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On Freedom's Frontier: Significant Developments in Pretrial and Trial Procedure

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Introduction

The debate has raged on for many years—is military justice fair? Specific parts of the debate[1] criticize the manner in which court members are selected,[2] the paternalism in negotiating and approving pretrial agreements,[3] the lack of independence of military judges,[4] and the potentially inappropriate prosecutorial role of a convening authority and staff judge advocate in the court-martial process.[5]

The legislature, and for that matter, the United States Court of Appeals for the Armed Forces (CAAF) and the intermediate service courts, are at a special place in military legal history—on *Freedom's Frontier*.[6] Like no other time, except for the 1968

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1. The debate is wide ranging, focusing on the fundamental structure of the military system. This article focuses on just three areas of pretrial and trial procedure (court-marital personnel, pleas and pretrial agreements, and voir dire and challenges). Practitioners who are interested in other associated areas or a more comprehensive analysis of the entire system may consult any of the following references. *See, e.g.*, Major James Kevin Lovejoy, *Abolition of Court Member Sentencing in the Military,* 142 MIL. L. REV. 1 (1994); Dwight W. Sullivan, *Playing The Numbers: Court-Martial Panel Size and the Military Death Penalty,* 158 MIL. L. REV. 1 (1998); David A. Schlueter, *The Twentieth Annual Kenneth J. Hodson Lecture: Military Justice for the 1990's—A Legal System Looking for Respect*, 133 MIL. L. REV. 1 (1991); Jonathan Lurie, *Military Justice 50 Years After Nuremberg: Some Reflections on Appearance v. Reality*, 149 MIL. L. REV. 189 (1995); Dwight Sullivan, *A Matter of Life and Death: Examining the Military Death Penalty's Fairness*, THE FED. LAW., June 1998, at 38; Kathleen A. Duignan, *Military Justice: Not an Oxymoron,* THE FED. LAW., Feb. 1996, at 22; Keith M. Harrison, *Be All You Can Be (Without the Protection of the Constitution)*, 8 HARV. BLACKLETTER J. 221 (1991); Brigadier General John S. Cooke, *The Twenty-Sixth Annual Kenneth J. Hodson Lecture: Manual for Courts-Martial 20X*, 156 MIL. L. REV. 1 (1998); Stephen Cox, *The Military Death Penalty: Implications for Indigent Service Members*, 3 LOY. POV. L. J. 165 (1997); Comment, *Military Justice: Removing the Probability of Unfairness,* 63 U. CINN. L. REV. 439 (1994); Note, *Military Justice and the Supreme Court's Outdated Standard of Deference: Weiss v. United States,* 70 CHI. KENT. L. REV. 265 (1994); Note, *Military Justice and Article III,* 103 HARV. L. REV. 1909 (1990); Note, *The "Good Soldier" Defense: Character Evidence and Military Rank at Courts-Martial,* 108 YALE L. J. 879 (1999).

2. *See generally* Major Guy Glazier, *He Called for His Pipe, and He Called for His Bowl, and He Called for His Members Three—Selection of Military Juries By the Sovereign: Impediment to Military Justice*, 157 MIL. L. REV. 1 (1998). Major Glazier's review of the court member selection process and proposal for instituting a random selection system in the military justice system also includes an excellent discussion of some of the primary arguments for and against the fairness of the present structure of justice in the court-martial process.

3. *See generally* Major Michael E. Klein, *United States v. Weasler and the Bargained Waiver of Unlawful Command Influence Motions: Common Sense or Heresy?*, ARMY LAW., Feb. 1998, at 3. Major Klein discusses the evolution of pretrial agreements in the context of the landmark decision of *United States v. Weasler. See* United States v. Weasler, 43 M.J. 15 (1995) (holding that the government and defense may negotiate a pretrial agreement term which waives an accusatory stage unlawful command influence motion). Major Klein also makes a general observation regarding the appropriateness of restricting an accused, and the government, to certain bargainable terms in the pretrial agreement negotiation and approval processes. *See also* Major Ralph H. Kohlmann, *Saving the Best Laid Plans: Rules of the Road for Dealing with Uncharged Misconduct Revealed During Providence Inquiries,* ARMY LAW., Aug. 1996, at 3 n.70 (acknowledging that the Court of Appeals for the Armed Forces recognized the "free-market approach to pretrial negotiations" when it decided *Weasler*).

4. *See* Frederic Lederer & Barbara Hundley, *Needed: An Independent Military Judiciary—A Proposal to Amend the Uniform Code of Military Justice*, 3 WM. & MARY BILL OF RTS. J. 629 (1994); Kevin Barry, *Reinventing Military Justice*, PROCEEDINGS, July 1994, at 54 (*Proceedings* is a Naval Review published by the U.S. Naval Institute). *See also* Eugene R. Fidell, *Going on Fifty: Evolution and Devolution in Military Justice*, 32 WAKE FOREST L. REV. 1213 (1997) (proposing that legal power in the military justice system has devolved from the military commander to the "legal apparatus," and that part of the legal apparatus that should be the center of power is the military judge). This change in the power "center of gravity" is consistent with what is occurring in the civilian federal courts of appeals and district courts.

5. *See Glazier*, *supra* note 2. *See also* Major Stephen A. Lamb, *The Court-Martial Panel Selection Process: A Critical Analysis*, 137 MIL. L. REV. 103 (1992). *See* United States v. Bradley, 47 M.J. 715 (A.F. Ct. Crim. App. 1997) (holding that there was no unlawful command influence when the acting staff judge advocate made a recommendation to refer charges, inconsistent with investigating officer's recommendation, and convening authority followed acting staff judge advocate's advice).

6. "Freedom's Frontier" does not refer to the Demilitarized Zone (DMZ), the boundary between North and South Korea created after the armistice ending the Korean War in 1953—although that is more than a worthy analogy. Soldiers who were assigned to protect the DMZ designated it the "DMZ-Freedom's Frontier." *See* U.S. Forces Korea (visited 23 Apr. 1999) <http://www.korea.army.mil>. "Freedom's Frontier," in the context of this article, is more analogous to the expansion of the United States during the 1700s and 1800s by American settlers. A great deal was involved in the decision to expand, such as: whether to stay in the eastern states where it was comfortable and safe, whether supplies and economic resources were available, the difficulty of traversing undeveloped land, weather, the search for a better way of life. The CAAF and the intermediate service courts face similar but different issues on the eve of emergence into the Twenty-First Century—advancing a military justice system that is fair to all, determining the degree that civilian case law and statutes will influence military criminal jurisprudence, allocating the proper amount of power to the parties in pretrial agreement negotiations, determining when an accused can prevail on an appeal that is based on a technical argument in court-martial personnel cases; and determining the appropriate place for the military judge in the military justice system.

Military Justice Act approval process,[7] have the appellate courts and legislature had the opportunity to answer the debate and determine the structure that will carry the military justice system into the Twenty-First Century. During 1998, the CAAF and the intermediate service courts grappled with some of the issues of the debate regarding fairness and the structure of the military justice system.

This article reviews recent developments in the law relating to pleas and pretrial agreements, court-martial personnel, and voir dire and challenges. The article does not discuss every recent case. Rather, it reviews only those that establish a significant trend or change in the law. Additionally, the article identifies and discusses practical ramifications for the practitioner.

Court-Martial Personnel

Changing the Face of the Military Justice System: Panel Selection

The National Defense Authorization Act for 1999 (NDAA)[8] requires the Secretary of Defense to develop and to report on a random selection method of choosing individuals to serve on courts-martial panels.[9] The method for selecting members has drawn much attention over the years, and also has been the focus of much of the attack aimed at revising the court-martial process to make it consistent with the fundamental objective of creating fairness for the military accused.[10] The NDAA report requirement appears to be a serious step toward making changes to the selection process.[11]

In many cases, the CAAF and the intermediate appellate courts have ventured to set clear guidance for practitioners and convening authorities in this area. Nevertheless, at least one improper selection case is decided each year, at either the intermediate appellate court or the CAAF. Last year was no different—but the two 1998 decisions may have greater impact for the system because of the coincidence of the NDAA requirement.

Commanders, Senior NCOs, and the Pursuit of Justice: White and Benson[12]

Clearly, convening authorities must not improperly use the Article 25, UCMJ, criteria when selecting members. Does a convening authority improperly use the Article 25 criteria when he decides that commanders, based on their status as such, are better suited for panel membership than other officers in the command? Before 1998, two cases indicated that the answer to this question was a qualified no. Selection by duty position alone, without considering the Article 25, UCMJ, criteria, is a violation of the law.[13] In *United States v. White*,[14] the CAAF had another opportunity to answer this question.

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7. *See generally* THE ARMY LAWYER: A HISTORY OF THE JUDGE ADVOCATE GENERAL'S CORPS, 1771-1975 245-49 (1975). The Act made several important changes, it: (1) redesignated the law officer as a military judge and assigned the new position powers comparable to a civilian judge, (2) created a field judiciary independent of the staff judge advocate, (3) required that counsel at special courts-martial be lawyers except in situations of military exigency, (4) designated the boards of review as Courts of Military Review, (5) gave an accused the right to petition for a new trial on the basis of newly discovered evidence or fraud, (6) gave the convening authority power to defer the serving of confinement until completion of an appeal, and (7) gave The Judge Advocates General authority to vacate or modify the findings of any court-martial because of newly discovered evidence. *See also* Brigadier General John S. Cooke, *The Twenty-Sixth Annual Kenneth J. Hodson Lecture: Manual for Courts-Martial 20X*, 156 MIL. L. REV. 1, 2 (1998) (describing the radical nature of the changes under the 1968 Act, which the 1969 Manual implemented); Major General Michael J. Nardotti, *The Twenty-Fifth Annual Kenneth J. Hodson Lecture: General Ken Hodson—A Thoroughly Remarkable Man*, 151 MIL. L. REV. 202 (1996).

8. *See* The Strom Thurmond National Defense Authorization Act for Fiscal Year 1999, Pub. L. No. 105-261, § 1, 112 Stat. 1920 (1998).

9. Convening authorities must use the Article 25, UCMJ, criteria to select members. UCMJ art. 25 (West 1999). The specific criteria listed are age, education, training, experience, length of service, and judicial temperament. In addition, the convening authority must select those who, in his opinion, are best qualified for the duty after applying the criteria. The bill, originally introduced into the House of Representatives by Congressmen Skelton and Spence, requires the Secretary of Defense to report to the Senate Armed Services Committee on the plan during Spring 1999.

10. *See* Major Craig P. Schwender, *One Potato, Two Potato . . . A Method of Selecting Court Members*, ARMY LAW., Oct. 1990, at 10 (criticizing the process). Major Schwender, however, also proposes meaningful ways to ensure that the selection process is executed consistent with the criteria in Article 25(d), UCMJ.

11. No one knows the real intent underlying the NDAA report requirement—it could be a serious move to change the member selection process or a simple collection of information for comparison and contrast. The importance and seriousness of the issue has been elevated simply because it is before a congressional subcommittee.

12. The two cases discussed in this section also raise issues regarding unlawful command influence. These issues are beyond the scope of this article. This article only discusses the two cases in the context of the mechanics of panel selection.

13. *See* United States v. Cunningham, 21 M.J. 585 (A.C.M.R. 1985) (holding that preference for those in leadership positions is permissible where the convening authority selected six commanders and three executive officers who were one colonel, three lieutenant colonels, two majors, two captains, and one first lieutenant where the convening authority indicated that his preference was based on the fact that commanders "were much more in touch and concerned about caring for soldiers" and had a better feel of what was going on in the command. *See also* United States v. Lynch, 35 M.J. 579 (C.G.C.M.R. 1993), *rev'd on other grounds*, 39 M.J. 223 (C.M.A. 1994) (holding that a selection process which produces a senior officer panel with many commanders is permissible where the convening authority was attempting to create a panel of commanders that had seagoing experience in a case involving a commander who ran a ship aground in the Great Lakes).

14. 48 M.J. 251 (1998).

In *White*, the accused was charged with a *potpourri* of offenses relating to his attempt to obtain Air Force testing materials before sitting for an examination.[15] Before trial, the convening authority sent a letter to his subordinate commanders soliciting nominations for court member duty. In the letter, the convening authority asked subordinate commanders to nominate their "best and brightest staff officers to serve as court members."[16] The convening authority prefaced this request by observing that, during the most recent selection process, some twenty percent of officers that subordinate commanders nominated were not available because of leave, temporary duty commitments, or reassignment.[17] After indicating that the Air Force deserved a "system composed of the very best officers we have to decide the issues in our courts,"[18] the convening authority further stated that "all my commanders, deputies, and first sergeants [are] available to serve as members on any court-martial at Kadena."[19] Finally, the convening authority closed the memorandum by requesting that subordinate commands nominate their "best and brightest . . . noncommissioned officers to serve as members . . . ."[20]

The ten-person venire for the accused's court-martial consisted of eight commanders. The convening authority selected nine persons for the accused's court-martial.[21] Seven of the nine were commanders.[22] The defense moved to dismiss based on improper selection. Specifically, the defense argued that the virtual exclusion of non-commanders violated the requirement to employ only Article 25, UCMJ, considerations in the selection process.[23]

The CAAF held that the defense's statistical evidence was not of the quality to raise an issue of court packing.[24] The decision is significant for many reasons. First, it raises the question whether the defense can ever prevail, in the modern era, on an improper selection motion without very strong independent evidence of wrongful intent. Last year, in *United States v. Lewis*,[25] the CAAF confronted an issue similar to *White*. The CAAF held that a panel consisting of five females and four males in a case of attempted voluntary manslaughter, assault, and aggravated assault on the accused's wife did not raise an issue of court stacking where the defense motion based its challenge only on statistical evidence.[26] While the defense was able to show a disproportionate number of females on panels in cases involving sexual and assault offenses against female victims, the defense was unable to show the percentage of officer and enlisted personnel who were disqualified and unavailable for court member duty.[27] Moreover, the CAAF held that the presence of females on panels over the six months before the accused's trial only showed that females routinely sat on panels.[28]

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15. *Id.* at 252. The accused was charged with conspiring to wrongfully appropriate Air Force promotion-testing materials and violating a lawful general regulation by unlawfully obtaining access to and reviewing Air Force testing materials in violation of Articles 81 (conspiracy) and 92 (failure to obey order or regulation), UCMJ. He was sentenced to a bad-conduct discharge, a fine of $3000, confinement until the fine was paid but not to exceed two months, and reduction to pay grade E-4. *Id.*

16. *Id.* at 253.

17. *Id*.

18. *Id.*

19. *Id.*

20. *Id.* The actual closing language in the memorandum was: "each group is tasked on a quarterly basis to nominate staff officers and NCOs [noncommissioned officers] to serve as court members. I expect you to work closely with my legal office to ensure that the lists of personnel nominated to serve as court members are your best and brightest." *Id.*

21. *Id.*

22. *Id.*

23. *Id.* at 253. The defense appeared to have a very good motion–there was strong statistical evidence supporting the defense argument. The defense offer of proof indicated that: (1) in the last six months before the accused's trial, a high percentage of commanders were selected to sit on panels (6 of 9, 7 of 9, and 8 of 9 members); (2) the selection of a high percentage of commanders was improper, as a direct matter, because such selection pattern was inconsistent when compared to the officer population on the installation (of 737 officers at Kadena Air Base only 58 were commanders; (3) commanders only comprised 7.8% of the officer population at Kadena but accounted for 80% of the membership on the panels). *Id.*

24. *Id.* at 255. *Cf.* United States v. Upshaw, 49 M.J. 111 (1998). In *Upshaw*, the CAAF ruled on an issue that was almost identical to *White*. The CAAF held that an administrative mistake of excluding soldiers below the rank of E-7 did not raise an issue of improper selection where the defense conceded at trial that such action was "just simply a mistake." *Id.* at 115. *Upshaw* is more a case of defense concession than improper selection, but conveys the CAAF's understanding that the selection process, as a matter of mechanics, must not institute the systematic exclusion of the lower eligible grades.

25. 46 M.J. 338 (1997).

26. *Id.* at 342-43. The original convening order consisted of ten members, five of whom were females. In response to the defense counsel's request for enlisted members, the convening authority relieved two female members and added one female enlisted member. *Id.* at 339.

27. *Id.* at 340.

White is further evidence of the firmly established trend to place a very high standard of proof on the defense in improper selection motions.[29] The difference between *White* and *Lewis*, however, is that the defense was able to show, through *the convening authority's memorandum*, the pool of officers who were available to sit as court members.[30] Although *all* officers on the installation were available to sit as members, an extremely high percentage of commanders were selected to sit on the accused's panel. *White* appears to present the percentage evidence, as required by *Lewis*, that would lead an appellate court to hold that the issue of improper selection was *at least* raised by the statistical evidence.[31]

What is most important about *White*, however, is the CAAF's apparently new interpretation of the Article 25(d), UCMJ, selection criteria. The CAAF's new construction of Article 25, UCMJ, now permits convening authorities to use the "best and brightest" standard[32] to select those who are "best qualified" to sit as panel members. It *appears* to reverse black letter law in that, except for specific types of cases that require special competence, a convening authority must not go outside the criteria, spirit, and intent of Article 25(d), UCMJ, in selecting members.

Before *White*, the spirit and intent of Article 25(d), UCMJ, was to exclude the use of criteria which equated selection for panel membership with selection for command or leadership positions.[33] Noting this distinction, Judge Effron stated in a concurring opinion:

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28. *Id.* at 342.

29. *See generally* United States v. Hilow, 32 M.J. 439 (C.M.A. 1991) (holding that the government is held to a "clear and positive" or strict liability standard of proof to show that there was no improper action in the selection process); United States v. Lewis, 46 M.J. 338 (1997) (appearing to assign the same standard to the defense). *But see* United States v. Nixon, 33 M.J. 433 (C.M.A. 1991) (holding that a panel consisting of only master sergeants and sergeants major creates an appearance of evil and is probably contrary to congressional intent, but also stressing that the convening authority's testimony established that rank was not used as a selection criteria).

30. United States v. White, 48 M.J. 251, 253 (1998).

31. In concurrence, Judge Effron notes and agrees with the majority's conclusion that the statistical evidence did not raise the issue of court stacking. The majority's decision is based on the apparent lack of ill-motive in the convening authority's memorandum requesting commanders and noncommissioned officers as nominees. Judge Effron's concurrence, however, appears to indicate the true basis of the majority opinion. He states that in order for the defense to prevail on an improper selection motion evidence must show:

> (1) direct evidence of improper intent on the part of the convening authority to appoint commanders qua commanders as an improper shortcut application of the criteria under Article 25; or a stronger statistical history of practice (e.g., a greater number of courts-martial in a short period or a consistent practice over a longer period), from which an inference of such improper intent could be drawn and which would negate the inference drawn from the convening authority's memorandum that the high number of commanders was due to a pendulum effect (i.e., overcorrecting the shortage of commander-members on prior panels.

Id. at 259 (Effron, J., concurring).

The high standard imposed on the defense, in the face of excellent percentage evidence that the defense made in consideration of the CAAF's decision in *Lewis*, will never support an improper selection motion if there is a lack of ill-intent on the part of the convening authority. Given the small possibility that the defense will be able to make such a showing, it might be time for the CAAF to create a *per se* rule for improper selection motions similar to the *United States v. Moore*. *See* United States v. Moore, 28 M.J. 366 (1988) (creating a *per se* rule for peremptory challenges).

32. The majority opinion language is quite clear. The court stated:

> [L]ike selection for promotion, selection for command is competitive. We agree with the observation of the then Army Court of Military Review (now Army Court of Criminal Appeals), that 'officers selected for highly competitive command positions . . . have been chosen on the best qualified basis,' and that the qualities required for exercising command 'are totally compatible' with the statutory requirements for selection as a court member.

White, 48 M.J. 251, 255 (quoting United States v. Carman, 19 M.J. 932, 936 (A.C.M.R. 1985)). One could view the CAAF's action regarding the "best and brightest" standard as the creation of an additional criterion or, equally plausible, a statement of what was already part of the law but not affirmatively acknowledged until now.

33. *See generally* United States v. Cunningham, 21 M.J. 585 (A.C.M.R. 1989) (holding that preference for those in leadership positions is permissible where the convening authority articulates some relationship to the Article 25(d) criteria–thus, a panel of six commanders and three executive officers who were one colonel, three lieutenant colonels, two majors, two captains, and one first lieutenant did not constitute improper selection where convening authority indicated that he selected commanders because he believed they were "more in touch" with what was happening in the command and would treat accused's more fairly); United States v. Lynch, 35 M.J. 579 (C.G.C.M.R. 1993), *rev'd on other grounds*, 39 M.J. 223 (C.M.A. 1994). *See also* United States v. McClain, 22 M.J. 124 (C.M.A. 1986) (holding that convening authority improperly excluded junior enlisted personnel and officers in a intentional design to exclude those more likely to adjudge light sentences). In a partial concurrence in the result, Judge Effron noted this problem, in the majority opinion, of equating selection for command with selection for court member duty. *White*, 48 M.J. at 259.

> [A]lthough command experience may be an appropriate factor for consideration in determining whether a particular individual is 'best qualified' to serve on a court-martial panel, it would be inappropriate to infer that, as a general matter, commanders as a class are 'best qualified' to serve on court-martial panels simply because selection for command is competitive.[34]

While *White's* meaning, in terms of the relationship between the "best qualified" and "best and brightest" standards, is open to interpretation, what is clear is that it changes the potential "face" of courts-martial panels. After *White*, convening authorities may believe that they have the added option of lawfully including more commanders on panels.

Similarly, another case potentially changes the face of courts-martial panels. Unlike *White*, however, the Air Force Court of Criminal Appeals' (AFCCA) decision in *United States v. Benson*[35] appears more consistent with a long line of precedents and projects a greater perception of fairness in the military justice system. In *Benson*, the AFCCA considered whether a convening authority violated Article 25, UCMJ, by sending a letter to subordinate commands that directed them to nominate "officers in all grades and NCO's in the grade of master sergeant or above for service as court members."[36] After the selection process was complete, the convening authority failed to select members below the grade of master sergeant (an E-7 in the Air Force).[37] At trial, the convening authority testified that "in general a master sergeant has been around long enough in the Air Force, [and] has that additional education level, maturity level experienced with the Air Force. So, it is a general guideline, I guess you might say[,]" to support why he did not choose soldiers below the rank of E-7.[38] The convening authority also testified that he had never selected an individual below the rank of E-7 to sit for court member duty.[39]

In holding that the convening authority violated congressional intent by systematically excluding persons below the rank of master sergeant (E-7) from the selection process, the AFCCA formally established new guidelines for the selection of enlisted personnel based on statistical evidence.[40] After reviewing case law supporting the notion that a convening authority may first look to senior grades to select members,[41] the court noted that one case set a clear line of demarcation regarding the classes of soldiers that possess the requisite qualities to sit as court members. In *United States v. Yager*,[42] the Court of Military Appeals held that the exclusion of persons below the grade of E-3 was permissible where there was a demonstrable relationship between the exclusion and selection criteria embodied in Article 25(d), UCMJ. The court also noted that the disqualification of privates was an "embodiment of the Article 25 statutory criteria"–they simply did not have enough time and experience to exercise the proper degree of responsibility required of court members."[43]

The Court of Military Appeals, however, indicated that "if circumstances should arise where servicemen are serving in the grades of E-1 and E-2 as a result of more rigorous requirements for promotion, the requisite relationship could be wanting."[44] While the law is clear that grades E-4 to E-6 cannot be systematically excluded based on a lack of requisite qualifications under Article 25(d), it is not a common occurrence to see lower ranking enlisted personnel as court members.

The AFCCA took this opportunity to formerly implement the *Yager* holding regarding grades E-4 to E-6. The AFCCA holding is based on the changing demographics and promotion

34. *White*, 48 M.J. at 259.

35. 48 M.J. 734 (A.F. Ct. Crim. App. 1998).

36. *Id.* at 738.

37. *Id.*

38. *Id.* The text of the convening authority's testimony is worth mentioning, as it indicates his intent. His intent was an important factor in the Court's holding. The convening authority indicated that the memorandum was intended to "disallow any capability to take anybody of a, let's say, a staff sergeant [E-5] or tech sergeant [E-6]." *Id.* In addition, on cross-examination the convening authority stated:

> I feel like, and still feel like, in most cases, again, it's not excluded that I couldn't find a tech sergeant or staff sergeant that would meet the proper qualifications. But in general a master sergeant has been around long enough in the Air Force, has that additional education level, maturity level experienced with the Air Force. So, it is a general guideline, I guess you might say.

Id. at 738.

39. *Id.*

40. The new guidelines pertain to the Air Force only. Other services that do not employ this type of statistical evidence to support an actual wider array for court member selection might consider doing so.

41. *See generally* United States v. Crawford, 35 C.M.R. 3 (C.M.A. 1964).

42. 7 M.J. 171 (C.M.A. 1979). *See* United States v. Delp, 11 M.J. 836 (A.C.M.R. 1981) (holding that a convening authority did not violate Article 25(d) when he failed to select soldiers below the rank of E-4 because the criteria are such as to make selection of persons in that grade a rare occurrence).

requirements of the military. The AFCCA took judicial notice that a substantially higher number of soldiers in grades E-4 to E-6 possess secondary education, post-secondary education, associate's or higher degrees, and have substantially more time on active duty than ever before.[45] A convening authority who excludes soldiers in these grades, therefore, violates Article 25(d), UCMJ.

Practitioner Tips and Considerations

White and *Benson* are very significant cases for practitioners, especially at this watershed time characterized by the change of personnel on the CAAF,[46] congressional interest in the panel member selection process, and preparation of the military justice system for a Twenty-First Century military. Both cases indicate the tension that exists in the application of Article 25(d). Under *White*, at one end of the spectrum, convening authorities who are entrusted with the responsibility for good order and discipline must also have the authority to lawfully engineer the military justice process. An expansion of the Article 25(d), UCMJ, selection process–that is, including the authority to equate selection for command with selection for court-member duty–might appear to grant commanders too much authority. At the other end of the spectrum, *Benson* defines the appropriate line of demarcation between those who are eligible and ineligible to sit as members, while also elevating the role of enlisted soldiers in the military justice system. Practitioners should look for these cases to have pivotal impact in the debate concerning random selection.[47]

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43. Regarding the specific basis for the systematic disqualification, the court stated:

> [T]he disqualification of privates is an embodiment of the application of the statutory criteria–age, education, training, experience, length of service, and judicial temperament. Persons in the grade of private are normally in one of the following categories: they have only a few months service; or although having sufficient service they have failed promotion because they have shown no ability, aptitude, or intelligence; or they have been reduced in grade for misconduct or inefficiency. Privates are in the initial training cycle of their military service, preparing themselves to become useful, productive soldiers. They are in a strange environment, many away from home for the first time, and subject to the pressures inherent in a stressful, strict disciplinary situation.

Yager, 7 M.J. at 172 (quoting United States v. Yager, 2 M.J. 484, 486-87 (A.C.M.R. 1975)). The Court of Military Appeals noted that the prevailing statistics and regulations supported this interpretation. *Id.* at 173.

44. *Id.* at 173.

45. In *United States v. Benson*, the AFCCA stated:

> [T]he majority of E-4s have served 5 or more years on active duty, the majority of E-5s have served 10 or more years on active duty, and the majority of E-6s have served 15 or more years on active duty (citations omitted). Likewise, we take judicial notice that 88 % of E-4s have some amount of post secondary education, 18 % of E-5s have an associate's or higher degree, and 33 % of E-6s have an associate's or higher degree (citations omitted).

United States v. Benson, 48 M.J. 734, 739 (1998).

The day is soon approaching when all grades might potentially be considered for court member duty. A recent article noted that 99 % of soldiers coming on active duty have a high school diploma, and that 50 % of recruits cannot get into the service, presumably based on higher entrance standards. Recruiting figures indicate that soldiers coming on active duty are older, married, and have experience dealing with responsibility. Young soldiers are coming onto active duty with more educational and "life" experience. *See* Thomas E. Ricks, *U.S. Infantry Surprise: It's Now Mostly White; Blacks Hold Office Jobs–A Better-Educated Military Bears Little Resemblance to Civilian Perceptions–Half Who Try Don't Get In*, WALL ST. J., Jan. 6, 1997, at A1.

46. Judge Cox will leave the CAAF in September–another judge will be appointed to fill the vacancy. Judge Crawford will be the Chief Judge.

47. Practitioners must keep in mind that *White* and *Benson* are Air Force cases. It appears that the Air Force and Coast Guard do not use, as a matter of course, standing panels. Thus, members are selected for each court-martial, although there may be a "standing pool" of individuals available. The issue, therefore, may be whether *one of the systems* for selection, currently in use under the present statutory scheme, is best suited to effect congressional intent under Article 25(d), UCMJ. *See* UCMJ art. 25(d) (West 1998).

White and *Benson*[48] provide, however, three more practical lessons for the practitioner. First, as indicated last year in *Lewis*, to succeed on an improper selection motion, the defense must show evidence of systematic exclusion based on more than statistical evidence.[49] Second, counsel must be aware of the impact of convening authority testimony. The primary difference in *White* and *Benson* is the character of the convening authority's testimony. In *White* there was no convening authority testimony supporting improper selection. In *Benson*, however, the convening authority provided ample support for reversal. Finally, counsel should be aggressive in eliminating the line of demarcation between soldiers who are eligible and ineligible for court member selection under Article 25(d), UCMJ. New statistics and demographics of new recruits, as indicated in *Benson*, suggests that younger service members are more experienced and sophisticated.

A Reaffirmation of Power and Respect: The Judge in the Military Justice System

Over the last three years, the CAAF has elevated, and rightly so, the position of the military judge. Regarding pretrial and trial jurisprudence, this elevation of position and authority is most notable in the areas of voir dire and challenges. Two years ago, this review noted the CAAF's great deference accorded to a military judge's decision to determine the scope of and procedure for voir dire.[50] In 1997, one scholar of military jurisprudence commented that the military trial bench is experiencing a new level of power that neither the Congress nor the Executive Branch understands.[51] The reaffirmation of power and respect is a major theme in three cases, one from the CAAF, and two from intermediate service courts.

United States v. Acosta,[52] *United States v. Miller*,[53] and *United States v. Robbins*[54] are three examples of the breadth of military judge authority.

Jeopardy and the Military Judge: Acosta

In *Acosta*, the accused sought reversal of his conviction for wrongful distribution and use of methamphetamine.[55] On appeal, the accused argued that the military judge abandoned his impartial role during the trial by asking a prosecution witness numerous questions that greatly assisted the prosecution.[56] Previous to the military judge's questions, the defense obtained a ruling that suppressed evidence of the accused's prior sale of drugs to a prosecution witness, an undercover informant for the military police.[57] The defense's purpose in obtaining the ruling was to ensure that this uncharged misconduct evidence would not be presented to the members.[58] During cross examination of the undercover informant, the defense created the impression that the undercover informant, "was under great pressure from the [military police] to set up a buy,"[59] and "placed undue pressure on the [accused] to commit a crime he would otherwise not have done."[60] The defense counsel adeptly avoided any direct impression that he was pursuing an entrapment defense to pre-

48. *See* United States v. Upshaw, 49 M.J. 111 (1998) (indicating that counsel should be aggressive in pursuing correction of any "administrative error" in the selection process).

49. *See generally* United States v. Lewis, 46 M.J. 338 (1997). It appears that the CAAF has, *sub silentio*, reversed or modified those cases that hold the issue of improper selection is raised by the presence of high rank or many commanders on a panel.

50. *See* Major Gregory B. Coe, *Restating Some Old rules and Limiting Some Landmarks: Recent Developments in Pretrial and Trial Procedure*, ARMY LAW., at 25, 43, Apr. 1997 (discussing United States v. Williams, 44 M.J. 482 (1996), United States v. DeNoyer, 44 M.J. 619 (Army Ct. Crim. App. 1996), and United States v. Jefferson, 44 M.J. 312 (1996)). *Williams*, *DeNoyer*, and *Jefferson* signify the CAAF's and the Army Court of Criminal Appeals' (ACCA) expansive interpretation of Rule for Courts-Martial 912, which grants general authority for the military judge to control voir dire. *See* MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 912 (1998) [hereinafter MCM].

51. *See* Fidell, *Going on Fifty: Evolution and Devolution in Military Justice*, 32 WAKE FOREST L. REV. 1213 (1997).

52. 49 M.J. 14 (1998).

53. 48 M.J. 790 (N.M. Ct. Crim. App. 1998).

54. 48 M.J. 745 (A.F. Ct. Crim. App. 1998).

55. *Acosta*, 49 M.J. at 15. The accused was charged with two specifications of wrongful distribution and two specifications of wrongful use of methamphetamine. He was sentenced to a dishonorable discharge, 10 years confinement, total forfeitures, and reduction to E-1. *Id.*

56. *Id.*

57. *Id.* The accused, as the evidence indicated, sold drugs to the undercover informant on three occasions. Two occasions were charged. The uncharged misconduct occurred five months before the first charged offense. *Id.* at 17.

58. *Id.* at 15.

59. *Id.* at 16.

60. *Id.*

serve his gains from the granted motion *in limine*.[61] The trial counsel recognized the impact of the defense counsel's cross-examination, but failed to focus on the issue of entrapment or request that the judge reconsider the motion *in limine*.[62]

The military judge then proceeded to ask the undercover informant "a series of 89 questions"[63] some of which were "housekeeping questions"[64] but many of which focused or "nail[ed] down why the witnessed believed in late December 1994 that the appellant would be willing to sell him crystal methamphetamine."[65] When the defense counsel objected and requested a "short 39(a),"[66] the military judge curtly responded, "No. Sit down . . . . You raised an issue of entrapment."[67]

In reversing the Navy-Marine Court of Criminal Appeals (NMCCA), the CAAF held that the military judge did not abandon his impartial role by asking the undercover informant eighty-nine questions on the issue of entrapment. In doing so, the CAAF noted that Article 46, UCMJ[68] provides wide latitude to a military judge to ask questions of witnesses called by the parties.[69] The Court further noted that Military Rule of Evidence (MRE) 614[70] does not limit the number of questions that a military judge may ask. Specifically, MRE 614 provides that the military judge is not prohibited from asking questions to which he may "know the answer";[71] and the military judge has an "equal opportunity" to obtain witnesses and other evidence."[72] The CAAF also held that, a reasonable person would not view the military judge's questions as casting doubt on the "legality, fairness, and impartiality of the proceeding or the military judge."[73]

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61. The defense was attempting to straddle the fence. The CAAF notes that the defense only mentioned the word "entrapment" once.

62. The trial counsel, as the CAAF framed it, "appeared concerned primarily with damage control as to his witness' credibility; he did not deal with entrapment at all." The defense counsel then continued exploring the witness's credibility and his theme that the undercover informant was u nder pressure from military police authorities to produce a controlled drug purchase. *Id*. at 16.

63. *Id.*

64. *Id.*

65. *Id.*

66. *Id.*

67. *Id.*

68. Article 46, UCMJ, provides:

> The trial counsel, the defense counsel, and the court-martial shall have equal opportunity to obtain witnesses and other evidence in accordance with such regulations as the President may prescribe. Process issued in court-martial cases to compel witnesses to appear and testify and to compel the production of other evidence shall be similar to that which courts of the United States having criminal jurisdiction may lawfully issue and shall run to any part of the United States, or Territories, Commonwealths, and possessions.

UCMJ art. 46 (West 1999).

69. *Acosta*, 49 M.J. at 17.

70. Military Rule of Evidence 614, provides:

> *Calling by the court-martial.* The military judge may, *sua sponte*, or at the request of the members or the suggestion of a party, call witnesses, and all parties are entitled to cross-examine witnesses thus called. When the members wish to call or recall a witness, the military judge shall determine whether it is appropriate to do so under these rules or this Manual.
>
> *Interrogation by the court-martial.* The military judge or members may interrogate witnesses, whether called by the military judge, the members, or a party. Members shall submit their questions to the military judge in writing so that a ruling may be made on the propriety of the questions of the course of questioning and so that questions may be asked on behalf of the court by the military judge in a form acceptable to the military judge. When a witness who has not testified previously is called by the military judge or the members, the military judge may conduct the direct examination or may assign the responsibility to counsel for any party.
>
> *Objections.* Objection to the calling of witnesses by the military judge or the members or to the interrogation by the military judge or the members may be made at the time or at the next available opportunity when the members are not present.

MCM, *supra* note 50, MIL. R. EVID. 614.

71. *Acosta*, 49 M.J. at 18.

72. *Id.*

What is most interesting about *Acosta*, though unstated in the opinion, is the CAAF's implicit practical interpretation of what constitutes judicial advocacy–in the modern military justice system military judges are given wide, but fair latitude to preside over trials without the fear of "second guessing"[74] reversal. The NMCCA opinion, that held to the contrary, was based on case law that took a very strict view of what constitutes judicial advocacy. In *United States v. Carper*,[75] *United States v. Reynolds*,[76] and *United States v. Schakleford*,[77] the Court of Military Appeals opined that a military judge must scrupulously avoid even the slightest appearance of partiality. These cases led the NMCCA to strictly apply the rule on impartiality.[78]

Last year, the CAAF expanded the military judge's role to decrease the zone of situations subject to an allegation of military judge partiality. In *United States v. Figura*,[79] the CAAF held that a military judge would not be partial to the government if, after the parties' agreement, the military judge summarized the accused's providence inquiry and then delivered that summary to the panel. Additionally, language in the opinion suggested, that even without agreement of the parties, the military judge is in the best position to execute this action based on his impartial position in a court-martial.[80]

The *Acosta* opinion takes the same liberal view toward impartiality as the *Figura* opinion. The majority of questions the military judge asked were directly related to the evidentiary matter and concerned issues that the defense and the government previously explored. [81] *Acosta* also indicates that an issue involving the military judge's impartiality and the alleged over questioning of a key witness must be viewed in terms of waiver, the impact of questioning, and the particular evidence or information that the military judge seeks to clarify or complete with the questioning.[82] While recognizing the military judge's equal access to information and witnesses,[83] the CAAF cautioned military judges that when they question the government's principal witness, they must have a heightened awareness of the concern for the "appearance of fairness at court-martial and judicial impartiality."[84]

Drugs, Intemperate Remarks, and "Real-Life Experienced" Judges: Cornett, Miller, and Robbin

In *United States v. Cornett*,[85] the CAAF also solidified the position of the judge in the military justice system. In *Cornett*, the CAAF held that R.C.M. 902(a) does not require recusal in a situation that involves a military judge's intemperate remarks, as long as the military judge complies with the requirements of that rule. Under R.C.M. 902(a),[86] when the military judge is

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73. *Id.*

74. *See* United States v. Youngblood, 47 M.J. 338 (1997) (Crawford, J., dissenting).

75. 45 C.M.R. 809 (N.M.C.R. 1972) (holding that it is improper for the military judge to praise a prosecution witness' testimony by reading a passage from *Profiles in Courage* to describe the witness after his testimony).

76. 24 M.J. 261 (C.M.A. 1987) (holding that the military judge did not show a lack of impartiality by reacting harshly to a defense objection and by questioning the accused when the accused appeared to change his testimony).

77. 2 M.J. 17 (C.M.A. 1976) (holding that the military judge abandoned his impartiality by using information gained from the accused's providence inquiry to question the accused before a panel after it appeared that the accused modified his testimony).

78. The NMCCA noted: "Before the trial judge examines a witness . . . he should determine whether that witness's testimony need clarification or completion. If the bench believes it does, questioning should be conducted with the greatest restraint. The military judge . . . must continue to appear and must in fact be neutral . . . ." STEPHEN A. SALTZBURG ET. AL., MILITARY RULES OF EVIDENCE MANUAL 709 (3d ed. 1991).

79. 44 M.J. 308 (1996). *Figura* appears to be a culmination of a mixed bag of cases dealing with judicial activism, but primarily a recognition that one must not view these cases in a vacuum. *See* United States v. Zaccheus, 31 M.J. 766 (A.C.M.R. 1990) (holding that military judge's assistance in laying the foundation for the admission of evidence was not error); United States v. Bouie, 18 M.J. 529 A.F.C.M.R. 1984) (holding that it was not error for military judge to asked 370 question of accused since the issues were complex, dealing with state of mind and were somewhat of a "gordian knot"); United State v. Morgan, 22 M.J. 959 (C.G.C.M.R. 1986) (holding that the military judge overstepped his bounds in cross-examining the accused to obtain admission of a knife, which trial counsel unsuccessfully sought to obtain in evidence).

80. *Figura*, 44 M.J. at 310. Judge Sullivan suggested, in concurrence, that this procedure is akin to the English system and "In this way, the jury views the law and the facts through the eye of the experienced judge."

81. *Acosta*, 49 M.J. at 18.

82. *See id.* at 18-19 (indicating that defense counsel failed to challenge the military judge for cause after the questioning, and the questions were designed to negate the defense theory of entrapment only after the defense obtained suppression of information which would have negated its own case theory).

83. *See* Major Francis A. Delzompo, *When the Military Judge is No Longer Impartial: A Survey of the Law and Suggestions for Counsel*, ARMY LAW., June 1995, at 3.

84. *Acosta*, 49 M.J. at 19. In addition, the CAAF held that the "curt" denial of the defense request for a "short 39(a)" was appropriate, based on the entire record, because there was no possibility for the defense to obtain a favorable ruling on the evidentiary ruling regarding the uncharged misconduct. *Id.*

confronted with a recusal situation, especially one involving intemperate remarks, he must fully disclose the matter on the record and invite voir dire concerning any predisposition toward the parties. In turn, the CAAF's construction of R.C.M. 902 requires counsel to establish strong evidence in support of a recusal motion. One service court case[87] implements the *Cornett* construction of R.C.M. 902 and, in the process, is instructive on the appropriate degree of bench decorum in courts-martial.

In *United States v. Miller*,[88] the military judge stated, upon hearing that the accused suffered a drug overdose and was medically evacuated to a hospital, that the accused was a "cocaine addict and a manipulator of the system."[89] The military judge also stated that "[p]erhaps he [the accused] will OD and die, and then we won't have to worry about this case."[90] Taking a liberal interpretation of the case law, the NMCCA held that the military judge's comments indicated that he was impatient and frustrated with an unplanned delay in a scheduled court-martial proceeding. The court stated that these "comments alone do not reasonably suggest that the military judge held such "deep-seated and unequivocal antagonism" towards the appellant as to make fair judgment impossible."[91]

Miller is worth mention because, as stated above, it continues the *Cornett* trend of requiring counsel to provide very strong evidence to support recusal of a military judge. Indeed, it appears that appellate courts are inclined to carefully search the record to determine the character of the military judge's statements, rather than imply some pernicious or sinister plan on the part of the military judge.[92]

One other service court recognized the power and authority of the military judge in this era of "evolution and devolution,"[93] and established an expanded test to resolve situations when a military judge is the victim of an offense similar to the case he is trying.[94] In *United States v. Robbins*,[95] the accused was convicted of committing a battery and intentionally inflicting grievous bodily harm on his wife, and committing involuntary manslaughter by unlawfully causing the termination of his wife's pregnancy.[96] During the initial stages of the trial, the military judge, *sua sponte*, informed the parties that thirteen years ago she had been the victim of spousal abuse.[97] After providing

85. 47 M.J. 128 (1997) (holding that a military judge did not abuse his discretion when he denied a defense challenge for cause against the military judge based on an *ex parte* conversation between the military judge and trial counsel). During the conversation, the military judge stated "Well, why would you need that evidence in aggravation, because I've never seen so many drug offenses." Why don't you consider holding that evidence in rebuttal and p resenting it, if necessary, in rebuttal?" *Id*. at 130.

86. MCM, *supra* note 50, R.C.M. 902(a). This rule states:

> In general. Except as provided in subsection (e) of this rule, a military judge shall disqualify himself or herself in any proceeding in which that military judge's impartiality might reasonably be questioned.
>
> . . . .
>
> (c)(2) Each party shall be permitted to question the military judge and to present evidence regarding a possible ground for disqualification before the military judge decides the matter.

Id.

87. *See* United States v. Bray, 48 M.J. 300 (1998) (holding that the military judge is not required to recuse himself when he has conducted a providence inquiry, reviewed a stipulation of fact, and entered findings of guilty to initial pleas in a co-accused's case).

88. 48 M.J. 790 (N.M. Ct. Crim. App. 1998).

89. *Id.* at 793.

90. *Id.* at 792.

91. *Id.* at 793.

92. The NMCCA stated that "[m]oreover, the record of trial itself reflects no overt hostility by the military judge towards the appellant and the sentence which he awarded was neither excessive nor inappropriate for these offenses and this offender." *Id.*

93. *See* Fidell, *supra* note 51.

94. This new test applies to Air Force courts-martial. The new test, however, may be instructive for military judges of all services.

95. 48 M.J. 745 (A.F. Ct. Crim. App. 1998).

96. *Id.* at 747. The involuntary manslaughter was charged under the Assimilative Crimes Act. *See* 18 U.S.C. § 13 (1994). The Act assimilated the Ohio fetal homicide statute. The military judge sentenced the accused to a dishonorable discharge, confinement for eight years, and reduction to E-1. The convening authority waived $900.90 per month, for a period of six months, of the appellant's mandatory forfeitures for the benefit of his wife. *Id.*

97. *Id.* at 753.

both parties a copy of a voir dire from a previous trial on the matter and permitting extensive questions, she denied a defense motion that she recuse herself.[98] In denying the defense motion, the military judge appeared to apply a subjective test, stating that:

> I don't believe that my ability to be fair and impartial has reasonably been questioned. To suggest that a military judge, who more that ten years ago was the victim of any offense would be unable to serve, would perhaps disqualify many judges across the nation from being able to serve . . . . As I indicated in voir dire, and I believe in the manner in which I've dealt with this entire issue, I believe I can be fair and impartial, and I will do so.[99]

The AFCCA held that the military judge did not abuse her discretion by denying the motion for recusal. The AFCCA noted that the R.C.M. 902(a) test for a recusal motion, however, is objective. Therefore, the test applied here, based on the military judge's personal belief, was improper.[100] In the process, the AFCCA expanded the R.C.M. 902(a) objective test by adding three factors to balance and consider: (1) whether the military judge was victimized in the very recent past or the distant past, (2) whether the facts and the surrounding circumstances of the crime were so egregious as to inflame one's emotions at the expense of one's judicial instincts when recalling the event, and (3) if the answer to the second questions is yes, whether a reasonable person with knowledge of all of the relevant facts would conclude that sufficient time had passed whereby the military judge's judicial instincts and temperament are no longer compromised.[101] The AFCCA's application of this test to the military judge's spousal abuse that occurred thirteen years prior "[fell] way short" of a situation requiring recusal.

Practitioner Tips and Considerations

While an intermediate service court case, *Robbins* is noteworthy–not only for military judges but also for all military criminal justice practitioners. *Robbins* adds factors to R.C.M. 902(a) which give the military judge and counsel concrete rules to determine whether to raise and how to resolve recusal motions. In addition, the AFCCA also noted, consistent with *Cornett* and *Miller*, that significantly more is required to recuse a military judge in a modern court-martial system. This is so because our system, as well as the state and federal systems, recognize that the "average citizen, civilian or military, prefers judges with real-life experiences."[102] Counsel should continue proceeding on motions to recuse a military judge when the situation arises. Counsel, should, however, realize that the courts recognize a new stature for military judge–implicit in the reasonable person standard is an understanding "that judges are not grown in, and harvested from, a sterile, idyllic existence frequently referred to as the 'ivory tower.'"[103]

Expanding the Frontier of Military Justice: United States v. Price and United States v. Reynold

Over the past three years, with the exception of *United States v. Turner*[104] and *United States v. Mayfield*,[105] no two cases

98. *Id.*

99. *Id.* In addition, the military judge further commented on the issue, adding more "[fuel] to the uncertainty" that she used a subjective test to rule on the issue. *Id.* The following short colloquy occurred between defense counsel and the military judge: "[MJ:] I think reasonable people might differ." *Id.* at 753. [DC:] [Do you believe] those reasonable people [having heard all facts] might disagree to an impropriety [sic] of a judge with a history of spouse abuse sitting in a judge alone court-martial, in a case involving assault on a spouse[?]"

100. *See generally* United States v. Sherrod, 22 M.J. 920 (A.C.M.R. 1986). The court noted that the military judge's actions (resolving the recusal motion on the basis on a subjective test rather than an objective, reasonable person test) were identical to the military judge's action in *Sherrod.* In *Sherrod*, the military judge erroneously held that he could sit on a case of an accused charged with burglary and assault of his next door neighbor (whose child, a best friend of the military judges daughter, was assaulted by the accused).

101. *Robbins*, 48 M.J. at 754.

102. *Id.*

103. *Id.*

104. 47 M.J. 348 (1996) (holding that a military judge-alone court-martial is not deprived of jurisdiction simply because the request for trial by judge alone was obtain at a post-trial corrective session).

105. 45 M.J. 176 (1996) (holding that a military judge alone court-martial is not deprived of jurisdiction when counsel, in the presence of a silent accused, makes the request for forum). Although this article does not discuss *Mayfield* and *Turner*, practitioners should note that the NMCCA extended *Mayfield* to permit a post-assembly acceptance of a military-judge alone request. *See* United States v. Jungbluth, 48 M.J. 953 (N.M. Ct. Crim. App. 1998). *See also* United States v. Seward, 29 M.J. 369 (1998) (holding that while it was improper for a military judge to incorporate by reference a forum request made at a trial prior to a mistrial, case law did not operate to deprive the court-martial of jurisdiction where the forum request was part of the new pretrial agreement). Both of these cases continue the trend to review court-martial personnel issues on a substance over form basis. In addition, they also provide lessons learned--a military judge should normally begin a session of court, especially one that has been previously held and terminated by mistrial and also those that have been characterized by multiple sessions, by reviewing everything that has been done thus far in the proceeding to ensure that all necessary documents and rights acknowledgments are part of the record.

have caused as much calm and consternation in court-martial personnel jurisprudence than the Army Court of Criminal Appeals' (ACCA) decisions in *United States v. Price*[106] and *United States v. Reynolds.*[107] The CAAF opinions in these two cases had the same impact on military criminal law.

Bob Barker at the CAAF: United States v. Price

In *Price*, the accused was absent for trial after being informed of the date trial would commence.[108] The accused also participated in the litigation of substantive pretrial motions at three Article 39(a)[109] sessions. Because the court-martial had to resolve the substantive motions, the military judge decided to forego the "calling upon the accused to plead" step of arraignment.[110] The arraignment was, therefore, defective.[111] The ACCA caused a quiet calm over the prosecution by holding that, when an arraignment is procedurally defective and an accused voluntarily absents himself from a court-martial after participating in the litigation of motions and being informed of the date that the trial will commence, the court-martial will not be deprived of jurisdiction to try the accused *in absentia*. A cornerstone of the ACCA opinion was the observation that a long line of precedent, apparently dating from Colonel William Winthrop, supported the view that an accused could waive by conduct either the reading or "calling upon to plead" components of an arraignment.[112]

In a well-reasoned majority opinion and over strong, equally persuasive dissent,[113] Chief Judge Cox wrote a majority opinion for the CAAF that reversed the ACCA. The CAAF held that R.C.M. 904 contemplates trial *in absentia* only after an effective arraignment. Therefore, an accused by his conduct, cannot waive any part of an arraignment when that arraignment is defective.

The CAAF's route to that holding is very important. First, the CAAF compared R.C.M. 904 with its civilian counterpart, Federal Rule of Criminal Procedure (FRCP) 43(b).[114] The CAAF posited that there was a difference between the two rules in terms of the time after which trial *in absentia* is permissible.[115] According to the CAAF, FRCP 43(b) sets this time after the commencement of trial, while R.C.M. 904 sets this time after an effective arraignment. There was no demonstrable difference in both rules, however, concerning whether a particular time had been set.[116] The CAAF also noted that R.C.M. 904 was based on FRCP 43(b). A plausible construction of R.C.M. 904 must, therefore, be consistent with the Supreme Court's interpretation of the federal rule.[117]

In two cases, *Taylor v. United States*[118] and *Crosby v. United States*,[119] the CAAF reasoned that the Supreme Court strictly interpreted the federal rule. *Taylor* acknowledged that an accused who absents himself *after* trial on the merits has commenced is foreclosed from making an argument that the court

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106. 43 M.J. 823 (Army Ct. Crim. App. 1996).

107. 44 M.J. 726 (Army Ct. Crim. App. 1996).

108. *Price*, 43 M.J. at 824. The accused in Price was charged and convicted of conspiracy to commit robbery, robbery, and aggravated assault. He was sentenced by an officer and enlisted panel, *in absentia*, to a dishonorable discharge, confinement for 8 years, and forfeiture of all pay and allowances. *Id.*

109. UCMJ art. 39(a) (West 1999).

110. *Price*, 43 M.J. at 824.

111. MCM, *supra* note 50, R.C.M. 904. This Rule provides: "*Arraignment*. Arraignment shall be conducted in a court-martial session and shall consist of reading of charges and specifications to the accused and calling on the accused to plead. The accused may waive the reading. The entry of please is not part of the arraignment." *Id.*

In conjunction, R.C.M. 804, provides:

> (a) Presence required. The accused shall be present at the arraignment, the time of the plea, every stage of the trial including sessions conducted under Article 39(a), voir dire and challenges of members, the return of the findings, sentencing proceedings, and post-trial sessions, if any, except as otherwise provided by this rule.
> (b) Continued presence not required. The further progress of the trial to and including the return of the findings and, if necessary, determination of a sentence shall not be prevented and the accused shall be considered to have waived the right to be present whenever an accused, initially present:
> (1) Is voluntarily absent after arraignment (whether or not informed buy the military judge of the obligation to remain during the trial; or
> After being warned by the military judge that disruptive conduct will cause the accused to be removed from the courtroom, persists in conduct which is such as to justify exclusion from the courtroom.

Id. R.C.M. 804.

112. *Price*, 43 M.J. 826-27. *See* Colonel William Winthrop, Military Law and Precedents (1920). The ACCA opined that Colonel Winthrop would probably be of the opinion that the accused could waive either part of the arraignment. *See also* United State v. Houghtaling, 2 C.M.R. 229 (A.B.R. 1951); United States v. Napier, 43 C.M.R. 262 (C.M.A. 1971); United States v. Lichtsinn, 32 M.J. 898 (A.F.C.M.R. 1991); United States v. Stevens, 25 M.J. 805 (A.C.M.R. 1988); United States v. Wolff, 5 M.J. 923 (N.M.C.M.R. 1978); United States v. Cozad, 6 M.J. 958 (N.M.C.M.R. 1979).

113. Judge Sullivan and Judge Crawford dissented from the majority opinion.

failed to specifically advise him that trial would proceed in his absence. In *Crosby*, however, the CAAF determined that the Court "set *Taylor* in sharp relief."[120] On facts very similar to *Price*, except for the defective arraignment, the Court held that trial *in absentia* was not authorized and reversed Crosby's conviction.[121] The Court based its holding on the rational distinction between absences that occur before and after trial on the merits start. Additionally, the Supreme Court implied that, in both circumstances, the trial could only occur if the accused was specifically or constructively warned that the trial would proceed in his absence.[122] While military case law extended the rule where trial *in absentia* attached back to arraignment, there was nothing in the record indicating that the accused was on notice that trial would *proceed* in his absence. The Supreme Court's strict application of the *in absentia* rule in *Crosby* operated to reverse Price's conviction.[123]

Judge Sullivan wrote a short, but strong, dissent indicating that an "incomplete arraignment"[124] never operates to deprive a court of jurisdiction. Judge Sullivan theorized that the arraignment was incomplete because the accused absented himself–the accused was responsible for the incomplete arraignment. In a more extensive dissent, Judge Crawford adopted the ACCA's waiver theory.[125]

Practitioner Tips and Considerations

Price is one of the most important opinions of the last three years in court-martial personnel jurisprudence–especially for the government. First, Judge Crawford's dissent intimates that the majority opinion is inconsistent with the recent trend to apply procedural statutes based on "substance over form."[126] The trend, starting *with United States v. Algood*[127] and coming to fruition in *United States v. Turner*,[128] predictably resulted in the CAAF's refusal to grant technical appeals in court-martial personnel cases.[129] *Price* may allow appellate and trial defense

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114. Fed. R. Crim. P. 43 (a), (b). These rules provide:

> (a) Presence required. The defendant shall be present at the arraignment, at the time of the plea, at every stage of the trial including the impaneling of the jury and the return of the verdict, and at the imposition of sentence, except as otherwise provided by this rule.
> (b) Continued Presence Not Required. The further progress of the trial to and including the return of the verdict shall not b e prevented and the defendant shall be considered to have waived his right to be present whenever a defendant, initially present,
> (1) voluntarily absents himself after the trial has commenced (whether or not he has been informed by the court of his obligation to remain during the trial); or
> after being warned by the court that disruptive conduct will cause him to be removed from the courtroom, persist in conduct which is such as to justify his being excluded from the courtroom.

Id.

115. 48 M.J. at 182.

116. The CAAF focused on the "*after the trial has commenced*" language in Federal Rule of Criminal Procedure 43(b).

117. *Price*, 48 M.J. 181, 183.

118. 414 U.S. 17 (1973) (holding that trial *in absentia* is permissible when an accused absents himself after trial on the merits had commenced, thereby neutralizing appellant's argument that he could not have waived his rights to testify and confront witness after being absent). The Court reasoned that it was "incredible that a defendant who flees from a courtroom in the midst of a trial . . . would not know that as a consequence the trial would continue in his absence." *Id.* at 20.

119. 506 U.S. 255 (1993).

120. *Price*, 48 M.J. at 183.

121. In *Crosby*, the accused was convicted of mail fraud by conspiring with codefendants to sell military veteran commemorative medallions to fund the alleged construction of a theme park. He appeared before a magistrate on 15 June 1988, and was released after posting a $100,000 bond. Like the accused in *Price*, Crosby appeared for pretrial conferences and hearings with his attorney. The court advised Crosby that his trial would be on 12 October 1988. Crosby failed to appear for trial and the trial judge proceeded to judgment *in absentia* over defense objection. *Crosby*, 506 U.S. at 256-57.

122. 48 M.J. at 183.

123. *Id.*

124. *Id.* at 184.

125. *Id.* at 184-86.

126. 48 M.J. at 184.

127. 41 M.J. 492 (1995) (dismissing a technical reading of the UCMJ and refusing to reverse a conviction in a case where charges were referred to trial using members selected by a previous commander of an installation that was deactivated under the Base Realignment and Closure Program).

counsel to again pursue, with some sense of hope, relief based on a technical issue in court-martial personnel cases.

Second, the CAAF's resolution of *Price* is not based on military precedent. Rather, it is based on an interpretation of constitutional law that the ACCA said was in direct conflict with military legal precedent. Implicit in this manner of analysis is Article 36, UCMJ, which directly permits the President, and indirectly permits the courts, to align military procedures with civilian federal procedures, where practicable.[130] Framing the issue in constitutional terms permitted the majority to imply that the military and the federal rule on trial *in absentia* embody the same procedural rights. The CAAF was able to downplay the impact of cases that both set the *in absentia* attachment at arraignment for service members and indicated that an accused can waive arraignment by conduct.[131]

Reviewing *Price* through a constitutional magnifying glass appears to cast a parochial light on the entire issue of ensuring that an accused is present for trial. Applying civilian *in absentia* cases to the military does not appear to take into account that courts-martial almost never occur in the accused's county or state. The accused may be assigned overseas or in the continental United States without his immediate family. Additionally, bail does not exist in the military justice system. Simply put, a military accused is more apt to flee because he does not have the same ties to the court-martial community as a civilian does to his county or state of residence. These factors were implicit in the ACCA opinion. *Price* may be a good example of a case where the CAAF should have affirmed the ACCA based on the rule of *Parker v. Levy*.[132]

What is certain, however, is that *Price* requires a change to the *Military Judge's Benchbook*.[133] The law requires military judges to call upon the accused to plead, but there is no requirement to instruct the accused about the impact of being absent from trial. The *Benchbook* should be amended to require the trial *in absentia* advisement in all courts-martial. Until a change is made, a smart trial counsel will not only ensure that arraignment is complete, but will also specifically request that the military judge read the advisement to the accused on the record.[134]

All Wrapped Up in Reynolds: Presence, Parties, and Constitutional Structures

United States v. Reynolds[135] is equally important to court-martial personnel jurisprudence. In *Reynolds*, the military judge conducted the preliminary phase of a trial, up to and including arraignment, by speakerphone.[136] All other phases of the trial were conducted with the military judge, counsel, and the accused in the same courtroom. The CAAF affirmed the ACCA's determination that the military judge violated R.C.M. 804,[137] 805,[138] Article 39(a), UCMJ,[139] and Article 26, UCMJ.[140] These provisions require that all parties must be present in one

128. 47 M.J. 348 (1997) (refusing to technically read and apply the Article 16, UCMJ, requirement that the accused make a military judge-alone forum request and holding that an accused who silently sits at the counsel table, while counsel makes same forum request, assented to choice by conduct).

129. *See* United States v. Sargent, 47 M.J. 367 (1997) (holding that a court-martial was not deprived of jurisdiction because of court member's absence); s*ee also* United States v. Jungbluth, 48 M.J. 953 (N.M. Ct. Crim. App. 1998).

130. UCMJ art. 36 (West 1998).

131. *See supra* note 112.

132. 417 U.S. 733 (1974) (noting that the military is a special separate society and military law is a jurisprudence that exists separate and apart from the law that governs the federal judicial establishment, necessitating different rules, depending on the situation). Two years ago, Chief Judge Cox wrote a concurring opinion that reminded practitioners of the importance of *Parker* to the military justice system. *See* United States v. Eberle, 44 M.J. 374 (1996) (Cox, C.J., concurring). Last year, the CAAF implicitly applied the rules of *Parker* in two cases. *See* United States v. Tulloch, 47 M.J. 283 (1997); United States v. Witham, 47 M.J. 297 (1997). The *Price* majority may have missed the opportunity to point out that the military accused and the civilian accused are not in the same position with regard to trial *in absentia*.

133. *See* U.S. Dep't of Army, Pam 27-9, Legal Services: Military Judges' Benchbook, ch. 2, § VIII, at 148 (30 Sept. 1996) [hereinafter Benchbook]. The current trial *in absentia* advisement is optional "when the accused is arraigned but trial on the merits is postponed to a later date." *Id.*

134. One can see the problem associated with reading an accused the trial *in absentia* advisement, especially in a situation where the thought of fleeing before the merits and sentencing phases may never have occurred to an accused. Having heard the advisement, the accused may now plan to flee. Trial counsel probably do not want to execute responsibilities all the way to sentencing only to have punishment meted out to an absent accused. Ensuring that the trial will proceed without jurisdictional impediments, even at the risk of having an accused flee after hearing the trial *in absentia* advisement, is preferable–especially in light of *Price*.

135. 49 M.J. 260 (1998).

136. Reynolds was charged with attempted larceny and housebreaking. The military judge called the initial session of the court-martial to order with the accused and counsel for both parties located in a courtroom at Fort Jackson, South Carolina, and the military judge located in a courtroom at Fort Stewart, Georgia. The courtrooms were about 150 miles apart. *See* United States v. Reynolds, 44 M.J. 726, 729 (Army Ct. Crim. App. 1996). Each courtroom contained a speakerphone. The military judge obtained the accused consent to the procedure. The military judge told the accused that he was not required to proceed by speakerphone, indicating that "my not being present only saves the court some time and the United States some TDY and travel money." *Reynolds*, 49 M.J. at 261.

137. MCM, *supra* note 50, R.C.M. 804.

location for a valid court-martial to occur. The ACCA communicated that video teleconferencing, electronic, or telephonic means could not be used for the formal stages of a court-martial.[141]

The CAAF also held that the partial absence of the accused or military judge from a formal stage of trial may not always operate to deprive the court of jurisdiction. In doing so, the CAAF reasoned that the military judge's absence from the trial was not extensive,[142] and the accused consented to the procedure.[143] Significantly, the court stated that absence, under these circumstances, did not fall within the class of "structural rights," the deprivation of which would entitle an accused to reversal.[144] This permitted the court to apply a harmless error standard to the error–similar to the ACCA opinion.

Most important, however, the CAAF reasoned that the accused did not suffer any material prejudice to his substantial rights under Article 59(a), UCMJ.[145] The court quickly dismissed the accused's argument that he was deprived of his opportunity to make an "informed" decision regarding forum and other rights. The CAAF stated at all times counsel represented the accused and the military judge appears to have reviewed selection of forum and made the accused enter pleas on the record. The CAAF not only applied the rule of *Mayfield*[146] and *Turner*[147] to *Reynolds*, but also continued a trend of using Article 59(a), UCMJ, to resolve claims in this area of the law. The standard for success on an Article 59(a), UCMJ, claim is difficult for the defense to establish.

Practitioner Tips and Considerations

While *Price* may be a departure from the *Algood-Mayfield-Turner* standard of review, *Reynolds* is more indicative of the manner in which the CAAF will review court-martial personnel issues.[148] The important lesson in *Reynolds* for practitioners is that the accused must object *at trial* if the issue might even remotely concern a "technical appeal."[149] Except for *Price*,[150] in the past three years the CAAF has refused to grant an accused relief based on technical court-martial personnel legal arguments.

138. *Id.* R.C.M. 805.

139. UCMJ art. 39(a) (West 1999).

140. *Id.* art. 26.

141. *See* Coe, *supra* note 50 (providing a complete discussion of this aspect of the case). In fact, the CAAF's decision specifically adopts this aspect of the ACCA's opinion. *See Reynolds*, 49 M.J. at 262.

142. The speakerphone proceeding only lasted for 12 minutes of a seven-hour trial. *Reynolds*, 49 M.J. at 261.

143. *Id.* at 263.

144. *Id.* at 262. The structural rights that would entitle and accused to substantial relief, if a court determined that a accused was deprived of such a right, include certain basic protections like the right to counsel, the right to an impartial judge, the right to a jury composed of persons t hat were not unlawfully discriminated against based on race or gender, or the right to self-representation at trial. *See id.*

145. UCMJ art. 59(a) (West 1999).

146. 45 M.J. 176 (1996).

147. 47 M.J. 348 (1997).

148. The CAAF engages in a search for information indicating that there was really no material prejudice to the accused. Usually, this is information indicating that the accused waived advantage of the alleged deprived right. In *Reynolds*, consent to the speakerphone procedure constituted waiver. There was no defense objection. These cases give credence to the CAAF's employment of the harmless error and non-technical statutory review rules. Implicit in these rules is a recognition that the CAAF and intermediate service courts must be mindful that an accused is given advantage of all procedural rights. The military justice system, however, has matured to the point where the appellate courts can imply a general presumption of regularity that the accused's rights were not materially prejudiced when a technical appeal is raised.

149. The CAAF stated: "Thus, as we noted by the reviewing court below, 'appellant would receive an undeserved windfall' if his findings of guilty and sentence were set aside in these circumstances . . . . Such an obvious technical appeal cannot prevail." *Reynolds*, 49 M.J. at 264 (citing United States v. Jette, 25 M.J. 16 (C.M.A. 1987)).

150. *See* United States v. Mayfield, 45 M.J. 176 (1996); United States v. Turner, 47 M.J. 348 (1997); United States v. Sargent, 47 M.J. 367 (1997); United States v. Cook, 48 M.J. 434 (1998) (holding that violation of the R.C.M. 505 prohibition against excusing more that one-third of members prior to trial does not involve a matter of fundamental fairness that would deprived court-martial of jurisdiction). The CAAF may find an error, but will most likely disposed of the matter with the harmless error rule or the "no prejudice" rule under Article 59(a), UCMJ.

Pleas and Pretrial Agreements

It was a quiet year in the areas of pleas and pretrial agreements. [151] Except for *United States v. Singleton*,[152] appellate courts spent their time reaffirming rules of law and public policy. The 1998 cases provide a greater foundation for the key concepts that were developed in 1995. Two concepts prevailed in the 1998 cases: (1) the government and the defense must exercise a high degree of care in the formation and organization of pretrial agreements, and (2) a recognition of the free-market, *laissez faire* approach to negotiating pretrial agreements.

Formation: A Pretrial Agreement Is Worth the Paper It's Written On

In *United States v. Mooney*,[153] the CAAF reviewed a case involving an oral pretrial agreement term. The accused was charged with wrongful use of marijuana and lysergic acid diethylamide.[154] During the trial, the accused and the government entered into an oral agreement that required him to plead guilty to two specifications of the charge.[155] The government agreed to withdraw a third specification of the charge.[156] Both sides agreed to the oral term on the record. Each side complied with the oral term, and the accused "concede[d] that he received the benefit of the bargain."[157]

In a specified issue appeal, the CAAF held that there was a technical violation of R.C.M. 705(d)(2),[158] which requires that all pretrial agreements be in writing. Because the matter was "set out on the record," however, there was no prejudice to the accused under Article 59(a). Just last year, in *United States v. Bartley*,[159] the CAAF reminded practitioners of the importance of following the R.C.M. 705(d)(2) writing requirement. Citing to the seminal cases of *United States v. King*[160] and *United States v. Green*,[161] the CAAF "stressed the constitutional and statutory significance of pretrial agreements that reflect the accused's voluntary and knowing acceptance of terms."[162]

151. The CAAF and intermediate service courts decided a plethora of cases involving the substantial conflict test and the necessary elements of a valid providence inquiry. *See, e.g.*, United States v. Biscoe, 47 M.J. 398 (1998); United States v. McQuinn, 47 M.J. 736 (N.M. Ct. Crim. App. 1997); United States v. Kolly, 48 M.J. 797 (N.M. Ct. Crim. App. 1998); United States v. Handy, 48 M.J. 590 (A.F. Ct. Crim. App. 1998); United States v. Keith, 48 M.J. 563 (C.G. Ct. Crim. App. 1998); United States v. Lark, 47 M.J. 435 (1998); United States v. Boddie, 49 M.J. 310 (1998); United States v. Crutcher, 49 M.J. 236 (1998).

152. 144 F.3d 1343, *rev'd*, 165 F.3d 1297 (10th Cir. 1998) (en banc) (holding that 18 U.S.C. § 201(c) does not apply to the United States and does not include assistant United States attorneys acting as alter ego of the United States–U.S. attorneys can offer an accomplice or other witness leniency in exchange for truthful testimony). Most courts that considered the issue did not follow the panel decision in *Singleton*. *See* 165 F.3d at 1301 and cases cited therein. As the en banc 10th Circuit reversed itself, *Singleton* has virtually no vitality in the military justice system from the defense perspective. Three federal circuits followed the en banc 10th Circuit's reasoning. *See* United States v. Lowery, 166 F.3d 1119 (11th Cir. 1999); United States v. Ramsey, 165 F.3d 980 (D.C. Cir. 1999); United States v. Johnson, 169 F.3d 1092 (8th Cir. 1999). The latest federal circuit opinion also follows the en banc reasoning. *See* United States v. Condon, 170 F.3d 687, 1999, (7th Cir. 1999) (holding that 18 U.S.C. § 201(c) does not apply to the government, foregoing criminal prosecution or securing a lower sentence is not a "thing of value" within the meaning of the statute, and relying on United States v. Barrett, 505 F.2d 1091 (7th Cir. 1974) for its reasoning). Defense counsel who still desire to pursue a *Singleton* motion may review the concurrence to the *en banc* opinion, which indicates that the statute is applicable to the Government, but Congress carved out specific exceptions authorizing a thing of value in exchange for truthful testimony or the like tin certain statutes. *See Singleton*, 165 F.3d at 1297, 1303-08 (Lucero, J. (concurring)). *See also* State v. Elie, LaDistCt 9th Dist., Rapides Parish, Crim. Docket No. 240,890, Metoyer, J., *cited in* 12 Crim. Prac. Rep. (BNA) No. 24, at 491 (Dec. 2, 1998).

153. 47 M.J. 496 (1998).

154. The accused pleaded guilty and was sentenced to a bad-conduct discharge, confinement for 12 months, and reduction to the lowest enlisted grade.

155. 47 M.J. at 496.

156. *Id.*

157. *Id.*

158. MCM, *supra* note 50, R.C.M. 705(d)(2). This rule provides:

> Formal submission. After negotiation, if any, under subsection (d)(1) of this rule, if the accused elects to propose a pretrial agreement, the defense shall submit a written offer, all terms, conditions, and promises between the parties shall be written. The proposed agreement shall be signed by the accused and the defense counsel, if any. If the agreement contains any specific action on the adjudged sentence, such action shall be set forth on a page separate from the other portions of the agreement.

Id.

159. 47 M.J. 182 (1997).

160. 3 M.J. 458 (C.M.A. 1977).

161. 1 M.J. 453 (C.M.A. 1976).

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

While the CAAF was not willing to reverse *Mooney* based on a technical violation,[163] it chided the government and the defense, stating that "we do not condone the parties' disregard for the Rules for Courts-Martial . . . ."[164]

Organization: Placement is Also Important

Similarly, in *United States v. Forester*[165] the CAAF dealt with another specified issue involving the formation and organization of pretrial agreements. In *Forester*, the accused was charged with attempted housebreaking, attempted larceny, violation of a general regulation, false official statement, robbery, and aggravated assault.[166] The parties entered into a pretrial agreement that required the accused to "waive any and all defenses that he may present regarding any of the agreed-upon facts during all phases of trial, including the providency inquiry and the case-in-chief."[167] The term was placed in the stipulation of fact rather than in the offer to plead portion of the agreement.[168]

The CAAF reviewed the appropriateness of inserting a term in a place other than in the offer to plead by implicitly asking whether the government was attempting to avoid the requirements of R.C.M. 705(c)(1)(B).[169] That provision recognizes that the government may "encourage"[170] an accused to plead by "offering a favorable pretrial agreement."[171] The provision also cautions the government that it cannot attempt to deprive the accused of a Constitutional Due Process right during the negotiation and the approval of a pretrial agreement. The CAAF intimates that when a term, especially one setting forth a disfavored general waiver of "any and all defenses,"[172] is placed in a document other than the offer to plead, it indicates that the government specifically intended to avoid the R.C.M. 705(c)(1)(B) restriction.[173] The CAAF refused, however, to grant the accused any relief on appeal. After applying the rules of *United States v. Rivera*,[174] the CAAF determined that the accused was not entitled to relief based on the "overly broad"[175] nature of the waiver. The record did not indicate that the accused was prevented from asserting any defense.[176]

Practitioner Tips and Considerations

Practitioners should take special note of *Mooney* and *Forester.* First, the CAAF continues to be very careful in the area of pretrial agreements in the wake of the late Judge Wiss' criticism of the majority opinion in *United States v. Weasler.*[177] The *Weasler* majority promised that it would carefully review cases involving pretrial agreements containing unlawful command influence terms.[178] This trend has migrated to cases involving novel pretrial agreement terms, and now appears to have been

163. The CAAF stated that the record clearly supported that the accused was not prejudiced under Article 59, UCMJ.

164. United States v. Mooney, 47 M.J. at 496 (1998).

165. 48 M.J. 1 (1998).

166. *Id.*

167. *Id.* at 2.

168. *Id.* at 3.

169. MCM, *supra* note 50, R.C.M. 705(c)(1)(B). This rule generally provides that the government may not obtain a pretrial agreement by gaining the waiver of an accused's substantial constitutional due process rights. These constitutional due process rights include the right to counsel, due process, the right to challenge jurisdiction, the right to a speedy trial, complete sentencing proceedings, and the effective exercise of post-trial and appellate rights. This is a nonexclusive list. *Id.*

170. *Forester*, 48 M.J. at 3.

171. *Id.*

172. *See generally* United States v. Rivera, 46 M.J. 52 (1997). *See also* United States v. Jennings, 22 M.J. 837 (N.M.C.M.R. 1986).

173. The CAAF stated that "the government may not avoid these provisions by setting forth prohibited terms, as in this case, in the stipulation of fact. The terms of a pretrial agreement should not be in the stipulation but in the agreement itself for acceptance or rejection by the convening authority." *Forester*, 48 M.J. at 3.

174. 46 M.J. 52 (1997) (holding invalid a pretrial agreement term that required the accused to waive "all pretrial motions," but ruling that no relief is appropriate where the record indicated that the accused had no viable motions to make).

175. *Forester*, 48 M.J. at 4.

176. *Forester* continues the *Rivera* application of *United States v. Weasler. See* United States v. Weasler, 43 M.J. 15 (1995). Courts will allow the parties to bargain and, if there is an offending term (statutorily or inconsistent with public policy), look to the record to see whether the accused received the benefit of the bargain before finding prejudice under Article 59, UCMJ.

177. *Id.* The CAAF held that accusatory stage unlawful command influence is waivable when proposed by the defense. Judge Wiss concurred in the result, but stated that the majority would "[regret] the message that this majority opinion implicitly sends to commanders." *Id.* at 21 (Wiss, J., concurring). Practitioners may have attached more impact to *Weasler*–many believe that it opens to door to negotiation of terms previously prohibited.

extended to pretrial agreement cases in general.[179] Practitioners must be careful during the negotiation phase to ensure that pretrial agreements are organized consistent with R.C.M. 705.

Second, there is no substitute for a writing. Although the CAAF did not grant relief in *Mooney*, it voiced its dislike for oral pretrial agreements. It appears that the *Mooney* terms were created in the midst of trial and the parties decided to proceed without taking a recess to secure a written pretrial agreement. It may be expedient to proceed without taking a recess to secure a written pretrial agreement, but the parties risk having an appellate court chide counsel or grant the accused relief for doing so. Practitioners must remember that noncompliance with the procedural rules in this sensitive area causes significant concern at the CAAF.[180]

Alcohol, Bug Spray, and the Free Market of Pretrial Agreements: Perlman and Bray

One of the unfortunate by-products of the CAAF's earth shattering opinion in *United States v. Weasler*[181] is the idea that R.C.M. 705 now permits the government and the defense to negotiate, agree to, and approve any and all terms imaginable in pretrial agreements. This is not the interpretation of the law that the CAAF intended in *Weasler*. Further the CAAF has reminded practitioners that the medium for negotiation is a "qualified free market" with both sides standing on a level playing field. Two 1998 cases signify this trend.[182]

In *United States v. Perlman*,[183] the CAAF reviewed a pretrial agreement term that appeared to release the government from the obligation to forward a vacation of suspension action to the general court-martial convening authority for review and action.[184] In exchange for his guilty pleas at a special court-martial, the accused secured a pretrial agreement that required the convening authority to suspend all confinement in excess of thirty days.[185] If the accused committed post-trial misconduct, the agreement appeared to release the convening authority from the sentence limitation.[186] The agreement also provided that the hearing provisions of R.C.M. 1109 would apply to any action contemplated that resulted from post-trial misconduct.[187]

The court-martial sentenced the accused to reduction to E-1, forfeitures, a Bad-Conduct Discharge, and confinement for fourteen weeks.[188] The accused served the thirty days, and after returning to the base, committed additional misconduct by consuming alcohol in his barracks. The special court-martial con-

178. *See* United States v. Bartley, 47 M.J. 182 (1997). *See also* Coe, *supra* note 162, at 50.

179. *See* United States v. Benitez, 49 M.J. 538 (N.M. Ct. Crim. App. 1998) (holding that the government may not propose a term that requires the accused to waive statutory or constitutional speedy trial rights). It was clear from the record that the accused had a viable Article 10 motion. *See* UCMJ art. 10 (West 1999) (requiring the government to exercise due diligence, upon arresting or imposing pretrial confinement, to "inform him of the specific wrong of which he is accused and to try him or to dismiss the charges and release him"). *See also* United States v. Williams, 49 M.J. 542 (N.M. Ct. Crim. App. 1998) (holding that a pretrial agreement was valid wherein the government agreed to suspend forfeitures and waive automatic forfeitures when the accused was not entitled to pay and allowances upon conviction). The fact that *neither* side was aware of a new Department of Defense Regulation, which mandated forfeiture of pay and allowances of service members on legal hold who are later convicted, was important. Because the government was not aware of the regulation, it could not unlawfully induce the accused into acceptance. While both cases may eventually end up at the CAAF, the NMCCA opinions are indicative of the exacting reviews in the wake of *Weasler* and *Rivera*. *See also* United States v. Acevedo, 46 M.J. 830 (C.G. Ct. Crim. App. 1997) (holding that term in pretrial agreement requiring the government to suspend for 12 months and then remit a dishonorable discharge did not preclude approval of an adjudged bad-conduct discharge).

180. Practitioners should also remember that the *Mooney* and *Forrester* involved *specified issues*. The CAAF thought them important enough to raise *sua sponte*.

181. 43 M.J. 15 (1997). *See* Major Ralph H. Kohlmann, *Saving the Best Laid Plans: Rules of the Road for Dealing with Uncharged Misconduct Revealed During Providence Inquiries*, ARMY LAW., Aug. 1996, at 3 n.70 (pointing out the beginning of the trend, but not adopting the view that everything is subject to negotiation).

182. One other case has "fair market" implications, however, it is an intermediate service court case and its impact cannot be truly assessed until the CAAF has an opportunity to review it. United States v. Pilkington, 48 M.J. 523 (N.M. Ct. Crim. App. 1998) (holding that an accused has the right to enter into an enforceable post-trial agreement with the convening authority when the parties decide that such an agreement is mutually beneficial).

183. 48 M.J. 353 (1998) (sum. disp.).

184. *See* United States v. Perlman, 44 M.J. 615 (N.M. Ct. Crim. App. 1996). *See also* UCMJ art. 72(b) (providing the substantive and procedural law for vacating of suspensions). In conjunction, R.C.M. 1109(d)(2)(D) establishes a two-step process for vacation actions. Vacation actions involving a general court-martial sentence or a suspended special court-martial sentence including a bad-conduct discharge must be forwarded to the general court-martial convening authority after a hearing on whether the probationer violated the conditions of suspensions. The general court-martial convening authority will determine whether to vacate the suspension after reviewing the hearing officer's recommendation. The hearing officer is usually the special court-martial convening autho rity. *See* MCM, *supra* note 50, R.C.M. 1109(d)(2)(D).

185. United States v. Perlman, 44 M.J. at 615, 616 (N.M. Ct. Crim. App. 1996).

186. *Id.*

187. *Id.* at 616.

188. *Id.*

vening authority (SPCMCA) vacated the suspension and the accused served the remainder of the confinement. Obviously, the government and the defense had different interpretations of the meaning and the intent of the term. On appeal, the NMCCA held that the provision purporting to release the SPCMCA from the two-step R.C.M. 1109 vacation process was invalid. The court held that Article 72, UCMJ, and R.C.M. 1109 contain a congressionally mandated procedural right that has the same impact as a constitutionally protected procedural right.[189] Moreover, the NMCCA held that this congressionally mandated right was one that the accused did not have the authority to waive.[190]

The CAAF's summary disposition affirmed the NMCCA result, applying the new rule of *United States v. Smith*.[191] The summary disposition, however, nudged open the door to another test case on whether a waiver of the right to a complete vacation proceeding might be an appropriate term in a pretrial agreement. Employing equivocal language, the CAAF noted that the NMCCA "did *not err* in holding [that] the special court-martial convening authority wrongfully repudiated the pretrial agreement."[192] The CAAF further noted that it expressed "no opinion as to whether such a procedure might be waived on an appropriate record,"[193] citing *United States v. Rivera*[194] to support its rationale.

Previously, *Perlman* was interpreted as a case that indicated that an accused could not introduce a term "where there is a strong indication that Congress created a nonwaivable substantive right, no matter what great benefit accrues to the accused."[195] The NMCCA took a very paternal view of the facts and the term in *Perlman*. The CAAF appears to take an expansive or "qualified free market" view of the case. The summary disposition ostensibly permits an accused to bargain away R.C.M. 1009 rights as long as the record indicates that there are no violations of the *Rivera* Rule.[196] While the CAAF's determination is less paternal, practitioners should be cautious about including vacation proceeding waivers in pretrial agreements. At a minimum, the government should ensure that all parties fully understand the meaning and effect of the term in light of the NMCCA's opinion in *Perlman*. The government might decrease the potential for adverse appellate court review by including language in the pretrial agreement that fully explains the effect of the term.

United States v. Bray[197] also illustrates the CAAF's "qualified free market" approach to the negotiation of pretrial agreements. In *Bray*, the accused was charged, *inter alia*, with assault and battery on a five-year-old child, kidnapping that child, and committing indecent acts on the child.[198] He negotiated a pretrial agreement that limited the potential confinement to twenty years.[199] The accused completed the providence inquiry. During the sentencing proceeding, a defense witness, who was a psychiatric social worker, testified that "it was possible that appellant was not responsible for his actions because of having sprayed insecticide at some unspecified earlier period of time, thus precipitating, she ventured, a psychotic reaction akin to a similar one he had experienced in 1987."[200] The military judge, noting the possibility of a defense, informed the accused of the potential defense to the charge.[201] The military

189. *Id.* This is the authors reading of the opinion.

190. *Perlman*, 44 M.J. at 617.

191. 46 M.J. 263 (1997) (holding that a pretrial agreement term that provides for vacation proceedings and processing under Article 72, UCMJ, and R.C.M. 1109 in the event of future misconduct cannot be interpreted as waiver of the general court-martial convening authority's responsibility to review and act on a vacation).

192. 48 M.J. 353 (1998).

193. *Id.*

194. 46 M.J. 52 (1997).

195. *See* Coe, *supra* note 50, at 25, 28.

196. *See generally* Coe, *supra* note 162, at 44, 52. The *Rivera* rule, which the CAAF applied to a pretrial agreement involving a term which required to accused to waive" all pretrial motions, is as follows: an accused will not be entitled to relief from a potentially invalid or expansive term in a pretrial agreement if the accused proposed the term, benefited from the term, he or the record fails to identify a right deprived, and the record or the accused fails to show that a viable motion could have been made but for inclusion of the term in the pretrial agreement. The CAAF appears to view the two-step vacation process as falling outside the rule of United States v. Mezzanato. *See* United States v. Mezzanato, 513 U.S. 196 (1995) (holding that some rights are not subject to bargaining, as they involve rights are "so fundamental to the reliability of the fact-finding process that they may never be waived without irreparably discrediting the system").

197. 49 M.J. 300 (1998). While the article does not review ineffective assistance, practitioners should review *Bray* to ascertain how the CAAF reviews ineffective assistance of counsel in the context of pretrial agreement negotiations.

198. *Id.* at 301.

199. *Id.* at 307.

200. *Id.* at 302. The majority opinion notes that the witness testified "undismayed by a lack of education, training, or credentials in the realm of toxicology or psychiatry . . . ." *Id.*

judge also informed the accused of his right to withdraw his plea and the meaning and effect of that action.[202] After a short recess and receipt of counsel's advice, the accused withdrew his plea.[203] Shortly thereafter, the accused negotiated a new pretrial agreement with the convening authority–but this time the agreement only limited the accused's confinement to thirty years.[204] The military judge sentenced the accused to thirty-seven years of confinement.[205] On appeal, the CAAF considered whether the accused was prejudiced when the convening authority increased the quantum portion by ten years.

The CAAF held that when an accused withdraws from a pretrial agreement, especially after receiving the benefit of counsel's tactical advice, he is left to the unpredictable forces of the market in negotiating a second pretrial agreement.[206] A convening authority can increase the sentence cap without violating the spirit and intent of R.C.M. 705,[207] absent any defense reliance on the original pretrial agreement. In holding that the accused was not prejudiced, the CAAF noted that this rule was neither new nor unique to the military.[208]

In addition, the CAAF noted the disparity of authority between an accused and a convening authority to withdraw from a pretrial agreement. Rule for Courts-Martial 705(d)(4) grants an accused almost unlimited authority to withdraw from a pretrial agreement.[209] Conversely, R.C.M. 705 (d)(4)(B)[210] provides that a convening authority can only withdraw from a pretrial agreement in certain circumstances. The relative positions of the parties, as specified in the *Manual*, give an accused the advantage by severely restricting a convening authority's right to withdraw from a pretrial agreement–the government and the defense are on a level playing field.

The CAAF easily resolved the issue. In doing so, the Court noted that the accused: (1) had the benefit of a level playing field regarding withdrawal under the *Manual*, (2) decided to forego the military judge's offer to reopen the providence inquiry, (3) had the benefit of informed counsel's advice, (4) received two explanations of his rights from the military judge based on a term in the pretrial agreement that dealt specifically with withdrawal of his pleas, and (5) still received a substantial benefit from the second pretrial agreement.[211]

Practitioner Tips and Considerations

Regarding practice considerations, *Bray* reminds defense counsel to be careful when introducing evidence during the sen-

201. *Id.*

202. *Id.*

203. *Id.* at 303.

204. *Id.*

205. *Id.*

206. *Id.* at 308.

207. MCM, *supra* note 50, R.C.M. 705.

208. Bray, 49 M.J. at 308 (citing American Bar Association Standard for Criminal Justice 3-4.2(c); United States v. Penister, 25 M.J. 148 (C.M.A. 1987)).

209. MCM, *supra* note 50, R.C.M. 705 (d)(4). This rule provides that an accused "may withdraw from a pretrial agreement at any time; however, the accused may withdraw a plea of guilty or a confessional stipulation entered pursuant to a pretrial agreement only as provided in R.C.M. 910(h) or 811(d), respectively." *Id.* Pleas are normally entered in connection with a pretrial agreement in courts-martial.

210. *Id.* R.C.M. 705(d)(4)(B). This rule provides:

> [A convening authority can withdraw from a pretrial agreement} at any time before the accused begins performance of promises contained in the agreement, upon failure by the accused to fulfill any material promise or condition in the agreement, when inquiry by the military judge discloses a disagreement as to a material term in the agreement, or if findings are set aside because a plea of guilty entered pursuant to the agreement is held improvident on appellate review.

Id.

211. *Bray*, 48 M.J. at 308. The CAAF noted that the accused received a seven-year sentence reduction under the second pretrial agreement. One may note the importance of knowledge–the CAAF acknowledged that the accused was fully apprised of the impact of withdrawal and was well informed about the "bug spray" defense after counsel had an opportunity to investigate it. Having full knowledge of his rights led the CAAF to conclude:

> We perceive no fundamental unfairness or inequity in these circumstances which would reasonably justify relieving appellant of his own voluntary decisions (citations omitted). A criminal accused may face many difficult choices in the criminal justice system, but that does not render that process constitutionally unfair (citations omitted). Finally, the accused has not shown that he relied to his detriment on the first agreement . . . .

Id.

tencing hearing. While the defense sought to introduce the psychiatric social worker's testimony for mitigation purposes only, it still raised a defense. Better witness preparation may have produced better results. Here, the accused was deprived of a ten-year reduction of his confinement because of a sentencing witness' testimony.

Finally, *Bray* and *Perlman* indicate, and apparently resolve, the CAAF's position on "Freedom's Frontier" regarding the application of *Weasler* and the free market approach to pretrial agreements. *Perlman* appears to revive the view that the door is open to waiver of almost anything[212] if the parties do not violate *Rivera*. *Bray* reiterates that an accused's decisions in the area of pretrial agreements, done with the benefit of counsel, will foreclose an accused from an appellate argument that he was somehow prejudiced by that decision. Practitioners, therefore, have a clear picture of the CAAF's position in this area of the law.

Peremptory Challenges: A Complete Circle

While the CAAF was relatively quiet in the areas of voir dire and challenges,[213] it delivered a significant decision in the area of peremptory challenges. In doing so, it aligned itself with the present civilian federal court application of *United States v. Batson*.[214] In *United States v. Ruiz*,[215] the CAAF completed the circle[216] of *Batson's* application to courts-martial. At the same time, it opened a Pandora's box regarding the appropriate procedure to resolve *Batson* issues involving post-trial affidavits.

In *Ruiz*, the accused was convicted of adultery and fraternization.[217] After voir dire and causal challenges, the trial counsel exercised his peremptory challenge against the only female member of the panel.[218] The defense objected under *Batson*, "asserting that the challenge was sexually motivated to eliminate the prospect of a female."[219] While the Supreme Court had delivered *J.E.B. v. Alabama ex rel. T.B.*,[220] the CAAF had not addressed the application of *Batson* to gender, nor could either counsel obtain a copy of the case for the military judge to review before ruling on the *Batson* objection.[221] The military judge ruled that *Batson* only applied to race-based peremptory challenges and refused to require the trial counsel to state a gender-neutral reason supporting the peremptory challenge.[222]

The AFCCA refused to grant relief, holding that when a military judge considers a *Batson* objection based on gender, the *per se* rule of *United States v. Moore*[223] does not apply. The rationale was that *Batson* is based on racial discrimination, not gender discrimination. In addition, while gender might be a pretext for racial discrimination, the court noted that there are a small percentage of females in the military and serving on a panel indicates that the government peremptory challenge against a female in a rape case was exercised in good faith.[224]

In 1988, the CAAF widened the frontier of military justice–it began to apply *Batson* incrementally to the military justice

212. Practitioners must remember that the appellate court will ask whether the term is in conflict with R.C.M. 705, public policy, and *United States v. Mezzanato*.

213. The big issue in causal challenges last year involved the appropriate application of the implied bias doctrine to the military justice system. *See generally supra* note 162, at 74.

214. 476 U.S. 479 (1986). The CAAF aligned itself with federal civilian court application of *Batson* but retained prior military case law establishing restrictions on the application of *Batson* to courts-martial. *See infra* note 230 and accompanying text.

215. 49 M.J. 340 (1998).

216. *See* Coe, *supra*, note 162, at 25 (discussing military cases and rationale involving the application of *Batson* to the military justice system).

217. The accused was a captain. He was sentenced to a dismissal and a reprimand. *Ruiz*, 49 M.J. at 340, 341.

218. *Id.* at 342.

219. *Id.*

220. 511 U.S. 127 (1994) (holding that gender is a suspect classification under *Batson*).

221. 49 M.J. at 343.

222. *Id.* at 342. The military judge agreed to reconsider his ruling pending receipt of a copy of the case. Because the case was tried in an overseas jurisdiction, counsel could not obtain a copy of the case. The "matter was never mentioned again" and the trial proceeded to completion. *Id.*

223. 28 M.J. 366, 368 (C.M.A. 1989) (holding there is no requirement for an objecting party in a *Batson* scenario to provide extrinsic evidence of intentional discrimination in courts-martial).

224. *See* United States v. Ruiz, 46 M.J. 503, 508 (A.F. Ct. Crim. App. 1997). According to the AFCCA, females make up less than 20 percent of the military population. This produces less female membership on a panel. In a rape case, therefore, one would logically conclude that the government would want a female member on the panel. This led the court to conclude that there are situations (for example, a *government* peremptory challenge against a female in a rape case) where the application of *Batson* would yield "absurd results." *Id.*

system.[225] In 1989, it fashioned the *per se* "automatic trigger" rule of *United States v. Moore*,[226] which eliminated the requirement for the party making a *Batson* objection to produce evidence of discrimination. Last year, in *United States v. Witham*,[227] the CAAF applied *Batson* to the defense and to situations involving gender when the military judge *called on the party making a peremptory challenge* to provide a supporting reason for that challenge. In *Ruiz*, the CAAF completed the *Batson* circle[228] in the military justice system–it set aside the AFCCA's determination and held that *Batson* applies in all gender situations, whether the military judge requests a reason supporting the peremptory challenge or not.[229] Counsel making a peremptory challenge against a female court member must now be prepared to give a gender-neutral reason supporting the challenge under *Batson*.[230]

While *Ruiz* appears to complete the circle of *Batson's* application to courts-martial, it caused two judges to vigorously dissent. Judge Sullivan noted that the majority's retroactive application of the *Moore per se* rule diverged from specific wording in *Moore*. He stressed that the *Moore per se* rule itself departs from *Batson* and was to be applied, according to the *Moore* majority, "after today"–meaning the date of the *Moore* decision (10 August 1989).[231] Consistent with the incremental and conservative approach that the CAAF has taken in *Batson* jurisprudence, Judge Sullivan opined that the *Witham* rule should also be applied to cases occurring after the date of the *Witham* decision (30 September 1997.)[232] In addition, Judge Sullivan disagreed with the majority's decision to remand the case for a *DuBay*[233] hearing to determine the essential findings of fact that support the peremptory challenge. He noted that there was no dispute that the trial counsel exercised his peremptory challenge because the member was a contracting officer whom he believed would hold the government to a higher standard of proof than normally required.[234] Judge Sullivan intimates that the majority's *DuBay* approach is inconsistent with recent case law permitting an appellate court to resolve issues when there are noncompeting affidavits concerning what occurred at a court-martial.[235] Although not specifically stated in his dissent, Judge Sullivan's view can also be seen as criticism of the majority for departing from a practice that is generally accepted in the civilian federal courts. Specifically, some federal circuits permit the parties to file competing affidavits in *Batson* challenge situations for appellate resolution.[236]

225. *See* United States v. Santiago-Davila, 26 M.J. 380 (1988) (holding that an accused has an Equal Protection and Due Process right to be tried by a jury from which no racial group has been excluded).

226. 28 M.J. 366 (1989).

227. 47 M.J. 297 (1997).

228. *See* Coe, *supra* note 162, at 72-74. The other important case involving application of *Batson* is *United States v. Tulloch*. United States v. Tulloch, 47 M.J. 283 (1997) (holding that a trial counsel who make a peremptory challenge must provide a reason that is plausible, reasonable, and sensible upon a *Batson* objection). By "completing the circle" this article suggests that the CAAF has placed military justice on the same plane as the civilian federal courts in the application of *Batson*, taking into account that *Batson* is applied differently in the military justice system. One could argue that this is not true with regard to religion. According to the CAAF, *Batson* does not prohibit religion based peremptory challenges. *See* United States v. Williams, 44 M.J. 482 (1996). There are no reported cases in which a military judge has ruled otherwise. In the federal district courts, however, there are a few cases indicating that if religion has been "sufficiently intertwined with the criminal charges" then religion would be a sufficient basis for a *Batson* inquiry. *See* United States v. Sommerstein, 959 F. Supp. 592 (E.D.N.Y. 1997); United States v. Stafford, 136 F.3d 1109 (7th Cir. 1998); United States v. Greer, 939 F.2d 1076 (5th Cir. 1991). Some states have recently dealt with the issue. *See* Thorson v. State, 721 So. 2d 590 (Miss. 1998); People v. Martin, 75 Cal. Rptr. 2d 147 (Cal. Ct. App. 1998). It appears that the CAAF has not had a meritorious opportunity to explore this issue–or may not have fully appreciated the impact of religion to the African American Mason organization when it decided *Williams*.

229. In *United States v. Witham* the military judge called on defense counsel to provide a gender-neutral reason to support its challenge against the only female member of the panel. *See* United States v. Witham, 47 M.J. 297 (1997). The defense failed to provide the gender-neutral reason and the military judge denied the peremptory challenge. In *Ruiz*, the CAAF reasoned that "[b]ecause the military judge in *Witham* required the explanation at trial, we had no occasion to formally to reach the question of whether the *Moore per se* rule extended to cases of potential gender-based discrimination. For the very same reasons as articulated in *Moore*, however, we now hold that it does." *Ruiz*, 49 M.J. at 344.

230. *Id.*

231. 49 M.J. 348.

232. *Id.*

233. United States v. DuBay, 37 C.M.R. 411 (C.M.A. 1967) (providing for post-appellate consideration of cases by a trial judge to resolve factual issues).

234. *Ruiz*, 49 M.J. at 348-49. The majority indicated that a *DuBay* hearing was required because a "post-trial affidavit is invariably an inferior substitute for resolving factual controversies." *Id.* at 344. The majority noted that the *DuBay* judge would be "better equipped than the trial judge" to deal with: (1) the fact that the voir dire did not deal with the contracting officer issue; (2) the AFCCA's erroneous implication that the only reason for the peremptory challenge was the contracting officer-higher standard of proof issue; and (3) the AFFCA's failure to consider the trial counsel's first reason ("that the court member box is very small and, especially if there is a large panel, gives the members minimal space to properly hear a case"). *Id.* at 344. According to the CAAF, these facts and the failure to properly assess them, according to the CAAF, "becloud[ed] the AFCCA's conclusions that the government gave a non-gender basis for the peremptory challenges." *Id.* at 345.

235. *See generally* United States v. Ginn, 47 M.J. 236 (1997) (holding that an appellate court is not authorized to determine questions of fact concerning a post-trial claim solely on the basis of conflicting affidavits submitted by the parties).

Judge Crawford also strongly dissented, writing that the extension of *Moore* was unnecessary. She stressed that there was no "historical basis" for application of the *Moore per se* rule in the first place because the "[p]attern of using peremptory challenges to prevent minorities from sitting on juries . . . could not exist in the military because each side is limited to a single peremptory challenge."[237] She also concluded that the majority opinion would require that the issue of gender discrimination be litigated at every trial.[238]

Practitioner Tips and Considerations

Ruiz provides clear guidance for counsel in *Batson* situations and is consistent with previous decisions in this area of the law. Meticulous preparation is essential to execute effective voir dire and challenges. Counsel must be prepared to provide a sensible, plausible, and clear reason for peremptory challenges–one that is both race and *gender* neutral. In addition, *Ruiz* indicates the CAAF's willingness to be a "leader in eradicating racial discrimination"[239] and other forms of unlawful discrimination. There is no reason why *Batson* should not apply to the military justice system through the *Moore per se* rule. By requiring an explanation of all peremptory challenges upon a *Batson* objection, the CAAF assures that there are no violations, consistent with the Supreme Court's 1986 mandate. The maturation of *Batson* jurisprudence since 1986 in courts-martial, and especially over the last three years, has expanded the rights for all who are involved in the military justice system.

Conclusion

"If we want to talk about freedom . . . we must mean freedom for others as well as ourselves, and we must mean freedom for everyone inside our frontiers . . . ." [240]

The last three years at the CAAF and the intermediate service courts have been significant regarding pretrial and trial procedure. In 1996, the courts recognized the military judge's authority to control voir dire[241] and the *qualified sacrosanct nature* of the providence inquiry by prohibiting its use to convict an accused of a greater offense in a mixed plea case.[242] In 1997, the courts broke new ground by giving an accused a qualified right to an open Article 32 investigation,[243] and modifying and extending the application of *Batson* to the government[244] and the defense.[245]

Most recently, the courts have changed the face of the court member panel by holding that the criteria for court member duty is identical with the criteria that is used to select commanders. Additionally, only soldiers in grades E-2 and below may be systematically excluded from panel membership. The CAAF reaffirmed the "qualified free market" approach to the negotiation of pretrial agreements. It expanded the impact of military jurisprudence by applying a constitutional analysis to a problem that appeared to be military in nature. Finally, it completed the circle of *Batson's* application by extending the *Moore per se* rule to gender.

Most, if not all, of these decisions have resulted in significant expansion of the government's or the accused's rights, not just a restatement of existing law. All of the decisions have provided practitioners with good guidance to execute their missions. On a structural or fundamental level, CAAF opinions appear to establish the boundaries on the frontier of military justice. The decisions in the last three years have shaped the basic foundation of the Twenty-First Century military justice system by indicating that the source of procedural and substantive rights will not only have a purely military genesis. Rather, the courts will more readily adopt and apply civilian federal procedures and jurisprudence, and interpret the law expansively where statutes permit.[246] The impact of those decisions

236. Judge Crawford raised this point in her dissent. Currently, the Second, Fourth, Fifth, Sixth, and Seventh Circuits permit this practice. *See Ruiz*, 48 M.J. at 350 (Crawford, J., dissenting). *See also* United States v. Vasquez-Lopes, 100 F.3d 996 (9th Cir. 1996) (unpub.); United States v. Tipton, 90 F.3d 861 (4th Cir. 1994).

237. *Ruiz*, 49 M.J. at 351. Also, Judge Crawford provides an interesting opinion to her dissent–she opines that *Batson* should never have been applied to the military justice system in the first place. She concludes that Article 25, UCMJ, contains criteria for court member selection and is part of a system of checks and balances to ensure that a member is not excluded from panel membership on the basis of unlawful discrimination. *Id.* at 352 (Crawford, J., dissenting).

238. *Id.* Essentially, Judge Crawford indicates that the majority opinion requires that the issue be litigated at every trial. One should note, however, that the majority indicated there must still be an objection to the peremptory challenge and "[c]ertainly it is no more difficult for counsel to explain a challenge involving gender that it is for one involving race." *Id.* at 344.

239. United States v. Santiago-Davila, 26 M.J. 380, 390 (1988).

240. Wendell L. Wilkie, One World, *quoted in*, George Seldes, The Great Quotations at 385 (1967).

241. *See* United States v. Williams, 44 M.J. 482 (1996); United States v. Jefferson, 44 M.J. 312 (1996).

242. United States v. Ramelb, 44 M.J. 625 (Army Ct. Crim. App. 1996).

243. *See* ABC, Inc. v. Powell, 47 M.J. 363 (1997).

244. *See* United States v. Tulloch, 47 M.J. 283 (1997).

245. *See* United States v. Witham, 47 M.J. 297 (1997).

adopting this course of action,[247] especially the 1998 cases of *United States v. White*,[248] *United States v. Price*,[249] *United States v. Reynolds*,[250] and *United States v. Ruiz*,[251] will be felt for years to come.

246. The CAAF does this to ensure that a statute is not applied with form elevated over substance. Unfortunately, many times this results in the accused losing the ability, on appeal, to prevail based on a technical argument. *See generally*, *supra* note 162, at 44,. *See also* United States v. Reynolds, 49 M.J. 260, 264 (1998).

247. *See* United States v. Mayfield, 45 M.J. 176 (1996); United States v. Turner, 47 M.J. 348 (1997) (discussing court-martial personnel). *See also* United States v. Rivera, 46 M.J. 52 (1997) (discussing the area of pleas and pretrial agreements).

248. 48 M.J. 251 (1998).

249. 48 M.J. 181 (1998).

250. 49 M.J. 260 (1998).

251. 49 M.J. 340 (1998).

Watchdog or Pitbull?: Recent Developments in Judicial Review of Unlawful Command Influence

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> *Implied bias is reviewed through the eyes of the public . . . . The focus 'is on the perception or appearance of fairness of the military justice system.'*

United States v. Youngblood, 47 M.J. 338 (1997) (citations 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. No doubt the personal presentation of that subject by the commander is impressive, but that is as it should be. The question is not his influence but, rather, whether he chartered it through forbidden areas.*

United States v. Youngblood, 47 M.J. 338 (1997) (Crawford, J., dissenting) (citing *United States v. Danzine*, 30 C.M.R. 350, 352 (C.M.A. 1961)).

Introduction

The recent spate of high-profile courts-martial in the military services[1] has brought heightened attention to the unique role of the military commander in the world of military justice. The dilemma facing commanders was recognized by the then Court of Military Appeals[2] in 1961. This dilemma has continued to bedevil the military justice system for the past thirty-eight years.

Compounding the problem for today's commander is the recent crush of the media and general public's interest in military justice and its perceived differences from civilian criminal justice systems. Perhaps the most scrutinized distinction between the two systems is the broad role of the convening authority, in particular the tri-partite power they wield over which cases to prosecute, the level of court (and therefore potential sentence), and personal selection of the members who will serve on the court. This power is commonly referred to as command influence, or, depending on one's point of view, unlawful command influence.

Allegations of command influence were common to almost every recent high-profile case, including the courts-martial of First Lieutenant Flynn, Sergeant Major McKinney, the Aberdeen and Leonard Wood trainee abuse cases, and the most recent trials of Major General Hale and the Marine aviators involved in the Aviano cable car incident. The high-profile nature of these cases made them particularly susceptible to such allegations. This is due partly to the media and the general public's thirst for on-the-spot, up-to-the-minute, information. From the media and general public's perspective, there is no better source for that information than *the commander*, or better yet, *the Pentagon.* When senior commanders comment on cases early in the process, prior to action or recommendation by subordinate commanders, allegations of unlawful command influence are almost certain to follow.

While none of the above cases has resulted in reported opinions addressing unlawful command influence, they do raise red flags for anyone associated with the prosecution or defense of a high-profile case. Judge advocates confronted with a high-profile case must take steps to ensure that commanders at every level understand the significance and the potential impact of pretrial comments or conduct that may be viewed as unlawful command influence.

Prior to analyzing decisions from the most recent term, there are three other military justice trends relating to unlawful command influence that are worth discussing. The most obvious trend is the steep ten-year decline in court-martial prosecutions in the Army. In fiscal year 1989, the Army tried 3985 courts-martial, including 1585 general courts-martial. By fiscal year 1998, those numbers had decreased to 1461 and 685, respectively.[3] Jurisdictions that historically tried ten, twenty, or thirty cases a year, are now trying sometimes as few as two or three cases a year. Consequently, senior commanders and staff judge

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1. For example, United States v. McKinney, United States v. Flynn, the Aberdeen sexual assault cases, the Aviano pilot cases, Tailhook, and most recently, the trial of Major General David Hale.

2. On 5 October 1994, the United States Court of Military Appeals was renamed the Court of Appeals for the Armed Forces.

3. Statistics provided courtesy of the Clerk of Court, Army Court of Criminal Appeals.

advocates (SJAs) in these prosecution-starved jurisdictions may be tempted to over-manage the one or two cases that do arise during their brief tours.

Such top-down management of courts-martial clearly violates the fundamental tenet of military justice that demands independent discretion at every level of command.[4] It is easy to understand why commanders are inclined to operate in such a fashion. Giving (and receiving) guidance from the top down is how the military generally operates. Only the practice of military justice requires senior commanders to refrain from giving "commander's guidance" or "commander's intent" to their subordinates. Since the practice of military justice runs counter to the general way the Army does business, judge advocates, particularly those at installations with a reduced criminal justice load, must ensure that senior commanders "hold their fire" until cases work their way up to their level.

Another recent change in Army life that may foster an atmosphere conducive to unlawful command influence is the increased number of relatively short tour deployments of military forces. Many of these deployments are performed with split operations between rear detachments and forward-deployed units. Such "split-ops" are ripe for unlawful command influence. It is not uncommon for deploying units to leave their "problem" soldiers with the rear detachment rather than disrupt the deploying force. While most units leave these discipline problems completely to the discretion of the rear detachment commander, some commanders succumb to the temptation of providing the often less experienced rear detachment commanders specific instructions on how to dispose of these cases involving "problem" soldiers.

Other commanders on short deployments may choose to maintain open lines of communication with the rear commander at the home station throughout the period of deployment. While this may be a worthy practice for many important aspects of command, it clearly raises the specter of unlawful command influence if these commanders influence the military justice decisions of the stay behind commander. Judge advocates (who may themselves be less experienced) must take extra precautions to ensure that rear detachment commanders understand that it is their responsibility to make justice-related decisions while in command. They should not unduly concern themselves with what they think the deployed commander would want if he were still in command.

The final trend of note are the recent initiatives to exclude the convening authority from the military justice process. Two major changes have been suggested involving the convening authority'S power to select court members and to decide which cases will be referred to trial. Congress recently directed the Secretary of Defense and service secretaries to consider alternative methods of court member selection, including the possibility of some type of random selection process.[5] A report on the feasibility of alternative methods was due to Congress by 15 April 1999. Another proposal, discussed at various levels, would transfer authority to refer cases to trial from the convening authority to a central prosecutor.[6] While neither proposal appears likely to be implemented in the near future, they nevertheless reflect a growing sentiment among the civilian leadership that military commanders are unable to manage (even with the advice and support of judge advocates) a fair and impartial system of military justice.[7] This growing sense of distrust among the military's civilian leadership, and critical media reports oR the practice of military justice, have clearly put supporters and military justice practitioners on the defensive.

Exactly where these trends will lead is far from clear. One thing remains certain, however, decisions from the Court of Appeals for the Armed Forces (CAAF), as they have for almost fifty years, will continue to play a critical role in the future shape of military justice. In particular, the CAAF's resolution of command influence issues will likely take center-stage.

The current public spotlight on the military justice system raises a difficult issue for military appellate courts–when military courts conclude that certain conduct manifests unlawful command influence, do such opinions bode well or poorly for the future of the current system? From one point of view, the answer is easy–such opinions reflect poorly upon the military justice system, as the public will note an incident where the system failed. Yet, if the problem is viewed from a much broader perspective, it may lead to a different conclusion. By concluding that certain conduct constitutes unlawful command influence and issuing an appropriate remedy (dismissal, a rehearing, sentence relief), military appellate courts demonstrate their ability to stand guard against the *mortal enemy*[8] of military justice. Proactive decisions by military appellate courts that quash unlawful command influence prove that *the system* (the bigger system that includes military appellate courts) can and does work.

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4. *See* United States v. Hawthorne, 22 C.M.R. 83 (C.M.A. 1956).

5. *See Strom Thurmond National Defense Authorization Act for Fiscal Year 1999*, H.R. 3616, 105th Cong. (1998). *See also* Major Guy Glazier, *He Called for His Pipe, and He Called for His Bowl, and He Called for His Members Three—Selection of Military Juries by the Sovereign: Impediment to Military Justice*, 157 MIL. L. REV. 1 (1998).

6. *See* Brigadier General John S. Cooke, *The Twenty-Sixth Annual Kenneth J. Hodson Lecture: Manual for Courts-Martial 20X*, 156 MIL. L. REV. 1 (1998).

7. In the 106th Congress there are 136 House members with military experience (down 4); 43 Senate members with military experience (down 5). One-fifth of the Senate-approved Clinton appointees have military experience.

8. *See* United States v Thomas, 22 M.J. 388, 393 (C.M.A. 1986).

Yet, what is to be made of decisions in which the appellate courts conclude that the conduct in question *does not* constitute unlawful command influence? Do such opinions prompt Congress and the general public to lose confidence in the independence and oversight capabilities of the military appellate court system? Stated simply, do the opinions from the military appellate courts serve to eradicate unlawful command influence or simply fan its flames? Which is better for the system–a decision that finds unlawful command influence, or one that does not?

Further complicating the equation is the fact that these decisions are not simply a matter of determining the existence or non-existence of unlawful command influence. Adding fog to the battlefield of unlawful command influence is the fact that the *mere appearance* of unlawful command influence can be just as detrimental to the system as actual command influence.[9] In fact, the CAAF and service courts decided three such "appearance" cases during its most recent term.

Appearance is Everything

Three cases–*United States v. Youngblood*, *United States v. Rome*,[10] and *United States v. Villareal*,[11] support the view that "appearance is everything" when it comes to unlawful command influence. Both *Youngblood* and *Rome* involved issues of implied bias of court-members. *Villareal,* on the other hand, addressed one command's efforts to "head off" an allegation of unlawful command by transferring the case to a different convening authority during the accusative stage. Although the Navy-Marine Corps Court of Criminal Appeals (NMCCA) affirmed Villareal's conviction, it felt compelled, based purely on appearances, to substantially reduce the sentence of the accused.[12]

Several days prior to Airman First Class Youngblood's trial, the general court-martial convening authority (GCMCA) held a staff meeting at which he and his staff judge advocate (SJA) discussed, *inter alia*, command responsibility and discipline.[13] Three officers who later served on Youngblood's court-martial panel, also attended this meeting. Both the GCMCA and SJA voiced their opinions that previous commanders in the Wing had "underreacted" and "shirked . . . [their] leadership responsibilities."[14] According to one member, the GCMCA said he "forwarded a letter to that commander's new duty location expressing the opinion that 'that officer had peaked.'"[15] Another member recalled the SJA stating words to the effect that "he thought the commander probably should have been given an Article 15 for dereliction of duty and removed from his position."[16]

At trial, the defense challenged all three members for cause. The military judge, however, granted only one challenge. On appeal, the defense asserted that the military judge abused his discretion when he failed to grant the other two challenges for cause. The majorityof the CAAF agreed[17] and set aside the sentence.[18] Stating that "implied bias is reviewed through the eyes of the public," the court observed that the focus "is on the perception or appearance of fairness of the military justice system."[19] The CAAFs focus on appearances was evident from the fact neither the SJA nor the GCMCA was ever called to testify or provide a post-trial sworn affidavit. In a similar vein, the majority was not impressed by the members' testimony that they could still give the accused a fair trial, despite having heard the harsh comments of both the GCMCA and the SJA. Noting how difficult it is for a "subordinate [to ascertain] . . . the actual influence a superior has on that subordinate"[20] the court concluded that "it was 'asking too much' to expect these members to adjudge an appropriate sentence without regard for its potential impact on their careers."[21]

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9. *See* United States v. Youngblood, 47 M.J. 338 (1997).

10. 47 M.J. 467 (1998).

11. 47 M.J. 657 (N.M. Ct. Crim. App. 1997).

12. *Id*. at 666.

13. *Youngblood*, 47 M.J. at 339.

14. *Id.* at 340.

15. *Id.*

16. *Id.*

17. In a concurring and a dissenting opinion, Judge Sullivan would have set aside the sentence on the basis of both implied bias and unlawful command influence. Based on its resolution of the implied bias issue, the majority declined to answer the unlawful command influence issue. *Id.* at 342 (Sullivan, J., concurring in part and dissenting in part).

18. *Id.* at 338. The court did not set aside the conviction. Such results, however, are not unusual when an accused pleads guilty to the charged offenses, and the unlawful command influence is determined to be unrelated to the decision to enter such a plea.

19. *Id.* at 341.

Judge Crawford's dissent highlighted the fundamental command dilemma of maintaining both good order and discipline and an impartial system of justice. She cited the eloquent 1961 opinion of Judge Latimer[22] for the proposition that the GCMCA is not required to simply stand by, deaf, dumb, and mute, while the foundations of good order and discipline within his unit crumble around him. According to Judge Latimer:

> 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. No doubt the personal presentation of that subject by the commander is impressive, but that is as it should be. The question is not his influence but, rather, whether he charted it through forbidden areas.[23]

This portion of Judge Crawford's dissent is supported by the common sense notion that if a commander is responsible for discipline, he must be given the authority to influence it. To support her argument, Judge Crawford cited several UCMJ provisions permitting, in fact requiring, commanders to provide general instructional and informational classes on military justice.[24] While it would be a stretch to conclude that Judge Crawford's reference to Article 37, UCMJ, which permits general instruction on military justice,[25] was intended to cover the type of "instruction" provided by the GCMCA and the SJA in *Youngblood*,[26] it does support the more general position that command discussions regarding the UCMJ are permissible, if not expected.[27]

Judge Crawford, however, stands on much stronger ground regarding her criticism of the majority's analysis of implied bias. Focusing on Supreme Court precedent that implied bias should only be used in "extreme situations," and that it is "virtually impossible to shield jurors from every contact or influence that might theoretically affect their vote,"[28] Judge Crawford expressed grave concerns that the majority was unnecessarily expanding the realm of implied bias. Comparing the federal and military justice systems, Judge Crawford opined that the "blue ribbon" quality of military court-martial panels calls for even rarer application of the implied bias doctrine in a court-martial.[29]

Judge Crawford's final observations regarding the effect of the majority's opinion on the trial judiciary and military court members offers a radically different twist on exactly which "appearances" the court should focus its concern. Judge Crawford criticized the majority for undercutting the moral authority and psychological support of the trial judge who had the advantage of observing the demeanor of the parties involved.[30] Citing one member's testimony that he took his oath and court-martial duty very seriously, Judge Crawford heaped additional criticism upon the majority's growing distrust of officers and NCOs to serve critical roles in the administration of military justice.[31]

The competing opinions in *Youngbood* provide a telling example of whether the CAAF's decisions serve to reduce the specter of unlawful command influence or fan its flames. By relying on a fluid concept of implied bias and public perception versus that of the military judge and court members, the majority has provided a new source of oxygen for the flames of unlawful command influence to burn.

Shortly thereafter, Judge Crawford found herself expressing similar views in a dissenting opinion in *United States v. Rome.*[32]

20. *Id.* (citing United States v. Gerlich, 45 M.J. 309, 313 (1996)).

21. *Id.* at 342.

22. United States v. Danzine, 30 C.M.R. 350 (C.M.A. 1961).

23. *Id.* at 352.

24. *See Youngblood*, 47 M.J. at 344-45 (Crawford, J., dissenting) (citing UCMJ art. 137 (West 1999)).

25. "The foregoing provisions of the subsection shall not apply with respect to (1) 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).

26. *Youngblood*, 47 M.J. at 344-45 (Crawford, J., dissenting).

27. *See* UCMJ art. 37 (requiring an explanation of the UCMJ to members upon initial entrance on active duty, and again after six months, and upon the occasion of every re-enlistment).

28. *Youngblood*, 47 M.J. at 345 (quoting United States v. Phillips, 455 U.S. 209, 217 (1982)).

29. *Id.* at 346.

30. *Id*.

31. *Id.*

Like *Youngblood*, the issue on appeal concerned the implied bias of a court member. Private First Class Rome was convicted of attempted robbery and sentenced to a Bad-Conduct Discharge and two years of confinement. During voir dire, the military judge announced that in a previous trial he had found that one of the current panel members had committed an unintentional act of unlawful command influence, and had been "kind of grilled" by Rome's current defense counsel at a prior court-martial. The defense counsel stated that she was not concerned so much that the member had committed an act of unlawful command influence, but that she had caused trouble for him in a prior high-profile case with media attention. During voir dire by the trial counsel, the member stated that the defense counsel "did a good job, in my opinion, of supporting her client," and that his previous encounter with her would not affect his ability to sit impartially in this case. No further information was developed, and the defense challenge for cause was denied. The defense preserved the issue by challenging the member peremptorily.[33]

As in *Youngblood*, a four-judge majority concluded that the military judge abused his discretion by not granting the challenge for cause on the basis of implied bias.[34] In almost verbatim language to that in *Youngblood*, the CAAF held that "*[i]n the eyes of the public, the appearance of fairness* would have been compromised by allowing LTC M to sit after being personally and professionally embarrassed by appellant's defense counsel."[35] "Allowing LTC M to sit would have been 'asking too much of both him and the system.'"[36]

Judge Crawford launched a three-pronged attack on the majority opinion. First, she stated that the majority was applying the "liberal grant"[37] mandate at the appellate level. Second, she explained that its application of the implied bias standard was too subjective to be of use. Finally, Judge Crawford believed that the majority's expansive view of implied bias called into question the ability of any officer or non-commissioned officer (NCO) to serve as a court member.[38] Common to each of Judge Crawford's concerns was the subjective application of the implied bias doctrine–that an "I know it when I see it" approach to the theory of implied bias leaves trial judges and counsel without clear guidelines.[39]

Judge Crawford's concern that the majority's opinion raises the question whether any officer or NCO can serve as a court member borders on the extreme. Nevertheless, the majority should not underestimate the potential broad impact that its opinions may have on the overall future of military justice. The relative ease with which it finds otherwise competent, honest, "blue ribbon" members unfit for court-martial duty may generate undue criticism of the military justice system and the people who are sworn to administer it fairly. As a result, the military justice system may someday become void of military participants.

In *United States v. Villareal*[40] the Navy-Marine Crops Court of Criminal Appeals also decided a case solely on the basis of appearances. Despite finding that there was no actual command influence, the Navy court reduced the accused's sentence from ten years to seven and one-half in order to "rectify the specter of apparent unlawful command influence."[41]

Aviation Ordnanceman Airman Villareal was charged with several offenses, including aggravated assault, involuntary manslaughter, and obstruction of justice.[42] The original GCMCA signed a pretrial agreement permitting the accused to avoid a murder conviction, and requiring the GCMCA to suspend any confinement in excess of five years.[43] After discussing the case with his old friend, who happened to be his senior officer, the GCMCA decided to withdraw from the pretrial

32. 47 M.J. 467 (1998).

33. *Id.* at 468-69.

34. *Id.* at 469.

35. *Id.* (emphasis added).

36. *Id.*

37. On numerous occasions the CAAF has enjoined military judges to be liberal in granting challenges for cause. *See, e.g.*, United States v. Smart, 21 M.J. 15, 21 (C.M.A. 1985).

38. *Rome*, 47 M.J. at 470-72.

39. *Id*. at 472.

40. 47 M.J. 657 (N.M. Ct. Crim. App. 1997).

41. *Id.* at 665-66.

42. The charges stemmed from playing a game similar to Russian roulette in the barracks room, in which one of the victims ended up killing himself with a bullet through the head.

43. *Villareal*, 47 M.J. at 658-59.

agreement.[44] Upon the sound advice of his SJA, the GCMCA transferred the case to a different GCMCA to avoid allegations of unlawful command influence. Although the accused attempted to reach a similar pretrial agreement with the new GCMCA, he was unable to do so, and was eventually tried, convicted, and sentenced to ten years confinement.[45]

Prior to trial, the accused filed a motion to abate the proceedings until the new GCMCA would agree to abide by the terms of the original pretrial agreement. The trial judge denied the accused's request. The military judge concluded that the decision to withdraw was not based on comments from the senior commander, but from a ten-page letter from the victim's family criticizing the original GCMCA's decision to enter into a pretrial agreement that did not include the murder charge.[46] The judge was also satisfied that the new GCMCA was not tainted by even the appearance of the original unlawful command influence.[47]

On appeal, the Navy court held that the early pretrial transfer of the case to a neutral GCMCA was a satisfactory remedy that provided the accused his basic right to individual consideration of his case by a commander who was free from unlawful command influence.[48] The court refused to order specific performance of the original pretrial agreement for two reasons. First, the court reasoned that convening authorities are free to withdraw from pretrial agreements at any time before the accused begins to perform his end of the bargain. Second, the accused offered no evidence of detrimental reliance on the original agreement during the three days it was in effect.[49]

Despite finding that the "appellant enjoyed a convening authority unaffected by any perceived command influence," a two to one majority of the court nevertheless believed that the accused was entitled to "some relief" to fulfill the court's statutory obligation to "preserve both the reality *and appearance* of fairness of the military justice system." [50] The court exercised its Article 66(c), UCMJ, power to reassess the sentence and reduced it from ten to seven years and six months of confinement. The court asserted that this action was not based on clemency, but rather on the court's "power to seek and do justice and to protect the integrity of the military justice system."[51]

The exercise of such unrestricted appellate relief, based purely on appearances, is not good for the military justice system. As noted by Judge Dombroski in his dissenting opinion, such attempts to "split the baby" have no basis in law and equity.[52] Judge Dombroski disagreed with the majority's finding that the accused was only "largely" made whole by the transfer of the case to a neutral GCMCA. According to Judge Dombroski, the accused "entered the arena once again on an even keel" and ultimately "asked for and received his day in court without taint of partiality or unlawful command influence."[53]

At the tactical trial court level, these three cases provide a rather simple lesson for defense counsel. In addition to arguing that certain conduct constitutes actual unlawful command influence, counsel should also argue that "it looks bad, your honor, and you should be concerned with more than just actual command influence." Government counsel, on the other hand, must be creative in their efforts to rebut such arguments that unlawful command influence, like beauty, is in the eyes of the beholder. Despite objective proof that no actual unlawful command influence occurred or affected the trial, the government may still find itself on the short end of the result based on guidance military judges will take from these three decisions reinforcing the importance of appearances.

On the strategic, policy making level, this trilogy of "apparent" unlawful command influence cases reveals a disturbing trend among our military appellate courts; a trend now focused on the general public's perception of military justice rather than that of the commanders, lawyers, and judges most responsible for maintaining good order and discipline in our armed forces. Having said that, it should be noted that these three decisions represent a marked contrast from previous terms in which military appellate courts raised the bar on the accused's burden to establish sufficient facts to raise the issue of unlawful command influence.[54]

44. This officer was not in favor of the deal and asked: "What would it hurt to just send it to trial and let the members decide?" *Id.* at 660.

45. *Id.* at 659.

46. *Id*. at 660.

47. *Id.*

48. *Id.* at 661.

49. *Id.* at 662.

50. *Id.* at 665 (emphasis added).

51. *Id.* at 666.

52. *Id.* at 666-67 (Dombroski, J., dissenting).

53. *Id.*

Dubay, or not Dubay, That is the Question

With the exception of "apparent" command influence cases, resolution of alleged unlawful command influence normally requires a fully developed record. This often presents appellate courts with the decision of whether to order a post-trial Article 39(a), or *Dubay*[55] hearing. This was precisely the issue in two CAAF and two service court decisions that were decided during the 1998 term.

In *United States v. Norfleet*,[56] the accused won "the battle of *Dubay*" by getting the Air Force Court of Criminal Appeals to order a *Dubay* hearing, but lost the war of establishing unlawful command influence based on the live testimony presented during the hearing. After being convicted of marijuana use and sentenced to a bad-conduct discharge and reduction to E-1, Staff Sergeant Norfleet[57] alleged, on appeal, that the SJA had improperly discouraged his deputy SJA (DSJA) from testifying on her behalf. To support her allegation, the accused provided affidavits from herself and another paralegal in the office. The SJA and the DSJA provided opposing affidavits. The Air Force Court ordered a *DuBay* hearing to resolve the conflict.[58]

Based on the live testimony of all four witnesses at the *Dubay* hearing, the trial judge found that the SJA never attempted to discourage the DSJA from testifying, and, in fact, had encouraged her to do what she thought was right.[59] Supporting the judge's finding was his observation that the affidavits submitted by the accused and her fellow paralegal were "suspiciously similar." On review, the Air Force court was convinced beyond a reasonable doubt that the SJA did not attempt to influence the testimony of his DSJA. The court agreed with the military judge and concluded that the facts pointed to "a fabrication of the allegations by a desperate appellant."[60]

A slightly different Air Force Court reached a similar conclusion in *United States v. Bradley*[61] (*Bradley II),* after reviewing the SJA's testimony in a *Dubay* hearing. In *Bradley I*,[62] the court ordered a *Dubay* hearing based on allegations that the SJA: (1) pressured a defense witness not to testify, (2) published a post-trial article in the local newspaper that tainted the convening authority, (3) engaged in conversation with the president of the court-martial during a break, and (4) rejected defense counsel's request for a verbatim transcript of the Article 32(b) investigation with a less than professional comment regarding counsel's effectiveness.[63] To support her appellate allegations, the accused submitted an affidavit from the master sergeant whom the SJA was accused of intimidating, and the SJA's memorandum denying the defense request for the verbatim transcript of the Article 32(b) investigation.[64]

Based on the SJA's memorandum, the fact the SJA authored an article that appeared in the base newspaper two weeks after trial,[65] and the unrebutted affidavit claiming the SJA had discouraged a defense witness from testifying, the Air Force Court had "grave concerns" that the accused had not received a trial free from improper command influence.[66] Sensing an "unfair atmosphere hanging over the case," the court provided the SJA a chance to tell his side of the story before reaching a conclusion concerning unlawful command influence.[67] In its order

54. *See* Lieutenant Colonel Lawrence J. Morris, "*This Better be Good": The Courts Continue to Tighten the Burden in Unlawful Command Influence Cases*, ARMY LAW., May 1998, at 49 (containing a complete review and analysis of the 1997 term of unlawful command influence cases).

55. United States v. DuBay, 37 C.M.R. 411 (C.M.A. 1967).

56. No. ACM 829280, 1998 WL 433022 (A.F. Ct. Crim. App. 1998).

57. A paralegal with 18 years service.

58. *Norfleet*, 1998 WL 55402, at *5.

59. *Id.*

60. *Id.* at *6.

61. 48 M.J. 777 (A.F. Ct. Crim. App. 1998) [hereinafter *Bradley II*]. In Judge Snyder's place was Judge Pearson.

62. 47 M.J. 715 (A.F. Ct. Crim. App. 1997).

63. *Id.* at 720. The SJA's reply included the following response to defense counsel's concern that he would be incompetent without a verbatim transcript of the victim's Article 32(b) testimony: "Unfortunately, the competency of any military or civilian defense counsel is largely beyond control of this office. Should you have further concerns about your competency, however, I urge you to notify your Chief Circuit Defense Counsel." *Id.* at 722.

64. *Id.*

65. *Id.* at 721.

66. *Id.* at 722.

67. *Id.* at 723.

directing a *Dubay* hearing, the court provided detailed instructions on each issue the court wanted the trial judge to address.[68]

Based on the record developed at the *Dubay* hearing, the *Bradley II* court had little trouble resolving the allegations of command influence in favor of the government.[69] Observing that the entire issue might possibly have been avoided had the government provided an affidavit from the SJA during *Bradley I*,[70] the court concluded that the SJA's testimony was much more credible than that of the witness he allegedly discouraged from testifying.[71] The court was also convinced that the article that the SJA wrote for the local paper did not constitute unlawful command influence since there was no evidence that the GCMCA ever considered it prior to taking action on the case.[72] The court was also satisfied that the SJA's conversation with the president of the court concerned matters that were unrelated to the trial at hand. It also helped that the SJA brought the discussion to the attention of the defense counsel who chose not to pursue the issue at trial. The court's only remaining concerns were the SJA's comments regarding the competence of the defense counsel. Finding the comments "ill-advised," the majority nevertheless empathized with the SJA, finding his remarks to be the result of frustration as opposed to evidence of a bias towards the accused."[73]

The lesson for government counsel to take from *Bradley I* and *II* is that aggressive appellate advocacy may help avoid the need for costly, troublesome *Dubay* hearings. By obtaining affidavits from all parties involved, the government may be able to provide the appellate courts with a sufficient factual basis to resolve some allegations of error without the need for an additional post-trial proceeding.[74] Although such affidavits may not always prevent the appellate courts from ordering such hearings, they will certainly ensure that courts do not decide the issue on the basis of unrebutted defense affidavits. In *Bradley I*, the court was quick to suspect the SJA of unlawful command influence based on the unrebutted defense submissions. In fact, the court was quite critical of the SJA's performance in *Bradley I*. Only after it reviewed the SJA's *Dubay* testimony, did the *Bradley II* court became somewhat apologetic for its critical dicta regarding the SJA's behavior in *Bradley I*.[75]

United States v. Dingis[76] involved a rare allegation that the special court-martial convening authority (SPCMCA) was an *accuser*.[77] Convinced that appellant's post-trial allegations were sufficiently reliable, the CAAF ordered a *Dubay* hearing to develop the facts under "the crucible of an adversary proceeding."[78] While pursuing a doctorate degree at the University of Oklahoma, Captain Dingis volunteered as an assistant scoutmaster with a local Boy Scout troop. Shortly thereafter, Boy Scout officials brought allegations of homosexual activity to the attention of an Air Force officer [Colonel M]. Colonel M, himself a Boy Scout district chairman, was not in the accused's chain of command. Additionally, Captain Dingis did not fall under Colonel M's special court-martial jurisdiction. Nevertheless, Colonel M ordered the AFOSI to investigate the allegation, and he eventually requested that the accused be assigned to his unit to initiate the criminal process. Charges were preferred and forwarded to Colonel M. As the SPCMCA, Colonel M directed an Article 32(b) investigation and subsequently forwarded the charges to the GCMCA with a recommendation for a general court-martial.[79]

At trial, the accused pleaded guilty and was sentenced to a dismissal, total forfeitures, and five months confinement.[80] After completing his period of confinement the accused discovered, through a Freedom of Information Act request, new infor-

68. The trial court was ordered, at a minimum, to obtain the testimony of the two key witnesses, and to obtain a copy of the newspaper article written by the SJA. The order also directed the trial judge to make specific findings of fact and conclusions of law on several issues. *Id.* at 723.

69. United States v. Bradley, 48 M.J. 777 (A.F. Ct. Crim. App. 1998).

70. *Id.* at 779 (citing United States v. Ginn, 47 M.J. 236 (1997) (appellate courts may not resolve disputed questions of fact based on conflicting affidavits submitted by parties).

71. The court found that this defense witness "had clearly become a zealous advocate for appellant, both during and after the trial . . . Her negative outburst immediately following appellant's conviction . . . is evidence of her bias in the case." *Id.* at 780.

72. *Id.*

73. *Id.* at 781.

74. *See* United States v. Ginn, 47 M.J. 236, 248 (discussing the principles of when an appellate court may resolve an issue without further evidentiary proceedings).

75. "Suffice it to say that, if the government had presented a post-trial affidavit from Lt Col Dent at the time we originally considered this case, we might well have approached the case from an entirely different perspective. Rather than suggesting in our opinion that there appeared to be possible command influence . . . we would not have suggested in our original opinion that things did not look good for Lt Col Dent." *Bradley II*, 48 M.J. at 779.

76. *Id.*

77. *See* UCMJ art. 1(9) (West 1999); MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 601 (1998).

78. United States v. Dingis, 49 M.J. 232 (1998).

79. *Id.* at 233-34.

mation concerning Colonel M's involvement in the case. This information supported the allegation that Colonel M was "so closely connected with the offense that a reasonable person would conclude he had a personal interest in the case."[81] Satisfied that the facts alleged by the accused were sufficient to raise the issue that Colonel M should be disqualified from acting as a SPCMCA in the case, a unanimous CAAF directed a *Dubay* hearing to further develop the facts.[82]

Appellate counsel should take note of the CAAF's footnote explaining why it did not apply waiver in *Dingis.* The CAAF acknowledged the general rule that non-jurisdictional defects in the pretrial process not raised at trial are normally waived. Nevertheless, the court declined to apply waiver in *Dingis* based on appellant's representation that he did not discover the potentially disqualifying information until well after the trial.[83] This should discomfort government appellate counsel since there was no evidence of intentional non-disclosure by the trial counsel. Colonel M's involvement in the case was certainly information that was discoverable by the defense prior to trial. Government appellate counsel should also heed the CAAF's criticism that the government failed to submit an affidavit from Colonel M during the appellate process.[84] Had the government submitted an affidavit from Colonel M, the government may well have convinced the CAAF that a *Dubay* hearing was unnecessary to resolve the issue.[85]

The CAAF reached a different conclusion in *United States v. Ruiz*,[86] and refused to order a *Dubay* hearing to gather additional evidence of post-trial allegations of unlawful command influence. Prior to final action by the convening authority, the civilian defense counsel asked the convening authority, on five separate occasions, to order a post-trial Article 39(a) session to address two allegations of unlawful command influence. The first issue he raised was that a court member deliberately concealed information during voir dire. The other issue concerned "newly discovered evidence" that the convening authority held a briefing prior to trial in which he stated his opinion regarding the "appropriate punishment for offenses such as fraternization."[87]

Despite repeated requests from the civilian defense counsel, the convening authority refused to order a post-trial hearing. His response on each occasion was that the allegations were unsubstantiated.[88] Citing the Air Force Court's conclusion that the convening authority had "no obligation, under the circumstances, to develop evidence to support appellant's allegations," the CAAF was satisfied that the convening authority did not abuse his discretion in not ordering a post-trial Article 39a hearing.[89] Both the Air Force Court and the CAAF were satisfied the accused "had ample opportunity to support his accusations of misconduct" but had failed to do so.[90]

The CAAF's opinion in *Ruiz* is consistent with its recent trend of placing an increased burden on the accused to produce sufficient evidence of unlawful command influence.[91]

80. *Id.* at 232.

81. *Id* at 234. The information included e-mails and affidavits from airmen in Colonel M's office that indicated Colonel M was a District Chairman in the Boy Scouts, that Boy Scout officials had contacted Colonel M because of his position in the Boy Scouts, that Colonel M had the investigation initiated despite having no command authority over the accused, and that Colonel M requested that the accused be transferred to his command. *Id.*

82. *Id.*

83. *Id.* at 234 n.2.

84. *Id.* at 234 n.3.

85. The court clearly indicated the willingness to resolve the issue without a *Dubay* hearing, but felt constrained in the absence of an affidavit from Colonel M. Noting that the government had submitted affidavits from "other, less critical players," the court lamented the absence of an opportunity to "examine those matters in the context of other circumstances that might bear on the questions of whether Col. M.'s involvement was official or personal for purposes of the applicable provisions of the Code and the Manual." *Id.* at 234. The government clearly missed an opportunity to create a sufficient record through the back door of a post-trial affidavit.

86. 49 M.J. 340 (1998).

87. *Id.* at 347.

88. *Id.*

89. *Id.* at 348.

90. *Id.* The defense submission consisted of unsubstantiated allegations that one of the members attended a briefing in which the convening authority allegedly expressed his opinion regarding punishment for fraternization: "Col [H] relayed the findings of the meeting and his interpretation of the Commander's intent to a junior officer under his command. Capt. [N] is prepared to give testimony regarding his knowledge of the meeting and the impact it had on Col [H]." *Id.*

91. *See* United States v. Newbold, 45 M.J. 109, 111 (1996) (citing United States v. Stombaugh, 40 M.J. 208, 211 (C.M.A. 1994)). *See also* Lieutenant Colonel Lawrence J. Morris, *"This Better Be Good": The Courts Continue to Tighten the Burden in Unlawful Command Influence Cases*, ARMY LAW., May 1998, at 49 (containing an excellent discussion of this rising trend).

Although *Ruiz* involves factual *allegations* that are similar to those in *Youngblood*, the two can be distinguished based on the degree of evidence produced by the defense. In *Youngblood*, the defense offered considerable evidence of the command briefing on the record during voir dire. Counsel in *Ruiz*, on the other hand, despite repeated requests from the convening authority, failed to offer any additional evidence beyond the assertion that "Capt. N is prepared to give testimony."

Shortcuts in the Court Member Selection Process

There were three cases in the past year involving alleged short cuts in the court member selection process, two from the CAAF, and one from the Air Force Court of Criminal Appeals. All three cases involved guidance from the convening authority regarding the court member nomination process. The CAAF cases, *United States v. White*[92] and *United States v. Upshaw*,[93] were ultimately affirmed, while the lone Air Force case, *United States v. Benson*,[94] was reversed.

In *White*, the new convening authority observed that few commanders were appointed to court-martial duty, and that several nominated members were not available due to temporary duty, leave, or permanent change of station orders. In an attempt to tighten up the nomination process, the convening authority issued directives to his subordinate commanders to "nominate your best and brightest staff officers" and that he regarded "all his commanders and their deputies as available to serve as members."[95] At trial, the accused claimed that his court-martial panel was the result of improper application of the court member selection criteria set forth in Article 25(d), UCMJ. To support his allegation, the defense offered proof that commanders in the jurisdiction constituted less than eight-percent of the officer population but constituted eighty-percent of the court-martial membership. Eight of the ten nominees and seven of the nine ultimately selected for appellant's court were commanders.[96]

The military judge denied the accused's motion for three reasons. First, the trial judge found no evidence that commanders were selected because they were believed to be stricter disciplinarians. Second, he relied upon the well-established principle that court-martial panels need not represent a cross-section of the military population. Finally, he observed that "commanders have unique military experience that is conducive to selection as a court-martial member."[97]

The CAAF agreed with all three findings of the military judge. Most notable was the court's discussion of what constitutes unlawful court-packing by a convening authority. A three-member majority[98] was clearly satisfied that the convening authority's directive did not stem from an improper motive to stack the court. In fact, they concluded that his directives reflected a "commendable effort . . . to ensure that the 'best and brightest' members of his command serve as court members."[99]

More controversial are the court's comments regarding the alleged disproportionate number of commanders who were chosen to sit as members. Citing a 1985 Army Court of Military Review opinion,[100] the court opined that the criteria for command selection "are totally compatible" with the Article 25(d), UCMJ, criteria for court-member selection.[101] As a result, the court was not convinced that the selection of more commanders than non-commanders, absent improper motive, constituted unlawful court packing.[102]

In a concurring opinion, Judge Effron acknowledged that while these facts do not present a case of unlawful command influence under Article 37, UCMJ,[103] he was nonetheless trou-

92. 48 M.J. 251 (1998).

93. 49 M.J. 111 (1998).

94. 48 M.J. 734 (A.F. Ct. Crim. App. 1998).

95. *White*, 48 M.J. at 253.

96. *Id.* The defense also offered evidence that in the three courts-martial preceding appellant's, commanders constituted six of nine, seven of nine, and eight of nine members respectively.

97. *Id.*

98. The court's decision was unanimous; however, Judges Effron and Sullivan wrote separate concurring opinions.

99. This is well supported by the two memoranda that included language that the convening authority, in addition to considering all commanders and deputies available, wanted the subordinate commands to nominate their "best and brightest staff officers." *White*, 48 M.J. at 255.

100. United States v. Carman, 19 M.J. 932, 936 (A.C.M.R. 1985).

101. "Like selection for promotion, selection for command is competitive . . . officers selected for highly competitive command positions . . . have been chosen on the 'best qualified' basis, [and] . . . the qualities required for exercising command . . . are totally compatible with the statutory requirements for selection as a court member." *White*, 48 M.J. at 255.

102. *Id.*

bled over the majority's analysis of the convening authority's application of the Article 25(d), UCMJ, criteria. Though he was ultimately convinced that the convening authority complied with the Article 25(d), UCMJ, criteria,[104] Judge Effron expressed two major objections to the majority's opinion. His greatest concern was the majority's unnecessary willingness to equate the criteria for command selection with that for court-members selected pursuant to Article 25(d), UCMJ. Viewing the convening authority's automatic consideration of all commanders as a short-cut application of the Article 25(d), UCMJ, criteria, Judge Effron expressed doubts that the majority vigilantly exercised its duty to ensure that convening authorities demonstrate strict compliance with their statutory obligations under Article 25(d), UCMJ. Second, concluding that selection for command may be a factor for convening authorities to consider, Judge Effron thought it unfair to infer that all commanders are "best qualified" to serve as members simply because they were selected for command.[105]

In a related concern, Judge Effron suggested that the convening authority's memoranda praising the qualifications of commanders might unintentionally encourage subordinate commands to systemically exclude non-commanders from the nomination process.[106]

In *United States v. Upshaw*,[107] a four to one CAAF majority concluded that an honest administrative mistake regarding the rank of the accused that resulted in the systematic exclusion of E-6s from the court-martial selection process, did not prejudice the accused. While preparing the court-martial nomination memorandum, the SJA erroneously believed that the accused was an E-6. As a result, he instructed his staff to prepare a list of nominees in the grades of E-7 and above.[108] At trial, the defense conceded that there was no "bad faith" on behalf of the SJA; that it was "just simply a mistake." Unfortunately for the accused, rather than request that the convening authority select additional members or start the selection process anew, the defense moved to dismiss the case for lack of jurisdiction. The military judge denied the motion.[109]

The CAAF upheld the trial judge's conclusion. While noting that members may not be selected nor excluded solely on the basis of rank,[110] the court, in language similar to *White*, found no evidence of improper motive on behalf of the convening authority. Based on the defense counsel's concession at trial that the exclusion of E-6s was "just simply a mistake," the CAAF concluded that the issue of unlawful court stacking was not raised. Though the CAAF concluded that it was error for such potential members to be excluded, it found no prejudice to the accused.[111]

Judge Sullivan seized the opportunity to draft a concurring opinion expressing his view that cases challenging the convening authority's court member selection methods would no longer be an issue if Congress were to require random selection of court members.[112] Judge Crawford also authored a separate opinion to reinforce her position that allegations of accusative stage[113]unlawful command influence are waived unless they are raised at trial. Additionally, she opined that it was the responsibility of military appellate courts to enforce this principle by refusing to consider such unraised issues on appeal.[114]

In his continuing effort to account for the fact that members of the armed forces are denied their Sixth Amendment right to a trial of their peers, Judge Effron authored a strong dissent, in effect, demanding strict scrutiny of any deviation from the statutory requirements of Article 25(d), UCMJ. In Judge Effron's view, the government was placed on notice that the selection process was flawed and in need of correction. Despite an ill-phrased request for relief from the defense,[115] Judge Effron con-

103. This conclusion is based on the absence of any evidence regarding improper motives on behalf of the convening authority. *Id.* at 259.

104. To support a violation of Article 25(d), Judge Effron would require either: (1) direct evidence of improper intent, or (2) greater statistical evidence than that offered by the accused. *Id.*

105. Judge Sullivan shared the same view in his concurring opinion. *Id.*

106. *Id.*

107. 49 M.J. 111 (1998).

108. *Id.* at 112. The SJA testified that he routinely avoids nominating members of the same rank as an accused to avoid risks of administrative mistakes regarding dates of rank and thereby inadvertently nominating a member who is junior to the accused. *Id.*

109. *Id.*

110. *Id.* at 113.

111. *Id.*

112. *Id.* at 114.

113. *See* United States v. Drayton, 45 M.J. 180 (1996).

114. *Upshaw*, 49 M.J. at 114.

cluded that the government should nevertheless have taken corrective measures to ensure compliance with Article 25(d), UCMJ. The government's failure to do so, after having been put on notice of the defect, would justify reversal in Judge Effron's view.[116] Although Judge Effron could not sway the majority, his admonition to the government to "play by the rules" should not go unheeded by trial counsel. The deviation in *Upshaw* was relatively minor. More egregious deviations from the requirements of Article 25(d), UCMJ, even those that do not rise to the level of actual command influence, may create enough *apparent* command influence to convince a majority of the court to take some type of remedial action.[117]

In *United States v. Benson*,[118] the Air Force Court had no trouble finding reversible error when a subordinate level SPCMCA systematically excluded all ranks below E-7 from court-martial membership. In his memorandum soliciting court member nominees, the SPCMCA directed subordinate commanders to nominate officers in all grades and "NCOs in the grade of master sergeant or above" for service as court members.[119] The list forwarded to the GCMCA included four E-7s and four E-8s. The GCMCA ultimately selected four E-7s and one E-8 to sit on the accused's panel.[120]

At trial, the accused raised the issue of improper application of the Article 25(d), UCMJ, selection criteria. The SPCMCA offered the following testimony: "I felt like, and I still feel like, in most cases, again, it's not excluded that I couldn't find a tech sergeant [E-5] or staff sergeant [E-6] that would meet the proper qualifications. But in general a master sergeant [E-7] has been around long enough in the Air Force, has that additional education level, maturity level, and experience with the Air Force. So it is a general guideline, I guess you might say."[121] He also acknowledged on cross-examination that he had never appointed an E-5 or E-6 to sit on a court-martial panel.

Based on this testimony, the Air Force Court was convinced the SPCMCA improperly used rank as a shortcut application of the Article 25(d), UCMJ, criteria. After taking judicial notice of the educational and experience level of Air Force NCOs (including E-4s), the court criticized the systematic exclusion of all ranks below E-7,[122] and set aside both the findings and sentence. The court emphasized three basic rules for court member selection: (1) grade alone cannot be used as a shortcut for the Article 25(d) criteria, (2) convening authorities cannot systematically exclude any grade above E-2, and (3) the defense bears the burden of demonstrating such systematic exclusion.[123]

Undoing Unlawful Command Influence

Two cases from the most recent term demonstrate the ability (and inability) of the command and military judge to take corrective measures to overcome acts of actual unlawful command influence. In *United States v. Rivers*,[124] the government and military judge were able to salvage both the conviction and sentence despite three separate allegations of unlawful command influence. In *United States v. Plumb*,[125] the Air Force Court set aside the findings and sentence after criticizing both the military judge and the command for its failure to take remedial efforts in what the court labeled the worst case of wrongful government conduct it had seen in its combined ninety-plus years of service.

In *United States v. Rivers*, the defense alleged three acts of unlawful command influence. The first involved a command

115. The defense did not ask that new members be selected. Instead, the defense moved to dismiss the charges for lack of jurisdiction arising from the improperly constituted court. *Id.* at 112.

116. *Id.* at 116.

117. *See* United States v. Villareal, 46 M.J. 657 (N.M. Ct. Crim. App. 1997) (reducing the sentence from ten to seven and one half years confinement to rectify the specter of apparent command influence).

118. 48 M. J. 734 (A.F. Ct. Crim. App. 1998).

119. *Id.* at 738. An Air Force master sergeant is an E-7.

120. *Id.*

121. *Id.*

122. *Id.* at 739. The court also expressed concern over the SPCMCA's apparent bottom-line consideration of only E-5s. The court observed that this violated the minimum standard established in *United States v. Yager. See* United States v. Yager, 7 M.J. 171 (C.M.A. 1979) (permitting convening authorities to systematically exclude E-2s and E-1s from consideration).

123. *Benson*, 48 M.J. at 740. The court also expressed concern over additional guidance in the convening authority's memorandum that stated that officers and NCOs "have a responsibility to ensure a disciplined force" and "I expect those selected for this important duty to fulfill their responsibility." *Id.* at 738. The court considered such gratuitous comments as the equivalent of asking subordinates to nominate "hardliners," which would constitute unlawful command influence. *Id.* at 740.

124. 49 M.J. 434 (1998).

125. 47 M.J. 771 (A.F. Ct. Crim. App. 1997).

policy letter on physical fitness published by the GCMCA that included the phrase "[t]here is no place in our Army for illegal drugs or for those who use them."[126] The second allegation of unlawful command influence involved public comments from the accused's battery commander advising soldiers to stay away from other soldiers involved with drugs.[127] The final allegation was that the battery first sergeant discouraged four defense witnesses from testifying for the defense by reading them their Article 31, UCMJ, rights prior to questioning.[128]

At trial, the government conceded that the GCMCA and the battery commander had committed acts of unlawful command influence.[129] Rather than challenge the underlying acts of alleged unlawful command influence, the government presented evidence to the military judge that the accused's trial was not tainted by these acts of unlawful command influence. To support its position, the government offered evidence of the GCMCA's retraction memorandum and a corrected copy of his physical fitness policy memorandum. In his retraction memorandum he stated he did not believe that all drug offenders must be discharged from the service, and that it was his strong belief that all soldiers deserved individual assessment of their cases.[130]

The government also offered evidence of the additional remedial steps the command took to ensure the battery commander's conduct did not taint the proceedings. The evidence included the results of an informal investigation ordered by the GCMCA, which resulted in a written memorandum of reprimand issued to the commander. The battery commander was also ordered to make a public retraction and apology to the members of the battery in the presence of the battalion and division artillery commander. The fact the battery commander's tour of command ended prior to trial also supported the government's position that his conduct did not adversely affect the proceedings.[131]

The command's remedial efforts were supplemented by additional corrective measures ordered by the military judge. These measures included: (1) the admission as stipulations of expected testimony, the testimony from twenty-two soldiers questioned during the informal investigation; (2) instructions to each defense witness to report any perceived retribution based upon their testimony to the military judge; (3) banishment of the battery commander from the court room; and (4) notice to the defense counsel that he would "favorably consider" any other remedial measures requested by the defense.[132]

Regarding the allegations against the battery first sergeant, the military judge ordered a post-trial session to obtain additional evidence. After considering testimony from numerous witnesses, the military judge made detailed findings of fact, concluding that the first sergeant's decision to advise potential defense witnesses of their Article 31, UCMJ, rights did not constitute unlawful command influence.[133]

On appeal, the CAAF was satisfied beyond a reasonable doubt that appellant's case was not tainted by unlawful command influence, and that the accused had not been deprived of any witnesses on the merits or on sentencing.[134] In fact, a unanimous CAAF heaped praise upon the government for its "prompt corrective actions," and the military judge for his "aggressive and comprehensive actions to ensure that any effects of unlawful command influence were purged and that appellant's court-martial was untainted." This case provides counsel and military judges in the field an excellent illustration of how to "undo" acts of unlawful command influence that are identified early in the process.

If *United States v. Rivers* sets the standard for how to "undo" acts of unlawful command influence, *United States v. Plumb*[135] provides a "how to manual" for those intending to commit unlawful command influence. Captain Plumb was a special agent for the Air Force Office of Special Investigations (AFOSI) who came under suspicion for fraternization, adultery, and conduct unbecoming an officer. The ensuing investigation resulted in allegations of unlawful command influence and witness intimidation against commanders, criminal investigators and legal advisors who were involved in the case.

126. *Rivers*, 49 M.J. at 438.

127. *Id.* at 440.

128. *Id.* at 441. This allegation was raised *sua sponte* by the military judge prior to the close of the trial.

129. *Id.* at 440.

130. *Id.* at 439. The government offered additional evidence that the SJA had reviewed and recommended deletion of the phrase "or those who use them," but that those changes were not made by the staff principle who was responsible for the memorandum.

131. *Id.* at 441.

132. *Id.* at 441. At trial, the military judge, upon noticing the new battery commander was in the courtroom, ordered him to depart.

133. *Id.* at 442.

134. *Id.* at 443.

135. 47 M.J. 776 (A.F. Ct. Crim. App. 1997).

Concluding that they had never seen, in their combined ninety-plus years as judge advocates, a case "so fragrant with the odor of government misconduct" and command influence, the Air Force Court, in laundry list fashion, described the specific acts of improper and illegal conduct in the following manner:

> While they failed to so find, our Army brethren have noted that "a case may occur in which the appearance of unlawful command influence is so aggravated and so ineradicable that no remedy short of reversal of the findings and sentence will convince the public that the accused has been fairly tried . . . . *We have found just such a case*–a case where witnesses believed investigators were trying to influence them; where government investigators [with the advice and assistance of the local SJA office] obtained "emergency" approval for a wire surveillance which had been disapproved by the Air Force General Counsel; where those same investigators prepared an inaccurate transcription of that surveillance which implicated the appellant in crimes he did not commit; where commanders and supervisors alike warned witnesses away from the trial and appellant; where witnesses were punished or denied favorable treatment in part because they associated with the appellant or supported his defense; where government investigators denied the defense access to evidence and threatened defense counsel; where a government investigator socialized with a court-member immediately before trial; where defense witnesses were warned of their rights against self-incrimination for having made minor errors in prior statements, while one government witness was merely encouraged to reconsider his statement and another was simply re-interviewed; and where at least one witness was told not to talk to defense counsel.[136]

The Air Force Court was highly critical of the trial judge's inadequate reaction to these multiple allegations of unlawful command influence, in particular the shallow two-step analysis he conducted pursuant to *United States v. Stombaugh.*[137] Although in agreement with the trial judge's conclusion that the defense had presented ample evidence to satisfy the first prong of the *Stombaugh* test,[138] the Air Force Court roundly criticized the military judge's analysis and conclusion that the defense failed to satisfy the second prong of the test regarding unfair prejudice to the accused. The trial judge based this finding on the fact that every witness who testified on the motion stated they were not affected by the government conduct. The AFCCA condemned this finding for two reasons. First, because the trial judge failed to take any corrective measures at trial to prevent further interference with the witnesses and defense counsel. Like the CAAF in *Rivers*, the Air Force Court observed that the trial judge should have ensured that all witnesses were reminded of their duty to testify if called as a witness for the defense, and that no adverse action would follow from such testimony. The military judge should not have relied upon their statements that they were not affected by the government conduct. The Air Force Court also criticized the trial judge for failing to ban from the courtroom the AFOSI agent who threatened the defense counsel.[139]

The court also found error, as a matter of law, in the trial judge's singular focus on the existence of "actual" harm to the accused.[140] The court observed that the inquiry into command influence cases does not stop with the absence of "actual" influence. Trial judges must also review the case for the "appearance" of unlawful command influence. Failure to do so in the instant case, one involving the appearance of such a "veritable cavalcade"[141] of unlawful command influence, required nothing short of setting aside both the findings and sentence, despite the testimony of a few witnesses stating they were not influenced by such behavior.[142]

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136. *Id.* at 780 (citations omitted) (emphasis added).

137. 40 M.J. 208 (C.M.A. 1994).

138. *Id.* The first prong requires the accused to allege sufficient facts, which, if true, constitute unlawful command influence.

139. *Plumb*, 47 M.J. at 779.

140. *Id.* at 780.

141. *Id.*

142. *Id.*

Conclusion

The Air Force Court's concerns over appearances in *Plumb*[143] brings us back full circle to cases discussed earlier in this article involving the CAAF's similar concerns with the general public's perception of military justice.[144] Based on public interest in our military justice system, it is likely that our military appellate courts' will continue to approach unlawful command influence with a great deal of deference to the general public's perception. Trial advocates, trial judges, and appellate advocates should not underestimate the appellate courts' concern with more than actual command influence. While trial advocates and judges have made great strides in correcting or minimizing acts of actual command influence,[145] the courts have yet to establish a method for analyzing and perhaps correcting conduct that looks bad to the general public. Since military justice can never know when appellate courts will find that something looks bad enough to require a remedy, we must all remain ever vigilant in preventing such conduct before it happens.

143. "Our concern in apparent unlawful command influence cases is not only that the appellant receive a fair trial, but also that the public perceives military justice as fair and impartial." *Id.*

144. *See supra* notes 11-54 and accompanying text.

145. *See, e.g.*, United States v. Rivers, 49 M.J. 434 (1998).

Silence is Golden: Recent Developments in Self-Incrimination Law

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Introduction

Don't talk unless you can improve the silence.[1]
- Laurence Coughlin

In the military, the law of self-incrimination embraces several essential sources of protection–Article 31,[2] the Fifth Amendment,[3] the Sixth Amendment,[4] and the voluntariness doctrine.[5] During the 1998 term,[6] the military appellate courts addressed self-incrimination issues that centered on each of these important safeguards. Generally, the courts applied the recognized rule of law applicable to the issue. In some cases, however, the courts injected a subtle twist to a rule, or redefined the limits of a rule. Regardless of the analysis or the rule of law applied, the result was the same–admissibility of the accused's confession[7]–except when there was silence. When the accused's decision to remain silent was introduced at trial either through intentional or unintentional acts by the trial counsel, the appellate courts consistently found error. As a result, the practical and obvious message from this year's cases is: trial counsel, do not reference the accused's silence, and defense counsel, pray your client remains silent!

The purpose of this article is to assist the military practitioner in evaluating last term's significant self-incrimination cases. When applicable, this article highlights trends and critiques the courts' analysis. The article begins by addressing cases that define an interrogation, a concept that applies regardless of the source of protection involved. The article then focuses on Article 31(b)–the trigger and warnings relevant to this unique statute.[8] Next, this article speaks to recent developments with invoking the Fifth Amendment right to counsel. After a discussion about several cases pertaining to the accused's exercise of silence, this article concludes by addressing the voluntariness doctrine. To assist the reader, a brief overview of the applicable rule of law relevant to the discussion is at the beginning of each section.

The Interrogation

Two sources of self-incrimination protection directly linked to an interrogation are the Fifth Amendment and Article 31(b). In 1966, with the case *Miranda v. Arizona*,[9] the Supreme Court held that before any custodial interrogation, the police must warn the suspect that he has a right to remain silent, to be informed that any statement made may be used as evidence against him, and to the assistance of an attorney.[10] This Court-created warning requirement was intended to protect persons

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1. Ashley Pirovich, *Quotation Ring* (last modified Dec. 5, 1998) <http://pirovich.com/quotes.html#s>.

2. UCMJ art. 31 (West 1999).

3. U.S. Const. amend. V.

4. *Id.* amend. VI.

5. The voluntariness doctrine embraces common law voluntariness, due process voluntariness, and Article 31(d). *See* Captain Fredric I. Lederer, U.S. Army, *The Law of Confessions–The Voluntariness Doctrine*, 74 Mil. L. Rev. 67 (1976) for a detailed historical account of the voluntariness doctrine.

6. The 1998 term began 1 October 1997 and ended 30 September 1998.

7. For purposes of this article, the word "confession" includes both a confession and an admission. A confession is defined as "an acknowledgment of guilt." Manual for Courts-Martial, United States, Mil. R. Evid. 304(c)(1) (1995) [hereinafter MCM]. An admission is defined as "a self-incriminating statement falling short of an acknowledgment of guilt, even if it was intended by its maker to be exculpatory." *Id.* Mil. R. Evid. 304(c)(2). Military Rules of Evidence 301-306 reflect a partial codification of the law of self-incrimination. There are no equivalent rules under the Federal Rules of Evidence.

8. UCMJ art. 31(b) (West 1999). Article 31 has remained unchanged since its enactment in 1950.

9. 348 U.S. 436 (1966). In *United States v. Tempia,* 37 C.M.R. 249 (C.M.A. 1967), the Court of Military Appeals applied *Miranda* to military interrogations.

10. *See Miranda*, 348 U.S. at 465. The Court found that in a custodial environment, police actions are inherently coercive, and therefore, police must give the subject warnings concerning self-incrimination. The test for custody is an objective examination, from the perspective of the subject, of whether there was a formal arrest or restraint or otherwise deprivation of freedom of action in any significant way. *Id.* at 444. *See also* Berkemer v. McCarty, 468 U.S. 420, 428 (1985); MCM, *supra* note 7, Mil. R. Evid. 305(d)(1)(A). The *Miranda* warnings are intended to overcome the inherently coercive environment. In support of the Court's opinion that warnings are necessary, the Court referred to the military's warning requirement under Article 31(b). *Id.* at 489. Unlike Article 31(b) warnings, the *Miranda* warnings do not require the interrogator to inform the subject of the nature of the accusation, but do not confer a right to counsel.

against compelled self-incrimination–a protection guaranteed by the Fifth Amendment.[11]

Before *Miranda*, the military had a similar warning requirement. In 1948, Article 31 was codified, and to date remains unaltered.[12] Article 31(b) requires a person subject to the code to warn a suspect or an accused of the right against self-incrimination when questioning him about criminal misconduct.[13] Without an affirmative waiver of the rights provided by *Miranda* or Article 31(b), the government cannot question the accused about the suspected criminal misconduct.[14]

A common thread to both *Miranda* and Article 31(b) is "questioning" or "interrogation." The terms are synonymous.[15] The legal definition for an interrogation "includes any formal or informal questioning in which an incriminating response either is sought or is a reasonable consequence of such questioning."[16] This test is applied not from the perspective of the suspect, but rather from the interrogator's perspective, that is, did the police officer know or should he have known that his comments or actions were reasonably likely to invoke an incriminating response from the suspect.[17]

Last term, two cases presented the issue of what constitutes an interrogation–*United States v. Turner*[18] and *United States v. Young*.[19] In *Turner*, the Army Court of Criminal Appeals decided the interrogation issue; however, in *Young*, when given an opportunity to do so, the United States Court of Appeals for the Armed Forces (CAAF) did not.

In *Turner*, a Border Patrol Agent apprehended the accused upon entering the United States from Mexico.[20] The arrest resulted when the agent found "four blocks of marijuana weighing a total of about twenty-three pounds" in the trunk of the car that the accused was driving.[21] After the arrest, the agent advised the accused of his *Miranda* rights.[22] The accused appeared "confused" and did not clearly waive his rights.[23] Several hours later, the agent discovered that the accused was absent without leave (AWOL) from the Army.[24] When the agent told the accused of his find, the accused responded emotionally and begged the agent not to return him to the military.[25]

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11. U.S. CONST. amend V. In part, the Fifth Amendment states: "nor shall [any person] be compelled in any criminal case to be a witness against himself . . . ."

12. *See generally* Captain Fredric I. Lederer, U.S. Army, *Rights Warnings in the Armed Services*, 72 MIL. LAW REV. 1 (1976) (providing a historical review of Article 31).

13. Article 31(b) states:

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

UCMJ art. 31(b).

14. *See* MCM, *supra* note 7, MIL. R. Evid. 304(g).

15. *See id.* MIL. R. EVID. 305(b)(2).

16. *Id.*

17. *See* Rhode Island v. Innis, 446 U.S. 291 (1980). In *Innis,* the Supreme Court held that an "'interrogation' under *Miranda* refers . . . to express questioning, . . . [and] also to any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response . . . ." *Id.* at 301.

18. 48 M.J. 513 (Army Ct. Crim. App. 1998).

19. 49 M.J. 265 (1998).

20. *Turner*, 48 M.J. at 514.

21. *Id.*

22. *Id. Turner* did not involve Article 31(b) warnings because the border agent was not acting under the direction of the military and therefore, was not a person subject to the code. *Id.* at 515 n.1. *See* United States v. Payne, 47 M.J. 37 (1997) (finding that a defense investigative service agent who was conducting a background investigation was not acting under the direction of military authorities and was not, therefore, required to provide Article 31(b) warnings); United States v. Moreno, 36 M.J. 107 (C.M.A. 1992) (holding that a social services worker who had an independent duty under state law to investigate child abuse was not required to provide Article 31(b) warnings because there was no agency relationship with the military); UCMJ art. 31(b) (West 1999).

23. *Turner*, 48 M.J. at 515.

24. *Id.*

25. Specifically, the accused stated: "Please don't do that, anything but that. You know, turn me over to the deputy, do whatever you want to do, just don't turn me over to CID." *Id.* at 515.

At trial, the defense challenged the introduction of the accused's reactions and comments during this exchange.[26] The defense argued that the agent's remark about the AWOL was an interrogation. Given that *Miranda* warnings applied, the agent could not question the accused until he obtained a valid waiver of rights. Since the accused never waived his rights, his incriminating response was inadmissible.[27] The military judge held, however, that the Agent's actions and comments were not an interrogation.[28] On review, the Army Court agreed.

In reaching its decision, the Army Court recognized that the "test to determine whether questioning or its functional equivalent is an 'interrogation' within the meaning of *Miranda*, is whether the police conduct or questioning, under the circumstances of the case, was 'reasonably likely to elicit an incriminating response from the suspect.'"[29] The court concluded that telling the accused he was AWOL and would be turned over to the Army were comments regarding the nature of the evidence against him, and not comments designed to elicit an incriminating response.[30] In addition to the plain meaning of the stated words, the Army Court considered the intentions of the border agent. The court found that the agent did not intend to interrogate the accused; rather, he wanted to keep the accused informed.[31] Although not controlling, the court placed great significance on the investigator's intentions. In the end, the court declared that the agent's comments were not an interrogation and the military judge did not error in admitting the accused's responses.[32]

The significance of *Turner* is two-fold. First, the Army Court recognizes that an interrogator's comments about the status of the evidence against a suspect may not be an interrogation. Second, the questioner's intentions are a significant factor in determining whether there is an interrogation. This was not the first time the Army Court placed great weight on the investigator's intent when determining if there was an interrogation. The investigator's intent was a controlling factor that convinced the Army Court in *United States v. Young*[33] that there was not an interrogation. The CAAF, however, did not ratify the Army Court's position.

In *Young*, the accused was apprehended as a suspect for robbery and taken to a military police station for questioning.[34] Before the interrogation, the investigator informed the accused of his rights under Article 31(b) and *Miranda*.[35] The accused initially waived his rights, but later invoked his right to counsel. Upon invocation of counsel rights, the investigator stopped questioning the accused. While leaving the interrogation room, however, the investigator turned to the accused and said: "I want you to remember me, and I want you to remember my face, and I want you to remember that I gave you a chance."[36] Before the investigator could leave the room, the accused told the investigator that there was something he wanted to say.[37] The investigator re-advised the accused of his rights. The accused waived the presence of a lawyer and confessed to the robbery.[38] Two days later the accused made a second, more detailed confession.

On appeal, the accused challenged the admissibility of the confessions, arguing that the investigator's comments during the first confession were comments likely to elicit an incriminating response,[39] and thus, was a police-initiated interrogation in violation of his counsel rights.[40] This violation made the first

26. *Id.*

27. *Id.*

28. *Id.*

29. *Id.* at 515 (citing Rhode Island v. Innis, 446 U.S. 291, 301 (1980)).

30. *Turner*, 48 M.J. at 516.

31. *Id.*

32. *Id.*

33. 46 M.J. 768 (Army Ct. Crim. App. 1997) (holding that the investigator's comments, "I want you to remember me, and I want you to remember my face, and I want you to remember that I gave you a chance," were words of frustration and not designed to elicit an incriminating response).

34. United States v. Young, 49 M.J. 265, 266 (1998).

35. *Id.*

36. *Id.*

37. *Id.*

38. *Id.*

39. *Id.* *See also* Rhode Island v. Innis, 446 U.S. 291, 301 (1980).

40. *Young*, 49 M.J. at 266.

confession unlawful, which then tainted the second confession.[41]

The Army Court focused on the admissibility of the accused's first confession. The court found that the accused unambiguously invoked his right to counsel and the *Edwards* rule applied, that is, no further questioning of the accused could occur without counsel present.[42] The court, however, held that the investigator's comments were not designed to elicit an incriminating response and did not constitute a police-initiated interrogation in violation of *Edwards.*[43] Rather, the accused's confession was the result of his spontaneous re-initiation of the interrogation. Since the investigator obtained a voluntary waiver of counsel rights before the re-interrogation, the confession was admissible.[44]

In determining whether the investigator re-initiated the interrogation, the Army Court applied an objective test from the perspective of the investigator.[45] Specifically, were the statements those that an investigator would, "under the circumstances, believe to be reasonably likely to convince the suspect to change his mind about wanting to consult with a lawyer?"[46] Relying heavily on the testimony of the investigator, the court held that his comments were merely words of frustration that did not equate to an interrogation.[47] Therefore, both confessions were lawful.

Before the CAAF, the defense raised the same challenge to the accused's confession. Unfortunately, the CAAF did not make a definitive finding regarding the investigator's comments. Instead, the CAAF *assumed* there was an interrogation and focused its attention on the admissibility of the accused's second confession (an issue that is discussed later in this article).[48] In the end, the court held that any error made during the interrogations was harmless. In a concurring opinion, Judge Sullivan declared that the investigator's comments "implicitly threatened" the accused for invoking his right to counsel.[49] As such, they equated to an interrogation.[50] Judge Sullivan felt it was important for the majority to decide the interrogation issue. As it stands, parting shots by an investigator after a suspect exercises his right to counsel or right to silence may be permissible. This is an open question the CAAF failed to resolve.

Triggering Article 31(b): The Casual Conversation

Similar to the purpose of *Miranda* warnings, Article 31(b) was enacted to dispel a service member's inherent compulsion to respond to questioning from a superior in either rank or position.[51] On its face, the statute's meaning and application appear evident. Yet, as years pass, the scope and applicability of Article 31(b) continues to evolve.[52] Currently, the protections under Article 31(b) are triggered when a person who is subject to the Uniform Code of Military Justice (UCMJ), acting in an official capacity, and perceived as such by the suspect or accused, questions the suspect or accused for law enforcement or disciplinary purposes.[53]

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41. *Id.*

42. United States v. Young, 46 M.J. 768, 769 (Army Ct. Crim. App. 1997). Sergeant Young was in continuous custody from the time he invoked counsel rights until he made his subsequent confession. The Supreme Court in *Arizona v. Edwards* held that if a subject invokes his right to counsel in response to *Miranda* warnings, the government cannot interrogate further until counsel is made available. Arizona v. Edwards, 451 U.S. 477, 484 (1981). Later in this article there is a brief discussion of the protections afforded under *Edwards. See infra* notes 97-100 and accompanying text.

43. *Id.* at 770. The court determined that the investigator's comments were a display of frustration and not designed to elicit an incriminating response.

44. *Id. See* MCM, *supra* note 7, MIL. R. EVID. 305(e)(1), 305(g)(2)(B)(i).

45. *Young,* 46 M.J. at 769 (citing Rhode Island v. Innis, 446 U.S. 291 (1980)).

46. *Id.*

47. *Id.* at 770.

48. United States v. Young, 49 M.J. 265, 267 (1998). *See infra* notes 101-111 and accompanying text for a discussion of the admissibility of Sergeant Young's second confession.

49. *Id.* at 268.

50. *Id.* Judge Sullivan states, "These were words that the police should know are reasonably likely to elicit an incriminating response from a suspect." *Id.*

51. *Miranda* focuses on the environment of the questioning. If a custodial setting in which there is going to be an interrogation, then *Miranda* warnings are required. *See* Arizona v. Miranda, 384 U.S. 435, 436 (1966). Article 31(b) provides similar warnings and is triggered by a similar environment. For some reason, however, the military courts have focused not only on the perspective of the suspect, but also on the perceptions of the questioner. *See also* Major Howard O. McGillin, Jr., *Article 31(b) Triggers: Re-Examining the "Officiality Doctrine,"* 150 MIL. L. REV. 1 (1995).

52. *See* Major Ralph H. Kohlmann, *Tales from the CAAF: The Continuing Burial of Article 31(b) and the Brooding Omnipresence of the Voluntariness Doctrine,* ARMY LAW., May 1997, at 3 (providing a scholarly analysis of 1996 self-incrimination cases).

Once triggered, the questioner must, as a matter of law, give the suspect or accused three warnings. These warnings are: (1) the nature of the misconduct that is the subject of the questioning,[54] (2) the privilege to remain silent, and (3) that any statement made may be used as evidence against him.[55] Unlike *Miranda* warnings, Article 31(b) does not provide a right to counsel.

A suggested framework for analyzing when Article 31(b) warnings are required is to address three questions: (1) who must provide the warnings, (2) when must the warnings be given, and (3) who must receive the warnings?[56] Last term, the military appellate courts addressed cases dealing with each of these questions.

The test for determining who must give the warnings is two-fold. First, the person asking the questions must be acting in an official capacity. This means that the person must be subject to the UCMJ, and asking questions for a law enforcement or disciplinary purpose. Second, the suspect or accused–the person being questioned–must perceive the questioning as more than mere casual conversation.[57] In *United States v. White*,[58] and *United States v. Rios*,[59] the CAAF addressed the second element, that is, was the questioning perceived as more than a mere casual conversation.

In *White*, a special court-martial convicted the accused of cheating on a written promotion examination.[60] The investigation into the accused's misconduct began when the test examiner confessed to allowing the accused to review and even videotape test materials relevant to a written promotion test that the accused was required to take.[61] Under the direction and monitoring of the Air Force Office of Special Investigation (OSI), the test examiner phoned the accused and conversed

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53. *See* UCMJ art. 31(b) (West 1999). *See also* United States v. Duga, 10 M.J. 206 (C.M.A. 1981) (holding that Article 31(b) warnings are required when the questioner is acting in an official capacity and the person questioned perceives the inquiry as more than a mere casual conversation); United States v. Loukas, 29 M.J. 385 (C.M.A. 1990) (declaring that Article 31(b) warnings are required only when questioning is done during an official law enforcement investigation or disciplinary inquiry). *See generally* McGillin, *supra* note 51, at 1.

54. Two recent cases address the requirement to warn about the nature of the accusation. *See* United States v. Rogers, 47 M.J. 135 (1997) (holding that informing a suspect that he will be questioned about sexual assault includes the offense of rape); United States v. Kelly, 48 M.J. 677 (Army Ct. Crim. App. 1998) (advising the accused that he was going to be questioned about rape implicitly included the offense of burglary since the burglary was part of the accused's plan to commit the rape). Both cases support a trend that it takes little effort for the government to satisfy this warning. It seems that all that is required is to inform the suspect or accused of the suspected incident of misconduct, and not all the known offenses surrounding the incident.

55. *See* UCMJ art 31(b) (West 1999). *See also* United States v. Rogers, 47 M.J. 135, 138 (1997). Judge Crawford, writing for the majority, schematically portrays the triggering events and content of warnings for both Article 31(b) and *Miranda* as follows:

	Art. 31(b)	Miranda
Who Must Warn	Person Subject to Code	Law Enforcement Officer
Who Must be Warned	Accused or Suspect	Person Subject to Custodial Interrogation
When Warning Required	Questioning or Interrogation	Custodial Interrogation
Content of Warning	1. Nature of Offense 2. Right to Silence 3. Consequences	1. Right to Silence 2. Consequences 3. Right to Counsel

Id. at 137.

56. Robert F. Maguire, *The Warning Requirement of Article 31(b): Who Must Do What To Whom and When?*, 2 MIL. L. REV. 1 (1958).

57. *See Duga*, 10 M.J. 206; *Loukas*, 29 M.J. 385. In *Duga*, The Court of Military Appeals determined that Article 31(b) only applies to situations in which, because of military rank, duty, or other similar relationship, there might be subtle pressure on a suspect to respond to an inquiry. As a result, the court set forth a two-pronged test, the "*Duga* test," to determine whether the person asking the questions qualifies as a person who should provide Article 31(b) warnings. The *Duga* test requires that the questioner be subject to the Code and acting in an official capacity in the inquiry, and that the person questioned perceive the inquiry involved as more than a mere casual conversation. If both prongs are satisfied, then the person asking the questions must provide Article 31(b) warnings. In *Loukas*, the court narrowed the *Duga* test by holding that Article 31(b) warnings are only required when the questioning is done during an official law enforcement investigation or disciplinary inquiry. *See also* United States v. Payne, 47 M.J. 37 (1997) (holding that Defense Investigative Service agents conducting a background investigation were not engaged in law enforcement activities); United States v. Moses, 45 M.J. 132 (1996) (finding that NCIS agents engaged in an armed standoff with the accused were not engaged in a law enforcement or disciplinary inquiry); United States v. Good, 32 M.J. 105 (C.M.A. 1991) (applying an objective test to the analysis of whether questioning is part of an official law enforcement investigative or disciplinary inquiry). In short, whenever there is official questioning of a suspect or an accused for law enforcement or disciplinary purposes, Article 31(b) warnings are required.

58. 48 M.J. 251 (1998).

59. 48 M.J. 261 (1998).

60. *White*, 48 M.J. at 252.

61. *Id.* at 255. The results of the test (weighted airman promotion system test) determined if the accused would be promoted to staff sergeant.

about the cheating scheme. The test examiner did not give the accused Article 31(b) warnings before the conversation.[62]

At trial, the defense challenged the admissibility of the accused's incriminating statements made during the telephone conversation. The defense argued that the test examiner was acting at the request of the military investigators and was, therefore, required to give Article 31(b) warnings before questioning the accused about the misconduct.[63] In denying the motion to suppress the statements, the military judge agreed with the defense that the test examiner was acting in an official capacity; however, the trial judge held that the accused perceived the exchange as a casual conversation. Therefore, Article 31(b) warnings were not required.[64]

The CAAF agreed with the military judge's ruling. Although the accused was suspicious about the phone conversation, the court emphasized that there was no "evidence of coercion based on 'military rank, duty, or other similar relationship.'"[65] In making its determination that the conversation was a casual one, the CAAF considered the contents of the exchange, the impressions of the parties to the conversation, and the environment.[66]

Two messages can be gleaned from *White*. First, a telephone conversation lacks the custodial environment that makes a questioning more than a mere casual conversation. This is not to say that a pretextual telephone call is *per se* a casual conversation. It is, however, a weighty factor. Second, the CAAF seems to focus on the "four-corners" of the conversation to determine if the exchange was casual.

The CAAF remained true to these two messages in *United States v. Rios*,[67] reaching the same conclusion as it did in *White*, that is, that the accused perceived the phone call as casual conversation.[68] Although a similar issue was raised, the facts were somewhat different. The accused in *Rios* was suspected of sexually abusing his fourteen-year-old stepdaughter.[69] The investigative plan was to have the accused's commanding officer direct the accused to call his stepdaughter when he returned from temporary duty. The OSI agent intended to monitor the telephone conversation, hoping to gain incriminating information.[70]

The accused returned as scheduled. Upon his return, he met his sister who quickly informed him that he was under investigation for sexually abusing his stepdaughter.[71] An officer interrupted the greeting and told the accused to report immediately to his commanding officer, which the accused then did. His commanding officer directed him to go home and call his stepdaughter.[72] He went to his house, but before he could call his stepdaughter, she called him and they discussed the alleged abuse. On appeal, the accused challenged the admissibility of the telephone conversation.[73]

The defense argued that the stepdaughter was acting as an agent of the military investigators and should have provided Article 31(b) warnings before questioning the accused. The defense also contended that the accused perceived the conversation as more than a mere casual conversation.[74] This, the defense argued, was supported by the accused's belief that the conversation was formal, and by the fact that his commanding officer ordered him to call his stepdaughter. The CAAF disagreed. In denying the defense argument, the CAAF held that the telephone call lacked the element of coercion that Article 31(b) was designed to guard against.[75]

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62. *Id.* at 256.

63. *Id.* at 257.

64. *Id.*

65. *Id.* at 258.

66. *Id.* at 257. Even thought the accused testified during the motion hearing that he believed the conversation was formal, the CAAF and the military judge believed the test examiner's version of the conversation.

67. 48 M.J. 261 (1998). Both *Rios* and *White* were decided on 13 August 1998.

68. *Id.* at 264.

69. *Id.* at 263.

70. *Id.*

71. *Id.* at 264.

72. *Id.* The accused's commanding officer told him to call his stepdaughter and also gave him a note to do the same.

73. *Id.*

74. *Id.*

In a strong dissent, Judges Effron and Sullivan opined that the commander's involvement distinguished *Rios* from similar cases. The dissent agreed that under normal circumstances, a pretextual telephone call is a legitimate investigative tool that does not require *Miranda* or Article 31(b) warnings.[76] In *Rios*, however, the commander directed the accused to make the call. This was a significant factor that rendered the conversation compelled and not casual, even though it occurred external to the conversation.[77] The majority acknowledged this fact, but seemed to focus more on the conversation itself.[78]

In *Rios*, the CAAF seemed to minimize the impact of external factors to the conversation, and focused primarily on the circumstances internal to the conversation. Counsel should take this message to heart; when challenging or defending the "casual conversation prong" counsel should fully develop the facts internal to the conversation. External factors to the conversation should not be ignored, however. Although not persuasive to the majority of the court, the CAAF nevertheless *considered* the external factor of the commander's directive in *Rios*, and at least two judges found it controlling.

Triggering Article 31(b): Who is a Suspect?

The third question to answer in the analysis is who must receive the warnings? The answer is a suspect or an accused. Defining an accused is easy. An accused is a person against whom the government prefers charges.[79] Defining a suspect, however, is not as easy. The test for a suspect is whether the interrogator believes, or reasonably should believe, that the person being questioned is suspected of an offense.[80] In two recent cases, the military appellate courts addressed the issue of when a person becomes a suspect. In both instances, the courts found the person to be a suspect.

In *United States v. Miller*,[81] the CAAF declared that since the accused was not even subject to a *Terry* stop,[82] he could not have been a suspect for purposes of Article 31(b). The accused in *Miller* was one of a group of five black male Marines who were temporarily stopped by military policemen and questioned concerning their whereabouts during the evening.[83] The military policemen were investigating a robbery that occurred earlier in the evening. The victims reported that five black male Marines attacked and robbed them.[84] At no time during the questioning did the military police advise the Marines of their rights under Article 31(b) or *Miranda*.[85] At trial, the prosecutor used the accused's statements to the military police to rebut an alibi defense.

The defense challenged the admissibility of the accused's statements, arguing that the military police should have given Article 31(b) warnings because the accused was a suspect.[86] Consistent with the military judge's ruling and the holding of the service appellate court, the CAAF found that the accused was not a suspect.[87] The court declared that the evidence available to the military police had not "sufficiently narrowed to make [the accused] a suspect."[88] Then, instead of applying the traditional test for a suspect as stated above, the CAAF introduced a unique twist to the analysis. The court concluded that since the military police did not have enough suspicion required for a *Terry* stop (a Fourth Amendment concept), the accused was not a suspect for purposes of Article 31(b).[89]

75. *Id.*

76. *Id.* at 268.

77. *Id.* at 270.

78. *Id.* at 264. The majority gave great weight to the accused's testimony that his commanding officer's directive "was not on [his] mind during the conversation" with his stepdaughter. *Id.*

79. *See* BLACK'S LAW DICTIONARY 21 (5th ed. 1979).

80. *See* United States v. Morris, 13 M.J. 297 (C.M.A. 1982).

81. 48 M.J. 49 (1998).

82. *See* Terry v. Ohio, 392 U.S. 1 (1968) (holding that a stop and frisk search is permissible if the stop is temporary and justified by a reasonable suspicion that criminal activity may be afoot, and the frisk is supported by a reasonable belief that the individual being stopped is armed and presently dangerous).

83. *Miller*, 48 M.J. at 52.

84. *Id.*

85. *Id.* at 53.

86. *Id.* The defense also argued that the accused was in custody and *Miranda* warnings should have been given. With little discussion, the CAAF held that "the Fifth Amendment was not implicated, because this was not a custodial interrogation." *Id.* at 54.

87. *Id.*

88. *Id.*

Although the outcome in *Miller* is not disturbing, the court's blending of Fourth Amendment and self-incrimination analysis is somewhat confusing. One could argue that the CAAF has diluted the test for a suspect under Article 31(b) to that of a *Terry* stop. Conversely, one could argue that the government's ability to conduct a *Terry* stop has been limited to situations where the person is a suspect as defined by Article 31(b). The best advice is to dismiss the blending of protections as a deficient analogy and apply the traditional standard used to define a suspect under self-incrimination law. *United States v. Muirhead*,[90] provides such an analysis.

The accused in *Muirhead* was convicted of sexually assaulting his six-year-old stepdaughter.[91] During the investigation phase, agents conducted a permissive search of the accused house. During the search, the accused made statements about events that happened before and after the assault of his stepdaughter.[92] At trial, over a defense objection, the prosecutor used these statements to provide a motive for committing the abuse.[93] The defense argued that when the agents questioned the accused during the permissive search, he was a suspect and therefore, should have been informed of his rights under Article 31(b). The military judge ruled otherwise.

On appeal, the Navy-Marine Corps Court considered whether the accused was a suspect and should have been given Article 31(b) warnings. In a *de novo* review, the court held that the accused was not a suspect. In reaching its decision, the court correctly defined the requisite suspicion for purposes of Article 31(b) as a suspicion that "has crystallized to such an extent that a general accusation of some recognizable crime can be framed."[94] Armed with this definition, the court found that the agents did not, nor reasonably should have, considered the accused a suspect.[95]

Between the two cases discussed, *Muirhead* provides a clearer, more traditional application of the test defining a suspect under Article 31(b).

After an Invocation

What should the government do when a suspect invokes a right in response to an Article 31(b) or *Miranda* warning? First, the interrogation must stop immediately. What happens next depends on which source of self-incrimination law applies and what right the suspect has invoked. If the suspect invokes the right to remain silent under Article 31(b) or *Miranda*, he is entitled to a temporary respite from questioning that the government must scrupulously honor.[96] Once honored, the government may re-approach the suspect for further questioning at a later date.

If, however, the suspect invokes the right to counsel under *Miranda*, the government cannot question the suspect further unless counsel is made available, or the suspect re-initiates questioning.[97] If the government keeps the suspect in custody, the requirement to make counsel available is met when counsel is physically present at any subsequent interrogation.[98]

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89. *Id. See* Major Walter M. Hudson, *A Few Developments in the Fourth Amendment*, Army Law., Apr. 1999, at 32 (discussing the Fourth Amendment and the impact of *Miller*).

90. 48 M.J. 527 (N.M. Ct. Crim. App. 1998).

91. *Id.* at 530.

92. *Id.* at 536.

93. *Id.* The motive proposed by the prosecutor was that the accused abused his stepdaughter to get even with his wife, whom he suspected of having an extra-marital affair. *Id.*

94. *Id.* (citing United States v. Haskins, 29 C.M.R. 181 (1960)). The court makes clear that a mere hunch of criminal activity is not enough to satisfy the definition of a suspect under Article 31(b).

95. *Muirhead*, 48 M.J. at 536. The factors the court considered in determining that the accused was not a suspect were the agents' beliefs that the accused was not a suspect; the accused belief that he was not a suspect; the stepdaughter's version of the abuse in which she did not implicate the accused, and the lack of other evidence incriminating the accused. *Id.*

96. *See* Michigan v. Mosley, 423 U.S. 96 (1975) (holding that a two hour respite from interrogation was enough time to honor the suspect's request to remain silent).

97. *See* Edwards v. Arizona, 451 U.S. 477 (1981). In *Edwards*, the Supreme Court created a second layer of protection for a person undergoing a custodial interrogation (*Miranda* provides the first layer of protection). If a suspect invokes his right to counsel in response to *Miranda* warnings, not only must the current questioning cease, but a valid waiver of that right cannot be established by showing only that the subject responded to further police-initiated custodial interrogation. *Id.* at 484. This precept is commonly called the *Edwards* rule. It is important to note that the *Edwards* rule is not offense specific. *See* Arizona v. Roberson, 486 U.S. 675 (1988). Further, following an initial waiver, only an unambiguous request for counsel will trigger the *Edwards* protection. Davis v. United States, 512 U.S. 452 (1994) (finding that the accused's comment, "Maybe I should talk to a lawyer," made after an initial valid waiver of the Fifth Amendment right to counsel, was an ambiguous request for counsel and that investigators were not required to clarify the purported request or terminate the interrogation); United States v. Henderson, 48 M.J. 616 (Army Ct. Crim. App. 1998) (holding that the accused's desire to give a statement now and to consult with counsel in the morning was an ambiguous re-invocation of the right against self-incrimination).

98. *See* McNeil v. Wisconsin, 501 U.S. 171 (1991); Minnick v. Mississippi, 498 U.S. 146 (1990).

If, however, the government releases the suspect from custody, the requirement to make counsel available is met when the suspect has a meaningful opportunity to consult with counsel during the break in custody.[99] If the suspect has this opportunity, then the government can re-interrogate the suspect without counsel present.[100] In *United States v. Young*,[101] the CAAF addressed the latter scenario and shed some light on how long the break in custody should be before the government can re-initiate an interrogation.

The facts in *Young* are set forth in "The Interrogation" section of this article.[102] In short, an investigator was questioning the accused about robbery when he invoked his Fifth Amendment right to counsel.[103] In response, the investigator made a comment that the CAAF *assumed* was an interrogation.[104] The accused made an incriminating statement and was released from custody. Two days later, the government re-interrogated the accused.[105] In the second statement, the accused provided a more detailed account of his criminal activity. This was the statement introduced by the prosecution during the court-martial.[106]

The defense argued that the accused's request for counsel during the first interrogation invoked the *Edwards* rule. As such, the government could not re-interrogate the accused until counsel was made available. Under the facts of the case, defense posited that the government did not comply with *Edwards*, and therefore both confessions were inadmissible.[107] The CAAF agreed with the defense that the government took the first statement in violation of *Edwards*, but disagreed as to the second confession. Specifically, the court found that the two-day break in custody precluded an *Edwards* violation.[108]

In reaching its decision, the court applied a unique rationale. Instead of determining if the two-day break in custody offered the accused a meaningful opportunity to consult with counsel, the CAAF emphasized that the accused was "free to speak to his family and friends" during the break.[109] This analysis focuses more on the break in the custodial environment than it does on the accused's desire to deal with the police through counsel–the interest that *Edwards* was designed to protect.[110] As written, *Young* serves as strong precedent for the government to justify an aggressive pursuit of a re-interrogation whenever there is the slightest break in custody. What cannot be ignored, however, is considerable precedent that recognizes the need for the accused to have a meaningful opportunity to seek counsel's advice.[111]

The Use of Silence

Absent a grant of immunity, all service members enjoy the privilege against self-incrimination. When exercised, that is, when one elects to remain silent when confronted with questions about criminal conduct, often, the government cannot use the silence against that person in a court-martial. There are, however, situations where the prosecution can introduce an accused's silence to establish guilt.[112]

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99. *See* United States v. Schake, 30 M.J. 314 (C.M.A. 1990) (re-interrogating the accused after a six-day break in custody provided a real opportunity to seek legal advice); United States v. Vaughters, 44 M.J. 377 (1996) (re-interrogating the accused after being released from custody for 19 days provided a meaningful opportunity to consult with counsel); United States v. Faisca, 46 M.J. 276 (1997) (re-interrogating the accused after a six month break in custody was permissible).

100. If the police continue the interrogation without obeying the "counsel availability rules," statements made by the suspect are inadmissible. *See* MCM, *supra* note 7, MIL. R. EVID. 304(a).

101. 49 M.J. 265 (1998).

102. *See supra* notes 34-50 and accompanying text.

103. *Young*, 49 M.J. at 266.

104. *Id.* at 267. Specifically, the investigator said, "I want you to remember me, and I want you to remember my face, and I want you to remember that I gave you a chance." *Id.* at 266.

105. *Id.* at 266.

106. *Id.*

107. *Id.* The defense also challenged the admissibility of the second confession under the theory that it was tainted by the unlawful first confession. The CAAF held that the first statement did not taint the second statement. *Id.* at 267.

108. *Id.* at 268.

109. *Id.*

110. Arizona v. Edwards, 451 U.S. 477, 485 (1981).

111. *See generally supra* note 99.

112. *See* MCM, *supra* note 7, MIL. R. EVID. 304(h)(3).

In general, the three scenarios where silence often becomes an issue are: (1) when the accused remains silent in response to questioning that occurs before the protections of *Miranda* or Article 31(b) attach, (2) when the accused invokes his right to remain silent in response to *Miranda* or Article 31(b) warnings, and (3) when the accused does not testify at trial. This year, the CAAF, and at least one of the service courts, decided cases that addressed these scenarios. As the title of this article suggests, this was one area where the courts granted the accused relief.

United States v. Cook[113] focuses on the first scenario described above–silence in response to questioning that occurs when the protections of *Miranda* or Article 31(b) do not exist. While at a friend's house, agents from the OSI arrested Staff Sergeant Cook for raping a woman he had met the night before. He was questioned and released.[114] A week later, Staff Sergeant Cook's friend asked him if he had been charged for rape, and whether he did it. The accused did not respond to the questions.[115] At trial, the prosecutor introduced the accused's silence and argued that the accused's failure to respond to his friend's questions reflected a guilty mind.[116]

This case brings into question the application of Military Rule of Evidence (MRE) 304(h)(3).[117] This rule provides that "[a] person's failure to deny an accusation of wrongdoing, [that is, silence,] concerning an offense for which . . . the person was under official investigation or was in confinement, arrest, or custody" is irrelevant.[118] The CAAF found that the accused was the focus of an official investigation for rape. As such, any silence asserted by the accused in response to questioning about the rape was irrelevant, regardless of who was asking the questions.[119] The court held that OSI's start of its investigation against the accused was a defining event that triggered the protection of MRE 304(h)(3).[120]

The CAAF's holding that the start of an investigation triggers the protections of MRE 304(h)(3) is welcome guidance to practitioners. What is unclear, however, is whether the accused has to have knowledge of the investigation. In *Cook*, the facts support an inference that the accused had knowledge of the investigation.[121] Unfortunately, the court did not incorporate the accused's knowledge as part of its analysis. If the accused did not have knowledge of the investigation, as would be the case in an undercover investigation, the accused's silence may be relevant. If, however, the accused has knowledge of the investigation, the accused's silence may be asserted because of his understanding that he can remain silent when facing a criminal allegation, an irrelevant use of silence.[122] Even though *Cook* provides some clarification, counsel should not overlook the accused's knowledge of the investigation, or lack thereof, when faced with a MRE 304(h)(3) situation.

United States v. Miller,[123] is a case that addresses the second scenario–the accused's invocation of his right to remain silence in response to *Miranda* or Article 31(b) warnings. In *Miller*, the Navy-Marine Corps Court set aside the findings and sentence because the government introduced evidence that the accused terminated an interrogation with a Naval Criminal Investigative Service (NCIS) agent.[124]

At trial, in response to the prosecutor's questions, an NCIS agent testified that after informing the accused of his rights, he interrogated him concerning the sexual assault of his adopted daughter.[125] The agent stated that eventually the accused terminated the interrogation by invoking his right to silence and his

113. 48 M.J. 236 (1998).

114. *Id.* at 238.

115. *Id.* at 239.

116. *Id.* The defense did not object to the prosecutor's argument, and the military judge did not give a limiting instruction.

117. This case raises an evidentiary error and not a constitutional error. The accused was not subject to protections of Article 31(b), *Miranda*, or the Sixth Amendment. *Id.* at 240.

118. MCM, *supra* note 7, MIL. R. EVID. 304(h)(3).

119. *Cook*, 48 M.J at 240. The CAAF declared that the error in admitting the accused's silence was not harmless, and reversed the lower court's decision. In a strong dissent, Judge Crawford and Chief Judge Cox argued that in addition to the commencement of an investigation, the questioner must be acting in an official capacity. *Id.* at 244.

120. *Id.* at 241.

121. *Id.* at 239. The OSI apprehended the accused and questioned him about the rape before his conversation with his friend.

122. *Id.* at 244.

123. 48 M.J. 811 (N.M. Ct. Crim. App. 1998).

124. *Id.* at 816.

125. *Id.* at 813.

right to counsel.[126] The defense requested that the military judge give the members a limiting instruction, informing them that they should not hold the accused's termination of the interrogation against him.[127] The military judge agreed, but decided to give the instruction later in the trial. The defense did not object. Later, the military judge instructed the members using the standard instructions, but did not give the limiting instruction.[128] The Navy-Marine Corps Court declared that the NCIS agent's testimony was inadmissible, and the military judge failed to take the action necessary to correct the error.[129]

In reaching its decision, the service court relied on the recent case of *United States v. Riley*.[130] This is another case involving the courtroom and the law of self-incrimination. In reversing the Navy-Marine Corps Court of Criminal Appeals,[131] the CAAF found that it was plain error for the government to introduce testimony that commented on the accused's invocation of his pretrial right to silence.[132] In *Riley,* the accused was convicted of committing indecent acts and forcible sodomy with a ten-year-old female.[133] During the government's investigation, an investigator questioned the accused. Immediately after he was advised of his "military and constitutional rights," the accused elected to remain silent.[134]

At trial, the government presented the members with the testimony of the investigator who questioned the accused.[135] Three times during the testimony, the investigator commented on the accused's assertion of his right to silence.[136] There was no defense objection or cross-examination of this witness.

The Court of Criminal Appeals held that the "three-time reference to [the accused's] assertion of his right to silence was inadmissible."[137] Nevertheless, the service court determined that the error did not constitute plain error because the mistake was not preserved, that is, there was no defense objection at trial.[138] The CAAF reversed the Navy-Marine Corps Court of Criminal Appeals decision, finding that, regardless of defense objection, there was plain error. The CAAF placed great weight on two factors: (1) the investigator was the government's first witness, and therefore, his testimony "was the filter through which all the evidence was viewed by the members," and (2) the military judge did not provide a limiting instruction.[139] The court gave little, if any, consideration to defense's failure to object.

Although the facts in *Miller* are not as troublesome as the facts in *Riley*, the service court determined that the effect was the same. The obvious message one can glean from *Miller* and *Riley* is that absent corrective action, the appellate courts are likely to grant relief when the accused's reliance on his rights under *Miranda* or Article 31(b) are paraded before the court-martial. The law regarding in-court mention of the accused's election to remain silent is firmly settled. Counsel cannot do it.[140] The pragmatic points identified by *Miller* and *Riley* are:

126. *Id.*

127. *Id.*

128. *Id.*

129. *Id.* at 814.

130. 47 M.J. 276 (1997).

131. United States v. Riley, 44 M.J. 671 (N.M. Ct. Crim. App. 1996).

132. *Riley*, 47 M.J. at 280.

133. *Id.* at 277.

134. *Id.* at 278. It is implied that the rights given were the warnings required by Article 31(b) and *Miranda.*

135. *Id.* It is unclear what probative value the investigator added to the government's case. The substance of his testimony consisted of background information about why the investigation was initiated and the attempted interview of the accused.

136. *Id.* at 278. The investigator testified that after advising the accused of his rights, he "elected to remain silent." The investigator then testified that the next day, the accused informed him (the investigator) that "based on his attorney's advice, he would elect to remain silent [and] wouldn't participate in any further interrogation." Finally, the investigator testified that the only person he interviewed in the case was the accused and "he elected to remain silent." *Id.*

137. *Id.*

138. *Id.* at 279. "To be plain, 'the error must not only be both obvious and substantial, it must also have had an unfair prejudicial impact on the jury's deliberations.'" *Id.* (quoting United States v. Fisher, 21 M.J. 327, 328 (C.M.A. 1986)). The plain error test is a three-part test: (1) the error must be obvious, (2) the error must be substantial, and (3) the error must actually prejudice the accused, i.e., materially prejudice the substantial rights of the accused. *See* UCMJ arts. 66(c), 67(c) (West 1999).

139. *Riley*, 47 M.J. at 280.

140. *See* MCM, *supra* note 7, MIL. R. EVID. 301(f)(3).

(1) trial counsel should prepare witnesses so they do not mention invocation of rights, (2) if a witness does, defense should object, and (3) if the first two recommendations fail, the military judge should, *sua sponte,* give a curative instruction.

The final situation to discuss is when the accused does not testify at trial. The CAAF addressed this issue when it decided *United States v. Cook.*[141] Lance Corporal Cook was convicted of murdering his daughter.[142] During the trial on the merits, he elected not to testify. In closing arguments, the prosecutor highlighted times in the trial when the accused yawned.[143] He argued that this type of demeanor is indicative of guilt.[144] Not only did the defense counsel not object, but he rejected the military judge's offer to instruct the member's on the accused's right not to testify.[145]

On appeal, the defense argued that the prosecutor's argument violated the accused's "Fifth Amendment right not to testify by commenting on his failure to testify."[146] The CAAF agreed with the defense that the prosecutor committed error, however, the court found the error did not constitute plain error.[147] In reaching its decision, the CAAF recognized that "Fifth Amendment protection tends to testimonial communications."[148] The court determined that the accused's yawning was non-testimonial, and therefore unprotected. Even though constitutionally unprotected communication, the court held that the accused's "yawning in the courtroom [was] not relevant to the question of guilt or innocence."[149]

As illustrated in each of the above cases involving the accused's assertion of silence, the military appellate courts are very protective of the fundamental privilege we all possess. When improperly raised at trial, there is a strong presumption that absent any corrective action, the appellate courts will find error, hence the title of this article: "Silence is Golden."

Voluntariness

This article would not be complete without some discussion of the voluntariness doctrine. This firmly rooted doctrine embraces elements of the common-law voluntariness doctrine, due process, and compliance with Article 31(d).[150] Whether or not *Miranda* is triggered, a confession must be voluntary to be valid; thus, a confession deemed coerced must be suppressed despite an initial validly obtained waiver.[151] Generally, when determining whether a confession is voluntary, it is necessary to look to the totality of the circumstance to decide if the accused's will was overborne.[152]

Last term, in *United States v. Campos*,[153] the CAAF adopted a modified version of this test when the issue raised is a due process violation. Lance Corporal Campos was involved in a serious car accident that required a lengthy hospitalization.[154] While still in the hospital, NCIS agents questioned Lance Corporal Campos about suspected methamphetamine use. After

141. 48 M.J. 64 (1998).

142. *Id.* at 65.

143. *Id.* The accused apparently yawned several times during the testimony of a defense expert witness who testified about the accused's sanity. The record did not reflect the yawning at the time it occurred. It is interesting to note that in a footnote, Judge Crawford hints that courts-martial will eventually be videotaped. *Id.* n.1.

144. *Id.* at 65.

145. *Id.*

146. *Id.*

147. *Id.* at 67.

148. *Id.* at 66. The court noted in dicta a number of instances of non-testimonial acts, which could be admissible or inadmissible.

149. *Id.* at 67.

150. Lederer, *supra* note 5, at 68. Article 31(d) states: "No statement obtained from any person in violation of this article, or through the use of coercion, unlawful influence, or unlawful inducement may be received in evidence against him in a trail by court-martial." UCMJ art. 31(d) (West 1999).

The Analysis to MRE 304 (c)(2) lists examples of involuntary statements as those resulting from : inflection of bodily harm; threats of bodily harm; imposition of confinement or deprivation of privileges; promises of immunity or clemency; and promises of reward or benefit. MCM, *supra* note 7, Mil. R. Evid. 304(c)(3) analysis, app. 22, at A22-10.

151. United States v. Bubonics, 45 M.J. 93 (1996) (declaring that the "Mutt and Jeff" interrogation techniques used by the interrogators improperly coerced the accused's statement).

152. Schneckloth v. Bustamonte, 412 U.S. 218 (1973).

153. 48 M.J. 203 (1998).

154. *Id.* at 204. The accused suffered a "severe head injury, a broken neck, and spinal cord damage that resulted in a permanently paralyzed left arm." *Id.*

providing a written waiver of his rights under *Miranda* and Article 31(b), Campos confessed to the drug use.[155]

At trial, the defense challenged the admissibility of the Campo's confession. The defense alleged that the NCIS agents unlawfully interrogated Campos when he was impaired by medication. When Campos was questioned, he was medicated with Tylenol 3 with codeine, a drug that can "deaden" the brain.[156] The defense asserted that since the NCIS agents did not consult with medical personnel at the hospital before interrogating Campos, they acted unlawfully.[157] As such, the confession was inadmissible.

The trial judge disagreed and ruled that the accused's confession was voluntary. In reaching his decision, the military judge considered all the circumstances surrounding the confession. In particular, the judge considered the state of mind of the accused (the affect the Tylenol 3 had on the accused), the actions and perceptions of the accused, the actions and perceptions of the NCIS agents, and the interrogation environment.[158] On appeal, the CAAF agreed that the confession was admissible, but applied a slightly different analysis.

The CAAF analysis was to first determine if the government overreached, if it did, then decide if the confession was voluntary.[159] Only after the predicate question of overreaching was answered in the affirmative, did the mental impairment of the accused become relevant.[160] The court found that the facts in *Campos* did not support a finding of government overreaching.[161] Although the CAAF recognized that no further consideration of the accused's mental impairment was warranted, it nevertheless, continued the analysis and held that the confession was voluntary despite the accused's medicated state.[162]

The unique tiered analysis that the CAAF applied in *Campos* is limited to a due process challenge.[163] Challenges under Article 31(d) or challenges to the validity of the waiver of rights require courts to apply a "totality of the circumstances" analysis; this includes the accused's mental impairment.[164] Counsel need to understand this distinction when challenging or defending the voluntariness of the confession. When raising a due process challenge, defense counsel should also consider alternative theories of involuntariness. Prosecutors, however, should demand that defense state with specificity the theory of the voluntariness challenge.

Conclusion

Although there were no "landmark" decisions during the 1998 term, the military appellate courts authored ample opinions to make this year's self-incrimination jurisprudence engaging. Collectively, the opinions touched on all the fundamental sources of self-incrimination law. From applying the prophylactic protections established in *Miranda* to defining the triggers of Article 31(b), the courts found the means necessary to uphold the admissibility of the confession. Only when the government exploited the accused's exercise of his privilege to remain silent did the courts grant relief. Is silence the only sanctuary for self-incrimination protection in the military justice system? Clearly not; but based on this year's cases, silence is definitely golden.

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155. *Id.*

156. *Id.* During the motion *in limine* to suppress the confession, defense called the accused's physician to testify about the affects that Tylenol 3 with codeine has on the brain. Even though the drug does affect the the brain, the physician opined that it would not "be sufficient to overbear one's free will to do what someone else wanted." *Id.*

157. *Id.*

158. *Id.* at 205.

159. *Id.* at 207. The CAAF cited to *Colorado v. Connelly* as the precedent that established the due process framework of analysis the court applied. *See* Colorado v. Connelly, 479 U.S. 157 (1986).

160. *Campos*, 48 M.J. at 207.

161. *Id.*

162. *Id.*

163. *Id.*

164. *See* United States v. Morris, 49 M.J. 227 (1998) (finding that an interrogator's statement that if the accused cooperated he would help him did not render his confession involuntary when considering the totality of the circumstances); United States v. Mason, 48 M.J. 946 (N.M. Ct. Crim. App. 1998) (applying a totality of the circumstances test, the court determined that a confession subsequent to an unlawful confession was voluntary).

Recent Developments in Sentencing

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Introduction

The court-martial sentencing procedure provides for "presentation of much of the same information to the court-martial as would be contained in a pre-sentence report, but it does so within the protections of an adversarial proceeding."[1] Rule for Courts-Martial (R.C.M.) 1001 specifies five categories of evidence for the prosecution[2] and three categories of evidence for the defense[3] at the sentencing phase of the court-martial. The objective of the sentencing phase is to educate the sentencing authority to arrive at a proper and fair sentence for the accused.

Presentencing Evidence

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

In two recent cases, the Court of Appeals for the Armed Forces (CAAF) upheld the admission of documentary evidence from the personnel records of the accused pursuant to R.C.M. 1001(b)(2).[4] At issue in *United States v. Ariail*[5] was a Department of Defense (DD) Form 398-2, National Agency Questionnaire, offered by the prosecution as part of the accused's personnel record.[6] In completing the questionnaire, the accused detailed a series of traffic violations and the disposition of each.[7] The court held that the exhibit reflected appellant's "'past conduct and performance' and [was] 'maintained according to' Army regulations."[8] Although neither the *Manual for Courts-Martial (Manual)* nor *Army Regulation 27-10*[9] mentions the DD Form 398-2, the accused filled out the form and made no objection to the document as inaccurate or incomplete.[10]

The accused in *United States v. Clemente*[11] faced charges relating to attempted larceny and larceny of mail matter. During sentencing, the prosecution introduced two letters of reprimand–for child neglect and spouse abuse–from the accused's

1. United States v. Clemente, 50 M.J. 36 (1999).

2. Manual for Courts-Martial, United States, R.C.M. 1001(b) (1998) [hereinafter MCM]. The five categories identified for the prosecution are: (1) service data from the charge sheet; (2) personal data and character of prior service of the accused; (3) evidence of prior convictions of the accused; (4) evidence in aggravation; and (5) evidence of rehabilitative potential. *Id.*

3. *Id.* R.C.M. 1001(c). The categories for the defense are: (1) matter in extenuation, (2) matter in mitigation, and (3) statement by the accused. *Id.*

4. *Id.* R.C.M. 1001(b)(2). This rule states:

> *Personal data and character of prior service of the accused.* Under regulations of the Secretary concerned, trial counsel may obtain and introduce from the personnel records of the accused evidence of the accused's marital status; number of dependents, if any; and character of prior service. Such evidence includes copies of reports reflecting the past military efficiency, conduct, performance, and history of the accused and evidence of any disciplinary actions including punishments under Article 15.
>
> '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. If the accused objects to a particular document as inaccurate or incomplete in a specified respect, or as containing matter that is not admissible under the Military Rules of Evidence, the matter shall be determined by the military judge. Objections not asserted are waived.

Id.

5. 48 M.J. 285 (A.F. Ct. Crim. App. 1998).

6. *Id*. at 286.

7. *Id*. The arrests and dispositions included the following: speeding/$65 fine; improper lane change/$35 fine; no helmet/$70 fine; wrong class license/$200 fine; driving with suspended license/$200 fine. *Id.*

8. *Id*. at 287.

9. U.S. Dep't of Army, Reg. 27-10, Military Justice, para. 5-26(a) (24 June 1996).

10. *Ariail*, 48 M.J. at 287.

11. 50 M.J. 36 (1999).

personnel file.[12] The CAAF noted that while "R.C.M. 1001(b)(2) does not provide blanket authority to introduce all information . . . maintained in the personnel records of an accused,"[13] in this case there was no defense objection concerning accuracy of the records. The information addressed in the letters of reprimand directly rebutted the "picture of concern for the welfare of his family, which was presented by [the accused] during sentencing."[14]

The foregoing cases remind trial counsel that courts will require prosecution sentencing evidence under R.C.M. 1001(b)(2) to be "made or maintained according to departmental regulations."[15] Trial counsel who offer documentary evidence that reflects past misconduct of the accused should be prepared to argue that the records "reflect the past conduct and performance of the accused"[16] and that such evidence responds to a characterization presented by the accused or on his behalf. For defense counsel, the lesson is always to examine any records for errors or omissions that might render a record not relevant or reliable. Additionally, defense counsel should scrutinize documentary sentencing evidence offered by the prosecution for any contention that it might inflame the sentencing authority.[17]

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

Prior convictions of the accused are less frequently available or used than in civilian jurisdictions, but are another category of permissible prosecution evidence at sentencing.[18] The Air Force Court of Criminal Appeals (AFCCA) addressed the age of such convictions in *United States v. Tillar*.[19] After a panel convicted Tillar of larceny of government property, the prosecution introduced a prior special court-martial conviction against Tillar for larceny of military property.[20] Because the prior conviction was eighteen years old, the defense objected that it was not probative and should be excluded.[21] The defense relied on other time limitations in the *Manual*–ten years for impeachment by conviction[22] and three years for certain sentence enhancements[23]–to argue against the admissibility of the prior conviction. In affirming admission of the eighteen year-old prior conviction, the AFCCA noted that the age of the conviction in and of itself did not render it inadmissible, though age could be a factor in balancing under Military Rule of Evidence 403.[24]

12. *Id*. at 37.

13. *Id*. (citing *Ariail*, 48 M.J. at 287).

14. *Id*. *See* United States v. Zakaria, 38 M.J. 280, 283 (C.M.A. 1993). In *Zakaria*, the court held it was an abuse of discretion for the military judge, in a case involving an accused about to be sentenced on larceny charges, to admit a letter of reprimand for indecent acts with four minor girls under R.C.M. 1001(b)(2), since the letter was "evidence of sexual perversion" and would "[brand] him as a sexual deviant or molester of teenage girls." *Id.*

15. MCM, *supra* note 2, R.C.M. 1001(b)(2). *See* United States v. Davis, 44 M.J. 13 (1996) (Gierke, J., concurring). In *Davis*, Judge Gierke noted the record at issue, a Discipline and Adjustment Board Report, was prepared and maintained pursuant to regulations of the United States Disciplinary Barracks. Judge Gierke determined the document in issue, offered under R.C.M. 1001(b)(2), was not a record "made or maintained in accordance with departmental regulations," but the defense waived the issue by failing to object at trial. *Id*.

16. MCM, *supra* note 2, R.C.M. 1001(b)(2).

17. *See Zakaria*, 38 M.J. 280.

18. MCM, *supra* note 2, R.C.M. 1001(b)(3). "The trial counsel may introduce evidence of military or civilian convictions of the accused." *Id. But see* United States v. White, 47 M.J. 139, 141 (1997) ("[A]dmissibility of major categories of prior civilian judgments is a matter that readily could be clarified through an amendment to R.C.M. 1001(b)(3)").

19. 48 M.J. 541 (A.F. Ct. Crim. App. 1998).

20. *Id*. at 542.

21. *Id*. The appellate defense counsel stated the position as follows:

> [A prior conviction] loses significance, and probative value, with the passage of time . . . . A person changes a lot in 18 years. For the record of a conviction to be admissible, it must convey something relevant about the accused as he stands before that court-martial to be sentenced, not as he was at some time in the distant past.

Id.

22. MCM, *supra* note 2, MIL. R. EVID. 609(b). "Evidence of a conviction under this rule is not admissible if a period of more than ten years has elapsed since the date of the conviction . . . ." *Id.*

23. *Id*. R.C.M. 1003(d)(2). "[P]roof of two or more previous convictions adjudged by a court-martial during the 3 years next preceding the commission of any offense of which the accused stands convicted shall authorize a bad conduct discharge . . . ." *Id.*

24. *See Tillar*, 48 M.J. at 543. *See also* MCM, *supra* note 2, MIL. R. EVID. 403.

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

Evidence in aggravation under R.C.M. 1001(b)(4)[25] allows the prosecution to focus on the effects of the crime and its victims, and not just on the accused, as a basis for an appropriate sentence. The service courts rendered several decisions over the past year that remind both trial and defense counsel of the limits of R.C.M. 1001(b)(4).

The threshold for evidence in aggravation under R.C.M. 1001(b)(4) is that it be "directly relating to or resulting from the offenses of which the accused has been found guilty."[26] The Navy-Marine Corps Court of Criminal Appeals (NMCCA) highlighted the disjunctive nature of this requirement in *United States v. Sanchez*.[27] Following the accused's conviction for misprision of aggravated assault,[28] the prosecution introduced evidence in aggravation under R.C.M. 1001(b)(4) of the injuries sustained by the victim of the assault. Defense objections to evidence of the injuries noted that such injuries resulted from the underlying aggravated assault committed by the co-accuseds, and not to the misprision offense committed by Sanchez.[29] In upholding admission of the evidence of the assault victim's injuries, the NMCCA held that although the injuries did not *result from* misprision of a serious offense by Sanchez, it was "evidence *directly relating to* that offense."[30] For a court to determine an appropriate sentence in a case, the court-martial may properly receive evidence of the "nature and circumstances of the particular underlying [offense]."[31]

Separating the *directly relating to* or *resulting from* prongs for evidence in aggravation, as in *Sanchez*, does not relieve the prosecution of the burden of linking the accused to the evidence in aggravation. In *United States v. Mance*, the NMCCA pointed out that the prosecution failed to make this connection.[32] After convicting the accused of, *inter alia*, assault, assault consummated by battery, adultery, and wrongful cohabitation, the prosecution called the assault victim to testify at sentencing. The victim described a threat that the accused made to him over the telephone, while on duty. Additionally, the victim contended that the accused had committed additional assaults against the accused's paramour in the adultery and wrongful cohabitation charges, notwithstanding that such allegations constituted uncharged misconduct.[33] The prosecution, however, failed to show the accused made the alleged phone threat or committed the uncharged assaults.[34] Absent evidence specifically linking the effects described to the accused's conviction, it was error to allow the testimony.[35]

Another prosecution failure to link evidence to the accused's offenses occurred in *United States v. Kelley*.[36] At sentencing for a conviction of wrongful use of marijuana and opium, the prosecution introduced a letter written by the accused indicating that she was frustrated and had thoughts of getting "drunk or high."[37] Because the accused wrote the letter to a friend following her drug use and after she completed a substance abuse rehabilitation program, the prosecution argued the letter "was relevant because it went to the [accused's] 'mental attitude toward the crimes she's committed.'"[38] The AFCCA, however, found the letter bore no relevance to the accused's charged offenses since the accused wrote the letter months following the charged offenses.[39]

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25. MCM, *supra* note 2, R.C.M. 1001(b)(4). "The trial counsel may present evidence as to any aggravating circumstances directly relating to or resulting from the offenses of which the accused has been found guilty." *Id.*

26. *Id*.

27. 47 M.J. 794 (N.M. Ct. Crim. App. 1998).

28. *See id.* at 795. *See also* MCM, *supra* note 2, pt. IV, para. 95(c)(1). "Misprision of a serious offense is the offense of concealing a serious offense committed by another but without such previous concert with or subsequent assistance to the principal as would make the accused an accessory." *Id.*

29. *Sanchez*, 47 M.J. at 797.

30. *Id.*

31. *Id.*

32. 47 M.J. 742 (N.M. Ct. Crim. App. 1997).

33. *Id*. at 747.

34. *Id.*

35. *Id.*

36. 50 M.J. 501 (A.F. Ct. Crim. App. 1998).

37. *Id*. at 502.

38. *Id*.

When it meets the *directly relating to or resulting from* requirement, evidence in aggravation may address a broad range of factors or conditions. Two recent service courts expounded on the types of evidence that are admissible under R.C.M. 1001(b)(4). In *United States v. Duncan*,[40] following convictions for rape, forcible sodomy, kidnapping, and attempted murder, among others,[41] the prosecution called a therapist who had counseled the victim. Relying on approximately twenty hours of counseling with the victim, the therapist described the victim's testimony as "becoming progressively more traumatizing," and her "motivation for continuing to testify was to protect herself and to protect other women from the appellant." [42] The NMCCA upheld the testimony of the therapist as proper evidence in aggravation under R.C.M. 1001(b)(4).[43]

In addition to evidence in aggravation that shows impact or effect on the individual victim, R.C.M. 1001(b)(4) evidence may also properly show the effect or impact on a unit.[44] In *United States v. Alis*,[45] the AFCCA upheld the admission of evidence relating to a degraded work environment in a base staff judge advocate (SJA) office as a result of crimes committed by the accused SJA. A court-martial convicted the accused of fraternization and conduct unbecoming an officer based on his relationship with a female non-commissioned officer assigned to the base SJA office.[46] Evidence in aggravation offered by the prosecution included the impact on the office and the accused's attitude toward his offenses. As to the former, a judge advocate described the tension in the office and the adverse effect on the office's ability to provide legal advice because others knew of the on-going improper relationship.[47] As to the latter, the accused had–in the midst of his own improper relationship–encouraged harsh discipline against a junior officer for similar misconduct, asserting it was necessary "to maintain core values."[48] The AFCCA held the statements of the accused SJA reflected his knowledge of the importance and seriousness of the misconduct, and constituted proper evidence in aggravation.[49]

The foregoing cases illustrate the range of evidence in aggravation from the accused's knowledge of the seriousness of his own misconduct, to the effect of his crimes on an individual victim or on the unit. Effect on the victim may include not only obvious descriptions of injury suffered, but also the motivation for the individual victim to testify and prognosis for recovery. All evidence in aggravation, however, must *directly relate* to or *result from* the offenses of which the accused is convicted. Additionally, the prosecution bears the burden of establishing that link in order to introduce the evidence properly under R.C.M. 1001(b)(4).

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

The last category of prosecution sentencing evidence is of rehabilitative potential of the accused under R.C.M. 1001(b)(5).[50] The CAAF affirmed the inadmissibility of evidence of specific acts of conduct[51] in building a foundation for evidence of rehabilitative potential in *United States v. Powell*.[52] In *Powell*, the prosecution called three witnesses from the accused's chain of command to assess his potential for rehabil-

39. *Id*. at 503. The charges alleged wrongful use of marijuana and opium compounds or derivatives between 6 November 1996 and 2 January 1997. The accused wrote the letter on 28 March 1997. The court rejected the government's claim the letter would have been proper rebuttal evidence. The court reasoned that this would require speculation "as to what the defense would have presented if the letter had not been admitted by the military judge." *Id.*

40. 48 M.J. 797 (N.M. Ct. Crim. App. 1998).

41. *Id*. at 800. The convictions included the following offenses against victim [M]: conspiracy to commit kidnapping, conspiracy to commit rape and forcible sodomy, two specifications of rape, five specifications of forcible sodomy, kidnapping, and attempted murder. *Id.*

42. *Id.* at 806.

43. *Id*.

44. MCM, *supra* note 2, R.C.M. 1001(b)(4), discussion. "Evidence in aggravation may include . . . evidence of significant adverse impact on the mission, discipline, or efficiency of the command directly and immediately resulting from the accused's offense." *Id.*

45. 47 M.J. 817 (A.F. Ct. Crim. App. 1998).

46. *Id*. at 820.

47. *Id*. at 825-26.

48. *Id*. at 825.

49. *Id*.

50. MCM, *supra* note 2, R.C.M. 1001(b)(5)(A). "The trial counsel may present . . . evidence in the form of opinions concerning the accused's previous performance as a service member and potential for rehabilitation." *Id.*

51. *Id*. R.C.M. 1001(b)(5)(D), discussion. "The witness or deponent, however, generally may not further elaborate on the accused's rehabilitative potential, such as describing the particular reasons for forming the opinion." *Id.*

itation. In laying foundations for their opinions, the witnesses commented on several specific problems of the accused, including failing to pay his rent, failing to attend a chaplain's counseling program, showing up for work late, losing his military identification card, and writing bad checks.[53] The CAAF held that such evidence–to the extent not acknowledged or admitted by the accused[54]–was inadmissible because it violated R.C.M. 1001(b)(5)(F) by referring to specific conduct.

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

Whereas in recent years military appellate courts have issued a number of decisions opening the doors for more evidence in aggravation, the past year saw several CAAF decisions that broadened the type and the amount of information provided by the defense at sentencing. These cases identify areas of extenuation[55] and mitigation[56] evidence, and expand the bounds of what an accused may address in an unsworn statement.[57]

In *United States v. Simmons*,[58] a court-martial convicted the accused of offenses arising out of an assault against his spouse.[59] Prior to the court-martial, the state of California prosecuted the accused for spousal abuse, and sentenced him to confinement and probation.[60] At sentencing for the same misconduct, the military judge determined that the state court sentence was not relevant information for the panel in determining an appropriate sentence.[61] The CAAF, however, held that it was error to exclude such evidence. The CAAF reasoned that the accused was not using this evidence as a basis for a sentence comparison. Rather, he offered the state court sentence to show that he had already been punished for the misconduct.[62] The CAAF noted the purpose of the sentencing rules in the *Manual* is "to admit legally and logically relevant evidence . . . if the proponent establishes relevance based upon the relationship of the evidence to the offense charged."[63]

As with prosecution evidence under R.C.M. 1001(b)(4), the CAAF in *United States v. Perry* required the defense to link its evidence to the particular court-martial.[64] Convicted of attempted sodomy, conduct unbecoming an officer, and indecent acts, the accused requested an instruction that a dismissal may cause him to have to pay back the cost of his Naval Academy education.[65] The CAAF upheld the military judge's deci-

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52. 49 M.J. 460 (1998).

53. *Id*. at 461-62.

54. *Id*. at 465. The court noted that while the testimony of the accused's tardiness to work was improper evidence of specific conduct, "it merely repeated what [the accused] admitted by his guilty pleas and his responses during the plea inquiry." *Id.*

55. MCM, *supra* note 2, R.C.M. 1001(c)(1)(A). "Matter in extenuation of an offense serves to explain the circumstances surrounding the commission of an offense, including those reasons for committing the offense which do not constitute a legal justification or excuse." *Id*.

56. *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, or to furnish grounds for a recommendation of clemency." *Id*.

57. *Id*. R.C.M. 1001(c)(2)(C). "The accused may make an unsworn statement and may not be cross-examined by the trial counsel upon it or examined upon it by the court-martial. The prosecution may, however, rebut any statements of facts therein. The unsworn statement may be oral, written, or both, and may be made by the accused, by counsel, or both." *Id.*

58. 48 M.J. 193 (1998).

59. *Id*. at 193-94. The accused was convicted of four specifications of assault, aggravated assault, and kidnapping.

60. *Id.* at 194. The state court in California sentenced the accused to time served–18 days–and two years' probation.

61. *Id*.

62. *Id*. at 196. The court stated:

> The civilian sentence was not offered for sentence comparison purposes, but to show that appellant had already been punished for this conduct. The defense should have had the choice of whether to introduce evidence of the civilian sentence, even though it arguably could have either benefited or harmed the defense. Defense counsel was in the best position to decide whether or not a sentence of 18 days' confinement plus 2 years' probation would have helped or hurt his client.

Id.

63. *Id.*

64. 48 M.J. 197 (1998).

65. *Id.* at 197-98. The defense-requested instruction read as follows: "A dismissal may cause Ensign Perry to be liable to reimburse the U.S. Government for all or a portion of the costs associated with his education at the U.S. Naval Academy. As computed by the U.S. Naval Academy, the total cost of education for the past four years is approximately $80,000." *Id.*

sion not to give the instruction because there was no evidence that the Navy intended to seek reimbursement from Perry.[66] The defense failed to establish the factual predicate linking the existing law and policy on reimbursement to this particular accused.[67]

The accused does not have an unlimited right to introduce evidence, since such evidence must be relevant and reliable.[68] The accused, however, can make a strong case for admission by showing that the evidence is a factor that might "lessen the punishment to be adjudged by the court-martial."[69] In *United States v. Bray*,[70] the defense called a psychiatric social worker as a sentencing witness. The purpose of the testimony was to demonstrate that the accused "was not responsible for his actions because of having sprayed insecticide . . . thus precipitating . . . a psychotic reaction."[71] In assessing a claim of ineffective assistance of counsel, the CAAF examined the mitigation evidence and concluded that it was relevant sentencing evidence.[72]

In *United States v. Loya*,[73] the CAAF again considered evidence that bore on the accused's culpability, but was offered in extenuation and mitigation. After the accused pleaded guilty to involuntary manslaughter, the defense called a medical doctor at sentencing to testify to inadequate medical care given to the victim immediately following the stabbing.[74] The defense offered the evidence to show additional factors that contributed to the victim's death that, though not rising to the level of an intervening proximate cause,[75] might lessen the punishment of the accused.[76] Overruling the military judge who determined the defense medical evidence was not relevant, a majority of the CAAF found that the medical evidence was relevant to show the circumstances surrounding the victim's death, and helpful since it might reduce the culpability of the accused.[77]

R.C.M. 1001(c)(2)(c): Unsworn Statement of the Accused

The CAAF further opened the door for defense sentencing evidence in a trio of decisions last year that addressed the

66. *Id*. at 199.

67. *Id*. at 200 (Effron, J., concurring). Concurring in the result, Judge Effron commented that "[the accused] did not introduce any evidence that he had signed such an agreement or that he had received the applicable notice. He simply introduced a Naval Academy memorandum generally directed at all midshipmen addressing the possibility of reimbursement." *Id.*

68. *See* United States v. Boone, 49 M.J. 187 n.14 (1998); MCM, *supra* note 2, R.C.M. 1001(c)(3). "The military judge may, with respect to matters in extenuation or mitigation or both, relax the rules of evidence. This may include admitting letters, affidavits, certificates of military and civil officers, and other writings of similar authenticity and reliability." *Id*.

69. MCM, *supra* note 2, R.C.M. 1001(c)(2)(B).

70. 49 M.J. 300 (1998).

71. *Id.* at 302. The accused had undergone a sanity board and was found to be fit for trial and mentally responsible. When the defense chose to use the evidence regarding the insecticide, the military judge refused to accept the plea. Accordingly, the accused was denied the twenty-year time limitation he had agreed to with the convening authority. When the accused was later sentenced at another court-martial for the same offenses to 35 years confinement, he made a claim of ineffective assistance against his civilian attorney for bringing in the insecticide evidence and losing the guilty plea agreement for a 20 year limitation on confinement.

72. *Id.* at 304.

73. 49 M.J. 104 (1998).

74. *Id*. at 105. The defense counsel stated:

> We'd like to put forth to this court exactly what was the medical treatment which was administered to [the victim], the quality of that medical treatment, the timeliness of the operation, and whether or not [the victim] would have had a chance to survive had things been done differently that day. Therefore, this is extenuating and mitigating, sir.

Id.

75. Rollin M. Perkins & Ronald N. Boyce, Criminal Law 791 (1982).

> An intervening cause is one 'which is neither operating in defendant's presence, nor at the place where defendant's act takes effect at the time of defendant's act, but comes into effective operation at or before the time of the damage.' It may have been produced by the first cause or it may merely happen to take effect upon a condition created by the first cause.

Id.

76. *Loya*, 49 M.J. at 106.

77. *See id*. at 107-08. Chief Judge Cox, however, noted the evidence chould be analyzed under Mil. R. Evid. 403, and the judge's ruling would have been measured against an abuse of discretion standard, and more likely have survived. *Id*. (Cox, C.J., dissenting).

bounds of matters that can be covered in an accused's unsworn statement.[78] In *United States v. Grill*,[79] *United States v. Jeffery*,[80] and *United States v. Britt*,[81] the CAAF faced the issue of limitations on matters that accuseds can address in their unsworn statements. In *Grill*, the accused sought to refer to sentences imposed by civilian courts against his co-conspirators.[82] *Jeffery* and *Britt* involved whether an accused can raise the possibility of an administrative discharge following the court-martial as a means to avoid a punitive discharge.[83] In all three cases the CAAF held that it was error to restrict the unsworn statements of the accuseds.[84]

In light of these cases, do any limits exist on an accused's unsworn statement? While "the right to make a statement in allocution is not wholly unfettered . . . the mere fact that a statement in allocution might contain matter that would be inadmissible if offered as sworn testimony does not, by itself, provide a basis for constraining the right of allocution."[85] Further, the CAAF noted that, though some limits might apply to an unsworn statement, "comments that address options to a punitive separation from the service . . . are not outside the pale."[86] Existing restrictions on the unsworn statement include matter that is "gratuitously disrespectful toward superiors or the court [or] a form of insubordination or defiance of authority;"[87] allegations regarding prior sexual behavior of a sexual offense victim; and matter that re-litigates guilty findings in a contested case.[88] Lest too broad a right of allocution lead to irrelevant information in the sentencing process, one judge commented the broad right of the accused to make an unsworn statement would not "require the military judge to permit [the accused] to read the Manhattan telephone book to the court-members."[89]

Since the *Manual* does not otherwise limit the unsworn statement of the accused, the CAAF looked to the trial counsel and military judge to put the unsworn statement in proper context for the panel. "A military judge has adequate authority to instruct the members on the meaning and effect of an unsworn statement . . . . Such instructions, as well as trial counsel's opportunity for rebuttal and closing argument, normally will suffice to provide an appropriate focus for the members' attention on sentencing."[90] Judge Crawford, while raising a concern for mini-trials over issues in an unsworn statement, expounded on areas of possible government rebuttal relating to administrative discharge as an option to a punitive discharge, including who would initiate, forward, and approve a request for discharge and what other administrative actions might be relevant.[91] As a result of the CAAF's decisions in *Grill*, *Jeffery*, and *Britt*, trial counsel and military judges must play a greater role–

78. MCM, *supra* note 2, R.C.M. 1001(c)(2). *See* United States v. Britt, 44 M.J. 731 (A.F. Ct. Crim. App. 1996) (providing a description of the history and evolution of the unsworn statement).

79. 48 M.J. 131 (1998).

80. 48 M.J. 229 (1998).

81. 48 M.J. 233 (1998).

82. *Grill*, 48 M.J. at 132.

83. *Jeffery*, 48 M.J. at 230; *Britt*, 48 M.J. at 234.

84. *Grill*, 48 M.J. at 132; *Jeffery*, 48 M.J. at 230; *Britt*, 48 M.J. at 234.

85. *Grill*, 48 M.J. at 133.

86. *Jeffery*, 48 M.J. at 231.

87. *Grill*, 48 M.J. at 132 (citing United States v. Rosato, 32 M.J. 93, 96 (1991)).

88. *Id.* at 134 (Crawford, J., dissenting).

89. *Id*. at 135 (Gierke, J., dissenting).

90. *Grill*, 48 M.J. at 133. The court noted that "we have confidence that properly instructed court-martial panels can place unsworn statements in the proper context, as they have done for decades." *Id*. The instruction relating to an accused's unsworn statement provides:

> The court will not draw any adverse inference from the fact that the accused has elected to make a statement, which is not under oath. An unsworn statement is an authorized means for an accused to bring information tot he attention of the court, and must be given appropriate consideration. The accused cannot be cross-examined by the prosecution or interrogated by court members or myself upon an unsworn statement, but the prosecution may offer evidence to rebut statements of fact contained in it. The weight and significance to be attached to an unsworn statement rests within the sound discretion of each court member. You may consider that the statement is not under oath, its inherent probability or improbability, whether it is supported or contradicted by evidence in the case, as well as any other matter that may have a bearing upon its credibility. In weighing an unsworn statement, you are expected to utilize your common sense and your knowledge of human nature and the ways of the world.

U.S. DEP'T OF ARMY, PAM 27-9, LEGAL SERVICES: MILITARY JUDGES' BENCHBOOK, ch. 2, at 101 (30 Sept. 1996) [hereinafter BENCHBOOK].

through rebuttal evidence,[92] argument and instruction–to "place unsworn statements in the proper context."[93]

R.C.M. 1001(g): Argument

In 1998, the service courts, on several occasions, addressed the bounds of proper argument at sentencing under R.C.M. 1001(g).[94] In *United States v. Weisbeck*,[95] a court-martial convicted the accused of indecent acts and related offenses against two teenage brothers at Fort Rucker. An earlier court-martial at Fort Devens had acquitted the accused of similar charges against two other teenage brothers.[96] During the merits phase of the Fort Rucker trial, the prosecution introduced evidence of the earlier allegations, alleging a common plan by the accused.[97]

When arguing on sentence in *Weisbeck*, the prosecution proposed a sentence for what the accused had done to *both* sets of brothers–from Fort Rucker in the present court-martial and from Fort Devens in the earlier court-marital that resulted in acquittal. Further, the prosecution stated that "this is not the first time, because you heard evidence about the similarities."[98] The military judge each time interrupted the prosecution argument and gave a curative instruction, limiting the panel to its guilty findings in the present court-martial in determining a sentence.[99] Normally, at sentencing, a court may consider evidence properly admitted on the merits.[100] In this case, however, the "trial counsel's argument crossed the line when he specifically asked the members not only to consider [the accused's] prior bad acts, but also to sentence [the accused] for them. Due process of law dictates that an accused may be sentenced only for convicted offenses."[101]

In *United States v. Fortner*,[102] the trial counsel invoked the Navy's "core values," and argued, "[the accused's] service, no matter how meritorious, is incompatible with the very core values that we must all support."[103] Although R.C.M. 1001(g) proscribes reference in argument to "the views of . . . [the convening or higher] authorities or any policy directive relative to punishment,"[104] the NMCCA held the service core values were "aspirational concepts" that did not prescribe a given punishment for noncompliance.[105] In *United States v. Sanchez*,[106]

91. United States v. Jeffery, 48 M.J. 229, 231 (1998) (Crawford, J., dissenting).

92. MCM, *supra* note 2, R.C.M. 1001(d). "The prosecution may rebut matters presented by the defense." *Id*.

93. *Grill*, 48 M.J. at 133.

94. MCM, *supra* note 2, R.C.M. 1001(g). "Trial counsel may not in argument purport to speak for the convening authority or any higher authority, or refer to the views of such authorities or any policy directive relative to punishment or to any punishment or quantum of punishment greater than that court-martial may adjudge." *Id.*

95. 48 M.J. 570 (Army Ct. Crim. App. 1998).

96. *Id*. at 572-73.

97. *Id.* at 573. MCM, *supra* note 2, Mil. R. Evid. 404(b).

> 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 . . . .

Id.

98. *Weisbeck*, 48 M.J. 576-77.

99. *Id*. at 576. The military judge instructed the court that, "[t]he accused is to be sentenced only for the offenses of which you have found him guilty. You may not consider, in adjudging a sentence, any other prior acts committed by the accused or that may have been committed by the accused;" and further that, "[t]he members will disregard the counsel's remark. The issue of the previous matter was introduced for a limited matter and may not be otherwise considered in the course of this matter." *Id*.

100. MCM, *supra* note 2, R.C.M. 1001(f)(2)(A). "[T]he court-martial may consider (2) Any evidence properly introduced on the merits before findings, including: (A) Evidence of other offenses or acts of misconduct even if introduced for a limited purpose . . . ." *Id*.

101. *Weisbeck,* 48 M.J. at 576.

102. 48 M.J. 882 (N.M. Ct. Crim. App. 1998).

103. *Id*. at 883.

104. MCM, *supra* note 2, R.C.M. 1001(g).

105. *Fortner*, 48 M.J. at 883. The trial counsel had established a factual basis for the argument, having examined one of the witnesses regarding the Navy's "core values." The defense did not object to the argument.

the prosecution argued that "the accused's behavior made him unsuitable for further military service and that his commission should be taken away."[107] Viewing this comment in the overall context of the prosecution argument, the AFCCA held that the statement did not improperly blend an administrative and punitive discharge, but represented a call for imposition of a dismissal.[108] Finally, in *United States v. Garren*,[109] the trial counsel impugned the accused for failing "to accept responsibility for his actions," and noted that, "[e]ven in his unsworn statement, he still is not accepting responsibility for what he has done."[110] In response to the prosecution argument, the military judge instructed on the mendacity of the accused.[111] The ACCA found trial counsel's comment a proper "observation of the [accused's] mendacious trial testimony and lack of remorse during the sentencing phase of the court-martial."[112]

Conclusion

So long as the court-martial sentencing process exists as an adversarial system, both trial and defense counsel will be responsible for providing information to the sentencing authority. Sentencing evidence must fit within one of the categories specified under R.C.M. 1001, and both sides should determine the appropriate category in order to particularize the offer of or objection to evidence. As the cases above illustrate, counsel and the courts continue to shape the outer limits of evidence and argument that fit within the rules. Thus, counsel must continue to seek evidence that will assist the sentencing authority in determining an appropriate sentence for an accused based on the offenses of which he has been found guilty.[113]

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106. 50 M.J. 506 (A.F. Ct. Crim. App. 1998).

107. *Id.* at 512.

108. *Id.* at 513.

109. 49 M.J. 501 (Army Ct. Crim. App. 1998).

110. *Id.* at 503. In his unsworn statement, the accused stated, "deep down in my heart, I still believe that, you know, I didn't have nothing (sic) to do with this." *Id.*

111. *Id.* at 504. The judge's instructions on mendacity provide:

> The evidence presented (and the sentencing argument of trial counsel) raised the question of whether the accused testified falsely before this court under oath. No person, including the accused, has a right to seek to alter or affect the outcome of a court-martial by false testimony. You are instructed that you may consider this issue only within certain constraints. First, this factor should play no role whatsoever in your determination of an appropriate sentence unless you conclude that the accused did lie under oath to the court. Second, such lies must have been, in your view, willful and material before they can be considered in your deliberations. Finally, you may consider this factor insofar as you conclude that it, along with all the other circumstances in the case, bears upon the likelihood that the accused can be rehabilitated. You may not mete out additional punishment for the false testimony itself.

BENCHBOOK, *supra* note 90, ch. 2, at 103.

112. *Garren*, 49 M.J. at 504. The court, however, cautioned:

> [Trial counsel] must be ever cautious that any such statement is based on a reasonable inference drawn from the evidence. Trial counsel must not cross the line and comment upon an accused's fundamental right to plead not guilty. This can be a dangerously thin line which trial counsel crosses at his own peril and risks reversal.

Id.

113. The *Benchbook* instruction states:

> Members of the court, you are about to deliberate and vote on the sentence in this case. It is the duty of each member to vote for a proper sentence for the offense(s) of which the accused has been found guilty. Your determination of the kind and amount of punishment, if any, is a grave responsibility requiring the exercise of wise discretion. Although you must give due consideration to all matters in mitigation and extenuation, (as well as to those in aggravation), you must bear in mind that the accused is to be sentenced only for the offense(s) of which [he] has been found guilty.

BENCHBOOK, *supra* note 90, ch. 2, at 91.

The CAAF Drives On: New Developments in Post-Trial Processing

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Introduction

As Lieutenant Colonel Lovejoy noted in last year's article,[1] *United States v. Chatman*[2] put the Court of Appeals for the Armed Forces (CAAF) at a crossroad in the post-trial arena. With the court's 1998 decisions in *United States v. Cornwell*[3] and *United States v. Wheelus*,[4] the CAAF drove right through that crossroad into an unmapped area of post-trial processing at the appellate level.

Although the CAAF's modification of the post-trial process is by far the most significant development in post-trial this past year, it has not been the only development. This article discusses standards of review at the appellate courts, disqualifications from post-trial processing, allegations of legal error, and a suggested approach for government responses, and the ever-present problem of "new matter." This article also addresses handling post-trial allegations of ineffective assistance, sentence conversion, and concludes with a look at sentence reassessment on appeal.

The Evolving Standard: To Boldly Go Where No Man Has Gone Before . . . .

Practitioners should read *Chatman*, *Cornwell*, and *Wheelus* in conjunction with the appellate courts' prior handling of post-trial errors to fully understand their significant impact on post-trial processing. The key to understanding these cases–and why their changes are so fundamental–is the clemency power exercised by convening authorities under Article 60, UCMJ[5] and Rule for Courts-Martial (R.C.M.) 1107.[6]

Prior to *Chatman*, *Cornwell*, and *Wheelus*, the appellate courts treated errors in the post-trial process that affected the convening authority's clemency function[7] as "presumptively prejudicial"[8] and would send the case back to the convening authority for a new staff judge advocate post-trial recommendation (SJA PTR) and convening authority action. Because the appellant has broad discretion on what to submit for the convening authority's consideration,[9] and the convening authority's clemency power is completely unrestrained,[10] the appellate courts were loath to speculate on what would have made a difference to the convening authority.[11] Accordingly, when an appellate court found an error, it would not substitute its judgment.[12] Rather, it would return the case to the convening authority.[13]

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1. Lieutenant Colonel James Kevin Lovejoy, *The CAAF at a Crossroads: New Developments in Post-Trial Processing*, ARMY LAW., May 1998, at 25.

2. 46 M.J. 321 (1997) (requiring future appellants who allege new matter in the addendum to the staff judge advocate's post-trial recommendation (SJA PTR) to show what they would have said in response to that new matter).

3. 49 M.J. 491 (1998).

4. 49 M.J. 283 (1998).

5. UCMJ art. 60 (West 1999).

6. MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 1107 (1998) [hereinafter MCM].

7. This includes "new matter" in an unserved addendum to the SJA PTR, which was the issue in *Chatman*.

8. United States v. Chatman, 46 M.J. 321, 323 (1997) (citing United States v. Jones, 44 M.J. 242, 244 (1996)).

9. *See* MCM, *supra* note 6, R.C.M. 1105. The SJA also has the right to submit any matter from outside the record of trial for the convening authority's consideration, provided that the defense is given the opportunity to review and comment upon those extra-record matters. *See id.* 1105, 1106.

10. United States v. Busch, 46 M.J. 562 (N.M. Ct. Crim. App. 1997). *Busch* was withdrawn from the bound volume at the request of the court. In *Busch*, the Navy-Marine Corps Court of Criminal Appeals (NMCCA) recognized that the convening authority can give clemency for a good reason, a bad reason, or no reason at all. *Id.*

11. United States v. Leal, 44 M.J. 235 at 237 (1996); *Chatman*, 46 M.J. at 324 (citing United States v Jones, 36 M.J. 438 at 439 (C.M.A. 1993). "[W]e will not speculate on what the convening authority would have done if defense counsel had been given an opportunity to comment." *Id.* Anecdotal evidence also illustrates that one can never be certain as to what will "push the convening authority's button."

Last year, *Chatman* began a fundamental change to that process. Responding to new matter in the unserved SJA addendum, the CAAF found that sending the case back to the convening authority was not a "productive judicial exercise"[14] if the appellant was not going to submit anything different to the new convening authority.[15] To prevent this perceived waste of time and judicial resources, the CAAF now requires appellants who allege error as a result of new matter in an unserved SJA addendum to demonstrate prejudice. To demonstrate prejudice,[16] these appellants must show "what, if anything, would have been submitted to 'deny, counter, or explain' the new matter [in the SJA addendum]."[17] Harking back to its prior position on post-trial errors, however, the CAAF said that if those appellants could satisfy this low threshold, the court would give them the "benefit of the doubt," implying that it would order the case returned to the convening authority.[18]

In *Cornwell*, without specifically citing *Chatman*, the CAAF applied the *Chatman* analysis to R.C.M. 1107. Captain Cornwell was an Air Force officer who pleaded guilty to false official statement, damaging military property and conduct unbecoming an officer.[19] The military judge sentenced Captain Cornwell to a dismissal, confinement for two months, and forfeiture of $1000 pay per month for two months. His post-trial processing was uneventful,[20] until the convening authority wrote a note to the SJA asking him what the appellant's commanders thought about clemency. The SJA phoned the commanders and verbally advised the convening authority that they disagreed with clemency.[21] The SJA then typed a memorandum for record (MFR)[22] that memorialized his conversation with the convening authority. The government did not serve the MFR on the defense, but did include it in the record of trial.[23]

On appeal, Captain Cornwell contended that this information was effectively new matter that should have been served on the defense in accordance with R.C.M. 1106(f)(7).[24] The CAAF, however, summarily dismissed this assertion.[25] The CAAF did comment, however, that this could be information "with knowledge of which the accused is not chargeable" under R.C.M. 1107(b)(3)(B)(iii).[26] Nevertheless, even assuming that the government should have served the MFR on the defense for rebuttal, the CAAF affirmed because "the appellant has provided no indication . . . as to what response he would have made with respect to the subordinate commanders' recommenda-

12. Whether the appellate courts have clemency power appears to be an open question as far as the CAAF is concerned. Although the CAAF expressly says that clemency power is strictly an executive function, the CAAF appears to have fashioned a quasi-clemency power from Article 66, UCMJ. United States v. Wheelus, 49 M.J. 283, 289 (1998).

13. For the last 40 years, the appellate courts have consistently intoned that the convening authority is the accused's last best chance for relief in the post-trial process. *See* United States v. Boatner, 43 C.M.R. 216, 217 (C.M.A. 1971); United States v. Wilson, 26 C.M.R. 3 (1958).

14. *Chatman*, 46 M.J. at 323.

15. If the accused was not going to submit anything different to the convening authority the second time around, the CAAF was probably justified in saying, in effect, "Why bother sending it back? We're just going to get it back to us in the same shape it's in now." This underlying theme of saving time and judicial resources has manifested itself in other areas as well. Objecting to appellate review of decisions to dismiss without prejudice under R.C.M. 707, Judge Wynne of the NMCCA said: "[Dismissal without prejudice] essentially prescribes that the accused may be tried again in exactly the same manner." United States v. Robinson, 47 M.J. 770 (N.M. Ct. Crim. App. 1997) (Wynne, J., dissenting).

16. The term "prejudice" here appears to be used as a term of art. In this context, prejudice means interference with the appellant's right to proper clemency consideration by the convening authority, under Article 60, UCMJ.

17. The court relied upon Article 59, UCMJ, as authority for this requirement. This is the same provision upon which appellate courts commonly rely when finding "harmless error." This standard will essentially shift the bulk of post-trial advocacy from the trial level (before convening authorities, in the form of defense R.C.M. 1105 and R.C.M. 1106 submissions) to the appellate level (before service courts in the form of appellate briefs).

18. *Chatman*, 46 M.J. at 323-24. Even if the court found new matter in an unserved addendum, it would not send the case back if the new matter was neutral or trivial.

19. United States v. Cornwell, 49 M.J. 491, 492 (1998).

20. The SJA wrote the SJA PTR and properly served it on the defense. After receiving the defense submissions, the SJA wrote an addendum to the SJA PTR, but did not include any new matter requiring service on the defense. The defense did not challenge the post-trial process to this point. *Id.*

21. *Id.*

22. In the MFR, the SJA stated: "I personally talked to each of the above commanders for . . . [the convening authority]. They each informed me that the recommended to approve the sentence as adjudged. I verbally informed . . . [the convening authority] of their recommendation." *Id.*

23. *Id.* at 493.

24. *Id.*

25. *Id.*

26. *Id.*

tions."[27] Although the CAAF did not cite *Chatman* and its requirement for a showing of prejudice, it applied that standard to affirm Captain Cornwell's conviction and sentence. *Cornwell* is yet another indication that the CAAF is willing to expand *Chatman's* reach beyond merely errors involving new matter under R.C.M. 1106(f)(7).

In *United States v. Wheelus*,[28] the CAAF further expanded *Chatman's* reach. First, the court applied the *Chatman* threshold to *all* errors in the convening authority's post-trial review" process.[29] Second, the court tapped the courts of criminal appeals to take the first opportunity to remedy errors.[30]

In *Chatman*, the CAAF said that if the accused made a colorable showing of prejudice, the court would not speculate on what the convening authority would have done. Again, this deference to the convening authority showed the depth of the CAAF's dedication to allowing the convening authority–the only one in the post-trial process with clemency power–the chance to exercise that awesome and unfettered power.

Wheelus marks an historic turning point. For forty years, the CAAF has told practitioners that the convening authority is the accused's best chance for clemency.[31] In *Wheelus,* the CAAF explicitly questioned whether a *different* convening authority, years after the trial, who does not know the case, the accused, the commanders, or the SJA involved, may truly be the accused's best chance for clemency.[32] The CAAF reasoned that sending the case back to such a convening authority would also be a waste of judicial resources. Drawing upon the service courts' authority in Article 66(c), UCMJ, and R.C.M. 1106(d)(6), the CAAF fashioned a way to give the service courts the first opportunity to remedy post-trial errors. By allowing the service courts to remedy the error post-trial, the court partially abandoned the forty-year tradition of supporting the convening authority's clemency power.[33]

Related to this second aspect of *Wheelus*, and its impact on the convening authority's clemency power, is the CAAF's creation of limited quasi-clemency power in the service courts under the guise of Article 66(c), UCMJ, and R.C.M. 1106(d)(6). Even though the CAAF specifically said that the appellate courts do not have clemency power and that clemency was "an [e]xecutive function" exercised by the convening authority,[34] it directed the service courts to "remedy the error and provide meaningful relief."[35] True devotion to the clemency power of the convening authority would require a remand in every case in which there was error in the convening author-

27. *Id.*

28. The CAAF decided *Cornwell* on 1 October 1998 and *Wheelus* on 30 September. 1998.

29. United States v. Wheelus, 49 M.J. 283, 288 (1998). Some courts appear to be having trouble applying the *Chatman / Wheelus* standards. For example, in *United States v. Leslie*, the accused, a Marine, pleaded guilty to unauthorized absence. United States v. Leslie, 49 M.J. 517 (N.M. Ct. Crim. App. 1998). At trial, the military judge asked the defense counsel what awards and ribbons the accused was authorized to wear. The defense counsel listed awards, but did not include a Combat Infantryman's Badge (CIB) from the accused's prior Army service. The SJA did not include the award in the SJA PTR. The defense did not comment on the omission. On appeal, the accused alleged plain error, citing *United States v. Demerse. See* United States v. Demerse, 37 M.J. 488 (C.M.A. 1993). Citing *Wheelus* and *Chatman*, the NMCCA said the accused had not met the threshold test and had not made a colorable showing of prejudice. The NMCCA said that Private First Class Leslie needed to "articulate why . . . the mention of this award [the CIB] in the SJAR would have made a difference to the convening authority." *Leslie*, 49 M.J. at 520. It seems that the NMCCA misses the point. *Chatman* says that the accused need only demonstrate "prejudice" by stating what, if anything, he would have submitted to "deny, counter, or explain" the error in (as expanded by *Wheelus*) the post-trial process. United States v. Chatman, 46 M.J. 283, 323 (1997) (citing United States v. Leal, 44 M.J. 235, 237 (1996)). If the accused did so, the court would return the matter to the convening authority (CA), since clemency is an executive function and the court would not speculate on what would make a difference to the convening authority. The "prejudice" here is to the accused's right to have the CA make a clemency determination, which includes the additional information that the accused demonstrates he would have submitted. The whole point of *Chatman* was to avoid sending cases back to the CA when the accused would not have submitted anything new; therefore, his right to a fair clemency determination has not been "prejudiced." *Wheelus* did not change the standard; it merely said the courts of criminal appeals could take action to remedy the situation, instead of an automatic return to the CA. When *Wheelus* said that if there was no prejudice, the CA should say so, it meant that to apply to situations where the accused has not shown "what, if anything, [he would submit to] deny, counter, or explain" the mistake in the post-trial process. In *Leslie*, the appellant alleged that he would have told the convening authority about his CIB. This should have been sufficient "prejudice" (as the term is used in *Chatman* and *Wheelus*) to satisfy the low threshold.

30. *Wheelus*, 49 M.J. at 288-89.

31. United States v. Wilson, 26 C.M.R. 3 (C.M.A. 1958).

32. *Wheelus*, 49 M.J. at 288.

33. In *Wheelus*, the CAAF did not go so far as to question the utility or continued vitality of the convening authority's clemency power at initial action under R.C.M. 1107. The CAAF's statement in *Wheelus* just recognizes reality, that sending cases back to the convening authority–years after all the players have changed–most likely will not result in any change to appellant's ultimate position.

34. *Wheelus*, 49 M.J. at 289.

35. *Id*. The CAAF also empowers the service courts to find harmless error, something that Judge Crawford has espoused. *See* United States v. Catalani, 46 M.J. 325, 330 (1997) (Crawford, J., dissenting). In *Catalani*, Judge Crawford assumed that the SJA injected new matter and did not inform the convening authority of clemency submissions. Nevertheless, she asked "were these errors harmless?" The CAAF appears to have some discomfort with this position, since later in the same paragraph, it tells the service courts to either provide meaningful relief or "return the case to The Judge Advocate General concerned for a remand to a convening authority . . . ." *Id.*

ity's post-trial process. No appellate court, however, can tell what would or would not "push a convening authority's button."

In summary, *Chatman* created a new approach to dealing with allegations of new matter in the addendum to the SJA PTR. *Cornwell* extended that approach to R.C.M. 1107. *Wheelus* took the last step of applying the *Chatman* approach to all errors in the convening authority's post-trial process,[36] expanded the role of the service courts, and anointed them with limited quasi-clemency powers. This trilogy of cases shows the CAAF's willingness to move away from forty years of previous precedent holding that the convening authority is the last best chance for clemency. Taking a very pragmatic approach when faced with the continued onslaught of cases involving post-trial error, the CAAF now appears willing to recognize a quasi-clemency power in the service courts. This power serves as a substitute for a new convening authority action, which it recognizes as–in many cases–an exercise in judicial futility.

The effect of these decisions will be to shift the burden of post-trial advocacy from the trial defense counsel (through post-trial submissions under R.C.M. 1105 and R.C.M. 1106) to the appellate defense counsel (through briefs at the appellate level). The appellate defense counsel will now assist the appellant in clearing the low *Chatman* threshold of demonstrating prejudice. Once cleared, the appellant will again have to rely on the appellate defense counsel to carry the ball in front of the service court, which, in light of *Wheelus*, has the first opportunity to remedy the situation.

Whether the CAAF will further expand appellate authority in the area of post-trial appellate practice remains to be seen. Nevertheless, unless the CAAF is willing to interpret the words "entire record" in Article 66(c), UCMJ, to include matters from outside the record, it should not be able to further expand the quasi-clemency power it gave to the service courts in *Wheelus*.

Plain Error: It's Not As Obvious As You Might Think

In *United States v. Powell*,[37] the CAAF tried to sort out the standard (and the burdens) that appellate courts should apply when dealing with errors not preserved by an objection at trial. One must first understand the review process in the civilian and military appellate systems before trying to understand *Powell*.

Civilian Standards for Appellate Review

As a general rule of appellate practice, an alleged error that is not objected to at trial is considered forfeited,[38] unless it is "plain error."[39] In federal criminal practice, Federal Rule of Evidence (FRE) 103(a) provides that errors that are not preserved by objection at trial are forfeited.[40] Federal Rule of Evidence 103(d) mitigates this "object or forfeit" rule by allowing appellate courts to notice errors to which there was no objection at trial, provided the error is "plain" and "affect[s a] substantial right[]."[41]

Supreme Court decisions have further explained "plain error" in federal criminal practice as covering "(1) error[s], (2) that [are] plain, and (3) that affect[] substantial rights. If these three conditions are met, an appellate court may exercise its discretion to notice a forfeited error, but only if (4) the error seriously affects the fairness, integrity, or public reputation of judicial proceedings."[42]

Military Standards for Appellate Review

Although the military has no equivalent to Federal Rule of Criminal Procedure 52, Military Rule of Evidence (MRE) 103(d) is based on FRE 103(d), which, in turn, was taken from Federal Rule of Criminal Procedure 52.[43] In the military, the same "object or forfeit" rule applies to errors, via MRE 103(a). As in federal criminal practice, MRE 103(d) mitigates the "object or forfeit" rule and allows appellate courts to notice

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36. After describing new matter in the addendum, "lawyer problems," and errors in the SJA PTR as three areas that "bedevil" post-trial practice, the CAAF established a three-step process for resolving those claims. "First, the appellant must allege the error at the Court of Criminal Appeals. Second the appellant must allege prejudice as a result of the error. Third, the appellant must show what he would do to resolve the error if given such an opportunity." *Wheelus*, 49 M.J. at 288.

37. 49 M.J. 460 (1998).

38. Although the CAAF in *Powell* uses the term "waiver" to describe the effect of failing to object at trial to an alleged error, the more accurate term is "forfeiture." *See* United States v. Olano, 507 U.S. 725, 733 (1993).

39. *See id.* at 731; Fed. R. Evid. 103(a),(d); Fed. R. Crim. P 52(b); MCM, *supra* note 6, Mil. R. Evid. 103(a), (d); *Powell*, 49 M.J. at 462-63.

40. Fed. R. Evid. 103(a). This rules state that "error may not be predicated upon a ruling . . . unless a substantial right of the party is affected, and (1) Objection. In case the ruling is one admitting evidence, a timely objection . . . appears of record . . . ." *Id.*

41. *Id.* 103(d). This rule states that "nothing in this rule precludes taking notice of plain errors affecting substantial rights although they were not brought to the attention of the court." *Id.* This rule is based on Federal Rule of Criminal Procedure 52(b), which says states that "plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court." Fed. R. Evid. 103(d) Advisory Committee Notes.

42. *See* Johnson v. United States, 520 U.S. 461, 462 (1997). This article will refer to the first three steps in this analysis as "civilian plain error." This article refers to civilian plain error, plus the fourth point which triggers its application, as "civilian plain error plus." *See also Olano*, 507 U.S. at 725; United States v. Young, 470 U.S. 1 (1985); United States v. Atkinson, 297 U.S. 157 (1936).

plain errors that "materially prejudice substantial rights [of the accused] . . . ."[44] Military Rule of Evidence 103(d) is effectively identical to FRE 103(d), substituting the terms "material[] prejudice"[45] to a substantial right in place of the civilian term "affects" a substantial right.[46]

Article 66(c), UCMJ, limits the ability of the courts of criminal appeals to affirm a case.[47] At the opposite end of the spectrum, Article 59(a), UCMJ, determines when the courts of criminal appeals and the CAAF can reverse a case.[48]

Powell and Plain Error Plus

In *Powell*, the CAAF attempted to clarify whether Article 59(a), UCMJ, is a mandatory trigger or just a minimum threshold for appellate action (to which the fourth point of the "civilian plain error plus" analysis from *United States v. Olano*[49] and *United States v. Johnson*[50] is applied).

First, the CAAF said that because of Article 66(c), UCMJ, the courts of criminal appeals do not need to rely on the "plain error" analysis (military or civilian) to notice errors in courts-martial.[51] Because of Article 59(a), UCMJ, however, the courts of criminal appeals can only reverse if they find an error that materially prejudices a substantial right.[52]

Next, the CAAF said that because the military plain error standard (error to the material prejudice of a substantial right) was higher than the requirement for civilian plain error (error which only *affects* a substantial right), satisfying the *Johnson/Olano* civilian plain error analysis does not equal military plain error.[53] In no uncertain terms, the CAAF told the service courts not to use the civilian plain error standard when determining plain error in the military.

While the CAAF does seem clear that the four-point "military plain error plus" analysis applies to review at the CAAF,[54] the court is not clear whether that four-point analysis applies at the service court level. As discussed below, appellate counsel could make valid arguments that support and oppose the "military plain error plus" analysis at the service court level. The CAAF will need to address this issue directly before the service courts and appellate counsel can apply plain error analysis with certainty.

"*Military Plain Error Plus*" *at the Service Courts–Opposed*

In *Johnson/Olano*, the Supreme Court said that even when an appellate court finds civilian plain error, it need not act on it unless that plain error "seriously affects the fairness, integrity, or public reputation of judicial proceedings."[55] In *Powell*, the CAAF said that "*Johnson* applies only to courts exercising discretionary powers of review."[56] Because the service courts are not courts of discretionary review,[57] the CAAF implied that the fourth *Johnson/Olano* point does not apply in the service courts; the service courts should apply military plain error analysis (Article 59(a), UCMJ), not "military plain error plus."

43. United States v. Powell, 49 M.J. 460, 462-63 (1998).

44. *See* MCM, *supra* note 6, MIL. R. EVID. 103(d). This article refers to this standard as "military plain error."

45. These terms are substituted to be consistent with Article 59(a), UCMJ. *Powell*, 49 M.J. at 462.

46. *See* FED. R. CRIM. P 52(b); FED. R. EVID. 103(d).

47. UCMJ art. 66(c) (West 1999). The courts of criminal appeals can only affirm findings and sentences that they find "correct in law and fact and determine[], on the basis of the entire record, should be approved." *Id. See Powell*, 49 M.J. at 464.

48. UCMJ art. 59(a). Military appellate courts can only reverse if they find an error that "materially prejudices the substantial rights of the accused." *Id.*

49. 507 U.S. 725 (1993)

50. 520 U.S. 461 (1997).

51. *Powell*, 49 M.J. at 464.

52. *Id.*

53. *Id.* at 465.

54. "[The alleged error] falls short of the standard for prejudicial plain error established by Article 59(a) and *Fisher*." *Id. See* United States v. Fisher, 21 M.J. 327, 328 (C.M.A. 1986) (quoting United States v. Atkinson, 297 U.S. 157, 160 (1936)). The language in *Fisher* eventually became the fourth point in *Johnson/Olano*: that plain errors should only be remedied when they "seriously affect the fairness, integrity, or public reputation of judicial proceedings." *Id.*

55. Johnson v. United States, 520 U.S. 461, 462 (1997).

56. *Id.* at 465.

57. UCMJ art. 66 (West 1999). Query whether the CAAF is completely a court of discretionary review, given its statutory mission under Article 67, UCMJ.

The plain language of Article 66(c), UCMJ, is also consistent with not applying "military plain error plus" analysis at the service court level. Article 66(c), UCMJ, is a unique limitation on the power of the service courts to affirm; however, the CAAF is not under such a limitation. The "military plain error plus" analysis would determine a violation of Article 59(a) (material prejudice to a substantial right), but would not reverse because the error did not "seriously affects the fairness, integrity, or public reputation of judicial proceedings" (the fourth *Johnson/Olano* point). By its very terms, however, Article 66(c), UCMJ, only allows the service courts to affirm if they find that the findings and sentence are *both* "correct in law and fact" *and* "should be approved." Finding an error, which triggers Article 59(a), UCMJ, precludes the service courts from affirming the findings and the sentence based on the fourth *Johnson/Olano* point. In such a case, the findings and sentence are not "correct in law."

"Military Plain Error Plus" at the Service Courts—In Favor

Although defense appellate counsel may argue for only the military plain error analysis, several service court opinions since *Powell*[58] have applied the "military plain error" plus analysis. The CAAF is correct that the service courts, by virtue of Article 66(c), UCMJ, are not limited to noticing only plain errors that make it through trial without objection.[59] That freedom to notice other errors, however, does not necessarily translate into a *requirement* that the service courts act on those errors.[60] This lack of a requirement to act on errors is at the heart of the fourth point of both the military and the "civilian plain error plus" analysis. The policy factors that support this fourth point[61] apply equally to the service courts.[62] Additionally, applying only the military plain error analysis at the service court level while applying the "military plain error plus" analysis at the CAAF risks depriving a deserving appellant of his due relief.[63]

The Burdens in Appellate Review

The CAAF said that in the military plain error analysis, the accused has the burden of persuasion to establish that there was plain error.[64] Once the accused has done so, the burden shifts to the government to show lack of prejudice.[65]

Although the CAAF cites *Olano* for the above statement of shifting burdens, *Olano* supports an opposite conclusion–that the accused always has the burden to establish plain error. In *Olano*, the Supreme Court was very clear in stating the difference between a harmless error analysis and plain error analysis.[66] The harmless error analysis is based on Federal Rule of Criminal Procedure 52(a), when the defense preserves error at trial by objecting. In such a case, the government has the burden to show that the error was not prejudicial.[67] In the plain error analysis (based on FRE 103 and FRCP 52(b)), "the defendant rather than the government bears the burden of persuasion with respect to prejudice."[68] Appellate government counsel

58. United States v. Damico, No. 9701016, 1999 CCA LEXIS 17 (N.M. Ct. Crim. App. Jan. 22, 1999); United States v. Ruiz, No. 529454, 1998 CCA LEXIS 495 (A.F. Ct. Crim. App. Dec. 21, 1998); United States v. Lanier, No. 9700598, 1999 CCA LEXIS 52 (Army Ct. Crim. App. Apr. 2, 1999).

59. *See* UCMJ art. 66(c); *Powell*, 49 M.J. at 464. *See also* United States v. Claxton, 32 M.J. 159, 162 (C.M.A. 1991); United States v. Riley, 47 M.J. 276, 281 (1997)(Gierke, J., concurring).

60. Although Article 66(c), UCMJ says that the service courts cannot affirm unless the findings and sentence are "correct in law and fact . . . ." The responding argument goes something like this: since the fourth *Johnson/Olano* point is the law, as stated by the Supreme Court, finding an error (although satisfying Article 59(a)) does not "seriously affect the fairness, integrity, or public reputation of judicial proceedings" makes the findings and sentence "correct in law." This finding allows the service court to affirm, under Article 66(c), UCMJ.

61. The bottom line for the military and civilian plain error plus analysis is that the appellate court will not grant relief because of an error (even a plain one) unless there would be a "miscarriage of justice" without such relief. *See* United States v. Frady, 456 U.S. 152, 162 n.14 (1982). The balance is between "our need to encourage all trial participants to seek a fair and accurate trial the first time around [by encouraging objections (and resolution at the trial level) through forfeiture] against our insistence that obvious injustice be promptly redressed." *Id.* at 162.

62. Even though the service courts *can* (because of Article 66(c)) notice errors that would otherwise be forfeited, does that mean they *should* do something about them? The lawyer in *Jurassic Park* was involved in doing something (creating dinosaurs) because he *could* (rather than because he *should*–at least according to Jeff Goldblum's character, Dr. Malcolm), and look what happened to him. As Chief Justice Rehnquist observed in his closing comment in *Johnson*, sometimes reversing the conviction (even in the face of error) would run afoul of the fourth *Johnson/Olano* point. Johnson v. United States, 520 U.S. 461, 462 (1992).

63. Consider the following situation with military plain error analysis at the service court and military plain error plus analysis at the CAAF. Assume that the service court finds no plain error, using the military plain error analysis. On review, the CAAF says that the service court erred when it did not find plain error, but applying military plain error plus, it determines that the appellant's case has not been harmed and affirms. In such a case, it seems that the CAAF essentially deprived the appellant of the relief that he should have had at the service court. This insight comes from Lieutenant Colonel Eugene Milhizer, Government Appellate Division. Telephone Interview with Major Patricia Ham, Government Appellate Division, United States Army Legal Services Agency (5 Apr. 1999) [hereinafter Ham Interview].

64. *Johnson*, 520 U.S. at 464-65.

65. *Id*.

66. *Id.*

should cite *Olano* as authority that in the plain error arena, the onus is on the defense to establish the required elements for relief.

Powell and Chatman / Wheelus: Same Song, Second Verse?

In *Chatman* and *Wheelus*, the CAAF said that it was not going to take any remedial action based on post-trial errors unless the appellant could show prejudice. *Powell*, with its "military plain error plus" analysis, also requires the appellant to demonstrate prejudice to obtain relief. *Powell* seems to continue the CAAF's *Chatman / Wheelus* trend to take no action unless the appellant can demonstrate that his ox has been gored.[69] Absent such a demonstration, the CAAF's position appears to be that taking corrective action is "not a productive judicial exercise."[70]

Who Can or Should Write the SJA PTR?

The person who gives the convening authority post-trial advice–in the form of the SJA PTR–is supposed to be neutral.[71] Several recent decisions have attempted to set some additional limits on who writes the SJA PTR.

In *United States v. Johnson-Saunders*,[72] the assistant trial counsel (ATC) wrote the SJA PTR in her capacity as the acting chief of military justice. She forwarded her recommendation to the SJA, who added one line indicating he had reviewed the record of trial and the recommendation, and that he concurred.[73] On appeal, the defense raised the disqualification issue, arguing that the author could not be impartial because of her significant involvement in the trial.[74] Not surprisingly, the CAAF found the author clearly disqualified under Article 6(c), UCMJ, and R.C.M. 1106(b). Accordingly, the CAAF set aside the convening authority's action, and returned the case for a new SJA PTR and convening authority action.[75]

The CAAF's opinion in *Johnson-Saunders* is significant for two reasons. First, the court held the author of the PTR disqualified even though she had routed the SJA PTR through an apparently *qualified* SJA, who concurred in her assessment. Second, the CAAF also articulated what may become the standard for disqualification in non-statutory situations: where the author's "extensive participation . . . would cause a disinterested observer to doubt the fairness of the post-trial proceed-

67. *Id.* at 731, 734.

68. *Id.* To drive home that point, the Supreme Court also said:

> [R]espondents have not met their burden of showing prejudice under Rule 52(b). Whether the [g]overnment could have met its burden of showing the absence of prejudice, under Rule 52(a), if respondents had not forfeited their claim of error, is not at issue here. This is a plain-error case, and it is the respondents who must persuade the appellate court that the [error] was prejudicial.

Id. at 741.

FED. R. CRIM. P. 52(a) says: "HARMLESS ERROR. Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded." Earlier in *Olano*, the court referred to Federal Rule of Criminal Procedure 52(a) as the provision "which governs unforfeited errors." *Id.* at 731. In *Powell*, the CAAF appears to have mixed harmless error and plain error analysis in reaching its burden-shifting conclusion.

69. Major Patricia Ham made this astute observation. Ham Interview, *supra* note 63.

70. United States v. Chatman, 46 M.J. 321, 323 (1997).

71. *See* United States v. Rice, 33 M.J. 451 (C.M.A. 1991); United States v. Spears, 48 M.J. 768 (A.F. Ct. Crim. App. 1998), *overruled in part* United States v. Owen, ACM 33140 (A.F. Ct. Crim. App. Dec. 3 1998).

72. 48 M.J. 74 (1998). Note also Judge Crawford's exasperation with mistakes in the post-trial process and her suggestion that The Judge Advocates General or their equivalents, as well as rating officials, be told who the SJA was at the time of the error.

73. *Id.* at 75. It is apparently not the practice of the Air Force to have the author actually sign the SJA PTR. *See* MCM, *supra* note 6, R.C.M. 1106(c). The SJA PTR and defense clemency matters, however, are commonly forwarded to the convening authority by an Air Force Form 1768. This form does contain the signatures and recommendations of all those who have been involved in the post-trial process. Telephone Interview with Major Christopher vanNatta, Instructor, Civil Law Department, U.S. Air Force Judge Advocate General's School (2 March 1999). Major vanNatta also pointed out that *Air Force Instruction 51-201*, specifically cautions Air Force SJAs to "[a]void use of the staff summary sheet in conjunction with the SJA's [Post-trial] Recommendation . . . ." U.S. DEP'T OF AIR FORCE INSTR. 51-201, ADMINISTRATION OF MILITARY JUSTICE (3 Oct. 1997). That paragraph goes on to say that if the staff summary sheet is used to forward the case to the convening authority for action, it needs to be served on the defense "for comment and attached to the record of trial." *Id.*

74. *Johnson-Saunders*, 48 M.J. at 75. The ATC swore the accuser, served the charges on the accused, conducted a portion of the voir dire (including a challenge for cause), examined witnesses during the findings portion, took the lead on the government sentencing case and made the sentencing argument for the government (which included a request that the court-martial impose the maximum sentence at that special court-martial).

75. *Id.* This case preceded *Wheelus'* application of *Chatman* to all post-trial errors. Otherwise, the CAAF would have required the appellant here to demonstrate prejudice by showing what she would have said or done to respond to the fact the SJA PTR had been written by the ATC.

ings."[76] Staff judge advocates must make sure that they either author the SJA PTR themselves or ensure that the actual author is not disqualified under either the Article 6(c) / R.C.M. 1106(b) standard or the new standard articulated by the CAAF in *Johnson-Saunders*. Defense counsel should determine who actually wrote the PTR and decide if they have a basis to object to the PTR.[77]

Although the SJA may personally prepare the PTR and not be disqualified under Article 6(c), UCMJ, or R.C.M. 1106(b), the SJA must be wary of other potential pitfalls that might prevent his further participation in the case post-trial.

Generally, preparation of the pretrial advice by itself is not enough to disqualify an SJA from preparing the PTR.[78] Nevertheless, intemperate remarks in the pretrial advice may do so. In *United States v. Plumb*,[79] the Air Force Court of Criminal Appeals (AFCCA) reviewed the SJA's *pretrial* advice and disqualified him based on comments contained therein. Captain Plumb was an Air Force officer, serving with the office of special investigations, who was eventually convicted of adultery and fraternization.[80] The acting SJA who prepared the pretrial advice characterized the accused "[l]ike a shark in the waters, [who] goes after the weak and leaves the strong alone."[81] The AFCCA, finding that the acting SJA's comments were "so contrary to the integrity and fairness of the military justice system that [they had] no place in the pretrial advice,"[82] disqualified the acting SJA from preparing the PTR and set aside the findings and the sentence.[83]

Finally, in *United States v. Spears*,[84] the AFCCA expanded the universe of documents to which disqualification may apply to include government responses to defense requests for waiver of automatic forfeitures under Article 58b, UCMJ.

Understanding *Spears* first requires understanding the case's byzantine chronology. On 9 May 1997, a special court-martial convicted Airman Spears of wrongful appropriation and writing bad checks.[85] He was sentenced to a reduction to E-1, confinement for five months, a Bad-Conduct Discharge, and forfeiture of $600 pay per month for six months.[86] On 16 May 1997, the accused requested waiver of the automatic forfeitures under Article 58b, UCMJ.[87] On 30 May 1997, the deputy SJA (DSJA) wrote the PTR, which did not address the waiver request.[88] The government served the SJA PTR on the defense. On 2 June 1997, the DSJA performed a legal review of the waiver request, and drafted a recommendation to the convening authority that he deny the request.[89] On 6 June 1997, the trial counsel (TC) did a staff summary sheet forwarding the DSJA's legal review and recommendation. On the staff summary sheet she also recommended that the convening authority deny the request.[90] Neither the DSJA's legal review and recommendation, nor the TC's staff summary sheet, were served on the defense.[91] On 10 June 1997, after considering both recommendations, the convening authority denied the waiver request.[92] On 19 June 1997, the defense submitted its post-trial submissions, which did not mention the waiver denial. There was no addendum to the SJA PTR.[93]

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76. *Id.*

77. Should this issue be raised on appeal, appellate defense counsel need to comply with the *Chatman* threshold, as expanded by *Wheelus*, and tell the appellate court what the defense would have said to respond to the disqualification issue.

78. *See* United States v. Collins, 6 M.J. 256, 257 (C.M.A. 1979) (citing United States v. Engle, 1 M.J. 387 (C.M.A. 1976)).

79. 47 M.J. 771 (A.F. Ct. Crim. App. 1997).

80. *Id.* at 773.

81. *Id*. at 781.

82. *Id*.

83. The AFCCA set aside the findings and sentence based on additional errors beyond just the ASJA's disqualification from preparing the SJA PTR. The AFCCA called this case an "often confusing testament to how not to conduct criminal investigations and prepare courts-martial for trial." *Id.* at 773.

84. 48 M.J. 768 (A.F. Ct. Crim. App. 1998), *overruled in part* United States v. Owen, ACM 33140 (A.F. Ct. Crim. App. Dec. 3, 1998).

85. *Spears*, 48 M.J. at 770.

86. *Id.*

87. *Id.* Because Airman Spears' adjudged forfeitures were less than the two-thirds automatic forfeitures under Article 58b, UCMJ, he requested the waiver.

88. *Id.* at 771.

89. *Id.*

90. *Id.*

91. *Id.*

On appeal, Airman Spears argued that the TC should not have been allowed to advise the convening authority on the waiver request, under Article 6(c), UCMJ, and R.C.M. 1106(b).[94] The AFCCA agreed with Airman Spears. The court found that the waiver request was a clemency submission under Article 60.[95] Because the "general principle underlying R.C.M. 1106(b) on disqualification is that the legal officer . . . [advising] the convening authority must be neutral,"[96] the AFCCA read Article 6(c) to "establish a rule of basic fairness which prevents a trial counsel from preparing *any* legal review for, or making *any* recommendation to, the convening authority at *any* stage of the post-trial process . . . ." (emphasis added).[97] Whether the other service courts or the CAAF will join the AFCCA in expanding the reach of the disqualification provisions is an open question. The AFCCA's analysis of the problem is sound. A request for waiver is essentially a request for clemency. The clemency process presumes that the government counsel who advises the convening authority on this issue is neutral (hence Article 6(c), UCMJ and R.C.M. 1106(b)). Therefore, legal advice to the convening authority on waiver requests should likewise come from a neutral source. Until the other service courts and the CAAF address this issue, government and defense would be well served to follow the AFCCA's analysis from *Spears*.[98]

Legal Error and the SJA Response To It: An Offer You Can't Refuse

At times, SJA's may feel compelled to respond to allegations of legal error the defense may raise in post-trial submissions. Many times, that response does little more than inject "new matter" into the process. Rule for Courts-Martial 1106(d)(4) makes clear that an SJA need only: (1) identify the legal error; (2) state his agreement or disagreement with the allegation; and (3) state whether, in the his opinion, corrective action is necessary based on the allegation.[99]

In *United States v. McKinley*,[100] the CAAF reemphasized that responses to legal error should not be tools for rebutting the defense assertion. In his personal post-trial statement, Airman McKinley referred to differences in treatment among those involved in the offenses with which he was charged.[101] The appellant's trial defense counsel did not directly raise the issue as legal error in his post-trial submission.[102] The SJA did not respond to the appellant's personal statement as legal error, but as an assertion of sentence disparity.[103] The appellate defense counsel alleged a violation of R.C.M. 1106(d)(4) for the SJA's failure to respond to an allegation of selective prosecution.[104] The CAAF determined that under the circumstances, the appellant had not raised selective prosecution and that the SJA was justified in treating the appellant's personal assertion as one of sentence disparity.[105]

Even though the CAAF found that the appellant and his defense counsel did not reasonably raise legal error, which would have required the SJA to respond, Judge Cox provided counsel with a format for SJA responses to legal error:

> The accused has asserted an issue of [_____].
> I disagree that the accused was [_________]
> or that corrective action is required.[106]

92. *Id.* at 772.

93. *Id.*

94. *Id.* at 773.

95. *Id.*

96. *Id.* at 774 (citing United States v. Rice, 33 M.J. 451 (C.M.A. 1991)).

97. *Id.* at 775.

98. Certainly this puts small offices, with limited government staff, in a bind. Absent a change in Article 6(c), UCMJ, and R.C.M. 1106, the SJA at the smaller offices may have to be more directly involved in preparing SJA PTRs.

99. MCM, *supra* note 6, R.C.M. 1106(d)(4).

100. 48 M.J. 280 (1998).

101. *Id.* at 281. Airman McKinley said he ad been "maligned by AB [L], a white female. And when the truth came out . . . the government turned a blind eye to her crimes and turned on me, a black male.

102. *Id.*

103. *Id.*

104. *Id.*

105. *Id.* at 281-82.

Staff judge advocates should use this as a model for responses to allegations of legal error contained in defense post-trial submissions.

"New Matter": I Know It When I See It . . . .

Two cases this year significantly expanded the areas from which "new matter" can creep into the post-trial process.

In *United States v. Spears*,[107] discussed above as it relates to disqualification, the AFCCA expanded the reach of "new matter" to government responses to requests for waiver of automatic forfeitures. In *Spears*, both the DSJA and the TC referred to matters outside the record of trial when advising the convening authority on Airman Spears' request for waiver.[108] On appeal, Airman Spears argued that this was new matter under R.C.M. 1106(f)(7), which required service on the defense for comment.[109] Although the AFCCA found that R.C.M. 1106(f)(7) was strictly inapplicable here,[110] it did "apply concepts of basic fairness and procedural due process to such situations. The clear purpose behind [R.C.M. 1106(f)(7)] was to give the defense an opportunity to respond to the SJA's position in post-trial legal advice provided to the convening authority."[111] The AFCCA determined that such concepts "prevent[] the SJA from bringing up new issues from outside the record to the convening authority and getting the last say without the defense even knowing about it."[112] Because the government's responses to the defense waiver request contained new matter and were not served on the defense, the AFCCA set aside the convening authority's action and returned the case to the convening authority for a new SJA PTR and convening authority action.

In *United States v. Cornwell*,[113] the CAAF addressed another potential source of new matter–SJA / convening authority conversations.

Prior to taking this case to the convening authority for initial action, the SJA bundled together the SJA PTR, defense submissions, and the addendum. Accompanying these documents was a staff summary sheet upon which the convening authority wrote a note to the SJA asking him what subordinate commanders thought about clemency. The SJA added a typewritten MFR that stated:

> I personally talked to each of the above commanders for . . . [the convening authority]. They each informed me that they recommended approving the sentence as adjudged. I verbally informed . . . [the convening authority] of their recommendations.

The CAAF disagreed with Captain Cornwell that such verbal conversations were new matter under R.C.M. 1106(f)(7). Citing the change to the post-trial process enacted by the Military Justice Act of 1983,[114] the CAAF said that to require the SJA to memorialize and serve on the defense any oral conversations between the SJA and the convening authority would be to "transform the [SJA PTR] and addenda thereto into something that Congress and the President intended to eliminate."[115]

The CAAF, however, did state that such conversations might run afoul of R.C.M. 1107(b)(3)(B)(iii).[116] The CAAF assumed (without deciding) that the subordinate commanders' recommendations should have been served on the defense for review and comment under that Rule, but found the error harmless.[117]

106. *Id.* at 281.

107. 48 M.J. 768 (A.F. Ct. Crim. App. 1998).

108. Both the DSJA and the TC called the appellant's wife a co-conspirator in his offenses and called both the appellant and his wife bad parents. *Id.* at 771.

109. The government did not serve either the DSJA legal review and recommendation or the TC's staff summary sheet and recommendation on the defense.

110. Because the "legal advice provided [related to] issues which [arose] before the SJAR was written . . . ." *Spears*, 48 M.J. at 775, *overruled in part* United States v. Owen, ACM 33140 (A.F. Ct. Crim. App. Dec. 3, 1998).

111. *Id.* at 775.

112. *Id.*

113. United States v. Cornwell, 49 M.J. 491 (1998). As discussed, Captain Cornwell pleaded guilty to false official statement, damaging government property and conduct unbecoming an officer. The court-martial sentenced him to a dismissal, confinement for two months, and forfeiture of all pay and allowances for two months. After trial, the SJA prepared and served the SJA PTR, and the defense submitted matters. The SJA prepared an addendum, but did not serve it on the defense. All parties agreed that the addendum did not contain new matters. *Id.*

114. The Act deleted the requirement that the SJA perform a detailed legal review of the case for the convening authority. According to the CAAF, the new "skeletal" SJA PTR "necessarily contemplates that a convening authority may ask questions and expect his SJA to answer them." *Id.*

115. *Id.*

116. *Id.*

Ineffective Assistance Post-trial: If Only My Lawyer Had . . . .

In *United States v. Cavan*,[118] the AFCCA did an admirable job of laying out for the practitioner what should happen when a client alleges ineffective assistance of counsel (IAC) during the post-trial process. Most defense counsel would not be shocked by the statement that, immediately after trial, many clients blame their defense counsel for their conviction. In such a case, the counsel is in an awkward position of still trying to zealously represent the client, while defending his own honor against the client's IAC accusation.

In *Cavan*, the AFCCA laid out a three-step process for such IAC allegations. First, the defense counsel must confront the client and determine whether the client is sincere in his IAC allegation, or whether he is merely "venting his frustration."[119] This may be an extremely difficult–and a potentially unworkable–distinction to expect the trial defense counsel to help the client draw. Hopefully, the counsel can encourage the client to be forthright with his feelings. Often, a client, while willing to rant against the counsel behind his back, is reluctant to tell the counsel to his face that he is unsatisfied with his representation. A defense counsel should muster all of his advocacy and client control skills to get the client to "come clean" on this issue. Assuring the client that you will not be offended by such an allegation is a good start. Telling the client that you want what is best for him and that if he feels you have been ineffective, you want him to say so might also bring down some barriers to honest communication.

Supervising defense counsel strongly should consider a requirement that trial defense counsel tell them of any allegations of IAC that arise post-trial. As an additional step in the process–or as a substitute for the first step–supervising defense counsel can talk to the client to determine the client's sincerity. Armed with this information, the supervising defense counsel can independently determine the need for substitute defense counsel for post-trial matters. Having the supervising defense counsel discuss this with the client would be preferable and more effective.

Second, the AFCCA stated that defense counsel need to advise the client of his right to conflict-free counsel in the post-trial process.[120] Again, while this step is certainly necessary, it may be better to have the supervising defense counsel discuss this with the client.

Finally, the AFCCA also placed a burden on the SJA, requiring him to notify the defense counsel of any known allegations of IAC, so the defense counsel can resolve them prior to "proceeding with the post-trial process." The SJA should be able to identify conflict-free counsel prior to service of the SJA PTR and authenticated record of trial. There is no point in serving these documents on, and getting defense post-trial submissions from, counsel with a conflict.

While the AFCCA in *Cavan* identified the minimum actions the defense bar should take when faced with an allegation of IAC during the post-trial phase, defense counsel should also notify their immediate supervisors of these allegations. Senior defense counsel should contact the clients themselves to determine whether the allegations are genuine or merely made from frustration. This removes the trial defense counsel from the awkward–and conflicting–position of determining the sincerity of the allegation.

The CAAF reviewed another allegation of IAC during the post-trial phase in *United States v. Sylvester*.[121] Aviation Structural Mechanic Airman Sylvester was convicted at a Special Court-Martial of use and distribution of methamphetamines.[122] On appeal, he alleged that neither his civilian nor his military defense counsel submitted written matters for the convening authority's consideration under R.C.M. 1105 and 1106.[123] Prior to action by the convening authority, however, civilian counsel had arranged a face-to-face meeting with the convening authority for both himself and the appellant's father.[124] During the meetings, the appellant's father asked for clemency, and the civilian defense counsel presented an oral submission to the convening authority, also asking for clemency.[125]

The CAAF looked at R.C.M. 1105 and 1106 and found no requirement that a defense counsel "supplement[] or memorial-

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117. The CAAF effectively applied the *Chatman* standard to this post-trial error; since "there is no hint that the appellant would have anything of substance to offer if a new recommendation and action were ordered, there is [no point to sending this back to the convening authority for a new recommendation and action]." *Id.*

118. 48 M.J. 567 (A.F. Ct. Crim. App. 1998).

119. *Id*. at 569.

120. *Id.*

121. 47 M.J. 390 (1998).

122. *Id.* at 391.

123. *Id.* at 392.

124. *Id.*

125. *Id.*

ize[] [a] personal presentation to the convening authority with a written submission . . . ."[126] Refusing to create such a requirement, although commenting that such supplementation or memorialization would have been "preferable,"[127] the CAAF found no IAC.[128]

Sentence Conversion: Be Careful What You Ask For . . . .

Rule for Courts-Martial 1107(d)(1) allows a convening authority at initial action to "change a punishment to one of a different nature as long as the severity of the punishment is not increased." The discussion to R.C.M. 1107(d)(1) cites conversion of a Bad-Conduct Discharge (BCD) to six months of confinement as an example of R.C.M. 1107(d)(1)'s operation. The courts have yet to fully define the outer limits of the convening authority's conversion power.

In *United States v. Carter*,[129] the CAAF found proper a convening authority's conversion of a BCD to an additional two years of confinement. Given *Carter's* unique facts, however, practitioners should not rely on a straight BCD-equals-two years conversion.[130] The CAAF currently has pending before it the case of *Frazier v. McGowan.*[131] Under circumstances substantially different than those in *Carter*,[132] the CAAF has been asked to determine if converting a BCD, two months of restriction and three months of hard labor without confinement to twelve months confinement is in violation of R.C.M. 1107(d)(1).[133]

Sentence Reassessment: More Power to the Service Courts

In two cases this past year, *United States v. Davis*[134] and *United States v. Boone*,[135] the CAAF provided counsel with a good synopsis of the appellate court's power after finding error in the sentencing portion of the case.

Airman Davis was charged with assault with intent to commit rape. At trial, the military judge failed to instruct the members on the lesser-included offense of indecent assault. Finding error and reducing the findings to indecent assault, the AFCCA reassessed the sentence and affirmed. Agreeing with the AFCCA, the CAAF held that a sentence rehearing is not always required when there has been a finding of error during the sentencing phase of the trial.[136]

Discussing the role of the service courts, the CAAF said "[t]he [service] court may reassess a sentence instead of ordering a sentence rehearing, if it 'confidently can discern the extent of the error's effect on the sentencing authority's decision.'"[137]

In his case, Specialist Boone alleged that his counsel was ineffective during the sentencing portion of his court-martial. Again, the CAAF said that upon a finding of error in the sentencing portion of the case, a service court can order a rehearing, if it cannot "reliably determine what sentence should have been imposed at the trial level if the error had not occurred."[138] If, on the other hand, the service court can determine that the sentence "would have been of at least a certain magnitude"[139]

126. *Id.* at 393.

127. *Id.*

128. Counsel should be extremely careful in relying only on oral presentations to convening authorities. The 1998 change to R.C.M. 1105 makes clear that the convening authority is only required to consider *written* submissions. While as a practical matter, face-to-face meetings with convening authorities may be beneficial, the convening authority is legally free to completely ignore them.

129. 45 M.J. 168 (1996).

130. In *Carter*, the appellant, a retirement-eligible senior enlisted soldier, asked for disapproval of the discharge in exchange for additional confinement. The accused did not limit the amount of additional confinement he was willing to serve to avoid the discharge (and loss of retirement). The court also noted that the additional two years for disapproval of the discharge saved the appellant $750,000.00 in retirement benefits.

131. No. 98-8021 (C.A.A.F. 1998)

132. The case is on an appeal of the denial of an extraordinary writ by the Coast Guard Court of Criminal Appeals. *See* Frazier v. McGowan, 48 M.J. 828 (C.G. Ct. Crim. App. 1998) (holding that conversion of a BCD (and several months of restriction and hard labor without confinement) to 12 months of confinement was permissible). In *Frazier*, the appellant was not retirement-eligible, opposed the conversion, and did not receive *any* confinement as part of the adjudged sentence.

133. Note that the CAAF (then known as the Court of Military Appeals) has previously held that converting a BCD to 12 months confinement when the defense successfully requested a discharge in lieu of confinement violates R.C.M. 1107(d)(1). Waller v. Swift, 30 M.J. 139 (C.M.A. 1990).

134. 48 M.J. 494 (1998).

135. 49 M.J. 187 (1998).

136. *Davis*, 48 M.J. at 495.

137. *Id.* (citing United States v. Reed, 33 M.J. 98, 99 (C.M.A. 1991)).

138. *Boone*, 49 M.J. at 194 (citing United States v. Sales, 22 M.J. 305, 307 (C.M.A. 1986)).

absent the error, it can reassess the sentence itself, without ordering a rehearing. If the service court reassess the sentence itself, the CAAF said that the "standard for reassessment is not what would have been imposed at a rehearing, but what would have been imposed at the original trial absent the error."[140]

In *Boone*, the CAAF again relied on its prior opinion in *United States v. Peoples*,[141] to support the service courts' ability and power to reassess sentences. Consistent with the CAAF's other actions in the post-trial area to expand the service courts' role in the name of expedience and judicial economy, the CAAF quoted *Peoples*: "Furthermore, we are well aware that it is more expeditious and less expensive for the Court of Military Review to reassess the sentence than to order a rehearing and sentence at the trial level."[142]

While *Davis* and *Boone* are good compilations of the law on sentence reassessment on appeal, *Boone's* quote from *Peoples* is also another subtle indicator of the underlying current behind many of the CAAF's decisions relating to post-trial this year–expedience and judicial economy.

Conclusion

Building on last year's decision in *Chatman*, the CAAF took two giant steps away from forty years of post-trial precedent in *Cornwell* and *Wheelus*. The CAAF recognized that the convening authority, in certain circumstances, might *not* be the accused's last, best chance for clemency in the post-trial process. To address this situation, the CAAF effectively gave the service courts quasi-clemency power to take appropriate action in post-trial error cases, rather than sending the case back to the convening authority.

Activism seems to have been the watchword in the post-trial arena within this last year. Whether and to what extent the CAAF and the service courts (particularly the AFCCA) will continue driving headlong into this unmapped area remains to be seen.

139. *Id.*

140. *Id.* at 195 (citing United States v. Taylor, 47 M.J. 322, 325 (1997)).

141. 29 M.J. 426 (C.M.A. 1990).

142. *Boone*, 49 M.J. at 195 (citing *Peoples*, 29 M.J. at 429).

Guard and Reserve Affairs Items

Guard and Reserve Affairs Division
Office of The Judge Advocate General, U.S. Army

GRA On-Line!

You may contact any member of the GRA team on the Internet at the addresses below.

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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.

1998-1999 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.

THE JUDGE ADVOCATE GENERAL'S SCHOOL RESERVE COMPONENT (ON-SITE) CONTINUING LEGAL EDUCATION TRAINING SCHEDULE 1998-1999 ACADEMIC YEAR

DATE	CITY, HOST UNIT, AND TRAINING SITE	AC GO/RC GO SUBJECT/INSTRUCTOR/GRA REP*		ACTION OFFICER
1-2 May	Gulf Shores, AL 81st RSC/AL ARNG Gulf State Park Resort Hotel 21250 East Beach Boulevard Gulf Shores, AL 36547 (334) 948-4853 (800) 544-4853	AC GO RC GO Int'l - Ops Law Contract Law GRA Rep	BG Michael J. Marchand BG Richard M. O'Meara LCDR Brian Bill MAJ Thomas Hong Dr. Mark Foley	1LT Chris Brown OSJA, 81st RSC ATTN: AFRC-CAL-JA 255 West Oxmoor Road Birmingham, AL 35209-6383 (205) 940-9303/9304 e-mail: browncr@usarc-emh2.army.mil
14-16 May	Kansas City, MO 8th LSO/89th RSC Embassy Suites (KC Airport) 7640 NW Tiffany Springs Parkway Kansas City, MO 64153-2304 (816) 891-7788 (800) 362-2779	AC GO RC GO Ad & Civ Law Criminal Law GRA Rep	BG Thomas J. Romig BG John f. DePue MAJ Janet Fenton MAJ Michael Hargis Dr. Mark Foley	MAJ James Tobin 8th LSO 11101 Independence Avenue Independence, MO 64054-1511 (816) 737-1556 jtobin996@aol.com http://home.att.net/~sckndck/jag/

*Topics and attendees listed are subject to change without notice.

Please notify MAJ Rivera if any changes are required, telephone (804) 972-6383.

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

1999

May 1999

3-7 May — 54th Fiscal Law Course (5F-F12).

3-21 May — 42nd Military Judge Course (5F-F33).

10-12 May — 1st Joint Service High Profile Case Management Course (5F-F302).

17-21 May — 2nd Advanced Trial Advocacy Course (5F-F301).

June 1999

7-18 June — 4th RC Warrant Officer Basic Course (Phase I) (7A-550A0-RC).

7 June- 16 July — 6th JA Warrant Officer Basic Course (7A-550A0).

7-11 June — 2nd National Security Crime and Intelligence Law Workshop (5F-F401).

7-11 June — 154th Senior Officers Legal Orientation Course (5F-F1).

21-25 June — 3rd Chief Legal NCO Course (512-71D-CLNCO).

14-18 June — 29th Staff Judge Advocate Course (5F-F52).

21 June-2 July — 4th RC Warrant Officer Basic Course (Phase II) (7A-550A0-RC).

21-25 June — 10th Senior Legal NCO Management Course (512-71D/40/50).

23-25 June — Career Services Directors Conference

July 1999

5-16 July — 149th Basic Course (Phase I-Fort Lee) (5-27-C20).

6-9 July — 30th Methods of Instruction Course (5F-F70).

6-9 July — Professional Recruiting Training Seminar

12-16 July — 10th Legal Administrators Course (7A-550A1).

16 July-24 September — 149th Basic Course (Phase II-TJAGSA) (5-27-C20).

August 1999

2-6 August	71st Law of War Workshop (5F-F42).
2-13 August	143rd Contract Attorneys Course (5F-F10).
9-13 August	17th Federal Litigation Course (5F-F29).
16-20 August	155th Senior Officers Legal Orientation Course (5F-F1).
16 August 1999- 26 May 2000	48th Graduate Course (5-27-C22).
23-27 August	5th Military Justice Mangers Course (5F-F31).
23 August- 3 September	32nd Operational Law Seminar (5F-F47).

September 1999

8-10 September	1999 USAREUR Legal Assistance CLE (5F-F23E).
13-17 September	1999 USAREUR Administrative Law CLE (5F-F24E).
13-24 September	12th Criminal Law Advocacy Course (5F-F34).

October 1999

4-8 October	1999 JAG Annual CLE Workshop (5F-JAG).
4-15 October	150th Basic Course (Phase I-Fort Lee) (5-27-C20).
15 October- 22 December	150th Basic Course (Phase II-TJAGSA) (5-27-C20).
12-15 October	72nd Law of War Workshop (5F-F42).
18-22 October	45th Legal Assistance Course (5F-F23).
25-29 October	55th Fiscal Law Course (5F-F12).

November 1999

1-5 November	156th Senior Officers Legal Orientation Course (5F-F1).
15-19 November	23rd Criminal Law New Developments Course (5F-F35).
15-19 November	53rd Federal Labor Relations Course (5F-F22).
29 November 3 December	157th Senior Officers Legal Orientation Course (5F-F1).
29 November 3 December	1999 USAREUR Operational Law CLE (5F-F47E).

December 1999

6-10 December	1999 USAREUR Criminal Law Advocacy CLE (5F-F35E).
6-10 December	1999 Government Contract Law Symposium (5F-F11).
13-15 December	3rd Tax Law for Attorneys Course (5F-F28).

2000

January 2000

4-7 January	2000 USAREUR Tax CLE (5F-F28E).
10-14 January	2000 USAREUR Contract and Fiscal Law CLE (5F-F15E).
10-21 January	2000 JAOAC (Phase II) (5F-F55).
17-28 January	151st Basic Course (Phase I-Fort Lee) (5-27-C20).
18-21 January	2000 PACOM Tax CLE (5F-F28P).
26-28 January	6th RC General Officers Legal Orientation Course (5F-F3).
28 January- 7 April	151st Basic Course (Phase II-TJAGSA) (5-27-C20).
31 January- 4 February	158th Senior Officers Legal Orientation Course (5F-F1).

February 2000

7-11 February — 73rd Law of War Workshop (5F-F42).

7-11 February — 2000 Maxwell AFB Fiscal Law Course (5F-F13A).

14-18 February — 24th Administrative Law for Military Installations Course (5F-F24).

28 February-10 March — 33rd Operational Law Seminar (5F-F47).

28 February-10 March — 144th Contract Attorneys Course (5F-F10).

March 2000

13-17 March — 46th Legal Assistance Course (5F-F23).

20-24 March — 3rd Contract Litigation Course (5F-F102).

20-31 March — 13th Criminal Law Advocacy Course (5F-F34).

27-31 March — 159th Senior Officers Legal Orientation Course (5F-F1).

April 2000

10-14 April — 2nd Basics for Ethics Counselors Workshop (5F-F202).

10-14 April — 11th Law for Legal NCOs Course (512-71D/20/30).

12-14 April — 2nd Advanced Ethics Counselors Workshop (5F-F203).

17-20 April — 2000 Reserve Component Judge Advocate Workshop (5F-F56).

May 2000

1-5 May — 56th Fiscal Law Course (5F-F12).

1-19 May — 43rd Military Judge Course (5F-F33).

8-12 May — 57th Fiscal Law Course (5F-F12).

June 2000

5-9 June — 3rd National Security Crime and Intelligence Law Workshop (5F-F401).

5-9 June — 160th Senior Officers Legal Orientation Course (5F-F1).

5-14 June — 7th JA Warrant Officer Basic Course (7A-550A0).

5-16 June — 5th RC Warrant Officer Basic Course (Phase I) (7A-550A0-RC).

12-16 June — 4th Senior Legal NCO Course (512-71D-CLNCO).

12-16 June — 30th Staff Judge Advocate Course (5F-F52).

19-23 June — 11th Senior Legal NCO Management Course (512-71D/40/50).

19-30 June — 5th RC Warrant Officer Basic Course (Phase II) (7A-550A0-RC).

26-28 June — Professional Recruiting Training Seminar

3. Civilian-Sponsored CLE Courses

1999

May

7 May
ICLE
Criminal Law, 5th and 6th Amendments Rights
Clayton State College
Atlanta, Georgia

14 May
ICLE
Emerging Issues in Employment Law
Omni Hotel
Atlanta, Georgia

June

4 June
ICLE
The Jury Trial
Sheraton Buckhead
Atlanta, Georgia

Current Materials of Interest

1. TJAGSA Materials Available through the Defense Technical Information Center (DTIC)

For a complete listing of the TJAGSA Materials Available through the DTIC, see the April 1999 issue of *The Army Lawyer*.

2. Regulations and Pamphlets

For detailed information, see the September 1998 issue of *The Army Lawyer*.

3. The Legal Automation Army-Wide System Bulletin Board Service

For detailed information, see the September 1998 issue of *The Army Lawyer*.

4. TJAGSA Publications Available Through the LAAWS BBS

For detailed information, see the September 1998 issue of *The Army Lawyer*.

5. Articles

The following information may be useful to judge advocates:

Roederick White, Sr., *Lawyer Fee Sharing Agreements,"* 25 S.U.L. REV. 227 (Spring 1998).

Wambdi Awanwicake Wastewin, *Strate v. A-1 Contractors: Intrusion into the Sovereign Domain of Native Nations*, 74 N.D. L. REV. 679 (1998

6. 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. Mr. Al Costa.

7. 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-DDS, The Judge Advocate General's School, United States Army, 600 Massie Road, Charlottesville, Virginia 22903-1781. Telephone numbers are DSN: 934-7115, ext. 394, commercial: (804) 972-6394, or facsimile: (804) 972-6386.