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Developments in Evidence III—The Final Chapter

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Introduction

Like Sylvester Stallone,[1] my life appears to revolve around sequels. For example, I've driven five different Japanese cars, endured two "Inside the Beltway" assignments, and indulged four super-model marriages.[2] Continuing the trend, this article is the third in a series detailing developments in the law of evidence.[3] Granted, evidence is the purest of the trial arts,[4] so one cannot help but get excited about the subject. For those practitioners who rely on these symposiums for their annual fix of criminal law, 1997 was a very good year for evidence junkies.

Back to the Future: Taking Advantage of the Accused's Post-Offense Misconduct

Most cases decided under Military Rule of Evidence (MRE) 404(b)[5] concern activities that occurred before the crime charged.[6] What about crimes, wrongs, or acts committed after the accused has allegedly committed the charged offense; does this make the evidence especially suspect? In other words, does Rule 404(b) exclude acts subsequent to the incident giving rise to the charge(s)? This was precisely the question posed in *United States v. Latney.*[7]

In September 1994, a two-hour undercover videotape captured Gregory Latney driving a blue Lincoln Continental to and from his mother's house. A passenger in the car eventually sold crack cocaine to a police informant.[8]

In May 1995, more than eight months later, the police found crack, baggies, and money in the car, and Latney was arrested for aiding and abetting the earlier distribution. Over defense objection, the trial court admitted this evidence to show Latney's intent and knowledge in September 1994.[9] In appealing his conviction, Latney argued that evidence of crack-related activities occurring after the charged offense was not relevant. The U.S. Court of Appeals for the D.C. Circuit disagreed.

The court noted that Rule 404(b) itself draws no distinction between bad acts committed before and bad acts committed after a charged offense.[10] In each case, the question the rule poses is whether the evidence is relevant to something other than the accused's character. The fact that Latney used his Lin-

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1. Hollywood screen legend, dilettante, and star of such cinematic tours de force as: *Stop! Or My Mother Will Shoot, Tango and Cash, Italian Stallion, The Lords of Flatbush, Rhinestone, Death Race 2000,* and *F.I.S.T.* Alright, so film noir it's not, but his movies have grossed over two billion dollars.

2. Wait, that's where our lives differ.

3. *See* Major Stephen R. Henley, *Postcards From the Edge: Privileges, Profiles, Polygraphs, and Other Developments in the Military Rules of Evidence*, ARMY LAW., Apr. 1997, at 92; Major Stephen R. Henley, *Developments in Evidence Law,* ARMY LAW., Mar. 1996, at 96.

4. With due deference to my learned colleagues in the Criminal Law Department, past and present, who have taught the Fourth, Fifth, and Sixth Amendments, if you can't get it in, it just doesn't matter.

5. Rule 404(b) provides:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

MANUAL FOR COURTS-MARTIAL, UNITED STATES, MIL. R. EVID. 404(b) (1995) [hereinafter MCM].

6. *See, e.g.*, United States v. Miller, 46 M.J. 63 (1997) (admitting multiple prior sexual contacts with another child to show intent to molest present victim); United States v. Lake, 36 M.J. 317 (C.M.A. 1993) (admitting ten previous incidents of drug sales to show intent to distribute); United States v. Ryder, 31 M.J. 718 (A.F.C.M.R. 1990) (admitting threat two months before charged maiming to show intent and absence of mistake).

7. 108 F.3d 1446 (D.C. Cir. 1997). Though a federal circuit court decision, the case has some precedential value for the military practitioner because MRE 101 provides that, "[i]f not otherwise prescribed in this *Manual* or these rules, and insofar as practicable and not inconsistent with or contrary to the code or this *Manual*, courts-martial shall apply . . . the rules of evidence generally recognized in the trial of criminal cases in the United States district courts." MCM, *supra* note 5, MIL. R. EVID. 101(b)(1).

8. *Latney,* 108 F.3d at 1448.

9. *Id.*

coln in May 1995 to facilitate drug trafficking made it more likely that he was doing the same thing eight months earlier.[11] In other words, it was more likely with the evidence that Latney was knowledgeable about the drug trade in September 1994 than without it. As the court noted, it is true that knowledge could have been gained after September, but that possibility went to the strength and weight of the evidence, not its relevancy.[12] So long as an item of evidence has *any* tendency to make the existence of a fact of consequence more or less probable, it is relevant.[13] "[W]hen it comes to relevancy, there is no sliding scale;"[14] the evidence is either relevant or not, and relevant evidence is admissible.[15]

Latney's value to trial counsel goes well beyond the use of uncharged misconduct offered under MRE 404(b). Consider the court's rationale when the defense injects the issue of the accused's character into the case. If, for example, the defense has introduced opinion or reputation evidence of the accused's good military character,[16] the trial counsel may well be able to impeach that evidence with evidence of specific instances of post-offense misconduct. Like MRE 404(b), nothing in MRE 405(a) limits evidence to acts which occurred before the date of the charged offense.[17] Similar to the issue in *Latney*, the question regarding cross-examination of character witnesses with post-offense misconduct is one of relevancy.[18] If, for example, the accused was a bad soldier or a poor duty performer after the date of the charged offense, it is more likely that he was a bad soldier or a poor duty performer on the date of the charged offense.[19] As such, an accused's post-offense misconduct is relevant to testing the knowledge and qualifications of a witness who gives a good character opinion, as well as the credibility of his testimony. Of course, depending on the circumstances of the case, the defense can, and should, argue that the probative value of using post-offense misconduct to challenge a character witness' opinion is substantially outweighed by the danger of unfair prejudice to the accused.[20]

"No Mas!! No Mas!!"[21] Defense Concessions to Uncharged Misconduct Evidence

It is a legal truism that relevant evidence is admissible; irrelevant evidence is not.[22] However, otherwise relevant evidence may still be excluded if its probative value is substantially outweighed by its unfair prejudicial effect.[23] In balancing the probative value of a piece of evidence against the danger of unfair prejudice, the military judge considers any number of factors,[24] to include the availability of alternative modes of proof, such as

10. *Id.* at 1449.

11. *Id.*

12. *Id.* at 1448.

13. MCM, *supra* note 5, MIL. R. EVID. 401. "Relevant evidence means evidence having *any* tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." *Id.* (emphasis added).

14. *Latney*, 108 F.3d at 1449.

15. *See* MCM, *supra* note 5, MIL. R. EVID. 402. *See also* United States v. Olivo, 69 F.3d 1057 (10th Cir. 1995) (observing that evidence of subsequent acts is highly probative when the disputed issue is intent, even though the accused engaged in the conduct one year after the charged offense); United States v. Corona, 34 F.3d 876 (9th Cir. 1994) (concluding that a drug customer list found in a wallet 11 months after the arrest cast doubt on asserted ignorance of drug transactions).

16. *See* MCM, *supra* note 5, MIL. R. EVID. 404(a)(1) (indicating that the accused is entitled to introduce evidence of his own pertinent character traits to show that it is less likely that he committed the charged offense).

17. "In all cases in which evidence of character or a trait of character of a person is admissible, proof may be made by testimony as to reputation or by testimony in the form of an opinion. *On cross-examination, inquiry is allowable into relevant specific instances of conduct.*" *Id.* MIL. R. EVID. 405(a) (emphasis added). Likewise, Rules 413 and 414 now permit the government, in cases in which the accused is charged with sexual assault or child molestation, to introduce evidence of the accused's commission of other offenses of sexual assault or child molestation for consideration on any matter to which they are relevant. *Id.* MIL. R. EVID. 413, 414. There is no requirement that the other acts precede the date of the charged offense. *See id.*

18. *See* United States v. Brewer, 43 M.J. 43, 47 (1995) (holding that cross-examination of defense character witness is limited to "relevant" instances of conduct).

19. Similarly, if an accused who is charged with aggravated assault has introduced character testimony regarding his peaceful nature, cross-examination regarding specific instances of post-offense violence offered to challenge the credibility of the witness' opinion would be relevant.

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

21. In November 1980, "Sugar" Ray Charles Leonard regained the WBC welterweight championship of the world when Roberto "Hands of Stone" Duran quit in the middle of the eighth round of a scheduled 15 round boxing match, by raising his hands and crying "No Mas!! No Mas!!" (No More!! No More!!).

22. "All relevant evidence is admissible. Evidence which is not relevant is not admissible." MCM, *supra* note 5, MIL. R. EVID. 402.

23. *Id.* MIL. R. EVID. 403.

defense stipulations and concessions to elements of the crime. Last year's evidence article discussed the case of *United States v. Crowder*[25] and queried whether an accused could concede elements of the charged offense and thereby preclude the government from introducing uncharged misconduct evidence under MRE 404(b).[26]

In *Crowder*, the United States Court of Appeals for the D.C. Circuit reversed the convictions of the two defendants and issued a narrow exception to Rules 404(b) and 403, holding that an accused may effectively remove from consideration evidence of other crimes, wrongs, or acts that is relevant to the intent element of a charged offense by unequivocally conceding that element at trial.[27] The court held that concession, coupled with an explicit instruction that the government need not prove that element,[28] gave the government everything it was looking for—arguably making the evidence devoid of any probative value.[29] However, as the court noted, even if the evidence retained some degree of probative value, it certainly was now substantially outweighed by the potential for the jury to unfairly rely on the evidence's tendency to show propensity.[30]

Since last April's year-in-review article, the Supreme Court summarily vacated the judgment in *Crowder* and remanded[31] the case for further consideration in light of *Old Chief v. United States*.[32] Though this action may be the death knell for defense concessions,[33] the Court's holding in *Old Chief* was limited to an unrelated issue regarding exclusion of the names and nature of prior offenses in cases involving prosecutions under 18 U.S.C. § 922(g)(1)[34] and not uncharged misconduct offered under Rule 404(b), the issue in *Crowder*. Unfortunately for the defense, Justice Souter, in writing for the majority, observed that "when a court balances the probative value against the unfair prejudicial effect of evidentiary alternatives, the court must be cognizant of and consider the [government's] need for evidentiary richness and narrative integrity in presenting a case."[35] He further acknowledged that "the accepted rule that the prosecution is entitled to prove its case free from any defendant's option to stipulate the evidence away rests on good

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24. These factors may include: the degree of similarity between the charged offense and the uncharged act, the importance of the fact to be considered, the importance of hearing from the accused, and the ability of the panel to adhere to a limiting instruction. *See* MICHAEL GRAHAM, HANDBOOK OF FEDERAL EVIDENCE 176-78 (3d ed. 1991).

25. 87 F.3d 1405 (D.C. Cir. 1996) (en banc). The case was a consolidated review of two separate cases in which both defendants, Crowder and Davis, were convicted of various drug distribution offenses.

In *Crowder*, three police officers in a marked car observed Rochelle Crowder exchange a small object for cash with another man. They motioned to Crowder, who began to run away. One of the pursuing policemen saw Crowder throw down a brown paper bag as he scaled a fence; the bag contained 93 ziplock bags of crack and 38 packets of heroin. In a search incident to arrest, the officers seized a pager and $988 in cash. Crowder denied ever possessing the bag, and his first trial ended in a hung jury after Crowder testified that the police beat him and falsely accused him of possessing the drugs when he refused to talk with them about an unrelated murder. Defense witnesses thereafter convinced the jury that the object passed was actually a cigarette and the large amount of cash was to purchase some home supplies. The beeper was to communicate with the mother of his daughter, as he had no phone. At the retrial, the prosecutor gave notice that he intended to offer evidence that Crowder had previously sold drugs to an undercover officer, to prove Crowder's knowledge of drug dealing and to prove the intent to distribute element of the charged offense. Crowder responded by offering to concede every element of the crime, except whether he possessed the drugs on the day of the arrest. The judge refused to bind the government's hands and admitted the evidence over defense objection. *Id.* at 1406.

In *Davis*, an undercover officer wanting to buy crack walked up to man standing on a Washington, D.C. street corner. The cop handed over $20, and the man walked over to another man sitting in a nearby car, an alleged drug dealer named Horace Davis. The cash was exchanged for a small packet, and the man walked back toward the undercover officer. The man placed the packet on a window ledge and motioned for the undercover officer to retrieve it. The officer complied and subsequently radioed descriptions for both men. Davis was arrested coming out of a nearby grocery store minutes later. At trial, Davis intended to raise a mistaken identification defense and subpoenaed the store owner as an alibi witness. The prosecutor gave notice that he intended to introduce evidence that Davis had sold cocaine three times before the charged offense, evidence intended to show knowledge of drug dealing and to prove the intent to distribute element of the charged offense. Davis then offered to concede that the person who possessed the drugs knew they were drugs and intended to sell them. He claimed, however, that it was not he. The judge admitted the evidence over defense objection. *Id.* at 1407-08.

26. *See* Henley, *Postcards from the Edge*, *supra* note 3, at 96.

27. *Crowder*, 87 F.3d at 1410-11.

28. For example, in a possession with intent to distribute cocaine case where the trial counsel wants to introduce evidence of prior acts on the issues of knowledge and intent, this sample instruction could follow the judge's instructions on the elements of the offense:

> By the accused's agreement, the government need not prove either knowledge or intent. Your job is thus limited to the possession element of the crime. Therefore, in order to meet its burden of proof, the government must prove beyond a reasonable doubt only one element of the crime, that the accused was in possession of the cocaine alleged in the charge and specification. You must find the accused guilty of possession with intent to distribute cocaine if you find that the government has proven beyond a reasonable doubt that the accused possessed the drugs.

29. *Crowder*, 87 F.3d at 1414.

30. *Id.*

31. *United States v. Crowder*, 117 S. Ct. 760 (1997).

sense."[36] This observation, coupled with the remand in *Crowder*, may lead to the inevitable conclusion that the government will not be bound by defense offers to concede elements for which Rule 404(b) misconduct is offered and may prove each element of a charged offense by any means it chooses. That issue, however, has not yet been specifically addressed by either the Supreme Court or the Court of Appeals for the Armed Forces (CAAF).[37]

Defense counsel should remain vigilant and still debate whether an offer to concede element(s) of the charged offense to preclude the admission of uncharged misconduct is in their clients' best interests. Counsel should at least have the military judge perform the Rule 403 balancing analysis on the record. At worst, she will simply deny the motion.[38] At best, she may exercise some of that judicial discretion inherent in all Rule 403 determinations and grant it, finding that the concession is a legitimate alternative mode of proof.[39]

Methods of Proving Character . . . and More

Character evidence is generally not admissible to show that a person acted in conformity on a particular occasion.[40] There are, however, several important exceptions.[41] One is that the accused is given the right to introduce evidence of his character.[42] The accused also has the option of introducing pertinent character traits of the victim of the charged offense.[43] Additionally, the credibility of any witness may be impeached or reha-

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32. 117 S. Ct. 644 (1997). After a fight in which shots were fired, Johnny Lynn Old Chief was charged with, inter alia, violating 18 U.S.C. § 922 (for being a felon in possession of a firearm) and aggravated assault. Old Chief offered to stipulate to the fact that he had been previously convicted of a felony, arguing that relating the name and nature of the prior conviction, aggravated assault, would result in the jury concluding that he was, by propensity, the probable perpetrator of the charged offense. *Id.* at 646. The government refused to join the stipulation and instead insisted on its right to present evidence of the prior conviction, an element of one of the offenses. The district court agreed with the government's position, and the Ninth Circuit affirmed. The Supreme Court granted certiorari and reversed. *Id*. at 647. The Court held that a district court abuses its discretion under Federal Rule of Evidence 403 if it spurns a defendant's offer to concede a prior conviction and admits the full judgment and record over objection, when the name and nature of the prior offense raise the risk that the jury will improperly consider the evidence and when the purpose of the evidence is solely to prove the prior conviction element of the charged offense. *Id*. at 647-56. As a result of *Old Chief*, if the only reason for introducing the details of a prior felony is to prove the prior conviction element of a prosecution under 18 U.S.C. § 922(g)(1), and the accused fully admits to the existence of the prior conviction, it is an abuse of the trial court's discretion under Rule 403 to reject the accused's offer to substitute the admission in its place. *Old Chief v. United States*, 61 Crim. L. Rep. (BNA) 3117 (Aug. 20, 1997).

33. As of 23 March 1998, the D.C. Circuit has yet to issue an opinion on remand.

34. This statute criminalizes the possession of a firearm by an unauthorized person, and is nominally referred to as "a felon in possession of a firearm."

35. *Old Chief*, 117 S. Ct. at 651.

36. *Id.* at 654.

37. Consider the case of *United States v. Orsburn*, 31 M.J. 182 (C.M.A. 1990), *cert. denied*, 498 U.S. 1120 (1991), in which the accused was charged with indecent acts with his eight-year-old daughter. The trial counsel offered into evidence three pornographic books found in Orsburn's bedroom to show an intent to gratify his lust or sexual desires, an element of the charged offense. Orsburn objected, arguing that the offenses never happened; but if they did, whoever did them, by their very nature, did so with the intent to gratify his lust and sexual desires. The military judge admitted the evidence anyway. Then-Chief Judge Sullivan, writing for the majority in affirming the conviction, held that the military judge did not abuse his discretion in balancing the probative value of the books against the danger of unfair prejudice to the accused. Importantly, Chief Judge Sullivan noted that Orsburn "had refused to commit himself on the issue of intent or provide any assurances that he would not dispute intent." *Id.* at 188.

38. *See* Louis A. Jacobs, *Evidence Rule 403 After United States v. Old Chief*, 20 AM. J. TRIAL ADVOC. 563 (1997).

39. The substantial impediment facing defense counsel now with regard to evidence of other acts is the impact of Military Rules of Evidence 413 and 414 and the admissibility of evidence of other offenses of sexual assault and child molestation on the issue of the accused's propensity or predisposition to commit such offenses. *See infra* notes 86-130 and accompanying text. It is unclear how an accused could concede the purpose for which the evidence appears to be offered, as this concession may necessarily require an admission that the accused is predisposed to, or has the propensity to engage in, sexual assault or child molestation, not a strategy recommended for most people accused of a crime.

40. The rationale behind the rule is made clear in *Michelson v. United States*:

> The [character] inquiry is not rejected because character is irrelevant; on the contrary, it is said to weigh too much with the jury and to overpersuade them as to prejudge one with a bad general record and deny him a fair opportunity to defend against a particular charge. The overriding policy of excluding such evidence, despite its admitted probative value, is the practical experience that its disallowance tends to prevent confusion of issues, unfair surprise, and undue prejudice.

335 U.S. 469, 482 (1948).

41. STEPHEN A. SALTZBURG ET AL., FEDERAL RULES OF EVIDENCE MANUAL 318 (6th ed. 1994).

42. Evidence of a person's character is not admissible to prove that the person acted in conformity, except that the accused can offer evidence of a pertinent character trait. MCM, *supra* note 5, MIL. R. EVID. 404(a)(1). *See* United States v. Gagan, 43 M.J. 200 (1996) (defining character as the exhibition of a pattern of repetitive behavior which is either morally praiseworthy or condemnable).

bilitated through the introduction of evidence of the character trait for truthfulness.[44]

While MRE 404(a) delineates the circumstances in which evidence of a person's character is admissible, MRE 405 recognizes the three devices available to prove it:[45] (1) reputation within a pertinent community;[46] (2) opinion of a witness who is familiar with the person's character; and (3) specific instances of conduct, if character is an essential element of the offense or defense.[47] In *United States v. Schelkle*,[48] the CAAF provided some insight, albeit limited, concerning just when character is an essential element of the offense or defense.

Major Kurt Schelkle, an Air Force officer, was charged with using marijuana, an allegation which he denied. At his trial, the military judge prohibited the defense from introducing specific instances of conduct to bolster a good soldier defense.[49] The CAAF affirmed the findings and sentence, finding no abuse of judicial discretion and holding that the observation of general good conduct or duty performance is not probative of an essential element of a good soldier defense.[50] In other words, "character" is not an essential element of a good military character defense such that it may be proven by specific instances of the accused's good conduct.[51] That is, perhaps, a logical result,[52] but the court does not adequately explain why.

Character may itself be an essential element of a charge or defense and thus, in the strict sense, be "at issue." In view of the crucial role of character in these cases, it may be proven by evidence of specific acts.[53] To implement this rule intelligently, however,[54] the courts generally have held that character is "at issue" only when it is an operative fact which determines the rights of the parties.[55] In other words, only when the existence or nonexistence of the trait *itself* establishes guilt or innocence will character qualify as an "essential" element.[56] If it does not, any evidence as to character should be limited to reputation and/or opinion testimony under MRE 405(a).

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43. For example, an accused who is charged with aggravated assault can introduce evidence of the victim's character for violence or aggressive behavior to support a theory of self-defense. The rule also contains a limited exception for the government in homicide or assault cases. The trial counsel can introduce evidence of the character trait of peacefulness of the victim to rebut any evidence introduced by the defense that the victim was an aggressor. MCM, *supra* note 5, MIL. R. EVID. 404(a)(2).

44. *Id.* MIL. R. EVID. 404(a)(3).

45. *See* MICHAEL H. GRAHAM & EDWARD D. OHLBAUM, COURTROOM EVIDENCE: A TEACHING COMMENTARY 312 (1997).

46. *See* United States v. Reveles, 41 M.J. 388 (1995) (interpreting "community" broadly to include patrons at officer's club bar).

47. STEPHEN A. SALTZBURG ET AL., MILITARY RULES OF EVIDENCE MANUAL 569 (4th ed. 1997). Military Rule of Evidence 405(b) provides that prior instances of conduct may be used to prove or to rebut character where character or a trait of character operates as an essential element of a charge, claim, or defense—in other words, when character is "at issue." MCM, *supra* note 5, MIL. R. EVID. 405(b).

48. 47 M.J. 110 (1997).

49. *Id*. at 111. Schelkle offered the evidence not under MRE 405(a) but under MRE 405(b) as evidence of a character trait which was an essential element of his defense—good military character. *Id.* The evidence consisted of several letters in which the authors each professed that the accused never used drugs in their presence, more accurately described by the court as specific instances of nonconduct. *Id*.

In *Michelson v. United States*, Justice Jackson had harsh words regarding the use of character evidence in general:

> To thus digress from evidence as to the offense to hear a contest as to the standing of the accused, at its best opens a tricky line of inquiry as to a shapeless and elusive subject matter. At its worst it opens a veritable Pandora's box of irresponsible gossip, innuendo, and smear.

335 U.S. 469, 478 (1948). He reasoned, however, that reputation and opinion evidence is preferable to evidence of the defendant's specific acts, because it avoids "innumerable collateral issues which, if it were attempted to prove character by direct testimony, would complicate and confuse the trial, distract the minds of jurymen, and befog the chief issues in the litigation." *Id.* at 480.

50. *Schelkle*, 47 M.J. at 112.

51. This result makes sense when one considers it in the context of existing rules. If character is used circumstantially to prove that a person acted in conformity, proof is limited to reputation and opinion testimony. The logical relevance of the good soldier defense argument in this case was that Major Schelkle was a good soldier at the time the witness knew him, he remained a good soldier thereafter, he was a good soldier on the date of the offense, and good soldiers do not use drugs. Character here is being used circumstantially to prove conduct; a person can use drugs but still be a good duty performer. Proving conduct through the circumstantial use of character is limited to reputation and opinion testimony.

52. *See* United States v. Kahan, 479 F.2d 290, 293 (2d Cir. 1973), *rev'd on other grounds*, 415 U.S. 239 (1974) (holding that evidence of prior performance of official duty without taking bribes is inadmissible in bribery prosecution); United States v. Bono, 324 F.2d 582 (2d Cir. 1963) (holding that specific occasions of accused's honorable conduct are inadmissible to support character for honesty, veracity, and trustworthiness).

53. *See* EDWARD W. CLEARY, MCCORMICK ON EVIDENCE 551-52 (3d ed. 1984).

54. So as not to deflect focus of the trial to collateral issues regarding character.

In *Schelkle*, proof that Major Schelkle exhibited the trait of good military character would not, *by itself*, have established that he did not use marijuana on the charged date; it is beyond doubt that a person can be a good duty performer and still abuse drugs. As existence of the trait of good military character would not *by itself* determine guilt or innocence of the parties, but simply be used as circumstantial proof of conduct, each witness was properly limited to offering his opinion relating reputation within the pertinent community regarding Major Schelkle's military character. The military judge was well within his discretion in not allowing the witness on direct examination to relate the specific reasons or conduct forming the basis of his testimony.[57]

In reality, character as an essential element of a charge or defense will rarely arise.[58] For example, consider an accused who is charged with voluntary manslaughter[59] and who has uncovered evidence, of which he was heretofore unaware, that the victim has a checkered past replete with a number of particularly obstreperous and vicious attacks on innocent civilians, evidence certainly helpful to the accused's case. Because a victim's character for violence is not an essential element of self-defense, the military judge would be within his discretion in prohibiting the accused from introducing those specific acts of violence under MRE 405(b).[60] Simply stated, a claim of self-defense can be resolved without evidence of or reliance upon the victim's character. As long as the accused reasonably apprehended that death or grievous bodily harm was about to be inflicted upon him and the means or force used were necessary for protection against death or grievous bodily harm, a claim of self-defense can be made.[61] Proof of the victim's character for violence, though helpful, would not, *by itself*, determine the ultimate issues in the case, reasonable apprehension and necessary means.[62] Thus, an assault victim's character for violence, or the accused's character for peacefulness for that matter, is not an essential element of self-defense, and proof of that trait is limited to reputation and opinion testimony.[63]

The only realistic circumstance in military practice when character will arguably be "at issue" is when character is offered to prove or to disprove the accused's predisposition to commit the crime following the raising of an entrapment defense.[64] In this situation, the accused typically admits to committing the crime, but the suggestion to do so originated with the government; in other words, the accused was entrapped. Arguably, as proof of the existence or nonexistence of the trait of predisposition to commit the crime would, by itself, determine the efficacy of the entrapment defense,[65] character could be considered an essential element, such that admissibility of specific acts to show a lack of predisposition would be proper.[66]

Speedbumps on the Road to Conviction: Limitations on Rebutting Evidence of Good Military Character

Generally speaking, the government cannot introduce character evidence to show that the accused acted in accordance with a particular character trait on a given occasion—in other words, that the accused must have committed the charged offense because he is a certain type of person.[67] The prosecution can, however, introduce character evidence responsively.[68] If the accused introduces evidence of a pertinent[69] character[70] trait, trial counsel may rebut it by cross-examining the witness with respect to specific instances of conduct or other bad acts in which the accused engaged.[71] In *United States v. Pruitt*,[72] the

55. *See, e.g.*, State v. Lehman, 616 P.2d 63, 66 (Ariz. 1980) (defining "essential" character trait as an operative fact which, under the substantive law, determines the rights and liabilities of the parties); West v. State, 576 S.W.2d 718, 719 (Ark. 1979) (holding that the defendant's peaceful character is not an essential element of self-defense). In a tort case which alleges negligent entrustment of an automobile to an incompetent driver, the plaintiff must show as part of his case that the defendant was aware of the incompetence; proof of specific acts of incompetence is admissible. *See* McClellen v. State, 570 S.W.2d 278 (Ark. 1978).

56. When character is viewed circumstantially to prove that a person acted in conformity with the character trait, only opinion and reputation are acceptable forms of proof, not evidence of specific instances of conduct. *See* Perrin v. Anderson, 784 F.2d 1040, 1045 n.4 (10th Cir. 1986). If, for example, a plaintiff sues for slander because the defendant called him a liar and the defendant defends on the basis that the plaintiff is in fact a liar, the plaintiff's character as a truthful person is an essential element of the defense, such that evidence of specific instances of lies are admissible. *See* WIGMORE, EVIDENCE, §§ 202, 207 (3d ed. 1940).

57. If, however, the trial counsel opens the door and cross-examines a defense character witness concerning awareness of any specific instances of misconduct which are probative of the trait offered, the defense counsel should certainly be able to rehabilitate the witness on redirect by asking the witness to relate the specific reasons which form the basis of his opinion. To do otherwise would mischaracterize the state of the evidence and leave the panel with the impression that the witness' testimony had no basis in fact at all. *See generally* MCM, *supra* note 5, MIL. R. EVID. 401, 611(a).

58. Considering that the Eighth Amendment prohibits the criminalization of a person's status, character will rarely (if ever) be an essential element of an offense. *See* Robinson v. California, 370 U.S. 330 (1962). Two examples where character may be viewed as an essential element of an offense are: (1) when the accused is charged with the common law crime of seduction, the victim's chastity is an element of the offense and (2) in a defamation action, the victim's reputation for honesty is directly at issue when the accused has called him dishonest. *See* MICHAEL H. GRAHAM, HANDBOOK OF FEDERAL EVIDENCE § 404.2 (3d ed. 1991).

59. *See* UCMJ art. 119 (West 1995).

60. *See* United States v. Keiser, 57 F.3d 847 (9th Cir. 1995) (holding that the accused's character for peacefulness is not an essential element of self-defense such that proof can be made by specific acts of conduct under Federal Rule of Evidence 405(b)).

61. MCM, *supra* note 5, R.C.M. 916(e)(1).

62. In more colloquial terms, a Hare Krishna can still be convicted of aggravated assault, and a Hell's Angel biker can still legitimately claim self-defense.

CAAF reaffirmed existing limitations on the methods trial counsel can use to rebut a good soldier defense.

Airman First Class Martell Pruitt was a postal clerk who was charged with under-reporting the sale of two money orders (for $1000 less than their actual value) and falsifying documents to cover it up.[73] Pruitt admitted to falsifying one of the money orders with the help of his then-girlfriend, Sarah, but claimed that it was meant as a paperwork joke on his supervisor.[74] As evidence of his innocence, Pruitt called several witnesses who testified as to their high opinions of his military character. On cross-examination, the trial counsel asked the witnesses whether they were aware that Pruitt had taped a sexual act with Sarah without her knowledge and threatened to send the tape to her mother, that Pruitt had assaulted Sarah on occasion, and that he had also been caught driving while intoxicated (DWI).[75]

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63. For example, when introducing evidence of a character trait of the victim in an assault case pursuant to MRE 404(a)(2), the examination would follow something like this:

> Defense Counsel: Do you know the victim in this case, PFC _____?
> Witness: Yes. She's been my next door neighbor for two years, and we work in the same motor pool.
> Defense Counsel: During the time you've known her, have you formed an opinion regarding her character for violence?
> Witness. Yes.
> Defense Counsel: What is that opinion?
> Witness: It is my opinion that PFC _____ is an extremely violent and aggressive woman.
> Defense Counsel: Thank you. No further questions.

Similarly, when introducing evidence of a pertinent character trait of the accused in a larceny case pursuant to MRE 404(a)(1), the examination would follow something like this:

> Defense Counsel: Are you familiar with my client's reputation for honesty and trustworthiness within the Fort Bragg community?
> Witness: Yes I am. I've talked to a number of individuals myself and have heard other people talking as well.
> Defense Counsel: What is his reputation?
> Witness: He has a reputation for being honorable, forthright, and of the highest integrity.

64. When the defense raises entrapment, the accused makes his character an essential trial issue. Trial and defense counsel may thus introduce specific instances of conduct which are probative of predisposition to determine whether criminal intent or design originated with the government. *See* United States v. Thomas, 134 F.3d 975 (9th Cir. 1998). *See* SALTZBURG, *supra* note 47, at 573 (indicating that character might be an element of a defense if entrapment is claimed and the government (or defense) wants to prove (or to disprove) predisposition).

65. If the accused was not predisposed, he is not guilty. If he was predisposed, he is guilty.

66. This evidence could be other specific instances in which the accused was tempted to sell drugs and chose not to do so.

67. *See* GLEN WEISSENBERGER, FEDERAL EVIDENCE—1996 COURTROOM MANUAL 48 (1996); *see also* United States v. Reed, 44 M.J. 825 (A.F. Ct. Crim. App. 1996) (prohibiting trial counsel from initiating evidence of the accused's character by simply cross-examining regarding a pertinent character trait not already placed in issue by the defense). *But see* MCM, *supra* note 5, MIL. R. EVID. 413, 414 (providing that, in cases of sexual assault or child molestation, evidence of the accused's commission of other sexual assault or child molestation offenses is admissible for its bearing on any relevant matter).

68. SALTZBURG, *supra* note 47, at 320. "The price a defendant must pay for attempting to prove his good name is to throw open the entire subject which the law has kept closed for his benefit and to make himself vulnerable where the law otherwise shields him." Michelson v. United States, 335 U.S. 469, 492 (1948).

69. Whether a trait is pertinent depends on the relationship between the trait offered and the charged offense. *See, e.g.*, United States v. Gagan, 43 M.J. 200 (1996) (observing that heterosexual orientation is a character trait in prosecution for homosexual-related assault); United States v. Brown, 41 M.J. 1 (1994) (admitting evidence of the accused's strong opposition to use of drugs and alcohol as a matter of religious principle as character evidence in drug use case); United States v. Clemons, 16 M.J. 44 (C.M.A. 1983) (treating character for lawfulness as pertinent to barracks larceny charges); United States v. Stanley, 15 M.J. 949 (A.F.C.M.R. 1983) (identifying character for morality as pertinent trait in trial for indecent acts and liberties with a child under the age of 16).

70. Character has been defined by the military courts as the exhibition of a pattern of repetitive behavior, which is either morally praiseworthy or condemnable. United States v. Gagan, 43 M.J. 200 (1996).

71. Trial counsel can test the soundness of opinion testimony through inquiry into relevant specific instances of conduct, even though they may fall outside of the time period upon which the witness bases his opinion. *See* United States v. Brewer, 43 M.J. 43 (1996).

72. 43 M.J. 864 (A.F. Ct. Crim. App. 1996), *aff'd*, 46 M.J. 148 (1997).

73. *Id.* at 149.

74. *Id.*

75. *Id.* at 150.

While the witnesses agreed that all of these acts would tend to show poor military character, they testified that they did not know if the allegations of the trial counsel were in fact true. Not satisfied with these responses, the trial counsel called Sarah to authenticate the tape and to corroborate the assault, and he introduced a copy of an Article 15 Pruitt received for the DWI offense.[76] The CAAF found error, though harmless, under the circumstances.[77]

When challenging a good soldier defense, a trial counsel can either call his own reputation and opinion character witness in rebuttal or *inquire* on cross-examination as to the witness' familiarity with specific instances of the accused's conduct.[78] "Inquiry" means what it says—asking questions of the witness while on the stand. Counsel may not, however, introduce extrinsic proof that the acts or events actually occurred,[79] unless the extrinsic proof is offered for a purpose other than to rebut character testimony.[80] In *Pruitt*, the trial counsel properly asked whether the witnesses were aware of the prior acts, but the military judge erred by permitting him to call Sarah to corroborate both the assault and videotaping and by permitting him to introduce extrinsic proof of the DWI.

As the lower court noted, even though trial counsel are allowed to ask questions on cross-examination regarding familiarity with pertinent acts of misconduct,[81] defense counsel must recognize that the focus should be on the accused's conduct and not on any disciplinary action taken by the command against him.[82] Here, the trial counsel should have focused on the conduct underlying the arrest for assault on Sarah and not on the arrest itself; the focus should have been on the act of driving while intoxicated and not on the imposition of Article 15 punishment.[83] The arrest and the imposition of Article 15 punishment reflect government conduct taken in response to what Pruitt did or may have done, not conduct of Pruitt himself. As the Air Force court intimated, other disciplinary actions in an accused's personnel files, such as bars to reenlistment, letters of reprimand, and counseling statements, can be similarly characterized.[84] If used to challenge the opinion of a defense character witness, trial counsel should focus on the underlying facts and circumstances that brought about the action and not on the actual record of any subsequent punishment.[85]

Scorching the Character Landscape: Propensity Evidence in Sexual Assault and Child Molestation Cases

Representative of election year rhetoric to "get tough on crime,"[86] Congress promulgated Federal Rules of Evidence 413 and 414[87] pursuant to the Violent Crime Control and Law

76. *Id.*

77. *Id.*

78. "In all cases in which evidence of character is admissible, proof may be made by testimony as to reputation or by testimony in the form of an opinion. On cross-examination, inquiry is allowable into relevant specific instances of conduct." MCM, *supra* note 5, MIL. R. EVID. 405(a).

79. For example, a character witness who offers a favorable opinion as to the accused's good military character may be asked whether she knew that the accused had assaulted his first sergeant three months before the charged offense. If the witness did not know, the implication is that she is not sufficiently qualified to attest to the accused's character. If she did know, but still had a favorable opinion, the witness herself is suspect, and the panel should discount her opinion. If the witness doubts that the assault happened, or denies it outright, however, the trial counsel is still bound by either response and cannot call the first sergeant to prove that the assault actually happened or introduce extrinsic evidence detailing its circumstances.

80. For example, MRE 608(c) permits a witness to be impeached with evidence of bias, prejudice, or motive to misrepresent one's testimony. MCM, *supra* note 5, MIL. R. EVID. 608(c). Because this evidence may be introduced through the examination of witnesses or "by evidence otherwise adduced," extrinsic evidence is plainly allowed. SALTZBURG, *supra* note 47, at 743. For example, assume that the defense character witness testified that the accused was a peaceful person. On cross-examination, the trial counsel asks the witness if he owes the accused $1500 from an unpaid gambling debt. The witness denies the debt. As this evidence goes directly to the witness' bias and motivation to testify favorably in this case, namely to satisfy the unpaid debt, the trial counsel is not stuck with the denial and can introduce independent proof that the debt actually exists. In this case, the evidence is admissible because it is offered under MRE 608(c), not MRE 405(a). *See* United States v. Aycock, 39 M.J. 727 (N.M.C.M.R. 1993) (treating a government witness' loss of $195 to the accused as evidence of bias and motive to testify falsely).

81. Trial counsel must have a good faith belief that the conduct occurred, and the conduct must relate to the trait that was offered on direct examination. *See* United States v. Robertson, 39 M.J. 211 (C.M.A. 1994) (holding that a rap sheet alone is insufficient to furnish a good faith basis, absent underlying facts and circumstances which detail the arrest).

82. *Pruitt*, 43 M.J. at 868.

83. *Id.*

84. *Id.* at 870.

85. *Id.* at 868.

86. *See Symposium on the Violent Crime Control and Law Enforcement Act of 1994*, 20 U. DAYTON L. REV. 557 (1995). The Congressional act which promulgated the new rules also authorized billions of dollars for police, crime prevention, and prisons; contained a ban on so-called "assault weapons"; included a federal "three-strikes-and-you're-out" provision; and added dozens of death penalty offenses. *See* Bill McCollum, *The Struggle for Effective Anti-Crime Legislation—An Analysis of the Violent Crime Control and Law Enforcement Act of 1994*, 20 U. DAYTON L. REV. 561-565 (1995).

Enforcement Act of 1994.[88] They became effective for federal courts on 10 July 1995. By operation of MRE 1102,[89] these rules have been part of the military rules since 6 January 1996.[90] In general terms, the new rules liberalize the admissibility of character evidence in cases which involve sexual assault or child molestation offenses. Specifically, trial counsel may now offer evidence of the accused's commission of other sexual assault or child molestation offenses for consideration by the fact finder "on any matter to which it is relevant,"[91] including the accused's propensity to commit the charged crime.[92]

Rules 413 and 414 provide a specific admissibility standard for evidence of other acts in sexual assault and child molestation cases, and the rules are intended to supersede the limiting features of Rules 404(a) and (b), which generally prohibit the use of character evidence to show that the accused has the propensity to commit the charged offense.[93] Rules 413 and 414 now permit evidence of other instances of misconduct as proof of, inter alia, the accused's proclivity, predisposition, or predilection to engage in sexual assault and child molestation.[94] The rules also appear to render admissible what was heretofore excludable—character evidence in the form of specific acts introduced on a theory that a person who has engaged in earlier offenses is more likely to have acted true to form in the instance which underlies the current charge, precisely the inference forbidden by a long tradition of evidence law.[95] There were a number of questions regarding the new rules,[96] and the appellate courts have begun to provide some answers.

Does Military Rule of Evidence 403 Apply?

It was unclear whether the military judge retained the discretion under the new rules to exclude otherwise relevant sexual assault and child molestation evidence as unduly prejudicial. While existing rules provided for such balancing, the new rules contained neither mandatory language[97] nor a special balancing test.[98] Given that the rules simply stated that evidence "is admissible,"[99] scholars initially questioned a trial judge's authority even to apply Rule 403.[100] In a series of recent federal court cases, however, it is clear that evidence otherwise admissible under Rules 413 and 414 may nonetheless be excluded

87. Federal Rule of Evidence 413 pertains to evidence of similar crimes in sexual assault cases. Federal Rule of Evidence 414 pertains to evidence of similar crimes in child molestation cases.

88. The Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, 108 Stat. 1796-2151 (1994).

89. Amendments to the Federal Rules of Evidence automatically become part of the Military Rules of Evidence 180 days after the effective date of such amendments. MCM, *supra* note 5, MIL. R. EVID. 1102. A proposed amendment to MRE 1102 will change the 180-day effective date to 18 months. Telephone Interview with Lieutenant Colonel William M. Mayes, Army Representative, Joint Service Committee on Military Justice Working Group (Jan. 7, 1998).

90. Military Rules of Evidence 413 and 414 were adopted as written; therefore, they are identical to their Federal Rule counterparts. A number of technical modifications have been proposed by the Joint Service Committee to tailor the rules to military practice. The proposed changes would reduce the 15-day notice requirement to 5 days; substitute military offenses under the Uniform Code of Military Justice for federal offenses; and exclude adultery and consensual sodomy as qualifying offenses under Rule 413. The substance of the rules, however, which allow consideration of other offenses of sexual assault and child molestation on the issue of propensity, has not changed. The proposed versions are expected to be adopted without further change. Appendix A to this article contains the text of the proposed versions of Rules 413 and 414. *See* SALTZBURG, *supra* note 47, at 614-23.

91. MCM, *supra* note 5, MIL. R. EVID. 413(a), 414(a).

92. *See* Mary Katherine Danna, *New Federal Rules of Evidence 413-415: The Prejudice of Politics or Just Plain Common Sense*, 41 ST. LOUIS U. L.J. 277, 279 (1996).

93. *See* United States v. Meachum, 115 F.3d 1488, 1491 (10th Cir. 1997) (indicating that the new rules provide a specific admissibility standard in sexual assault (and child molestation) cases, replacing Federal Rule of Evidence 404(b)'s general criteria). *See also* 140 CONG. REC. S12,990 (daily ed. Sept. 20, 1994) (remarks of Sen. Dole) ("The new rules will supersede in sex offenses the restrictive aspects of Federal Rule of Evidence 404(b)."). Examples of the restrictive aspects of 404(b) include: the requirement that the uncharged misconduct be offered for a noncharacter purpose (such as motive, identity, intent, or absence of mistake); the fact that the military judge generally defers ruling on 404(b) motions until the government's rebuttal case; and the limiting instruction given to the panel not to consider the evidence for its logical purpose, which is the accused's propensity or predisposition to commit the charged offense.

94. Jason L. McCandless, *Prior Bad Acts and Two Bad Rules: The Fundamental Unfairness of Federal Rules of Evidence 413 and 414*, 5 WM. & MARY BILL RTS. J. 689 (1997).

95. "One of the most deeply rooted and jealously guarded principles of Anglo-American criminal law is the axiom that an accused may not be convicted of being a scoundrel. If the accused is to be convicted, the prosecution must prove that he or she has committed a specific offense." Edward J. Imwinkelried, *The Dispute over the Doctrine of Chances*, 7 CRIM. JUST. 16 (1992), *citing* A.A.S. ZUCKERMAN, THE PRINCIPLES OF CRIMINAL EVIDENCE 232 (1989).

96. *See* Major Stephen R. Henley, *Caveat Criminale: The Impact of the New Rules of Evidence in Sexual Assault and Child Molestation Cases*, ARMY LAW., Mar. 1996, at 86-90 (raising a number of significant unanswered questions concerning the scope and applicability of the new rules).

97. For example, when impeaching the credibility of any witness after testifying, evidence that the witness has a prior conviction which involves dishonesty or a false statement "shall be admitted" without balancing the probative value of the conviction against any unfair prejudice. *See* MCM, *supra* note 5, MIL. R. EVID. 609(a)(2).

98. When impeaching the credibility of the accused after testifying, a felony-type conviction "shall be admitted," if the military judge determines that its probative value outweighs its prejudicial effect (this is not an MRE 403 balancing). *Id*. MIL. R. EVID. 609(a)(1).

pursuant to Rule 403 if the judge determines that its probative value is substantially outweighed by its potential for unfair prejudice.[101] This conclusion is consistent with Congress' intent, as reflected in the legislative history, that Rules 413 and 414 do not mandate the admission of evidence of other acts or eliminate the need for the court to conduct the analysis required under Rule 403.[102]

Are There Any Temporal Proximity Requirements?

Although Rule 403 applies and the trial judge can exclude otherwise relevant evidence upon the proper balancing, the defense may unfortunately realize little practical difference in application. No time limit is imposed on past offenses offered under Rules 413 or 414;[103] in fact, the rules anticipate liberal admission. In *United States v. Meachum*,[104] for example, the accused was charged with two incidents of molesting his now twelve-year-old niece over the previous five years. He testified and categorically denied committing the offenses.[105] Over defense objection, the judge admitted evidence that Meachum had molested his two minor stepdaughters thirty years before.[106] On appeal, the U.S. Court of Appeals for the Tenth Circuit affirmed, finding that the judge did not err in his assessment that the probative value of these prior acts of molestation was not substantially outweighed by the danger of unfair prejudice. The court found that, even though Rule 403 applies, the legislative history behind the rules revealed that Congress intended for the temporal scope of Rules 413 and 414 to be broad,[107] and "it should be a rare circumstance in which such evidence is excluded."[108] As a practical matter, therefore, application of Rule 403 may be of little consolation to the defense, as evidence that the accused committed other incidents of sexual assault and child molestation are properly admissible, notwithstanding substantial lapses in time between the charged and uncharged offenses.[109]

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99. *See id.* MIL. R. EVID. 413(a), 414(a). *See also supra* note 90.

100. *See, e.g.*, Louis M. Natali, Jr. & R. Stephen Stigall, *"Are You Going to Arraign His Whole Life?": How Sexual Propensity Evidence Violates the Due Process Clause*, 28 LOY. U. CHI. L.J. 1, 2 (1996) (asserting that the new rules require a district court to admit propensity evidence without regard to other rules of evidence, including Rule 403); James J. Duane, *The New Rules of Evidence on Prior Acts of Accused Sex Offenders: A Poorly Drafted Version of a Very Bad Idea*, 157 F.R.D. 95 (1994) (hypothesizing that a judge's authority to apply Rule 403 may be limited). Rules 413 and 414 were added as part of the same 1994 crime bill that also amended Rule 412. Since those amendments provided for balancing tests in Rules 412(c) and 412(b)(1) (for civil and criminal cases respectively), if Congress had intended a balancing test for Rules 413 and 414, they easily could have and would have provided for one. *See* Henley, *supra* note 96, at 88-89.

101. *See* United States v. Sumner, 119 F.3d 658 (8th Cir. 1997) (holding that the admission of evidence of similar crimes under Rule 413 or Rule 414 is subject to Rule 403); United States v. Guardia, 955 F. Supp. 115 (D.N.M. 1997), *aff'd*, No. 97-2053, 1998 WL 37575 (10th Cir. Feb 2, 1998) (excluding Rule 413 evidence as unduly prejudicial under Rule 403); Frank v. County of Hudson, 924 F. Supp. 620 (D.N.J. 1996) (mandating that evidence proffered under the new rules must still be legally relevant under Rule 403).

102. *See* 140 CONG. REC. S12,990 (daily ed. Sept. 20, 1994) (remarks of Sen. Dole) ("The general standards of the rules of evidence will continue to apply, including . . . the court's authority under evidence rule 403 to exclude evidence whose probative value is substantially outweighed by its prejudicial effect."). *See also* 140 CONG. REC. H5437 (daily ed. June 29, 1994) (remarks of Rep. Molinari) ("This [new rule] allows, it does not mandate, a judge's discretion . . . when he or she thinks that the cases are similar and relevant enough to introduce prior evidence.").

103. Conversely, convictions over 10 years old offered to attack the credibility of a witness are presumptively inadmissible, absent a finding by the military judge that the probative value of the conviction substantially outweighs its prejudicial impact. MCM, *supra* note 5, MIL. R. EVID. 609(d).

104. 115 F.3d 1488 (10th Cir. 1997).

105. *Id.* at 1491.

106. The judge limited consideration of the other offense to a noncharacter purpose, instructing the jury as follows:

> Ladies and gentlemen, this is being permitted to go into [sic] for a very limited purpose. You can't consider prior acts as evidence that the acts charged in the indictment occurred, and you can't consider those prior acts, if any, to provide a character trait of the defendant. But you can consider it as it may bear upon the intention, preparation, the plan, or absence.

Id. at 1493-94.

107. "No time limit is imposed on the uncharged offenses for which evidence may be admitted; as a practical matter, evidence of other sex offenses by the defendant is often probative and properly admitted notwithstanding substantial lapses of time in relation to the charged offense or offenses." 140 CONG. REC. S12,990 (daily ed. Sept. 20, 1994) (statement of Sen. Dole), *quoted in* United States v. Larson, 112 F.3d 600, 605 (2d Cir. 1997). "Notwithstanding very substantial lapses in time," evidence should be admissible. 140 CONG. REC. H8992 (daily ed. Aug. 21, 1994) (statement of Rep. Molinari).

108. *Meachum*, 115 F.3d at 1492 (observing that Rule 403 balancing is applicable, but courts are to liberally admit evidence of prior uncharged sex offenses offered under Rules 413 and 414).

109. While a significant time lapse between the charged and uncharged acts may be insufficient in and of itself to swing the prejudice pendulum in the accused's favor, defense counsel should still consider it as simply one of many factors in arguing against admissibility. Other factors include: (1) the dissimilarity between the charged offense and the extrinsic acts; (2) the differing circumstances surrounding each offense, such as the methods of commission, the ages of the victims, and the locations, manner, and scope of abuse; and (3) the limited number of past incidents. SALZTBURG, *supra* note 47, at 618.

Can the Trial Counsel Introduce the Other Acts As Evidence of Propensity?

Rules 413 and 414 permit evidence of other sexual assault and child molestation offenses to be considered for its bearing on any matter to which it is relevant. Despite scathing criticism to the contrary,[110] Congress considered as relevant the accused's propensity to engage in this type of deviant behavior.[111] However, one of the more persuasive arguments against the use of propensity evidence is that such admission is fundamentally unfair and may violate the Due Process Clause of the U.S. Constitution.[112] Although the category of infractions which violate fundamental fairness is admittedly narrow,[113] it is well established that fundamental fairness requires the government to prove by proof beyond a reasonable doubt every element of the offense, and this principle "prohibits the State from using evidentiary presumptions that have the effect of relieving the State of its burden of persuasion."[114] Admissibility of such propensity evidence comes perilously close in this regard.

Even when courts have admitted evidence of other acts under Rules 413 and 414, it has almost never been solely to show that, by propensity, the accused is the probable perpetrator of the crime. There has nearly always been an alternative non-character theory of admissibility. For example, in *United States v. Larson*,[115] the accused was charged with the interstate transportation of a child with the intent to engage in criminal sexual conduct.[116] Prior to trial, the government served notice that it intended to offer testimony from three other witnesses that they had been similarly molested by Larson when they were minors.[117] Analyzing the admissibility of the testimony under Rules 404(b) and 414, the court held that the testimony was within the scope of both rules.[118] The judge, however, instructed the jury to consider the other acts of molestation only to demonstrate a common plan or scheme or to show Larson's intent or motive to commit the crime and not as evidence of any propensity on his part to engage in child molestation in general.[119] This non-propensity limitation follows existing precedent.[120] While the U.S. Supreme Court has never expressly held that introducing uncharged misconduct only to show the defendant's propensity to commit the charged crime violates due process, it has come close.[121]

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110. *See generally* Anne E. Kyl, *The Propriety of Propensity: The Effects and Operation of New Federal Rules of Evidence 413 and 414*, 37 ARIZ. L. REV. 659, 663 (1995) (asserting that Anglo-American law has, since the Restoration, preferred judge and jury to try the accused solely on the charges and not on his crimes in the past or inferences about his character that knowledge of those crimes creates); David P. Leonard, *Perspectives on Proposed Federal Rules of Evidence 413-415: The Federal Rules of Evidence and the Political Process*, 22 FORDHAM URB. L.J. 305, 333-41 (1995) (noting that, in its zeal to respond to a perceived epidemic of sexual assault and child molestation offenses, Congress has sparked a movement which will be difficult to stop); David P. Bryden & Roger C. Park, *"Other Crimes" Evidence in Sex Offense Cases*, 78 MINN. L. REV. 529, 565 (1994) (hypothesizing that jurors will be more willing to convict where the other evidence of guilt is weak); Dale A. Nance, *Symposium on the Admission of Prior Offense Evidence in Sexual Assault Cases: Foreword: Do We Really Want to Know the Defendant?*, 70 CHI.-KENT L. REV. 3, 8 (1994).

111. *See* 140 CONG. REC. H2433 (daily ed. Apr. 19, 1994) (statement of Rep. Molinari).

> The past conduct of a person with a history of rape or child molestation provides evidence that he or she has the combination of aggressiveness and sexual impulse that motivates the commission of such crimes and lacks the inhibitions against acting on these impulses. A charge of rape or child molestation has greater plausibility against such a person.

Id.

112. U.S. CONST. amends. V, XIV, §1. In *Lovely v. United States*, the Court of Appeals for the Fourth Circuit remarked:

> The rule which thus forbids the introduction of evidence of other offenses having no reasonable tendency to prove the crime charged, except in so far as they may establish a criminal tendency on the part of the accused . . . arises out of the fundamental demand for justice and fairness which lies at the basis of our jurisprudence. If such evidence were allowed . . . persons accused of crime would be greatly prejudiced.

169 F.2d 386, 389 (4th Cir. 1948).

113. To prove a due process violation, the defendant must show that Rules 413 and 414 fail the fundamental fairness test and violate those fundamental concepts of justice which lie at the base of our civil and political institutions. *See generally* Dowling v. United States, 493 U.S. 342, 352-53 (1990). The Supreme Court has narrowed the infractions which violate fundamental fairness, declaring that "beyond the specific guarantees enumerated in the Bill of Rights, the Due Process Clause has limited operation." *Id*. at 352.

114. Francis v. Franklin, 471 U.S. 307, 313 (1985).

115. 112 F.3d 600 (2d Cir. 1997).

116. 18 U.S.C. § 2423 (1994).

117. *Larson*, 112 F.3d at 602. The judge found similarities in the types of sex acts performed, the methodologies used to entice the victims, and the locations where the abuse occurred. *Id.*

118. *Id*. at 603. The trial judge admitted the evidence under both Rules 404(b) and 414 because "it goes to the presence of a common scheme or plan on the part of the defendant and also is relevant to the defendant's intent and motive in the commission of the charged offense." *Id*.

The only decision that expressly upholds the constitutionality of a statute which permits the admission of evidence of prior sexual assault and child molestation offenses solely to prove propensity is a California state court case, *People v. Fitch*.[122] Robert Lee Fitch was charged with rape. As permitted by a recently enacted section of the California Evidence Code,[123] the judge admitted evidence that Fitch had committed another rape. The evidence was admitted to show a propensity to commit the charged crime, and the judge instructed the jury as to its use.[124] On appeal, Fitch argued, inter alia, that the admission of evidence of prior acts only to show propensity violates due process. The court disagreed and affirmed.[125]

Notwithstanding *Fitch*, evidence of prior crimes introduced for no other purpose than to show criminal disposition likely violates the Due Process Clause.[126] Until specifically addressed by either the federal[127] or military appellate courts,[128] trial coun-

119. *Id*. In fact, the trial judge instructed the jury that it could consider the other acts of molestation only for the limited purpose of determining whether the defendant intended to engage in criminal sexual activity with the victim of the charged offense and not as evidence of a general criminal propensity to engage in that type of behavior. *Id.*

120. For example, in *People v. Zackowitz*, Chief Justice Cardozo, writing for the majority, reversed a murder conviction based upon the use of propensity evidence. 172 N.E. 466 (N.Y. 1930). Zackowitz had been charged with murdering a heckler who had propositioned his wife. At trial, the judge permitted evidence that, at the time of the shooting, Zackowitz had a number of firearms in his apartment. In reasoning that the only purpose of the evidence was to show that the accused "was a man of vicious and dangerous propensities, who because of these propensities was more likely to kill with deliberate and premeditated design than a man of irreproachable life and amiable manners," Chief Justice Cardozo held that the evidence should have been excluded. *Id.* at 468. He explained his rationale in an oft-cited passage:

> If a murderous propensity may be proved against a defendant as one of the tokens of his guilt, a rule of criminal evidence, long believed to be of fundamental importance for the protection of the innocent, must be first declared away. Fundamental hitherto has been the rule that character is never an issue in a criminal prosecution unless the defendant chooses to make it one.

Id.

121. *See* Natali & Stigall, *supra* note 100, at 12-23. *Cf.* Estelle v. McGuire, 502 U.S. 62, 78 (1991) (O'Connor, J., concurring) (suggesting that, in most circumstances, admitting evidence only to show propensity may violate the Due Process Clause); Burnham v. Superior Court of California, 495 U.S. 604 (1990) (acknowledging that the admission of evidence of other crimes raises due process concerns); Huddleston v. United States, 485 U.S. 681, 685-87 (1988) (discussing the admissibility of uncharged acts under a noncharacter theory); Spencer v. Texas, 385 U.S. 554, 570, 573-74 (1967) (Warren, C.J., dissenting) (commenting that the use of prior convictions to show criminal disposition is fundamentally at odds with the policies underlying due process); Brinegar v. United States, 338 U.S. 160, 173-74 (1949) (implying that the prohibition against propensity evidence is embedded in the Due Process Clause); Michelson v. United States, 335 U.S. 469, 475-76 (1948) (asserting that allowing the prosecution to resort to evidence of the defendant's evil character to establish probability of his guilt would deny him a fair opportunity to defend against a particular charge).

122. 63 Cal. Rptr. 2d 753 (Cal. Ct. App. 1997).

123. Evidence Code section 1108, enacted in 1995, is the California equivalent of Federal Rule of Evidence 413 and permits the use of uncharged sex offenses to show a propensity to commit the charged offense unless their probative value is substantially outweighed by the danger of unfair prejudice. CAL. EVID. CODE § 1108(a) (West 1998).

124. *Fitch*, 63 Cal. Rptr. 2d at 760. The trial judge instructed substantially as follows:

> Evidence that the defendant committed a crime other than the one for which he is on trial, if believed, was also admitted and may be considered as evidence that he has the trait of character that predisposes him to commission of certain crimes. Therefore, you may use that evidence that the defendant committed another offense for the [limited] purpose of deciding whether he has a particular character trait that predisposes him to the commission of the charged offense.

Id.

125. *Id.* at 762. Of significance to the court was the "safeguard" written into the rule, which subjected evidence of uncharged sexual misconduct to a balancing test similar to MRE 403. The court held that, with this check, section 1108 did not violate the Due Process Clause. *Id*. Of course, even if the rule is constitutional—and that is a big if—a judge can still abuse his discretion in admitting evidence of other sexual misconduct if its probative value is later determined to be substantially outweighed by the danger of unfair prejudice to the accused. S*ee*, *e.g.*, People v. Harris, 70 Cal. App. 4th 727 (Cal. Ct. App. 1998) (holding that the trial judge abused his discretion in admitting evidence of prior sexual assault).

126. *See* Henry v. Estelle, 33 F.3d 1037 (9th Cir. 1994), *rev'd on other grounds sub nom.*, Duncan v. Henry, 115 S. Ct. 887 (1995) (observing that evidence of prior child molestation violates the Due Process Clause); McKinney v. Rees, 993 F.2d 1378 (9th Cir. 1993) (indicating that the use of evidence to show propensity violates the Due Process Clause).

127. In *United States v. Enjady*, the defendant was charged with rape. He admitted having sex, but he claimed that it was consensual. 134 F.3d 1427 (10th Cir. 1998). The government sought to introduce evidence from another woman whom Enjady had raped approximately two years earlier, to show his propensity to rape. The Tenth Circuit affirmed, noting that the evidence in this case had undeniable value in corroborating the victim's claims and in bolstering her credibility, two purposes other than to show the defendant's propensity to rape. *Id.* With the safeguards of Rule 403, the court concluded that Rule 413 was not unconstitutional on its face as a violation of the Due Process Clause. *Id.* The court further held that there was no equal protection violation based on a rational basis test; the congressional objective of enhancing effective prosecution for sexual assaults and child molestation is a legitimate government interest. *Id*.

sel would do well to follow the guidance in *Larson*, articulate a non-propensity theory of admissibility, and resist the urge to argue to the panel, "notwithstanding the evidence, we know he must be guilty of this offense because he has a history of such behavior."

That is not to say that the new rules have no practical value to trial counsel. While Rule 403 does apply, and the military judge can still exclude otherwise relevant evidence upon application of the proper balancing test, it is apparent that Congress anticipated a more liberal admissibility of evidence of prior acts under Rules 413 and 414 than previously realized under Rule 404(b).[129] In other words, trial counsel should find the Rule 403 balancing assessment tilting in their favor almost every time.[130] However, counsel should still step cautiously, proceed as did the prosecutor in *Larson*, and be prepared to articulate a non-character theory of admissibility, even for evidence offered under Rules 413 and 414. In the short-term, counsel would be wise to resist the temptation to use these rules as Congress intended—to show the accused's propensity or predisposition to engage in sexual assault or child molestation. Until the Supreme Court or the military appellate courts have addressed whether a rule that permits evidence *only* to show an accused's propensity to commit the charged offense is constitutional, self-imposed restraint may save a case on appeal.

"Your Secret's Safe With Me, Sergeant. Sorta." The Psychotherapist-Patient Privilege in Military Practice

One of the most important developments in evidence law over the last eighteen months was the Supreme Court's recognition of a psychotherapist-patient privilege. In *Jaffee v. Redmond*,[131] the Court held that confidential communications between patients and their psychotherapists made during the course of diagnosis or treatment are now protected from compelled disclosure in federal court. The Supreme Court's recognition of a new privilege that protects confidential communications made not only to psychiatrists and psychotherapists but also to licensed social workers who engage in psychotherapy was, however, grounded in a logical interpretation of Federal Rule of Evidence 501.[132] When last year's year-in-review was printed, it was unclear whether *Jaffee* would result in the immediate recognition of a similar privilege in military practice, absent a legislative or executive mandate amending the military rules.[133] Although MRE 501(a)(4)[134] and 101(b)[135] seemed to provide authority to adopt testimonial and evidentiary privileges that are recognized in federal district court, a substantial impediment appeared to exist in the military rules, namely MRE 501(d).[136] As suggested in last year's evidence article, it would be difficult, though not impossible, to reconcile *Jaffee* and 501(d).[137]

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128. *But see* United States v. Davis, 47 M.J. 707, 711 n.4 (N.M. Ct. Crim. App. 1997) (noting that, with the addition of Rules 413 and 414, uncharged misconduct is now arguably admissible, notwithstanding Rule 404(b), precisely to show propensity to commit the charged offenses).

129. With respect to Rule 403 balancing, one of the bill's sponsors stated that "[t]he presumption is that the evidence admissible pursuant to these rules is typically relevant and probative and that its probative value is not outweighed by any risk of prejudice." 140 CONG. REC. S12,990 (daily ed. Sept. 20, 1994) (statement of Sen. Dole). Another of the bill's sponsors stated, "[T]he underlying legislative judgment is that the evidence admissible pursuant to the proposed rules is typically relevant and that its probative value is normally not outweighed by any risk of prejudice or other adverse effects." 140 CONG. REC. H8992 (daily ed. Aug. 21, 1994) (statement of Rep. Molinari), *quoted in* United States v. Larson, 112 F.3d 600, 604 (2d Cir. 1997).

130. *See, e.g.*, United States v. LeCompte, 99 F.3d 274 (1996), *rev'd and remanded*, 131 F.3d 767 (8th Cir. 1997) (holding that, in light of the strong legislative judgment that prior sexual offenses are relevant and not unduly prejudicial, evidence of the accused's commission of uncharged acts of sexual abuse against his first wife's niece is admissible under Rule 414 at retrial for abuse of second wife's niece, even though the court had previously held the same evidence inadmissible under Rule 404(b) as unduly prejudicial).

131. 116 S. Ct. 1923 (1996).

132. Federal Rule of Evidence 501 provides:

> Except as otherwise required by the Constitution of the United States or provided by Act of Congress, or in rules prescribed by the Supreme Court pursuant to statutory authority, the privilege of a witness, person, government, [s]tate, or political subdivision thereof shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience.

FED. R. EVID. 501.

133. *See* Henley, *Postcards From the Edge*, *supra* note 3, at 98.

134. Military Rule of Evidence 501 provides:

> (a) A person may not claim a privilege with respect to any matter except as required by or provided for in:
> . . . .
> (4) The principles of common law generally recognized in the trial of criminal cases in the United States district courts pursuant to Rule 501 of the Federal Rules of Evidence insofar as the application of such principles in trials by courts-martial is practicable and not contrary to or inconsistent with the Uniform Code of Military Justice, these rules, or this *Manual.*

MCM, *supra* note 5, MIL. R. EVID. 501(a)(4).

Two developments have occurred since last April's issue of the year-in-review, one judicial and one executive. In *United States v. Demmings*,[138] the Army Court of Criminal Appeals stated in dicta that the federal psychotherapist-patient privilege recognized in *Jaffee* could possibly protect from compelled disclosure communications between a service member and a mental health professional made during the course of diagnosis or treatment. However, because Demmings failed to assert the privilege at his court-martial, the issue was waived on appeal.[139]

Of more long-term consequence to trial practitioners is the action taken by the Joint Service Committee on Military Justice (JSC)[140] in response to *Jaffee*. The JSC has recently recommended adoption of a new rule of evidence to recognize a limited psychotherapist-patient privilege in courts-martial practice. Proposed MRE 513[141] would establish a psychotherapist-patient privilege for investigations and proceedings authorized under the UCMJ.[142] If the proposed rule is promulgated, a patient can refuse to disclose and prevent others from disclosing confidential communications made to a psychotherapist or assistant, if made for the purpose of facilitating diagnosis or treatment of a mental or emotional condition.[143] However, since the President is not expected to take action on the proposed rule until late 1998,[144] counsel who argue for an immediate recognition of a psychotherapist privilege may be able to rely on the limited precedential value of the Army court's dicta in *Demmings*.

Shopping for Godot.[145] Supplementing the Defense Team

135. Military Rule of Evidence 101(b) declares:

> (b) Secondary Sources. If not otherwise prescribed in this *Manual* or these rules, and insofar as practicable and not inconsistent with or contrary to the Code or this *Manual*, courts-martial shall apply:
> (1) First, the rules of evidence generally recognized in the trial of criminal cases in the United States district courts; and
> (2) Second, when not inconsistent with subdivision (b)(1), the rules of evidence at common law.

Id. MIL. R. EVID. 101(b).

136. "Notwithstanding any other provision of these rules, information not otherwise privileged does not become privileged on the basis that it was acquired by a medical officer or civilian physician in a professional capacity." *Id.* MIL. R. EVID. 501(d).

137. *But see* SALTZBURG, *supra* note 47, at 630 (stating that MRE 501(d) would not bar psychotherapist-patient privilege in light of an extraordinary need for confidentiality between psychotherapist and patient that is as important in the military as in civilian life).

138. 46 M.J. 877 (Army Ct. Crim. App. 1997) (treating the psychotherapist-patient privilege as not included within the broader physician-patient privilege).

139. *Id*. at 883. Sergeant Robert Demmings had sought mental health counseling at the installation mental health clinic for marital stress and homicidal and suicidal thoughts. Shortly after a subsequent physical altercation with his wife and an attempted suicide, Demmings was taken for an emergency mental evaluation. At his court-martial for offenses related to these incidents, the government called the treating psychiatrist, who testified about what Demmings had said during the treatment sessions and emergency psychiatric evaluation. The defense did not object. On appeal, Demmings argued that his psychiatrist violated the psychotherapist-patient privilege recognized in *Jaffee* by disclosing communications made during the course of diagnosis and treatment. *Id*. at 878-79. The Army court concluded:

> [We] could hold that confidential communications between an accused and mental health professional in the course of diagnosis or treatment are protected from compelled disclosure at a court-martial. We need not decide this issue, however, because we conclude that the appellant waived the issue by failing to assert the privilege at his court-martial.

Id. at 883 (footnote omitted). *But cf.* United States v. English, 47 M.J. 215, 216 (1997) (holding that the *MCM* does not recognize a psychotherapist-patient privilege), *construed in* United States v. Flack, 47 M.J. 415 (1998).

140. The JSC is comprised of senior representatives from the Army, Navy, Air Force, Marine Corps, Coast Guard, the CAAF, and the general public. One of the JSC's stated purposes is to ensure that the *Manual for Courts-Martial* "reflects current military practice and judicial precedent." *See* U.S. DEP'T OF DEFENSE, DIR. 5500.17, REVIEW OF MANUAL FOR COURTS-MARTIAL, para. D.1.b (Jan. 23, 1985). In furtherance of this goal, the JSC suggests revisions to the MCM, staffs proposed changes through the executive branch for detailed review, and eventually forwards them to the White House for action. *See* Criminal Law Div. Note, *Amending the Manual for Courts-Martial*, ARMY LAW., Apr. 1992, at 78.

141. Appendix B to this article contains the text of proposed MRE 513.

142. The privilege should apply in Article 32 investigations, all level courts-martial, courts of inquiry convened under Article 135, pretrial confinement reviews, search and seizure authorizations, and disciplinary proceedings conducted pursuant to Article 15. The privilege would arguably not apply in administrative elimination boards, fitness for duty determinations, family advocacy program meetings, and drug and alcohol abuse counseling sessions.

143. Even with new MRE 513, the doctor-patient privilege would not be broader. *See* United States v. Mansfield, 38 M.J. 415 (C.M.A. 1993), *cert. denied*, 114 S. Ct. 1610 (1994) (finding that there is no physician-patient privilege in federal or military law). Further, commanders will still be entitled to confidential information when necessary for the safety and security of military personnel, dependents, military property, classified information, or mission accomplishment. *See* MRE 513(d)(6) in Appendix B to this article.

144. Telephone Interview with Lieutenant Colonel William M. Mayes, Army Representative, Joint Service Committee on Military Justice Working Group (Jan. 9, 1998).

With Expert Assistance

With genetic markers, hair sampling, blood spatter, polygraphs, eyewitness identification, bite mark and dental identification, questioned documents examination, accident reconstruction, psychological autopsies, firearms identification, toxicology, fingerprint and voice-print analyses, recovered and repressed memories, and forensic psychiatry, the modern courtroom has become a veritable minefield of scientific bouncing bettys.[146] Defense counsel encounter any number of practical challenges when faced with such complex issues. Supplementing the defense team with expert assistance can help inexperienced counsel to comprehend, to dissect, and to attack these issues.[147] The CAAF recently reiterated the circumstances when the government must pay for such help and who the defense will get.

It is well established that a military accused has a limited right to expert assistance at government expense to prepare his defense.[148] However, this assistance need only be provided when it is necessary.[149] In *United States v. Gonzalez*,[150] the CAAF articulated the three-step test for determining whether government-funded assistance is necessary.[151] The defense must show: (1) why the expert assistance is needed; (2) what the expert assistance would accomplish; and (3) why the defense counsel and his staff are unable to gather and to present the evidence the expert assistant would be able to develop. It is generally the third requirement, a showing of inadequacy or unavailability of expert assistance from other sources, where the defense fails.

In *United States v. Ndanyi*,[152] the defense requested that the convening authority pay for a particular named expert of their choosing to assist with analyzing expected DNA evidence.[153] The convening authority denied the request but indicated that the defense could use the services of several experts at the nearby Criminal Investigation Command laboratory who were not involved in the case. The defense rejected this offer on the basis that, because the government itself had utilized civilian experts, they were entitled to the same treatment. The military judge denied the subsequent defense motion to compel production of the named expert.[154] The CAAF affirmed, holding that, absent a showing by the accused that his case is unusual or the

145. With apologies to Samuel Beckett, the following colloquy is taken from the last scene of his 1948 existential masterpiece, WAITING FOR GODOT:

Estragon: Didi.
Valdimir: Yes.
Estragon: I can't go on like this.
Valdimir: That's what you think.
Estragon: If we parted, that might be better for us.
Vladimir: We'll hang ourselves tomorrow (pause) . . . unless Godot comes.
Estragon: And if he comes?
Vladimir: We'll be saved.

146. Which includes all the erstwhile "excuses" offered by criminal defendants to justify evading responsibility for their actions, to include black rage syndrome, superbowl sunday disorder, urban survival syndrome, abused child syndrome, steroid rage, premenstrual dysphoric disorder, XYY chromosomal disorder, mob-mentality syndrome, television addiction, the "twinkie" defense, post-traumatic stress disorder, parental alienation, fetal alcohol syndrome, attention deficit disorder, Cherambault-Kandisky syndrome ("lovesickness"), Munchausen-by-proxy syndrome, and nicotine withdrawal syndrome. *See* ALAN M. DERSHOWITZ, THE ABUSE EXCUSE: AND OTHER COP-OUTS, SOB STORIES, AND EVASIONS OF RESPONSIBILITY (1994).

147. Will A. Gunn, *Supplementing the Defense Team: A Primer on Requesting and Obtaining Expert Assistance*, 39 A.F. L. REV. 143 (1996).

148. *See* United States v. Mustafa, 22 M.J. 165 (C.M.A. 1986).

149. United States v. Garries, 22 M.J. 288 (C.M.A. 1986).

150. 39 M.J. 459, 461 (1994), *citing* United States v. Allen, 31 M.J. 572, 623 (N.M.C.M.R. 1990), *aff'd*, 33 M.J. 209 (C.M.A. 1991).

151. An important distinction must be drawn between a request for expert assistance to help prepare for trial and a request for an expert witness to testify at trial. *See, e.g.*, United States v. Langston, 32 M.J. 894 (A.F.C.M.R. 1991) (asserting that the rules differ, as do the foundation requirements for motions to provide the services at government expense, and that different bodies of precedent are used to resolve them). Importantly, the analysis used in determining whether the government has offered an adequate substitute for the requested defense expert witness—one with similar professional qualifications who can testify to the same opinions and conclusions—does not apply to requests for expert assistance. *See, e.g.*, United States v. Guitard, 28 M.J. 952, 955 (N.M.C.M.R. 1989).

152. 45 M.J. 315, 319 (1996).

153. *Id*. *See* Major Edye U. Moran, *Pyrrhic Victories and Permutations: New Developments in the Sixth Amendment, Discovery, and Mental Responsibility*, ARMY LAW., Apr. 1998, at 106.

154. *See* MCM, *supra* note 5, R.C.M. 703. Because of the inherent dangers in having to reveal strategic information in order to obtain the expert, defense counsel usually ask for an ex parte hearing before the military judge to justify the request. However, the defense has no absolute right to an ex parte hearing to demonstrate its need for a defense expert at government expense, and a military judge does not abuse his discretion when requiring a preliminary showing of necessity on the record. *See* United States v. Kaspers, 47 M.J. 176 (1997). *See also* United States v. Ruppel, 45 M.J. 578 (A.F. Ct. Crim. App. 1997) (holding that there is no right to an ex parte hearing). *But see* United States v. Garries, 22 M.J. 280, 291 (C.M.A. 1986) (indicating that the defense may be entitled to an ex parte hearing to demonstrate its need for an expert in "unusual" circumstances, though the court does not define what qualifies as "unusual").

experts proffered by the government are unqualified, incompetent, partial, or unavailable,[155] "the investigative, medical, and other expert services available in the military are sufficient to permit the defense to adequately prepare for trial."[156] The defense cannot reject an offer of competent military assistance simply because the trial counsel employs civilian expert assistance.

The CAAF went one step further in *United States v. Washington*,[157] holding that the defense is not even entitled to military assistance simply by noting that the prosecution has employed expert assistance to prepare its case.[158] In other words, the fact that the trial counsel employs investigative assistance does not, by itself, establish the defense's inability to gather evidence in its own right, a critical element to any showing of need for such services.[159]

So what is the result of these cases? Defense counsel, in showing the necessity for expert assistance, must be able to articulate specifically why the defense is unable to gather and to present the evidence that the assistant would be able to develop on his own.[160] This showing presumes that defense counsel will try to educate himself to attain the level of competence necessary to defend the particular issues in a given case.[161] Further, there is no absolute right to demand that a particular individual be detailed.[162] Absent a showing that the case is unusual, expert services available in the military will generally be sufficient to permit the defense to prepare for trial.

Supreme Court Affirms Polygraph Ban

On 31 March 1998, the U.S. Supreme Court decided *United States v. Scheffer*.[163] In reversing the CAAF, the Court held that MRE 707,[164] which excludes polygraph evidence in courts-martial, does not unconstitutionally abridge the Sixth Amendment right of a service member to present a defense.[165] Therefore, a testifying accused whose credibility has been

155. *Ndanyi*, 45 M.J. at 319-20.

156. *Id.* at 319 (quoting *Garries*, 22 M.J. at 290-91).

157. 46 M.J. 477 (1997). Washington was charged with various offenses arising from his service as a contracting officer during Operations Desert Shield and Desert Storm. Before trial, the defense counsel submitted a request for investigative assistance, citing a number of reasons why he and his staff could not perform the tasks themselves. The military judge denied the request, finding that the defense had failed to make a plausible showing that the investigator could obtain information that the defense and its staff would not be able to obtain on its own. *Id*. at 479.

158. *Id*.

159. *But see* United States v. Mann, 39 M.J. 639 (N.M.C.M.R. 1990). In *Mann*, the Navy-Marine Corps court observed that, particularly in child abuse cases, where experts provide conclusory opinions (such as the cause of an injury), such opinions are not neutral and non-accusatory and differ in form and kind from a chemist (for example) identifying components of a given substance, and the defense may be entitled to expert assistance in developing its case because the government had similar help. *Id*.

160. In this regard, defense counsel should be prepared to answer a number of questions, to include:

1. What have you done to educate yourself in the requested area of expertise?
2. What experts and government employees having knowledge in this area have you interviewed?
3. If the issue in question involves a laboratory analysis by the CID or the FBI, have you requested the opportunity (using TDS funding) to visit the crime lab and to examine the procedures and quality control standards used in the laboratory in this or any other case?
4. What did you learn from the visit?
5. What do you need to learn that you still do not understand in order to defend the accused in this case?
6. What treatises have you examined?
7. Are there experts other than the one requested who would meet your needs? Have you talked with them? Would providing an Army employee as an expert consultant meet your needs? If not, why?
8. How many other cases involving this issue have you tried? As to military defense counsel with little or no expertise in this area:
   (a) Have you requested that the senior defense counsel or regional defense counsel detail another defense counsel with greater familiarity in the area of expertise to help defend the accused? Have you advised the accused of his right to request an IMC who has greater familiarity in this area?
   (b) Have you requested through TDS channels that CID or other Army organizations provide you and other counsel with training in this area?
   (c) If this area of expertise is common to many cases in your jurisdiction, why have no such requests been made previously?
9. Have you requested through TDS channels any resource material in this area, if not readily obtainable from local sources?

161. *See* United States v. Kelly, 39 M.J. 235 (C.M.A. 1994). *See also* United States v. Thomas, 41 M.J. 873 (N.M. Ct. Crim. App. 1995).

162. *See* United States v. Tornowski, 29 M.J. 578 (A.F.C.M.R. 1989) (indicating that when the defense seeks to have the government provide expert assistance, it has no right to demand that a particular individual be designated); United States v. True, 28 M.J. 1057, 1061 (N.M.C.M.R. 1989) (noting that the defense will be entitled to civilian help only in very unusual circumstances where the government cannot, within its own resources, provide investigative services sufficient to enable the defense to prepare adequately for trial). *See also* Britt v. North Carolina, 404 U.S. 226, 227 (1971) (holding that indigents are not entitled to all the assistance that a wealthier counterpart might buy, but only to the basic and integral tools).

163. 118 S. Ct. 1261 (1998).

attacked is no longer entitled to attempt to lay the foundation for admitting exculpatory polygraph evidence.[166] However, while *Scheffer* resolves the constitutionality of the military's per se ban on the use of polygraph evidence at trial, polygraph results (both inculpatory and exculpatory) can still be used pre-trial and post-trial in assisting the convening authority in determining the appropriate disposition of a particular case. In addition, as the military judge is not bound by the MREs in ruling on the admissibility of evidence,[167] counsel can still offer polygraph testimony during Article 39(a) sessions in support of motions to admit or to exclude evidence.

Conclusion

Fury said to
a mouse, that
he met
in the
house,
'Let us
both go
to law:
I will
prosecute
you.—
Come, I'll
take no
denial;
We must
have a
trial:
For
really
this
morning
I've
nothing
to do.'
Said the
mouse to
the cur,
'Such a
trial,
dear sir,
With no
jury or
judge,
would be
wasting
our breath.'
'I'll be
judge,
I'll be
jury,'
Said
cunning
old Fury:
'I'll try
the whole
cause,
and
condemn
you
to
death.[168]

To help keep "fury" at bay, the military has adopted certain measures to restrict the use of unduly prejudicial evidence in courts-martial—the MREs. Unfortunately, as societies change, rules change. Alter the values and perceptions of a people and their rules will generally follow suit. As recent decisions highlight, the rules prohibiting the use of character and propensity evidence in courts-martial have dramatically changed[169]—a result, good or bad, fraught with uncertainty. In time, we will see which.[170]

164. *See* MCM, *supra* note 5, MIL. R. EVID. 707.

165. *Id.*

166. *See* United States v. Scheffer, 44 M.J. 442 (1996).

167. *See* MCM, *supra* note 5, MIL. R. EVID. 104(a).

168. LEWIS CARROLL, ALICE'S ADVENTURES IN WONDERLAND, chap. 3 (1865).

169. *See supra* notes 86-130 and accompanying text.

170. "Nos scimus quia lex bona est, modo quis eâ utatur legitime [We know that the law is good, if a man use it lawfully]." LAW: A TREASURY OF ART AND LITERATURE 107 (Sara Robbins et al. eds., 1990).

Appendix A

Proposed Rule 413. Evidence of Similar Crimes in Sexual Assault Cases.

(a) In a court-martial in which the accused is charged with an offense of sexual assault, evidence of the accused's commission of one or more offenses of sexual assault is admissible and may be considered for its bearing on any matter to which it is relevant.

(b) In a court-martial in which the [g]overnment intends to offer evidence under this rule, the [g]overnment shall disclose the evidence to the accused, including statements of witnesses or a summary of the substance of any testimony that is expected to be offered, at least 5 days before the scheduled date of trial, or at such later time as the military judge may allow for good cause.

(c) This rule shall not be construed to limit the admission or consideration of evidence under any other rule.

(d) For purposes of this rule, "offense of sexual assault" means an offense punishable under the Uniform Code of Military Justice, or a crime under [f]ederal law or the law of a [s]tate that involved—

(1) any sexual act or sexual contact, without consent, proscribed by the Uniform Code of Military Justice, [f]ederal law, or the law of a [s]tate;

(2) contact, without consent of the victim, between any part of the accused's body, or an object held or controlled by the accused, and the genitals or anus of another person;

(3) contact, without consent of the victim, between the genitals or anus of the accused and any part of another person's body;

(4) deriving sexual pleasure or gratification from the infliction of death, bodily injury, or physical pain on another person; or

(5) an attempt or conspiracy to engage in conduct described in paragraphs (1)-(4).

(e) For purposes of this rule, the term "sexual act" means:

(1) contact between the penis and the vulva or the penis and the anus, and for purposes of this rule, contact occurs upon penetration, however slight, of the penis into the vulva or anus;

(2) contact between the mouth and the penis, the mouth and the vulva, or the mouth and the anus;

(3) the penetration, however slight, of the anal or genital opening of another by a hand or finger or by any object, with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person; or

(4) the intentional touching, not through the clothing, of the genitalia of another person who has not attained the age of 16 years, with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person.

(f) For purposes of this rule, the term "sexual contact" means the intentional touching, either directly or through the clothing, of the genitalia, anus, groin, breast, inner thigh, or buttocks of any person with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person.

(g) For purposes of this rule, the term "[s]tate" includes a [s]tate of the United States, the District of Columbia, Puerto Rico, Guam, the Virgin Islands, and any other territory or possession of the United States."

Proposed Rule 414. Evidence of Similar Crimes in Child Molestation Cases.

(a) In a court-martial in which the accused is charged with an offense of child molestation, evidence of the accused's commission of one or more offenses of child molestation is admissible and may be considered for its bearing on any matter to which it is relevant.

(b) In a court-martial in which the [g]overnment intends to offer evidence under this rule, the [g]overnment shall disclose the evidence to the accused, including statements of witnesses or a summary of the substance of any testimony that is expected to be offered, at least 5 days before the scheduled date of trial, or at such later time as the military judge may allow for good cause.

(c) This rule shall not be construed to limit the admission or consideration of evidence under any other rule.

(d) For purposes of this rule, "child" means a person below the age of sixteen, and "offense of child molestation" means an offense punishable under the Uniform Code of Military Justice, or a crime under [f]ederal law or the law of a [s]tate that involved—

(1) any sexual act or sexual contact with a child, proscribed by the Uniform Code of Military Justice, [f]ederal law, or the law of a [s]tate;

(2) any sexually explicit conduct with children proscribed by the Uniform Code of Military Justice, [f]ederal law, or the law of a [s]tate;

(3) contact between any part of the accused's body, or an object held or controlled by the accused, and the genitals or anus of a child;

(4) contact between the genitals or anus of the accused and any part of the body of a child;

(5) deriving sexual pleasure or gratification from the infliction of death, bodily injury, or physical pain on a child; or

(6) an attempt or conspiracy to engage in conduct described in paragraphs (1)-(5).

(e) For purposes of this rule, the term "sexual act" means:

(1) contact between the penis and the vulva or the penis and the anus, and for purposes of this rule, contact occurs upon penetration, however slight, of the penis into the vulva or anus;

(2) contact between the mouth and the penis, the mouth and the vulva, or the mouth and the anus;

(3) the penetration, however slight, of the anal or genital opening of another by a hand or finger or by any object, with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person; or

(4) the intentional touching, not through the clothing, of the genitalia of another person who has not attained the age of 16 years, with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person.

(f) For purposes of this rule, the term "sexual contact" means the intentional touching, either directly or through the clothing, of the genitalia, anus, groin, breast, inner thigh, or buttocks of any person with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person.

(g) For purposes of this rule, the term "sexually explicit conduct" means actual or simulated:

(1) sexual intercourse, including genital-genital, oral-genital, anal-genital, or oral-anal, whether between persons of the

same or opposite sex;

(2) bestiality;

(3) masturbation;

(4) sadistic or masochistic abuse; or

(5) lascivious exhibition of the genitals or pubic area of any person.

(h) For purposes of this rule, the term "[s]tate" includes a [s]tate of the United States, the District of Columbia, Puerto Rico, Guam, the Virgin Islands, and any other territory or possession of the United States.

Appendix B

Proposed Rule 513. Psychotherapist-Patient Privilege.

(a) *General rule of privilege*. A patient has a privilege to refuse to disclose and to prevent any other person from disclosing a confidential communication made by the patient to a psychotherapist or an assistant to the psychotherapist, in a case arising under the UCMJ, if such communication was made for the purpose of facilitating diagnosis or treatment of the patient's mental or emotional condition.

(b) *Definitions*. As used in this rule of evidence:

(1) A "patient" is a person who consults with or is examined or interviewed by a psychotherapist for purposes of advice, diagnosis, or treatment of a mental or emotional condition.

(2) A "psychotherapist" is a psychiatrist, clinical psychologist, or clinical social worker who is licensed in any [s]tate, territory, the District of Columbia, or Puerto Rico to perform professional services as such, or who hold[s] credentials to provide such services from any military health care facility, or is a person reasonably believed by the patient to have such license or credentials.

(3) An "assistant to a psychotherapist" is a person directed by or assigned to assist a psychotherapist in providing professional services, or is reasonably believed by the patient to be such.

(4) A communication is "confidential" if not intended to be disclosed to third persons other than those whom disclosure is in furtherance of the rendition of professional services to the patient or those reasonably necessary for such transmission of the communication.

(5) "Evidence of a patient's records of communications" is testimony of a psychotherapist or assistant to the same, or patient records that pertain to communications by a patient to a psychotherapist, or assistant to the same, for the purpose of diagnosis or treatment of the patient's mental or emotional condition.

(c) *Who may claim the privilege*. The privilege may be claimed by the patient or the guardian or conservator of the patient. A person who may claim the privilege may authorize trial counsel or defense counsel to claim the privilege on his or her behalf. The psychotherapist or assistant to the psychotherapist who received the communication may claim the privilege on behalf of the patient. The authority of such a psychotherapist, assistant, guardian, or conservator to so assert the privilege is presumed in the absence of evidence to the contrary.

(d) *Exceptions*. There is no privilege under this rule under the following circumstances:

(1) Death of patient. The patient is dead;

(2) Spouse abuse or child abuse or neglect. When the communication is evidence of spouse abuse, child abuse, or neglect or in a proceeding in which the spouse is charged with a crime against the person of the other spouse or a child of either spouse;

(3) Mandatory reports. When [f]ederal law, [s]tate law, or service regulation imposes a duty to report information contained in a communication;

(4) Patient is dangerous to self or others. When a psychotherapist or assistant to a psychotherapist has a belief that a patient's mental or emotional condition makes the patient a danger to any person, including the patient;

(5) Crime or fraud. If the communication clearly contemplated the future commission of a fraud or crime or if the services of the psychotherapist are sought or obtained to enable or [to] aid anyone to commit or [to] plan to commit what the patient knew or reasonably should have known to be a crime or fraud;

(6) Military necessity. When necessary to ensure the safety and security of military personnel, military dependents, military property, classified information, or the accomplishment of a military mission;

(7) Defense, mitigation, or extenuation. When an accused offers statements or other evidence concerning his mental condition in defense, extenuation, or mitigation, under circumstances not covered by R.C.M. 706 or M.R.E. 302, the military judge may, upon motion, order disclosure of any statement made by the accused to a psychotherapist as may be necessary in the interests of justice; or

(8) Constitutionally required. When admission or disclosure of a communication is constitutionally required.

(e) *Procedure to determine admissibility of patient records or communications*.

(1) In any case in which the production or admission of records or communications of a patient other than the accused is a matter in dispute, a party may seek an interlocutory ruling by the military judge. In order to obtain such a ruling, the party shall:

(A) file a written motion at least 5 days prior to entry of pleas specifically describing the evidence and stating the purpose for which it is sought or offered, or objected to, unless the military judge, for good cause shown, requires a different time for filing or permits filing during trial; and

(B) serve the motion on the opposing party, the military judge, and if practical, notify the patient or the patient's guardian or representative of the filing of the motion and of the opportunity to be heard as set forth in subparagraph (e)(2).

(2) Before ordering the production or admission of evidence of a patient's records or communications, the military judge shall conduct a hearing. Upon motion of counsel for each party and upon good cause shown, the military judge may order the hearing closed. At the hearing, the parties may call witnesses, including the patient, and offer other relevant evidence. The patient will be afforded a reasonable opportunity to attend the hearing and be heard at the patient's own expense unless the patient has been otherwise subpoenaed or ordered to appear at the hearing. However, the proceedings will not be unduly delayed for this purpose. In a case before a court-martial composed of military judge and members, the military judge shall conduct the hearing outside the presence of the members.

(3) The military judge shall examine the evidence or a proffer thereof in camera, if such examination is necessary to rule on the motion.

(4) To prevent unnecessary disclosure of evidence of a patient's records or communications, the military judge may issue protective orders or may admit only portions of the evidence.

(5) The motion, related papers, and the record of the hearing shall be sealed and shall remain under seal unless the military judge or an appellate court orders otherwise.

Analysis to Military Rule of Evidence 513.

"199_" Amendment: Military Rule of Evidence 513 establishes a psychotherapist-patient privilege for investigations or proceedings authorized under the Uniform Code of Military Justice. MRE 513 clarifies military law in light of the Supreme Court decision in *Jaffee v. Redmond*, ___U.S.___, 116 S. Ct. 1923, 135 L. Ed. 2d 337 (1996). *Jaffee* interpreted Federal Rule of Evidence 501 to create a federal psychotherapist-patient privilege in civil proceedings and refers federal courts to state laws to determine the extent of privileges. In deciding to adopt this privilege for courts-martial, the committee balanced the policy of following federal law and rules when practicable and not inconsistent with the UCMJ or MCM with the needs of commanders for knowledge of certain types of information affecting the military. The exceptions to the rule have been developed to address the specialized society of the military and separate concerns, which must be met to ensure military readiness and national security. *See* Parker v. Levy, 417 U.S. 733, 743 (1974); United States *ex rel*. Toth v. Quarles, 350 U.S. 11, 17 (1955); Department of the Navy v. Egan, 484 U.S. 518, 530 (1988). There is no intent to apply the privilege in any proceeding other than those authorized under the UCMJ. MRE 513 was based in part on Proposed Fed. R. Evid. (not adopted) 504 and state rules of evidence.

MRE 513 is not a physician-patient privilege; instead, it is a separate rule based on the social benefit of confidential counseling recognized by *Jaffee*, and similar to the clergy-penitent privilege. In keeping with American military law since its inception, there is still no physician-patient privilege for members of the Armed Forces. See the analyses for MRE 302 and MRE 501.

(a) General Rule of Privilege. The words "under the UCMJ" in this rule mean that this privilege applies only to UCMJ proceedings and does not limit the availability of such information internally to the services, for appropriate purposes.

(b) Exceptions. These exceptions are intended to emphasize that military commanders are to have access to all information and that psychotherapists are to readily provide information necessary for the safety and security of military personnel, operations, installations, and equipment.

The CAAF at a Crossroads: New Developments in Post-Trial Processing

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Introduction

"We are concerned with the large number of cases coming before us involving issues of new matter in post-trial addenda. The court below has noted that post-trial errors have accounted for 44% of the cases where they have granted relief as of October 1995." —*UNITED STATES V. CHATMAN* [1]

Post-trial errors continued to bedevil military appellate courts throughout the 1997 term. As noted above, close to half of the cases in which the Air Force Court of Criminal Appeals recently ordered relief involved post-trial mistakes.[2] The concern of the Court of Appeals for the Armed Forces (CAAF) over the steady volume of post-trial mistakes appears to have reached the point where the court is prepared to take affirmative steps to change the way post-trial errors are reviewed on appeal.

A New Rule?

In what may prove to be the CAAF's most significant post-trial opinion in several years, *United States v. Chatman*,[3] the CAAF fashioned a new rule that shifts the burden to the accused to show what he would have submitted to "deny, [to] counter, or [to] explain" new matter in the staff judge advocate's (SJA's) addendum.[4] This new burden imposed on the appellant represents a significant departure from the existing post-trial appellate review process, in which appellate courts generally refuse to "speculate on what the convening authority would have done if he had been presented with an accurate record."[5]

This is a significant change of direction for the CAAF. As justification for its new approach to reviewing post-trial addendum errors, the court cited Article 59(a) of the Uniform Code of Military Justice (UCMJ).[6] This is the provision of the UCMJ commonly cited to support findings of "harmless error." The majority of the CAAF has consistently resisted the application of the "harmless error" standard to post-trial errors. Judge Crawford, however, has long espoused this to be the appropriate standard in numerous dissenting opinions.[7] To the extent *Chatman* stands for the proposition that the CAAF will now apply a harmless error analysis to addenda with new matter that was not served on the defense, it appears that Judge Crawford's minority view is gathering steam among other members of the court.

Whether *Chatman* is a precursor of additional changes to appellate review of post-trial processing is far from certain. Though clearly placing a new burden on the defense to demonstrate prejudice, Judge Gierke's majority opinion establishes an extremely low standard for future appellants to satisfy. Judge Gierke wrote: "[w]e believe that the threshold should be low,

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1. 46 M.J. 321, 323 (1997), *citing* United States v. Thompson, 43 M.J. 703, 707 (A.F. Ct. Crim. App. 1995).

2. These statistics were the product of an informal survey conducted by the Air Force Court of Criminal Appeals. This number is even more telling when one considers the number of post-trial mistakes typically held to be harmless.

3. 46 M.J. 321. In *Chatman*, the accused alleged ineffective assistance of counsel because his attorney never gave him the opportunity to explain the single remaining charged use of cocaine. In his addendum, the staff judge advocate responded that this was a "tactical decision" because the defense counsel was aware of a second positive urinalysis that the government could have used in rebuttal. The addendum was not served on the accused. The accused claimed that this information constituted "new matter" requiring service on the defense and an opportunity to respond. The CAAF reversed the conclusion of the Air Force Court of Criminal Appeals and held that this did not constitute "new matter." *Id*. at 324.

4. *Id.* at 323.

> For all cases in which a petition for review is filed after the date of this decision asserting that defense counsel have not been served with an addendum containing new matter, we will require appellant to demonstrate prejudice by stating what, if anything, would have been submitted to "deny, counter, or explain" the new matter.
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> .

Id. The CAAF did not apply the new rule to the instant case. The court returned the record for a new post-trial recommendation and action. *Id.*

5. *Id.*, *citing* United States v. Leal, 44 M.J. 235, 237 (1996).

6. *See* UCMJ art. 59(a) (West 1995) (stating that "[a] finding or sentence of a court-martial may not be held incorrect on the ground of an error of law unless the error materially prejudices the substantial rights of an accused").

7. *See, e.g.*, *Leal*, 44 M.J. at 240 (Crawford, J., dissenting).

and if an appellant makes *some colorable showing of possible prejudice*, we will give that appellant the benefit of the doubt . . . ."[8] Just how far the CAAF's new standard, which requires "some colorable showing of possible prejudice," is from traditional notions of harmless error (errors that do not materially prejudice the substantial rights of an accused)[9] remains to be seen. Judge Crawford acknowledged this discrepancy by concurring only "insofar as the majority is willing to apply the harmless error test in the future to cases involving those numerous post-trial errors."[10] Judge Crawford's firm stance in support of the harmless error standard is based on her unflinching view that "Article 59(a) makes no exceptions as to application of the harmless error test" to the review of errors occurring during the post-trial process.[11]

Why Post-trial Errors Are Treated Differently from Other Trial Errors

Before proceeding further into recent developments, it may prove useful to take a step back to understand why military appellate courts have been reluctant to analyze post-trial errors under the same standard used to review errors committed at other stages of trial. The UCMJ and the *Manual for Courts-Martial* (*MCM*)[12] instituted an elaborate post-trial system designed to provide an accused with his "best chance" for sentence relief.[13] Post-trial practitioners are required to navigate their way through numerous rules under both the UCMJ and the *MCM* to ensure that an accused's post-trial rights are honored.[14] Due, in no small part, to the sheer number of post-trial rules there are to follow, numerous post-trial mistakes repeatedly occur.[15]

Unlike the courts' consistent treatment of other trial errors under the harmless error standard of Article 59(a), military appellate courts have applied an inconsistent methodology for reviewing post-trial errors. Time and again, military appellate courts confront the ultimate question of whether the alleged post-trial error affects a substantial right of the accused[16] or amounts to merely a harmless procedural error.[17]

Unique Nature of Military Justice Post-trial Practice

It is the unique nature and purpose of the military post-trial process that poses this conundrum for military appellate courts. The virtually limitless extra-record information that the government and defense can present for the convening authority's consideration during the post-trial process distinguishes the post-trial phase from the pretrial, trial, and sentencing phases of a court-martial. To accommodate these virtually unrestricted submissions from the government and defense, the UCMJ and the *MCM* provide convening authorities with broad discretion to consider matters outside the record prior to acting on a case. Since final action regarding findings and sentence is a matter within the convening authority's "sole discretion,"[18] convening authorities are permitted to consider any matters they "deem appropriate."[19] As noted in *United States v. Busch*,[20] a convening authority may grant clemency "for good reason, for no reason, or even for what an appellate court might consider to be a bad reason."[21]

In light of the convening authority's extreme latitude, the rules permit both the government and the defense to submit extra-record matters for the convening authority's consider-

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8. *Chatman*, 46 M.J. at 323-24 (emphasis in original).

9. UCMJ art. 59(a).

10. *Chatman*, 46 M.J. at 324 (Crawford, J., concurring).

11. *Id.*

12. MANUAL FOR COURTS-MARTIAL, UNITED STATES (1995) [hereinafter MCM].

13. *See* United States v. Boatner, 43 C.M.R. 216, 217 (C.M.A. 1971).

14. *See* MCM, *supra* note 12, R.C.M. 1101-1114.

15. *See Chatman*, 46 M.J. 321.

16. *See* UCMJ art. 59(a) (West 1995).

17. The issue can also be framed by asking whether an accused's right to clemency is a "substantial right" that has been materially prejudiced by a particular post-trial error. *See* United States v. Busch, 46 M.J. 562, 565 (N.M. Ct. Crim. App. 1997) (withdrawn from the bound volume at the request of the court).

18. MCM, *supra* note 12, R.C.M. 1107(b)(1).

19. *Id.* R.C.M. 1107(b)(3)(B)(iii). If the convening authority considers adverse matters outside of the record, the accused must be notified and given an opportunity to respond.

20. 46 M.J. 562.

21. *Id.* at 564.

ation. Rule for Courts-Martial (R.C.M.) 1106(b) enables an accused to submit "*any written matters which may reasonably tend to affect the convening authority's decision* whether to disapprove any findings of guilty or to approve the sentence." [22] The rules provide the SJA with similar discretion to include matters outside the record of trial in the post-trial review. "The recommendation of the staff judge advocate or legal officer may include . . . *any additional matters deemed appropriate* by the staff judge advocate or legal officer. Such matter may include *matters outside the record*."[23]

The unique problem posed by the boundless matters available for the convening authority's consideration is the absence of boundaries within which to assess the impact that erroneous or incomplete information may have had on the convening authority's exercise of his unfettered discretion. Since there are no limits on matters that the defense may elect to submit, appellate courts struggle to determine whether denial of an accused's right to submit matters may have affected the convening authority's decision to grant or to deny clemency. Consequently, courts are reluctant to speculate as to what a defense counsel would have submitted had she not been denied the opportunity to do so.[24] In similar fashion, the limitless reasons a convening authority may grant clemency (any reason, no reason, even a bad reason) make it an equally daunting task for appellate courts to ascertain the effect post-trial errors (for example, erroneous information provided by the government or denied opportunities to present matters by the defense) may have had on the convening authority's decision whether to grant clemency. Just as appellate courts are reluctant to speculate about what defense counsel would have done, these same courts are even more reluctant to speculate as to what the convening authority might have done had the error not occurred.[25]

Is Chatman a Turning Point?

Years from now, military justice practitioners may look back on C*hatman* as the seminal case in which a nearly unanimous CAAF[26] changed direction regarding appellate review of post-trial errors. It may represent the court's first of many steps toward reviewing post-trial errors under the same standard applied to other trial errors. Placing the burden on the accused to demonstrate prejudice, albeit under the very low standard of "some colorable showing of potential prejudice,"[27] represents a clear departure from the historical treatment of post-trial errors as a class of their own. Whether this new burden will be limited to instances of government failure to re-serve addenda containing new matter remains to be seen. It would not be surprising to see future arguments from the defense that an accused had suffered similar prejudice because either the government failed to serve the SJA post-trial recommendation (PTR) on the defense[28] or the record of trial did not include the SJA's PTR.[29] In both instances, the appellate courts will be left to speculate, first, as to what the defense counsel would have submitted if given notice and an opportunity to respond and, second, what the convening authority would have done had he considered these speculative matters.

Also left unresolved is whether the *Chatman* court's willingness to accept the appellant's affidavit concerning what he would have submitted to "deny, [to] counter, or [to] explain" the new matter will lead to acceptance of a convening authority's affidavit explaining what he would have done if he had been provided with accurate information. Will military appellate courts attempt to avoid the lengthy and unproductive process of returning cases to convening authorities for new reviews and actions by accepting affidavits that state what, if anything, the convening authority would have done differently? Allegations that the convening authority was misinformed of the

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22. MCM, *supra* note 12, R.C.M. 1106(b) (emphasis added). The rule further provides:

> Such matters are not subject to the Military Rules of Evidence and may include:
> (1) Allegations of errors affecting the legality of the findings or sentence;
> (2) Portions or summaries of the record and copies of documentary evidence offered or introduced at trial;
> (3) Matters in mitigation which were *not available for consideration at the court-martial*; and
> (4) Clemency recommendations by any member, the military judge, or *any other person*. The *defense may ask any person for such a recommendation*.

Id. (emphasis added).

23. *Id.* R.C.M. 1106(d)(5) (emphasis added).

24. *See, e.g.*, United States v. Leal, 44 M.J. 235 (1996).

25. *See, e.g.*, United States v. Chatman, 46 M.J. 321, 324 (1997).

26. Judge Sullivan concurred with the ultimate holding in *Chatman*, but he dissented with what he termed "judicial rulemaking" by the majority. *Id*. at 324 (Sullivan, J., concurring in part and dissenting in part).

27. *Id.* at 323, 324.

28. *See* MCM, *supra* note 12, R.C.M. 1106(f)(1) (requiring service of the SJA PTR on counsel for the accused).

29. *See* United States v. Mark, 47 M.J. 99 (1997).

accused's service record,[30] or failed to consider clemency matters submitted by the accused, are post-trial errors that could be resolved more efficiently through affidavits, as opposed to the time-consuming, labor-intensive process of ordering a new review and action. It is clear from the result in *Chatman* that the CAAF, at least with respect to post-trial addenda errors, has lost confidence "that returning cases for a new recommendation and action is a productive judicial exercise."[31] In light of the numerous post-trial errors reviewed by the courts over the years, it just may be that military appellate courts are now confident in their ability to speculate on what a defense counsel or convening authority would have done under certain circumstances.

The Slow Process of Change

Counsel should not be too quick to herald the arrival of a new standard for post-trial review. One week after publishing *Chatman*, the CAAF published *United States v. Buller.*[32] In that case, Buller asked the convening authority to reduce the adjudged sentence of total forfeitures to forfeiture of only $500.00 pay so that he could pay some "honorable" debts. In his addendum recommending against clemency, the SJA advised the convening authority that the accused had continued to receive "his pay of over $900 per month since his trial and confinement in January."[33] On appeal, Buller asserted that the SJA's comment regarding his continued full pay constituted "new matter" that required service on the defense and the opportunity to respond.[34]

Rather than resolve the issue through the traditional two-step process of first determining whether the information constituted "new matter" that required service on the defense and *then* testing for prejudice to the accused, the court skipped right to the question of prejudice. Noting the imprecise definition of "new matter" in R.C.M. 1106(f)(7), the CAAF concluded that it was not necessary to "attempt a more precise definition or to determine whether the material constituted 'new matter.'"[35] Instead, the CAAF assumed that it was new matter and decided the case on the much easier issue of finding that the accused was not prejudiced by the government's failure to serve the addendum.[36]

Though the shift of the burden of proof is not as clearly stated as in *Chatman*, the *Buller* court impliedly shifted the burden to the accused to show that the information contained in the SJA addendum was erroneous. Since the issue concerned the appellant's pay and financial situation, the court concluded that the accused was "in the best position to tell this [c]ourt whether the SJA's otherwise neutral comments were erroneous, inadequate, or misleading."[37] The CAAF observed that "[n]o such showing has been made" by the appellant.[38] The CAAF's concluding remarks that the essence of R.C.M. 1106(f)(7)[39] is "fair play" provides further evidence of the CAAF's apparent change in direction. Noting the court's history of presuming prejudice when the defense is not provided notice and an opportunity to respond to new matter, the *Buller* court reinforced its new view that it will not engage in "such a presumption [of prejudice] when the information is neutral or 'trivial.'"[40]

Had the CAAF concluded its opinion at this point, *Buller* and *Chatman* would have provided relatively clear, consistent

30. Pursuant to R.C.M. 1106(d)(3)(C), the SJA's PTR must include a summary of the accused's service record, to include length and character of service, awards and decorations received, and any record of non-judicial punishment and previous convictions. Inaccuracies and omissions of service records are frequently the subject of appellate litigation. *See, e.g.*, United States v. Demerse, 37 M.J. 488 (C.M.A. 1993).

31. *Chatman*, 46 M.J. at 323. The court stated further: "We are no longer confident that returning cases for a new recommendation and action is a productive judicial exercise in the absence of some indication that the information presented to the convening authority on remand will be significantly different." *Id.*

32. 46 M.J. 467 (1997).

33. *Id.* at 468.

34. *Id. See* MCM, *supra* note 12, R.C.M. 1106(b)(3)(A).

35. *Buller*, 46 M.J. at 468.

36. *Id.* (stating that the "appellant was not prejudiced by the failure to do so"). The court concluded that there was no prejudice because the SJA's comments reflected the routine administration of the sentence under the law in effect at the time of trial. Although recognizing that even routine information could be used in such a manner that failure to serve the accused could prejudice the defense, the court concluded that this was not such a case. *Id*. Counsel should note that this case arose prior to the recent change to UCMJ Article 58b, which requires automatic forfeiture of pay within 14 days of the announcement of a sentence that includes forfeitures.

37. *Id.* at 469.

38. *Id.* at 469.

39. *See* MCM, *supra* note 12, R.C.M. 1106(f)(7). "When new matter is introduced after the accused and counsel for the accused have examined the recommendation, however, the accused and counsel for the accused must be served with the new matter and given 10 days from service of the addendum in which to submit comments." *Id*.

40. *Buller*, 46 M.J. at 469.

signals that the court was headed in the direction favoring a more streamlined review of post-trial processing. At the end of its opinion, however, the CAAF added a footnote to offer its thoughts regarding the continued existence of potential appellate litigation over "new matter."[41] Noting that problems of new matter are likely to continue to plague the court, the CAAF recommended that the Rules for Courts-Martial be amended to require "serving the addendum on the accused in all cases, regardless of whether it contains 'new matter'"[42]

In his concurring opinion in *Buller*, Judge Sullivan bemoaned, "[e]nough of this ex parte justice"[43] of providing additional information to the convening authority through the SJA's addendum. Judge Sullivan suggested that the rules be changed to provide convicted soldiers rights akin to those afforded to civilian criminals under Federal Rule of Criminal Procedure (Fed. R. Crim. P.) 32(b)(6) to review, to comment upon, and to object to matters in federal presentence reports.[44]

Judge Sullivan's analogy to due process rights under Fed. R. Crim. P. 32(b)(6) and the majority's willingness to create additional post-trial procedural rules reveal the court's nagging reluctance to recognize or to distinguish concepts of due process from clemency. Pursuant to Fed. R. Crim. P. 32(b)(6), a civilian accused is afforded the *procedural due process right* to review and to comment on information presented during the sentencing phase of a federal criminal trial.[45] The UCMJ already provides soldiers who are convicted of crimes substantial procedural due process during the adversarial sentencing hearing.[46] Judge Sullivan's demand to end "this ex parte justice" during the clemency process is off the mark. Clemency, as opposed to determining an appropriate sentence for a convicted criminal, is not a matter of due process and justice. It is a matter of mercy.[47] By recommending that the President create an additional due process procedural requirement to serve the SJA's addendum in every case, the CAAF continues to merge concepts of mercy with concepts of procedural due process. The end result is an ever-expanding procedural due process entitlement to submit clemency matters.

Buller and *Chatman* provide perfect examples of the CAAF's ongoing struggle to develop a consistent approach to the review of post-trial errors. On one side of the struggle (*Buller*) is the court's unanimous recommendation for more post-trial procedural due process protection in the form of a new rule requiring mandatory service of the addendum. On the other side lies *Chatman*, where the CAAF de-emphasized post-trial procedural due process by creating a new rule that placed the burden on the accused to demonstrate prejudice when the government fails to serve addenda that contain new matter. The inability of the CAAF to settle on a consistent methodology for reviewing post-trial errors is apparent in several other cases decided during the 1997 term.

The Post-trial Addendum

In addition to *Chatman* and *Buller*, the CAAF reviewed two other cases that alleged failure to serve an addendum containing *new matter.* In both *United States v. Cook*[48] and *United States v. Catalani*,[49] the alleged *new matter* involved gratuitous praise for the military judges who presided over the courts-martial and the observation that the esteemed judges had considered the same clemency matters now before the convening authority.[50] In both cases, the CAAF had little trouble finding that such remarks constituted new matter and that the SJA's failure to serve the addendum was prejudicial.

In *Catalani*, the CAAF noted that the military judge had, in fact, not considered much of the clemency package and, more importantly, that the favorable comments regarding the military judge were simply an attempt to bolster the SJA's own recommendation.[51] The CAAF also criticized the SJA's failure to address "the more fundamental question . . . of the relationship

41. *Id.* at 469 n.4.

42. *Id.*

43. *Id.* at 471.

44. *Id.* at 469-71.

45. FED. R. CRIM. P. 32(b)(6).

46. *See* MCM, *supra* note 12, R.C.M. 1001(c) (permitting the defense to present evidence in extenuation and mitigation and to rebut government aggravation evidence).

47. *See* WEBSTER'S NEW COLLEGIATE DICTIONARY 206 (1973). Clemency is defined as "an act or instance of leniency." *Id.* It is synonymous with notions of mercy.

48. 46 M.J. 37 (1997).

49. 46 M.J. 325 (1997).

50. *See Cook*, 46 M.J. at 38. The SJA described the military judge as "the senior military judge in our circuit, one of the most experienced trial judges in the USAF, [who] considered most of the clemency matters now before you." *Id.* The SJA's addendum in *Catalani* offered similar praises for the military judge: "[a]ll of the matters submitted for your consideration in extenuation and mitigation were offered by the defense at trial; and *the* seniormost military judge in the Pacific imposed a sentence that, in my opinion, was both fair and proportionate to the offense committed." *Catalani*, 46 M.J. at 327 (emphasis added).

between the responsibilities of the military judge at trial and the responsibilities of the convening authority in the post-trial review."[52] Highlighting the clear distinction between these phases of the trial, the CAAF described the differences in the following manner:

> The sentencing authority at trial is required to adjudge an "appropriate sentence" . . . subject to the maximum punishment . . . and the rules governing evidence . . . . The convening authority, on the other hand, is not limited to considering evidence that is admissible at a court-martial . . . . The fact that the military judge has imposed a lawful sentence and appropriate sentence does not restrain the convening authority who "may for any or no reason disapprove a legal sentence in whole or in part" . . . . The convening authority is directed to "approve that sentence which is warranted by the circumstances of the offense and appropriate for the accused."[53]

In stark differences of opinion, Judge Effron and Judge Crawford clashed over how to frame the central issue in the case. For Judge Effron, "the central issue . . . is not whether the sentence adjudged . . . was lawful, but whether *applicable procedural steps were followed* during post-trial proceedings involving exercise of the convening authority's broad discretion to modify an otherwise lawful sentence."[54] In her dissenting opinion, Judge Crawford framed the central issue in a different light: "[a]ssuming the staff judge advocate (SJA) did not inform the convening authority about the clemency matters and did interject new matter, *were these errors harmless?*"[55]

Catalani and *Chatman* were published on the same day.[56] Although Judge Effron concurred with the new rule announced in *Chatman*, his majority opinion in *Catalani*, characterizing the central issue as a matter of procedure rather than prejudice, is indicative of the majority's unwillingness to completely abandon the post-trial procedural due process approach to appellate review of post-trial errors in favor of Judge Crawford's harmless error approach.

United States v. Cook[57] was a much easier case for a unanimous CAAF. The court concluded that failure to serve the SJA's post-trial addendum prejudiced the accused. In addition to comments that the senior military judge in the circuit had considered the matters, the SJA also discussed the unlikelihood of the accused waiving an administrative separation hearing if the convening authority disapproved the bad-conduct discharge. The SJA also attempted to downplay the impact that a bad-conduct discharge would have had on the accused's future.[58]

Erroneous Advice Regarding the Convening Authority's Clemency Power

In *United States v. Hamilton*,[59] a unanimous CAAF explained the distinction between two types of erroneous SJA advice to the convening authority. If the SJA provides erroneous advice regarding the convening authority's duty to review legal errors, it is "less pivotal to an accused's ultimate interests" and can be subsequently corrected by appellate litigation over the claimed legal error. It is therefore appropriate for appellate courts to test such errors for prejudice.[60] If, however, the erroneous advice concerns the execution of the convening authority's clemency power, the mistake "is particularly serious because no subsequent authority adequately can fix that mistake."[61]

Hamilton's post-trial submission alleged several errors concerning the admissibility of evidence at trial. In his addendum,

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51. *Catalani*, 46 M.J. at 328.

52. *Id.*

53. *Id.* (citations omitted).

54. *Id.* at 329 (emphasis added).

55. *Id.* at 330 (Crawford, J., dissenting) (emphasis added).

56. The opinions were both published on 18 August 1997.

57. 46 M.J. 37 (1997).

58. *Id.* at 40. The government conceded these errors, but challenged the Air Force court's remedial power, urging the court to order a new review and action. The Air Force court declined to do so, reassessed the sentence, and set aside the bad-conduct discharge. The government appealed the Air Force court's decision to the CAAF, and the CAAF subsequently affirmed the broad remedial powers of the service courts to fashion an appropriate remedy in each case brought before it. *Id.* at 39-40.

59. 47 M.J. 32 (1997).

60. *See id.* at 35-36.

61. *Id.* at 35.

the SJA incorrectly advised the convening authority that "[e]videntiary rulings do not fall under the province of the convening authority, but are matters properly brought before the [military judge], as was done in this case . . . . *Unfavorable rulings are issues for appeal rather than reasons for granting clemency.*"[62] The CAAF concluded that, even if this advice misled the convening authority, it involved legal issues, as opposed to clemency powers. Exercising its power to review legal issues, the CAAF ultimately found that the alleged legal errors lacked merit and that the accused was not prejudiced by the erroneous advice.[63]

Counsel must understand the critical distinction at issue in *Hamilton*.[64] The fact that the convening authority's clemency power is unique from his other post-trial powers reinforces the principle that errors affecting these unique clemency powers, as opposed to his other duties, are much more likely to result in findings of prejudice to an accused. There is simply no other mechanism (other than appellate court speculation) that can make up for this "lost opportunity" to obtain clemency from the convening authority. The fact that the CAAF characterized the issue in *Hamilton* as legal advice instead of clemency advice justified the court's ultimate conclusion.

The Air Force Court of Criminal Appeals addressed a similar issue of mistaken advice regarding the convening authority's power to reassess a sentence after certain charges were dismissed during post-trial review. In *United States v. Kerwin*,[65] the SJA advised the convening authority that one of several specifications was erroneously referred to trial. Based on the error and the accused's request for clemency, the SJA recommended that the convening authority dismiss the specification and reduce the period of forfeitures from twenty-four to eighteen months.[66] The Air Force court agreed with the defense that, in those instances when the SJA recommends relief for a legal error, the SJA must follow a two-step process in advising the convening authority before taking final action.[67] The first step is to advise the convening authority as to the sentence that would probably have been adjudged had the error not occurred (sentence reassessment).[68] The second step (assuming the accused requests clemency) is to advise the convening authority whether *clemency* is warranted in light of the newly reassessed sentence.[69]

> [T]he SJA's advice to the convening authority on what impact an error had on the adjudged sentence, if any, is totally separate from what sentence the convening authority should actually approve as a matter of command discretion, including clemency . . . . Here, the SJA failed to distinguished [sic] between the various sentencing concepts to appellant's prejudice . . . . Thus, the SJA erred in not discussing whether the dismissed offense had an impact on any aspect of appellant's sentence and in lumping sentencing relief for the legal error with clemency.[70]

In *United States v. Griffaw*,[71] the SJA's failure to appreciate the differences between clemency and relief for legal errors prompted the Air Force court to order a new review and action. Airman First Class Griffaw pleaded guilty to several offenses and was sentenced to a bad-conduct discharge, total forfeitures, reduction to E-1, and eighteen months confinement. His pretrial agreement limited confinement to twelve months. In response to the accused's clemency request for a further reduc-

62. *Id.* at 34 (emphasis added).

63. *Id.* at 36. The court concluded that even though the convening authority has the power to respond to claims of legal error, and is encouraged to act in the interests of fairness to the accused and efficiency of the system, "he is not required to do so." *Id*. at 36. Ultimately, the issue of prejudice to the accused will be tested during the normal course of appellate review. *Id.* at 35-36.

64. The majority noted that it is not easy to draw the distinction between the convening authority's clemency powers and the power to review legal errors. The court commented that the SJA "seemed to muddy the water" with his advice. *Id.* at 35. The SJA's advice to the convening authority (that legal errors are not reasons for granting clemency) was incorrect in that it implied that such matters are not of proper concern to the convening authority. Convening authorities are required to consider any matters submitted by the accused. MCM, *supra* note 12, R.C.M. 1107(b)(3)(A)(iii). The court, however, appears to have balanced this duty against the more controlling provision of R.C.M. 1107(b)(1), which states that "[t]he convening authority is not required to review the case for legal errors or factual sufficiency." *Hamilton*, 47 M.J. at 35, *quoting* MCM, *supra* note 12, R.C.M. 1107(b)(1).

65. 46 M.J. 588 (A.F. Ct. Crim. App. 1996). This case also involved erroneous advice in the SJA's addendum concerning the convening authority's options regarding a punitive discharge. *Id.* at 590-91.

66. *Id.* at 589.

67. *Id.* at 591.

68. *Id*. "Generally an accused is entitled to be placed in the position he would have occupied if an error had not occurred." *Id.* (citing United States v. Hill, 27 M.J. 293, 296 (C.M.A. 1988)).

69. *Id.* at 591-92.

70. *Id.* at 591.

71. 46 M.J. 791 (A.F. Ct. Crim. App. 1997).

tion in confinement, the SJA advised the convening authority that "the accused had the benefit of a pretrial agreement in this case . . . . In my opinion, the accused has already received clemency in the form of six months off of the sentence adjudged by the [c]ourt."[72]

Senior Judge Pearson cogently explained the relationship between clemency and pretrial agreements. He observed that a convening authority does not exercise "any command prerogative in reducing a sentence to comply with a PTA [pretrial agreement] cap; rather, that officer merely abides by the agreement as required by law."[73] Clemency, on the other hand, is a matter of command prerogative, and the clemency review process begins at "the lower of either the adjudged sentence or the sentence cap."[74] The court concluded that the SJA's advice erroneously "insinuated" to the convening authority that he had already fulfilled his clemency duties by reducing confinement from eighteen to twelve months pursuant to the pretrial agreement. The court ordered a new review and action.[75]

In light of *Kerwin* and *Griffaw*, staff judge advocates must recognize and understand the convening authority's different post-trial responsibilities. They must be able to provide convening authorities with accurate advice regarding the proper exercise of these separate and distinct obligations. Allegations of erroneous post-trial advice regarding legal errors during the trial will be tested for prejudice and may survive appellate scrutiny. Cases involving erroneous clemency power advice, however, are often not suitable for the typical harmless error analysis[76] and may require a new review and action.

Erroneous Post-trial Recommendations

The military appellate courts reviewed several cases that alleged erroneous information in the SJA's post-trial recommendations (PTR). The common thread among these cases is the degree to which appellate courts rely on the PTR as the foundational document for the convening authority. In those cases where courts reinforce the importance of the PTR over information contained in other portions of the record (for example, pretrial advice, pretrial agreement, pretrial investigation report), errors in the PTR were held fatal. If the convening authority relies solely on the SJA's PTR for information relevant to clemency, the information contained therein must be accurate, because even the slightest error or omission might adversely affect the convening authority's decision to grant clemency. There are instances, however, when the appellate courts are willing to look beyond the PTR to support findings that erroneous or missing information was harmless, where the convening authority was apprised of the correct information through other sources. To the extent that appellate courts are willing to attribute information to the convening authority through sources other than the SJA's erroneous PTR, it is more likely that the error will be found harmless.

United States v. Busch[77] involved the all too common failure of the SJA to list the accused's awards and decorations accurately in the staff judge advocate recommendation (SJAR).[78] The Navy-Marine Corps Court of Criminal Appeals held that failure to list three Navy Good Conduct Medals in the SJAR rose to the level of plain error and justified a presumption of prejudice.[79] The court ordered a new review and action.[80]

The Navy court's opinion included a lengthy discourse on the importance of the SJAR and its relation to the convening authority's broad clemency powers. The SJAR is a "formal assessment of a case for the convening authority from his or her principal legal advisor."[81] Because of the convening authority's sweeping clemency powers, errors in the SJAR frequently

72. *Id.* at 792.

73. *Id.*

74. *Id.*

75. *Id.* at 793. Senior Judge Pearson also explained the rationale for entering into a pretrial agreement by comparing it to the reasons homeowners buy flood insurance on a house. "You buy flood insurance, not because you want your house flooded, but because you want to put a ceiling on your loss if disaster strikes." *Id.* at 792.

76. This is not an easy distinction to draw. *See* United States v. Hamilton, 47 M.J. 32 (1997); *see also supra* notes 59-64 and accompanying text. Although the CAAF concluded that the SJA's erroneous advice concerned legal errors (admissibility of evidence), one could argue that advising the convening authority that "[u]nfavorable rulings are issues for appeal rather than reasons for granting clemency" relates not only to legal errors, but also affects the convening authority's clemency power. *See Hamilton*, 47 M.J. at 34. This argument could be extended to practically any erroneous post-trial advice when one considers that the convening authority can grant clemency for any reason at all.

77. 46 M.J. 562 (N.M. Ct. Crim. App. 1997) (withdrawn from the bound volume at the request of the service court).

78. *See* MCM, *supra* note 12, R.C.M. 1106(d)(3)(C). The SJAR is the Air Force and Navy-Marine Corps equivalent of the Army post-trial recommendation (PTR).

79. *Busch*, 46 M.J. at 565. "Because of the unquestioned importance of the SJAR and its contents, the importance of military awards, particularly *three* consecutive Good Conduct Awards, and the unrestricted discretionary power of the convening authority to grant clemency, we will presume prejudice in this case." *Id.* (emphasis in original).

80. *Id.*

require a new SJAR and action. The Navy court justified this relatively severe remedy on the court's inability to substitute its judgment for the unfettered discretion of the convening authority. "An omitted award that may seem relatively unimportant to an appellate court may have significance to a particular convening authority."[82] Since an appellant is entitled to be placed in the position he should have been in had there been no error in the SJAR, the only remedy is to return the case for a new review and action.[83]

Critical to Busch's success was his initial ability to convince the Navy court that the convening authority was not otherwise aware of his three Good Conduct Awards. The Navy court cautioned, however, that "[h]ad we found in the record and accompanying documents that the convening authority had been otherwise aware of all of the appellant's awards prior to taking action, we would conclude that the appellant was not prejudiced by the SJAR deficiency, and deny relief, on that basis alone."[84] Most surprising is the fact that these medals were listed in the accused's service records, entered as Defense Exhibit A. Nevertheless, the court concluded that the convening authority "relied on the SJAR."[85]

In *United States v. Mark*,[86] the alleged error involved an SJAR that was not only defective but also completely missing from the record of trial. The Navy court applied a presumption of regularity to find that the SJAR had been prepared, served on the defense, and considered by the convening authority.[87] The CAAF reversed the Navy court, holding that no presumption of regularity can save a case where the SJAR is completely missing from the record of trial.[88]

The CAAF used *Mark* as an opportunity to reinforce the controlling nature of the SJAR to the post-trial process. "Although its scope has been narrowed, the significance of the SJA's recommendation and its contents has actually increased. This has occurred because the convening authority no longer is required to personally review the record of trial before taking action."[89] The government had urged the court to test for prejudice, as in previous cases involving erroneous SJARs and missing documents.[90] However, Judge Sullivan distinguished *Mark* from cases where the court had other court documents to consider to test for prejudice.[91]

In essence, *Mark* stands for the proposition that there is no substitute for the SJA's PTR (or SJAR). The irreplaceable nature of the PTR stems from the "permissible extra-record"[92] information an SJA may include in the PTR that he provides to the convening authority. Since there is virtually no limit on what the SJA may include in his PTR, it is extremely difficult for appellate courts to speculate as to what information the convening authority was aware of and how that information may have affected the clemency decision. Consequently, appellate courts have little choice in such circumstances but to return such records to the convening authority for a new review and action.

In *United States v. Wiley*,[93] the CAAF took a much more liberal approach to assessing the convening authority's level of

81. *Id.* at 564.

82. *Id.* at 565.

83. *Id.*

84. *Id.* at 564.

85. *Id.* The court also explained how the "fundamental differences between the federal and military criminal justice systems, especially the unique clemency powers of the convening authority," justify a different approach to harmless error analysis from the seminal Supreme Court case *United States v. Olano*, 507 U.S. 725, 732-34 (1993). *Id.* "The *Olano* court was not interpreting FED. R. CRIM. P. 52(b) plain error in the context of post-trial error committed in the military system." *Id.* at 565-66. Overall, the Navy court appears to have adopted the most protective posture of the appellate courts with respect to the primacy of the SJA's post-trial responsibilities.

86. 47 M.J. 99 (1997).

87. *Id.* at 100 (citing the unpublished Navy court opinion). The Navy court applied the presumption of regularity based on its observation that the court would "not seriously entertain" the appellant's assigned error without an affirmative declaration that "neither he nor his trial defense counsel received a copy of the recommendation." *Id.* at 100.

88. *Id.* at 100-01. "We cannot join this parade of presumptions [(1) that the SJAR was submitted to the convening authority, (2) that it had been served on the defense, and (3) that a defense response was submitted and considered by the convening authority]." *Id.*

89. *Id.* at 101.

90. *Id.* at 102 (citing United States v. Hickock, 45 M.J. 142 (1996); United States v. Murray, 25 M.J. 445, 449 (C.M.A. 1988)).

91. *Id.* In *Hickock*, the court had the actual PTR to review when testing for prejudice arising from the failure to serve it on the defense. 45 M.J. 142. In *Murray*, the court turned to the evidence in the record of trial to determine whether the accused was prejudiced by the omission of the SJA's pretrial advice. 25 M.J. at 449.

92. *Mark*, 47 M.J. at 102.

knowledge. Senior Airman Wiley was originally charged with rape, sodomy, indecent acts, and taking indecent liberties on diverse occasions with his seven-year-old stepdaughter. At trial, he pleaded guilty to committing the indecent acts and liberties during a shorter time period. The rape and sodomy charges were withdrawn as part of the pretrial agreement.[94] In his PTR to the convening authority, the SJA erroneously summarized the evidence supporting the original charges, rather than those to which the accused pleaded guilty.[95] The defense failed to object to this erroneous information.

On appeal, the CAAF rejected Wiley's claim of ineffective assistance of counsel and found that he suffered no prejudice from counsel's failure to object to the erroneous information in the PTR.[96] One of the three justifications offered by the court was that the convening authority "was thus well aware of the evidence against appellant" because he had "referred the charges to trial, accepted appellant's pretrial agreement, and acted on the sentence."[97] The CAAF concluded that "[t]he SJA's erroneous recommendation merely told the convening authority what he already knew."[98]

Although it is difficult to contest the CAAF's practical approach of attributing more facts to the convening authority than those communicated solely through the PTR, it is a markedly different approach from that taken by the Navy court in *Busch*.[99] Aside from Judge Effron's dissent, the *Wiley* opinion fails to address the significance of the PTR as the principle means of communication between the SJA and the convening authority.

In his dissent, Judge Effron criticized all three justifications on which the majority relied. The sentence reduction, he reasoned, was not the result of post-trial action, but simply a matter of complying with the terms of the pretrial agreement.[100] He rejected as speculation the majority's conclusion that the convening authority was well aware of the evidence based on prior involvement in the case. Judge Effron emphasized the unique relationship between the SJA and the convening authority as follows:

> The primary duty of a convening authority is to command a military unit, not to serve as a judicial official. The statutory requirement for an SJA to prepare a formal written recommendation reflects recognition that *busy commanders need assistance in summarizing and focusing the issues* in cases presented to them for action. In this case, the summary was inaccurate and unfocused.[101]

Though acknowledging that convening authorities are permitted to consider additional misconduct, Judge Effron would not extend this concept to situations where the convening authority is misled to believe that such evidence was actually presented at trial.[102]

In *United States v. Ruiz*,[103] the Air Force Court of Criminal Appeals went to even greater lengths to attribute to the convening authority information that was not contained in the SJAR. In response to the initial SJAR, Captain Ruiz alleged several legal errors, challenged the severity of the sentence, and requested that the SJA and the convening authority be disqualified. The convening authority agreed, in part, and disqualified the SJA office. A new SJAR was prepared by a different SJA, and it was served on the defense. The defense failed to submit new matters, and the convening authority took action without considering the issues raised in the original defense submission. On appeal, the Air Force court refused to consider the original defense assertions of error on the basis of waiver.[104]

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93. 47 M.J. 158 (1997).

94. *Id.* at 159.

95. *Id*. Counsel should note that the PTR need not include a summary of the evidence. With respect to the charges, the PTR need only state "[t]he findings and sentence adjudged by the court-martial." MCM, *supra* note 12, R.C.M. 1106(d)(3)(A). Staff judge advocates are no longer required to summarize the evidence supporting those findings. *See id*.

96. *Wiley*, 47 M.J. at 160.

97. *Id.* at 160.

98. *Id.* The two other reasons relied upon by the court were the convening authority's authorization to consider additional misconduct in deciding whether to grant clemency and the fact that the accused received a substantial sentence reduction (eight years down to six) under his pretrial agreement. *Id*.

99. *See United States v. Busch*, 46 M.J. 562 (N.M. Ct. Crim. App. 1997); *see also supra* notes 77-85 and accompanying text.

100. *Wiley*, 47 M.J. at 161 (Effron, J., dissenting). *See* United States v. Griffaw, 46 M.J. 791 (A.F. Ct. Crim. App. 1997); *see also supra* notes 71-75 and accompanying text.

101. *Wiley*, 47 M.J. at 161 (emphasis added).

102. *Id.*

103. 46 M.J. 503 (A.F. Ct. Crim. App. 1997).

Captain Ruiz also alleged that the second SJAR's failure to accurately summarize his character of service rose to the level of plain error.[105] The Air Force court disagreed because the convening authority had access to this information through two other sources—the "personal data sheet" attached to the SJAR and, oddly enough, the original clemency submission.[106] The court concluded that the convening authority knew about the accused's good service record through the circular reasoning that the information was contained in the accused's original clemency submission. This was the same submission that the convening authority failed to consider after the second SJAR was prepared.[107] While the ultimate result in *Ruiz* is unremarkable, the roundabout steps the Air Force court was willing to take to attribute knowledge to the convening authority provides a stark contrast to the direct approach applied by appellate courts in *Busch* and *Mark*.

In a slightly different context, the Coast Guard Court of Criminal Appeals expressed a similar willingness to rely on information outside of the PTR to impute knowledge to a convening authority. In *United States v. Acevedo*,[108] the record failed to include proof that the convening authority had considered the appellant's petition for clemency. In support of its argument that the Coast Guard court should apply a "presumption of regularity," the government submitted an affidavit from the SJA stating that the clemency matters were given to the convening authority together with the SJA's PTR. Based on the affidavit and the absence of any evidence to suggest that the convening authority failed to consider the matters (other than the fact that they were not initialed), the court concluded that the convening authority had considered the accused's clemency petition.[109]

Acevedo provides yet another example of the gradual movement toward greater application of Article 59(a)'s harmless error analysis and less concern over black-letter post-trial procedural requirements. If military appellate courts are willing to accept affidavits from SJAs, are affidavits from convening authorities soon to follow? Such affidavits would certainly improve the ability of appellate courts to expeditiously review cases that allege that the convening authority failed to consider clemency matters. The courts could also use affidavits from convening authorities to shortcut the lengthy procedure of ordering a new review and action in other contexts. Convening authorities could simply state via affidavit whether they would have made a different decision to grant clemency had they known, for example, that the accused was the recipient of three Good Conduct Medals.[110] Likewise, they could swear that they understood their responsibility to consider clemency only after they had reassessed the sentence adjudged at trial.[111]

This would be a drastic, but not unprecedented,[112] departure from traditional concepts that limit appellate review to matters contained in the record of trial. If efficiency and accuracy of the final result are the goals, strong arguments can be made favoring greater use of post-trial affidavits from SJAs, appellants, and convening authorities. Balanced against this interest is the interest in preserving the integrity of the elaborate post-trial process set forth in the *MCM*.

Other Recent Developments in Post-Trial Processing

Post-trial 39(a) Sessions

Post-trial Article 39(a) sessions are rarely requested by counsel.[113] Several recent cases demonstrate how attentive

104. *Id*. at 512. The appellant claimed that it was unfair for the convening authority not to consider legal issues raised in response to the first SJAR. The Air Force court disagreed. Since the second SJAR made no mention of the first SJAR, the defense was put on notice that the original matters were not being considered by the second SJA. *Id*. The Air Force court added that, even if the convening authority erred by not considering the original assertions of error, they would have found no prejudice. *Id*. In doing so, the Air Force court erroneously lumped together the alleged legal errors with the accused's request for clemency from the severe sentence. *See supra* notes 59-76 and accompanying text (discussing the difference between the convening authority's duties to review for legal errors and to consider clemency).

105. *Ruiz*, 46 M.J. at 512.

106. *Id*.

107. *Id*. at 512, 513. Despite the fact that the court concluded that the defense waived the errors raised in this original submission by failure to resubmit them to the convening authority after being served the second SJAR, the Air Force court nevertheless concluded that "[t]he convening authority's act of disqualifying his legal office convinces us he considered the submissions." *Id*.

108. 46 M.J. 830 (C.G. Ct. Crim. App. 1997).

109. *Id.* at 835.

110. *See* United States v. Busch, 46 M.J. 562, 564 (1997); *see also supra* notes 77-85 and accompanying text.

111. *See* United States v. Kerwin, 46 M.J. 588 (A.F. Ct. Crim. App. 1996); *see also supra* notes 65-70 and accompanying text.

112. Appellate courts frequently obtain post-trial affidavits from counsel to help resolve post-trial allegations of ineffective assistance of counsel.

113. *See* MCM, *supra* note 12, R.C.M. 1102(b)(2). Post-trial Article 39(a) sessions "may be called for the purpose of inquiring into, and, when appropriate, resolving any matter which arises after trial and which substantially affects the legal sufficiency of any findings of guilty or the sentence." *Id*.

counsel can utilize such sessions to resolve lingering trial and post-trial issues. In fact, counsel may find that failure to request a post-trial 39(a) session prevents their clients from obtaining appellate relief.

In *United States v. Miller*,[114] the accused alleged that he was subjected to illegal post-trial punishment because he was forced to work on Saturdays, the recognized Sabbath of Seventh Day Adventists. The CAAF denied Miller any relief, in part because he failed to exhaust his administrative remedies. The CAAF was most critical of the defense counsel's failure to seek relief from the military judge pending authentication of the record of trial.[115]

The facts in *United States v. McConnell*[116] provide counsel another example of how post-trial 39(a) sessions can be used to the benefit of the client. In McConnell's post-trial submissions, he alleged that the court-members considered during their deliberations erroneous[117] information regarding his eligibility to retire.[118] The Air Force court rejected McConnell's allegation and concluded that the alleged "inconsistencies and vague references to confusion are insufficient to raise an inference that the members even considered erroneous information."[119] The defense could have made a much stronger case had they demanded a post-trial 39(a) session to gather additional testimony regarding the matter.

When an accused demands a post-trial 39(a) session, the accused's right to defense counsel of choice should be honored by the military judge. In *United States v. Miller*,[120] a unanimous decision that reinforces the importance of post-trial hearings and an accused's right to an attorney, the CAAF concluded that the military judge abused his discretion by denying the accused's request to obtain civilian counsel to represent him at the post-trial article 39(a) session.[121]

Convening Authority Action

Two other cases involving a convening authority's post-trial powers were resolved during the 1997 term. In *United States v. Carter*,[122] the CAAF revisited the issue of sentence conversion. Master Sergeant Carter, a twenty-four year veteran, was sentenced to a bad-conduct discharge, partial forfeitures, reduction to the grade of E-1, and confinement for twelve months. In his clemency submission, Carter asked the convening authority to commute his bad-conduct discharge to additional confinement. Pursuant to the clemency request, the convening authority commuted the bad-conduct discharge to an additional twenty-four months confinement and twenty-four months of forfeitures. The accused alleged, on appeal, that the convening authority exceeded the lawful limits of the adjudged punishment by converting the bad-conduct discharge to an additional twenty-four months confinement and forfeiture of $400.00 per month for thirty-five months.[123]

The CAAF rejected the appellant's argument, noting that the accused requested conversion "without setting any conditions as to the length of confinement to be substituted."[124] The accused's own clemency submission, in which he detailed how

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114. 46 M.J. 248 (1997).

115. *Id*. at 250. "During the critical period, the record of trial had not been authenticated, and the military judge could have been brought into the question of illegal post-trial confinement." *Id*.

116. 46 M.J. 501 (A.F. Ct. Crim. App. 1997) (opinion withdrawn from the bound volume because it was not for publication).

117. The Air Force court noted that both counsel inaccurately used the term *erroneous* information. Rules permitting impeachment of a jury verdict do not include consideration of merely *erroneous* information. The prohibition is against consideration of *extraneous* evidence during deliberations. *Id.* at 502-03.

118. *Id*. During sentencing, the government argued for one year of confinement. The members sentenced him to, inter alia, a bad-conduct discharge and three years confinement. Based on post-trial feedback, the defense alleged that the members mistakenly thought that if they sentenced the 17-year veteran to three years confinement, he would not lose his retirement pay. *Id*. at 501.

119. *Id.* at 502. The court distinguished this case from *United States v. Wallace*, 28 M.J. 640 (A.F.C.M.R. 1989), which was cited by the defense. In *Wallace*, one of the members reported alleged deliberation errors to the military judge, but the judge refused to call a post-trial 39a session to investigate the alleged deliberation errors. The Air Force court held that the military judge's refusal to call a post-trial 39a session cast doubt as to the integrity of the sentence in the case. *Wallace*, 28 M.J. at 642.

120. 47 M.J. 352 (1997).

121. *Id.* Miller was initially advised on 1 March 1994 that the post-trial session would convene during the first week in April. On 2 March, he was advised that the hearing would be held on 4 March. The accused was unable to contact his civilian counsel until the night before the hearing. His detailed military counsel for post-trial matters had not represented him at trial and did not meet the accused or review the record of trial until the night before the hearing. The military judge justified his refusal to grant a continuance as a matter of convenience and savings to the government. *Id*. The judge's decision was based on the fact that one of the members was called out of retirement, one was present on temporary duty, and the circuit military judge had specifically remained on post to conduct the post-trial session.

122. 45 M.J. 168 (1996).

123. *Id*. at 168-69.

124. *Id.* at 170.

he stood to "lose approximately $750,000" in retirement benefits, supported the CAAF's conclusion that an additional two years confinement can "rationally be considered 'less severe.'"[125]

The CAAF introduced its opinion by cautioning counsel to be mindful of the old adage, "[w]atch what you ask for, you may get it."[126] At one time, there may have existed unspoken perceptions of sentence conversions that a bad-conduct discharge was worth six months confinement and a dishonorable discharge worth twelve. This was certainly not the case in *Carter*, and rightly so considering the potential financial impact on Carter. The lesson for counsel to take from *Carter* is that appellate courts will review each sentence conversion on an individual basis. Counsel would be wise to consider putting limitations on future requests for sentence conversion.

In *United States v. Clemente*,[127] the Air Force court addressed the issue of whether the convening authority must explain his reasons for denying an accused's request to waive the automatic forfeiture provisions under Article 58b of the UCMJ.[128] Clemente urged the Air Force court to treat the request to defer automatic forfeitures like a request for deferment of confinement, which requires the convening authority to explain his denial in writing.[129] The CAAF declined to do so, opting to treat the request to defer automatic forfeitures like any other clemency requests that are not reviewable by the appellate courts.[130]

Post-Trial Processing Delays

Allegations of errors related to post-trial processing delays is one aspect of post-trial litigation where military appellate courts consistently apply the harmless error standard. In a series of cases involving "outrageously" lengthy post-trial processing delays, military appellate courts remained committed to requiring the accused to demonstrate specific prejudice.

In *United States v. Hudson*,[131] the government took 839 days to prepare the record of trial for final action. Although critical of such "outrageous" delays, the CAAF rejected the accused's alleged claim of prejudice. Hudson alleged that the delay prevented him from becoming eligible for parole and clemency consideration. Noting that the accused had thrice been considered for, and denied, parole since arriving at the Disciplinary Barracks in Fort Leavenworth, Kansas, the CAAF concluded that his assertions of prejudice were "speculative, if not wishful thinking."[132] The court also rejected the appellant's suggestion that the court return to a bright line ninety-day rule and his appeal to the court to exercise its "supervisory jurisdiction" to award relief.[133]

In *United States v. Nelson*,[134] the accused was unable to convince the Air Force Court of Criminal Appeals that he was prejudiced when the government took 146 days to transcribe an eighty-one-page record of trial and 171 days to take final action. Although the court held that such a delay was "unreasonable," particularly when records of routine administrative separation boards were transcribed ahead of the appellant's court-martial, the Air Force court refused to grant the accused any relief.

In *United States v. Santoro*,[135] the CAAF finally was convinced that a seven-year delay in forwarding the record of trial for review warranted some relief. In 1988, Yeoman Seaman Apprentice Santoro pleaded guilty to larceny (shoplifting

125. *Id.* at 170-71. The CAAF noted that "to commute a sentence means 'a reduction of penalty,' not 'merely a substitution.'" *Id.* Consequently, commutation of a sentence will be lawful only if the overall sentence is less severe than that originally adjudged by the court. *Id*.

126. *Id*. at 168.

127. 46 M.J. 715 (A.F. Ct. Crim. App. 1997).

128. Article 58b of the UCMJ provides for automatic forfeiture of all pay and allowances in a general court-martial when an accused receives a sentence which includes confinement for more than six months or death, or confinement for six months or less and a dishonorable or bad-conduct discharge or dismissal. *See* UCMJ art. 58b (West Supp. 1997).

129. *See id*. art. 57(d); MCM, *supra* note 12, R.C.M. 1101(c).

130. *Clemente*, 46 M.J. at 720-21. Convening authorities are not required to explain or to justify the decisions they make on clemency, and their decisions are not subject to appellate review. *See* UCMJ art. 60(c)(2); MCM, *supra* note 12, R.C.M. 1107(b)(1). The *Clemente* court reasoned that the lack of detailed requirements in the statute supported the conclusion that it was intended to give the convening authority broad discretion to grant or to deny such requests without explanation. *Clemente*, 46 M.J. at 720-21.

131. 46 M.J. 226 (1997).

132. *Id.* at 227.

133. *Id*. at 227-28. Nevertheless, Judge Sullivan warned that "in the future, our court system may devise a more perfect system of accountability and responsibility which seldom has to lean on the twin crutches of 'no prejudice' and 'waiver' to achieve just results." *Id*. (Sullivan, J., concurring).

134. 46 M.J. 764 (A.F. Ct. Crim. App. 1997).

135. 46 M.J. 344 (1997).

$183.46) and resisting apprehension. He was sentenced to a bad-conduct discharge, confinement for ninety days, partial forfeitures, and reduction to the grade of E-1.[136] The convening authority approved the sentence. Seven years later, the Navy discovered that the record of trial had never been forwarded for appellate review.[137]

Although the original record was lost, the government found the audio tapes and copies of the convening authority's action and promulgating order. The government recreated the record as best it could and forwarded it to the Navy court for review. Based on the missing charge sheet, convening order, SJAR, and all fourteen government and eighteen defense exhibits, the Navy court set aside the conviction for resisting apprehension, affirmed the accused's guilty plea to larceny, and approved a sentence of "no punishment."[138]

The CAAF was likewise satisfied that the retranscribed record of trial provided a substantial basis to corroborate the regularity of Santoro's guilty plea to the charge of larceny.[139] Noting that the accused was in the best position to demonstrate prejudice, his failure to do so convinced the CAAF to affirm the decision of the Navy court. Like the Air Force court in *Nelson*, the CAAF refused to exercise its "supervisory jurisdiction" to "send a message" that such gross delays will not be tolerated.[140]

Conclusion

1997 was truly a remarkable year in post-trial. The new rule pronounced in *Chatman* may prove to be the turning point for the CAAF's approach to reviewing post-trial errors. At the very least, it manifests the court's increasing frustration with the existing remedy of ordering new reviews and actions. The significance of *Chatman*, however, is somewhat tempered by the majority's footnote in *Buller*, which calls for greater procedural due process in the form of mandatory service of the SJA's addendum. The principles that these two opinions support are difficult to reconcile—one represents greater emphasis on the procedural process and the other on practical, prejudicial impact. Which approach will ultimately prevail, if either, waits to be seen.

136. *Id*. at 345.

137. *Id*.

138. *Id.* at 345.

139. *Id.* at 346.

140. *Id*. at 348.

Recent Developments in Sentencing Under the Uniform Code of Military Justice

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Introduction

The sentencing phase of courts-martial continues to provide opportunities for trial and defense counsel to hone their advocacy skills. Although Rule for Courts-Martial (R.C.M.) 1001[1] sets forth the scheme for the types of evidence the prosecution and defense may offer at sentencing, a review of recent cases illustrates the role advocates play in shaping the categories of evidence. The military appellate courts also have indicated a desire to provide relevant information to the sentencing authority, whether members or a military judge, in order to enhance the decision-making process. Several areas of court-martial sentencing remain ripe for development by advocates.

Presentencing Evidence

R.C.M. 1001(b)(2): Personal Data and Character of Prior Service of the Accused

Letters of reprimand are one type of documentary evidence offered under R.C.M. 1001(b)(2).[2] During the past year, military appellate courts examined the propriety of such evidence in the presentencing phase of courts-martial.

In *United States v. Clemente*,[3] the accused was convicted by officer members of various larceny-related offenses.[4] As part of the government case in aggravation, the trial counsel offered two letters of reprimand which had previously been issued to the accused for child neglect and spouse abuse. Testing the proffered letters of reprimand against the requirements of R.C.M. 1001(b)(2),[5] the military judge held that the evidence from the accused's unfavorable information file[6] was properly maintained in accordance with departmental regulations and was offered to reflect the past military conduct and history of the accused.[7]

Defense counsel in *Clemente* objected to the admission of the letters of reprimand, citing Military Rule of Evidence (MRE) 403.[8] The defense stressed the extreme prejudicial effect of coloring the accused as a child and spouse abuser and asserted that the evidence had the potential "to unduly arouse the members' hostility or prejudice against him"[9] when the court was to sentence him only for larceny-related offenses.[10] In overruling the defense objection, the military judge noted that the letters of reprimand did not brand the accused. The military judge distinguished the "neglect" of leaving a child unattended in one letter and the apparent "simple assault" in the other as incidents which fell short of characterizing the accused as an abuser, a characterization which might subject him to an unduly harsh sentence for his larceny-related convictions.[11]

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1. MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 1001 (1995) [hereinafter MCM].

2. *Id.* R.C.M. 1001(b)(2).

3. 46 M.J. 715 (A.F. Ct. Crim. App. 1997).

4. *Id*. at 720. The accused was convicted of six specifications of attempted larceny, 13 specifications of larceny, and one specification of stealing and opening mail.

5. MCM, *supra* note 1, R.C.M. 1001(b)(2). "'Personnel records of the accused' includes any records made or maintained in accordance with departmental regulations that reflect the past military efficiency, conduct, performance, and history of the accused."

6. U.S. DEP'T OF AIR FORCE, SECRETARY OF THE AIR FORCE INSTR. 36-2907, UNFAVORABLE INFORMATION FILE (UIF) PROGRAM § 1.1 (May 1997). "The Unfavorable Information File (UIF) is an official record of unfavorable information about an individual. It documents . . . censures concerning the member's performance, responsibility, behavior, and so on." *Id.*

7. *Clemente*, 46 M.J. at 720.

8. MCM, *supra* note 1, MIL. R. EVID. 403. Rule 403 provides, "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the members, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." *Id.*

9. *Clemente*, 46 M.J. at 720.

10. *Id*. The defense sought also to bring *Clemente* within the ruling in *United States v. Zakaria*, 38 M.J. 280 (C.MA. 1993). In *Zakaria*, the accused was also convicted of several larceny-related offenses, and the prosecution introduced at sentencing letters of reprimand for indecent acts with minor children. 38 M.J. 280. In finding error for admitting the letters of reprimand in *Zakaria*, the court noted that the evidence branded the accused as a "sexual deviant or molester of teenage girls." *Id.*

In affirming *Clemente*, the Air Force Court of Criminal Appeals reminds defense counsel to include MRE 403 objections to presentencing evidence and to ensure that the sentencing authority focuses on the offenses of which an accused stands convicted. On the other hand, trial counsel who are offering letters of reprimand should be able to articulate how such evidence shows the service history of the accused, as opposed to coloring him as a repulsive or distasteful character.

The Court of Appeals for the Armed Forces (CAAF) addressed a letter of reprimand as presentencing evidence in *United States v. Williams*.[12] Airman Williams faced charges related to wrongful use of controlled substances on multiple occasions.[13] Pursuant to a pretrial agreement, the government withdrew an additional charge and specification for wrongful use of marijuana. Before the court-martial convened, however, the unit commander issued a letter of reprimand for the marijuana use.[14]

Defense counsel in *Williams* failed to object to the admission of the letter of reprimand, which the prosecution offered as part of its case in aggravation.[15] Thus, the CAAF easily resolved the issue on waiver by defense counsel, notwithstanding the appellant's contentions that the letter of reprimand was improperly filed and that it impermissibly commented on the accused's suitability for retention.[16] The court also rejected the appellant's challenge to the letter of reprimand as evidence of uncharged misconduct, holding that the misconduct in issue only became uncharged by mutual agreement of the parties, that is, by the pretrial agreement submitted by the accused.[17]

The absence of defense objection in *Williams* should deter trial counsel from trying to address withdrawn charges with letters of reprimand prior to trial. Defense counsel should consider including language in a pretrial agreement which not only secures withdrawal of a charge and specification, but also closes the door on any use at court-martial of such alleged misconduct.[18]

R.C.M. 1001(b)(3): Evidence of Prior Convictions of the Accused

One of the less frequently used forms of aggravation evidence is records of prior civilian convictions. When such prior convictions come from state courts, it is unclear what constitutes a conviction.[19] In *United States v. White*,[20] the CAAF issued a call for legislation to set forth specific requirements for proper evidence of civilian convictions under R.C.M. 1001(b)(3).[21] Without such guidance from the legislature or the President, military courts have allowed various forms of proof to show prior civilian convictions.

In *White*,[22] the trial counsel, in order to establish prior civilian convictions of the accused, offered in aggravation four criminal warrants for bad checks; the warrants had been issued by a state court in Georgia.[23] The warrants indicated the name of the accused, the amount of the bad check, and the notation "nolo"[24] to reflect the plea entered by the accused.[25] In presenting defense sentencing matters, the accused testified that she had paid restitution for each of the warrants.[26]

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11. *Clemente*, 46 M.J. at 720.

12. 47 M.J. 142 (1997).

13. *Id.*

14. *Id.* at 143.

15. *Id.* at 144.

16. *Id*. at 144. The letter of reprimand indicated that the command saw "no potential for rehabilitation and retention" of the accused. *Id*. The defense, however, also failed to object based on violation of R.C.M. 1001(b)(5) as improper evidence of rehabilitative potential. The court further noted, "It is far from clear that the letter of reprimand from appellant's personnel records would have been admissible had there been timely objection." *Id*.

17. *Id.*

18. Often, the pretrial agreement contains terms such as, "the government agrees to withdraw charge x and its specification" or "the government agrees to present no evidence on the merits as to charge x and its specification." To avoid the situation in *Williams*, defense counsel should consider language such as: "the government agrees to withdraw charge x and its specification, and further agrees to offer no evidence of this allegation during the accused's court-martial" or "the government agrees that any evidence of charge x and its specification is irrelevant to the accused's pending court-martial, and therefore agrees not to offer any such evidence."

19. *See generally* 2 FRANCIS A. GILLIGAN & FREDRIC I. LEDERER, COURT-MARTIAL PROCEDURE 44 (1991).

> The Rule does not, however, define a civilian "conviction," leaving that to the law of the jurisdiction in which the conviction was adjudged. The fact that a state permits use of a civilian disposition not amounting to a "conviction" in that state's sentencing does not make it admissible at a court-martial.

Id.

20. 47 M.J. 139 (1997).

The CAAF noted in *White* the absence of any indication by the defense that, but for admission of the warrants offered by the prosecution, the accused would not have testified as to restitution.[27] The court held that the "appellant waived the right to challenge the evidence when she took the stand and testified about the warrants, and the record does not reflect any indication from the defense that she would not have testified about the warrants if not for their earlier admission into evidence."[28]

Absent change to the *Manual for Courts-Martial* setting forth specific evidence required to establish a civilian conviction, trial counsel should seek any available documentation which shows a charge and disposition. The defense, on the other hand, should demand the strictest proof of the conviction. In rebutting or explaining any such conviction, defense counsel should consider using the accused's testimony regarding the prior conviction only if the military judge allows the prosecution evidence of the civilian conviction—in whatever form the evidence might be.

R.C.M. 1001(b)(4): Evidence in Aggravation

Victim-impact evidence continues to provide trial counsel with ample opportunity to show the full effect of the accused's crimes. In *United States v. Wilson*,[29] the CAAF held such evidence proper, even when the offense was not committed in the presence of the victim, so long as the circumstances are "directly relating to or resulting from the offenses of which the accused has been found guilty."[30]

The accused in *Wilson* had been convicted at a previous court-martial of assault consummated by battery and unlawful entry.[31] In that trial, the prosecutor, who was the victim of the disrespect that resulted in the accused's second court-martial, cross-examined the accused and argued for a conviction and sentence.[32] When the accused made disparaging remarks[33] about the prosecution in his prior court-martial, the unit brought new charges for disrespect to a superior commissioned officer and for disorderly conduct.[34] The victim was not present when the accused made the disrespectful remarks, but she subsequently learned of them.[35] Even though the victim did not directly hear the remarks, she testified that she felt "a little bit of concern" as a result of the accused's disrespect and owing in part to her husband's frequent absences as a pilot.[36] She contacted an agent from the Office of Special Investigations[37] regarding threats against attorneys.

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21. *Id.* at 140.

> Neither appellant's plea of *nolo contendere* nor other special pleas and judgments that frequently appear at sentencing and provoke defense objection are addressed in the Rule. These include no contest pleas, juvenile convictions, expungements, and other such judgments, which are not denominated as convictions under state law but which may be the subject of litigation under the Rule. While the *Manual* cannot anticipate every future point of contention on this issue, admissibility of major categories of prior civilian judgments is a matter that readily could be clarified through an amendment to RCM 1001(b)(3).

Id. *See* MCM, *supra* note 1, R.C.M. 1001(b)(3).

22. In this guilty plea case, the accused was found guilty of two specifications each of larceny, forgery, and uttering forged checks, and one specification of wrongful appropriation, in violation of Uniform Code of Military Justice (UCMJ) Articles 121 and 123. *White*, 47 M.J. at 139. *See* UCMJ arts. 121, 123 (West 1995).

23. *White*, 47 M.J. at 139.

24. GA. CODE ANN. § 17-7-95 (1995). "Except as otherwise provided by law, a plea of nolo contendere shall not be used against the defendant in any other court or proceedings as an admission of guilty or otherwise or for any purpose . . . ." *Id.*

25. *White*, 47 M.J. at 139.

26. *Id.*

27. *Id.* at 140.

28. *Id.*

29. 47 M.J. 152 (1997).

30. *Id. See* MCM, *supra* note 1, R.C.M. 1001(b)(4).

31. *Wilson*, 47 M.J. at 153.

32. *Id.* at 154.

33. *Id.* at 153. The accused commented to his squadron section commander, "Captain Power, that fucking bitch is out to get me." *Id*.

34. *Id.* at 152.

35. *Id.* at 153.

The CAAF held that the victim's concern was directly related to the accused's disrespect and was thus proper evidence in aggravation.[38] In particular, the court identified several factors to support its conclusion:

> [O]ther circumstances including [the victim's] prosecution of the accused at court-martial, her isolated home-life situation, and appellant's history of physical confrontation, which reasonably justified her fear or anxiety over appellant's words. Finally, the record of trial establishes a temporal identity between [the victim's] knowledge of appellant's offense, his court-martial for that offense, and [the victim's] continuing state of concern.[39]

Although there is a broad range of admissible evidence in aggravation under R.C.M. 1001(b)(4), two cases illustrate limitations on such evidence. In *United States v. Skoog*,[40] the prosecution offered evidence of post-traumatic stress disorder suffered by the child-victim of indecent acts.[41] The trial counsel called an expert witness on post-traumatic stress disorder, after having had the expert review stipulations of expected testimony in the case.[42] The expert witness never interviewed the victim, and the victim did not testify at sentencing.[43] The expert never had an opportunity to observe the victim's demeanor or reaction in describing the acts that formed the basis of the charges of which the accused was convicted.[44]

The Army Court of Criminal Appeals held that the evidence from the expert "was not specifically related to the victim . . . and was only minimally based on the facts of the case."[45] In order for such testimony to be admissible, trial counsel must specifically relate the evidence to the victim in the case at bar. To do so, trial counsel should at least have the expert interview the victim prior to trial or observe the testimony of the victim at trial or in a pretrial proceeding.

Another example of improper evidence in aggravation under R.C.M. 1001(b)(4) occurred in *United States v. Powell*.[46] In *Powell*, the accused was found guilty of offenses relating to failure to report to work on time and travel and housing allowance fraud.[47] During the sentencing phase, the trial counsel elicited testimony that the accused, in addition to the offenses of which he was found guilty, had lost government property, was financially irresponsible, and had passed worthless checks.[48] On close examination, however, the Navy-Marine Corps Court of Criminal Appeals held that the particular acts of uncharged misconduct did not constitute "aggravating circumstances *directly* relating to or resulting from the appellant's crimes."[49] *Powell* is a reminder for trial and defense counsel that R.C.M. 1001(b)(4) determines the admissibility of uncharged misconduct at sentencing and that such evidence "is not admissible unless it directly relates to or results from the offense(s) of which the accused has been found guilty."[50]

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36. *Id.* at 154.

37. "The Air Force Office of Special Investigations (AFOSI) . . . performs as a federal law enforcement agency with responsibility for conducting criminal investigations . . . ." U.S. DEP'T. OF AIR FORCE, MISSION DIRECTIVE 39, § 1 (1 Nov. 1995).

38. *Wilson*, 47 M.J. at 153. Chief Judge Cox, concurring in the decision, noted a concern regarding the use of a judge advocate as a witness and commented that Rule 3.7(a) of the Rules of Professional Conduct specifically prohibits a lawyer from acting as an advocate when the attorney will be a witness at the court-martial. *Id.* at 156 (Cox, C.J., concurring). "There is such a close connection between the trial counsel, the chief of military justice, and the staff judge advocate, at least in the eyes of the military and civilian communities, that it is disingenuous to suggest that Rule 3.7(a) offers a place to hide." *Id*.

39. *Id.* at 155.

40. No. 9601723 (Army Ct. Crim. App. Aug. 5, 1997).

41. *Id*. slip op. at 1. The accused was convicted of indecent acts with a child under sixteen years of age, in violation of UCMJ Article 134. *Id. See* UCMJ art. 134 (West 1995). He was sentenced to a bad-conduct discharge, confinement for nine months, total forfeitures, and reduction to the grade of E-1. *Skoog*, No. 9601723, slip op. at 1.

42. *Skoog*, No. 9601723, slip op. at 1.

43. *Id.*

44. *Id.* slip op. at 2.

45. *Id.*

46. 45 M.J. 637 (N.M. Ct. Crim. App. 1997).

47. *Id.* at 638.

48. *Id.* at 639.

49. *Id.* at 640 (emphasis in original).

Skoog and *Powell* highlight the requirements of R.C.M. 1001(b)(4). Defense counsel must break the chain of causation—for example, by foundation (as in *Skoog*) or by type (as in *Powell*)—in order to exclude such sentencing evidence. Conversely, trial counsel must demonstrate the relationship between the accused's offenses and their impact on the victim, even though the accused and the victim may have been remote from one another.

R.C.M. 1001(b)(5): Evidence of Rehabilitative Potential

A long trail of appellate litigation[51] regarding evidence of an accused's rehabilitative potential ended with the 1995 amendment to the *Manual for Courts-Martial*. The amended version of R.C.M. 1001(b)(5)[52] implemented requirements for rehabilitative potential evidence which were formerly found only in case law and which relate to the foundation,[53] basis,[54] and scope[55] of such testimony. Several recent cases from the courts of criminal appeals reflect the need for continued scrutiny of rehabilitative potential evidence at sentencing and illustrate the precision with which trial counsel must offer such evidence.

When offered. Where the prosecution deems it appropriate to offer evidence of the rehabilitative potential of the accused at sentencing, there is no requirement that the prosecution wait for the defense to raise the issue first.[56]

Foundation. In order to testify as to an accused's rehabilitative potential, a witness:

> [M]ust possess sufficient information and knowledge about the accused to offer a rationally-based opinion . . . . Relevant information and knowledge include, but are not limited to, information and knowledge about the accused's character, performance of duty, moral fiber, determination to be rehabilitated, and nature and severity of the offense or offenses.[57]

In *Powell*,[58] the trial counsel sought to lay a foundation for evidence of rehabilitative potential. In eliciting the foundation testimony, however, the trial counsel allowed the witnesses to make several references to specific conduct of the accused.[59] The Navy-Marine Corps court reminded practitioners that "inquiry by the trial counsel into specific examples of an accused's conduct establishing the reasons for the opinion is not permitted on direct examination."[60]

Opinion Testimony Relating to Rehabilitative Potential

Rule for Courts-Martial 1001(b)(5)(D) authorizes a witness to give his opinion as to whether the accused has rehabilitative potential. It is improper, however, for the witness to express an opinion as to retention or discharge of the soldier, either expressly or by euphemism.[61]

In *United States v. Hughes*,[62] the Army Court of Criminal Appeals held that a first sergeant's testimony which implied

50. *Id. See* MCM, *supra* note 1, R.C.M. 1001(b)(4).

51. *See generally* 2 GILLIGAN & LEDERER, *supra* note 19, at 51. "The government's ability to present evidence as to lack of rehabilitative potential has given rise to a significant degree of litigation." *Id. See, e.g.*, United States v. Aurich, 31 M.J. 95 (C.M.A. 1990); United States v. Wilson, 31 M.J. 91 (C.M.A. 1990); United States v. Cherry, 31 M.J. 1 (C.M.A. 1990); United States v. Kirk, 31 M.J. 84 (C.M.A. 1990); United States v. Ohrt, 28 M.J. 301 (C.M.A. 1989); United States v. Horner, 22 M.J. 294 (C.M.A. 1986); United States v. Pompey, 32 M.J. 547 (A.F.C.M.R. 1990).

52. Prior to the 1995 amendment to R.C.M. 1001(b)(5), the section read as follows: "The trial counsel may present, by testimony or oral deposition in accordance with R.C.M. 702(g)(1), evidence, in the form of opinions concerning the accused's previous performance as a servicemember and potential for rehabilitation. On cross-examination, inquiry is allowable into relevant and specific instances of conduct." MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 1001(b)(5) (1984).

53. MCM, *supra* note 1, R.C.M. 1001(b)(5)(B).

54. *Id.* R.C.M. 1001(b)(5)(C).

55. *Id.* R.C.M. 1001(b)(5)(D).

56. *See* United States v. Phelps, No. 9601351 (Army Ct. Crim. App. May 29, 1997).

57. MCM, *supra* note 1, R.C.M. 1001(b)(5)(B).

58. United States v. Powell, 45 M.J. 637 (N.M. Ct. Crim. App. 1997).

59. *Id*. at 639. The specific instances referred to by the three prosecution witnesses included ineffective counseling sessions between the witness and the unreceptive accused; that the accused had financial problems and had been late for work; and that the accused had lost military property, was financially irresponsible, and may have passed worthless checks. *Id*.

60. *Id*. at 640. The court further noted that "[s]uch initial inquiry into specific examples of conduct of an accused is limited to cross-examination to test or [to] impeach the opinion testimony." *Id*. *See* MCM, *supra* note 1, R.C.M. 1001(b)(5) analysis, app. 21, at A21-71 ("Note that inquiry into specific instances of conduct is not permitted on direct examination, but may be made on cross-examination.").

that the accused should receive a punitive discharge violated R.C.M. 1001(b)(5)(D).[63] Although the accused also made allegations of unlawful command influence rising from the first sergeant's testimony,[64] the Army court was not persuaded since the senior enlisted witness testified in front of a panel of officer members.[65]

The Army court also held recently that a senior non-commissioned officer's testimony that an accused had no *military* rehabilitative potential did not constitute an impermissible euphemism suggesting imposition of a punitive discharge.[66] Though the witness focused on the accused's "*military* rehabilitative potential," the court noted that whether such testimony constitutes an impermissible euphemism depends on the context of the statement.[67] In this instance, the testimony was, according to the Army court, an "honest, realistic, and . . . rationally-based observation of an NCO supervisor. That opinion established that [the accused's] character and performance indicated that he could not, or would not, conform to Army standards."[68] Once again, the court rejected contentions of unlawful command influence since the witness was a senior non-commissioned officer testifying to an officer panel.[69]

In *United States v. Garcia*,[70] the accused was convicted of several offenses relating to marijuana. Following the conviction, trial counsel elicited the following testimony from the accused's first sergeant: "We need a zero defect for any type of drug transaction. There's no place for that in the United States Army."[71] This testimony is improper evidence of rehabilitative potential because it focuses not on the individual accused and his characteristics, but solely on the nature of the offense.[72]

These cases illustrate the effects of imprecise testimony in the area of rehabilitative potential. Trial counsel must ensure that witnesses avoid references to specific instances of conduct in laying a foundation for the testimony. In offering the testimony of a witness, trial counsel must avoid having the witness recommend discharge from the service for the accused, either expressly or by euphemism. Defense counsel must remain vigilant to protect against improper recommendations for discharge. When a witness—officer or enlisted, commander or supervisor—testifies in a manner which appears to suggest that the accused should no longer serve in the military, counsel should object to such testimony and argue that it is a euphemism for a punitive discharge. In the absence of defense objection at trial, the appellate courts will use the plain error standard to analyze the testimonial error regarding rehabilitative potential.[73] In addition, defense counsel must protect the accused against unlawful command influence in evidence of rehabilitative potential. Thus, defense counsel should closely scrutinize and object to testimony from the accused's chain of command that effectively says that they no longer want the accused in the unit.

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61. *See* United States v. Ohrt, 28 M.J. 301, 307 (C.M.A. 1989) (stating that "[a] witness . . . should not be allowed to express an opinion whether an accused should be punitively discharged . . . . The use of euphemisms . . . are just other ways of saying 'Give the accused a punitive discharge'"); United States v. Cherry, 31 M.J. 1, 5 (C.M.A. 1990) (stating that "[a] commander's opinion stopping short of expressly recommending a punitive discharge, but which impliedly advocate[s] separation from the service, [is] also prohibited at courts-martial").

62. No. 9501978 (Army Ct. Crim. App. May 5, 1997).

63. *Id.*, slip op. at 3. The court did not indicate the precise testimony of the witness, but noted, "The questionable testimony by the first sergeant was an expansive although nonresponsive answer to a proper question by trial counsel . . . . The comment by the first sergeant was not a clearly stated opinion that the accused should be punitively discharged." *Id. See* MCM, *supra* note 1, R.C.M. 1001(b)(5)(D).

64. *Hughes*, No. 9501978, slip op. at 4. *See Cherry*, 31 M.J. at 5. In *Cherry*, the court held that one basis for not allowing admission of a commander's opinion as to an appropriate punishment (for example, a punitive discharge) in a court-martial is that such an opinion "constituted unlawful command influence." *Id*.

65. *Hughes*, No. 9501978, slip op. at 4, *citing* United States v. Malone, 38 M.J. 707 (A.C.M.R. 1993).

66. *See* United States v. Yerich, 47 M.J. 615, 620 (Army Ct. Crim. App. 1997). The scope of the witness' opinion was as follows: "Q: And, have you formed an opinion as to his rehabilitative potential? A: I can form one as to his military rehabilitation. Q: What is that opinion, sir [sic]? A: For military, I don't think so." *Id*. at 617.

67. *Id.* at 619.

68. *Id*. at 620. The court signaled its dissatisfaction with the euphemism rule in resolving this issue against the appellant, since the witness' reference to *military* rehabilitative potential (and that the accused lacked such potential) came very close to suggesting that the accused be given a punitive discharge.

69. *Id*. at 619 n.5 (recommending abandonment of the concept of euphemisms in testimony regarding rehabilitative potential due to the subjective nature of such statements).

70. No. 9601482 (Army Ct. Crim. App. Nov. 12, 1997).

71. *Id.* slip op. at 2 n.1.

72. *See* MCM, *supra* note 1, R.C.M. 1001(b)(5)(C). "The opinion of the witness or deponent regarding the severity or nature of the accused's offense or offenses may not serve as the principal basis for an opinion of the accused's rehabilitative potential." *Id. See* United States v. Horner, 22 M.J. 294, 296 (C.M.A. 1986) (stating, "his testimony was plainly based not upon any assessment of appellant's character and potential, but upon the commander's view of the severity of the offense.").

R.C.M. 1001(c): Matters to be Presented by the Defense

Among the many types of evidence which might constitute extenuation[74] or mitigation[75] for an accused, the most significant type recently addressed by the CAAF concerns loss of retirement benefits. Previously, the Court of Military Appeals held that a military judge properly denied an accused's proffer of evidence of loss of retirement benefits as irrelevant or so collateral as to risk confusing the members.[76] The accused in that case was over three years from retirement and would have had to reenlist in order to become retirement-eligible.[77] More recently, in *United States v. Sumrall*,[78] the CAAF recognized the appropriateness of such evidence for service members who *are retirement-eligible*. Recognition of the appropriateness of evidence of retirement benefits, however, did not resolve the issue of the relevance of such evidence.

Recently, the CAAF set aside the sentences in two courts-martial as it sought to clarify the circumstances in which potential loss of retirement benefits is relevant evidence. The accused in *United States v. Becker*[79] had served nineteen years and eight and one-half months at the time of his court-martial.[80] During sentencing, the defense sought to introduce evidence of the projected loss of retirement benefits if the court-martial adjudged a punitive discharge. The military judge refused the defense-proffered evidence, finding that since the accused was not retirement-eligible, evidence of loss of retirement benefits to which he was not yet entitled was irrelevant.[81]

The CAAF premised its decision to set aside the sentence in *Becker* on three points. First, "relevant evidence" under M.R.E. 401 is broad and concerns "any tendency" and "any fact."[82] The court also noted the broad mitigation rights of an accused to offer any evidence that might lessen his punishment and the military judge's discretion to relax the rules of evidence for an accused at sentencing.[83]

The result of this broad evidentiary view at sentencing for the accused is the second point relied upon by the CAAF. "[T]he relevance of evidence of potential loss of retirement benefits depends upon the facts and circumstances of the individual accused's case."[84] Unlike in *Henderson*, the court noted, the accused in *Becker* was only three and one-half months from retirement and did not have to reenlist in order to be eligible to retire.[85] The court expressly avoided a per se rule for exclusion of evidence of loss of retirement benefits in favor of an ad hoc analysis.[86]

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73. *See Garcia*, No. 9601482, slip op. at 3 (citing United States v. Young, 470 U.S. 1, 17 n.14 (1985)). "To be plain, the error must be obvious, substantial, and have had a prejudicial impact on the sentencing authority's deliberative process." *Id*.

74. *See* MCM, *supra* note 1, R.C.M. 1001(c)(1)(A). "Matter in extenuation of an offense serves to explain the circumstances surrounding the commission of an offense." *Id*.

75. *See id.* R.C.M. 1001(c)(1)(B). "Matter in mitigation of an offense is introduced to lessen the punishment to be adjudged by the court-martial." *Id*.

76. *See* United States v. Henderson, 29 M.J. 221, 222 (C.M.A. 1989).

77. *Id.* "Retirement-eligible" refers to members of the armed services who meet the statutory entitlement to be eligible for retirement. *See* 10 U.S.C. § 3914 (1994) (providing that "[u]nder regulations to be prescribed by the Secretary of the Army, an enlisted member of the Army who has at least 20, but less than 30, years of service computed under Section 3925 of this title may, upon his request, be retired").

78. 45 M.J. 207 (1996). In *Sumrall*, the court noted that "the potential loss of retirement benefits was a proper matter for consideration by factfinders at appellant's court-martial." *Id*. at 209. Captain Sumrall was found guilty of two specifications of indecent acts with a female under the age of 16 years, in violation of UCMJ Article 134 and was sentenced to a dismissal and confinement for four years. At the time of his court-martial, he had completed 21 years of active service and was retirement-eligible. At sentencing, he offered evidence of pay he would receive if allowed to retire and the total he would receive over his life expectancy. The CAAF held that the opportunity of the defense to present this mitigation evidence satisfied the meaningful-opportunity-to-be-heard concerns of the Due Process Clause. *Id*.

79. 46 M.J. 141 (1997). The accused was convicted of conspiracy to commit larceny, seven specifications of larceny, and eight specifications of wrongful appropriation and false swearing. *Id*. *See* UCMJ arts. 81, 121, 134 (West 1995). His sentence included a dishonorable discharge, total forfeitures, and reduction to the grade of E-1.

80. *Becker*, 46 M.J. at 142.

81. *Id.*

82. *Id*. *See* MCM, *supra* note 1, MIL. R. EVID. 401. "'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." *Id*.

83. *Becker*, 46 M.J. at 143. *See* MCM, *supra* note 1, R.C.M. 1001(c)(3).

84. *Becker*, 46 M.J. at 143.

85. *Id.*

86. *Id.*

Third, the CAAF stressed the importance of this particular evidence and the need to have an informed sentencing authority. "[T]he value of retired pay should be recognized as the single most important consideration in determining whether to adjudge a punitive discharge . . . . The sentencing authority should not have to make that decision, however, while merely speculating about the significant impact of a punitive discharge."[87]

In *United States v. Greaves*,[88] which was decided on the same day as *Becker*, the CAAF emphasized the importance of evidence regarding loss of retirement benefits and the need for guidance to the sentencing authority. The accused in *Greaves* was just nine weeks from retirement-eligibility when he was convicted at court-martial of wrongful use of cocaine.[89] During deliberations on sentencing, the court members asked the military judge whether confinement or hard labor without confinement, plus a bad-conduct discharge, equaled loss of retirement benefits for the accused.[90] The military judge, finding that the accused had no vested retirement benefits at the time of his court-martial, refused to answer the panel's questions directly.[91]

The CAAF found prejudicial error in the military judge's refusal to instruct the members with answers to their questions.[92] Since the accused was only nine weeks shy of twenty years of service and did not have to reenlist to reach retirement-eligibility, "the members were left largely unguided in a critical sentencing area."[93] In determining whether to instruct the members, the CAAF held that "whether a collateral consequences instruction is appropriate in an individual case depends upon the particular facts and circumstances of that case."[94]

As a result of the decisions in *Becker* and *Greaves*, defense counsel should offer in mitigation evidence of potential loss of retirement benefits for an accused who is close to retirement and would not have to reenlist to be retirement-eligible. Though an accused who would not become retirement-eligible within his current enlistment would not fit within the holdings of *Becker* and *Greaves*, defense counsel should consider offering evidence of potential loss of other benefits for an accused who faces a punitive discharge.[95]

Punishments

Two recent developments—one judicial and one legislative—affect punishments authorized in the Uniform Code of Military Justice.

R.C.M. 1003(b)(2): Forfeiture of Pay and Allowances

Articles 57(a) and 58b of the Uniform Code of Military Justice impose mandatory automatic maximum forfeitures when courts-martial sentences meet specified triggers.[96] Forfeitures at courts-martial, whether automatic based on the sentence or adjudged by the court-martial, take effect fourteen days after sentence is adjudged or on action by the convening authority, whichever is earlier.[97] These changes, as promulgated, apply to all courts-martial *sentences adjudged* on or after 1 April 1996.

The CAAF addressed the effect of the Ex Post Facto clause of the Constitution[98] on these forfeiture provisions in *United States v. Gorski*.[99] The court categorized the timing and amount of the automatic forfeitures imposed by Articles 57(a) and 58b as "punishment" rather than mere "administrative" matters,[100] thus invoking the protections of the Ex Post Facto clause.[101] The court held that application of Articles 57(a) and 58b to

87. *Id.* at 144.

88. 46 M.J. 133 (1997). The accused's sentence for conviction of one specification of wrongful use of cocaine was a bad-conduct discharge, confinement for 90 days, and reduction in grade to E-4.

89. *Id.* at 134.

90. *Id.*

91. *Id.* at 135.

92. *Id*. at 137. The judge repeated certain of his earlier instructions regarding a punitive discharge and then added, "I am not trying to be evasive, but all I can tell the members is that there are certain effects that are collateral to your decision, and what those effects are, you shouldn't speculate." *Id*.

93. *Id.* at 138.

94. *Id.* at 139.

95. *See, e.g.*, United States v. Sumrall, 45 M.J. 207, 211 (1996). In *Sumrall*, Judge Sullivan refers to *United States v. Ives*, No. S29118 (Army Ct. Crim. App. July 2, 1996), noting the extreme loss to a soldier who is convicted of use of marijuana and, as a result of a punitive discharge, would lose early separation pay of over $200,000. *Id*. Similarly, an accused might qualify for other separation bonuses or early retirement, but lose such entitlements if he receives a punitive discharge at a court-martial. Judge Sullivan also recommended adoption of a new sentence option of discharge with no loss of retirement benefits. *Id.*

96. *See* UCMJ arts. 57(a), 58b (West Supp. 1997). By operation of UCMJ Article 58b, a sentence at a general court-martial that includes more than six months confinement, or any confinement plus a punitive discharge, results in total forfeiture of all pay and allowances while the accused is in confinement or on parole. *Id*. art. 58b. At a special court-martial, a sentence that includes any confinement plus a punitive discharge results in forfeiture of two-thirds pay while the accused is in confinement or on parole. *Id*.

offenses committed prior to 1 April 1996 violates the Ex Post Facto clause.[102]

The CAAF upheld the validity and application of Articles 57(a) and 58b, but limited their application to offenses committed on or after 1 April 1996.[103] In an exercise of judicial economy, the CAAF chose not to address waiver for individual cases that applied Articles 57(a) and 58b to offenses committed prior to 1 April 1996, but simply determined the Ex Post Facto application.[104] The remedy for any accused who was sentenced on or after 1 April 1996 for offenses committed prior to that date is "recoupment of forfeitures taken in reliance on the provisions of 58b and 57(a)(1)."[105]

R.C.M. 1003((b)(8): Confinement

The National Defense Authorization Act for Fiscal Year 1998[106] contained an amendment to the Uniform Code of Military Justice that created a new punishment of life without eligibility for parole. The new punishment is applicable to offenses committed on or after 18 November 1997.[107] This sentencing option authorizes a court-martial to impose a sentence of confinement for life without eligibility for parole for any offense that authorizes a sentence of confinement for life.[108] A sentence of life without eligibility for parole is, however, still subject to modification by the convening authority, the appellate courts (including the United States Supreme Court), or executive par-

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97. *Id.* art. 57(a)(1).

> Any forfeiture of pay or allowances or reduction in grade that is included in a sentence of a court-marital takes effect on the earlier of—(A) the date that is 14 days after the date on which the sentence is adjudged; or (B) the date on which the sentence is approved by the convening authority.

Id.

98. U.S. CONST. art. I, § 9.

99. 47 M.J. 370 (1997).

100. *Id*. at 373.

101. *Id.* A law is *ex post facto* if the law "changes the punishment, and inflicts a greater punishment, than the law annexed to the crime when committed." *Id*., *citing* Calder v. Bull, 3 U.S. (3 Dall.) 386, 390 (1798).

102. *Gorski*, 47 M.J. at 374.

103. *Id*.

104. *Id.* at 375. "[W]e nevertheless elect not to consider whether . . . others . . . waived the claim . . . . It is simply neither reasonable nor cost effective to adjudicate each of the numerous pending cases." *Id*.

105. *Id*. Note, however, that the remedy extends only to *automatic* forfeitures, and not to *adjudged* forfeitures. Thus, an accused who was sentenced on or after 1 April 1996, for offenses committed prior to that date, and whose sentence included forfeitures of pay and allowances, would not be entitled to recoupment of the forfeited pay and allowances. If the forfeitures adjudged by the court were taken earlier due to application of Article 57(a) (forfeitures effective 14 days after sentence adjudged), the accused would be entitled to recoupment of forfeitures taken prior to approval of the adjudged forfeitures by the convening authority.

106. Pub. L. No. 105-85, § 581, 111 Stat. 1629 (1997).

107. *Id*. The Act provides:

> 856a. Art. 56a. Sentence of confinement for life without eligibility for parole
>
> (a) For any offense for which a sentence of confinement for life may be adjudged, a court-martial may adjudge a sentence of confinement for life without eligibility for parole.
> (b) An accused who is sentenced to confinement for life without eligibility for parole shall be confined for the remainder of the accused's life unless—
> (1) the sentence is set aside or otherwise modified as a result of—
> (A) action taken by the convening authority, the Secretary concerned, or another person authorized to act under section 860 of this title (article 60); or
> (B) any other action taken during post-trial procedure and review under any other provision of subchapter IX;
> (2) the sentence is set aside or otherwise modified as a result of action taken by a Court of Criminal Appeals, the Court of Appeals for the Armed Forces, or the Supreme Court; or
> (3) the accused is pardoned.

108. The following offenses under the UCMJ authorize a sentence of confinement for life: art. 94 (Mutiny & sedition); art. 99 (Misbehavior before the enemy); art. 100 (Subordinate compelling surrender); art. 101 (Improper use of countersign); art. 102 (Forcing safeguard); art. 103 (Looting, pillaging); art. 104 (Aiding the enemy); art. 105 (Misconduct as prisoner); art. 106a (Espionage); art. 110 (Willfully and wrongfully hazarding a vessel); art. 113 (Misbehavior of sentinel or lookout in time of war); art. 118(1-4) (Murder); art. 120 (Rape); art. 125 (forcible sodomy); art. 134 (Kidnapping).

don, in the course of approval and review of a court-martial sentence.[109]

Conclusion

The *Manual for Courts-Martial* provides an adversary system in the sentencing phase of courts-martial, and advocates for the prosecution and defense play important roles in providing information to the sentencing authority. Effective advocacy affects the scope of admissible evidence in the form of personnel records, prior convictions, aggravation, victim-impact, and rehabilitative potential. An important and fertile area for defense counsel to develop extenuation and mitigation evidence is the area of collateral consequences of a court-martial sentence. In addition to an accused's personal concern with such consequences, punishment provisions in forfeitures and confinement for life without parole put such matters before the sentencing authority. Recognizing this trend, the zealous advocate will begin to shape the emerging law.

109. Pub. L. No. 105-85, 111 Stat. 1629.

"This Better Be Good": The Courts Continue to Tighten the Burden in Unlawful Command Influence Cases

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Introduction

Commanders and, notably, their legal advisors, again found new ways to invite scrutiny for their justice-related actions. Allegations of unlawful command influence continue to be a fertile source of appellate litigation, generating eight reported opinions in the past year, six of them by the Court of Appeals for the Armed Forces (CAAF). In only one of those opinions was a conviction reversed outright. In most circumstances, the courts granted no relief, often finding that the defense failed to meet its burden of developing and litigating the command influence in a thorough and timely manner and with a specific showing of prejudice. Effectively, the courts have told the defense community that any charge of unlawful command influence "better be good," or it will not be strong enough to raise the issue, to shift the burden, and to require the government to respond. This article analyzes the command influence cases of the past term and highlights numerous instances in which counsel, staff judge advocates, and military judges can learn from the tactics and practices of those who participated in these cases.

Burden of Proof: Sifting Cases at the Threshold

When assessing the strength of a command influence case, counsel must understand the burden of proof and likely method of analysis to be employed by the courts. In last year's cases, the courts further reinforced the *Ayala-Stombaugh* test for shifting the burden and determining, at the outset, the likely result of a command influence case. Ever since the rulings in *United States v. Stombaugh*[1] in 1994 and *United States v. Ayala*[2] in 1995, the courts have increasingly relied on these two cases, often coupled together, to clarify the standard of review under Article 37.[3] Despite the frequent and solitary criticisms by Judge Sullivan, it is clearer than ever that a command influence allegation must pass through the winnowing gate of *Ayala-Stombaugh* before it is likely to gain the full attention of the courts.

Stombaugh supplies the current test for command influence[4] and most frequently is cited for the proposition that unlawful command influence requires that the alleged source of command influence have acted with the "mantle of command authority."[5] In *Stombaugh*, this meant that the Naval lieutenants who pressured their peer to decline or to refuse to testify in a court-martial might have engaged in improper conduct, but it was not a violation of Article 37 because there was no *command* aspect to the pressure.[6] In *Ayala*, the CAAF decided that a sheaf of affidavits that asserted command influence, collected after trial by a friend of the accused, was insufficient to shift the burden of proof to the government. *Ayala* frequently has been cited for its controlling proposition: "The burden of disproving

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1. 40 M.J. 208 (C.M.A. 1994).

2. 43 M.J. 296 (1995).

3. *See* UCMJ art. 37 (West 1995). The pertinent portion of Article 37 of the Uniform Code of Military Justice provides:

> No authority convening a . . . court-martial, nor any other commanding officer, may censure, reprimand, or admonish the court or any member, military judge, or counsel thereof, with respect to the findings or sentence adjudged by the court, or with respect to any other exercises of its or his functions in the conduct of the proceedings. No person subject to this chapter may attempt to coerce or, by any unauthorized means, influence the action of a court-martial or any other military tribunal or any member thereof, in reaching the findings or sentence in any case, or the action of any convening, approving, or reviewing authority with respect to his judicial acts.

Id.

4. *See Stombaugh*, 40 M.J. at 213. The current test for *actual* unlawful command influence, enunciated in *Stombaugh* and purloined from Judge Cox's concurring opinion in *United States v. Levite*, requires the complainant to: "(1) 'allege sufficient facts which, if true, constitute unlawful command influence'; (2) show that the proceedings were unfair; and (3) show that the unlawful command influence was the proximate cause of that unfairness." *Id.*, *quoting* United States v. Levite, 25 M.J. 334, 341 (C.M.A. 1987) (Cox, J., concurring).

5. The language actually predates *Stombaugh*, but it effectively became part of the test for command influence in *Stombaugh*. *See Stombaugh*, 40 M.J. at 208. On the same page, the *Stombaugh* court speaks of "the mantle of *official* command authority," but later citations of *Stombaugh* have not included the (probably gratuitous) modifier, "official." *See generally* United States v. Kitts, 23 M.J. 108 (C.M.A. 1986). When introducing the term "mantle of authority," the *Kitts* court refers to *United States v. McClain*, 22 M.J. 124 (C.M.A. 1986), a case of significant and improper staff judge advocate involvement in selection of substitute panel members; the *McClain* court, however, did not actually use the "mantle" phrase.

the existence of unlawful command influence or proving that it did not affect the proceeding does not shift to the [g]overnment until the defense meets its burden of production."[7]

The pairing of *Ayala* and *Stombaugh* has permitted the courts, at times, to accomplish with some finesse what they would otherwise have to do in plain English: declare that a case is just not strong enough to require them to engage in tortured command influence analysis. In *United States v. Denier*,[8] a defense witness named Mr. Farrell complained after trial that he had overheard two court members in the men's room say that the accused, an Air Force major on trial for drug and sexual offenses, was receiving harsh treatment because of fallout from the Tailhook scandal.[9] Based on this allegation,[10] the military judge directed that the members answer a questionnaire under oath, after which he held a post-trial Article 39(a) session. The CAAF, hamstrung in part by the equivocal findings of the military judge,[11] relied on *Stombaugh* to hold that, even if such a conversation occurred, it still did not constitute unlawful command influence, because the speaker did not carry the mantle of command authority.[12] The court, citing *Ayala*, concluded that the accused did not meet his burden.[13]

Judge Sullivan, in one of his many separate opinions in the command influence area, took the occasion to criticize the majority for what he considers to be the extra-judicial expansion of the plain language of Article 37. He further believes that the "mantle of command authority" language "misreads or misinterprets [Article 37] in a way that significantly narrows a servicemember's protection from an unfair trial."[14] He believes that the majority has inflicted "[a]n added burden" on an accused, requiring him "not only . . . to prove that the trial was improperly influenced by a military member subject to the UCMJ (the statute's only requirement) but also that the military member was wearing something—a 'mantle of command authority'—whatever that means."[15]

Judge Sullivan makes a plausible case for strict statutory construction. He asserts that "all that needs to be proved . . . is that someone subject to the UCMJ tried to improperly influence the vote of the court members," and he further states that "Article 37 clearly indicates on its face that rank or grade or command does not matter when the fairness of a court-martial is at issue."[16] He is not incorrect. Article 37 begins by forbidding commanders and convening authorities from interfering with the court-martial process.[17] In its next sentence, however, the statute broadens its scope: "*No person* subject to this chapter

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6. *Stombaugh*, 40 M.J. at 213-14. The lieutenants also pressured a petty officer in the case. The Court of Military Appeals found that the pressure on the petty officer "amounted to unlawful command influence," though it found no prejudice. *Id*. The late Judge Wiss' concurrence in *Stombaugh* provides the most precise and measured critique of the "mantle" language of *Stombaugh*. He wrote that he would accept the mantle language in an effort to broaden the first sentence of Article 37(a) beyond literal commanders, but said he "part[ed] company with the majority . . . with its implication that the 'mantle of command authority' is limited to the formal structure of some particular command." *Id*. at 214, 215 (Wiss, J., concurring in part and in the result). He emphasized that the "very essence of military relationships is that the orders of *superior commissioned officers, warrant officers, noncommissioned officers, and petty officers*—not just superior commanders—will be obeyed (in the absence of their illegality)." *Id*. at 215 (emphasis in original).

7. United States v. Ayala, 43 M.J. 296, 299 (1995) (holding that "[t]he defense has the initial burden of producing *sufficient evidence* to raise unlawful command influence" (emphasis added)). The court did not further define "sufficient," so the combination of the relatively malleable "sufficiency" test of *Ayala* and the *Stombaugh* three-prong test and "mantle of command authority" language has provided appellate courts with plenty of agility and maneuver room in which to cull and discard sketchy claims of unlawful command influence.

8. 47 M.J. 253 (1997).

9. *Id*. at 257 (quoting the witness' letter to the Secretary of the Air Force). According to the witness, "[t]he gist of the conversation" by the supposed panel members "was that if it weren't for the 'fuck up' at tail hook (sic) and the command interest, this guy would get off with a slap on the wrist." *Id*. Tailhook was the notorious Navy episode of public sexual misconduct, which was followed by cover-ups, investigations, and disciplinary actions.

10. *Id.* In his letter, Mr. Farrell continued:

> They were USAF LTC's in their Blue uniforms and as such, members of the jury. I could not see their names, and since they were all about the same size I could not be sure which ones they were. I did notice both were rated aviators, and one was additionally wearing jump wings.

Id.

11. *Id*. at 266. In extensive findings, the military judge wrote that he was "convinced" that the witness "now sincerely believes that the conversation he describes occurred; and secondly, that the conversation was at the time and is now being filtered through the emotionally charged memory of an individual who has seen a close friend, of whose innocence he remains absolutely convinced, convicted . . . ." *Id*.

12. *Id.* at 260.

13. *Id.*

14. *Id.* at 261 (Sullivan, J., dissenting) (citation omitted).

15. *Id.*

16. *Id.*

[the UCMJ] may attempt to coerce or, by any unauthorized means, [to] influence the action of a court-martial . . . in reaching the findings or sentence . . . ."[18]

Judge Sullivan's analysis is hampered by two factors: a strawman illustration and a bridge-burning posture toward his fellow judges. Seeking to challenge the "mantle" rubric, he offered a hypothetical involving a panel member whose participation was influenced by the secret, written orders of an airbase commander.[19] In that hypothetical scenario, "mantle" analysis would be superfluous, because all could readily agree that unlawful command influence occurred. Judge Sullivan's purpose is to show that the funnel of unlawful influence cases is improperly constricted by the narrowing throat of the "mantle of command authority." His simplistic hypothetical fails to refute the utility of the mantle analysis in less obvious situations. Judge Sullivan also seems determined not to enlist anyone else in his cause. His sardonic comment about commanders having to be "wearing something" surely does not advance his cause or make a modification of *Stombaugh* likely. Similarly, in a concurrence in *United States v. Johnson*,[20] another unlawful influence case from last year, Judge Sullivan unleashed another of his customary sarcastic metaphors, admonishing Judge Crawford that "a court must use its nose as well as its eyes to search for command influence. I would not say the dissent needs stronger reading glasses but perhaps they are suffering from a temporary nasal cold."[21] To be fair, Judge Sullivan has been consistent in his critique of the "mantle" language, starting with *Stombaugh* itself,[22] but there is no evidence that the court's majority is at all uncomfortable with the test it formulated in *Stombaugh*.

Judge Sullivan's critique illuminates the limits and imprecision of the term command influence.[23] Article 37 is entitled "Unlawfully influencing the action of court."[24] Though it most typically has been applied to actions of commanders, analysts have to assume that Congress chose the language in the statute advisedly. When it wrote the first sentence of Article 37, it clearly contemplated commanders. Just as clearly, the clause "No person subject to this chapter," which is written in the broader second sentence, clearly encompasses anyone who wears a military uniform.

In *Stombaugh*, the CAAF was confronted with young Navy lieutenants who pressured one of their peers not to testify for the accused, a seaman.[25] The court employed the "mantle of command authority" language in trying to find a common strain among cases involving unlawful influence of court members. Strictly, the "mantle" language should only apply to such cases. Moreover, the fact that there is such a common strain in the cases cited in *Stombaugh* does not mean that Congress intended such a limitation when it drafted the broadly-worded "no person" portion of Article 37. Thus, counsel who raise non-panel command influence claims should not assume that the "mantle" requirement of *Stombaugh*, not yet four years old, precludes their fashioning cases of command influence where the actors are not reasonably cloaked with such authority.

Regardless of the long-term viability of the mantle analysis, *Stombaugh* has altered the method of analysis in unlawful command influence cases. Together with *Ayala*, it allows trial and appellate courts to sift command influence cases on a more mechanical threshold standard, instead of subjecting every case to a detailed factual analysis. It also gives counsel a rule of thumb to gauge the prospects of prevailing in pretrial motions, and counsel can discard those that generate smoke—but smoke that is too wispy to attract close appellate scrutiny.

Denier contains lessons for military judges as well as for counsel. The trial judge's apparent equivocation significantly limited the ability of the reviewing courts to do what the facts required: state that there was simply not enough evidence to warrant disturbing a verdict based on weak, after-the-fact speculation, when the witness could have raised it much closer in time.[26] The military judge ruled that he was "convinced" that the complainant "now sincerely believe[d] that the conversa-

17. *See* UCMJ art. 37 (West 1995). "No [convening] authority . . . nor any other commanding officer, may censure, reprimand, or admonish the court or any member, military judge or counsel . . . [regarding] the findings or sentence adjudged by the court, or with respect to any other exercises of its or his functions . . . ." *Id*.

18. *Id.* (emphasis added).

19. *Denier*, 47 M.J. at 261 (Sullivan, J., concurring).

20. 46 M.J. 253 (1997).

21. *Id.* at 255.

22. *See* United States v. Stombaugh, 40 M.J. 208, 215 (C.M.A. 1994) (Sullivan, C.J., concurring). Concurring in *Stombaugh*, then-Chief Judge Sullivan wrote to "reject [the] dissection [of Article 37] and the suggestion that Article 37 is inapplicable to situations where courts-martial are unlawfully influenced by persons other than commanders . . . . Wavering in this matter conflicts with nearly a half century of tradition and practice at this Court." *Id*.

23. *See generally* Lawrence J. Morris, *In with the Old: Creeping Developments in the Law of Unlawful Command Influence*, ARMY LAW., May 1997, at 39, 43 (proposing that command influence is a restrictive misnomer); Deana Willis, *The Road to Hell is Paved With Good Intentions: Finding and Fixing Unlawful Command Influence*, ARMY LAW., Aug. 1992, at 3.

24. UCMJ art. 37 (West 1995).

25. *Stombaugh*, 40 M.J. at 211.

tion he describe[d] occurred."[27] The judge continued, "I do not find the argument that Mr. Farrell has manufactured this incident to be credible; on the other hand, however, his interpretation of the conversation similarly lacks credibility."[28] It is hard to interpret such analysis as anything other than the strained attempt of a judge to pass the case to the appellate court to sort out.

The trial judge made the following three inconsistent findings: (1) Mr. Farrell believed the story, (2) Mr. Farrell did not make up the story, and (3) Mr. Farrell's interpretation was not credible. Mr. Farrell's *interpretation*, however, was irrelevant and not really at issue in the dispute. It was the conversation, as reported by the "credible" Mr. Farrell, that was at issue.[29] No one sought or considered his *interpretation*, because it did not matter—it was only the interpretation of the panel members that mattered, if they engaged in such a conversation at all.

The point, simply, is that trial judges play a critical role in sifting information in command influence cases, as in any consequential trial motion. The trial judge's ambivalence in *Denier* tied the hands of the appellate courts, constraining the CAAF, in particular, because it, unlike the courts of criminal appeal, lacks independent fact-finding power.[30] As discussed earlier, the mushy facts put the CAAF through a mildly tortured analysis before the court disposed of the case. Had the judge made clearer findings—for example, "there is no basis for believing that the conversation occurred, if at all, in the manner reported by Mr. Farrell"—less ink would have been spilled, and cleaner, more forthright analysis would have been possible.

Counsel also can learn from *Denier*. When Mr. Farrell's claim regarding the conversation came to the judge's attention, he ordered the members to complete questionnaires under oath, in which they answered specific questions about the purported conversation.[31] One of the members signed only one of the two pages on the questionnaire, a matter not pursued at trial but raised on appeal. The majority found that "[t]he opportunity to obtain a fuller explanation of the member's affidavit was thereby waived."[32] Command influence or not, the courts are going to require trial-level counsel to develop the facts and will not indulge raising them later, when the earlier opportunity clearly was present. "The defense's disinterest in seeking more information when the opportunity was afforded moots further speculation."[33]

Even if the conversation occurred as reported, it would not necessarily generate a finding of unlawful command influence, because trials do not occur in a vacuum. The CAAF held that, even if the conversation occurred, it reflected "[m]ere common knowledge . . . of front page newsworthy events [which did] not equate to" unlawful command influence.[34] A wholly different method of analysis would be implicated if there were evidence that any member "believed that a particular result should be obtained to please the command."[35] In such a circumstance, the mantle of authority would be irrelevant, "because the issue of impartiality focuses on the belief of the member, not the position of the command."[36]

The tardiness of the sketchy complaint in *Denier* was a factor in the CAAF's disinclination to disturb the verdict. Any evi-

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26. His tardiness was a significant factor, as the CAAF ruled that the complainant "had abundant opportunity to alert defense counsel or appellant of this impending injustice during recesses in the court-martial, [and] he did not do so." United States v. Denier, 47 M.J. 253, 255 (1997).

27. *Id.* at 266.

28. *Id.*

29. If Mr. Farrell was, in fact, telling the truth, a serious case of panel member misconduct may have occurred; however, the conversation between the panel members may not have been enough to cross the stringent threshold of Military Rule of Evidence 606(b), which narrowly limits the circumstances in which a verdict may be impeached. *See* MANUAL FOR COURTS-MARTIAL, UNITED STATES, MIL. R. EVID. 606(b) (1995) [hereinafter MCM].

30. *See* UCMJ art. 66(c) (West 1995). Article 66(c) gives the courts of criminal appeals fact-finding authority in addition to the normal power accorded to an appellate court. *Id*. The CAAF has no such power, though it need not accord the same weight to factors found by lower courts. The CAAF majority said: "[W]e accept the assumptions of the courts below that Farrell was not fabricating in claiming that he overheard a conversation relating to the Tailhook scandal . . . ." *Denier*, 47 M.J. at 260.

31. *Denier*, 47 M.J. at 257-58. The military judge showed great initiative in drafting and mailing the questionnaires, as not all members were available to attend a post-trial session in person.

32. *Id.* at 260.

33. *Id*. While Chief Judge Cox probably means lack of interest, not disinterest, the point is clear: speak up when the opportunity to create the record exists, or do not complain later. "[W]hen of (sic) the matter of the affidavits was expressly before the court-martial in post-trial session, the defense offered no objection to the documents, and it affirmatively declined the opportunity to call additional witnesses. The opportunity to obtain a fuller explanation of the member's affidavit was thereby waived." *Id*.

34. *Id.*

35. *Id.* at 261.

36. *Id.*

dence that the defense is hedging its bets in a command influence case is not likely to sit well with appellate courts. The Air Force Court of Criminal Appeals drove this message home in *United States v. Hill*.[37] Hill was in pretrial confinement for attempted burglary (among other things) when his apparently energetic and thorough defense counsel decided, before the Article 32 investigation, to visit the crime scene. The defense sought permission to have Hill ride along to the crime scene, but received "half a loaf" from the government: Hill could ride along, but he could not leave the car.

At the crime scene, the defense counsel shuttled between the car, which was parked in the front of the residence, and the rear window of the house, where the burglar allegedly entered. Hill could just as well have been 1000 miles away as 100 meters away if the government was not going to let him see the rear of the house with his counsel. The defense counsel, however, said nothing further about this contretemps throughout the court-martial, and Hill ultimately was convicted.

Long after trial,[38] the defense raised the issue of denying Hill the chance to accompany his lawyer to the rear of the house—and cloaked it in command influence language.[39] The Air Force court rejected the argument and chided the defense for its apparent indolence—or hedging of its bets. The court noted that the defense "sat through [the Article 32] without raising the issue"; "sat through the entire trial without so much as a word about it, although several other pretrial issues were vigorously contested"; and "did not raise the issue in post-trial submissions to the convening authority."[40] Though it gently chided the government for its strange practice in this case,[41] the Air Force court reinforced the now-solid line of cases that finds that accusative-stage command influence is waived if not raised.[42] The court ruled that the defense asserted "a perceived wrong capable of being remedied by a motion" but "forfeited the issue" by failing to do so in a timely manner.[43]

The court addressed the command influence concerns, but it was careful not to characterize the case as primarily one of unlawful command influence. It cited *United States v. Hamilton*[44] for the proposition, since reinforced in *United States v. Drayton*[45] and *United States v. Brown*,[46] that an accused forfeits accusative phase unlawful command influence claims when he does not raise them before trial.[47] The defense earns credit in this scenario for creatively packaging the interference with defense preparation as a command influence issue in the first place—it turned *Stombaugh* against the government for a change, arguing that the denial was cloaked with the mantle of command authority.[48] The case still stands, however, as another object lesson in the near-absolute principle that pretrial command influence is waived if not raised.

Forfeiture of the Issue

Although the CAAF has added the "mantle" gloss to the "no person" language, it has made clear that it will strictly construe Article 37 to restrict its reach to the adjudicative stage of courts-martial. Article 37 states that its proscriptions apply to "the findings or sentence."[49] Since *United States v. Hawthorne*[50] in 1956, courts have struggled with the extent to which Article 37 applied to actions that precede findings and sentence—the pro-

37. 46 M.J. 567 (A.F. Ct. Crim. App. 1997).

38. The trial defense counsel submitted the complaining affidavit "over 10 months after appellant's trial." *Id.* at 572.

39. *Id.* at 572, 573. It appears that the staff judge advocate forbade Hill from accompanying his lawyers to the rear of the house. The staff judge advocate refused to reconsider his decision after a defense request. *Id.*

40. *Id.* at 573.

41. *Id.* The court said that it "strongly recommend[s] more sensitivity to legitimate defense preparation needs." *Id.* There may have been a reason for the command's extreme caution in this case, perhaps a fear that Hill would flee if he were let out of the car. Still, reasonable restraints (such as handcuffs and leg irons) could have been placed on Hill to ensure that he did not flee but still give him a reasonable opportunity to view the residence. Though the government properly prevailed on the thin and tardy command influence claim, *Hill* is yet another example of the government's purchasing an avoidable issue by conduct that, at least as the facts appear on appeal, seems unduly intransigent.

42. *See generally* United States v. Brown, 45 M.J. 389 (1996); United States v. Drayton, 45 M.J. 180 (1996); United States v. Hamilton, 41 M.J. 32 (C.M.A. 1994).

43. *Hill*, 46 M.J. at 573. Still, the court says, "the crux of the appellant's complaint is that he was hamstrung in his trial preparation" when he was denied permission to leave the car, "a perceived wrong capable of being remedied by a motion to the military judge for appropriate relief" under Rule for Courts-Martial 906(a). *Id.* *See* MCM, *supra* note 29, R.C.M. 906(a).

44. 41 M.J. 32 (C.MA. 1994).

45. 45 M.J. 180 (1996).

46. 45 M.J. 389, 399 (1996).

47. *Id.*

48. *Hill*, 46 M.J. at 572-73.

cess of preferring, investigating, and referring charges, referred to as the "accusative" stage of trial.[51] In recent years, the CAAF has made it clear that Article 37 applies only to the adjudicative phase.[52] The CAAF added an extra nail in the accusative coffin on the last day of the 1996 term in *United States v. Brown*,[53] when it ruled that "[f]ailure to raise the issue of command influence as to the accusatorial process, as in this case at the trial, waives the issue."[54] This is probably the clearest proposition in the doctrine of unlawful command influence: if the defense is aware of command influence in the accusative stage of trial and does not raise it in pretrial motions, the issue is waived.

Since *United States v. Weasler*[55] in 1995, it is also clear that accusative stage command influence may be waived as part of a pretrial agreement. The courts have not yet expressly addressed whether adjudicative-stage command influence can be waived as part of a plea agreement. In fact, such a scenario is hard to conjure, because mid-trial plea bargaining is infrequent and, in the event of a mistrial or retrial, what might have been adjudicative-phase command influence in a prior trial becomes accusative-stage command influence in the subsequent case.

Back from Obscurity: Censure of Counsel

The portion of Article 37 regarding improper criticism or manipulation of counsel and judges has received scant attention over the past generation, largely because of increased sensitivity to command influence and the institutional independence of military judges and the military defense services.[56] In *United States v. Crawford*,[57] the Coast Guard resurrected the issue this year. The accused and his counsel, acting on an apparent Coast Guard tradition, paid a "courtesy call" on the convening authority just before the accused began to serve his sentence.[58] The convening authority complained that the sentence, which included one month in the brig and a punitive discharge, was too light. He then upbraided the defense counsel, telling her that the accused had lied to her and "used" her.[59]

Article 37 makes it unlawful for a convening authority "or any other commanding officer [to] censure, [to] reprimand, or [to] admonish the court or any member, military judge, *or counsel . . . [regarding] the findings or sentence adjudged by the court, or with respect to any other exercises of its or his functions* . . . ."[60] The Coast Guard Court of Criminal Appeals found that the convening authority's conduct in *Crawford* "clearly amounted to censure for the manner in which [the defense counsel] represented appellant at trial, particularly with regard to the sentence."[61]

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49. UCMJ art. 37 (West 1995).

50. 22 C.M.R. 83 (C.M.A. 1956). *Hawthorne*, which involved a policy letter that required a general court-martial anytime a soldier faced a third court-martial (such a scenario is impossible to fathom in today's one-strike-and-you're-almost-always-out military), is frequently cited for the proposition that any command influence at any stage cannot be waived. The court wrote that "any circumstance which gives even the appearance of improperly influencing the court-martial proceedings against the accused must be condemned." *Id*. at 87. In fact, careful reading of *Hawthorne* shows that its frequently-quoted language does not mean that command influence can never be waived or that a certain level of relief is always mandated. It is also worth noting that *Hawthorne* was issued when the Court of Military Appeals and the UCMJ were barely five years old; today's courts, notwithstanding the persistence of command influence, have greater equanimity regarding the dangers of command influence to the integrity of the military justice system.

51. *See* United States v. Weasler, 43 M.J. 15, 17 (1995). The accusative stage includes "preferral, forwarding, [and] referral" of charges. *Id*.

52. *See id*. at 18. The adjudicative stage includes the court-martial itself, and interference with this part of the process includes "interference with witnesses, judges, members, and counsel." *Id*.

53. 45 M.J. 389 (1996). In *Brown*, another case in which the SJA's conduct raised the issue of unlawful command influence by conduit, there was a question whether a brigade commander had forfeited his ability to be a convening authority because of statements he made on television about the near-mutiny of National Guard troops in training during Operation Desert Shield. The defense's failure to raise the issue in a timely manner meant that the courts did not have to reach the merits of the command influence claim.

54. *Id.* at 399.

55. 43 M.J. 15 (1997).

56. Counsel and judge manipulation is probably the most futile form of command influence.

57. 46 M.J. 771 (C.G. Ct. Crim. App. 1997).

58. *Id.* at 774. The sentence included a month in the brig and a bad-conduct discharge.

59. *Id*. He said that he believed that Crawford "had lied to counsel and had encouraged her to present false and misleading evidence during the presentencing portion" of his guilty plea. *Id*. He emphasized that "he was not accusing her of any wrongdoing, merely that she was being used by her client, who had been lying to her all along." *Id*. He also told the accused that when he returned to the ship, after confinement but before his bad-conduct discharge was final, "he would be very closely observed and would have to work very hard," which counsel took to be "an attempt to chill appellant's exercise of his appellate rights." *Id*. at 775. He was also handcuffed as he left the ship, though he was not a flight risk and was convicted of nonviolent offenses, such as lying and marijuana use. *Id*.

60. UCMJ art. 37(a) (West 1995) (emphasis added).

Crawford illustrates the vitality of Article 37(a) and the wisdom of convening authorities keeping such opinions to themselves. It also, however, reflects how the government can act swiftly to lawfully contain the damage from such comments. Because there was nothing about the convening authority's statements that could reasonably be said to "relate back" to the findings or sentence, they were unaffected by the conduct and not part of the court's analysis.

Such comments reflect an intemperance that is inconsistent with continuing to act as a convening authority. It cannot reasonably be said that the accused would receive a disinterested review of his case from such a person. The convening authority, on the advice of his staff judge advocate (SJA), disqualified himself from further involvement in the case and did not take action on the record,[62] a course of conduct that the court endorsed.[63] Because of this, the court found no prejudice to the accused.[64]

Future defense counsel could try to argue, based on the convening authority's reported statements, that he was unfit to act as a convening authority. Such an argument would likely fail, however, because: (1) intemperance is generally not found to disqualify a convening authority in the accusative stage[65] and (2) there is probably nothing about his statements in this case that could be used to build a case of witness, subordinate, or panel member intimidation in future cases.[66] Such conduct, however, is improper and yielded a measured reproach from the Coast Guard court. "[C]onduct of the kind encountered here is not only unbecoming a commanding officer, but also constitutes a rebuke of counsel in the performance of defense counsel duties, in violation of Article 37 of the UCMJ and, therefore, must be avoided at all times."[67]

Kicking a Case Back

Not infrequently, the CAAF will find that it has insufficient information on which to base a final decision in a command influence case. It is a long-standing doctrine that, although the burden of proof for the government at the trial level is preponderance of the evidence,[68] the CAAF will not affirm a case unless it is convinced beyond a reasonable doubt that the verdict was unaffected by unlawful command influence.[69]

In *United States v. Johnson*,[70] the court was faced with confusing facts. The accused, Lieutenant Johnson, was convicted of committing various sexual offenses, including sodomy on his young son.[71] Before trial, it appears that the accused's commanding officer, a Navy captain, recommended to the convening authority that any adjudged dismissal be suspended. This intention to suspend the dismissal was corroborated by a later memorandum from a Navy judge advocate (also a captain), who was the legal advisor to the Chief, Naval Personnel.[72] After a change of convening authorities but before initial action on the accused's case, it appears that his commanding officer "withdrew his support [for commuting the dismissal] because of 'top down command pressures'; and appellant's sentence to a dismissal was thereafter approved."[73] Citing *United States v.*

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61. *Crawford*, 46 M.J. at 776.

62. *Id.* at 775 (noting that the convening authority voluntarily relinquished "his position as convening authority, upon advice from the government").

63. *Id.* at 776 (stating that "the motion to disqualify him from acting further in the case was well justified, as was his voluntarily taking this step").

64. *Id.* at 775.

65. *See generally* United States v. Thomas, 22 M.J. 388, 394 (C.M.A. 1986) (indicating that a commander's attitude generally does not disqualify him unless it is evident that "he then possessed a disqualifying personal interest in the outcome . . . . [E]ven then any defect in referral (as a result of command influence) would not have been jurisdictional").

66. Still, vigilant defense counsel should scrutinize all such statements for evidence that could be used to frame future command influence motions. The widely broadcast sentiments of a convening authority who is disgusted with a defense counsel who simply appeared to do her job zealously (and ethically) could conceivably chill future counsel or future witnesses. The convening authority in *Crawford* made the statement in the presence of witnesses, including a chief petty officer who had testified for the accused. No prejudice arose from the exchange, however, because the chief even testified in the accused's subsequent summary court-martial. *Crawford*, 46 M.J. at 774, 776. Those who come to know of the exchange, however, could be intimidated, providing fodder for defense claims of witness intimidation.

67. *Id*. at 776. The court clearly disapproved of the convening authority's actions, but saying that such conduct should be "avoided" suggests something short of an absolute dissatisfaction or prohibition. There should be no wiggle room for convening authorities who intimidate counsel or witnesses.

68. *See* United States v. Stombaugh, 40 M.J. 208, 214 (C.M.A. 1994).

69. *See* United States v. Thomas, 22 M.J. 388 (C.M.A. 1986).

70. 46 M.J. 253 (1997).

71. *Id.* at 253.

72. *Id.* at 254. That memorandum said "'full commutation is expected' of [Johnson's] sentence." *Id.*

73. *Id.* at 254.

Thomas,[74] a four-judge majority said that "these uncontested facts are sufficient to require that appellant be afforded the opportunity to make his case" of unlawful command influence.[75]

Judge Crawford's querulous dissent is difficult to understand for its vehemence. She accurately and appropriately cites *Stombaugh* and *Ayala* on the issue of shifting the burden of proof.[76] She then makes a strained, speculative, and ultimately unpersuasive case for the proposition that the convening authority, a major general, could not have been affected by the disputed memorandum, in part because of the disparity in rank and because of the geographical distance between the two.[77] Judge Crawford said that the defense failed to meet the *Ayala* threshold to shift the burden of proof, because the author of the contested memorandum in the case was located in Washington, D.C., and the convening authority was at Camp Pendleton, California. "Perhaps appellant would have a closer case if the [author] and the convening authority shared an office or, at least, a base, but they do not,"[78] Judge Crawford wrote. She said that the defense failed to establish any method (for example, fax) by which the convening authority could have been aware of the memo; this failure, she wrote, meant that the facts were "simply not sufficient to meet the first prong of the command influence test."[79] She went on to question whether Johnson's commander actually withdrew his letter.[80] Again, such elemental facts should not still be in dispute at this stage of the litigation. Judge Crawford makes the more significant legal point, though buried at the end of her dissent, that the memo in question was not addressed to the convening authority but was addressed to a Navy judge advocate captain. She notes pointedly that the convening authority was a major general, who approved the SJA's recommendation, further dimming the credibility of a charge of command influence.[81]

This bit of post-hoc speculation lends credence to Judge Sullivan's criticism, in his concurring opinion, that Judge Crawford holds the defense to an "unbelievably high threshold of proof."[82] The defense makes a more than plausible case that the author of the memo may have influenced the captain to withdraw his recommendation and deprived the convening authority of its benefit when making his decision. This still should qualify as Article 37 interference with the court-martial process, because it deprived the convening authority of crucial information.[83] This case demonstrates again that the term "*command* influence" is imprecise and unduly narrow.

Finally, Judge Crawford tips her result-oriented hand in this case with her concluding paragraph. Here, she asserts accurately and unhappily that the sentence of dismissal and three year's confinement "was extremely light considering his offense—sexual abuse of his 16-year-old son."[84] It is also irrelevant. Even when a trial judge delivers what appears to be a light sentence, an appellate judge cannot decide that the command influence is harmless because the accused was able to gain such lenient disposition. The command influence in this case relates to the convening authority's action (approving the dismissal), so the analysis begins at that stage of the proceedings; the judge's seeming leniency should not affect the analysis.[85]

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74. 22 M.J. 388 (C.M.A. 1986).

75. *Johnson*, 46 M.J. at 254. Judge Sullivan wrote a concurrence that added nothing to the majority opinion, but it took shots at the dissenting opinions, which were written separately by Judges Crawford and Gierke. *See id*. at 255 (Sullivan, J., concurring). The concurrence included the following uncontroversial language: "Command influence is normally a secret thing, not easily discovered and even if discovered, not easily admitted." *Id*.

76. *See id*. at 256 (Crawford, J., dissenting).

77. *Id.* at 254-55.

78. *Id.* at 256 (Crawford, J., dissenting).

79. *Id.*

80. *Id.*

81. *Id.*

82. *Id.* at 255 (Sullivan, J., concurring). "We should not affirm a case where there exists an unresolved question of command influence on the record." *Id.* at 254.

83. *See generally* United States v. Hilow, 32 M.J. 439 (C.M.A. 1991) (holding that it was improper for a division deputy adjutant general, a captain in charge of procuring court member nominees, to submit only the names of "supporters of a command policy of hard discipline"). In *Hilow*, the conduct in question was a violation of Art. 25, but the convening authority himself knew nothing of it. The court found the convening authority's ignorance to be irrelevant, because the process still affected the pool that was made available to him. "[U]nlawful influence in the military justice system can be exerted on a convening authority from many directions and in unsuspected ways." *Id*. at 442.

84. *Johnson*, 46 M.J. at 256 (Crawford, J., dissenting). She is correct—though wrong about the boy's age, as the charge was for sodomy and other exploitation of a child *under* 16. *Id*. at 253.

85. *Id*. In fact, had the dismissal been approved in this case, the accused would have been free virtually immediately, as the convening authority had approved a pretrial agreement in which he suspended the confinement but which did not address discharge.

Judge Gierke's briefer, extremely fact-based dissent views *Johnson* as another *Ayala* case, founded on "unsupported speculation."[86] Judge Gierke could also be correct, and the majority's terse recitation of the facts could be skewed. Still, opinions of the military's highest appellate court should not read like partisan appellate briefs. As relayed by the court, the facts of *Johnson* are insufficiently developed, still another example (it seems) of trial-level disinclination or inability to create an adequate record. Regardless, if the majority's rendition of the facts is *essentially* correct—it is written by Chief Judge Cox, not a knee-jerk author on command influence issues, and it refers to "unrebutted" inferences and "uncontested facts"[87]—that should be enough to require the government to disprove the existence of unlawful command influence, following the *Stombaugh* test.

On the issue of producing facts, the government should never fear a fully developed record. There may be a natural reluctance to place all of the facts on the record, in fear of giving an appellate court information on which to hinge a decision to remand or to grant relief. More likely, an ill-developed record will result in a CAAF majority drawing the conclusions and making the inferences that Chief Judge Cox did in *Johnson*, thereby burdening the government years later (in *Johnson*, forty-two months later[88]) to reconstruct a complex scenario, colored by faded memories and, invariably, jaded or self-interested perspectives.

"Who's Kidding Whom?": Words Still Matter

In *United States v. Bartley*,[89] the CAAF showed that there still is nothing more important in a potential command influence case than the words uttered or written by a convening authority. The commander of Norton Air Force Base, an Air Force major general, published a poster, entitled "Who's Kidding Whom?," in which he sought to debunk several "myths" regarding discipline and justice, especially in cases involving illegal drugs.[90] Bartley claimed that the poster amounted to unlawful command influence and induced him to plead guilty at his court-martial.

Constrained by an indulgent opinion of the Air Force Court of Criminal Appeals and a defense decision not to raise a pretrial motion of unlawful command influence, the CAAF made no finding of command influence. It did, however, reverse the Air Force court and set aside the findings and sentence, because it was "not convinced beyond a reasonable doubt . . . that the command influence issue did not induce the guilty plea."[91]

This was the only case in the past year in which a military appellate court reversed a lower court based on unlawful command influence. Though the CAAF was hampered by unclear facts that led to the discovery and litigation of the command influence issue, *Bartley* makes it clear that commanders still will be held accountable for the way that their language potentially affects the court-martial process. The poster at issue, which appears in full as an appendix to the CAAF opinion,[92] is a polemical, 615-word document that effectively reproaches (and potentially intimidates) witnesses who might testify for airmen at trial,[93] as well as others involved in the military justice system.[94]

Three of the "myths" relate directly to drug charges, but all seven reasonably can be interpreted to affect the three populations through whose perspectives the courts commonly evaluate command influence: (1) subordinate commanders (ensuring that they are not robbed of their independent discretion to make recommendations or decisions regarding misconduct;[95] (2) panel members (who must be unaffected by the opinions or perceptions of the convening authority when they deliberate and vote);[96] and, probably most critically in this case, (3) potential witnesses (who must be free to testify candidly about their perceptions and opinions).[97] The potential adverse

86. *Id*. at 256 (Gierke, J., dissenting). His critique is well taken (the defense claim is based on a series of actions from which inferences may be drawn), but great weight should be accorded to the lead opinion, written by the measured Chief Judge Cox. As Chief Judge Cox observed, "top-down pressure" led to withdrawal of the clemency recommendation. *Id*. at 254.

87. *Id.* at 254.

88. *Id.* at 254, 255. He was convicted and sentenced on 6 December 1993, and the court's decision was released on 7 July 1997.

89. 47 M.J. 182 (1997).

90. *Id.* at 188. The seven myths appeared on the poster in capital letters, followed by substantial explanatory text:

> 1. DUTY PERFORMANCE REPRESENTS THE PREEMINENT CRITERION IN EVALUATING SUBORDINATES . . . . 2. OFF-DUTY ACTIVITIES SHOULD NOT AFFECT EPR EVALUATIONS . . . . 3. DRUG ABUSERS STILL CAN BE CONSIDERED WELL ABOVE AVERAGE MILITARY MEMBERS . . . . 4. ABUSES INVOLVING SMALL AMOUNTS OF DRUGS ARE NOT SERIOUS OFFENSES . . . . 5. DRUG ABUSERS CAN BE TRUSTWORTHY, DEPENDABLE AIRMEN . . . . 6. SKILLED AIRMEN ARE TOO VALUABLE TO LOSE DUE TO OFF-DUTY MISCONDUCT . . . . 7. ANYONE WHO CAN BE REHABILIATED SHOULD BE.

Id. at 188.

91. *Id.* at 187.

92. *Id.* at 188.

impact of the poster was heightened by the particular places where it was displayed: the waiting room of the convening authority's office[98] and the wall of the staff judge advocate's office.[99] In this circumstance, the defense appears to have met its burden of production by showing that the words and predilections of the convening authority were communicated in such a public and unequivocal manner.

It is not a *Stombaugh-Ayala* case of forcing the defense through the three-part test for prejudice. Effectively, it is a case of *apparent* command influence when, in the absence of solid evidence of affected witnesses, members, or commanders (such evidence is difficult to generate in a guilty plea case), a court will find that it cannot affirm a case when soldiers or members of the public might lose confidence in the system.[100] *Bartley* did not ripen (or had not ripened) into a classic case of actual command influence, because the defense was unable to show witnesses or others who were affected by the poster. The CAAF did not classify the case as one of either actual or apparent command influence. Still, it refused to affirm the findings and sentencing in a case where the commander's contact had the unquestioned potential to intimidate witnesses, commanders, and panel members.

The CAAF could not affirm a case in which the convening authority had published, over his signature in public places where the business of military justice is conducted, statements such as: "Many bright, loyal, young Americans are waiting in line to enter the Air Force. We can ill afford to keep them waiting in order to spare criminals in our organization."[101] It is not a strained interpretation of such language to suggest that the convening authority was encouraging courts to err on the side of discharging airmen, as opposed to rehabilitating them and returning them to duty. If there were any doubt about the convening authority's views on rehabilitation, the following paragraph made it still clearer:

> Rehabilitation is a proper goal of our justice system, but it is not the 'only' goal . . . . [T]he military does not provide a perpetual rehabilitation service for social misfits . . . . We have neither the time nor the resources to restore every member who has chosen to violate our laws, then wants to remain in the Air Force.[102]

It is important to remember that there is nothing inherently improper about the opinions contained in the poster, but they are improper when publicly pronounced by a person who is entrusted with the authority to convene courts and consider requests for clemency. They reflect skepticism of favorable testimony and a predisposition toward a particular punishment (commonly, as here, a punitive discharge) and against rehabilitation. Such opinions would not automatically disqualify a court member, for example (though, depending on the context and the discussion with the military judge, they well might). They do, however, disqualify a convening authority in the exercise of his quasi-judicial responsibilities.

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93. *Id.* The text of myth #6 read as follows:

> "Sergeant _____ is the best worker I have. I need Sergeant _____ back or his unit may fall apart." In truth, no one is indispensable. Many bright, loyal, young Americans are waiting in line to enter the Air Force. We can ill afford to keep them waiting in order to spare criminals in our organization.

Id.

94. *Id.* Other targets can include subordinate commanders and panel members. Consider the language in the lead paragraph of the poster and the arguments of potential future effect that can be based on it: "Myths die hard. Those who cling to myths often are unencumbered by knowledge or insight. I am deeply concerned that many of our people persist in espousing a number of myths incompatible with Air Force concepts of discipline and justice." *Id*.

95. *See, e.g.*, United States v. Treakle, 18 M.J. 646 (A.C.M.R. 1984).

96. *See, e.g.*, United States v. Martinez, 42 M.J. 327 (1995).

97. *See, e.g.*, United States v. Gleason, 43 M.J. 69 (1995).

98. *Bartley*, 47 M.J. at 184.

99. *Id.* at 186 (stating that "the poster was prominently displayed on the wall at the Norton Air Force Base legal office"). The opinion does not mention whether the poster was displayed anywhere other than the two locations mentioned.

100. *See generally* United States v. Cruz, 20 M.J. 873, 880-90 (A.C.M.R. 1985) (providing a lucid, scholarly, and still-applicable explanation of the difference between actual and apparent command influence; the different concerns that each addresses; and the different methods of analysis for each).

101. *Bartley*, 47 M.J. at 188. The impact of such language is that discharge should be automatic (or at least very seriously considered) in drug cases, potentially affecting the discretion of all three populations: (1) commanders, who arguably would "ratchet up" their recommendations as to disposition; (2) panel members, who arguably would vote for harsher sentences, aware of the sentiments of the convening authority who chose them for court-martial duty; and (3) potential witnesses, who arguably would not testify, or would testify with greater restraint and less candor because of the convening authority's opinions.

102. *Id*.

Judge Crawford's opinion for the unanimous CAAF insightfully emphasized that such messages must be evaluated for their overall thrust. The poster contained many lines that are unremarkable and fully accurate, such as "duty performance is only one of many important criteria" to use in evaluating subordinates.[103] The attempt to "balance" the pernicious effects of the poster with such boilerplate did not mollify Judge Crawford. She wrote that the poster, "seemingly written by a lawyer, seeks to negate many defense arguments in favor of rehabilitating drug users such as appellant."[104]

As in most command influence cases, there is room for debate, and the unpublished opinion of the Air Force court, which upholds the poster, is proof that few command influence opinions command unanimity. *Bartley* reaffirms the CAAF's primary concern in command influence cases, and it extends beyond its peculiar, not-likely-to-be-repeated facts. When the CAAF first remanded the case (the published opinion was its second look at *Bartley*), it asked the Air Force court to obtain evidence on whether command influence affected "the decision to prosecute, the forwarding recommendations, or the deliberations of the court members . . . whether any witnesses were deterred from testifying; and whether waiver of the command influence issue was part of the negotiation of a plea agreement."[105] In command influence cases, the central concerns of a reviewing court, especially the CAAF, are the impact on: subordinate commanders ("the decision to prosecute, the forwarding of recommendations"); the panel ("the deliberations of the court members"); and, most importantly, witnesses ("whether any witnesses were deterred from testifying").[106]

Unclear wording in several places makes *Bartley* murkier than it ought to be. The court clearly follows the long-standing precedent of *United States v. Thomas*[107] in refusing to affirm a finding of guilty unless convinced beyond a reasonable doubt that unlawful command influence did not affect the findings or sentence. In stating the court's holding, however, Judge Crawford wrote that the unanimous court was "not convinced beyond a reasonable doubt, based on this record, that the command influence *issue* did not induce the guilty plea."[108] Though it is probably just imprecise wording, it is not the command influence *issue*, but the *possible fact* of command influence that may have induced the guilty plea, and that is why the defense sought the sub rosa pretrial agreement.

The *Bartley* court examined not only the convening authority's conduct, but also the convoluted bargaining process that led to the guilty plea at trial. The bargaining issue consumes a large part of the opinion, but it is largely historical artifact, a sort of "prequel" to the *Weasler* decision of three years ago. In *United States v. Weasler*,[109] the CAAF ruled for the first time that command influence, at least in the accusative stage, could be a subject of overt bargaining and a negotiated pretrial agreement.[110] When the negotiations occurred in *Bartley*, *Weasler* had not yet been published. Therefore, treatment of the seeming sub rosa agreement is interesting because it affords a final glimpse of the pre-*Weasler* way of doing business. *Bartley* reinforces *Weasler's* wisdom of permitting overt bargaining on issues that were otherwise discussed indirectly—potentially compromising counsel, SJAs, and convening authorities—and were, therefore, not subject to important judicial scrutiny.

In two other instances, the majority opinion (perhaps written in haste at the end of the term[111]) suffers from unclear wording. First, the civilian attorney who staffed military justice actions for the convening authority in the jurisdiction is characterized as having made a decision "not [to] recommend a plea agreement because of the unlawful command influence issue."[112] It is unclear whether this means that his recommendation in favor of a plea agreement (which there was in this case) was not motivated by the command influence issue or that he recommended against a plea agreement because of the command influence issue. In the next paragraph of the opinion, Judge Crawford writes that the "Who's Kidding Whom" poster "did not address

103. *Id*. The poster also contains such unremarkable statements as: "Military members are on duty 24 hours a day and judged by the civilian community on that basis" and "In fact, duty performance is only one of many important criteria" to use in evaluating subordinates. *Id*.

104. *Id*. at 186.

105. *Id*. at 183.

106. I would suggest that it is not simply whether witnesses were deterred from testifying but whether they were deterred from testifying freely. Some witnesses who are subject to command influence might appear in court but not testify with the vigor or candor that would have characterized their testimony in the absence of unlawful command influence.

107. 22 M.J. 388, 393 (C.M.A. 1988). The court has long held to the doctrine that a command influence case cannot be affirmed at the appellate level unless the court is convinced beyond a reasonable doubt that the findings and sentence were unaffected by unlawful command influence.

108. *Bartley*, 47 M.J. at 187 (emphasis added).

109. 43 M.J. 15 (1995).

110. *Id.* at 19.

111. *Bartley* was among several decisions released on 24 September 1997 in the final blitz of cases released during the last week of the term.

112. *Bartley*, 47 M.J. at 185.

command influence or suggest a punishment."[113] Of course it did not. In no sense did it "*address* command influence," but it surely raised command influence issues.[114]

The final lesson from *Bartley* is that an important case of convening authority misconduct almost was not corrected because of the defense counsel's decision not to raise it during the questioning of potential panel members.[115] The court reversed the case anyway, because, though it was accusatory-stage command influence, it potentially affected the entire process and because the court was not convinced beyond a reasonable doubt that unlawful command influence did not induce the guilty plea.[116] Still, the CAAF reflects its accurate understanding of the dynamics of the average court-martial in keeping the burden on counsel and military judges to explore such issues at trial. "Questions on voir dire about the poster would have required the judge, who may have known about the agreement, to examine the command influence issue on the record. However, everyone stayed clear of the subjects mentioned in the poster."[117]

What's the Boss Think?

A commander's language again drew fire in *United States v. Youngblood*,[118] another Air Force case, in which the CAAF found unlawful command influence. *Youngblood* also reinforces the fact that officials other than commanders, notably SJAs, can be sources and conduits of unlawful command influence.

Several days before the trial of Airman First Class Youngblood, the convening authority and his SJA held a staff meeting on several issues, including "[s]tandards, command responsibility, and discipline."[119] Among those present were the three most senior members of the panel that was to sentence Youngblood, who pleaded guilty to a variety of offenses.[120] *Youngblood* is probably most noteworthy for its treatment of the doctrine of "implied bias," a growth area in the case law concerning member selection and voir dire.[121] It is also highly relevant to the evolution of unlawful command influence, because it illustrates how difficult it is to discern the effects of command influence on sophisticated and intelligent court members.

At the staff meeting, the SJA mentioned a commander who had "underreacted" and "shirked his or her leadership responsibilities" in a child abuse case.[122] The convening authority emphasized that the SJA "speaks for the Wing Commander" and said that, in the instance the SJA cited, the convening authority had sent a letter to the derelict commander's new duty station "expressing the opinion that 'that officer had peaked.'"[123] One court member, a major, recalled during voir dire that the SJA had said that the commander in question should have received nonjudicial punishment for dereliction of duty.[124]

Addressing the possible command pressure, another member, a lieutenant colonel, said during voir dire:

> [Y]ou're always having to . . . justify [decisions] . . . to your boss and the boss's commander . . . . [T]here are always those pressures that are inherent with the job . . . influences from things that you hear at the stand-up, from . . . my boss, or General Marr [the convening authority], his boss, giving opinions on what they think is important with

113. *Id.*

114. If Judge Crawford is suggesting that the problem with the poster was its failure to include some sort of prophylactic boilerplate, that is a dangerous and, I think, almost certainly futile undertaking.

115. *See Bartley*, 47 M.J. at 186. "[D]efense counsel did not explore the poster's impact on the members during voir dire, though the poster was prominently displayed on the wall at the Norton Air Force Base legal office." *Id*.

116. *Id.* at 187.

117. *Id.* at 186.

118. 47 M.J. 338 (1997).

119. *Id.* at 339.

120. *Id*. at 338, 340. There does not appear to have been similarity between Youngblood's offenses and those of the cases the general and the SJA addressed. The briefing is described as having been "of a general nature." The one case in which the command was said to have "underreacted" was a child abuse case, while Youngblood was on trial for drugs, larceny, and altering military ID cards. *Id*.

121. *See generally* Major Gregory B. Coe, *"Something Old, Something New, Something Borrowed, Something Blue": Recent Developments in Pretrial and Trial Procedure*, ARMY LAW., Apr. 1998, at 44.

122. *Youngblood*, 47 M.J. at 340.

123. *Id*.

124. *Id*.

> regard to the good order and discipline of their unit and your specific unit . . . . [T]here are factors that are just inherent with the job that are influences that I know enter into anyone in a command position.[125]

He also said that he would "do what was right" on the panel, but he said that the remarks by the SJA and commanding general were "at a minimum in my subconscious and, you know, parts of it are very clearly in my conscious."[126] The major said that her opinion could "be somewhat influenced by guidance and information out there, but it's ultimately mine."[127] A third member, another lieutenant colonel, had a more benign recollection of the staff meeting, but he did clearly remember the story about forwarding a letter to the gaining command of the "peaked" commander. "The impression definitely was there. The way it was left with me was there was a presentation, the Wing Commander was dissatisfied with the way things had happened, and he wrote a letter to the individual's now present supervisor."[128]

A divided CAAF upheld the findings in *Youngblood* (a guilty plea), but set aside the sentence.[129] In the well-reasoned majority opinion, Judge Gierke, joined by Chief Judge Cox and Judge Effron, held that it is unreasonable to expect commanders to sit as impartial court members when they have heard the convening authority's strongly expressed views on military justice—views that were reinforced by his SJA and by action such as sending critical letters to gaining commanders.[130]

The court's three most mainstream judges combined in *Youngblood* to deliver an opinion that essentially states one of the core assumptions undergirding the whole concept of unlawful command influence: military subordinates take seriously what their superiors say. When those superiors make strong statements about military justice, it is unreasonable to expect that those subordinate commanders can block out those opinions and perceptions and make decisions wholly unaffected by their superiors' statements. Moreover, it is unreasonable to expect non-lawyers to put command pressure in neat boxes; that is, the court did not take seriously the argument that the three officers in this case were likely to be unaffected in their duties as panel members, because the pressure actually related to their roles as commanders. The majority wrote:

> We recognize that the remarks at issue were directed at the commander's role in initiating disciplinary action rather than an officer's role as a member of a court-martial. Nevertheless [a lieutenant colonel] left the staff meeting with the clear impression that a fellow commander's career was in danger of being abruptly ended because BG Marr considered his response to a disciplinary situation inadequate . . . . Under the circumstances, we hold that it was "asking too much" of [the officers] to expect them to impartially adjudge an appropriate sentence without regard for its potential impact on their careers.[131]

The CAAF majority cited the most applicable recent precedent, *United States v. Gerlich*,[132] in which pressure from the local inspector general to the general court-martial convening authority traveled all the way back to the major who imposed nonjudicial punishment on the accused. The Article 15 was set aside, charges were preferred, and, ultimately, the accused was convicted at court-martial and received a bad-conduct discharge[133] until the CAAF reversed the conviction.[134]

Some of the testimony in *Gerlich* sounds similar to that of the court members in *Bartley*. *Gerlich* involved commanders trying to discern the pressure to change their minds about disposition of a case, whereas *Bartley* involved prospective panel members gauging the pressure they were feeling, but the problem was the same. In both cases, officers with military justice matters admitted keeping their antennae attuned to perceived desires or proclivities of senior commanders.[135] Judge Cox captured the problem in his majority opinion in *Gerlich*, describing

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125. *Id*. at 339.

126. *Id*. at 340.

127. *Id*.

128. *Id*.

129. *Id*. at 342.

130. *Id*. at 340-41.

131. *Id*. at 342.

132. 45 M.J. 309 (1996).

133. *Id*. at 312.

134. *Id*. at 314.

"the difficulty of a subordinate ascertaining for himself/herself the actual influence a superior has on that subordinate."[136]

The majority does not take the extreme view that commanders are barred from making *any* statements about discipline. Though that issue was not squarely before the court, the majority strongly implied that commanders, even commanders who are convening authorities, are not required to remain silent in the face of indiscipline.[137] The court has never taken that position. It does, however, strongly reinforce the proposition that "the effect of subtle pressure" cannot be minutely calibrated and that such pressure, combined with a tender sensitivity to public and soldier perceptions of the fairness of the military justice system, requires erring on the side of finding command influence and correcting it—in this instance, by liberally granting challenges for cause of the affected court members.[138]

Youngblood returns to the fundamentals in evaluating command influence—the military commander has primary roles in military operations *and* in military justice; no one's words, attitudes, or actions are more consequential. Because of this, the words of commanders warrant the greatest scrutiny. A CAAF majority, unencumbered by a predilection to defend commanders reflexively, is likely to find unlawful command influence when those words come from both the commander and his primary legal advisor, are "recent . . . in the minds of court members," and constitute a specific threat buttressed by a recent example.[139] The motives of the speakers are relatively unimportant when analyzing influence. This means that courts need not waste time divining intent or indicting commanders (and, in this instance, SJAs), but courts should instead focus on the reasonable recipient of the message. Here, when all three officers acknowledged a degree of intimidation, it would have been unreasonable for the court to have found no effect on the process. The majority emphasized that its "focus is on the impact of the remarks on the members rather than the exact language, intentions, or motivations of the speakers."[140]

Finally, while too much can be made of any one opinion, *Youngblood* reflects what may well be the emerging dynamic on the CAAF. Judge Crawford dissented strongly. Frequently the source of the court's most insightful legal analysis, especially in matters of constitutional criminal procedure and military post-trial concerns, Judge Crawford seemed like an apologist for commanders, unconcerned about the effects of perception in the tender area of unlawful command influence. Judge Sullivan, characteristically dissenting in part and concurring in part, has long professed a Douglas-Black-like absolutism regarding command influence, forfeiting the opportunity to exert greater influence in the area.[141] Judge Sullivan's partial concurrence and dissent sheds no light on the command influence controversy, but Judge Crawford's dissent stakes out the position that the military justice system is a discipline-based system in which commanders are expected to take active roles.[142] Judge Crawford cites prior cases of commanders' pretrial statements that were not found to be offensive, but none of them is sufficiently similar to *Youngblood* to qualify as compelling support.[143] She also cites *United States v. Martinez*,[144] one of the more benign command influence cases in recent years, before concluding that "the impact on the members in this case

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135. *See id*. at 313. A colonel in the case, who was both recipient and conduit of command pressure, testified that he wondered, "Is the boss trying to tell me something? . . . . What is the boss trying to say? Is he trying to say anything on this?" *Id*.

136. *Id*.

137. *See* United States v. Youngblood, 47 M.J. 338, 341 (1997). The majority wrote, "We recognize a commander's responsibility for discipline, the need occasionally for a more senior commander to intervene to prevent a miscarriage of justice, and the reality that an officer's lax attitude toward discipline may reflect inaptitude for command." *Id*.

138. *Id*.

139. *Id.* at 342. The majority acknowledged, for example, that "the remarks at issue were directed at the commander's role in initiating disciplinary action rather than an officer's role as a member of a court-martial," but ultimately found this to be a thin distinction, as it was reasonable for all three officers to feel that their court performance would be similarly (and improperly) scrutinized. *Id*. The majority concluded "that it was 'asking too much' . . . to expect them to impartially adjudge an appropriate sentence without regard for its potential impact on their careers." *Id*.

140. *Id*. at 339. At the end of the opinion, the court reiterated that "[t]he perceived message rather than the actual message is what controls . . . because we are concerned with how the message may have affected the impartiality of the court members." *Id*. at 341.

141. *See, e.g.*, United States v. Weasler, 43 M.J. 15, 20-21 (1995) (Sullivan, C.J., concurring in result). In *Weasler*, Judge Sullivan wrote that the majority was endorsing "bartered justice"; condoning "private deals between an accused and a commander to cover up instances of unlawful command influence"; and permitting an accused to "blackmail the guilty commander, subverting the integrity of the military justice system . . . [to] the private interests of an accused and a convening authority." *Id*.

142. *Youngblood*, 47 M.J. at 344 (Crawford, J., concurring) (citation omitted). "The primary responsibility for the maintenance of good order and discipline in the services is saddled on commanders, and we know of no good reason why they should not personally participate in improving the administration of military justice." *Id*. This sentiment is consistent with her strong pro-command stands in prior cases, including last year's *Gerlich* dissent, in which she wrote: "The majority's message to superior commanders appears to be that they may not exercise responsible command leadership by suggesting reconsideration of a particular disposition of a case." United States v. Gerlich, 45 M.J. 309, 314 (1996) (Crawford, J., dissenting).

143. *See Youngblood*, 47 M.J. at 344-45 (citations omitted).

is far from obvious."[145] "Obviousness," however, is not a requirement in the subtle realm of command influence.

In *Youngblood*, defense counsel appear once again to have forfeited the chance to develop the record better. The majority noted that neither the convening authority nor the SJA in question was asked to testify, leaving the court with "only the fragmentary recollections of those who heard his remarks."[146] The CAAF made it clear that the controlling factor was the *perception* of the remarks rather than the remarks *per se* or the motivations of the speakers. Still, the defense lost at trial (only one of its three challenges for cause was granted) and lost at the Air Force Court of Criminal Appeals. Perhaps if it had gained frank acknowledgments from the SJA and the convening authority about what happened in the meeting—acknowledging that their motivations were irrelevant, though invariably to be developed by the government—the defense would have had a better chance of prevailing at an earlier stage of the proceedings. A resentencing ordered on 27 September 1997 is cold comfort for an airman who received a sentence of two years' confinement on 21 February 1995. A rehearing, if ordered at all, will be capped by the two-year prior sentence and almost certainly will yield a lesser sentence—paper relief that will not compensate her for time already served.

Just this past month the CAAF considered still another implied bias case, finding that a military judge abused his discretion when he refused to grant a challenge for cause against a member who, inter alia, had been found by the same judge to have committed unlawful command influence in a prior court-martial. In *United States v. Rome*,[147] the judge found that the lieutenant colonel member "had crossed the line in counseling or talking to some NCOs who had written statements on behalf of the accused in that [prior] case."[148] The majority found that this command influence, coupled with some other factors,[149] justified excusing the member for implied bias. Judge Crawford blistered the majority, arguing that the loose combination of command influence and relatively routine factors such as a rating relationship between panel members goes to the core of the military justice system's ability to assert discipline. As in *Youngblood*, Judge Crawford appeared to lecture her fellow judges, reminding them of the unique role of the military justice system:

> This Court must always remember that the military criminal justice system is a worldwide system of justice administered by the armed forces and responsible to civilian authority. Commanders are entrusted with the mission of carrying out the civilian leadership's direction to assure that this country remains a super-power and maintains a strong national defense. *In order to do so, commanders must ensure that sevicemembers are responsive to orders*. Discipline is an integral part of this mission. Commanders and senior NCOs are responsible for maintaining discipline, and they should be trained on how to do so.[150]

There was no issue of "training" regarding justice in this case, so it is unclear whether Judge Crawford is making the point that more or better justice training is called for, or that training should be permitted beyond the relatively strict bounds permitted by Article 37.[151] Addressing the delicate relationship between implied bias theory and command influence, Judge Crawford continued that, in light of the majority's interpretation of implied bias theory, "one must now question whether commanders and senior NCOs can ever serve as court members. Even the random selection of court members would not resolve this matter to the majority's satisfaction."[152]

Implied bias doctrine, as developed in *Youngblood* and *Rome* provides fertile ground for the defense to assert, to liti-

144. 42 M.J. 327 (1995). In *Martinez*, the convening authority wrote a "We Care About You" letter to members of his command. In the letter, he suggested a "starting point" for drunk driving punishments that were resolved at Article 15. Eight days after the letter was published, a court-martial for a drunk-driving-related negligent homicide was held in the same jurisdiction. The CAAF found that the letter, though improper, had no effect on the members because it did not imply that they should find the accused guilty and that full disclosure and voir dire cured the good faith error by the convening authority. *Id*. at 332-33.

145. *Youngblood*, 47 M.J. at 345 (Crawford, J., concurring).

146. *Id*. at 341. Not only the majority was frustrated with the sketchy facts. Judge Crawford makes a similar observation in her dissent, writing, "The full details of the conference are unclear." *Id*. at 344 (Crawford, J., concurring). The "full details" should not still be "unclear" at this stage, and the failure to develop them at trial provides an easy out to a judge who is inclined to uphold the government.

147. 47 M.J. 467 (1998).

148. *Id.* at 468-69.

149. The defense counsel who had "grilled" the lieutenant colonel in the prior case was the defense counsel in this case; the lieutenant colonel knew a prosecution witness, for whom his daughter babysat; and the lieutenant colonel was the battalion commander of a staff sergeant (E-6) on the panel, though each assured the judge that they would not be embarrassed or restrained by each other's presence on the panel. *Id.* at 469, 486.

150. *Id.* at 472 (Crawford, J., dissenting) (emphasis added).

151. Article 37(a) permits only "general instructional or informational courses in military justice if such courses are designed solely for the purpose of instructing members of a command in the substantive and procedural aspects of courts-martial." UCMJ art. 37(a) (West 1995).

gate, and to preserve command influence claims. *Rome* seems to represent, in effect, a sort of "totality of the circumstances" test in which the command influence claim supplies the critical mass that tips the scales toward sustaining the implied bias claim. Judge Crawford's dissent may seem hyperbolic, but it shows that command influence can be an effective wedge in perfecting an implied bias challenge—one that, reasonably, is most unlikely otherwise to have been granted. The broader issue raised by Judge Crawford is the more interesting one: the extent to which the subjective realm of implied bias, coupled with the military's liberal challenge bent and salted by command influence, can shake the foundation for the long-standing system of military panels.

Command Influence by Conduit: SJAs Can Be Live Wires

The SJA's unfortunate role in *Youngblood* is not anomalous, and, if anything, last year was the year of the SJA in command influence cases, though it is not a new phenomenon.[153] Also last year, an Air Force SJA overstepped his responsibilities when his intimate and relentless involvement in all stages of prosecution jeopardized a conviction in *United States v. Argo*.[154] Argo, an Air Force lieutenant, was on trial for adultery and disobedience. The SJA advised the squadron commander (a lieutenant colonel) regarding a no-contact order, the violation of which formed the basis for some of the charges. He also swore the squadron commander to the charges and received the charges on behalf of the wing commander, the summary court-martial convening authority.[155] He signed for the wing commander (from a different squadron) in appointing a judge advocate to be the Article 32 investigating officer.[156] The case developed in a contentious atmosphere and included a controversy over whether the SJA threatened his counsel with nonjudicial punishment for "leaks" regarding the controversial prosecution.[157] The SJA frequently visited the investigating officer, ostensibly concerned (there was an unresolved dispute about his intent) that the defense was "pushing around" the investigating officer, a judge advocate who was not under the SJA's direct supervision.[158] When the defense suggested that the SJA might be exerting command influence on the investigating officer, the SJA asked that the Article 32 investigation be reopened to explore the issue.[159]

Though the CAAF expressed displeasure with much of the SJA's conduct, it did not find that the conduct amounted to unlawful command influence. Several years ago, Judge Sullivan admonished that an SJA is not a "potted plant."[160] The SJA in this case got himself in trouble by being a whirling dervish, and it is his omnipresence and meddling that purchased much of the court's scrutiny and disapproval. The CAAF found that there was nothing improper about the SJA's asking to have the investigation reopened to address the command influence issue, as it was clearly within the scope of his authority as the wing commander's representative.[161] The CAAF saw no grounds for relief, because the court "cannot discern how appellant could have been prejudiced by a full investigation of his allegations of unlawful command influence."[162]

Ex parte contact by a legal advisor (here, the SJA) with an Article 32 investigating officer is improper,[163] but there was no prejudice in this instance because the investigating officer

152. *Rome*, 47 M.J. at 472 (Crawford, J., dissenting).

153. In 1986, the court addressed SJA misconduct in *United States v. Kitts*, in which an Army SJA advised the convening authority about ways to minimize the participation of junior ranks in courts-martial. 23 M.J. 105 (C.M.A. 1986). The CAAF found that, under the circumstances, the SJA's involvement carried the "mantle of command authority." *Id.* at 108.

154. 46 M.J. 454 (1997).

155. *Id*. at 458. The wing commander was probably the summary and special court-martial convening authority, in accordance with the common Air Force practice, but it is unclear from the majority opinion. In Judge Sullivan's concurrence, he characterized the wing commander as the special court-martial convening authority. *Id*. at 465 (Sullivan, J., concurring). In receiving the charges for the summary court-martial convening authority, the SJA tolled the statute of limitations. *See* UCMJ art. 43 (West 1995); *see also* MCM, *supra* note 29, R.C.M. 403(a).

156. *Argo*, 46 M.J. at 456.

157. *Id*. at 457. Two subordinates recalled such a threat. They recalled that the SJA "threatened nonjudicial punishment for any further office 'leaks.' [The SJA] testified that he had no specific recollection of mentioning nonjudicial punishment but that it was possible." *Id*.

158. *Id.* at 458. The investigating officer was from Sheppard Air Force Base (AFB) but was appointed by the Reese AFB commander, for whom the SJA in question served.

159. *Id*. at 457-58.

160. In *United States v. Martinez*, Judge Sullivan was critical of a convening authority's ability to make fundamental military justice errors (writing a policy letter that suggested specific, minimum punishments for drunk driving offenses at Article 15), observing: "Where was the SJA? We know the typical SJA is not a 'potted plant.'" 42 M.J. 327, 332 (1995).

161. *Argo*, 46 M.J. at 458.

162. *Id*.

"resisted [the SJA's] advocacy, sought independent advice from her SJA . . . and exercised her independent judgment."[164] In short, if the SJA were attempting improperly to influence the proceedings, the court was "satisfied from the evidence of record that his efforts failed."[165]

As in so many cases in recent years, actions taken or foregone by trial-level counsel enable the CAAF to avert potentially harder questions. While the court is most unlikely to find that an SJA's or legal advisor's contact with an investigating officer is automatically command influence, it was spared a difficult call in this case because of the defense's decision or inability to pursue the command influence issue as it ripened. Writing for the court, Judge Gierke observed that the "defense did not ask the appointing authority to appoint a new investigating officer or ask the military judge to order a new Article 32 investigation."[166]

Argo is significant because it makes clear that the CAAF will not disturb a conviction simply out of dissatisfaction with the conduct of an SJA. Most importantly, the court will examine the honesty and independence of those who are subject to attempted influence. This case survived appellate scrutiny despite the SJA's overbearing conduct,[167] because the investigating officer proved herself impervious to it.

Argo also provided still another opportunity for the CAAF to reinforce *Stombaugh*,[168] in finding that the defense has (and in this case failed to meet) the burden of production in command influence cases. That burden, the court reiterated, "'is on the party raising the issue.' While 'the threshold triggering further inquiry should be low . . . it must be more than a bare allegation or mere speculation.'"[169] Aggressive staff judge advocates should draw little comfort from *Argo*, however. The court was clearly unhappy with the SJA's conduct, and it reemphasized that SJAs certainly can function as agents of command influence. Judge Gierke wrote that if the SJA "had attempted to influence [S's] testimony, either as a command representative or in his individual capacity, such conduct would violate Article 37."[170] This is significant because it suggests that *Argo*'s outcome hinged more on the SJA's failure to affect the course of the proceedings than on the conduct standing alone. It also suggests a broader view of Article 37 by Judge Gierke, and Judges Cox and Crawford, who joined in the opinion of the unanimous court. If the SJA could have violated Article 37 *in his individual capacity*, it suggests breathing life back into the "no person" language of Article 37, in contravention of the opinion in *United States v. Denier*,[171] which suggests its decline or demise through strict application of the "mantle of command" rubric.

Judge Effron's thoughtful concurrence is noteworthy for its conclusion that the SJA's actions "did not have any material effect" on the Article 32 investigation, "the referral decision by the general," or the trial or post-trial process.[172] Judge Effron's sentiments could form the working draft of a more nuanced harmless error analysis for the court, which has shown an inclination in recent years to assess the significance of command influence in the overall atmosphere of a developing case.[173]

As almost always in command influence cases, Judge Sullivan wrote separately to express his acute concern for the integrity of the military justice system. He said that *Argo* was "really about fairness in the military justice system and the concern of Congress that military prosecutions be perceived as fair by servicemembers *and the American public*."[174] He called the SJA's actions "a perceived manipulation of a military justice proceeding," a perception he called "not unreasonable" but one which yielded "no reasonable possibility of prejudice."[175] Judge Sul-

163. *See generally* MCM, *supra* note 29, R.C.M. 405(d)(1) discussion. "The investigating officer may seek legal advice concerning the investigating officer's responsibilities from an impartial source, but may not obtain such advice from counsel for any party." *Id*.

164. *Argo*, 46 M.J. at 459.

165. *Id*.

166. *Id.*

167. *Id*. "While we do not condone [the SJA's] conduct, we hold that appellant was not prejudiced by [the SJA's] improper ex parte contacts with the Article 32 investigating officer." *Id*. Judge Effron was similarly cautionary in his concurrence: "These are serious allegations, and the majority is careful to place these matters in context without endorsing activities of the individuals concerned." *Id.* at 464 (Effron, J., concurring).

168. 40 M.J. 208, 213 (C.M.A. 1994).

169. *Argo*, 46 M.J. at 461 (citations omitted).

170. *Id*.

171. 47 M.J. 253 (1997).

172. *Argo*, 46 M.J. at 464 (Effron, J., concurring).

173. *Compare id. with* United States v. Gleason, 43 M.J. 69 (1995) (holding that absence of defense witnesses from unit to testify at general court-martial for popular sergeant major warrants reversal based on atmosphere of paranoia fostered by battalion commander/summary court-martial convening authority) *and* United States v. Newbold, 44 M.J. 109 (1996) (providing that a ship commander's characterization of accused sailors as "scumbags" and "rapists" did not require relief because the commander was not the convening authority and the ship's population was excluded from the pool of potential panel members).

livan remains the member of the court who is most sensitive to command influence concerns. He has not, however, suggested a clear, alternative method of analyzing such cases, risking his being relegated to the role of court rogue on a critical issue. After concluding that there was no prejudice in *Argo*, he criticized the majority for a sort of obtuseness on the issue, but he concurred in the result.[176]

Command Influence Never Dies

By its terms, Article 37 applies to conduct that affects the findings or sentence of a court-martial. The conduct, however, may have occurred in a prior proceeding that is not itself subject to Article 37, if that conduct can be said to affect the court-martial. The CAAF rarely has been unanimous on command influence issues in recent years, but the five judges agreed in a remarkably unanimous opinion without concurrences that the defense may collaterally attack a properly filed and adjudicated Article 15 on command influence grounds when the government seeks to introduce it at court-martial.

In *United States v. Lorenzen*,[177] the court ultimately held that the Article 15 at issue would not have affected the result but said it was a proper issue for scrutiny at trial.[178] The Air Force Court of Criminal Appeals had held that the command influence issue evaporated when the accused chose to accept adjudication under Article 15 and not to demand trial by court-martial.[179] The CAAF expressly held otherwise. Writing for the unanimous court, Judge Crawford found that Lorenzen "did not waive his unlawful command influence claim by electing Article 15 nonjudicial punishment rather than demanding trial."[180] She wrote, however, that even if unlawful command influence were involved in the Article 15, the accused was unable in this instance to show that his trial was unfair (the second prong of the three-part *Stombaugh* test).[181] Because the Article 15 was admitted with other reprimands and counselings, the CAAF was satisfied that the possible command influence did not carry over to the sentence.[182]

In *Lorenzen*, the CAAF makes several critical points for counsel. The first and most obvious is that Article 15s are never "final" and that defense counsel should aggressively assert possible command influence whenever it has a good faith basis. In particular, acceptance of nonjudicial punishment does not waive command influence as to later use of the Article 15 at court-martial. Equally clear, however, is that the government benefits from smothering the record with as much derogatory information as it can find.

The CAAF did not have to make the tough call in this case—determining whether there was command influence in the contested Article 15—because the other derogatory sentencing evidence enabled the CAAF simply to find that the Article 15 standing alone would not have made enough difference.[183] In arguing a command influence motion, the defense needs to assert aggressively the uniquely prejudicial effect of Article 15 evidence. When the government's sentencing case consists of an Article 15 and "two other reprimands and counselings,"[184] it should not be so easy for the court to say that, essentially, the Article 15 merges into a generally negative picture of the accused and "'any command influence . . . did not [carry over

174. *Argo*, 46 M.J. at 464 (Sullivan, J., concurring) (emphasis in original). Judge Sullivan wrote further, "I am concerned that the conduct of the SJA may have unnecessarily jeopardized public confidence in this prosecution." *Id*.

175. *Id*. at 465.

176. *Id*. at 465. Judge Sullivan returned to the garden for his metaphor in this case when criticizing his brethren for lacking his breadth of vision.

> The process of a criminal prosecution may be viewed as a plant that grows in the soil of justice. The majority here has looked at this case only as to the results that are above ground—the referral of the case for trial, the trial, and the appeal. The majority has declared this referral [etc.] to be valid, and I agree. However, my view also goes beneath the ground to critically look at the main root of this criminal process—the pretrial investigation (the military equivalent of the grand-jury process). If this root is rotten, then the entire plant will eventually fail and die. I find the root damaged by the interference of the SJA, but the damage is not fatal.

Id.

177. 47 M.J. 8 (1997).

178. *Id*.

179. *Id*. at 15.

180. *Id*.

181. *Id*.

182. *Id*.

183. *Id*.

184. *Id*.

to] affect the findings or sentence' in this court-martial."[185] Defense counsel should be emboldened to assert in good faith the possibility of command influence in any adverse evidence the government introduces during the sentencing phase of trial. Besides trying to refute such evidence where possible, the government should seek a diversity of evidence so that its case does not rise or fall based on a single potentially questioned document.

Conclusion

When analyzing the command influence cases of recent years, it is important to remember the purposes of the proscriptions against command influence and the reasons that Congress included Article 37 in the UCMJ. Broadly, there are two reasons for Article 37's existence: to preclude overt corruption of the system (pressuring decision-makers and witnesses) and to maintain and to foster confidence in the justice system by its constituents (service members under the UCMJ) and the public. The first area is conventional command influence, and it hinges on the perceptions of the participants in the court-martial process. The second area, apparent command influence, is less common. It arises when there is no real effect on the trial, but when the public or rank and file might lose faith in the system. Courts and commentators frequently say that not only must justice be done, but it must be *seen* to be done.[186]

When counsel analyze their cases, they do well to keep both concerns in mind. These purposes have shaped the tests for command influence and the "fixes" available to correct incipient problems. The command influence issues of the recent term ranged from the grossly ill-considered (the "Who's Kidding Whom" poster) to the murky (the uncertain paper trail on the homosexuality issue in *United States v. Johnson*) to the arcane (Lorenzen's Article 15). Courts broke very little new ground in the past year. A majority of the CAAF clearly is comfortable with the *Stombaugh* test for command influence, and the *Stombaugh-Ayala* combination in winnowing command influence cases. Judge Crawford remains most sympathetic to commanders, and Judge Sullivan apparently feels as though he is the lone crusader for pure justice in the command influence realm. Military justice practitioners can learn from the strategies and their counterparts in this year's cases when framing and responding to command influence issues in the future.

Finally, a word about the Air Force. Six of the eight reported command influence decisions by the military appellate courts from the past year came from the Air Force (one came from the Navy and one came from the Coast Guard). It is nothing but conjecture to speculate about the cause. It simply could have been a bad year for the Air Force, it could reflect in part the entrusting of significant responsibility to relatively junior judge advocates (for example, the major (O-4) SJA in *Argo*), or it could suggest a disinclination to rein in stubborn commanders (the three-star general who generated and posted the "Who's Kidding Whom?" poster in *Bartley*). It could have nothing at all to do with the culture of a particular service. On the other hand, it could reflect the aggressiveness and unity of the Air Force defense counsel in ferreting and aggressively pursuing command influence claims. Regardless, the cases as a whole reflect that commanders and their advisors continue to find new ways to slip in the area of command influence. Overall, the burden remains high on the defense, and the CAAF in particular shows a continued determination to hold the defense to that high burden.

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185. *Id.*, *quoting* United States v. Stombaugh, 40 M.J. 208, 214 (C.M.A. 1994) (bracketed language appears in *Lorenzen* opinion).

186. As two authors state:

> To be strictly accurate, a justice-based system must be perceived to be fair and reasonably accurate. Although justice is a valid goal in and of itself, a discipline-oriented perspective emphasizes what the "troops" will need for high morale, and in the short term a perception of fairness will suffice in lieu of its actuality.

1 Francis A. Gilligan and Fredric I. Lederer, Court-Martial Procedure 7-8 (1991). *See* United States v. Youngblood, 47 M.J. 338, 343 (1997) (Sullivan, J., concurring in part and dissenting in part) (stating that "[a] jury system must appear fair for it to be recognized as fair"); United States v. Ayala, 43 M.J. 296, 304 n.4 (1995) (Sullivan, J., concurring in part and dissenting in part) (stating that "[a] system of justice must not just be fair, it must appear to be fair").

Guard and Reserve Affairs Items

Guard and Reserve Affairs Division

Office of The Judge Advocate General, U.S. Army

The Judge Advocate General's Reserve Component (On-Site) Continuing Legal Education Program

The following is the current schedule of The Judge Advocate General's Reserve Component (on-site) Continuing Legal Education Program. *Army Regulation 27-1, Judge Advocate Legal Services,* paragraph 10-10a, requires all United States Army Reserve (USAR) judge advocates assigned to Judge Advocate General Service Organization units or other troop program units to attend on-site training within their geographic area each year. All other USAR and Army National Guard judge advocates are encouraged to attend on-site training. Additionally, active duty judge advocates, judge advocates of other services, retired judge advocates, and federal civilian attorneys are cordially invited to attend any on-site training session.

1997-1998 Academic Year On-Site CLE Training

On-site instruction provides updates in various topics of concern to military practitioners as well as an excellent opportunity to obtain CLE credit. In addition to receiving instruction provided by two professors from The Judge Advocate General's School, United States Army, participants will have the opportunity to obtain career information from the Guard and Reserve Affairs Division, Forces Command, and the United States Army Reserve Command. Legal automation instruction provided by personnel from the Legal Automation Army-Wide System Office and enlisted training provided by qualified instructors from Fort Jackson will also be available during the on-sites. Most on-site locations supplement these offerings with excellent local instructors or other individuals from within the Department of the Army.

Additional information concerning attending instructors, GRA representatives, general officers, and updates to the schedule will be provided as soon as it becomes available.

If you have any questions about this year's continuing legal education program, please contact the local action officer listed below or call Major Juan J. Rivera, Chief, Unit Liaison and Training Officer, Guard and Reserve Affairs Division, Office of The Judge Advocate General, (804) 972-6380 or (800) 552-3978, ext. 380. You may also contact Major Rivera on the Internet at riverjj@hqda.army.mil. Major Rivera.

USAR Vacancies

A listing of JAGC USAR position vacancies for judge advocates, legal administrators, and legal specialists can be found on the Internet at http://www.army.mil/usar/vacancies.htm. Units are encouraged to advertise their vacancies locally, through the LAAWS BBS, and on the Internet. Dr. Foley.

GRA On-Line!

You may contact any member of the GRA team on the Internet at the addresses below.

COL Tom Tromey,.....trometn@hqda.army.mil
Director

COL Keith Hamack,.....hamackh@hqda.army.mil
USAR Advisor

Dr. Mark Foley,.....foleyms@hqda.army.mil
Personnel Actions

MAJ Juan Rivera,.....riverjj@hqda.army.mil
Unit Liaison & Training

Mrs. Debra Parker,.....parkeda@hqda.army.mil
Automation Assistant

Ms. Sandra Foster, ...fostesl@hqda.army.mil
IMA Assistant

Mrs. Margaret Grogan,.....grogame@hqda.army.mil
Secretary

THE JUDGE ADVOCATE GENERAL'S SCHOOL RESERVE COMPONENT (ON-SITE) CONTINUING LEGAL EDUCATION TRAINING SCHEDULE 1997-1998 ACADEMIC YEAR

DATE	CITY, HOST UNIT, AND TRAINING SITE	AC GO/RC GO SUBJECT/INSTRUCTOR/GRA REP*		ACTION OFFICER
2-3 May	Gulf Shores, AL 81st RSC/AL ARNG Gulf State Park Resort Hotel 21250 East Beach Blvd. Gulf Shores, AL 36547 (334) 948-4853 or (800) 544-4853	AC GO RC GO Ad & Civ Law Int'l - Ops Law GRA Rep	BG Joseph Barnes BG Thomas W. Eres LTC John German MAJ Michael Newton Dr. Mark Foley	CPT Scott E. Roderick Office of the SJA 81st RSC ATTN: AFRC-CAL-JA 255 West Oxmoor Road Birmingham, AL 35209 (205) 940-9304
15-17 May	Kansas City, MO 89th RSC Embassy Suites Hotel KCI Airport 7640 NW Tiffany Springs Pkwy Kansas City, MO 64153-2304 (800) 362-2779	AC GO RC GO Ad & Civ Law Int'l - Ops Law GRA Rep	BG Joseph Barnes BG Richard M. O'Meara LTC Paul Conrad LTC Richard Barfield COL Keith Hamack	LTC James Rupper 89th RSC ATTN: AFRC-CKS-SJA 2600 N. Woodlawn Wichita, KS 67220 (316) 681-1759, ext 228 or CPT Frank Casio (800) 892-7266, ext. 397

*Topics and attendees listed are subject to change without notice.

CLE News

1. Resident Course Quotas

Attendance at resident continuing legal education (CLE) courses at The Judge Advocate General's School, United States Army, (TJAGSA) is restricted to students who have confirmed reservations. Reservations for TJAGSA CLE courses are managed by the Army Training Requirements and Resources System (ATRRS), the Army-wide automated training system. **If you do not have a confirmed reservation in ATRRS, you do not have a reservation for a TJAGSA CLE course.**

Active duty service members and civilian employees must obtain reservations through their directorates of training or through equivalent agencies. Reservists must obtain reservations through their unit training offices or, if they are nonunit reservists, through the United States Army Personnel Center (ARPERCEN), ATTN: ARPC-ZJA-P, 9700 Page Avenue, St. Louis, MO 63132-5200. Army National Guard personnel must request reservations through their unit training offices.

When requesting a reservation, you should know the following:

TJAGSA School Code—**181**

Course Name—133d **Contract Attorneys Course** 5F-F10

Course Number—133d Contract Attorney's Course **5F-F10**

Class Number—**133d** Contract Attorney's Course 5F-F10

To verify a confirmed reservation, ask your training office to provide a screen print of the ATRRS R1 screen, showing by-name reservations.

The Judge Advocate General's School is an approved sponsor of CLE courses in all states which require mandatory continuing legal education. These states include: AL, AR, AZ, CA, CO, CT, DE, FL, GA, ID, IN, IA, KS, KY, LA, MN, MS, MO, MT, NV, NC, ND, NH, OH, OK, OR, PA, RH, SC, TN, TX, UT, VT, VA, WA, WV, WI, and WY.

2. TJAGSA CLE Course Schedule

1998

May 1998

4-22 May	41st Military Judges Course (5F-F33).
11-15 May	51st Fiscal Law Course (5F-F12).

June 1998

1-5 June	1st National Security Crime and Intelligence Law Workshop (5F-F401).
1-5 June	148th Senior Officer Legal Orientation Course (5F-F1).
1-12 June	3d RC Warrant Officer Basic Course (Phase 1) (7A-550A0-RC).
1 June-10 July	5th JA Warrant Officer Basic Course (7A-550A0).
8-12 June	2nd Chief Legal NCO Course (512-71D-CLNCO).
8-12 June	28th Staff Judge Advocate Course (5F-F52).
15-19 June	9th Senior Legal NCO Course (512-71D/40/50).
15-26 June	3d RC Warrant Officer Basic Course (Phase 2) (7A-55A0-RC).
29 June-1 July	Professional Recruiting Training Seminar.

July 1998

6-10 July	9th Legal Administrators Course (7A-550A1).
6-17 July	146th Basic Course (Phase 1, Fort Lee) (5-27-C20).
7-9 July	29th Methods of Instruction Course (5F-F70).
13-17 July	69th Law of War Workshop (5F-F42).
18 July-25 September	146th Basic Course (Phase 2, TJAGSA) (5-27-C20).
22-24 July	Career Services Directors Conference.

August 1998

3-14 August	10th Criminal Law Advocacy Course (5F-F34).
3-14 August	141st Contract Attorneys Course (5F-F10).
10-14 August	16th Federal Litigation Course (5F-F29).
17-21 August	149th Senior Officer Legal Orientation Course (5F-F1).
17 August 1998-28 May 1999	47th Graduate Course (5-27-C22).
24-28 August	4th Military Justice Managers Course (5F-F31).
24 August-4 September	30th Operational Law Seminar (5F-F47).

September 1998

9-11 September	3d Procurement Fraud Course (5F-F101).
9-11 September	USAREUR Legal Assistance CLE (5F-F23E).
14-18 September	USAREUR Administrative Law CLE (5F-F24E).

3. Civilian-Sponsored CLE Courses

1998

May

8 May	Criminal Law (6 CLE hours)	
ICLE	Clayton State University	
	Atlanta, GA	
14 May	Administrative Procedure	
ICLE	Marriott North Central Hotel	
	Atlanta, GA	
21 May	Curing Discovery Abuse	
ICLE	Marriott North Central Hotel	
	Atlanta, GA	
1 June	Administrative Procedure	
ICLE	Marriott North Central Hotel	
	Atlanta, GA	

For further information on civilian courses in your area, please contact one of the institutions listed below:

AAJE:	American Academy of Judicial Education 1613 15th Street, Suite C Tuscaloosa, AL 35404 (205) 391-9055
ABA:	American Bar Association 750 North Lake Shore Drive Chicago, IL 60611 (312) 988-6200
AGACL:	Association of Government Attorneys in Capital Litigation Arizona Attorney General's Office ATTN: Jan Dyer 1275 West Washington Phoenix, AZ 85007 (602) 542-8552
ALIABA:	American Law Institute-American Bar Association Committee on Continuing Professional Education 4025 Chestnut Street Philadelphia, PA 19104-3099 (800) CLE-NEWS or (215) 243-1600
ASLM:	American Society of Law and Medicine Boston University School of Law 765 Commonwealth Avenue Boston, MA 02215 (617) 262-4990
CCEB:	Continuing Education of the Bar University of California Extension 2300 Shattuck Avenue Berkeley, CA 94704 (510) 642-3973
CLA:	Computer Law Association, Inc. 3028 Javier Road, Suite 500E Fairfax, VA 22031 (703) 560-7747
CLESN:	CLE Satellite Network 920 Spring Street Springfield, IL 62704 (217) 525-0744 (800) 521-8662
ESI:	Educational Services Institute 5201 Leesburg Pike, Suite 600 Falls Church, VA 22041-3202 (703) 379-2900

FBA: Federal Bar Association
1815 H Street, NW, Suite 408
Washington, DC 20006-3697
(202) 638-0252

FB: Florida Bar
650 Apalachee Parkway
Tallahassee, FL 32399-2300

GICLE: The Institute of Continuing Legal Education
P.O. Box 1885
Athens, GA 30603
(706) 369-5664

GII: Government Institutes, Inc.
966 Hungerford Drive, Suite 24
Rockville, MD 20850
(301) 251-9250

GWU: Government Contracts Program
The George Washington University National Law Center
2020 K Street, NW, Room 2107
Washington, DC 20052
(202) 994-5272

IICLE: Illinois Institute for CLE
2395 W. Jefferson Street
Springfield, IL 62702
(217) 787-2080

LRP: LRP Publications
1555 King Street, Suite 200
Alexandria, VA 22314
(703) 684-0510
(800) 727-1227

LSU: Louisiana State University
Center on Continuing Professional Development
Paul M. Herbert Law Center
Baton Rouge, LA 70803-1000
(504) 388-5837

MICLE: Institute of Continuing Legal Education
1020 Greene Street
Ann Arbor, MI 48109-1444
(313) 764-0533
(800) 922-6516

MLI: Medi-Legal Institute
15301 Ventura Boulevard, Suite 300
Sherman Oaks, CA 91403
(800) 443-0100

NCDA: National College of District Attorneys
University of Houston Law Center
4800 Calhoun Street
Houston, TX 77204-6380
(713) 747-NCDA

NITA: National Institute for Trial Advocacy
1507 Energy Park Drive
St. Paul, MN 55108
(612) 644-0323 in (MN and AK)
(800) 225-6482

NJC: National Judicial College
Judicial College Building
University of Nevada
Reno, NV 89557

NMTLA: New Mexico Trial Lawyers' Association
P.O. Box 301
Albuquerque, NM 87103
(505) 243-6003

PBI: Pennsylvania Bar Institute
104 South Street
P.O. Box 1027
Harrisburg, PA 17108-1027
(717) 233-5774
(800) 932-4637

PLI: Practicing Law Institute
810 Seventh Avenue
New York, NY 10019
(212) 765-5700

TBA: Tennessee Bar Association
3622 West End Avenue
Nashville, TN 37205
(615) 383-7421

TLS: Tulane Law School
Tulane University CLE
8200 Hampson Avenue, Suite 300
New Orleans, LA 70118
(504) 865-5900

UMLC: University of Miami Law Center
P.O. Box 248087
Coral Gables, FL 33124
(305) 284-4762

UT: The University of Texas School of Law
Office of Continuing Legal Education
727 East 26th Street
Austin, TX 78705-9968

VCLE: University of Virginia School of Law
Trial Advocacy Institute
P.O. Box 4468
Charlottesville, VA 22905.

4. Mandatory Continuing Legal Education Jurisdiction and Reporting Dates

Jurisdiction	Reporting Month
Alabama**	31 December annually
Arizona	15 September annually
Arkansas	30 June annually
California*	1 February annually
Colorado	Anytime within three-year period
Delaware	31 July biennially
Florida**	Assigned month triennially
Georgia	31 January annually
Idaho	Admission date triennially
Indiana	31 December annually
Iowa	1 March annually
Kansas	30 days after program
Kentucky	30 June annually
Louisiana**	31 January annually
Michigan	31 March annually
Minnesota	30 August triennially
Mississippi**	1 August annually
Missouri	31 July annually
Montana	1 March annually
Nevada	1 March annually
New Hampshire**	1 August annually
New Mexico	prior to 1 April annually
North Carolina**	28 February annually
North Dakota	31 July annually
Ohio*	31 January biennially
Oklahoma**	15 February annually
Oregon	Anniversary of date of birth—new admittees and reinstated members report after an initial one-year period; thereafter triennially
Pennsylvania**	30 days after program
Rhode Island	30 June annually
South Carolina**	15 January annually
Tennessee*	1 March annually
Texas	31 December annually
Utah	End of two-year compliance period
Vermont	15 July biennially
Virginia	30 June annually
Washington	31 January triennially
West Virginia	31 July annually
Wisconsin*	1 February annually
Wyoming	30 January annually

* Military Exempt

** Military Must Declare Exemption

For addresses and detailed information, see the February 1998 issue of *The Army Lawyer*.

Current Materials of Interest

1. Web Sites of Interest to Judge Advocates

a. Department of Defense Publications (http://web7.whs.osd.mil/corres.htm).

This is the best site to find official Department of Defense policy. You will find at this site the latest DOD directives, instructions, publications, administrative instructions, and directive-type memoranda. You can also search the extensive database for older directives and publications.

b. DA PAM 25-30 Online (http://www.pubs.5sigcmd.army.mil/pam.htm).

You can use this web site to search *DA PAM 25-30*, the Army's index of publications. If you do not have access to the CD-ROM or the Microfiche, this web site will enable you to find the Army regulation or publication that addresses your topic of interest. You will not be able to access the publication directly; however, this is a great starting point to find the regulation number and latest date of publication.

c. Department of Justice Search Engine (http://www.info.gov/cgi-bin/search_doj).

From this page, you can search for DOJ papers and documents. It is especially useful if you need access to government information and statistics.

2. TJAGSA Materials Available through the Defense Technical Information Center

Each year The Judge Advocate General's School, U.S. Army (TJAGSA), publishes deskbooks and materials to support resident course instruction. Much of this material is useful to judge advocates and government civilian attorneys who are unable to attend courses in their practice areas, and TJAGSA receives many requests each year for these materials. Because the distribution of these materials is not in its mission, TJAGSA does not have the resources to provide these publications.

To provide another avenue of availability, some of this material is available through the Defense Technical Information Center (DTIC). An office may obtain this material in two ways. The first is through the installation library. Most libraries are DTIC users and would be happy to identify and order requested material. If the library is not registered with the DTIC, the requesting person's office/organization may register for the DTIC's services.

If only unclassified information is required, simply call the DTIC Registration Branch and register over the phone at (703) 767-8273. If access to classified information is needed, then a registration form must be obtained, completed, and sent to the Defense Technical Information Center, 8725 John J. Kingman Road, Suite 0944, Fort Belvoir, Virginia 22060-6218; telephone (commercial) (703) 767-9087, (DSN) 427-9087, toll-free 1-800-225-DTIC, menu selection 6, option 1; fax (commercial) (703) 767-8228; fax (DSN) 426-8228; or e-mail to reghelp@dtic.mil.

If there is a recurring need for information on a particular subject, the requesting person may want to subscribe to the Current Awareness Bibliography Service, a profile-based product, which will alert the requestor, on a biweekly basis, to the documents that have been entered into the Technical Reports Database which meet his profile parameters. This bibliography is available electronically via e-mail at no cost or in hard copy at an annual cost of $25 per profile.

Prices for the reports fall into one of the following four categories, depending on the number of pages: $6, $11, $41, and $121. The majority of documents cost either $6 or $11. Lawyers, however, who need specific documents for a case may obtain them at no cost.

For the products and services requested, one may pay either by establishing a DTIC deposit account with the National Technical Information Service (NTIS) or by using a VISA, MasterCard, or American Express credit card. Information on establishing an NTIS credit card will be included in the user packet.

There is also a DTIC Home Page at http://www.dtic.mil to browse through the listing of citations to unclassified/unlimited documents that have been entered into the Technical Reports Database within the last eleven years to get a better idea of the type of information that is available. The complete collection includes limited and classified documents as well, but those are not available on the Web.

Those who wish to receive more information about the DTIC or have any questions should call the Product and Services Branch at (703)767-9087, (DSN) 427-8267, or toll-free 1-800-225-DTIC, menu selection 6, option 1; or send an e-mail to bcorders@dtic.mil.

Contract Law

AD A301096	Government Contract Law Deskbook, vol. 1, JA-501-1-95 (631 pgs).
AD A301095	Government Contract Law Deskbook, vol. 2, JA-501-2-95 (503 pgs).
AD A265777	Fiscal Law Course Deskbook, JA-506-93 (471 pgs).

Legal Assistance

AD A303938	Soldiers' and Sailors' Civil Relief Act Guide, JA-260-96 (172 pgs).
AD A333321	Real Property Guide—Legal Assistance, JA-261-93 (180 pgs).
AD A326002	Wills Guide, JA-262-97 (150 pgs).
AD A308640	Family Law Guide, JA 263-96 (544 pgs).
AD A283734	Consumer Law Guide, JA 265-94 (613 pgs).
AD A323770	Uniformed Services Worldwide Legal Assistance Directory, JA-267-97 (60 pgs).
*AD A332897	Tax Information Series, JA 269-97 (116 pgs).
AD A329216	Legal Assistance Office Administration Guide, JA 271-97 (206 pgs).
AD A276984	Deployment Guide, JA-272-94 (452 pgs).
AD A313675	Uniformed Services Former Spouses' Protection Act, JA 274-96 (144 pgs).
AD A326316	Model Income Tax Assistance Guide, JA 275-97 (106 pgs).
AD A282033	Preventive Law, JA-276-94 (221 pgs).

Administrative and Civil Law

AD A328397	Defensive Federal Litigation, JA-200-97 (658 pgs).
AD A327379	Military Personnel Law, JA 215-97 (174 pgs).
AD A255346	Reports of Survey and Line of Duty Determinations, JA-231-92 (90 pgs).
AD A301061	Environmental Law Deskbook, JA-234-95 (268 pgs).
AD A338817	Government Information Practices, JA-235-98 (326 pgs).
AD A325989	Federal Tort Claims Act, JA 241-97 (136 pgs).
AD A332865	AR 15-6 Investigations, JA-281-97 (40 pgs).

Labor Law

AD A323692	The Law of Federal Employment, JA-210-97 (290 pgs).
AD A336235	The Law of Federal Labor-Management Relations, JA-211-98 (320 pgs).

Developments, Doctrine, and Literature

AD A332958	Military Citation, Sixth Edition, JAGS-DD-97 (31 pgs).

Criminal Law

AD A302672	Unauthorized Absences Programmed Text, JA-301-95 (80 pgs).
AD A274407	Trial Counsel and Defense Counsel Handbook, JA-310-95 (390 pgs).
AD A302312	Senior Officer Legal Orientation, JA-320-95 (297 pgs).
AD A302445	Nonjudicial Punishment, JA-330-93 (40 pgs).
AD A302674	Crimes and Defenses Deskbook, JA-337-94 (297 pgs).
AD A274413	United States Attorney Prosecutions, JA-338-93 (194 pgs).

International and Operational Law

AD A284967	Operational Law Handbook, JA-422-95 (458 pgs).

Reserve Affairs

AD B136361	Reserve Component JAGC Personnel Policies Handbook, JAGS-GRA-89-1 (188 pgs).

The following United States Army Criminal Investigation Division Command publication is also available through the DTIC:

AD A145966	Criminal Investigations, Violation of the

U.S.C. in Economic Crime Investigations, USACIDC Pam 195-8 (250 pgs).

* Indicates new publication or revised edition.

3. Regulations and Pamphlets

a. The following provides information on how to obtain Manuals for Courts-Martial, DA Pamphlets, Army Regulations, Field Manuals, and Training Circulars.

(1) The United States Army Publications Distribution Center (USAPDC) at St. Louis, Missouri, stocks and distributes Department of the Army publications and blank forms that have Army-wide use. Contact the USAPDC at the following address:

Commander
U.S. Army Publications
Distribution Center
1655 Woodson Road
St. Louis, MO 63114-6181
Telephone (314) 263-7305, ext. 268

(2) Units must have publications accounts to use any part of the publications distribution system. The following extract from *Department of the Army Regulation 25-30, The Army Integrated Publishing and Printing Program*, paragraph 12-7c (28 February 1989), is provided to assist Active, Reserve, and National Guard units.

b. The units below are authorized [to have] publications accounts with the USAPDC.

(1) *Active Army*.

(a) *Units organized under a Personnel and Administrative Center (PAC)*. A PAC that supports battalion-size units will request a consolidated publications account for the entire battalion except when subordinate units in the battalion are geographically remote. To establish an account, the PAC will forward a DA Form 12-R (Request for Establishment of a Publications Account) and supporting DA 12-series forms through their Deputy Chief of Staff for Information Management (DCSIM) or DOIM (Director of Information Management), as appropriate, to the St. Louis USAPDC, 1655 Woodson Road, St. Louis, MO 63114-6181. The PAC will manage all accounts established for the battalion it supports. (Instructions for the use of DA 12-series forms and a reproducible copy of the forms appear in *DA Pam 25-33, The Standard Army Publications (STARPUBS) Revision of the DA 12-Series Forms, Usage and Procedures (1 June 1988)*.

(b) *Units not organized under a PAC*. Units that are detachment size and above may have a publications account. To establish an account, these units will submit a DA Form 12-R and supporting DA Form 12-99 forms through their DCSIM or DOIM, as appropriate, to the St. Louis USAPDC, 1655 Woodson Road, St. Louis, MO 63114-6181.

(c) *Staff sections of Field Operating Agencies (FOAs), Major Commands (MACOMs), installations, and combat divisions*. These staff sections may establish a single account for each major staff element. To establish an account, these units will follow the procedure in (b) above.

(2) *Army Reserve National Guard (ARNG) units that are company size to State adjutants general*. To establish an account, these units will submit a DA Form 12-R and supporting DA Form 12-99 through their State adjutants general to the St. Louis USAPDC, 1655 Woodson Road, St. Louis, MO 63114-6181.

(3) *United States Army Reserve (USAR) units that are company size and above and staff sections from division level and above*. To establish an account, these units will submit a DA Form 12-R and supporting DA Form 12-99 forms through their supporting installation and CONUSA to the St. Louis USAPDC, 1655 Woodson Road, St. Louis, MO 63114-6181.

(4) *Reserve Officer Training Corps (ROTC) Elements*. To establish an account, ROTC regions will submit a DA Form 12-R and supporting DA Form 12-99 forms through their supporting installation and Training and Doctrine Command (TRADOC) DCSIM to the St. Louis USAPDC, 1655 Woodson Road, St. Louis, MO 63114-6181. Senior and junior ROTC units will submit a DA Form 12-R and supporting DA 12-series forms through their supporting installation, regional headquarters, and TRADOC DCSIM to the St. Louis USAPDC, 1655 Woodson Road, St. Louis, MO 63114-6181.

Units not described above also may be authorized accounts. To establish accounts, these units must send their requests through their DCSIM or DOIM, as appropriate, to Commander, USAPPC, ATTN: ASQZ-LM, Alexandria, VA 22331-0302.

c. Specific instructions for establishing initial distribution requirements appear in *DA Pam 25-33*.

If your unit does not have a copy of DA Pam 25-33, you may request one by calling the St. Louis USAPDC at (314) 263-7305, extension 268.

(1) Units that have established initial distribution requirements will receive copies of new, revised, and changed publications as soon as they are printed.

(2) Units that require publications that are not on their initial distribution list can requisition publications using the Defense Data Network (DDN), the Telephone Order Publications System (TOPS), the World Wide Web (WWW), or the Bulletin Board Services (BBS).

(3) Civilians can obtain DA Pams through the Na-

tional Technical Information Service (NTIS), 5285 Port Royal Road, Springfield, VA 22161. You may reach this office at (703) 487-4684 or 1-800-553-6487.

(4) Air Force, Navy, and Marine Corps judge advocates can request up to ten copies of DA Pamphlets by writing to USAPDC, 1655 Woodson Road, St. Louis, MO 63114-6181.

4. The Legal Automation Army-Wide System Bulletin Board Service

a. The Legal Automation Army-Wide System (LAAWS) operates an electronic on-line information service (often referred to as a BBS, Bulletin Board Service) primarily dedicated to serving the Army legal community, while also providing Department of Defense (DOD) wide access. Whether you have Army access or DOD-wide access, all users will be able to download the TJAGSA publications that are available on the LAAWS BBS.

b. Access to the LAAWS BBS:

(1) Access to the LAAWS On-Line Information Service (OIS) is currently restricted to the following individuals (who can sign on by dialing commercial (703) 806-5772 or DSN 656-5772 or by using the Internet Protocol address 160.147.194.11 or Domain Names jagc.army.mil):

(a) Active Army, Reserve, or National Guard (NG) judge advocates,

(b) Active, Reserve, or NG Army Legal Administrators and enlisted personnel (MOS 71D);

(c) Civilian attorneys employed by the Department of the Army,

(d) Civilian legal support staff employed by the Army Judge Advocate General's Corps;

(e) Attorneys (military or civilian) employed by certain supported DOD agencies (e.g., DLA, CHAMPUS, DISA, Headquarters Services Washington),

(f) All DOD personnel dealing with military legal issues;

(g) Individuals with approved, written exceptions to the access policy.

(2) Requests for exceptions to the access policy should be submitted to:

LAAWS Project Office
ATTN: Sysop
9016 Black Rd., Ste. 102
Fort Belvoir, VA 22060

c. Telecommunications setups are as follows:

(1) The telecommunications configuration for terminal mode is: 1200 to 28,800 baud; parity none; 8 bits; 1 stop bit; full duplex; Xon/Xoff supported; VT100/102 or ANSI terminal emulation. Terminal mode is a text mode which is seen in any communications application other than World Group Manager.

(2) The telecommunications configuration for Worl d Group Manager is:

Modem setup: 1200 to 28,800 baud
(9600 or more recommended)

Novell LAN setup: Server = LAAWSBBS
(Available in NCR only)

TELNET setup: Host = 134.11.74.3
(PC must have Internet capability)

(3) The telecommunications for TELNET/Internet access for users not using World Group Manager is:

IP Address = 160.147.194.11

Host Name = jagc.army.mil

After signing on, the system greets the user with an opening menu. Users need only choose menu options to access and download desired publications. The system will require new users to answer a series of questions which are required for daily use and statistics of the LAAWS OIS. Once users have completed the initial questionnaire, they are required to answer one of two questionnaires to upgrade their access levels. There is one for attorneys and one for legal support staff. Once these questionnaires are fully completed, the user's access is immediately increased. *The Army Lawyer* will publish information on new publications and materials as they become available through the LAAWS OIS.

d. Instructions for Downloading Files from the LAAWS OIS.

(1) Terminal Users

(a) Log onto the OIS using Procomm Plus, Enable, or some other communications application with the communications configuration outlined in paragraph c1 or c3.

(b) If you have never downloaded before, you will need the file decompression utility program that the LAAWS OIS uses to facilitate rapid transfer over the phone lines. This program is known as PKUNZIP. To download it onto your hard drive take the following actions:

(1) From the Main (Top) menu, choose "L" for File Libraries. Press Enter.

(2) Choose "S" to select a library. Hit Enter.

(3) Type "NEWUSERS" to select the NEWUSERS file library. Press Enter.

(4) Choose "F" to find the file you are looking for. Press Enter.

(5) Choose "F" to sort by file name. Press Enter.

(6) Press Enter to start at the beginning of the list, and Enter again to search the current (NEWUSER) library.

(7) Scroll down the list until the file you want to download is highlighted (in this case PKZ110.EXE) or press the letter to the left of the file name. If your file is not on the screen, press Control and N together and release them to see the next screen.

(8) Once your file is highlighted, press Control and D together to download the highlighted file.

(9) You will be given a chance to choose the download protocol. If you are using a 2400 - 4800 baud modem, choose option "1". If you are using a 9600 baud or faster modem, you may choose "Z" for ZMODEM. Your software may not have ZMODEM available to it. If not, you can use YMODEM. If no other options work for you, XMODEM is your last hope.

(10) The next step will depend on your software. If you are using a DOS version of Procomm, you will hit the "Page Down" key, then select the protocol again, followed by a file name. Other software varies.

(11) Once you have completed all the necessary steps to download, your computer and the BBS take over until the file is on your hard disk. Once the transfer is complete, the software will let you know in its own special way.

(2) Client Server Users.

(a) Log onto the BBS.

(b) Click on the "Files" button.

(c) Click on the button with the picture of the diskettes and a magnifying glass.

(d) You will get a screen to set up the options by which you may scan the file libraries.

(e) Press the "Clear" button.

(f) Scroll down the list of libraries until you see the NEWUSERS library.

(g) Click in the box next to the NEWUSERS library. An "X" should appear.

(h) Click on the "List Files" button.

(i) When the list of files appears, highlight the file you are looking for (in this case PKZ110.EXE).

(j) Click on the "Download" button.

(k) Choose the directory you want the file to be transferred to by clicking on it in the window with the list of directories (this works the same as any other Windows application). Then select "Download Now."

(l) From here your computer takes over.

(m) You can continue working in World Group while the file downloads.

(3) Follow the above list of directions to download any files from the OIS, substituting the appropriate file name where applicable.

e. To use the decompression program, you will have to decompress, or "explode," the program itself. To accomplish this, boot-up into DOS and change into the directory where you downloaded PKZ110.EXE. Then type PKZ110. The PKUNZIP utility will then execute, converting its files to usable format. When it has completed this process, your hard drive will have the usable, exploded version of the PKUNZIP utility program, as well as all of the compression or decompression utilities used by the LAAWS OIS. You will need to move or copy these files into the DOS directory if you want to use them anywhere outside of the directory you are currently in (unless that happens to be the DOS directory or root directory). Once you have decompressed the PKZ110 file, you can use PKUNZIP by typing PKUNZIP <filename> at the C:\> prompt.

5. TJAGSA Publications Available Through the LAAWS BBS

The following is a current list of TJAGSA publications available for downloading from the LAAWS BBS (note that the date UPLOADED is the month and year the file was made available on the BBS; publication date is available within each publication):

FILE NAME	UPLOADED	DESCRIPTION

3MJM.EXE	January 1998	3d Criminal Law Military Justice Managers Deskbook.
4ETHICS.EXE	January 1998	4th Ethics Counselors Workshop, October 1997.
8CLAC.EXE	September 1997	8th Criminal Law Advocacy Course Deskbook, September 1997.
21IND.EXE	January 1998	21st Criminal Law New Developments Deskbook.
22ALMI.EXE	March 1998	22d Administrative Law for Military Installations, March 1998.
46GC.EXE	January 1998	46th Graduate Course Criminal Law Deskbook.
97CLE-1.PPT	July 1997	Powerpoint (vers. 4.0) slide templates, July 1997.
97CLE-2.PPT	July 1997	Powerpoint (vers. 4.0) slide templates, July 1997.
97CLE-3.PPT	July 1997	Powerpoint (vers. 4.0) slide templates, July 1997.
97CLE-4.PPT	July 1997	Powerpoint (vers. 4.0) slide templates, July 1997.
97CLE-5.PPT	July 1997	Powerpoint (vers. 4.0) slide templates, July 1997.
ADCNSCS.EXE	March 1997	Criminal Law, National Security Crimes, February 1997.
96-TAX.EXE	March 1997	1996 AF All States Income Tax Guide.
98JAOACA.EXE	March 1998	1998 JA Officer Advanced Course, Contract Law, January 1998.
98JAOACB.EXE	March 1998	1998 JA Officer Advanced Course, International and Operational Law, January 1998.
98JAOACC.EXE	March 1998	1998 JA Officer Advanced Course, Criminal Law, January 1998.
98JAOACD.EXE	March 1998	1998 JA Officer Advanced Course, Administrative and Civil Law, January, 1998.
ALAW.ZIP	June 1990	*The Army Lawyer*/ *Military Law Review* Database ENABLE 2.15. Updated through the 1989 *The Army Lawyer* Index. It includes a menu system and an explanatory memorandum, ARLAWMEM.WPF.
BULLETIN.ZIP	May 1997	Current list of educational television programs maintained in the video information library at TJAGSA and actual class instructions presented at the school (in Word 6.0, May 1997).
CLAC.EXE	March 1997	Criminal Law Advocacy Course Deskbook, April 1997.
CACVOL1.EXE	July 1997	Contract Attorneys Course, July 1997.
CACVOL2.EXE	July 1997	Contract Attorneys Course, July 1997.
CRIMBC.EXE	March 1997	Criminal Law Deskbook, 142d JAOBC, March 1997.
EVIDENCE.EXE	March 1997	Criminal Law, 45th Grad Crs Advanced Evidence, March 1997.
FLC_96.ZIP	November 1996	1996 Fiscal Law Course Deskbook, November 1996.

FSO201.ZIP	October 1992	Update of FSO Automation Program. Download to hard only source disk, unzip to floppy, then A:INSTALLA or B:INSTALLB.
51FLR.EXE	January 1998	51st Federal Labor Relations Deskbook, November 1997.
97JAOACA.EXE	September 1997	1997 Judge Advocate Officer Advanced Course, August 1997.
97JAOACB.EXE	September 1997	1997 Judge Advocate Officer Advanced Course, August 1997.
97JAOACC.EXE	September 1997	1997 Judge Advocate Officer Advanced Course, August 1997.
137_CAC.ZIP	November 1996	Contract Attorneys 1996 Course Deskbook, August 1996.
145BC.EXE	January 1998	145th Basic Course Criminal Law Deskbook.
JA200.EXE	January 1998	Defensive Federal Litigation, August 1997.
JA210.EXE	January 1998	Law of Federal Employment, May 1997.
JA211.EXE	January 1998	Law of Federal Labor-Management Relations, January 1998.
JA215.EXE	January 1998	Military Personnel Law Deskbook, June 1997.
JA221.EXE	September 1996	Law of Military Installations (LOMI), September 1996.
JA230.EXE	January 1998	Morale, Welfare, Recreation Operations, August 1996.
JA231.ZIP	January 1996	Reports of Survey and Line of Duty Determinations—Programmed Instruction, September 1992 in ASCII text.
JA234.ZIP	January 1996	Environmental Law Deskbook, September 1995.
JA235.EXE	March 1998	Government Information Practices, March 1998.
JA241.EXE	January 1998	Federal Tort Claims Act, May 1997.
JA250.EXE	January 1998	Readings in Hospital Law, January 1997.
JA260.EXE	April 1998	Soldiers' and Sailors' Civil Relief Act Guide, April 1998.
JA261.EXE	January 1998	Real Property Guide, December 1997.
JA262.EXE	January 1998	Legal Assistance Wills Guide, June 1997.
JA263.ZIP	October 1996	Family Law Guide, May 1996.
JA265A.ZIP	January 1996	Legal Assistance Consumer Law Guide—Part I, June 1994.
JA265B.ZIP	January 1996	Legal Assistance Consumer Law Guide—Part II, June 1994.
JA267.EXE	April 1997	Uniformed Services Worldwide Legal Assistance Office Directory, April 1997.
JA269.DOC	March 1998	1997 Tax Information Series (Word 97).
JA269(1).DOC	March 1998	1997 Tax Information Series (Word 6).
JA271.EXE	January 1998	Legal Assistance Office Administration Guide, August 1997.

JA272.ZIP	January 1996	Legal Assistance Deployment Guide, February 1994.
JA274.ZIP	August 1996	Uniformed Services Former Spouses' Protection Act Outline and References, June 1996.
JA275.EXE	January 1998	Model Income Tax Assistance Guide, June 1997.
JA276.ZIP	January 1996	Preventive Law Series, June 1994.
JA281.EXE	January 1998	AR 15-6 Investigations, December 1997.
JA280P1.EXE	March 1998	Administrative & Civil Law Basic Course Handbook, LOMI, March 1998.
JA280P2.EXE	March 1998	Administrative & Civil Law Basic Course Handbook, Claims, March 1998.
JA280P3.EXE	March 1998	Administrative & Civil Law Basic Course Handbook, Personnel Law, March 1998.
JA280P4.EXE	March 1998	Administrative & Civil Law Basic Course Handbook, Legal Assistance, March 1998.
JA280P5.EXE	March 1998	Administrative & Civil Law Basic Course Handbook, Reference, March 1998.
JA285V1.EXE	March 1998	Senior Officers Legal Orientation Deskbook (Core Subjects), March 1998.
JA285V2.EXE	March 1998	Senior Officers Legal Orientation Deskbook (Elective Subjects), March 1998.
JA301.ZIP	January 1996	Unauthorized Absence Programmed Text, August 1995.
JA310.ZIP	January 1996	Trial Counsel and Defense Counsel Handbook, May 1996.
JA320.ZIP	January 1996	Senior Officer's Legal Orientation Text, November 1995.
JA330.ZIP	January 1996	Nonjudicial Punishment Programmed Text, August 1995.
JA337.ZIP	January 1996	Crimes and Defenses Deskbook, July 1994.
JAGBKPT1.ASC	January 1996	JAG Book, Part 1, November 1994.
JAGBKPT2.ASC	January 1996	JAG Book, Part 2, November 1994.
JAGBKPT3.ASC	January 1996	JAG Book, Part 3, November 1994.
JAGBKPT4.ASC	January 1996	JAG Book, Part 4, November 1994.
NEW DEV.EXE	March 1997	Criminal Law New Developments Course Deskbook, November 1996.
OPLAW97.EXE	May 1997	Operational Law Handbook 1997.
RCGOLO.EXE	January 1998	Reserve Component General Officer Legal Orientation Course, January 1998.
TAXBOOK1.EXE	March 1998	1997 Tax CLE, Part 1.
TAXBOOK2.EXE	January 1998	1997 Tax CLE, Part 2.
TAXBOOK3.EXE	January 1998	1997 Tax CLE, Part 3.
TAXBOOK4.EXE	January 1998	1997 Tax CLE, Part 4.
TJAG-145.DOC	January 1998	TJAGSA Correspondence Course Enrollment Application, October 1997.

Reserve and National Guard organizations without organic computer telecommunications capabilities and individual mobilization augmentees (IMA) having bona fide military needs for these publications may request computer diskettes containing the publications listed above from the appropriate proponent academic division (Administrative and Civil Law; Criminal Law; Contract Law; International and Operational Law; or Developments, Doctrine, and Literature) at The Judge Advocate General's School, Charlottesville, VA 22903-1781.

Requests must be accompanied by one 5 1/4 inch or 3 1/2 inch blank, formatted diskette for each file. Additionally, requests from IMAs must contain a statement verifying the need for the requested publications (purposes related to their military practice of law).

Questions or suggestions on the availability of TJAGSA publications on the LAAWS BBS should be sent to The Judge Advocate General's School, Literature and Publications Office, ATTN: JAGS-DDL, Charlottesville, VA 22903-1781. For additional information concerning the LAAWS BBS, contact the System Operator, SSG James Stewart, Commercial (703) 806-5764, DSN 656-5764, or at the following address:

LAAWS Project Office
ATTN: LAAWS BBS SYSOPS
9016 Black Rd, Ste 102
Fort Belvoir, VA 22060-6208

6. *The Army Lawyer* on the LAAWS BBS

The Army Lawyer is available on the LAAWS BBS. You may access this monthly publication as follows:

a. To access the LAAWS BBS, follow the instructions above in paragraph 4. The following instructions are based on the Microsoft Windows environment.

(1) Access the LAAWS BBS "Main System Menu" window.

(2) Double click on "Files" button.

(3) At the "Files Libraries" window, click on the "File" button (the button with icon of 3" diskettes and magnifying glass).

(4) At the "Find Files" window, click on "Clear," then highlight "Army_Law" (an "X" appears in the box next to "Army_Law"). To see the files in the "Army_Law" library, click on "List Files."

(5) At the "File Listing" window, select one of the files by highlighting the file.

a. Files with an extension of "ZIP" require you to download additional "PK" application files to compress and decompress the subject file, the "ZIP" extension file, before you read it through your word processing application. To download the "PK" files, scroll down the file list to where you see the following:

PKUNZIP.EXE
PKZIP110.EXE
PKZIP.EXE
PKZIPFIX.EXE

b. For each of the "PK" files, execute your download task (follow the instructions on your screen and download each "PK" file into the same directory. *NOTE: All "PK"_files and "ZIP" extension files must reside in the same directory after downloading*. For example, if you intend to use a WordPerfect word processing software application, you can select "c:\wp60\wpdocs\ArmyLaw.art" and download all of the "PK" files and the "ZIP" file you have selected. You do not have to download the "PK" each time you download a "ZIP" file, but remember to maintain all "PK" files in one directory. You may reuse them for another downloading if you have them in the same directory.

(6) Click on "Download Now" and wait until the Download Manager icon disappears.

(7) Close out your session on the LAAWS BBS and go to the directory where you downloaded the file by going to the "c:\" prompt.

For example: c:\wp60\wpdocs
or C:\msoffice\winword

Remember: The "PK" files and the "ZIP" extension file(s) must be in the same directory!

(8) Type "dir/w/p" and your files will appear from that directory.

(9) Select a "ZIP" file (to be "unzipped") and type the following at the c:\ prompt:

PKUNZIP MAY.ZIP

At this point, the system will explode the zipped files and they are ready to be retrieved through the Program Manager (your word processing application).

b. Go to the word processing application you are using (WordPerfect, MicroSoft Word, Enable). Using the retrieval process, retrieve the document and convert it from ASCII Text (Standard) to the application of choice (WordPerfect, Microsoft Word, Enable).

c. Voila! There is the file for *The Army Lawyer*.

d. In paragraph 4 above, *Instructions for Downloading Files from the LAAWS OIS* (section d(1) and (2)), are the instructions for both Terminal Users (Procomm, Procomm Plus,

Enable, or some other communications application) and Client Server Users (World Group Manager).

e. Direct written questions or suggestions about these instructions to The Judge Advocate General's School, Literature and Publications Office, ATTN: DDL, Mr. Charles J. Strong, Charlottesville, VA 22903-1781. For additional assistance, contact Mr. Strong, commercial (804) 972-6396, DSN 934-7115, extension 396, or e-mail stroncj@hqda.army.mil.

7. Article

The following information may be useful to judge advocates:

Zev Trachtenberg, *The Environment: Private or Public Property*, 50 OKLA. L. REV. 399.

8. TJAGSA Information Management Items

The Judge Advocate General's School, United States Army, continues to improve capabilities for faculty and staff. We have installed new projectors in the primary classrooms and pentiums in the computer learning center. We have also completed the transition to Win95 and Lotus Notes. We are now preparing to upgrade to Microsoft Office 97 throughout the school.

The TJAGSA faculty and staff are available through the MILNET and the Internet. Addresses for TJAGSA personnel are available by e-mail at jagsch@hqda.army.mil or by calling the Information Management Office.

Personnel desiring to call TJAGSA can dial via DSN 934-7115 or use our toll free number, 800-552-3978; the receptionist will connect you with the appropriate department or directorate. For additional information, please contact our Information Management Office at extension 378. Lieutenant Colonel Godwin.

9. The Army Law Library Service

With the closure and realignment of many Army installations, the Army Law Library Service (ALLS) has become the point of contact for redistribution of materials purchased by ALLS which are contained in law libraries on those installations. *The Army Lawyer* will continue to publish lists of law library materials made available as a result of base closures.

Law librarians having resources purchased by ALLS which are available for redistribution should contact Ms. Nelda Lull, JAGS-DDL, The Judge Advocate General's School, United States Army, 600 Massie Road, Charlottesville, VA 22903-1781. Telephone numbers are DSN: 934-7115, ext. 394, commercial: (804) 972-6394, or facsimile: (804) 972-6386.