Achieving Simplicity in Charging Larcenies by Credit, Debit, and Electronic Transactions by Recognizing the President's Limitation in the *Manual for Courts-Martial*

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I. Introduction

The Army Court of Criminal Appeals (ACCA) recently struggled to reconcile decisions by the Court of Appeals for the Armed Forces (CAAF) on larcenies by credit, debit, and electronic transactions in *United States v. Endsley*.[1] Even though, in the usual case, the merchant from whom the goods were obtained would be the victim,[2] the ACCA held that a debit card holder was a proper victim in *Endsley*, where the accused used the card number, without permission, to purchase food from restaurants and comic books from Amazon.com.[3] *Endsley* is a usual case, and with it the CAAF had the opportunity to clarify how prosecutors should distinguish "usual" cases from "unusual" cases. This distinction is important to the identification of the correct victim[4] of a larceny by credit, debit, or electronic transaction. The CAAF reversed the ACCA's ruling in *Endsley* because the prosecutor alleged the cardholder as the victim in a case where the merchants should have been identified as the victims.[5] Unfortunately, the CAAF reversed the ACCA in a summary disposition without explaining its rationale. The CAAF missed an opportunity to give clear guidance on identifying the victim of a debit, credit, or electronic transaction larceny.

The simplest way, and perhaps the only way, to reconcile the CAAF's credit and debit card transaction larceny cases from the last fifteen years is to hypothesize the CAAF is enforcing the presidential limitation contained in the *Manual for Courts-Martial* (*MCM*).[6] In 2002, the President amended the *MCM*, specifying that the victim of a larceny by credit, debit, or electronic transaction is *usually* the merchant that provides the goods to the thief. Although the CAAF has issued opinions explaining its rationale in credit and debit card transaction larcenies with unusual facts, the court has not explained its rationale when setting aside convictions in garden-variety cases where the wrong victim was alleged. The President has limited prosecutorial discretion in the usual cases, and the CAAF should explicitly recognize this presidential limitation requiring prosecutors to allege the merchant as the victim in usual debit card larcenies. When trial practitioners understand that the CAAF is correctly enforcing the President's directive, they will be able to reconcile the CAAF's opinions and identify the correct victim. The CAAF should use its opinions to establish more clearly the parameters for what constitutes an "unusual" case. Though the CAAF has not yet taken the opportunity to provide clear guidance, a review of the case law in this area is instructive.

II. Background for *Endsley*

Private Endsley secretly copied the debit card number of a friend in his squad and used that number to purchase food from Domino's and Chinese Chef and comic books from Amazon.com. The accused pled guilty to stealing money from the cardholder. The stipulation of fact stated that when the accused used the friend's debit card number, he was using, spending, and stealing money from the friend's bank account. During the providence inquiry, the accused told the military judge that on multiple occasions he took money from his friend's bank account using the debit card number. The military judge accepted the accused's guilty plea to the larceny.[7]

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[1] 73 M.J. 909 (A. Ct. Crim. App. 2014) *rev'd*, No. 15-0202/AR (C.A.A.F. Jan. 14, 2015) (sum. disp.).

[2] MANUAL FOR COURTS-MARTIAL, UNITED STATES pt. IV, ¶ 46c(1)(i)(vi) (2012) [hereinafter MCM].

[3] *Endsley*, 73 M.J. at 910–12.

[4] This article uses the word "victim" to mean the owner of the stolen property.

[5] United States v. Endsley, No. 15-0202/AR (C.A.A.F. Jan. 14, 2015) (sum. disp.).

[6] MCM, *supra* note 2, pt. IV, ¶ 46c(1)(i)(vi) (2012).

[7] *Endsley*, 73 M.J. at 910.

On appeal, Endsley argued that the proper victims were the merchants rather than the cardholder.[8] After analyzing the rulings of its superior court in *United States v. Lubasky*,[9] *United States v. Gaskill*,[10] and *United States v. Cimball Sharpton*,[11] the ACCA held that the military judge did not abuse his discretion in accepting the guilty plea to larceny of money from the cardholder.[12] A discussion of the President's 2002 amendment to ¶46 of Part IV of the *MCM*, as well as *Lubasky*, *Gaskill*, and *Cimball Sharpton*, will assist in understanding the law that the ACCA had to decipher.

III. The President Selected the Theory of Larceny and Narrowed the Category of Proper Victim

The *MCM* is a valuable legal reference. In some respects, the *MCM* is a source of law. For example, Part II of the *MCM* (Rules for Courts-Martial) and Part III of the *MCM* (Military Rules of Evidence) are examples of law created by the President using his authority under Article 36, Uniform Code of Military Justice (UCMJ).[13] Although Part IV (Punitive Articles) is not governed by Article 36, the President may narrow the interpretation of the UCMJ's provisions. If the narrowing construction is consistent with the statute and the Constitution, and the President provides additional rights for the accused, military appellate courts give effect to the President's interpretation.[14]

United States v. Davis[15] is a good example. Corporal Davis and about ten other Marines participated in a blanket party to encourage a substandard Marine to improve. The Marines grabbed the victim, threw him to the floor, bound his hands and feet together with tape, and assaulted him with their hands and feet.[16] Davis escalated the assault when he put an unloaded gun to Simon's head and said, "You're nothing but a pussy. I ought to cap you now."[17] Corporal Davis was convicted by a court-martial of conspiracy to commit assault and battery, violation of a lawful general order, assault with a dangerous weapon, and communicating a threat. The Navy-Marine Corps Court of Criminal Appeals (NMCCA), sitting *en banc*, affirmed the findings and sentence.[18]

The CAAF reversed the decision of the NMCCA, applying the hierarchy of rights. The edition of the *MCM* in effect at the time of Davis's trial, like every edition of the *MCM* before and since, provided, "an unloaded pistol, when presented as a firearm and not as a bludgeon, is not a dangerous weapon or a means of force likely to produce grievous bodily harm, whether or not the assailant knew it was unloaded."[19] The CAAF gave deference to the President's interpretation of Article 128, UCMJ, limiting the conduct subject to prosecution as an aggravated assault, because it did not contradict the Constitution or the UCMJ. "[W]here the President unambiguously gives an accused greater rights than those conveyed by higher sources, this Court should abide by that decision unless it clearly contradicts the express language of the Code."[20]

United States v. Contreras[21] is a more recent example. Article 130, UCMJ, prohibits unlawful entry into another's building or structure with the intent to commit a criminal offense therein.[22] The President narrowed the universe of criminal offenses that could be the intended crime for a housebreaking offense. "Any act or omission which is punishable by courts-martial, except an act or omission constituting a purely military offense, is a 'criminal offense.'"[23] The intended offense underlying Contreras's housebreaking conviction was indecent acts with another.[24] The CAAF determined that indecent acts with another was not a purely military offense. It followed the hierarchy of rights analysis and did not

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[8] *Id*.

[9] 68 M.J. 260 (C.A.A.F. 2010).

[10] 73 M.J. 207 (C.A.A.F. 2014) (sum. disp.).

[11] 73 M.J. 299 (C.A.A.F. 2014).

[12] *Endsley*, 73 M.J. at 910.

[13] UCMJ, art. 36 (President may prescribe rules).

[14] *United States v. Lopez,* 35 M.J. 35, 39 (C.M.A. 1992).

> "[The] military, like the Federal and state systems, has hierarchical sources of rights. These sources are the Constitution of the United States; Federal Statutes, including the Uniform Code of Military Justice; Executive Orders containing the Military Rules of Evidence; Department of Defense Directives; service directives; and Federal common law . . . . Normal rules of statutory construction provide that the highest source authority will be paramount, unless a lower source creates rules that are constitutional and provide greater rights for the individual."

Id.

[15] 47 M.J. 484 (C.A.A.F. 1998).

[16] *Id.* at 487.

[17] *Id.*

[18] *Id.* at 484.

[19] *Id.* at 486.

[20] *Id.*

[21] 69 M.J. 120 (C.A.A.F. 2010).

[22] UCMJ, art. 130.

[23] MCM, *supra* note 2, pt. IV, ¶ 56c(3).

[24] This offense was punishable under Article 134, UCMJ, because the offense occurred before 1 October 2007.

"disturb the President's narrowing construction . . . on the conduct subject to prosecution."[25]

With respect to larcenies accomplished by credit, debit, or electronic transaction, the President has prescribed a narrowing of Article 121 that constrains the way military prosecutors can charge and prove these offenses. Article 121 codifies three common law offenses. "A wrongful taking with intent permanently to deprive includes the common law offense of larceny; a wrongful obtaining with intent permanently to defraud includes the offense formerly known as obtaining by false pretenses; and a wrongful withholding with intent permanently to appropriate includes the offense formerly known as embezzlement."[26] Understanding the theories of larceny before drafting charges is important because a correct understanding of the theory of larceny will ensure the prosecutor correctly identifies the victim of the larceny and the stolen property. Larcenies accomplished with credit, debit, or electronic transactions are complicated crimes that can be viewed as fitting more than one theory of larceny. A recent article, *"Where's the Money Lebowski?"—Charging Credit and Debit Card Larcenies Under Article 121, UCMJ*, contains a comprehensive discussion of the different views on possible theories of larceny for credit and debit card transactions,[27] and the article does a good job demonstrating the uncertainty in this area of the law.

While the theft of the credit or debit card itself is a wrongful taking, the unauthorized use of the stolen card to buy a television at the Post Exchange (PX) could be viewed as a wrongful obtaining from the PX, a wrongful obtaining (of money) from the bank where the cardholder has his account, or a wrongful obtaining (of money) from the cardholder.[28] The gravamen of the wrongful obtaining is the material misrepresentation that causes the owner of the property to transfer it to the thief. A determined prosecutor might view this larceny as a wrongful taking of money from the cardholder, and some debit card transactions may be viewed as wrongful withholdings where the thief owes a fiduciary duty to the card-holder.[29] The wrongful-obtaining-from-the-merchant model, however, is the easiest model to understand and the easiest to prove.[30]

This myriad of charging possibilities has been narrowed by the President in the Credit, Debit, and Electronic Transactions provision of Article 121, in which he directed that "[w]rongfully engaging in a credit, debit, or electronic transaction to obtain goods or money is an obtaining-type larceny by false pretense."[31] This provision limits trial counsel to charging and prosecuting these crimes as wrongful obtainings without exception. In addition to fixing the theory of larceny, the President used this provision to identify the victim in the usual case. "Such use to obtain goods is *usually* a larceny of those goods from the merchant offering them. Such use to obtain money or a negotiable instrument . . . is *usually* a larceny of money from the entity presenting the money or negotiable instrument."[32] The President's narrowing construction of the larceny statute, if followed, will result in trial counsel using the simplest and easiest criminal model. Trial counsel who proceed on a theory other than wrongful obtaining violate the President's directive.[33]

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[25] United States v. Guess, 48 M.J. 69, 71 (C.A.A.F. 1998) (quoting *Davis,* 47 M.J. at 486-87); *see* United States v. Conliffe, 67 M.J.127 (C.A.A.F. 2009) (holding conduct unbecoming an officer and a gentleman is a purely military offense).

[26] MCM, *supra* note 2, pt. IV, ¶ 46c(1)(a).

[27] Major Benjamin M. Owens-Filice, *"Where's the Money Lebowski?" —Charging Credit and Debit Card Larcenies Under Article 121, UCMJ,* ARMY LAW., Nov. 2014, at 3.

[28] The thief makes a material misrepresentation to the merchant when he represents he is an authorized user of the card making a bona fide purchase. The merchant, in turn, then innocently makes the same misrepresentation to the bank and card-holder. The thief is criminally liable for the merchant's innocent misrepresentation under Article 77(2), UCMJ. *See also id.* at 6.

[29] "A 'withholding' may arise as a result of devoting property to a use not authorized by its owner." MCM, *supra* note 2, pt. IV, ¶ 46.c (1)(b); *see, e.g.,* United States v. Cimball Sharpton, 73 M.J. 299 (C.A.A.F. 2014) (detailing that the thief, a government purchase card-holder, had a duty to the Air Force only to use the card for authorized purposes); United States v. Lubasky, 68 M.J. 260 (C.A.A.F. 2010) (explaining that the thief had a fiduciary duty only to use the debit card to purchase things for the benefit of the co-owner of the debit account); *see also* Owens-Filice, *supra* note 27, at 7.

[30] One author disagrees. "[I]t may prove difficult to use eye-witness testimony from the merchant to establish which goods were obtained by the thief, as the merchant may not remember the details of a mundane credit or debit card transaction that took place months or years ago." Owens-Filice, *supra* note 27, at 3. However, careful merchants will keep invoices and sales receipts listing the property for two years to avoid chargebacks. BEN DWYER, CHARGEBACKS: A SURVIVAL GUIDE, *available at* http://www.cardfellow.com/blog/chargebacks/ (last visited May 28, 2015). If the merchant has a receipt or invoice, the merchant's memory of an old, mundane transaction can be refreshed. Moreover, the receipt or invoice may qualify for admission as a business record. MCM, *supra* note 2, MIL. R. EVID. 803(6).

[31] MCM, *supra* note 2, pt. IV, ¶ 46c(i)(vi) (Miscellaneous considerations).

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

[33] Trial counsel should be leery about the language in the analysis of Article 121 that suggests alternative charging theories remain available. MCM, *supra* note 2, at A23-17. The information published in the analysis to the punitive articles is not official or binding. *See* MCM, *supra* note 2, pt. I, ¶4 discussion; *see also* United States v. Fosler, 70 M.J. 225, 231 (C.A.A.F. 2011) (describing the drafters' analysis as explanatory, hortatory, and non-binding). Also, the analysis merely explains that, if the facts of a case raise an issue as to whether the merchant was a victim, such as where the accused might have had authority to use the card, and the transaction might not be fraudulent vis à vis the merchant, then alternative charging theories can be used.

Trial counsel who identify a victim other than the merchant (for purchases) or the bank (for ATM withdrawals) must have a valid reason for selecting an "unusual" victim.[34]

The Credit, Debit, and Electronic Transactions provision is every bit as directive as the Presidential limitations created for Articles 128 and 130, as previously discussed. In all three cases, the President has shielded accused Soldiers from prosecution based on enumerated, specific theories of criminality. Any doubt the President intended to limit prosecutorial choices is eliminated because the President provides a definition that lists the payment devices to which the limitation applies.[35] The CAAF should enforce all three of these limitations equally.

IV. CAAF Discusses the Proper Victim of Larcenies by Credit and Debit Card Transactions in *Lubasky*

The first time the CAAF discussed the proper victims of larcenies by credit, debit, and electronic transactions after the 2002 amendment to the *MCM* was in *Lubasky*. The court acknowledged that the amendment post-dated Lubasky's criminal conduct and court-martial, but the court still found the amendment instructive.[36] Chief Warrant Officer Four Lubasky was appointed as a Casualty Assistance Officer to help the widow of a retired officer manage her financial affairs and obtain a new military identification card.[37] Although his duties should have ended after she received her identification card, he offered to continue to assist her with her financial affairs. Between December 1998 and June 2000, the widow gave the accused limited authority to use three credit cards and a debit card for her benefit. During that period, the accused also used those cards for his personal needs without her knowledge or permission.[38]

The accused was charged with stealing from the widow by making unauthorized use of her credit and debit cards to obtain cash and goods.[39] The court quickly disposed of the specifications involving the credit cards. "In using the credit cards in this case, Appellant did not obtain anything from [the widow]. Rather, he obtained those things from other entities. For these reasons, the proper subject of the credit-card-transaction larcenies was not [the widow]."[40] The court set aside the convictions involving the credit cards and dismissed seven larceny specifications.[41]

The court, however, affirmed the convictions for seven specifications involving debit transactions.[42] The court stated that, although the 2002 amendment to the *MCM* stated that debit card transactions are usually a larceny of goods or money from the merchant or bank presenting them, alternative theories remain available if warranted by the facts.[43] The court found that the evidence in *Lubasky* supported a larceny of money from the widow. The unique facts in the case were that the accused obtained access to the money as a joint owner of the bank account by falsely representing to the widow that he would only use the funds in an authorized manner and he would use those funds to make purchases only for the benefit of the widow.[44] These facts are indeed unusual and support a finding that the accused obtained some property from the widow; therefore, the widow was a proper victim.

V. The Usual Debit Card Larceny in *Gaskill*

The first time the CAAF applied the 2002 *MCM* amendment to credit card larcenies was in *Gaskill*. In its summary disposition, the CAAF did not discuss the facts or its rationale in detail; however, the facts of the case are articulated in the Army court's summary disposition.[45] Three of the larceny specifications alleged stealing funds from three different Soldiers in the unit. The accused had stolen their bank debit cards and used them to

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[34] *See* United States v. Gaskill, 73 M.J. 207 (C.A.A.F. 2014) (setting aside three larceny specifications because the trial counsel proceeded with the wrong victim) (sum. disp.); United States v. Gaskill, ARMY 20110028, 2013 CCA LEXIS 605 (A. Ct. Crim. App. 2014) (reciting facts that show this was a garden-variety debit card larceny and the merchant from whom the accused received the merchandise should have been the victim in the specifications).

[35] MCM, *supra* note 2, ¶46c.(1)(i)(vi).

> For purposes of this section, the term "credit, debit, or electronic transaction" includes the use of an instrument or device, whether known as a credit card, debit card, automated teller machine (ATM) card or by any other name, including access devices such as code, account number, electronic serial number or personal identification number, issued for the use in obtaining money, goods, or anything else of value.

Id.

[36] *Lubasky*, 68 M.J. at 263.

[37] *Id*. at 262.

[38] *Id*.

[39] *Id*.

[40] *Id*.

[41] *Id*. at 265.

[42] *Id*.

[43] *Id*. at 263–64.

[44] *Id*. at 264.

[45] United States v. Gaskill, No. 20110028, 2013 CCA LEXIS 605 (A. Ct. Crim. App. Aug. 12, 2013) (sum. disp.).

purchase goods.[46] The three Soldiers were listed as the alleged victims rather than the merchants or the issuers of the bank debit cards. The accused pled guilty to these three specifications, and the accused admitted during the providence inquiry that he used the stolen cards, without authorization, to purchase pizza, Xbox games, and Xbox videos.[47]

With this "usual" fact pattern, CAAF did not hesitate. In a summary disposition, CAAF was quick and decisive.

> On consideration of the petition for grant of review of the decision of the United States Army Court of Criminal Appeals, and in light of *United States v. Lubasky*, 68 M.J. 260 (C.A.A.F. 2010), we note that the proper victim in Specifications 2, 3, and 4 of Charge V was the merchant who provided the goods and services upon false pretenses, not the debit cardholder/Soldier. However, the charge sheet, stipulation of fact, and providence inquiry focused on the three Soldiers as victims, and there was no discussion on the record of whether the merchants were victimized.[48]

The court set aside the convictions for those three specifications without further explanation of its rationale.[49] However, the specifications so clearly violated the President's limitation that no further explanation was required. The prosecution must charge the larceny as an obtaining of the goods from the merchant, unless the particular facts of the case warrant a different theory of criminality. The possibility of cases where the facts do not permit charging larceny of the goods from the merchant is why the President used the word "usually." The facts of *Gaskill* clearly did not warrant an exception to the rule. With this run-of-the-mill fact pattern, the CAAF saw no reason to discuss the possibility of anyone except the usual victim, the merchant, being the victim of the larceny.

VI. The Unusual Credit Card Larceny in *Cimball Sharpton*

After *Gaskill*, the CAAF encountered an unusual fact pattern, with a victim other than the merchant, and explained why it was an unusual case. Senior Airman Cimball Sharpton was issued a General Purchase Card (GPC) by U.S. Bank so she could purchase medical supplies for an Air Force hospital in Mississippi. The GPC could only be used by authorized cardholders for legitimate government purchases. After reviewing GPC purchases, the Air Force would cause the Defense Finance Accounting Service (DFAS) to pay for the GPC purchases using Air Force appropriated funds.[50] The GPC functioned like a debit card with a level of review between the time of purchase and payment.[51]

Cimball Sharpton used the GPC to make over $20,000 worth of personal purchases at AAFES, Walgreens, and Walmart. She was eventually caught and charged with larceny of Air Force money. Cimball Sharpton was convicted of larceny and other charges,[52] after pleading not guilty. At trial, Cimball Sharpton did not dispute the facts or elements; in fact, the defense actually stipulated to many facts that helped the CAAF later find the specification legally and factually sufficient. The defense's strategy at trial appears to have been to exploit a perceived charging error by the trial counsel; the trial counsel did not charge the merchants as the victims and the merchandise received as the property stolen. The strategy did not work at trial, and it did not work before the Air Force Court of Criminal Appeals (AFCCA). Not only did the AFCCA find the larceny specification legally and factually sufficient, they noted the merchants could not be the named victims because they were compensated and did not lose anything of value. According to the AFCCA, the Air Force was the only victim in the case.[53] Cimball Sharpton appealed to the CAAF.

The CAAF began its analysis with the President's directive: "Wrongfully engaging in a credit, debit or electronic transaction to obtain goods or money is an obtaining-type larceny by false pretenses. Such use to obtain goods is usually a larceny of those goods from the merchant offering them."[54] The court treated this larceny

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[46] *Id*. at *2.

[47] *Id*. at *2–3.

[48] *Gaskill*, 73 M.J. at 207.

[49] *Id*.

[50] *Sharpton,* 73 M.J. at 299–300.

[51] The government purchase card (GPC) functions like a debit card in that there is guaranteed payment. The GPC functions like a credit card in that there is a delay in payment. *Cf.* Owens-Filice, *supra* note 27, at 5.

[52] Senior Airman Cimball Sharpton was convicted of one specification of larceny, one specification of wrongful use of oxycodone, one specification of wrongfully using cocaine, and one specification of fraudulent enlistment. She was sentenced to a Bad Conduct Discharge, twelve months of confinement, reduction to E1, and a $20,000 fine. *Sharpton,* 73 M.J. at 300.

[53] *Id.* at 300.

[54] *Id.* at 301.

as a wrongful obtaining,[55] but approved of the deviation from the general rule of using the merchant from whom the goods are obtained as the victim of the larceny.[56] Unfortunately, the CAAF did not explain the difference between the "usual" case, where the victim is the merchant, and an "unusual" case where the victim is someone other than the merchant. The CAAF did, however, strongly suggest that this is an unusual case because the Air Force alone suffered the financial loss,[57] but the court stopped short of saying that the Air Force was the only possible victim in this case.

The CAAF's analysis and comment that *Cimball Sharpton* is consistent with *Lubasky*[58] has created an unfortunate impression that a situation where the merchant is not the person who suffers the financial loss is an "unusual" circumstance permitting deviation from the President's directive. A merchant is always a victim of larceny when he transfers property to a thief because of a fraudulent debit or credit card transaction, and the fact that the merchant may not suffer a financial loss does not change this. The crime of larceny is complete when all of the elements coalesce. Moreover, determining who suffered the financial loss from a fraudulent transaction can be difficult.[59]

VII. The Usual Debit Card Larceny in *Endsley*

With the CAAF going to great lengths to explain why the unusual facts of *Lubasky* and *Cimball Sharpton* warrant alleging someone other than the merchant or bank as the victim of credit or debit card transaction larcenies, and with them summarily setting aside a conviction in a case with usual facts not warranting a victim other than the merchant, one would think that the ACCA would enforce the President's directive in a routine case like *United States v. Endsley*. However, it did not. In *Endsley*, after acknowledging that the opinions in *Lubasky*, *Gaskill*, and *Cimball Sharpton* were controlling,[60] the ACCA held that the cardholder could be the victim in a case with facts indistinguishable from those in *Gaskill*, despite the CAAF's crystal-clear language in *Gaskill:* "we note that the proper victim in Specifications 2, 3, and 4 of Charge V was the merchant who provided the goods and services upon false pretenses, not the debit cardholder/Soldier."[61]

Key to the ACCA's holding is its assertion that "one who purchases goods with a debit card obtains those goods in exchange for money which results in an immediate deduction from the cardholder's account. In debit card transactions, an item is obtained via an immediate expenditure from and debit against the cardholder's account, hence the label 'debit card.'"[62] This blanket statement is not accurate for all debit card transactions. As discussed below, in some debit card transactions, there is not an immediate debit from the cardholder's account. In such cases, without more, the mere usage of a debit card does not permit the inference that money was actually removed from the cardholder's account.

The ACCA's blanket statement is an over-simplification; the statement only describes *some* debit card transactions. Currently, there are at least three types of debit cards: the electronic fund transfer point of sale (EFTPOS) debit card,[63] the offline debit card,[64] and the stored value card.[65] One card can be a part of more than one processing system.

The ACCA's blanket statement describes the EFTPOS or online debit card system. The hallmark of the EFTPOS system is that the cardholder must use a personal identification number (PIN) at the time of the sale. Online debit cards require electronic authorization, usually a PIN, for every transaction, and the debits are posted to the cardholder's account almost immediately. Offline debit cards look like online debit cards and are used at the point of sale like a credit card. The merchant authenticates the transaction by obtaining the cardholder's signature. Like credit cards, offline debit card transactions can take several days to be posted to the

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[55] "In view of the elements of Article 121, UCMJ, Appellant (a) wrongfully obtained property . . . ." *Id.*

[56] "We view this as a case where such an alternative charging theory should apply[.]" *Id.*

[57] "No other party suffered financially as a result of Appellant's action." *Id.* at 302.

[58] "*Lubasky* is fully consistent with our decision today." *Id.*

[59] Owens-Filice, *supra* note 27, at 6.

[60] *Endsley*, 73 M.J. at 910.

[61] *Gaskill*, 73 M.J. at 207.

[62] *Endsley*, 73 M.J. at 911.

[63] "Online debit cards use a [personal identification number (PIN)] for customer authentication and online access to account balance information . . . . Debit card transactions are authorized in real time at the [point of sale] using the same electronic funds transfer (EFT) networks that handle ATM transactions and typically settled at the end of the day using the ACH network." FED. FIN. INSTS. EXAMINATION COUNCIL, RETAIL PAYMENT SYSTEMS: IT EXAMINATION HANDBOOK 21 (2010), *available at* http://ithandbook.ffiec.gov/it-booklets/retail-payment-systems.aspx [hereinafter RETAIL PAYMENT HANDBOOK].

[64] "Off-line debit card systems authenticate consumers through a written signature or other authenticating action. The transactions are processed in batch mode through the same bankcard networks as credit card transactions and typically settle at the end of the business day." *Id.* at 21.

[65] "Stored-value cards do not typically involve a deposit of funds as the value is prepaid and stored directly on the cards. Because its business model requires cardholders to pay in advance, it substantially eliminates the nonpayment risk for the issuing financial institution." *Id.* at 25.

cardholder's account and fraudulent transactions can be stopped before the debit is posted. A stored value debit card stores value on a chip that is part of the card. The card does not require an internet connection, because the funds do not come from an external account. Generalizing about the operation of a debit card and focusing on who suffers the loss in a credit or debit card larceny is dangerous and unnecessary.

There were sound reasons why the President limited the victim of larceny by credit, debit, and electronic transactions to the merchant in usual cases. If the accused obtained the goods from the merchant by false pretenses, that would constitute a larceny of the goods from that merchant. Although funds might be removed from the cardholder's account at the time of the larceny, or soon thereafter, which could be a larceny of those funds from the cardholder or issuing bank as an additional theory of larceny, the President had the authority to make the prosecution of usual cases much simpler and more rapid by limiting the theory available to the prosecution in routine cases to the wrongful obtaining of the goods from the merchant. It is up to the appellate courts to define the parameters for what constitutes an unusual case to which this limitation does not apply. The CAAF has begun to do so. From *Lubasky* and *Cimball Sharpton*, it is clear that, when the cardholder gives the accused authority to make credit, debit, or electronic transactions for a limited purpose, such as for the benefit of the cardholder, a transaction for the accused's personal benefit could be charged and prosecuted as a larceny from the cardholder. On the other hand, it is clear from *Gaskill* and now *Endsley* that using a debit card without any authority to obtain merchandise cannot be charged and prosecuted as a larceny from the cardholder.

Whether one agrees with the President's interpretation in the *MCM* or not, the President's directive limits the theory of larceny available to the prosecution and the identity of the victim, except in the yet-to-be-fully-defined category of unusual cases. There is no doubt that *Endsley*, with its routine fact pattern, is not an unusual case.

The ACCA raised another point in *Endsley* that is worthy of discussion. The ACCA correctly stated that "whether a victim is made whole, stolen property is returned, or reimbursement is paid are matters in mitigation, but these factors are not wholly determinative of whether or not a larceny occurred in the first place and who was the initial victim of that larceny."[66] Also, as the *MCM* states, "[o]nce a larceny is committed, a return of the property or payment for it is no defense."[67] *Cimball Sharpton* did not change these basic principles. "[A]n obtaining of property from the possession of another is wrongful if the obtaining is by false pretense."[68] If the accused obtains goods from a merchant by a false representation that causes the merchant to part with the property, then there is a larceny of those goods from that merchant, even if the merchant gets reimbursed for the cost of the goods. The CAAF's focus on who suffered the financial loss in *Cimball Sharpton* seems to have misled the ACCA about whether suffering the ultimate financial loss is dispositive on who could be a proper victim.[69] In the absence of the President's directive on how to prosecute larcenies by credit, debit, and electronic transactions, the person who suffered the financial loss could be a proper victim, but determining who suffers the ultimate loss can be hard to determine and adds a layer of complexity to the proof required at trial.

When a credit card is fraudulently used, the cardholder can dispute the transaction, and the dispute may lead the card's issuing bank to recoup the amount of the transaction using a process called "chargeback."[70] A chargeback is a form of customer protection provided by the issuing banks that allows cardholders to file a complaint regarding fraudulent transactions. Once the cardholder files a dispute, the issuing bank investigates. If the transaction is fraudulent, the bank will refund the amount of the transaction to the cardholder. If the merchant does not prove the transaction to be legitimate, the issuing bank will take back the entire value of the transaction along with a fee.[71] If the loss is small, the issuing bank may not investigate or recoup the amount of the transaction because the cost of the investigation

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[66] *Endsley*, 73 M.J. at 912.

[67] MCM, *supra* note 2, pt. IV, ¶ 46c(1)(f)(iii)(C).

[68] MCM, *supra* note 2, pt. IV, ¶ 46c(1)(d).

[69] Another recent example is the Army Court of Criminal Appeal's (ACCA's) summary disposition in *United States v. Conway*, No. 20120708, 2014 CCA LEXIS 855 (A. Ct. Crim. App. Nov. 21, 2014) (sum. disp.). Specialist Conway wrongfully appropriated another Soldier's debit card and used it to purchase merchandise on divers occasions at the Army and Air Force Exchange Service (AAFES) at Fort Bragg. Because he did not know the PIN, Conway chose to use the credit function by signing the cardholder's name on an electronic pad. The cardholder's account at TCF Bank, which issued the card, showed a loss of over $14,000. Pursuant to his pleas, the accused was convicted of larceny of U.S. currency from TCF Bank. On appeal, Conway argued that the larcenies were obtaining-type larcenies of the retail goods from the merchant by false pretenses, but the ACCA found that "the government proceeded upon a valid alternative charging theory because TCF Bank suffered a financial loss." *Id.* at *3.

[70] RETAIL PAYMENT HANDBOOK, *supra* note 63, at B-2 (defining "chargeback" as "a transaction generated when a cardholder disputes a transaction or when the merchant does not follow bankcard company procedures. The issuer and [acquiring bank] research the facts to determine which party is responsible for the transaction.").

[71] "The merchant is required by the card companies to cover fraudulent transactions through the chargeback process if it does not follow the minimum procedures." *Id.* at 51.

would exceed the value of the loss. In the case of a fraudulent credit card transaction, the cardholder may be liable for up to $50 of the loss. In some cases, the cardholder will not suffer a loss.[72] The bottom line is that the cardholder, merchant, or issuing bank could suffer all or part of the financial loss from a fraudulent credit card transaction. Determining who suffered the financial loss is an unnecessary and, potentially, time-consuming task. Once the person or entity that suffered the financial loss is determined, presenting proof that this person or entity is a victim of the larceny will require additional witnesses and cause delay to an otherwise routine case. On the other hand, the merchant from whom the goods were obtained by false pretenses is always a victim of the larceny, and proving this element is straight-forward and easy to understand. The merchant is always a necessary witness, in a usual debit or credit card larceny, to prove the material misrepresentation made by the thief.

Determining who suffered the financial loss of fraudulent debit card transactions is even more complicated. The potential loss to the cardholder is limited by federal law.[73] If the cardholder reports a card lost or stolen before it is used, the cardholder has no financial liability if the card is used later. If the cardholder reports an unauthorized transaction within two business days after learning about the loss, the cardholder's maximum loss is $50.00. If the cardholder reports an unauthorized transaction more than two business days after a loss but less than sixty calendar days after the statement is sent to the cardholder, the cardholder's maximum loss is $500.00. If the cardholder does not report unauthorized use within sixty calendar days of the statement being sent to him, the cardholder can be liable for the full loss.[74] Like with credit cards, the person or entity that suffered the financial loss from a fraudulent debit card transaction will vary from case to case. However, the merchant from whom the goods were stolen is always a victim of the larceny. Charging anyone other than the merchant as the victim in routine debit card cases is inefficient and unwise, and, most importantly, it is not permitted under the President's narrowing construction in the *MCM*.

In *Endsley*, the CAAF was just as quick and decisive in its summary disposition as it was in *Gaskill*, using almost identical language.

> On consideration of the petition for grant of review of the decision of the United States Army Court of Criminal Appeals, and in light of *United States v. Lubasky*, 68 M.J. 260 (C.A.A.F. 2010), we note that the proper victims in the Specification of the Charge were the merchants who provided the goods upon false pretenses, not the debit cardholder/Soldier. However, the charge sheet, stipulation of fact, and providence inquiry focused on the Soldier as the victim, and there was no discussion on the record of whether the merchants were victimized.[75]

The court set aside the conviction, again without explaining its rationale any further.[76] However, the CAAF stated that the proper victims were the merchants. It explicitly stated that the debit cardholder was not a proper victim, and it implied that the issuing bank was not a proper victim. In a run-of-the-mill case like this, the only proper victim is the merchant. The prosecution must follow the President's limitation in the *MCM*, unless the particular facts of the case warrant a different theory of liability. Otherwise, routine cases like *Gaskill* and *Endsley* will meet the same fate. Hopefully, when the next case involving this issue arises, the CAAF will issue an opinion that clearly explains its rationale, in order to avoid confusion by trial practitioners in the future.

VIII. Conclusion

Following the money in credit, debit, and electronic transactions can be a challenge. Although more than one person or entity theoretically could be a proper victim in larcenies by such transactions, the President simplified the prosecution of these cases by limiting the theory and victim upon which the prosecution could proceed in routine cases. Debating who could be a proper victim of larceny is academic in the routine cases, because the President has exercised his authority to direct how prosecutors will charge and prosecute the routine cases. Prosecutors should follow the President's directive to avoid having convictions set aside for routine debit card transaction larcenies. Prosecutors will also avoid a

[72] "Under the [Fair Credit Billing Act (FCBA)], your liability for unauthorized use of your credit card tops out at $50.00. However, if you report the loss before your credit card is used, the FCBA says you are not responsible for any charges you didn't authorize. If your credit card number is stolen, but not the card, you are not liable for unauthorized use." FEDERAL TRADE COMMISSION, LOST OR STOLEN CREDIT, ATM, AND DEBIT CARDS, 2–3 (Aug. 2012), *available at* http://www.consumer.ftc.gov/articles/0213-lost-or-stolen-credit-atm-and-debit-cards.

[73] *Id.*

[74] *Id.*

[75] United States v. Endsley, No. 15-0202/AR (C.A.A.F. Jan. 14, 2015) (sum. disp.).

[76] *Id.*

granted motion for a finding of not guilty[77] by following the President's directive. With the CAAF treating the larceny specifications in *Endsley* like the larceny specification in *Gaskill*, military trial judges will likely grant motions for a finding of not guilty under RCM 917.

The CAAF missed an opportunity in *Endsley* to articulate explicitly its reliance on the President's narrowing construction and the "hierarchy of rights" and to establish clearer parameters for identifying unusual cases. The CAAF will have another chance to clarify its analysis for practitioners, reveal whether their analysis relies on the President's narrowing construction, and provide guidance on how to distinguish a "usual" case from an "unusual" case in *United States v. Williams*.[78]

[77] MCM, *supra* note 2, R.C.M. 917 (providing that the military judge shall enter a finding of not guilty if the evidence is insufficient to sustain a conviction).

[78] United States v. Williams, No. 20130284 (A. Ct. Crim. App. Aug. 28, 2014) *review granted* No. 15-0140/AR (C.A.A.F. Apr. 30, 2015).