

**THE ABUSE OF DISCRETION STANDARD OF REVIEW
IN MILITARY JUSTICE APPEALS[©]**

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I. Introduction

No subject is more critical yet more neglected in appellate practice than standards of review. Standards of review guide appellate decision-making by setting forth the “degree of deference given by the reviewing court to the decision under review.”¹ Standards of review should therefore play an important role in determining the outcome of a case. The reality, though, is often quite different. At best, standards of review frequently serve only as a loose framework for appellate analysis. At worst, they seem to operate as nuisances to be worked around when they do not support the desired outcome. Sometimes, standards of review are overlooked altogether. As one scholar has argued, standards of review may be “ignored, manipulated, or misunderstood.”² Regrettably, military appellate practice is not immune from this condition.

“Abuse of discretion” is perhaps the most important standard of review, but it is also the least understood. Abuse of discretion is the prescribed standard for the vast majority of appellate issues that arise from court-martial convictions. In fact, it is the most common standard applied to review of trial court decisions in military justice practice.³ Yet appellate counsel and judges often fail to fully address and apply this standard in their pleadings, arguments, and opinions. This is unfortunate because more attention to the standard would provide immeasurably greater insight into appellate decision-making.

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¹ Martha S. Davis & Steven A. Childress, *Standards of Review in Criminal Appeals: Fifth Circuit Illustration and Analysis*, 60 TUL. L. REV. 461, 465 (1986).

² Amanda Peters, *The Meaning, Measure, and Misuse of Standards of Review*, 13 LEWIS & CLARK L. REV. 233, 233 (2009).

³ Patricia A. Ham, *Making the Appellate Record: A Trial Defense Attorney’s Guide to Preserving Objections – the Why and How*, ARMY LAW., Mar 2003, at 10, 17 (“The most common standard of review – and that applied to nearly all evidentiary rulings – is abuse of discretion.”).

This article attempts a first step toward a closer examination of the abuse of discretion standard in military appellate practice. The intent is not to criticize case law addressing the abuse of discretion standard or advocate for any particular change in the law.⁴ This article also does not seek to provide a comprehensive catalog either of standards of review generally or the abuse of discretion standard outside the military justice context. Several scholars have offered thorough treatments of these topics.⁵ Rather, this article focuses on explaining how the abuse of discretion standard functions in military appellate practice, both on paper and in practice. After a brief overview of the subject, this article offers nine observations from a former appellate counsel and current appellate judge about how the abuse of discretion standard has (and has not) been defined, detailed, and employed in military appellate practice. Hopefully, this article will prompt greater clarity and transparency in appellate jurisprudence under the abuse of discretion standard.

II. Standards of Review

Appellate practice revolves around standards of review. Standards of review frame nearly every issue at the appellate level and often determine the outcome of the controversy. Numerous commentators have noted their crucial nature in appellate advocacy and outcomes. For example, the standard of review has been called “essential to every appellate court decision,”⁶ “the . . . language of appeals,”⁷ “the power of

⁴ The author is mindful of the requirements of the *Air Force Uniform Code of Judicial Conduct* contained in Air Force Instruction 51-201, *Administration of Military Justice*, Attachment 5 (6 June 2013). Nothing in this article should be construed as a comment upon the author’s position in any case that may be brought before him, or as a judgment as to the correctness or incorrectness of any decision by any military appellate court. This article is strictly observational about the development of the abuse of discretion standard and the only change the article advocates for is greater attention to and development of this standard.

⁵ See, e.g., STEVEN ALAN CHILDRESS & MARTHA S. DAVIS, *FEDERAL STANDARDS OF REVIEW* (4th ed. 2010); Martha S. Davis, *Standards of Review: Judicial Review or Discretionary Decisionmaking*, 2 J. APP. PRAC. & PROCESS 47 (2000); J. ERIC SMITHBURN, *APPELLATE REVIEW OF TRIAL COURT DECISIONS* (2009); Kelly Kunsch, *Standard of Review (State and Federal): A Primer*, 18 SEATTLE U. L. REV. 11 (1994); Amanda Peters, *supra* note 2; Maurice Rosenberg, *Appellate Review of Trial Court Discretion*, 79 F.R.D. 173 (1978); Ronald R. Hofer, *Standards of Review – Looking Beyond the Labels*, 74 MARQ. L. REV. 231 (1991).

⁶ Kunsch, *supra* note 5, at 12.

the lens” used to review a lower court’s decision,⁸ and the “keystone to court of appeals decision-making.”⁹ Identifying the proper standard of review “should be the starting point for the resolution of each separate issue in an appeal.”¹⁰ Indeed, counsel have been warned: “Woe unto the lawyer and litigant who urges the wrong standard or no standard at all!”¹¹

Essentially, standards of review represent “yardstick phrases,” “meant to guide the appellate court in approaching both the issues and the trial court’s earlier procedure or result.”¹² A standard of review measures the “appellate court’s depth of review,” asking “what is necessary to overturn the decision?”¹³ Stated differently, a standard of review “sets the height of the hurdles over which an appellant must leap in order to prevail on appeal”¹⁴ or, to use a different metaphor, it “indicate[s] the decibel level at which the appellate advocate must play to catch the judicial ear.”¹⁵

Standards of review matter because many appellate issues are close calls. Trial judges are often called upon to rule on issues when more than one “right” answer may be possible; reasonable people in the trial judge’s situation may all agree on the correct legal framework for the issue but reach different conclusions. At the heart of the matter, the standard of review determines what the appellate court is doing when it reviews a trial judge’s actions. Is the appellate court simply determining the right “law” to apply to the issue, or is it making a judgment call about the trial judge’s determination? Does the appellate court consider the issue important enough that it must review the issue with a clean slate or do other interests dictate granting the trial judge some latitude in

⁷ STEVEN A. CHILDRESS & MARTHA S. DAVIS, *FEDERAL STANDARDS OF REVIEW* ix (3d ed. 1999).

⁸ Robert L. Byer, *Judge Aldisert’s Contribution to Appellate Methodology: Emphasizing and Defining Standards of Review*, 48 U. OF PITT. L. REV. xvi, xvi (1987).

⁹ MICHAEL D. MURRAY & CHRISTY H. DESANCTIS, *LEGAL RESEARCH AND WRITING* 493 (2005).

¹⁰ Timothy P. O’Neill, *Standards of Review in Illinois Criminal Cases: The Need for Major Reform*, 17 S. ILL. U. L.J. 51, 51 (1992).

¹¹ Hon. Henry A. Politz, *Foreword*, in 1 S. CHILDRESS & M. DAVIS, *FEDERAL STANDARDS OF REVIEW* (2d ed. 1992).

¹² CHILDRESS & DAVIS, *supra* note 7, § 1.01 at 1-2.

¹³ Smithburn, *supra* note 5, at 7.

¹⁴ Ronald R. Hofer, *Standards of Review – Looking Beyond the Labels*, 74 MARQ. L. REV. 231, 232 (1991).

¹⁵ Alvin B. Rubin, *The Admiralty Case on Appeal in the Fifth Circuit*, 43 LA. L. REV. 869, 873 (1983).

determining a course of action? Ultimately, then “a standard of review answers two similar, yet different, questions: (1) How ‘wrong’ the lower court has to be before it will be reversed[,] and (2) What is necessary to overturn the [lower court’s] decision?”¹⁶ Standards of review essentially decide who is permitted to make what types of decisions; they represent “the crucial question of how power is allocated among the decision-makers in the criminal system.”¹⁷ This, in turn, provides some measure of structure to the appellate process by signaling who has the primary decision-making authority over a given issue:

What level of deference will the appellate court give to the judge, the jury, the prosecutor, and the defendant, and to the other participants in the process? What are the boundaries that mark the extent of the power of the participants; or perhaps more legalistically, in what area do those boundaries move about? Once those boundaries, or boundary areas, are defined, appeal becomes more predictable, and even the choice whether to appeal at all can be made more rationally.¹⁸

These abstracts represent what standards of review are *supposed* to do. The reality appears far messier. Many civilian commentators have opined that the lofty goals of standards of review do not translate neatly into practice. Standards of review, it has been observed, are used in seemingly conflicting ways, or are glossed over without truly being utilized in an issue’s analysis. Some suspect that while standards of review are meant to seem meaningful on surface, they actually contain “no more substance at the core than a seedless grape.”¹⁹ One commentator bluntly stated:

It would be difficult to name a significant legal precept that has been treated more cavalierly than standard of review. Some courts invoke it talismanically to authenticate the rest of their opinions. Once they state the standard, they then ignore it throughout their analysis

¹⁶ Todd J. Bruno, *Say What?? Confusion in the Courts Over What is the Proper Standard of Review for Hearsay Rulings*, 18 SUFFOLK J. TRIAL & APP. ADVOC. 1, 8 (2013) (further citations and quotations omitted).

¹⁷ O’Neill, *supra* note 10, at 53-54.

¹⁸ DAVIS & CHILDRESS, *supra* note 1, at 464.

¹⁹ Ernest Gellhorn & Glen O. Robinson, *Perspectives on Administrative Law*, 75 COLUM. L. REV. 771, 780 (1975).

of the issues. Other courts use standard of review to create an illusion of harmony between the appropriate result and the applicable law. If an appellate court wants to reverse a lower tribunal, it characterizes the issue as a mixed issue of law and fact, thereby allowing de novo review. If the court wants to affirm, it characterizes the issue as one of fact or of discretion. It then applies a higher (more deferential) standard of review to the lower tribunal's decision. Finally, some courts disregard standard of review in their analysis entirely.²⁰

Despite these criticisms, standards of review are discussed in nearly every appellate decision. As a result, perhaps they carry *some* sort of meaning in determining an appeal's outcome. At a minimum, these standards provide the appellate court a general sense of which party faces an uphill struggle, how closely the reviewing court will scrutinize the trial court's ruling, and how much latitude the higher court will grant the trial court before intervening.

Standards of review, according to Professors Childress and Davis in their definitive work on the subject, "actually matter."²¹ It may be true that standards of review serve as mere generalized phrases that have little substance until they are applied to individual cases. As Childress and Davis note, "The formulations do not say much until the appeals court, in discussion and application, gives them life. . . . [W]ord meaning often boils down to the fact of power and expertise rather than a theory of natural significance."²² Yet, even general phrases may help shape an outcome by serving as guideposts for how those phrases are to be translated into practice. "Even when the slogans have no real internal meaning, in many cases it is clear that the issue framing or assignment of power *behind* the words is the turning point of the decision."²³

Standards of review are no less significant in military justice practice than elsewhere. Judge Wiss of the United States Court of Military Appeals – the forerunner of today's Court of Appeals for the Armed Forces (CAAF) – declared that the standard of review issue is "one in which appellate courts must take care to be precise in articulation and

²⁰ Kunsch, *supra* note 5, at 12.

²¹ CHILDRESS & DAVIS, *supra* note 5, § 1.01 at 1-2.

²² *Id.*

²³ *Id.* (emphasis in original).

application – and one, as well, which appellate counsel before this Court should uniformly address at the outset of their pleadings on any issue.”²⁴ CAAF itself has acknowledged and rejected the perception “that it tilts with windmills to quarrel whether something is a question of fact reviewable for clear error, a question of law reviewable de novo, a mixed question, and so forth.”²⁵ The court has recognized that the standard of review can be “critical to the outcome.”²⁶ In short, standards of review are no less imperative in the military justice system than they are in appellate practice generally.²⁷ For this reason, military appellate advocates are required to state up front the standard of review that applies to each issue presented.²⁸

For purposes of this article, military appellate courts generally recognize four standards of review. The first is plain error. Plain error review is typically appropriate when the party alleging an error did not timely object at trial and thus has surrendered the right to full appellate review of that alleged error, although the appellate courts will still review the issue to some degree.²⁹ To obtain relief under the plain error standard, the appellant must demonstrate an error was committed, the error was plain or obvious, and the error materially prejudiced a substantial right of the appellant.³⁰

If the issue is properly preserved through a timely objection – or in some special instances when case law does not require the appellant to have preserved the issue – one of three remaining standards will apply. The least deferential to the trial court is de novo review. De novo review occurs when appellate courts review pure matters of law, such as whether the military judge properly instructed the court members or whether an

²⁴ United States v. White, 36 M.J. 284, 289 (C.M.A. 1993) (Wiss, J., concurring).

²⁵ United States v. Siroky, 44 M.J. 394, 399 n.1 (C.A.A.F. 1996)

²⁶ United States v. Baker, 70 M.J. 283, 287 (C.A.A.F. 2011).

²⁷ Ham, *supra* note 3, at 16 (asserting that standards of review “are absolutely critical in appellate practice”).

²⁸ U.S. CT. OF APPEALS FOR THE ARMED FORCES R. 24(a); CTS. CRIM. APP. ATCH. 2 (1 May 1996).

²⁹ See, e.g., United States v. Gladue, 67 M.J. 311, 313 (C.A.A.F. 2009) (distinguishing between forfeiture as the failure to timely assert a right and waiver as the intentional relinquishment of a known right, and holding that forfeited issues are reviewed under a plain error standard while waived issues are extinguished and may not be raised on appeal).

³⁰ United States v. Harcrow, 66 M.J. 154, 158 (C.A.A.F. 2008).

article of the Uniform Code of Military Justice is constitutional.³¹ The service courts of criminal appeals also employ the de novo standard when judging the factual and legal sufficiency of the appellant's conviction and the appropriateness of the appellant's sentence; CAAF likewise uses this standard for its legal sufficiency reviews.³² The phrase de novo means "anew" or "from the beginning,"³³ requiring the appellate court to decide the matter for itself without regard for the trial court's determination.

However, even when the de novo standard is used, the appellate court may (and sometimes, must) defer to the military judge's underlying findings of fact.³⁴ This is the third standard of review: specifically when the issue revolves around historical facts, those factual findings are reviewed to determine if they are "clearly erroneous," a standard that grants "substantial deference" to the military judge's findings of fact.³⁵ Examples of issues reviewed under the clearly erroneous standard include a finding that an appellant had a subjective expectation of privacy in an area searched³⁶ or a finding that an appellant was mentally competent to stand trial.³⁷ A finding is clearly erroneous when "although there [may be] evidence to support it, the reviewing court on the entire

³¹ Kunsch, *supra* note 5, at 27 (citing *Pierce v. Underwood*, 487 U.S. 552, 558 (1988)); *see also* *United States v. Ober*, 66 M.J. 393, 405 (C.A.A.F. 2008) ("Whether a panel was properly instructed is a question of law reviewed de novo."); *United States v. Prather*, 69 M.J. 338, 341 (C.A.A.F. 2011) ("The constitutionality of a statute is a question of law we review de novo.").

³² *See generally* *United States v. Nerad*, 69 M.J. 138, 142 n.1 (C.A.A.F. 2010) (summarizing the legal and factual sufficiency standards); *United States v. Roach*, 66 M.J. 410, 412 (C.A.A.F. 2008) (noting that a court of criminal appeals "conducts a de novo review under Article 66(c) of the facts as part of its responsibility to make an affirmative determination as to whether the evidence provides proof of the appellant's guilt of each offense beyond a reasonable doubt. The court also conducts a de novo review of the sentence under Article 66(c) as part of its responsibility to make an affirmative determination as to sentence appropriateness") (citations omitted); *United States v. Washington*, 57 M.J. 394, 399 (C.A.A.F. 2002) (Article 66(c), UCMJ, "requires the Courts of Criminal Appeals to conduct a de novo review of legal and factual sufficiency of the case.").

³³ BLACK'S LAW DICTIONARY 435 (6th ed. 1990).

³⁴ *United States v. Melanson*, 53 M.J. 1, 2 (C.A.A.F. 2000); *United States v. Owens*, 51 M.J. 204, 209 (C.A.A.F. 1999).

³⁵ *United States v. Danylo*, 73 M.J. 183, 186 (C.A.A.F. 2014); *see also* *United States v. Barreto*, 57 M.J. 127, 130 (C.A.A.F. 2002); *United States v. Melanson*, 53 M.J. 1, 2 (C.A.A.F. 2000).

³⁶ *United States v. Maxwell*, 45 M.J. 406, 417 (C.A.A.F. 1996).

³⁷ *United States v. Fry*, 70 M.J. 465, 470 (C.A.A.F. 2012); *United States v. Proctor*, 37 M.J. 330, 336 (C.M.A. 1993).

evidence is left with the definite and firm conviction that a mistake has been committed.”³⁸ Under this standard, the appellate court will uphold any reasonable finding of fact, “even though it is convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently.”³⁹ Further, CAAF has held that a finding of fact is clearly erroneous only when it is “unsupported by the record,” a standard that “is a very high one to meet.”⁴⁰ Put more colorfully, CAAF has stated that before it would overturn a factual finding as clearly erroneous, “it must strike us as wrong with the force of a five-week-old, unrefrigerated dead fish.”⁴¹ Regardless of the court’s colorful language, under this standard, the court examines whether there is “some evidence” to support the military judge’s findings of fact,⁴² and whether “the military judge’s findings of fact are . . . within the range of evidence permitted under the clearly-erroneous standard.”⁴³

Finally, the fourth standard of review that military appellate courts employ is the abuse of discretion standard, which forms the basis for the remainder of this article.

III. Abuse of Discretion in Military Appellate Practice – Nine Observations

A full listing of trial-level rulings reviewed under the abuse of discretion would be exceedingly lengthy. To state but a few, the abuse of discretion standard applies to the military judge’s decision to: admit or exclude evidence;⁴⁴ issue non-mandatory instructions to members;⁴⁵ accept a guilty plea as provident;⁴⁶ sustain or overrule objections to argument;⁴⁷ grant or deny relief for unreasonable multiplication of

³⁸ *United States v. Martin*, 56 M.J. 97, 106 (C.A.A.F. 2001) (quoting *United States Gypsum Co.*, 333 U.S. 364, 395 (1948)).

³⁹ *Anderson v. City of Bessemer City, N.C.*, 470 U.S. 564, 573 (1985).

⁴⁰ *United States v. Leedy*, 65 M.J. 208, 213 n.4 (C.A.A.F. 2007).

⁴¹ *United States v. French*, 38 M.J. 420, 425 (C.M.A. 1993) (quoting *Parts and Electric Motors Inc. v. Sterling Electric, Inc.*, 866 F.2d 228, 233 (7th Cir. 1988)).

⁴² *See id.* (noting the many definitions of clearly erroneous).

⁴³ *United States v. Norris*, 55 M.J. 209, 215 (C.A.A.F. 2001).

⁴⁴ *United States v. Freeman*, 65 M.J. 451, 453 (C.A.A.F. 2008).

⁴⁵ *United States v. Barnett*, 71 M.J. 248, 249 (C.A.A.F. 2012).

⁴⁶ *United States v. Inabinette*, 66 M.J. 320, 322 (C.A.A.F. 2008).

⁴⁷ *United States v. Briggs*, 69 M.J. 648, 650 (A.F. Ct. Crim. App. 2010) (citing *United States v. Macklin*, 104 F.3d 1046, 1049 (8th Cir. 1997)).

charges or merge charges and specifications for sentencing purposes;⁴⁸ grant or deny a continuance;⁴⁹ grant or deny relief on a motion for illegal pretrial confinement;⁵⁰ limit voir dire;⁵¹ deny discovery;⁵² exclude individuals from the courtroom;⁵³ sequester witnesses;⁵⁴ and grant or deny a mistrial,⁵⁵ along with numerous other issues decided by the military judge.⁵⁶

The abuse of discretion standard recognizes that trial judges require some amount of discretion to perform their duties. Every case presents unique issues. Trial judges must receive some latitude or else the specter of appellate correction would hang over every judgment call a trial judge makes. As the Supreme Court has stated, “A criminal trial does not unfold like a play with actors following a script; there is no scenario and can be none. The trial judge must meet situations as they arise and to do this must have broad power to cope with the complexities and contingencies inherent in the adversary process.”⁵⁷ The abuse of discretion standard is one of the primary tools used to empower the trial judge to carry out his or her role. For this reason, more deference is given to the trial judge under this standard than other standards, such as clearly erroneous review, at least in theory.⁵⁸

Normally, a military judge abuses his or her discretion (1) when the findings of fact upon which he or she predicates the ruling are not supported by the evidence of record; (2) if incorrect legal principles were used; or (3) if his or her application of the correct legal principles to the facts is clearly unreasonable.⁵⁹ As a general matter, “the abuse of

⁴⁸ United States v. Campbell, 71 M.J. 19, 22-25 (C.A.A.F. 2012).

⁴⁹ United States v. Weisbeck, 50 M.J. 461, 464 (C.A.A.F. 1999).

⁵⁰ United States v. Wardle, 58 M.J. 156, 157 (C.A.A.F. 2003).

⁵¹ United States v. Williams, 44 M.J. 482, 485 (C.A.A.F. 1996).

⁵² United States v. Jones, 69 M.J. 294, 298 (C.A.A.F. 2011).

⁵³ United States v. Short, 41 M.J. 42, 44 (C.M.A. 1994).

⁵⁴ United States v. Roth, 52 M.J. 187, 190 (C.A.A.F. 1999).

⁵⁵ United States v. Rushatz, 31 M.J. 450, 456 (C.M.A. 1990).

⁵⁶ For a thorough, but somewhat dated, catalogue of issues reviewed under the abuse of discretion standard, as well as other standards of review, see Eugene R. Fidell, *Going on Fifty: Evolution and Devolution in Military Justice*, 32 WAKE FOREST L. REV. 1213, 1220-24 (1997).

⁵⁷ *Geders v. United States*, 425 U.S. 80, 86 (1976).

⁵⁸ Kevin Casey et. al., *Standards of Appellate Review in the Federal Circuit: Substance and Semantics*, 11 FED. CIRCUIT B.J. 279, 286 (2002) (“The most lenient standard of review is abuse of discretion.”); Peters, *supra* note 5, at 243 (noting that the abuse of discretion standard “is the most deferential to trial court decisions”).

⁵⁹ United States v. Ellis, 68 M.J. 341, 344 (C.A.A.F. 2010).

discretion standard of review recognizes that a judge has a range of choices and will not be reversed so long as the decision remains within that range.”⁶⁰ Military appellate courts speak of the abuse of discretion standard as “a strict one, calling for more than a mere difference of opinion.”⁶¹ In order for the challenged action to be overturned, the military judge’s action must be “arbitrary, fanciful, clearly unreasonable, or clearly erroneous.”⁶²

This summary of the abuse of discretion standard may make it seem as if appellate review under this standard is a fairly straight-forward matter, with a high likelihood that the trial judge will be upheld. In reality, though, the abuse of discretion standard can be difficult to understand and apply. Numerous formulations of the standard exist, and some seem to directly contradict each other. The “abuse of discretion” label is used as if it were one all-encompassing benchmark, but certain rulings by trial judges seem to receive more deference than others. Sometimes appellate courts indicate that they should grant the trial judge a measure of deference but then seem to do anything but this in their analysis. Even for the most well-intentioned counsel and judges, trying to decode the abuse of discretion standard proves so difficult that it simply proves easier to gloss over the standard and proceed directly to the substantive analysis about the “right” resolution of the appeal.

Appellate counsel and courts must not close their eyes to the darker recesses of the abuse of discretion standard. A cursory approach to the standard of review bypasses some foundational questions of appellate decision-making: what is discretion, why should the trial court have it, and how much discretion should be granted in a given case. To assist counsel and courts in the struggle to restore the abuse of discretion to the central role it deserves, the following nine observations are offered about the abuse of discretion standard, specifically as it translates to appellate practice in the military justice system.

⁶⁰ *United States v. Gore*, 60 M.J. 178, 187 (C.A.A.F. 2004) (citing *United States v. Wallace*, 964 F.2d 1214, 1217 n.3 (D.C. Cir. 1992)).

⁶¹ *United States v. Lloyd*, 69 M.J. 95, 99 (C.A.A.F. 2010).

⁶² *United States v. McElhaney*, 54 M.J. 120, 130 (C.A.A.F. 2000) (quoting *United States v. Miller*, 46 M.J. 63, 65 (C.A.A.F. 1997); *United States v. Travers*, 25 M.J. 61, 62 (C.M.A. 1987)).

A. Abuse of Discretion is a Catch-All Phrase that Encompasses Review of Several Distinct Types of Issues

Marine Corps Private First Class Larry Holmes absconded with a car from the Camp Pendleton “lemon lot” on a joy ride that included a brief trip to Mexico. He was stopped at the border re-entering the United States and lied to a U.S. Customs agent about the identity of the car’s owner. He also lied to a California Highway Patrol officer about how he acquired the car and later repeated the fabrication to a military investigator. At a special court-martial, he pled guilty to three specifications of making a false official statement and one specification of wrongful appropriation.⁶³

On appeal, he asserted his guilty plea to two of the false official statement specifications were improvident because the statements to the customs agent and the highway patrol officer were not “official.”⁶⁴ Before reaching the merits of this issue, though, the Navy-Marine Corps Court of Criminal Appeals recognized that the appellant’s claim presented two surprisingly difficult questions. The first concerned whether the appropriate standard of review was *de novo* or abuse of discretion, as CAAF had previously issued seemingly conflicting decisions on this point.⁶⁵ The Navy-Marine court determined abuse of discretion was the appropriate standard. However, even this did not resolve the question about how much deference to grant the military

⁶³ United States v. Holmes, 65 M.J. 684, 685 (N-M. Ct. Crim. App. 2007).

⁶⁴ To be punishable under Article 107 of the Uniform Code of Military Justice, a false statement must be “official,” that is, “made in the line of duty.” MANUAL FOR COURTS-MARTIAL, UNITED STATES pt. IV, ¶ 31c.(1) (2012). CAAF has repeatedly decided cases about the limits of what is considered “official” under this article. *See, e.g.*, United States v. Passut, 73 M.J. 27 (C.A.A.F. 2014) (statements to Army and Air Force Exchange Service employees were official); United States v. Capel, 71 M.J. 485 (C.A.A.F. 2013) (statements to civilian police officer denying use of another service member’s debit card were not official statements); United States v. Spicer, 71 M.J. 470 (C.A.A.F. 2013) (false statements to civilian law enforcement officials about the purported kidnapping of the accused’s infant son were not official); United States v. Day, 66 M.J. 172 (C.A.A.F. 2008) (false statements to civilian firemen who were members of base fire department charged with performing an on-base military function qualified as false official statements).

⁶⁵ *See* United States v. Eberle, 44 M.J. 374, 375 (C.A.A.F. 1996) (citing United States v. Gallegos, 41 M.J. 446 (C.A.A.F. 1995)) (abuse of discretion review for providence of a guilty plea); United States v. Phillippe, 63 M.J. 307, 309 (C.A.A.F. 2006) (abuse of discretion review); United States v. Pena, 64 M.J. 259, 267 (C.A.A.F. 2007) (citing United States v. Harris, 61 M.J. 391, 398 (C.A.A.F. 2005)) (“We review claims as to the providence of a plea under a *de novo* standard.”).

judge's decision to accept the plea. Rather, the court recognized that military appellate courts have used the phrase "abuse of discretion" in distinct, ill-defined ways:

In general, "abuse of discretion" as a standard of review is commonly used in two different ways. Sometimes, "abuse of discretion" is a conclusory label, such as when it is said a lower court abused its discretion because its findings of fact were clearly erroneous or because it was mistaken on the law. In such cases, factual findings have been reviewed under a "clearly erroneous" standard, and legal determinations under a *de novo* standard. To say the lower court abused its discretion may be a technically correct usage of this "term of art," but it can obscure the true standard of review.

On the other hand, "abuse of discretion" may also indicate the appellate court will defer to a lower court's discretionary decision so long as that decision was within a range of reasonable possible decisions. Often, such situations arise where a lower court must apply the law to a set of facts, such as occurred in this case. The appellate court will normally review *de novo* the law applied by the lower court, and will generally reverse only a clearly erroneous factual finding. It will, however, often review the lower court's discretionary act of applying the law to the facts under a standard affording the lower court some degree of deference, though something short of the clearly erroneous standard by which it examines factual findings. Such is the case when a military judge decides there is a factual basis to accept a guilty plea.⁶⁶

In some situations, the court noted, *no* military judge could accept an accused's plea because the plea lacked a factual basis or because matters existed in the record that were inconsistent with the plea. At the other extreme, the court recognized, there may be some situations where the factual basis clearly supports the plea and the military judge must accept it. The court then found that "[i]n between these two extremes, however,

⁶⁶ *Holmes*, 65 M.J. at 686-87 (citations omitted).

the military judge has discretion to accept or reject the plea.”⁶⁷ Having determined that the military judge’s decision to accept Private First Class Holmes’ plea was entitled to some degree of deference because this case lay in between those two extremes, the court nonetheless found that the military judge exceeded the scope of that deference because there was simply no basis to establish the official nature of the appellant’s statements.⁶⁸

As the *Holmes* court recognized, military appellate courts use the phrase “abuse of discretion” in differing ways without always recognizing that they are doing so. However, even the Navy-Marine Corps court may not have realized the full scope of the problem because it seems as if military appellate courts utilize the standard in at least *four* distinct ways rather than just two.

First, as the *Holmes* court recognized, abuse of discretion may simply be used as a conclusory label. If the military judge is clearly erroneous in his or her findings of fact, or misstates or misapplies the law, the military judge is said to have abused his or her discretion. In this sense, the abuse of discretion term is an umbrella term used in place of the more precise standard of review for the sub-issue. Thus, military courts sometimes summarize the abuse of discretion standard this way: “An abuse of discretion occurs when the trial court’s findings of fact are clearly erroneous or if the court’s decision is influenced by an erroneous view of the law.”⁶⁹ Phrased slightly differently, “a military judge abuses his discretion if his findings of fact are clearly erroneous or his conclusions of law are incorrect.”⁷⁰ Likewise, the Air Force court has held: “On questions of fact, [we ask] whether the decision is reasonable; on questions of law, [we ask] whether the decision is correct. If the answer to either question is ‘no,’ then the military judge abused his discretion.”⁷¹

⁶⁷ *Id.* at 687.

⁶⁸ *Id.* at 689-90.

⁶⁹ *United States v. Freeman*, 65 M.J. 451, 453 (C.A.A.F. 2008); *see also United States v. Hollis*, 57 M.J. 74, 79 (C.A.A.F. 2002) (holding that under the abuse of discretion standard, “We will reverse if the findings of fact are clearly erroneous or if the military judge’s decision is influenced by an erroneous view of the law”).

⁷⁰ *United States v. Rodriguez*, 60 M.J. 239, 246 (C.A.A.F. 2004); *United States v. Ayala*, 43 M.J. 296, 298 (C.A.A.F. 1995).

⁷¹ *United States v. Terry*, 66 M.J. 514, 517 (A.F. Ct. Crim. App. 2008) (quoting *United States v. Baldwin*, 54 M.J. 551, 553 (A.F. Ct. Crim. App. 2000)).

This approach essentially conceives of abuse of discretion review in binary fashion – either the trial court’s action consists of a finding of fact (which is entitled to significant deference) or it is a conclusion of law (which is reviewed de novo, or receiving no deference). The military judge receives some deference under this approach because his or her findings of fact are reviewed under a clearly erroneous standard even if the ultimate conclusion is reviewed de novo. Military courts have taken this approach to analyze issues like the exclusion of evidence under Military Rule of Evidence 412,⁷² admission or suppression of evidence seized pursuant to an allegedly unlawful search,⁷³ admission or suppression of evidence on hearsay grounds,⁷⁴ and admission or suppression of an allegedly unlawfully-obtained confession.⁷⁵

Secondly, “abuse of discretion” sometimes focuses on the military judge’s stated rationale for his or her ruling. Under this approach, the challenged action must be “arbitrary, fanciful, clearly unreasonable, or clearly erroneous” to constitute an abuse of discretion.⁷⁶ Alternatively stated, an abuse of discretion exists where “‘reasons and rulings of the’ military judge are ‘clearly untenable and . . . deprive a party of a substantial right such as to amount to a denial of justice.’”⁷⁷ Accordingly, the appellate court grants a significant amount of deference to the military judge; it need not agree with the military judge’s rationale to uphold the decision. Rather, under this approach, the military judge is permitted to be “wrong” to a certain degree and still be upheld so long as his or her decision is not outside this range of reasonableness. To find an abuse of discretion in this sense “does not imply an improper motive, willful purpose, or intentional wrong.”⁷⁸ It merely recognizes that the trial judge has ventured beyond, as phrased by one former federal judge, “a pasture in which the trial judge is free to graze.”⁷⁹

⁷² United States v. Ellerbrock, 70 M.J. 314, 317 (C.A.A.F. 2011); United States v. Roberts, 69 M.J. 23, 26 (C.A.A.F. 2010).

⁷³ United States v. Cote, 72 M.J. 41, 44 (C.A.A.F. 2013); United States v. Monroe, 52 M.J. 326, 330 (C.A.A.F. 2000).

⁷⁴ United States v. Hollis, 57 M.J. 74, 79 (C.A.A.F. 2002).

⁷⁵ United States v. Chatfield, 67 M.J. 432, 437 (C.A.A.F. 2009).

⁷⁶ United States v. White, 69 M.J. 236, 239 (C.A.A.F. 2010) (quoting United States v. Lloyd, 69 M.J. 95, 99 (C.A.A.F. 2010)).

⁷⁷ United States v. Travers, 25 M.J. 61, 62 (C.M.A. 1987) (quoting Guggenmos v. Guggenmos, 359 N.W.2d 87, 90 (Neb. 1984)) (further citations omitted).

⁷⁸ *Id.*

⁷⁹ Maurice Rosenberg, *Appellate Review of Trial Court Discretion*, 79 F.R.D. 173, 173 (1978).

In a third but somewhat similar sense, occasionally the abuse of discretion standard is employed when the military judge has selected from among a range of lawful options to address a given situation. For example, where a military judge has determined that unlawful command influence exists, the military judge must craft a remedy to remove the taint of the unlawful command influence. The military judge enjoys “broad discretion” under the abuse of discretion standard in selecting the appropriate remedy.⁸⁰ In these situations, the reviewing court will only find an abuse of discretion if it possesses a “definite and firm conviction that the court below committed a clear error of judgment in the conclusion it reached upon a weighing of the relevant factors.”⁸¹ This approach “recognizes that a judge has a range of choices and will not be reversed so long as the decision remains within that range.”⁸² Therefore, for example, even though the dismissal of charges with prejudice upon a finding of unlawful command influence is a “drastic remedy” that requires military judges to “look to see whether alternative remedies are available,”⁸³ the military judge’s decision will be upheld so long as he or she considered alternative remedies. At that point, the appellate court only examines whether the military judge’s election was “within the range of remedies available and not otherwise a clear error of judgment.”⁸⁴

Finally, the abuse of discretion standard grants enormous latitude for certain matters most innately considered the province of the trial judge. Military judges are generally given wide latitude to control their courtrooms and dockets, and in their rulings on matters such as severance and joinder,⁸⁵ continuances,⁸⁶ mode of witness interrogation,⁸⁷ and

⁸⁰ *United States v. Douglas*, 68 M.J. 349, 350 (C.A.A.F. 2010).

⁸¹ *United States v. Gore*, 60 M.J. 178, 187 (C.A.A.F. 2004) (quoting *United States v. Houser*, 36 M.J. 392, 397 (C.M.A. 1993)).

⁸² *Id.* (citing *United States v. Wallace*, 964 F.2d 1214, 1217 n.3 (D.C. Cir. 1992)).

⁸³ *Id.* (citing *United States v. Cooper*, 35 M.J. 417, 422 (C.M.A. 1992)).

⁸⁴ *Id.* at 189.

⁸⁵ *United States v. Duncan*, 53 M.J. 494, 497-98 (C.A.A.F. 2000) (holding that a military judge’s decision to deny severance will not be held to constitute an abuse of discretion unless “the defendant is able to show that the denial of a severance caused him actual prejudice in that it prevented him from receiving a fair trial; it is not enough that separate trials may have provided him with a better opportunity for an acquittal”) (quoting *United States v. Alexander*, 135 F.3d 470, 477 (7th Cir. 1998)).

⁸⁶ *United States v. Wellington*, 58 M.J. 420, 425 (C.A.A.F. 2003) (recognizing that trial judges enjoy “broad discretion” on matters of continuances) (quoting *Morris v. Slappy*, 461 U.S. 1, 11 (1983)).

excluding witnesses.⁸⁸ These are issues that deal primarily with control of the proceedings and ensuring an orderly courtroom, areas in which the appellate courts are loathe to undercut the efforts of trial judges. In many jurisdictions outside the military justice context, the term “abuse of discretion” is applied primarily to these type of procedural matters, while other standards of review apply to more substantive legal issues.⁸⁹ Such decisions are very rarely overturned.

While military appellate jurisprudence uses the abuse of discretion standard in these four senses, cases generally evince no awareness that the phrase carries different meanings in different contexts. Often, appellate briefs will borrow language courts used to analyze one sense of the phrase when addressing an issue that falls under a different aspect. Courts, unfortunately, are not immune from this condition. Counsel and courts could add clarity to this area simply by distinguishing between the term’s uses.

B. Abuse of Discretion Represents a Spectrum of Deference, Not One Fixed Standard

Because the phrase “abuse of discretion” applies to several distinct situations, it necessarily implies that varying levels of deference are granted depending on the specific type of situation presented. How much discretion “abuse of discretion” review entails depends upon a number of factors, which in turn relate to the reasons trial judges receive discretion in the first place.

⁸⁷ *United States v. Brown*, 72 M.J. 359 (C.A.A.F. 2013) (finding no abuse of discretion in military judge’s decision to allow a support person to accompany a 17-year-old victim on the stand).

⁸⁸ *United States v. Langston*, 53 M.J. 335, 337 (C.A.A.F. 2000) (holding that while a military judge must sequester a witness if none of the exceptions of Military Rule of Evidence 615 applies, a military judge’s decision as to whether those exceptions is present is reviewed under an abuse of discretion standard).

⁸⁹ Peters, *supra* note 2, at 243 (“The abuse of discretion standard, which is the most deferential to trial court decisions, is often used to review procedural matters decided by the trial court.”); *see also* Timothy P. O’Neill, *Taking Standards of Appellate Review Seriously: A Proposal to Amend Rule 341*, 83 ILL. B.J. 512, 514-15 (1995) (reviewing the general standards of review applicable to appeals and stating that the abuse of discretion standard applies to “discretionary matters,” which encompasses decisions made by a trial court judge in orchestrating a trial, supervising the litigation process, or overseeing the court docket”).

As an initial matter, civilian courts differ as to exactly how much deference trial judges receive under the abuse of discretion standard. Some jurisdictions treat the standard as if it was one fixed level of discretion; others utilize gradations of abuse of discretion review; some add language to the standard in an attempt to more clearly define it; some hold that abuse of discretion involves an action actually outside the scope of the applicable law; and still others hold that the standard is met and “a reversal is warranted only if the trial court’s decision was arbitrary or irrational.”⁹⁰

Commentators have remarked that these diverse approaches are not used in any coherent manner, leading to little to no guidance as to how much discretion is warranted in a given case. The standard is called “often vague and open-ended”; “courts have some difficulty writing about discretion and its review, and have set out slightly different tests with each passing case.”⁹¹ The standard, in the words of one notable scholar, “is used to convey the appellate court’s disagreement with what the trial court has done, but does nothing by way of offering reasons or guidance for the future. . . . It is a form of ill-tempered appellate grunting and should be dispensed with.”⁹² Courts even criticize themselves for failing to articulate what abuse of discretion means. Judicial observations of the standard include that it “defies an easy description”⁹³ and “is so amorphous as to mean everything and nothing at the same time and [is] virtually useless as an analytic tool.”⁹⁴

While the utility of such a broad standard may not be immediately obvious, the gradations of this standard serve a purpose. Judge Henry J. Friendly, a long-time judge on the Second Circuit Court of Appeals, observed:

There are a half dozen different definitions of “abuse of discretion,” ranging from ones that would require the appellate court to come close to finding that the trial court had taken leave of its senses to others which differ

⁹⁰ Peters, *supra* note 2, at 244.

⁹¹ CHILDRESS & DAVIS, *supra* note 7, § 7.06[4], 7-85.

⁹² Maurice Rosenberg, *Judicial Discretion of the Trial Court, Viewed from Above*, 22 SYRACUSE L. REV. 635, 659 (1971).

⁹³ Arneson v. Arneson, 670 N.W.2d 904, 910 (S.D. 2003).

⁹⁴ Hurtado v. Statewide Home Loan Co., 167 Cal. App. 3d 1019, 1022 (Cal. Ct. App. 1985).

from the definition of error by only the slightest nuance, with numerous variations between the extremes.⁹⁵

Judge Friendly once thought these “wildly different definitions of abuse of discretion could not be defended and that we ought to pick one . . . and apply it across the board.”⁹⁶ However, he came to realize that “the differences are not only defensible but essential. Some cases call for application of the abuse of discretion standard in a ‘broad’ sense and others in a ‘narrow’ one.”⁹⁷ Abuse of discretion, Judge Friendly learned, is not designed to be a fixed standard, and counsel and judges should not fall into the trap of treating it as one. Rather, the term connotes a range of discretion afforded to trial judges: the issue being reviewed and a variety of other factors may call for more or less deference to be afforded in a given case. Judge Friendly advocated: “It should be clear, then, that there are at least weak and strong senses of ‘discretion’ and in reality ‘abuse of discretion’ may invoke a broad spectrum of review standards and applications.”⁹⁸

Judge Friendly has not been alone in this view. One commentator asserts that abuse of discretion is intended to be “a highly flexible and malleable term that is applied to widely differing circumstances with equally differing results.”⁹⁹ Another has observed:

Clearly there is no such thing as *one* abuse of discretion standard. It is at most a useful generic term. Even within review of discretionary calls (or perhaps because sometimes different types of calls have a varying amount of real judgment to them), this standard of review more accurately describes a *range* of appellate responses. In practice, however, while courts cite “the” abuse of discretion standard in varying contexts, most imply awareness that varying kinds of review follow, whether by firmly applying the factors applicable to the discretionary choice, or by giving a stronger

⁹⁵ Hon. Henry J. Friendly, *Indiscretion About Discretion*, 31 EMORY L.J. 747, 763 (1982).

⁹⁶ *Id.* at 754.

⁹⁷ *Id.*

⁹⁸ Steven Alan Childress, *Standards of Review Primer: Federal Civil Appeals*, 229 F.R.D. 267, 294 (1995).

⁹⁹ Hon. Andrew M. Mead, *Abuse of Discretion: Maine’s Application of a Malleable Appellate Standard*, 57 ME. L. REV. 519, 520 (2005).

presumption to one set of applications, or even by blatantly stating that several abuse of discretion standards may be involved.¹⁰⁰

Still another observer notes the vastness of the abuse of discretion spectrum:

[T]he abuse of discretion standard of review spans the spectrum of deference. At one extreme, it is a standard so deferential that it has been described as a “virtual shield” or “rubber stamp” of trial court rulings; but at the other end of the spectrum, when it is defined to necessarily include de novo review of legal conclusions, it is a standard that owes no deference to a trial court ruling.¹⁰¹

There may be widespread recognition that abuse of discretion represents a range of appellate deference to trial judge rulings, but a more difficult task remains: determining where along the spectrum a given issue falls. A good first step is to determine exactly what type of issue is being presented, as outlined in the section above. Is the appellate court reviewing a military judge’s choice of remedy, his or her management of the court proceedings, or a substantive legal ruling? A military judge’s ruling on a matter of courtroom management will receive a great deal of deference compared to a determination of what the law is in a given area. Matters involving the selection of an appropriate remedy from a range of options or the weight given to a series of factors, or situations in which the appellate court is asked to review the military judge’s decision-making process, may fall somewhere in the middle.

However, the analysis does not end there. One must examine the underlying reasons why trial judges receive deference before determining where along the spectrum of deference a given issue falls. Once again, Judge Friendly eloquently summarized this matter:

When we look at the spectrum of trial court decisions, we find a wide variance in the deference accorded to them by appellate courts. In some instances the trial court is accorded broad, virtually unreviewable

¹⁰⁰ Davis, *supra* note 35, at 77-78 (emphasis in original) (citation omitted).

¹⁰¹ Bruno, *supra* note 16, at 29.

discretion, as is still the case with criminal sentencing in the federal system. In others, the trial judge's decision is accorded no deference beyond its persuasive power, as in the case of determinations of the proper rule of law or the application of the law to the facts. Our concern is with determinations where the scope of review falls somewhere between these extremes. How much deference should be accorded to various determinations along this continuum? Just as the answer to the constitutional inquiry "what process is due?" depends upon the costs and benefits of procedural safeguards in different instances, defining the proper scope of review of trial court determinations requires considering in each situation the benefits of closer appellate scrutiny as compared to those of greater deference.¹⁰²

One approach to this analysis is that of Professor Maurice Rosenberg. In an attempt to fashion a more intelligible structure for organizing the abuse of discretion spectrum, Professor Rosenberg emphasized the role of choice in discretion. He asserted that a decision cannot be considered "discretionary" without multiple possible outcomes placed before the decisionmaker.¹⁰³ Thus, Professor Rosenberg differentiated between "primary" or "true" discretion – where the trial court is not bound by any overriding principles or guidelines and thus is truly free to select its own decision – and "secondary" or "guided" discretion – which deals with the limitations of the appellate court's ability to substitute its discretion for that of the lower court.¹⁰⁴ Professor Rosenberg noted that an abuse of primary or true discretion would be unlikely to occur because there is no "right" answer in the absence of overriding criteria; therefore, abuse of discretion occurs only in the secondary or guided sense. There, an abuse of discretion takes place when the trial judge has failed to correctly apply factors handed down from the appellate court, or when the trial judge's choice is contrary to the evidence or experience or is even "so arbitrary, on its own terms, that the appellate court feels compelled to reject the actual choice."¹⁰⁵

¹⁰² Friendly, *supra* note 95, at 755-56.

¹⁰³ Maurice Rosenberg, *Judicial Discretion of the Trial Court, Viewed from Above*, 22 SYRACUSE L. REV. 635, 636 (1971), *cited in* CHILDRESS & DAVIS, *supra* note 7, § 7.06[2][a], 7-67.

¹⁰⁴ *Id.*

¹⁰⁵ *Id.* (citing *Motor Vehicles Manufacturers Ass'n v. State Farm Ins. Co.*, 463 U.S. 29, 43 (1983)).

Commentators and case law generally agree on two primary reasons for vesting the trial court with discretion, both with varying degrees of deference attached to them. First and most obviously, the trial judge has the advantage of being physically on the spot as the facts are gathered and applied to the law. The trial judge can look the witness in the eye, hear the quiver in his or her voice, and have a sense of the flow of the proceedings that a cold record can never replicate. Indeed, appellate courts have consistently cited the trial court's better position to evaluate evidence as a reason to grant discretion to the trial court.¹⁰⁶ Professor Rosenberg also deems this one of the two "good" reasons for granting trial judges discretion.¹⁰⁷ Because a unique, fact-bound determination is necessary to resolve certain types of issues – a determination that is almost, by definition, beyond that of an appellate court – a greater degree of deference to the trial court is often necessary.

The second "good" reason for granting trial judges discretion is that the issue under review is not amenable to general rules formulated by the appellate court or is too novel to be the subject of such rules.¹⁰⁸ In this vein, Professors Childress and Davis state that two of the four determiners of how much deference the trial court enjoys are: 1) If the trial court's decision is part of an evolving area of the law, is there

¹⁰⁶ See, e.g., *Mason v. United States*, 244 U.S. 362, 366 (1917) (holding, in the context of reviewing a trial court's order imposing a fine for contempt in refusing to answer questions during a grand jury investigation, "[o]rdinarily, [the trial judge] is in much better position to appreciate the essential facts than an appellate court can hold, and he must be permitted to exercise some discretion, fructified by common sense, when dealing with this necessarily difficult subject"); *Christmas v. City of Chicago*, 682 F.3d 632, 641 (7th Cir. 2012) ("Because we are confined to reading the trial court's transcript and cannot duplicate the district judge's experience of the trial, we defer to the district judge and find no abuse of discretion occurred."); *Fox v. Hayes*, 600 F.3d 819, 839 (7th Cir. 2010) ("A district judge, at the controls of an emotional, gut-wrenching trial like this, is in a far better position than appellate judges to weigh the competing factors that go into a probative value versus unduly prejudicial calculus. A trial judge's call on these types of issues can only be upset if we are convinced that the judge has clearly abused the wide discretion he enjoys."); *Greenleaf v. Garlock, Inc.*, 174 F.3d 352, 363 (3d Cir. 1999) ("[W]e recognize that in matters of trial procedure . . . the trial judge is entrusted with wide discretion because he or she is in a far better position than we to appraise the effect of the improper argument of counsel.").

¹⁰⁷ CHILDRESS & DAVIS, *supra* note 7, §2.06[2][a] at 7-67 (citing Rosenberg, *supra* note 5, at 660-65); see also SMITHBURN, *supra* note 13, at 285-319 (listing trial court vantage point as one of several reasons for granting discretion to trial court rulings).

¹⁰⁸ CHILDRESS & DAVIS, *supra* note 7, §2.06[2][a] at 7-67 (citing Rosenberg, *supra* note 5, at 662).

enough precedent to show a pattern of decision, and if so, what is that pattern?, and 2) Is the appellate court ready to state a rule based on any pattern?¹⁰⁹ The Supreme Court has likewise picked up on this theme. In *Pierce v. Underwood*,¹¹⁰ the Court set forth helpful considerations to help decide how much deference to grant a decision regarding whether to allow attorney fee shifting in an action under the Equal Access to Justice Act. The Court acknowledged that in many situations, “a long history of appellate practice” must define the appropriate standard of review.¹¹¹ However, when no such history exists, “it is uncommonly difficult to derive from the pattern of appellate review . . . an analytical framework that will yield the correct answer.”¹¹² The Court then laid out facts that may call for more or less deference, including “whether the issue demands flexibility because it presents a “multifarious and novel question, little susceptible, for the time being at least, of useful generalization; and likely to profit from the experience that an abuse-of-discretion rule will permit to develop.”¹¹³ It makes sense that appellate courts will be hesitant to intervene where an issue is novel, or involves a unique fact pattern. In these situations, there is little reason to believe appellate courts are better positioned to decide such issues than trial judges. Appellate courts are also generally less concerned about individual cases that have no application to other disputes, and they may be reluctant to intervene on novel issues until they see how trial judges handle them.

At some point, however, a pattern develops, and appellate courts may sense the need to lay down markers to apply in future cases. At that point, the matter is likely to receive more scrutiny. As Professors Childress and Davis state:

[This reason for conferring discretion]—issues that defy formulation—causes this concept of discretion to be in a constant state of flux. Some issues originally thought by the appellate courts to be incapable of governance by general rules of decision are, after a time and a number of decisions on cases with similar facts, found to be addressable by such rules. When, over time a pattern of decision with regard to similar facts emerges, it becomes

¹⁰⁹ *Id.* § 7.06[4], 7-88.

¹¹⁰ 487 U.S. 552 (1988).

¹¹¹ *Id.* at 558.

¹¹² *Id.*

¹¹³ *Id.* at 562.

in effect a rule of law, and that “corner of the pasture” is removed from the discretionary field. Failure to follow the rule of law then becomes legal error rather than a discretionary decision, even though the decisionmaking may continue to be labeled as discretionary. The same is true when some novel issue arises. The appellate courts may leave the decision to lower court discretion at least long enough to permit “experience to accumulate at the lowest court level” until the appellate courts see a pattern allowing a prescribed rule. Various issues will be, at any given time, at different stages in this evolutionary process.¹¹⁴

In addition to these two primary reasons for granting discretion, Professor Rosenberg and others have identified several “lesser” reasons for granting a trial court discretion, which may influence the degree of deference an appellate court grants to the trial court in some cases but which do not “provide clear clues as to which trial court rulings are cloaked with discretionary immunity of some strength.”¹¹⁵ These lesser reasons include judicial economy, trial court morale, and finality of the decision. Another study repeats many of these themes.¹¹⁶

Military appellate courts seem to utilize the same considerations in determining how much discretion a military judge’s ruling receives. CAAF has noted that under the abuse of discretion standard, it will be more likely to defer to the military judge’s ruling when the military judge’s first-hand observation is particularly important.¹¹⁷ Military

¹¹⁴ CHILDRESS AND DAVIS, *supra* note 7, § 7.06[2][a], at 7-69 to 70 (quoting Rosenberg, *supra* note 5, at 650, 662-63).

¹¹⁵ CHILDRESS & DAVIS, *supra* note 7, § 7.06[2][a], at 7-69 to 70 (quoting Rosenberg, *supra* note 5, at 660-65).

¹¹⁶ SMITHBURN, *supra* note 13, at 285-319.

¹¹⁷ For example, *United States v. Nash*, 71 M.J. 83, 88 (C.A.A.F. 2012), held that the following in reviewing a military judge’s determination on the issue of actual bias on the part of a court member:

Appellate courts will review the military judge’s ruling for abuse of discretion. “Because a challenge based on actual bias involves judgments regarding credibility, and because ‘the military judge has an opportunity to observe the demeanor of court members and assess their credibility during voir dire,’ a military judge’s ruling on actual bias is afforded great deference.” “‘Great deference’ is not a separate standard.” Rather it is our recognition that the legal question of

appellate courts have also occasionally demonstrated a willingness to defer to fact-specific rulings, at least until a decipherable pattern of issues susceptible to appellate guidance emerges. For example, the principle prohibiting the government from an unreasonable multiplication of charges is well established in military law.¹¹⁸ For decades, appellate case law supplied little guidance as to what constituted an unreasonable multiplication of charges. The result was this: “Lacking more particular guidance, military appellate courts simply defer to the judgment of military judges. Whether the charges against an appellant have been ‘piled on,’ so as to be unreasonable, is a question for the military judge in the exercise of his sound discretion.”¹¹⁹ Thus military judges were essentially vested with equitable powers largely considered beyond appellate review to remedy perceived issues with unreasonable multiplication of charges.¹²⁰ Over time, however, patterns began to emerge, and appellate judges began to see a need for more definitive appellate guidance that would narrow the field of military judges’ discretion in this area.¹²¹ By the turn of the century, the Navy-

actual bias rests heavily on the sincerity of an individual’s statement that he or she can remain impartial, an issue approximating a factual question on which the military judge is given greater latitude of judgment. The standard, however, remains an abuse of discretion.

See also United States v. Daulton, 45 M.J. 212, 217 (C.A.A.F. 1996); United States v. White, 36 M.J. 284, 287 (C.M.A. 1993).

¹¹⁸ United States v. Quiroz, 55 M.J. 334, 336-37 (C.A.A.F. 2007); MANUAL FOR COURTS-MARTIAL, UNITED STATES ¶ 27 (1949) (“One transaction, or what is substantially one transaction, should not be made the basis for an unreasonable multiplication of charges against one person.”); United States v. Oatney, 41 M.J. 619, 623 (N-M. Ct. Crim. App. 1994) (“The military judge retains discretion to dismiss specifications brought in contravention of this policy.”).

¹¹⁹ Lieutenant Colonel Michael J. Breslin & Lieutenant Colonel LeEllen Coacher, *Multiplicity and Unreasonable Multiplication of Charges: A Guide to the Perplexed*, 45 A.F. L. REV. 99, 123 (1998).

¹²⁰ *See, e.g.*, United States v. Erby, 46 M.J. 649, 652 (A.F. Ct. Crim. App. 1997) (discussing the military judge’s power to adjust the maximum sentence in a given case based on equitable considerations).

¹²¹ In *United States v. Baker*, Judge Cook argued:

That multiplicity for sentencing is a mess in the military justice system is a proposition with which I believe few people familiar with our system would take issue. Servicemembers are often forced to make the fundamental decision whether to contest a case or to plead guilty, possibly in conjunction with a pretrial agreement, without the slightest appreciation of the risks at stake. By the same token, cases are often overturned years after trial simply because some higher level of review selected a different test for multiplicity from that

Marine Corps Court and then CAAF had seen enough, and set forth factors military appellate courts (and therefore military judges) would consider in analyzing unreasonable multiplication of charges issues.¹²² Unreasonable multiplication of charges issues are still reviewed under the abuse of discretion standard, but the pasture of trial judge discretion has narrowed considerably.

Military appellate courts also evince a recognition of the remaining reasons for conferring deference to the trial judge. Therefore, military appellate courts will sometimes grant a greater degree of deference to trial judge decisions based on concerns such as protecting the function and morale of the trial judge, judicial economy and efficiency, finality in the administration of justice, and reducing the size of the appellate docket.¹²³

Inside or outside the military justice system, simply determining that an issue is reviewed under the abuse of discretion standard does not answer the question of how much discretion the trial judge receives. Even if appellate courts do not always specifically state as such, the presence or absence of certain underlying reasons for granting trial judges discretion may move the appellate court to any one of an infinite number of spots along a spectrum of deference.

agreed upon by the trial participants. The instant case is such an example. This is not justice; this is chaos!

14 M.J. 361, 372 (C.M.A. 1983) (Cook, J., dissenting).

¹²² *United States v. Quiroz*, 52 M.J. 510 (N-M. Ct. Crim. App. 1999), *set aside and remanded*, 55 M.J. 334 (C.A.A.F. 2001). CAAF set aside and remanded the service court's decision in *Quiroz* based on one word the lower court used in the factors it developed. Otherwise, CAAF approved of the factors the service court utilized.

¹²³ *See, e.g., United States v. Adcock*, 65 M.J. 18, 29 (C.A.A.F. 2007) (Stucky, J., dissenting):

At trial, military judges will face protracted litigation concerning the minutiae of confinement programs and whether a particular facility or guard violated some provision of a service regulation. Appellate court dockets will be flooded with pleas that military judges abused their discretion in not granting additional credit. Ultimately, this Court may find itself the de facto supervisor of substantive conditions of confinement involving members of the armed forces – a function that we are exceedingly ill suited to perform.

C. Military Appellate Courts Have Not Solved the Mixed Questions Challenge

The abuse of discretion standard faces a particular dilemma in the case of “mixed questions.” A mixed question “simply presents the decision maker with the task of applying the law to the facts of the case.”¹²⁴ Many appellate issues require the trial judge to first determine what occurred: what the facts are that give rise to the motion for relief. The trial judge must then determine the correct legal standards that apply to the motion, accurately noting any governing legal authorities, including those that require him or her to analyze certain factors in reaching a decision. Finally, the trial judge must then apply the facts to the law to make a ruling. The staple of appellate work involves reviewing these types of rulings. As Professor Rosenberg put it, “All appellate Gaul . . . is divided into three parts: review of facts, review of law, and review of discretion.”¹²⁵

At first glance, appellate review of such questions may seem to be a fairly easy task. Reviewing courts merely need to separate the trial judge’s ruling into its component parts, apply the correct standard to each component, and determine whether to affirm or reverse the trial court’s ruling. A military judge’s findings of fact are generally reviewed under the clearly erroneous standard, while an appellate court reviews *de novo* whether the military judge applied the correct legal principles to the ruling. Therefore, appellate courts need only to separate fact from law and apply the appropriate standard to reviewing each part of the trial judge’s decision.

In practice, however, review of mixed questions is not nearly so simple. For one thing, determining what is a finding of fact and what is a conclusion of law is often surprisingly difficult. By definition, a finding of fact is empirical – it concerns itself with events that actually take place – while conclusions of law concern rules or principles.¹²⁶ These definitions seem straight-forward but lead to some surprisingly difficult determinations. For example, if a ruling calls for determining whether two people were married at the time of the charged act, this determination might include both factual (was there a marriage

¹²⁴ Evan Tsen Lee, *Principled Decision Making and the Proper Role of Federal Appellate Courts: The Mixed Questions Conflict*, 64 S. CAL. L. REV. 235, 235 (1991).

¹²⁵ Rosenberg, *supra* note 5, at 173.

¹²⁶ See Hofer, *supra* note 14, at 235-39 (summarizing various approaches to defining facts versus law).

certificate) and legal (was the marriage valid under state law) components.¹²⁷ Similarly, questions of the reasonableness of an action or belief often present difficulties in the law versus fact determination.¹²⁸ As one work notes:

The importance of the law-fact distinction is surpassed only by its mysteriousness. On the one hand, it is the legal system's fundamental and critical distinction. Significant consequences attach to whether an issue is labeled "legal" or "factual" – whether a judge or jury will decide the issue; if, and under what standard, there will be appellate review; whether the issue is subject to evidence and discovery rules; whether procedural devices such as burdens of proof apply; and whether the decision has precedential value. On the other hand, the distinction continues to bedevil courts and commentators alike. In recent times, the Supreme Court has referred to the distinction as "elusive," "slippery," and as having a "vexing nature" – while acknowledging that its decisions have "not chartered an entirely clear course" and that no rule or principle will "unerringly distinguish a factual finding from a legal conclusion."¹²⁹

Because distinguishing between facts and law can be so difficult, and because labeling a matter as a fact or law may determine the outcome of the appeal, some commentators have skeptically asserted that the fact or law label is applied not based on any rational distinction. Rather, they assert, the label is used merely to support an outcome the court wants to reach.¹³⁰

¹²⁷ *Id.* at 234-35.

¹²⁸ *Id.* at 244-45.

¹²⁹ Ronald J. Allen & Michael S. Pardo, *The Myth of the Law-Fact Distinction*, 97 *Nw. U. L. REV.* 1769, 1769 (2003) (quoting *Miller v. Fenton*, 474 U.S. 104, 113 (1985); *Thompson v. Keohane*, 516 U.S. 99, 110-111 (1995); *Pullman-Standard v. Swint*, 456 U.S. 273, 288 (1982); *Williams v. Taylor*, 529 U.S. 362, 385 (2000)).

¹³⁰ See Randolph E. Paul, *Dobson v. Commissioner: The Strange Ways of Law and Fact*, 57 *HARV. L. REV.* 753, 811-12 (1944) (noting the "crazy quilt of contradiction" in courts' labeling of matters as law or fact, summarizing various commentators' difficulties squaring judicial decisions labeling such matters, and noting scholars' views that matters are labeled as law or fact based on the courts' disposition to review the issues); see also Louis L. Jaffe, *Judicial Review: Question of Law*, 69 *HARV. L. REV.* 239, 239-40 (1955):

In military practice, CAAF has similarly recognized that “the distinction between a question of law and a question of fact is not always clearly defined”¹³¹ A dissenting judge on the Navy-Marine Corps court also recognized this difficulty:

In reviewing factual determinations made by a trial judge—an empirical type process to establish the who-what-why-when-and-how factors in a case—appellate courts should pay a high degree of deference to the trial court, which is in the better position to evaluate and weigh the pertinent evidence relating to factual issues, while making credibility determinations during the live, in-court testimony of witnesses. Legal conclusions, however, require no such logical deference, as the appellate court, without the immediate and pressing duties and responsibilities involved in a live, ongoing trial, is in a just-as-good, or perhaps in a better position to examine questions of law with its collaborative, deliberative process.

Applying the fact-law distinction is complicated, however, in cases such as this one, with its mixed question of fact and law. The difficulty exists in attempting to “unmix” the issues, in order to be able to apply the clearly-erroneous standard to the factual aspects or issues, while reviewing the legal issues *de novo*.¹³²

The problem of mixed questions does not end with separating facts from law. A more problematic issue is determining what standard

It is often said that in many situations it is difficult, perhaps indeed impossible, to make a clean distinction between fact and law; that the difference is one of degree, that the relation of fact and law can be described as a spectrum with finding of fact shading imperceptibly into conclusion of law. It is sometimes said that a question is fact or law depending on whether the court chooses to “treat” it as one or the other.

¹³¹ United States v. Lowry, 2 M.J. 55, 58 (C.M.A. 1976).

¹³² United States v. Daniels, 58 M.J. 599, 608 (N.M. Ct. Crim. App. 2003) (Villemez, J., dissenting). CAAF later overturned the majority in the case, siding with Judge Villemez that the warrantless search of the accused’s bedside nightstand violated the Fourth Amendment. United States v. Daniels, 60 M.J. 69 (C.A.A.F. 2004).

applies to the trial judge's application of the facts to the law. For example, where the appellate court reviews a trial judge's determination that probable cause supported a search warrant, the trial judge will develop findings of fact about what information was presented to the magistrate and will make conclusions of law, citing cases that define probable cause. However, a third step remains: the trial judge must make an ultimate conclusion that probable cause did or did not exist, applying the facts to the law. Is this application a finding of fact (reviewed under the clearly erroneous standard), a conclusion of law (reviewed de novo), or a third category involving application of facts to law that warrants its own standard of review?

Civilian courts are widely split on this issue.¹³³ Some courts label this application of facts to law a question of law to be reviewed under a de novo standard.¹³⁴ Under this view, even if the ultimate standard of review for the mixed question is labeled abuse of discretion, the court really reviews the matter without deference because the heart of the matter being reviewed is the application of the facts to the law, and this application is considered a question of law. Other courts label such applications as matters of law to be decided de novo but nonetheless grant some discretion to the trial court's ruling if the decision involves the application of facts to settled areas of the law.¹³⁵ Still another

¹³³ See Kunsch, *supra* note 5, at 27 (citing Pullman-Standard v. Swint, 456 U.S. 273, 290 n.19 (1982)) (noting there is "substantial authority in the Circuits on both sides" of the question of what standard of review to apply to mixed questions); United States v. McConney, 728 F.2d 1195, 1200 (9th Cir. 1984) (noting a "disarray in standard of review jurisprudence [that] appears to be pervasive" concerning the issue of mixed questions). See also Lee, *supra* note 124, at 235-36:

One group of circuits generally reviews findings on [mixed] questions on a non-deferential, de novo basis; another group generally reviews them on a highly-deferential, "clearly erroneous" basis; a third group varies the standard of review depending on the "mix" of the question; and a fourth group has yet to establish a clear pattern. The Supreme Court, despite clear opportunity, has never undertaken to resolve the conflict.

¹³⁴ Davis, *supra* note 35, at 48. For a good example of this approach with enlightening analysis, see Universal Minerals, Inc. v. C.A. Hughes & Co., 669 F.2d 98, 102-03 (3d Cir. 1981).

¹³⁵ See Kevin Casey, Jade Camara & Nancy Wright, *Standards of Appellate Review in the Federal Circuit: Substance and Semantics*, 11 FED. CIRCUIT B.J. 279, 281 (2001-2002) (asserting that under the de novo standard, the trial court's opinion will nonetheless receive deference when the trial court has simply applied settled law to the facts).

approach explicitly defers to the trial judge's application of the facts to the law and will only reverse it if that discretion has been abused.¹³⁶ No consensus has emerged.¹³⁷

In the federal circuits, a popular approach analyzes whether the mixed question is based more in law or fact and then adopts the standard that corresponds with the predominant issue in the mixed question. In the Tenth Circuit, for example, the court reviews mixed questions "under the clearly erroneous or de novo standard, depending on whether the mixed question involves primarily a factual inquiry or the consideration of legal principles."¹³⁸ Similarly, the Sixth Circuit grants "significant deference" to the trial court when the mixed question is "highly fact-based,"¹³⁹ and

¹³⁶ See Michael H. Graham, *Abuse of Discretion, Reversible Error, Harmless Error, Plain Error, Structural Error: A New Paradigm for Criminal Cases*, 43 CRIM. LAW BULLETIN 955 (2007).

To the extent the trial court's determination turns on an interpretation of a rule of evidence, i.e., a mistake of law, the review is plenary, frequently called de novo. Where the trial court has made a factual finding, the standard of review is clearly erroneous. Under this standard a finding of fact will be reversed only if it is completely devoid of a credible evidentiary basis or bears no rational relationship to the evidence in support. Finally, application of a rule of evidence to the facts is reviewed applying the abuse of discretion standard. Reversal will occur only if the ruling is manifestly erroneous, i.e., the trial court commits a clear error of judgment.

Id.

¹³⁷ In addition, a state high court's effort to resolve the mixed question conundrum is notable. In *State v. Pena*, 869 P.2d 932 (Utah 1994), the court reviewed a trial court's denial of a defense motion to suppress statements and the results of a strip search at a jail. The court recognized that such mixed issues present "thorny issues" for appellate courts, and held that the trial judge is entitled to some deference in applying the legal standard to a set of facts. *Id.* at 936-37. The court analogized review of mixed questions along a "spectrum" or in terms of a "pasture" in which the trial court is free to roam, and held that with fact-intensive issues incapable of broad legal rules, this pasture would be larger. *Id.* at 937-38. The court ultimately concluded that the standard of review for reasonable-suspicion determinations is a determination of law and is reviewable de novo; however, the trial judge receives "a measure of discretion" when applying the reasonable suspicion standard to a given set of facts. *Id.* at 939. This case was later abrogated and has been modified to some degree. See, e.g., *State v. Levin*, 144 P.3d 1096 (Utah 2006) (describing that mixed questions of law and fact require a "determination of whether a given set of facts comes within the reach of a given rule of law"). However, *Pena* continues to be cited positively in state court decisions. For a good overview of the *Pena* case, see Andrew F. Peterson, *Ten Years of Pena: Revisiting the Utah Mixed Question Standard of Appellate Review*, 19 BYU J. PUB. L. 261 (2004).

¹³⁸ *Armstrong v. Comm'r*, 15 F.3d 970, 973 (10th Cir. 1994).

¹³⁹ *United States v. Hazelwood*, 398 F.3d 792 (6th Cir. 2005).

the Second Circuit reviews mixed questions “either de novo or under the clearly erroneous standard[,] depending on whether the question is predominantly legal or factual, and exercises of discretion for abuse thereof.”¹⁴⁰ The Seventh Circuit takes a slightly different approach. When “the only question is the legal significance of a particular and nonrecurring set of historical events,” the court reviews the trial judge’s application of the facts to the law under the clearly erroneous standard because the appellate court’s “main responsibility is to maintain the uniformity and coherence of the law,” a responsibility not triggered for facts unique to a given case.¹⁴¹ The First Circuit also uses the clearly erroneous standard for mixed questions based on a similar rationale to that of the Seventh Circuit.¹⁴² Often, courts have no cohesive framework for deciding the standard used in such application issues.¹⁴³

The Supreme Court has been unwilling to prescribe one standard of review for all mixed questions, preferring instead a functional approach in which the Court decides, on a case-specific basis, whether the trial judge or the appellate court is in a better position to determine the matter because it more closely resembles a factual or legal conclusion.¹⁴⁴ The Court has stated that “deferential review of mixed questions of law and fact is warranted when it appears that the district court is ‘better positioned’ than the appellate court to decide the issue in question or that probing appellate scrutiny will not contribute to the clarity of legal doctrine.”¹⁴⁵ One factor the Court appears to consider in deciding which approach to take in a given situation “is a sense in which the matter appears to be discretionary, i.e., does it smack of judgment, choice, sensitivity, and presence, or is instead somewhat informed by broader concepts that seem legal?”¹⁴⁶ Despite this general guidance, no definitive Supreme Court guidance exists as to when a trial court’s application of the facts to the law is to be granted some measure of deference.

¹⁴⁰ United States v. Thorn, 446 F.3d 378, 387 (2nd Cir. 2006).

¹⁴¹ Mucha v. King, 792 F.2d 602, 605-06 (7th Cir. 1986).

¹⁴² Sweeney v. Board of Trustees of Keene State College, 604 F.2d 106, 109 n.2 (1st Cir. 1979).

¹⁴³ See Lee, *supra* note 124, at 245-47 (surveying federal circuits in which courts follow “no discernable pattern” in treating mixed questions).

¹⁴⁴ Cynthia K.Y. Lee, *A New “Sliding Scale of Deference” Approach to Abuse of Discretion: Appellate Review of District Court Departures Under the Federal Sentencing Guidelines*, 35 AM. CRIM. L. REV. 1, 15 (1997).

¹⁴⁵ *Salve Regina College v. Russell*, 499 U.S. 225, 233 (1991) (quoting *Miller v. Fenton*, 474 U.S. 104, 114 (1985)).

¹⁴⁶ CHILDRESS & DAVIS, *supra* note 7, §7.06[3][b] at 7-77.

Mixed questions therefore remain, as the Court of Claims once characterized them, “elusive abominations.”¹⁴⁷ In the words of one commentator, mixed questions “[have] become a sort of catch-all, an amorphous box into which courts place any issue or combination of issues that cannot nearly be labeled law or fact. Hence, the lack of clarity and coherence.”¹⁴⁸ The end result is the appellate court “sit[s] precisely at the midpoint between the Scylla of allowing errors to go uncorrected and the Charybdis of judicial inefficiency.”¹⁴⁹

Scholars likewise disagree on the best approach to resolve this issue. One commentator surveyed the various approaches the circuits have taken regarding mixed questions, and concluded that the clearly erroneous standard is the best approach, at least for application issues that are case-specific and not likely to establish broad precedent.¹⁵⁰ Another has advocated for the standard of review to be determined based on whether the issue is primarily factual or primarily a question of law.¹⁵¹

One commentator proposed an intriguing solution: recognize that there is no one best approach for applying the standard of review to mixed questions. Rather, this author noted that what are broadly termed “mixed questions” really consist of three primary and distinct “issue-types.”¹⁵² The first type of mixed question is an “evaluative determination” that requires the trial court to make a judgment about a person’s knowledge or belief, such as reasonableness. Evaluative determinations would receive more or less deference based on whether the issue is recurring or unique to a given fact pattern.¹⁵³ Another type of mixed question is a question of “definitional application”: an issue that requires the decision-maker to determine whether a particular set of facts falls within a legal definition. This would likewise have varying standards of review based on whether the reviewing court is being asked to refine the definition in a way that is generally applicable to other cases, or if it is simply a question of whether the facts of a particular case

¹⁴⁷ *S & E Contractors, Inc. v. United States*, 433 F.2d 1373, 1378 (Ct. Cl. 1970).

¹⁴⁸ Randall H. Warner, *All Mixed Up About Mixed Questions*, 7 J. APP. PRAC. & PROCESS 101, 102 (2005).

¹⁴⁹ Lee, *supra* note 124, at 236.

¹⁵⁰ *Id.*

¹⁵¹ Peterson, *supra* note 137, at 271-75.

¹⁵² Warner, *supra* note 148, at 128-41.

¹⁵³ *Id.* at 131-32.

fall within an established definition.¹⁵⁴ Still other mixed questions are “compound questions” – questions that consist of multiple sub-issues that involve questions of law, fact, or otherwise. These questions should be separated into their components and each sub-issue should be reviewed under its own standard rather than applying one standard of review to the entire matter.¹⁵⁵ As appealing as this multi-faceted approach is, it has not gained traction in appellate decisions.

In military appellate practice, CAAF has established the standard of review for mixed questions as abuse of discretion.¹⁵⁶ The “abuse of discretion” label for such questions is often misleading, however, because the real issue being reviewed – the application of the facts to the law – is often held to be a conclusion of law and reviewed *de novo*.¹⁵⁷ For example, a decision regarding the admission of evidence is reviewed for an abuse of discretion, but CAAF has nonetheless held that the ultimate issue is a question of law.¹⁵⁸ Likewise, the entitlement to confinement credit for illegal pretrial punishment is recognized as a mixed question of law and fact, but appellate courts review *de novo* the ultimate question of whether an appellant is entitled to credit for a violation of Article 13 of the Uniform Code of Military Justice.¹⁵⁹ Military courts have applied a *de novo* review to the ultimate conclusion in several other mixed scenario questions, such as resolution of a marital privilege issue¹⁶⁰ and whether probable cause existed for a search.¹⁶¹ CAAF has demonstrated a willingness to review even heavily fact-specific issues under a *de novo* standard. For example, in one recent decision, the court found the military judge abused his discretion in two respects: by concluding that an individual involved in an initial viewing and collecting of evidence from a friend’s computer was acting as an agent of the government, and by using this erroneous conclusion as the basis for suppressing the evidence from two laptop computers and a flash drive.¹⁶² Under this approach, the only area of mixed questions in which the military judge receives deference involves findings of fact. If the

¹⁵⁴ *Id.* at 133-35.

¹⁵⁵ *Id.* at 139-42.

¹⁵⁶ *United States v. Ayala*, 43 M.J. 296, 298 (C.A.A.F. 1995).

¹⁵⁷ *See, e.g., United States v. Rose*, 71 M.J. 138, 143 (C.A.A.F. 2012); *United States v. Durbin*, 68 M.J. 271, 273 (C.A.A.F. 2010).

¹⁵⁸ *United States v. Freeman*, 65 M.J. 451, 453 (C.A.A.F. 2008).

¹⁵⁹ *United States v. Mosby*, 56 M.J. 309, 310 (C.A.A.F. 2002).

¹⁶⁰ *Durbin*, 68 M.J. at 273.

¹⁶¹ *United States v. Gallo*, 53 M.J. 556, 561 (A.F. Ct. Crim. App. 2000).

¹⁶² *United States v. Buford*, No. 14-6010/AF, 2015 CAAF LEXIS 308 (C.A.A.F. Mar. 24, 2015).

true issue being reviewed involves the application of the facts to the law rather than the findings of fact themselves – the normal situation on appeal – the military judge receives no deference.

In some cases, however, military courts take a slightly different approach. Courts sometimes lay out the clearly erroneous and de novo aspects of the standard but then add language indicating some measure of deference is warranted.¹⁶³ This is particularly true in cases involving the admission of expert testimony. In *United States v. Ellis*,¹⁶⁴ for example, CAAF reviewed a military judge's admission of expert testimony on the appellant's risk of recidivism. The court noted decisions to admit or exclude expert testimony are reviewed for an abuse of discretion, and a military judge "abuses his discretion when: (1) the findings of fact upon which he predicates his ruling are not supported by the evidence in record; (2) if incorrect legal principles were used; or (3) *if his application of the correct legal principles to the facts is clearly unreasonable.*"¹⁶⁵ Similarly, CAAF has held in a case reviewing the admission of expert testimony that "when judicial action is taken in a discretionary matter, such action cannot be set aside by a reviewing court unless it has a definite and firm conviction that the court below committed a clear error of judgment in the conclusion it reached upon a weighing of the relevant factors."¹⁶⁶ The CAAF has also stated that for mixed questions involving admission of expert testimony, "[a]s long as a military judge properly follows the appropriate legal framework, we will not overturn a ruling for an abuse of discretion unless it was 'manifestly erroneous.'"¹⁶⁷ Thus, in a case reviewing the military judge's admission of a physician's examination of a child victim, the court granted deference to the military judge's ruling and upheld it despite voicing some concerns about certain aspects of the ruling.¹⁶⁸ In all of these mixed question cases, the court granted the military judge significant deference in his or her application of the facts to the law.

¹⁶³ See, e.g., *United States v. Wicks*, 73 M.J. 93 (C.A.A.F. 2013); *United States v. Baker*, 70 M.J. 283, 287 (C.A.A.F. 2011).

¹⁶⁴ 68 M.J. 341, 344 (C.A.A.F. 2010).

¹⁶⁵ *Id.* at 344 (citing *United States v. Mackie*, 66 M.J. 198, 199 (C.A.A.F. 2008)) (emphasis added).

¹⁶⁶ *United States v. Houser*, 36 M.J. 392, 397 (C.M.A. 1993) (citation omitted).

¹⁶⁷ *United States v. Sanchez*, 65 M.J. 145, 149 (C.A.A.F. 2007) (quoting *United States v. Griffin*, 50 M.J. 278, 284 (C.A.A.F. 1999)).

¹⁶⁸ *Id.* at 153.

This willingness to grant deference to application of facts to law is not limited to cases involving the admission of expert testimony. In a government appeal of a military judge's ruling to suppress a urinalysis result – a mixed question – CAAF held that a military judge abuses his discretion “when his findings of fact are clearly erroneous, the court's decision is influenced by an erroneous view of the law, or the military judge's decision on the issue at hand is outside the range of choices reasonably arising from the applicable facts and the law.”¹⁶⁹ In another formula for analyzing application issues that indicates something other than a *de novo* standard, the court held that even when “the evidence in [the] record may well have supported the [military judge's] decision,” the military judge may nonetheless have abused his discretion where the military judge's ruling was based on a “misapprehension of the applicable law” and the military judge's findings failed to address the relevant considerations.¹⁷⁰

It is difficult to decipher a pattern as to when the military judge receives some deference in the application component of mixed questions and when he or she does not. Military appellate courts have not attempted to resolve their different pronunciations on this issue, and sometimes it is simply not clear which standard the court chooses.¹⁷¹ Occasionally, however, military courts have at least recognized that labeling the standard of review of mixed questions under the term “abuse of discretion” standard is confusing when the ultimate issue is usually reviewed *de novo*. In one case holding the appellant's Article 31 rights were not violated, Judge Sullivan of CAAF concurred based on his understanding that “use of the ‘abuse-of-discretion’ terminology to [such claims] does not accurately respond to the standard of review which this

¹⁶⁹ *United States v. Miller*, 66 M.J. 306, 307 (C.A.A.F. 2008) (citing *United States v. Gore*, 60 M.J. 178, 187 (C.A.A.F. 2004)).

¹⁷⁰ *United States v. Cokeley*, 22 M.J. 225, 229 (C.M.A. 1986).

¹⁷¹ *See, e.g., United States v. McCarthy*, 47 M.J. 162 (C.A.A.F. 1997). In this case, CAAF held that the issue of whether a pretrial prisoner suffered unlawful punishment presents a mixed question of law and fact, which qualifies for “independent review.” *Id.* at 165 (quoting *Thompson v. Keohane*, 516 U.S. 99 (1995)). The court then held that for “basic, primary, or historical facts” that essentially dictate the outcome of the military judge's ruling, such as purpose or intent to punish an accused, it would reverse only for a clear abuse of discretion. *Id.* (quoting *Thompson*, 516 U.S. at 109-113). Judge Effron, concurring, noted that he was not sure what standard of review the majority settled upon: “In this case, although the majority asserts that it is applying an ‘abuse of discretion’ standard, the majority's detailed analysis of the historical events reflects a *de novo* review.” *Id.* at 168 (Effron, J., concurring).

Court employs in reviewing suppression motions denied by military judges”:¹⁷²

A military judge has no discretion to admit an involuntary confession or one taken in violation of Article 31, Uniform Code of Military Justice; or one prohibited by *United States v. McOmber*, 1 M.J. 380 [(C.M.A. 1976)], or the version of Mil. R. Evid. 305 (e) . . . in effect at the time of trial; or one taken in violation of the Fifth or Sixth Amendment.

Admittedly, in *United States v. Ayala*, [43 M.J. 296, 298 (C.A.A.F. 1995)], this Court employed this umbrella term [abuse of discretion] in the suppression context. However, it specifically defined this term to include clearly-erroneous factfinding review and de novo legal determinations, which definition also applies to mixed questions of fact and law. I agree that these particular standards of review are appropriate for determining suppression-motion appeals. However, I do not believe “abuse of discretion” adequately captures the full breadth of the legal review required of this Court on such matters. On resolution of the legal questions raised in a suppression motion, we do not defer to a military judge’s discretion.¹⁷³

Judge Sullivan’s depth of explanation remains the exception rather than the rule. Normally appellate courts either do or do not grant deference to a military judge’s application of the facts to the law, without elucidation. Military case law would benefit from further exploration of this area. Consistent with the approach of some courts and commentators, mixed questions that involve a case-specific application of facts to well-settled law in a way that is unlikely to change the definition of a legal standard could receive some amount of deference, regardless of whether that application is labeled as a “conclusion of law.” Conversely, applications that ask the military judge to make a ruling with broader impact, such as a determination about whether a widely-used law enforcement tactic *per se* renders a confession involuntary, could be reviewed under scrutiny approaching a de novo standard. In this latter

¹⁷² *United States v. Payne*, 47 M.J. 37, 44 (C.A.A.F. 1997) (Sullivan, J., concurring).

¹⁷³ *Id.*

situation, a military judge's findings of fact will receive deference and will frame the legal issue to be decided, but the reviewing court will conduct its own application of the facts to the law to reach an independent decision. Of course there will be some cases that may lie in the middle of these two extreme types of mixed questions, in which case appellate counsel should be prepared to argue why a given case lies closer to one extreme than the other.

D. Military Appellate Courts Are Generally Less Deferential Than Their Civilian Counterparts in Employing the Abuse of Discretion Standard

Abuse of discretion involves a spectrum of deference, but as a general matter, the standard is supposed to be highly deferential to the trial judge's decision. An appellate court may uphold a decision under this standard even if it disagrees with that decision. In the military justice system, however, the principle of deference is less likely to influence the appellate court if it perceives an injustice has occurred that deserves remedying. The military justice system is often labeled "paternalistic," meaning appellate courts are more willing to protect the interests of the accused or a convicted servicemember than their civilian counterparts might be in an effort to ensure that the discipline aspect of the military justice system does not come at the expense of justice.¹⁷⁴ To be sure, there is support for the proposition that the military justice system has grown less paternalistic over time,¹⁷⁵ and in particular, it has been noted that CAAF has "increasingly settled" on an "overwhelmingly . . . narrow" approach to standards of review and may be heading to a point

¹⁷⁴ See, e.g., David A. Schlueter, *The Military Justice Conundrum: Justice or Discipline?*, 215 MIL. L. REV. 1, 39 (2013) ("Some have viewed the military justice system as being paternalistic"); Eugene R. Fidell, *Zen and the Jurisprudence of the U.S. Court of Appeals for the Armed Forces*, 54-MAY FED. LAW. 28, 29 (2007) ("[W]hat is the jurisprudence of the U.S. Court of Appeals for the Armed Forces? It continues to be one of paternalism"); *United States v. Sunzeri*, 59 M.J. 758, 762 (N-M. Ct. Crim. App. 2004) ("The military justice system, as it is currently designed and has developed – with its post-World War II philosophy, revisions, and implementation of the Uniform Code of Military Justice – is quite paternalistic in some regards, with its numerous built-in safeguards to protect the individual servicemember in his or her quest to navigate, in his or her best interests, the treacherous waters of military discipline.").

¹⁷⁵ See, e.g., Hon. Robinson O. Everett, *Specified Issues in the United States Court of Military Appeals*, 123 MIL. L. REV. 1, 5 (1989) (stating that "paternalism is on the wane" and referring to "a bygone era of paternalism in military justice"); *United States v. Rivera*, 44 M.J. 527, 530 (A.F. Ct. Crim. App. 1996) (suggesting the military justice system has grown less paternalistic in recent years).

in which it defers significantly more to trial court rulings than its civilian counterparts.¹⁷⁶ However, the fact remains that military appellate courts – particularly the service courts – sense a special responsibility to protect the system in actuality and in appearance. As a result, they may be inclined to grant less deference to the military judge than their civilian counterparts would regardless of the stated standard of review.

As will be discussed *infra*, the service courts of criminal appeals have broad authority under Article 66(c), UCMJ, to substitute their judgment for that of the military judge. But although CAAF does not enjoy this same authority and is therefore bound by the abuse of discretion standard when applicable,¹⁷⁷ and despite the appearance of embracing a narrower standard of review, CAAF has often demonstrated a willingness to pierce the deference afforded by the abuse of discretion standard. Despite a docket that results in only about 40 opinions annually in recent years,¹⁷⁸ CAAF typically issues several decisions each term finding that a military judge abused his or her discretion. Just since 2011, CAAF found that military judges abused their discretion by:

- Accepting an appellant’s guilty plea of possessing images of “nude minors and persons appearing to be nude minors” when the plea contained unresolved inconsistencies, and when the military judge failed to adequately elicit the appellant’s understanding of the distinction between criminal and constitutionally protected conduct and incorrectly stated the law.¹⁷⁹
- Admitting an accused’s statement to investigators without contextually analyzing whether he could and did knowingly and intelligently waive his right to counsel, and instead focusing solely on the question of voluntariness, and in addressing whether the accused’s waiver was knowing and intelligent solely as a conclusory finding of fact, rather than as a conclusion of law.¹⁸⁰

¹⁷⁶ Fidell, *Going on Fifty*, *supra* note 56, at 1224.

¹⁷⁷ *United States v. Cole*, 31 M.J. 270, 272 (C.M.A. 1990) (“This Court would be required to use an ‘abuse of discretion’ test should the military judge enjoy any discretion in his ruling.”).

¹⁷⁸ See *Annual Reports*, U.S. CT. OF APPEALS FOR THE ARMED FORCES (Apr. 1, 2015), http://www.armfor.uscourts.gov/newcaaf/ann_reports.htm.

¹⁷⁹ *United States v. Moon*, 73 M.J. 382 (C.A.A.F. 2014).

¹⁸⁰ *United States v. Mott*, 72 M.J. 319 (C.A.A.F. 2013).

- Admitting evidence under Military Rule of Evidence 413 of prior sexual assaults committed by the appellant for which he had previously been acquitted, without mentioning or reconciling the appellant's important alibi evidence and with little to no weight given to the fact of the prior acquittal.¹⁸¹
- Accepting the appellant's guilty plea to kidnapping a minor without questioning the defense counsel to ensure the appellant's knowledge of the sex offender registration consequences of her plea.¹⁸²
- Failing to excuse a member for actual bias after that member asked a question of a witness that suggested the member believed the accused was a pedophile.¹⁸³
- Admitting a green detoxification drink bottle as demonstrative evidence where the bottle had minimal to no probative value, the demonstrative evidence was not helpful, the bottle was not an accurate representation of bottles described by witnesses, and the bottle failed a balancing test under Military Rule of Evidence 403.¹⁸⁴
- Prohibiting a pretrial review of evidence of receipt of child pornography without sufficient justification, where the parties had agreed to such a review, and there was no argument that the scheduled pretrial review would have interfered in the trial proceedings.¹⁸⁵

This is not a complete list of CAAF's findings of abuse of discretion during this period. CAAF undoubtedly had valid reasons to find abuses of discretion in these cases, and there is no statistical comparison available to determine if CAAF is more willing to find an abuse of discretion than other similar courts (especially ones that enjoy discretionary review as does CAAF). However, it can safely be said that CAAF is not shy about exercising its "supervisory role as the highest court in the military justice system."¹⁸⁶ The CAAF has specifically recognized its responsibility to "continuously bear in mind that to perform its high function in the best way justice must satisfy the

¹⁸¹ United States v. Solomon, 72 M.J. 176 (C.A.A.F. 2013).

¹⁸² United States v. Riley, 72 M.J. 115 (C.A.A.F. 2013).

¹⁸³ United States v. Nash, 71 M.J. 83 (C.A.A.F. 2012).

¹⁸⁴ United States v. Pope, 69 M.J. 328 (C.A.A.F. 2011).

¹⁸⁵ United States v. Jones, 69 M.J. 294 (C.A.A.F. 2011).

¹⁸⁶ United States v. Dowty, 60 M.J. 163, 175 (C.A.A.F. 2004).

appearance of justice.”¹⁸⁷ By its own words, CAAF is willing to bend standards of review to prevent an unjust result and to protect the military justice system.¹⁸⁸

Military appellate courts have a special responsibility to protect the fairness of the military justice system, both in reality and in appearance. As a result, a deferential standard of review has not always prevented them from intervening to reach what they believe is a just result.

E. The Unique Authority of the Courts of Criminal Appeals Allows for Increased Appellate Scrutiny

A military judge’s findings of fact are reviewed under the clearly erroneous standard of review,¹⁸⁹ but as noted above, the clearly erroneous standard is often subsumed under the abuse of discretion standard for mixed questions. Many questions analyzed under the abuse of discretion standard involve findings of fact made by the military judge, and appellate review of findings of fact is typically exceedingly deferential to the trial judge. Therefore, CAAF has held that, in reviewing a military judge’s findings of fact, “[W]e will not substitute our judgment for that of the military judge who was present in the courtroom and familiar with the sense of what was happening at the time of the [events].”¹⁹⁰

However, the service-level courts of criminal appeals are empowered to do exactly what CAAF said it may not – to substitute their judgment for that of the military judge on findings of fact. For example, in *United States v. Cole*,¹⁹¹ the accused pled guilty to two specifications of committing indecent acts with two juvenile females; a pretrial agreement provided that the four remaining indecent-act specifications and one

¹⁸⁷ *United States v. Greatting*, 66 M.J. 226, 232 (C.A.A.F. 2008) (quoting *Liljeberg v. Health Services Acquisition Corp.*, 486 U.S. 847, 864 (1988)).

¹⁸⁸ *United States v. Blaylock*, 15 M.J. 190, 193 (C.M.A. 1983) (“In view of the policy clearly stated in Article 37[(a), UCMJ], we have never allowed doctrines of waiver to prevent our considering claims of improper command control. Indeed, to invoke waiver would be especially dangerous, since a commander willing to violate statutory prohibitions against command influence might not hesitate to use his powers to dissuade trial defense counsel from even raising the issue.”).

¹⁸⁹ *Ham*, *supra* note 27, at 17.

¹⁹⁰ *United States v. Travers*, 25 M.J. 61, 63 (C.M.A. 1987).

¹⁹¹ 31 M.J. 270 (C.M.A. 1990).

specification of sodomy with a juvenile female would be dismissed.¹⁹² In sentencing proceedings, the defense called an expert clinical psychologist to testify that lengthy confinement was not appropriate since the accused was amenable to out-patient treatment for his issues concerning sexual behavior with children. Trial counsel then cross-examined the expert about the progression of sexual activity that the accused had engaged in with the victims, and the expert's answers at least hinted at the misconduct referred to in the dismissed specifications.¹⁹³ Despite the defense counsel's objection, the military judge permitted the cross-examination. The Air Force court, in a 2-1 decision, found that the military judge erred in overruling the defense's objection.¹⁹⁴ The Judge Advocate General then certified for review by the Court of Military Appeals the question of whether the Air Force court failed to apply the appropriate abuse of discretion standard.

The Court of Military Appeals held that whether such rulings are reviewed under the abuse of discretion standard is irrelevant because service courts possess broad powers under Article 66(c) of the UCMJ¹⁹⁵ that allow a service court to "substitute its judgment" for that of the military judge. Therefore, the service court may review the admissibility of uncharged misconduct de novo even though the normal standard for review of this issue is abuse of discretion.¹⁹⁶ The service court may apply the normal abuse of discretion standard if it chooses, or it may elect not to do so, the court held.¹⁹⁷

Following *Cole*, service courts of criminal appeals on rare occasions have elected to exercise their Article 66(c) authority to substitute their judgment for that of the military judge even when the normal appellate standard of review is abuse of discretion.¹⁹⁸ Appellate practitioners

¹⁹² *Id.* at 270-71.

¹⁹³ *Id.* at 271.

¹⁹⁴ *United States v. Cole*, 29 M.J. 873 (A.F.C.M.R. 1989).

¹⁹⁵ 10 U.S.C. § 866(c) (2012).

¹⁹⁶ *United States v. Cole*, 31 M.J. 270, 272 (C.M.A. 1990).

¹⁹⁷ *Id.*

¹⁹⁸ *See United States v. Olean*, 56 M.J. 594 (C.G Ct. Crim. App. 2001) (electing not to apply the abuse of discretion standard to a military judge's ruling allowing the introduction of evidence of the victim's knowledge of the accused's uncharged misconduct but finding no error in substituting its judgment for that of the military judge). *Cf. United States v. Anderson*, 36 M.J. 963, 981 n. 29 (A.F.C.M.R. 1993) (warning military judges that explaining their balancing analysis regarding admissibility of uncharged misconduct threatens the deference they enjoy under the abuse of discretion

should always remember when advocating for a particular level of deference at the court of criminal appeals that these courts possess special powers “designed to benefit an accused.”¹⁹⁹ In fact, they have “*carte blanche* to do justice.”²⁰⁰ Following this lead, service courts have often stressed their willingness to right perceived wrongs, no matter how deferential the standard of review is.²⁰¹ In fact, the courts of criminal appeals’ broad authority allows them to act as “the proverbial 800-pound gorilla when it comes to their ability to protect an accused.”²⁰²

Article 66(c) of the UCMJ not only grants service-level military appellate courts the power to disregard standards of review, it also bestows up on them broad fact-finding authority to “weigh the evidence, judge the credibility of witnesses, and determine controverted questions of fact, recognizing that the trial court saw and heard the witnesses.”²⁰³ “This awesome, plenary, de novo power of review grants unto the [court of criminal appeals] authority to, indeed ‘substitute its judgment for that of the military judge.’”²⁰⁴ The statutory responsibility of the courts of criminal appeals under Article 66(c) is “one of the broadest and most unusual of any criminal appellate court in this country.”²⁰⁵

This authority is not unlimited. In granting the service courts fact-finding authority, “Congress intended a court of criminal appeals to act as factfinder in an appellate-review capacity and not in the first instance as a trial court.”²⁰⁶ A service court has “fact-finding power on collateral claims,” but it may not “determine innocence on the basis of evidence

standard, and “that deference need not be permanent” under the authority granted the service courts by the *Cole* decision).

¹⁹⁹ United States v. Smith, 39 M.J. 448, 451 (C.M.A. 1994).

²⁰⁰ United States v. Claxton, 32 M.J. 159, 162 (C.M.A. 1991).

²⁰¹ See, e.g., United States v. White, NMCCA 200200803 (N.M. Ct. Crim. App. 31 August 2006) (unpub. op.), at *6 (noting that although security determinations of confinement officials normally receive great deference on appeal, “we will not hesitate to hold the Government accountable” where such determinations are based on improper reasons); United States v. Harris, 34 M.J. 1213, 1216 (A.C.M.R. 1992) (noting that while admission of evidence under the Mil. R. Evid. 403 balancing test is normally “within the sound discretion of the trial court,” if the court’s mandate in Article 66(c), UCMJ, “requires us to reverse a case because of an erroneous discretionary ruling by the trial judge, then we will not hesitate to do so”).

²⁰² United States v. Parker, 36 M.J. 269, 271 (C.M.A. 1993).

²⁰³ 10 U.S.C. §866(c) (2012).

²⁰⁴ *Cole*, 31 M.J. at 272.

²⁰⁵ United States v. Bauerbach, 55 M.J. 501, 504 (A. Ct. Crim. App. 2001).

²⁰⁶ United States v. Ginn, 47 M.J. 236, 242 (C.A.A.F. 1997).

not presented at trial.”²⁰⁷ Therefore, if a court of criminal appeals wishes to rely upon information not presented at trial to establish particular facts, it often must resort to remanding the case to the trial level for a post-trial fact-finding hearing.²⁰⁸ In addition, the service courts may not find as fact any allegation in a specification for which the trial court found the accused not guilty.²⁰⁹ In general, however, courts of criminal appeals possess broad fact-finding authority not seen in other appellate courts:

Under [Article 66(c)], the basic character of review by the [Courts of Criminal Appeals] is both original and appellate. It is appellate because it involves a general power to examine and revise the judgment of a military or naval trial court, or court martial, an original-jurisdiction tribunal. It is original because the last two sentences of the statute explicitly empower the [courts of criminal appeals] to examine and determine *anew* both the facts of the case and the law, albeit from a written record only, in arriving at their own decisions independently of any trial-court determination of fact or law.²¹⁰

As a general matter, CAAF and the courts of criminal appeals employ the same standards of review. For example, both CAAF and all the service courts review a military judge’s denial of a motion for a mistrial for an abuse of discretion.²¹¹ However, the service courts can examine the factual findings underpinning the denial of a mistrial much more closely than can CAAF, leading to a greater basis for the courts of

²⁰⁷ *Id.*

²⁰⁸ *Id.* at 248 (setting forth principles to guide the courts of criminal appeals in deciding whether to order a post-trial fact-finding hearing when post-trial affidavits are filed); *United States v. DuBay*, 37 C.M.R. 411 (C.M.A. 1967) (recognizing the authority of the appellate courts to order a post-trial fact-finding hearing).

²⁰⁹ *United States v. Walters*, 58 M.J. 391, 395 (C.A.A.F. 2003); *see also* *United States v. Augspurger*, 61 M.J. 189, 192 (C.A.A.F. 2005); *United States v. Seider*, 60 M.J. 36, 38 (C.A.A.F. 2004).

²¹⁰ Hon. John Powers, *Fact Finding in the Courts of Military Review*, 44 BAYLOR L. REV. 457, 460 (1982).

²¹¹ *United States v. Coleman*, 72 M.J. 184, 186 (C.A.A.F. 2013); *United States v. Behenna*, 70 M.J. 521, 529 (A. Ct. Crim. App. 2011); *United States v. Dossey*, 66 M.J. 619, 629 (N.M. Ct. Crim. App. 2008); *United States v. Hughes*, 48 M.J. 700, 718 (A.F. Ct. Crim. App. 1998); *United States v. Bridges*, 58 M.J. 540, 549 (C.G. Ct. Crim. App. 2003).

criminal appeals to overturn trial court rulings. These courts exercise this authority judiciously, remaining aware that the military judge had the opportunity to personally see and hear the witnesses.²¹² Nevertheless, occasionally the courts of criminal appeals will employ their unique fact-finding authority to correct a military judge's findings of fact where CAAF could not. For example, in *United States v. Hynes*,²¹³ the Coast Guard court reviewed a military judge's ruling that the appellant's statements were voluntary. This determination was based on factual findings normally reviewed under a clearly erroneous standard. The Coast Guard court, however, observed that it possessed additional fact-finding authority that permitted it to "substitute its own judgment on factual issues."²¹⁴ Noting that the military judge was present and heard the witnesses, the court nonetheless exercised its broad fact-finding authority by weighing the evidence for itself to determine whether it agreed with the military judge's conclusion.²¹⁵ The court analyzed the evidence that formed the basis for the military judge's factual conclusions, stated that it was "persuaded differently on this particular issue," and overturned the military judge's ruling.²¹⁶

Where necessary, courts of criminal appeals will invoke their Article 66(c) authority to conduct their own independent fact-finding when reviewing other mixed questions under the abuse of discretion standard.²¹⁷ Normally, courts of criminal appeals will defer to the

²¹² See, e.g., *United States v. Ellis*, 54 M.J. 958, 964 (N-M. Ct. Crim. App. 2001) ("Although the military judge made essential findings of fact in ruling on the appellant's suppression motion, we are not bound by his findings under our Article 66(c), review authority. However, we are generally inclined to give such findings deference, so long as they are adequately supported by the evidence of record."); *United States v. Hall*, 54 M.J. 788, 789 (A.F. Ct. Crim. App. 2001) ("Although we are authorized to find facts under Article 66(c), we normally defer to the military judge unless his findings are clearly erroneous."); *United States v. Baldwin* 54 M.J. 551, 557 (A.F. Ct. Crim. App. 2000) (Young, J., concurring) (stating that the courts of criminal appeals "have the authority to perform our own fact-finding under Article 66(c) . . . , [but] we normally defer to the military judge's findings of fact").

²¹³ 49 M.J. 506 (C.G. Ct. Crim. App. 1998).

²¹⁴ *Id.* at 509.

²¹⁵ *Id.*

²¹⁶ *Id.* at 510. CAAF did not review the Coast Guard court's decision.

²¹⁷ See, e.g., *United States v. Weston*, 65 M.J. 774, 776 (N-M. Ct. Crim. App. 2007), *rev'd on rehearing*, 66 M.J. 544 (N-M. Ct. Crim. App. 2008) (reviewing a decision to admit evidence of a warrantless search of the accused's residence and adopting the military judge's finding of facts as not clearly erroneous, but noting that it would "invoke our authority under [Article 66(c), UCMJ] to supplement those facts from the record in order to resolve the issues before us."); *United States v. Benton*, 54 M.J. 717, 725 (A. Ct. Crim. App. 2001) (declining to apply an abuse of discretion standard to review of a

military judge's findings of fact unless they are clearly erroneous, but they possess the authority to invoke their fact-finding authority where appropriate and review the military judge's findings of fact under a less deferential standard. A mixed question that is highly fact-centric normally warrants considerable deference to the trial judge, but courts of criminal appeals need not simply defer to those findings of fact and may review the issue with little to no deference.

F. Government Interlocutory Appeals Involve a Special Class of Abuse of Discretion Review

The fact-finding authority enjoyed by the courts of criminal appeals does not exist when the government brings an interlocutory appeal of a ruling by the military judge. Under Article 62, UCMJ,²¹⁸ in any trial in which a punitive discharge may be adjudged, the United States may appeal certain orders or rulings such as a ruling that terminates the proceedings with respect to a charge or specification or that excludes evidence that is substantial proof of a fact material in the proceeding.²¹⁹ However, unlike the fact-finding authority in Article 66(c) of the UCMJ, Article 62(b) states, "In ruling on an appeal under this section, the Court of Criminal Appeals may act only with respect to matters of law"²²⁰

This exclusion of fact-finding authority significantly limits the intermediate appellate courts' review of military judges' factual determinations in interlocutory appeals. Where the court is limited to reviewing matters of law, "the question is not whether a reviewing court might disagree with the trial court's findings, but whether those findings are 'fairly supported by the record.'"²²¹ The court of criminal appeals may not find facts in addition to those found by the military judge, and must conclude that any factual finding by the military judge is "unsupported by the evidence of record or was clearly erroneous" in

military judge's ruling excluding evidence because the military judge failed to issue findings of fact, and finding the facts itself to uphold the military judge's ruling); *United States v. Agosto*, 43 M.J. 745, 748 (A.F. Ct. Crim. App. 1995) ("Where the military judge's findings are silent or clearly erroneous, we may exercise our statutory authority under [Article 66(c), UCMJ] and find the facts ourselves.").

²¹⁸ 10 U.S.C. § 862 (2012).

²¹⁹ 10 U.S.C. § 862(a)(1)(A), (B) (2012).

²²⁰ 10 U.S.C. § 862(b) (2012).

²²¹ *United States v. Gore*, 60 M.J. 178, 185 (C.A.A.F. 2004) (quoting *United States v. Burris*, 21 M.J. 140, 144 (C.M.A. 1985)).

order to overturn the finding.²²² Therefore, in reviewing government interlocutory appeals for issues decided under an abuse of discretion standard, the service court may not rely on its fact-finding authority to overturn a factual finding by the military judge. The overall standard of review may remain the same, but where factual determinations are involved, courts of criminal appeals are much more limited in their review and therefore are more deferential to military judges' rulings.

*United States v. Baker*²²³ provides an illustration of this limitation. In *Baker*, the military judge granted a motion to suppress evidence of an initial photo identification and later in-court identification made by the victim of the accused's alleged indecent exposure and assault. The military judge issued extensive findings of fact that summarized the manner in which the police conducted the photo identification, ruling that, under the Supreme Court's five-factor test for determining the admissibility of pretrial and in-court identifications,²²⁴ the photo identification was unnecessarily suggestive and subject to a substantial likelihood of misidentification.²²⁵

The Army Court of Criminal Appeals held the military judge's findings of fact were not clearly erroneous, but also held the military judge abused his discretion because he "committed a clear error of judgment in the conclusions [he] reached upon weighing of the relevant factors."²²⁶ In this respect, the court's holding would have been relatively unremarkable had it come in the context of an Article 66 appeal. Because this was an Article 62 appeal, however, CAAF reversed, expressing concern about the Army court's action. Noting that, when reviewing a ruling on a motion to suppress, the court considers the evidence in the light most favorable to the prevailing party at trial,²²⁷ CAAF held that this application of the facts to the law itself was reviewed under the clearly erroneous standard.²²⁸ In concluding that the military judge did not abuse his discretion, CAAF stated:

²²² *Id.*; *United States v. Middleton*, 10 M.J. 123, 133 (C.M.A. 1981).

²²³ 70 M.J. 283 (C.A.A.F. 2011).

²²⁴ *Neil v. Biggers*, 409 U.S. 188, 199-200 (1972).

²²⁵ *United States v. Baker*, 70 M.J. 282, 286 (C.A.A.F. 2011).

²²⁶ *Id.* at 287 (quoting *United States v. Baker*, ARMY MISC 20100841 (A. Ct. Crim. App. 7 March 2011) (unpub. op.)).

²²⁷ *Id.* at 288 (citing *United States v. Cowgill*, 68 M.J. 388, 390 (C.A.A.F. 2010)).

²²⁸ *Id.* at 291-92.

Even if another court may have drawn other findings based on the evidence, the military judge's decision cannot be reversed based on a mere difference of opinion or an impermissible reinterpretation of the facts by appellate courts. Further, the Army court's decision to vacate the military judge's ruling was based to a large degree on impermissible findings of fact.

...

Again, even if reasonable minds could differ about the application of the facts to the law, we cannot say that the military judge's decision to suppress the identifications was arbitrary or fanciful.²²⁹

The *Baker* decision may or may not represent an outlier holding, both in terms of the deference granted the military judge in the application portion of a mixed question and in the limitations it places on the courts of criminal appeals in overturning military judges' factual findings. Clearly, CAAF's decision was motivated in part by a concern that the Army court did not recognize its more limited role in interlocutory appeals. Nonetheless, service courts have cited the opinion numerous times to hold that they were restrained in their review of a military judge's ruling during a government interlocutory appeal.²³⁰ It seems apparent that when the courts of criminal appeal lack fact-finding authority, they are required to be at least somewhat more deferential to military judges' rulings, particularly where the military judge has issued detailed and supportable findings of fact.

²²⁹ *Id.* at 292. Judges Baker and Ryan dissented, in part based on the majority's application of the abuse of discretion standard. The dissenting judges opined that the military judge abused his discretion by omitting critical aspects of the victim's testimony from his review of the relevant factors, by misapplying the law to the facts, and by not following the appropriate structure for addressing situations that might raise the risk of misidentification. *Id.* at 292-95 (Baker and Ryan, JJ., dissenting).

²³⁰ *See, e.g.,* United States v. Cooper, Army Misc. 20110914 (A. Ct. Crim. App. 14 September 2012) (unpub. op.) ("It is neither fanciful nor clearly unreasonable to conclude that the government failed to scrupulously honor appellee's right to remain silent under the circumstances and failed to establish by a preponderance of the evidence that appellee's statements were voluntarily rendered."); United States v. Murray, NMCCA 201200295 (N-M. Ct. Crim. App. 21 August 2012) (unpub. op.) (rejecting the government's contention in an interlocutory appeal that the military judge misstated facts and misapplied the law in excluding evidence obtained during a search of the accused, and reviewing the military judge's ruling under a deferential standard).

G. The Abuse of Discretion Standard Does Not Cover Review of Decisions by the Courts of Criminal Appeals

Military judges receive substantial deference in their fact-finding under the clearly erroneous standard, and as detailed above, their application of the facts to the law in mixed questions sometimes receives a significant measure of deference as well. However, the appellate military judges of the courts of criminal appeals do not enjoy this same deference when their decisions are reviewed.

In *United States v. Siroky*,²³¹ the accused was accused of the rape and sodomy of his young daughter, among other offenses. When the child's mother reported the alleged abuse, a psychotherapist examined the child. The child eventually verbalized and demonstrated sexual abuse by the accused.²³² The prosecution sought to introduce the statements the child made to the psychotherapist, and the military judge admitted the statements as made for the purpose of obtaining medical diagnosis or treatment. The Air Force Court of Criminal Appeals reversed in part, holding that the military judge abused his discretion in admitting the hearsay statements.²³³ The Air Force court noted the lack of specific findings of fact concerning the child's expectation of promoting her well-being through the statements and held that, to the extent the military judge made such findings of fact, they were clearly erroneous.²³⁴

The acting Air Force Judge Advocate General certified the case to CAAF. The court quickly noted an "important question at the outset of this appeal," namely, "What is the standard of review regarding [the child's expectation of facilitating a diagnosis and treatment] – and to whose decision do we apply the standard?"²³⁵ The court reviewed a prior decision clearly stating that the existence of an actual expectation of receiving medical treatment on the part of the out-of-court declarant presents a question of fact, which is reviewed under the clearly erroneous standard, but noted that this decision left "somewhat cloudy whose

²³¹ 44 M.J. 394 (C.A.A.F. 1996).

²³² *Id.* at 397.

²³³ *United States v. Siroky*, 42 M.J. 707 (A.F. Ct. Crim. App. 1995).

²³⁴ *Id.* at 713.

²³⁵ *Siroky*, 44 M.J. at 398.

decision this court reviews – the military judge’s or the lower appellate court’s.”²³⁶ The court also noted that civilian intermediate appellate courts had struggled with this issue but seemed to generally substitute their judgment for that of the lower appellate court to directly review the trial judge’s ruling.²³⁷ The court then concluded that it would follow its normal course of action:

That is, when determining the correctness of the decision of the now-Court of Criminal Appeals, we typically have pierced through that intermediate level and have examined the military judge’s ruling for clear error; then, on the basis of that examination, we have decided whether the Court of Criminal Appeals was right or wrong in its own examination for clear error.²³⁸

Piercing through the court of criminal appeals’ ruling, CAAF nonetheless affirmed the Air Force court.²³⁹

The CAAF has continued this approach in a number of cases since *Siroky* and reviewed the trial court’s ruling without deference to the intermediate court’s opinion.²⁴⁰ It is not entirely clear, however, whether CAAF will *always* adopt this approach, or whether it might grant the courts of criminal appeals some deference when a mixed issue is fact-centric and the service appellate court has exercised its own fact-finding power. For instance, Judge Gierke, concurring in the *Siroky* decision, stated: “I agree that in most cases we must pierce the Court of Criminal Appeals’ decision and examine the military judge’s ruling, but I am concerned with the majority’s apparent lack of deference to the court below where it has exercised its independent fact-finding power.”²⁴¹ Normally, CAAF grants the service courts a great deal of independence

²³⁶ *Id.* at 398-99 (citing *United States v. Quigley*, 40 M.J. 64, 66 (C.M.A. 1994)).

²³⁷ *Id.* at 399 (quoting STEVEN ALAN CHILDRESS & MARTHA S. DAVIS, *FEDERAL STANDARDS OF REVIEW* (2d ed. 1992)).

²³⁸ *Id.*

²³⁹ *Id.* at 401.

²⁴⁰ See *United States v. Wuterich*, 67 M.J. 63, 70 (C.A.A.F. 2008); *United States v. Cabrera-Frattini*, 65 M.J. 241, 246 (C.A.A.F. 2007); *United States v. Rader*, 65 M.J. 30, 32 (C.A.A.F. 2007); *United States v. Stephens*, 64 M.J. 200 (C.A.A.F. 2006) (summary disposition); *United States v. Shelton*, 64 M.J. 32, 37 (C.A.A.F. 2006); *United States v. Feltham*, 58 M.J. 470, 474-75 (C.A.A.F. 2003); *United States v. Benner*, 57 M.J. 210, 212 (C.A.A.F. 2002); *United States v. Harris*, 55 M.J. 433, 438 (C.A.A.F. 2001).

²⁴¹ *Siroky*, 44 M.J. at 401 (Gierke, J., concurring in part and in the result).

in exercising their unique powers under Article 66(c).²⁴² Therefore, when a mixed question of fact and law particularly turns on a determination of some factual matter, it is possible the courts of criminal appeals may enjoy a considerable measure of deference in resolving the issue.²⁴³ However, in general terms, when applying the facts to the law, the service appellate courts apparently enjoy no such deference. As CAAF has stated, “Although a Court of Criminal Appeals has broad fact-finding power, its application of the law to the facts must be based on a correct view of the law.”²⁴⁴

H. Military Judges Can Take Certain Steps to Increase the Amount of Deference Their Rulings Enjoy

Military appellate courts are less likely to find an abuse of discretion exists when the military judge has thoroughly developed the record on an issue, cited the correct legal guidelines in reaching a ruling, and generally ruled on the matters before him or her in a logical, even-handed manner. For instance, CAAF has stated: “We do not expect record dissertations but, rather, a clear signal that the military judge applied the right law. While not required, where the military judge places on the record his analysis and application of the law to the facts, deference is clearly warranted.”²⁴⁵ Put more simply: “[A] reasoned analysis will be given greater deference than otherwise.”²⁴⁶ Appellate courts consistently cite to the thoroughness of a military judge’s ruling in

²⁴² See, e.g., *United States v. Winckelmann*, 73 M.J. 11, 15 (C.A.A.F. 2013) (noting the “broad discretion” the courts of criminal appeals possess when reassessing sentences, and noting that such reassessments would only be disturbed “in order to prevent obvious miscarriages of justice or abuses of discretion”) (quoting *United States v. Harris*, 53 M.J. 86, 88 (C.A.A.F. 2000)); *United States v. Brooks*, 49 M.J. 64, 69 (C.A.A.F. 1998) (holding that when considering a petition for a new trial, the courts of criminal appeals “are free to exercise . . . [t]heir fact-finding powers.’ The only limit on their fact-finding powers is that their ‘broad discretion must not be abused’”) (quoting *United States v. Bacon*, 12 M.J. 489, 492 (C.M.A. 1982)); *United States v. Brock*, 46 M.J. 11, 13 (C.A.A.F. 1997) (noting that CAAF does not possess the fact-finding authority of the courts of criminal appeals and therefore would examine the service courts’ decisions on sentence appropriateness for an abuse of discretion).

²⁴³ See *Wuterich*, 67 M.J. at 70 (noting that CAAF reviewed the military judge’s ruling directly without deference to the service court because “this case involves an issue of law that does not pertain to the unique fact-finding powers of the Court of Criminal Appeals”).

²⁴⁴ *United States v. Weatherspoon*, 49 M.J. 209, 212 (C.A.A.F. 1998).

²⁴⁵ *United States v. Downing*, 56 M.J. 419, 422 (C.A.A.F. 2002).

²⁴⁶ *United States v. Winckelmann*, 73 M.J. 11, 16 (C.A.A.F. 2013).

upholding rulings at trial. The following excerpts represent typical analysis where military appellate courts find no abuse of discretion in a military judge's ruling:

“We find no abuse of discretion in the military judge’s thorough, reasoned ruling.”²⁴⁷

“We commend the trial judge for setting out in detail his findings of fact and conclusions of law concerning this issue. We are in complete agreement with his ruling and find no abuse of discretion.”²⁴⁸

“In this case, the military judges made thorough and detailed findings of fact and their findings were amply supported by the evidence. . . . Accordingly, the military judges did not abuse their discretion in denying the appellant’s motion to suppress.”²⁴⁹

“[W]e find the military judge’s findings of fact and conclusions of law to be detailed, concise, and correct. We adopt them as our own, supplemented by our own careful review of the record. . . . We further find that the military judge’s rulings were fully supported by the evidence, and he did not abuse his discretion in ruling as he did.”²⁵⁰

When an appellate court is convinced that the military judge earnestly and meticulously considered the issue being appealed, the appellate court is less likely to find that an abuse of discretion occurred even if the appellate court might have ruled differently. Conversely, a military judge who fails to give a matter careful attention is more likely to be found to have abused his or her discretion, as the appellate court will more closely scrutinize the ruling. The Army Court of Criminal Appeals summarized this principle as follows:

²⁴⁷ United States v. Hudgins, ACM 38305 (A.F. Ct. Crim. App. 3 April 2014) (unpub. op.).

²⁴⁸ United States v. Daniels, 23 M.J. 867, 868 (A.C.M.R. 1987).

²⁴⁹ United States v. Koebele, ACM 37381 (A.F. Ct. Crim. App. 2010) (unpub. op.). The reference to more than one military judge is correct, because the military judge was replaced during the proceedings due to a scheduling conflict.

²⁵⁰ United States v. Savoy, 65 M.J. 854, 857 (A.F. Ct. Crim. App. 2007).

When the standard of review is abuse of discretion, and we do not have the benefit of the military judge's analysis of the facts before him, we cannot grant the great deference we generally accord to a trial judge's factual findings because we have no factual findings to review. Nor do we have the benefit of the military judge's legal reasoning in determining whether he abused his discretion²⁵¹

Likewise, CAAF has repeatedly found that a military judge abused his discretion, not because the decision reached was wrong but because the military judge's analysis was insufficient. In *United States v. Cokeley*,²⁵² the court held a military judge's determination that a witness was unavailable constituted an abuse of discretion. The court observed that the evidence in the record might have supported the military judge's ruling given "the substantial discretion reposed in the military judge" on this issue.²⁵³ However, the court concluded that the military judge either misapprehended the law or did not weigh the relevant considerations because his ruling lacked sufficient detail for the appellate court to have confidence that the military judge correctly understood the law and considered the correct factors.²⁵⁴ Likewise, in another case, CAAF held that a military judge abused his discretion by admitting an accused's statements without first "contextually analyzing" whether the appellant could and did knowingly and intelligently waive his right to counsel.²⁵⁵ The court declined to decide whether the appellant did in fact knowingly and intelligently waive his right to counsel; rather the court held that the military judge's abuse of discretion lay in his lack of analysis.²⁵⁶

Recently CAAF provided an excellent example of this principle. In *United States v. Flesher*,²⁵⁷ the court considered whether the military judge abused his discretion when he allowed a sexual assault response

²⁵¹ *United States v. Benton*, 54 M.J. 717, 725 (A. Ct. Crim. App. 2001) (citations omitted); *see also* *United States v. Reinecke*, 30 M.J. 1010, 1015 (A.F.C.M.R. 1990) ("Without a proper statement of essential findings, it is very difficult for an appellate court to determine the facts relief upon, whether the appropriate legal standards were applied or misapplied, and whether the decision amounts to an abuse of discretion or legal error.").

²⁵² 22 M.J. 225 (C.M.A. 1986).

²⁵³ *Id.* at 229.

²⁵⁴ *Id.* at 229-30.

²⁵⁵ *United States v. Mott*, 72 M.J. 319, 321 (C.A.A.F. 2013).

²⁵⁶ *Id.* at 326.

²⁵⁷ 73 M.J. 303 (C.A.A.F. 2014).

coordinator (SARC) to testify as an expert witness at trial. A divided court found an abuse of discretion existed, and the majority's analysis focused on the defects in the military judge's handling of the issue. The court found "the military judge did not handle in a textbook manner the issues of whether the SARC was truly an expert, the subject and scope of her testimony, whether her testimony in this case was relevant and reliable, and whether its probative value outweighed its potential prejudicial effect."²⁵⁸ The military judge, CAAF found, failed to rule on matters presented to him, failed to thoroughly articulate his rationale for allowing the expert testimony, failed to develop the record by exploring the SARC's testimony in an Article 39(a), UCMJ, session, and failed to stop the government when the SARC's testimony exceeded the limits the military judge had established. The court, therefore, was "left with a limited understanding of the military judge's decision-making process and, accordingly, [gave] his decisions in this case less deference than [it] otherwise would."²⁵⁹ Conducting its own review of the matter under scrutiny approaching de novo review, CAAF reversed the military judge and set aside the findings of guilty on the aggravated sexual assault charge to which the SARC testified.²⁶⁰

The abuse of discretion standard can significantly protect a military judge's rulings from reversal. To receive the full benefit of this standard, though, a military judge must convince the appellate court that he or she thoroughly, logically, and fairly considered the matter at issue. When the military judge does so by developing the record, issuing supported findings of fact, correctly citing the relevant legal authorities, and reaching a conclusion that falls within a range of reasonable decisions, the abuse of discretion standard will generally favor upholding the military judge's ruling. Where the military judge fails to take these steps, the appellate court will view the military judge's ruling with more

²⁵⁸ *Id.* at 307.

²⁵⁹ *Id.* at 312.

²⁶⁰ *Id.* at 318. Chief Judge Baker dissented from the opinion, finding that the military judge did not abuse his discretion under the liberal standard of admission granted expert testimony. However, he did acknowledge that "the record is succinct and sometimes hurried on how the military judge applied the [relevant] factors." *Id.* at 319 (Baker, C.J., dissenting). Judge Ryan separately dissented, stating that the military judge's actions were even worse than the majority concluded but finding no prejudice from the error. Judge Ryan complained that the military judge wholly failed to act as the "gatekeeper" on this matter, stating, "The standards for gatekeeping and admissibility are low, but they are not nonexistent – a military judge engaging in no inquiry under the applicable law, even though asked to, and relying entirely on past experts who testified in other cases, is not enough." *Id.* at 324 (Ryan, J., dissenting).

scrutiny. Commentators have noted the same tendency in civilian appellate courts. An appellate court “will not tolerate an exercise of discretion when the trial tribunal fails to explain its reasons. Findings adequate to permit meaningful review of the trial court’s exercise of discretion are essential.”²⁶¹

I. Abuse of Discretion Review is Inherently Tied to the Issue of Prejudice

Article 59 of the UCMJ prohibits military appellate courts from holding a finding or sentence incorrect on the ground of a legal error unless the error materially prejudices the substantial rights of the accused.²⁶² Therefore, appellate courts often assume error because the matter can be more easily settled by finding a lack of material prejudice.²⁶³ The requirement to demonstrate material prejudice “recognizes that errors are likely to occur in the dynamic atmosphere of a trial, and that prejudice must be shown before reversing the findings or sentence.”²⁶⁴

The requirement to demonstrate prejudice is not unique to the military justice system, and like the abuse of discretion standard of review, it reflects the reality that errors take place in trials. Even constitutional errors do not necessarily require reversal so long as the error is a “trial error”; that is, one “which occurred during the presentation of the case to the jury, and which may therefore be quantitatively assessed in the context of other evidence presented in order to determine whether its admission was harmless beyond a reasonable doubt.”²⁶⁵ The harmless-error doctrine preserves the “principle that the central purpose of a criminal trial is to decide the factual question of the defendant’s guilt or innocence, and promotes public respect for the criminal process by focusing on the underlying fairness of the trial rather than on the virtually

²⁶¹ Casey et al, *supra* note 135, at 28.

²⁶² 10 U.S.C. § 859(a) (2012).

²⁶³ See, e.g., United States v. Allende, 66 M.J. 142, 145 (C.A.A.F. 2008) (assuming error in appellate delay by finding no prejudice resulted); United States v. Seider, 60 M.J. 36, 41 (C.A.A.F. 2004) (“Even assuming error in the military judge’s instructions to the members, such action did not materially prejudice Appellant.”); United States v. Glover, 53 M.J. 366, 368 (C.A.A.F. 2000) (assuming error in the military judge overruling defense objections and admitting accused’s prior state convictions during sentencing proceedings but finding any such error did not result in prejudice).

²⁶⁴ United States v. Davis, 64 M.J. 445, 449 (C.A.A.F. 2007).

²⁶⁵ Arizona v. Fulminante, 499 U.S. 279, 307-08 (1991).

inevitable presence of immaterial error.”²⁶⁶ Only when an error is “structural,” “affecting the framework within which the trial proceeds, rather than simply an error in the trial process itself,” is prejudice presumed.²⁶⁷

The abuse of discretion test is distinct from the requirement to demonstrate material prejudice to a substantial right of the appellant. The Air Force court has recognized this: “[A]t least in the context of rulings on evidence, ‘abuse of discretion’ only measures the extent to which the appellate court disagrees with the ruling of the trial judge. Article 59(a), UCMJ, . . . requires that we evaluate the impact of that ruling in light of all the other evidence properly admitted.”²⁶⁸ However, the two tests are related and easily mixed. For example, CAAF has stated in the context of a denial of a continuance that an abuse of discretion exists when “‘reasons or rulings of the’ military judge are ‘clearly untenable and . . . deprive a party of a substantial right such as to amount to a denial of justice’”²⁶⁹ This formulation of the abuse of discretion standard was originally limited to review of a denial of a continuance, but military appellate courts have occasionally cited it as the applicable standard in their review of other issues reviewed under the abuse of discretion standard as well.²⁷⁰ Occasionally, military appellate courts use the conflated term “prejudicial abuse of discretion” to describe the standard by which they review a military judge’s ruling.²⁷¹

²⁶⁶ *Delaware v. Van Arsdall*, 475 U.S. 673, 681 (1986).

²⁶⁷ *Fulminante*, 499 U.S. at 310.

²⁶⁸ *United States v. Simmons*, 44 M.J. 819, 823 (A.F. Ct. Crim. App. 1996).

²⁶⁹ *United States v. Weisbeck*, 50 M.J. 461, 464 (C.A.A.F. 1999) (quoting *United States v. Miller*, 47 M.J. 352, 358 (1997)) (further citations and quotations omitted).

²⁷⁰ *See, e.g.*, *United States v. Flesher*, 73 M.J. 303, 311 (C.A.A.F. 2014) (reviewing military judge’s decision to permit sexual assault response coordinator to testify as expert witness); *United States v. Travers*, 25 M.J. 61, 62 (C.M.A. 1987) (reviewing military judge’s decision not to close trial to the public upon motion of an accused); *United States v. Moore*, 55 M.J. 772, 781 (N.M. Ct. Crim. App. 2001) (reviewing military judge’s determination to take judicial notice); *United States v. Laborde*, No. 200001654 (N.M. Ct. Crim. App. 31 October 2003) (unpub. op.) at *4 (reviewing military judge’s decision to admit evidence).

²⁷¹ *See, e.g.*, *United States v. Meghdadi*, 60 M.J. 438, 442 (C.A.A.F. 2005) (overturning a military judge’s denial of a defense motion for a post-trial evidentiary session to examine allegations of misconduct by a government witness, finding that “the military judge’s reasons and rulings were clearly untenable and that they constitute a prejudicial abuse of discretion”); *United States v. True*, 41 M.J. 424, 427 (C.A.A.F. 1995) (finding “no prejudicial abuse of discretion” in the military judge’s decision to exclude evidence of the accused’s alleged peaceable nature); *United States v. Munoz*, 32 M.J. 359, 360 (C.M.A. 1991) (“We find no prejudicial abuse of discretion by the military judge in this case and affirm.”).

Many rulings of the military judge reviewed under the abuse of discretion are, practically speaking, beyond the scope of appellate review because such rulings are extremely unlikely to result in material prejudice to a substantial right of the accused. For example, a military judge's ruling on an objection to the use of leading questions is unlikely to be overturned, not just because such a ruling receives substantial discretion but because such rulings are extremely unlikely to result in material prejudice.²⁷² Military appellate courts can dispose of an issue by assuming an abuse of discretion occurred but find that it was harmless. Both for expediency's sake and the desire to avoid ruling on issues they need not reach, courts often do so. It should be apparent that the reverse is also true: matters that are more likely to impact the outcome of a trial will be viewed more closely precisely because they are so important. The Supreme Court has recognized this, holding that a trial judge may receive more deference based on "the liability produced by the District Judge's decision."²⁷³ Where a ruling carries with it "substantial consequences, one might expect it to be reviewed more intensively."²⁷⁴

IV. Conclusion: The Need for Greater Attention to the Abuse of Discretion Standard in Military Appellate Practice

Study of these nine propositions should provide a deeper understanding regarding how the abuse of discretion standard of review plays out in military appellate practice. Abuse of discretion is a generic label that actually encompasses review of several distinct types of issues. As a result, the term does not represent one immovable level of deference but actually a flexible spectrum of discretion offered to trial judges. Despite the fact that mixed questions make up a large percentage of appellate issues, military appellate courts struggle along with their civilian counterparts in developing a coherent framework for determining when trial judges' application of the law to the facts receives some

²⁷² See *United States v. Yerger*, 3 C.M.R. 22, 24 (C.M.A. 1952) (finding "[r]epeated violations of fundamental rules of evidence [that] cannot be condoned" but noting: "Isolated and minor errors in receiving hearsay testimony and using leading questions appear in many criminal trials, both civilian and military, and ordinarily such deviations would not be substantially prejudicial and hence would not concern us as an appellate court").

²⁷³ *Pierce*, 487 U.S. 552, 563 (1988).

²⁷⁴ *Id.*

measure of deference. As a general matter, military appellate courts are likely to be less deferential to trial court rulings than their civilian counterparts. The unique fact-finding authority of the intermediate service courts of criminal appeals partially accounts for this increased level of scrutiny. This fact-finding authority, however, does not carry over to government interlocutory appeals, which represent their own category of abuse of discretion review. Despite the fact-finding authority generally possessed by the service courts, their decisions do not receive deference on review by CAAF. Military judges can increase the amount of deference their rulings receive by issuing thorough rulings that accurately cite relevant legal provisions. Finally, issues may receive closer or lesser scrutiny based on the likelihood that the decision affected the outcome of the trial, meaning the abuse of discretion standard is inherently linked to the requirement to demonstrate prejudice.

A tenth observation rounds out this analysis: better appellate advocacy and more detailed judicial analysis is necessary to properly flesh out the abuse of discretion standard. Venturing behind the “abuse of discretion” curtain is not for the faint of heart. Exploring the intricacies of the standard is difficult, tricky work. Closer attention may lead to the conclusion that the phrase has been misapplied, requiring an upsetting of precedent. It may not lead to more questions than definitive answers. Painstaking work may be necessary to specify exactly what the appellate court is being asked to do, what are the reasons why it should grant the lower court more or less discretion, and how to define that discretion into a workable formula. Advocates and courts may need to take on the seemingly-unsolvable mixed questions dilemma. However, it is critical that appellate practitioners and courts roll up their sleeves and address the abuse of discretion standard to a degree they have not yet explored.

The hard work would be worth it. Consider the following two hypothetical examples (citations omitted) that address the standard of review for a military judge’s decision to admit evidence over a Military Rule of Evidence 403 objection:

1: A military judge’s decision to admit or deny evidence is reviewed for an abuse of discretion. The abuse of discretion standard is a strict one, calling for more than a mere difference of opinion. The challenged action must be arbitrary, fanciful, clearly unreasonable, or clearly erroneous.

2: A military judge's decision to admit or deny evidence is generally reviewed for an abuse of discretion. "Abuse of discretion" is a broad term used to describe review of a variety of trial-level rulings. While definitions of the exact degree of deference afforded trial judges under the abuse of discretion standard differ, the standard generally recognizes that appellate courts are willing to uphold the trial court's ruling even if the appellate court disagrees with the ruling to some extent. A number of factors support the need to grant trial judges with deference. Here, two reasons indicate this court should grant the military judge considerable deference. First, Military Rule of Evidence 403 is intended to afford the military judge considerable latitude to ensure the fairness and flow of trial proceedings. A military judge who is immersed in trial proceedings has a better sense of the "flow" of the trial and how the proffered evidence would affect the proceedings than the appellate court could have. Second, rulings under Military Rule of Evidence 403 involve a well-established legal test and are by necessary implication fact-specific. The exact contours of the rule are not easily subject to appellate guidance, and must be shaped at the trial level by military judges on the basis of the facts before them. Therefore, this court should not upset the military judge's ruling on this issue unless it finds the military judge's ruling was arbitrary, fanciful, clearly unreasonable, or clearly erroneous. The military judge thoroughly and logically analyzed this issue, offering this court a solid understanding of his ruling and providing even more reason for this court to grant significant deference to his ruling. Even assuming error, the military judge's ruling resulted in no material prejudice, meaning this court need not closely scrutinize this ruling. Nothing about this ruling was so unjust to warrant this court exercising its Article 66(c) authority to review the military judge's decision without deference.

The first example is typical of appellate briefs and decisions in the military justice system. The second represents a degree of analysis not often seen but that would better inform appellate decision-making.

Military courts and counsel must consciously decide to more comprehensively explore the abuse of discretion standard. The standard forms the backdrop behind many of the appellate decisions that shape the law of military justice. It covers fundamental matters of division of power within the military judiciary and who is best qualified to make certain kinds of decisions. Given the standard's crucial role in military appellate case law, appellate counsel and judges should be motivated to clearly define what the standard means and when and how it is used. A

decision to better define the abuse of discretion standard would result in increased confidence in appellate decision-making, better advocacy, and more predictability. Such a decision is supportable under even the most exacting standard of review.