members:

> The implication is clear: Congress and the President crafted few prohibitions on court-martial service to ensure maximum discretion to the convening authority in the selection process, while maintaining the basic fairness of the military justice system.[46]

With this reasoning, the CAAF held the portions of AR 27-10 limiting the assignment of commissioned officers to panels directly conflicted with Article 25.[47] As such, the regulation must yield to the statute.[48]

The opinion also explained how prejudice should be assessed. The court rejected the defense argument that this error was "structural" in nature, which would preclude the requirement of showing prejudice.[49] Noting the "strong presumption" that an error is not structural, the court found the panel selection error in this case was statutory as opposed to constitutional.[50] As such, the CAAF will not reverse unless there is a showing of material prejudice to a substantial right of the accused.[51] In this case, the court held the error "was not a simple administrative mistake" so the Government had the burden of showing harmless error.[52] The CAAF considered six factors and determined the error was harmless:

> (1) [T]here is no evidence that the Secretary of the Army enacted the regulation with an improper motive; (2) there is no evidence that the convening authority's motivation in detailing the members he assigned to Appellant's court-martial was anything but benign—the desire to comply with a facially valid Army regulation; (3) the convening authority who referred Appellant's case to trial was a person authorized to convene a general court-martial; (4) Appellant was sentenced by court members personally chosen by the convening authority from a pool of eligible officers; (5) the court members all met the criteria in Article 25, UCMJ; and, (6) as the military judge found, the panel was "well-balanced across gender, racial, staff, command, and branch lines."[53]

These six factors are important for practitioners. The first five factors should apply in every case pre-dating *Bartlett*. Put another way, if a convening authority has properly applied the Article 25, UCMJ criteria (even if officers in special branches were exempted), the first five factors will apply and appellate courts will likely find harmless error. Although it goes without saying, this analysis only applies to panels that announced a sentence before *Bartlett*. Any panel assembled after the decision was announced would run afoul of the second factor, as the convening authority would not be following a "facially valid" regulation. While the opinion was very instructive in terms of deciding prejudice, it was less helpful in determining if a convening authority could apply Article 25 and exclude other personnel from court-martial panels.

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[45] *Id.*

[46] *Id.*

[47] *Id.* ("Moreover, the Secretary's application of 10 U.S.C. § 3013(g) (2000) runs afoul of the accepted principle of statutory construction that in cases of direct conflict, a specific statute overrides a general one, regardless of their dates of enactment.") (citing 2B NORMAN J. SINGER, STATUTES AND STATUTORY CONSTRUCTION § 51.02, at 187 (7th ed. 2000); Morton v. Mancari, 417 U.S. 535, 550–51 (1974); Bulova Watch Co. v. United States, 365 U.S. 753, 758 (1961); United States v. Mitchell, 44 C.M.R 649, 651 (A.C.M.R. 1971)).

[48] *Id.* ("As such, the Army regulations must yield to the clear language of Article 25, UCMJ.") (citing United States v. Simpson, 27 C.M.R. 303, 306 (C.M.A. 1959)).

[49] *Id.* at 430.

[50] *Id.* The court noted that one of the cases cited by the defense to argue structural error, *Arizona v. Fulminante*, 499 U.S. 279, 310 (1991), found that exclusion of the defendant's race from a grand jury constituted structural error. *Id.* By contrast, the CAAF has a long history of using a "case-specific rather than a structural-error analysis" in reviewing challenges to panel selection. *Id.* Regarding this statement, Judge Erdmann wrote a separate concurring opinion and argued, "I do not believe that language should be read to foreclose the possible application of structural-error analysis to other member-selection cases." *Id.* at 431 (Erdmann, J., concurring).

Last term, the CAAF found structural error when a court-martial was improperly closed to the public while a child victim testified, triggering reversal even without showing prejudice to the accused. United States v. Ortiz, 66 M.J. 334, 342 (C.A.A.F. 2008) ("An erroneous deprivation of the right to a public trial is structural error, which requires this Court to overturn Appellant's conviction without a harmless error analysis.") (citing *Fulminante*, 499 U.S. at 310).

[51] *Bartlett*, 66 M.J. at 430. *See generally* UCMJ art. 59(a) ("A finding or sentence of court-martial may not be held incorrect on the ground of an error of law unless the error materially prejudices the substantial rights of the accused.").

[52] *Bartlett*, 66 M.J. at 430.

[53] *Id.* at 431. The court added, "Under these circumstances, we are convinced the error in this case was harmless." *Id.*

Bartlett did not address whether a convening authority could exclude officers branched in the Judge Advocate General's Corps or Military Police. Of note, the staff judge advocate's formal advice in *Bartlett* only stated "the GCMCA could not 'detail officers assigned to the Medical Corps, Medical Specialist Corps, Army Nurse Corps, Dental Corps, Chaplain Corps, Veterinary Corps, nor those detailed to Inspector General.'" [54] The advice makes no mention of judge advocates or military police. There is separate case law supporting exclusions of these groups.[55] Regarding Judge Advocates, there are two trends in appellate cases. First, as the CAAF held last term in *United States v. Townsend*, "Lawyers are not per se disqualified as court-martial members unless they have served in one of the capacities explicitly set forth as a disqualification in the Uniform Code of Military Justice (UCMJ)."[56] However, other cases warn against detailing Judge Advocates to panels.[57] The courts have two similar tracks for law enforcement. First, as the CAAF noted last term in *Townsend*, "Law enforcement personnel are not per se disqualified from service as court members."[58] However, appellate courts have discouraged convening authorities from detailing law enforcement personnel to panels.[59]

Practitioners should consider whether the experience criterion of Article 25, UCMJ could be used by the convening authority as a basis for excluding law enforcement personnel or Judge Advocates. In *United States v. Dale*, a 1995 CAAF case, the accused was charged with sexual offenses against a child.[60] One panel member, an Air Force captain, was Deputy Chief of Security Police and routinely sat in on criminal activity briefings with the base commander.[61] In reversing the military judge's denial of a challenge for cause, Judge Cox, writing for the majority, focused on the perception and appearance of fairness.[62] The challenged member was intimately involved day-to-day law enforcement on the base and was "'the embodiment of law enforcement and crime prevention'" at the Air Force base.[63] Judge Cox noted, however, "that peace officers are not disqualified from service as members of courts-martial as a matter of law."[64] By contrast, in *United States v. Fulton*, a 1996 CAAF case also authored by Chief Judge Cox, the court upheld the military judge's decision to deny a challenge for cause against member who was "Chief of Security Police Operations for Pacific Air Forces."[65] The CAAF noted that involvement "in security police work did not disqualify him from court-martial duty per se."[66] In a dissenting opinion in *Fulton*, Judge Sullivan correctly observed that the opinions in *Fulton* and *Dale* "are directly at odds."[67] Judge Sullivan further noted that in *Dale* the court decided the member should have been excused for cause as the "embodiment of law enforcement" for the base; the member in *Fulton* "stands in the same, if not larger, shoes as [the *Dale* member]."[68] It should also be noted that Judge Crawford dissented from *Dale*, arguing the opinion "may be read as establishing a *per se* rule against present law enforcement personnel serving as court members on the same installation where they perform law enforcement duties without regard for whether those duties have any connection with an accused's case," a change that "is

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[54] *Id.* at 427 (quoting Memorandum from Garrison Staff Judge Advocate to Garrison Commander, Fort Meade, Md. (18 July 2002)).

[55] United States v. Hedges, 29 C.M.R. 458, 459 (C.M.A. 1960) (selection of lawyers and military police personnel as panel members creates "the appearance of a hand-picked court"); *see also* United States v. McKinney, 61 M.J. 767, 769 (A.F. Ct. Crim. App. 2005) (citing *Hedges*, 29 C.M.R. 458 for similar proposition).

[56] 65 M.J. 460, 465 (C.A.A.F. 2008) (citations omitted).

[57] United States v. Sears, 20 C.M.R. 377, 381–82 (C.M.R. 1956) (cautioning against the "obvious dangers" in the use of a lawyer on a court-martial and noting that "any deviation from the limited role of member in the direction of the more stimulating position of untitled law officer" would result in disqualification and necessitate his removal); *Hedges*, 29 C.M.R. at 462 (Latimer, J., concurring) (reviewing case in which the panel president was an attorney and concluding, "In a court of that standing the law officer must be the judge, and when rank and legal knowledge in the form of a legally qualified president are superimposed over him, the probabilities are there will be encroachment into his domain.").

[58] *Townsend*, 65 M.J. at 464 (citing United States v. Dale, 42 M.J. 384, 386 (C.A.A.F. 1995)).

[59] United States v. Swagger, 16 M.J. 759, 760 (A.C.M.R. 1983) ("At the risk of being redundant—we say again—individuals assigned to military police duties should not be appointed as members of courts-martial. Those who are the principal law enforcement officers at an installation must not be.").

[60] 42 M.J. 384.

[61] *Id.* at 385.

[62] *Id.* at 386.

[63] *Id.*

[64] *Id.* (citing United States v. Berry, 34 M.J. 83, 88 (C.M.A. 1992) (Cox, J., concurring)).

[65] 44 M.J. 100, 100 (C.A.A.F. 1996).

[66] *Id.* at 101 (citing United States v. Berry, 34 M.J. 83, 88 (C.M.A. 1992) (Cox, J., concurring)); *see also* United States v. McDavid, 37 M.J. 861 (A.F.C.M.R. 1993) (no "per se" rule of exclusion for security policemen).

[67] *Fulton*, 44 M.J. at 102 (Sullivan, J., dissenting).

[68] *Id.* at 101–02 (Sullivan, J., dissenting).

the province of only the Executive or Legislative Branch."[69] She further argued it was not an abuse of discretion for the military judge to deny the challenge for cause in that case.[70]

There is scant case law considering the individual Article 25 criteria and how a convening authority may properly apply it to rule out certain nominees from serving, though two cases have discussed the experience criterion. In *United States v. Smith*, the Court of Military Appeals (COMA) set aside findings based on an installation policy of detailing "hardcore" female members to sex offense cases.[71] The COMA rejected the Government's argument that the convening authority was merely applying the experience criterion, reasoning that the females were selected "to help assure a particular outcome."[72] By contrast, in *United States v. Lynch*,[73] the Coast Guard appellate court affirmed a convening authority's selection of members who had substantial seagoing experience. In *Lynch*, the accused was a Coast Guard commanding officer convicted of negligently hazarding a vessel after his 180-foot buoy tender ran aground.[74] The defense claimed the convening authority violated Article 25 by excluding otherwise qualified nominees who did not have "buoy tender or other significant seagoing experience."[75] The court upheld the selection process, as the convening authority's decision to select only "among officers with significant seagoing experience" was consistent with the experience criterion of Article 25.[76] Given the offenses in the case, the convening authority was permitted to select members with seagoing experience to "sit in judgment."[77]

Smith and *Lynch*, when read together, suggest two potentially-conflicting standards in panel selection. First, the Article 25 criteria cannot be used to justify court stacking. Second, the convening authority is afforded great discretion in choosing what kind of experience is necessary for a panel member. Under these cases, would it be permissible for a convening authority to not select judge advocates because of their legal experience? Could a convening authority not select military police because of their law enforcement experience? On its face, Article 25 does not allow the convening authority to consider implied bias of potential members when selecting a panel. Arguably, a panel that included judge advocates and military police could give the appearance of an unfair proceeding. It does not seem to serve the interests of justice for the convening authority to select members who will likely be excused for cause based on their duties.[78]

Stick to the Fundamentals: Improper Commitment Questions during Voir Dire

For these reasons, military judges must have broad discretion in overseeing voir dire questioning. This discretion, however, should extend to looking behind the questions asked, especially where questions suggest an effort at securing commitments to case related "hypothetical" facts.[79]

This term, the CAAF cautioned practitioners to stick to fundamentals in voir dire, by steering clear of hypothetical questions that attempt to commit members to findings. In *United States v. Nieto*, the accused was charged with wrongful use of cocaine based "primarily" on a positive urinalysis result.[80] During voir dire, the trial counsel walked the panel through the

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[69] United States v. Dale, 42 M.J. 384, 386 (C.A.A.F. 1995) (Crawford, J., dissenting).

[70] *Id.* (Crawford, J., dissenting).

[71] 27 M.J. 242, 250 (C.M.A. 1988). The Government argued female members would have a "unique ability" to assess the victim's testimony, based on their personal experience. *Id*. The COMA quickly dismissed this argument: "For whatever reason, the unique 'experience' of females apparently was viewed at Fort Ord as being relevant *only* in cases involving sex offenses." *Id*.

[72] *Id.*

[73] 35 M.J. 579 (C.G.C.M.R. 1992), *rev'd on other grounds*, 39 M.J. 223 (C.M.A. 1994).

[74] *Id.* at 581–82.

[75] *Id.* at 586.

[76] *Id.* at 588.

[77] *Id.* at 587.

[78] *But see* MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 505(c)(1)(A) (2008) [hereinafter MCM] ("Before the court-martial is assembled, the convening authority may change the members for the court-martial without showing cause."). Under this provision, the convening authority could select medical personnel or inspectors general, in accordance with *Bartlett*, and then excuse those members prior to trial. Rule for Courts-Martial 505(c)(1)(A) would allow the convening authority to consider implied bias issues or workload of members to issue excusals, even though *Bartlett* would prohibit the convening authority from systematically excluding such members from panel selection.

[79] United States v. Nieto, 66 M.J. 146, 152 (C.A.A.F. 2008) (Baker & Erdmann, JJ., concurring in the result).

[80] *Id.* at 147 ("The voir dire reflected the parties' anticipation that the prosecution would rely primarily on a positive urinalysis test . . . .").

Government's case, asking specific questions about the reliability of urinalysis results.[81] Some of the questions were confusing, including: "If the government proves to you beyond a reasonable doubt that drugs were present in the accused['s] urine[,] would you be capable of inferring that he knowingly used those drugs that were found there?" and "Do any members disagree with the use of a urinalysis to determine the presence of contraband substance in the body?"[82] The trial counsel then asked a question that mistakenly planted the seeds of reasonable doubt:

> [TC:] Does any member believe that *any* technical error in the collection process, *no matter how small*[,] means that the urinalysis is *per se invalid*?
>
> Okay affirmative response from each of the members.[83]

While not a model of clarity, the question suggested that any error in a urinalysis, no matter how minor, would invalidate the test results. During individual voir dire, trial counsel tried to rehabilitate members from this answer, using fact-intensive hypothetical questions that mirrored the deficiencies in the accused's urinalysis.[84]

The trial counsel questioned six members individually. First, the trial counsel questioned Chief Warrant Officer 3 (CWO3) M, who said any "gap in the chain" in a urinalysis could cause him to question the validity of the test results.[85] The trial counsel then asked about "standard operating procedure" for a urinalysis, which led to this exchange:

> TC: You believe that *any type of deviation* from the SOP automatically invalidates that[,] there is no weight to be assigned to it, you didn't follow procedures so therefore you can't rely on it, it is unreliable evidence?
>
> MBR (CWO3 [M]): Any time you have a gap in the chain, sir[,] it makes it a weak link. So it is possible that any part of that gap could have been tampered with. *I would like to hear the evidence of why there is a gap there*, and *based off of that evidence I could make a better determination of whether it is valid or not valid*.[86]

Undeterred by the warrant officer's statement that he would rather wait to make a decision until he heard the evidence in the case, the trial counsel drove on with more specific "hypothetical" questions:

> TC: What if it was something else[?] What if there was a particular space where someone didn't initial, where other wise [sic] they would have? Is that the sort of procedural error that you think would invalidate a urinalysis test per se?
>
> MBR (CWO3 [M]): Only if it is a standard operating procedure for that point in time, yes, sir.
> TC: So if there were some body [sic] like the coordinator who was supposed to initial the bottle, and he didn't, that would necessarily mean that you couldn't rely on that sample that was collected because he didn't fulfill the duties he should have?
>
> MBR (CWO3 [M]): Yes, sir.[87]

Second, trial counsel engaged in the following colloquy with CWO2 C, who agreed that a specific minor defect in a hypothetical urinalysis would not cause him to acquit:

> TC: And so it wouldn't necessarily be per se invalid if the coordinator didn't put his initials on the bottle[,] let's say. If it came back to the coordinator [and] the accused brought it back to the table, but the

[81] *Id.* at 147–48.

[82] *Id.* at 147 (alterations in original).

[83] *Id.* at 148 (alterations in original) (emphasis added).

[84] *Id.* at 148–49.

[85] *Id.* at 148.

[86] *Id.* (alterations in original) (emphasis added).

[87] *Id.* (alterations in original).

coordinator didn't put his initials on the bottle before it went back into the box. Would that be a violation that you couldn't over look [sic]? No matter what[,] that is an invalid test in your mind?

MBR (CWO2 [C]): In that case with the initials, no.[88]

The trial counsel then individually questioned a staff sergeant (SSgt) and a Corporal, who generally agreed with CWO2 C's responses.[89] The fifth member, Sergeant (Sgt) Z, suggested that he would possibly vote to acquit if there were minor deficiencies in the urinalysis collection procedure:

TC: [Is it] your opinion [that] any violation of the SOP regarding the collection process, no matter what it is[,] that automatically means that you can't rely on the results of that test?

MBR (Sgt [Z]): Yes, sir.

TC: Would it make any difference what sort of violation we are talking about?

MBR (Sgt [Z]): I believe that is something that seriously needs to be perfect, sir.

TC: All right. So if that included a coordinator, for instance, not initialing the bottle when he should have, that, in your mind, *is a deviation that seriously jeopardizes the reliability of the results?*

MBR (Sgt [Z]): *Yes, sir*.[90]

Finally, the trial counsel questioned the sixth member, Cpl L, who eventually agreed that minor deficiencies explained in a hypothetical scenario would not necessarily invalidate the results:

TC: If the evidence showed that the accused is the one who brought back a bottle and he put the label on the bottle himself, and verified it was his social security number, that sort of thing, and he put his initials on that label, and then he himself put the tape on the bottle and he initialed the top of the tape, and he put the sample into the box himself and took out his ID card. Would the fact that the coordinator in that process hadn't picked up the bottle himself and initial [sic] it . . . be enough to . . . throw out the results of that test, that couldn't support a conviction, you couldn't find the accused guilty if that was the error that occurred here? Is that true or not?

MBR (Cpl [L]): Not true because he signed for it.

TC: The accused?

MBR (Cpl [L]): The accused signed saying that it was his urine, sir.[91]

Throughout this questioning, the defense counsel did not object.[92]

Not surprisingly, the trial counsel challenged two of the members for cause. The trial counsel argued that CWO3 M and Sgt Z showed an "inflexible attitude with respect to processing errors."[93] The military judge granted the challenge for Sgt Z and the trial counsel used a peremptory challenge against CWO3 M.[94] On appeal, the defense argued that the trial counsel improperly committed panel members based on a series of hypothetical facts, which violated the accused's right to be tried by an impartial panel.[95] Because there was no objection at trial, appellate counsel argued the military judge committed plain

[88] *Id.* (alterations in original).

[89] *Id.* The court did not reprint the questions and responses for these two members. *Id.*

[90] *Id.* at 148–49 (alterations in original) (emphasis added).

[91] *Id.* at 149 (alterations in original).

[92] *Id.* at 147.

[93] *Id.* at 149. The CAAF noted there were other grounds for challenging these members, which were apparently not necessary for resolving the case. *Id.*

[94] *Id.*

[95] *Id.*

error by permitting trial counsel's questions.[96] Applying a plain error standard, the CAAF affirmed in a unanimous opinion.[97]

As a rule, hypothetical questions are "a permissible means of exploring grounds for challenge."[98] However, the CAAF acknowledged that it has never addressed the "scope of permissible questioning" for such hypothetical questions.[99] In fact, very few courts have discussed the limits of hypothetical questions during voir dire. The court's own research on the subject yielded six civilian cases: one from the Eighth Circuit Court of Appeals and five from state courts.[100] From these cases, two approaches emerged. First, a number of courts have ruled that hypothetical questions can be impermissible if used to obtain a commitment from jurors to decide the case a particular way based on a hypothetical set of facts.[101] Second, a number of courts have a "broader prohibition," barring questions that ask jurors to commit to resolution of an aspect of the case based upon a hypothetical set of facts.[102] The CAAF noted that the parties to the appeal did not cite to decisions "from the federal civilian courts that would indicate a generally applicable standard for considering the question in the trial of criminal cases in federal district courts."[103]

The CAAF relied on the sparse nature of case law in determining the military judge had not committed plain error, noting "at the time of trial, the case law from this Court did not preclude trial counsel's questions, generally applicable federal criminal law did not provide guidance on point, and only a handful of state cases addressed this matter."[104] Based on the uncertain state of the law, the court concluded that the military judge did not commit plain or obvious error in allowing the trial counsel to ask his hypothetical questions.[105] Despite the CAAF's conclusion that this was a "matter of first impression," one "on which there is little guidance from other federal courts," the court did not provide guidance for the permissible use of hypothetical questions.[106]

Given the gap in current case law, two concurring opinions, joined by three judges, tried to give guidance to the field regarding improper voir dire questions. In the first, Judge Stucky wrote to "emphasize that actions like those of the trial counsel are disfavored, if not necessarily outright error."[107] Interestingly, Judge Stucky compared this case to *United States v. Reynolds*, which held it was error to pose case-specific facts that ask members to commit to a punitive discharge: "Neither the Government nor the accused is entitled to a commitment from the triers of fact about what they will ultimately do."[108] Judge Stucky concluded that while the error was not sufficient to reverse under a plain error standard, "I would find the use of voir dire questions asking for a commitment using case-specific facts to formulate hypothetical questions was error in this

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[96] *Id.* at 149.

[97] *Id.* at 147, 150.

[98] *Id.* at 149.

[99] *Id*. at 150 ("Although this Court has addressed challenges for cause based upon answers provided by prospective members to hypothetical questions during voir dire, . . . we have not heretofore addressed the scope of permissible questioning in this regard." (citation omitted)).

[100] *Id.* (citing Hobbs v. Lockhart, 791 F.2d 125, 129–30 (8th Cir. 1986); Thompson v. State, 169 P.3d 1198, 1209 (Okla. 2007); State v. Ball, 824 So.2d 1089, 1110 (La. 2002); Hutcheson v. State, 213 S.W.3d 25, 32 (Ark. Ct. App. 2005); Burkett v. State, 179 S.W.3d 18, 31 (Tex. Ct. App. 2005); State v. Henderson, 574 S.E.2d 700, 705–06 (N.C. Ct. App. 2003)).

[101] *Id.*

[102] *Id.*

[103] *Id.*

[104] *Id.*

[105] *Id.*

[106] *Id.* This lack of guidance is troubling as practitioners seem inclined to use such hypothetical commitment questions. *See* United States v. Rood, No. 200700186, 2008 CCA LEXIS 96 (N-M. Ct. Crim. App. Mar. 20, 2008) (unpublished) (affirming military judge's denial of causal challenge of member who answered in the affirmative to two questions: "Does any member believe that a positive urinalysis alone proves a knowing use of a controlled substance?" and, following the member's statement that an accused is "personally responsible" for a substance found in the body, "This belief that you are responsible for everything that goes into your body is a firmly held belief?").

[107] *Nieto*, 66 M.J. at 150 (Stucky, J., concurring).

[108] 23 M.J. 292, 294 (C.M.A. 1987) (citing Unites States v. Small, 21 M.J. 218 (C.M.A. 1986)). *Reynolds* illustrates the problems with hypothetical voir dire questions. The accused was charged with larceny and wrongfully taking mail matter. *Id.* at 292. During voir dire, defense counsel asked a series of case-specific hypothetical questions to a lieutenant colonel member about adjudging a punitive discharge if the accused were found guilty of all offenses and the Government proved "the stolen property belonged to subordinates, . . .was taken from a unit safe, and that an abuse of a position of trust was involved." *Id.* at 293. The member refused to speculate about his sentence before hearing evidence in the case, noting he did not have all the information before him to make such a decision, though he admitted a mild predisposition in favor a discharging based on the limited hypothetical. *Id*. The defense counsel similarly asked a major if would be "compelled" to adjudge a discharge if the accused were found guilty of all offenses; the member said he would be mildly disposed to a discharge. *Id.* The COMA concluded that a member need not be disqualified for a mere "unfavorable inclination" against an offense, but only for a bias that would not yield to the evidence and the military judge's instructions. *Id.* at 294 (citations omitted).

case."[109]

Appellate courts have long disfavored commitment questions, viewing them as artful or tricky queries proffered by defense counsel. The courts have considered questioning about whether members would automatically adjudge a punitive discharge if the accused were found guilty or if members would be willing to sentence the accused to no punishment. For example, in *United States v. Rolle*, an Army staff sergeant pled guilty to a single specification of wrongful use of cocaine.[110] During group voir dire, four members said they would have "a problem" with the accused staying in the Army.[111] Two members were then asked a series of questions by defense counsel and indicated they would not sentence the accused to "no punishment."[112] The military judge denied causal challenges and the CAAF upheld the judge's decision.[113] The CAAF reasoned: "It is not surprising that the notion of 'no punishment' has bedeviled this Court for most of its history. A punishment of no punishment appears to be an oxymoron, but it is a valid punishment."[114] More important, the CAAF sympathized with members who were asked questions "in a vacuum, before they heard any evidence or received instructions from the military judge."[115] As Judge Gierke noted in a majority opinion in another case:

> I would have substantial misgivings about holding that a military judge abused his discretion by refusing to excuse a court member who could not in good conscience consider a sentence to no punishment in a case where all parties agree that a sentence to no punishment would have been well outside the range of reasonable and even remotely probable sentences.[116]

The *Rolle* court relied in large part on the fact that defense counsel "virtually conceded" that no punishment was outside such a range.[117] Arguably, the CAAF would have come to a different result if a sentence of no punishment seemed remotely possible.[118]

The second concurring opinion in *Nieto* focused on improper "commitment" questions. Judge Baker, joined by Judge Erdmann, wrote separately because the court should "offer further guidance to the field distinguishing between proper and improper hypothetical and commitment questions during voir dire."[119] In discussing the two state court approaches noted in the opinion, this concurrence correctly observed that "under either track" the trial counsel was improperly previewing "the members' reaction to evidence yet to come."[120] For example, the trial counsel gave a "hypothetical" scenario about a urinalysis bottle that had not been initialed by the urinalysis observer; the trial counsel followed this scenario with, "Would that be a violation that you couldn't overlook?"[121] However, in the absence of a defense objection at trial, a military judge

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[109] *Nieto*, 66 M.J. at 151 (Stucky, J., concurring). Regarding the plain error analysis, Judge Stucky noted that an "[e]rror cannot be plain or obvious if the law is unsettled on the issue at the time of trial and remains so on appeal." *Id.* (Stucky, J., concurring) (citing United States v. Garcia-Rodriguez, 415 F.3d 452, 455–56 (5th Cir. 2005); United States v. Diaz, 285 F.3d 92, 96 (1st Cir. 2002)). Judge Stucky added, "Nor is an error 'plain' if Appellant's theory requires 'the extension of precedent.'" *Id.* (Stucky, J., concurring) (quoting United States v. Hull, 160 F.3d 265, 272 (5th Cir. 1998)).

[110] 53 M.J. 187 (C.A.A.F. 2000).

[111] *Id.* at 188.

[112] *Id.* at 189. The members' responses were unequivocal. The first member responded, "No, I can't sir" when asked if he could give "no punishment at all." *Id*. The second member responded, "Could I give him—no, sir" when asked if he could sentence the accused to "no punishment." *Id*.

[113] *Id.* at 193.

[114] *Id.* at 191.

[115] *Id.* The CAAF added, "[T]his Court stated that it was 'sympathetic with the plight of court-martial members who on *voir dire* are asked hypothetical questions about the sentence they would adjudge in the event of conviction.'" *Id.* (quoting United States v. Heriot, 21 M.J. 11, 13 (C.M.A. 1985)).

[116] United States v. McLaren, 38 M.J. 112, 119 n.* (C.M.A. 1993).

[117] *Rolle*, 53 M.J. at 193.

[118] *See* United States v. Giles, 48 M.J. 60 (C.A.A.F. 1998). In *Giles*, the accused was charged with attempting to possess LSD with intent to distribute and attempting to distribute LSD. *Id.* at 60. During individual voir dire, a member said, "But my personal opinion is anybody that is convicted of dealing drugs or trafficking drugs or things of that nature that I personally feel that they should be discharged from the Navy, dishonorably or through bad-conduct discharge." *Id.* at 61. In finding the military judge "clearly abused his discretion" in denying the defense challenge for cause, the CAAF reasoned the member showed an actual bias with an inelastic view toward sentencing. *Id.* at 63. The *Rolle* court attempted to distinguish its similar facts from *Giles*, arguing that the challenged member in its case did not have a predisposition regarding the "real" sentencing disputes (a punitive discharge and confinement) and that the defense had "virtually" conceded that "no punishment" was not a probable outcome. *Rolle*, 53 M.J. at 193; *cf. id.* (Sullivan, J., concurring) ("I concur with the majority opinion, except where it vainly attempts to square its opinion today with its opinion in [*Giles*].").

[119] United States v. Nieto, 66 M.J. 146, 151 (C.A.A.F. 2008) (Baker & Erdmann, JJ., concurring in the result).

[120] *Id.* at 152 (Baker & Erdmann, JJ., concurring in the result).

[121] *Id.* (Baker & Erdmann, JJ., concurring in the result).

does not have normally a sua sponte duty "to look behind the question asked."[122] Similar to the court's reasoning, this concurring opinion properly placed the burden on the defense to object at trial: "In the voir dire context, it is the counsel who will have the better feel for the coming evidence rather than the military judge."[123] However, Judges Baker and Erdmann would go so far as to impose a sua sponte duty on a military judge to halt improper commitment questions: "Thus, in instances where a military judge can reasonably foresee the direction of the case, hypothetical factual questions like those presented in this case might indeed present obvious attempts to commit the members. In such cases, *a military judge would err in not testing the basis for such questions*."[124]

For practitioners, *Nieto* directs defense counsel to object at trial to hypothetical questions when appropriate: "Particularly in light of the fact-intensive, case-specific nature of the issue raised by Appellant, it is an issue that would benefit from a well-articulated objection at trial, as well as findings of fact and conclusions of law by the military judge."[125] Despite the fuzzy limits, three of the five CAAF judges (based on the two concurring opinions) believe it is error for counsel to ask hypothetical questions that ultimately *commit* members to accept or reject certain evidence. However, if the defense counsel had objected to the trial counsel's questions about "hypothetical" problems with the urinalysis testing procedure, the military judge could have instructed the members on the law and asked them if they could follow his instructions, which would likely have resolved the issue for appeal.[126]

Defense counsel have two options when faced with hypothetical questioning by opposing counsel. First, the defense counsel can do nothing and hope the appellate courts find plain error in the questioning. Two of the CAAF judges suggested that such questioning could trigger a plain error finding.[127] However, in finding no plain error in *Nieto*, the CAAF relied largely on the lack of binding authority in this area, while also declining to fill the gap with any guidance of its own.[128] Because there is still a lack of authority regarding commitment question, defense counsel would be unwise to rely on an appellate court finding plain error.

The second option for defense counsel is to allow trial counsel to ask improper commitment questions and then challenge members for cause who agree with the Government's theory of the case. The *Nieto* court noted that the defense counsel made no such challenge at trial.[129] Appellate counsel did not argue that counsel erred by not challenging members at trial.[130] In *Nieto*, four members agreed they could "overlook" the deficiencies in the accused's urinalysis.[131] Even if the military judge had allowed the trial counsel to try to rehabilitate the members after such a challenge was lodged, implied bias and the liberal grant mandate could require the members be excused. However, as set forth in the next section, the implied bias standard can be difficult to apply.

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[122] *Id.* (Baker & Erdmann, JJ., concurring in the result).

[123] *Id.* (Baker & Erdmann, JJ., concurring in the result). Judges Baker and Erdmann added, "Counsel, rather than the military judge, will have a better feel during voir dire as to whether hypothetical questions are truly hypothetical and intended to test for bias, or whether they are in reality (and in disguise) commitment questions intended to preview attitudes toward specific evidence." *Id.* (Baker & Erdman, JJ., concurring in the result).

[124] *Id.* at 152–53 (Baker & Erdmann, JJ., concurring in the result) (emphasis added). This statement is odd considering the extensive hypothetical questions proffered by the trial counsel. The long and detailed individual voir dire (regarding missing initials and statements by the accused) seem to be the kind of "obvious attempts to commit the members" admonished by the concurring opinion. *Id*. at 153.

[125] *Id.* at 150.

[126] *See* United States v. Dorsey, 29 M.J. 761 (A.C.M.R. 1989). In *Dorsey*, defense counsel asked the members during group voir dire if they believed the accused needed to explain his positive cocaine result after a urinalysis; all members responded in the affirmative. *Id.* at 762. The defense counsel asked the members if they agreed that "the only person that has anything to fear from participating in the Army urinalysis program is an individual who uses drugs."; all members except for two agreed. *Id.* The military judge properly denied defense challenges for cause against the members after they agreed to follow instruction on the prosecution's burden of proof. *Id.* at 763.

[127] *See supra* note 124 and accompanying text.

[128] *Nieto*, 66 M.J. at 150 (noting the sparse case law an lack of "generally applicable federal criminal law" and concluding, "[i]n that context, we conclude that Appellant has not carried his burden of demonstrating that the military judge committed an error that was 'plain' or 'obvious' in permitting the trial counsel to ask the hypothetical questions at issue in the present case").

[129] *Id.* ("In the present case, however, defense counsel not only permitted the trial counsel's questions to proceed without objection, but also offered no challenge to any of the members who rendered the findings or sentence.").

[130] *Id.* ("On appeal, Appellant has not contended that trial defense counsel erred in not offering a challenge for cause or that the military judge erred in permitting any member to sit on the panel.").

[131] *See supra* notes 88–91 and accompanying text.

Come on Ref!: Blowing the Whistle on Implied Bias

In *Hoosiers*, the team is playing the sectional finals in Deerlick, Indiana. Throughout the close game, the other team roughs up the Hickory players, while the referee calls fouls against Hickory. Coach Dale yells to the referee, "Hey, ref, call it both ways."[132] Unfortunately, military courts have called it both ways when evaluating implied bias challenges. Three cases this term show the difficulties in applying the implied bias doctrine.[133]

Under RCM 912(f)(1)(N), a panel member should be excused for cause "whenever it appears that the member . . . [s]hould not sit as a member in the interest of having the court-martial free from substantial doubt as to the legality, fairness, and impartiality."[134] A challenge for cause under RCM 912(f)(1)(N) encompasses both actual and implied bias.[135] Actual bias, as the name suggests, is a member's unwillingness to yield to the judge's instructions and the evidence. Implied bias is focused on the public's perception of the military justice system, specifically whether an impartial member of the public would have a substantial doubt regarding the fairness or impartiality of the proceedings.[136] The CAAF has held, "An accused 'has a constitutional right, as well as a regulatory right, to a fair and impartial panel.'"[137] Appellate courts give the military judge "great deference when deciding whether actual bias exists because it is a question of fact, and the judge has observed the demeanor of the challenged member."[138] A military judge will receive less deference on appeal for challenges based on implied bias because the standard is objective, based on the view through the eyes of the public.[139] The CAAF has noted, "Thus, '[i]ssues of implied bias are reviewed under a standard less deferential than abuse of discretion but more deferential than de novo.'"[140] Finally, "in close cases military judges are enjoined to liberally grant challenges for cause."[141] A military judge who addresses the liberal grant mandate when evaluating an implied bias challenge will receive more deference on appeal.[142]

In *United States v. Bragg*, a Marine recruiter was charged with rape and other offenses involving two female high school students.[143] During voir dire, one member stated that he learned information about the case before trial.[144] While he could not recall how he obtained this information, he knew the "general identity" of the victim, the general nature of the offense, and the investigatory measures taken by law enforcement.[145] The member had been the deputy chief of staff for recruiting and, in that capacity, he normally read relief for cause (RFC) packets of recruiters.[146] The member could not recall if he had reviewed the accused's RFC packet, though he said that if he had, he "probably would have" recommended relief.[147] Despite his prior knowledge of the case, the member said he could be impartial.[148] The defense challenged the member for cause and the military judge denied the challenge.[149] Surprisingly, the CAAF reversed in a unanimous decision.[150]

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[132] HOOSIERS (Metro Goldwyn Mayer 1986) (quoting Gene Hackman as Coach Norm Dale).

[133] United States v. Elfayoumi, 66 M.J. 354 (C.A.A.F. 2008); United States v. Bragg, 66 M.J. 325 (C.A.A.F. 2008); United States v. Townsend, 65 M.J. 460 (C.A.A.F. 2008).

[134] MCM, *supra* note 78, R.C.M. 912(f)(1)(N).

[135] *Elfayoumi*, 66 M.J. at 356; *Bragg*, 66 M.J. at 327; *Townsend*, 65 M.J. at 463.

[136] *Elfayoumi*, 66 M.J. at 356.

[137] *Bragg*, 66 M.J. at 326 (quoting United States v. Wiesen, 56 M.J. 172, 174 (C.A.A.F. 2001)).

[138] *Id.* (quoting United States v. Napolitano, 53 M.J. 162, 166 (C.A.A.F. 2000)).

[139] *Id.* (citing United States v. Rome, 47 M.J. 467, 469 (C.A.A.F. 1998)).

[140] *Id.* (alteration in original) (quoting United States v. Miles, 58 M.J. 192, 195 (C.A.A.F. 2003)).

[141] United States v. Clay, 64 M.J. 274, 277 (C.A.A.F. 2007).

[142] *Bragg*, 66 M.J. at 326 (citing *Clay*, 64 M.J. at 277).

[143] 66 M.J. 325.

[144] *Id.* at 326.

[145] *Id.*

[146] *Id.*

[147] *Id.* The CAAF noted the member likely read the investigation in this case: "However, after recalling what he knew of the case, he later stated, '[s]o, based off that, I believe I read the investigation as opposed to reading the newspaper accounts and all that kind of stuff.'" *Id.* (alteration in original).

[148] *Id.*

[149] *Id.* ("The military judge denied defense counsel's challenge of LtCol W for cause, finding that LtCol W's 'answers and candor . . . and body language' suggested that he would be impartial, and decide the case solely on the evidence presented in court.").

[150] *Id.* at 325–26.

The *Bragg* court began by emphasizing the importance of voir dire in selecting fair and impartial members:

> The purpose of voir dire and challenges is, in part, to ferret out facts, to make conclusions about the members' sincerity, and to adjudicate the members' ability to sit as part of a fair and impartial panel. However, the text of R.C.M. 912 is not framed in the absolutes of actual bias, but rather addresses the appearance of fairness as well, dictating the avoidance of situations where there will be substantial doubt as to fairness or impartiality. Thus, implied bias picks up where actual bias drops off because the facts are unknown, unreachable, or principles of fairness nonetheless warrant excusal.[151]

The CAAF noted the military judge's duty to note the legal standards on the record: "We do not expect record dissertations but, rather, a clear signal that the military judge applied the right law. While not required, where the military judge places on the record his analysis and application of the law to the facts, deference is surely warranted."[152] The court added that implied bias is gauged from the totality of circumstances.[153]

In an opinion written by Judge Baker, the CAAF concluded, "The liberal grant mandate exists for cases like this."[154] Specifically, the member had knowledge of the case not available to other members, was a "senior member on the panel," and may have recommended adverse administrative action against the accused.[155] The CAAF noted that the liberal grant mandate serves to "remove the necessity of reaching conclusions of fact that are beyond the capacity of the member to recall."[156] In this case, the member could not remember if he actually recommended relief, but he believed he may have, so "a substantial doubt is nonetheless raised as to fairness and impartiality."[157] Simply stated, "Viewed objectively, we conclude that a member of the public would have substantial doubt that it was fair for this member to sit on a panel where that member had likely already reached a judgment as to whether the charged misconduct occurred."[158]

In *United States v. Townsend*, the accused was charged with attempted unpremeditated murder and reckless endangerment for shooting at an occupied vehicle.[159] On appeal, the defense argued the military judge should have granted a challenge for cause for implied bias against a member who planned to become a prosecutor.[160] In a unanimous decision written by Judge Erdmann, the CAAF held the military judge did not abuse his discretion in denying the defense challenge for cause.[161] The challenged member, a Navy lieutenant, made several relevant comments during individual voir dire.[162] At the time of trial, he was taking law school classes at night.[163] He said he wanted to be a prosecutor, noting his interests in "public service," "putting the bad guys in jail," and "keeping the streets safe."[164] When asked his "opinions of defense counsels," the member said he had a "mixed view."[165] While he respected military defense counsel as military officers with high ethical and moral standards, he had a "lesser respect for some of the ones you see on TV, out in the civilian world," an

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[151] *Id.* at 327.

[152] *Id.* at 326–27 (quoting United States v. Clay, 64 M.J. 274, 277 (C.A.A.F. 2007)).

[153] *Id.* at 327 ("In making judgments regarding implied bias, this Court looks at the totality of the factual circumstances." (citing United States v. Strand, 59 M.J. 455, 459 (C.A.A.F. 2004)).

[154] *Id.*

[155] *Id.*

[156] *Id.*

[157] *Id.*

[158] *Id.*

[159] 65 M.J. 460 (C.A.A.F. 2008).

[160] *Id.* at 462.

[161] *Id.*

[162] In addition to the relevant comments discussed in the text, the court mentioned the member had taken the "Non-Lawyer Legal Officer Course" at the Naval Justice School during which he learned "just basics" of legal defenses, including self-defense. *Id.* The court did not analyze whether this experience should have impacted a challenge for cause. *Id.*

[163] *Id.*

[164] *Id.*

[165] *Id.*

apparent reference to the member's regular viewing of the television show *Law and Order*.[166] His father was in law enforcement and, as a result, the member had (in his words) a "healthy respect for law enforcement and people in authority."[167] In a lengthy exchange, the member suggested a "well respected" law enforcement officer would be more credible, though he responded "yes" to a leading question that he would weigh the testimony of law enforcement personnel in the same way as other witnesses.[168] Based on these statements, the defense counsel challenged the lieutenant for cause.[169] In finding no implied bias, the unanimous court quickly dismissed the proffered bases for challenge.[170]

Regarding the member's father-son relationship with a law enforcement officer, the court held that law enforcement personnel are not per se disqualified for service, so a "mere familial relationship" would similarly not be disqualifying.[171] The court noted that the member respected law enforcement, but his respect did not "translate into any objectively discernable bias."[172] The court further noted that the member said he would consider the favorable service record of a law enforcement officer, as such a factor could be used by any member "along with his or her personal observation of the witness and all other evidence of record in determining credibility."[173] Regarding the member's status as a law school student and intent to become a prosecutor, the court noted that attorneys are not per se disqualified from serving as members.[174] Similarly, a member "who only aspires to become a lawyer" need not be excused.[175] The court quickly dismissed the claim that the member disliked defense attorneys, noting the member actually had a "high regard" for military counsel.[176] In conclusion, "The record reflects that the factors asserted as a basis for implied bias are not disqualifying or egregious and would not, *individually or cumulatively*, result in the public perception that Townsend received something less than a court-martial of fair and impartial members."[177]

Despite the straightforward facts of *Townsend*, the case shows some cracks in the implied bias standard. In a dubitante opinion,[178] Judge Baker argued the military judge should have granted the challenge for cause, though it was not required as a matter of law: "I think it was an easy call at the trial level to dismiss [the member] from the member pool, but a harder call to do so on appeal as a matter of law."[179] Mirroring his majority opinion in *Bragg*, Judge Baker started his doubting opinion

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[166] *Id. Law and Order* has aired on NBC for the last eighteen years. *See Law and Order* Webpage, http://www.nbc.com/Law_and_Order/about/ (last visited Mar. 4, 2009). Each hour-long episode is split in two parts; in the first half hour, detectives investigate a crime and, in the second half hour, the district attorney's office prosecutes the crime. *Id.*

[167] *Townsend*, 65 M.J. at 462.

[168] The CAAF summarized the exchange:

> Asked if he would hold the testimony of law enforcement personnel in higher esteem than other witnesses, LT B responded that he would try to be objective about everything. If he had a "gut decision" to make, he stated that: "a good cop, [if] he's had a good record, you know, [was] well respected, that—that would definitely give some credibility to their testimony." Asked if he could follow the military judge's instructions with respect to weighing the credibility of law enforcement as he would any other witness, LT B responded, "Yes." LT B stated that a witness's status as a law enforcement officer would not automatically cause him to believe or disbelieve that individual.

Id. (alterations in original).

[169] *Id.* at 463.

[170] *Id.* at 461–62.

[171] *Id.* at 464.

[172] *Id.*

[173] *Id.*

[174] *Id.*

[175] *Id.* at 465.

[176] *Id.* ("The record reflects that LT B expressed high regard for military defense counsel as officers and persons of high integrity.").

[177] *Id.* (emphasis added).

[178] Dubitante is defined as: "Doubting. This term was usually placed in a law report next to a judge's name, indicating that the judge doubted a legal point but was unwilling to state that it was wrong." BLACK'S LAW DICTIONARY 537 (8th ed. 2004).

[179] *Townsend*, 65 M.J. at 467 (Baker, J., dubitante). Contrary to the majority, Judge Baker found there were ten different subjects relevant in the implied bias analysis:

> Extrajudicial knowledge of the law, law school attendance, desire to be a prosecutor, knowledge of forensic science, participation in a previous judicial proceeding, relationship to a law enforcement officer causing bias in favor of prosecution, gun ownership, views of criminal defense attorneys, willingness to give sentence accused to life imprisonment, and perception of witnesses testifying in exchange for a lower sentence.

Id. at 467 n.2 (Baker, J., dubitante).

with, "The liberal grant mandate exists for cases like this."[180] Judge Baker offered three considerations that support excusal of members in close cases, the most compelling of which was the conclusion that "appellate review of member challenges is an ungainly, if not impractical, tool to uphold and reinforce the importance" of RCM 912.[181] However, he was unwilling to vote for the case to be reversed.

For practitioners, *Townsend* is a good case for rehabilitating members. The challenged member had several discreet bases for challenge: he had a close relationship with a law enforcement officer, he was attending night classes to become a prosecutor, and he evidenced a disdain for defense counsel. Each of these issues, both individually and in the aggregate, was explained away during questioning. For military judges, *Townsend* suggests that the liberal grant mandate (despite its name) is less-than mandatory. As the dubitante opinion suggests, the appellate courts agree the liberal grant mandate should be used more often but are not likely to reverse when a judge fails excuse a member under the doctrine.[182]

The CAAF also noted that rehabilitative questions could trigger an implied bias excusal: "[T]here is a point at which numerous efforts to rehabilitate a member will themselves create a perception of unfairness in the mind of a reasonable observer."[183] Put another way, a reasonable member of the public might question a member's impartiality if extensive questioning was necessary to resolve biases mentioned during voir dire. Despite the CAAF's warning about extensive rehabilitative questioning, the court surprisingly rejected an implied bias challenge in another case that seemed to illustrate the rule.

In *United States v. Elfayoumi*, a male accused was charged, among other things, with forcible sodomy and three specifications of indecent assault against other men.[184] The indecent assault specifications were based on touching other men while watching pornography.[185] During voir dire, the panel member stated that homosexuality and pornography were "morally wrong."[186] Consider this exchange with the military judge:

> MJ: Earlier you indicated you had some strong objections to homosexuality?
>
> MEM: That is correct, sir.
>
> MJ: Could you explain a little bit about that.
>
> MEM: *I feel that it is morally wrong. It is against what I believe as a Christian and I do have some strong opinions against it.*
>
> MJ: You notice[] on the [charge sheet] that the word "homosexual" is not there?
>
> MEM: Yes, sir.
>
> MJ: But there are male on male sexual touchings alleged.
>
> MEM: Yes, sir.
>
> MJ: Do you think, with your moral beliefs that you can fairly evaluate the evidence of this case given the nature of the allegations?
>
> MEM: Yes, sir.[187]

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[180] *Id.* at 466 (Baker, J., dubitante); *cf.* United States v. Bragg, 66 M.J. 325, 327 (C.A.A.F. 2008) ("The liberal grant mandate exists for cases like this.").

[181] *Townsend*, 65 M.J. at 467 (Baker, J., dubitante). Judge Baker offered two other considerations: (1) the liberal grant mandate assuages public concerns about bias in court-martial proceedings, which may be triggered by rules that allow the convening authority to select members and that authorize only one peremptory challenge per side; and (2) based the record, there was no suggestion that the pool of potential members was small. *Id.*

[182] The military judge did not state on the record that he considered "implied bias or the liberal grant rule." *Id.* at 464. As a result, the CAAF "accord[ed] less deference to his ruling than we would to one which reflected consideration of implied bias in the context of the liberal grant mandate." *Id.* (citing United States v. Clay, 64 M.J. 274, 277 (C.A.A.F. 2007)). However, the court concluded, "[T]his is not a close case where failure to apply the liberal grant mandate is fatal." *Id.* at 466. Applying an abuse of discretion standard, the CAAF upheld the military judge's decision to deny the challenge for cause. *Id.*

[183] *Id.* at 465.

[184] 66 M.J. 354, 355 (C.A.A.F. 2008).

[185] *Id.*

[186] *Id.*

[187] *Id.* (alterations in original) (emphasis added).

The member also seemed predisposed to punitively discharge the accused if he were found guilty:

> MJ: Do you think you could honestly consider not discharging the accused even with that kind of conviction?
>
> MEM: I would have a hard time with that, sir.
>
> MJ: Could you consider it though?
>
> MEM: Yes, sir.
>
> MJ: After hearing the entire case, you wouldn't [categorically] exclude that?
>
> MEM: No, sir.[188]

Finally, the panel member evinced similar opposition to pornography:

> [DC:] In response to one of the questions, you stated that you had a moral aversion to pornography.
>
> [MEM:] Yes, I believe it is wrong also.
>
> [DC:] Would you consider someone who possessed or used pornography more likely to commit an immoral act . . . just because they have possessed that?
>
> [MEM:] No.
>
> [DC:] What about an act that you might perceive to be sexually immoral?
>
> [MEM:] If I knew someone who watched pornography, are they more apt to do a sexual act that I consider to be immoral?
>
> [DC:] Yes, sir.
>
> [MEM:] Does that make them immoral, no.[189]

At trial, the military judge denied the defense challenge for cause of this member.[190] In a 3–2 opinion, the CAAF upheld the military judge's decision to deny the challenge for cause.[191]

After reciting the standards regarding implied bias under RCM 912(f)(1)(N), the court acknowledged the defense argument that "the question of homosexuality and military service may evoke strongly held moral, legal, and religious views."[192] The court discussed the judge's duty to ensure the accused receives a fair trial: "To accomplish this end, *the military judge has a number of tools*, including the authority to oversee and conduct voir dire and to instruct members on the law and their deliberations."[193]

In a muddled opinion, the court concluded with limited analysis that "the military judge used these tools."[194] Unlike other opinions addressing challenges for cause, the court did not differentiate between actual and implied bias, or discuss the liberal grant mandate.[195] The court considered two points that seem to relate to actual bias, though the court did not identify them as such.[196] First, the court cited with approval the military judge's questions about "personal bias that might manifest

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[188] *Id.* (alteration in original).

[189] *Id.* at 356.

[190] *Id.*

[191] *Id.* at 354.

[192] *Id.* at 356. The CAAF added, "The range and depth of these views is reflected in debate over those personnel policies identified by the rubric 'Don't Ask, Don't Tell.'" *Id.*

[193] *Id.* (emphasis added).

[194] *Id.* at 357.

[195] *Id.*

[196] *Id.*

itself" during deliberations.[197] Specifically, "the military judge disaggregated the question of homosexuality from the charged criminal conduct at issue."[198] Second, the court noted with approval the military judge's remedy of allowing defense counsel to question the member without restriction.[199] The CAAF found the member's answers "revealed" he could distinguish between immoral acts and criminal offenses.[200]

Turning to implied bias, the court noted that moral or religious views are not per se disqualifying, provided the member shows a "capacity to hear a case based on the four corners of the law and as instructed by the military judge."[201] The law recognizes the "human condition" and "gives a military judge the added flexibility, *and duty*, to err on the side of caution where there is a substantial doubt as to the fairness of having a member sit."[202] The court explained that a military judge "need not impugn the integrity or values of a member in finding actual bias, but can in context rely on the implied bias/liberal grant doctrine."[203] In this case, the court summarily concluded that it "would not be unusual" for members to have strong views about "lawful conduct involving sex or pornography."[204] The court, in less clear reasoning, noted, "So too, a member might have a strongly held view about unlawful conduct—murder, shoplifting, forcible, sodomy, etc."[205] Against this backdrop, the majority found the "natural propensity of members" to have strong views on these subjects is anticipated in the law and not necessarily a basis for challenge:

> Thus, the question is not whether they have views about certain kinds of conduct and inclinations regarding punishment, but whether they can put their views aside and judge each particular case on its own merits and the law, such that appellate courts, in applying R.C.M. 912, are not left in substantial doubt as to the fairness or impartiality of the members.[206]

In this case, the member stated he could separate his personal views from the facts of the case, so the military judge did "not abuse his discretion in denying the challenge for cause."[207]

In a well-reasoned dissenting opinion, Judge Erdmann (joined by Judge Ryan) found that a reasonable member of the public would have serious doubts about the fairness of the accused's trial with this member sitting in judgment.[208] Relying on cases from the Supreme Court and three circuit courts, the dissent noted that "[r]eligious, moral, and personal believes are relevant in determining whether an individual should serve as juror."[209] Because such beliefs can disqualify a member, the traits could also create a "perception of unfairness" requiring excusal for implied bias under the liberal grant mandate.[210] In this case, the facts are in favor of the dissent. All parties acknowledge that "homosexual conduct and pornography were at the core of the case."[211] The challenged member, in his own words, believed homosexuality was "morally wrong" and that he would have a "hard time" considering whether the accused should not be discharged.[212] The dissent notes that these "unwavering responses" would cause a reasonable person to believe the member's personal beliefs would influence his

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[197] *Id.*

[198] *Id.*

[199] *Id.*

[200] *Id.*

[201] *Id.*

[202] *Id.* (emphasis added).

[203] *Id.*

[204] *Id.*

[205] *Id.*

[206] *Id.*

[207] *Id.*

[208] *Id.* (Erdmann & Ryan, JJ., dissenting).

[209] *Id.* at 357–58 (Erdmann & Ryan, JJ., dissenting) (citing Aldridge v. United States, 283 U.S. 308, 313 (1931)). Further, "If moral or religious principles are so strong that they will not yield and permit a potential member to adjudicate the case without violating those principles, there is cause to excuse that member." *Id.* at 358 (Erdmann & Ryan, JJ., dissenting) (citing United States v. Decoud, 456 F.3d 996, 1017 (9th Cir. 2006); United States v. Geffrard, 87 F.3d 448, 451–52 (11th Cir. 1996); United States v. Hoffman, 806 F.2d 703, 705 (7th Cir. 1986)).

[210] *Id.* (Erdmann & Ryan, JJ., dissenting)

[211] *Id.* (Erdmann & Ryan, JJ., dissenting).

[212] *Id.* (Erdmann & Ryan, JJ., dissenting); *see also supra* notes 176–77 and accompanying text.

adjudication of the accused, who "inferentially was homosexual," viewed pornography, touched another male while watching pornography, touched three males on three separate occasions, and committed forcible sodomy on another male who refused his advances.[213] Citing *Townsend*, the dissent correctly notes that implied bias is reviewed "despite a disclaimer."[214] The member's claim that he would set aside his "strong" personal beliefs is not sufficient to end the implied bias inquiry. The dissenting opinion concludes there was a "substantial risk" that members of the public would believe this court-martial was "not conducted with a fair and impartial panel."[215] The dissent then parroted back the majority's statement that the liberal grant mandate provides a military judge the "added flexibility, and duty, to err on the side of caution where there is substantial doubt as to the fairness of having [the member] sit."[216]

Looking at all three implied cases from the CAAF's last term, it is difficult to read the cases in concert. In *Bragg* (in which the member may have reviewed the accused's relief for cause packet), the challenge seems like a close call.[217] The court's opinion is predicated on the mistaken belief that the member had already decided the accused was guilty. The CAAF does not give the facts that support this conclusion. Presumably, a Marine recruiter would be relieved for cause simply for having sexual relationships with two high school students, even if the students had not alleged rape. Equally important, the standard of proof required for a relief for cause is significantly lower than the "beyond a reasonable doubt" standard at a court-martial.[218] Despite these facts that favored upholding the military judge's denial of the causal challenge, the CAAF unanimously reversed.[219] By contrast, the member in *Townsend*—with his predisposition towards law enforcement witnesses, his plans to become a prosecutor, and his law school education—would seem like a much closer call, though the CAAF unanimously upheld the military judge's denial of the causal challenge.[220] Finally, in *Elfayoumi*, the CAAF allowed a member who had strong moral opposition to homosexuality and pornography to sit on a case in which both issues were front and center, even after he admitted a predisposition to punitively discharge the accused.[221]

These cases suggest a change regarding implied bias and the liberal grant mandate. In 2007, the CAAF considered a series of implied bias cases and determined that a military judge who fails to address implied bias or the liberal grant mandate is entitled to little or no deference in denying challenges for cause.[222] Against these cases, the military judges in *Townsend* and *Elfayoumi* did not discuss the liberal grant mandate when denying the causal challenges at issue.[223] The *Townsend* opinion concluded that the facts did not constitute a "close case," so the liberal grant mandate did not apply.[224] By contrast, *Elfayoumi* did not decide whether its facts constituted a "close case" or even discuss the liberal grant mandate.[225] While military judges would be wise to discuss actual bias, implied bias, and the liberal grant mandate when denying a defense challenge for cause, the CAAF has suggested that sloppy analysis (or no analysis at all) is not necessarily fatal on appeal.

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[213] *Id.* (Erdmann & Ryan, JJ., dissenting).

[214] *Id.* (Erdmann & Ryan, JJ., dissenting) (citing United States v. Townsend, 65 M.J. 460, 463 (C.A.A.F. 2008)).

[215] *Id.* (Erdmann & Ryan, JJ., dissenting).

[216] *Id.* (Erdmann & Ryan, JJ., dissenting) (quoting *id.* at 357).

[217] United States v. Bragg, 66 M.J. 325 (C.A.A.F. 2008).

[218] The CAAF found this distinction to be irrelevant to the implied bias analysis: "In the present case, for example, the military judge was not ultimately compelled to explore the capacity of [the member] to recommend administrative relief in one context, yet keep an open mind about Appellant's conduct when applying a criminal standard of review as a court-martial member." *Id.* at 327.

[219] *Id.* at 328.

[220] United States v. Townsend, 65 M.J. 460 (C.A.A.F. 2008)

[221] *Elfayoumi*, 66 M.J. 354.

[222] *See generally* Major Patrick D. Pflaum, *More Than Just Implied Bias . . . : The Year in Pleas and Pretrial Agreements, Article 32, and Voir Dire and Challenges*, ARMY LAW., June 2008, at 50, 69 ("The CAAF has shown an appropriate willingness to overturn serious cases based on implied bias and the failure of the military judge to consider implied bias and the liberal grant mandate in denying defense challenges for cause.") (discussing United States v. Terry, 64 M.J. 295 (C.A.A.F. 2007); United States v. Clay, 64 M.J. 274 (C.A.A.F. 2007); United States v. Briggs, 64 M.J. 28 (C.A.A.F. 2008)).

[223] *See Elfayoumi*, 66 M.J. at 358 (Erdmann & Ryan, JJ., dissenting) ("[T]he military judge's ruling does not reflect that he considered the liberal grant mandate."); United States v. Townsend, 65 M.J. 460, 464 (C.A.A.F. 2008) ("[T]he ruling denying the challenge of [member] did not reflect whether he considered either implied bias or the liberal grant rule.").

[224] *Townsend*, 65 M.J. at 466 ("[T]his is not a close case where failure to apply the liberal grant mandate is fatal."). Judge Baker's separate opinion in *Townsend* suggests he disagreed with the majority's conclusion that this was not a close case: "At the same time, this was a close case as a matter of law (as opposed to practice), and I was not present to evaluate the tone, content, and sincerity of the member's responses, all of which inform an implied as well as actual bias challenge." *Id.* at 467 (Baker, J., dubitante).

[225] The CAAF wrote in broad terms regarding the "substantial doubt" provision of RCM 912(f)(1)(N), without separating actual and implied bias: *See supra* note 206 and accompanying text.

Conclusion

At the end of *Hoosiers*, before playing the state championship game, Coach Dale takes his player to the empty, big city gym. [226] For the players from Hickory, Indiana, the shiny floor and endless rows of seats are overwhelming. To put his players at ease, Coach Dale pulls out a tape measure and has the boys check the height of the rim and the length from the free throw line.[227] The players realize the measurements are the same as the small gym back home.[228] The players and crowd might change, but the court stays the same. Unfortunately, military courts are not as consistent.

This was a year of fundamentals for pretrial procedures. The CAAF struck down a regulation that exempted officers in special branches from serving on courts-martial. The court admonished counsel to avoid elaborate hypothetical questions during voir dire. Perhaps most important, the CAAF suggested that implied bias is a fluid concept that may yield disparate results.

Next year's terms will likely continue this theme. Following *Bartlett*, cases should be percolating through appellate channels and challenging the methods by which convening authorities are applying the new rule. Following *Nieto*, counsel should be war-gaming responses to hypothetical voir dire questions. Military judges may try to reign in counsel during voir dire, which could trigger separate challenges. Following the string of implied bias cases, the courts will hopefully return to fundamentals and reverse cases in which the military judge fails to properly consider implied bias and the liberal grant mandate when ruling on challenges for cause. The CAAF's trend has been to chastise military judges who do not discuss these principles on the record, while affirming the decisions. Such a practice only serves to perpetuate the slipshod analysis of lower courts.

For practitioners, the CAAF called for vigilant trial practice. Defense counsel in particular should be challenging panel selection, combating improper trial counsel questioning during voir dire, and aggressively arguing implied bias challenges. Defense counsel who fail to lodge timely objections risk waiver on appeal. In a pivotal scene in *Hoosiers*, the assistant coach is left in charge during a close game.[229] During a timeout, the agitated coach tells the team: "Alright, boys, this is the last shot we got. Boys, we're gonna run the picket fence at 'em. . . . . Now, don't get caught watching the paint dry."[230] Trial practitioners should follow the same advice.

[226] HOOSIERS (Metro Goldwyn Mayer 1986).

[227] *Id.*

[228] *Id.*

[229] *Id.*

[230] *Id.* (quoting Gene Hackman as Coach Norm Dale)

CLE News

1. Resident Course Quotas

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

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

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

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

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

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

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

ATTRS. No.	Course Title	Dates
	GENERAL	
5-27-C22	57th Judge Advocate Officer Graduate Course	11 Aug 08 – 22 May 09
5-27-C22	58th Judge Advocate Officer Graduate Course	10 Aug 09 – 20 May 10
5-27-C20	178th JAOBC/BOLC III (Ph 2)	20 Feb – 6 May 09
5-27-C20	179th JAOBC/BOLC III (Ph 2)	17 Jul – 30 Sep 09
5F-F1	206th Senior Officer Legal Orientation Course	23 – 27 Mar 09
5F-F1	207th Senior Officer Legal Orientation Course	8 – 12 Jun 09
5F-F52	39th Staff Judge Advocate Course	1 – 5 Jun 09
5F-F52S	12th SJA Team Leadership Course	1 – 3 Jun 09
600-BNCOC	4th BNCOC Common Core (Ph 1)	9 – 27 Mar 09
600-BNCOC	5th BNCOC Common Core (Ph 1)	12 – 29 May 09
600-BNCOC	6th BNCOC Common Core (Ph 1)	3 – 21 Aug 09
512-27D30	4th Paralegal Specialist BNCOC (Ph 2)	1 Apr – 5 May 09
512-27D30	5th Paralegal Specialist BNCOC (Ph 2)	1 Jun – 8 Jul 09

512-27D30	6th Paralegal Specialist BNCOC (Ph 2)	26 Aug – 30 Sep 09
512-27D40	2d Paralegal Specialist ANCOC (Ph 2)	2 Apr – 2 May 09
512-27D40	3d Paralegal Specialist ANCOC (Ph 2)	1 Jun – 8 Jul 09
512-27D40	4th Paralegal Specialist ANCOC (Ph 2)	26 Aug – 30 Sep 09
WARRANT OFFICER COURSES		
7A-270A1	20th Legal Administrators Course	15 – 19 Jun 09
7A-270A2	10th JA Warrant Officer Advanced Course	6 – 31 Jul 09
ENLISTED COURSES		
512-27D/20/30	20th Law for Paralegal NCO Course	23 – 27 Mar 09
512-27D-BCT	11th BCT NCOIC/Chief Paralegal NCO Course	20 – 24 Apr 09
512-27D/DCSP	18th Senior Paralegal Course	22 – 26 Jun 09
512-27DC5	28th Court Reporter Course	26 Jan – 27 Mar 09
512-27DC5	29th Court Reporter Course	20 Apr – 19 Jun 09
512-27DC5	30th Court Reporter Course	27 Jul – 25 Sep 09
512-27DC6	9th Senior Court Reporter Course	14 – 18 Jul 09
512-27DC7	11th Redictation Course	30 Mar – 10 Apr 09
ADMINISTRATIVE AND CIVIL LAW		
5F-F202	7th Ethics Counselors Course	13 – 17 Apr 09
5F-F21	7th Advanced Law of Federal Employment Course	26 – 28 Aug 09
5F-F22	62d Law of Federal Employment Course	24 – 28 Aug 09
5F-F23	64th Legal Assistance Course	30 Mar – 3 Apr 09
5F-F24	33d Administrative Law for Installations Course	16 – 20 Mar 09
5F-F28H	2009 Hawaii Income Tax CLE Course	12 – 16 Jan 09
5F-F29	27th Federal Litigation Course	3 – 7 Aug 09
CONTRACT AND FISCAL LAW		
5F-F10	162d Contract Attorneys Course	20 – 31 Jul 09
5F-F103	9th Advanced Contract Law Course	16 – 20 Mar 09

5F-F12	80th Fiscal Law Course	11 – 15 May 09
5F-DL12	3d Distance Learning Fiscal Law Course	19 – 22 May 09
CRIMINAL LAW		
5F-F301	12th Advanced Advocacy Training Course	27 – 29 May 09
5F-F31	15th Military Justice Managers Course	24 – 28 Aug 09
5F-F33	52d Military Judge Course	20 Apr – 8 May 09
5F-F34	32d Criminal Law Advocacy Course	14 – 25 Sep 09
INTERNATIONAL AND OPERATIONAL LAW		
5F-F41	5th Intelligence Law Course	22 – 26 Jun 09
5F-F43	5th Advanced Intelligence Law Course	24 – 26 Jun 09
5F-F44	4th Legal Issues Across the IO Spectrum	13 – 17 Jul 09
5F-F47	52d Operational Law of War Course	27 Jul – 7 Aug 09
5F-F47E	2009 USAREUR Operational Law CLE	10 – 14 Aug 09
5F-F48	2d Rule of Law	6 – 10 Jul 09

3. Naval Justice School and FY 2008 Course Schedule

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

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

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

525N	Prosecuting Complex Cases (010)	18 – 22 May 09
03RF	Legalman Accession Course (020) Legalman Accession Course (030)	12 Jan – 27 Mar 09 11 May – 24 Jul 09
049N	Reserve Legalman Course (Ph I) (010)	6 – 17 Apr 09
056L	Reserve Legalman Course (Ph II) (010)	20 Apr – 1 May 09
4040	Paralegal Research & Writing (010) Paralegal Research & Writing (020)	15 – 26 Jun 09 (Norfolk) 13 – 24 Jul 09 (San Diego)
5764	LN/Legal Specialist Mid-Career Course (020)	4 – 15 May 09
7485	Classified Info Litigation Course (010)	5 – 7 May 09 (Andrews AFB)
7487	Family Law/Consumer Law (010)	6 – 10 Apr 09
7878	Legal Assistance Paralegal Course (010)	6 – 11 Apr 09
NA	Iraq Pre-Deployment Training (010) Iraq Pre-Deployment Training (020) Iraq Pre-Deployment Training (030) Iraq Pre-Deployment Training (040)	6 – 9 Oct 09 5 – 8 Jan 09 6 – 9 Apr 09 6 – 9 Jul 09

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

Naval Justice School Detachment San Diego, CA		
947H	Legal Officer Course (050) Legal Officer Course (060) Legal Officer Course (070) Legal Officer Course (080)	4 – 22 May 09 8 – 26 Jun 09 20 Jul – 7 Aug 09 17 Aug – 4 Sep 09
947J	Legal Clerk Course (040) Legal Clerk Course (050) Legal Clerk Course (060) Legal Clerk Course (070) Legal Clerk Course (080)	30 Mar – 10 Apr 09 4 – 15 May 09 8 – 19 Jun 09 27 Jul – 7 Aug 09 17 Aug – 4 Sep 08
3759	Senior Officer Course (040) Senior Officer Course (050) Senior Officer Course (060) Senior Officer Course (070) Senior Officer Course (080)	30 Mar – 3 Apr 09 (San Diego) 13 – 17 Apr 09 (Bremerton) 27 Apr – 1 May 09 (San Diego) 1 – 5 Jun 09 (San Diego) 14 – 18 Sep 09 (Pendleton)

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

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

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

Negotiation and Appropriate Dispute Resolution Course, Class 09-A	18 – 22 May 09
Environmental Law Update Course (DL), Class 09-A	27 – 29 May 09
Reserve Forces Paralegal Course, Class 09-A	1 – 12 Jun 09
Staff Judge Advocate Course, Class 09-A	15 – 26 Jun 09
Law Office Management Course, Class 09-A	15 – 26 Jun 09
Paralegal Apprentice Course, Class 09-05	23 Jun – 5 Aug 09
Judge Advocate Staff Officer Course, Class 09-C	13 Jul – 11 Sep 09
Paralegal Craftsman Course, Class 09-03	20 Jul – 27 Aug 09
Paralegal Apprentice Course, Class 09-06	11 Aug – 23 Sep 09
Trial & Defense Advocacy Course, Class 09-B	14 – 25 Sep 09

5. Civilian-Sponsored CLE Courses

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

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

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

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

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

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

ASLM:	American Society of Law and Medicine Boston University School of Law 765 Commonwealth Avenue Boston, MA 02215 (617) 262-4990
CCEB:	Continuing Education of the Bar University of California Extension 2300 Shattuck Avenue Berkeley, CA 94704 (510) 642-3973
CLA:	Computer Law Association, Inc. 3028 Javier Road, Suite 500E Fairfax, VA 22031 (703) 560-7747
CLESN:	CLE Satellite Network 920 Spring Street Springfield, IL 62704 (217) 525-0744 (800) 521-8662
ESI:	Educational Services Institute 5201 Leesburg Pike, Suite 600 Falls Church, VA 22041-3202 (703) 379-2900
FBA:	Federal Bar Association 1815 H Street, NW, Suite 408 Washington, DC 20006-3697 (202) 638-0252
FB:	Florida Bar 650 Apalachee Parkway Tallahassee, FL 32399-2300 (850) 561-5600
GICLE:	The Institute of Continuing Legal Education P.O. Box 1885 Athens, GA 30603 (706) 369-5664
GII:	Government Institutes, Inc. 966 Hungerford Drive, Suite 24 Rockville, MD 20850 (301) 251-9250
GWU:	Government Contracts Program The George Washington University National Law Center 2020 K Street, NW, Room 2107 Washington, DC 20052 (202) 994-5272

IICLE:	Illinois Institute for CLE 2395 W. Jefferson Street Springfield, IL 62702 (217) 787-2080
LRP:	LRP Publications 1555 King Street, Suite 200 Alexandria, VA 22314 (703) 684-0510 (800) 727-1227
LSU:	Louisiana State University Center on Continuing Professional Development Paul M. Herbert Law Center Baton Rouge, LA 70803-1000 (504) 388-5837
MLI:	Medi-Legal Institute 15301 Ventura Boulevard, Suite 300 Sherman Oaks, CA 91403 (800) 443-0100
NCDA:	National College of District Attorneys University of South Carolina 1600 Hampton Street, Suite 414 Columbia, SC 29208 (803) 705-5095
NDAA:	National District Attorneys Association National Advocacy Center 1620 Pendleton Street Columbia, SC 29201 (703) 549-9222
NITA:	National Institute for Trial Advocacy 1507 Energy Park Drive St. Paul, MN 55108 (612) 644-0323 (in MN and AK) (800) 225-6482
NJC:	National Judicial College Judicial College Building University of Nevada Reno, NV 89557
NMTLA:	New Mexico Trial Lawyers' Association P.O. Box 301 Albuquerque, NM 87103 (505) 243-6003
PBI:	Pennsylvania Bar Institute 104 South Street P.O. Box 1027 Harrisburg, PA 17108-1027 (717) 233-5774 (800) 932-4637

PLI:	Practicing Law Institute 810 Seventh Avenue New York, NY 10019 (212) 765-5700
TBA:	Tennessee Bar Association 3622 West End Avenue Nashville, TN 37205 (615) 383-7421
TLS:	Tulane Law School Tulane University CLE 8200 Hampson Avenue, Suite 300 New Orleans, LA 70118 (504) 865-5900
UMLC:	University of Miami Law Center P.O. Box 248087 Coral Gables, FL 33124 (305) 284-4762
UT:	The University of Texas School of Law Office of Continuing Legal Education 727 East 26th Street Austin, TX 78705-9968
VCLE:	University of Virginia School of Law Trial Advocacy Institute P.O. Box 4468 Charlottesville, VA 22905

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

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

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

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

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

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

7. Mandatory Continuing Legal Education

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

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

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

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

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

Current Materials of Interest

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

Date	Region	Location	Units	ATRRS Number	POC
3–5 Apr 09	Midwest	Cincinnati, OH	9th LSO 91st LSO 139th LSO	Course: JAO-1 Class: 006	CPT Steve Goodin (910) 396-7014 (office) Steven.Goodin@us.army.mil SSG Williams 614-692-7593 adrian.m.williams@usar.army.mil
17–19 Apr 09	Heartland	New Orleans, LA	8th LSO 1st LSO 2d LSO 214th LSO	Course: JAO-1 Class: 007	MSG Larry Barker larry.r.barker@us.army.mil SSG Dale Herman 816.836.0005 x2156 dale.herman@usar.army.mil
19–25 Apr 09	Southeast Functional Exercise	Ft. Jackson, SC	7th LSO (Lead) 12th LSO 174th LSO (Support)	TBD	TBD
15–19 Jun 09	Midwest Functional Exercise	Ft. McCoy, WI	7th LSO	TBD	TBD

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

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

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

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

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

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

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

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

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

Contract Law

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

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

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

Legal Assistance

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Administrative and Civil Law

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

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

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

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

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

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

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

Labor Law

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

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

Criminal Law

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

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

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

International and Operational Law

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

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

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

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

b. Access to the JAGCNet:

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

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

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

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

(d) FLEP students;

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

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

LAAWSXXI@jagc-smtp.army.mil

c. How to log on to JAGCNet:

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

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

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

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

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

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

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

4. TJAGSA Publications Available Through the LAAWS XXI JAGCNet

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

The TJAGSA faculty and staff are available through the Internet. Addresses for TJAGSA personnel are available by e-mail at jagsch@hqda.army.mil or by accessing the JAGC directory via JAGCNET. If you have any problems, please contact LTMO at (434) 971-3257.

Phone numbers and e-mail addresses for TJAGSA personnel are available on TJAGSA Web page at http://www.jagcnet.army.mil/tjagsa. Click on "directory" for the listings.

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

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

5. TJAGSA Legal Technology Management Office (LTMO)

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

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

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

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

6. The Army Law Library Service

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

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

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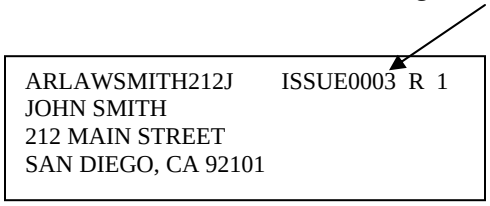

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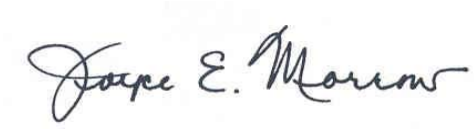

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