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Lore of the Corps

Articles

Book Reviews

Lore of the Corps

Adam E. Patterson: First African American Judge Advocate in History

Fred L. Borch
Regimental Historian & Archivist

The first African-American lawyer to join our Corps– then known as the Judge Advocate General's Department – was Adam E. Patterson. He had practiced law in Oklahoma and Illinois for more than fifteen years before being appointed as a Major, Division Judge Advocate, 92d Division, American Expeditionary Force, by General John J. Pershing on October 5, 1918. What follows is the story of a remarkable lawyer and judge advocate.

Born in Walthall, Mississippi on December 23, 1876, Adam E. Patterson went to high school in Kansas City, Kansas and Pueblo, Colorado. After graduating in 1897, he attended the University of Kansas, and earned his LL.B.[1] in 1900.[2]

After being admitted to the bar, 24-year old Patterson began practicing law in Cairo, Illinois. Five years later, he moved to Muskogee, Oklahoma. Active in Democratic Party politics, he was "conspicuous" in supporting Woodrow Wilson in the 1912 elections.[3] As a reward, once he was elected, President Wilson nominated Patterson to be Register of the U.S. Treasury on July 24, 1913. Two days later, however, after two prominent senators from Mississippi and South Carolina and their followers "served notice" on Wilson that the nomination of an African-American "could not be confirmed," Wilson withdrew Patterson's nomination.[4] Secretary of State Williams Jennings Bryan subsequently offered Patterson the position of "Minister to Liberia," but Patterson apparently declined this appointment and returned to Illinois in 1914.[5]

Adam E. Patterson as a student at the University of Kansas, circa 1900.

In Chicago, Patterson continued his involvement in politics. He was elected president of the National Colored Democratic League and, in 1916 "managed the national campaign for [the] Democratic Party among colored voters."[6] He also had an active civil and criminal law practice and took on a number of high profile cases. On one occasion, Patterson worked alongside the famous lawyer Clarence Darrow[7] in defending Oscar S. De Priest, a black Republican and Chicago alderman, who was being prosecuted for graft; De Priest was acquitted.[8]

In 1917, after America's entry into World War I, Patterson joined the Officers Training Camp at Fort Des

[1] A bachelor of laws, which was the basic degree awarded to an individual upon the completion of law school until the late 1960s. THE FREE DICTIONARY, http://www.legal-dictionary.thefree dictionary.com/LL.B. (last visited Feb. 18, 2015).

[2] Questionnaire for the Judge Advocates Record of the War, Adam E. Patterson, National Archives and Records Administration, Record Group (RG) 153, Records of the Office of The Judge Advocate General, Entry 45, Box 4. [hereinafter NARA]

[3] THE CRISIS, Sept. 1913 at 227.

[4] *First Negro for Register: Opposition in Senate to President's Nomination of Patterson*, N.Y. TIMES 27 July 1913, at 4.

[5] NARA, *supra* note 2.

[6] *Id.*

[7] *See* IRVING STONE, CLARENCE DARROW FOR THE DEFENSE: A BIOGRAPHY (1941). Clarence Darrow (1857-1938) is perhaps the most famous trial lawyer in U.S. history and was known for taking unpopular cases. He gained national prominence when defending John T. Scopes at the so-called "Scopes Monkey Trial" in Tennessee in 1925. *Id.*

[8] UNITED STATES HOUSE OF REPRESENTATIVES, HISTORY, ART & ARCHIVES, DE PRIEST, OSCAR STANTON, http://history.house.gov/ People/Detail/12155? ret=True#biography (last visited Jan. 26, 2015). Oscar Stanton De Priest (1871-1951) was the first African-American to be elected to Congress from outside the southern states. He served as a Republican in the House of Representatives from 1929 to 1935; he was the only African-American in Congress during these years. *Id.*

Moines, Iowa. He spent ten months as a captain of Infantry and was an instructor in the 4th Officers Training Camp, Camp Dodge, Iowa. Then, on October 5, 1918, Patterson was promoted to major and appointed Division Judge Advocate for the 92d Division.

This all African-American division, which had been created by General John J. Pershing as part of the American Expeditionary Force in 1917, had four infantry battalions, three field artillery battalions, and three machine gun battalions. It also had an engineer regiment, an engineer train, a signal corps and a trench mortar battery.[9] While most officers in the division were African-American, black officers could not outrank white officers—meaning black officers generally were unable to attain a rank higher than lieutenant. This meant that Patterson was truly unique; one of only a handful of African-American majors in the Army and the first African-American lawyer to wear the crossed quill-and-sword insignia on his collar.

At the time of his appointment as Division Judge Advocate, the 92d Division was already in existence. Consequently, Patterson sailed to France, joined the unit, and then remained in France at least until February 1919.[10] Assisting him with his legal duties were Captain Austin T. Walden, the Assistant Judge Advocate and two enlisted men.[11] As for what he did as the senior lawyer in the division, Patterson wrote in 1925 that he "personally handled all offenses committed by the soldiers from A.W.O.L. to murder."[12] Additionally, he would have provided legal advice to commanders and their staffs, and almost certainly was available if soldiers in the 92d needed legal assistance.

After returning to Chicago from France in 1919, Patterson "became a major figure in the city's Democratic Party." He also established "The Committee of One Hundred," composed mostly of African-American war veterans, working for "civic racial uplift" in Chicago.[13]

Patterson also was very active in refuting an organized campaign by General Robert L. Bullard and other senior white Army officers to discredit the contributions of African-Americans in World War I, especially those of the 92d Division.[14] As General Pershing had lauded the exploits of the division in France, Patterson and other black Americans who had served in the 92d took Bullard's criticisms "as a personal affront."[15]

In the 1920s and 1930s, Patterson served as assistant corporation counsel for the City of Chicago, a prestigious and high-paying position. In this job, Patterson defended the city in civil suits for money damages. He continued to use his military rank during this time, and is routinely identified in books and newspaper stories as "Major Adam Patterson."[16]

Patterson probably remained in Chicago for the remainder of his life but your Regimental Historian has been unable to find an obituary for him that would confirm this assumption; though one must exist given his prominence in the community. In any event, it is unquestionable that Adam E. Patterson was inordinately proud of his service as a Judge Advocate and that he deserves to be remembered.

Correction: The May 2014 Lore of the Corps stated that then Colonel Eugene M. Caffey landed at Omaha Beach on June 6, 1944. This is incorrect as Caffey waded ashore at Utah Beach. The author regrets the error.

[9] STEVEN D. SMITH AND JAMES A. ZEIDLER, A HISTORIC CONTEXT FOR THE AFRICAN-AMERICAN MILITARY EXPERIENCE (1998), 156.

[10] NARA, *supra* note 2

[11] Walden was the second African-American lawyer to join the Army as a judge advocate. He was commissioned as a captain on 15 November 1918 and ordered to duty as the Assistant Judge Advocate, 92d Division. Born at Fort Valley, Georgia in 1885, Walden received his law degree from the University of Michigan in 1911 and practiced law in Macon, Georgia prior to joining the Army in 1917. Walden returned to Georgia after World War I and became a prominent member of the African-American community in the Atlanta area. He also was active in politics, and when appointed to a judgeship on the Atlanta Municipal Court in 1964, he became the first black judge in Georgia since Reconstruction. Walden died in 1965. NARA *supra* note 2; A. T. Walden (1885-1965), New Georgia Encyclopedia, http://www.georgiaencyclopedia. org/articles/history-archaeology/t-walden-1885-1965 (last visited 27 Jan. 2015).

[12] *92d Division Officer Nails Bullard's Lie*, CHICAGO DEFENDER, 13 Jun 1925, at 3.

[13] CHAD LOUIS WILLIAMS, TORCHBEARERS OF DEMOCRACY: AFRICAN AMERICAN SOLDIERS IN THE WORLD WAR I ERA (2010), 322.

[14] General Bullard, commander of the 2d American Army, insisted that African-American soldiers were "hopelessly inferior" and had been cowards in battle. Historians today view condemnations by Bullard and others to have been "attempts to cover their own failures in combat and pitiful efforts to promote their own belief in black inferiority." SMITH AND ZEIDLER, *supra* note 6, at 179.

[15] WILLIAMS, *supra* note 13. Pershing told the members of the 92d that the "Division stands second to none in the record you have made since your arrival in France … I commend the 92d Division for its achievements not only in the field, but on the record its men have made in their individual conduct." SMITH AND ZEIDLER, *supra* note 9, at 178-179.

[16] WALLACE B. WEST, PASSIONATELY HUMAN, NO LESS DIVINE (2005), 178; *Lays Cornerstone of $50,000 Church*, CHICAGO DEFENDER, Jul 31, 1937, at 4.

Absent Without Leave on Appeal and the Fugitive Disentitlement Doctrine

Colonel James A. Young, United States Air Force (Retired)[*]

Background

Private First Class (PFC) Amanda N. Moss left her unit in August 2007 and remained away for three years.[1] She was apprehended by civilian authorities on civilian charges and was eventually returned to military control.[2] After her court-martial arraignment on a charge of desertion terminated by apprehension,[3] Private First Class Moss again left military control and did not appear at her court-martial.[4] A special court-martial convicted her in absentia and adjudged a bad-conduct discharge, confinement for six months, partial forfeiture of her pay, and reduction to the lowest enlisted grade.[5]

Before trial, the trial defense counsel advised PFC Moss in writing that, if the approved sentence included a punitive discharge or confinement in excess of one year, her case would be automatically forwarded to the Court of Military Review [6] for appellate review, and she could request appellate counsel to represent her. Appellant signed an appellate rights form that contained the following advice: "After the [Army Court of Criminal Appeals] ACCA completes its review, I may petition the United States Court of Appeals for the Armed Forces (CAAF) to review my case." Later, in the same form, Appellant indicated as follows: "If applicable, I do want to be represented before the Army Court of Criminal Appeals by Appellate Defense Counsel appointed by The Judge Advocate General (TJAG) of the Army." There is no evidence that Appellant authorized an appeal before the CAAF. Before trial, PFC Moss and her defense counsel prepared an unsworn statement for her to give during the sentencing hearing, if she were convicted.[7] After her conviction, PFC Moss's defense counsel read the unsworn statement to the court members.[8]

Private First Class Moss's sentence resulted in automatic referral of her case to the ACCA.[9] Before the ACCA, PFC Moss's appellate defense counsel argued four issues related to the propriety of the trial defense counsel reading the unsworn statement from the absent Appellant to the court-martial.[10] The ACCA affirmed the findings and sentence, holding that the trial defense counsel did not provide ineffective assistance of counsel by presenting the unsworn statement.[11]

The Clerk of Court mailed a copy of the ACCA's opinion to PFC Moss's last known address with instructions on the process for appealing the ACCA's decision to the CAAF.[12] The envelope was returned to the Clerk's office with the notation "undeliverable."[13]

On behalf of PFC Moss, appellate defense counsel petitioned the CAAF for review.[14] The CAAF granted review of the same four issues Appellant had raised before the ACCA.[15] After oral argument, during which it became apparent that Appellant was still in an unauthorized absence status, the CAAF specified four additional issues, all revolving around that status: (1) whether the decision to appeal was personal to Appellant and, if so, how is it to be exercised; (2) whether there is evidence in the record that she authorized an appeal to the CAAF and, if not, does counsel nevertheless have a continuing duty to represent her; (3) when an appellant cannot be located, what is the appellate defense counsel's responsibility to file an appeal in light of the statutory time limit to file an appeal; and

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[*] Senior Legal Advisor to the Honorable Scott W. Stucky, Associate Judge, U.S. Court of Appeals for the Armed Forces. J.D., University of Pennsylvania Law School, 1975; B.A., Lehigh University, 1968. Colonel Young served as a military judge and an appellate military judge, retiring in January 2003 as the Chief Judge of the U.S. Air Force Court of Criminal Appeals. Previous publications: *Court-Martial Procedure: A Proposal*, THE REPORTER, vol. 41, no. 2, 2014, at 20; *Revising the Court-Martial Selection Process*, 163 MIL. L. REV. 91 (2000); *The Accomplice in American Military Law*, 45 A.F. L. REV. 59 (1998); *Multiplicity and Lesser-Included Offenses*, 39 A.F. L. REV. 159 (1996); *The Continued Vitality of Peremptory Challenges in Courts-Martial*, ARMY LAW., Jan. 1992, at 20. The opinions expressed herein are solely those of the author.

[1] United States v. Moss, 73 M.J. 64, 65 (C.A.A.F. 2014). The full case is located in the Appendix.

[2] *Id.*

[3] Uniform Code of Military Justice (UCMJ) art. 85; 10 U.S.C. § 885 (2012).

[4] *Moss*, 73 M.J. at 65.

[5] *Id.*

[6] The Courts of Military Review became the Courts of Criminal Appeals on October 5, 1994, seventeen years before Appellant signed the form. Pub. L. 103-337, § 924, 108 Stat. 2663 (1994).

[7] *Moss*, 73 M.J. at 70 (Baker, C.J., joined by Effron, S.J., dissenting).

[8] *Id.* at 65.

[9] *See* UCMJ art. 66(b), 10 U.S.C. § 866(b) (2012) (unless an accused specifically waives appellate review, the "Judge Advocate General shall refer to the Court of Criminal Appeals the case of any accused whose sentence as approved by the convening authority extends to "death, dismissal of a commissioned officer, cadet, or midshipman, dishonorable or bad-conduct discharge, or confinement for one year or more").

[10] United States v. Moss, No. 2011037, 2013 WL 211255, at *1 (A. Ct. Crim. App. Jan. 17, 2013).

[11] *Id.* at *5.

[12] *Moss*, 73 M.J. at 66.

[13] *Id.*

[14] United States v. Moss, 72 M.J. 161 (C.A.A.F. 2013) (docketing order).

[15] *Moss*, 73 M.J. at 66.

(4) should the case be dismissed with prejudice under the CAAF's holding in *United States v. Schreck*.[16]

Appellate defense counsel argued that PFC Moss had "manifested her desire to seek review of her case at [the CAAF] when she elected to have counsel appointed to represent her at the Army Court."[17] Appellate counsel had a continuing duty to represent her and the fugitive disentitlement doctrine of *Schreck* should not apply because she was not an escapee from confinement.[18]

The Government agreed that PFC Moss had requested appellate representation before she went absent and, therefore, appellate defense counsel had a continuing duty to represent her before the CAAF.[19] Nevertheless, the Government argued that, because of her fugitive status, her appeal should be dismissed with prejudice.[20]

The Opinion

A three-member majority of the CAAF dismissed the case because PFC Moss had not personally authorized the appeal and, therefore, the CAAF lacked jurisdiction to hear her appeal.[21] Judge Erdmann, writing for the majority, neither relied on nor mentioned either *Schreck* or the fugitive disentitlement doctrine.

The majority's analysis begins and ends with a discussion of the court's jurisdiction under Article 67(a)(3), UCMJ.[22] That statute "directs this Court to review cases which have been reviewed by a Court of Criminal Appeals and where there is a 'petition of the accused' and 'good cause shown.' The statute clearly establishes that all three of these predicates must exist before the congressional mandate to review a case arises."[23] The majority noted that, although Appellant had authorized an appeal to the ACCA, she had not authorized such an appeal to the CAAF.

Although PFC Moss's appellate counsel had a continuing duty to represent her that duty "was, by its own terms, limited to representation before the ACCA."[24] The majority concluded that the decision to appeal "is personal to an appellant, and because Moss did not authorize the appeal, [the CAAF] lacks statutory jurisdiction under Article 67(a)(3) and the appeal must be dismissed."[25]

Chief Judge Baker joined by Senior Judge Effron, dissented, asserting that the majority "reaches for a jurisdictional issue the parties did not raise or appeal and that we need not decide. In doing so the majority reaches an erroneous conclusion that dramatically curtails the jurisdiction of this Court to provide appellate and civilian review of trials in absentia."[26] They found compelling the Government's concession that PFC Moss's case was lawfully before the court.[27]

The dissenters argued that "the military justice system is predicated on the principle of civilian oversight," but the majority "has determined that there should be no civilian review of trials where an accused has absented himself prior to appeal before this Court or the Supreme Court."[28] They noted that Article 39(b), UCMJ,[29] does not specifically authorize trial in absentia and argue that, "[i]f the accused can be tried in absentia under Article 39, UCMJ, then there is no statutory reason to read Article 67, UCMJ, as prohibiting an appeal in absentia."[30]

Analysis of the Opinion

As the Supreme Court has noted, "the accused has the ultimate authority to make certain fundamental decisions regarding the case, [including] whether to. . . take an appeal."[31] There is no evidence of record that PFC Moss authorized an appeal to the CAAF, and the court should not infer she wanted to appeal merely because she asked her appellate counsel to appeal to the ACCA.

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[16] United States v. Moss, 73 M.J. 53 (C.A.A.F. 2013) (supplemental order).

[17] Brief for Appellant on Specified Issues at 3, *available at* http://www.armfor.uscourts.gov/newcaaf/briefs/2013Term/Moss13-0348AppellantBriefSpecifiedIssue.pdf (last viewed Jan. 14, 2015).

[18] *Id.*

[19] *Id.* at 2.

[20] *Id.*

[21] *Moss*, 73 M.J. at 69.

[22] 10 U.S.C. § 867(a)(3) (2012): "The Court of Appeals for the Armed Forces shall review the record in—(3) all cases reviewed by a Court of Criminal Appeals in which, upon petition of the accused and on good cause shown, the Court of Appeals for the Armed Forces has granted a review."

[23] United States v. Rodriguez, 67 M.J. 110, 114–15 (C.A.A.F. 2009), *quoted in Moss* 73 M.J. at 67.

[24] *Moss*, 73 M.J. at 69.

[25] *Id.* The Supreme Court denied a Petition for Certiorari in a death penalty case, in which the defendant asserted he had not authorized an appeal, and referred correspondence with counsel to the Disciplinary Board of the Supreme Court of Pennsylvania. Ballard v. Pennsylvania, 134 S. Ct. 2842 (2014) (discussed in Jeffrey D. Koelemay, *Did Inmate OK Supreme Court Appeal? Death-Row Drama Sent Back to Pennsylvania*, 95 CRIM. L. REP. (BNA) 603 (Aug. 20, 2014).

[26] *Moss*, 73 M.J. at 69. (Baker, C.J., joined by Effron, S.J., dissenting).

[27] *Id.* (Baker, C.J., joined by Effron, S.J., dissenting).

[28] *Id.* at 70 (Baker, C.J., joined by Effron, S.J., dissenting).

[29] 10 U.S.C. § 839(b) (2012) (providing that, in hearings held out of the presence of the court members, an accused has a right to be present or, if at least one defense counsel is in accused's presence, such hearing may be held by audiovisual technology).

[30] *Moss*, 73 M.J. at 71 (Baker, C.J., joined by Effron, S.J., dissenting).

[31] Jones v. Barnes, 463 U.S. 745, 751 (1983); *accord* Florida v. Nixon, 543 U.S. 175, 187 (2004); *see* United States v. Larneard, 3 M.J. 76, 79 (C.M.A. 1977).

The dissenters' argument that the majority "reaches for a jurisdiction issue the parties did not raise or appeal and that we need not decide," is misplaced. The CAAF is an Article I[32] federal court.[33]

> Federal courts are courts of limited jurisdiction. They possess only that power authorized by Constitution and statute, which is not to be expanded by judicial decree. It is to be presumed that a cause lies outside this limited jurisdiction, and the burden of establishing the contrary rests upon the party asserting jurisdiction.[34]

'On every writ of error or appeal, the first and fundamental question is that of jurisdiction . . . . This question the court is bound to ask and answer for itself, even when not otherwise suggested . . . ."[35] The majority in *Moss* correctly determined that jurisdiction was the threshold question that had to be answered before the court could reach the merits of the issue presented. PFC Moss had not authorized an appeal to the CAAF and, therefore, the CAAF was without jurisdiction to hear her case.

The dissenters are correct in asserting that the military justice system is predicated on civilian oversight but incorrect in assuming that the CAAF is the sole instrument able to exercise that control. Congress exercises civilian control over the military justice system;[36] the CAAF is merely a limited instrument of congressional control and oversight. After all, Congress has limited the CAAF's jurisdiction to cases in which (1) the sentence, as affirmed by the service court of criminal appeals, includes death; (2) the case was reviewed by the service court of criminal appeals and the Judge Advocate General orders it sent to the CAAF; or (3) the case was reviewed by the service court of criminal appeals and the CAAF grants review on good cause shown.[37] Surely, the dissenters would not suggest the CAAF has jurisdiction to review cases not meeting these jurisdictional requirements.

The dissenters are also correct in noting that Article 39, UCMJ, does not provide for trials in absentia. But read in context, Article 39 was only meant to ensure that an accused is not excluded from sessions in which the military judge makes evidentiary and procedural rulings that will affect the accused's trial. It was not meant to preclude in absentia trials where the accused had been present for arraignment.

Finally, the dissent's conclusion that the majority "has determined that there should be no civilian review of trials where an accused has absented himself prior to appeal"[38] should be written off as mere hyperbole. The majority decided the case on lack of jurisdiction and specifically declined to decide the remaining specified or granted issues.[39]

Discussion

Jurisdiction

Resolving the jurisdictional issue is easy. In fact, it is likely that the military services have already modified the statement of appellate rights to provide an accused the opportunity to authorize appeals before the CAAF. But the greater issue—whether the CAAF should and will consider such cases—is uncertain.

Fugitive Disentitlement Doctrine

In *Ortega-Rodriguez v. United States*, the Supreme Court noted that "[i]t has been well settled for well over a century that an appellate court may dismiss the appeal of a defendant who is a fugitive from justice during the pendency of his appeal."[40] The justifications for such a rule are: (1) concerns about the enforceability of the appellate court's judgment against the fugitive;[41] (2) escape is "tantamount to waiver or abandonment" of the right to appeal;[42] (3) "[i]t discourages the felony of escape and encourages voluntary surrender";[43] and (4) "[i]t promotes the efficient, dignified operation" of the appellate court.[44] But there are limitations to the court's discretion to dismiss. There must be "some connection between a defendant's fugitive status and the appellate process, sufficient to make an appellate sanction a reasonable response."[45]

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[32] U.S. CONST. art. I.

[33] *See* United States v. Denedo, 556 U.S. 904, 912 (2009); Clinton v. Goldsmith, 526 U.S. 529, 534 (1999).

[34] Kokkonen v. Guardian Life Ins. Co. of Am., 511 U.S. 375, 377 (1994), *quoted in* Ctr. for Constitutional Rights v. United States, 72 M.J. 126, 128 (C.A.A.F. 2013) (quotation marks and citations omitted).

[35] Great S. Fire Proof Hotel Co. v. Jones, 177 U.S. 449 (1900), *quoted in* Ctr. for Constitutional Rights, 72 M.J. at 128.

[36] U.S. CONST. art. I, § 8, cl. 14 ("The Congress shall have Power . . . To make Rules for the Government and Regulation of the land and naval Forces.").

[37] UCMJ art. 67, 10 U.S.C. § 867(a) (2012).

[38] *Moss*, *73* M.J. at 71.

[39] *Id.* at 69.

[40] 507 U.S. 234, 239 (1993); *see also* Molinaro v. New Jersey, 396 U.S. 365 (1970); Smith v. United States, 94 U.S. 97 (1876).

[41] *Rodriguez*, 507 U.S. at 239–40 (citing *Smith*, 94 U.S. at 97; Bohanan v. Nebraska, 125 U.S. 692 (1887); Eisler v. United States, 338 U.S. 189 (1949)).

[42] *Id.* at 240 (citing *Molinaro*, 396 U.S. at 366).

[43] *Id.* at 241 (citing Estelle v. Dorrough, 420 U.S. 534, 537 (1975)).

[44] *Id.* (citing *Dorrough*, 420 U.S. at 537 (1975)).

[45] *Id.* at 244.

In *United States v. Smith*,[46] the Court of Military Appeals[47] (CMA) adopted the Supreme Court's fugitive disentitlement jurisprudence. Smith fled after his arraignment and was tried in absentia.[48] After his conviction was affirmed by the Navy Court of Military Review (CMR), his appellate defense counsel filed a timely petition for review at the CMA.[49] The court granted review. The accused returned to military control within the thirty-day period for petitioning the CMA but after his counsel had petitioned the CMA for review. The Court held that "one who voluntarily absents himself without leave is not entitled to invoke the processes of this Court, so long as he continues in that status."[50] Thus, while the appellant was a fugitive, the petition filed by his attorney was unauthorized by law, unauthorized by the appellant, and therefore, "ineffective for all purposes."[51] As no petition was filed between the time the appellant returned to military control and the end of the statutory period for such filing, there was no petition validly before the Court. The court's "jurisdiction, therefore, terminated."[52]

Only seven years later, however, the judges on the CMA could not agree on the application of the fugitive disentitlement doctrine to the military. In *United States v. Schreck*, appellate defense counsel filed a petition for review before the CMA.[53] The Government moved the court to dismiss the petition because the appellant was an unauthorized absentee on the day the CMR rendered its decision in the case, and the time for filing at the CMA had long passed.[54] In a split opinion, the CMA held that the appellant had specifically authorized service on his counsel if he could not be served; Schreck's counsel had been served, and had filed a petition within the statutory period.[55] The court denied the Government's motion to dismiss and allowed the appeal to go forward, even though the appellant had not returned to military control.[56] Citing the court's previous opinion in *United States v. Larneard*,[57] which permitted service on either the accused or counsel of the intermediate appellate court's judgment, the majority concluded that its opinion in *Smith* had, in part, been overruled.[58]

Chief Judge Everett, in a concurring opinion, criticized the CMA's earlier *Smith* opinion:

> Since such a result would penalize the accused who relies on the power of attorney procedure authorized by *Larneard* and the regulations stemming from that decision, the rule in *Smith* seems inconsistent with *Larneard*. Secondly, in holding "ineffective" the filing of a petition for review by an accused who at the time was absent without authority, *Smith* sought to restrict a right which Congress had given in unqualified terms.[59]

Judge Cook dissented, noting that *Larneard* did not involve an accused who was absent without leave and, therefore, did not overrule *Smith*.[60] Larneard was not a fugitive from justice: he had already served his sentence to confinement and was on appellate leave.[61] *Larneard* instead concerned whether a petition for review was timely filed at the CMA when the accused had granted his appellate counsel power of attorney to receive the decision of the CMR and the petition for grant of review was filed within the statutory time period. The CMA recognized that the statute requires the accused be notified but accepted, under general principles of agency, that notification to counsel who had the accused's power of attorney to receive the CMR's decision, was notification to the accused.[62]

When *Schreck* reached the CMA on its merits, the court split three ways.[63] In the lead opinion, Chief Judge Everett noted that in allowing Schreck's appeal to move forward, the court "did not intend to suggest that [it] lack[ed] the power to dismiss, at some time after filing, a petition for review filed for an accused who is absent without authority."[64] Judge Fletcher concurred in the result,[65] specifically limiting

[46] 46 C.M.R. 247, 248 (C.M.A. 1973) (citing *Molinaro*, 396 U.S. at 366; *Smith*, 94 U.S. at 97).

[47] The United States Court of Military Appeals was renamed the United States Court of Appeals for the Armed Forces on October 5, 1994. Pub. L. No. 103-337, § 924(b), 108 Stat. 2663 (1994).

[48] *Smith*, 46 C.M.R. at 248.

[49] *Smith*, 46 C.M.R. at 248. Although unclear from the case, it is probable that the CMA lacked jurisdiction to hear the appeal, as it is unlikely the appellant had authorized his counsel to file one at the CMA.

[50] *Id.* at 249 (citing *Molinaro*, 396 U.S. at 366).

[51] *Id.*

[52] *Id.*

[53] 9 M.J. 217, 217 (C.M.A. 1980).

[54] *Id.*

[55] *Id.* at 219 (Everett, C.J., concurring).

[56] *Id.*

[57] 3 M.J. 76 (C.M.A. 1977).

[58] *Schreck*, at 218.

[59] *Id.* at 219 (Everett, C.J., concurring) (discussing *Larneard*, 3 M.J. 76). Although the power of attorney may have permitted the defense attorney to accept service of the lower court's decision, the CMA opinion does not discuss whether Schreck had specifically authorized an appeal to the CMA.

[60] *Id.* at 220 (Cook, J., dissenting).

[61] *Larneard*, 3 M.J. at 78. An accused who completes the sentence to confinement but is awaiting a discharge to be executed may now be placed on appellate leave. U.S. DEP'T OF DEF. INSTR. 1327.06, LEAVE AND LIBERTY POLICY AND PROCEDURES enclosure 2 ¶ 1.l.(2) (13 Aug. 2013).

[62] *Larneard*, 3 M.J. at 81.

[63] United States v. Schreck, 10 M.J. 226 (C.M.A. 1981).

[64] *Id.* at 229 (opinion by Everett, C.J.).

[65] *Id.* (Fletcher, J., concurring in the result).

his concurrence to the disposition of the case—unless the appellate defense counsel advised the court within thirty days that the accused had returned to military control, it would dismiss the appeal with prejudice—but declined to join the rest of the Chief's opinion.[66] Judge Cook dissented.[67] Unbeknownst to the court, Schreck had returned to military control and was on appellate leave.[68] The CMA later concluded that it would be inappropriate under these circumstances to dismiss Schreck's petition.[69] The CMA granted his appeal and remanded for a new supervisory authority action.[70]

Conclusion

After *Schreck*, the continued vitality of *Smith* and the fugitive disentitlement doctrine in the military is unclear. To the extent permitted by the Supreme Court in *Ortega-Rodriguez*, the CAAF should adopt this discretionary doctrine. To do otherwise is to waste judicial resources and grant an AWOL appellant the power to determine whether the court's judgment will be enforceable.

[66] *Id.* (opinion by Everett, C.J.).

[67] *Id.* (Cook, J., dissenting).

[68] *See id.* 374.

[69] *Id.* at 375.

[70] *Id.*

Appendix

UNITED STATES, Appellee

v.

Amanda N. MOSS, Private First Class
U.S. Army, Appellant

No. 13-0348

Crim. App. No. 20110337

United States Court of Appeals for the Armed Forces

Argued September 18, 2013

Decided January 27, 2014

ERDMANN, J., delivered the opinion of the court, in which STUCKY and RYAN, JJ., joined. BAKER, C.J., filed a separate dissenting opinion, in which EFFRON, S.J., joined.

Counsel

For Appellant: Captain Ian M. Guy (argued); Colonel Kevin M. Boyle, Lieutenant Colonel Peter Kageleiry Jr., Lieutenant Colonel Jonathan F. Potter, Major Jacob D. Bashore, and Major Vincent T. Shuler (on brief); Colonel Patricia A. Ham.

For Appellee: Captain Sean P. Fitzgibbon (argued); Lieutenant Colonel James L. Varley, Major Robert A. Rodrigues, and Captain Steve T. Nam (on brief); Major Elisabeth A. Claus.

Military Judge: Tiernan P. Dolan

This opinion is subject to revision before final publication.

Judge ERDMANN delivered the opinion of the court.

A panel of officers sitting as a special court-martial convicted Private First Class Amanda Moss, in absentia and contrary to her pleas, of one specification of desertion terminated by apprehension in violation of Article 85, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 885 (2012). The panel sentenced Moss to reduction to E-1, forfeiture of $978.00 pay per month for twelve months, confinement for six months, and a bad-conduct discharge. The convening authority approved the adjudged sentence and credited Moss with eighteen days of confinement against the sentence to confinement. The United States Army Court of Criminal Appeals (ACCA) affirmed the findings and sentence. United States v. Moss, No. ARMY 20110337, 2013 CCA LEXIS 15, at *18, 2013 WL 211255, at *6 (A. Ct. Crim. App. Jan. 17, 2013).

An accused "has the ultimate authority to determine whether to plead guilty, waive a jury, testify in his or her own behalf, or take an appeal." Florida v. Nixon, 543 U.S. 175, 187 (2004) (internal quotation marks omitted). "[I]t is the appellant's decision whether to take an appeal to this Court . . . ." United States v. Larneard, 3 M.J. 76, 82 (C.M.A. 1977). We specified additional issues in this case to determine whether Moss authorized the appeal to this court. We hold that since the decision to appeal must be made by the appellant and because

the record does not reflect that Moss authorized such an appeal, the appeal must be dismissed.

Background

On August 26, 2007, Moss left her unit without authority and remained absent for approximately three years. Following her apprehension by civilian authorities, Moss was brought back to Fort Stewart, Georgia, and charged with desertion. After arraignment, but prior to trial on the merits, Moss absented herself again and was ultimately tried in absentia at a special court-martial. During the presentencing proceedings, Moss's trial defense counsel gave an unsworn statement on her behalf. The unsworn statement informed the members that Moss had absented herself to care for her aunt, VM, who was ill. On rebuttal, however, the government called Moss's father who testified that Moss did not have an aunt with that name.

During pretrial preparation, Moss completed a "Post Trial and Appellate Rights Advisement" in which she acknowledged that if the sentence approved by the convening authority included a punitive discharge or confinement for one year or more, her case would be automatically reviewed by the ACCA. Moss also requested representation before the ACCA by appellate defense counsel appointed by the Judge Advocate General of the Army by circling the word "do" in paragraph 13 of the rights advisement. Since Moss's approved sentence included a punitive discharge,

her case was automatically referred to the ACCA where she was represented by appellate counsel.

Before the ACCA, Moss's appellate defense counsel primarily argued that Moss was denied her Sixth Amendment right to effective assistance of counsel due to trial defense counsel's decision to give an unsworn statement on her behalf without her permission. Appellate defense counsel also argued that trial defense counsel's decision to inform the members that Moss absented herself to care for her aunt, only to have the government rebut the very existence of the aunt, demonstrated inadequate investigation of Moss's presentencing case. Moss, 2913 CCA LEXIS 15, at *4-*5, 2013 WL 211255, at *2. Ultimately, the ACCA held that trial defense counsel's strategy in providing the unsworn statement "was tactically sound and not unreasonable" and therefore did not constitute ineffective assistance of counsel under Strickland v. Washington, 466 U.S. 668 (1984). Moss, 2013 CCA LEXIS 15 at *16, 2013 WL 211255, at *5 (internal quotation marks and citation omitted).

Following the ACCA's decision, the ACCA Clerk's Office mailed a copy of the decision along with a cover letter to the address that Moss had last provided. The letter stated, in part:

> This letter is notification of the decision of the United States Army Court of Criminal Appeals and informs you of your right to petition the United States Court of Appeals for the Armed Forces for a

> grant of review. The 60-day period within which you may petition the Court of Appeals for the Armed Forces begins on the day following the date this letter was mailed to you.
>
> If you select to petition the United States Court of Appeals for the Armed Forces (CAAF), please sign and date the five copies of DA Form 4918-R, which are enclosed, and mail them to that Court in the envelope provided. If you DO NOT select to petition CAAF, you may request final action in your case by completing the enclosed DA Form 4919-R and mail it directly to your Appellate Defense Counsel. DO NOT do both.

The ACCA Clerk's Office completed a Department of the Army (DA) Form 4916-R (Certificate of Service/Attempted Service) which indicated that the letter was returned as undeliverable.

On March 18, 2013, appellate defense counsel petitioned this court for review of the ACCA decision. United States v. Moss, 72 M.J. 161 (C.A.A.F. 2013) (docketing order). We granted review of four issues that involve the unsworn statement made by trial defense counsel.[1] During oral argument the court asked the

[1] We granted review of the following issues:

> I. Whether Appellant was denied her Sixth Amendment right to effective assistance of counsel where the defense counsel made an unsworn statement on her behalf when she was tried in absentia and there is no evidence that she consented to the unsworn statement.
>
> II. Whether Appellant was deprived of her right to conflict-free counsel when her defense counsel made an unsworn statement without her consent and subsequently invoked his Fifth Amendment rights and failed to assert that Appellant was prejudiced.

parties whether there was any evidence that Moss had authorized the appeal to this court, as there was no indication in the record that she had done so. Appellate defense counsel acknowledged that Moss had not signed a specific authorization for appeal to this court nor had he spoken to her and obtained a verbal authorization to appeal on her behalf. Appellate defense counsel argued that Moss's completion of the "Post Trial and Appellate Rights Advisement" constituted an implied authorization for such an appeal, and, when combined with counsel's ethical duty of continued representation, he was required to pursue the appeal before this court on Moss's behalf.

On September 20, 2013, we issued an order specifying and requesting briefing on additional issues concerning the authorization to appeal.[2]

III. Whether the military judge committed plain error when he allowed the defense counsel to make an unsworn statement on behalf of Appellant when she was tried in absentia.

IV. Whether the military judge abused his discretion when he found that there was no prejudice when the defense counsel read an unsworn statement without Appellant's consent and then failed to instruct the panel to disregard the unsworn statement and Sergeant First Class M's rebuttal testimony.

United States v. Moss, 72 M.J. 407 (C.A.A.F. 2013) (order granting review).

[2] We specified the following issues:

Arguments of the Parties

Appellate defense counsel recognizes that the decision to appeal is personal to an appellant but argues that the following actions by Moss reflected her intent to have counsel seek relief in all possible appellate forums: Moss requested assignment of appellate defense counsel to represent her at the ACCA; she signed the "Post Trial and Appellate Rights Advisement" which referenced her right to appeal to this court; and she authorized her trial defense counsel to file clemency matters in her absence. Appellate defense counsel further argues that Moss

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I. Whether the decision to appeal to this Court is a personal decision of the Appellant, and if so, in what manner may such a decision be made?

II. Whether there is any evidence in the record that the Appellant has authorized an appeal to this Court, and if there is no such authorization, is there nonetheless a continuing duty to represent the Appellant, and if so, from where does this duty derive?

III. In circumstances where the Appellant cannot be located during the time period available to file a petition for grant of review at this Court, what is the responsibility of appellate defense counsel in the context of the statutory time limit in Article 67, UCMJ, to file an appeal?

IV. Should this case be dismissed with prejudice under the holding in United States v. Schreck, 10 M.J. 226 (C.M.A. 1981)?

United States v. Moss, __ M.J. __ (C.A.A.F. Sept. 20, 2013) (supplemental order).

understood she had the same rights to counsel before this court as she did at the ACCA and therefore, absent any indication that she did not want representation at this court, it followed that she wanted to be represented before this court by appointed counsel. Appellate defense counsel concludes by asserting that once he was appointed under Article 70, UCMJ, 10 U.S.C. § 870 (2012), he had a duty to continue representing Moss until the attorney-client relationship was terminated. See Dep't of the Army, Reg. 27–10, Legal Services, Military Justice app. C, para. C-3 a.(1), b.(1) (Oct. 3, 2011) [hereinafter AR 27-10, app. c]. Since Moss never terminated the relationship, his duty of representation extended to all appellate proceedings under the UCMJ. See Dep't of the Army, Reg. 27-26, Legal Services, Rules of Professional Conduct for Lawyers, R. 1.12, R. 1.16 (May 1, 1992). The government generally agrees with Moss's position on these issues.

Discussion

Whether the personal authorization of an appellant is required to appeal to this court is a legal issue which we review de novo. See United States v. Daly, 69 M.J. 485, 486 (C.A.A.F. 2011). Where, as here, all of the evidence relating to the authorization issue is in the record and is not disputed, the issue before the court "necessarily reduces to a question of law." See United States v. Lundy, 63 M.J. 299, 301 (C.A.A.F.

2006). Both parties agree that the decision whether to take an appeal to this court is personal to an appellant. Larneard, 3 M.J. at 82. The parties also agree that Moss's completion of the "Post Trial and Appellate Rights Advisement" reflected her intent to appeal to this court and therefore constituted an implied authorization to proceed with the appeal.

Article 67(a)(3) requires this court to review:

> (3) all cases reviewed by a Court of Criminal Appeals in which, upon petition of the accused and on good cause shown, the Court of Appeals for the Armed Forces has granted a review.

10 U.S.C. § 867 (2012) (emphasis added). This provision was discussed in United States v. Rodriguez, 67 M.J. 110, 114-15 (C.A.A.F. 2009):

> Pertinent to this case is subsection (a)(3) which directs this court to review cases which have been reviewed by a Court of Criminal Appeals and where there is a "petition of the accused" and "good cause shown." The statute clearly establishes that both of these predicates must exist before the congressional mandate to review a case arises.

The threshold issue before this court is whether there is a "petition of the accused" which was personally authorized by the accused. The rights advisement was signed by Moss on April 14, 2011, three weeks prior to her trial and contained the following pertinent provisions:

> I am the accused whose name appears above. I certify that my trial defense counsel has advised me of the following post-trial and appellate rights in the event that I am convicted of a violation of the Uniform Code of Military Justice.

> . . . .
>
> 4. If the convening authority approves an adjudged punitive discharge (dismissal for officers; bad-conduct or dishonorable discharge for enlisted soldiers) or confinement for one year or longer, my case will be automatically reviewed by the Army Court of Criminal Appeals (ACCA). I am entitled to be represented by counsel before such court. If I so request, military counsel will be appointed to represent me at no cost to me. If I so choose, I may also be represented by civilian counsel at no expense to the United States.
>
> 5. After the ACCA completes its review, I may petition the United States Court of Appeals for the Armed Forces (CAAF) to review my case. If that Court grants my petition, I may request review by the Supreme Court of the United States. I have the same rights to counsel before those courts as I have before the ACCA. If I am pending an approved dishonorable or bad-conduct discharge it may only be ordered executed after the completion of the appellate process in accordance with Rule for Court-Martial 1209 [sic], unless I waive appellate review.
>
> . . . .
>
> 13. (Strike through inapplicable portion.) If applicable, I (do) (do not) [Moss circled "do" and struck through "do not"] want to be represented before the Army Court of Criminal Appeals by Appellate Defense Counsel appointed by the Judge Advocate General (TJAG) of the Army. I understand that I may contact my Appellate Defense Counsel by writing to Defense Appellate Division, U.S. Army Legal Services Agency (JALS-DA), 901 North Stuart Street, Arlington, Virginia 22203-1837.

Ordinarily, "may" is a permissive rather than a mandatory term. United States v. Rodgers, 461 U.S. 677, 706 (1983) ("The

word 'may,' . . . usually implies some degree of discretion.").[3] The rights advisement simply informed Moss that if her conviction was affirmed by the ACCA, she had the discretion to appeal to this court and the Supreme Court, and if she chose to do so she had the same right to counsel before those courts as she did before the ACCA. The language concerning a possible appeal to this court was informative only, and Moss's exercise of her right to counsel before the ACCA cannot be construed to authorize a subsequent appeal to either this court or the Supreme Court.

The letter sent to Moss from the ACCA Clerk's Office after the issuance of the ACCA decision reinforces this conclusion. The letter referenced and enclosed five copies of the DA Form 4918-R which is entitled "Petition for Grant of Review in the United States Court of Appeals for the Armed Forces." That form provides:

> TO THE JUDGES OF THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES:
>
> 1. I hereby petition the Court for review of my conviction.
>
> 2. I understand that, unless I specifically request the contrary, a military lawyer will be designated by The Judge Advocate General to represent me free of

[3] See also 10 U.S.C. 101(f)(2) ("'may' is used in a permissive sense"); Rodriguez, 67 M.J. at 117 (Effron, C.J., dissenting) ("[In Article 67(b)], Congress used permissive language: The accused may petition . . . .") (internal quotation marks omitted)).

> charge before the US Court of Appeals for the Armed Forces.
>
> SIGNED: _____

As noted earlier, the envelope containing the letter and copies of the ACCA decision, DA Form 4917-R ("Advice as to Appellate Rights"), DA Form 4918-R, and DA Form 4919-R was later returned to the ACCA Clerk's Office as undeliverable. Although the government currently argues that Moss's post-trial election to have appellate defense counsel represent her before the ACCA constituted an authorization to appeal to this court, the instructions in the ACCA Clerk's letter and the enclosed DA Form 4918-R are inconsistent with that position.

The parties also argue that appellate defense counsel had a continuing duty to represent Moss until the attorney-client relationship was severed. We agree that once an attorney-client relationship is established it must continue until terminated. See AR 27–10, app. C, para. C-3 a.(1) (stating that a duty of continued representation exists until the attorney-client relationship is terminated, counsel is reassigned, or the appellate processes under the UCMJ are terminated). However, the extent of appellate defense counsel's duty to represent Moss was predicated on her previously provided limited authority to appeal only to the ACCA. If the accused is not available and cannot be located within the time provided to file a petition

for review before this court, "the attorney can and should proceed in accordance with the authority previously given by the accused and file such proceedings as may be necessary to protect the interests of his client." Larneard, 3 M.J. at 82. Paragraph 13 of the "Post Trial and Appellate Rights Advisement," where Moss indicated a desire to be represented by appellate defense counsel, was, by its own terms, limited to representation before the ACCA.[4] Therefore, the attorney-client relationship was limited to representation before the ACCA.

The issues raised in this appeal were brought on by both Moss's actions and inactions. She initially absented herself for over three years, which led to the desertion charge. She then chose to flee again prior to her trial, which resulted in her being tried in absentia. In consulting with counsel prior to trial, Moss was advised that if her sentence fell within the jurisdiction of the ACCA, her case would automatically be appealed to that court. With this information, Moss exercised her right to counsel before that court. Following the decision of the ACCA, the government provided Moss with the opportunity to appeal to this court and the opportunity to have a military lawyer designated to represent her. However, because Moss both remained absent without authorization and failed to keep the

[4] "If applicable, I (do) (do not) [Moss circled "do" and struck through "do not"] want to be represented before the Army Court of Criminal Appeals by Appellate Defense Counsel appointed by The Judge Advocate General of the Army."

Defense Appellate Division apprised of her current address, she did not exercise that option. Accordingly, we hold that since the decision to appeal to this court is personal to an appellant, and because Moss did not authorize the appeal, this court lacks statutory jurisdiction under Article 67(a)(3) and the appeal must be dismissed. See Rodriguez, 67 M.J. at 114-15. Given this holding, we need not address the remaining specified issues or the granted issues.

Decision

The court's order granting the petition for grant of review is vacated, and the petition for grant of review is dismissed.

BAKER, Chief Judge, with whom EFFRON, Senior Judge, joins (dissenting):

The Court reaches for a jurisdictional issue the parties did not raise or appeal and that we need not decide. In doing so the majority reaches an erroneous conclusion that dramatically curtails the jurisdiction of this Court to provide appellate and civilian review of trials in absentia. Such trials raise uncommon and complex Fifth and Sixth Amendment issues as well as ethical challenges for defense counsel. These are just the sort of issues that must be subject to appellate review in a credible justice system and should be subject to a uniform application of law between services and servicemembers. The majority's conclusion is also logically inconsistent, permitting defense counsel to represent absent clients at trial but not on appeal. This is not required by the law and it is not fair. It is no surprise, then, that the Court's decision will overturn settled law and precedent dating to the advent of the Uniform Code of Military Justice (UCMJ). Therefore, I respectfully dissent.

In contrast to the majority, I would decide this case on the basis for which it was originally granted and determine whether defense counsel was ineffective and, if so, whether Appellant was prejudiced under Strickland. Strickland v. Washington, 466 U.S. 668 (1984). Indeed, the legal issues

underlying this case underscore the very concerns I have with the majority's jurisdictional overreach: trial defense counsel's actions at trial proved problematic in the absence of his client, which, on appeal, cast doubt on the legality of the proceedings. Nothing in the UCMJ suggests that Congress, by design or implication, established a system allowing servicemembers to be tried in their absence yet denied civilian appellate review because of that absence. Indeed, these cases raise a host of effectiveness and ethical issues for counsel that should be subject to appellate review in a credible system of justice.

Discussion

In this case, the Court initially granted two issues raised by Appellant. The first asserted ineffective assistance of counsel after trial defense counsel delivered an unsworn statement on Appellant's behalf at the conclusion of her trial in absentia. Appellant, then the accused, went absent without leave (AWOL) before she was tried but after she was charged. During this interim period, defense counsel and the accused prepared an unsworn statement, which Appellant intended to give to the members. But the context for making that unsworn statement changed in a manner neither the accused nor trial defense counsel had contemplated. Among other unexpected developments, the accused's own father testified in a manner

that undercut if not eviscerated her unsworn statement. Presumably, this unfavorable turn of events would have warranted at least reconsideration and revalidation of the earlier decision to give an unsworn statement and, in particular, the prior drafted unsworn statement. The second granted issue raised a related matter regarding trial defense counsel's invocation of his right to silence when asked by the military judge whether the absent accused had consented to his delivery of the accused's unsworn statement.

Against this backdrop, and following oral argument, this Court specified a number of issues addressed to whether Appellant had authorized an appeal to this Court and, in any event, whether the "fugitive disentitlement doctrine" should apply.[1] Appellant responded: yes and no. On point one -- whether Appellant had authorized appeal to this Court -- the Government agreed and noted "Appellant expressed her desire for appellate representation before she went absent from these proceedings." However, on point two, the Government disagreed. "Although appellant's petition for review was lawfully before this court, her continuing fugitive status should preclude her from any relief from this court." To emphasize, the Government

[1] Under what has been labeled the "fugitive disentitlement doctrine," "an appellate court may dismiss the appeal of a defendant who is a fugitive from justice during the pendency of his appeal." Ortega-Rodriguez v. United States, 507 U.S. 234, 239 (1993).

stated both that the case is lawfully before this Court and "[a]ppellate defense counsel has a continuing duty to represent appellant" and if the Appellant "cannot be located within the statutory period to elect appeal to this court, appellate defense counsel is responsible for preserving, to the extent practicable under the law, appellant's ability to invoke the jurisdiction of this court upon her return."

Nonetheless, a majority of this Court has determined not only that it is impracticable for defense counsel to continue to represent the client, but also that it falls outside our jurisdiction to hear any case in which an appellate defense counsel does not demonstrate the appellant personally requested an appeal to this Court.

> [T]he decision to appeal must be made by the appellant and because the record does not reflect that Moss authorized such an appeal, the appeal must be dismissed.

United States v. Moss, __ M.J. __ (2–3).

> [A]nd because Moss did not authorize the appeal, this court lacks statutory jurisdiction under Article 67(a)(3) and the appeal must be dismissed.

Moss, __ M.J. __ (14).

> the "Post Trial and Appellate Rights Advisement,". . . was, by its own terms, limited to representation before the ACCA. Therefore, the attorney-client relationship was limited to representation before the ACCA.

Moss, __ M.J. __ (13). Of course, this Court is not bound by the parties' agreement. Therefore, the problem is not that the parties reached a different conclusion than the majority; the problem is that each of these conclusions is erroneous. They also undercut the purpose and intent of the UCMJ, including one of the bedrocks of the military justice system: the assignment of military defense counsel to an accused free of charge all the way to the Supreme Court.

First, the military justice system is predicated on the principle of civilian oversight. This takes the form of appellate review by this Court and potentially by the Supreme Court. Civilian review is a sine qua non for the credibility of the military justice system. The majority, however, has determined that there should be no civilian review of trials where an accused has absented himself prior to appeal before this Court or the Supreme Court (unless, of course, for some unfathomable reason the accused was to elect in writing to appeal to this Court and perhaps the Supreme Court before being tried and convicted at court-martial).

The law does not compel this result and has not for more than sixty years of the UCMJ's existence. Nor have there been amendments to the UCMJ that would dictate a contrary result. Moreover, unlike Rodriguez where a three-judge majority of this

Court decided to shed the jurisdiction this Court had exercised consistently for the previous sixty years, the majority's decision here is not based on any language in the UCMJ. Compare United States v. Rodriguez, 67 M.J. 110, 115 (C.A.A.F. 2009) ("While the option of whether to petition or not petition the court rests with the appellant ('may'), Congress established without qualification when such petitions must be filed. Under the plain language of the statute, the petition must be filed within the sixty-day statutory time limit."). Further, the majority's analysis is contradictory and fails to recognize or address the tension between the exercise of jurisdiction to conduct trials in absentia and the asserted lack of jurisdiction to permit appeals in absentia. The UCMJ contains no express prohibition on the actions that a defense counsel may take on behalf of a client to include representation during a trial in absentia as well as an appeal. Nonetheless, the majority finds that a trial in absentia with a defense counsel who is not specifically authorized to represent the accused has jurisdiction, but an appeal of that trial where an accused cannot be shown to have authorized the appeal explicitly deprives this Court of jurisdiction. I do not see how this result is consistent, how it involves jurisdiction, or how it is fair. But that is the result. A defense counsel can represent an absent accused at trial but not on appeal.

Put another way: there is no express authority for defense counsel to act for an accused who is not present. Indeed, there is no express authority in the UCMJ for the accused to be tried in absentia. On the contrary: Article 39(b), UCMJ, 10 U.S.C. § 839(b) (2012) expressly requires the "presence of the accused" in all Article 39(a), UCMJ, sessions. Article 39(c), UCMJ, requires that "all other proceedings" take place "in the presence of the accused." If, as the majority contends, the references to the accused in Article 67, UCMJ, 10 U.S.C. § 867 (2012), are jurisdictional, why would the references to the accused in Article 39(b), UCMJ, not establish a jurisdictional prohibition against trial in absentia?

The point here is not that there is a prohibition against trial in absentia. It is that the references to the accused in Article 67, UCMJ, like the references to the accused in Article 39, UCMJ, must be read reasonably in light of the history and purpose of the UCMJ. If the accused can be tried in absentia under Article 39, UCMJ, then there is no statutory reason to read Article 67, UCMJ, as prohibiting an appeal in absentia.

Article 67, UCMJ, and our rules heretofore have made this clear. Article 67(b)(2), UCMJ, has two important provisions: requirement for service of the Court of Criminal Appeals (CCA) decision on appellate counsel and express provision for this Court to act on a petition in accordance with our rules. The

Court's Rules of Practice and Procedure (e.g., Rule 20) expressly recognize a petition filed by appellate defense counsel as a separate channel of appeal. C.A.A.F. R. 20(b). There is no statutory requirement that counsel's submission be accompanied by an authorization from the client, nor do the rules require such a submission. How, then, can this be jurisdictional? This is a jurisdictional invention of the Court.

Moreover, by focusing exclusively on the culpability and conduct of the accused and not on the credibility of the system as a whole, the majority removes the prospect of civilian and even military appellate review in that group of cases that is arguably most suspect to abuse -- trials in absentia.[2] Indeed, trials in absentia are the sort of trials that undermine the credibility of foreign military justice systems. These are also just the sort of trials where civilian oversight of the U.S. military justice system is important, as a matter of validation and as a matter of credibility. In addition to raising important questions involving the knowing and voluntary waiver of an accused's Fifth and Sixth Amendment rights, trials in absentia raise a host of uncommon and complex ethical challenges for defense counsel. What actions may or should defense counsel

[2] For this same reason, I would not apply the fugitive disentitlement doctrine under the circumstances of this case.

take at trial without the informed consent of the client? See Model Rules of Prof'l Conduct R. 1.4 (2013). What duties, if any, does defense counsel have to seek a speedy trial, or in the alternative, delay the start of a trial? Id.; Dep't of the Army, Reg. 27-26, Rules of Professional Conduct for Lawyers R. 3.2 (May 1, 1992). To what extent, if at all, can defense counsel waive the attorney-client privilege? See United States v. Marcum, 60 M.J. 198 (C.A.A.F. 2004); Military Rule of Evidence (M.R.E.) 511. To what extent may defense counsel waive an accused's right to trial by members? When, and to what extent, can defense counsel effectively represent a client when the defendant is not present at trial?[3] The majority opinion not only fails to spot and address these issues by choosing to curtail appellate review of in absentia trials, but it also ensures the answers will vary from trial to trial and defense counsel to defense counsel. That is not the uniform system Congress envisioned or enacted.

Even more alarming, the effect of the majority's decision is to close the courtroom door not only to an accused who intentionally absents himself, but also to military members who are convicted at trial and subsequently cannot be located while

[3] See Sarah C. Sykes, "Defense Counsel, Please Rise": A Comparative Analysis of Trial In Absentia, 216 Mil. L. Rev. 170 (2013).

they are on appellate leave. We cannot put a number on the potential pool of appellants that might fall into this category, but we know it is a large number based on the number of cases dismissed following Rodriguez.[4]

To avoid this risk -- not just of the AWOL appellant, but the far more frequent appellant who cannot be located -- the majority's new rule will compel defense counsel to seek authorization to appeal to the Courts of Criminal Appeal, this Court, and the Supreme Court. Such an authorization will neither be informed nor based on a particular decision of the Court of Criminal Appeals. It will be defensive in nature to ensure jurisdiction in the event of appeal. But of course, having authorized an appeal, appellate defense counsel will be bound to appeal. In short, authorization to appeal will be given without specific input from an appellant, but based on the risk that appellate defense counsel will not be able to locate an appellant to authorize an appeal upon receipt of the CCA's decision. Nor will authorization to appeal be based on what is actually decided at the CCA. For this same reason, defense and appellate defense counsel who wish to avoid ineffective assistance of counsel claims should also seek advance authorization to appeal to the Supreme Court, without first

[4] No doubt this Court has heard and decided many cases for which the majority decides today this Court has never had jurisdiction.

knowing the outcome before the Criminal Court of Appeals or this Court. As discussed above, this result is not required by the UCMJ; it runs contrary to the UCMJ's intent.

Finally, the majority's adoption of a mechanical and formalistic approach to determining whether an appellant has authorized appeal before this Court unduly and impracticably interferes with the attorney-client privilege. By requiring appellate defense counsel to demonstrate that a client has specifically authorized appeal to this Court, the majority places appellate defense counsel between a rock and hard place. Either the decision dictates the manner in which they communicate with their client by compelling written evidence of an appeal authorization or it will compel appellate counsel to reveal verbal attorney-client communications in order to demonstrate a personal decision by an appellant to appeal to a specific court. Presumably, defense counsel will be compelled to file an affidavit documenting such a client communication.

The majority does all this without even addressing or explaining how a lawyer might fulfill his or her ethical duty to represent clients zealously and diligently when the client cannot be located, for whatever reason, to authorize an appeal personally, and where the lawyer believes meritorious issues warrant appeal.

For all these reasons, I respectfully dissent.

Explaining the Extraordinary: Understanding the Writs Process

Major Jeremy Stephens[*]

Introduction

Every counsel who has spent hours laboring over a motion, double-checking cites and sentence structure, believes they must prevail. Upon hearing the judge digest and disapprove of thier argument in moments, each one wants a second bite at the apple, another arena in which to make their point. A second chance may indeed exist, if counsel are prepared and understand how to seek such relief.

The defense bar, and to a lesser extent trial counsel, have whispered about the special power of writs practice for more than a generation. Trial counsel have embraced the unique force of the government appeal process for decades. Now with the advent of the Army's Special Victim Counsel (SVC) Program and others like it across the military, more counsel are diving headfirst into the sea of military criminal law. This development has introduced a new class of practitioners looking to do all they can for their clients at trial, including seeking interlocutory relief.

Counsel navigating the muddy waters of pseudo-appellate practice while facing an unfamiliar panel of judges and carrying the albatross of trial-level defeat have new questions to answer. What decisions even merit review by the appellate courts? What issues are "extraordinary"? How long will interlocutory review take? What does a writ filing entail and who actually does the filing?

This article will discuss the legal underpinnings of extraordinary relief and outline the standard procedures for filing writs by defense counsel, trial counsel, and special victim counsel. It will also compare these procedures to those used when trial counsel file appeals under the procedures of Article 62 of the Uniform Code of Military Justice. Following the conclusion, a pair of appendices is included to assist practitioners in the basic analysis of whether to file a writ or an Article 62 appeal.

Writs Overview

A writ is an, "order in the name of a state or other competent legal authority, commanding the addressee to do or refrain from doing, some specified act." [1] While practitioners use writs to seek immediate appellate review of decisions, writs practice cannot be used to enlarge the jurisdiction of a court. [2] Writs practice is a means of extraordinary relief because it is outside the normal course of appellate review. An interlocutory appeal is an appeal to a superior court of a trial court's ruling before the trial court's ruling on the entire case.[3] Thus both writs and the procedures outlined in Article 62 of the Uniform Code of Military Justice are mechanisms for interlocutory relief.

Extraordinary relief from a trial judge's decision in the nature of a writ is a tool in the practitioner's tool box, but it is just a tool. Not every project calls for a workman's full complement of tools, not every case or issue lends itself to interlocutory relief. Although the writs process provides a means to seek appellate review of an erroneous ruling, a writ is not always the right tool to choose. Just because counsel has lost a motion, or otherwise found themselves on the wrong end of a judge's decision, does not mean that counsel should file a writ. Before filing a writ, counsel should consult with colleagues and superiors to determine if such action is necessary and appropriate.

The All Writs Act,[4] gives federal appellate courts the ability to grant relief "in aid of their jurisdiction."[5] The Act does not confer an independent jurisdictional basis; rather, it provides a mechanism of review to assist a court in the exercise of its lawful jurisdiction. Before a writ will issue under the Act, every petitioner must answer two questions; (1) is the requested writ in aid of the court's jurisdiction; and (2) is the writ necessary and appropriate.[6] In 1969, the Supreme Court held that the All Writs Act applied to

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[1] BLACK'S LAW DICTIONARY, 1299 (7th ed. 2000).

[2] *Ctr. for Constitutional Rights et al., v. United States and Colonel Denise Lind*, 72 M.J. 126, 128-29, (C.A.A.F. 2013), *United States v. Gross*, 73 M.J. 864, 867 (Army Ct. Crim. App. 2014), *United States v. Booker*, 72 M.J. 787, 791 (N-M.C.C.A. 2013).

[3] BLACK'S LAW DICTIONARY, *supra* note 1 at 74.

[4] 28 U.S.C. §1651(a).

[5] *Id.*

[6] *LRM v. Kastenberg*, 72 M.J. 364, 368 (C.A.A.F. 2013)(citation omitted)(internal quotation marks omitted).

military appellate courts,[7] comprised of the service courts of criminal appeals and the Court of Appeals for the Armed Forces (CAAF). Any discussion of military writs practice necessarily includes an analysis of military appellate jurisdiction

Jurisdiction

The jurisdiction of the service courts of criminal appeals (CCAs) is described in Article 66 of the UCMJ.[8] The service courts have jurisdiction over cases in which the sentence, as approved, extends to death, dismissal of a commissioned officer, cadet, or midshipman, dishonorable or bad-conduct discharge, or confinement for at least one year.[9] This jurisdiction is broadened by the plenary authority of each service's Judge Advocate General to send other cases to the service courts of criminal appeal, even when the sentence falls below the threshold established in Article 66.[10]

Article 67, UCMJ, meanwhile confines the jurisdiction of the Court of Appeals for the Armed Forces (CAAF) to: cases with a death sentence; "all cases reviewed by a Court of Criminal Appeals which the Judge Advocate General orders sent to the [court]; and all cases reviewed by a Court of Criminal Appeals in which, upon petition of the accused and on good cause shown, the [court] has granted a review."[11] Additionally, Article 67 mandates that the accused must petition the CAAF for review within sixty (60) days of an adverse CCA decision, a timeline the court has found to be a jurisdictional bar.[12] While understanding the jurisdiction of appellate courts is statutorily straightforward, understanding when it will be exercised is much less clear-cut.

The All Writs Act asserts, "all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law."[13] To avoid the logic problem in such a definition (i.e. where a court's jurisdiction is based on the approved sentence how can any action be in aid of and yet not enlarging that jurisdiction where no sentence has been entered) military appellate courts have used three main principles which more clearly define interlocutory jurisdiction.

First, the doctrine of potential jurisdiction allows appellate courts to issue opinions in matters that may reach the actual jurisdiction of the court.[14] Second, ancillary jurisdiction is the authority to determine matters incidental to the court's exercise of its primary jurisdiction, such as ensuring adherence to a court order.[15] Third, supervisory jurisdiction refers to the broad authority of the courts to determine matters within the supervisory function of administering the military justice system. Though these doctrines provide for an expansive jurisdiction, the CAAF and military courts can go too far in exercising their supervisory function of the military justice system as was seen in the landmark case of *Clinton v. Goldsmith*.[16]

In *Goldsmith*, the CAAF exercised jurisdiction under the All Writs Act to stop the government from dropping the accused, an Air Force major, from the rolls of the Air Force.[17] Goldsmith's conviction was upheld by the service appellate court and when he made no appeal to the CAAF his conviction became final.[18] While serving his sentence, Goldsmith was informed that he was to be dropped from the rolls of the Air Force. He pursued a writ stopping his release from the Air Force which the CAAF granted.[19] In a unanimous decision, the Supreme Court held the CAAF lacked jurisdiction to issue the writ because it was not "in aid of" the CAAF's strict jurisdiction to review court-martial findings and sentences, despite the fact the reason why Goldsmith was being dropped from the rolls was the same infraction he was punished for at court-martial.[20]

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[7] *Noyd v. Bond*, 395 U.S. 683, 698-699 (1969).

[8] 10 U.S.C. § 866.

[9] 10 U.S.C. § 866(b). This grant of jurisdiction is further limited because an accused may always withdraw or waive an appeal, except in cases extending to death. *See*, 10 U.S.C. § 861.

[10] 10 U.S.C. § 869.

[11] 10 U.S.C. § 867(a).

[12] 10 U.S.C. § 867(b). *See e.g., United States v. Rodriguez*, 67 M.J. 110, 115 (C.A.A.F. 2008).

[13] 28 U.S.C. § 1651(a). *See also, United States v. Denedo*, 556 U.S. 904, 911 (2009).

[14] *See e.g., Kastenberg*, 72 M.J. at 368; *ABC, Inc. v. Powell*, 47 M.J. 363, 364 (C.A.A.F. 1997)(accused and media entities challenged an order closing the accused's Article 32 hearing), *San Antonio Express-News v. Morrow*, 44 M.J. 706 (A.F. Ct. Crim. App. 1996).

[15] *United States v. Davis*, 63 M.J. 171, 177 (C.A.A.F. 2006); *Boudreaux v. U.S.N.M.C.M.R.*, 28 M.J. 181 (C.M.A. 1989); *United States v. Montesinos*, 28 M.J. 38, n.3 (C.M.A. 1989) (Since the integrity of the judicial process is at stake, appellate courts can issue extraordinary writs on their own motion).

[16] 526 U.S. 529 (1999). While Article III courts also struggle to define the scope of their jurisdiction under the All Writs Act, those courts do exercise writ jurisdiction to protect the legal rights of parties and insure the administration of justice. *United States v. New York Telephone Co.*, 434 U.S. 159 (1977). *See also, Thorogood v. Sears*, 678 F.3d 546, 548 (7th Cir. 2012), *United States v. Yielding*, 657 F.3d 722, 728 (8th Cir. 2011), *Gabhart v. Cocke County*, 155 Fed. Appx. 867, 872 (6th Cir. 2005), *Potomac Electric Power Co. v. Interstate Commerce Com*., 702 F.2d 1026, 1035 (D.C. Cir. 1983), *In re Metro-East Mfg. Co.*, 655 F.2d 805, 808-809 (7th Cir. Ill. 1981).

[17] Id. at 531-3. Major Goldsmith's prosecution centered the fact he had unprotected sex while carrying HIV and failed to inform his sexual partners, despite being ordered to do so. The CAAF granted the writ by a 3-2 margin. *Goldsmith v. Clinton*, 48 M.J. 84, 92 (C.A.A.F. 1998).

[18] *Id.* at 532.

[19] *Id.* at 533.

[20] *Id*. at 535-6.

Additionally, even if the CAAF might have had some arguable basis for jurisdiction, the Court ruled the writ was neither "necessary" nor "appropriate," in light of other remedies available.[21]

Some of the CAAF's supervisory jurisdiction was returned a decade later in *United States v. Denedo*.[22] In *Denedo*, the accused sought an extraordinary writ at the Navy-Marine Court of Criminal Appeals, alleging ineffective assistance of counsel more than five years after his case was finalized.[23] After the Navy-Marine Court denied relief, the CAAF granted review of the writ. The government appealed the CAAF's decision to the Supreme Court, asserting that neither the Navy-Marine Court nor the CAAF had jurisdiction in the case. The Supreme Court reasoned that jurisdiction was proper since the petition directly challenged the validity of his conviction and returned the case to the military courts.[24]

Once a practitioner determines whether the court has jurisdiction to hear the writ and issue the requested relief, she must then decide which type of writ is appropriate. There are four main writ types: *mandamus*, prohibition, *habeas corpus*, and *coram nobis*.

Mandamus

In seeking this type of relief, a petitioner is simply asking a court to order that a certain action be done. Because the nature of extraordinary relief review by the appellate courts is unique, the analysis is larger than the substantive issue being appealed. "To prevail on a request for a writ, the petitioner must show that: '(1) there is no other adequate means to attain relief; (2) the right to issuance of the writ is clear and undisputable; and (3) the issuance of the writ is appropriate under the circumstances.'"[25] The analysis requires the court to satisfy itself that an issue is not more appropriately addressed as an interlocutory matter or on direct appeal.

Prohibition

Relief through a writ of prohibition is the inverse of mandamus relief, as it requests that the court prohibit a military judge or another entity from taking a certain action. Courts view these writs as drastic tools "to prevent usurpation of judicial power" and do not exercise their power lightly.[26] The analysis for a writ of prohibition uses the same three-factor test as a writ of mandamus and both actions are concerned with confining lower courts to their proper areas of jurisdiction.[27]

Habeas Corpus

Habeas corpus writs are appropriate when a party is seeking review of confinement or detention.[28] The phrase is translated from Latin and asserts "that you have the body"; in essence the petitioner seeks to challenge his confinement outside of traditional appellate review.[29] While courts can use this mode of relief to direct release, such as from pretrial confinement,[30] the CAAF has also seen habeas filings as a mechanism for "post-conviction" relief when an accused's appeals are exhausted. In *United States v. Loving*, Private Loving filed a *habeas* petition at the CAAF in 2006, long after the Supreme Court upheld his conviction and death sentence.[31]

Coram Nobis

The writ of *error coram nobis* is a tool used when new facts or developments have arisen and the petitioner seeks in essence a "belated extension" of an earlier trial.[32] A writ of *error coram nobis* is available only when a writ of *habeas corpus* is not.[33] *Denedo* centered on a writ of *error coram*

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[21] *Id*. at 537.

[22] *Denedo*, 556 U.S. at 915.

[23] Id. at 907-08.

[24] Id. at 917. The Army Court of Criminal Appeals briefly touched on the idea of supervisory jurisdiction in *U.S. v. Reinert* and *Gipson v. U.S. Army* where the government counsel filed a petition for extraordinary relief. The court had 'significant concerns' about the viability of such writs post-*Goldsmith*, but nevertheless granted relief.
United States v. Reinert, 2008 CCA LEXIS 526, * 35, 2008 WL 8105416 (Army Ct. Crim. App. Aug. 7, 2008)(unpub.).

[25] *Gross*, 73 M.J. at 867, *quoting*, *Hasan v. Gross*, 71 M.J. 416, 418 (C.A.A.F. 2012) (internal citations omitted). Even if a court finds the first two prongs are met, the issuance of the writ remains discretionary.

[26] *Gross*, 73 M.J. at 867 (quotation omitted).

[27] *Hasan*, 71 M.J. at 418 (C.A.A.F. 2012).

[28] BLACK'S LAW DICTIONARY , *supra* note 1 at 569.

[29] *Id*. *See Rodriguez-Rivera, v. United States*, 61 M.J. 19 (C.A.A.F. 2005); *United States v. Ferguson*, 5 U.S.C.M.A. 68, 73-74 (C.M.A. 1954).

[30] *See Buber v. Harrison*, 61 M.J. 70 (C.A.A.F. 2005). Several of Sergeant Scott Buber's convictions surrounding his role in the death of his son were reversed on appeal to ACCA. Since he had already served the full two years of confinement time ACCA affirmed on appeal, he sought immediate release from jail via a habeas action while his direct appeal continued. Ultimately CAAF set aside the two-year sentence roughly a year after issuing habeas relief. *United States v. Buber*, 62 M.J. 476 (C.A.A.F. 2006).

[31] 68 M.J. 1,2 (C.A.A.F. 2009). Private Loving was convicted of premeditated murder, felony murder, attempted murder, and several specifications of robbery. The court-martial sentenced him to a dishonorable discharge, forfeiture of all pay and allowances, and death. The author served on a team of post-conviction counsel for PVT Loving and assisted in the filing of this petition before CAAF, more than ten years after the Supreme Court declined to intervene. *See*, 517 U.S. 748, 774 (1996).

[32] *Rittenhouse v. United States*, 69 M.J. 174 (C.A.A.F. 2010) (quotation omitted).

[33] *Loving v. United States*, 62 M.J. 235, 251 (C.A.A.F. 2005).

nobis and Denedo argued he was unaware his guilty plea could have an effect on his immigration status due to ineffective assistance.[34]

Procedures

With the changes to the UCMJ and the introduction of Special Victim Counsel, the landscape of extraordinary writs is changing, and the cases in which they may be necessary and appropriate is on the rise. New issues giving rise to writs, such as whether or not victims can be heard by and through counsel during certain portions of trial, are extraordinary[35] and, because of this, counsel can generally predict potential interlocutory battles.

Upon receipt of the filing, the appellate court will typically take one of several actions: deny the relief on its face, direct the opposing counsel to show cause why the writ should not issue or "whatever other action it deems appropriate." [36] Petitioner has the initial burden of persuasion to show jurisdiction and the extraordinary circumstances that make the writ necessary or appropriate.[37] When reviewing a petition for extraordinary relief, and whether action in a specific case is necessary and appropriate, ACCA reviews several factors:

> (1) the party seeking relief has no other adequate means, such as direct appeal, to attain the relief desired; (2) the petitioner will be damaged or prejudiced in a way not correctable on appeal; (3) the lower court's order is clearly erroneous as a matter of law; (4) the lower court's order is an oft-repeated error, or manifests a persistent disregard of federal rules; (5) the lower court's order raises new and important problems, or issues of law of first impression.[38]

The court's rules recognize this high burden, and "issuance by the Court of an extraordinary writ authorized by 28 U.S.C. Section 1651(a) is not a matter of right, but of discretion sparingly exercised."[39]

When seeking relief at ACCA, counsel must file two separate documents, a petition for extraordinary relief and a brief in support of that petition. [40] While the brief's substance is generally patterned after a trial court motion, the petition for extraordinary relief must include the following information: (1) case history; (2) the facts of the case; (3) pertinent parts of the record and all exhibits; (4) an issue statement; (5) what relief is sought; (6) why the writ should issue; (7) jurisdictional basis for relief and why ordinary appeal does not work; and (8) "request for appointment of appellate counsel."[41]

There is no automatic stay of proceedings when a writ is filed, although a military judge may grant a continuance to file a writ and practitioners should ask for one if it benefits their case.[42] If either side loses at the first appellate court, they can appeal to the CAAF.[43]

While writs must generally be filed at the CCA before they can be filed at the CAAF,[44] the CAAF's rules do allow for original filings when good cause is shown.[45] If an original writ is filed at CAAF, the court's rules require the following: (1) a case history; (2) why relief was not sought from the appropriate service court; (3) the relief sought; (4) the issues presented; (5) the facts necessary to understand the issues presented by the petition; (6) reasons why the writ

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[34] *Denedo*, 556 U.S. at 907-909. The NMCCA denied the requested writ after the case was returned. *United States v. Denedo*, 2010 CCA LEXIS 27, * 4, 2010 WL 996432 (N-M.C.C.A. Mar. 18, 2010)(unpub.). While Denedo filed a writ appeal of this decision to CAAF, he did so out of time and a motion to file for review out of time was denied by the court. *United States v. Denedo*, 69 M.J. 262, 263 (C.A.A.F. 2010).

[35] *Kastenberg*, 72 M.J. at 366-67.

[36] Courts of Criminal Appeals Rule (C.C.A. R.) 20(f) (31 July 2009). Article 66(f) allows the service JAGs to create uniform rules of procedure at the courts of criminal appeals, this rule is one that has been adopted by all of the service courts.

[37] *McKinney v. Jarvis*, 46 M.J. 870, 873 (Army Ct. Crim. App. 1997); *United States v. Mahoney*, 36 M.J. 679, 685 (A.F.C.M.R. 1992).

[38] *Dew v. United States*, 48 M.J. 639, 648-49 (Army Ct. Crim. App. 1998), *citing*, *Bauman v. U.S. Dis't Court*, 557 F.2d 650, 654-55 (9th Cir. 1977)(additional citation omitted).

[39] Army Court of Criminal Appeals Rule 20.1.

[40] C.C.A. R. 20 (31 July 2009).

[41] C.C.A. R. 20(a) (31 July 2009). Requirement (8) pertains exclusively to defense counsel as TDS counsel will file these documents without DAD attorneys signing as co-counsel while government counsel usually file interlocutory petitions with a GAD/TCAP attorney signing the filing as well.

[42] *See* R.C.M. 906(b)(1). While explicitly discussing motions, the rule gives military judges authority to grant continuances at their discretion. In *Gross*, the military judge granted a stay of proceedings pending resolution of a writ filed by trial counsel. 73 M.J. at 866.

[43] CAAF Rules of Practice and procedure, Rule 19(e), *available at*, http://www.armfor.uscourts.gov/newcaaf/library/Rules/Rules2013Sep.pdf (last visited February 11, 2015). Rule 19(b)(2) draws a distinction when a service TJAG certifies a decision on extraordinary relief from a CCA to the CAAF. Those cases have a sixty (60) day timeline.

[44] There is a preference for initial consideration by a CCA. *See, ABC Inc.*, 47 M.J. at 364-5; *United* States *v. Redding*, 11 M.J. 100 (C.M.A. 1981) ; *see also*, R.C.M. 1204(a), discussion (service court filing favored for judicial economy).

[45] CAAF Rule 4(b)(1): "The Court may, in its discretion, entertain original petitions for extraordinary relief . . . . Absent good cause, no such petition shall be filed unless relief has first been sought in the appropriate Court of Criminal Appeals." *See, Toohey v. United States*, 60 M.J. 100 (C.A.A.F. 2004) (original writ filed after direct appeal sat at NMCCA for more than four years).

should issue; and (7) contact information for each respondent.[46] During the twelve-month term ending August 31, 2014, neither of the two original writs filed at CAAF were granted review by the court.[47] Practitioners filing either petitions for extraordinary review at CAAF do not need to file briefs unless directed to do so by the court.[48] When dealing with a writ-appeal, however, the appellee is required to file an answer to the petition no later than ten (10) days after filing.[49] Finally, the accused must be included as the real party in interest when not otherwise named in a writ filing.[50]

While the decision of whether or not to file for interlocutory relief is often a complex analysis dependent on a variety of circumstances, the question of who files for such relief analysis is much clearer. When an accused is seeking relief, trial defense counsel or civilian defense counsel must file for extraordinary relief as the attorneys at Defense Appellate Division (DAD) have no attorney/client relationship with the client. This construct can lead to an interesting assignment of counsel quandary at DAD when the government counsel, or more recently the victim counsel, files a writ against the military judge who also needs representation.[51]

Conversely, when trial counsel seeks an extraordinary writ, attorneys from the Government Appellate Division (GAD) will file the writ with the appropriate appellate court. When a SVC seeks to file a writ, the counsel files the petition and brief directly with the court, independent of both the trial counsel and staff judge advocate (SJA).

Regardless of who files at the service court of appeals, petitioners must remember to file both a petition for extraordinary relief and a brief in support of the petition.[52]

Article 62 Appeals

The writs process is one part of the military's interlocutory appeal system. But since the 1983 amendments to the UCMJ, government counsel have possessed an ability to appeal certain matters to the appellate courts.[53]

While both writs and the Article 62 system deal with near-immediate review of trial level decisions, Article 62 only applies to certain situations, and only government counsel can avail themselves of its relief. The Article 62 process only applies when a military judge is presiding and a punitive discharge may be adjudged,[54] thus eliminating issues arising at Article 32 preliminary hearings from the Article 62 realm.

Article 62 proceedings are limited to certain rulings as well. Only orders from a military judge which dismiss a charge or specification, "exclude evidence that is substantial proof of a fact material," or fall into four classes of rulings by military judges that potentially require the release of classified material, are appealable under Article 62.[55]

Notice of appeal under Article 62 must be filed within seventy-two hours of the ruling being challenged; listing both the exact ruling being appealed and the timing of the ruling.[56] This timeline is jurisdictional and appeals filed beyond 72 hours are denied.[57] In the Army, this notice must be authorized by either the SJA or General Court-Martial Convening Authority (GCMCA).[58] After the certified notice of appeal is filed, trial counsel must send the GAD an original plus three copies of those portions of the verbatim record of proceedings necessary for the Article 62 appeal within twenty days.[59] Ultimately, the decision to file the Article 62 appeal at ACCA rests with the Chief of GAD.[60] Despite a lack of any clear authority to hear appeals of CCA decisions in Article 62 cases, CAAF has held its jurisdiction, coupled with a desire for ". . . uniformity in the application of the Code among the military services," created authority

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[46] CAAF Rule 27. The CAAF rules also show a template for how to produce the filing.

[47] October 27, 2014 e-mail from Bill DeCicco, clerk of the court, Court of Appeals of the Armed Forces, on file with the author.

[48] CAAF Rules 27-28.

[49] CAAF Rule 27.

[50] *See*, *Kastenberg*, 72 M.J. at 366.

[51] *Reinert*, 2008 CCA LEXIS 526, *2.

[52] C.C.A.R. 20. Rule 20 is a joint CCA rule. *See supra* note 35.

[53] *See*, The Military Justice Act of 1983, Pub. L. 98-209 (1983).

[54] *See*, 10 U.S.C. § 862(a)(1). These guidelines are jurisdictional and unlike the potential jurisdiction doctrine seen in writs practice, there is no such complement here.

[55] 10 U.S.C. § 862(a)(1)(A)-(F). The classified material categories of interlocutory review were part of the 1996 amendments to Article 62, UCMJ. National Defense Authorization Act for FY 1996, Pub. L. No. 104-106, § 1141(a), 110 Stat. 186, 467 (1996).

[56] 10 U.S.C. § 862(a)(2) and R.C.M. 908(b)(3).

[57] *See*, *United States v. Daly*, 69 M.J. 485, 486 (C.A.A.F. 2011). In *Daly*, the government asked the military judge to reconsider his original decision nine days after the fact and then sought to file an Article 62 appeal 72 hours after losing the motion. CAAF declined to hear the case. Government counsel however do not need to request a delay to preserve the 72 hours or stall proceedings, the timeline runs from the moment the order is issued. *See*, *United States v. Neal*, 68 M.J. 289 (C.A.A.F 2010).

[58] The requirement for SJA or GCMCA approval before filing a notice of appeal flows from Army Regulation [AR] 27-10, para. 12-3(a) and is not found in the statute itself.

[59] AR 27-10, chapter 12-3(c). Interestingly, AR 27-10 uses the term record of trial, albeit modified by the phrase necessary for the appeal, while R.C.M. 908(b)(5) uses the term record of proceedings, a dichotomy discussed by ACCA in *United States v. Hill*, 71 M.J. 678, 683-84 (Army Ct. Crim. App. 2012).

[60] AR 27-10, ch 12-3(a).

to hear such appeals under its Article 67 grant of jurisdiction.[61]

Article 62 is modeled after a similar provision used in federal civilian prosecutions and military courts often look to Article III for guidance when deciding these appeals.[62]

During an Article 62 appeal, courts of appeal may act only with respect to matters of law.[63] "In an Article 62, UCMJ petition, this Court reviews the military judge's decision directly and reviews the evidence in the light most favorable to the prevailing party at trial."[64] When reviewing the exclusion of certain evidence, the court will examine factual conclusions under the clearly erroneous standard, while conclusions of law will receive *de novo* review.[65] Additionally, where an accused is held in pretrial confinement, commanders must consider the factors outlined for pretrial confinement in determining whether or not the accused will be held during the pendency of the appeal.[66]

While the reach of Article 62 is somewhat narrower when compared to the potential reach of a writ filing, one effect counsel may find useful is that upon notice of filing of an appeal, the proceedings are automatically stayed and only that portion of the trial which does not deal with the order or ruling at issue may continue.[67] Additionally, Article 62 asserts filings, "shall, whenever practicable, have priority over all other proceedings before that court."[68] Practitioners should note, however, that even with such prioritization, the timeline for a writ to the CCA will likely still be several weeks, and CAAF review could stretch the interlocutory review process over a number of months.[69]

The often lengthy process of extraordinary relief is a factor practitioners must analyze before filing an appeal; however, the time spent filing an interlocutory appeal is excludable delay for speedy trial purposes, as long as the appeal is not frivolous.[70]

Current Issues

While SVCs are statutorily foreclosed from filing Article 62 appeals on behalf of their clients, they are not forbidden from filing writs; indeed, the writ in *Kastenberg* was drafted and filed by a victim's lawyer. In fact, writs practice has gained steam recently with the armed forces' full implementation of the SVC program. Since October 1, 2014, Army SVCs have filed four writs at ACCA seeking relief, and the court has issued one order of relief.[71] The 2015 National Defense Authorization Act also recognizes this unique practice tool and explicitly makes clear that SVCs can file writs of mandamus seeking relief in Military Rules of Evidence 412/513 matters.[72]

In *Kastenberg*, the SVC filed a writ of mandamus following a military judge's order to produce documents concerning the victim under Military Rules of Evidence 412 and 513.[73] The Air Force Court of Criminal Appeals did not grant the writ, saying it had no jurisdiction, and denied reconsideration of its finding *en banc*. The Air Force Judge Advocate General certified the case to CAAF, which, while denying the writ, held that victims' counsel can file for interlocutory relief because, although their clients are not a party to the case, they are not strangers to the proceedings, as they could offer evidence to the fact finder.[74] The SVC program gained bona fides in *Kastenberg* and opened the world of writs practice to SVCs, though the limitations of writs practice were not changed.

The *Kastenberg* opinion was issued a few months after CAAF's ruling in *Center for Constitutional Rights (CCR) v. United States*.[75] In *CCR*, relief was denied for a group of media entities seeking real-time transcripts as well as transcripts of R.C.M. 802 conferences in the *United States v.*

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[61] *United States v. Lopez de Victoria*, 66 M.J. 67, 71 (C.A.A.F. 2008).

[62] *United States v. Wuterich*, 67 M.J. 63, 71-72 (C.A.A.F. 2008)

[63] *United States v Gore*, 60 M.J. 178, 185 (C.A.A.F. 2004).

[64] *United States v. Wicks*, 73 M.J. 93, 98 (C.A.A.F. 2014), *quoting*, *United States v. Baker*, 70 M.J. 283, 287-88 (C.A.A.F. 2011).

[65] *Id.*

[66] R.C.M. 908(b)(9).

[67] *See*, R.C.M. 908(b)(4). The discussion to R.C.M. 908 notes the rationale behind other parts of the trial continuing likely lays in the fact that unlike civilian practice in a courts-martial unrelated offenses are routinely charged and tried at the same time thus issues may exists which only affect a portion of the offenses at issues leaving others undisturbed. *See also*, R.C.M. 601(e)(2) (discussion noting "ordinarily all known charges should be referred to a single court-martial").

[68] 10 U.S.C. § 862(b). *See*, *United States v. Danylo*, 73 M.J. 183, 187 (C.A.A.F. 2014).

[69] On December 8, 2014, CAAF issued an opinion in *United States v. Vargas*, an Article 62 appeal which arose out of a court order from August 2013. 74 M.J. 1 (C.A.A.F. 2014). This decision reversed NMCCA's earlier ruling that a military judge's denial of a government request for a continuance met Article 62's exclusion of evidence category. The opinion is clear such actions by military judges do not fall under the ambit of Article 62 as they do not exclude evidence but rather fall under the military judge's authority to manage the trial. Additionally in *Hill*, a relatively brief period of three and one-half months elapsed between the notice of appeal and the court's decision. *See*, *Hill*, *supra* note 58 at 684.

[70] *See*, R.C.M. 707(b)(3)(C); R.C.M. 707(c); and *United States v. Ramsey*, 28 M.J. 370 (C.M.A. 1989).

[71] January 7 & 9, 2015 e-mails from Anthony Pottinger, Chief Deputy Clerk of the Court, Army Court of Criminal Appeals, on file with the author.

[72] National Defense Authorization Act for Fiscal Year 2015, § 535, Pub. L. 113-291 (2014).

[73] *Kastenberg*, 72 M.J. at 369.

[74] *Id.* at 368, 376.

[75] 72 M.J. 126 (C.A.A.F. 2013).

PFC Bradley Manning court-martial, because they were strangers to the proceedings, and unlike the victim in *Kastenberg*, could add nothing to the case.[76]

Analyzed together, *Kastenberg* and *CCR* illustrate the outer edge of modern day writs practice in the military justice system. If a petitioner can add something to the case—contribute evidence to the proceedings—a writ stands a better chance of granted review. If a petitioner is a true stranger with nothing to add to the proceedings, any writ is unlikely to be granted.

Conclusion

The power of a writ is extraordinary in our trial practice, and practitioners must understand that denial of a motion by a trial court does not necessarily mean a writ should issue. By design interlocutory relief is both an extremely powerful and rarely used tool. While a second bite of the apple of a novel or compelling issue can be appealing, the most important question in extraordinary relief practice is "Why?" Why should the Court get involved now? Why is this issue and the ruling, so important to disturb the procedural protections written into the military justice system? Why is this writ necessary or appropriate? The counsel prepared to answer these questions will be in the best position to have their petitions for extraordinary relief granted by the appellate courts.

[76] Id. at 129. After losing at CAAF, the petitioners filed in federal district court, however the issue became moot once the Army shifted policy and agreed to release documents through an on-line reading room and permit a private stenographer in the gallery. Interestingly, PFC Manning did not join in the petitioner's filings either in military courts or in U.S. district court. *See*, CCR et al. v. COL Denise Lind et al., No. 1:13-cv-01504-ELH, slip op. at 41-42 (D.Md. Jun. 19, 2013), *available at,* http://www.caaflog.com/wp-content/uploads/20130619-CCR-v-Lind-OPINION-DMd.pdf (last visited February 11, 2015).

Appendix A

Writs Filing Analysis

___Does the court you are asking to issue the writ have jurisdiction over the case?

___Will this writ aid in such jurisdiction?

___Why is this writ necessary or appropriate?

___What type of writ are you seeking?

___*Writ of mandamus* (Order the court to do something)

___*Writ of prohibition* (Forbid the court from doing something)

___*Writ of habeas corpus* (Direct the court to free a servicemember from confinement)

___*Error coram nobis* (Appellate courts only, are there exceptional new facts or law)

___If you decide to file, you must file both . . .

___Petition for relief (include a request for a stay if desired).[77]

AND

___Brief in support of petition.

___Somewhere in your filings ask for oral argument if desired (non-binding).

___You must also file a motion for *pro hac vice*, if not barred at the CCA, seeking permission to join the court's bar for this case only to file the petition and brief.

___If the CCA finds adversely to your side, you may appeal to CAAF.

[77] *See* Army Court of Criminal Appeals Rule 20.

Appendix B

Article 62 Filing Analysis

___Are you at a qualifying proceeding (i.e. is a military judge presiding and can a punitive discharge be adjudged)?

___Did the military judge make a qualifying ruling that can be appealed?

___Terminate the proceedings with respect to certain charges or specifications

___Exclude certain evidence

___Violate certain rules regarding classified material (i.e. direct that it be disclosed, sanction those who fail to disclose or refuse to issue/enforce a protective order)

___If the answer to both of the above questions is not YES, then **STOP** your issue is not appealable using Article 62 procedures (you may still use the writ procedures outlined in Appendix A).

___If you can appeal under Article 62, then trial counsel (with the approval of SJA or GCMCA) must give notice to the military judge of the specific ruling being appealed **within 72 hours of the ruling**. This time period is jurisdictional and will automatically pause the trial on all issues related to the filing.

___Within twenty (20) days of the notice prepare a verbatim record and three copies of the proceedings up to the point of the ruling (See, RCM 908(b)(5)) and forward these materials to Government Apellate Division.

___The Chief, GAD, will make the final decision on filing with the ACCA.

___If the case is filed at the CCA level, whichever side loses may still appeal to CAAF.

Thank You for Your Service[1]

Reviewed by *Major Cesar B. Casal*[*]

The soldier in combat is trapped within [a] tragic Catch-22. If he overcomes his resistance to killing and kills an enemy soldier in close combat, he is forever burdened with blood guilt, and if he elects not to kill, then the blood guilt of his fallen comrades and the shame of his profession, nation, and cause lie upon him. He is damned if he does, and damned if he doesn't.[2]

Introduction

Far from the sands of Iraq and the mountains of Afghanistan, a war rages. This war is waged every minute of every day: in rush hour traffic, in bed, at work and at the dinner table.[3] In his latest book, *Thank You for Your Service*, David Finkel sheds light on the fight that returning Soldiers face, many of whom suffer from wounds in their "hearts and minds" that cannot be seen, only felt. These wounds are borne not just by the Soldiers themselves, but also by the families that support, and at times carry, them in their journey back to "normal" life.[4]

The numbers are staggering. By Finkel's calculations, some 400,000–600,000 servicemembers of the two million sent to fight in Iraq and Afghanistan will return with a diagnosis of either post-traumatic stress disorder (PTSD), traumatic brain injury (TBI), or both.[5] Finkel recognizes that the numbers are difficult to fathom, "especially in a country that paid such scant attention to the wars" that they are returning from.[6] Lieutenant Colonel David Grossman argues that, as society reaps the benefits of creating a group of people who kill and destroy, that society becomes morally responsible for the consequences after the war is long over.[7] *Thank You for Your Service* is a stark reminder of that responsibility.

About the Author

David Finkel, an editor and staff writer at the *Washington Post*, is a recipient of the 2006 Pulitzer Prize for Explanatory Reporting for his series of articles in December of 2005 about America's "attempt to bring democracy to Yemen."[8] While those articles captured the essence of high-level U.S. policy efforts, he is no stranger to boots-on-the-ground military journalism. His first book, *The Good Soldiers*, covered his time as an embedded journalist with the 2-16th Infantry Battalion, 1st Infantry Division, during the Iraqi Surge from 2007 to 2008.[9] This stirring effort landed him on multiple bestseller lists and garnered him numerous honors.[10] In *Thank You for Your Service*, Finkel capitalizes on the bond he formed with those Soldiers, following them home and documenting their attempt to cope with the changes their wartime service has wrought in them.[11]

Emotional *Tour-de-Force*

Finkel's strength as a writer, if his Pulitzer prize is any indication, is his ability to simplify and humanize his narrative.[12] To address the difficulty of fathoming large numbers of "walking wounded" he tells his story through the eyes of various Soldiers, family members, and support personnel, each with a unique but emblematic slice of the day to day experiences of Iraq and Afghanistan veterans.[13] Finkel approaches the narrative via a third-person limited perspective, giving the reader the sense of walking with the protagonists as they deal with frustrations that the Army, and life, throws at them:[14]

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[1] DAVID FINKEL, THANK YOU FOR YOUR SERVICE (2013).

[2] LT. COL. DAVE GROSSMAN, ON KILLING: THE PSYCHOLOGICAL COST OF LEARNING TO KILL IN WAR AND SOCIETY 87 (1995).

[3] FINKEL, *supra* note 1, at 10–11.

[4] *Id.* at 11–12.

[5] FINKEL, *supra* note 1, at 11.

[6] *Id.*

[7] GROSSMAN, *supra* note 2 at 291–92.

[8] *The 2006 Prize Winners—Explanatory Reporting*, THE PULITZER PRIZES, http://www.pulitzer.org/citation/2006-Explanatory-Reporting (last visited Sept. 1, 2014).

[9] Macmillan, Editors Comment to *David Finkel, The Good Soldiers*, MACMILLIAN PUBLISHERS, http://us.macmillan.com/thegoodsoldiers/davidfinkel (last visited Sept. 1, 2014).

[10] *Id.*

[11] *Id.*; FINKEL, *supra* note 1 at 11-12.

[12] *The 2006 Prize Winners—Explanatory Reporting*, *supra* note 8 (explaining the prize category as "a distinguished example of explanatory reporting that illuminates a significant and complex subject, demonstrating mastery of the subject, lucid writing and clear presentation").

[13] *See* FINKEL, *supra* note 1, at 3, 23, 35, 51 (introducing Adam and Saskia Schumann, Amanda Doster, Tausolo Aieti, and Nic DeNinno, respectively).

[14] *See id*. at 141–43 (describing Tim Jung's methodical thought process about how he will commit suicide in minute detail, up until the very moment that he decides not to go through with it and returns to work).

> He had shown up early for orientation and been given a list of thirty-nine [Warrior Transition Battalion] WTB offices he would have to visit and get signatures from to prove that he had been there. He'd gone first to human resources, where the door was shut and locked and no one answered his knock even though the sign on the door said OPEN. He'd gone to the mailroom, where the guy working there had screamed over the music he was playing. . . He'd gone to the chaplain, who wasn't there. . . He'd gone to see his S-1, who wasn't there. . . .[15]

At its heart, *Thank You for Your Service* is a stinging criticism of the Army mental health system, and the subtext, although it may as well have been shouted from the rooftops, is that America is failing its service members yet again.[16] Finkel strikes at the "Home of the Brave" not with harsh invective, but with quotidian accounts of the constant struggle for survival endured by the men and women in her service now left to navigate her bureaucratic maze.[17] The sense of futility he expresses through his subjects' stories, and the resulting shame and self-reflection he may engender in the reader, are much more devastating than any explicit criticism could ever be.

Finkel also addresses a commonly neglected issue: the struggle of military spouses and their attempts to move on or hold their families together after war.[18] Two of his main characters are military spouses: Amanda Doster, who is either unwilling or unable to move on from her husband's death,[19] and Saskia Schumann, wife of one of the narrator-Soldiers, then-Staff Sergeant Adam Schumann.[20] While Army spouses fight a different sort of battle, they too face the daunting task of adjusting to the consequences of war; they typically act as first responders when that first flashback, outlash, or nightmare comes.[21] Finkel also recounts the story of Ms. Kristy Robinson, who eventually left her husband Jessie when she could no longer handle who he had become.[22] Ms. Schumann's struggles highlight the morally fraught position the Army has put her, and all military spouses, in. Ms. Schumann knows that her husband is no longer the same man she married, and perhaps she is no longer compatible with him. But is she obligated to stay with him even though she will likely be unhappy? Is it her duty as a military spouse to stay? When, if ever, does that duty end? Is her happiness merely an inextricable part of the sacrifice that SSG Schuman made for our country?[23] These are difficult, if not unfathomable, questions to comprehend.

Finkel's criticism, expressed through his subjects, exposes the Army system as particularly reliant on pharmaceuticals and ineffectual "check the box" exercises that anyone who has served a day in uniform is all too familiar with.[24] He portrays then Vice Chief of Staff of the Army, General Peter Chiarelli, as a competent and well-intentioned officer, but one that was hopelessly overmatched when he set his sights on suicide prevention.[25] Indeed, while General Chiarelli may have been unsuccessful at reducing Army suicide rates during his tenure, he deserves credit for tackling Army culture with respect to mental health.[26]

Finkel accurately captures the frustrating aspects of Army life: the endless gathering of signatures and rubber stamps,[27] the briefings of dubious value,[28] the bureaucratic, byzantine process of obtaining care,[29] the formations to nowhere,[30] and the ruffling of feathers.[31] Manageable annoyances in normal life, these aspects take on a different

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[15] *Id.* at 143–44.

[16] *See id.* at 149–50. Specialist (SPC) Tausolo Aieti's narrations show the Army at its worst. Here, he misses President Obama's presentment speech for Medal of Honor recipient Staff Sergeant (SSG) Salvatore Giunta, a speech that may have lifted SPC Aieti's spirits immensely, because he was busy gathering signatures for his in-processing sheet.

[17] *See id.* at 43 (describing Aieti's selection process for the WTU/WTB, combining aspects of a tribunal, election, and a job interview).

[18] *Id.* at 3, 23.

[19] *Id.* at 121 (describing Amanda Doster's criteria for "The Perfect Man," with #5 being an "understanding of her undying love for [her deceased husband] James, and isn't threatened").

[20] *Id.* at 3.

[21] *Id.* at 159–71 (documenting Kristy Robinson's experience with her husband, who returned from his war an abusive and violent man).

[22] *Id.*

[23] *Id.* at 177–79.

[24] *Id.* at 43, 144.

[25] *Id.* at 75–81. Finkel adeptly juxtaposes the story of First Lieutenant (1LT) James Gardner, who received the Medal of Honor in Vietnam, with General Chiarelli's struggle with suicides in the Army. After defeating scores of enemies and being gravely wounded in the process, 1LT Gardner finally destroyed an enemy bunker by detonating grenades he carried into it. His last words reportedly were "It's the best I can do," a reflection of his valiant but ultimately futile effort. Finkel later says General Chiarelli looks to be on the verge of saying the same after the suicide briefing.

[26] Greg Jaffee, *Army's Vice Chief of Staff, Gen. Peter W. Chiarelli, Gives Closing Words of Advocacy*, WASH. POST (Jan. 28, 2012), http://www.washingtonpost.com/world/national-security/armys-vice-chief-of-staff-gen-peter-chiarelli-gives-closing-words-of-advocacy/2012/01/27/giQAjv1tYQ_story.html.

[27] FINKEL, *supra* note 1, at 143–44; *see also id.* at 158 (discussing the unit's concern that a Soldier who committed suicide may not have attended a suicide briefing and that the unit would be blamed for the Soldier's death).

[28] *Id.* at 158–59.

[29] *Id.* at 129, 145.

[30] *Id.* at 204–05.

[31] *Id.* at 136–38 (describing how an injured Soldier and his spouse, instead of focusing on the Soldier's upcoming retirement ceremony, were occupied with apologizing to a newly-arrived staff officer who was offended that they asked one of the Soldier's previous commanders to write his award recommendation).

tone and magnitude when evaluated in the context of post-combat stress reality. One of the narratives culminates in the description of the "Contract for Safety," where Tausolo Aieti, a high-risk Soldier in the WTB, is made to sign a contract not to kill himself.[32] A similarly disturbing exchange plays out later when Aieti meets his third case manager in three months, a role Finkel describes as the most critical contact in the treatment chain. The case manager, in her very first meeting with Aieti, before developing any significant rapport, delves right into a cringe-inducing risk-assessment checklist that serves no purpose other than to protect those who collect and file them.[33]

Finkel's account of the various treatment options betrays the seemingly futile nature of treating PTSD. Particularly depressing are the in-patient centers that seem more like prisons than places where people go to heal,[34] centers that have a set treatment period, as if healing a broken psyche is just like healing a broken ankle,[35] and treatments that cater more to the symptoms than their causes.[36] One cause that Finkel identifies for this disconnect is the burgeoning "military medical-industrial complex" that has led to vast expenditures on new treatment facilities with expensive trappings and questionable effects on outcomes.[37] To be sure, this is not an Army-specific concern. It is a central conflict that plagues all of modern medicine: the sick generate revenues[38] while the cured do not.

Sad but True?

One criticism of Finkel's approach is the unending stream of negative events he portrays in the book. Every minor success is followed by some seemingly insurmountable setback.[39] One step forward and two steps back. Finkel's narrative builds a crescendo of hopelessness and ends in a note of cautious optimism, although even that is a generous characterization.[40] In an interview with an editor at Amazon.com, Finkel states that it was not necessarily his intent to be "ironic, sarcastic, or bitter" in deciding on the title of *Thank You for Your Service*.[41] He also made a conscious effort to remove his personal opinion from the story.[42] Despite his intent, however, *Thank You for Your Service* evokes a modern documentary film, a factual work created to elicit a specific set of emotions in the audience.[43] Finkel could have given more robust treatment to some of the Army's positive initiatives regarding the PTSD/suicide problem. In one instance, he briefly mentions the link between Soldier and athlete traumatic brain injuries but doesn't mention the Army's cooperation with the National Football League or Boston University's Chronic Traumatic Encephalopathy Center. These are just examples of the Army's willingness to explore unorthodox solutions and partnerships to combat PTSD and TBI and Finkle could have used such examples to express some optimism.[44] Finkel's approach is likely much more effective from an emotional perspective, but it is not necessarily as balanced as it could have been. The one-sided treatment, at times, dilutes the book's persuasive impact.

To be fair, Finkel does offer some leeway. He credits the good intentions and genuine efforts of the individuals involved in the Army's response, from the Vice Chief of Staff of the Army on down.[45] And even though Finkel appears to lack sympathy for the Army's ham-fisted efforts (as portrayed in the book), he recognizes the enormity of the problem.[46] Post-traumatic stress disorder is a challenging disorder to manage; multifaceted and ever-changing, its diagnosis is unique and specific to each individual.[47]

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[32] *Id.* at 145. The contract states, surreally: "I [name] know that I am in a difficult state and may look for a way out by harming myself or others. I will not intentionally harm myself or others and if I have thoughts about harming myself or others I will contact my Chain of Command immediately. I agree to take these precautions and stay safe because I know that my life and the lives of those around me are worth holding on to."

[33] *Id.* at 198–200.

[34] *See id.* at 54 (discussing Pueblo, Colorado treatment center's initial three day lockdown period and then a gradual return of privileges through "good behavior").

[35] *Id.* at 174. Finkel discusses the Veterans' Administration operated Topeka, Kansas treatment program lasting seven weeks and the four week privately-run Pueblo, Colorado program throughout the book. Here, he introduces and contrasts the Pathway Home program in California run entirely with private donations and lasting for four months *minimum.*

[36] *See id.* at 166 ("All they did was drug him").

[37] *Id.* at 43. Or as Adam Schumann describes: "Fucking nice is what it is. But you can gift wrap a piece of shit and it's still a piece of shit." *Id.*

[38] *See generally* COMM. ON CONFLICT OF INTEREST IN MED. RESEARCH, EDUC., AND PRACTICE, INST. OF MED. OF THE NAT'L ACADS., CONFLICT OF INTEREST IN MEDICAL RESEARCH, EDUCATION, AND PRACTICE 44 (Bernard Lo & Marilyn J. Field eds., 2009) (stating the tension between "professional goals of medicine" and the "financial goals of industry").

[39] *See, e.g.*, FINKEL, *supra* note 1, at 175 (describing Adam Schumann's admittance into a treatment program that may be the best in the country and his wife expressing disappointment that the program is four months long).

[40] *See id.* at 256 (Schumann feeling as if his home is the most peaceful place in the world, at least right now.).

[41] Chris Schluep, *Editorial Review and Interview with David Finkel*, AMAZON.COM, http://www.amazon.com/Thank-Your-Service-David-Finkel/dp/0374180660/ (last visited Sep. 1, 2014).

[42] *Id*.

[43] Vincent Stehle, *How Documentaries Have Become Stronger Advocacy Tools*, CHRON. OF PHILANTHROPY, http://philanthropy.com/article/A-Revolution-in-Documentaries/129202/.

[44] David Vergun, *NFL, Army Both Work to Combat Traumatic Brain Injury*, U.S. ARMY (Aug. 31, 2012), http://www.army.mil/article/86544/; *First Cases of Degenerative Brain Disease CTE Found in Veterans with Blast Injuries*, NAT. INST. OF NEUROLOGICAL DISORDERS & STROKE (Jun. 29, 2012), http://www.ninds.nih.gov/news_and_events/news_articles/CTE_found_in_veterans.htm.

[45] FINKEL, *supra* note 1, at 75–81.

[46] *Id.* at 77–78.

[47] AM. PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 276-78 (5th ed. 2013) (discussing various risk and diagnostic factors for PTSD).

Indeed, the Warrior mindset, cultivated from the first drill sergeant's piercing scream at the start of basic training, presents a barrier all its own: the "'suck it up and drive on' ethos has great survival value in the heat of battle, but it has also kept us from seeking helpful treatment after the battle."[48] Effective treatments transcend the individual: cultures and attitudes in the community pay a role in the healing process, and changing them is neither a short nor simple process.[49] But as General Chiarelli stated, "[W]e have got to do better."[50]

Conclusion

Is it a fair criticism to characterize a book as too depressing if it accurately reflects the current state of affairs that the author seeks to upend? To borrow a quote from a sports visionary, "You are what your record says you are."[51] And if the American people are dissatisfied with any Soldier-suicide figure greater than zero, if even a single suicide represents an unacceptable loss, then change can only be for the better.[52] If Finkel's goal is to effect that change, he has certainly written a means to do that with *Thank You for Your Service*, and pulled no punches in doing so.

In the end, *Thank You for Your Service* will impact all who read it, especially those who have little to no understanding of the realities of military service. This is not to say that the book has little value for judge advocates; to the contrary, its lessons may be much more meaningful, if less shocking. Civilians are generally so far removed from the experiences these Soldiers describe that the accounts may as well be fictional, something only experienced in novels and movies. But judge advocates, even if rarely in combat themselves, are in near constant contact with those who were. Judge advocates working in some of the core disciplines such as military justice, legal assistance, or administrative law are responsible for addressing many of the negative consequences of war on Soldiers and their families. *Thank You for Your Service* serves as that perfect reminder of who they are fighting for.

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[48] LT. COL. DAVE GROSSMAN, ON COMBAT 289 (2004).

[49] *Id.*

[50] FINKEL, *supra* note 1, at 79.

[51] *You Are Your Record*, WALL ST. J. (Dec. 30, 2008), http://online.wsj.com/news/articles/SB123060008676141231.

[52] Jaffee, *supra* note 28.

The Internal Enemy: Slavery and War in Virginia, 1772–1832[1]

Reviewed by Major Nolan T. Koon[*]

Our Negroes are flocking to the enemy from all quarters, which [the enemy] convert into troops, vindictive and rapacious—with a most minute knowledge of every bye path. They leave us as spies upon our posts and our strength, and they return upon us as guides and soldiers and incendiaries [for the enemy].[2]

Introduction

In his latest work, Alan Taylor[3] crafts a thoroughly researched and detailed account of slavery in Virginia during the years following the Revolutionary War and through Nat Turner's bloody revolt.[4] Drawing principally upon primary sources,[5] he recounts the often overlooked stories of runaway slaves who joined the British navy during the War of 1812. He also highlights the hypocrisy of a Virginia society that fervently embraced and espoused principles of liberty and equality, while it simultaneously perpetuated and protected a system of slavery.

Throughout the work, Taylor alludes to, without fully exploring, other interesting narratives. For instance, recognizing that their contradictory societal system was unsustainable politically, philosophically, and practically, many prominent Virginia statesmen, nevertheless, refused to seriously consider emancipation. Notwithstanding that some questions remain unanswered in this masterful work, *The Internal Enemy: Slavery and War in Virginia, 1772–1832* (*The Internal Enemy*) is an excellent and well-written historical account of this dark time in American history and well-deserving of its numerous accolades.[6]

The Internal Enemy's Main Points and Ideas

In 1812, the United States declared war against Britain for, among other reasons, impressments of American merchant sailors into the Royal Navy. At the outset of hostilities, Britain recruited a handful of runaway slaves to serve as guides and pilots for its Chesapeake littoral campaigns.[7] British naval officers eventually freed thousands more slaves. Approximately 3,400 runaway slaves obtained British sanctuary and freedom by paddling to "freedom's swift-winged angels" (i.e., British warships).[8]

Taylor paints both a broad and a meticulous description of race, slavery, and politics in Virginia circa the War of 1812. Although the breadth and the scope of his endeavor may arguably obscure some points, his main ideas are threefold. First, he provides individual accounts of runaway slaves who fled the yoke of their masters for the promised freedom of British vessels. Second, he describes the incongruity and dichotomy of a Virginia agrarian economy built on slave labor and a societal system allegedly principled upon liberty and equality of *all men*. Third, he depicts a Virginia population utterly consumed by fear of a perceived internal enemy and an imminent murderous slave revolt.

Critique of *The Internal Enemy*'s Main Points

Inhumane Treatment of Black Virginians

In poignant detail, Taylor weaves together individual stories to form a tapestry detailing the cruel maltreatment of slaves. He recounts brutal beatings with clubs and whips to increase productivity and profit.[9] Most emotional are his accounts of families torn asunder by the sale of loved ones. Some plantation owners desired to maintain slave families, but their aspirations were frequently superseded by economic interests.[10] Owners also sold slaves and family members as a form of punishment.[11] A female slave who

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[1] ALAN TAYLOR, THE INTERNAL ENEMY: SLAVERY AND WAR IN VIRGINIA, 1772–1832 (2013).

[2] *Id.* at 286.

[3] Alan Taylor is a history professor at the University of Virginia and has written ten books regarding early American history. He has won the Pulitzer and Bancroft prizes for his prior publications.

[4] On the evening of August 21–22, 1831, in Southampton County, Virginia, Nat Turner led a small slave rebellion and killed approximately 60 white Virginians. TAYLOR, *supra* note 1, at 414–15.

[5] Taylor draws significantly upon the following: letters from runaway slaves to their former owners; slave owners' claims for remuneration for runaway slaves; and newspaper articles and other publications from the time period.

[6] In addition to numerous glowing reviews, *The Internal Enemy* was a 2013 National Book Award Finalist and a 2014 Pullitzer Prize winner.

[7] TAYLOR, *supra* note 1, at 4.

[8] *Id*. at 3.

[9] *Id*. at 63.

[10] *Id*. at 60.

[11] *Id.*

suffered numerous whippings and whose husband was sold years before, declared that, "[s]elling is worse than flogging. . . . My heart has bled ever since [my husband was sold] . . . but my back has healed in time."[12]

The racial oppression faced by blacks is interlaced throughout and is a foundational theme of *The Internal Enemy*. If this were Taylor's *only* thesis, his work would not add anything original to existing scholarly research; however, he uses it to introduce and then to underscore the hypocrisy of the Virginia establishment. It is in this endeavor that Taylor truly shines and demonstrates his expertise to wed narration and history.

Duplicity of Virginia Society

Taylor excels when affording the reader insight into the complexities of a nascent America filled with revolutionary zeal and egalitarian ideals. In the Declaration of Independence, America proudly pronounced the following to the world: "We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty, and the pursuit of Happiness."[13]

Taylor masterfully exposes the shameful irony of a plantation society that consciously refused to extend these fundamental rights to enslaved blacks. After consoling a ten-year old child who had been separated from his mother, one sympathetic master rationalized that slave labor "supported, rather than contradicted, the freedom of those *who most deserved it*."[14] Countless instances such as this formed a "tragic contradiction [of] promoting greater equality for white men while weakening the security of black families."[15]

Not all Virginians were blind to the duplicity of their political beliefs and their slave system; yet, even reasonable men came to embrace the status quo as a necessary evil to ensure the economic livelihood and survival of whites. "Otherwise honorable men sustained an exploitative and encompassing economic system dedicated to property in humans, the pursuit of profit, the rights of creditors, and the interests of heirs. Seeing no other choice, most Virginians maintained slavery as their duty."[16] As one slave owner lamented, "Surely, the Virginians are not barbarians. Habit may make them forget the . . . daily horrors which pass under their eyes."[17]

Other Virginians supported slavery because of fear. They believed that if Virginia freed blacks, the "emancipated would try to destroy their former masters."[18] Although Thomas Jefferson believed in gradual emancipation, he conditioned their freedom on their deportation to Africa. Believing former slaves and whites could never live together as equals, Jefferson declared the following: "We have the wolf by the ears, and we can neither hold him, nor safely let him go."[19]

Notwithstanding, the reader is left perplexed regarding why Virginia adamantly clung to slavery. Economics and racial bigotry can only be a partial justification. Britain, which also struggled with these same considerations, had enthusiastically abolished the slave trade.[20] The British prime minister praised abolition as "one of the most glorious acts that had ever been undertaken by any assembly of any nation."[21]

In the time after the Revolution and leading up to the Civil War, the New England states and the Federalist Party attempted to limit the expansion of slavery into new territories.[22] The abolition movement gained momentum with religious groups such as Quakers, Methodists, and Baptists.[23] Even some politicians from western territories openly questioned the practice of slavery as an extension of class warfare.[24] They viewed it as a luxury of wealthy eastern landowners—especially as slavery inched the country to war. Complaints swirled that the "rich man's war had become the poor man's fight."[25]

During this time period, some of Virginia's social and intellectual elites publicly supported an end to slavery—or at least questioned the morality of its practice. "The leading Patriots recognized the gap between their soaring ideals and their sordid practice of slavery."[26] A prominent plantation owner, lawyer, and statesman, St. George Tucker commented that, while America fought a war for freedom, "We were imposing upon our fellow men . . . a slavery ten thousand times more cruel than . . . those grievances . . . of

[12] *Id* at. 59.

[13] U.S. CONST. art. I, § 8, cl. 8.

[14] TAYLOR, *supra* note 1, at 59 (emphasis added).

[15] *Id*. at 6.

[16] *Id*. at 83.

[17] *Id*.

[18] *Id*. at 7.

[19] *Id*. at 9.

[20] *Id*. at 115.

[21] *Id*.

[22] *Id*. at 153.

[23] *Id*. at 36.

[24] *Id*. at 153.

[25] *Id*. at 154.

[26] *Id*. at 35. Regarding the practice of slavery, Patrick Henry wrote that it was "as repugnant to humanity as it is inconsistent with the bible, and destructive to liberty." *Id*. Notwithstanding, Henry never freed his own slaves because of "the general inconveniency of living without them." *Id*.

which we complained. . . . Should we not have loosed their chains?"[27]

If this historical work has a substantive blemish, it is that it does not answer the following question: In the face of such political, social, religious, and moral objections, why did Virginia fail to act rationally with respect to slavery? The presumption is that the majority of Virginians would have made a decision based on a cost-benefit analysis. How were Virginians able to so effortlessly ignore the moral and religious objections? Did they underestimate the emancipation movement? Did they inflate the social and economic costs associated with ending slavery? Did their fear of free blacks obfuscate their analysis?

Perhaps there is no adequate historical explanation regarding why Virginia chose to cling to slavery in the face of such moral, political, ideological, and religious currents. Regardless, the irrational decision of Virginia and the greater South would eventually lead to their folly and the Civil War—as well as a slave insurrection that took shape on British warships and returned to America in red coats.

Virginia Society Feared a Bloody Slave Revolt

With remarkable writing dexterity and astute insight, Taylor pieces together seemingly unrelated events to show a complete picture of a complicated period of history. He goes to great length to dispel Virginia's macabre specter of an indiscriminate murderous slave revolt. He then brings the reader along step-by-step to demonstrate how the insurrection so feared by Virginians took on an unanticipated form.

"Virginians imagined a dreaded 'internal enemy' who might, at any moment, rebel in a midnight massacre to butcher white men, women, and children in their beds."[28] It's true that there were isolated incidents of insurrection and violence. In 1800, for example, a skilled blacksmith and slave, Gabriel, recruited and organized 500 men to march on Richmond and seize the governor's mansion.[29] However, the plot largely fell apart when, on the night of the operation, inclement weather washed away roads and bridges to Richmond.[30] In 1831, Nat Turner led approximately 60 slaves in a bloody one night rebellion in Virginia.[31] Regardless, the massive slave revolt that gripped Virginians' imaginations never transpired.[32] The wife of a congressman reported the following: "Through the mercy of providence we have once more escap'd the horrors of a Massacre."[33]

Early in Taylor's work, the reader is left to speculate why there was no massive slave rebellion in Virginia during the War of 1812. According to other historians, the small size of Virginia plantations and the small number of slaves (relative to whites) made large-scale insurrections impractical.[34] Consequently, the struggle against slavery by blacks often took on the form of individual and daily acts of resistance.[35]

In the latter portions of his book, though, Taylor shows that resistance took another form. British Admiral George Cockburn, organized 450 liberated slaves into the Colonial Marines, a battalion of formidable and disciplined fighters. "The Colonial Marines responded so well . . . that [Admiral] Cockburn . . . claimed he preferred them to his own marines."[36]

Rather than recount particular battles or acts of heroism, Taylor movingly recounts the personal bonds formed between British naval officers and their new allies. In doing so, the reader is afforded a glimpse into the complexities of human relationships in times of war. British officers frequently accompanied freed slaves back to their former owners' plantations in order to liberate and reunite family members.[37] When former owners demanded the return of their slaves, the British officers, who felt honor bound, resolutely resisted and "stood firm in protecting the refugees."[38] In another historical account of slavery and the War of 1812, *The Slaves' Gamble: Choosing Sides in the War of 1812 (The Slave's Gamble)*, Gene Allen Smith documents instances where the British admiralty ordered intensified attacks on the American shoreline.[39] These operations did not have a military objective; rather, their sole purpose was "to protect the desertion of the Black Population."[40] Taylor uses these episodes to allude to an irony of history: during a war started because of their impressment of Americans, the British Empire and Crown—not the newly formed democracy of the United States—

[27] *Id*. at 35–36.

[28] *Id*. at 7.

[29] *Id*. at 96.

[30] *Id*.

[31] *Id*. at 414–15.

[32] *Id*.

[33] *Id*. at 133.

[34] Eric Foner & John A. Garraty, *The Reader's Companion to American History*, HISTORY (1991), http://www.history.com/topics/black-history/slavery-iv-slave-rebellions.

[35] *Id*.

[36] GENE ALLEN SMITH, THE SLAVES' GAMBLE: CHOOSING SIDES IN THE WAR OF 1812, at 104 (2013).

[37] TAYLOR, *supra* note 1, at 337.

[38] *Id*. at 338.

[39] SMITH, *supra* note 36.

[40] TAYLOR, *supra* note 1 at 108.

found themselves on the right side of liberty and equality for all men.[41]

Though Taylor does not address the fact that the War of 1812 afforded free blacks and slaves a profound choice, it is the focus of *The Slaves' Gamble*, which is an excellent companion piece. "[T]he war provided an unparalleled chance for slaves and free blacks to join the side that promised freedom or advancement, and they ultimately played the competing powers against one another in the attempt to secure this promise."[42]

Not all free blacks and runaway slaves chose to fight for the British. For instance, in 1813, Charles Moore, who was a runaway slave, volunteered to join the American navy. Moore was not alone in his decision; blacks comprised approximately fifteen percent of the American navy.[43] One interesting question posed by Smith's research, and absent from Taylor's is, did free blacks and slaves have an American identity and fidelity that motivated their decision to fight for their country? As noted by Smith, the answer to this question is an inherently complex and personal one, a function of infinite variables.[44]

Conclusion

"The War of 1812 gave Virginians a great scare, revealing the military potential of black troops deployed against them. Long a specter, the feared internal enemy had become real in the red coats of British troops rather than as the anticipated murderous massacre at midnight."[45] Despite not fully examining some interesting questions, Taylor excels at shedding light upon this often overlooked aspect of American history. It details the social, political, and economic complexities surrounding slavery during the War of 1812. No doubt these complexities contributed to the dichotomy of a Virginia society that simultaneously embraced both the practice of slavery and the principle of equality.

Finally, although the book is a historical accounting regarding slavery in Virginia during the War of 1812, Taylor offers the following caution: "Slavery reveals how anyone, now as well as then, can come to accept, perpetuate, and justify an exploitative system that seems essential and immutable. After all, we live with our monsters."[46]

[41] Britain was bemused by the hypocrisy of American political ideals in light of its sordid practice of slavery. British officers often mocked "American republicanism as tyranny perfected rather than as liberty protected." *Id*. at 140.

[42] *Id*. at 6.

[43] *The War of 1812: Black Sailors and Soldiers in the War of 1812* (PBS television broadcast Sept. 1, 2014), http://www.pbs.org/wned/war-of-1812/essays/black-soldier-and-sailors-war/.

[44] SMITH, *supra* note 36, at 6.

[45] TAYLOR, *supra* note 1, at 398.

[46] *Id*. at 83.

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 TJAGLCS 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 servicemembers and civilian employees must obtain reservations through their directorates' training office. U.S. Army Reserve (USAR) and Army National Guard (ARNG) Soldiers must obtain reservations through their unit training offices.

c. Questions regarding courses should be directed first through the local ATRRS Quota Manager or the ATRRS School Manager, Academic Department, at (800) 552-3978, extension 3172.

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 ATRRS Self-Development Center and click on "Update" your ATRRS Profile (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. Continuing Legal Education (CLE)

The armed services' legal schools provide courses that grant continuing legal education credit in most states. Please check the following web addresses for the most recent course offerings and dates:

a. The Judge Advocate General's Legal Center and School, U.S. Army (TJAGLCS).

Go to: https://www.jagcnet.army.mil. Click on the "Legal Center and School" button in the menu across the top. In the ribbon menu that expands, click "course listing" under the "JAG School" column.

b. The Naval Justice School (NJS).

Go to: http://www.jag.navy.mil/njs_curriculum.htm. Click on the link under the "COURSE SCHEDULE" located in the main column.

c. The Air Force Judge Advocate General's School (AFJAGS).

Go to: http://www.afjag.af.mil/library/index.asp. Click on the AFJAGS Annual Bulletin link in the middle of the column. That booklet contains the course schedule.

3. Civilian-Sponsored CLE Institutions

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
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 Law School 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
MC Law:	Mississippi College School of Law 151 East Griffith Street Jackson, MS 39201 (601) 925-7107, fax (601) 925-7115
NAC	National Advocacy Center 1620 Pendleton Street Columbia, SC 29201 (803) 705-5000
NDAA:	National District Attorneys Association 44 Canal Center Plaza, Suite 110 Alexandria, VA 22314 (703) 549-9222

NDAED:	National District Attorneys Education Division 1600 Hampton Street Columbia, SC 29208 (803) 705-5095
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

4. Information Regarding the Judge Advocate Officer Advanced Course (JAOAC)

a. The JAOAC is mandatory for the career progression and promotion eligibility for all Reserve Component company grade judge advocates (JA). It is a blended course divided into two phases. Phase I is an online nonresident course administered by the Distributed Learning Division (DLD) of the Training Developments Directorate (TDD) at TJAGLCS. Phase II is a two-week resident course at TJAGLCS each December.

b. Phase I (nonresident online): Phase I is limited to USAR and ARNG JAs who have successfully completed the Judge Advocate Officer's Basic Course (JAOBC) and the Judge Advocate Tactical Staff Officer Course (JATSOC). Prior to enrollment in Phase I, students must have obtained at least the rank of CPT and must have completed two years of service since completion of JAOBC, unless, at the time of their accession into the JAGC, they were transferred into the JAGC from prior commissioned service. Other cases are reviewed on a case-by-case basis. Phase I is a prerequisite for Phase II. For further information regarding enrollment in Phase I, please go to JAG University at https://jagu.army.mil. At the home page, find JAOAC registration information at the "Enrollment" tab.

c. Phase II (resident): Phase II is offered each December at TJAGLCS. Students must have completed and passed all non-writing Phase I modules by 2400 1 October in order to be eligible to attend Phase II in the same fiscal year as the 1 October deadline. Students must have submitted all Phase I writing exercises for grading by 2400 1 October in order to be eligible to attend Phase II in the same fiscal year as the 1 October deadline.

d. Phase II includes a mandatory Army Physical Fitness Test (APFT) and height and weight screening. Failure to pass the APFT or height and weight may result in the student's disenrollment.

e. If you have additional questions regarding JAOAC, contact LTC Andrew McKee at (434) 971-3357 or andrew.m.mckee2.mil@mail.mil.

5. Mandatory Continuing Legal Education

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

b. 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.

c. 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.

d. Regardless of how course attendance is documented, it is the personal responsibility of JAs 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 JAs 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.

e. Please contact the TJAGLCS CLE Administrator at (434) 971-3307 if you have questions or require additional information.

Current Materials of Interest

1. The USALSA Information Technology Division and JAGCNet

a. The USALSA Information Technology Division operates a knowledge management, and information service, called JAGCNet. Its primarily mission is dedicated to servicing the Army legal community, but alternately provides Department of Defense (DoD) access in some cases. Whether you have Army access or DoD-wide access, all users will be able to download TJAGLCS publications available through JAGCNet.

b. You may access the "Public" side of JAGCNet by using the following link: http://www.jagcnet.army.mil. Do not attempt to log in. The TJAGSA publications can be found using the following process once you have reached the site:

(1) Click on the "Legal Center and School" link across the top of the page. The page will drop down.

(2) If you want to view the "Army Lawyer" or "Military Law Review," click on those links as desired.

(3) If you want to view other publications, click on the "Publications" link below the "School" title and click on it. This will bring you to a long list of publications.

(4) There is also a link to the "Law Library" that will provide access to additional resources.

c. If you have access to the "Private" side of JAGCNet, you can get to the TJAGLCS publications by using the following link: http://www.jagcnet2.army.mil. Be advised that to access the "Private" side of JAGCNet, you MUST have a JAGCNet Account.

(1) Once logged into JAGCNet, find the "TJAGLCS" link across the top of the page and click on it. The page will drop down.

(2) Find the "Publications" link under the "School" title and click on it.

(3) There are several other resource links there as well. You can find links the "Army Lawyer," the "Military Law Review," and the "Law Library."

d. Access to the "Private" side of JAGCNet is restricted to registered users who have been approved by the Information Technology Division, and fall into one or more of the categories listed below.

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

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

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

(4) FLEP students;

(5) 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.

e. Requests for exceptions to the access policy should be e-mailed to: itdservicedesk@jagc-smtp.army.mil.

f. If you do not have a JAGCNet account, and meet the criteria in subparagraph d. (1) through (5) above, you can request one.

(1) Use the following link: https://www.jagcnet.army.mil/Register.

(2) Fill out the form as completely as possible. Omitting information or submitting an incomplete document will delay approval of your request.

(3) Once you have finished, click "Submit." The JAGCNet Service Desk Team will process your request within 2 business days.

g. Contact information for JAGCNet is 703-693-0000 (DSN: 223) or at itdservicedesk@jagc-smtp.army.mil

2. The Judge Advocate General's Legal Center and School (TJAGLCS)

a. Contact information for TJAGLCS faculty and staff is available through the JAGCNet webpage at https://www.jagcnet2.army.mil. Under the "TJAGLCS" tab are areas dedicated to the School and the Center which include department and faculty contact information.

b. TJAGLCS resident short courses utilize JAG University in a "blended" learning model, where face-to-face resident instruction ('on-ground') is combined with JAGU courses and resources ('on-line'), allowing TJAGLCS short course students to utilize and download materials and resources from personal wireless devices during class and after the course. Personnel attending TJAGLCS courses are encouraged to bring a personal wireless device (e.g. laptop or tablet) to connect to our free commercial network to access JAGU course information and materials in real-time. Students must have their AKO username and password to access JAGU unless the wireless device has a Common Access Card (CAC) reader. Additional details on short course operations and JAGU course access are provided in separate correspondence from a Course Manager.

c.. Personnel desiring to call TJAGLCS can dial via DSN 521-3300 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 TJAGLCS Information Technology Division at (434) 971-3264 or DSN 521-3264.

3. Distributed Learning and JAG University (JAGU)

a. *JAGU:* The JAGC's primary Distributed Learning vehicle is JAG University (JAGU), which hosts the Blackboard online learning management system used by a majority of higher education institutions. Find JAGU at https://jagu.army.mil.

b. *Professional Military Education:* JAGU hosts professional military education (PME) courses that serve as prerequisites for mandatory resident courses. Featured PME courses include the Judge Advocate Officer Advanced Course (JAOAC) Phase 1, the Pre-Advanced Leaders Course and Pre-Senior Leaders Course, the Judge Advocate Tactical Staff Officer's Course (JATSOC) and the Legal Administrator Pre-Appointment Course.

c. *Blended Courses:* TJAGLCS is an industry innovator in the 'blended' learning model, where face-to-face resident instruction ('on-ground') is combined with JAGU courses and resources ('on-line'), allowing TJAGLCS short course students to utilize and download materials and resources from personal wireless devices during class and after the course. Personnel attending TJAGLCS courses are encouraged to bring a personal wireless device (e.g. laptop, iPad, tablet) to connect to our free commercial network to access JAGU course information and materials in real-time. Students must have their AKO user name and password to access JAGU unless the wireless device has a Common Access Card (CAC) reader. Additional details on short-course operations and JAGU course access are provided in separate correspondence from a Course Manager.

d. *On-demand self-enrollment courses and training materials:* Self enrollment courses can be found under the 'Enrollment' tab at the top of the JAGU home page by selecting course catalog. Popular topics include the Comptrollers Fiscal Law Course, Criminal Law Skills Course, Estate Planning, Law of the Sea, and more. Other training materials include 19 Standard Training Packages for judge advocates training Soldiers, the Commander's Legal Handbook, and specialty sites such as the SHARP (Sexual Harassment/Assault Response and Prevention) site and the Paralegal Proficiency Training and Resources site.

e. *Streaming media:* Recorded lectures from faculty and visiting guests can be found under the JAGU Resources tab at the top of the JAGU home page. Video topics include Investigations Nuts and Bolts, Advanced Contracting, Professional Responsibility, Chair Lectures and more.

f. *Naval Justice School Online (NJS Online):* JAGU is also the home of the Naval Justice School Online Legal Education Program. Find it by going to the JAGU home page and selecting the 'NJS Online' tab. NJS Online features 'LAWgos,' which are "shot in the arm" self-paced chunks of targeted learning in various topics. NJS Online also features

multi-week courses taught over a number of weeks with facilitated instruction. Most courses are open enrollment for servicemembers across the DOD.

g. *Contact information:* For more information about Distributed Learning/JAGU, contact the JAGU help desk at https://jagu.army.mil (go to the help desk tab on the home page), or call (434) 971-3157.

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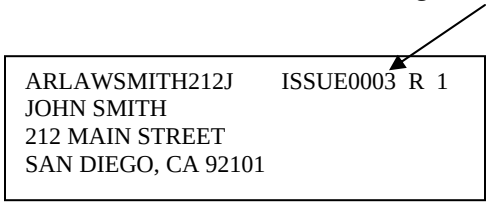

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