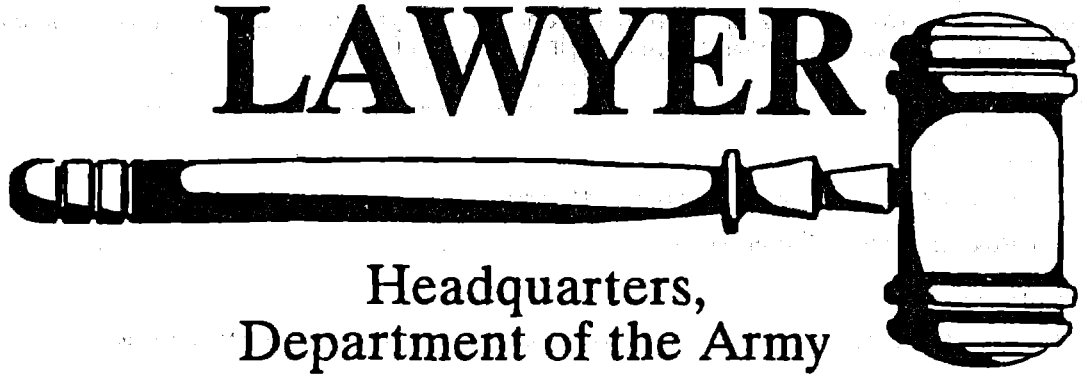
# THE ARMY LAWYER



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## Military Justice Symposium

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# Foreward

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In the following articles, the members of the Criminal Law Department of The Judge Advocate General's School address significant developments in military criminal law during 1995. A year is, of course, an artificial construct when analyzing the law—or movies and books for that matter—because significant developments do not necessarily confine themselves to neat twelve month periods. The articles in this symposium are written for both the critic or analyst and the military justice practitioner—the judge and counsel who try the case. Each professor has chosen to focus on developments in his or her area of academic concentration that are noteworthy because of the changes they bring to military law or because of the manner in which they embroider or alter recent developments or presage future ones. Although each author's approach is unique, each first lays some groundwork—informing the reader of what is new—and then places the developments in context and, when appropriate, identifies or suggests trends.

The authors evaluate cases from all military courts, but because of its finality, pay particular attention to the Court of Appeals for the Armed Forces (formerly the Court of Military Appeals), the highest military appellate court, which produced 107 written opinions in 1995.

The workload of the military appellate courts can be roughly forecast by examining court-martial trends, and the number and rate of courts-martial may finally have crested in the past few years. The total number of Army courts-martial declined from 1569 in 1994 to 1482 in 1995.[1] The number of Army general courts-martial declined from 843 to 825. This actually represents a slight increase in the rate of general courts-martial from 1.51 to 1.58 per 1000 soldiers, owing to the continued decline in the number of soldiers on active duty. Importantly, the rate of general courts-martial appears to have stabilized. Until 1989, the rate exceeded 2 per 1000 for many years. In four of the past five years it has stayed within the narrow range of 1.47 to 1.58.[2]

The five judges on the Court of Appeals for the Armed Forces (CAAF) evenly distributed the work during 1995, with all writing from 19-23 majority opinions,[3] but the judges varied markedly in their ability to write opinions that spoke commandingly for the court. Forty-two, or 46% of the court's opinions,[4] had no concurring or dissenting opinions. The best consensus builder was the late Judge Wiss,[5] 11 of whose 23 opinions drew neither concurrences nor dissents.[6] By contrast, only six of Judge Crawford's 21 opinions (29%) were without concurrence or dissent.

Broadly viewed, the court shows marked solidarity, as 86 of its opinions (81%) were unanimous, 14 (13%) were 4-1 decisions, and only six cases (5.6%) were decided by 3-2 margins. Such a large number of cases featured multiple concurrences, however, makes it difficult to discern the court's direction or predilections. Although there appears to be a solidarity to the court, 21 of its decisions (20%) featured at least three opinions.

Judge Sullivan, chief judge until the end of the 1995 term, was the most restless or prolific member of the court. He wrote 50 opinions, meaning that he wrote an opinion in 47% of the court's cases; he also wrote the most dissents (9). At the other extreme was Judge Cox, chief judge as of 1 November 1995, and the court's senior member, with nearly twelve years on the bench. He only wrote 32 opinions (in 30% of the court's cases), including 10 separate concurrences. He and Judge Wiss wrote the fewest dissents (two each). Judge Wiss wrote the greatest number of concurrences (20, one more than Judge Sullivan).

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[1] The source for this and all statistics in this introduction is the Office of the Clerk of Court, United States Army Legal Services Agency, Falls Church, Virginia.

[2] The special court-martial (the "straight" special not empowered to adjudge a punitive discharge) continued its glide toward obsolescence in 1995, declining from 32 to 20 cases Army-wide. There were 149 special courts-martial in 1990. The rate of special courts empowered to adjudge a bad-conduct discharge has also stabilized in recent years at between .58 and .73. There were 333 in 1995, a rate of .64 per 1000 soldiers.

[3] Retired Judge Robinson O. Everett wrote one opinion, *United States v. Gleason*. 43 M.J. 69 (1995).

[4] The 107 opinions do not include the court's lone *per curiam* opinion of the year, United States v. Gonzalez. 42 M.J. 373 (1995).

[5] Judge Wiss died on 23 October 1995. As of this writing, the President had not nominated a replacement.

[6] Chief Judge Sullivan followed close behind, as nine of his 19 lead opinions (47%) did not generate concurrences or dissents.

There were so many unanimous opinions and separate concurrences, and only six cases with more than one dissenting vote, that no clear or obvious ideological or analytical soulmates on the court in the Brennan and Marshall mold revealed themselves. Of the six 3-2 cases, Judges Gierke and Crawford shared two dissents,[7] as did Judges Wiss and Sullivan,[8] but there is no obvious strain of consistency or allegiance in these pairs of cases.[9] Both Judges Sullivan and Wiss, however, shared a sensitivity to command influence issues. In their separate but complementary dissents in *United States v. Ayala*[10] and their blistering concurrences in *United States v. Weasler*,[11] they raked the majority opinions for what they characterized as unprecedented tolerance of unlawful command influence.[12] The passing of Judge Wiss and the naming of his replacement may help determine whether such command influence cases remain hotly contested, or whether a clear direction (reflected perhaps in 4-1 opinions) emerges.

Judge Gierke, perhaps the CAAF judge most difficult to characterize, was in the middle of the pack in terms of opinions written and the ability to marshall other judges to his viewpoint. Judge Crawford, in her fifth year on the court, continued to speak with a strong voice in sharply worded opinions (including three dissents in prominent urinalysis cases and an emotional dissent in a rape case). She wrote seven dissents, second on the court, six concurrences and two partial concurrences and dissents.

All of this provides ample challenge for the authors of the pieces that follow, but deprives practitioners of some of the certainty and predictability that senior appellate courts strive to provide. The chart below provides a snapshot of the CAAF's activity during 1995.

| AUTHOR | TOTAL OPINIONS WRITTEN* | MAJORITY OPINIONS | WRITTEN MAJORITY OPINIONS WITHOUT CONCURRENCE OR DISSENT | WRITTEN DISSENTING OPINIONS | WRITTEN CONCURRING OPINIONS | CONCURRENCE WITHOUT WRITTEN OPINION | CONCUR IN PART, DISSENT IN PART, WITH WRITTEN OPINIONS |
|---|---|---|---|---|---|---|---|
| COX | 32 (30%) | 20 | 9 (45%) | 2 | 10 | 0 | 0 |
| CRAWFORD | 36 (34%) | 21 | 6 (29%) | 7*** | 6 | 2 | 2 |
| GIERKE | 34 (32%) | 22 | 7 (32%) | 4 | 8 | 1 | 0 |
| WISS | 47 (44%) | 23 | 11 (48%) | 2 | 20 | 1 | 2 |
| SULLIVAN | 50 (47%) | 19 | 9 (47%) | 9 | 19 | 0 | 3 |
| TOTALS FOR COURT | 200 | 106** | 42 (40%) | 24 | 63 | 4 | 7 |

* The figure in parentheses is the percentage of the total number of the court's 1995 opinions written by that judge.

** The court actually issued 108 opinions during 1995. One was written by Senior Judge Everett; United States v. Gleason, 43 M.J. 69 (1995); and the other was a per curiam opinion, United States v. Gonzalez, 42 M.J. 373 (1995).

*** In an additional case, Judge Crawford joined without written opinion, the dissent written by Judge Gierke. United States v. McGowan, 41 M.J. 406, 415 (1995).

[7] United States v. McGowan, 41 M.J. 406 (1995); United States v. Townsend, 43 M.J. 205 (1995).

[8] United States v. Reed, 41 M.J. 449 (1995); United States v. Ayala, 43 M.J. 296 (1995).

[9] The two dissents shared by Judges Gierke and Crawford are common in that both respond to majority opinions written by Chief Judge Sullivan and take what may be characterized (albeit facilely) as "pro-government" stands. The two Wiss-Sullivan dissents have no obvious link. In *Reed*, both wrote separately and with different legal bases; the *Ayala* dissent is addressed presently.

[10] *Ayala*, 43 M.J. at 296 (1995).

[11] 43 M.J. 15 (1995).

[12] *Ayala*, 43 M.J. at 296 (1995) involved a claim that soldiers failed to write supportive post-trial affidavits because of perceived command pressure. Chief Judge Sullivan (in a concurrence and dissent) argued that there was sufficient cause to remand the case for a *Dubay* hearing. His opinion criticized "the majority's hypertechnical construction" of the UCMJ's prohibition of unlawful command influence. *Id.* at 303 (Sullivan, C.J., concurring in part and dissenting in part). In addition, he appended to his opinion, *inter alia*, two pithy letters from President Truman, the second of which includes a personal anecdote about command influence. *Id.* at 312. In his dissent, Judge Wiss said there was a sufficient quantity of the "disconcerting, acrid smell of smoke" of command influence to require an inquiry. *Id.* at 313. He scored "the majority's timidity that regrettably is part of a pattern of this Court's recent disposition of issues relating to unlawful command influence," suggesting that "[c]omplacency puts the entire system at risk." *Id.* at 313-314. *United States v. Weasler*, 43 M.J. 15 (1995) involved, *inter alia*, whether an accused could waive issues of command influence as part of a pretrial agreement. The two jurists strongly believed that such waivers were contrary to good policy, as they would permit convening authorities to extort pretrial agreements from accused soldiers in order to cover up command influence charges. As in *Ayala*, Judges Wiss and Sullivan heavily criticized the majority, suggesting it was setting a standard of "tolerable" command influence. Chief Judge Sullivan wrote that the majority had blessed "private deals between an accused and a command to cover up instances of unlawful command influence . . .[,] a 'blackmail type' option to those who would engage in unlawful command influence." *Id.* at 20-21 (Sullivan, C.J., dissenting). Judge Wiss spoke of a commander's ability to "buy off that accused's silence and go on his merry way" as a result of the majority opinion. *Id.* (Wiss, J., dissenting).

# Developments in the Substantive Criminal Law Under the Uniform Code of Military Justice

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## Introduction

Substantive criminal law[1] is an area of military justice practice about which the military appellate courts increasingly agree only in their disagreement. This discord, whether between the service appellate courts and the Court of Appeals for the Armed Forces (CAAF),[2] or among the judges of the various courts themselves, can create significant confusion for the military justice practitioner. Recent military cases addressing issues in the substantive criminal law reveal, for example, a tug of war between a service courts and the CAAF over issues of statutory interpretation and the definition of offenses that has lasted three years,[3] conflicting opinions from the various panels of a service courts resolved only by an en banc decision by the court,[4] and a surprising number of plurality opinions from a highly divided CAAF about various important issues.[5]

This article will attempt to sift through this confusion and analyze selected recent decisions by the military appellate courts as well as significant statutory changes. Not every recent case is discussed; only those developments that resolve or create uncertainties in the law are considered. To the extent possible, the practical ramifications for the practitioner in the field have been identified and discussed.

The article will reflect the major divisions of the substantive criminal law. The article will first consider crimes against persons, property, and military order.[6] Next, the article will discuss major developments in theories of criminal liability and inchoate offenses.[7] After an examination of new developments in the law of defenses, the subjects of multiplicity, included offenses, and pleadings will be the last topics considered.[8] The reader will then be familiar with the recent legal developments in the substantive criminal law and their implications for the military justice practitioner.

## Crimes Against Persons

### *Unloaded Firearms as Dangerous Weapons*

Traditionally, an unloaded firearm has not been considered a "dangerous weapon or other means or force likely to inflict death or grievous bodily harm" for the purpose of the aggravated assault prohibition of the Uniform Code of Military Justice (UCMJ),[9] unless it was used as a missile or bludgeon.[10] However, in *United States v. Sullivan*,[11] a panel of the Army Court of Military Review held that an apparently functional pistol that was brandished in a threatening manner was a dangerous weapon whether or not it

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[1] "The substantive criminal law is that law which, for the purpose of preventing harm to society, declares what conduct is criminal and prescribes the punishment to be imposed for such conduct. It includes the definition of specific offenses and general principles of liability." 1 WAYNE R. LAFAVE AND AUSTIN W. SCOTT, JR., SUBSTANTIVE CRIMINAL LAW § 1.2, at 8 (1986) [hereinafter LAFAVE & SCOTT].

[2] On 5 November 1994, the National Defense Authorization Act for Fiscal Year 1995, Pub. L. No. 103-337, 108 Stat. 2663 (1994), changed the names of the United States Courts of Military Review and the United States Court of Military Appeals. The new names are the United States Courts of Criminal Appeals and the United States Court of Appeals for the Armed Forces, respectively. For the purpose of this article, the name of the court at the time of that a particular case is decided is the name that will be used in referring to that decision. *See* United States v. Sanders, 41 M.J. 485, 485 n.1 (1995).

[3] United States v. Antonelli, 43 M.J. 183 (1995).

[4] United States v. Turner, 42 M.J. 689 (Army Ct. Crim. App. 1995) (en banc).

[5] *E.g.*, United States v. Anzalone, 43 M.J. 322 (1995) (plurality opinion).

[6] *See infra* notes 9-117 and accompanying text.

[7] *See infra* notes 118-28 and accompanying text.

[8] *See infra* notes 129-224 and accompanying text.

[9] UCMJ art. 128(b).

[10] MANUAL FOR COURTS-MARTIAL, United States, pt. IV, ¶ 54c(4)(a)(ii) (1995 ed.) [hereinafter MCM].

[11] 36 M.J. 574 (A.C.M.R. 1992), *overruled by* United States v. Turner, 42 M.J. 689 (Army Ct. Crim. App. 1995) (en banc).

was loaded or even functional.[12] Shortly thereafter, another panel of the Army court held to the contrary in *United States v. Rivera*.[13]

This conflict within the Army court created a certain amount of confusion among military justice practitioners, and generated some academic commentary.[14] A recent en banc decision of the Army Court of Criminal Appeals (ACCA) has resolved the conflict and clarified the law of aggravated assault under the UCMJ. In *United States v. Turner*,[15] the Army court held "as a matter of law and in accordance with legal precedent, an unloaded pistol presented as a firearm is not a dangerous weapon and is not being used in a manner 'likely' to produce death or grievous bodily harm as contemplated by Article 128(b)(1)."[16]

The Army court's en banc decision in *Turner* is significant for at least three reasons. First, it reduces the uncertainty facing Army practitioners by unambiguously overruling the court's opinion in *United States v. Sullivan*,[17] thereby resolving the apparent conflict among the panels of the Army court. Moreover, the court's holding is consistent with military precedent that requires more than a "fanciful, speculative, or remote possibility" that grievous injury will result from the use of a given instrumentality for it to be a "dangerous weapon or means or force likely to inflict death or grievous bodily harm."[18] The court noted that "under no conceivable circumstances is an unloaded pistol capable of inflicting any bodily harm, unless it is used as a missile or bludgeon."[19] Finally, the Army court in *Turner* recognized that the policy concerns that motivated the court in *Sullivan* were nevertheless meritorious, and strongly urged The Judge Advocate General of the Army to join with his counterparts from the other services in recommending to the President to increase the maximum punishment for simple assaults committed with unloaded firearms or other apparently dangerous weapons.[20] Military justice practitioners should be alert to the possibility that the President will increase the maximum punishment for some types of simple assaults.

The Navy-Marine Corps Court of Criminal Appeals also recently confronted, albeit in a slightly different context, the problem of whether an unloaded firearm is a dangerous weapon. In *United States v. Palmer*,[21] the appellant pled guilty to, inter alia, wrongful possession of a dangerous weapon—an unloaded .25 caliber handgun—in violation of a naval regulation that prohibited any person in the naval service from having "in his or her possession any dangerous weapon . . . on board any ship, craft, aircraft, or in any vehicle of the naval service or within any base or other place under naval jurisdiction."[22] He challenged the providency of his guilty plea to this offense, asserting that the relevant regulation did not define the term "dangerous weapon," and that the law of aggravated assault treated an unloaded firearm as a dangerous weapon only if used a bludgeon.[23]

The Navy court disagreed, and concluded "that a charge of violating Article 1159 of U.S. Navy Regulations by wrongfully possessing an unloaded handgun aboard a naval station involves the definition of a dangerous weapon similar to that used for the

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[12] *Id.* at 577.

[13] 40 M.J. 544, 550 (A.C.M.R.), *pet. denied*, 42 M.J. 12 (1994).

[14] *See* Major William T. Barto & First Lieutenant (now Captain) Lawrence J. Lucarelli, TJAGSA Practice Note, *Dangerous Weapons, Unloaded Firearms, and the Law of Aggravated Assault: The ACMR Hangfires in Two Conflicting Opinions*, ARMY LAW., Jan. 1995, at 56.

[15] 42 M.J. 689 (Army Ct. Crim. App. 1995) (en banc).

[16] *Id.* at 691 (footnote and citations omitted). The court went on to hold "that it was error as a matter of law to have informed the appellant during the providence inquiry that an unloaded pistol, used only as a firearm, was a dangerous weapon likely to produce death or grievous bodily harm within the meaning of Article 128(b)(1), UCMJ." *Id.*

[17] *Id.* at 691 n.3.

[18] *See, e.g.*, United States v. Joseph, 37 M.J. 392, 397 (C.M.A. 1993)(quoting United States v. Johnson, 30 M.J. 53 (C.M.A.), *cert. denied*, 498 U.S. 919 (1990)).

[19] *Turner*, 42 M.J. at 691.

[20] *Id.* at 692.

[21] 41 M.J. 747 (N.M. Ct. Crim. App. 1994).

[22] *Id.* at 748.

[23] *Id.* at 748-49.

offense of carrying a concealed weapon."[24] The court distinguished this offense from aggravated assault by reasoning as follows:

> [I]n cases where only possession of the instrument or weapon is involved, the proper focus cannot be on the use because there is no use, but rather on the nature of an item, its design and intended purpose. . . . We presume that all guns, whether loaded or not, are dangerous weapons in cases involving alleged violations of Article 1159 of U.S. Navy Regulations. . . . [T]hey are able to be quickly and easily loaded and are designed to be fired. They are designed for no other purpose.[25]

At least two lessons can be drawn from the *Turner* and *Palmer* decisions. First, the definition of "dangerous weapon" is neither constant nor universal, and may vary depending on the context in which it arises; *Turner* involved the interpretation of Article 128, UCMJ, while *Palmer* considered a regulatory provision. The second lesson relates closely to the first; counsel should revise, or recommend revision to, local orders or regulations pertaining to dangerous weapons to reduce definitional ambiguities such as those that gave rise to *Turner* and *Palmer*.

## Homicide

### *Voluntary Manslaughter*

Military law has long recognized that "[a]n unlawful killing, although done with intent to kill or inflict great bodily harm, is not murder but voluntary manslaughter if committed in the heat of sudden passion caused by adequate provocation."[26] The *Manual for Courts-Martial* provides in relevant part that "[t]he provocation must be adequate to excite uncontrollable passion in a reasonable person."[27] The *Manual* goes on to state that "[i]nsulting or abusive words or gestures, a slight blow with the hand or fist, and trespass or other injury to property are not, standing alone, an adequate provocation."[28] There has been some uncertainty over time as to the meaning and effect of the qualifying clause, "standing alone," and the ACCA has provided some guidance on this matter in its opinion in *United States v. Saulsberry*.[29]

In *Saulsberry*, the Army court found the facts as follows:

> [T]he appellant was peaceably watching television in his own room in the barracks when SPC Speed entered without invitation, opened the appellant's refrigerator, and consumed one of his drinks. . . . Furthermore, the conduct was accompanied by loud and abusive remarks about the appellant. When these events led to a confrontation and shoving match that the appellant broke off, SPC Speed attacked the appellant from the rear, threw him on the bed, began to choke him, and then subdued and humiliated him in front of other soldiers. The appellant then retreated to his corner of the room where he sat on his bed. He was again confronted by the swaggering and foul-mouthed SPC Speed who taunted him by calling him 'all sorts of names.' Specialist Speed asked, 'What are you going to do mother ------' and 'f--- you, what are you gonna do, chicken s---?' He also challenged the appellant, 'Do you want me to teach you a lesson.' All of these epithets were delivered by SPC Speed while he stood adjacent to the appellant's bed and while he leaned over in the appellant's face in a menacing manner.[30]

The appellant then stabbed SPC Speed once in the heart, killing him.[31] Saulsberry was convicted at court-martial of unpremeditated murder, but the Army court found the evidence "sufficient to support only a conviction for voluntary manslaughter."[32] The court reasoned "that these provocations were adequate to provoke uncontrollable rage, fear, and passion in a reasonable person. Thus, the conviction for unpremeditated murder cannot stand."[33]

There are two primary lessons for practitioners in the wake of *Saulsberry*. While verbal abuse, simple assaults, or trespass to property may not be adequate provocation when considered separately, they may reduce a charge of murder to manslaughter if they occur, as they do in *Saulsberry*, in a single case. A second

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[24] *Id.* at 749-50.

[25] *Id.* (citations omitted).

[26] MCM, *supra* note 10, pt. IV, ¶ 44c(1)(a).

[27] *Id.* ¶ 44c(1)(b).

[28] *Id.*

[29] 43 M.J. 649 (Army Ct. Crim. App. 1995).

[30] *Id.* at 651-52.

[31] *Id.* at 650.

[32] *Id.* at 649.

[33] *Id.* at 652.

point to bear in mind is that the Army court set aside Saulsberry's conviction because of the *factual* insufficiency of the evidence; the court nevertheless found the evidence *legally* sufficient to support a conviction for unpremeditated murder.[34] As a result, this case has more tactical than legal significance, but should be kept in mind by supervisors and counsel when making charging decisions or determining negotiating posture in a case involving similar facts.

### *Negligent Homicide*

Turning over the operation of an automobile to an intoxicated person, who later kills a third party while drunkenly operating the vehicle, has for some time been considered a culpably negligent act sufficient to justify an involuntary manslaughter conviction.[35] The CAAF recently expanded the potential for criminal liability in this area in *United States v. Martinez*,[36] where the court held that negligently allowing a fellow service member to drive the accused's vehicle while under the influence of alcohol, resulting in the death of the intoxicated driver *himself*, was punishable under Article 134, UCMJ, as negligent homicide.[37] The nature of the negligence in these cases lies in heedlessly turning over the keys to the "chariot of death," without even inquiring about how much alcohol the driver had actually consumed.[38]

The holding of the court in *Martinez* is probably less important than two other aspects of the court's various opinions in this case. The concurring opinion of the late Judge Wiss is of immediate importance to practitioners, especially military judges, confronting a case like *Martinez*. Judge Wiss wrote separately to emphasize the need for military judges to tailor their instructions to the evidence in a given case, particularly one involving complex concepts such as proximate cause, immediate cause, independent and intervening cause, and contributory negligence.[39] His concurring opinion provides an exceptionally understandable explanation of the law of causation, and also includes a sample instruction that could be adapted for use by military judges in appropriate cases.[40]

Another potentially significant portion of the *Martinez* opinion is found in a footnote in the opinion of the court. It opines:

> The Bible . . . asks the question, 'Am I my brother's keeper?' In my personal view, within the confines of this case, this question is to be answered in the affirmative. *There are instances in military life where the high standards set for membership in the profession of arms require that Armed Forces members not only take care of themselves but also their fellow warriors.*[41]

This passage raises a number of questions. What is the nature of this duty to care for fellow warriors? Who are fellow warriors? What is the source of this duty? More importantly, what are its limits? How is it proved at trial? Unfortunately, the answers to these questions are not discussed in the court's opinion in *Martinez*. Even assuming that this duty to care is limited to facts such as those in *Martinez*, counsel should nevertheless be mindful of the ambiguity surrounding this duty and proceed cautiously, mindful of the limiting precedent in this area of the law when considering whether to charge some conduct as a breach of this duty.[42]

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[34] *Id.* at 649.

[35] *See* United States v. Brown, 22 M.J. 448 (C.M.A. 1986).

[36] 42 M.J. 327 (1995).

[37] *Id.* at 330-31.

[38] *Id.* at 331 n.4 (citing *United States v. Brown*, 22 M.J. 448 (C.M.A. 1986)).

[39] *Id.* at 336 (Wiss, J., concurring).

[40] *Id.* at 338. For example, Judge Wiss wrote concerning causation and contributory negligence:

> [E]ven if appellant was negligent in giving his keys to a person he knew or should have known was intoxicated, that negligence is not a proximate cause of the subsequent accident and death unless the driver's drunkenness, itself, was the immediate cause of the accident. If, notwithstanding the driver's intoxication, the accident occurred due to some other circumstance, then appellant's negligence is not a proximate cause. . . . Further, even if appellant was negligent, if the victim was contributorily negligent and if that contributory negligence was so substantial, when compared to the accused's negligence, that the latter became relatively unimportant as a contributing cause, then appellant's negligence was not a proximate cause.

[41] *Id.* at 331 n.5 (emphasis added).

[42] *Cf.* United States v. Epps, 25 M.J. 319 (C.M.A. 1987)(agreeing that failure to stop crime, without more, generally insufficient to establish aider and abettor liability); United States v. Flaherty, 12 C.M.R. 466 (A.B.R. 1953)(permitting negligent operation of vehicle when accused is senior occupant not dereliction of any duty).

## Sexual Offenses

A large number of cases over the last year have involved appellate review of court-martial convictions for sexual offenses. Those appellate opinions involving sexual offenses that also address matters of substantive criminal law are fewer in number and, in large part, concern the defense of ignorance or mistake of fact; these cases will be discussed elsewhere in this review.[43] The remaining cases that will be discussed here consider the offenses of indecent assault and, somewhat surprisingly, pandering.

### *Indecent Assault*

Military law had traditionally defined an indecent assault as "the taking by a man of indecent, lewd, or lascivious liberties with the person of a female, without her consent and against her will, with intent to gratify his lust or sexual desires."[44] The President changed the definition of the offense in 1984 to eliminate the requirement that the assault itself be "an indecent, lewd, or lascivious liberty;"[45] the offense is now complete when one commits any assault against another person, not their spouse, with the intent to gratify the lust or sexual desires of the accused under circumstances that were either prejudicial to good order and discipline in, or discrediting to, the armed forces.[46]

Unfortunately, the *Military Judges' Benchbook*[47] was never revised to reflect this change; this oversight was exacerbated in 1993 when the United States Army Trial Judiciary issued an updated instruction for indecent assault that continued to require the government to prove that the act constituting the assault was indecent.[48] The CAAF recently took the opportunity to comment on the elements of indecent assault in *United States v. Hoggard*,[49] where the court confirmed that "notwithstanding the misleading denomination, there appears to be no requirement in 'assault-indecent' that the touching offered, attempted, or accomplished be 'indecent.' Indeed, 'assault-indecent' is merely a simple assault committed by one with a prurient state of mind."[50] Military judges and counsel alike should therefore modify their *Military Judges' Benchbook* or other instructional source to reflect the correct elements of the offense of indecent assault.

The opinion of the court in *Hoggard* is also informative as to the circumstantial evidence of indecent intent that the CAAF requires to establish an indecent assault. The appellant was convicted of indecent assault in violation of Article 134, UCMJ by grabbing the victim's right shoulder and moving his face within a foot of the victim as if trying to kiss her.[51] The court found such evidence to be "insufficient for a rational factfinder to conclude that appellant's attempt to kiss SGT B was done with the intent to gratify his lust or sexual desires."[52] The CAAF, over vigorous dissent, reasoned as follows:

> [w]e do not understand that every attempted kiss, or even every intended kiss with romantic overtones, establishes an intent to gratify lust or sexual desires. . . . Certainly we understand that some kisses, and even some attempted kisses, may, in the circumstances of the conduct, be sufficient to establish such a state of mind. But in the absence of an admission of such a state of mind by appellant, nothing in the uncontested facts of this case went far enough to establish such an intent.[53]

The CAAF's apparent skepticism in this area is not limited to evidence of the indecent intent required to establish an indecent assault. In *United States v. Cage*,[54] the CAAF displayed similar misgivings about the existence of the actus reus itself. In *Cage*, the court held that evidence that the complainant had bloody bowel movement, painful urination, and general soreness after passing out from extreme intoxication in the company of an accused who

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[43] *See infra* notes 127-63 and accompanying text.

[44] MCM, *supra* note 10, ¶ 213d.(2) (1951).

[45] MCM, *supra* note 10, pt. IV, ¶ 63b (1984).

[46] MCM, *supra* note 10, pt. IV, ¶ 63(b) (1995 ed.).

[47] DEP'T OF ARMY, PAM. 27-9, MILITARY JUDGES' BENCHBOOK, para. 3-128 (1 May 1982) (C1, 15 Feb 1985) [hereinafter BENCHBOOK].

[48] Memorandum, Chief Trial Judge, U.S. Army Trial Judiciary, to All Chief Circuit and Circuit Judges, U.S. Army Trial Judiciary, subject: U.S. Army Trial Judiciary Benchbook Update Memorandum 3 (13 April 1993).

[49] 43 M.J. 1 (1995).

[50] *Id.* at 3.

[51] *Id.* at 2.

[52] *Id.* at 4. The court set aside the finding of guilt as to the relevant specification and dismissed the specification.

[53] *Id.* at 4.

[54] 42 M.J. 139 (1995).

had earlier expressed a desire for sexual contact with her was, in light of the absence of trauma or any recollection of events of the night, legally insufficient to uphold a conviction for indecent assault.[55]

Judge Crawford and Chief Judge Sullivan vigorously dissented in both[56] opinions, asserting that the majority attributed insufficient weight to the circumstantial evidence in each case and misapplied the standard of appellate review for legal sufficiency.[57] The lesson for the practitioner to take from the CAAF's decisions in *Hoggard* and *Cage* is that the CAAF is now, with the passing of Judge Wiss, evenly divided between those judges who argued for strict application of the standard of review for legal sufficiency, and those judges who, on the other hand, seem more aggressive in their examination of the evidence, or lack thereof, for indecent assault. The posture of a majority of the court will not be discernable until a fifth judge is appointed to the court.

### *Pandering*

Pandering is an offense under military law arising under Article 134, UCMJ.[58] Two types of pandering are described in the *Manual for Courts-Martial:* compelling, inducing, enticing or procuring an act of prostitution; and arranging or receiving consideration for arranging for sexual intercourse or sodomy.[59] In *United States v. Gallegos*,[60] the CAAF considered the issue of whether the latter form of pandering *requires* the exchange of valuable consideration; the opinion of the court concluded that it does not.[61]

Chief Judge Sullivan wrote separately, concurring in part and in the result.[62] He observed that the simple question before the court was whether the appellant's guilty pleas to pandering could be upheld; in his opinion, "[n]o broad pronouncement on the scope of pandering as a civilian crime or as explained in the *Manual for Courts-Martial* is required."[63] He could have noted further that the opinion of the court itself indicates that this issue was decided as a matter of military law arguably as early as 1952,[64] but in any case no later than 1969.[65] Moreover, the plain text of the President's description of this offense in the *Manual* provides that the offense may be committed *either* by receiving consideration for arranging for sexual intercourse or sodomy, *or* simply by wrongfully arranging for sexual intercourse or sodomy.[66] As such, the reason for anything more than a summary disposition of this case is unclear. The appellate practitioner could, however, view *Gallegos* and similar cases as an indication that the CAAF is not averse to hearing argument and issuing full opinions of the court that revisit heretofore well-settled propositions of law, thereby providing opportunities for advocacy and change that would not otherwise be available.

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[55] *Id.* at 144-45.

[56] Judge Crawford dissented in part and concurred in the result in part in *Hoggard*. *See Hoggard*, 43 M.J. at 4.

[57] *See, e.g., Cage*, 42 M.J. at 147-49 (Crawford, J., dissenting). The test for legal sufficiency of the evidence is "whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Id.* at 143 (opinion of the court)(quoting Jackson v. Virginia, 443 U.S. 307, 319 (1979)).

[58] MCM, *supra* note 10, pt. IV, ¶ 97.

[59] *Id.* ¶ 97b.

[60] 41 M.J. 446 (1995).

[61] *Id.* at 446.

[62] *Id.* at 448.

[63] *Id.* at 448 (Sullivan, C.J., concurring in part and in the result)(noting case is guilty plea in which specifications allege conduct prejudicial to the good order and discipline).

[64] *See* United States v. Snyder, 1 C.M.A. 423, 4 C.M.R. 15 (1952), *cited in* United States v. Gallegos, 41 M.J. 446, 447 (1995).

[65] *See* United States v. Adams, 19 C.M.A. 75, 40 C.M.R. 22 (1969), *cited in* United States v. Gallegos, 41 M.J. at 447.

[66] MCM, *supra* note 10, pt. IV, ¶ 97b(3), BENCHBOOK, *supra* note 47, para. 3-166.III.b. at 3-334. In that the offense arises under Article 134, UCMJ, all types of pandering include the element of proof that the conduct was either prejudicial to the good order and discipline of, or discrediting to, the armed forces; pandering is, in any event, "a manifest example of conduct prejudicial to good order and military discipline." *Gallegos*, 41 M.J. at 447 (*quoting* United States v. Snyder, 1 C.M.A. 423, 427, 4 C.M.R. 15, 19 (1952)).

## Crimes Against Property

### *Larceny of Allowances*

Wrongful withholding, as prohibited by Article 121, UCMJ,[67] is the military descendent of the offense of embezzlement.[68] Embezzlement generally requires "the fraudulent conversion of the personal property of another by one whose original acquisition did not involve a trespassory taking thereof."[69] As a matter of law, only the property *of another* can be the object of a wrongful withholding.

In the case of an overpayment of allowances to a service member, the question then becomes who is the owner of the overpayment? In *United States v. Antonelli*,[70] the Court of Military Appeals (COMA) held that allowances paid to one who is ineligible to receive them remain the property of the United States, and their wrongful withholding may therefore violate Article 121, UCMJ.[71] On remand, the Air Force court disagreed with the COMA and stated that it was "unable to find a bailment or any other factual basis for holding that a military allowance remains the property of the government after being paid to a service member."[72]

While phrased as a factual determination, the holding of the Air Force court amounted to a legal challenge to the reasoning of the original COMA decision concerning ownership of allowances.[73] The CAAF subsequently set aside the lower court opinion and remanded the case to the Air Force court once again.[74] The opinion of the CAAF remanding the case reaffirms the holding of its initial consideration of this case[75] as binding authority on all lower military courts for the proposition that the government retains title to allowances, such as those for quarters and subsistence, after they are paid to ineligible[76] military personnel.[77]

Even assuming the validity of the CAAF position concerning government ownership of excess allowances, the government must still prove that the accused fraudulently converted the government property in order to establish a wrongful withholding in violation of Article 121, UCMJ.[78] The CAAF therefore remanded the case to the Air Force court with instructions to use its fact-finding powers under Article 66, UCMJ, to determine whether the record contained evidence of "any affirmative action either to ensure the inappropriate continuation of the elevated allowances or to mislead officials in a way so as to co-opt a recoupment."[79]

The primary value to the military practitioner of this, the latest chapter in the saga of Senior Airman Antonelli, is twofold. The CAAF has clearly confirmed not only its position that excess allowances paid to a service member remain government property, but also that the CAAF has not yet decided whether a service member who merely accepts the overpayment of allowances and

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[67] UCMJ art. 121; *see* MCM, *supra* note 10, pt. IV, ¶ 46.

[68] *See* United States v. Antonelli, 37 M.J. 932, 936 (A.F.C.M.R. 1993)(citations omitted), *set aside*, 43 M.J. 183 (1995).

[69] ROLLIN M. PERKINS & RONALD N. BOYCE, CRIMINAL LAW 357 (3d ed. 1982) [hereinafter PERKINS & BOYCE].

[70] 35 M.J. 122 (C.M.A. 1992).

[71] *Id.* at 128.

[72] *Antonelli*, 37 M.J. at 938.

[73] *See* United States v. Antonelli, 43 M.J. 183, 184 (1995).

[74] *Id.* at 186.

[75] 35 M.J. 122 (C.M.A. 1992).

[76] Judge Wiss noted in the unanimous opinion of the court that "it is the familial relationship *and* the fact of actual financial support that 'entitle[s]' the service member to the elevated rate of [quarters] allowances." 43 M.J. at 185 (citation omitted).

[77] *Id.* at 184.

[78] *See* PERKINS & BOYCE, *supra* note 69, at 357.

[79] *Id.* at 185 (implying lower court should find certification of support by accused was conversion required to constitute embezzlement/wrongful withholding as well as act of false pretense for subsequent payments). The *Antonelli* saga has many unfortunate aspects, but perhaps none so unfortunate as the fact that in the years since this case has been winding its way through the appellate system, the government has still failed to amend either Title 37 of the United States Code or the military pay regulations to clarify the issues of the ownership of improperly paid allowances or whether one has a *sua sponte* duty to account for known overpayments. We have, in large measure, no one to blame but ourselves for the confusion and judicial wrangling in this area of the law.

does nothing to correct the error is criminally liable.[80] The latter issue awaits resolution within the framework of a future case.

*Other Larcenies*

All forms of larceny proscribed by Article 121, UCMJ, require that the accused intend to "deprive or defraud another of the use and benefit of property or . . . to appropriate the property to the thief's own use or the use of any person other than the owner.[81] In *United States v. McGowan*,[82] the CAAF considered whether the appellant's plea of guilty to wrongful appropriation of government property was provident when the property in question, a tactical vehicle, was used to aid wounded Marines and other official activities.

The CAAF, in a plurality opinion, set aside the findings of guilt and the sentence, and returned the case to the Judge Advocate General of the Navy.[83] The opinion reasoned as follows.

> A simple intent to interfere with lawful possession of the Government will not suffice where it is also shown that a service member intended the property to be used "*wholly*" for a "legitimate" government purpose. However, if the accused also intends to help his own military unit at the actual expense of another unit possessing the property, a sufficient criminal intent has been found to exist (as this is not wholly a government purpose). The bottom line, however, is clear: An accused must intend to deprive the Government or a unit thereof of more than mere possession of its property in order to be guilty of wrongful appropriation.[84]

The opinion further stressed that this was an offense committed in a theater of war: "[i]t is simply inconceivable that Congress intended that Article 121 be applied in martinet fashion to burden appellant with a Federal theft conviction for intending to help wounded soldiers in a war zone by repairing inoperable military property assigned on paper to some other unit."[85]

Judges Gierke and Crawford dissented, questioning not only the standard of review that was applied in this, a guilty plea case, but the legal reasoning of the plurality opinion. Judge Gierke observed that "[t]here is nothing in . . . [Article 121, UCMJ] which requires an intent 'to deprive the Government or a unit thereof of more than mere possession.'"[86] The dissenters conclude that "[t]here is no factual or legal basis for setting aside the guilty pleas in this case."[87]

Military justice practitioners should attribute minimal precedential significance to the decision in *McGowan*. The CAAF was sharply divided in its resolution of this case, and produced three separate opinions. A majority of the current members of the court actually disagreed with the legal conclusions in the plurality opinion concerning larceny and wrongful appropriation of government property. Ultimately, the real value of *McGowan* may simply be found in Chief Judge Sullivan's observation that "justice in a combat zone should focus on the right of a service member to receive fair treatment under the law rather than the protection of 'sloppy discipline.'"[88]

## Offenses Against Military Order

*Desertion*

The court-martial of Captain Yolanda Huet-Vaughn was certainly one of the most publicized and controversial trials to arise out of the war in Southwest Asia, and the CAAF brought this

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[80] *See id.* The opinion of the court did cite, in connection with this latter issue, Judge Crawford's opinion concurring in the result of the CAAF's previous treatment of *Antonelli* in which she indicated her position that the passive but knowing recipient of excess allowances may commit a "continuing trespass" and thus be guilty of a larceny *by taking*. *United States v. Antonelli*, 35 M.J. 122, 131 (C.M.A. 1992) (Crawford, J., concurring in the result). The authorities cited by Judge Crawford make clear, however, that the fictional notion of a "continuing trespass" requires that the original taking be *tresspassory*, which is not the case in an *unknowing* receipt of misdelivered property or, for that matter, excess allowances; if there was never a trespass, it cannot continue. *See* LAFAVE & SCOTT, *supra* note 1, § 8.5(f), at 365-66. *But cf.* United States v. Johnson, 39 M.J. 707 (N.M.C.M.R. 1993) (affirming guilty plea to larceny by false pretenses based on passive but knowing receipt of excess allowances); United States v. Thomas, 36 M.J. 617 (A.C.M.R. 1992)(affirming conviction for larceny where accused arguably knew of duty to inform finance office of changed circumstances but failed to do so).

[81] MCM, *supra* note 10, pt. IV, ¶ 46c(1)(f)(i); *see* UCMJ art. 121.

[82] 41 M.J. 406 (1995)

[83] *Id.* at 414.

[84] *Id.* at 412 (Sullivan, C.J.).

[85] *Id.* at 413 n.3.

[86] *Id.* at 416 (Gierke, J., with whom Crawford, J., joins, dissenting).

[87] *Id.* at 416.

[88] *Id.* at 414 n.4.

notorious episode to an apparent close with its recent decision in *United States v. Huet-Vaughn*.[89] The CAAF held that the military judge at Huet-Vaughn's court-martial for desertion with intent to avoid hazardous duty or shirk important service did not err to the prejudice of the accused by excluding defense witnesses who were to testify about the accused's motives for leaving her unit.[90] The CAAF reasoned that the appellant's motives were irrelevant to whether she possessed the specific intent to avoid hazardous duty or shirk important service.[91]

The evidentiary aspects of the *Huet-Vaughn* decision are overshadowed by the potential impact of several remarks made in passing in the opinion of the court concerning the law of defenses. In one passage, the court reasoned that "[t]o the extent that CPT Huet-Vaughn quit her unit because she felt it was necessary to avoid a greater evil, the proffered evidence was irrelevant because it did not support a 'necessity' defense. When . . . necessity [is] asserted as [a] defense[ ], the evidence must show that the accused had no alternative but to break the law."[92] The opinion of the CAAF could be interpreted as asserting that there is a defense of necessity recognized under military law. Practitioners should note, however, that the defense of necessity is not expressly recognized as a special defense in either Rule for Courts-Martial (R.C.M.) 916,[93] or in relevant decisions by the military appellate courts.[94] Counsel should therefore continue to evaluate situations involving the so-called "necessity" defense in terms of the duress defense described in R.C.M. 916(h).[95]

The opinion of the court also had the following to say about the disobedience of unlawful orders:

> To the extent that CPT Huet-Vaughn's acts were a refusal to obey an order that she perceived to be unlawful, the proffered evidence was irrelevant. The so-called 'Nuremberg defense' applies only to individual acts committed in wartime; it does not apply to the government's decision to wage war. The duty to disobey an unlawful order applies only to 'a positive act that constitutes a crime' that is 'so manifestly beyond the legal power or discretion of the commander as to admit no rational doubt of their unlawfulness.'[96]

This passage, if read in isolation, may produce some confusion as to when an order may be lawfully disobeyed. Only *lawful* military orders must be obeyed;[97] an order is unlawful, and need not be obeyed, if it does not relate to a military duty, conflicts with the statutory or constitutional rights of the recipient of the order,[98] or exceeds the authority of the individual issuing the order.[99] This brief treatment does not purport to be an exhaustive list of factors affecting the lawfulness of orders, but it does establish that members of the armed forces *may* disobey orders other than those issued during wartime that require "'a positive act that constitutes a crime' that is 'so manifestly beyond the legal power

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[89] 43 M.J. 105 (1995).

[90] *Id.* at 106. The CAAF set aside the Army court decision, which had held to the contrary, and returned the record of trial to the Judge Advocate General of the Army for remand to the Army Court of Criminal Appeals for further review. *Id.* at 116.

[91] *Id.* at 114-15. The CAAF's conclusion was anticipated by some commentators, *see* Major Edith M. Rob, *A Question of "Intent"—Intent and Motive Distinguished*, ARMY LAW., Aug. 1994, at 27, 33-34, but is nevertheless a controversial one. Professors Perkins and Boyce, in their noted treatise on the substantive criminal law, have this to say to the contrary:

> The motive with which an actus reus was committed is always relevant and material. The presence or absence of a motive on the part of the defendant which might tend to the commission of such a deed may always be considered by the jury on the question of whether he did commit it

PERKINS AND BOYCE, *supra* note 69, at 928 (footnotes omitted). The passage does conclude, however, with the observation that when all other requisites of criminal guilt are present and the proof of motive fails to negate the mens rea required to establish an offense, then "even proof of a good motive will not save the defendant from conviction." *Id.*

[92] *Id.* at 114.

[93] MCM, *supra* note 10, R.C.M. 916.

[94] *See generally* Captain Eugene R. Milhizer, *Necessity and the Military Justice System: A Proposed Special Defense*, 121 MIL. L. REV. 95 (1988). One could reasonably contend that necessity has been implicitly recognized and applied under the name of duress to certain cases involving unauthorized absences and similar offenses. *See id.* at 105-07; *e.g.*, United States v. Hullum, 15 M.J. 261 (C.M.A. 1983) (holding avoidance of potentially dangerous racial harassment is not a frivolous defense to unauthorized absence). *But cf.* United States v. Rankins, 34 M.J. 326, 329 (C.M.A. 1992) (Crawford, J.,) (noting reluctance of military courts to apply the necessity defense by judicial fiat); United States v. Banks, 37 M.J. 700, 702 (A.C.M.R. 1993)(noting that need for discipline in military supports rejection of necessity defense).

[95] MCM, *supra* note 10, R.C.M. 916(h).

[96] *Id.* at 114-115 (citations omitted).

[97] *See, e.g.*, UCMJ art. 90(2)(prohibiting the willful disobedience of "a *lawful* command of his superior commissioned officer")(emphasis added); DEP'T OF ARMY, FIELD MANUAL 27-10, THE LAW OF LAND WARFARE, para. 509b, at 183 (July 1956) ("[I]t must be borne in mind that members of the armed forces are bound to obey only lawful orders.").

[98] *But cf.* Brown v. Glines, 444 U.S. 348 (1979) (upholding Air Force regulation requiring approval from commanders before petitions are circulated by service members on base).

[99] MCM, *supra* note 10, pt. IV, ¶ 14c(2)(a) (discussing lawfulness of orders).

or discretion of the commander as to admit of no rational doubt of their unlawfulness.'"

A final point worth noting is the scope of the *Huet-Vaughn* decision. The accused was convicted of desertion with intent to avoid hazardous duty or shirk important service.[100] This offense, sometimes called "short desertion,"[101] requires a different specific intent than desertion with an intent to remain away permanently; the former merely requires that the accused intended to avoid a certain hazardous duty or shirk a certain important service, while the latter requires proof that the accused "intended to remain away from his or her unit, organization, or place of duty permanently."[102] One could reasonably conclude that the motive for leaving one's unit, organization, or place of duty *could* negate an intent to remain away permanently, and as such may be relevant in an appropriate circumstance.[103] This issue was not reached in *Huet-Vaughn* and awaits resolution in a future case.

### *Fraternization*

The CAAF reentered the legal fray surrounding improper relationships between service members of different rank with its decision in *United States v. Boyett*.[104] Lieutenant Boyett, an Air Force officer, pled guilty to conduct unbecoming an officer in violation of Article 133, UCMJ, by having "an unprofessional close personal social relationship, including sexual intercourse," with an enlisted woman not under his supervision.[105] He alleged on appeal, inter alia,[106] that the specification to which he had pled guilty was void for vagueness.[107] The CAAF disagreed and held that the record contained sufficient information to conclude that the accused was on notice that his conduct was criminal.[108]

Dealing as it does with matters of Air Force custom and stare decisis, much of the CAAF's decision in *Boyett* is of little interest to non-Air Force practitioners. There are, however, two aspects of the many opinions[109] in this case that bear our attention. *Boyett* reveals that Judges Crawford and Sullivan may disagree concerning the effect on the government's burden of proof of pleading an associational offense as a violation of Article 133, UCMJ rather than as fraternization in violation of Article 134, UCMJ. Judge Crawford stated that "[a]lleging an offense under Article 133 rather than specifically alleging fraternization under Article 134 does not alleviate the government's burden of establishing a service custom against fraternization."[110] Chief Judge Sullivan appears to disagree, finding instead various forms of associational misconduct by officers, other than that described by the President as fraternization, that do not require proof of service custom at trial.[111] This conceptual conflict predates the arrival of either judge on

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[100] 43 M.J. at 106.

[101] *See* United States v. Gonzalez, 42 M.J. 469, 472 n.3 (1995).

[102] *See generally* MCM, *supra* note 10, pt. IV, ¶ 9b(describing elements of both short and long desertion).

[103] For example, consider the case of an individual who leaves her unit that is engaged in important service in order to obtain medical treatment for an injury. If the individual were charged upon her return to military control with short desertion, evidence of her intent would likely be considered irrelevant after *Huet-Vaughn*. If the individual were instead charged with long desertion, her motive, i.e., to obtain medical treatment, may be relevant to negate proof of an intent to remain away permanently if the medical treatment was of a finite duration and the individual returned to the unit after its completion.

[104] 42 M.J. 150, *cert. denied*, 116 S. Ct. 308 (1995).

[105] *Id.* at 151.

[106] The appellant also alleged that the Air Force court erred as a matter of law and violated stare decisis in ruling that the findings of service precedent, i.e., United States v. Johanns, 17 M.J. 862 (A.F.C.M.R. 1983), *aff'd in part, set aside in part*, 20 M.J. 155 (C.M.A.), *cert. denied*, 474 U.S. 850 (1985), were limited to that case. This issue is of limited relevance to Army practitioners and is beyond the scope of this inquiry.

[107] *Id.* at 151.

[108] Judge Crawford's opinion points out that the appellant's precommissioning training, which included instruction that there was a custom of the service in the Air Force against any dating between officer and enlisted personnel, was "fortified when he was counseled twice by his squadron commander about potential disciplinary action for such activity." *Id.* at 154. Judge Cox asserted in his concurring opinion that the Manual for Courts-Martial's discussion of fraternization "constitutes rather explicit notice to service members." *Id.* at 156 (Cox, J., concurring). Judges Sullivan, Gierke, and Wiss concurred in the result and relied instead upon the accused's responses to the providence inquiry, in which he "openly conceded that his conduct violated a custom of the Air Force, that he knew that it violated that custom, and that he knew that such conduct was unbecoming an officer." *Id.* at 161 (Sullivan, C.J., with whom Wiss, J., joins, concurring in the result); *see id.* at 161-62 (Gierke, J., with whom Wiss, J., joins, concurring in the result).

[109] There are four separate opinions in *Boyett*. Judge Crawford wrote the plurality opinion in this case. Judge Cox wrote a separate concurring opinion, while then-Chief Judge Sullivan and Judge Gierke each wrote separate opinions concurring in the result reached by Judge Crawford. Judge Wiss joined the opinions by Judge Gierke and then-Chief Judge Sullivan, concurring in the result.

[110] *Id.* at 152.

[111] "Regardless of whether this conduct should properly be considered fraternization, it squarely falls within the authoritative military law precedents prohibiting sexually demeaning conduct by an officer. . . . I . . . would hold that appellant's conduct under the circumstances in this case demeaned him as an officer and undermined his ability to lead." *Id.* at 160 (Sullivan, C.J., with whom Wiss, J., joined concurring in the result) (quoting Judge Miller's partially dissenting opinion in United States v. Johanns, 17 M.J. 862, 882-83 (A.F.C.M.R. 1983), *aff'd in part, rev'd in part*, 20 M.J. 155 (C.M.A.), *cert. denied*, 474 U.S. 850 (1985)).

the court,[112] and is not resolved in *Boyett*.[113] Practitioners should therefore exercise caution and still attempt to prove (or disprove) that associational misconduct violated the service custom even if charged as a violation of Article 133, UCMJ.

A second aspect of *Boyett* is of particular importance to Army practitioners. Judge Cox, in his concurring opinion, writes "that even the most ardent advocates concede that sexual intercourse by a superior officer with a subordinate service member takes it over the line of 'equality,' the *sine qua non* of fraternization (or 'sororitization' as the case may be)."[114] This observation is correct as far as it goes, but it is important to remember that the offense of fraternization also requires proof that the association violated relevant service custom and was prejudicial to the good order and discipline of, or discrediting to, the armed forces.[115] Army policy does not prohibit sexual relationships between individuals of different rank unless such conduct causes actual or perceived partiality or unfairness, involves the improper use of rank or position for personal gain, or creates an actual or clearly predictable adverse impact on discipline, authority, or morale.[116] As a result, the Army practitioner should bear in mind that sexual intercourse between individuals of different rank, without more, is *neither necessary nor sufficient* as a matter of law to establish fraternization in violation of Army custom.[117]

### Inchoate Offenses

The law of two inchoate offenses, conspiracy and attempt, intersect in the recent decision by the CAAF in *United States v. Anzalone*.[118] Corporal Anzalone was convicted of a number of offenses, including attempted conspiracy to commit espionage by transferring material relating to the national defense to an Federal Bureau of Investigation agent that he believed was a foreign agent.[119] The Navy-Marine Corps Court of Military Review held that an agreement between a service member and an undercover government agent to commit an offense under the UCMJ does not constitute the offense of attempted conspiracy.[120] The CAAF disagreed, set aside the decision by the lower court, and returned the case for remand to the court of criminal appeals.[121]

The CAAF was highly divided in *Anzalone*, with four separate opinions and none commanding a majority; however, a few unambiguous lessons may be drawn from this case. Notwithstanding the fractured posture of the court, two observations may be made concerning *Anzalone* and the law of inchoate offenses. First, it is unlikely that we have seen the last legal challenge to the offense of attempted conspiracy. Half of the sitting members of the CAAF question the legal conclusion of the plurality opinion that an offense of attempted conspiracy exists under military law; Chief Judge Cox and Judge Gierke believe instead that the offense committed by the appellant was solicitation.[122] Only Judges Sullivan and Crawford believe that the offense of attempted conspiracy exists. Chief Judge Sullivan reasoned in *Anzalone* that one can be liable under the UCMJ for any attempt to commit an "offense under this chapter;" because conspiracy is, by its placement and language, such an offense, one can be criminally liable for an attempted conspiracy.[123] This split virtually guarantees that the court will revisit the question of the continued vitality of the offense of attempted conspiracy.

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[112] *See, e.g.*, United States v. Callaway, 21 M.J. 770 (A.C.M.R. 1986)(treating fraternization and generally unbecoming conduct as two alternative bases of affirming finding of guilt); *cf.* United States v. Johanns, 20 M.J. 155, 162 (C.M.A.) (Cox, J., concurring in part, concurring in the result in part) (asserting that conduct that does not amount to fraternization in violation of a custom of the service may still be unbecoming conduct), *cert. denied*, 474 U.S. 850 (1985).

[113] At least two sitting judges may believe that associational misconduct not amounting to fraternization can be prosecuted as a violation of Article 133, UCMJ: Judges Sullivan, 43 M.J. at 160, and Cox. *See Johanns*, 20 M.J. at 161-65 (Cox, J., concurring in part and concurring in the result in part). Judge Crawford appears to be in the opposite camp, *Boyett*, 43 M.J. at 152, while Judge Gierke's position is not yet apparent.

[114] *Id.* at 156 (Cox, J., concurring).

[115] MCM, *supra* note 10, pt. IV, ¶ 83b.

[116] *See* DEP'T OF ARMY, REG. 600-20, PERSONNEL-GENERAL: ARMY COMMAND POLICY, para. 4-14a, at 11 (30 March 1988); DEP'T OF ARMY, PAM. 600-35, PERSONNEL-GENERAL: RELATIONSHIPS BETWEEN SOLDIERS OF DIFFERENT RANK, para. 1-5e (7 December 1993).

[117] *Cf.* United States v. Kroop, 38 M.J. 470, 472 (C.M.A. 1993) (Everett, S.J.) (holding specification alleging "excessive social contacts" and "undue familiarity" with subordinates, including sexual intercourse, did not state an offense of unbecoming conduct); United States v. Nunes, 39 M.J. 889, 890 (A.F.C.M.R.) ("[I]t is the illicit association between officers and enlisted personnel on terms of equality, not any particular sexual relationship (or any such relationship at all) that is the gravamen of the offense.") (citations omitted), *rev. denied*, 41 M.J. 372 (C.M.A. 1994).

[118] 43 M.J. 322 (1995).

[119] *Id.* at 323.

[120] 40 M.J. 658, 666 (N.M.C.M.R. 1994), *set aside in part*, 43 M.J. 322 (1995).

[121] 43 M.J. at 326.

[122] *Id.* at 326 (Gierke, J., with whom Cox, J., joins, concurring in the result).

[123] *Id.* at 327 (Sullivan, C.J., concurring in the result).

The decision in *Anzalone* also contains the seeds of future conflict on a second issue in the law of inchoate offenses. As follows, the plurality opinion noted in dicta that the CAAF had previously stated:

> adopted the American Law Institute's Model Penal Code 'Unilateral Approach' to conspiracy. Under this approach each individual's culpability is not dependent on other actors. . . . The gravamen of the offense is the agreement with another to commit a criminal act, even though there is an impossibility because the individual whom the accused believes is part of the conspiracy is actually a government agent. . . . In his own mind the accused thought there was an agreement between himself and the undercover agent in terms of the potential dangerousness of his conduct and his mental attitude.[124]

Both Judges Gierke and Cox disagree with this description of the law of conspiracy, and instead interpret the court's precedent as merely providing that "acquittal of all co-conspirators does not require that a conspiracy conviction be set aside."[125] Judge Gierke concludes that an actual meeting of the minds is still necessary to establish the offense of conspiracy.[126] As a result, only a minority of the sitting court unambiguously subscribes to the view of the unilateral theory of conspiracy advanced by the plurality opinion.[127] The CAAF must clarify its position on the law in this area; in the meantime, a prudent practitioner should still consider the requirement for an actual meeting of the minds to be a part of the military law of conspiracy, and charge an attempt to conspire with an undercover agent as a solicitation, rather than as an attempted conspiracy.[128]

## Defenses

### *Mistake of Fact or Law—Mistake of Fact as to Consent*

The defense of mistake of fact as to the consent of the victim of a sexual offense continues to be the source of much appellate litigation.[129] The primary focus of much of this litigation is the propriety of the military judge's instructional decisions.[130] Several recent appellate decisions consider the effect of judicial failure to instruct on mistake of fact as to consent in a court-martial for rape. In a number of these cases, this instructional omission did not constitute reversible error because the appellate court distinguished between a defense of mistake of fact as to consent and a defense of actual consent.

In *United States v. Willis*,[131] the CAAF held that the military judge did not err by failing to instruct on the affirmative defense of mistake of fact to a rape charge because "our Court and other courts have clearly held that a mistake of fact instruction is not warranted where the evidence raises and the parties dispute only the question of actual consent."[132] A similar result was reached in *United States v. Brown*,[133] where the CAAF reasoned that "[a]ppellant rested his case upon his testimony that the prosecutrix initiated the sexual encounter and the resulting sexual intercourse. There was no scienter of mistake, be it reasonable or honest, in either his version or her version of the facts of the case."[134]

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[124] *Id.* at 325 (Crawford, J.).

[125] *Id.* at 326 (Gierke, J., with whom Cox, J., joins, concurring in the result).

[126] *Id.*

[127] Chief Judge Cox and Judge Gierke reject the assertion that the unilateral theory of conspiracy is part of military law; Judge Crawford believes to the contrary. Only Judge Sullivan's position is unclear from *Anzalone*. *See supra* notes 116-21 and accompanying text.

[128] The strongest argument in favor of an offense of attempted conspiracy is found in the doctrine of factual impossibility. For a compelling treatment of the doctrine and its implications for inchoate offenses, see the late Judge Wiss's opinion concurring in the result in *United States v. Anzalone*. 43 M.J. at 327-28 (Wiss, J., concurring in the result).

[129] *E.g.*, United States v. Willis, 41 M.J. 435 (1995).

[130] *Id.*

[131] *Id.*

[132] *Id.* at 438.

[133] 43 M.J. 187 (1995).

[134] *Id.* at 190.

While cases like *Harris* and *Brown* would seem to stand for the proposition of a significant distinction, and even potential inconsistency, between the defenses of consent and mistake, military judges and other counsel should be aware of an undercurrent in these decisions that has important ramifications at trial. As a threshold matter, the decisions reinforce the point of law that the military judge *must* instruct on the defense of mistake of fact as to consent whenever it is fairly and reasonably raised by the record.[135] Judge Cox, in the opinion of the court in *Brown*, offered the following prudent observation:

> In every case where consent is the theory of the defense to a charge of rape, the military judge would be well-advised to either give the "honest and reasonable mistake" instruction *or* discuss on the record with counsel the applicability of the defense . . . . Why invite an appellate issue?[136]

Judge Wiss, concurring in part and dissenting in part in *Willis*, went even further and recommended that the military judge instruct on mistake in all cases involving consent "regardless of an accused's stubborn insistence that no mistake was made and that, in fact, consent was given."[137] The adoption of these recommendations at the trial level would certainly reduce the amount of appellate litigation on these issues and avoid, as Judge Cox labeled it, "Monday morning quarterbacking" by the military appellate courts.[138]

The military appellate courts have, in several recent cases, reinforced the rule that only an honest and reasonable mistake of fact as to the consent of the victim of a sexual offense will excuse liability. The mistake must exist at the time of the offense; evidence of mistake of fact as to consent must therefore be relevant to the accused's state of mind at the time of the offense.[139] In *United States v. Black*,[140] the ACCA held that knowledge acquired by the accused after the offense occurs is irrelevant, and may be properly excluded at trial.[141] In *United States v. True*,[142] the CAAF solidified the requirement that in order for a mistake of fact to be reasonable, the accused must exercise due care with respect to discerning the wishes of a potential sexual partner.[143] Mere wishful thinking on the part of the accused will not suffice. The ACCA recently held, in *United States v. Stanley*,[144] that where the victim's actions were predominantly consistent with lack of consent, the fact "[t]hat a few of her actions might be viewed as ambiguous does not give rise to a reasonable belief that she consented."[145] Cases such as these continue to refine our understanding of the limits of the excuse of mistake of fact as to consent.

### *Mistake of Fact as to Age*

The elements of the offenses of carnal knowledge[146] and indecent acts or liberties with a child[147] as described in the *Manual for Courts-Martial* are silent as to any requirement of knowledge by the accused of the age of the victim.[148] Two significant changes, one judicial and one statutory, will increase the importance of the

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[135] *See, e.g., Willis*, 41 M.J. at 441.

[136] Judge Cox also observed that "it is hard to believe that [the] . . . Military Judges' Benchbook does not have a statement in 2-inch high letters, `INSTRUCT ON REASONABLE AND HONEST MISTAKE IN ALL RAPE CASES INVOLVING CONSENT UNLESS THE DEFENSE COUNSEL AGREES THAT THE DEFENSE IS NOT RAISED.'" 43 M.J. at 190 n.3. Until such a change is made, all counsel would be well advised to go ahead and make the change themselves in their own copy of the *Benchbook*.

[137] 41 M.J. at 441 (Wiss, J., concurring in part and dissenting in part).

[138] *Brown*, 43 M.J. at 190 n.3 (observing that military appellate courts are "ill-equipped" to engage in "Monday morning quarterbacking").

[139] United States v. Black, 42 M.J. 505, 515 (Army Ct. Crim. App. 1995).

[140] *Id.*

[141] *Id.* at 515.

[142] 41 M.J. 424 (1995).

[143] "The mistaken belief [as to consent of the victim] must be true and sincere rather than feigned or mere pretext, and it must be reasonable. . . . In other words, one must be seen as exercising due care with respect to the truth of the matter in issue. . . . We conclude, therefore, that the instruction that a mistake of fact defense cannot be predicated on appellant's own negligence is a correct statement of the law." *Id.* at 426 (citations omitted).

[144] 43 M.J. 671 (Army Ct. Crim. App. 1995).

[145] *Id.* at 676.

[146] UCMJ art. 120(b).

[147] MCM, *supra* note 10, pt. IV, ¶ 87.

[148] *See supra* notes 144-45.

accused's perception of the victim's age in cases involving these offenses.

The National Defense Authorization Act for Fiscal Year 1996[149] amended Article 120, UCMJ to provide the affirmative defense of mistake of fact as to the age of the victim in a prosecution for carnal knowledge.[150] The accused will have the burden of proving two elements by a preponderance of the evidence; the victim must have been at least twelve years old at the time of the alleged offense, and the accused reasonably believed the victim to be at least sixteen years old.[151] The defense is very similar to that described in federal criminal statutes, with the exception that the federal provision does not require the accused to prove that the victim had attained the age of twelve years.[152] As a result, practitioners should adapt the relevant Federal Pattern Jury Instruction for use at court-martial until the *Military Judges' Benchbook* is appropriately revised.[153] Counsel should further be aware that this defense is a true affirmative defense; the accused, as in the defense of lack of mental responsibility but unlike other special defenses described in R.C.M. 916, bears the burden of persuasion under this new form of defense.[154] Instructional clarity will therefore be essential to avoiding confusion by the trier of fact.

The CAAF also expanded the applicability of the excuse of mistake to sexual offenses in its decision in *United States v. Strode*.[155] In *Strode*, the CAAF held that the defense of mistake of fact is available to a military accused who is charged with committing indecent acts with a child under the age of sixteen if he had an honest and reasonable belief as to the age of the person *and* if the acts would otherwise be lawful were the prosecutrix age sixteen or older.[156] The court reasoned that a mistake of fact as to the age of the victim may be relevant in determining whether the conduct is indecent, service discrediting, or prejudicial to good order and discipline.[157]

The opinion of the CAAF in *Strode* also identified significant limitations to the defense in addition to those described above.[158] The court stressed that the defense would not be available if the accused were charged with indecent acts or liberties with a child committed as foreplay to either attempted or consummated sodomy or carnal knowledge;[159] the form of the pleadings in a given case may therefore determine whether or not the defense is available.

Moreover, the court indicated that a mistake of fact as to the age of the victim may not change the maximum authorized punishment for other offenses such as sodomy[160] or carnal knowledge,[161] with aggravating factors based on the *actual* age of the victim.[162] Such factors operate to impose strict liability for enhanced punishment on an accused. For instance, even an honest

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[149] H.R. 1530, 104th Cong., 1st Sess. (1995).

[150] The bill will also make the offense of carnal knowledge gender neutral. *Id.* § 1113.

[151] *Id.*

[152] *See, e.g.*, 18 U.S.C. § 2243(c)(1) (1988).

[153] An example of the pattern jury instruction concerning this defense that is used by the federal courts is as follows:

> It is a defense to the charge of (attempted) sexual abuse of a minor that the defendant reasonably believed that the minor was over the age of sixteen years. The defendant has the burden of proving that it is more probably true than not true that the defendant reasonably believed that the minor was more than sixteen years of age. If you find that the defendant reasonably believed that the minor was more than sixteen years of age, you must find the defendant not guilty.

COMMITTEE ON MODEL JURY INSTRUCTIONS NINTH CIRCUIT, MANUAL OF MODEL CRIMINAL JURY INSTRUCTIONS FOR THE NINTH CIRCUIT § 8.37G (1995). Counsel can easily adapt this instruction by the substitution of the word "accused" for "defendant" and the addition of the requirement that the accused prove that the victim was over twelve.

[154] *See supra* note 147 and accompanying text.

[155] 43 M.J. 29 (1995).

[156] *Id.* at 33 (footnote omitted).

[157] *See id.* at 32-33.

[158] *See supra* notes 153-55.

[159] *Id.* at 32. The court opined that the defense of mistake of fact as to the age of the victim in a prosecution for carnal knowledge would be "of no moment in a prosecution for indecent acts. The Government must prove the acts were indecent, and the age of the victim is but one factor among many to be considered." *Id.* at 33 n.3.

[160] *See* UCMJ art. 125; MCM, *supra* note 10, pt. IV, ¶ 51e.

[161] *See* UCMJ art. 120(b); MCM, *supra* note 10, pt. IV, ¶ 45e.

[162] 43 M.J. at 32.

and reasonable belief that one's partner in consensual sodomy has attained the age of sixteen years will apparently not serve to reduce the maximum authorized punishment from twenty years of confinement to five years.

Furthermore, the defense may not operate to exculpate an accused when the indecency or discrediting nature of the acts are found in factors other than, or in addition to, the age of the victim. The court points out that "there is no magic line of demarcation between decent acts and indecent acts based precisely on the age of the sex partner."[163] Thus, while "[a]n act that may not be indecent between consenting adults may well be made indecent because it is between an adult and a child,"[164] other acts are indecent regardless of the age of the partners. Notwithstanding these limitations, *Strode* is a significant revision to the law of mistake as applied to sexual offenses, and its sweep is astonishing.[165]

*Mistake and Property Offenses*

A number of recent military appellate decisions have dealt with the complex defense of mistake of fact as to justification.[166] The defense arises when, because of a mistake of fact, the actor does not know that his conduct is criminal and believes there is no risk of criminality.[167] Such a mistake would excuse criminal culpability to the extent that it negates an intent or degree of knowledge required to establish an offense.[168]

In *United States v. Gillenwater*,[169] the CAAF held that the defense was raised at the court-martial of the accused for larceny of government property by evidence that his former supervisor gave the accused permission to take things home for government use, may have given him permission to take things home for personal use, and acknowledged that the accused had worked on several government projects at home.[170] The CAAF reasoned that such evidence was relevant to the issue of whether the accused "unlawfully took or withheld the property 'with the intent temporarily to deprive' the Government of 'the use' of such property," and concluded that an "honest but subjective mistake of fact as to his permission to take the items or an honest mistake of fact as to permission to temporarily hold the items would be a defense."[171] Similarly, in *United States v. Little*,[172] the CAAF set aside the accused's guilty plea to unauthorized possession of a dangerous weapon in violation of a Navy regulation where he persistently asserted during the providence inquiry that his possession of the knife in question was authorized; such statements were held by the CAAF to be substantially inconsistent with his guilty plea, leading the court to set aside the relevant findings of guilt.[173]

It is important to note, however, that a distinction in the law between believing one's conduct is justified and knowing that conduct is wrongful but will be tolerated exists. In *United States v. Reap*,[174] the CAAF affirmed the guilty pleas of a pair of brothers to wrongful disposition of government property by transferring the property in question outside of regular supply channels.[175] The opinion of the court reasoned that "[a]ny statement [in the providence inquiry] that raised the possibility that such conduct might be winked at was, at best, an attempt to justify their acts and not truly inconsistent with guilt."[176]

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[163] *Id.*

[164] *Id.*

[165] "It is . . . surprising to me that the majority for the first time would establish a new 'defense' . . . in a guilty-plea case. In this regard, I note that Judge Cox has 'often expressed reservations about making substantive law on a guilty-plea record.'" *Id.* at 34 (Sullivan, C.J., dissenting)(calling the decision "judicial legislation"). *But cf. United States v. Gunter*, 42 M.J. 292 (1995)(revising defense of claim of right).

[166] For an illuminating discussion of this defense, *see* LAFAVE & SCOTT, *supra* note 1, § 184.

[167] *Id.* § 184(a)(1), at 399.

[168] *See* United States v. Gillenwater, 43 M.J. 10, 13 (1995); United States v. McMonagle, 38 M.J. 53, 59-61 (C.M.A. 1993); United States v. Sicley, 6 C.M.A. 402, 411, 20 C.M.R. 118, 127 (1955), *citing* MCM, *supra* note 10, ¶ 154(a)(4) (1951). *But cf.* MCM, *supra* note 10, R.C.M. 916(l)(1) (observing that ignorance or mistake of law not generally a defense).

[169] 43 M.J. 10 (1995).

[170] *Id.* at 12-13.

[171] *Id.* at 13. *But cf.* United States v. Zaiss, 42 M.J. 586 (Army Ct. Crim. App. 1995) (holding evidence legally and factually sufficient to support accused's conviction for attempted larceny of military property in the form of a bug light, notwithstanding accused's contention that he was told by a supply sergeant that he could keep the light if he could fix it). One could also conclude that such a mistake was not a mistake of fact at all, but rather a *mistake of law*. *See infra* note 190 and accompanying text.

[172] 43 M.J. 88 (1995).

[173] *Id.* at 91-92.

[174] 43 M.J. 61 (1995).

[175] This practice is referred to in the opinion of the court as "cumshawing." *Id.* at 62.

[176] *Id.* at 63.

In like manner, the CAAF in *United States v. McDivitt*[177] held that the evidence in the accused's court-martial for making a false official statement did not raise the issue of mistake where he falsely certified that he had provided adequate support for his dependent after being told by a clerk that he was entitled to certain allowances, regardless of his nonsupport of his dependents, until he was divorced from his wife.[178] The court reasoned as follows:

> If a service member knowingly signs a false official record, he cannot thereafter complain that he had made an honest mistake as to his intent for, in that instance, his falsity defeats the honesty of his purpose. Thus, it does not matter if he honestly believed he was entitled to the housing allowance; he cannot, as a matter of law, sign false documents to obtain the allowance.[179]

Judge Wiss wrote separately, concurring in the result, to point out that "[t]he evidence fairly raised the defense of mistake of fact regarding whether appellant *subjectively intended to deceive*. The majority's sole focus on whether the appellant *intended to falsify* is not dispositive of this issue."[180] The concurrence is valuable because it reminds the military justice practitioner that mistakes usually apply to a specific element of the offense, and are only relevant to the extent that they negate the mental state called for by that particular element.[181]

### *Claim of Right*

The defense of mistake of fact as to justification is often considered in tandem, or confused with, the defense of claim of right in cases alleging larceny or related offenses. The traditional rule of law in military practice was that a taking, obtaining, or withholding of property was not wrongful "if done by a person who has a right to the possession of the property either equal to or greater than the right of one from whose possession the property is taken, obtained, or withheld."[182] This claim of right also allowed "a service member to seize another member's property . . . to satisfy a debt or acquire security for it.[183]

The CAAF significantly modified this rule in *United States v. Gunter*,[184] holding "as a matter of military law that . . . a service member creditor had no legal right to seize his debtor's property *without the agreement of that debtor*."[185] The court reasoned that the facts of its prior cases dealing with this issue "*suggest* that such a right must be based on an agreement between the parties providing for the satisfaction or the security of the debt in this fashion."[186] By its holding in *Gunter*, then, the CAAF took its own suggestion and narrowed the defense of claim of right.[187]

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[177] 41 M.J. 442 (1995).

[178] *Id.* at 444.

[179] *Id.*

[180] *Id.* at 445 (Wiss, J., concurring in the result) no prejudice because instruction was given for accompanying larceny charge).

[181] *Cf.* United States v. Greaves, 40 M.J. 432, 437-38 n.5 (C.M.A. 1994), *cited in* United States v. Gillenwater, 43 M.J. 10, 13 (1995) (asserting that mistake as a defense is merely an attack on the mens rea component of a particular element), *cert. denied*, 115 S. Ct. 907 (1995).

[182] *See* MCM, *supra* note 10, pt. IV, ¶ 46c(1)(d), at IV-67.

[183] *See* United States v. Gunter, 42 M.J. 292, 295 (1995).

[184] 42 M.J. 292 (1995).

[185] *Id.* at 293 (emphasis added). *Accord* MCM, *supra* note 10, pt. IV, ¶ 46c(1)(b).

[186] 42 M.J. at 295 (emphasis added).

[187] Judge Wiss took issue with the court's interpretation of its precedents.

> I cannot fully join the majority opinion because, in my view, it does not give full faith and credit to this Court's precedent. Regardless of the language used, my reading of the cases in this precedent is as follows: First, when an accused takes money from someone who, for whatever reason, owes the accused money, he does not have the requisite intent to steal because he is merely retrieving his own property; thus, until today, this Court has treated money as fungible property, without regard to the particular bills of currency. Second, when an accused takes personal property from someone because that person owes the accused money, similarly the intent to steal is missing because the accused merely was helping himself to security for a bona fide debt; an intent to steal would exist only to the extent that the value of the property exceeded the amount of the debt.

*Id.* at 298 (Wiss, J., concurring in part and dissenting in part). Moreover, Judge Gierke characterized the opinion as "an advisory opinion regarding honest mistake of fact and claim of right as applied to larceny cases." *Id.* at 297 (Gierke, J., concurring in part and in the result). An assessment of the validity of these assertions is beyond the scope of this article, and must be left to the individual reader.

The CAAF in *Gunter* also addressed the issue of mistake in the context of the claim of right defense. The appellant asserted that the military judge failed to explain and rule out a defense based on an honest mistake as to an ownership interest in the relevant property or a legal right to recapture them.[188] The CAAF disagreed, and found the military judge's inquiry on this matter adequate.[189]

Judge Wiss wrote separately, concurring in part and in the result, to point out that such a mistake is not a mistake of fact. A mistake of fact as to justification in this context, as Judge Wiss wrote:

> might present itself, for instance, if an accused believed that the tangible property that he retrieved was his, when in fact it was not; or if an accused was in error for some reason in believing that the other person owed him anything at all. Under such circumstances, to the extent that our jurisprudence would recognize a right of self-help or a claim of right at all . . . a mistake of fact becomes relevant to whether such a right applies.[190]

Judge Wiss wrote that what the appellant is actually claiming is a mistake of *law*, which is generally not a defense.[191] This assertion is accurate in describing the nature of the defense asserted by the appellant,[192] but could nevertheless lead to some confusion concerning the potential applicability of the mistake of law defense. The law in this area is better described in the discussion accompanying R.C.M. 916(l)(1), which provides in relevant part as follows:

> Ignorance or mistake of law may be a defense in some limited circumstances. If the accused, because of a mistake as to a separate nonpenal law, lacks the criminal intent or state of mind necessary to establish guilt, this may be a defense. For example, if the accused, under mistaken belief that the accused is entitled to take an item under property law, takes an item, this mistake of law (as to the accused's legal right) would, if genuine, be a defense to larceny.[193]

Military judges and counsel should note that while the *Military Judges' Benchbook*[194] contains a similar discussion of the defense of mistake of law,[195] neither the *Benchbook* nor the relevant Trial Judiciary Update Memorandum[196] contain an adequate instruction for the trier of fact on this issue. Practitioners should therefore be alert to this omission and tailor an appropriate instruction when necessary.

### Multiplicity & Included Offenses

The law of multiplicity and included offenses has undergone significant change in the last several years. In *United States v. Teters*,[197] the COMA held that the legislative intent that offenses be separate was to be inferred, in the absence of evidence to the contrary, if the elements of the offenses each require proof of a unique fact.[198] In *United States v. Foster*,[199] the COMA expanded

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[188] *Id.* at 295-96.

[189] *Id.* at 296-97.

[190] *Id.* at 299.

[191] *Id.* at 298-99.

[192] *See id.* at 296 n.5 (Sullivan, C.J.)(finding it inappropriate to characterize appellant's mistake, if it existed at all, a factual mistake).

[193] MCM, *supra* note 10, R.C.M. 916(l)(1); *see* United States v. Sicley, 6 C.M.A. 402, 411, 20 C.M.R. 118, 127 (1955). The opinion of the court comments upon the defense of mistake of law in the following manner:

> This court . . . has, at least implicitly, recognized that a defense may exist to a larceny charge where the soldier takes property from another *honestly believing* that he has a superior claim of right to that specific property. . . . We note that recognition of this traditional defense to the mens rea or specific-intent element of larceny has become increasingly disfavored in American courts. *See* LAFAVE & SCOTT, sec. 8.5(d) at 363-64; Annot., 88 ALR 3d 1309 (1978).

*Id.* at 296 (footnote omitted). The authoritativeness of the quoted passage is problematic in that the authorities cited by the court in support of this proposition lend meager support, at best, to the court's assertion. Professors LaFave and Scott merely observe that the wisdom of the Model Penal Code provision creating a claim of right defense to larceny "is, at best, debatable." LAFAVE & SCOTT, *supra* note 1, § 8.5(d), at 364. They had previously stated that "[o]ne may take the property of another honestly but mistakenly believing . . . that it is his own property." *Id.* § 8.5(a), at 358. The cited Annotation simply notes that claim of right is not likely to be recognized as a complete defense to attempted or completed robbery, or an assault to commit robbery.

[194] *See supra* note 47.

[195] *Id.* para. 5-11 (C1, 15 Feb 85).

[196] *See supra* note 48, Update Memorandum 13 (23 November 1994).

[197] 37 M.J. 370 (C.M.A. 1993), *cert. denied*, 114 S. Ct. 919 (1994).

[198] *Id.* at 378.

[199] 40 M.J. 140 (C.M.A. 1994).

on its holding in *Teters* and held that all offenses under the UCMJ have an element, express or implicit, requiring either prejudice to the good order and discipline of, or discredit to, the armed forces; offenses arising under Article 134, UCMJ, may therefore be included offenses to enumerated offenses arising under the other punitive articles of the UCMJ.[200]

The CAAF has again revised the law of multiplicity and included offenses. In *United States v. Weymouth*,[201] the CAAF held that "in the military, those elements required to be alleged in the specification, along with the statutory elements, constitute the elements of the offense for the purpose of the elements test."[202] Comprehensive analysis of the CAAF's complex decision in *Weymouth* is beyond the scope of this article, but practitioners should be aware that the precedential authority of the plurality opinion in the case is problematic.

Chief Judge Sullivan and Judge Wiss both asserted, in separate opinions, that the case was not ripe for government appeal under Article 62, UCMJ.[203] Even assuming that the issue was ripe for review, Chief Judge Sullivan points out in his opinion concurring in the result that the plurality opinion by Judge Cox is "an effort to rewrite the law of multiplicity in dicta,"[204] a conclusion arguably supported by the sweeping scope of the lead opinion.[205] Moreover, the rationale of the plurality opinion justifying this departure from the clear federal and military precedent in this area is simply unconvincing; all the factors that the court cites in support of its adoption of a "pleadings-elements" rule of multiplicity existed at the time of the *Teters* and *Foster* decisions.[206]

The decision in *Weymouth* will affect military justice practitioners in at least three ways. First, the use of the pleadings-elements test to make multiplicity and included offense determinations will place a premium on skillful drafting of specifications; prolix pleading may convert two otherwise separate offenses into the same offense for multiplicity purposes.[207] The pleadings- elements test may also encourage what Judge Cox deplored as "prosecutorial cuteness"—the deliberate omission of

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[200] *Id.* at 143.

[201] United States v. Weymouth, 43 M.J. 329 (1995).

[202] *Id.* at 340. The CAAF arguably began a retreat from strict application of the so-called "elements" test announced in *Teters* shortly after the standard was announced. In *United States v. Foster*, 40 M.J. 140 (C.M.A. 1994), the court looked beyond statutory elements in determining whether indecent assault was an included offense of sodomy. The opinion of the court, looking to the *facts* of the case, observed that although indecent assault required proof that the victim was not the spouse of the accused, "[a]s a practical matter, however, appellant could hardly have failed to have been on notice that [the victim] was not his wife." *Id.* at 145 n.5. In *United States v. Wheeler*, 40 M.J. 242 (C.M.A. 1994), the court looked expressly at the *pleadings* in the case to evaluate whether indecent acts, adultery, wrongful cohabitation, and incest were multiplicious when they arose out of the same criminal transaction. *Id.* at 243. The opinion of the court in *Wheeler* even went so far as to assert that the allegations of adultery and indecent acts were not multiplicious with the wrongful cohabitation specification because they "were not the *means* by which [the accused] wrongfully cohabited with [the victim] for a month." *Id.* at 247. *Cf. United States v. Teters*, 37 M.J. 370, 376 (C.M.A. 1993) (rejecting "means" test as method of making multiplicity/included offense determinations), *cert. denied*, 114 S. Ct. 919 (1994). In light of the court's analyses in *Foster* and *Wheeler*, one could conclude that the decision in *Weymouth* merely formalizes the analytical framework already in use by the CAAF.

[203] *Id.* at 341. The accused was charged with the following offenses, all of which arose out of a single criminal transaction: attempted murder, intentional infliction of grievous bodily harm, assault with a dangerous weapon or means or force likely to inflict death or grievous bodily harm, and assault with intent to commit murder. The military judge provisionally dismissed the three assault specifications because he considered them to be lesser-included offenses of attempted murder, but all parties agreed that if any of the included offenses were raised by the evidence that the judge would appropriately instruct the trier of fact thereon. The prosecution never intended to seek convictions on more than one of the specifications in question, but nonetheless appealed the ruling. *See id.* at 330.

[204] *Id.* at 341 (Sullivan, C.J., concurring in the result).

[205] *E.g.*, 43 M.J. at 338-41.

[206] *See supra* notes 195 & 197. The most compelling aspect of the argument of the lead opinion in *Weymouth* is that strict application of a statutory elements test is impossible because "military offenses are not exclusively the product of statutes." 43 M.J. at 335. For instance, strict application of the statutory elements test to offenses arising under the Article 134, UCMJ, could result in a finding that such offenses are always included in offenses arising under the enumerated punitive articles. *See id.* This outcome, in and of itself, could justify a departure from the strict application of the statutory elements test. The military appellate courts, however, had already begun to address this concern using far less sweeping measures than the adoption of a "pleadings-elements" test. In *United States v. Foster*, 40 M.J. 140 (C.M.A. 1994), the COMA observed that:

> it seems to us that sound practice would dictate that prosecutors plead not only the principal offense, but also any analogous Article 134 offenses as alternatives. The court-martial would then be instructed as to the required elements of each offense and would be further admonished that the accused could not be convicted of both offenses. If he were convicted of the greater offense, the members would simply announce no findings as to the lesser offense and it would be dismissed.

*Id.* at 143. Moreover, the "statutory" elements of offenses arising under Article 134, UCMJ, could be considered to be those described by the President in the *Manual for Courts-Martial*. *Accord United States v. Neblock*, 41 M.J. 619, 628 (N.M. Ct. Crim. App. 1994). This restrained approach to the problem of included offenses arising under the General Article was, of course, implicitly rejected by the court in *Weymouth*, but at least two questions remain unanswered by the lead opinion. Why it is ever necessary to look to the pleadings for elements of enumerated offenses enacted by Congress? How does the "pleadings-elements" test differ from the old "means" test for multiplicity and included offense determination rejected in *Teters*? Counsel and the courts will have to provide the answers to these questions in future cases.

[207] The plurality opinion stated that the court "need not decide here if the Government could create a lesser offense merely by alleging extra, non-essential elements." 43 M.J. at 337 n.5. One could conclude that by adopting a "pleadings-elements" test as described in *Weymouth*, the court *was* holding that two offenses whose statutory elements each require proof of a unique fact could be transformed into the same offense by the manner in which the government chose to plead the two offenses.

critical facts in specifications to ensure that offenses are treated as separate for multiplicity purposes.[208] Military justice supervisors and military judges should be alert to both issues.

The second inevitable effect of the *Weymouth* decision is to confuse the precedential status of the opinions issued by the service courts since the *Teters* and *Foster* opinions but prior to the release of the *Weymouth* decision.[209] Decisions that applied a strict elements test for multiplicity determinations may not apply to cases arising after *Weymouth*. Practitioners will, at least for the short term, have to analyze many multiplicity situations without the aid of precedent.

A final effect of the decision will be to virtually guarantee future litigation on the scope and effect of the plurality opinion in *Weymouth*. For example, the decision at one point justifies the departure from federal and military precedent by noting that the case involved not a findings issue, but only a *charging* issue;[210] elsewhere in the plurality opinion Judge Cox states the holding of the case in broad terms with no indication that the pleadings-elements test is to be limited to multiplicity determinations prior to trial.[211] As such, more litigation will be necessary to determine the true intent of the court as to application of the pleadings- elements test.

### Pleadings

Rule for Courts-Martial 307(c)(4) provides that "[e]ach specification shall state only one offense."[212] Military practice tolerates, in the absence of defense objection, duplicitous specifications designed to simplify the pleading and proof of certain offenses.[213] The potentially prejudicial effect of this practice[214] has been mitigated in bad check cases by limiting the maximum punishment for a duplicitous specification to that warranted by the dollar value of the largest check pled therein.[215] The CAAF significantly relaxed this limitation, however, with its recent decision in *United States v. Mincey*;[216] the court held as follows:

> that in bad-check cases, the maximum punishment is calculated by the number and amount of the checks *as if they had been charged separately*, regardless of whether the Government correctly pleads only one offense in each specification or . . . joins them in a single specification as they have done here.[217]

The *Mincey* opinion raises a number of problems. Most significantly, the opinion relies on a mistaken quotation of the text of the Rules for Court-Martial limiting the maximum punishment for offenses. The opinion quotes what it purports to be the text of R.C.M. 1003(c)(1)(A)(i), punishment is to be imposed "for each separate *offense*, not for each specification."[218] However, the actual text of the cited rule provides the maximum punishments described in part IV of the MCM are "for each separate offense, not for each *charge*."[219] The difference is significant. Although the court's misquotation of the rule supports its holding that the maximum punishment for each specification is determined by aggregating the maximum punishment for each offense contained therein, the *actual* text of the rule would seemingly lead to the opposite result.[220]

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[208] *See id.* at 334 n.4.

[209] *See, e.g, United States v. Mason*, 42 M.J. 584 (Army Ct. Crim. App.)(holding rape and adultery to be separate offenses), *rev. denied*, 43 M.J. 166 (1995); *United States v. McHerrin*, 42 M.J. 672 (Army Ct. Crim. App. 1995) (holding disrespect and provoking speeches and gestures to be separate offenses).

[210] 43 M.J. at 336.

[211] *Id.* at 340.

[212] MCM, *supra* note 10, R.C.M. 307(c)(4).

[213] *See, e.g.*, United States v. Poole, 26 M.J. 272 (C.M.A. 1988).

[214] The effect most likely being sought by trial counsel using a so-called "mega-spec" is to create the appearance that the offenses in the specification occurred under circumstances such as to allow the value of the items to be aggregated for calculating the maximum sentence. *See* MCM, *supra* note 10, ¶ 46.c.(1)(h)(ii).

[215] *See* United States v. Poole, 24 M.J. 539, 542 (A.C.M.R. 1987), *aff'd*, 26 M.J. 272 (C.M.A. 1988).

[216] 42 M.J. 376 (1995).

[217] *Id.* at 378.

[218] *Id.*

[219] MCM, *supra* note 10, R.C.M. 1003(c)(1)(A)(i) (emphasis added).

[220] In the court's formulation of the rule, the accused is punished for each offense rather than for each specification. 43 M.J. at 378. The actual rule, presuming that each specification states only one offense, provides that the accused is to be punished for each specification of which he is found guilty, and not merely each charge. *See* MCM, *supra* note 10, R.C.M. 1003(c)(1)(A)(i).

Furthermore, the CAAF's attempt to limit its holding to "bad-check cases" is not borne out by the decision's rationale; the provisions of R.C.M. 1003 apply to all offenses, not just those pertaining to bad checks. There is, therefore, neither a logical nor legal reason why the CAAF's radical holding in *Mincey* should not be applied to all offenses, be they larcenies or crimes against persons.[221]

It is also disturbing that the CAAF is changing the substantive law of pleading and punishment in the context of a guilty plea review,[222] while at the same time declaring that "[w]e neither condone nor condemn the practice of joining numerous offenses into one specification for ease of pleading and prosecuting the case."[223] The decision in *Mincey* actually *encourages* the use of duplicitous specifications in bad check cases by removing the previous limitations on the maximum punishment for such specifications; the line of authority supporting the prior rule of law is effectively overruled or reversed.[224]

## Conclusion

The military appellate courts have been very active in their examination of issues concerning the substantive criminal law. Their decisions sometimes resolve matters of concern to the military justice practitioner, but frequently the decisions of the appellate courts contain the seeds of future litigation. Perhaps this is as it should be; in any event, the uncertainty sown by the courts in their recent decisions virtually guarantees a bountiful harvest of litigation and argument in the coming years.

[221] This is not to say that the rule of law announced in *Mincey should* be extended to other categories of offenses, but merely that it seemingly *could* be.

[222] It is interesting to note that Judge Cox authored the opinion of the court; he has frequently expressed "grave reservations" about making substantive law in this setting. *See, e.g.*, United States v. Byrd, 24 M.J. 286, 293 (C.M.A. 1987) (Cox, J., concurring in the result).

[223] *Id.* at 378.

[224] *See, e.g.*, United States v. Poole, 26 M.J. 272 (C.M.A. 1988).

# New Developments in Pretrial Confinement

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## Introduction

This article reviews the significant cases from the past year addressing pretrial confinement procedures. It also discusses new developments in the area of sentence credits for pretrial confinement and pretrial punishment in violation of Article 13.

## Finality of Magistrate's Decision to Release Prisoner from Pretrial Confinement in the Army

One very recent decision, *Keaton v. Marsh*,[1] is of particular significance to Army practitioners. In *Keaton*, the Army Court of Criminal Appeals (ACCA)[2] declared illegal the procedure in *Army Regulation (AR) 27-10*,[3] which allows supervising military judges[4] to review and reverse a magistrate's[5] decision to release a pretrial prisoner.

Rule for Courts-Martial (R.C.M.) 305(l) states that a service member can be reconfined after having been released from pretrial confinement only where additional misconduct or evidence is discovered.[6] The newest version of *AR 27-10*, though, allows a supervising military judge to reconfine soldiers based solely on the record before the magistrate without any additional misconduct or evidence.[7] The supervising military judge can set aside the magistrate's decision to release the soldier and order reconfinement if the military judge determines that the magistrate abused his or her discretion.[8]

The ACCA held this procedure invalid in *Keaton*. The accused in *Keaton* was released from pretrial confinement by a military magistrate. The government, pursuant to *AR 27-10*, requested that the supervising military judge review the magistrate's decision to release the accused. The supervising military judge granted the request, and conducted an *ex parte*[9] review of the magistrate's decision. The supervising military judge determined that the magistrate's decision was "clearly erroneous" and set it aside. After referral of the charges, the defense unsuccessfully challenged[10] the continued pretrial confinement before the military

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[1] Keaton v. Marsh, 43 M.J. 757 (Army Ct. Crim. App. 1996).

[2] On 5 October 1994, the National Defense Authorization Act for Fiscal Year 1995, Pub.L. No. 103-337, 108 Stat. 2663 (1994), changed the names of the United States Court of Military Appeals and the United States Courts of Military Review (to be codified at 10 U.S.C. sec. 941 n. (1995) and 10 U.S.C. sec. 866 n. (1995), respectively). The new names are the United States Court of Appeals for the Armed Forces, the United States Army Court of Criminal Appeals, the United States Air Force Court of Criminal Appeals, the United States Navy-Marine Court of Criminal Appeals, and the United States Coast Guard Court of Criminal Appeals.

[3] DEP'T OF ARMY, REG. 27-10, LEGAL SERVICES: MILITARY JUSTICE, para. 9-5b(1)(b) (8 Aug. 1994) [hereinafter AR 27-10].

[4] "Supervising military judges" are military judges who are assigned to provide direct supervision of military magistrates in the performance of magisterial duties. *Id.* para. 9-4b.

[5] In the Army, Rule for Courts-Martial [hereinafter R.C.M.] 305(i) reviews are conducted by judge advocates who are appointed as military magistrates. MANUAL FOR COURTS-MARTIAL, United States, R.C.M. 305(i) (1995 ed.) [hereinafter MCM]. The Military Magistrate Program is set out in *AR 27-10*. AR 27-10, *supra* note 3, chap. 9.

[6] The additional evidence or misconduct must be discovered after the order of release. It need not wholly justify pretrial confinement on its own; instead, it can be considered in conjunction with the evidence which was used to support the previous confinement. MCM, *supra* note 5, R.C.M. 305(l).

[7] The earlier versions of *AR 27-10*, prior to August 8, 1994, did not contain this provision. The regulation allows the supervising military judge, at the government's request, to review the magistrate's decision to disapprove pretrial confinement. AR 27-10, *supra* note 3, para. 9-5b(1)(a).

[8] AR 27-10, *supra* note 3, para. 9-5b(1)(1)(b). In reviewing the magistrate's decision for an abuse of discretion, the military judge examines the factual findings that provided the basis for the magistrate's decision to release. The regulation does not require the supervising military judge to base the reconfinement on either newly discovered evidence, or new misconduct. *Id.*

[9] *Army Regulation 27-10* requires that the government give prompt notice to the prisoner of its intent to request review of the magistrate's decision. *Id.* para. 9-5b(1)(c). Specialist Keaton, in the brief supporting his petition for extraordinary relief, alleged that neither he, nor his counsel received this notice. He challenged the *ex parte* nature of the judge's review, contending that it violated his due process rights under the Fifth Amendment. The ACCA decided that the review procedure was invalid, without reaching this specific issue. *Keaton*, 43 M.J. at 759 n. 3.

[10] After referral of the charges, R.C.M. 305(j)(1) allows the defense to challenge the propriety of continued confinement before the military judge. MCM, *supra* note 5, R.C.M. 305(j)(1).

judge.[11] Specialist Keaton petitioned the ACCA for extraordinary relief.

The ACCA granted Specialist Keaton's petition and ordered his immediate release. The court found that the supervising military judge's reconfinement of Specialist Keaton was unlawful because it was not authorized by R.C.M. 305(l).[12] First, the ACCA noted that R.C.M. 305 contemplates no review of a magistrate's decision to release a pretrial prisoner.[13] Second, it found that R.C.M. 305(l) clearly limits any future reconfinement of the soldier to those situations in which the government discovers either new evidence or misconduct. The ACCA concluded that, to the extent *AR 27-10* allows reconfinement without new evidence or misconduct, the regulation is inconsistent with the R.C.M. and must yield to the higher authority of the *Manual for Courts-Martial* (*Manual*).[14]

## Inception of *Rexroat* 48-Hour Clock

In *United States v. Rexroat*,[15] the Court of Military Appeals held that the Fourth Amendment[16] requirement for a 48-hour probable cause review of pretrial confinement applies to the military.[17] In *United States v. Scheffer*,[18] the Air Force Court of Criminal Appeals (AFCCA) addressed the question of when the 48-hour period begins if an accused is initially apprehended and held by civilian authorities, transferred into military custody, and then later placed into pretrial confinement.

In *Scheffer*, the accused was absent without leave from his unit when state authorities apprehended him for traffic offenses. The arresting officer contacted the accused's first sergeant, who asked the officer to detain the accused until military personnel could escort him back to the unit. Two days later, the accused was returned to his unit and his commander placed him in pretrial confinement.[19]

Based on these facts, the Air Force court could have found that the 48-hour clock began at any of several times and dates: when the local authorities apprehended the accused, when the first sergeant requested that the state officer hold the accused, when the military escort took custody of the accused, or when the commander actually ordered the accused into pretrial confinement. The court chose the last event. It held that so long as the accused's official custody was not at the direction of military authorities, and the military made reasonably diligent efforts to secure physical custody over the accused and order the pretrial confinement, the 48-hour review period begins with pretrial confinement pursuant to R.C.M. 305.[20]

## Waiver of R.C.M. 305(f) Right to Military Counsel

Once a pretrial prisoner has requested counsel for the purpose of representation at the pretrial confinement hearing under R.C.M. 305(f),[21] how does the accused subsequently waive the request? In *United States v. Coburn*,[22] the Navy-Marine Corps Court of

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[11] The military judge detailed to the case after referral was not the supervising military judge who set aside the magistrate's decision. *Keaton*, 43 M.J. at 758.

[12] *Id.* at 760.

[13] *Id.*

[14] *Id.*

[15] 38 M.J. 292 (C.M.A. 1993), *cert. denied*, 127 L. Ed. 2d 648, 114 S. Ct. 1296 (1994).

[16] U.S. CONST. amend IV.

[17] *Id.* at 295.

[18] 41 M.J. 683 (A.F. Ct. Crim. App. 1995) (en banc), *review granted on different grounds*, 43 M.J. 165 (1995).

[19] *Id.* at 692.

[20] *Id.* at 693. *Compare*, United States v. Stuart, 36 M.J. 746 (A.C.M.R. 1993). The Army Court of Military Review held that when the servicemember is detained by civilian authorities for a military offense with notice and approval of military authorities, the 48-hour *Rexroat* period begins upon the civilian detention. *Id.* at 748. *Stuart*, however, was decided prior to the change in R.C.M. 305(i)(1). Prior to the change, the deadline for the R.C.M. 305(i) magistrate's review was seven days from the date of imposition of the confinement. Change 6 amended the deadline to seven days from the imposition of pretrial confinement under military control. MCM, *supra* note 5, R.C.M. 305(i). The Army court may adopt the Air Force court's approach on this issue based on the change in the rule.

[21] R.C.M. 305(f) provides that once the pretrial prisoner requests military counsel, and the request is communicated to military authorities, that counsel must be provided to the prisoner. The government's deadline is 72 hours from communication of the request, or, prior to the hearing, whichever comes first. MCM, *supra* note 5, R.C.M. 305(f). Failure to provide counsel within the specified period results in day for day sentence credit under R.C.M. 305(k), for every day spent in violation of the rule. *Id.* R.C.M. 305(k).

[22] 42 M.J. 609 (N.M.Ct.Crim.App. 1995).

Criminal Appeals (NMCCA) dealt with this issue. In *Coburn*, the accused completed a form requesting military counsel during his pretrial confinement hearing. When he appeared at the R.C.M. 305(i) review hearing,[23] the government had not provided him with military counsel. The accused did not object to proceeding unrepresented at the hearing. Later, his detailed military defense counsel requested a new hearing, which was held weeks later. At trial, the defense requested R.C.M. 305(k) sentence credit for the government's failure to provide counsel during the initial pretrial confinement hearing. The government opposed the request, contending that the accused had waived his request for counsel by his silence.[24]

The NMCCA held that, once the right to counsel under R.C.M. 305(f) has been triggered, a waiver may not be inferred from the accused's subsequent silence; rather, the accused must waive the right to counsel in words that are clear and unequivocal.[25] The court first examined whether any specific provision in the *Manual* provided for either withdrawal of a request for counsel before R.C.M. 305(i) review, or for waiver of the presence of requested counsel at the review.[26] Finding none, the court relied on the general provisions in the Uniform Code of Military Justice and the *Manual*, which provide for right to counsel. The court noted, for example, that R.C.M. 506 states that waiver of counsel must be express, and that case law requires waivers to be stated by the accused personally on the record in words that are clear and unequivocal.[27] Relying on these general provisions, the NMCCA found that the accused had not waived his right to counsel at the R.C.M. 305(i) review by merely keeping silent.[28]

Because the government had neglected to provide the accused with military counsel and there was no waiver, the NMCCA found that the initial R.C.M. 305(i) review invalid.[29] The appellant was entitled to R.C.M. 305(k) sentence credit from the date that the R.C.M. 305(i) review should have occurred, until the date of the second, valid review where the accused was represented by counsel.[30]

This case reminds the government that it should establish a systematic approach for monitoring requests for counsel. The government used a form to advise the appellant of his pretrial confinement rights,[31] which allowed the appellant to annotate his request for military counsel directly on the form.[32] The accused's written request, however, was not transmitted to the reviewing officer. The government can avoid this situation by close coordination between the command, the confinement facility officials, and the trial counsel.

### Standard of Review for R.C.M. 305(j) Reviews of Pretrial Confinement by the Military Judge

The service courts have articulated different standards of review for military judges when reviewing pretrial confinement under R.C.M. 305(j).[33] In *United States v. Hitchman*,[34] the Army Court of Military Review held military judges should conduct a *de novo* review of pretrial confinement pursuant to R.C.M. 305(j). The AFCCA recently analyzed this issue in *United States v. Gaither*,[35] and determined that a *de novo* review is not appropriate in every case.[36] It determined that the proper standard of re-

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[23] MCM, *supra* note 5, R.C.M. 305(i). The rule requires a review of the pretrial confinement by a neutral and detached official within seven days of imposition of confinement under military control.

[24] *Coburn*, 42 M.J. at 611.

[25] *Id.* at 612.

[26] *Id.*

[27] *Id.*

[28] *Id.*

[29] *Id.* at 613.

[30] *Id.*

[31] MCM, *supra* note 5, R.C.M. 305(e). The prisoner must be informed, upon confinement, of the nature of the offenses, the right to remain silent and the potential use of statements against him, the right to retain civilian counsel, the right to request military counsel, and the pretrial confinement review procedures.

[32] *Coburn*, 42 M.J. at 611.

[33] R.C.M. 305(j) provides that once charges are referred, the military judge shall review the propriety of pretrial confinement upon motion for appropriate relief. MCM, *supra* note 5, R.C.M. 305(j).

[34] 29 M.J. 951 (A.C.M.R. 1990).

[35] 41 M.J. 774 (A.F.Ct. Crim. App. 1995), *rev. granted in part*, 43 M.J. 414.

[36] *Id.* at 778.

view depends on whether the accused wants the military judge to release him, and whether the accused contends that the confinement served to date is illegal.[37]

In *Gaither*, the accused contested the legality of pretrial confinement to the military judge. He alleged that the military magistrate abused his discretion by affirming continued confinement. The military judge held a *de novo* hearing on the issue, where the government presented all the evidence that the military magistrate had considered at the R.C.M. 305(i) hearing. Additionally, the military judge allowed the parties to present evidence that the magistrate had not reviewed.[38] The military judge determined, based solely on the evidence introduced at the R.C.M. 305(i) hearing, that the military magistrate had abused his discretion in leaving the appellant in pretrial confinement.[39] The military judge nonetheless denied the defense request for sentence credit because he thought that the new evidence justified the confinement.[40]

The AFCCA found that the military judge erred in ruling that the confinement already served was legal and, consequently, in denying the accused's request for R.C.M. 305(k) sentence credit.[41] The legality of the pretrial confinement already served depended on whether the military magistrate had abused his discretion in continuing the confinement. According to the AFCCA, military judges should use an abuse of discretion standard to determine whether to grant sentence credit. This standard means that the military judge confines his review to the identical information presented to the magistrate.[42] The AFCCA concluded that the military judge should not have considered the additional evidence in resolving this issue. Because the military judge originally found that the magistrate abused his discretion based on the information presented to the magistrate, the judge should have awarded appropriate sentence credit under R.C.M. 305(k).[43]

A different standard applies to the question of whether a military judge should release an individual from pretrial confinement. When a judge is reviewing the propriety of continued confinement, the appropriate standard of review is determined by whether the accused is pursuing release under R.C.M. 305(j)(1)(A) or (B).[44] R.C.M. 305(j)(1)(A) applies when the military judge finds the magistrate has abused her discretion. In that case, the military judge conducts a *de novo* hearing where the government must present sufficient information to justify continued pretrial confinement at the time of the hearing.[45] R.C.M. 305(j)(1)(B) applies when the military has not found an abuse of discretion. In this case the accused must present, at a *de novo* hearing, information not previously presented to the magistrate which establishes that the accused should be released.

When litigating whether a military judge should release an accused from pretrial confinement at the time of the hearing, the AFCCA's approach provides a sound framework for all trial practitioners. When the issue is the legality of confinement already served, an abuse of discretion standard applies. Army practitioners though must be prepared for the *de novo* hearing and review as set out in *United States v. Hitchman*.[46] All trial practitioners should ensure that all matters presented to the military magistrate are made part of the record of the R.C.M. 305(i) hearing.[47]

## Sentence Credits for Pretrial Confinement or Pretrial Punishment

Whenever service members are subjected to pretrial confinement, or pretrial punishment in violation of Article 13,[48] they are entitled to a variety of sentence credits.[49]

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[37] *Id.*

[38] The trial counsel requested, without defense objection, that the military judge consider the appellant's sworn responses during the guilty plea inquiry. The appellant had testified that he absented himself from his unit without authority to avoid a having his drug use detected on a urinalysis. *Id.* at 779.

[39] *Id.* at 777.

[40] The military judge said that the military judge had come to the correct decision—to continue confinement—but for the wrong reason. *Id.*

[41] *Id.* at 778.

[42] *Id.*

[43] *Id.*

[44] *Id.* at 779.

[45] *Id.*

[46] 29 M.J. 951, 955 (A.C.M.R. 1990).

[47] Neither MCM, *supra* note 5, R.C.M. 305(i), nor AR 27-10, *supra* note 3, dictate a form for the magistrate's written decision, or for the recording of evidence. Trial counsel should ensure that all information presented to the magistrate is made part of the record.

[48] Article 13, UCMJ, states in part:

> No person, while being held for trial, may be subjected to punishment . . . other than arrest or confinement . . . nor shall the arrest or confinement . . . be any more rigorous than the circumstances require to insure his presence. . . .

[49] In United States v. Allen, the Court of Military Appeals held that an accused is entitled to day-for-day sentence credit for each day spent in pretrial confinement. 17 M.J. 126 (C.M.A. 1984). This type of sentence credit is commonly referred to as "*Allen* credit." An accused who is subjected to punishment in violation of Article 13 may receive greater than day-for-day sentence credit. United States v. Suzuki, 14 M.J. 491 (C.M.A. 1983), *after remand*, 20 M.J. 248 (C.M.A. 1985).

### *Sentence Credit for Pretrial Custody Under the Interstate Agreement on Detainers Act*[50]

In *United States v. Bramer*,[51] the NMCCA addressed unique procedural concerns confronting practitioners who prosecute or defend soldiers incarcerated in state prisons. In *Bramer*, the accused was convicted and imprisoned by a state court for civilian offenses.[52] While the accused was in state prison, court-martial charges were preferred and referred.[53] Pursuant to a detainer the Navy filed under the Interstate Agreement on Detainers Act (IADA), the state returned the accused to military control for the trial.[54] The accused remained in a military confinement facility for several months awaiting trial by court-martial and, after conviction, while awaiting sentencing. The military judge refused to award *Allen*[55] credit for the days the accused spent in the military confinement facility.

The NMCCA, ruled that Bramer was not entitled to *Allen* credit because he had never been subjected to military pretrial confinement for which *Allen* credit can be awarded.[56] The NMCCA characterized the restraint as "temporary custody" pursuant to the IADA.[57] The NMCCA reasoned that because the IADA requires the military to keep the accused confined, the government never had the option of either formally imposing or terminating military confinement.[58] Furthermore, the accused was not prejudiced during his stay at the military facility because he continued to receive credit toward his state sentence.[59]

### *Sentence Credit for Pretrial Punishment While in Civilian Confinement Facility*

The CAAF's decision in *United States v. Phillips*[60] reminds practitioners that, absent an intent to punish or stigmatize an accused, service members are not entitled to receive Article 13 credit merely because of the harsh conditions in a civilian facility. The accused was in military pretrial confinement at a civilian jail.[61] The head jailer refused the accused's request that he be allowed to possess his Wiccan "Bible."[62] The jailer erroneously thought that Wicca was not a recognized religion.[63]

The military judge denied the accused's request for Article 13 sentence credit and the ACCA affirmed.[64] The court cited the absence of any evidence to show that the head jailer intended to punish the accused. Instead, the court found that the denial served good order and discipline because the general prison population might confuse the Wiccan practice with Satanism.[65]

The CAAF agreed that the appellant was not subjected to pretrial punishment. It also focused on the lack of any intentional punishment or effort to stigmatize the accused.[66] Judge Wiss, in

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[50] 18 U.S.C. app. sec. 2, art. IV(e). The IADA is an agreement between the United States, most of the individual states, and several territories, which facilitates the orderly disposition of charges and detainers of persons who are already incarcerated in another jurisdiction. Pub.L. No. 91-538, sec. 5, 84 Stat. 1397, sec. 5. It applies to the military. *See* United States v. Greer, 21 M.J. 338 (C.M.A. 1986).

[51] 43 M.J. 538 (N.M. Ct. Crim. App. 1995).

[52] *Id.* at 540.

[53] *Id.* at 541.

[54] *Id.*

[55] *See supra* note 49.

[56] *Bramer*, 43 M.J. at 547.

[57] *Id.*

[58] *Id.*

[59] *Id.* at 547 n. 14.

[60] 42 M.J. 346 (1995), *cert. denied*, 116 S. Ct. 781, 133 L.Ed.2d 732 (1996)..

[61] The accused was assigned to the 82d Airborne Division at Fort Bragg, North Carolina. Pursuant to an agreement between Fort Bragg and local civilian county officials, soldiers in military pretrial confinement were held in the Cumberland County Jail. *Phillips*, 38 M.J. 641, 642-643 (A.C.M.R. 1993).

[62] *Id.* at 347.

[63] *Id.* at 349. Wicca is a pagan religion which is often erroneously confused with Satanism. *Phillips*, 38 M.J. at 642, n. 3.

[64] *Id.* at 643.

[65] *Id.*

[66] *Phillips*, 42 M.J. at 349.

his concurring opinion, reminded defense counsel how crucial it is to raise complaints about civilian confinement facilities by means of a pretrial Article 39(a) session. For the accused who is subjected to an unlawful condition of pretrial confinement, the most effective relief is to ask the military judge to lift the condition.[67] The accused need only prove that he is being subjected to an unlawful condition. An accused who submits to the unlawful condition at the civilian jail should not expect compensation through military sentence credit. He ultimately may be unable to prove that the confinement officials intended to punish him[68] and will be denied relief.

### *Litigating Motions for Sentence Credit for Article 13 Violations*

Intent to punish is also a crucial issue in litigating other types of claims for Article 13 sentence credit. *United States v. Washington*[69] reminds trial counsel that they should always seek to have the person who imposed the challenged conditions on the accused testify at the hearing on the motion.

The accused was convicted of a variety of offenses arising from abuse of his position as a contingency contracting officer in the United Arab Emirates during Operations Desert Shield and Storm. Soon after his initial apprehension by military authorities, the accused was transferred back to his home unit at Shaw Air Force Base to await trial. His commander reassigned him to the base Correctional Custody and Transition Flight (CCTF) program and ordered him not to have contact in any way with personnel from his former duty section, the base contracting office.[70] At the CCTF program, the accused's duties included menial tasks such as landscaping, painting, and cleaning duck droppings from rocks around the base duck pond.[71]

On appeal, the AFCCA found that the appellant was subjected to pretrial punishment in violation of Article 13 and awarded him day-for-day credit.[72] The AFCCA applied the two-part test set out by the Court of Military Appeals in *United States v. Palmiter*[73] for evaluating alleged Article 13 violations. First, the AFCCA looked for any intent to punish the service member.[74] The existence of an intent to punish can be can be inferred from examining the purposes served by the condition and whether such purposes are "reasonably related to a legitimate governmental objective."[75] The AFCCA next looked at whether a condition, which may on its face appear to be punishment, was justified by a legitimate nonpunitive governmental objective.[76]

In answering the first question, the AFCCA found that the commander had a partial intent to punish the accused.[77] At the motion hearing, the accused testified that his commander reassigned him only after learning that the accused had given his defense counsel embarrassing information about the commander. The government neglected to rebut this testimony with that of the commander. In the absence of a rebuttal, the court found the partial intent to punish.[78]

The AFCCA also found pretrial punishment under the second test. It could find no legitimate, nonpunitive reason for the conditions imposed by the commander. The government did not present any evidence explaining why different duties could not be found for the accused which were more appropriate to his rank. The government also neglected to provide any explanation of why it was necessary to forbid all contact, even social contact, with the members of the contracting office.[79]

*United States v. Washington* demonstrates how important it is for trial counsel to fully litigate Article 13 issues, and have the

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[67] *Id.* at 352 (Wiss, J., concurring).

[68] *Id.*

[69] 42 M.J. 547 (A.F. Ct. Crim. App. 1995).

[70] *Id.* at 555.

[71] *Id.*

[72] *Id.* at 563.

[73] 20 M.J. 90 (C.M.A. 1985).

[74] *Id.* at 562.

[75] *Id.*

[76] *Id.*

[77] *Id.*

[78] *Id.*

[79] *Id.*

official who imposed the challenged conditions testify at the motion hearing. If the government does not have the official testify, it may be nearly impossible to rebut defense allegations which often surface for the first time during the hearing, such as the allegation that the commander was punishing the accused for speaking unfavorably about him or her.

### *Standard for Appellate Review of Article 13 Determinations*

The service courts disagree on what appellate standard of review should apply to trial rulings on Article 13 issues.[80] Recently, the AFCCA determined the proper appellate standard is *de novo* review.[81] Over two years ago, in the case of *United States v. Phillips*,[82] the ACCA adopted an abuse of discretion standard; however, the CAAF's intervening decision in *United States v. Huffman*[83] suggests that the AFCCA's approach in *Washington* is more logical.

In *Huffman*, the CAAF held that only an affirmative, fully-developed waiver of an Article 13 claim, on the record, will waive the issue at trial.[84] In light of *Huffman*, the AFCCA noted that the nonwaivable nature of an Article 13 claim is more consistent with a *de novo* standard of review than an abuse of discretion review. However, the ACCA decided the *Phillips* case prior to *Huffman*, and the ACCA might have decided the issue differently in light of *Huffman*. The safest practice for trial practitioners is to litigate fully all Article 13 issues and to put all evidence on the record so that it will be available should the appellate court apply the heightened standard of review.

### *Differing Approaches on* Allen *Credit for Civilian Pretrial Confinement*

The service courts also disagree on the question of whether service members who have spent time in a civilian confinement facility, prior to being transferred into military custody, are entitled to *Allen*[85] credit. For years, the Army has taken a generous approach toward awarding *Allen* credit for civilian pretrial confinement. A soldier is entitled to *Allen* credit for time spent in pretrial confinement in a civilian jail under the direction of military authorities.[86] Even if the Army is not involved in the source or length of the civilian confinement, a soldier is still entitled to sentence credit if the civilian custody is in connection with an offense for which a sentence to confinement by court-martial is ultimately imposed.[87] The key to sentence credit in this situation is that the civilian confinement must have been solely for the eventual court-martial offense. If the soldier is being held for any other reason, such as for a separate state offense,[88] the accused will not be entitled to *Allen* credit for the military offense.

In *United States v. Laster*,[89] the AFCCA firmly rejected the appellant's claim for *Allen* credit for the time he had spent in a civilian jail after his arrest by civilian authorities. State police arrested the accused after he had attempted to rob an off-post convenience store. The local authorities held him in a civilian jail for eight days before deciding to release him to the military for court-martial.[90] The AFCCA held the appellant was not entitled to eight days of sentence credit, unless there was some evidence that the Air Force had either played a role in the arrest or incarceration or had caused or influenced the length of the confinement.[91]

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[80] The CAAF has not formally stated the standard of review on this issue.

[81] United States v. Washington, 42 M.J. 547 (A.F. Ct. Crim. App. 1995).

[82] 38 M.J. 641, 642 (A.C.M.R. 1993), *aff'd*, 42 M.J. 346 (1995).

[83] 40 M.J. 225 (C.M.A. 1994).

[84] *Huffman*, 40 M.J. at 227. In *Huffman*, the accused neglected to raise specifically the Article 13 issue at trial. *Id.* at 226.

[85] *See supra* note 49.

[86] *See* United States v. Huelskamp, 21 M.J. 509 (A.C.M.R. 1985).

[87] United States v. Dave, 31 M.J. 940, 942 (A.C.M.R. 1990).

[88] *See* United States v. McCullough, 33 M.J. 595 (A.C.M.R. 1991)(accused not entitled to Allen credit where period of civilian pretrial confinement was based on state traffic violations).

[89] 42 M.J. 538 (A.F. Ct. Crim. App. 1995).

[90] *Id.* at 543.

[91] *Id.*

A different panel of the AFCCA, though, recently announced a different rule for Air Force practitioners. In *United States v. Murray*,[92] the AFCCA held that the appellant was entitled to forty-six days of sentence credit for the time he spent in civilian confinement for the offense. The AFCCA held that service members are entitled to *Allen* credit for civilian pretrial confinement under Department of Defense Directive 1325.4A.[93] The Directive requires military departments to compute sentences in the same manner as the Department of Justice.[94] The Department of Justice gives day-for-day credit for federal prisoners in state pretrial confinement.[95] While the panels of the AFCCA remain divided on this issue, at least one other AFCCA panel has adopted the *Murray* approach.[96]

## Conclusion

The remedy for noncompliance with pretrial restraint rules typically amounts to a few days of sentence credit. Although this may appear unimportant in comparison with other issues in the case, these few days are of great importance to the accused and, often, to the credibility of the command and the military justice system. Moreover, neither the government nor the accused benefits from unnecessary confinement.[97] This is one area in which practitioners should ensure absolute compliance with the rules, protecting both the accused's and the government's interests.

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[92] 43 M.J. 507 (A.F. Ct. Crim. App. 1995).

[93] DEP'T OF DEF. DIR. 1325.4, "CONFINEMENT OF MILITARY PRISONERS AND ADMINISTRATIVE OF CORRECTIONAL PROGRAMS AND FACILITIES," encl. 1, para. H.5 (19 May 1988).

[94] *Id.*

[95] The computation of federal sentences is governed by statute. 18 U.S.C. § 3585(b) (1994). The statute mandates sentence credit for any time spent in official detention imposed as a result of the offense for which the sentence is imposed. 18 U.S.C. § 3585(b)(1) (1994). As the AFCCA noted, federal courts have construed the statute to require federal credit for state pretrial confinement. *Murray*, 43 M.J. at 515.

[96] *See* United States v. Hunter, 1995 WL 472283 (A.F. Ct. Crim. App. Aug. 3, 1995) (sentence credit should be awarded by confinement facilities for time spent in civilian pretrial confinement).

[97] MCM, *supra* note 5, R.C.M. 305 analysis, app. 21, at A21-16.

# New Developments in Speedy Trial

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## Introduction

Six sources of the right to a speedy trial in the military exists: (1) statute of limitations,[1] (2) Due Process Clause of the Fifth Amendment,[2] (3) Sixth Amendment,[3] (4) Articles 10 and 33 of the UCMJ,[4] (5) Rule for Courts-Martial (R.C.M.) 707,[5] and (6) case law.[6] The 1991 amendments to R.C.M. 707[7] significantly changed the 120-day speedy trial rule.[8] The military courts continue to review key provisions of the new rule, as well as other sources of the right to a speedy trial.

## Interstate Agreement on Detainers Act[9] Speedy Trial Rights

The Interstate Agreement on Detainers Act (IADA) provides an additional speedy trial right for the military accused pending court-martial charges who is also serving a state prison sentence in a state facility. It sets out the procedure by which the state prison facility, the "sending state," transfers the prisoner to the military authorities for trial on military charges. It provides that when the prisoner makes written notice and a demand for speedy trial, then the "receiving state," the military, must bring the prisoner to trial in 180 days.[10]

Before the 180-day limit is triggered, three requirements must be met: (1) the prisoner has entered a term of imprisonment in the sending state, (2) the receiving state has filed a detainer, and (3) the prisoner has provided notice of his imprisonment and requested final disposition of the charges by the receiving state.[11]

In *United States v. Bramer*,[12] neither the accused nor his defense counsel fulfilled the third requirement; they never requested final disposition by the Navy. The Navy-Marine Court of Criminal Appeals (NMCCA) agreed with the defense, though, that the accused was excused from complying with the third requirement of the IADA, because the civilian prison officials neglected to advise him of his right to request speedy disposition of the charges.[13]

Because the accused never requested final disposition of his case, the court had to decide what other event triggered the 180-day clock. The defense argued that the triggering event should

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[1] UCMJ art. 43 (1988).

[2] U.S. CONST. amend V.

[3] *Id.* amend VI.

[4] UCMJ arts. 10, 33 (1988).

[5] MANUAL FOR COURTS-MARTIAL, United States, R.C.M. 707 (1995 ed.) [hereinafter MCM].

[6] United States v. Reed, 41 M.J. 449 (1995).

[7] MCM, *supra* note 5, R.C.M. 707 (C5, 6 Jul 91).

[8] For example, one triggering event was changed from notice of preferral of charges to the date of preferral; the remedy changed from dismissal with prejudice to dismissal with or without prejudice; and, the separate ninety day clock for pretrial confinement and arrest cases was eliminated.

[9] 18 U.S.C app. § 2, art. III.

[10] *Id.*

[11] *See*, United States v. Greer, 21 M.J. at 338, 340-41 (C.M.A. 1986).

[12] 43 M.J. 538 (A.F. Ct. Crim. App. 1995).

[13] An accused cannot be denied the remedial provisions of the IADA when the sending state gives the prisoner inaccurate or misleading information, or is unable to comply with the IADA through no fault of his own. *Greer*, 21 M.J. at 341.

have been the date on which a general hold was placed on the accused.[14] The NMCCA disagreed, finding at a minimum that the IADA requires a detainer filed by the receiving state based on an indictment, information or complaint.[15] The court ruled that the earliest possible triggering date had to be after the date of preferral.[16] Because the government brought the accused to trial within 172 days of preferral, he was not denied his IADA speedy trial rights.[17]

The *Bramer* case reminds trial practitioners of the unique issues confronting them in cases implicating the IADA. Trial counsel must comply with its 180-day speedy trial clock. Trial counsel should ascertain whether the sending state authorities have notified the accused of his IADA rights, and consider requesting such a notification if it has not already occurred. Assuming the accused has been notified of his rights, the defense counsel should ensure that the accused properly demanded a speedy trial.[18]

### When Do R.C.M. 707 Delays Begin?

*United States v. Nichols*[19] reminds government counsel not to engage in gamesmanship when sorting out R.C.M. 707(c) delays. In *Nichols*, three weeks before the date for the Article 32 investigation, the accused requested a delay.[20] At trial, the government contended that the inception date for the defense-requested delay was the date of the request for delay, and not the scheduled date for investigation which was delayed. The military judge agreed, reducing the government's R.C.M. 707 speedy trial accountability by three weeks.[21]

The Air Force Court of Criminal Appeals (AFCCA) rejected the trial court's calculation of the inception date for the delay. The AFCCA held that when a party requests a delay in a pre-scheduled event, the inception date for the delay is the pre-scheduled date of the event and not the date of the request.[22] The AFCCA noted that this orderly approach would discourage gamesmanship by the parties.[23]

### What Is a Delay Under the New Rule?

An even more fundamental question is whether delays must be initiated by a request from either party. The AFCCA explored this question in *United States v. Nichols*. The accused was an Air Force judge advocate accused of a variety of offenses arising out of a prolonged course of sexual misconduct.[24] After the case was scheduled for trial, an Army military judge was detailed to replace the detailed Air Force military judge.[25]

At trial, the parties disagreed on accountability for two periods of time associated with docketing the case.[26] The first disputed period arose when the original Air Force military judge initially set the trial date. He did not set the trial for the first available day after the mandatory five-day waiting period after service of charges.[27] Instead, after communicating with the trial and defense counsel, he set the trial for a date convenient to all parties. The military judge made no record that a delay had been requested by either party.

The second disputed period arose when the Army military judge was unavailable on the previously scheduled trial date. After discussions with both sides, the Army judge rescheduled the trial for a later date.[28] Neither the government nor the defense requested a delay.

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[14] The evidence was unclear on exactly what type of "hold," if any, was placed on the appellant initially. The NMCCA assumed that it was a generic computer entry indicating that the appellant was in the Navy and should be returned to Naval authorities following completion of his sentence. *Bramer,* 43 M.J. at 543.

[15] *Id.*

[16] The court did not hold that, in those cases where the prisoner is excused from making the formal request, the new triggering date is the date of preferral. In fact, the court found that an IADA detainer cannot be filed until after referral of the charges; it simply chose to calculate appellant's time from the earlier preferral date. *Id.* at 544, n. 5.

[17] *Id.* at 544.

[18] Assuming that the sending state has not notified the accused, the defense counsel should seriously consider whether it is in the client's best interest to make the request. In *Bramer*, the appellant neglected to file the request even after he retained counsel. This fact, though, did not affect the court's resolution of the issue. The decision makes no mention of waiver based on the accused's representation.

[19] 42 M.J. 715 (A.F. Ct. Crim. App. 1995).

[20] *Id.* at 717.

[21] *Id.* at 720.

[22] *Id.* at 722.

[23] *Id.* If the delay were calculated from the date of the request, the defense would delay in making requests until the last minute so as to minimize the periods of the delay. Government counsel would take the opposite approach: they would request delays as early as possible, to lengthen the delays.

[24] *Id.* at 717.

[25] *Id.* at 718.

[26] *Id.* at 720. The two contested periods totalled 49 days.

[27] MCM, *supra* note 5, R.C.M. 602.

[28] *Nichols*, 42 M.J. at 718.

The military judge determined that the government was not accountable for the disputed forty-nine day period, ruling that the periods were delays excludable from government speedy trial accountability, which the military judge himself initiated and approved. The AFCCA agreed, holding that military judges or convening authorities can approve delays on their own authority.[29] So long as an appropriate authority approves the delay, the period is excluded from government accountability even though, as in the *Nichols* case, neither the accused nor the government requested it.[30]

### Are There Any Automatic Exclusions Under R.C.M. 707(c)?

One question which has surfaced several times is whether the government may be automatically relieved of speedy trial responsibility for any periods of time without having secured a delay from competent authority in advance.[31] Neither the text of the rule, nor the rule's discussion, specifically states that all delays need to be resolved before the fact. On the other hand, the rule does not provide any automatic exclusions from government accountability.

In *United States v. Duncan*,[32] the Court of Military Appeals (COMA) ruled that, absent extraordinary circumstances, an accused should be informed of all government-requested pretrial delays in advance and given the opportunity to respond. Therefore, the safest course of action for the government is to request a delay from competent authority[33] in advance to cover periods of absence or unavailability of the accused. There are times, however, when the government has not secured a delay in advance, but asks to be relieved from accountability for the time. This issue has arisen primarily in two contexts. First, when an accused is absent without leave (AWOL), the government may argue that the period of absence is automatically deducted from the government's speedy trial accountability. Second, when an accused has been held for a crime by a foreign government, the government may assert that the military is excused from accountability for this period when the foreign government declines to prosecute.

The NMCCA wrestled with the AWOL issue in *United States v. Dies*.[34] There, the accused absented himself without leave after unrelated charges were preferred against him. Preferral of charges triggers the R.C.M. 707(a) speedy trial clock.[35] The government neglected to secure a delay for the twenty-three days that the accused was AWOL. Because the accused was arraigned 146 days after preferral, the defense moved to dismiss the charges for violation of the R.C.M. 707(a) 120-day rule. The military judge, relying on *United States v. Powell*,[36] found that the government was not accountable for the period of time that the accused was AWOL.

The NMCCA disagreed with the trial judge's interpretation of *Powell*. The NMCCA opined that the holding in *Powell* was limited to the unique case where charges were preferred prior to the amendment of R.C.M. 707,[37] which eliminated automatic exclusions and required competent authority to approve all delays. No such situation arose in *Dies*, since both the preferral and arraignment of the accused occurred under the current rule. The NMCCA found that *Powell* was inapplicable, and held that the military judge could not relieve the government of accountability for the AWOL period by granting an after-the-fact delay.[38]

Some practitioners may disagree with the NMCCA's narrow interpretation of *Powell*. While the COMA in *Powell* did note that the charges were preferred before the amendment to R.C.M. 707, and discussed how the case straddled the old and new rules,

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[29] *Id.* at 721.

[30] *Id.*

[31] Prior to Change 5 to R.C.M. 707, the government was not accountable for periods of time covered by defense delays, or which were enumerated in the rule itself as excludable periods. MCM, *supra* note 5, R.C.M. 707 (1984).

[32] 38 M.J. 476 (C.M.A. 1993).

[33] Prior to referral, the convening authority is the only competent authority to grant delays. After referral, the military judge resolves delays. MCM, *supra* note 5, R.C.M. 707(c)(1).

[34] 42 M.J. 847 (N.M.Ct.Crim.App. 1995).

[35] MCM, *supra* note 1, R.C.M. 707(a)(1).

[36] 38 M.J. 153 (C.M.A. 1993). In *Powell*, the COMA held that although it had not secured a delay, the government was not accountable for the time that the accused spent AWOL. *Id.* at 155.

[37] Prior to change 5, if an accused went AWOL, the period of the AWOL was automatically excluded from government accountability. MCM, *supra* note 5, R.C.M. 707(c)(6) (1984).

[38] *Id.* at 851. The court left open the possibility that in extraordinary circumstances, such as unforeseeable military exigencies, military judges may grant an after-the-fact delay as matters of military necessity. *Id.* at 850 n. 2.

this factor was not the focus of the court's holding. The COMA appeared to focus more on the fact that the charges were preferred when the accused was absent; consequently, the accused was not in government control when the triggering event, preferral of charges, occurred. The COMA held that where an accused places himself outside the reach of the government at all relevant periods, the speedy trial clock does not start ticking until the accused returns to military control.[39] The COMA did not appear to limit its holding only to those cases which straddled the change in the rule.

The COMA did, however, limit its holding in *Powell*, to those cases were the accused was already absent when the triggering event occurred, for example, the triggering of the clock through preferral of charges. Practitioners could read the *Powell* opinion as an exception allowing an automatic exclusion of time only if an accused is AWOL at the time of the triggering event. In such a case, the clock is wound, ready to start ticking, and awaits the accused's return to military control. If, though, charges are preferred before the accused absents himself or herself, then the clock is already ticking and continues to do so; *Powell* does not contemplate an automatic exclusion of the AWOL period. The government must secure a contemporaneous delay from competent authority, or be held accountable.[40]

Another situation when the accused may be viewed as beyond the control of the government is where the crime occurs overseas and the host country initially asserts jurisdiction. A significant period of time may lapse the host country and the United States military determine who will prosecute the case. The questions are whether the R.C.M. 707 clock has been triggered and whether the government is accountable for the period of time leading up to the host country's decision to defer jurisdiction to the United States military.

In *United States v. Youngberg*,[41] the Army Court of Military Review (ACMR) held that the government is not accountable for such periods of time. German authorities apprehended the accused for murdering a German citizen, and held the accused for over 200 days. The German authorities initially asserted investigatory and prosecutorial control in the case.[42] They refused to release jurisdiction to the Army until they were assured, in writing, that the Army would pursue a non-capital referral.[43] While the accused remained in German confinement, court-martial charges were preferred, the Article 32 investigation completed, and the case was referred non-capital. Soon thereafter, the German authorities waived primary jurisdiction.[44]

Although preferral had triggered the speedy trial clock, the government did not secure a delay for the period that the accused was held in German confinement. Relying on *Powell*, though, the ACMR relieved the government of accountability for this perid. It ruled that, like the accused in *Powell*, the accused was beyond the control of the government until the German authorities agreed to release jurisdiction.[45] Further, the government was under no obligation to rush to a non-capital referral to speed along the German waiver of jurisdiction. In the absence of bad faith, the ACMR refused to place such a burden on the government.[46]

The AFCCA confronted a somewhat similar situation in *United States v. Thomas*.[47] The accused was also apprehended by German authorities for murder. Instead of retaining the accused in a German confinement facility, though, the Air Force utilized a provision in the Status of Forces Agreement that allowed the Air Force to hold the accused in a United States military confinement facility.[48] After approximately eight months, the Air Force notified the German authorities of its intent to prosecute and the German authorities immediately deferred to the United States prosecution.[49]

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[39] *Id.* at 155.

[40] Again, the debate over the appropriate interpretation of *Powell* should be purely academic; government counsel should always protect the case by securing a delay from competent authority.

[41] 38 M.J. 635 (A.C.M.R. 1993), *affirmed*, 43 M.J. 379 (1995).

[42] A sovereign state has exclusive jurisdiction to punish offenses against its laws committed within its borders unless it expressly or impliedly consents to surrender its jurisdiction. Wilson v. Girard, 354 U.S. 524 (1957). Many countries, such as Germany, have entered into international agreements with the United States in which they expressly agree to limit or waive criminal jurisdiction over United States soldiers in certain situations. *See* DEP'T OF ARMY, REG. 27-50, STATUS OF FORCES POLICIES, PROCEDURES, AND INFORMATION (1989).

[43] *Youngberg*, 38 M.J. at 636.

[44] *Id.*

[45] *Id.* at 639.

[46] *Id.*

[47] 43 M.J. 626 (A. F. Ct. Crim. App. 1995).

[48] *Id.* at 636.

[49] *Id.*

The AFCCA held that the speedy trial clock had not been triggered, so the government was not accountable for the eight months during which the German authorities made their decision. First, unlike *Youngberg*, the Air Force did not prefer court-martial charges until the German authorities relinquished jurisdiction. Similar to the ACMR in *Youngberg*, the AFCCA refused to impose an obligation on the government to prefer at the earliest moment, or to otherwise speed the case toward a German relinquishment of jurisdiction.[50] The AFCCA also found that imposition of the pretrial confinement pursuant to the SOFA did not trigger the clock. It held that the speedy trial clock was not triggered by pretrial confinement pursuant to the request of foreign authority under a treaty obligation.[51]

### Deciding Between Dismissal With or Without Prejudice Under R.C.M. 707

In *United States v. Edmond*,[52] the Court of Appeals for the Armed Forces (CAAF) addressed, for the first time, the change in the remedy for violations of R.C.M. 707, which now permits military judges to decide whether to dismiss court-martial charges with or without prejudice for violations of the R.C.M. 707(a) 120-day speedy trial clock. According to R.C.M. 707(d), the military judge must consider four factors in choosing between dismissal with or without prejudice: the seriousness of the offense, the facts and circumstances of the case that lead to dismissal, the impact of a reprosecution on the administration of justice, and any prejudice to the accused resulting from denial of a speedy trial.[53]

In *Edmond*, the CAAF reviewed a military judge's exercise of that discretion. The CAAF affirmed the military judge's decision to dismiss charges, without prejudice, for violation of the 120-day speedy trial clock. The court found that, because the defense had not proven an impact on the accused's right to a fair trial, any prejudice to the accused was "slight."[54] It also determined that the facts and circumstances leading to dismissal weighed in favor of dismissal without prejudice. The CAAF cited an absence of truly neglectful government attitudes, intentional violations, or patterns of neglect in the government's actions. It further determined that the remaining two factors weighed in favor of dismissal without prejudice.[55] Prior to litigating a R.C.M. 707 motion to dismiss, counsel for both sides should study *Edmond* for detailed guidance in preparing the most effective argument for dismissal with or without prejudice.[56]

### Speedy Trial Under Article 10

Article 10 mandates that after confinement or arrest, the government must take immediate steps to try a prisoner, or to release him.[57] In *United States v. Kossman*,[58] the COMA held the standard for measuring government compliance with Article 10 is "reasonable diligence." Since the *Kossman* decision in 1993, the service courts have wrestled with the question of what actions reflect "reasonable diligence" on the part of the government.[59]

In a majority of the cases, the service courts have found the government proceeded with reasonable diligence.[60] In *United States v. Hatfield*,[61] the NMCCA examined the reasonable diligence standard in depth and decided that the military judge abused his discretion in dismissing the charges under Article 10. The central issue in the case was how five periods of delay, totalling forty-eight days, should be characterized. The military judge characterized the entire period as "inordinate delay" and dismissed the charges.[62] The government appealed and the NMCCA reversed.[63]

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[50] *Id.* at 639.

[51] *Id.* at 637.

[52] 41 M.J. 419 (1995), *cert. granted and judgment vacated on other grounds*, 116 S. Ct. 43, 133 L.Ed.2d 10 (1995).

[53] MCM, *supra* note 5, R.C.M. 707(d).

[54] *Id.* at 422.

[55] *Id.*

[56] *See* Criminal Law Department Notes, *R.C.M. 707: Dismissal With or Without Prejudice*, ARMY LAW., Sep. 1995, at 31-35.

[57] UCMJ art. 10 (1988).

[58] United States v. Kossman, 38 M.J. 258 (C.M.A. 1993).

[59] In *Kossman*, the COMA described reasonable diligence as something other than constant motion by the prosecution. Brief periods of inactivity were found to be permissible so long as they were not unreasonable or oppressive. *Id.* at 262. The court observed that an Article 10 issue would be raised where government could have gone to trial but negligently or spitefully chose not to. *Id.* at 261.

[60] *See* United States v. Scheffer, 41 M.J. 683 (A.F. Ct. Crim. App. 1995) (government proceeded with reasonable diligence when it arraigned accused 154 days after imposition of pretrial confinement).

[61] United States v. Hatfield, 43 M.J. 662 (N.M.Ct.Crim.App. 1995).

[62] *Id.* at 665.

[63] *Id.* at 663.

The NMCCA first examined the sufficiency of the military judge's factual findings. It determined that the evidence did not support the judge's computation of forty-eight days of government inactivity because on many of those days, the government took specific steps toward trial.[64] The NMCCA then examined the military judge's characterization of the "delay" as "inordinate." It concluded that since many steps needed for court-martial were accomplished on these days, the military judge erred in concluding that the government lacked reasonable diligence.[65]

The NMCCA also determined that the military judge had misapplied the law, reiterating that the test for reasonable diligence is not whether the government could have gone to trial sooner. The NMCCA stated that absent evidence of negligence or spite, mere delay does not prove that the government has violated Article 10.[66]

The *Hatfield* case emphasizes the importance of record-keeping for the government, especially when the accused is in pretrial confinement or arrest. Trial counsel must keep clear, accurate records of all actions taken to move cases towards trial. The trial counsel must also integrate into the case chronologies office activities which, while not case-related, nonetheless affect the case.[67] If this is done, the trial counsel who is confronted with an Article 10 motion will be prepared to present detailed and complete evidence covering the entire course of case preparation and processing. The government risks dismissal with prejudice[68] if it neglects to keep detailed records or to place complete evidence on the record.

Occasionally, trial courts do grant Article 10 motions and service courts affirm.[69] In *United States v. Laminman*[70] the Coast Guard Court of Criminal Appeals (CGCCA) affirmed the trial judge's dismissal of charges for lack of speedy trial,[71] providing practitioners with an in-depth analysis of the rule. This case, again, emphasizes the government's burden when confronted with an Article 10 motion.

In *Laminman*, the accused was in pretrial confinement from 15 December 1993 until his trial commenced on 25 April 1994. The defense moved for dismissal of the charges on Article 10 grounds. The military judge was not impressed with the government's explanation for the delays. She found that the government had failed to present evidence explaining the reasons for various delays in the trial process.[72] She concluded that the evidence showed a non-diligent or negligent attitude on the part of the government.[73]

The CGCCA agreed and affirmed. First, it noted that the burden of proof falls on the prosecution whenever the defense moves to dismiss for lack of speedy trial.[74] Then the court examined the evidence the government placed on the record in an effort to explain the government's delay. It found that the government had not demonstrated that it proceeded with due diligence.[75]

The *Laminman* court made concrete suggestions on how to litigate these issues. It suggested that both parties enter a stipulation of fact for undisputed portions of the case chronology, and then present evidence on disputed portions of the chronology.[76] The CGCCA also acknowledged that the military judge may correctly adopt a sliding-scale analysis, judging the government's diligence based in part on how much time has passed in processing the case. The military judge in the case was especially critical of the government's failure, at day ninety of the confinement, to transmit the Article 32 investigative report to the convening authority by overnight delivery.[77] She thought, and the appellate court agreed, that due diligence required expedited processing of

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[64] *Id.* at 666.

[65] *Id.*

[66] *Id.* at 667.

[67] *Id.* The court specifically noted the evidence concerning the trial counsel's involvement in other courts-martial. *Id.*

[68] United States v. Kossman, 39 M.J. 258, 262 (C.M.A. 1993).

[69] *See* United States v. Collins, 39 M.J. 739 (N.M.C.M.R. 1994) (denying appeal in post-*Kossman* case where during three-month delay, government made only six to eight phone calls in preparation for the case).

[70] 41 M.J. 518 (C.G.Ct.Crim.App. 1994) (en banc).

[71] *Id.* at 518.

[72] The delays were associated with preferral of charges, ordering the Article 32 investigation, detailing of the defense counsel, and commencing the Article 32 investigation. *Id.* at 523.

[73] *Id.* at 522 n.4.

[74] *Id.* at 521.

[75] *Id.* at 523.

[76] *Id.* at 518 n. 2.

[77] *Id.* at 522 n. 4.

the case. The CGCCA explained that this event, taken in context, reflected a governmental attitude inconsistent with reasonable diligence, which permeated the entire process.[78]

### Fifth Amendment Speedy Trial Rights

The Fifth Amendment Due Process Clause[79] provides an independent speedy trial guarantee to the military accused. It protects the accused from egregious preaccusation delays where there has been no restraint.[80] In the military, "preaccusation" delays generally are those occurring prior to preferral of charges.[81]

A speedy trial due process claim must address two issues: first, whether the accused suffered actual prejudice from the delay,[82] and second, whether the prosecution engaged in egregious or intentional tactical delay.[83] For many years, the federal circuits have split on the question of whether the burden to prove both prongs falls on the defense, or whether after the defense proves actual prejudice, the burden falls on the government to prove that the delay was not egregious or intentional.[84]

In *United States v. Reed*,[85] the CAAF clarified which approach military judges should follow. Reed was charged with raping a fellow sailor at a party.[86] The victim first reported the incident in January 1992. The Naval Investigative Service investigated the crime, and first informed the appellant's command in August 1992.[87] Charges were preferred in September 1993, and referred to trial in January 1994. The military judge granted the defense's motion to dismiss on due process grounds.[88] The NMCMR reversed the trial judge's dismissal of the charges.

The CAAF affirmed, holding there was no violation of the accused's right to a speedy trial under the Fifth Amendment's Due Process Clause. The CAAF resolved the question of which party has the burden of proof on the two prongs by deciding that the defense retains the burden to prove both actual prejudice and egregious or intentional tactical delay by the prosecution.[89] In examining the record, the CAAF determined that the accused had not met his burden of proving either prong of the due process test.[90] Now that the CAAF has clarified that the burden of proof remains on the defense, defense counsel should be prepared to obtain and present evidence on both prongs of the due process inquiry.[91]

### Conclusion

One clear message emerges from the speedy trial cases decided in the last year: practitioners must keep detailed, comprehensive case-processing chronologies. This is especially true for defense counsel whose clients' speedy trial rights have diminished over the past several years. The comprehensive chronology is an indispensable tool for proving government compliance or noncompliance with the reasonable diligence standard of Article 10. It also is crucial to convincing the military judge to dismiss a case with prejudice or without prejudice for violation of R.C.M. 707(a).

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[78] *Id.*

[79] U.S. CONST. amend V.

[80] United States v. Reed, 41 M.J. 449, 451 (1995).

[81] United States v. Vogan, 35 M.J. 32 (C.M.A. 1992).

[82] "Actual prejudice" is more than an accusation or speculation. The defense must establish prejudice such as the loss of key witnesses or testimony or the loss of physical evidence. *Reed*, 41 M.J. at 452.

[83] United States v. Lovasco, 431 U.S. 783, 795 (1977).

[84] *Compare* United States v. Byrd, 31 F.3d 1329 (5th Cir. 1994) (defense burden to prove both intentional delay on the part of prosecutor to gain tactical advantage and that the defendant suffered actual prejudice) *with* Howell v. Barker, 904 F.2d 889 (4th Cir. 1990)(after defense shows actual prejudice, burden shifts to the prosecution to prove the absence of an improper motive).

[85] 41 M.J. 449 (1995).

[86] *Id.* at 450.

[87] *Id.*

[88] The defense alleged, *inter alia*, that due to the twenty months from the notice of the crime until preferral of charges, the appellant was unable to identify or locate two witnesses who were in the same hotel room the night of the incident. *Id.* at Appendix.

[89] *Id.* at 452.

[90] *Id.* at 453.

[91] It may be a difficult task for defense counsel to acquire evidence of bad faith by the prosecution. In his dissenting opinion, Judge Wiss was critical of a test which places the burden on the accused to demonstrate the government's reasons for its delays. As he noted, the government is in the best position to articulate its reasons for delay, and it defies common sense to put this burden on the accused. *Id.* at 456 (Wiss, dissenting).

# Recent Developments in Military Pretrial and Trial Procedure

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## Introduction

This article reviews significant recent developments in pleas and pretrial agreements, court-martial personnel, Article 32 pretrial investigations, and voir dire. This mélange focuses on those cases most relevant to trial practitioners, or cases representing significant shifts or trends in the body of law delineating miliary pretrial practice.

## Pleas and Pretrial Agreements

### United States v. Sweet

More than twenty-five years ago, the Court of Military Appeals (COMA)[1] in *United States v. Care*[2] obligated military judges to make adequate inquiries into the factual basis for guilty pleas. This requirement was subsequently codified in Rule for Courts-Martial (R.C.M.) 910(c)(5)[3] and R.C.M. 910(e).[4] Soon after, in *United States v. Bertelson*,[5] the COMA held that a military judge may not admit a stipulation of fact constituting an admission of guilt without ascertaining from the accused that a factual basis exists for that stipulation.[6] While the degree of inquiry necessary to meet the *Care* and *Bertelson* standards is generally left to the discretion of the trial court, minimum compliance seems to require an accused to orally inculpate himself in open court.

Recently, in *United States v. Sweet*,[7] the United States Court of Appeals for the Armed Forces (CAAF) addressed whether an accused who has pleaded guilty and entered into a confessional stipulation must also orally re-state facts sufficient to meet all elements of the offense in question. Sweet, a Navy ensign, pleaded guilty to two specifications of indecent acts with a child under the age of sixteen. As part of a pretrial agreement, he signed a detailed and unambiguous, two-page, single-spaced, confessional stipulation of fact describing his conduct as it related to the charged offenses. The military judge conducted a brief providence inquiry consisting of reading the elements of the offense, explaining the service discrediting and prejudicial components of Article 134, UCMJ, and defining an indecent act.

After consenting to the admission of the stipulation, the accused admitted that the acts detailed in the stipulation were indecent. Finally, the military judge re-advised the accused regarding the elements of the offense using specific factual details found in the stipulation. The trial judge concluded the inquiry with the following colloquy:

> MJ: Do you honestly believe and admit that taken together those five elements correctly describe what you did?
>
> ACC: Yes sir, they do.
>
> MJ: Do you believe what you did is wrong?
>
> ACC: Yes sir, I do.[8]

In upholding the efficacy of this procedure, the CAAF held that a factual basis for a guilty plea may be established when, in conjunction with a confessional stipulation, the trial judge reads

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[1] On 5 October 1994, the National Defense Authorization Act for Fiscal Year 1995, Pub. L. No. 103-337, 108 Stat. 2663 (1994), changed the name of the United States Court of Military Appeals (COMA) to the United States Court of Appeals for the Armed Forces (CAAF). The same act changed the names of the Courts of Military Review to the Courts of Criminal Appeals. This article will use the name of the court in existence at the time the decision was rendered.

[2] 40 C.M.R. 247 (1969). In *Care*, the COMA mandated that "the military judge or the president has questioned the accused about what he did or did not do, and what he intended." *Id.* at 253.

[3] MANUAL FOR COURTS-MARTIAL, United States, R.C.M. 910(c)(5) (1995 ed.) [hereinafter MCM]. R.C.M. 910(c)(5) requires that the military judge "question the accused about the offenses to which the accused has pleaded guilty."

[4] *Id.* R.C.M. 910(e) requires the military judge to make "such inquiry of the accused as shall satisfy the military judge that there is a factual basis for the plea."

[5] 3 M.J. 314 (C.M.A. 1977).

[6] In *Bertelson*, the accused pleaded not guilty to distributing drugs but stipulated to facts sufficient to meet all the necessary elements of the offense as part of a plea agreement with the convening authority. *Id.* at 315.

[7] 42 M.J. 183 (1995).

[8] United States v. Sweet, 38 M.J. 583, 586 (N.M.C.M.R. 1993).

tailored elements to the accused and the accused admits that those elements accurately describe the accused offenses. The CAAF reviewed the requirements of R.C.M. 910[9] and concluded that an adequate factual basis for the accused's pleas was established via the abbreviated procedures used by the trial court.

Under no circumstances, however, should military judges and other practitioners interpret *Sweet* as authority for more abbreviated or streamlined providence inquiries. The CAAF in *Sweet* expressly noted "a more detailed inquiry in many instances may be advisable or even necessary in order to resolve questions surrounding the providence of pleas."[10] Matters taken into consideration by the court were the status of the accused as a commissioned officer who was "represented by qualified counsel,"[11] the detailed nature of the stipulation, and a finding that the accused's "yes" and "no" answers to the "military judge inquiry were responses to questions of fact and not conclusions of law."[12]

In its earlier review of *Sweet*, the Navy-Marine Corps Court of Military Review prudently advised counsel to provide trial judges with stipulations prior to trial to encourage conformity between the elements of the offense and the facts contained in the stipulation.[13] The Navy court also noted that most military judges understand the importance of "an in-depth personal colloquy with the accused to determine the facts underlying the guilty pleas, requiring that the essential facts be stated on the record in the accused's own words."[14] This more detailed procedure "offers the best chance to discover and obviate misunderstandings regarding the law and potential inconsistences with the guilty pleas."[15] Judges who remain true to the approved trial "script" from the *Military Judges' Benchbook*[16] and glean complete and consistent inculpatory statements in the accused's own words will ensure compliance with the requirements of R.C.M. 910.

## United States v. Weasler

In *United States v. Weasler*,[17] the CAAF reviewed a pretrial agreement initiated by an accused that waived objections to claims of unlawful command influence. The CAAF, while declaring that government-mandated waivers of unlawful command influence are against public policy,[18] held such waivers are permissible when they originate with the defense.[19]

In *Weasler*, the accused's company commander, prior to departing on leave, told the officer designated to serve as acting commander that if charges against the accused arrived in her absence, "all he had to do was sign them."[20] This statement provided the basis for a defense motion to dismiss due to unlawful command influence. While awaiting the trial court's ruling on that motion, the defense counsel proposed a pretrial agreement in which the accused would waive his motion to dismiss for unlawful command influence in return for a confinement limitation of three months.[21]

The CAAF noted in *Weasler* that the command interference complained of "did not affect the adjudicative process"[22] but instead impacted only upon the "accusatory stages"[23] of the case. In upholding the validity of the agreement, the CAAF relied in large

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[9] MCM, *supra* note 3, R.C.M. 910.

[10] *Sweet*, 42 M.J. at 185.

[11] *Id.* at 185.

[12] *Id.*

[13] *Sweet*, 38 M.J. at 592.

[14] *Id.*

[15] *Id.* It is equally important to ensure that the words used by the accused to describe his or her misconduct are not inconsistent with the guilty plea. Consider *United States v. Bates*, 40 M.J. 362 (C.M.A. 1994), where the accused, in pleading guilty to carnal knowledge, related he "attempted" to have intercourse with the victim but that he had stopped after the victim said "it hurt." (*Id.* at 363) The majority found the inquiry by the trial judge was "minimally sufficient," (Id. at 362). Judge Wiss indicated the providence inquiry was "a model of inadequacy." (Wiss, J. dissenting).

[16] DEP'T OF ARMY, PAMPHLET, 27-9, MILITARY JUDGES' BENCHBOOK, (1 May 1982).

[17] 43 M.J. 15 (1995).

[18] *Id.* at 19 (citing United States v. Kitts, 23 M.J. 105 (C.M.A. 1986)).

[19] *Id.*

[20] *Id.* at 16.

[21] Specialist (E4) Weasler was charged in six separate specifications with uttering 28 bad checks of a total value of $8,920. *Id.* at 15.

[22] *Id.* at 18.

[23] *Id.* at 19.

part upon *United States v. Mezzanatto*,[24] a recent decision by the United States Supreme Court. In *Mezzanato* the government, as a pre-condition to proceeding with pretrial discussions with the accused and counsel, required the accused to agree that any statements made during the meeting could be used to impeach contradictory statements made at trial.[25] The CAAF in *Weasler* (quoting *Mezzanato*) noted the "mere potential for abuse of prosecutorial bargaining power is an insufficient basis for foreclosing negotiation altogether."[26] In *Mezzanato*, the Supreme Court declared that even "the most basic rights of criminal defendants are. . . subject to waiver,"[27] including "many of the most fundamental protections afforded by the Constitution."[28]

Concurring only in the result, Chief Judge Sullivan pronounced the majority opinion in *Weasler* to be "a landmark decision. . . which, for the first time permits affirmative waiver of a *prima facie* case of unlawful command influence."[29] Chief Judge Sullivan warned against allowing an accused a "blackmail" option whenever the accused discovers that a commander may have committed unlawful command influence.[30] In a separate concurrence, Judge Wiss noted with disfavor attempts to distinguish pretrial command influence from command influence occurring later in the trial process. Judge Wiss argued that the "greatest risk presented by unlawful command influence has nothing to do with the stage at which it is wielded."[31]

The effort by the majority in *Weasler* to distinguish defense-originated waivers of unlawful command influence from those that might be initiated by the government appears strained. Prior to 1991, the government was flatly prohibited from initiating any pretrial agreement negotiations with the defense. This artificial and unnecessary prohibition was displaced by Change 5 to the *Manual for Courts-Martial*.[32] The COMA recently upheld the government's right under R.C.M. 705(c)(2)(E)[33] to insist that an accused waive his right to a trial before members as part of a pretrial agreement.[34] Prior authority required that a waiver of trial before members be a "freely-conceived defense product"[35] that did not "originate with the government."[36]

Considering the abrogation of these historical restraints on government-initiated pretrial agreements, there seems little justification for prohibiting the government from proposing a waiver of potential unlawful command influence. If an accused, represented by competent independent counsel, knowingly and voluntarily waives such issues, there is little danger of government overreaching even in the relatively sacrosanct area of command influence. The CAAF notes that the command influence complained of in *Weasler* was not so egregious as to preclude the government from re-preferring the charges.[37]

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[24] 115 S. Ct. 797 (1995). *See also* Stephen R. Henley, *Current Developments in Evidence Law*, ARMY LAW. March 1996, at 96.

[25] FED. R. EVID. 410(4) excludes from evidence at trial statements made by the accused to a prosecuting attorney during pretrial negotiations. MCM, *supra* note 3, MIL R. EVID. 410 is substantially the same as FED. R. EVID. 410.

[26] *Weasler*, 43 M.J. at 18-19 (quoting *Mezzanato*, 115 S. Ct. at 806 (1995)).

[27] *Mezzanato*, 115 S. Ct at 801 (quoting Pertetz v. United States, 501 U.S. 923, 936 (1991)).

[28] *Mezzanato*, 115 S. Ct. at 801 (*citing* Ricketts v. Adamson, 483 U.S. 1, 10 (1987)).

[29] *Weasler*, 43 M.J. at 20 (Sullivan, C.J., concurring).

[30] *Id.*

[31] *Id.* (Wiss, J., concurring).

[32] MCM, *supra* note 3, R.C.M. 705(d)(1) (R.C.M. 705(d)(1) provides that "negotiations may be initiated by the accused, defense counsel, trial counsel, the staff judge advocate, convening authority, or their duly authorized representatives).

[33] *Id.* R.C.M. 705(d)(1).

[34] United States v. Burnell, 40 M.J. (C.M.A. 1994). Prior to Change 5, an accused was permitted to bargain away his or her right to be sentenced by members "so long as the government did not require (or was perceived as requiring) waiver of members as a condition precedent to acceptance of a pretrial agreement." United States v. Andrews, 38 M.J. 650 (A.C.M.R. 1993).

[35] United States v. Schmeltz, 1 M.J. 8, 12 (C.M.A. 1975).

[36] United States v. Andrews, 38 M.J. 650 (A.C.M.R. 1993).

[37] United States v. Weasler, 43 M.J. 15, 18 (1995).

Additionally, in relying on *Mezzanato*, the CAAF fails to distinguish two important aspects of that decision. First, it was the government that initially raised the waiver proposal with the defendant in *Mezzanato*.[38] Second, unlike the accused in *Weasler*, the defendant in *Mezzanato* pleaded "not guilty" and had no pretrial agreement, yet he was still bound by his prior waiver.[39] The failure of the CAAF to comment upon these factual distinctions is especially perplexing when the Supreme Court's opinion in *Mezzanato* seems to invite a broader holding.[40] Therefore, *Weasler* may represent an incremental first step in allowing the government greater latitude in negotiating pretrial agreements involving unlawful command influence.

## United States v. Conklan

In *United States v. Conklan*,[41] the Army Court of Criminal Appeals (ACCA) held, on public policy grounds, that pretrial agreements depriving an accused of the right to litigate good faith claims of transactional immunity or lack of jurisdiction are not "proper subjects for plea bargaining."[42] In *Conklan*, the accused was charged with unlawful sexual relations with Army trainees and with carnal knowledge with a twelve-year-old girl. The accused countered that his commanders had violated an express promise not to prosecute him for carnal knowledge if civilian authorities dropped their charges against him involving the young girl.[43] Additionally, the accused challenged the legal process by which military judges were appointed.[44]

During pretrial negotiations, the parties agreed that the convening authority would limit confinement to four years if the accused pleaded guilty unconditionally. If, on the other hand, the accused wished to enter a conditional guilty plea,[45] preserving for appeal issues of de facto immunity[46] and jurisdiction,[47] the convening authority would limit confinement to five years. In effect, this agreement placed a surtax on the accused's conditional guilty plea.

In examining this agreement, the ACCA reviewed the language of R.C.M. 705(c)(1)(B),[48] which prohibits pretrial agreement terms or conditions that deprive the accused of "the right to due process"[49] or "the right to challenge jurisdiction."[50] The ACCA noted that while not depriving the accused of his absolute right to raise these motions prior to pleas, the parties' decision to encumber these rights in the agreement "substantially endangered them."[51] The court noted that such agreements are likely to "result in meritorious claims going unremedied"[52] and that the proper resolution of such matters is best accomplished by the trial judge "outside of the pretrial agreement process."[53]

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[38] At a pretrial meeting, the prosecutor in *Mezzanato* informed Mezzanato and his counsel that as a condition of proceeding with pretrial discussions, Mezzanato would have to agree that any statements made during the meeting could be used for possible impeachment purposes at trial. Mezzanato agreed and made inculpatory statements during the discussion. After taking the witness stand in his own behalf and denying his involvement in the crimes alleged, the prosecution was in fact allowed by the trial judge to use Mezzanato's pretrial statements to rebut his contradictory testimony. United States v. Mezzanato, 115 S. Ct. 797 (1995).

[39] *Id.*

[40] Federal courts have upheld pretrial agreements that require the general waiver of the right to appellate review. United States v. Yemitan, No. 95-1352 (2d Cir. Nov. 30, 1995); United States v. Salcido-Contreras, 990 F.2d 51 (2d Cir.), *cert. denied*, 113 S. Ct. 3060 (1993). One court upheld a waiver of the right to claim ineffective assistance of counsel. United States v. Shields, 44 F.3d 673 (8th Cir. 1995).

[41] 41 M.J. 800 (Army Ct. Crim. App. 1995).

[42] *Id.* at 805.

[43] The court noted that the general court-martial convening authority was at least "putatively aware" of this *de facto* agreement as was the staff judge advocate. *Id.* at 803, n. 2.

[44] Issues involving the status and appointment of military judges were resolved by the United States Supreme Court in United States v. Weiss, 114 S. Ct. 752 (1994). Military due process does not require fixed terms of office for military judges nor do military judges need additional judicial appointment.

[45] MCM, *supra* note 3, R.C.M. 910(a)(2). A conditional guilty plea allows an accused to preserve issues for appeal that would otherwise be waived by the entry of a guilty plea. If the accused prevails on appeal, the accused may withdraw his or her prior guilty plea.

[46] *See* Samples v. Vest, 38 M.J. 482 (C.M.A. 1994).

[47] Jurisdictional issues are not normally waived by the accused's failure to raise them at trial United States v. Coffey, 38 M.J. 290 (C.M.A. 1993).

[48] MCM, *supra* note 3, R.C.M. 705(c)(1)(B).

[49] *Id.*

[50] *Id.*

[51] *Conklan*, 41 M.J. at 804-05.

[52] *Id.* at 805.

[53] *Id.*

Practitioners should avoid pretrial agreements that have the practical effect of depriving an accused of the right to challenge jurisdiction, that impinge on issues of constitutional due process,[54] or that appear to place a heavier sentencing burden on the exercise of a conditional guilty plea.[55]

### Article 32 Investigations

In *United States v. Marrie*,[56] the CAAF reviewed the "100-mile-rule" for witnesses at investigations held pursuant to Article 32 of the Uniform Code of Military Justice (UCMJ).[57] Rule for Courts-Martial 405(g)(1)(A)[58] requires that "witnesses whose testimony would be relevant to the investigation and not cumulative, shall be produced if reasonably available."[59] Witnesses are "reasonably available" if they are "located within 100 miles of the situs of the investigation and the significance of the testimony and personal appearance of the witness outweighs the difficulty, expense, delay, and effect on military operations of obtaining the witness' appearance."[60]

In *Marrie*, the accused was charged with sodomy and indecent acts with children. He sought to require the attendance of five of the alleged victims at his Article 32 investigation. The Article 32 investigating officer determined that three children who resided more than 100 miles away were unavailable.[61] Over defense objections, the Article 32 investigating officer considered the sworn written statements of the "unavailable" witnesses. At trial, the military judge ruled that the 100-mile-rule was *per se* determinative of unavailability.

The CAAF, affirming the Air Force Court of Military Review's previous decision in *Marrie*,[62] held that a *per se* reading of the 100-mile-rule is inconsistent with the confrontational rights enjoyed by a service member accused under Article 32, UCMJ and with the "shall be produced" language in R.C.M. 405(g)(1)(A).[63] The CAAF also considered language in the analysis to R.C.M. 405(g)(1)(A),[64] which provides that "the production of witnesses located more than 100 statute miles[65] from the situs of the investigation is within the discretion of the witness' commander (for military witnesses) or the commander ordering the investigation (for civilian witnesses)."[66] Significantly, the CAAF also declared that the confrontational rights of an accused under the *Manual for Courts-Martial* are "much broader than the Sixth Amendment right at preliminary hearings and grand juries."[67]

Although the court in *Marrie* determined that the application of a *per se* 100-mile-rule was in error, the error was deemed harmless because defense counsel had adequate access and opportunity to interview the witnesses in question prior to trial. For practitioners, however, *Marrie* clearly establishes that witnesses

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[54] *See* United States v. McMillian, 33 M.J. 257 (C.M.A. 1991) (multiplicious charges made during sentencing not waived by guilty plea to the charges); United States v. Coffey, 38 M.J. 290 (C.M.A. 1993) (jurisdictional issues not waived by accused failure to raise them at trial); United States v. Johnston, 39 M.J. 242 (C.M.A. 1994) (unlawful command influence issues are not waived by guilty plea); United States v. Henry, 42 M.J. 231 (1995) (selective prosecution not waived where facts necessary to make claim not fully developed); United States v. Keyes, 33 M.J. 567 (N.M.C.M.R. 1991).

[55] The use of conditional guilty pleas should normally be limited case dispositive issues such as motions to suppress evidence (including statements)(R.C.M. 906(b)(13)) or to dismiss for violations of an accused's right to speedy trial (R.C.M. 707).

[56] 43 M.J. 35 (1995).

[57] UCMJ art. 32 (1988).

[58] MCM, *supra* note 3, R.C.M. 405(g)(1)(A).

[59] *Id.*

[60] *Id.*

[61] *Id.* at 37. Two of the alleged victims resided within 100 miles, but their parents refused to let them testify. Ultimately, none of the child victims testified at the Article 32 investigation. *Id.*

[62] United States v. Marrie, 39 M.J. 993 (A.F.C.M.R. 1994).

[63] MCM, *supra* note 3, R.C.M. 405(g)(1)(A).

[64] *Id.* R.C.M. 405(g)(1)(A) analysis, app. 21, at A21-24.

[65] A statute mile is a distance of 5280 feet as distinguished from a nautical (or air) mile of 6076.10333 feet which is equivalent to 1/60 of one degree of the Earth's Equator. Webster's New World Dictionary, The Southwestern Co., 1966.

[66] For the Army, payment of transportation and per diem for civilian witnesses must be approved by the general court-martial convening authority. DEPT OF ARMY, REG. 27-10, LEGAL SERVICES: MILITARY JUSTICE, para. 5-12(b) (Sept. 1994).

[67] United States v. Marrie, 43 M.J. 35, 40 (1995).

located more than 100 miles from the site of an Article 32 investigation are *not* presumptively unavailable.

While trial counsel might still credibly assert that the 100-mile-rule sets up a *rebuttable* presumption of unavailability, defense counsel should argue that the decision to call witnesses located more than 100 miles away requires a separate and distinct exercise of discretion by a soldier-witness's commander or for civilians, the commander ordering the investigation. Trial counsel should ensure that any denial of such witness requests (1) be in writing, (2) incorporate the specific balancing test language of R.C.M. 405(g)(1)(A), and (3) be made part of the official Article 32 record of proceedings.

## Court-Martial Personnel

### United States v. Allgood

*United States v. Allgood*[68] involves the adoption of court member selections made by a predecessor-in-command under R.C.M. 601(b).[69] In *Allgood*, the commander of the United States Army Garrison, Fort Dix (USAG) referred the accused's charges to a general court-martial with panel members selected nine months earlier by the Commander of United States Army Training Center and Fort Dix (USATC).[70] The Army Court of Military Review (ACMR) determined the court-martial lacked jurisdiction for two reasons. First, the previous command had in fact ceased to exist (thus terminating the prior convening order). Secondly, the USAG commander did not personally select the members in accordance with Article 25(d)(2), UCMJ.[71]

In reversing the Army court, the CAAF held that despite the technical requirements of service regulations, the military reality was that the USATC commander was a predecessor commander under R.C.M. 601(b). The court noted that, at the time charges were referred, the USAG had valid secretarial authority under Article 22 to convene general courts-martial, and "there was no objection by the defense"[72] to the court-martial as referred.

Addressing the issue of personal selection under Article 25(d)(2), the CAAF noted that the referral by the USAG commander to the prior convening order included the names, ranks, and units of the detailed members. The court also made reference to a post-trial memorandum for record signed by the USAG commander expressly declaring that prior to referring the case to trial, he had "adopted the panel selections of my predecessor."[73]

Judge Cox, in a dissent, asserted that the prior command had terminated. Therefore, without the new grant of convening authority by the Secretary of the Army, the USAG commander would not have had authority to convene general courts-martial.[74] Additionally, even if an argument could be made for a valid *de facto* referral, the failure of the USAG commander (despite the post-trial memorandum) to make personal selections should have proven fatal to the jurisdiction of the court. Indeed, at the time the USAG commander referred the case to trial, "the majority of members on the order were no longer at Fort Dix."[75] Judge Cox lamented the lack of concern for "the mere technicalities which impede the lawful prosecution of this accused for his misdeeds,"[76] and the *ad hoc* analysis that "fails to consider this bedrock of all criminal law: No person shall suffer the punishment of a court of law unless the court has jurisdiction over the person and the case."[77]

Both the majority opinion and Judge Cox's dissent highlight a fundamental concern—the critical importance of ensuring the jurisdictional underpinnings of court-martial charges. This is most

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[68] 41 M.J. 492 (1995). Judge Gierke (joined by Judge Crawford) authored a separate concurrence that emphasized that the unit was merely "renamed" and not discontinued. *Id.* at 497.

[69] MCM, *supra* note 3, R.C.M. 601(b).

[70] *But see* United States v. McKillop, 38 M.J. 701 (A.C.M.R. 1993) in which a different panel of the Army Court of Military Review, on similar facts to *Allgood* found that "only a name change was involved" as opposed to an official termination of a command. *Id.* at 703.

[71] UCMJ art. 25(d)(2) (1988); United States v. Allgood, 37 M.J. 960 (A.C.M.R. 1993).

[72] *Allgood*, 41 M.J. at 495.

[73] *Id.* at 496.

[74] *Id.* at 497 (Cox, J., dissenting).

[75] *Id.* at 498 (Cox, J., dissenting)

[76] *Id.*

[77] *Id.* Judge Cox might also have cited United States v. Bellett, 36 M.J. 563 (A.F.C.M.R. 1992) *and* United States v. Byers, 34 M.J. 923 (A.C.M.R. 1992) *set aside and remanded*, 37 M.J. 73 (C.M.A. 1993), *reversed as to sentence*, 40 M.J. 321 (C.M.A. 1994), *sent. aff'd. on remand* (A.C.M.R. 23 Jan. 1995)(unpub.), both *quoting* United States v. Runkle, 122 U.S. 543, 555-556 (1887): "A court-martial under the laws of the United States is a court of limited and special jurisdiction. To give effect to its sentences it must appear affirmatively and unequivocally that the court-martial was legally constituted: that it had jurisdiction; that all statutory regulations governing its proceedings have been complied with;" *and* McClaughry v. Deming 186 U.S. 49 (1902): "[A] court-martial is a creature of statute, and, as a body or tribunal, it must be convened and constituted in entire conformity with the provisions of the statute, or else it is without jurisdiction."

important (and potentially most difficult) during periods of organizational change, operational deployment,[78] or installation realignment. Staff judge advocates must not assume that jurisdiction runs with the land or the flag.

Except for those occasions when expediency overshadows the routine, a single convening authority should convene a court-martial, select its members, and refer charges. In the event that charges are referred to a court convened by a predecessor-in-command under R.C.M. 601(b), staff judge advocates must ensure the convening authority referring those charges has personally adopted previously selected members.[79] At a minimum, the assignment and duty status of each member should be made known to the convening authority before adopting prior panels, and a memorandum should be prepared memorializing this selection.

### United States v. Ryder

In *United States v. Ryder*,[80] the United States Supreme Court reviewed a Coast Guard enlisted member's assertion that the two civilian judges on the Coast Guard Court of Military Review were appointed in violation of the Appointments Clause[81] of the United States Constitution. *Ryder* is a follow-up decision to *United States v. Weiss*.[82] In *Weiss*, the Supreme Court held that the current method of appointment for military judges[83] did not violate the Appointments Clause because the initial appointment of military trial and appellate judge advocates as commissioned officers satisfies the requirements of the Appointments Clause.[84] The Court also held that due process did not require that military judges serve with tenure or for a fixed term.[85]

Previously, the COMA considered the Appointments Clause challenge to the composition of the Coast Guard Court of Military review in *United States v. Carpenter*.[86] In *Carpenter*, the COMA held that while the appointment of a civilian Chief Judge to the Coast Guard Court of Military Review was defective in light of the Appointments Clause, decisions of that court as constituted would be afforded *de facto* validity under the Supreme Court's decision in *Buckley v. Valeo*.[87]

In reversing COMA's decision in *Ryder*, the Supreme Court held that the *de facto* validity doctrine of *Buckley v. Valeo* did not apply to decisions rendered by the Coast Guard Court of Military Review.[88] The Supreme Court also held that any error was not rendered harmless by subsequent review of the Coast Guard Court of Military Review's decision by the COMA.[89] The Supreme Court distinguished the *de novo* review authority enjoyed by the Courts of Military Review from the narrower scope of review allowed the COMA.[90]

The issue of the proper composition of the Coast Guard court still has not been resolved. As an interim solution, civilian judges have been appointed to the Coast Guard Court of Criminal Appeals by the Secretary of Transportation.[91] This procedure, however, was also challenged in *Edmond v. United States*.[92] In

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[78] *See* CENTER FOR LAW AND MILITARY OPERATIONS, LAW AND MILITARY OPERATIONS IN HAITI, 1994-95: LESSONS LEARNED FOR JUDGE ADVOCATES, at 111 n. 360 and accompanying text (11 Dec. 1995).

[79] UCMJ, art. 25(d)(2), 1994.

[80] 115 S. Ct. 2031 (1995).

[81] U.S. CONST., art. II, sec. 2, cl. 2. The Appointments Clause states that "Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments." Two of the three judges on the Coast Guard Court of Military Review were civilians when it decided Ryder's appeal. *Ryder*, 115 S. Ct. at 2032.

[82] 114 S. Ct. 752 (1994).

[83] MCM, *supra* note 3, R.C.M. 503(b)(1).

[84] *Weiss*, 114 S. Ct. at 753.

[85] *Id.*

[86] 37 M.J. 291 (C.M.A. 1993).

[87] 424 U.S. 1 (1976). Buckley v. Valeo held that past acts of certain federal election commissioners would be afforded *de facto* validity despite defects in their method of appointment. *See also* Connor v. Williams 404 U.S. 549 (972).

[88] In United States v. Weiss, 114 S. Ct. 752, 759, n.4 (1994), the Court (obviously anticipating the potential Appointments Clause issue in *Ryder*) indicated: "[T]he constitutionality of the provision allowing civilians to be assigned to Courts of Military Review, without being appointed pursuant to the Appointments Clause, obviously presents a quite different question." *Id.*

[89] *Id.*

[90] *Id.* at 2041.

[91] 49 U.S.C. § 323 (1988) authorizes the Secretary of Transportation to "appoint and fix the pay of officers and employees of the Department of Transportation and . . . prescribe their duties and powers."

[92] 41 M.J. 419 (1995), *vacated and remanded*, 116 S. Ct. 43 (1995).

*Edmond*, the Supreme Court remanded the secretarial appointment issue back to the CAAF for "further consideration in light of *United States v. Ryder*."[93] At this time, it appears the appointment of active duty commissioned officers[94] by the General Counsel of the Secretary of Transportation[95] is the only procedure which clearly meets both the express statutory authority of Article 66(a)[96] and the mandates of *Weiss* and *Ryder*.

## United States v. Knight

*United States v. Knight*[97] involved improper communications made by court-martial members during a rape trial.[98] During the course of the trial, three senior noncommissioned members daily solicited information from their detailed duty driver regarding the veracity of witnesses, medical testimony,[99] and what had transpired during Article 39(a), UCMJ[100] sessions. Upon discovery of this misconduct, the defense moved for a mistrial.

After hearing the testimony of the driver regarding his communications with the members and after conducting a limited inquiry of each member, the military trial judge denied the motion. After the trial, the convening authority ordered a post-trial Article 39(a) session in which the convening authority granted the three court members immunity and ordered their testimony. Nevertheless, the military judge determined any prejudice to the accused was harmless.[101]

In reversing the trial judge's decision, the Army court held that "once it is determined that communications have been made, prejudice is presumed."[102] In this case the "discussions were extensive, frequent, intentional, and concerned most of the key relevant issues litigated at trial."[103] Under these circumstances, the government had failed to meet its heavy burden of rebutting this presumption of prejudice. The court noted with concern that the need to immunize the court members "should have sounded a resounding alarm to all."[104] The court also indicated that the trial judge, staff judge advocate, and convening authority "were remiss"[105] in failing to take immediate corrective action "to avoid the appearance of evil in the courtroom and to foster public confidence in court-martial proceedings."[106]

*Knight* is a strong reminder of a staff judge advocate's obligation under R.C.M. 1105(d)(4)[107] to recommend corrective action to the convening authority when legal error in the conduct of a court-martial is apparent. Military judges faced with plausible allegations of improper communications between jurors and third persons must protect public confidence in the military justice system by holding the government to the presumptive prejudice standard in *Knight*. Military justice supervisors also need to ensure the proper selection, training, and supervision of ancillary court personnel when such personnel are likely to have contact with witnesses, members, the military judge[108] or others.

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[93] *Id.* The CAAF did not consider a challenge to the interim composition of the Coast Guard Court of Criminal Appeals in deciding *Edmond*. *Id.*

[94] This appointment may include military judges who only serve on the Coast Guard Court of Criminal Appeals on a part-time basis. *See* United States v. Carpenter, 37 M.J. 291, 295-296 (C.M.A. 1993).

[95] The General Counsel serves as The Judge Advocate General for the United States Coast Guard. 10 U.S.C. § 801 (1988).

[96] UCMJ art. 66(a) (1988) requires Judge Advocates General to establish Courts of Military Appeals. Article 66 authorizes Judge Advocate Generals to appoint "commissioned officers or civilians" to the Courts of Criminal Appeals.

[97] 41 M.J. 867 (Army Ct. Crim. App. 1995).

[98] For further discussion of this case in the context of Pretrial Procedures, *see* Lawrence J. Morris, *New Developments in Sentencing and Post-Trial Procedure*, ARMY LAW., Mar. 1996, at 106.

[99] The driver (a specialist) had training as an emergency medical technician. *Id.* at 868.

[100] UCMJ art. 39(a) (1988).

[101] *Id.* at 869.

[102] *Id.* at 870.

[103] *Id.*

[104] *Id.* at 871.

[105] *Id.*

[106] *Id.*

[107] MCM, *supra* note 3, R.C.M. 1105(d)(4).

[108] *See* United States v. Aue, 37 M.J. 528 (A.C.M.R. 1993). In *Aue*, a military judge's assigned driver sought to impress court-martial witnesses by telling them that the trial judge had "already decided the case." *Id.* at 529.

## Voir Dire

In a significant shift from an established series of cases expanding the scope of *Batson v. Kentucky*,[109] the Supreme Court, in *Purkett v. Elem*,[110] held that a party exercising a peremptory challenge need not provide an explanation that is persuasive or even plausible when responding to claims of racial discrimination.[111] Under *Elem*, the trial judge must make a preliminary finding of purposeful racial discrimination before that judge may rule further on the validity of the explanation offered for the peremptory challenge.[112]

In *Elem*, a Missouri prosecutor struck two black men from the jury because he did "not like the way they looked" and they looked "suspicious;" and because one of the jurors had "long, unkempt hair, a mustache, and a beard."[113] The Eighth Circuit, ruling these explanations as pretextual, relied on *Batson* and *Hernandez v. New York*,[114] for the proposition that any explanation offered must be "clear and reasonably specific"[115] and be "related to the particular case to be tried."[116] In overruling this decision, the Supreme Court determined that a "legitimate reason [for the exercise of a peremptory challenge] is not a reason that makes sense, but a reason that does not deny equal protection."[117]

In a vigorous dissent, Justice Stevens, joined by Justice Breyer, bemoaned the Court's "misuse" of its summary reversal authority and argued that "today the Court holds that it did not mean what it said in *Batson*."[118] Justice Stevens points out that under *Elem* "any neutral explanation, no matter how implausible or fantastic, even if it is silly or superstitious, is sufficient to rebut a *prima facie* case of discrimination."[119] One commentator noted that if not liking the way someone looks is an acceptable race-neutral justification for a peremptory challenge, "only a very stupid prosecutor will ever lose a *Batson* claim."[120]

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[109] 476 U.S. 79 (1988). In *Batson*, the Supreme Court held that peremptory challenges by prosecutors calculated to exclude jurors of the same race as the accused violated the Fourteenth Amendment's Equal Protection Clause. *Id.* Since *Batson*, the Court expanded the scope of its Equal Protection analysis to allow objections to racially motivated peremptory challenges regardless of the race of the accused (Powers v. Ohio, 499 U.S. 400 (1991)); to civil litigants (Edmondson v. Leesville Concrete Co., 500 U.S. 614 (1991)); to peremptory challenges made by criminal defendants (Georgia v. McCollum, 112 S. Ct. 2348 (1992)); and to litigants striking potential jurors solely on the basis of gender (J.E.B. v. Alabama *ex rel.* T.B., 114 S. Ct. 1419 (1994)).

[110] 115 S. Ct. 1769 (1995) (per curiam).

[111] To establish a prima facie case of purposeful discrimination under *Batson*, the objecting party must demonstrate that: (1) he or she is a member of a cognizable racial group (or gender); (2) that an opposing party used a peremptory challenge to remove a member of a cognizable racial group (or gender); and (3) that the facts and any other relevant circumstances raise an inference that the opposing party used the peremptory challenge to exclude the juror on the account of that person's race (or gender). Batson v. Kentucky, 476 U.S. 79, 96 (1988).

[112] *Id.*

[113] *Id.*

[114] 500 U.S. 352 (1991).

[115] *Id.* at 1771 (quoting *Batson* 476 U.S. at 98).

[116] *Id.*

[117] *Elem*, 115 S. Ct. at 1770. On remand from Supreme Court, the Eighth Circuit held: "[T]he statement by a prosecutor . . . merely to deny having a discriminatory motive or to affirm good faith . . . to rely on such bald assertions or denials is that they fail to state any reasons at all." Such statements "provide an unsubstantiated self-serving answer to the question before the trial court." Elem v. Purkett, 25 F.3d 679, 681 (8th Cir. 1995).

[118] Justice Stevens, in his dissent, cited numerous federal and state court decisions, since *Batson*, that had required that reasons for peremptory challenges be clear, specific, relatively non-subjective, and bear some relation to the case. *Id.* at 1773. Not cited, but also representative is State v. Cruz, 857 P.2d 1249 (Ariz. 1993). In *Cruz*, the Supreme Court of Arizona noted "if we hold that a party's assertion of a wholly subjective impression of a juror's perceived qualities, without more, overcomes a *prima facie* showing of discrimination, Batson could easily become a dead letter." *Id.* at 1252 The court ruled that a prosecutor's explanations that a Hispanic juror appeared "weak" and "would be led," and that another Hispanic juror was "18 years old, worked twelve hours a day and may lose his job," were insufficient to rebut a prima facie challenge. *Id.* at 1251; *But see* United States v. Sandoval, 997 F.2d 491 (8th Cir. 1993)(prosecutor's challenge of a black juror from panel upheld because she was a cosmetologist, young, and probably did not have a high level of education).

[119] Id. In *United States v. Thomas*, 40 M.J. 726 (N.M.C.M.R. 1994), the trial judge noted:

> [O]ne doesn't have to have a good reason for a peremptory challenge, one only has to have a non-racial reason. It can be a bad non-racial reason. So even if you are correct and that's a bad reason to get rid of him, I've got to decide whether, despite being a bad reason it's a non-racial reason and that is the only inquiry that the *Batson v. Kentucky* case requires me to make at this point.

*Id.* at 729.

[120] Donald A. Dripps, *I Didn't Like the Way He Looked*, TRIAL, July 1995, at 96.

While *Elem* appears to allow greater latitude to counsel in the exercise of peremptory challenges, it should not be viewed as a green light for counsel to play fast and loose with the equal protection rights of an accused or court members.[121] Despite the ruling in *Elem*, trial counsel should avoid exercising peremptory challenges that have the practical effect of removing a minority member or woman from a panel without legitimate reasons to do so. Hunches, guesses, and gut instinct are poor substitutes for a thorough and professional voir dire.[122]

Defense counsel especially should be alert for potential warning flags, which may include disparate treatment, perfunctory individual voir dire of minority members, or the failure to challenge a minority or female member for cause prior to seeking a peremptory challenge. In the face of subjective hunches or guesses (for example, "she just didn't seem comfortable up there"), defense counsel may ask the trial judge to re-open voir dire[123] so that the basis for such gut instinct concerns can be specifically explored.[124] Despite *Elem*, *Batson* is still far from a dead letter and counsel should still not hesitate to raise *Batson* based objections whenever appropriate.[125]

## Conclusion

Decisional law continues to play a dynamic role in current pretrial military practice. For example, while *United States v. Weasler*[126] evinces a trend towards further liberalizing the scope of pretrial agreement negotiation, *United States v. Conklan*[127] appears to constrict the limits of negotiating authority because of public policy concerns. *United States v. Marrie*[128] and *United States v. Allgood*[129] highlight fundamental procedural issues affecting both due process and jurisdiction. Finally, *United States v. Ryder*,[130] *Edmond v. United States*,[131] and *Purkett v. Elem*[132] reflect both the direct and indirect influence of decisions by the Supreme Court upon military practice.

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[121] Powers v. Ohio, 111 S. Ct. 1366 (1991).

[122] *See*, John I. Winn, *A Practitioner's Guide to Race and Gender Neutrality in the Military Courtroom*, ARMY LAW., May 1995, at 32.

[123] The nature and scope of examination of members is within the discretion of the military judge. MCM, *supra* note 3, R.C.M. 912(d) (discussion). *See also* United States v. Smith, 27 M.J. 25 (C.M.A. 1988).

[124] Explanations that rest in part on lack of knowledge (hunches) "might warrant extra caution on the part of the trial judge and reviewing court." State v. Harris, 647 N.E.2d 893 (Ill. 1994).

[125] *See* Gilchrist v. State, 667 A.2d 876 (Md. Ct. App. 1995), in which a defense counsel removed four white members because one "reminded her of a Catholic school teacher she did not like;" another was too "young;" a third too "studious;" and a fourth because he "wore a Brooks Brothers suit;" these challenges were deemed "pretextual" and "insufficient to overcome the *prima facie* case of racial discrimination." *Id.*

[126] 43 M.J. 15 (1995).

[127] 41 M.J. 800 (Army Ct. Crim. App. 1995).

[128] 43 M.J. 35 (1995).

[129] 41 M.J. 492 (1995). Judge Gierke (joined by Judge Crawford) authored a separate concurrence that emphasized that the unit was merely renamed and not discontinued. *Id.* at 497.

[130] 115 S. Ct. 2031 (1995).

[131] 41 M.J. 419 (1995), *vacated and remanded*, 116 S. Ct. 43 (1995).

[132] 115 S. Ct. 1769 (1995)(per curiam).

# Recent Developments in Search and Seizure Law

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## Introduction

This article discusses recent developments in military search and seizure law under the Fourth Amendment of the United States Constitution.[1] Over the past year, the courts have significantly limited soldiers' protections under the Fourth Amendment. This article examines these limitations in the context of prior search and seizure law.

The Fourth Amendment contains two clauses; the first requires that searches be reasonable, and the second requires that warrants be based on probable cause.[2] The relationship between these two clauses has long been open to debate.[3] In the past, the prevailing view held that the second clause helped to define the first clause. Under this view, searches and seizures could not be reasonable unless they were based upon a warrant and probable cause or based upon a well-established exception to the warrant and probable cause requirements.[4] More recently, many courts have begun to view the reasonableness clause as being independent from the warrant clause. Under this view, a search or seizure must be based upon a warrant and probable cause only if the police attempt to obtain a warrant; otherwise, the search need only be reasonable.[5]

Recently, this second view has been prevalent in both military and civilian practice. The courts have created many new exceptions to the Fourth Amendment based upon reasonableness.[6] The courts have also limited the application of the Fourth Amendment by ruling that many areas are not covered by its protections.[7] Additionally, the courts have created new exceptions and expanded existing exceptions to the exclusionary rule.[8]

As a result of these trends, the courts have limited the Fourth Amendment's protections. This past year was no exception. In eleven of the twelve decisions discussed in this article, the court found that the Fourth Amendment was inapplicable or was not violated or an exception to the exclusionary rule applied. Because the law in this area is evolving quickly, it is important for practitioners to keep abreast of these new developments.

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[1] U.S. CONST. amend. IV. These constitutional rules have been codified in the Military Rules of Evidence. *See* MANUAL FOR COURTS-MARTIAL, United States, MIL R. EVID. 311-17 (1984) [hereinafter MCM]. Some have suggested that the Fourth Amendment may not apply to the military because the Supreme Court has never specifically applied it to servicemembers. If this is the case, the Military Rules of Evidence would provide the only protection against unreasonable searches and seizures in the military. *See* United States v. Lopez, 35 M.J. 35, 41 (C.M.A. 1992); United States v. Taylor, 41 M.J. 168, 171 (C.M.A. 1994); Fredric I. Lederer and Frederic L. Borch, *Does the Fourth Amendment Apply to the Armed Forces?*, 144 MIL. L. REV. 110 (1994).

[2] The Fourth Amendment provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. CONST. amend. IV.

[3] *See generally* William W. Greenhalgh & Mark J. Yost, *In Defense of the "Per Se" Rule: Justice Stewart's Struggle to Preserve the Fourth Amendment's Warrant Clause*, 31 AM. CRIM. L. REV. 1013 (1994).

[4] This view was championed by Justice Stewart. *See* Katz v. United States, 389 U.S. 347, 356-57 (1967).

[5] This view was first stated by Justice Minton in United States v. Rabinowitz, 339 U.S. 56, 66 (1950). More recently, this view has been espoused by Chief Justice Rehnquist. *See* Florida v. Jimeno, 500 U.S. 248, 250 (1991); Texas v. Brown, 460 U.S. 730, 737 (1983).

[6] *See e.g.*, Michigan Dept. of State Police v. Sitz, 496 U.S. 444 (1990) (sobriety checkpoints are reasonable and, therefore, do not violate the Fourth Amendment); New Jersey v. T.L.O., 469 U.S. 325 (1985) (school searches based on reasonable grounds do not violate Fourth Amendment).

[7] *See e.g.*, United States v. Verdugo-Urquidez, 494 U.S. 259 (1990) (Fourth Amendment does not apply to search by U.S. agents of foreigner's property located in a foreign country); United States v. McCarthy, 38 M.J. 398 (C.M.A. 1993) (no warrant was required to apprehend soldier in barracks; opinion suggests that there is no reasonable expectation of privacy and, therefore, no Fourth Amendment protections in barracks).

[8] *See, e.g.*, United States v. Leon, 468 U.S. 897 (1984) (created good faith exception to exclusionary rule); United States v. Lopez, 35 M.J. 35 (C.M.A. 1992) (expanded good faith exception by applying it to searches authorized by commanders); Nix v. Williams, 467 U.S. 431 (1984) (created inevitable discovery exception to exclusionary rule).

### Applicability of the Fourth Amendment

Several recent cases dealt with the issue of the applicability of the Fourth Amendment. The Fourth Amendment only applies to government intrusions[9] and it only applies if the accused has a reasonable expectation of privacy in the area searched.[10] If these two conditions are not met, the Fourth Amendment provides no protections.

In *United States v. Sullivan*,[11] the CAAF discussed what constitutes a nongovernment intrusion. In *Sullivan*, the CAAF found that a private individual's interception and recording of cordless telephone transmissions was not such an intrusion.

The accused in *Sullivan* conducted a telephone sex survey using a cordless telephone. His neighbor, another soldier, surreptitiously monitored some of the accused's calls with a scanner and recorded them. Based in part on these recordings, the accused was convicted of, among other offenses, conduct unbecoming an officer. The CAAF held that the Fourth Amendment exclusionary rule was inapplicable to the action of the neighbor, who was acting in a private capacity.[12]

In *United States v. Maxwell*,[13] the Air Force Court of Criminal Appeals (AFCCA) discussed an individual's reasonable expectation of privacy. It found that individuals have such an expectation in electronic mail transmissions stored in private computer accounts. The accused in *Maxwell* used his private home computer to exchange child pornography images through his personal electronic mail account with America Online. The Federal Bureau of Investigation (FBI) searched the accused's electronic mail accounts pursuant to a search warrant and discovered indecent messages in one of the accounts. These messages led to a subsequent search of his computer, where pornographic images were discovered. Based on this evidence, the accused was convicted of four specifications of service discrediting conduct under Article 134, Uniform Code of Military Justice (UCMJ).[14]

The AFCCA ruled that the accused had a reasonable expectation of privacy in the messages because only he and his accomplices could retrieve the messages by using their passwords. The AFCCA also found that the FBI did not have probable cause to search the accused's account in which the indecent messages were found.[15] However, the AFCCA held that the messages were admissible under the good faith exception to the exclusionary rule[16] because the FBI relied in good faith on their search warrant.

One particularly valuable lesson from the *Maxwell* case is the importance of using alternative theories to justify a search. Although the trial judge in *Maxwell* found that the accused did not have a reasonable expectation of privacy in the electronic mail messages, he went on to rule on the existence of probable cause. This permitted the AFCCA to affirm his ruling based on the good faith exception.[17] Trial counsel and military judges should always explore alternative theories for the admission of evidence.

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[9] Rakas v. Illinois, 439 U.S. 128, 140-49 (1978).

[10] Katz v. United States, 389 U.S. 347 (1967).

[11] 42 M.J. 360 (1995).

[12] Interception of oral and wire transmissions is also covered by Military Rule of Evidence 317. However, this rule only prohibits interceptions which are unlawful under the Fourth Amendment and certain interceptions for law enforcement purposes. MCM, *supra* note 1, MIL. R. EVID. 317. In addition, a federal statute provides protections against interception of oral and wire transmissions. 18 U.S.C. §§ 2510-21 (1988). This statute has its own exclusionary rule, which is more stringent than the Fourth Amendment; it applies to interceptions by individuals acting in their private capacity. 18 U.S.C. § 2515; People v. Otto, 831 P.2d 1178 (Cal. 1992). However, cordless telephones were not covered by the statue at the time the accused in *Sullivan* was convicted. 18 U.S.C. § 2510(1) (1988). The statute has since been amended to cover cordless telephones. Pub. L. No. 103-414, §§ 202-03, 108 Stat. 4279, 4290-91 (1994).

[13] 42 M.J. 568 (A.F. Ct. Crim. App. 1995).

[14] UCMJ art. 134 (1988). Two of these specifications alleged use of a personal computer to communicate indecent language. The other two specifications alleged violations of federal law by (1) receiving or transporting visual depictions of minors engaged in sexually explicit conduct, and (2) transporting in interstate commerce visual depictions of an obscene nature. 18 U.S.C. §§ 2252, 1465 (1988).

[15] The accused had four separate electronic mail accounts with America Online. The FBI was provided information that the accused had used the screen name "Redde1" to transmit pornographic images. When this name was transcribed to the search warrant, it was mistakenly typed as "REDDEL." The search warrant gave the FBI authority to search all of the accused's accounts, including an account named "Zirloc," where indecent messages were discovered. Although the AFCCA held that the incorrect transcription of the name "Redde1" did not invalidate the magistrate's probable cause determination, it held that the magistrate did not have probable cause to order the searches of the accused's other accounts.

[16] United States v. Leon, 468 U.S. 897 (1984); MCM, *supra* note 1, MIL. R. EVID. 311(b)(3).

[17] Although the military judge did not use the good faith exception in denying the defense motion to suppress, his analysis of probable cause enabled the AFCCA to determine that there was a "substantial basis" for determining probable cause, as required when the good faith exception is applied. MCM, *supra* note 1, MIL. R. EVID. 311(b)(3)(B); *Maxwell*, 42 M.J. at 578-79.

### Neutral and Detached Requirement

The official authorizing a search[18] must be neutral and detached.[19] Although commanders can authorize searches, their neutrality is sometimes called into question. The CAAF discussed this issue recently in *United States v. Freeman*.[20]

The accused in *Freeman* was charged with, among other offenses, the use of cocaine. This charge was based on a urine sample the accused's commander ordered him to provide after the commander received information from the civilian police that the accused had been arrested for drunk driving and possession of drugs. At trial, the accused alleged that the commander was not neutral and detached when he ordered the urine test because the commander had requested the civilian police report pertaining to the accused and had read the accused his rights under Article 31 of the Uniform Code of Military Justice (UCMJ).[21] The trial judge ruled that the commander was sufficiently impartial because he did not initiate the civilian police investigation and did not ask the accused any questions.

The CAAF held that the trial judge did not err in ruling that the commander was neutral and detached. The CAAF noted that "it is only when the commander participates as a law enforcement official or is personally and actively involved in the process of gathering evidence that he loses his right to authorize searches."[22] Judge Cox, in a concurring opinion, stated that the term "neutral and detached commander" is an oxymoron. However, he agreed that the search did not violate the Fourth Amendment because it was reasonable.[23]

*United States v. Lazenby*[24] also involved the issue of whether a commander was neutral and detached. In *Lazenby*, the accused was charged with larceny of military property and receiving stolen property. At trial, the accused challenged the search of his quarters, in which the stolen property was discovered. The accused alleged that the commander who authorized the search was not neutral and detached because he readily accepted a Coast Guard special agent's request for the search authorization without questioning him at length and because the commander was present at the scene of the search. The military judge held that the commander was neutral and detached and ruled that the evidence discovered during the search was admissible.

The Coast Guard Court of Criminal Appeals (CGCCA) affirmed the trial judge's ruling. The CGCCA found that the commander's presence at the quarters did not taint his neutrality[25] and that the commander's reliance on the special agent's explanation was understandable.[26]

Both *Freeman* and *Lazenby* reemphasize the courts' willingness to find that commanders are neutral and detached. However, they also indicate that the courts are still scrutinizing commanders' search authorizations to ensure they do not become too involved in the investigation or participate in the search.

### Reasonableness Requirement

The Fourth Amendment requires that all searches be conducted in a reasonable manner.[27] This requirement applies even if a search is based on probable cause and a proper warrant or authorization. In *Wilson v. Arkansas*,[28] the Supreme Court reemphasized this

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[18] A search "authorization" is the military equivalent of a civilian search "warrant." Although the two terms refer to similar concepts, there are some differences. A search authorization is permission to search granted by a military commander, judge or magistrate; a search warrant is permission to search granted by a competent civilian authority. Both a search authorization and a search warrant must be based on probable cause. However, a search authorization may be oral or written and need not be based upon sworn information while a search warrant is written and must be supported by oath or affirmation. MCM, *supra* note 1, MIL. R. EVID. 315(b), (d); United States v. Stuckey, 10 M.J. 347 (C.M.A. 1981); U.S. CONST. amend. IV.

[19] MCM, *supra* note 1, MIL. R. EVID. 315(d); United States v. Ezell, 6 M.J. 307 (C.M.A. 1979).

[20] 42 M.J. 239 (1995).

[21] UCMJ art. 31 (1988).

[22] *Id.* at 243.

[23] *Id.* (Cox, J., concurring). Judge Cox has a unique view of the Fourth Amendment. He believes that a commander does not violate the Fourth Amendment as long as he or she acts reasonably. *See* United States v. Lopez, 35 M.J. 35, 45 (C.M.A. 1992) (Cox, J., concurring with modest reservations).

[24] 42 M.J. 702 (C.G. Ct. Crim. App. 1995).

[25] The court noted that "an otherwise impartial authorizing official does not lose that character merely because he or she is present at the scene of the search." *Id.* at 704. *See also* MCM, *supra* note 1, MIL. R. EVID. 315(d).

[26] The court also found that this search authorization deviated from Coast Guard procedures, which require that commanders authorize searches only in exigent circumstances when resort to a military judge would lead to loss of evidence. However, the court noted that failure to follow these procedures does not invalidate a search. *Lazenby*, 42 M.J. at 704-05.

[27] U.S. CONST. amend. IV.

[28] 115 S. Ct. 1914 (1995).

principle by holding that the common law principle that police officers must "knock and announce" their presence before executing a search warrant is part of the Fourth Amendment reasonableness inquiry.

In *Wilson*, the police entered the accused's house pursuant to arrest and search warrants and found drugs and other contraband.[29] The accused challenged the search because the police failed to "knock and announce" before entering her home.[30] The Court ruled that a failure to knock and announce will violate the reasonableness requirement of the Fourth Amendment in some circumstances. However, it also stated that an unannounced entry may be reasonable under the Fourth Amendment if announcement would result in physical harm to the police or destruction of evidence. The Court remanded the case, so the lower courts could determine whether the police were required to knock and announce in this case.[31]

The rationale of the *Wilson* case also applies to the military. Military police and commanders conducting searches should be advised to knock and announce their presence whenever possible.[32] Defense counsel litigating search and seizure motions may argue that failure to knock and announce violates the Fourth Amendment.[33]

### Consent

If an individual consents to a search of his person or an area under his control, the Fourth Amendment does not require probable cause or an authorization.[34] To be valid, consent must be given voluntarily under the totality of the circumstances.[35] In *United States v. Kitts*,[36] the CAAF discussed the issue of voluntariness of consent. The CAAF held that the consent of the accused was voluntary even though several government agents had already entered his quarters before he consented to a search.

The accused in *Kitts* lived in government quarters and was suspected of maintaining them in an unsanitary condition. Several soldiers arrived at the accused's quarters to investigate and, when they asked to "come in and look," the accused invited them in.[37] They noticed extensive filth and damage and also stolen government property. Only after numerous government agents looked through the quarters did they obtain written consent to search the quarters.

At the accused's trial for, among other offenses, larceny and wrongful appropriation of military property,[38] the military judge found that the accused voluntarily gave his consent. The CAAF held that the military judge did not err even though the accused signed the consent form after numerous government agents had already entered and searched his quarters.

*Kitts* is an example of the importance of ensuring that the military police and commanders obtain proper consent to search before entering a suspect's quarters. This is especially true since the government has the burden to prove that the consent was voluntary by clear and convincing evidence.[39] In *Kitts*, the accused's initial oral invitation to enter his quarters may have provided vol-

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[29] The warrants were obtained based on information from an informant. The accused had reportedly waived an automatic pistol in the informant's face and threatened to kill her if she turned out to be working for the police. After the police entered the accused's home, they found the accused in the bathroom flushing marijuana down the toilet. *Id.* at 1915.

[30] The police identified themselves and announced that they had a warrant while opening an unlocked screen door and entering the accused's residence. *Id.*

[31] The Court noted that the evidence "may well provide the necessary justification for the unannounced entry in this case." *Id.* at 1917. However, the Court decided to let the state court make the necessary findings of fact. *Id.*

[32] MCM, *supra* note 1, MIL. R. EVID. 315(h)(1) states:

> **Notice.** If the person whose property is to be searched is present during a search conducted pursuant to a search authorization granted under this rule, the person conducting the search should when possible notify him or her of the act of authorization and the general substance of the authorization. Such notice may be made prior to or contemporaneously with the search. Failure to provide such notice does not make a search unlawful with the meaning of Mil. R. Evid. 311.

This rule does not comport with *Wilson* because it does not require police to knock and announce *prior* to entry and does not provide for exclusion of evidence if the police unreasonably fail to knock and announce. *Wilson*, 115 S. Ct. at 1917. To the extent this rule provides less protections than those provided by the Fourth Amendment, as interpreted in *Wilson*, the latter prevails. *See* MCM, *supra* note 1, MIL. R. EVID. 103(a), analysis, app. 22, at A22-2.

[33] For a more detailed analysis of *Wilson*, *see* TJAGSA Practice Notes, Criminal Law Notes, *Wilson v. Arkansas: Fourth Amendment May Require Police to Knock and Announce*, ARMY LAW., Jul. 1995, at 32.

[34] MCM, *supra* note 1, MIL. R. EVID. 314(e).

[35] *Id.* MIL. R. EVID. 314(e)(4).

[36] 43 M.J. 23 (1995).

[37] *Id.* at 24.

[38] The accused was convicted of suffering damage to military property through neglect and larceny and wrongful appropriation of military property. However, the Air Force Court of Military Review only affirmed the larceny and wrongful appropriation convictions. *Id.* at 24.

[39] MCM, *supra* note 1, MIL. R. EVID. 314(e)(5).

untary consent;[40] however, it would have been better to obtain the written consent at the search's outset.

### Exigent Circumstances

A search warrant or authorization is not required when there is insufficient time to obtain one because the delay necessary to obtain a warrant or authorization would lead to removal, destruction, or concealment of evidence.[41] This "exigent circumstances" exception to the warrant requirement was discussed in *United States v. Murray*.[42]

The accused in *Murray* was charged with, among other offenses, raping a former girlfriend and assaulting her with a loaded pistol. After the victim reported the rape and assault, the local civilian police entered the accused's apartment to arrest him. They did not have a warrant because they believed the accused was armed and dangerous and might escape or destroy evidence if they took the time to obtain one. While in the apartment, the police seized the accused's clothing, which was lying in plain view, and took pictures of the premises.

At trial, the military judge denied the defense's motion to suppress the evidence obtained during the warrantless entry, ruling that exigent circumstances excused the absence of a warrant. The military judge also ruled that, even if exigent circumstances had not justified the warrantless entry, the evidence would have been admissible under the inevitable discovery doctrine. The AFCCA affirmed the military judge's ruling, agreeing that the evidence was admissible under either theory.

*Murray* demonstrates the courts' willingness to use the exigent circumstances exception. It is also an excellent example of how the government can use alternative theories to justify a search or seizure.

### Inspections

Another situation where no probable cause or authorization is required is when evidence is uncovered during an inspection. The primary purpose of an inspection must be administrative in nature; it must be to ensure security, military fitness, or good order and discipline. Its primary purpose cannot be to obtain evidence for use in disciplinary proceedings.[43] An inspection is presumed to be an invalid subterfuge for a criminal search if its purpose is to locate contraband, and it was (1) directed immediately following the report of a crime and not previously scheduled, or (2) specific persons were targeted for examination, or (3) persons were subjected to substantially different intrusions. Once this subterfuge rule is triggered, the government must prove by clear and convincing evidence that the primary purpose for the examination was administrative; otherwise, the inspection is invalid.[44]

*United States v. Moore*[45] dealt with the subterfuge rule. The accused in *Moore* became "non-deployable" because he received nonjudicial punishment under Article 15, UCMJ.[46] As a result, he was assigned to a "legal platoon," composed of soldiers with disciplinary problems. Not surprisingly, the accused's commander decided to conduct urinalysis inspections of this platoon more frequently than other platoons.[47] The accused's urine sample tested positive for drug use during two of these inspections. At the accused's trial for drug use, the military judge suppressed the accused's urinalysis test results, finding that the subterfuge rule was triggered and that the government had not met its burden of proving a proper primary purpose for the inspections by clear and convincing evidence. The government appealed this ruling.[48]

The Navy-Marine Corps Court of Criminal Appeals (NMCCA) held that the military judge erred by suppressing the urinalysis test results. The court stated that it was not convinced the subterfuge rule was triggered; it found that the military judge's conclusion that individuals were singled out because of their lack of discipline did not justify invocation of the rule. The NMCCA held that, even assuming that the subterfuge rule was triggered, the government adequately demonstrated by clear and convincing evidence that the inspection had a proper primary purpose. It found that the commander's decision to inspect the legal platoon more frequently was based on his concern about discipline problems.

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[40] Although consent may be oral, mere acquiescence in an announced intention to search is not voluntary consent. *Id.* MIL. R. EVID. 314(e).

[41] *Id.* MIL. R. EVID. 315(g); Warden v. Hayden, 387 U.S. 294 (1967) (warrant not required when police are in "hot pursuit").

[42] 43 M.J. 507 (A.F. Ct. Crim. App. 1995).

[43] MCM, *supra* note 1, MIL. R. EVID. 313(b).

[44] *Id.*

[45] 41 M.J. 812 (N.M. Ct. Crim. App. 1995).

[46] UCMJ art. 15 (1988).

[47] During the month of August 1994, the accused's platoon was tested on the 2d, 11th, 16th, 25th and 29th. Two other platoons in the accused's company, the communications platoon and motor transport platoon, were also inspected on a weekly basis. *Moore*, 41 M.J. at 814.

[48] Such appeals are permitted when the military judge terminates the proceedings with respect to a charge or specification, or excludes evidence that is substantial proof of a fact material to the proceedings. UCMJ art. 62 (1988).

*Moore* demonstrates the courts' reluctance to use the subterfuge rule to suppress evidence. The courts appear to be unwilling to find that the subterfuge rule has been triggered even where specific individuals have arguably been targeted for inspection as was the case in *Moore*.[49]

*United States v. Shover*[50] is another case that dealt with the subterfuge rule where the AFCCA upheld an inspection even though the subterfuge rule was triggered. In *Shover*, marijuana was planted in an Air Force officer's brief case. The investigation into this incident focused on three individuals believed to have a motive to cause the officer problems. At the suggestion of the judge advocate's office, the acting unit commander ordered a urinalysis sweep of all military personnel who worked in the same building as the officer, including the accused. Although the accused was not one of the three suspects, his was the only urine specimen to test positive for drugs.

At the accused's trial for use of methamphetamine, the military judge denied the accused's motion to suppress his urinalysis test results. The AFCCA upheld this decision. Although it found the subterfuge rule was triggered, because the inspection immediately followed the report of a specific offense, the AFCCA held that the prosecution met its burden of proving a proper primary purpose by clear and convincing evidence. The court pointed out that the commander's primary purpose was to end the speculation and recrimination caused by the planted marijuana.

*Shover* also demonstrates the courts' reluctance to use the subterfuge rule to suppress evidence. Even when the rule is triggered, as it was in *Shover*, the courts are quite willing to find that the government has met its burden of proving by clear and convincing evidence that the primary purpose for the inspection was proper.

### Medical Searches

Involuntary extractions of body fluids, such as blood or urine, are permitted if done for a valid medical purpose even though they are not based on an authorization or probable cause.[51] In *United States v. Fitten*,[52] the CAAF upheld such an involuntary extraction.

The accused in *Fitten* was admitted to a Navy hospital and became loud, disoriented, and combative. A doctor ordered the accused placed in restraints and also ordered a urine test to determine if he was under the influence of drugs or alcohol. Because the accused was unwilling to provide a urine sample, a nurse performed a catheterization to obtain the sample. After the nurse collected a medical urine sample, she moved the catheter tube to a second bottle and collected a sample for legal purposes. This second sample tested positive for drug use and was introduced in the accused's subsequent trial for use of marijuana and cocaine.

The CAAF held that this forced catheterization did not violate the Fourth Amendment because the test was conducted for medical purposes by medical personnel who were concerned about the accused's health. The court found that it was permissible to continue the flow of urine to fill the second bottle which was used for evidentiary purposes.

*Fitten* demonstrates the importance of the medical purpose exception to the probable cause and authorization requirements. As long as a search is conducted by medical personnel for a legitimate medical reason, it is unlikely that it will be found to violate the Fourth Amendment.

The result in the *Fitten* case would have been different in the Army, where regulatory provisions limit the use that can be made of such medical urinalysis tests. Mandatory urine tests ordered by a physician who suspects a soldier of drug use generally are subject to the "limited use policy," which prevents the use of such tests in subsequent disciplinary actions.[53] Additionally, drug tests obtained as a result of a soldier's emergency medical care for a drug overdose are also generally covered by the limited use policy.[54]

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[49] *See also* United States v. Taylor, 41 M.J. 168 (C.M.A. 1994). In *Taylor*, the CAAF held that the subterfuge rule was not triggered despite the fact that a urinalysis inspection immediately followed reports that the accused had used drugs. The court ruled that the subterfuge rule was not triggered by the fact that the accused's officer-in-charge, who knew of the reports, volunteered his section for testing. The CAAF found that the inspection was valid because the commander who ordered the test results had no knowledge of the reports. In essence, the CAAF ruled that the first prong of the subterfuge rule (which is triggered when an inspection immediately follows the report of a crime and is not previously scheduled) can only be triggered when the report is known to the commander who orders the inspection. For a more detailed analysis of this case, *see* TJAGSA Practice Notes, Criminal Law Notes, *Subordinate's Knowledge Does Not Turn Inspection into Subterfuge for Criminal Search*, ARMY LAW., Jan. 1995, at 54; James W. Herring, *What Is the "Subterfuge Rule" of MRE 313(b) After United States v. Taylor?*, ARMY LAW., Feb. 1996, at 24.

[50] 42 M.J. 753 (A.F. Ct. Crim. App. 1995).

[51] MCM, *supra* note 1, MIL. R. EVID. 312(f).

[52] 42 M.J. 179 (1995).

[53] DEP'T OF ARMY, REG. 600-85, PERSONNEL-GENERAL: ALCOHOL AND DRUG ABUSE PREVENTION AND CONTROL PROGRAM, paras. 10-3b(1), 6-4a(1). The limited use policy prohibits the use of these tests against a soldier in courts-martial and nonjudicial punishment proceedings and on the issue of characterization of service in separation proceedings. *Id.*, para. 6-4a.

[54] *Id.*, para. 6-4a(5). However, such tests are not subject to the limited use policy if the treatment resulted from apprehension by law enforcement officials. *Id.*

### Border Searches

Customs inspections fall within the "border search" exception to the probable cause and authorization requirements of the Fourth Amendment; such searches are valid if conducted for proper customs purposes.[55] *United States v. Ayala*[56] is a recent case dealing with this doctrine.

The accused in *Ayala* stole nearly four pounds of C-4, a military explosive, while in Saudi Arabia during Operation Desert Shield/Desert Storm. He mailed it to his mother in Colorado. United States Customs agents inspected and seized the explosives when they arrived at Dulles International Airport near Washington, D.C. At his trial for stealing and illegally importing the explosives, the accused challenged the search. The military judge ruled it to be a proper customs inspection.

On appeal, the accused argued that Customs officials must have a "reasonable cause to suspect" illegal importation before inspecting incoming mail. The accused's assertion was based on the United States Code, which authorizes Customs officials to search items in which they have "a reasonable cause to suspect there is merchandise which was imported contrary to law."[57] The CAAF disagreed. It found that the section of the United States Code cited by the accused only applies to items already introduced into the United States and that no "reasonable cause" requirement applied to Customs inspections at a border.[58] The CAAF upheld the trial judge's ruling.

### Good Faith Exception to Exclusionary Rule

If the government violates the Fourth Amendment, the remedy is generally exclusion of the evidence obtained during the search.[59] However, several exceptions to this exclusionary rule have been developed. One of the most important is the good faith exception.[60] Recently, in *Arizona v. Evans*,[61] the Supreme Court expanded this exception.

The accused in *Evans* was stopped by a police officer for driving the wrong way down a one way street. The officer's routine check of the police computer revealed that the accused had an outstanding arrest warrant. In actuality, the warrant had been quashed seventeen days earlier, but court personnel had not relayed this information to the police. As a result of the computer record, the officer arrested the accused and discovered drugs during the arrest. At the accused's trial for possession of drugs, the trial judge suppressed the drugs discovered during the arrest because the arrest was invalid.

The Supreme Court overturned this decision, holding that the good faith exception applied. The court held that the exclusionary rule does not require suppression of evidence seized incident to an arrest resulting from an inaccurate computer record where court personnel are responsible for the inaccuracy.

This is a significant expansion of the good faith exception. When the Supreme Court initially created the good faith exception, it applied it to mistaken probable cause determinations by magistrates and judges.[62] The CAAF later expanded this exception by applying it to mistaken probable cause determinations by military commanders.[63] Subsequently, the CAAF further expanded the exception by applying it to a commander's mistaken determination that he or she had authority over the place or person to be searched.[64] In *Evans*, the Supreme Court further expanded the exception by applying it where the mistake involved the existence of the warrant itself.[65] In the future, the good faith exception might be applied to situations where no warrant or search authorization was ever obtained.

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[55] MCM, *supra* note 1, MIL. R. EVID. 314(b); United States v. Ramsey, 431 U.S. 606 (1977); United States v. Williamson, 28 M.J. 511 (A.C.M.R. 1989).

[56] 43 M.J. 296 (1995).

[57] 19 U.S.C. § 482 (1988).

[58] The statute applicable to general border searches contains no "reasonable cause" requirement. 19 U.S.C. § 1582 (1988); *Ayala*, 43 M.J. at 298. The CAAF also found that, even under the code section cited by the accused, reasonable cause exists if the package to be searched is thicker and heavier than a normal first-class letter. It found that the accused's package met this standard. 19 U.S.C. § 482 (1988); *Ayala*, 43 M.J. at 298-99.

[59] Weeks v. United States, 232 U.S. 383 (1914).

[60] United States v. Leon, 468 U.S. 897 (1984); MCM, *supra* note 1, MIL. R. EVID. 311(b)(3).

[61] 115 S. Ct. 1185 (1995).

[62] *Leon*, 468 U.S. 897

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

[64] United States v. Mix, 35 M.J. 283 (C.M.A. 1992) (alternative holding: good faith exception applied where commander had good faith belief that he could authorize search of auto in dining facility parking lot even though he may not have had control over lot); United States v. Chapple, 36 M.J. 410 (C.M.A. 1993) (good faith exception applied to search of accused's off-post apartment overseas even though commander did not have authority to authorize search because accused was not in his unit). *See generally* Note, *COMA Further Extends the Good Faith Exception: United States v. Chapple*, ARMY LAW., July 1993, at 39.

[65] For a more detailed analysis of this expansion, *see* Note, *A New Expansion to the Good Faith Exception: Arizona v. Evans*, ARMY LAW., July 1995, at 56.

*Evans* indicates that the good faith exception is becoming quite important.[66] Some courts are now beginning their Fourth Amendment analysis by using the good faith exception. Under this view, probable cause is never required; all that is required is something more than a bare bones demonstration of probable cause, which is sufficient to show that the government acted in good faith.[67] In light of *Evans*, a warrant may also no longer be required; all that may be required is something more than a "bare bones" demonstration that the government agents conducting the search *thought* they had a valid warrant.

## Conclusion

As the above cases demonstrate, the courts are significantly limiting soldiers' protections under the Fourth Amendment. Practitioners must be aware of these new limitations. Prosecutors should aggressively use the new exceptions to the Fourth Amendment and the exclusionary rule to develop alternative theories for admissibility of evidence gathered during searches and seizures. Defense counsel must be aware of the limited nature of their clients' protections under the Fourth Amendment in deciding whether to raise search and seizure motions or to waive them in return for more favorable pretrial agreements.

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[66] *See also* United States v. Maxwell, 42 M.J. 568 (A.F. Ct. Crim. App. 1995). In *Maxwell*, the court's application of the good faith exception salvaged a conviction.

[67] *See Lopez*, 35 M.J. at 40.

# Recent Developments in Urinalysis Law

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## Introduction

This article discusses recent developments in the law relating to the military's urinalysis drug testing program. In the past, the Court of Military Appeals (COMA)[1] created special protections for the accused urinalysis cases.[2] Many of the cases discussed below continue this trend.

## Validity of Urinalysis Tests

Although the United States Supreme Court has never ruled directly on the constitutionality of the military's urinalysis program,[3] it has upheld urinalysis programs in several other contexts.[4] In *Veronia School District 47J v. Acton*,[5] the Supreme Court upheld the constitutional validity of urinalysis testing of students involved in school athletic programs.

In *Acton*, a school district required all students participating in school athletic programs to consent to random urinalysis drug testing. The district implemented the drug testing program because it discovered that student athletes were leaders of the drug culture within its schools. Students who tested positive for drug use were required to participate in a drug assistance program or be suspended from school athletics.

The Supreme Court held that this testing program was constitutional under the Fourth Amendment[6] because it was reasonable. It found that school athletes have a reduced expectation of privacy and that the urinalysis tests resulted in a negligible intrusion on the students' privacy interests. The Court also found deterring drug use by school children is an important governmental concern.

The Supreme Court's ruling in *Acton* arguably makes it more likely that the Supreme Court will find the military's urinalysis drug testing program constitutional if and when it ever directly addresses this issue. Although the urinalysis tests in *Acton* were not turned over to law enforcement officials, as military urinalysis tests are,[7] the military's unique mission makes the necessity for drug testing much greater than that involved in *Acton*.

## Permissive Inference of Wrongfulness

The presence of drug metabolites in a soldier's urine permits an inference that the soldier knowingly consumed the drug involved and that the use was wrongful.[8] This permissive inference is sufficient to support a conviction even though the soldier introduces evidence that his or her use of drugs may not have been wrongful.[9] This principle was reaffirmed in *United States v. Pabon*.[10]

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[1] On 5 October 1994, the National Defense Authorization Act for Fiscal Year 1995, Pub. L. No. 103-337, 108 Stat. 2663 (1994), changed the name of the United States Court of Military Appeals (COMA) to the United States Court of Appeals of the Armed Forces (CAAF). The same act also changed the names of the various courts of military review to the courts of criminal appeal. In this article, the title of the court that was in place when the decision was published will be used.

[2] *See e.g.* United States v. Arguello, 29 M.J. 198 (C.M.A. 1989) (urinalysis regulations prohibiting government use of negative urinalysis test results made government use of such negative results reversible error). *But see* United States v. Johnson, 41 M.J. 13 (C.M.A. 1994) (admissibility of negative test results should be based on Military Rules of Evidence, not regulations; *Arguello* overruled).

[3] The Supreme Court has recently issued an opinion in a military urinalysis case. However, the Court did not address the constitutionality of the military's urinalysis drug testing program in this opinion. *See* Ryder v. United States, 115 S. Ct. 2031 (1995) (decision of Coast Guard Court of Military Review was defective because civilians on court were not properly appointed).

[4] *See* Skinner v. Railway Labor Executives, 489 U.S. 602 (1989) (urine tests of train operators involved in accidents are reasonable searches); National Treasury Employees Union v. Von Rabb, 489 U.S. 656 (1989) (urine testing of employees who apply to carry firearms or are involved in drug interdiction does not require a warrant).

[5] 115 S. Ct. 2386 (1995).

[6] U.S. CONST. amend. IV. The Fourteenth Amendment extends the protections of Fourth Amendment to searches and seizures by state officers. *Id.* amend. XIV; Elkins v. United States, 364 U.S. 206, 213 (1960).

[7] In *United States v. Gardner*, 41 M.J. 189 (C.M.A. 1994), the Court of Military Appeals upheld the military's urinalysis drug testing program despite the fact that the tests were routinely reported to the military police and despite a commander's policy which stated that the minimum punishment for drug use would be nonjudicial punishment under UCMJ art. 15 (1988).

[8] United States v. Mance, 26 M.J. 244 (C.M.A. 1988).

[9] *See* United States v. Ford, 23 M.J. 331 (C.M.A. 1987) (permissive inference overcame accused's suggestion that his estranged wife may have planted marijuana in his food without his knowledge).

[10] 42 M.J. 404 (1995).

In *Pabon*, the accused was charged with use of cocaine based on a positive urinalysis test. On cross examination, a government expert conceded that the accused's positive test result, which indicated a cocaine metabolite level of 1793 nanograms per milliliter, was consistent with unknowing ingestion. The defense of unknowing or innocent ingestion occurs when the accused unknowingly ingests drugs; when, for example, they have been surreptitiously placed in his or her food or drink. In *Pabon*, the accused was convicted despite the expert's concessions about the possibility of innocent ingestion. On appeal, the accused alleged that the evidence was legally insufficient to support his conviction.

The Court of Appeals for the Armed Forces (CAAF) held that the evidence was sufficient. It ruled that the permissive inference of wrongfulness was sufficient to overcome the possibility of innocent ingestion. It noted that evidence which contradicts the inference does not *per se* bar the drawing of the inference.

*Pabon* indicates the importance of the permissive inference of wrongfulness. However, just because the inference is sufficient to support a conviction on appeal does not mean it will be sufficient to secure a conviction at trial.[11] When the defense of innocent ingestion is raised, the prosecution should attempt to rebut it with independent evidence that the accused used drugs[12] or with evidence that the accused or other witnesses raising the defense are untruthful or biased.[13]

## Defenses

One of the defenses sometimes raised during a urinalysis case is laboratory error.[14] This defense was addressed in *United States v. Manuel*.[15] In *Manuel*, the CAAF reversed the accused's conviction because the laboratory inadvertently destroyed the accused's urine sample after the drug test was completed.

The accused in *Manuel* was charged with cocaine use based on a positive urinalysis test. When the defense discovered the government had inadvertently destroyed the accused's urine sample, it moved to suppress the results of the urinalysis test. The Air Force Court of Military Review (AFCMR) reversed the accused's conviction, holding that the accused's urinalysis test results should have been suppressed. The CAAF affirmed this decision, holding that the regulations requiring retention of urine samples[16] conferred a substantial right upon the accused, which was violated when the sample was destroyed.

This rule is arguably inconsistent with prior case law. Ordinarily, violation of a regulation will not justify exclusion of evidence.[17] Additionally, government destruction of evidence generally will not justify exclusion of evidence or similar relief unless the government acted in bad faith.[18] In *Manuel*, the CAAF upheld suppression of urinalysis test results even though the government did not act in bad faith.[19]

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[11] In *Pabon*, the CAAF interpreted the evidence in the light most favorable to the government. *Id.* at 405.

[12] For example, in *Pabon*, the government also introduced testimony that the accused was seen buying what appeared to be rock cocaine. *Id. See also* United States v. Walker, 42 M.J. 67 (1995) (trial counsel rebutted implication of innocent ingestion with evidence of the accused's history of sinusitis, which was consistent with chronic cocaine use; although this evidence was unduly prejudicial, given expert's failure to examine the accused and the lack of a limiting instruction, the error in admitting the evidence was harmless).

[13] MANUAL FOR COURTS-MARTIAL, United States, MIL. R. EVID. 608 (1984) [hereinafter MCM].

[14] One potential source of such mistakes are the problems recently uncovered at the Fort Meade Forensic Toxicology Drug Testing Laboratory. On 24 July 1995, the commander of the Fort Meade Laboratory discovered that technicians had violated the laboratory's procedures by switching quality control samples during the screening radioimmunoassay tests to ensure the samples would meet quality control standards. The laboratory's oversight agency believes that all positive test results are still scientifically supportable because the confirming gas chromatography/mass spectroscopy tests were not affected. *See* Memorandum, Commander, Walter Reed Army Medical Center, MCHL-CG, to Unit Commanders Serviced by the FTDTL, Fort Meade (18 Aug. 1995).

[15] 43 M.J. 282 (1995).

[16] Air Force Drug Testing Laboratory Operating Instruction 160-202, which was effective at the time the accused's sample was tested, required retention of all positive specimens for one year. *Manuel*, 43 M.J. at 287. *See also* DEP'T OF DEFENSE, DIRECTIVE 1010.1, DRUG ABUSE TESTING PROGRAM, encl. 3, para. I.3 (28 Dec. 1984) [hereinafter DoD Dir. 1010.1] (requires retention of positive urine specimens which may be used in a court-martial for 120 days); DEP'T OF ARMY REG. 600-85, PERSONNEL-GENERAL: ALCOHOL AND DRUG ABUSE PREVENTION AND CONTROL PROGRAM, paras. 10-4e(5), 10-4f(10)(b) (21 Nov. 1988) [hereinafter AR 600-85] (requires retention of all positive urine specimens for 60 days; requires retention for 180 days or more upon request of unit).

[17] *See, e.g.*, United States v. Johnson, 41 M.J. 13 (C.M.A. 1994) (negative urinalysis test results should not be inadmissible solely because their use violates a regulation; Military Rules of Evidence, rather than regulations, should determine admissibility of negative urinalysis test results); United States v. Pollard, 27 M.J. 376 (C.M.A. 1989) (urinalysis test results were properly admitted even though the procedures used to collect the urine specimen did not comply with applicable regulations).

[18] Under the due process clause, the accused is not entitled to relief for government destruction of evidence unless the government acted in bad faith. Arizona v. Youngblood, 488 U.S. 51 (1988); United States v. Mobley, 31 M.J. 273 (C.M.A. 1990).

[19] The CAAF did find that the government destruction of the urine sample was the result of gross negligence. *Manuel*, 43 M.J. at 288. Therefore, the CAAF's decision is arguably limited to situations where the government's destruction of a sample was due to gross negligence.

*Manuel* is an example of the courts' willingness to create special rules applicable only to urinalysis cases. Practitioners need to be aware that the rules in urinalysis cases differ from those applicable in other cases. The government is often held to a higher standard in these cases, and the accused is often given special protections.[20]

### Defense Requested Tests

The defense often requests additional scientific testing to build its case. One test the defense may request is a test of the sample itself to determine if it has been contaminated. In *United States v. Mosley*,[21] the CAAF held that the military judge has broad discretion in deciding whether to grant such requests.

The accused in *Mosley* requested a retest of his sample to determine if it had been contaminated, asking that it be tested for raw cocaine and the cocaine metabolites benzoylecgonine (BZE) and ecgoninemethylester (EME).[22] The military judge ordered the tests and, when the government refused, abated the proceedings. The government appealed this ruling[23] based on case law indicating that the defense had no right to such tests absent a showing that the sample was adulterated or that the sample's chain of custody was flawed.[24]

The CAAF affirmed the military judge's ruling. It found that such tests fall into a middle ground; the military judge is not required, as a matter of law, to grant a defense request for such tests, but does not abuse his or her discretion when he or she does grant such a request.

As a result of *Mosley*, defense counsel in urinalysis cases may be tempted to routinely request tests for contaminants. However, the responsibility for deciding such requests rests squarely with the trial judge; the CAAF's opinion in *Mosley* suggests that the appellate courts will generally defer to the trial judge's decision. Therefore, it is now even more important for defense counsel to do an effective job at trial to advocate the necessity of such tests.

The accused may also request a polygraph test to demonstrate that he or she did not use drugs. Under Military Rule of Evidence 707,[25] such tests are inadmissible. In several recent cases, the defense has challenged the constitutionality of this rule.

In *United States v. Scheffer*,[26] the Air Force Court of Criminal Appeals (AFCCA) held that Military Rule of Evidence 707 is constitutional. The accused in *Scheffer* was charged with use of methamphetamine based on a positive urinalysis test. Two days after the test, the accused took a polygraph during which he answered "no" to the question "[s]ince you have been in the [Air Force], have you used any illegal drugs?"[27] The polygrapher opined that the accused indicated no deception in his answer. At trial, the accused attempted to admit this allegedly exculpatory polygraph result, but the military judge refused to allow him to do so. The AFCCA affirmed this ruling, finding that Military Rule of Evidence 707 did not unconstitutionally infringe the accused's rights to due process and to present a defense.

In *United States v. Williams*,[28] the Army Court of Criminal Appeals (ACCA) held that Military Rule of Evidence 707 is unconstitutional and that the trial judge erred in not permitting the accused to lay a foundation for allegedly exculpatory polygraph results.[29] However, the CAAF reversed this decision on other grounds.[30] The CAAF found that *Williams* was not an appropriate case to determine the constitutionality of Military Rule of Evidence 707 because the accused had waived this issue by failing to testify. The CAAF ruled that, because the accused did not take the stand, his polygraph results were inadmissible hearsay.[31]

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[20] For a more detailed discussion of this case, *see* TJAGSA Practice Notes, Criminal Law Notes, *Strict Scrutiny for Urinalysis Cases? United States v. Manuel, United States v. Fisiorek, and United States v. Sztuka*, ARMY LAW., Feb. 1996, at 31.

[21] 42 M.J. 300 (1995).

[22] The Department of Defense laboratories test all urine specimens for the cocaine metabolite BZE. However, BZE can be formed by placing raw cocaine directly in the urine sample. The EME metabolite of cocaine can not be formed in this manner; it can only be formed in the body. Therefore, tests for the EME metabolite and raw cocaine are designed to determine if the sample was contaminated with raw cocaine. *Id.* at 301.

[23] Such appeals are permitted when the military judge terminates the proceedings with respect to a charge or specification or excludes evidence that is substantial proof of a fact material to the proceedings. UCMJ art. 62 (1988).

[24] *See* United States v. Metcalf, 34 M.J. 1056 (A.F.C.M.R. 1992); United States v. Pabon, No. 29878 (A.F.C.M.R. 25 Mar. 1994), *aff'd* 42 M.J. 404 (1995).

[25] MCM, *supra* note 12, Mil. R. Evid. 707.

[26] 41 M.J. 683 (A.F. Ct. Crim. App. 1995), *pet. for review granted*, 43 M.J. 165 (1995).

[27] *Id.* at 686.

[28] 39 M.J. 555 (A.C.M.R. 1994).

[29] Although *Williams* was a forgery and larceny case, its discussion of the polygraph issue is equally applicable to urinalysis cases in which this issue arises.

[30] 43 M.J. 348 (1995).

[31] The court referred to the proffered polygraph results as "super enriched hearsay." *Id.* at 354.

Consequently, the services are currently split on the constitutionality of Military Rule of Evidence 707. Until the CAAF rules on this issue, defense counsel should attempt to introduce exculpatory polygraph results whenever they are available.

The accused may also request hair tests to prove he or she has not used drugs. Hair samples can disprove chronic use of drugs. Unfortunately, they generally will not disprove a one-time use of drugs. *United States v. Nimmer*[32] dealt with this issue.

The accused in *Nimmer* was charged with use of cocaine based on a positive urinalysis test. At trial, the military judge precluded the defense from introducing negative results of a hair test for drugs because the judge found that the test would not rule out a one-time use of cocaine. The Navy-Marine Court of Military Review affirmed the trial judge's ruling, finding that he had properly determined that the hair test was not admissible scientific evidence under the Military Rules of Evidence.[33] The CAAF vacated and remanded the case for relitigation of this issue using the standard for admissibility of scientific evidence set forth in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*.[34] The CAAF noted that *Daubert* had not been decided when the case was tried.[35]

As a result of the CAAF's reluctance to rule directly the issue, the admissibility of hair tests is still an open question. Until this issue is resolved, defense counsel should attempt to obtain and seek admission of favorable hair test results.

### New Evidence

After a urinalysis case is over, the defense may request a new trial based on newly discovered evidence. In order to obtain a new trial, the accused must demonstrate that the new evidence could not have been discovered at the time of trial by the exercise of due diligence and that the new evidence would probably produce a substantially more favorable result for the accused.[36]

In *United States v. Sztuka*,[37] the CAAF found that the accused should have been granted a new trial based on newly discovered evidence. Approximately one month after the accused's trial, her estranged husband allegedly admitted to another service member that he had placed marijuana in the accused's food. The AFCMR denied the accused's request for a new trial. It noted that the issue of innocent ingestion had been raised at trial, where the accused testified that she believed her husband had placed marijuana in her food. The CAAF reversed the decision of the AFCMR, giving little deference to the findings of fact by the lower court and interpreting the facts very favorably for the accused.

In *United States v. Fisiorek*,[38] the CAAF dealt with the related issue of allowing the defense to reopen its case after findings have been entered. In *Fisiorek*, a witness came forward during a recess between findings and sentencing to assert that he had blown cocaine on cookies which the accused consumed. The trial judge did not allow the accused to reopen his case because he found that the defense could have discovered the newly discovered evidence before trial through due diligence. The trial judge used the same standard applicable to granting a new trial. The CAAF reversed the trial judge's ruling, finding that the standard applicable to granting a new trial was too stringent. Again, the CAAF granted little deference to the trial judge's findings.

The CAAF's lack of deference to the lower courts' findings in both *Sztuka* and *Fisiorek* suggests that the CAAF is giving the accused in urinalysis cases special protections not available to other accused. As a result, defense counsel in urinalysis cases should actively continue to investigate after their cases are over. Any exculpatory evidence discovered after trial may justify a request for a new trial.

*Sztuka* and *Fisiorek* also demonstrate the importance of the innocent ingestion defense. Defense counsel should fully investigate this defense whenever it is raised and, as mentioned earlier,[39] the government should attempt to rebut this defense whenever it is suggested by the evidence.[40]

### Conclusion

The above cases indicate that the CAAF is continuing to create special rules for urinalysis cases. Practitioners involved in urinalysis cases need to be aware of this. Defense counsel should aggressively request protections which, in other cases, might not exist. Trial counsel, on the other hand, must ensure that their urinalysis cases are free of any significant errors which might lead to suppression of the urinalysis test results or dismissal of charges.

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[32] 43 M.J. 252 (1995).

[33] United States v. Nimmer, 41 M.J. 213 (N.M.C.M.R. 1994).

[34] 113 S. Ct. 2786 (1993).

[35] *See also* Stephen R. Henley, *Current Developments in Evidence Law*, ARMY LAW., Mar. 1996, at 96.

[36] MCM, *supra* note 12, R.C.M. 1210(f)(2).

[37] 43 M.J. 261 (1995).

[38] 43 M.J. 244 (1995).

[39] *See supra* notes 12-13 and accompanying text.

[40] For a more detailed discussion of this case, *see TJAGSA Practice Notes, Criminal Law Notes, Strict Scrutiny for Urinalysis Cases? United States v. Manuel, United States v. Fisiorek, and United States v. Sztuka*, ARMY LAW., Feb. 1996, at 31.

# Are You Ready for Some Changes? Five Fresh Views of the Fifth Amendment.

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## Introduction

The law is alive! Proof positive of this statement is that after 205 years the Fifth Amendment[1] continues to evolve in meaning and application. Nineteen ninety-five served as host for considerable movement in the world of self-incrimination law. Naturally, a year's worth of appellate cases will resolve and clarify some unsettled issues. The most interesting cases of the year, however, may be characterized as invitations by the courts for challenges to established precedents. Along with making fascinating reading, the new cases provide plentiful litigation fodder for trial and defense counsel alike. This article highlights five 1995 cases that either provide a better understanding of an old rule or set the stage for a significant change in the law. The cases address the scope of protection of the Fifth Amendment self-incrimination clause, and several aspects of the warning requirements mandated by *Miranda v. Arizona*[2] and the self-incrimination provisions of Article 31 of the Uniform Code of Military Justice.[3]

## Scope of Protection

A threshold issue in any self-incrimination analysis is whether the statement giving rise to the inquiry is within the scope of the rules against compelled self incrimination. One of the better explanations of the scope of these protection was set forth in *Pennsylvania v. Muniz*.[4] In *Muniz*, the United States Supreme Court held that whenever a suspect is asked for a response requiring communication of an express or implied assertion of a fact or belief, the response contains a testimonial component.[5] Statements containing a testimonial component are within the scope of the Fifth Amendment privilege against self-incrimination.

Following his arrest for driving under the influence of alcohol, Muniz provided slurred answers to seven questions by the police regarding his name, address, height, weight, eye color, date of birth, and current age. He was also asked, and was unable to give, the date of his sixth birthday.[6] The questioning session was videotaped and admitted as evidence at Muniz's bench trial.[7] In a plurality opinion, Justice Brennen found that evidence of the first seven questions was properly admitted because routine booking questions are reasonably related to police record keeping concerns, and therefore fall within a narrow exception to *Miranda* prescriptions concerning custodial interrogation.[8] Four other Justices concurred in the result, stating that although they disagreed with the distinction between routine booking questioning and other custodial questioning, routine booking questions do not call for testimonial responses raising Fifth Amendment concerns.[9]

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[1] The self-incrimination clause of the Fifth Amendment provides: "No person shall . . . be compelled in any criminal case to be a witness against himself." U.S. CONST. amend. V.

[2] 384 U.S. 435 (1966).

[3] UCMJ art. 31 (1988). Article 31 has remained unchanged since its enactment in 1950.

[4] 496 U.S. 582 (1990).

[5] *Id.* at 588-90 (citing Schmerber v. California, 384 U.S. 757, 761 (1966)). The Court said that when faced with such questions "the suspect confronts the 'trilemma' of truth, falsity, or silence, and hence the response (whether based on truth or falsity) contains a testimonial component." *Id.* at 582.

[6] *Id.* at 585-86.

[7] *Id.* at 587.

[8] *Id.* at 602-05. In *Miranda*, the Court ruled that prior to custodial interrogation, a subject must be warned that he has the right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed. *Miranda*, 384 U.S. at 444.

The "routine booking exception" has been applied where police questioning seeks biographical information and is not intended to elicit incrimination responses. *See generally*, United States v. D'Anjou, 16 F.3d 604, 608-09 (4th Cir.) (INS and ATF questions regarding nationality and address not designed to elicit incriminating response and not interrogation), *cert. denied*, 114 S.Ct. 2754 (1994); United States v Reyes, 908 F. 2d 281, 287-88 8th Cir. 1990) (officer's inquiry about suspect's name and other routine questions not interrogation because information elicited only for purpose of obtaining pretrial release), *cert. denied*, 499 U.S. 908 (1991); United States v. Tubbs, 34 M.J. 654 (A.C.M.R. 1992) (questioning to identify suspect during booking process does not call for a testimonial response).

[9] *Id.* at 606-08.

Turning to the question about the date of Muniz's sixth birthday, the four Justice plurality, and an otherwise dissenting Justice Marshall,[10] agreed that the question called for a testimonial response within the protection of the Fifth Amendment. Justice Brennen wrote that the question called for a response which could be incriminating not just because of *the manner* in which it was answered (as was the case with the slurred responses to the seven routine booking questions), but also because the content of the answer might support an inference that Muniz's mental state was confused.[11]

*United States v. Wade*[12] provides a fresh illustration of the distinction between testimonial responses and evidence of physical characteristics that are beyond the scope of the privilege against self-incrimination. Wade faced federal prosecution in New York for bank fraud and conspiracy.[13] A grand jury issued a subpoena requiring Wade to submit handwriting exemplars. In response, Wade produced eighty-seven pages of exemplars by copying letters and words that had been typed on sheets of paper. He refused, however, to provide handwriting exemplars pursuant to dictation. Wade argued such compulsion violated the Fifth Amendment privilege against self-incrimination.[14]

When enforcement of the subpoena was sought in federal district court, the court agreed with Wade. The court found that although learned, handwriting is the product of an involuntary muscular habit pattern. Accordingly, compelled production of handwriting exemplars of copied written material is not prohibited by the Fifth Amendment.[15]

Responding to dictation, however, provides an insight into matters such as spelling decisions and choice of form for writing numbers (that is, arabic or text). These are cognitive matters revealing a thought process. Revelation of such thought processes provides a testimonial response beyond the physical characteristics contained in a standard handwriting exemplar. Accordingly, because the act of responding to dictation contains a communicative component; compelled production of handwriting exemplars in this manner is prohibited.[16]

## Rights Warnings Triggers

In 1976, Captain Fredric Lederer[17] wrote of Article 31: "While the plain meaning of the statute would appear to answer all these questions, 25 years of litigation and judicial interpretation have made it clear that virtually nothing involving Article 31 has a 'plain meaning.'"[18] Now, forty-five years of Article 31 litigation has been recorded. The most recent cases indicate that the meaning of the statute is still evolving.

### *What Is Interrogation?*

The elements that trigger *Miranda* warning requirements differ from those attendant to Article 31 warnings.[19] A common element, however, is that in each case a government agent must be engaged in an activity amounting to interrogation. The definition of interrogation for *Miranda* and Article 31 purposes is generally considered to be the same.[20]

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[10] Justice Marshall disagreed with the plurality's application of a routine booking question exception to the *Miranda* rules as well as the four concurring Justices determination that the seven questions were not reasonably likely to elicit an incriminating response. *Id.* at 608-16 (Marshall, J., concurring in part and dissenting in part).

[11] *Id.* at 592-600. The Court said:

> When officer Hosterman asked Muniz if he knew the date of his sixth birthday and Muniz, for whatever reason, could not remember or calculate that date, he was confronted with the trilemma [see *infra* note 5]. By hypothesis, the inherently coercive environment created by the custodial interrogation precluded the option of remaining silent [citation omitted]. Muniz was left with the choice of incriminating himself by admitting that he did not then know the date of his sixth birthday, or answering untruthfully by reporting a date that he did not then believe to be accurate (an incorrect guess would be incriminating as well as untruthful).

*Id.* at 598-98.

[12] United States v. Wade, 95 CR. 0385 (RWS), 1995 WL 464908 (S.D.N.Y. Aug. 4, 1995).

[13] *Id.* at *2.

[14] *Id.*

[15] *Id.* at *3 (citing Gilbert v. California, 388 U.S. 263, 266-67 (1967).

[16] *Id.*, at *5 (citing *Schmerber*, 384 U.S. at 765; *see also* Doe v. United States, 487 U.S. 201 (1987).

[17] Professor Lederer is currently the Chancellor Professor of Law, Marshall-Wythe School of Law, College of William & Mary, and a Colonel, Judge Advocate General's Corps, United States Amy Reserve.

[18] Fredric Lederer, *Rights Warnings in the Armed Services*, 72 MIL. L. REV. 1, 11 (1976).

[19] *Miranda* warnings are triggered by custodial interrogation. *Miranda*, 384 U.S. at 467-73. The circumstances that give rise to Article 31 warning requirements are set forth in Article 31(b): "No person subject to this chapter may interrogate, or request any statement from an accused or person suspected of an offense without first informing him . . . ." UCMJ art. 31(b) (1988).

[20] United States v. Byers, 26 M.J. 132 (C.M.A. 1988).

*United States v Britcher*[21] is an Article 31 case featuring a potentially marked departure from established precedent concerning the meaning of the term interrogation. Britcher was a Coast Guard officer whose duties included oversight of his ship's imprest cash account. One fateful day, the ship's commanding officer directed the executive officer to conduct an audit of that account. In compliance with that order, the executive officer informed Britcher that an audit was to be conducted immediately. Britcher responded that there was no need for an audit, because there was no money in the account. Britcher was eventually convicted of, *inter alia*, forgery, wrongful appropriation and larceny, related to his handling of the imprest account.[22]

At his trial Britcher sought to suppress the statement to the executive officer, claiming it resulted from unwarned questioning in violation of Article 31. The military judge and the Coast Guard Court of Criminal Appeals[23] ruled that the executive officer's words and actions did not amount to interrogation for the purpose of triggering the Article 31 warning requirement.[24]

Although the result in this case may be correct, the analysis used to reach that result was flawed. In *Britcher*, the court wrote that "a conversation, no matter how subtle, designed to elicit a response is interrogation."[25] Applying this test, the court held that because the interaction between the executive officer and Britcher was not *designed* to elicit a response there was no interrogation.[26]

The definition of interrogation used in *Britcher* conflicts with the one set forth by the Supreme Court in *Rhode Island v. Innis*.[27] In *Innis*, the Court held that "*Miranda* safeguards come into play whenever a person in custody is subjected to either express questioning or its functional equivalent."[28] The Court described the functional equivalent of questioning as "any words or actions on the part of police (other than those normally attendant to arrest and custody) *that the police should know* are reasonably likely to elicit an incriminating response from the suspect."[29] The onset of interrogation then, is determined objectively, rather than through the subjective intent or design of the interrogator. The Court did allow that the subjective intent of the police *may* be relevant in an interrogation analysis, but only to the extent it affects an objective analysis of whether the police *reasonably should have known* that their words or actions were likely to elicit an incriminating response.[30]

If the United States Court of Appeals for the Armed Forces (CAAF) grants review this case it may agree that the executive officer's initial contact with Britcher did not amount to questioning for the purpose of triggering Article 31 warning requirements. Regardless of its ruling on that issue, hopefully the court will also correct the set and drift reflected in the Coast Guard court's definition of interrogation.

### *Who Is a Suspect?*

*United States v. Meeks*[31] addresses the issue of who is a suspect for the purposes of the Article 31 trigger. Meeks was an Air Force security policeman whose unit was ordered to deploy as part of Operation Desert Shield.[32] On the day the deployment order was issued, Meeks met with a chaplain because he was up-

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[21] 41 M.J. 806 (C.G.Ct.Crim.App. 1995).

[22] *Id.* at 807-08.

[23] On 5 October 1994, the National Defense Authorization Act for Fiscal Year 1995, Pub. L. No. 103-337, 108 Stat. 2663 (1994), changed the names of the United States Courts of Military Review and the United States Court of Military Appeals. The new names are the United States Army Court of Criminal Appeals, the United States Air Force Court of Criminal Appeals, the Navy-Marine Court of Criminal Appeals, the United States Coast Guard Court of Criminal Appeals, and the United States Court of Appeals for the Armed Forces. For the purposes of this article, the name of the court at the time of the decision is the name that will be used in referring to that decision.

[24] *Id.*

[25] *Id.* at 808. In support of this proposition the court cited United States v. Borodzik, 44 C.M.R. 149 (1971). No mention is made about the intervening effect of Rhode Island v. Innis, 446 U.S. 291 (1979) (*see infra* notes 27-30 and accompanying text).

[26] *Id.*

[27] 446 U.S. 291 (1979).

[28] *Id.* at 300-301.

[29] *Id.* at 301 (footnotes omitted) (emphasis added).

[30] *Id.* at 301 n.7.

[31] 41 M.J. 150 (1994).

[32] *Id.* at 153.

set about the deployment. The next day Meeks sought medical treatment, and was diagnosed as dehydrated, mildly anxious and depressed. Despite these maladies, however, he remained in a deployable status.[33] Two days later he received follow-up medical attention and was no longer dehydrated. He then reported to his commanding officer, who said: "Staff Sergeant Meeks, I am ordering you to report to [the personnel office] for processing to deploy with your team . . . . Will you do that?"[34] Meeks said "I can't."[35]

The government used Meeks's response in his subsequent prosecution for willful disobedience of an order. Meeks argued that the statement was the product of unwarned interrogation.[36] This aspect of the case gave rise to the question whether Meeks was a suspect, for the purposes of the Article 31 trigger, at the time the commanding officer asked about his willingness to comply with the deployment order.

This part of the case is fairly straightforward. While the commander may have suspected that Meeks was not *going to* obey the order, commanders are not required to anticipate disobedience of orders and give Article 31 warnings before giving an order.[37] More broadly stated, "[t]here is no requirement to prospectively advise an individual of Article 31 rights *prior* to commission of an offense."[38]

In the *dicta*, however, are the seeds of future controversy. Article 31(b) provides that "no person subject to the code may interrogate or request any statement from an accused, or a person suspected of an offense without first"[39] advising them of their rights under Article 31. Writing for the majority in *Meeks*, Judge Crawford stated that the test for whether someone is a suspect is an objective one, "asking whether a reasonable person should consider [the subject] to be a suspect under the totality of the circumstances."[40]

As pointed out by Chief Judge Sullivan, however, the majority opinion is not clearly supported by the court's previous analyses of who is a suspect.[41] The Chief Judge also argued that the majority opinion conflicts with the statutory language of Article 31, which does not "limit [the Article 31 advice] requirement to those persons who 'a reasonable person should' suspect."[42]

Prior to *Meeks*, the CAAF had developed and maintained both subjective and objective prongs to the "who is a suspect" analysis.[43] Although *Meeks* did not plainly announce a change in the *status quo*, footnote three in the majority opinion provides evidence of a budding new rule. The footnote chronicles a series of cases applying objective tests to criminal procedure questions of law handed down by the United States Supreme Court since the CAAF's development of the dual prong suspect analysis.[44] The footnote suggests that the dual prong test has been overruled by implication.

Many would undoubtedly mourn the loss of the seemingly useful bright line provided by the subjective prong to investiga-

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[33] *Id.*

[34] *Id.*

[35] *Id.*

[36] *Id.* at 152.

[37] *Id.* at 162.

[38] *Id.*

[39] 10 U.S.C. § 831(b) (1988).

[40] *Meeks*, 41 M.J. at 161 (citing United States v. Leiffer, 13 M.J. 337, 343 (C.M.A. 1982).

[41] *Id.* at 163 (Sullivan, C.J., concurring in the result).

[42] *Id.* at 163 (citations omitted). Judge Wiss joined the Chief Judge in opposing a change to the *status quo*. Judge Wiss termed the majority's purported elimination of the subjective prong as "inexplicable", and stated that the matter "deserves full plenary consideration by the Court, not mere naked pronouncement." *Id.* at 164 (Wiss, J., concurring in part and dissenting in part).

[43] Early discussion concerning the dual nature of the who is a suspect analysis may be found in United States v. Anglin, 18 U.S.C.M.A. 520, 40 C.M.R. 232 (1969) and United States v. Henry, 21 U.S.C.M.A. 98, 44 C.M.R. 152 (1971). The dual prong test was clearly articulated in United States v. Morris, 13 M.J. 297 (C.M.A. 1982).

> The test to determine if a person is a suspect is whether, considering all facts and circumstances at the time of the interview, the interrogator *believed or reasonably should have believed* that the one interrogated committed an offense.

*Id.* at 298 (footnote and citations omitted) (emphasis added)

The disjunctive relationship of the subjective and objective prongs was more recently reaffirmed by the CAAF in United States v. Davis, 36 M.J. 337, 340 (C.M.A. 19930, *aff'd on other grounds*, 114 S.Ct. 2350 (1994), and United States v. Shake, 30 M.J. 314, 317 (C.M.A. 1990).

[44] Scott v. United States, 436 U.S. 128 (1978)(what constitutes probable cause); Stansbury v. California, 114 S.Ct. 1526 (1994)(what constitutes custody); Rhode Island v. Innis, 446 U.S. 291 (1980)(what constitutes interrogation).

tors faced with the question of whether to provide Article 31 warnings to someone who *might be* a suspect. Other than several decades of the court's own precedents,[45] however, there does not appear to be any solid barrier to the new "suspect-lite" test proposed by Judge Crawford.

As has been the case throughout the history of Article 31 litigation, the language of the statute is imprecise enough to support a variety of interpretations.[46]

The practical impact of the change on the type of evidence that would be admissible at trial may be illusory as well. Remember, even under the suspect-lite test, the interrogator's subjective assessment of the situation is still a factor in the objective analysis. Assuming truthful testimony on the part of government agents, a review of the totality of the circumstances will normally indicate that a subject reasonably should have been considered a suspect in cases where the interrogator actually suspected the person of committing an offense. Nevertheless, with a pure reasonable man standard, prosecutors could argue that Article 31 warnings were not required during an interrogation despite the interrogator's belief that the subject had committed an offense in violation of the Uniform Code of Military Justice.

The dual prong test is not officially dead. Immediately following her explanation of why any subjective appraisal of a subject's status should be only a factor in an objective analysis of the totality of the circumstances, Judge Crawford stated that *Meeks* "does not even require a conclusion concerning the subjective or objective nature of our test to determine a suspect under Article 31(b)."[47] That being said, the *Meeks* single prong objective standard was cited as "the rule" by the Army Court of Criminal Appeals in *United States v. Pownall*.[48]

*Pownall* is unlikely to be the vehicle for resolution of the issue, however, since the Army court's preliminary recital of a purely objective test was followed by a dual pronged analysis of the case at bar.[49] Be that as it may, future courts-martial litigants and judges are sure to pick up on the suspect-lite test and additional guidance from the CAAF will undoubtedly be required.

### *Who Must Provide Article 31 Warnings?*

In addition to serving as the first in a potentially long line of *Meeks* progeny, *United States v. Pownall*[50] adds to the cases narrowing the class of persons required to provide Article 31 warnings to suspects prior to interrogation. Pownall began his journey to jurisprudential infamy by coming to work late and explaining to his noncommissioned officer-in-charge (NCOIC) that he had been with his wife at the hospital.[51] The NCOIC checked out the story and reported to the unit first sergeant that Mrs. Pownall had not been admitted at the hospital. When the first sergeant told Pownall that his story did not check out, he replied that his wife was still using a last name and an identification (ID) card from a previous marriage. The first sergeant instructed Pownall to get a new ID card for his wife and to bring the old ID card to him. After Pownall failed to report back with the old ID card, the first sergeant pursued the matter again and directed Pownall to produce a copy of his marriage license. Pownall provided the first sergeant with a fake marriage license and the saga continued until Pownall was charged, *inter alia*, with making false statements to the first sergeant.[52]

At trial, and on appeal, Pownall claimed his statements to the first sergeant should be suppressed because they came in response to unwarned questioning in violation of Article 31.[53] The question before the court was whether the first sergeant was a "person subject to the Code" for the purposes of Article 31 at the time of the conversations.

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[45] In United States v. Boyett, 42 M.J. 150 (1995), Judge Crawford observed that while *stare decisis* is important for stability, the doctrine does not apply when the basis for the previous precedent in no longer valid. *Id.* at 154.

[46] *See* Lederer, *supra* note 18.

[47] *Id.* at 163.

[48] 42 M.J. 682 (Army Ct. Crim. App. 1995).

[49] With regard to the "who is a suspect?" issue, the court found:

> We specifically find that 1SG Edmonds did not suspect appellant of making a false official statement. Second, under the totality of the circumstances, we are satisfied that a reasonable senior noncommissioned officer would not have suspected appellant of a false official statement, wrongful cohabitation, or BAQ fraud.

*Id.* at 686.

[50] 42 M.J. 682 (Army Ct.Crim.App. 1995), *rev. denied*, 43 M.J. 229 (C.M.A. 1995).

[51] *Id.* at 684.

[52] *Id.* at 684-86.

[53] *Id.* at 686.

Military courts have long declined to employ a literal application of the term "person subject to the Code" in Article 31 cases.[54] Instead, they have expanded and contracted the plain meaning of this phrase in accordance with what they perceived as the legislative intent of the Drafters. The landmark cases in this area are *United States v. Gibson*,[55] *United States v. Duga*,[56] and *United States v. Loukas*.[57]

*Gibson* was one of the COMA's earliest examinations of the legislative history of Article 31. Coming just four years after the enactment of the Code[58] *Gibson* proclaimed:

> Careful consideration of the history of the requirement of a warning, compels a conclusion that its purpose is to avoid impairment of the constitutional guarantee against compulsory self-incrimination. Because of the effect of superior rank or official position upon one subject to military law, the mere asking of a question *under some circumstances* is the equivalent of a command. A person subjected to these pressures may rightly be regarded as deprived of his freedom to answer or remain silent.[59]

In *Duga*, the COMA reaffirmed the principles of *Gibson*, finding that Article 31 applies "*only 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."[60] This type of pressure was identified as the factor which might impair servicemembers' free exercise of the constitutional guarantee against self-incrimination. The *Duga* court found that only situations where interrogators are acting in an official capacity presumptively give rise to the subtle coercive pressure contemplated by the drafters of the Code.[61]

In *Loukas*, the court again narrowed the field, stating that Article 31 warning requirements apply only if the interrogator is acting for official law enforcement or disciplinary purposes.[62] In explaining this conclusion, the *Loukas* majority relied lagely upon the statutory construction of Article 31.[63] The unstated implication of *Loukas*, however, is that a service member's free exercise of the privilege against self-incrimination is affected differently—that is more—by questioning from a person acting in a law enforcement or disciplinary capacity than by interrogation from the same person acting in an operational or private role.

Over the years, *Loukas*-style analyses have been applied to interrogations conducted by officials serving as medical person-

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[54] Just four years after its enactment, the Court of Military Appeals eschewed application of the literal language of Article 31:

> Taken literally, this Article is applicable to interrogations by all persons included within the term "persons subject to the code" as defined by Article 2 of the code [citation omitted], or any other who is suspected or accused of an offense. However, this phrase was used in a limited sense. In our opinion . . . there is a definitely restrictive element of officiality in the choice of the language "interrogate, or request any statement," wholly absent from the relatively loose phrase "person subject to this code," for military persons not assigned to investigate offenses, do not ordinarily interrogate nor do they request statements from others accused or suspected of crime.

United States v. Gibson, 3 U.S.C.M.A. 746, 14 C.M.R. 164, 170 (C.M.A. 1954).

[55] 3 U.S.C.M.A. 746, 14 C.M.R. 164 (1954).

[56] 10 M.J. 206 (C.M.A. 1981).

[57] 29 M.J. 385 (C.M.A. 1990).

[58] Article 31 was enacted as part of the Uniform Code of Military Justice on May 5, 1950.

[59] *Gibson*, 14 C.M.R. at 170 (emphasis added).

[60] *Duga*, 10 M.J. at 210 (emphasis added).

[61] *Id.* at 210. The officiality test set forth in *Duga* provides:

> Accordingly, in each case it is necessary to determine whether (1) a questioner was acting in an official capacity in his inquiry or only had a personal motivation; and (2) whether the person questioned perceived that the inquiry involved more than a casual conversation.

*Id.*

[62] *Loukas*, 29 M.J. at 387. The "law enforcement or disciplinary authority" aspect of the Article 31 warning trigger was previously discussed by the Court of Military Appeals in United States v. Fisher, 21 U.S.C.M.A. 223, 44 C.M.R. 277, 279 (C.M.A. 1972). Interestingly, this language was omitted from the test set forth in *Duga*.

[63] The court said:

> In reaching this conclusion we first note the statutory language of Article 31 which states:
>
> * * * * *
>
> (b) No person subject to this chapter *may interrogate, or request any statement from an accused or a person suspected of an offense* without first . . . .

*Id.* at 387.

nel,[64] disbursing personnel,[65] and social workers.[66] Applying a *Duga* official capacity analysis, these cases provide examples of threshold Article 31 applicability. In each case, however, the interrogators' non-law enforcement or disciplinary function caused the court to conclude that the circumstances surrounding the interrogations did not give rise to the coercive pressure that triggers Article 31 warning requirements.

*Pownall* purports to follow a *Loukas* analysis.[67] Several aspects of the case, however, venture onto new ground. The *Pownall* court found that the first sergeant was not conducting a law enforcement or disciplinary inquiry because it concluded his questions were "motivated by a desire to solve this soldier's problem, not to charge him with making a false official statement."[68] Short shrift is given to the fact that the interrogator in *Pownall* was a unit first sergeant, questioning a subordinate, after a report by the subject's NCOIC that the subject's explanation for an unauthorized absence did not check out. It was in response to unwarned questions about the unauthorized absence that the accused offered up the false statements that resulted in his court-martial.

The interrogator in *Pownall* is transported from an apparent disciplinary role, within the scope of Article 31, based on a finding that his subjective motivation was benign in nature. This analysis ignores principles common to *Gibson*, *Duga*, and *Loukas*. Like the *Miranda* rules, Article 31 was intended to safeguard free exercise of the privilege against self-incrimination by service members. Accordingly, circumstances triggering Article 31 requirements should be viewed from the perspective of the servicemember who may be subject to the type of subtle coercive pressure that can affect an individual's decision whether to respond to questions from his commanders.

The *Pownall* court does not comment on how the subjective motives of interrogators are to be discerned by the subject. The court also did not explain how subtle pressure to respond to questions by superior officers or noncommissioned officers acting in law enforcement or disciplinary roles is temporarily lifted when the interrogator subjectively develops a desire to *help* the suspect out of a jam. In *Pownall* the court gives great weight to the fact that the first sergeant had "previously assisted appellant with personal problems associated with his purported spouse, and he wanted to ensure that this situation did not escalate into another problem that might jeopardize the welfare of appellant and his wife."[69] The fact remains, however, that a first sergeant's role in a military unit is inextricably intertwined with the maintenance of good order and discipline. Further, when a soldier is questioned by the first sergeant about an unauthorized absence, the soldier is not free to walk away or stand silent.[70]

Of course, subjective motivation may be a relevant *factor* in determining whether an interrogator was acting in an official capacity for law enforcement or disciplinary purpose.[71] In *Pownall*, however, an objective view of the circumstances mark the interrogator as a superior responsible for maintenance of good order and discipline in the accused's unit. In such a case, the interrogator's lack of intent to prosecute, at the time of the questioning, has heretofore not been a valid basis for removing an interrogator from the class of persons "subject to the Code"[72] for the purposes of Article 31.

*Article 31 and the Right to Counsel.*

In time, *United States v. Lincoln*[73] may prove to be the most significant Article 31 case handed down by the CAAF in 1995.

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[64] United States v. Bowerman, 39 M.J. 219 (C.M.A. 1994)(Army physician not required to provide warning despite subjective belief of child abuse by the subject); United States v. Fisher, 21 U.S.C.M.A. 223, 44 C.M.R. 277 (C.M.A. 1972) (Army physician not required to provide warnings in emergency room where accused was in state of respiratory depression). The rule placing questions in furtherance of medical diagnosis or treatment was arguably extended in United States v. Dudley, 42 M.J. 528 (N.M.Ct.Crim.App. 1995)(questions by medical personnel asked for purpose of developing medical diagnosis or course of treatment are beyond the scope of Article 31 considerations even when subject is delivered to the medical personnel by law enforcement agents).

[65] United States v. Guron, 37 M.J. 942 (A.F.C.M.R. 1993).

[66] United States v. Raymond, 38 M.J. 136 (C.M.A. 1993); United States v. Moreno, 36 M.J. 107 (C.M.A. 1992).

[67] *Pownall*, 42 M.J. at 686.

[68] *Id.* at 687.

[69] *Id.* at 687.

[70] A service member's dilemma in the face of questioning by superiors brings to mind Justice Brennen's discussion of the historical role of the privilege against self-incrimination in combatting the "trilemma" of truth, falsity, or silence. *See supra* notes 5-11 and accompanying text.

[71] This principle is correctly stated in *Pownall*: "The purpose and nature of the questioning—and, hence, the motivation of the person asking the questions—are pertinent in analyzing when warnings are required" *Id.* at 686 (citations omitted).

[72] *See supra* notes 54-61 and accompanying text.

[73] 42 M.J. 315 (1995).

The import of the case is not obvious in a reading of the majority opinion. In *Lincoln*, the CAAF merely discusses the authority of the Courts of Military Review on government appeals under Article 62.[74] In the course of deciding this point of appellate procedure, however, the CAAF noted that the military judge below erred by relying on Article 31(b) as the basis for a right to assistance of counsel.[75] This apparent restatement of black letter law in turn provided a springboard for a concurring opinion that may mark the beginning of fundamental change in our understanding of Article 31.

*Lincoln* arose from a child abuse prosecution[76] based, in part, on the accused's confession and admissions. The incriminating statements were made during a series of conversations between Lincoln and two Naval Criminal Investigative Service (NCIS) agents.[77] The time and places for the conversations were negotiated and agreed upon by Lincoln and the agents and he was never placed under apprehension or restriction in any way during the process.[78] During the interrogation process, however, Lincoln was periodically advised of his right to consult with counsel pursuant to *Miranda v. Arizona*, as well as his rights under Article 31.[79] He consistently waived these rights although the interrogation was periodically terminated and restarted over the course of a week as the accused expressed a desire to think things over.[80]

On the fourth day of the process, one of the agents called Lincoln on the telephone and asked if he had made a decision about making a statement. Lincoln responded that he had an appointment with a lawyer at the local Naval Legal Service Office.[81] The agent told him, "'Okay, just let me know what your decision is.'"[82] Lincoln called back the next day and ultimately agreed to take a polygraph examination. Lincoln confessed to molesting his daughter shortly after the polygrapher told him that the test indicated he was being untruthful.[83]

The military judge found that the actions of the NCIS agents did not comply with the "consultation portion of Article 31(b), consultation of a lawyer."[84] On appeal, the government successfully argued: (1) the evidence did not establish custodial interrogation such that Fifth Amendment counsel provisions apply,[85] and (2) nothing in Article 31 creates a right to the assistance of counsel.[86] These findings were unremarkable and essentially restated the CAAF's previous demarcation between warnings and rights under Article 31 and those related to *Miranda*.[87]

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[74] UCMJ art. 62 (1988). The *Lincoln* court found that in reviewing government appeals from adverse rulings by a military judge under Article 62, Courts of Military Review are not required to remand cases for clarification of legal issues not decided by the military judge. Rather, the Courts of Military Review may rule on such issues where military judges' rulings are not so incomplete or ambiguous and where the record was adequate for review of such issues. *Lincoln*, 42 M.J. at 316-22.

[75] *Id.* at 321. In situations where Article 31 warnings are required, the subject of an interrogation must be informed of: (1) the nature of the accusation, (2) that he does not have to make any statement regarding the offense of which he is accused or suspected, and (3) that any statement made by him may be used as evidence against him in a trial by court-martial. *See* UCMJ art. 31(b) (1988).

[76] Lincoln was accused of committing an indecent act upon his three year old daughter. At trial, the military judge granted a defense motion to suppression the accused's pre-trial confession. The government appealed this ruling under Article 62. *See Id.* at 316.

[77] *Id.* at 317-18.

[78] United States v. Lincoln, 40 M.J. 674, 689 (N.M.C.M.R. 1994). The Court of Military Review opinion cited here provides some facts not detailed in the later CAAF opinion.

[79] *Id.* at 683-84. The CAAF's recitation of the facts indicates that the warnings provided by the agents included only Article 31 components. *Lincoln*, 42 M.J. at 317-18. Judge Cox's concurring opinion, however, supports the lower court's version of the events: "Importantly, in this case the [NCIS] agents did indeed scrupulously advise appellant that he enjoyed the right to counsel. This advice was incorporated into the advice given pursuant to Article 31(b)." *Id.* at 322.

[80] 42 M.J. at 317.

[81] *Id.*

[82] *Id.*

[83] *Id.* at 318.

[84] *Id.* at 319. The military judge also found that the statements were involuntary as discussed in United States v. Martinez, 38 M.J. 82 (C.M.A. 1993). This aspect of the case is beyond the scope of this article.

[85] *Id.* at 320. *See generally Miranda*, 384 U.S. at 444-45 and Edwards v. Arizona, 451 U.S. 477 (1981).

[86] *Lincoln*, 42 M.J. at 321.

[87] *See* United States v. Harris, 19 M.J. 331, 335 (C.M.A. 1985); MANUAL FOR COURTS-MARTIAL, United States, MIL. R. EVID. 305(d)(1) analysis, app. 22 at A14-15.

The precedents in this area, however, are not entirely secure. In his concurring opinion, Judge Cox states:

> Although I concur, I write to reflect upon a statement in the majority opinion that in my judgement may be overly broad and although technically correct, may be misleading. The statement was: "The court below correctly held that Article 31(b) does not confer a right to assistance of counsel." That is just as correct as saying, "The Fifth Amendment to the Constitution does not confer a right to assistance of counsel." That is correct, at least in the sense that you cannot find those words uttered in the Fifth Amendment, just like you cannot find them uttered in Article 31(b), [UCMJ].[88]

Judge Cox does not provide any authority for this new perspective. Instead, he follows-up his bombshell statement with a short discussion of the broad meaning of the term custodial interrogation in the context of military interrogations.[89]

Should the search for a counsel right in the penumbra of Article 31 continue, several points bear notice. First, the warning schemes prescribed in *Miranda* and Article 31(b) were both designed to safeguard the Fifth Amendment privilege against self-incrimination.[90] In *Miranda*, however, the United States Supreme Court made an in-depth analysis of police interrogation techniques[91] and concluded that "Unless adequate protective devices are employed to dispel the *compulsion inherent* in custodial surroundings, no statement obtained from the defendant can truly be the product of his free choice."[92] Conversely, Article 31(b) warnings were designed "to provide a counteragent for possible intangible 'presumptive coercion,' implicit in military rank and discipline[.]"[93]

While both warnings address the effect of coercion in the interrogation process, it does not necessarily follow that both types of coercive pressures require assistance of counsel in order to be dispelled. The Supreme Court determined that merely advising a subject about the existence of the privilege against self-incrimination, and the perils of making a statement, was insufficient to counteract the coercive pressure of custodial interrogation.

> A once-stated warning, delivered by those who will conduct the interrogation, cannot itself suffice to that end among those who most require knowledge of their rights. A mere warning given by the interrogators is not alone sufficient to accomplish that end. . . . Accordingly we hold that an individual held for interrogation must be clearly informed that he has the right to consult with a lawyer and to have the lawyer with him during the interrogation under the system for protecting the privilege we delineate today.[94]

Congress, on the other hand, clearly decided that the three part warning described in Article 31(b) was sufficient to dispel any coercive pressure emanating from the military rank or position of an interrogator.[95] Additionally, in the course of describing the value of rights warnings, the *Miranda* Court referred to the provisions of Article 31 and the fact that they do not contain a right to counsel.[96]

> Similarly, in our country the Uniform Code of Military Justice has long provided that no suspect may be interrogated without first being warned of his right not to make a statement and that any statement he makes may be used against him. Denial of the right to consult with counsel during interrogations *has also* been proscribed by military tribunals (emphasis added).[97]

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[88] *Id.*

[89] *Id.* at 322 (citing United States v. Tempia, 16 U.S.C.M.A. 629, 37 C.M.R. 249 (C.M.A. 1967)). Judge Cox also fails to explain why he now sees a right to counsel in Article 31 when he previously agreed there was none. In *Harris*, Judge Cox concurred with the majority's statement that "so far as the Code itself is concerned, servicemembers are granted no right to demand the presence of counsel if they are interrogated prior to the filing of charges.". *Harris*, 19 M.J. at 335. Writing separately, Judge Cox also acknowledged that *Miranda expands* upon the provisions of Article 31. *Id.* at 343 (Cox, J., concurring).

[90] *See Hearings on H.R. 2498 Before a Subcomm. of the House Comm. on Armed Services*, 81st Cong., 1st Sess. 983-93; and *Miranda*, 384 U.S. at 467-73.

[91] *Miranda*, 384 U.S. at 445-58.

[92] *Id.* at 458 (emphasis added).

[93] United States v. Gibson, 3 U.S.C.M.A. 746, 14 C.M.R. 164 (C.M.A. 1954).

[94] *Miranda*, 384 U.S. at 469-71.

[95] The potential for commissioned and noncommissioned officers to compel subordinates to incriminate themselves received Congressional attention after the close of World War II. In 1946 Congress amended Article of War 24 to include elements of a self-incrimination warning and an exclusionary rule. Article of War 24 served as the foundation for Article 31, UCMJ. *See supra* Lederer, *supra* note 18 at 4-7 (citing Report of the War Department Advisory Committee on Military Justice (1946)).

[96] *Miranda*, 384 U.S. at 489.

[97] *Id.* (footnotes omitted).

In support of this statement, the Court cited two military cases which established that *despite the absence* of a counsel right in Article 31, and that a Sixth Amendment counsel right does not arise until the initiation of adversarial criminal proceedings, a confession is inadmissible where the accused (without the benefit of a counsel warning) requested and was denied the opportunity to consult with an attorney during an interrogation.[98] This does not translate into recognition of a counsel right in a non-custodial situation where the accused has not made a *sua sponte* request.

A final hurdle to redefining Article 31 as conferring a right to counsel is that it is not clear that the "*Miranda* right to counsel" will remain a required element of criminal procedure. In *Davis v. United States*,[99] the United States Supreme Court once again recognized that the counsel aspect of the *Miranda* warning is not constitutionally required.[100] In his concurring opinion, Justice Scalia raises the issue whether the requirements of *Miranda* have been overcome by the provisions of 18 U.S.C. § 3501[101] (Admissibility of Confessions).[102] Section 3501 calls for warnings about the privilege against self-incrimination and the opportunity to consult with counsel to be used as part of a voluntariness determination, instead of as absolute prerequisites to admissibility.[103]

## Conclusion

Recent confessions and admissions cases reflect a trend toward reducing the reach of exclusionary rules surrounding the privilege against self-incrimination. This trend coincides with the military courts' practice of placing increased reliance on a more traditional voluntariness analysis[104] to ensure the reliability of the truthfinding process.[105] One thing can be said with certainty, self-incrimination issues will remain in the spotlight as the courts continue to define the borders of the privilege against self-incrimination.

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[98] *Id.* (citing United States v. Gunnels, 8 U.S.C.M.A. 130, 23 C.M.R. 354 (C.M.A. 1957); United States v. Rose, 8 U.S.C.M.A. 441, 24 C.M.R. 251 (C.M.A. 1957)). Although it did not suggest that Article 31 conferred a right to counsel, the *Gunnels* court went so far as to say:

> It seems to us to be a relatively simple matter to advise an uninformed and unknowing accused, that while he has no right to appointed military counsel, he does have a right to obtain legal advice and a right to have his counsel present with him during an interrogation by a law enforcement agent.

*Gunnels*, 23 C.M.R. at 354.

This aspect of *Gunnels* appears to have been largely ignored. The most recent mention of this nebulous right to counsel upon demand during military interrogations is found in United States v. Goodson, 18 M.J. 243 (C.M.A. 1984). Writing for the majority, Senior Judge Cook noted that "*Our case law* and service regulations give greater access to counsel at other earlier stages of prosecution and investigation [than required by the Sixth Amendment right to counsel]." *Id.* at 249 (citing, *inter alia*, *Gunnels*) (emphasis added).

[99] 114 S. Ct. 2350, 2354 (1994).

[100] *Id.*

[101] 18 U.S.C. § 3501 (1968), *as amended by* Act of Oct. 17, 1968.

[102] *Id.* at 2357 (Scalia, J., dissenting).

[103] *See generally*, Ralph H. Kohlmann, Davis v. United States: *Clarification Regarding Ambiguous Counsel Requests, and an Invitation to Revisit* Miranda*!*, ARMY LAW., Mar. 1995.

[104] *See generally* Fredric Lederer, *The Law of Confessions—The Voluntariness Doctrine*, 74 MIL. L. REV. 67 (1976).

[105] *See e.g.*, United States v. Martinez, 38. M.J. 82 (C.M.A. 1993); United States v. Bubonics, 40 M.J. 734 (N.M.C.M.R. 1994).

# Sex, Lies and Videotape: Child Sexual Abuse Cases Continue to Create Appellate Issues and Other Developments in the Areas of Sixth Amendment, Discovery, Mental Responsibility, and Nonjudicial Punishment

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## Introduction

Among the areas figuring prominently in the cases decided by the military appellate courts[1] during the past year were the Sixth Amendment, discovery, mental responsibility and competency, and nonjudicial punishment. This article highlights the more significant developments in these areas and critically analyzes their impact on the state of the law. The advice accompanying the discussion of the cases should assist military justice practitioners in thoughtful argument before trial and appellate courts.

## Sixth Amendment

> *In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor; and to have the Assistance of Counsel for his defence.*[2]

### *Confrontation Clause*

The latest cases involving the Confrontation Clause have concerned child sex abuse. Victims in these cases are frequently reluctant to testify[3] and prosecutors must often use pretrial statements to prove a case against the accused. The admissibility of such hearsay, however, creates tension with the Confrontation Clause. The Confrontation Clause reflects a preference for live testimony, while the hearsay exceptions recognize that, on occasion, out-of-court statements can actually lead to more accurate factfinding.[4] The Supreme Court has acknowledged that although the prohibition against hearsay and the Confrontation Clause are designed to protect similar values their overlap is not complete.[5]

*United States v. Siroky*[6] involved this overlap between the Confrontation Clause and the hearsay rules. In *Siroky*, a three year-old's statement to a child therapist was admitted at trial against the accused under the medical statement exception.[7] The little girl did not testify. Where a statement falls within a firmly-rooted hearsay exception, the Supreme Court has held that it is presumptively reliable and the Confrontation Clause is satisfied.[8] Because the medical statement exception is firmly-rooted,[9] the Air Force Court of Criminal Appeals declined to conduct further analysis under the Sixth Amendment and turned instead to the evidentiary implications of the case. Because no evidence existed that the little girl expected her statement to the therapist to help her get better, the court ruled that it was incorrectly admitted.[10]

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[1] On 5 October 1994, the National Defense Authorization Act for Fiscal Year 1995, Pub.L. No. 103-337, 108 Stat. 2663 (1994), changed the names of the United States Court of Military Appeals and the United States Courts of Military Review (codified at 10 U.S.C. § 941 n. (1995) and 10 U.S.C. § 866 n. (1995), respectively). The new names are the United States Court of Appeals for the Armed Forces, the United States Army Court of Criminal Appeals, the United States Navy-Marine Corps Court of Criminal Appeals, the United States Air Force Court of Criminal Appeals, and the United States Coast Guard Court of Criminal Appeals.

[2] U.S. CONST. amend. VI.

[3] Some of the reasons include fear of the alleged perpetrator, fear of court, threats by family members, fear of breaking up the family, and discomfort with discussing sex, a personal and private topic.

[4] Bourjaily v. United States, 483 U.S. 171 (1987).

[5] California v. Green, 399 U.S. 149, 155 (1970) (rejecting the idea that the Confrontation Clause merely codified the common law rules of hearsay and their exceptions).

[6] 42 M.J. 707 (A.F. Ct. Crim. App. 1995) (en banc).

[7] *Id.* at 708 (citing MANUAL FOR COURTS-MARTIAL, United States, MIL. R. EVID. 803(4) (1995 ed.)). The medical statement exception permits admission of the following: "[S]tatements made for purposes of medical diagnosis or treatment and described medical history, or past or present symptoms, pain, or sensation, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment. MANUAL FOR COURTS-MARTIAL, United States, MIL. R. EVID. 803(4) (1995 ed.) [hereinafter MCM].

[8] White v. Illinois, 502 U.S. 346 (1992). The Court has characterized a firmly-rooted hearsay exception as one "resting upon such solid foundations that admission of virtually any evidence within them comports with the 'substance of the constitutional protection.'" Ohio v. Roberts, 448 U.S. 56, 66 (1979) (quoting Mattox v. United States, 156 U.S. 237, 244 (1895)). Later, the Court described a firmly-rooted exception as one "steeped in our jurisprudence," similar to the common-law approach and unchanged by the Federal Rules of Evidence. 483 U.S. at 183.

[9] 502 U.S. at 355-56 n.8.

[10] 42 M.J. at 713.

The Air Force court addressed a similar situation in *United States v. Ureta*[11] where a thirteen year-old girl initially alleged that her father sexually abused her. She talked to a pediatrician and a social worker, and then was videotaped by the Air Force Office of Special Investigations (OSI). After charges were preferred against the father for carnal knowledge and indecent acts, however, the girl recanted, and refused to testify at trial.[12] The statements to the pediatrician and social worker were admitted as statements made for the purpose of medical treatment and the videotape as residual hearsay.[13] Because the medical statement exception is firmly-rooted, no confrontation analysis was needed for those two statements.[14] The videotape was a different matter. Residual hearsay is not firmly-rooted, and therefore satisfies the Confrontation Clause only if it has particularized guarantees of trustworthiness.[15] The appellate court adopted the trial judge's findings concerning the trustworthiness of the videotape—the girl was under oath, spoke in her own words, discussed events based on first-hand knowledge, was not prompted by leading questions, and seemed to be mature.[16] The court rejected the girl's recantation as contrived and concluded that the videotaped interview possessed sufficient indicia of reliability to satisfy the Confrontation Clause.[17]

The use of alternative forms of testimony, another Confrontation Clause issue, frequently arises in child sex abuse cases. In some cases, a child witness is allowed to testify from behind a screen or via closed circuit television.[18] In 1990, the Supreme Court upheld the use of one-way closed circuit television where a case-specific showing was made that: (1) the procedure was necessary to protect the child, (2) the child would otherwise be traumatized by the defendant, and (3) the child would suffer more than de minimis emotional distress if forced to face the defendant.[19]

In *United States v. Longstreath*,[20] the accused was charged with sexual abuse of his sixteen year-old step-daughter and ten and two year-old daughters. The two older girls testified at trial via one way closed circuit television.[21] The Navy-Marine Corps Court of Criminal Appeals (NMCCA) rejected the appellant's argument that the absence of any specific statutory authorization precluded the use of such a measure at a court-martial. The NMCCA pointed to a federal statute permitting two-way closed circuit television and noted that, although it does not directly apply to courts-martial, the same policy concerns regarding the protection of vulnerable victims exist in the military.[22] The NMCCA concluded that the statute provided guidance, and that the government adequately showed necessity for the televised testimony.

A court's willingness to rely on the federal statute, notwithstanding clear precedent in the military courts for alternative forms of testimony, may result in unintended consequences. The *Longstreath* court acknowledged that the statute does not directly apply to trials by court-martial[23] and conceded that the trial counsel did not comply with the language of the statute which provides for the use of *two-way* closed circuit television.[24] The use of the statute may have cleared a path for the defense to argue for

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[11] 41 M.J. 571 (A.F. Ct. Crim. App. 1994), *rev. granted*, 43 M.J. 140 (1995).

[12] *Id.* at 573-74. The girl wrote a statement indicating she fabricated the allegations to get her father to pay attention to abuse inflicted by the mother. *Id.* at 574.

[13] MCM, *supra* note 7, MIL. R. EVID 803(4) and 804(b)(5).

[14] 41 M.J. at 576-77.

[15] Idaho v. Wright, 497 U.S. 805 (1990) (the long-standing judicial and legislative experience is lacking with residual hearsay exceptions).

[16] 41 M.J. at 578. To this list, the court added its observation that the girl seemed sincere during the interview. *Id.*

[17] *Id.* at 579. The court concluded that her motive to lie did not make sense. The court also dismissed concerns with the role law enforcement officials played in taping the interview. The court concluded that based on its review of the tape, the OSI agent conducted the interview professionally, without any suggestiveness. *Id.*

[18] Coy v. Iowa, 487 U.S. 1012 (1988) (rejecting use of screen in absence of any particularized showing of need); Maryland v. Craig, 497 U.S. 836 (1990) (upholding use of one-way closed circuit television); United States v. Williams, 37 M.J. 289 (C.M.A. 1993) (confrontation not violated where accused had only sideways view of child seated in chair in center of courtroom); United States v. Thompson, 31 M.J. 168 (C.M.A. 1990), *cert. denied*, 498 U.S. 1084 (1991) (no violation of Confrontation Clause where victims testified with backs to accused).

[19] Maryland v. Craig, 497 U.S. 836 (1990).

[20] 42 M.J. 806 (N.M.Ct.Crim.App.), *pet. granted in part*, No. 95-1120/NA (Oct. 27, 1995).

[21] 42 M.J. at 811-12. The ten year-old was allowed to testify via closed-circuit television after a psychologist testified that seeing the accused would affect her mental health. *Id.* at 811. The 16 year-old first testified in open court. After several recesses, however, she could not continue, and she finished her testimony by closed-circuit television. *Id.* at 812.

[22] *Id.* at 814-15 (citing 18 U.S.C. § 3509(b) (Supp. IV 1992)).

[23] *See supra* note 22 and accompanying text.

[24] 42 M.J. at 815-16. The court found that error to be harmless, relying on *Maryland v. Craig*, 497 U.S. 836 (1990), where the Supreme Court upheld the use of one-way closed circuit television.

compliance with all the requirements of the statute, making it more cumbersome for trial counsel to employ alternative forms of testimony.[25] Instead of simply reaffirming principles established in *Maryland v. Craig* [26] and its progeny, the court based its decision on an inapplicable statute. Such an approach was unnecessary and may result in more litigation in the future.

Trial counsel's reliance on a deposition in lieu of live testimony can also create confrontation concerns. In *United States v. Dieter*,[27] the government introduced the deposition of a Criminal Investigation Division (CID) agent who was not present at trial. The agent took a confession from the accused concerning drug charges.[28] Over defense objection, the judge allowed the deposition to be used during a suppression motion, the merits of the case, and sentencing.[29] The judge cited the following in support of the deposition: Although the government was willing to reschedule the case, no judge was available, the agent was more than 100 miles away, other German witnesses were already present and would have to be rescheduled, and the agent's wife was undergoing surgery on the first day of the trial.

The Army Court of Criminal Appeals (ACCA) reviewed the judge's decision under an abuse of discretion standard and found that he erred in failing to weigh all the countervailing considerations.[30] Specifically, there was no evidence that other judges would not be available if the trial were rescheduled. Additionally, the agent would have been available on the second day of the trial, and witnesses could have been called out of order. Finally, that portion of Article 49, UCMJ, permitting a deposition to be used in court when the witness is more than 100 miles from the trial only applies to civilian witnesses.[31] The use of the deposition violated the accused's right to confront the witnesses against him.[32]

Another aspect of the Confrontation Clause arises when the witness is present in court and testifies against the accused, but limits are placed on the defense's ability to cross-examine the witness. Such limitations frequently occur in cases involving sexual assaults,[33] as in *United States v. Everett*.[34] This case involved a rape; the defense theory was that sexual intercourse was consensual and that the victim engaged in sex with the accused because her husband was unfaithful to her.[35] The defense maintained that when the accused's wife discovered the affair, the victim claimed rape for fear her husband would discover her peccadillo and physically harm her.[36] To develop this theory, the defense wanted to cross-examine the victim about the husband's infidelity and abuse.[37] The judge refused to allow the questions.

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[25] For example, a defense counsel could argue that trial counsel failed to comply with the five day notice period, persons other than those specifically authorized accompanied the child during questioning, the accused could not communicate with his attorney, and information was not properly safeguarded or documents were not filed under seal. 18 U.S.C. § 3509(b),(d) (Supp. IV 1992).

[26] 497 U.S. 836 (1990).

[27] 42 M.J. 697 (Army Ct. Crim. App. 1995).

[28] *Id.* at 698-99. German customs police apprehended the accused at the Netherlands-Germany border. They turned him over to military police, who drove the accused to Vilseck, Germany, where he was stationed. The CID agent questioned the accused about the drugs found in his car at the border. The accused admitted the drugs were his but said they were for personal use, not for distribution. *Id.*

[29] *Id.* at 699. During the motion hearing, in addition to the deposition, another police officer testified about the interview of the accused. The judge refused to suppress the accused's statements. *Id.* at 700. The trial counsel presented the testimony of several other witnesses during the merits of the case. *Id.* During the sentencing proceedings, the trial counsel read portions of the deposition to the members. The deposed agent testified that the accused admitted he frequently used marijuana and had knowledge of the urinalysis program in his unit. *Id.* at 701. Apparently some of the members were intrigued by this evidence, because they submitted several questions to the judge on this topic. *Id.*

[30] *Id.* at 699-700. The court observed that the judge "gave several reasons" for his ruling but "failed to 'articulate any weighing of relevant considerations.'" *Id.* at 700.

[31] *Id.* (quoting UCMJ, art. 49 (1988)). Article 49 provides in part that a deposition may be used at trial "if it appears, (1) that the witness resides or is beyond the State, Territory, Commonwealth, or District of Columbia in which the court, commission, or board is ordered to sit, or beyond 100 miles from the place of trial or hearing . . . ."

[32] 42 M.J. at 700. The ACCA went on to conclude that the erroneous use of the deposition during the motions and merits of the case was harmless, but its use during sentencing prejudiced the accused. *Id.* at 700-01.

[33] *See, e.g.*, United States v. Gray, 40 M.J. 77 (C.M.A. 1994); United States v. Bahr, 33 M.J. 228 (C.M.A. 1991); United States v. Diaz, 39 M.J. 1114 (A.F.C.M.R. 1994).

[34] 41 M.J. 847 (A.F.C.M.R. 1994).

[35] *Id.* at 850. The incident occurred at a party at the victim's quarters. During the party, the victim got upset because her husband was deployed, and she retreated to her bedroom. Later, the other guests left and the accused told them he would secure the home. Sometime during the night the two had intercourse. *Id.* at 849.

[36] *Id.* at 850. The accused's wife had called the victim's home and left a message on the answering machine. The defense contended that the victim suspected that word of the relationship would get back to her husband. *Id.*

[37] *Id.*

While acknowledging the judge's wide discretion in controlling cross-examination, the Air Force Court of Military Review ruled that he erred in limiting the cross-examination. Bias, prejudice, and motive to fabricate are permissible areas of cross-examination when the victim's credibility is at issue, as it was here. Her spouse's infidelity gave the victim a reason to sleep with another man, and the physical abuse might cause her to lie about her activities.[38]

*Everett* illustrates the dangers of overly restrictive cross-examination. Although the presence of a confession saved a conviction in this case, the government may not always be that lucky. Judges should allow liberal cross-examination of prosecution witnesses, especially in rape cases, where the crime is one-on-one and credibility is crucial. If the scope of the cross-examination relates to truthfulness or motive to lie and supports any possible defense theory, it is prudent to permit the questions.

### *Compulsory Process Clause*

The Compulsory Process Clause of the Sixth Amendment also figured prominently in recent cases. Although the accused has the right to call witnesses on his behalf, this right is not unlimited.[39] In the past, military courts have noted that the production of witnesses for the defense may depend on the importance of the witnesses to the issues in the case,[40] the stage of the trial,[41] whether the testimony will be cumulative,[42] and whether any alternatives to personal appearance exist.[43]

The defense requested five witnesses (all senior members of the Army Judge Advocate General's Corps), in support of a command influence motion in *United States v. Campos*.[44] The motion stemmed from the judge's comment that his replacement by a more senior judge at the post appeared to have resulted from the light sentences he imposed.[45] The judge denied the defense request for all five witnesses and forced the defense to stipulate to their expected testimony, despite a defense objection that two of the stipulations were contradictory.[46]

The United States Court of Appeals for the Armed Forces (CAAF) focused on the stage of the trial at which the witnesses were to testify; it was an interlocutory matter, which was not case dispositive. The CAAF found that the trial judge did not abuse his discretion in denying the witness request because he allowed himself to be liberally and extensively voir dired, another witness testified in person, and the stipulations of expected testimony were comprehensive and "generally consistent."[47]

Frequently, the defense requests an expert witness to assist in the investigation of the case or to testify. Pursuant to Rule for Courts-Martial 703(d), the defense is entitled to an expert only if the expert is relevant and necessary and the government has not provided an adequate substitute.[48] In *United States v. Reveles*,[49] the defense requested a military pathologist to rebut the government expert regarding fatal injuries suffered by the victim in an involuntary manslaughter case arising out of the accused's drunken

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[38] *Id.* The court went on to conclude that the error was harmless because the victim's testimony only corroborated the accused's confession. *Id.*

[39] United States v. Valenzuela-Bernal, 458 U.S. 858, 873 (1982); United States v. Sweeney, 14 U.S.C.M.A. 599, 34 C.M.R. 379 (1964).

[40] United States v. Tangpuz, 5 M.J. 426, 429 (C.M.A. 1978).

[41] *Id. See also* United States v. Allen, 33 M.J. 209 (C.M.A. 1991), *cert. denied*, 503 U.S. 936 (1992).

[42] 5 M.J. at 429. *See also* United States v. Harmon, 40 M.J. 107 (C.M.A. 1994); United States v. Brown, 28 M.J. 644 (A.C.M.R. 1989); United States v. Rust, 38 M.J. 726 (A.F.C.M.R. 1993), 41 M.J. 472, *cert. denied*, 116 S.Ct. 170 (1995).

[43] 5 M.J. at 429.

[44] 42 M.J. 253 (1995).

[45] *Id.* at 258. He made this comment early in the trial when trial counsel asked whether the judge knew of any grounds for challenge against him. *See* DEP'T OF ARMY, PAMPHLET 27-9, MILITARY JUDGES' BENCHBOOK, 2-5 (1 May 1982) (Update Memo 11, 19 July 1994). The judge added that he would do his best not to let the situation influence him. 42 M.J. at 258. After extensive voir dire and testimony by other witnesses, the defense conceded that there was no evidence of any actual command influence. The trial proceeded judge alone. *Id.* at 258-59. After the trial, defense raised the issue again, citing new evidence. This time, defense pointed to evidence that a local staff judge advocate complained to the judge's superiors about his sentencing philosophy. *Id.* at 259. The defense requested the following five witnesses: Brigadier General Kenneth Gray, Chief, United States Army Judiciary; Colonel Alexander Walczak, Staff Judge Advocate, III Corps & Fort Hood; Colonel Dennis Corrigan, Chief, Personnel, Plans, and Training Office; Colonel Malcom Yawn, Chief Circuit Judge, Third Judicial Circuit; and Colonel Howard Eggers, Chief, United States Army Trial Judiciary. 37 M.J. 894, 896, 900 n.3 (A.C.M.R. 1993).

[46] Among other things, defense alleged that Colonel Walczak complained about the judge's sentences to Brigadier General Gray. Brigadier General Gray admitted that such a conversation occurred, while Colonel Walczak denied it. 42 M.J. at 262.

[47] *Id.* The court apparently focused more on the number of stipulations and the overall similarities among them, dismissing the one area where two of the stipulations differed.

[48] MCM, *supra* note 7, R.C.M. 703(d).

[49] 41 M.J. 388 (1995).

driving[50] The trial was in Germany and the defense witness was at Fort Hood. The defense theory was that the victim was still alive after the accident but died through the intervening negligence of German paramedics who failed to immobilize the victim's neck before moving her.[51]

The defense expert disagreed with the government physician concerning the location of the spinal cord injury.[52] The CAAF held that the judge did not abuse his discretion in denying the request, where the defense offer of proof of the doctor's opinion was not based on facts in evidence, the request (first submitted five days before trial) was untimely considering the location of the witness, there was no showing why other government pathologists in Germany were inadequate, and the testimony was not relevant. As to the last point, the court noted that an intervening cause is not a defense if the accused's act of negligence is a substantial factor in the death.[53]

The court's conclusion that the proffered opinion was not based on facts in evidence is paradoxical. Although the defense doctor did not review the medical records in the case, it is reasonable to assume that he had been briefed on the government expert's findings and the facts in the case.[54] His opinion about the severance of the spinal cord was based on testimony that the victim's hand moved after the accident and that a bystander yelled she was still alive.[55]

The CAAF's conclusion that the defense failed to accept another expert tendered by the government ignores precedent that an adequate substitute is one who has the same opinion as the defense-requested expert.[56] Finally, the court's conclusion that the accused's conduct was a substantial factor in the victim's death would appear to infringe on the members' fact-finding power, in that it requires a finding on proximate cause, which is a question of fact.[57]

Two recent cases deal with requests for handwriting experts. In *United States v. Thomas*,[58] the NMCCA addressed the requirements for defense requests for expert assistance. The Navy court explained that the defense must normally show why the expert assistance is needed, what the expert will do for the defense, and why the defense counsel cannot do it himself.[59] In this case, the court found that the defense counsel failed to make such a showing because he never interviewed the government expert, did only cursory research into handwriting analysis,[60] and could not show that the defense expert would refute the government expert or that there were different views in the area.[61]

The defense also requested a handwriting expert in *United States v. Ruth*.[62] The expert was a law professor critical of the reliability of handwriting analysis in general.[63] Counsel based the request on a law review article written by the professor. The Army court found that the judge did not abuse his discretion in

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[50] *Id.* at 389. The accused was intoxicated and drove at a high rate of speed. He crossed over the center line of the road and collided with the victim's van. The driver of the van died, and a passenger was seriously injured. *Id.* at 389-90.

[51] *Id.* at 390. According to the defense offer of proof, their expert would testify that in any situation involving a possible neck injury, the neck should be immobilized before the person is moved. *Id.* at 393.

[52] The government witness, a German medical doctor, opined that the accident severed the victim's spinal cord between the first and second vertebrae. The defense expert, a board-certified forensic pathologist, would have testified that based on hand movement, the break did not occur above the fifth vertebra. *Id.* at 392-93.

[53] *Id.* at 394-95.

[54] This is supported by the fact that defense counsel spoke to the pathologist on the phone and provided a written summary for the court. In the summary, the pathologist discussed the implications of hand movement and the lack of skid marks in the road. *Id.* at 392-93.

[55] *Id.* at 393. If the victim were still alive, the defense expert contended that her neck should have been secured before she was moved. There was evidence that the paramedics who responded to the scene failed to do that. *Id.* at 392.

[56] United States v. Van Horn, 26 M.J. 434, 439 (C.M.A. 1988) (Everett, C.J., concurring) ("where there are divergent scientific views, the Government cannot select a witness whose views are very favorable to its position and then claim that this same witness is 'an adequate substitute' for a defense-requested expert of a different viewpoint").

[57] *See* DEP'T OF ARMY, PAMPHLET 27-9, MILITARY JUDGES' BENCHBOOK, para. 5-19 (1 May 1982) (update Memo 14, 21 Mar. 1995).

[58] 41 M.J. 873 (N.M.Ct.Crim.App. 1995).

[59] *Id.* at 875 (quoting United States v. Allen, 31 M.J. 572, 623-24 (N.M.C.M.R. 1990)). For example, counsel must show what they expect to find, how the information will affect the case, and why counsel or their staff could not do it on their own. *Id.*

[60] The court observed that the area is "not an arcane or highly complex field." 41 M.J. at 875 n.2.

[61] *Id.* at 875. The defense requested a forensic document examiner, Mr. Gonzales, to examine the signatures on bad checks, allegedly written by the accused. The request was denied, but the government tendered the services of a Naval Investigative Services (NIS) expert. When he concluded that the accused signed the checks, the government decided to use him as a witness. *Id.* at 874.

[62] 42 M.J. 730 (Army Ct. Crim. App. 1995).

[63] *Id.* at 733-34. The professor did not know anything about the facts in the case. *Id.* at 734.

denying the request. The court reasoned that handwriting is not a complex field, the expert had no direct knowledge of the case, and counsel's failure to use the law review article to cross-examine the government's handwriting expert negated any argument that their expert was "relevant and necessary."[64]

*Thomas* and *Ruth* illustrate how difficult it is for defense counsel to convince a court-martial of the need for an expert. Counsel must be prepared to demonstrate the nature of the expert's knowledge and how that relates to the defense theory of the case. However, counsel cannot identify the problem areas for which assistance is needed unless they have technical knowledge or expertise, which is why they are asking for help in the first place! Faced with this dilemma, counsel should gather as much information in the field as possible on their own and then use the results of this research to argue that the defense needs expert assistance to apply these concepts to the facts in the case.[65]

### *Ineffective Assistance of Counsel*

Perhaps the most significant development in the Sixth Amendment area involves the procedure for handling ineffective assistance of counsel allegations. In 1984, the Army Court of Military Review established procedures to be followed when an appellant asserted that his trial defense counsel was ineffective.[66] The procedures required trial defense counsel to submit an affidavit responding to the allegation. The procedures had long been criticized by the United States Army Trial Defense Service (TDS) which objected to the requirement to respond to sometimes spurious allegations on the grounds that it contradicted the presumption of competence.[67]

*United States v. Lewis*[68] brought this issue to the forefront. The appellant claimed his civilian and military defense counsel were ineffective in several respects.[69] Despite an order by the Army Court of Military Review, counsel refused to submit affidavits and instead filed a Motion to Stay and to Quash, in which they challenged the authority of the court to compel affidavits.[70] The court rejected counsels' arguments, but further concluded that counsel were not ineffective.[71]

On review before the CAAF, the TDS filed a brief and argued as amicus curiae.[72] The CAAF agreed with the contention that counsel should not respond to an allegation of ineffective assistance of counsel until a court reviews the record and determines that the allegation overcomes the presumption of compe-

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[64] *Id.*

[65] Experts may frequently be found at the Armed Forces Institute of Pathology as well as universities and hospitals. Additional sources of information for defense counsel include the Trial Defense Service training officer; many states also have organizations devoted to capital litigation, for example, the South Carolina Death Penalty Resource Center. Trial counsel, of course, can turn to the Trial Counsel Assistance Program and the National Center for Prosecution of Child Abuse, in addition to state and federal law enforcement labs.

[66] United States v. Burdine, 29 M.J. 834 (A.C.M.R. 1989), *pet. denied*, 32 M.J. 249 (C.M.A. 1990). These procedures first required appellate defense counsel to ascertain from the appellant the exact manner in which counsel was ineffective. This was to be as specific as possible. Second, appellate counsel was to encourage appellant to put his allegations in an affidavit, advising him it would be helpful but not required. Finally, appellate defense counsel was to advise the appellant that the allegations relieve the trial defense counsel of the duty of confidentiality. After this information was served on the government appellate counsel, that individual was to obtain an affidavit from the trial defense counsel. *Id.* at 837.

[67] Telephone interview with Richard W. Cairns, Judge, United States Army Court of Criminal Appeals (Feb. 9, 1996) (Colonel Cairns indicated that when he served as Chief, Trial Defense Service, he noticed significant concern among defense counsel in the field over the requirement to respond to an increasing number of ineffectiveness allegations).

[68] 42 M.J. 1 (1995).

[69] *Id.* at 3. Appellant claimed that counsel were ineffective for failing to submit his post-trial clemency letter, tell appellant he could request deferment of confinement, safeguard Article 32 tapes and conceding at trial that they were lost in good faith, interview witnesses, and aggressively handle the case due to an overly close relationship with government representatives. He also alleged that they were ineffective because they coerced appellant to sign stipulations, continued representation after the ineffective allegation was made, and argued against appellant's best interests during sentencing. 38 M.J. 501, 522 (1993).

[70] *Id.* at 512. Counsel objected that the Army court lacked jurisdiction to order the affidavits, the order violated the court's procedures and the attorney-client privilege, the order was unnecessary because appellant's allegations did not overcome the presumption of competence, and Article 31 warnings should have been provided. *Id.*

[71] *Id.* at 521.

[72] 42 M.J. at 2. In addition to its complaint that *Burdine* clashed with the presumption of competence, amicus curiae objected on the following grounds. The procedures contradicted well established law. Brief of Amicus Curiae at 10, United States v. Lewis, 42 M.J. 1 (1995). The procedures were unethical in requiring, rather than allowing, trial defense counsel to disclose client confidences in response to the ineffective allegations. *Id.* at 15. The procedures were factually unnecessary in the majority of cases. *Id.* at 30. The courts of military review lacked jurisdiction to issue orders requiring witnesses to provide evidence. According to amicus, if the court needs additional information to resolve an ineffectiveness claim, the court should order a *DuBay* hearing *Id.* at 38-43 (citing United States v. DuBay, 17 U.S.C.M.A. 147, 37 C.M.R. 411 (C.M.A. 1967)). Amicus' final argument was that counsel should be advised of Article 31 rights before receiving orders to provide affidavits. Brief of Amicus Curiae at 50, United States v. Lewis, 42 M.J. 1 (1995).

tence. Once that determination has been made, the court can order an affidavit.[73]

The *Lewis* case should dramatically reduce the number of times trial defense counsel respond to ineffective assistance of counsel claims. In the majority of cases, the allegation will not overcome the presumption of competence.[74] On the other hand, if an affidavit is ordered, it may slow down the appellate process for that particular case.[75] There will be little, if any, effect on the ultimate resolution of the ineffective assistance of counsel claims themselves because of the great deference courts have traditionally given to performance by defense counsel. Another impact of the case may be harder to measure—the perception of defense counsel by their clients. No longer will an ineffective assistance allegation automatically place the defense counsel and the client in antagonistic positions.

To prevail on a claim of ineffective assistance of counsel, an appellant must show that counsel's performance was deficient and that the deficient performance prejudiced the defense; that is, the errors were so serious, the accused did not receive a fair trial.[76] Counsel are presumed to be competent unless the performance was unreasonable under prevailing professional norms.[77]

In *United States v. Murray*,[78] the CAAF held that an objective standard is also applied in determining whether the defense was prejudiced. In this case, the accused raised ineffective assistance of counsel in a post-trial session. The judge concluded that the performance of counsel who argued diminished capacity in a judge-alone rape case was deficient.[79] However, in determining whether the accused was prejudiced, the judge used a subjective standard and concluded that his findings would not have been different, despite counsel's errors, because the victim and medical evidence were so convincing. On appeal, the CAAF noted that the test for prejudice assumes that the decision maker "reasonably, conscientiously, and impartially" applied the standards governing the decision.[80] The court concluded that the test for prejudice is objective.

When a client ambiguously complains about his counsel's representation, *United States v. Cornelious*[81] may help resolve the problem. In that case, the accused wrote a letter which his defense counsel submitted as part of post-trial matters. In the letter, the accused asserted that his defense counsel improperly handled his case and failed to call alibi witnesses. The CAAF explained that once counsel receives notice of the accused's apparent displeasure with his work, he should advise the client of the consequences of terminating the attorney-client relationship, determine if the client wants to do that, and if so, notify the appropriate authorities and discontinue the representation.[82] Because the record was unclear whether counsel discussed the issue with the client, it was impossible to determine whether counsel operated under a conflict of interest. Therefore, the case was returned to the lower court for further proceedings.[83]

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[73] 42 M.J. at 6. The CAAF rejected other aspects of the amicus argument, among them, that a *DuBay* hearing, 17 U.S.C.M.A. 147, 37 C.M.R. 411 (1967) is required once a prima facie case of ineffective assistance of counsel is made. 42 M.J. at 6.

[74] *See, e.g.*, Brief of Amicus Curiae at 31 n.21, United States v. Lewis, 42 M.J. 1 (1995) (examples of allegations include trying the case on Friday the 13th, failing to make a closing argument at an Article 32 investigation, requesting a delay at trial, and failing to ask the client questions at trial that were rehearsed).

[75] First, the court must look at the record and determine if the allegation overcomes the presumption of competence. Then the court orders the defense counsel to respond. Once the defense counsel responds, the court must consider the affidavit and rule on the allegations. This will presumably slow things down.

[76] Strickland v. Washington, 466 U.S. 668 (1984).

[77] United States v. Cronic, 466 U.S. 648 (1984).

[78] 42 M.J. 174 (1995).

[79] 42 M.J. at 176. Counsel presented evidence at trial that due to working two jobs, accused's sleep deprivation resulted in diminished capacity. At the post-trial session, counsel acknowledged that such a theory did not constitute a defense to rape, but explained that it was the best defense he had. The judge concluded that the defense was neither plausible nor believable and that counsel failed to adequately investigate the case, object to inadmissible evidence, and effectively cross-examine the victim. *Id* at 176.

[80] *Id.* at 177. The court also pointed out that the test for prejudice is based on a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* (quoting Strickland v. Washington, 466 U.S. 668, 694 (1984)).

[81] 41 M.J. 397 (1995).

[82] *Id.* at 398 (quoting United States v. Carter, 40 M.J. 102, 105 (C.M.A. 1994)). In *Carter*, the accused's complaint went directly to the Staff Judge Advocate and defense counsel was unaware of the situation. 40 M.J. at 104-5.

[83] 41 M.J. at 398-99.

### Discovery

This past year, the Supreme Court clarified the rules applicable when the prosecution fails to disclose evidence to the defense. In the landmark discovery case of *Brady v. Maryland*,[84] the Supreme Court held that failure to disclose favorable evidence to the defense violates an accused's due process rights when the evidence is material to guilt or punishment.[85] Evidence is material when there is a reasonable probability that the results of the trial would have been different had the evidence been disclosed.[86]

In *Kyles v. Whitley*,[87] the Court clarified the application of this reasonable probability standard. First, the standard does not require the defense to show that the disclosed evidence would result in acquittal; rather, it only requires a *reasonable* probability of a different result. Next, it is not a sufficiency of the evidence test. Defense need only show that the undisclosed evidence puts the case in a different light, so as to undermine confidence in the verdict. Once error is found, it cannot be treated as harmless. Finally, the analysis focuses on the cumulative effect of the undisclosed evidence, not the effect of each individual item.[88]

*United States v. Meadows*[89] involved a nondisclosure situation with a slightly different twist; the prosecutor used a document at trial that differed from the one provided defense before trial and used in the Article 32 hearing. The charges involved larceny of housing allowances, and the disputed document was a lease, signed by the accused. The amount of the rent was filled in by the accused on one copy and by his former fiancee on the other. The record contained no evidence of any discovery request.[90]

Because the evidence at trial indicated that both parties knew what was in the lease when they signed it, the CAAF held that any error was harmless beyond a reasonable doubt.[91] Although Judge Wiss's majority opinion purportedly relies on *United States v. Green*,[92] it actually contradicts his reasoning in the earlier case. In *Green*, Judge Wiss's concurring opinion emphasized that when there is a general request or no discovery request at all, the reasonable probability test applies.[93] Inexplicably however, in *Meadows*, Judge Wiss used the harmless error standard notwithstanding the absence of any discovery request.

### Mental Responsibility/Competency to Stand Trial

Sanity boards are often frustrating for trial counsel and staff judge advocates because they frequently slow down the trial process and government representatives often perceive that defense counsel use the board as a delaying tactic, making it more difficult to bring the accused to trial promptly. Therefore, the government may seek alternatives to the formal sanity board.

In *United States v. Collins*,[94] the ACCA rejected a mental status evaluation as an adequate substitute for a sanity board. Defense counsel requested a sanity board to determine whether his client was competent to stand trial.[95] Instead, the command sent the accused for a mental status evaluation. A one page Report of Mental Status Evaluation was produced.[96] Despite the defense's renewed request for a formal sanity board and the judge's ruling that the evaluation was an inadequate substitute for a sanity board, the judge denied the request and found the accused competent to stand trial.[97]

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[84] 373 U.S. 83 (1963).

[85] *Id.* at 87.

[86] United States v. Bagley, 473 U.S. 667 (1985) (plurality opinion). Earlier, the Court distinguished between those situations involving specific discovery requests from general requests or no request at all. United States v. Agurs, 427 U.S. 97 (1976). In *Bagley*, however, the Court held that the reasonable probability standard was sufficiently flexible to cover all three situations. 473 U.S. at 682.

[87] 115 S. Ct. 1555 (1995). For an in-depth discussion of the case, see Donna M. Wright, *TJAGSA Practice Note, Will Prosecutors Ever Learn? Nondisclosure at Your Peril*, ARMY LAW., Dec. 1995, at 74.

[88] 115 S. Ct. at 1565-67.

[89] 42 M.J. 132, *cert. denied*, 116 S.Ct. 190 (1995).

[90] *Id.* at 137.

[91] *Id.* at 138. Although the significance of the case may be limited to its facts, trial counsel should always scrupulously adhere to disclosure requirements and avoid appellate issues.

[92] 37 M.J. 88 (C.M.A. 1993).

[93] *Id.* at 91 (Wiss, J., concurring in part and in the result). Under the reasonable probability standard, evidence is material if there is a reasonable probability that the trial result would have been different if the evidence had been disclosed. 473 U.S. at 682.

[94] 41 M.J. 610 (Army Ct. Crim. App. 1994).

[95] *Id.* at 611. Counsel listed the client's hysteria and inconsistent statements to counsel as reasons for his concerns. *Id.*

[96] *Id.* at 612. The report was prepared on DA Form 3822-R. Dep't of Army, Form 3822-R, Report of Mental Status Evaluation (Oct. 1982). This form is commonly used in administrative elimination actions. *See* DEP'T OF ARMY, REG. 635-200, ENLISTED PERSONNEL, para. 1-34 (17 Oct. 1990).

[97] 41 M.J. at 612. The judge stated "I specifically find for the record that there's been no showing to overcome the presumption of mental capacity in this case." *Id.*

In reviewing the case, the ACCA reiterated that when the defense makes a good faith, nonfrivolous request for a sanity board, such a board must be conducted before a judge can rule on competency to stand trial.[98] The court agreed with the trial judge that the evaluation was not an adequate substitute for a sanity board. Other than the trial counsel's offer of proof that the person who signed the report was a psychiatrist, there was no evidence that the evaluation was designed to satisfy the requirements of Rule for Courts Martial 706.[99]

In *United States v. Combs*,[100] the court addressed the permissible scope of an expert's opinion on the issue of intent. In this shaken baby case, the defense wanted to present psychiatric testimony that the accused did not have the intent to kill or inflict great bodily harm when he violently shook his child.[101] The judge refused to allow the testimony, agreeing with the prosecution that the members could decide for themselves whether the accused had the requisite intent.

The military's highest court reversed. The CAAF found that testimony concerning one of the elements of the crime was relevant and admissible even though it embraced an ultimate issue to be decided by the trier of fact.[102] In this regard, a court-martial differs from other federal courts. While Federal Rule of Evidence 704(b)[103] prohibits testimony about an accused's mental state constituting one of the elements of the crime, the military rules permit such testimony.[104]

### Nonjudicial Punishment

For an area that normally does not receive much attention, there were several interesting developments in nonjudicial punishment in 1995. Two cases dealt with Article 15[105] credit at a subsequent court-martial for the same offense. In *United States v. Thompson*,[106] the ACCA once again explained the limitations involved in such a situation. A soldier may be court-martialed for an offense that has already been the subject of nonjudicial punishment only if the offense is a serious one.[107] The soldier must receive complete credit for any nonjudicial punishment served. The Article 15 itself may not be used for any purpose at trial, including impeachment, to show the soldier has a bad service record, or for any other evidentiary purpose.[108]

In *Thompson*, trial counsel erred in introducing the Article 15 as a prosecution exhibit during the presentencing proceedings, in eliciting testimony about it from a government witness, and in using it to argue for a harsher sentence. The problem was compounded when both the judge and the convening authority failed to credit the accused with the prior punishment.[109]

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[98] *Id.* (citing United States v. Jancarek, 22 M.J. 600 (A.C.M.R. 1986), *pet. denied*, 24 M.J. 42 (C.M.A. 1987); United States v. Kish, 20 M.J. 652 (A.C.M.R. 1985)).

[99] MCM, *supra* note 7, R.C.M. 706. On the form itself, all that accompanied the signature was the notation "MC colonel." The court observed that the report was merely a "check the block" form to evaluate whether the accused had the mental capacity to participate in administrative elimination proceedings. 41 M.J. at 613. The court compared this evaluation to the one in *Jancarek* where the evaluation was deemed to be an adequate substitute. There, the psychiatrist, who had experience with sanity boards, actually testified at the court-martial, evaluated the accused with knowledge of the charges against him, and was provided the reasons why his competency had been questioned. *Id.* (citing United States v. Jancarek, 22 M.J. 600 (A.C.M.R. 1986), *pet. denied*, 24 M.J. 42 (C.M.A. 1987)).

[100] 39 M.J. 288 (C.M.A. 1994).

[101] *Id.* at 290. The accused was charged with unpremeditated murder of his eighteen month old son. One of the elements of that offense is that the accused have the intent to kill or inflict great bodily harm. MCM, *supra* note 7, pt. IV, ¶ 43b(2)(d).

[102] 39 M.J. at 290-92. The Court of Military Appeals first observed that the testimony was relevant and not so confusing as to warrant exclusion. *Id.* at 291 (quoting MCM, *supra* note 7, MIL. R. EVID. 401). The court then noted that expert testimony need only be helpful to the trier of act, not necessary, as the trial judge had suggested. *Id.* (quoting MCM, *supra* note 7, MIL. R. EVID. 403). The psychiatrist's opinion had a valid foundation, as it was based on law enforcement reports, family advocacy records, sanity boards, and conversations with witnesses and the accused. *Id.* (quoting MCM, *supra* note 7, MIL. R. EVID. 702). Finally, testimony should not be barred just because it includes an ultimate issue in the case. *Id.* at 291-92 (quoting MCM, *supra* note 7, MIL. R. EVID. 704).

[103] FED. R. EVID. 704.

[104] MCM, *supra* note 7, MIL. R. EVID. 704 analysis. *See* STEPHEN A. SALTZBURG ET AL., MILITARY RULES OF EVIDENCE MANUAL, at 744 (3d ed. 1991). The authors note that enactment of Federal Rule of Evidence 704(b) resulted from concerns that conflicting testimony from opposing psychiatrists invaded the province of the fact-finder. *Id.* They also agree with the drafters of the Military Rules of Evidence that statutory qualifications for court members ensure that they will not be overly influenced by the opinions of experts. *Id.* at 746-47.

[105] UCMJ art. 15 (1988).

[106] 41 M.J. 895 (Army Ct. Crim. App. 1995).

[107] UCMJ art. 15 (1988).

[108] United States v. Pierce, 27 M.J. 367 (C.M.A. 1989).

[109] 41 M.J. at 898-99.

In *United States v. Edwards*,[110] the CAAF answered affirmatively the question of whether the judge, rather than the convening authority, could compute the prior punishment's effect on the sentence. In announcing the sentence, the judge explained in detail how he credited the accused with the prior punishment.[111] In upholding this method, CAAF pointed out that the defense requested the credit and consented to the judge's procedure.[112]

Recently, in *United States v. Kelley*,[113] the NMCCA declined to follow *United States v. Booker*[114] and urged the CAAF to reexamine the case. *Booker* held that records of nonjudicial punishment may not be introduced at a court-martial unless the prosecution shows that the accused had an opportunity to consult with counsel before accepting the Article 15.[115] The catalyst for the Navy court's opinion was the Supreme Court holding in *Nichols v. United States*[116] that a prior uncounseled misdemeanor conviction could be used in sentencing proceedings for a subsequent crime.[117] The NMCCA concluded that in light of the changes in the right to counsel, the lack of any constitutional basis for *Booker*, and the Supreme Court's deference to the military in matters involving constitutional rights, *Booker* is no longer binding.[118]

The Coast Guard Court of Criminal Appeals has also expressed doubt about the continued viability of *Booker*, urging CAAF to reconsider the case.[119] Seaman Kelley's petition for review to the military's highest court has been granted, so this issue will soon be resolved. For Army counsel, however, the *Booker* requirements have been incorporated into Army regulation; absent any regulatory change, counsel must continue to show that the accused had the opportunity to consult with counsel.[120]

## Conclusion

Both the prosecution and the defense found something in their stockings this year from the military appellate courts. Sixth Amendment issues continued to dominate cases involving child sexual abuse and trial counsel will be pleased with the courts' loose interpretation of the Confrontation Clause. With the new procedures for ineffective assistance of counsel claims, trial defense counsel can only benefit as the burden of responding to these allegations is substantially reduced. Only in those situations where the appellant raises a colorable claim, will counsel have to explain their actions.

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[110] 42 M.J. 381 (1995).

[111] *Id.* at 382. The judge announced the sentence: confinement for ninety-seven days, forfeiture of $117 pay per month for five months, reduction to E-1, and a bad conduct discharge (BCD). The judge then explained to the accused that he originally determined that an appropriate sentence would include confinement for five months, forfeiture of $500 pay per month for five months, reduction to E-1, and a BCD. The judge went on to explain that he credited the accused with twenty-three days of confinement for the forty-five days restriction he received from the nonjudicial punishment. An additional thirty days of confinement credit came from the forty-five days extra duty the accused had served. He also received credit for $914 of forfeitures and an additional $200 pay per month for the reduction in grade from the nonjudicial punishment. *Id.*

[112] *Id.* During the sentencing proceedings, the defense requested credit for the nonjudicial punishment. In response to the judge's inquiry, defense indicated it wanted the judge to apply the *Pierce* credit. The trial counsel then suggested the procedure used and the defense did not object. *Id.*

[113] 41 M.J. 833 (N.M.Ct.Crim.App.) (en banc), *pet. granted*, 43 M.J. 172 (1995).

[114] 5 M.J. 238 (C.M.A. 1977).

[115] *Id.* at 243.

[116] 114 S. Ct. 1921 (1994).

[117] *Id.* at 843. The Navy court conducted a detailed analysis of the underpinnings of *Booker* and then reviewed the changes in constitutional law since then. The court noted that in Scott v. Illinois, the Supreme Court held that a right to counsel did not exist for a misdemeanor conviction unless confinement was imposed. *Id.* (citing Scott v. Illinois, 440 U.S. 367 (1979)). The next year, however, the Court explained that although such an uncounseled misdemeanor conviction was constitutional, it could not be used as a previous conviction for purposes of sentence enhancement. Baldasar v. Illinois, 446 U.S 222 (1980). That same year the Court of Military Appeals decided United States v. Mack. 9 M.J. 300 (C.M.A. 1980). That case characterized the *Booker* rule as a means of enforcing the statutory right to refuse nonjudicial punishment, and dismissed any constitutional basis for the rule. 41 M.J. at 839 (citing United States v. Mack, 9 M.J. 300, 323 (C.M.A. 1980)). Finally, in *Nichols v. United States*, the Supreme Court overruled *Baldasar* and held that an uncounseled conviction could enhance the sentence for a later crime. 41 M.J. at 842 (quoting Nichols v. United States, 114 S.Ct. 1921, 1928 (1994)).

[118] 41 M.J. at 845.

[119] United States v. Lawer, 41 M.J. 751, 754 (C.G.Ct.Crim.App.) (Baum, C.J.), *pet. denied*, 43 M.J. 159 (1995). As far back as 1978, shortly after *Booker* was decided, Judge Baum criticized *Booker*. United States v. Nordstrom, 5 M.J. 528, 535 (N.C.M.R. 1978) (Baum, J., concurring). It is ironic that the *Kelley* court cited both Baum opinions as authority for the proposition that *Booker* has "engendered criticism." 41 M.J. at 838.

[120] *See* DEP'T OF ARMY, REG. 27-10, LEGAL SERVICES: MILITARY JUSTICE, para. 3-18c (8 Aug. 1994).

# Caveat Criminale: The Impact of the New Military Rules of Evidence in Sexual Offense and Child Molestation Cases

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## Introduction

The Federal Rules of Evidence turn twenty-one in July 1996,[1] and the Military Rules of Evidence celebrate their sixteenth birthday on 1 September 1996.[2] While the goals[3] of both sets of rules have largely been reached,[4] there remains some unpredictability as to their application at trial. One cause for this uncertainty is that several major rules require the trial judge to make ad hoc judgments, resulting in rulings which invariably change from case to case.[5] Congress responded to the concern that evidence "is whatever the judge says it is"[6] when it enacted the Violent Crime Control and Law Enforcement Act of 1994.[7] Heralded primarily as a bipartisan effort to "get tough on crime,"[8] the Act, in part,[9] renames and amends Federal Rule of Evidence 412[10] and adds three new Federal Rules of Evidence—413, 414, and 415.[11] Even though the Act specifically addressed the federal rules, these amendments have significant implications for the military practitioner. As a consequence of Military Rule of Evidence (MRE) 1102,[12] the amendments to Federal Rule of Evidence 412 have been part of the MREs since 29 May 1995 and Federal Rules of Evidence 413-415 since 6 January 1996.

In general terms, amended Rule 412 broadens the trial protections afforded victims of sexual misconduct, and Rules 413-

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[1] President Ford signed the Federal Rules of Evidence into law on 2 January 1975, as Pub. L. No. 93-595, 88 Stat. 1926, effective 180 days later. For an excellent review of the history of the codification movement which led to enactment of the Federal Rules of Evidence, *see* 21 CHARLES D. WRIGHT & KENNETH W. GRAHAM, JR., FEDERAL PRACTICE AND PROCEDURE: FEDERAL RULES OF EVIDENCE §§ 5001-5007 (1977).

[2] Exec. Order No. 12,198, 45 Fed. Reg. 16,932 (1980). This order was signed by President Carter on 12 March 1980, effective on 1 September 1980.

[3] The Rules were created, in part, to provide an easily accessible, compact body of evidentiary principles. By providing this instructional guide, uniformity, efficiency and clarity have been enhanced. STEPHEN A. SALTZBURG, MICHAEL M. MARTIN, & DANIEL J. CAPRA, FEDERAL RULES OF EVIDENCE MANUAL 4 (6th ed. 1994).

[4] Faust F. Rossi, *The Federal Rules of Evidence—Past, Present, and Future: A Twenty-Year Perspective*, 28 LOY. L.A. L. REV. 1271 (1995).

[5] David P. Leonard, *Foreword: Twenty Years of The Federal Rules of Evidence*, 28 LOY. L.A. L. REV., 1251, 1253 (1995).

[6] Rossi, *supra* note 4, at 1272.

[7] The Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, 108 Stat. 1796-2151 [hereinafter 1994 Crime Bill].

[8] *Symposium on the Violent Crime Control and Law Enforcement Act of 1994*, 20 U. DAYTON L. REV. 557 (1995).

[9] The 1994 Crime Bill also authorized billions of dollars for police, crime prevention, and prisons, contained a ban on so-called "assault weapons," included a federal "three-strikes-and-you're-out" provision, and added dozens of death penalty offenses.

Death penalty opponents, however, lost their bid to include the "Racial Justice Act" in the bill, which would have created substantial procedural obstacles to the imposition of capital punishment at both the federal and state levels. Bill McCollum, *The Struggle for Effective Anti-Crime Legislation-An Analysis of The Violent Crime Control and Law Enforcement Act of 1994*, 20 U. DAYTON L. REV. 561-565 (1995).

[10] FED. R. EVID. 412. Sex Offense Cases: Relevance of Alleged Victim's Past Sexual Behavior or Alleged Sexual Predisposition. 1994 Crime Bill, *supra* note 7, 108 Stat. at 1918-19, effective December 1, 1994. The complete text of amended Rule 412 appears in Appendix A.

[11] FED. R. EVID. 413. Evidence of Similar Crimes in Sexual Assault Cases; FED. R. EVID. 414. Evidence of Similar Crimes in Child Molestation Cases; and FED. R. EVID. 415. Evidence of Similar Acts in Civil Cases Concerning Sexual Assault or Child Molestation. 1994 Crime Bill, *supra* note 7, 108 Stat. at 2136-7. *See also* WEST'S FEDERAL REPORTER, THIRD SERIES, VOLUME 31, No. 1 starting at CCXXVIII (Oct. 1994).

[12] Amendments to the Federal Rules of Evidence automatically become part of the Military Rules of Evidence 180 days after the effective date of such amendments. MANUAL FOR COURTS-MARTIAL, United States, MIL. R. EVID. 1102 (1995 ed.) [hereinafter MCM]. As the military and federal versions of Rule 412 and 413-415 are currently identical, for simplicity, they will be referred to as "Rule" throughout the article.

415 liberalize the admissibility of propensity evidence in criminal and civil cases involving allegations of sexual assault and child molestation.[13] What follows is an overview of the potential impact these changes may have on courts-martial practice.[14]

## Changes to the Military Rules of Evidence

### *Rule 412*[15]

Rule 412 was not part of the original Federal Rules of Evidence promulgated in 1975. Rather, it was enacted three years later as part of the Privacy Protection for Rape Victims Act of 1978[16] in an attempt to protect rape victims from the degrading and embarrassing disclosure of intimate details about their private lives and to encourage reporting of sexual assault offenses. To achieve these goals, except under specified, limited circumstances, Rule 412 prohibited the defense from offering reputation, opinion or specific acts evidence concerning a victim's sexual behavior. However, despite existence of the rule, in practice, victims of rape were still being humiliated and harassed when they reported a sexual assault and then bullied and cross-examined about their prior sexual experiences in court. This was certainly not the intent of the drafters. As such, Rule 412 was amended as part of the 1994 Crime Bill to reduce confusion[17] which existed in the old rule[18] as well as to afford more substantive protections to victims of sexual assault.[19] The changes to Rule 412, expected to provide victims with greater encouragement to report sexual misconduct and to participate in subsequent legal proceedings against the alleged offenders,[20] are discussed below.[21]

*Scope.* The scope of the amended rule is intended to be much broader than the old rule.[22] The old rule was limited to cases in which a person was "accused of a nonconsensual sexual offense;"[23] in other words, a soldier had to be charged with a nonconsensual sex crime such as rape. As amended, Rule 412 is not limited to nonconsensual sexual offenses and now applies, in part, to criminal proceedings "*involving alleged sexual misconduct.*"[24] Clearly, this applies to charges alleging rape and forcible sodomy. However, the breadth of the amended rule seems to also cover offenses in which lack of consent is not an element of the offense

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[13] Rule 413, "Evidence of Similar Crimes in Sexual Assault Cases," is as follows:

(a) In a criminal case in which the defendant is accused of an offense of sexual assault, evidence of the defendant's commission of another offense or offenses of sexual assault is admissible, and may be considered for its bearing on any matter to which it is relevant.

(b) In a case in which the Government intends to offer evidence under this rule, the attorney for the Government shall disclose the evidence to the defendant, including statements of witnesses or a summary of the substance of any testimony that is expected to be offered, at least fifteen days before the scheduled date of trial or at such later time as the court may allow for good cause.

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

(d) defines "offenses of sexual assault"].

1994 Crime Bill, *supra* note 7, 108 Stat. at 2136. Rule 414 is substantially the same, except the words "child molestation" are substituted for the words "sexual assault." *Id.* Rule 415 extends to civil cases the same rule of broadened admissibility of sexual assault and child molestation evidence. *Id.* at 2137. The full texts of the new rules are included in Appendices B, C, and D, respectively, and can also be found in SALTZBURG ET AL, *supra* note 3, at 575-84.

[14] Unfortunately, time and a lack of judicial precedent discourage a more detailed analysis of the new rules. *See also* Lee D. Schinasi, *The Military Rules of Evidence: An Advocate's Tool*, ARMY LAW., May 1980, at 3.

[15] MCM, *supra* note 12, MIL. R. EVID. 412. The 1995 edition of the *Manual* inadvertently excluded several references to civil proceedings, which were part of the 1994 Crime Bill amendments and included in the Federal version of the rule. FED. R. EVID. 412(b)(2).

[16] Privacy Protection for Rape Victims Act, Pub. L. No. 95-540, 92 Stat. 2046 (1978).

[17] Clifford S. Fishman, *Consent, Credibility, and The Constitution: Evidence Relating to A Sex Offense Complainant's Past Sexual Behavior*, 44 CATH. U. L. REV. 709, 816 n.439 (1995).

[18] MCM, *supra* note 12, MIL. R. EVID. 412 (1994 ed.) (current version is MIL. R. EVID. 412 (1995 ed.)).

[19] Paul Nicholas Monnin, Note, *Proving Welcomeness: The Admissibility of Evidence of Sexual History in Sexual Harassment Claims under the 1994 Amendments to Federal Rule of Evidence 412*, 48 VAND. L. REV. 1155, 1169-71 (1995).

[20] *See* FED. R. EVID. 412 advisory committee note (1994).

[21] While not intended as a substitute for a careful reading of the amended rule, a comparison of the old and new rules is included with this article at Appendix E.

[22] *Supra* note 20.

[23] MCM, *supra* note 12, MIL. R. EVID. 412(a) (1994 ed.).

[24] *Id.* (1995 ed.).

such as carnal knowledge, indecent acts, consensual sodomy, and cruelty and maltreatment in the form of sexual harassment.[25] Additionally, consistent with the old rule, the amended rule bars the introduction in criminal proceedings of evidence relating to an alleged victim's sexual behavior.[26] Unlike the old rule, the amended rule now addresses use of such evidence in civil proceedings.[27]

*Definition of Victim.* As the legislative history clarifies, Rule 412 applies whether or not an alleged victim is named in the charges.[28] Rule 412 now extends to witnesses who testify about other instances of sexual conduct by the accused such as the issues of intent, absence of mistake, motive, identity, and other similar non-character theories of relevance.[29]

*Types of Behavior Covered.* The old versions of Rule 412(a) and (b) prohibited introduction of specific acts of a victim's *past* sexual behavior.[30] The word "past" has been deleted in the body of the amended Rules, contemplating protection of a victim's post-offense conduct.[31]

*Sexual Predisposition.* The new rules specifically bar evidence of the victim's sexual predisposition.[32] This addition is designed to widen the scope of sexual history covered by Rule 412 and to exclude sexual behavior and conduct implying sexual intercourse or contact.[33]

*Notice.* The old rule required that notice, either written or oral, be served on the military judge and trial counsel.[34] However, there was no specific time when this notice had to occur. Under the amended rule, a written motion must be served on all parties at least fourteen days before trial.[35] Additionally, a party intending to offer sexual history evidence must now specifically notify the alleged victim of the evidence; no such requirement existed under the old rule.

*Hearing.* Under the old rule, assuming sufficiency of the proponent's proffer, the military judge was required to conduct a hearing at an article 39(a) session[36] to determine admissibility of the Rule 412 evidence.[37] Under the amended rule, the military

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[25] An argument can be made that the accused does not have to even be charged with a sexual assault for Rule 412 to apply. Envision a situation where a soldier's motive in kidnapping a woman is to rape her but who voluntarily abandons his criminal endeavor before the actual assault occurs, not proceeding far enough to be charged with attempted rape. If the soldier were charged only with kidnapping, a victim would not have been protected under old Rule 412 although evidence of past sexual behavior may have been excluded under Rules 401 or 403. Trial counsel can now argue the victim is protected under the new rule because the proceedings "involve sexual misconduct"—the rape constituting the underlying basis for the kidnapping. *See, e.g.*, United States v. Galloway, 937 F.2d 542 (10th Cir. 1991).

[26] MCM, *supra* note 12, MIL. R. EVID. 412(a)(1) (1995 ed.).

[27] As the civil proceedings contemplated in MRE 412(a) and (c) are alien to the military justice system, this article will limit its discussion to the effect of the new rules on courts-martial practice. *Id.* 412(a), (c).

[28] The terminology "alleged victim" does not connote a requirement that the misconduct be actually pled in the charge and specification. FED. R. EVID. 412 advisory committee's note.

[29] MCM, *supra* note 12, MIL. R. EVID. 404(b) (1995 ed.).

[30] The old version of Rule 412 reads as follows:

> (a) Notwithstanding any other provision of these rules or this Manual, in a case in which a person is accused of a nonconsensual sexual offense, reputation or opinion evidence of the past sexual behavior of an alleged victim of such nonconsensual sexual offense is not admissible.
>
> (b) Notwithstanding any other provision of these rules or this Manual, in a case in which a person is accused of a nonconsensual sexual offense, evidence of a victim's past sexual behavior other than reputation or opinion evidence is also not admissible, . . ..

*Id.* MIL. R. EVID. 412(a) (1994 ed.).

[31] *Id.* MIL. R. EVID. 412(a)(1)-(2) (1995 ed.).

[32] Rule 412(a)(2) reads thusly:

> (a) Evidence generally inadmissible.
>
> (2)Evidence offered to prove any alleged victim's sexual predisposition.

*Id.* MIL. R. EVID. 412(a)(2) (1995 ed.).

[33] Although the rule fails to define or give examples of "evidence . . . of sexual predisposition," it would logically include evidence of the victim's brazen behavior, wearing of provocative clothing, working as a stripper, presence of venereal disease, birth of an illegitimate child, and use of contraceptives. *See, e.g.*, United States v. Greaves, 40 M.J. 432 (C.M.A. 1994) (military judge properly prevented accused from testifying that he knew victim was a hostess at a Japanese bar and dressed provocatively).

[34] MCM, *supra* note 12, MIL. R. EVID. 412(c)(1) (1994 ed.).

[35] *Id.* MIL. R. EVID. 412(c)(1)(A) (1995 ed.).

[36] The military judge had the discretion whether or not to close this article 39(a) session. *Id.* MIL. R. EVID. 412(c)(2) (1994 ed.).

[37] STEPHEN A. SALTZBURG, LEE D. SCHINASI, & DAVID A. SCHLUETER, MILITARY RULES OF EVIDENCE MANUAL 523 (3d ed. 1991).

judge is now required to hold an *in camera* hearing[38] before admitting evidence, which, by its very nature, is closed. As such, it appears the military judge has lost the discretion he or she exercised under the old rule to have this hearing open. The amended rule also now gives the alleged victim the right to attend the hearing and to be heard on the issue of admissibility;[39] a right which did not exist under the old rule.

*Trial Counsel Introduction.* One of the exceptions to the general prohibition on the introduction of a victim's sexual history is when it is offered on the issue of consent. Under the old rule, evidence of past sexual behavior was only admissible if offered by the accused to prove consent;[40] the trial counsel was generally precluded from introducing such evidence in its case-in-chief to show lack of consent. The amended rule now allows both the defense and the prosecution to introduce specific instances of sexual behavior by the alleged victim.[41] This change allows trial counsel to introduce 412 evidence to demonstrate lack of consent or, pursuant to MRE 404(b), to show a pattern of behavior.[42]

*Balancing Test.* While generally intended to protect victims and to help the government, the amendments to Rule 412 arguably give an advantage to the defense. The new balancing test applied by the courts in determining whether to admit sexual behavior or disposition testimony in a criminal case now favors the party introducing the evidence.

Under the old rule, if the military judge determined the evidence was relevant and the probative value outweighed the danger of unfair prejudice, such evidence was admissible.[43] This was not a MRE 403 balancing test and was essentially a rule of exclusion. Under this rule, there was a presumption the evidence was not admissible, and the burden was on the defense as the proponent of the evidence to show why it was admissible.

Under the amended rule, there is a heightened exclusionary balancing test for civil cases[44] but not one for criminal cases. The rule simply provides, "in a criminal case, the following evidence is admissible, if otherwise admissible under these rules."[45] Use of this particular terminology leads the military judge to apply a MRE 403 balancing test; relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues or misleading to the members.[46] Under this test, a strong presumption of admissibility exists, and the burden is on the opponent of the evidence to show why the evidence is inadmissible.[47]

*Intrinsic Acts Evidence.* Another possible advantage for the defense is the type of conduct to which the rule applies. As amended, Rule 412 bars evidence offered to prove a victim's "other sexual behavior."[48] Use of the word "other" suggests some flexibility in admitting evidence intrinsic to the charged offenses; evidence which, under the old rules, would have been excluded;

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[38] At the hearing, the parties can call witnesses and offer other relevant evidence. The record of the hearing must be sealed and remain under seal unless the court orders otherwise. MCM, *supra* note 12, MIL. R. EVID. 412(c)(2) (1995 ed.).

[39] *Id.*

[40] The old rule permitted evidence of a victim's past sexual behavior if it was past sexual behavior with the accused and was offered *by the accused* upon the issue of whether the alleged victim consented to the sexual behavior (emphasis added). *Id.* MIL. R. EVID. 412(b)(2)(B) (1994 ed.).

[41] Rule 412(b) reads in pertinent part:

(b) Exceptions.

(1) In a criminal case, the following evidence is admissible, if otherwise admissible under these rules:

(B) evidence of specific instances of sexual behavior by the alleged victim with respect to the person accused of the sexual misconduct offered by the accused to prove consent *or by the prosecution* (emphasis added).

*Id.* MIL. R. EVID. 412(b)(1)(B) (1995 ed.).

[42] For example, if a trial counsel has evidence that the victim rebuffed the accused's advances three times in the week before the rape, this would be relevant on the issue of consent or to a mistake of fact defense. Under the amended rule, the prosecution may be able to introduce such evidence in its case-in-chief.

[43] MCM, *supra* note 12, MIL. R. EVID. 412(c)(3) (1994 ed.).

[44] In a civil case, evidence offered to prove the sexual behavior or sexual predisposition of any alleged victim is admissible if its probative value substantially outweighs the danger of harm to the victim and unfair prejudice to any party. *Id.* MIL. R. EVID. 412(b)(2) (1995 ed.).

[45] *Id.* MIL. R. EVID. 412(b)(1) (1995 ed.).

[46] *Id.* MIL. R. EVID. 403 (1995 ed.).

[47] In summary, under the old rule, there was a presumption of exclusion. Rule 412 evidence was admitted only if its probative value outweighed its prejudicial effect, and the burden was on the defense to prove admissibility. A presumption of admission now exists under the amended rule. Rule 412 evidence is excluded only if its probative value is substantially outweighed by its prejudicial effect, and the burden is on the trial counsel to show why such evidence is not admissible.

[48] MCM, *supra* note 12, MIL. R. EVID. 412(a)(1) (1995 ed.).

for example, the victim lap dancing on the accused prior to the rape.[49]

*Joint Service Committee Changes.* The Joint Service Committee on Military Justice (JSC)[50] has proposed several changes to Rule 412.[51] Consistent with Article 36, UCMJ,[52] most are minor;[53] except, consistent with the old rule,[54] the protections of the proposed rule would only apply to cases where the accused is charged with a nonconsensual offense.[55] However, until action on the proposed rules is taken by the President, the version enacted as part of the 1994 Crime Bill, included at Appendix A, applies to military practice.

### *Rules 413-415*[56]

American jurisprudence is grounded in the theory that courts try cases rather than persons.[57] As such, the Federal and Military Rules of Evidence have generally prohibited the introduction of character and bad acts evidence against an accused if offered strictly to prove he or she is a bad person[58] and is just the type of soldier who would commit the charged offenses.[59]

However, the three new rules make it easier for trial counsel in sexual offense and child molestation cases to introduce evidence of an accused's prior sexual history solely to demonstrate that he or she has the propensity or disposition to commit that sort of act.[60] At a minimum, the general prohibition against the use of character evidence appears to be superseded in this context.[61] At a maximum, the new rules have completely altered the trial practice landscape. While it is unclear whether the rules will be the panacea intended,[62] even a cursory reading should give trial and defense practitioners pause to consider just how courts-martial practice will be affected. Some of the potential problems with the new rules are discussed below.[63]

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[49] *Cf.* Committee Note to 1991 Amendment to FED. R. EVID. 404(b).

[50] The JSC is comprised of representatives from the Army, Navy, Air Force, Marines, Coast Guard and the Court of Appeals for the Armed Forces. One of Committee's stated purposes is to ensure the *Manual* "reflects current military practice and judicial precedent." *See* DEP'T OF DEFENSE DIRECTIVE 5500.17, REVIEW OF MANUAL FOR COURTS-MARTIAL, para.D.1.b. (Jan. 23, 1985). In furtherance of this goal, the JSC suggests revisions to the *Manual*, staffs proposed changes through the executive branch for detailed review, and eventually forwards them to the White House for action. For a detailed explanation of the JSC, *see* Criminal Law Div., Note, *Amending the Manual for Courts-Martial*, ARMY LAW., Apr. 1992, at 78.

[51] PROP. MIL. R. EVID. 412, 60 Fed. Reg. 5656-58 (1995).

[52] While Congress has granted the President the authority to prescribe pretrial, trial and post-trial procedures for courts-martial practice, such regulations must be consistent with the principles of law and rules of evidence generally recognized in the trial of criminal cases in the United States district courts. UCMJ, art. 36 (1988). As such, although the JSC would like to propose more substantive changes, they cannot deviate too far from the version of Rule 412 as drafted and approved by Congress.

[53] These proposals include deleting references to civil proceedings; reducing fourteen days notice to five days; substituting "notice and an opportunity to be heard" for a "right" to be heard on the issue of admissibility; and substituting a "closed Article 39(a) hearing" for the *in camera* hearing.

[54] MCM, *supra* note 12, MIL. R. EVID. 412(a) (1994 ed.).

[55] *Supra* note 51, at 5657.

[56] MCM, *supra* note 12, *changed by* MIL. R. EVID. 413, 414 and 415 (Jan. 6, 1996). The complete texts of the new rules are included at Appendices B, C, and D to this article.

[57] Daniel J. Buzzetta, Note, *Balancing the Scales: Limiting the Prejudicial Effect of Evidence Rule 404(b) Through Stipulation*, 21 FORDHAM URB. L.J. 389 (1994).

[58] Rule 404(a) provides that evidence of a person's character or trait of character is not admissible for the purpose of proving that the person acted in conformity therewith on a particular occasion. MCM, *supra* note 12, MIL. R. EVID. 404(a). The usual application of Rule 404(b)'s "other acts . . . other purposes" language also precludes prosecutorial use of the accused's uncharged acts to prove character. *Id.* MIL. R. EVID. 404(b) ("evidence of other crimes, wrongs or acts is not admissible to prove character . . .. It may, however, be admissible for other purposes . . .").

[59] *Id.* MIL. R. EVID. 404(b). *See* Thomas J. Reed, *Reading Gaol Revisited: Admission of Uncharged Misconduct Evidence in Sex Offense Cases*, 20 AM. J. CRIM. L. 127 (1993). The authorized uses of specific instances of conduct in Rule 404(b) are for purposes other than showing action in conformity with a particular character trait.

[60] Paul Rothstein, *Intellectual Coherence In An Evidence Code*, 28 LOY. L.A. L. REV., 1259, 1260 (1995). By propensity, I mean evidence offered to show the accused committed certain offenses in the past, thus has a disposition to commit such offenses, and therefore is more likely to have committed a similar offense on the occasion at issue. James S. Liebman, *Proposed Evidence Rules 413 to 415—Some Problems and Recommendations*, 20 U. DAYTON L. R. 753, 754 (1995).

[61] James J. Duane, *The New Federal Rules of Evidence On Prior Acts Of Accused Sex Offenders: A Poorly Drafted Version of a Very Bad Idea*, 157 F.R.D. 95 (1994). *See also* 140 CONG. REC. S12,990 (Sept. 20, 1994) (remarks by Sen. Dole)("The new rules will supersede in sex offense cases the restrictive aspects of Federal Rule of Evidence 404(b)").

[62] The rationale for the proposed rules is demonstrated by the comments of Representative Susan Molinari (R-NY), who was responsible for inclusion of these rules in the 1994 Crime Bill:

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

140 CONG. REC. H2433 (Apr. 19, 1994) (statement of Rep. Molinari).

[63] For an excellent analysis of the numerous ambiguities in and problems caused by the new rules, *see* David P. Leonard, *The Political Process*, 22 FORDHAM URB. L.J. 305, 333-42 (1995).

*Use of Character Evidence.* The new rules provide that when the accused is charged with an offense of sexual assault or child molestation, evidence of his commission of another sexual assault or child molestation offense is admissible.[64] It is unclear from the sparse legislative history whether the type of evidence referred to in the rules includes character evidence.[65] If it does not, then trial counsel will be limited to direct evidence of the prior assault or molestation.[66] If character evidence is included, this could result in trial counsel's offering testimony concerning the accused's reputation for sexual aggressiveness and opinion testimony that he or she is a sexual predator, introduced as substantive evidence of the accused's propensity to commit the charged criminal act.

This is not a strained interpretation of the new rules. The Act's legislative history indicates that the language used, by design, authorizes "proof of a defendant's character or propensity towards sexual violence."[67] As such, it appears trial counsel are not limited to direct evidence of the prior act. This conceivably will allow a witness who did not see the accused commit the charged sexual offense or molestation, but who has heard that the accused has the reputation for such acts, to testify accordingly.[68]

*Effect of Existing Evidentiary Restrictions.* Military Rule of Evidence 402 provides that all relevant evidence is admissible unless some specific rule provides otherwise.[69] Military Rules of Evidence 413-414 now provide that evidence of a defendant's prior sexual history is admissible and may be considered for its bearing on any matter to which it is relevant,[70] without adding any limiting language such as "if otherwise admissible under these rules."[71] Given a literal interpretation, the new rules appear to override existing restrictions on the admissibility of evidence and appear to allow otherwise inadmissible opinion testimony,[72] hearsay[73] and unauthenticated[74] evidence.[75]

*No Logical Relevance.* The new rules lack any temporal restriction or requirement of similarity between the uncharged act and the charged offense. This could potentially lead to one of the more significant abuses of the new rules—use of unsubstantiated, stale, and possibly false allegations as a basis for the implication that an accused has a propensity to commit crimes (or a certain type of crime) and, therefore, is guilty of the offense charged.[76]

*Mode of Proof.* Military Rule of Evidence 405 provides that character evidence is generally admissible only in the form of opinion and reputation testimony.[77] Trial counsel cannot typically introduce specific acts of uncharged misconduct in the government's case-in-chief but can only do so on cross-examination to test the foundation of a defense character witness. Further, trial counsel are stuck with the witness's response; no extrinsic evidence of the prior acts is allowed. Under the new rules, however, trial counsel can offer reputation and opinion testimony

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[64] MCM, *supra* note 12, *changed by* MIL. R. EVID. 413(a) and 414(a).

[65] In situations where character evidence is allowed, reputation and opinion testimony is admissible. *Id.* MIL. R. EVID. 405(a).

[66] This could include such evidence as an arrest report, a record of conviction, or direct testimony by the alleged victim of the prior act.

[67] The new rules state that evidence may be considered for its bearing on any matter to which it is relevant. This language was intended primarily to include evidence of "the defendant's propensity to commit sexual assault or child molestation offenses." 140 CONG. REC. H8968-01, H8991 (Aug. 21, 1994) (remarks of Rep. Molinari).

[68] *Report of Judicial Conference on Admission of Character Evidence in Certain Sexual Misconduct Cases*, 56 CRIM. L. REP. (BNA) 2139 (Feb. 15, 1994). Of course, trial counsel will still have to satisfy the normal foundational requirements for opinion and reputation testimony offered under Rule 405(a). *See, e.g.*, United States v. McClure, 29 C.M.R. 368 (1960)(foundation for admission of opinion testimony) and United States v. Tomchek, 4 M.J. 66 (C.M.A. 1977)(foundation for admission of reputation testimony).

[69] MCM, *supra* note 12, MIL. R. EVID. 402.

[70] *Id. changed by* MIL. R. EVID. 413(a) and 414(a) (Jan. 6, 1996).

[71] Contrast the "is admissible" language used in Rules 413-414 with Rule 404(b), which states that evidence "may be admissible." *Id.* MIL. R. EVID. 404(b).

[72] *Cf. id.* MIL. R. EVID. 701 (generally excluding lay opinion testimony).

[73] *Cf. id.* MIL. R. EVID. 802 (generally excluding hearsay evidence). Further, Rule 802 says hearsay is not admissible, "except as provided by these rules or an Act of Congress." *Id.* Trial counsel can now argue that Rules 413 and 414 are part of "these rules," and the 1994 Crime Bill constitutes "an Act of Congress." However, even if the hearsay rules apply, a recognized exception already exists concerning reputation of a person's character among the person's associates or in the community. *Id.* MIL. R. EVID. 803(21).

[74] *Cf. id.* MIL. R. EVID. 901 (generally requiring authentication of evidence as a condition precedent to admissibility).

[75] Will trial counsel be able to call a military policeman to testify about what the victim told him? What about expert testimony concerning pedophile profiles or battering parent profiles? Can a witness testify that she looked at the accused's rap sheet, and it reflected several prior arrests of sexual misconduct? Taking an expansive interpretation of "evidence is admissible," all seem allowed under the new rules without regard to existing evidentiary restrictions.

[76] An allegation of rape may be fabricated to account for an unwanted pregnancy or explain an otherwise unexplainable illicit sexual contact. Duane, *supra* note 61, at 109 n.74. *Cf. Genesis* 39:7-18.

[77] MCM, *supra* note 12, MIL. R. EVID. 405.

as well as evidence of specific acts of misconduct by the accused during the government's case-in-chief. Trial counsel can offer this testimony as substantive evidence on the issue of guilt and without using it for impeachment of a defense character witness.

*Limiting Instruction.* Military Rule of Evidence 404(b) prohibits the use of specific bad acts evidence to prove that a person acted in conformity with a character trait but stipulates that such acts "may be admissible for other purposes."[78] As the court-martial panel was limited to the purposes for which they could consider such evidence, the defense was entitled to a limiting instruction.[79] The new rules provide that specific bad acts evidence may be considered for its bearing on any matter to which it is relevant.[80] Unlike evidence offered under MRE 404(b), there is no risk evidence offered under MREs 413-414 will be considered for a prohibited purpose, since the only limitation on the admissibility of that evidence is a relevancy restriction. As evidence of a propensity to commit the charged offense is now always relevant,[81] the new rules seem to allow the panel to use this evidence as it sees fit and correspondingly limits the military judge from telling them otherwise.[82]

*Accused's Use of Rebuttal Evidence.* Trial counsel can now offer evidence of an accused's propensity to commit sexual assault, but defense counsel are still prohibited from introducing evidence of a victim's propensity to engage in consensual sexual intercourse.[83] While trial counsel can now offer specific acts of sexual aggressiveness or violence, the defense still cannot offer specific acts of peaceful or virtuous conduct as MRE 405(b) only allows reputation or opinion testimony of specific character traits.[84] It seems inconsistent to allow trial counsel to now offer evidence of the accused's history of sexual assault with others as substantive proof of rape but preclude the defense from introducing evidence of a victim's prior history of consent with others to show consent.[85]

*Application of MRE 403.* The new rules provide that evidence of the accused's commission of other offenses of sexual assault or child molestation is "admissible and may be considered on any matter to which it is relevant,"[86] to include a propensity to commit the charged offense. It is unclear, however, whether the military judge retains the discretion under the new rules to exclude otherwise relevant sexual assault and molestation evidence whose probative value may be outweighed by the danger of undue prejudice.[87] While other rules provide for such balancing tests,[88] the new rules contain neither mandatory language nor a special balancing test. Given that the new rules simply state that "evidence is admissible," the military judge's authority to apply MRE 403 may be limited.

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[78] The purposes for which a trial counsel can introduce evidence of other crimes, wrongs or acts of the accused include proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. *Id.* MIL. R. EVID. 404(b).

[79] Rule 105 states:

> When evidence which is admissible as to one party or for one purpose but not admissible as to another party or for another purpose is admitted, the military judge, upon request, shall restrict the evidence to its proper scope and instruct the members accordingly.

*Id.* MIL. R. EVID. 105.

[80] *Id. changed by* MIL. R. EVID. 413(a) and 414(a) (Jan. 6, 1996).

[81] Evidence supporting an inference that a person has a propensity to act in a certain way is relevant when offered to show that the person in fact acted in that way on a particular occasion. People v. Zachowitz, 172 N.E. 466, 468 (N.Y. 1930) ("there may be cogency in the argument that a quarrelsome defendant is more likely to start a quarrel"). Michelson v. United States, 335 U.S. 469, 475 (1948)(character evidence might "logically be persuasive that [a defendant] is by propensity a probable perpetrator of the crime"). As a policy matter, character and uncharged misconduct evidence have been excluded because of the fear the accused would be unduly prejudiced by its introduction, not because it was logically irrelevant.

[82] Duane, *supra* note 61, at 117.

[83] MCM, *supra* note 12, MIL. R. EVID. 412.

[84] *Id.* MIL. R. EVID. 405(b).

[85] Roger C. Park, *The Crime Bill of 1994 and the Law of Character Evidence: Congress Was Right About Consent Defense Cases*, 22 FORDHAM URB. L.J. 271, 277 (1995).

[86] MCM, *supra* note 12, *changed by* MIL. R. EVID. 413(a) and 414(a) (Jan. 6, 1996).

[87] *Id.* MIL. R. EVID. 403.

[88] For example, evidence of crimes of dishonesty or false statement "shall be admitted." *Id.* MIL. R. EVID. 609(a)(2). A conviction of the accused "shall be admitted" if the military judge determines its probative value outweighs its prejudicial effect. *Id.* MIL. R. EVID. 609(a)(1). Even rule 412 now has a special balancing test for use in civil cases. *Id.* MIL. R. EVID. 412(b)(2). In addition, while uncharged misconduct evidence is not admissible to prove the character of a person, it "may, however, be admissible for other purposes . . .." *Id.* MIL. R. EVID. 404(b).

The argument against application of MRE 403 is simple. The amendments to Rule 412 were part of the same 1994 Crime Bill.[89] Those amendments provided for a balancing test in Rule 412(c) for civil cases and for criminal cases, stating evidence of sexual behavior "is admissible if otherwise admissible under these rules."[90] If Congress intended a balancing test in Rules 413-414, they certainly could have and would have provided for one.

The argument for application is even simpler—the legislative history says MRE 403 was intended to apply.[91] Further, MRE 403 cuts across other existing rules without specific mention; this case should be no different. The government response, however, is equally compelling: An Act's legislative history is irrelevant to interpretation of an unambiguous statute,[92] and the 1994 Crime Bill is not ambiguous.

The cautious approach in this area should be that evidence admissible pursuant to these new rules remains subject to the court's authority to exclude it if its probative value is substantially outweighed by the danger of unfair prejudice. Defense counsel would be advised to raise an MRE 403 objection in every case in which the government offers evidence of bad acts under MREs 413 and 414. That said, it is not expected that evidence admissible under the new rules will often be excluded on the basis of MRE 403. The presumption is in favor of admission. The underlying legislative judgment is that the sort of evidence that is admissible pursuant to MREs 413 and 414 is typically relevant and probative, and its probative value will normally not be outweighed by the danger or risk of prejudice.[93]

*Violation of Due Process.* The new rules allow trial counsel to present evidence and argue that "he must have committed this rape because we know he committed a rape five years ago." Once done, the defense is essentially forced to prove no propensity or disposition to rape [or molest children]. Propensity evidence effectively shifts the burden of proof and undermines the constitutional guarantees of Due Process. The unrestricted admission of propensity evidence arguably eviscerate's an accused's presumption of innocence.[94]

## Conclusion

In enacting Federal Rules of Evidence 413-415, putatively permitting the government to introduce repugnant and explosive bad acts and propensity testimony for purposes heretofore forbidden, Congress has fundamentally changed the structure of evidentiary law. The use of such evidence can have a powerful effect in child abuse and sexual assault cases,[95] and the new rules certainly go far in reflecting the belief held by many that persons who commit perverted acts are deviant and recidivist by nature and have immutable character traits.[96] Indeed, efforts to restrict the admission of prior bad acts and propensity testimony appear to have been repudiated in this regard. Military Rules of Evidence 413-415 now render admissible what was excludable—character evidence in the form of specific acts to prove the particular character trait of sexual deviancy. This is character evidence introduced to prove that it is more likely that the accused committed the offense in question, which is precisely the inference forbidden by a long tradition of evidence law.[97]

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[89] 1994 Crime Bill, *supra* note 7, 108 Stat. at 1918-19.

[90] MCM, *supra* note 12, MIL. R. EVID. 412(b)(1).

[91] 140 CONG. REC. S12,990-01 (Sept. 20, 1994) (remarks of Sen. Dole) ("The general standards of the rules of evidence will continue to apply, including . . . the court's authority under evidence rule 403 to exclude evidence whose probative value is substantially outweighed by its prejudicial effect"). *See also* 140 CONG. REC. H5437-03, at H5437 (Jun. 29, 1994)(remarks of Rep. Molinari) ("This [new rule] allows, it does not mandate, a judge's discretion . . . when he or she thinks that the cases are similar and relevant enough to introduce prior evidence of [past convictions]."

[92] *See, e.g.*, Davis v. Michigan Dep't of Treasury, 489 U.S. 803, 808 n.2 (1989).

[93] 140 CONG. REC. H2415-04, at H2433 (Apr. 19, 1994) (remarks of Rep. Molinari).

[94] A number of courts have inferred that admission of propensity evidence may violate the Due Process Clause of the Fourteenth Amendment. U.S. CONST. amend. XIV, § 1. In *Spencer v. Texas*, 385 U.S. 554 (1967), four dissenting justices agreed that "evidence of prior crimes introduced for no purpose other than to show criminal disposition would violate the Due Process Clause." *Id.* at 574. The Supreme Court has recently indicated that this issue remains an open one. Estelle v. McGuire, 502 U.S. 62,75 n.5 (1991) (O'Connor, J., concurring in part, dissenting in part). *See also* McKinney v. Rees, 993 F.2d 1378, 1384-86 (9th Cir.), *cert. denied*, 114 S. Ct. 622 (1993); Stidum v. Trickey, 881 F.2d 582, 583-4 (8th Cir. 1989), *cert. denied*, 493 U.S. 1087 (1990).

[95] "It was tragic. The defendant had, on several prior occasions, taken up with divorced women so he could have access to their children. He had sexually abused four other children before this little girl. The government either couldn't or didn't introduce any of this prior conduct at the defendant's trial. The jury acquitted. When some of the jurors subsequently found out about the prior incidents, they were furious. 'If only we'd known about them, we'd have convicted the guy!'" Chris Hutton, *Commentary: Prior Bad Acts Evidence in Cases of Sexual Contact With a Child*, 34 S.D. L. REV. 604, 605 (1989).

[96] *See generally* EDWARD IMWINKELRIED, UNCHARGED MISCONDUCT EVIDENCE § 4.14, at 31 (1984 & 1995 supp.).

[97] Leonard, *supra* note 63, at 335.

As discussed, the new rules, and to a lesser extent the amendments to MRE 412, raise significant unanswered questions concerning their scope and applicability to military trial practice. A close examination of the new rules raises troubling concerns. Will such evidence be admitted too liberally in sexual assault and child molestation cases? Will panel members interpret the prior bad acts evidence as conclusive proof, to the absence of all other testimony, that the accused has a propensity to commit sex crimes or molest children, and therefore, he must have committed the crimes for which he is on trial? At this point, one can only guess the answers and how tangible an effect the new rules[98] will have on courts-martial practice. While Congress has given the government new and more powerful evidentiary weapons to use in its continuing fight against sexual abuse and molestation, it is the judiciary's responsibility to decide just how fair that fight will be.[99]

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[98] The JSC has proposed several amendments to the new rules. These proposals include: (1) deleting references to Rule 415, (2) substituting military justice terminology throughout the rule, (3) replacing the fifteen day notice requirement with a five day notice requirement, and (4) adding the phrase "without consent" to MRE 413(d)(1) in order to exclude use of prior acts of adultery and consensual sodomy.

PROP. MIL. R. EVID. 413-414, 60 Fed. Reg. 51,988-90 (1995).

[99] For example, consider the case of *United States v. Hebert*, 35 M.J. 266 (C.M.A. 1992). The accused in *Hebert* was charged with sodomy of his adolescent stepson. At trial, the military judge admitted testimony concerning the accused's fondling and sodomy of two nephews several years earlier to show a state of mind. The Court of Military Appeals noted no specific intent was required to prove sodomy but held admission of the uncharged misconduct was harmless error. Under the new rules, trial counsel no longer have to pigeonhole the evidence within MRE 404(b) in cases where an accused is charged with sexual assault or child molestation. The sometimes tortured efforts of trial counsel to articulate a noncharacter theory of relevance of bad acts evidence would appear to be superfluous. Evidence formerly introduced as other acts evidence under MRE 404(b) now appears to be admissible under Rules 413 or 414 on the issue of the accused's propensity to commit the charged offense. As propensity to commit the charged offense is always relevant, the court's harmless error analysis would seem unnecessary in this area. However, a good rule of thumb for practitioners is to always try to have more than one theory of admissibility. In this regard, trial counsel would do well not to be too aggressive in using the new rules. Until the ramifications of Rules 413 and 414 are more clearly understood, it may be better practice to continue using MRE 404(b) as the primary basis to admit bad acts evidence and rely on the new rules only when such evidence would be otherwise excluded by the military judge. An ounce of prevention at trial may prevent a case from being pounded on appeal.

# Appendix A

**Rule 412. Sex Offense Cases; Relevance of Alleged Victim's Past Sexual Behavior or Alleged Sexual Predisposition.**

(a) *Evidence generally inadmissible.* The following evidence is not admissible in any civil or criminal proceeding involving alleged sexual misconduct except as provided in subdivisions (b) and (c):

(1) Evidence offered to prove that any alleged victim engaged in other sexual behavior.

(2) Evidence offered to prove any alleged victim's sexual predisposition.

(b) *Exceptions.*

(1) In a criminal case, the following evidence is admissible, if otherwise admissible under these rules:

(A) evidence of specific instances of sexual behavior by the alleged victim offered to prove that a person other than the accused was the source of semen, injury, or other physical evidence;

(B) evidence of specific instances of sexual behavior by the alleged victim with respect to the person acccused of the sexual misconduct offered by the accused to prove consent or by the prosecution; and

(C) evidence the exclusion of which would violate the constitutional rights of the defendant.

(2) In a civil case, evidence offered to prove the sexual behavior or sexual predisposition of any alleged victim is admissible if it is otherwise admissible under these rules and its probative value substantially outweighs the danger of harm to any victim and of unfair prejudice to any party. Evidence of an alleged victim's reputation is admissible only if it has been placed in controversy by the alleged victim.

(c) *Procedure to determine admissibility.*

(1) A party intending to offer evidence under subdivision (b) must—

(A) file a written motion at least 14 days before trial specifically describing the evidence and stating the purpose for which it is offered unless the court, for good cause, requires a different time for filing or permits filing during trial; and

(B) serve the motion on all parties and notify the alleged victim or, when appropriate, the alleged victim's guardian or representative.

(2) Before admitting evidence under this rule the court must conduct a hearing in camera and afford the victim and parties a right to attend and be heard. The motion, related papers, and the record of the hearing must be sealed and remain under seal unless the court orders otherwise.

# Appendix B

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

(a) In a criminal case in which the defendant is accused of an offense of sexual assault, evidence of the defendant's commission of another offense or offenses of sexual assault is admissible, and may be considered for its bearing on any matter to which it is relevant.

(b) In a case in which the Government intends to offer evidence under this rule, the attorney for the Government shall disclose the evidence to the defendant, including statements of witnesses or a summary of the substance of any testimony that is expected to be offered, at least fifteen days before the scheduled date of trial or at such later time as the court may allow for good cause.

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

(d) For purposes of this rule and Rule 415, "offense of sexual assault" means a crime under Federal law or the law of a State (as defined in section 513 of title 18, United States Code) that involved—

(1) any conduct proscribed by chapter 109A of title 18, United States Code;

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

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

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

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

# Appendix C

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

(a) In a criminal case in which the defendant is accused of an offense of child molestation, evidence of the defendant's commission of another offense or offenses of child molestation is admissible, and may be considered for its bearing on any matter to which it is relevant.

(b) In a case in which the Government intends to offer evidence under this rule, the attorney for the Government shall disclose the evidence to the defendant, including statements of witnesses or a summary of the substance of any testimony that is expected to be offered, at least fifteen days before the scheduled date of trial or at such later time as the court may allow for good cause.

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

(d) For purposes of this rule and Rule 415, "child" means a person below the age of fourteen, and "offense of child molestation" means a crime under Federal law or the law of a State (as defined in section 513 of title 18, United States Code) that involved—

(1) any conduct proscribed by chapter 109A of title 18, United States Code, that was committed in relation to a child;

(2) any conduct proscribed by chapter 110 of title 18, United States Code;

(3) contact between any part of the defendant's body or an object and the genitals or anus of a child;

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

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

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

# Appendix D

**Rule 415. Evidence of Similar Acts in Civil Cases Concerning Sexual Assault or Child Molestation**

(a) In a civil case in which a claim for damages or other relief is predicated on a party's alleged commission of conduct constituting an offense of sexual assault or child molestation, evidence of that party's commission of another offense or offenses or sexual assault or child molestation is admissible and may be considered as provided in Rule 413 and Rule 414 of these Rules.

(b) A party intending to offer evidence under this rule shall disclose the evidence to the party against whom it will be offered, including statements of witnesses or a summary of the substance of any testimony that is expected to be offered, at least fifteen days before the scheduled date of trial or at such later time as the court may allow for good cause.

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

## Appendix E

| | Old 412 | New 412 |
|---|---|---|
| Breadth | Criminal case where person is "accused of a nonconsensual sexual offense." | Criminal and civil proceedings "involving alleged sexual misconduct." |
| Applicability | Limited to victim of charged offense. | Includes pattern-type witnesses offered under 404(b). |
| Types of Acts | "Past" sexual behavior. | "Past" deleted in 412(a)(1), (2). |
| Predisposition Evidence | Not specifically recognized | 412(a)(2)—specifically excludes "evidence of sexual predisposition." |
| Notice | Accused shall serve notice on military judge and trial counsel | Party offering must file written motion at least 14 days before trial and serve on all parties, including victim. |
| Hearing | Article 39(a), which may be closed. | Before admitting, MJ must hold in camera hearing where victim right to be heard. |
| Trial Counsel Offer | 412(b)(2)(B)—past sexual behavior with accused—*offered by accused* on issue of consent. | 412(b)(1)(B)—". . . offered by accused to prove consent or *by the prosecution.*" |
| Balancing Test | 412(c)(3)—admitted only if PV outweighs PE. non 403 test. presumption of exclusion. | 412(b)(1)—"admissible, if otherwise admissible under these rules." 403 test excluded only if PV is substantially outweighed by PE. presumption of admission. |
| Intrinsic Acts Evidence | Not referenced. | 412(a)(1)-evidence that victim engaged in "other" sexual behavior inadmissible. |

# Current Developments in Evidence Law

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## Introduction

"Prove it." When uttered by children in the schoolyard, the proof used in support for one's position can take many shapes and forms, all with little concern for the formal rules governing the admissibility of evidence. In trial practice, however, it is a phrase with boundaries. When a defense counsel challenges the prosecutor to "prove it," a system of rules and standards comes into play.[1] As evidence is an essential ingredient in trial practice, lawyers must articulate basis for or against admissibility of proof in every case. Because you cannot cite what you do not know, it is imperative that trial practitioners stay abreast of developments in evidentiary law. This article will review several recent cases in this important area.

## Admissibility of Plea Statements

To promote the disposition of criminal cases by plea bargaining,[2] subject to some minor exceptions, Federal Rule of Evidence (FRE) 410[3] prohibits admission of pleas and certain statements made in conjunction with plea negotiations.[4] The United States Supreme Court recently addressed the scope of this general ban on the use of statements made by an accused during plea bargaining proceedings. In *United States v. Mezzanatto*,[5] the Court determined that such protections are waivable, at least when the accused's statements are used for impeachment purposes.

Mezzanatto was apprehended in a drug sting operation and quickly entered into plea negotiations with the prosecutor. With the consent of his defense attorney, Mezzanatto agreed to the government's demand that any statements made during pretrial discussions could be used for impeachment purposes at trial if the case proceeded that far. Mezzanatto, thereafter, admitted some involvement in the charged offenses, but because he was less than forthright as to other details of which the government was already aware, the prosecutor ended the negotiations.

At trial, Mezzanatto testified inconsistently with what was said during the plea negotiations, and his pretrial statements were used to impeach his credibility.[6] The court of appeals held that Mezzanatto's agreement to waive his FRE 410 rights was prohibited because it violated public policy.[7] The Supreme Court reversed; it held that agreements to waive exclusionary provisions of FRE 410[8] are valid and enforceable, absent some affirmative indication they were entered into unknowingly or involuntarily.[9]

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[1] EDWARD W. CLEARY ET AL., MCCORMICK ON EVIDENCE, § 1, at 1 (3d ed. 1984).

[2] "The disposition of criminal charges by agreement between the prosecutor and the accused, sometimes loosely called 'plea bargaining,' is an essential component of the administration of justice. Properly administered, it is to be encouraged. If every criminal charge were subjected to a full-scale trial, the States and the Federal Government would need to multiply by many times the number of judges and court facilities." Santobello v. New York, 404 U.S. 257, 260-61 (1971).

[3] FED. R. EVID. 410 reads in pertinent part:

Except as otherwise provided in this rule, evidence of the following is not, in any civil or criminal proceeding, admissible against the defendant who made the plea or was a participant in the plea discussions:

(1) a plea of guilty which was later withdrawn;

(2) a plea of nolo contendere;

(3) any statement made in the course of any proceedings under Rule 11 of the Federal Rules of Criminal Procedure or comparable state procedure regarding either of the foregoing pleas; or

(4) any statements made in the course of plea discussions with an attorney for the prosecuting authority which do not result in a plea of guilty or which result in a plea of guilty later withdrawn.

[4] If the proceedings during plea bargaining could be introduced as inculpatory statements against the accused, there would not be very much plea bargaining. United States v. Smith, 525 F.2d 1017, 1020 (10th Cir. 1975).

[5] 115 S. Ct. 797 (1995).

[6] FED. R. EVID. 613.

[7] United States v. Mezzanatto, 998 F.2d 1452 (9th Cir. 1993).

[8] Military Rule of Evidence 410 creates, in effect, a privilege of the defendant and, like other evidentiary privileges, may be waived or varied at the defendant's request. *Mezzanatto*, 115 S. Ct. at 803. *See also* United States v. Weasler, 43 M.J. 15 (1995) (pretrial agreement initiated by accused waived objection on appeal to unlawful command influence in preferral and referral of charges).

[9] While the opinion of the court did not limit the waiver issue to impeachment use of pretrial statements, three of the seven-justice majority added a brief concurrence expressly reserving the issue of admission of such statements during the government's case-in-chief.

As military defense counsel typically do not allow prosecutors access to their clients before trial, it would appear that *Mezzanatto* has little practical value for the military practitioner.[10] However, the case may have relevance to the extent trial counsel can apply the Supreme Court's rationale to the use of statements made during the accused's providence inquiry when the military judge does not accept the guilty plea.[11] This could be accomplished by including a condition in a pretrial agreement that statements made during the providence inquiry can be used by the trial counsel as impeachment if the military judge does not accept the plea.[12]

The inherent problem, of course, is that most pretrial agreements include provisions that specify the agreement ceases on the occurrence of any one of a number of events such as failure of the military judge to accept the accused's plea of guilty. However, a provision permitting the trial counsel to use providence inquiry statements may survive the pretrial agreement. One can analogize the providence inquiry to scenarios such as providing a nonrefundable deposit to rent a beachhouse, buying supersaver airline tickets through a discount travel broker, or transferring earnest money in the purchase of a house. All have some legal efficacy independent of other conditions contained in the underlying agreement.

Trial counsel can argue that the pretrial agreement condition allowing use of the providence inquiry for impeachment purposes is simply a cost of doing business for the accused; where completion of the act, acceptance of the plea by the military judge, is not required.[13] This is true even though the accused does not receive a tangible benefit from the pretrial agreement such as a cap on the sentence which can be approved.

Because this extension of *Mezzanatto* to military providence inquiries has not been tested by the courts, trial counsel should exercise caution in using this type of condition. However, in an appropriate case, such a condition may prove useful.

## Legal Relevancy and Military Rule of Evidence 403

In *United States v. Walker*[14] and *United States v. Rust*,[15] the United States Court of Appeals for the Armed Forces (CAAF)[16] took the opportunity to again impress upon counsel the distinction between logical[17] and legal relevance.[18] In both cases, the CAAF held that the military judge abused his discretion by admitting unduly prejudicial, though relevant, evidence.

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[10] Military Rule of Evidence 410, otherwise structurally identical to Federal Rule of Evidence 410, expands the parties authorized to bargain for the government to include the convening authority, staff judge advocate, trial counsel or other counsel for the government and includes as inadmissible statements made in furtherance of requests for administrative relief. MANUAL FOR COURTS-MARTIAL, United States (1995 ed.), MIL. R. EVID. 410 [hereinafter MCM].

[11] This situation is distinguished from the court's use during presentencing of information obtained during the providence inquiry. Military Rule of Evidence 410 does not prohibit such use, which, by its terms, applies to guilty pleas which are later withdrawn but not those which are accepted. United States v. Holt, 27 M.J. 57 (C.M.A. 1988).

[12] An example condition might be constructed as follows:

> "If the military judge does not accept my plea of guilty, I agree that any statements made to the military judge during the providence inquiry can be used by the trial counsel to impeach any contradictory testimony I might give at trial on those charges and specifications. I understand that, notwithstanding any other provisions or terms of this agreement, this provision will apply whether or not the military judge accepts my plea of guilty. I further understand that, although the trial counsel can use the statements I make to the military judge during my providence inquiry for impeachment purposes should the military judge not accept my plea and the government proceeds to trial, the convening authority is not bound by any sentence limitation in my pretrial agreement unless the military judge accepts my plea of guilty."

[13] The proposal to allow the government to use the accused's providence inquiry for impeachment purposes is not without precedent. For example, statements obtained in violation of *Miranda* or Article 31(b), UCMJ, though inadmissible during the government's case-in-chief, may still be used for impeachment purposes. *See* Harris v. New York, 401 U.S. 222, 226 (1971); MCM, *supra* note 10, MIL. R. EVID. 304(b). Further, the type of evidence which the government can use as impeachment is not limited to statements or admissions of the accused. Evidence obtained as a result of an unlawful search or seizure may also be used to impeach the in-court testimony of the accused. MCM, *supra* note 10, MIL. R. EVID. 311(b)(1).

[14] 42 M.J. 67 (1995).

[15] 41 M.J. 472 (1995).

[16] On 5 October 1994, the National Defense Authorization Act for Fiscal Year 1995, Pub. L. No. 100-337, 108 Stat. 2663, 2831-2 (1994), changed the names of the United States Courts of Military Review and the United States Court of Military Appeals (codified at 10 U.S.C. § 866 n. (1995) and 10 U.S.C. § 941 n. (1995), respectively). The new names are the: Army Court of Criminal Appeals, Navy-Marine Court of Criminal Appeals, Air Force Court of Criminal Appeals, Coast Guard Court of Criminal Appeals; and the United States Court of Appeals for the Armed Forces. In this article, the name of the court that was in place at the time the decision was published will be used.

[17] Logical relevance means "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." MCM, *supra* note 10, MIL. R. EVID. 401. Evidence is not subject to exclusion simply because its probative value is extremely low. If the evidence has any probative value whatsoever, it is logically relevant and admissible unless otherwise excludable under the rules.

[18] Legal relevance means that otherwise logically "relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the members, or by consideration of undue delay, waste of time, or needless presentation of cumulative evidence." *Id.* MIL. R. EVID. 403.

Sergeant Walker was convicted by an officer panel of a single specification of wrongful use of cocaine sometime between 7 and 12 July 1991.[19] On appeal, he alleged that the military judge erred in admitting portions of medical records reflecting a history of sinusitis and expert testimony that sinusitis could be caused by repeated or heavy drug use,[20] which was offered by the government to rebut a defense claim of unknowing ingestion.[21] The CAAF held that, while logically relevant under Military Rule of Evidence (MRE) 401,[22] the evidence was unduly prejudicial.

The CAAF noted this was a trial before members, who may have been confused by the limited use allowed of this evidence. The limited probative value[23] of the testimony to prove a one-time drug use was diminished because the government's expert did not examine the accused. No cautionary instructions were given that consideration of the evidence was limited to rebut a defense claim of innocent ingestion or that the members could not use the sinusitis evidence to conclude that the accused did the charged act.[24]

Although evidence of sinusitis may be relevant to show prior use of drugs, when an accused is charged with a single specification of drug use, the probative value of that evidence is apparently substantially outweighed by the danger of unfair prejudice. If presented with this type of evidence, trial counsel should have the government expert examine the accused and ask the military judge to give the cautionary instructions mentioned in *Walker*.

In *Rust*, the CAAF noted the different standard for admissibility of evidence during presentencing proceedings. Major Rust, an Air Force obstetrician, was charged with, among other offenses, dereliction of duty based on his failure to examine and admit to the hospital Mrs. S, the pregnant wife of an Army enlisted soldier. Mrs. S subsequently gave birth to a premature baby, who quickly died. The day after the delivery Mrs. S's adulterous lover, the father of the baby, strangled Mrs. S and then committed suicide by shooting himself. A note found next to the bodies attributed the murder-suicide in part to the loss of their child. At sentencing, the trial counsel offered the note as aggravation evidence[25] to show the specific psychological harm caused by the accused.

The CAAF concluded that, even assuming the note was logically connected to the dereliction of duty and thus relevant under MRE 401, the connection was too indirect to satisfy Rule for Courts-Martial (R.C.M.) 1001(b)(4)'s[26] higher standard of admissibility.[27]

Further, even if the trial judge accepted the government's contention that the subsequent murder-suicide was directly related to the accused's dereliction in not treating Mrs. S, that connection became too tenuous when weighed against the prejudicial impact of intimating to the members that the accused caused three deaths, violating MRE 403. The sentence was set aside.

*Rust* should impress upon trial counsel the different standard of admissibility for evidence offered during the presentencing phase of the court-martial. Counsel should ensure they can readily articulate for the record a basis satisfying at least one of the five recognized categories set forth in R.C.M. 1001(b).[28]

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[19] UCMJ art. 112a (1988).

[20] Sinusitis, an inflammation of the nasal mucous membranes, can be a symptom of frequent, repeated or chronic drug use. DORLAND'S MEDICAL DICTIONARY 1531 (27th ed. 1988).

[21] The accused's medical records indicated he was treated for sinusitis on six separate occasions between January 1989 and October 1991.

[22] *See, e.g.*, United States v. Ray, 26 M.J. 468 (C.M.A. 1988), *cert. denied*, 488 U.S. 1010 (1989)(evidence of a medical condition of sinusitis, coupled with expert testimony explaining the condition in terms of repeated drug use, is relevant to show prior drug use).

[23] As testified by the government expert, sinusitis could also be caused by allergies and dry air. United States v. Walker, 42 M.J. 67, 69 (1995).

[24] The military judge is only required to instruct the members on the limited use of uncharged misconduct evidence on request. United States v. Mundell, 40 M.J. 704 (A.C.M.R. 1994). However, the better practice may be to give such an instruction, even absent a specific request. United States v. Barrow, 42 M.J. 655 (A.F. Ct. Crim. App. 1995).

[25] The trial counsel offered the note as evidence of aggravating circumstances directly relating to or resulting from the offenses of which the accused has been found guilty. MCM, *supra* note 10, R.C.M. 1001(b)(4).

[26] The matters authorized to be presented by the prosecution include: (1) service data from the charge sheet; (2) personal data and character of the accused's prior service; (3) accused's prior convictions; (4) aggravation evidence; and (5) evidence of the accused's rehabilitative potential. *Id.* R.C.M. 1001(b).

[27] United States v. Gordon, 31 M.J. 30, 36 (C.M.A. 1990) (aggravation evidence must *directly* relate to or result from the offense to which the accused was convicted, a higher standard than simple relevance).

[28] *See also* Lawrence J. Morris, *New Developments in Sentencing and Post-Trial Procedure*, ARMY LAW., Mar. 1996, at 106.

## Character Evidence

Military rules generally exclude the circumstantial use of a person's character.[29] One of the exceptions to this rule is when the accused offers evidence of a pertinent trait[30] such as good military character.[31] If the defense offers this evidence, the trial counsel may rebut it. Such rebuttal typically consists of cross-examination of the defense's character witness.

In *United States v. Brewer*,[32] the accused sought to manipulate the scope of that cross-examination by limiting direct examination of several good military character witnesses to periods preceding the dates of the charged offenses.[33] The CAAF held that a party is not limited to the period of time chosen by the proponent of character evidence and may test the soundness of opinion testimony though inquiry into relevant specific instances of conduct even though they may not be within the time period upon which the witness bases his or her opinion.[34]

The "character" with which MRE 405 is concerned is character at the time of the crime charged.[35] Here, the only relevance of opinion testimony from a period preceding the charged offense would be in trying to connect that trait to the crime charged. The relevance is that the accused was a good officer in the past, has remained a good officer, and, therefore, would not have committed a crime at the time of the charged offense. As such, cross-examination of a character witness using specific bad acts which preceded the date of the charged offense is proper.

The defense in *Brewer* also objected to the relevance of the misconduct addressed by opposing counsel in cross-examination. The trial counsel asked defense witnesses who had testified about the accused's good duty performance if they were aware of the accused's excessive socializing with enlisted women.[36] The CAAF noted that, given the essence of the charges before the court, the only relevance of the accused's duty performance to this case was the extent to which it translated into good military character. As such, it was appropriate for trial counsel on cross-examination to test the foundation of the witness's opinion by asking whether he was aware of any specific instances of misconduct bearing on that trait such as excessive socializing with female enlisted members.[37]

Just what qualifies as a pertinent character trait for purposes of MRE 404 is sometimes difficult to ascertain. For instance, in *United States v. Gagan*,[38] the CAAF held that heterosexuality is a pertinent character trait when the accused is charged with homosexual related assault.

Lieutenant Commander Gagan was charged with four separate incidents of homosexual sodomy[39] and indecent assault.[40] At trial, the defense counsel wanted to present testimony from

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[29] MCM, *supra* note 10, MIL. R. EVID. 404(a).

[30] Evidence of a pertinent character trait of the accused offered by the accused is admissible to prove that he or she acted in conformity therewith on a particular occasion. *Id.* MIL. R. EVID,. 404(a)(1)

[31] *See, e.g.*, United States v. Weeks, 20 M.J. 22 (C.M.A. 1985).

[32] 43 M.J. 43 (1995).

[33] The accused was charged with, among other offenses, making a false official statement and conduct unbecoming an officer for engaging in a personal relationship with an enlisted soldier, offenses which occurred in late 1990 and early 1991. In presenting a good character defense, the accused's former supervisor from 1987-1988 testified the accused was a good duty performer and an honest person. On cross-examination, the trial counsel sought to challenge the basis of this opinion by asking whether the witness was aware of specific instances of conduct involving the accused and other enlisted soldiers during the summer of 1990. The defense counsel objected, questioning the relevance of instances of misconduct not within the substantive scope of direct examination.

[34] *Brewer*, 43 M.J. at 47, 50.

[35] STEPHEN A. SALTZBURG, LEE D. SCHINASI & DAVID A. SCHLUETER, MILITARY RULES OF EVIDENCE MANUAL 496 (3d ed. 1991).

[36] The defense counsel argued he had purposely limited his questioning to duty performance and did not open the door to questions involving other relationships with enlisted women. *Brewer*, 43 M.J. at 45.

[37] In testing the basis of the witness's character opinion, trial counsel incorporated the specific circumstances underlying the charge of conduct unbecoming an officer and asked, without objection, whether knowing that would affect the witness' opinion about the accused's good military character. United States v. Mason, 993 F.2d 406 (4th Cir. 1993). In dicta, the CAAF noted that it is improper to ask a character witness whether the charge then before the court-martial would affect that witness' opinion. *Brewer*, 43 M.J. at 47 n.2. *See also* United States v. Senak, 527 F.2d 129 (7th Cir. 1975), *cert. denied*, 425 U.S. 907 (1976). As there was no defense objection, absent plain error, the issue was waived. MCM, *supra* note 10, MIL. R. EVID. 103(a)(1).

[38] 43 M.J. 200 (1995).

[39] UCMJ art. 125 (1988).

[40] *Id.* art. 134.

Gagan's fiancee concerning his preference for heterosexuality,[41] arguing that this was relevant character evidence[42] offered to make it less likely that Gagan engaged in homosexual sodomy. The CAAF held the military judge erred by concluding that a preference for heterosexuality was not a relevant trait. The CAAF set forth the appropriate two-part test to determine just what qualifies as character: (1) the person exhibits a pattern of repetitive behavior, and (2) that behavior is either morally praiseworthy or condemnable.[43]

Applying that test to this case, the CAAF held that evidence of Gagan's sexual behavior in a heterosexual relationship was sufficient to demonstrate a pattern of repetitive behavior and that it had a moral component that could be viewed as either morally praiseworthy or condemnable.[44]

Even though the CAAF affirmed Gagan's conviction,[45] this case is yet another example of the CAAF's continuing recognition of the importance of defense character evidence in military courts-martial and is indicative of its tendency to bend over backwards to justify admission.[46] It is unclear, however, whether the CAAF's somewhat open-ended test applies to other character evidence such as an accused's preference for adults when charged with a child molestation offense or evidence of religious beliefs that would suggest exclusion of certain behaviors such as a Catholic's moral opposition to homosexuality.

Military Rule of Evidence 405(a) provides that a proponent may introduce reputation or opinion testimony in proving a pertinent character trait.[47] Reputation evidence summarizes what the witness heard in the community.[48] In *United States v. Reveles*,[49] the CAAF expanded the definition of "community" as defined in MRE 405(d).[50]

In *Reveles*, the accused, who was intoxicated and speeding, was charged with involuntary manslaughter[51] and reckless driving[52] based on a fatal automobile accident.[53] In support of the theory that the victim's ability to avoid the collision was impaired by her own intoxication, the defense wanted to introduce testimony from an officers' club bartender that the victim had a reputation among club patrons for intemperance. While the military judge allowed the witness to give an opinion regarding this character trait, he refused to allow reputation testimony, ruling that patrons of club bars were not a recognized community within the meaning of MRE 405(d).

The CAAF held otherwise, taking an expansive view of community to include social groups as well as geographical neighborhoods and military organizations.[54] As they constituted an identifiable work group, the club patrons, who included school teachers, civilian employees on the base, and pilots, qualified as a community. Any social group may constitute a community if the proponent is able to show the group was composed of the same

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[41] In his proffer, the defense counsel alleged the fiancee would testify that she had known the accused for three years, his conduct never gave any indication he was a homosexual, and that they enjoyed a regular heterosexual relationship. *Gagan*, 43 M.J. at 201-2.

[42] MCM, *supra* note 10, MIL. R. EVID. 405(a)(1).

[43] *Gagan*, 43 M.J. at 202.

[44] *Id.* at 203.

[45] Due to the strength of the government's case, the failure of the defense theory to address the possibility that the accused was a bisexual, the fact that such character testimony was only inconclusive circumstantial evidence, and the admission of similar testimony, the CAAF was convinced beyond a reasonable doubt that any error was harmless. *Id.* at 201.

[46] *See, e.g.*, United States v. Brown, 41 M.J. 1 (1994). Evidence of an accused's strong opposition to the use of drugs and alcohol as a matter of religious principle is character evidence permitted by MRE 404(a)(1) and not prohibited by MRE 610 (evidence of religious beliefs or opinions not admissible to enhance or impair witness credibility).

[47] The form of this line of questioning typically involves asking the witness "Have you heard" or "Do you know;" the latter referring to someone expressing an opinion based on personal knowledge and the former concerned with how a person is known within a community.

[48] *Michelson*, 335 U.S. at 477.

[49] 41 M.J. 388 (1995).

[50] The rule defines a community in the Armed Forces as including a "post, camp, ship, station, or other military organization regardless of size." MCM, *supra* note 10, MIL. R. EVID. 405(d).

[51] UCMJ art. 119 (1988).

[52] *Id.* art. 111.

[53] The prosecution theory was that the accused's intoxication and reckless driving constituted gross negligence which was the proximate cause of the victim's death. United States v. Reveles, 43 M.J. 388, 390 (1995).

[54] *Id.* at 395.

people who regularly assembled on an ad hoc basis to socialize.[55] Of course, the witness must still be sufficiently linked to the community to be competent to speak for that community regarding the person's reputation.[56]

### Bias

A witness may be impeached by evidence of bias, prejudice or motive to fabricate.[57] In *United States v. Bins*,[58] the CAAF again cautioned the trial judiciary that excluding defense evidence may deny an accused his right to confront the witnesses against him.[59] Sergeant First Class (SFC) Bins was charged with a number of nonconsensual sexual offenses. At trial, he conceded something happened to the victim, but insisted that he did not do it. In support of the theory that SFC Bins was a victim of circumstance, the defense wanted to introduce evidence of the woman's financial interest in making and maintaining accusations against him. These alleged interests included witness fee payments for attendance at the Article 32 investigation and trial, a cash settlement from the accused to withdraw civil charges in a concurrent foreign proceeding, and financial support from the United States Government in the form of per diem, housing assistance, meals, and mental health counseling.[60] In a pretrial hearing, the military judge concluded that the desired evidence did not establish a motive to fabricate and denied the request.

Although the CAAF agreed that witness fee payments do not tend to prove bias or a motive to misrepresent,[61] it did find the military judge exceeded his authority in deciding whether the victim was biased or motivated by money. The judge's responsibility under MRE 104[62] is to determine whether some evidence establishes that the witness is motivated by money. The weight of the evidence and credibility of the witness are matters for the fact-finder.

### Experts and Expert Testimony

At a Salem, Massachusetts, witchcraft trial in the mid-17th century, a local physician testified that the two defendants, who were seen collapsing in violent fits, had been bewitched. The physician, an expert witness described by the prosecutor as a man with great knowledge, related to the jury how the defendant's symptoms were similar to several reported cases in Denmark, where there had been a recent discovery of witches. After the trial judge had taken judicial notice of the existence of witches, the jury found the defendants guilty and they were quickly hanged.[63]

While some military defense counsel may argue they have seen little change in the government's use of experts since the days of the Salem witchcraft trials, it is probably fair to say the standards for admissibility of scientific expert testimony have been tightened over the years. However, some commentators predicted that the Supreme Court's 1993 decision in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*[64] did not bode well for supporters of the scientific method; they believed the liberalized standard announced in that case would open the doors to a flood of junk science.[65] Those fears have not been realized, and the trend is still towards careful judicial scrutiny of scientific evidence.[66]

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[55] *Id.*

[56] *See* United States v. Toro, 37 M.J. 317 (C.M.A. 1993) (setting out the proper foundation reputation testimony).

[57] MCM, *supra* note 10, MIL. R. EVID. 608(c).

[58] 43 M.J. 79 (1995).

[59] Davis v. Alaska, 415 U.S. 308 (1974) (sixth amendment confrontation clause requires defendant be given the opportunity to prove prosecution witness's bias).

[60] The defense argued that this tended to impeach the victim's credibility by showing she used the attack as an opportunity to make money from both the accused and the U.S. Government by maintaining the claims against the accused. In other words, she did not really know who attacked her, but with no accusation, there would be no money. *Bins*, 43 M.J. at 83.

[61] At the completion of the testimony, a civilian witness, whether testifying for government or the defense, "will receive standard mileage and witness fees." DAVID A. SCHLUETER, MILITARY CRIMINAL JUSTICE: PRACTICE AND PROCEDURE, §11-2(D)(1), at 371 (3d ed. 1992).

[62] The rules provide that "preliminary questions concerning . . . , the admissibility of evidence . . , shall be determined by the military judge." MCM, *supra* note 10, MIL. R. EVID. 104(a). When making this determination, the military judge is not bound by the rules of evidence, except with respect to privileges. The proponent of the evidence has the burden of establishing its admissibility by a preponderance of the evidence. *See* Bourjaily v. United States, 483 U.S. 171, 175-76 (1987).

[63] R. v. Culander and Duny, 6 State Trials (17 Charles II) 687 (1665), *in* Robert L. Swartz, *There Is No Archbishop of Science-A Comment on Elliott's Toward Incentive-Based Procedure: Three Approaches For Regulating Scientific Evidence*, 69 B.U. L. REV. 517, 519 (1989).

[64] 113 S. Ct. 2786 (1993), *aff'd on remand*, 43 F.3d 1311 (9th Cir. 1995). *Daubert* rejected the old *Frye* "general acceptance within the scientific community" standard and replaced it with a non-exclusive five factor test. The trial judge acts as evidentiary gatekeeper when it comes to novel scientific techniques. The focus of this initial judicial inquiry shifts from acceptance of the scientific proposition itself to acceptability of the methodology used to reach it. The factors the trial judge uses in making this determination include: (1) whether the technique or theory can be tested; (2) whether the technique or theory has been subjected to publication or peer review; (3) the error rate of the scientific method; (4) the existence of any control standards; and (5) the degree to which the technique or theory has been accepted within the scientific community.

[65] James Dam, *Supreme Court Allows More Scientific Evidence*, LAW. WKLY, USA, Jul. 5, 1993, at 1.; Richard C. Reuben, *Brave New World: A Supreme Court Ruling on Scientific Evidence May Cause More Problems Than it Solves*, CAL. LAW., Sept. 1993, at 31; *Supreme Court's Frye Ruling Seen as "Two-Edged" Sword*, BNA CRIM. PRAC. MANUAL (BNA) No. 15, at 345 (Jul. 21, 1993).

[66] Faust F. Rossi, *The Federal Rules of Evidence—Past, Present, and Future: A Twenty-Year Perspective*, 28 LOY. L.A. L. REV. 1271 (1995).

*Daubert* has not had much effect on the results in military practice but it has affected the process used in getting there. The military rejected the *Frye*[67] test in 1987 in *United States v. Gipson*[68] and adopted a similar reliability analysis. However, while the COMA in *Gipson* concluded that acceptance within the scientific community is not the be-all-and-end-all in the military, it made only general references to the other factors the military judge should use. The contribution of *Daubert* refines *Gipson* by providing a set of non-exhaustive validity factors and giving specific directional guidance the military judge should use in making an admissibility ruling.[69] The focus is now on the principles and methodology used by the expert, not on the specific conclusions he or she may have reached.

In *United States v. Nimmer*,[70] the CAAF had the opportunity to address the extent of *Daubert's* reach in military practice. Nimmer was charged with the wrongful use of cocaine.[71] At trial, the military judge refused to permit the defense to introduce what it characterized as an exculpatory hair analysis.[72] The military judge ruled the ability of hair analysis to detect a one-time drug use was not well established within the scientific community and that the proffered results lacked the necessary scientific underpinnings to reliably detect such use.[73] The accused challenged the rulings on appeal, alleging that the military judge did not apply the proper test in determining admissibility of scientific evidence when he based his ruling on the acceptability and reliability of the test within the scientific community.

The Navy-Marine Corps Court of Criminal Appeals (NMCCA) held that *Daubert*[74] did not have any substantive effect on the case as the military judge did not inappropriately base his decision on *Frye* but, consistent with *Gipson*, determined admissibility based on the reliability of the evidence. The CAAF concluded, however, that *Daubert* is persuasive in prescribing the analytical model for determining admissibility of expert scientific testimony in courts-martial. Whereas *Gipson* concerned itself with the reliability of the evidence, *Daubert* narrowed the focus to ensuring reliability of the methodology used in leading to that evidence. The CAAF remanded the case for a hearing by the trial judge to allow him to consider his ruling using the detailed directional guidance provided by *Daubert*; specifically, the reliability of the methodology used to detect cocaine in hair samples.

While it appears many of the recent appellate cases address the use of scientific evidence in courts-martial, MRE 702[75] actually focuses on the admissibility of three separate categories of expert testimony: scientific, technical, and other specialized knowledge. *Daubert* and its progeny have given the trial practitioner the recognized standard to determine the admissibility of novel scientific testimony. In *United States v. Ruth*,[76] the Army Court of Criminal Appeals (ACCA) looked at whether the same standard should be applied when faced with a proffer of nonscientific evidence.

The defense in *Ruth* challenged the validity of the government's use of handwriting analysis to prove some thirty-seven forgery specifications. The defense alleged that the military judge should have applied the *Daubert* validity factors in determining whether the statements and opinions of the government's forensic documents examiner were admissible as expert scientific testimony. However, the ACCA held that *Daubert* was never intended to apply to other than scientific knowledge and that handwriting analysis evidence is best treated as technical or other specialized knowledge under MRE 702.[77] This evidence does not have to satisfy the *Daubert* validity factors before being admitted at trial.

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[67] Frye v. United States, 293 F. 1013 (D.C. Cir. 1923).

[68] 24 M.J. 246 (C.M.A. 1987).

[69] *See generally* Paul C. Gianelli, *Daubert: Interpreting the Federal Rules of Evidence*, 15 CARDOZO L. REV. 1999 (1994); Clifton T. Hutchinson & Danny S. Ashby, *Daubert v. Merrell Dow Pharmaceuticals, Inc.: Redefining the Bases for Admissibility of Expert Scientific Testimony*, 15 CARDOZO L. REV. 1875 (1994).

[70] 43 M.J. 252 (1995).

[71] UCMJ art. 112a (1988).

[72] The accused submitted a urinalysis specimen upon reporting to Great Lakes Naval Training Center. Three days later, the report indicated a result slightly above the cut-off levels for listing a specimen as positive. A week later, the accused had a doctor test three strands of hair. In the doctor's opinion, there was no detectable amount of the cocaine metabolite present; with the inference being the accused did not consume cocaine within the three month period covered by the hair sample. *Nimmer*, 43 M.J. at 253.

[73] *Id.* at 254.

[74] *Daubert* was decided after the accused's trial but before appellate review by the NMCCA.

[75] Military Rule of Evidence 702 provides as follows:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

MCM, *supra* note 10, MIL. R. EVID. 702.

[76] 42 M.J. 730 (Army Ct. Crim. App. 1995).

[77] Following the logic set forth in United States v. Starzecpyzel, 880 F. Supp. 1027 (S.D.N.Y. 1995), the ACCA opined "while scientific principles may relate to some aspects of handwriting analysis, questioned documents examination constitutes technical or other specialized knowledge." *Ruth*, 42 M.J. at 732.

In determining admissibility of such evidence, practitioners should look to MRE 702, which itself imposes the requirements for admissibility of technical or other specialized knowledge. Such expert opinion testimony is admissible if (1) it is from a witness properly qualified as an expert and (2) it will assist the trier of fact to understand the evidence or to determine a fact in issue.[78]

In reviewing another in a seemingly endless string of cases addressing expert testimony in child sexual abuse prosecutions,[79] the CAAF has again cautioned trial practitioners concerning the proper scope of such evidence. In *United States v. Cacy*,[80] the accused was charged with sodomy[81] and indecent liberties[82] with his six-year old daughter. As part of the government's case-in-chief, a social worker and sexual abuse counselor were qualified as experts and allowed to testify concerning statements made by the daughter as well as typical behavior patterns exhibited by victims of sexual abuse. The CAAF held that expert testimony that a victim's behavior is consistent with the behavior patterns of a typical sexual abuse victim and that the victim did not appear rehearsed is admissible opinion testimony. However, testimony that the expert explained to the victim the importance of being truthful and, based on child-victim's responses, recommended further treatment is an affirmation that the expert believes the victim, which improperly usurps the responsibility of the fact-finder.[83] Although finding that admission of such testimony was error, the CAAF held that Cacy was not prejudiced and affirmed the conviction.

Similarly, the accused in *United States v. Marrie*[84] was charged with sodomy, committing indecent acts, and taking indecent liberties with several young boys. To explain the victim's reluctance to come forward, the trial counsel presented expert testimony that preteen and teenage boys are the least likely group to report abuse because of shame, embarrassment, and the fear of being labelled a homosexual. The expert further opined that false allegations from this group were extremely rare and outside of her clinical experience.

The CAAF concluded that, while expert testimony as to the behavioral characteristics of victims, including delays in reporting, is admissible, testimony which even inferentially comments on the credibility of the victim is not. In this case, the CAAF found the testimony was improperly admitted as a direct comment on the victim's credibility, although the error was harmless.[85]

Although counsel should be diligent in explaining seemingly inconsistent conduct when behavioral characteristics are admitted,[86] *Cacy* and *Marrie* teach trial judges to exercise caution when admitting expert testimony in child abuse prosecutions. Judges should ensure such witnesses do not improperly comment on the credibility of the alleged victim's accusations.

### Hearsay

Hearsay is defined as a statement other than one made by the declarant testifying at trial that is offered to prove the truth of the matter stated.[87] Such evidence is presumptively unreliable. Section VIII of the MREs codifies the hearsay rule and creates a system of class exceptions, supplemented by two catch-all or residual exceptions.

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[78] Towards this end, trial judges must still refrain from accepting as inherently reliable propositions submitted by nonscientific experts. I would submit that reliability standards similar to those developed by the Supreme Court in *Daubert* are necessary to provide some guidance to the trial judiciary in monitoring the admissibility of evidence offered as "technical or other specialized knowledge." *See* Edward J. Imwinkelreid, *The Next Step After Daubert: Developing a Similarly Epistemological Approach to Ensuring the Reliability of Nonscientific Expert Testimony*, 15 CARDOZO L. REV. 2271 (1994).

[79] *See, e.g.*, United States v. Pagel, 40 M.J. 771 (A.F.C.M.R. 1994), *rev. granted*, 42 M.J. 99 (1995); United States v. Buenaventura, 40 M.J. 519 (A.C.M.R. 1994); *rev. granted*, 42 M.J. 104 (1995); United States v. Suarez, 32 M.J. 767 (A.C.M.R. 1991), *aff'd*, 35 M.J. 374 (C.M.A. 1992); United States v. King, 35 M.J. 337 (C.M.A. 1992).

[80] 43 M.J. 214 (1995).

[81] UCMJ art. 125 (1988).

[82] *Id.* art. 134.

[83] With the logical inference as follows: "if I did not believe her, I would not have recommended further treatment. Therefore, because I recommended further treatment, she must have been telling the truth." *Cacy*, 43 M.J. at 218.

[84] 43 M.J. 35 (1995).

[85] *Id.* at 41-42. *But see* United States v. Barrow, 42 M.J. 655 (A.F. Ct. Crim. App. 1995) (psychologist's opinion that there is a higher frequency of molestation by stepfathers as opposed to biological fathers was properly admitted as rebuttal to defense expert that the accused's family did not represent the dynamics of a typical incest family).

[86] *Marrie*, 43 M.J. at 41.

[87] MCM, *supra* note 10, MIL. R. EVID. 801(c).

Due partly to the increasing number of child sexual abuse prosecutions in the military and the reluctance of the victim to testify at trial, counsel are having to rely on exceptions to the hearsay rule on a consistent basis. Two common exceptions seen in the area of child abuse prosecutions are excited utterances and statements made for purposes of medical diagnosis and treatment.

*Excited Utterances.* In *United States v. Grant*,[88] the accused was charged with various sexual offenses against his seven-year old stepdaughter. Trial counsel offered the stepdaughter's statement, made to a family friend between thirty-six and forty-eight hours after one of the alleged incidents, as both an excited utterance[89] and as residual hearsay.[90] The military judge admitted the statement as an excited utterance but rejected it as residual hearsay.

The CAAF held that the military judge erred in admitting the statement as an excited utterance, indicating that statements which are the product of sad reflection, as here, and are not made under the stress or excitement of the event do not qualify as excited utterances.[91] However, given this child-victim's mental state, the spontaneity of the statement, a lack of suggestiveness, and corroboration, the CAAF held it was sufficiently trustworthy to qualify as residual hearsay.[92] *Grant* demonstrates the importance of using alternate theories of admissibility. In *Grant*, the government salvaged a conviction by raising both the excited utterance and residual hearsay theories at trial.

*Medical Diagnosis and Treatment.* In *United States v. Cox*,[93] the accused was charged with rape, sodomy, and taking indecent liberties with children. At trial, and over defense objection, the government introduced the children's statements made to a therapist as statements made for medical diagnosis and treatment under MRE 803(4).[94] Although the therapist's office had toys and deliberately displayed none of the attributes of a medical facility, the Air Force Court of Criminal Appeals (AFCCA) found that the victims were taken to the therapist for help in overcoming "the devastating effects of sexual abuse;"[95] therefore, the statements were made for medical purposes. The AFCCA also held that the expectation of a medical benefit need not be based on the patient's testimony. Here, the mother testified that she explained to the children that they were seeing the therapist because she did not have the knowledge to help them, and the therapist had experience in helping children cope with the abuse.[96]

*United States v. Henry*,[97] is an example of what can happen when a law enforcement investigation begins too quickly. In *Henry*, the government appealed the military judge's ruling that suppressed a victim's out-of-court hearsay statement made during a rape protocol examination.[98] Finding no abuse of discretion, the ACCA affirmed the military judge's ruling, holding that statements made by the alleged rape victim to medical personnel were not made with the expectation of receiving any medical benefit but for the purpose of facilitating the collection of evidence.

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[88] 42 M.J. 340 (1995).

[89] MCM, *supra* note 10, MIL. R. EVID. 803(2).

[90] *Id.* MIL. R. EVID. 803(24).

[91] *See* United States v. Barrick, 41 M.J. 696 (A.F. Ct. Crim. App 1995). The basis of the excited utterance is that the speaker is under the fresh emotional impact of a startling event, not that the speaker relives her emotions when later relating the event. It would be bootstrapping to reason that the excitement generated by telling the event can give rise to an excited utterance. As such, it is the stress caused by the startling event and not any subsequent stress in recalling the event which is relevant. *See also* United States v. Morgan, 40 M.J. 405 (C.M.A. 1994), *cert denied*, 115 S. Ct. 907 (1995) (textbook example of excited utterance).

[92] In this case, prior notice was provided to opposing counsel as required in the residual hearsay exception. MCM, *supra* note 10, MIL. R. EVID. 803(24).

[93] 42 M.J. 647 (A.F. Ct. Crim. App. 1995).

[94] The military rules permit admission of hearsay statements "made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment." MCM, *supra* note 10, MIL. R. EVID. 803(4). The proponent of such a statement must show both that it was made for the purpose of medical diagnosis or treatment, and the declarant made the statement with the expectation of receiving a medical benefit. *See, e.g.*, United States v. Faciane, 40 M.J. 399 (C.M.A. 1994).

[95] *Cox*, 42 M.J. at 651.

[96] *See also* United States v. Yazzie, 59 F.3d 807 (9th Cir. 1995) (out-of-court statements of child's parent made to medical personnel for purposes of obtaining medical diagnosis or treatment admissible under Fed. R. Evid. 803(4)); United States v. Austin, 32 M.J. 757 (A.C.M.R. 1991); United States v. Hill, 13 M.J. 882 (A.C.M.R. 1982).

[97] 42 M.J. 593 (Army Ct. Crim. App. 1995).

[98] In *Henry*, a fifteen year-old girl told her mother that her stepfather raped her earlier that day. The mother took the daughter to a friend's house and called the military police. Both the mother and daughter were subsequently taken to the criminal investigation division (CID) offices where each gave statements. As there was no military medical facility nearby, CID agents drove the mother and daughter to the nearest facility a couple of hours away. At the hospital, a physician explained to the daughter he needed to examine her and ask questions so he could help her. The daughter eventually told the physician how the rape occurred. One of the agents was present during the medical examination. At trial, the daughter denied saying anything about the rape to the doctor and that she made up what she told her mother and CID. She also testified that she went to the hospital because CID forced her, and no one ever asked if she wanted a medical examination. The government wanted to introduce the daughter's statement to the physician as a statement made for the purpose of medical diagnosis or treatment. The military judge denied the request, and the government appealed. UCMJ art. 62 (1988).

In this case, the accused's allegedly abused daughter initially made a statement at the Criminal Investigation Division (CID) office. The CID agents thereafter brought her to the hospital and were present during the rape protocol examination. Their presence suggested the daughter spoke to the medical personnel only because she thought it was part of the ongoing investigatory process.

The ACCA noted that in cases where the medical examination is inextricably intertwined with a criminal investigation and where there is no express indication by the patient that he or she has some expectation of receiving a medical benefit, the burden of establishing the medical diagnosis or treatment exception is a heavy one for the government.[99]

*Henry* suggests several things trial counsel can do to make this burden surmountable. If a rape protocol examination is anticipated, it should be performed before the law enforcement agents question the victim. The personnel conducting the examination must make it clear to the patient that they are making medical decisions based on her responses. Finally, CID or other law enforcement agents should stay outside of the examining room during the protocol.[100]

## Conclusion

Application of the rules of evidence to trial practice can be an amorphous, challenging task. Application can be especially challenging in child abuse and sexual assault cases where the courts seem to keep changing the rules. Imagination and innovation, tempered with a degree of caution, can help. Staying abreast of developments in this area can keep dedicated practitioners one step ahead of their adversaries.

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[99] *Henry*, 42 M.J. at 596 n.5.

[100] *Id.*

# New Developments in Sentencing and Post-Trial Procedure

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## Introduction

The merits phases of courts-martial are, in most significant procedural respects, similar to civilian trials. Military practice tends to diverge from civilian practice during the sentencing phase when military-specific factors such as duty performance and rehabilitative potential become significant. The military post-trial phase is also unique. This article addresses recent developments in sentencing and post-trial procedures. It focuses on recent changes to the *Manual for Courts-Martial (Manual)*[1] and important appellate decisions handed down during 1995.

## Sentencing

### *One Earthquake—More Seismic Activity Detected*

After eight years of excruciating turmoil in sentencing procedures was put to rest--ratified in Change 7 to the *Manual*[2]—another major change was enacted. For the first time since enactment of the Uniform Code of Military Justice (UCMJ), total forfeiture of pay and allowances will become the norm for convicted soldiers who serve any significant jail time. Also on the horizon is the prospect of another seismic change—a military version of truth in sentencing.

### *Forfeiture Reform*

Following publicity that some military prisoners continued to receive pay while in confinement,[3] on 10 February 1996, the President signed amendments to the UCMJ that radically change the concept of court-martial forfeitures.[4] Most service members will face maximum forfeitures if they were sentenced on or after 1 April 1995. Under the new rules, if a service member receives more than six months confinement, or a punitive discharge and *any* confinement,[5] he or she will automatically forfeit pay and allowances up to the jurisdictional limit of the court (total forfeitures at a general court-martial; two-thirds forfeitures at a special court-martial). These forfeitures will be effective fourteen days after sentencing or upon convening authority action, whichever is sooner.[6]

Convening authorities may defer the imposition of forfeitures, upon application of the accused, until taking action on the sentence.[7] Additionally, if an accused has dependents, a convening authority will have the power to waive forfeitures for up to six months, and the forfeitures will be paid directly to the dependents.[8]

### Horner-Ohrt *at Rest?*

For almost ten years, since *United States v. Horner*[9], military courts have wrestled with the foundation, relevance, scope, and admissibility of testimony permitted under the rubric of "rehabilitative potential" under Rule for Courts-Martial (R.C.M.) 1001(b)(5).[10] When *United States v. Ohrt*[11] followed *Horner* three years later, the "*Horner-Ohrt*" objection quickly became a staple of court-martial sentencing practice. To many observers, it became an all-purpose defense objection that sought to quash any

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[1] MANUAL FOR COURTS-MARTIAL, United States (1995 ed.) [hereinafter MCM].

[2] *Id.* (1984) (C7, 10 Nov. 1994).

[3] *See Prisoners on Payroll*, DAYTON DAILY NEWS, Dec. 18, 1994, at 1A, 10B (editorial), 12A; Dec. 19, 1994, at 1A; Dec. 21, 1994, at 13A; Jan. 18, 1995, at 10A; Feb. 5, 1995, at 1A; Feb. 9, 1995, at 1A.

[4] National Defense Authorization Act for Fiscal Year 1996, Pub. L. No. 104-106, 110 Stat. 186 (1996).

[5] UCMJ art. 58(b) (1996).

[6] *Id.* art. 57(a).

[7] *Id.* art. 57(b)(2).

[8] *Id.* art. 58(b).

[9] 22 M.J. 294 (C.M.A. 1986).

[10] MCM, *supra* note 1, R.C.M. 1001(b)(5) permits trial counsel to call witnesses to provide opinion evidence concerning the accused's rehabilitative potential within strictly defined limits for the foundation, basis, and scope of the opinions.

[11] 28 M.J. 301 (C.M.A. 1989).

sentencing testimony that suggested that a soldier should be discharged. The government, which invited judicial scrutiny by instances of over-reaching and misanalysis in the sentencing arena, often believed that it was hand-cuffed during sentencing because judges would incant "*Horner-Ohrt*" to justify virtually any restrictive ruling during the sentencing phase of trial. While a number of reported decisions embroidered *Horner* and *Ohrt* over the years,[12] it became increasingly difficult for counsel and judges to understand the limitations of rehabilitative potential testimony, and *Horner-Ohrt* spats became resource-consuming sideshows at many sentencing proceedings.

### *Change 7 Clarifies, Codifies Case Law in Area*

Change 7 incorporated significant amounts of *Horner*, *Ohrt*, and their progeny into the language of R.C.M. 1001.[13] The changes finally give clearer direction to counsel and judges.

*Foundation:* The new rule requires that a witness "possess sufficient information and knowledge about the accused to offer a rationally-based opinion that is helpful to the sentencing authority."[14] Factors include "information and knowledge about the accused's character, performance of duty, moral fiber, determination to be rehabilitated, and nature and severity of the offense."[15] This language is taken directly from *Ohrt*.[16]

*Bases for Opinion:* Opinions about rehabilitative potential must now be based on "relevant information and knowledge possessed by the witness . . . and must directly relate to the accused."[17] Additionally, the witness's opinion "regarding the severity or nature of the accused's offense . . . must not serve as the principal basis for an opinion of the accused's rehabilitative potential."[18]

*Scope:* An opinion about rehabilitative potential "is limited to whether the accused has rehabilitative potential and to [its] magnitude or quality. A witness *may not* offer an opinion regarding the appropriateness of a punitive discharge or whether the accused should be returned to the accused's unit."[19]

### *Coming Battles: Limitations on Argument and Applying the Limitations Against the Defense*

It is, of course, naive to hope or suggest that the recent changes represent the end of the struggle over rehabilitative potential. Two areas of potential dispute are the extent to which *counsel* may advance their parties' positions regarding rehabilitative potential and the extent to which the new rules apply against the defense.

Regarding the first issue, a 1994 case placed limits on trial counsel arguments regarding rehabilitative potential. In *United States v. Hampton*,[20] a squad leader properly testified[21] that the accused lacked rehabilitative potential after which the trial counsel argued that the accused didn't "deserve to remain in the Army." The Court of Appeals for the Armed Forces (CAAF)[22] held that the argument was not based on a fair reading of the testimony and, notwithstanding the latitude accorded sentencing arguments, arguments must be based on evidence of record.[23]

The debate between Judge Cox, author of *Ohrt*, and Judge Crawford, in dissent, highlights the ambiguity and difficulty for counsel. Judge Cox acknowledges a *logical* link between the lack of rehabilitative potential and the possibility of discharge; that is, if a soldier lacks rehabilitative potential, it makes sense for him to leave the military, and the court-martial may discharge the soldier with whatever discharge options are available. It is, how-

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[12] *See, e.g.*, United States v. Pompey, 33 M.J. 266 (C.M.A. 1991); United States v. Cherry, 31 M.J. 1 (C.M.A. 1990); United States v. Aurich, 31 M.J. 95 (C.M.A. 1990); United States v. Corraine, 31 M.J. 102 (C.M.A. 1990); United States v. Gordon, 31 M.J. 30 (C.M.A. 1990); and United States v. Stimpson, 29 M.J. 768 (A.C.M.R. 1989).

[13] *See generally* MCM, *supra* note 1, R.C.M. 1001(b).

[14] *Id.* R.C.M. 1001(b)(5).

[15] *Id.* R.C.M. 1001(b)(5)(B).

[16] "[A] foundation must be laid to demonstrate that the witness does possess sufficient information and knowledge about the accused—his character, his performance of duty as a servicemember, his moral fiber, and his determination to be rehabilitated—to give a 'rationally based' opinion." United States v. Ohrt, 28 M.J. 301, 304 (C.M.A. 1989).

[17] MCM, *supra* note 1, R.C.M. 1001(b)(5)(C).

[18] *Id.*

[19] *Id.* R.C.M. 1001(b)(5)(D).

[20] 40 M.J. 457 (C.M.A. 1994).

[21] He testified via a stipulation of expected testimony. *Id.* at 459.

[22] On 5 October 1994, the National Defense Authorization Act for Fiscal Year 1995, Pub. L. No. 103-337, 108 Stat. 2663 (1994), changed the name of the United States Court of Military Appeals to the United States Court of Appeals for the Armed Forces (codified at 10 U.S.C. § 941 n. (1995)).

[23] *Hampton*, 40 M.J. at 460.

ever, an impermissible *legal* link because "an inferred (sic) assertion that appellant 'doesn't deserve to remain in the Army' can be rationally construed as an impermissible recommendation for a punitive discharge."[24] This is the "vexing paradox" that Judge Cox highlighted so effectively in *Ohrt*.[25] Judge Cox emphasized that "the logic of [this] view is sound,"[26] but it was rejected because it invades the province of the court-martial and "misplaces the concept of a *punitive* discharge,"[27] turning courts-martial into administrative separation proceedings.[28]

In her concurrence in *Hampton*, Judge Crawford argues pointedly[29] that "once the defense agreed to stipulate that appellant had no rehabilitative potential, they cannot turn right around and object to what this Court has held is a reasonable inference from that language."[30]

The contrary argument, of course, is that a punitive discharge is strictly a *punitive* measure, one of several possible *punishments* from which sentencing authorities may choose.[31] A soldier with little or no rehabilitative potential should only be discharged if this is an appropriate *punishment* for his or her crimes.[32] It is legally logical, for example, to retain a soldier who lacks rehabilitative potential but whose crime does not merit the stigma of punitive separation from the military, just as it may be logical to punitively separate the excellent performer whose crime calls for characterizing the soldier's service as dishonorable or bad.

Institutionally, this debate is over. Counsel must realize that they must de-link the concepts of rehabilitative potential and discharge. To argue otherwise is fruitless, and an invitation to error. Defense counsel should be vigilant to fight any suggestion that a soldier's rehabilitative potential has any relationship to the possibility of discharge. They should carry this advocacy through the trial counsel's argument on the case, notwithstanding the narrowness of *Hampton*.

These changes also should make clear to trial counsel that their efforts in sentencing are better expended elsewhere. Rarely should a commander or other witness's opinion regarding rehabilitative potential make a difference to the sentencing authority, especially when (necessarily) couched as broadly as "potential to be restored, through vocational, correctional, or therapeutic training or other corrective measures to a useful and constructive place in society."[33] What soldier, other than the rare, serious felon, does not have *some* such potential?

This is precisely the message that the appellate courts have been trying to drum into counsel for years,[34] a message now made explicit by the new rules. Given the breadth of such an opinion, and the fact that nearly every soldier qualifies, counsel need to seriously question the worth of such testimony. The issue of rehabilitative potential is of no moment in serious felonies. Virtually all rapists, child abusers, and the like will receive punitive discharges without much discussion. It is only those relatively few cases that fall between the guaranteed discharge and the likely retention for which rehabilitative potential makes a difference. For these cases, the question must relate not to whether the Army can use the soldier (an Army of fewer than 500,000 soldiers can

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[24] *Id.* at 459 (citations omitted).

[25] United States v. Ohrt, 28 M.J. 301, 304 (C.M.A. 1989). He continued: "The paradox is this:

a. We should only retain those people in service who have rehabilitative potential.

b. Thus, if a member does not have rehabilitative potential, he should not be retained.

c. If he should not be retained, he should be discharged.

d. If you ask a witness, 'Does the accused have rehabilitative potential?'; He will answer, 'No, he should be discharged.'" *Id.*

[26] *Id.*

[27] *Id.* at 305 (emphasis in original).

[28] For an excellent analysis of counsels' difficulties, along with the prudential and philosophical concerns in this area, see Denise Vowell, *To Determine an Appropriate Sentence: Sentencing in the Military Justice System*, 114 MIL. L. REV. 87 (1986).

[29] Judge Crawford cited *Ohrt*, the author of which (Judge Cox) also wrote the *Hampton* majority opinion. United States v. Hampton, 40 M.J. 457, 460 (C.M.A. 1994).

[30] *Id.*

[31] *See Ohrt*, 28 M.J. at 304.

[32] *See, e.g.*, United States v. Aurich, 31 M.J. 95, 97, n. (C.M.A. 1990), in which the court explained: "Having rehabilitative potential is a mitigating factor. Lacking rehabilitative potential is not an aggravating factor."

[33] MCM, *supra* note 1, R.C.M. 1001(b)(5). The standard derives directly from the *Horner* court's quotation of the definition of rehabilitation provided by *Webster's Third New International Dictionary, Unabridged*: "'the process of restoring an individual . . . to a useful and constructive place in society through some form of vocational, correctional, or therapeutic retraining or . . . other constructive measure.'" United States v. Horner, 22 M.J. 294, 295-96 (C.M.A. 1986) (citation omitted).

[34] *See, e.g.*, United States v. Aurich, 31 M.J. 95, 96, n. (C.M.A. 1990) ("[W]e believe it to be the rare case where it is necessary for the Government to introduce such opinions unless the accused places such potential in issue.")

afford to be choosy) but whether, in the broad language of the rule, *that* soldier can, *at some point in the future*, function in society.

It is futile for a trial counsel to try to establish that, although the accused may be amenable to rehabilitation to a constructive and useful place in society, he or she is not amenable to such rehabilitation in the military. Trial counsel who want to build a case for punitive discharge should focus on other aspects of the case, especially the aggravating circumstances, to argue that an accused's conduct, under the particular circumstances of a case, clearly warrants punitive characterization. One method, approved by the courts, is to elicit an opinion about the accused's future dangerousness.

In *United States v. Williams*,[35] an esteemed forensic psychiatrist testified that the accused, convicted of crimes of sex and violence, was a dangerous man.[36] Assuming sufficient foundation is established, an expert may anchor his opinion regarding the accused's future dangerousness to R.C.M. 1001(b)(5).[37] The Court of Military Appeals (COMA) found that the Rule was "broad enough to encompass this type of expert opinion."[38] Although other decisions have hinted at such an opening,[39] *Williams* is the most explicit and most current authority in support of such testimony. The COMA did not expressly rule out the possibility that a commander could provide such testimony, but it clearly prefers that such testimony be presented by experts.[40]

The defense must be equipped to combat such testimony through the traditional methods of fighting expert testimony, which include aggressively questioning the qualifications of the expert,[41] pointed cross-examination to expose weaknesses or presumptions in the theory or facts of the expert, or calling an expert in rebuttal.

A recent unpublished opinion provides a good example of effective defense cross-examination of an expert. Though it involved evidence in aggravation,[42] it showed how the defense can attack a sentencing witness who testifies about rehabilitation potential as well. In *United States v. Garza*,[43] the court focused on how effectively the defense counsel cross-examined the expert. The defense counsel questioned the expert about the brevity of his examination of the victim, his unfamiliarity with the victim's moods, and his failure to examine medical and school records or to administer any intelligence or psychological tests in support of his conclusions about the impact of sexual offenses on the seven year old victim.[44]

The central issue in *Garza* concerned the military judge's refusal to allow the defense to introduce a computer-generated record of the trial counsel's call to a sentencing expert that reflected "issue is re: aggravation."[45] Such evidence is immaterial. The defense must be prepared to directly confront the evidence through sharp, carefully prepared cross-examination because attacking collateral matters such as terse phone messages is not likely to make a difference to a client.

### *Sauce for the Goose: Applying the Rules Against the Defense*

Just as the government may not employ euphemisms to imply that a lack of rehabilitative potential suggests the need for a punitive discharge, the defense may be barred from adducing testimony designed to signal directly ("he should not be discharged") or euphemistically ("I'd go to war with him") that a soldier should not be discharged. The plain language of the *Manual* prohibition on the use of euphemisms for a punitive discharge falls under the section addressing the prosecution's pre-sentencing case.[46] Com-

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[35] 41 M.J. 134 (C.M.A. 1994).

[36] *Id.* at 137.

[37] MCM, *supra* note 1, R.C.M. 1001(b)(5).

[38] *Williams*, 41 M.J. at 139. This opinion was written by Royce Lamberth, a judge on the United States District Court for the District of Columbia, who was sitting pursuant to Article 142(f), UCMJ. *Id.* at 135, n.1.

[39] *See also* United States v. Stinson, 34 M.J. 233 (C.M.A. 1992) (family advocacy therapist testified about accused's "high risk of reoffense"); United States v. Gunter, 29 M.J. 140 (C.M.A. 1989) (expert testified that accused's chances in drug rehabilitation were "poor"); Barefoot v. Estelle, 463 U.S. 880 (1983).

[40] This is because of concerns about command influence when such testimony is delivered by a commander as well as the foundation that experts are more likely to possess for such opinions. *Williams*, 41 M.J. at 138, 139.

[41] Many are locally procured experts who often are nothing more than practitioners in the field. For example, the local drug and alcohol counselor, pediatrician, or family advocacy representative.

[42] The line between aggravation and rehabilitative potential testimony often is blurred by the government, an area in which the defense should insist on clarity by making explicit objections that cite the Rules for Courts-Martial and case law to the military judge.

[43] No. 9401994 (Army Ct. Crim. App. 7 Dec. 1995) (unpub.).

[44] *Id.* slip op. at 3.

[45] *Id.* at 2.

[46] "A witness may not offer an opinion regarding the appropriateness of a punitive discharge or whether the accused should be returned to the accused's unit. MCM, *supra* note 1, R.C.M. 1001(b)(5)(D) (emphasis added).

mon practice, abetted by case law and encouraging *dicta*,[47] suggests that judges have traditionally been more indulgent of defense invasions of the province of the jury than they have of those made by the government. Nevertheless, the CAAF suggested a possible levelling of the playing field in *United States v. Ramos*.[48] In *Ramos*, the CAAF stated that "[t]he mirror image might reasonably be that an opinion that an accused could 'continue to serve and contribute to the United States Army' simply is a euphemism for, 'I do not believe you should give him a punitive discharge.'"[49] The *Ramos* language was *dictum*, but it suggests that the CAAF's concern with the integrity of the highly regulated sentencing process extends to limiting the rein given to defense witnesses as well as those testifying for the government.

### *Truth in Sentencing?*

The *Ramos* decision illustrates the frustration for many counsel in the realm of military sentencing (too many rules), which keep witnesses and counsel from speaking plain English during the sentencing proceeding. For example, why should a witness be prohibited from testifying to the appropriateness of a discharge or confinement? Similarly, why not tell members that a soldier who receives a 30 year sentence will be eligible for parole in 10 years (as would a soldier receiving a 100 year sentence)[50] and that he or she would likely receive parole after serving a certain percentage of the sentence?

Chief Judge Sullivan raised this last issue in a concurring opinion in *United States v. Boone*.[51] Boone was sentenced to sixty years confinement for rape. In a decision that centered on the ineffectiveness of Boone's counsel,[52] Chief Judge Sullivan asked whether the members knew that the accused was likely to serve much less than the 60 years and suggested that the military was ready for some version of truth in sentencing:

> The jury sentenced him to 60 years. Already, the convening authority has reduced it to 50. The outcome of the majority's decision in this case may reduce it further. The parole authorities probably will reduce the ultimate sentence even more. Nobody tells the members this. The judge—learned in the law and its operation—knows that an accused rarely serves the full time of sentence, but the jury is uneducated on this point. Perhaps it is time to have 'truth in sentencing.'[53]

In case it was not obvious that he was inviting action and debate on this issue, Chief Judge Sullivan closed his dissent, one of his last opinions as chief judge,[54] by stating: "Congress should address this issue since this Court does not have the power to make a law mandating this fundamental point."[55]

### *Aggravation: Door Remains Open*

Unlike the area of rehabilitative potential, trial counsel continue to enjoy wide latitude in vividly portraying the effects of a crime.[56] A recent case represents the outer limits of that range. In *United States v. Rust*,[57] an accused physician failed to admit and treat a soldier's wife for premature labor. The baby died three days after birth. A day or two later, the father of the baby (who was not the soldier-husband) killed the woman and then himself, leaving a detailed, poignant note. The physician was convicted of dereliction of duty for the woman's death. The COMA found

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[47] "[T]he fact that a member of an armed force has sufficient trust and confidence in another member is often a powerful endorsement of the character of his fellow soldier. This favorable testimony has long been relevant in courts-martial." United States v. Aurich, 31 M.J. 95, 96 (citations omitted). The citations in support of the above proposition include MCM, *supra* note 1, R.C.M. 1001(c)(1)(B). The version in effect at the time of *Aurich* as well as now does not expressly permit such testimony, but generally outlines the type of mitigation evidence, including the accused's reputation, that is admissible during sentencing.

[48] 42 M.J. 392 (1995).

[49] *Id.* at 396.

[50] DEP'T OF DEFENSE DIRECTIVE 1325.4, CONFINEMENT OF MILITARY PRISONERS AND ADMINISTRATION OF MILITARY CORRECTIONAL PROGRAMS AND FACILITIES (13 May 1988).

[51] 42 M.J. 308 (1995).

[52] *Boone*'s relevance to ineffectiveness of counsel is addressed later in this article. See text accompanying notes 177-79.

[53] *Id.* at 314 (Sullivan, C.J., dissenting).

[54] Judge Cox assumed the duties of chief judge on 1 October 1995; Chief Judge Sullivan remains a member of the court.

[55] *Id.*

[56] MCM, *supra* note 1, R.C.M. 1001(b)(4).

[57] 41 M.J. 472 (1995).

prejudicial error in admitting the note, over defense objection, in aggravation. The court found that *even if* the government could establish a link between the accused's conduct and the murder-suicide (an arguable "but for" stemming from his refusal to admit the pregnant woman), the connection was too attenuated and clearly failed the Military Rule of Evidence 403 balancing test.[58]

Notwithstanding *Rust*, the trend of recent years has been toward liberal admissibility of victim-impact testimony. The requirement that such testimony concerns an impact "directly relating to or resulting from the offenses"[59] was interpreted broadly in *United States v. Scott*.[60] Scott was convicted of manslaughter for firing into a crowd and of carrying a concealed weapon. Although the manslaughter conviction was set aside, the court held there was no need for a sentence rehearing (a court of criminal appeals reassessment was sufficient) because the concealed weapons charge arose from the same offense because he "actually used the concealed weapon to injure and kill."[61]

The Army court recently made clear its willingness to interpret the concept of aggravation broadly. In *United States v. Zimmerman*,[62] the accused sold stolen military munitions[63] to undercover agents whom he believed were affiliated with a white supremacist organization. The military judge gave a carefully crafted limiting instruction in which he warned the members that they could:

> consider the nature of the intended recipient group only for the purposes of its tendency, if any, to put potentially dangerous materials into the stream of the civilian community . . . . [Y]ou may consider the nature of the group if you first believe it was a factor in who (sic) he relinquished it to.[64]

The Army court held that the information regarding the link to the putative supremacists was proper aggravation and suggested that the military judge was more cautious than necessary.[65] The court stated that information about the accused's intent to transfer the stolen property to white supremacists:

> constitutes aggravating circumstances that directly relate to the offense . . . especially . . . because racist attitudes and activities are perniciously destructive of good order and discipline . . .. The right to abstract racist beliefs and freedom of association must yield to the overriding military interest in good order and discipline when a soldier acts on those beliefs and associations in a manner that violates the law or is likely to result in violence.[66]

The court held that the judge "could have instructed the members that the appellant's supremacist motive was a matter in aggravation because his active participation in furtherance of white supremacist causes was inimical to good order and discipline."[67] In emphasizing that the link to extremist groups "directly related to the offenses and constituted proper aggravation,"[68] the court gently chided the judge who, it found, "chose a more conservative approach by limiting the members' use of the evidence more severely than required"[69]

*Zimmerman* reinforces the trend in all courts to expansively interpret aggravation. Trial counsel should not be sloppy in positing such links but neither should they be intimidated from aggressively asserting them when they exist. Defense counsel can learn two lessons from *Zimmerman:* (1) carefully limit the examination of sentencing witnesses to preclude opening the door to such explosive testimony,[70] and (2) object at trial.[71]

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[58] "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice [or] confusion of the issues." MCM, *supra* note 1, MIL. R. EVID. 403.

[59] *Id.* R.C.M. 1001(b)(4).

[60] 42 M.J. 457 (1995).

[61] *Id.* at 460.

[62] No. 9401182 (Army Ct. Crim. App. 29 Jan. 1996).

[63] Besides conspiring to transfer stolen military property, the accused and his co-actors transferred some of what they stole to the supposed white supremacists. The accused pleaded guilty to stealing, among other things, ammunition, flares, grenades and grenade simulators, M-16 magazines and weapons parts. *Id.* slip op. at 2. Large amounts of stolen military munitions were found at the accused's off-post storage locker. *Id.* n. 2.

[64] *Id.* slip op. at 4, 5.

[65] *Id.* at 6.

[66] *Id.* at 7.

[67] *Id.*

[68] *Id.* at 8.

[69] *Id.* at 7.

[70] The stipulation of fact mentioned the white supremacist motivations of the accused and his co-actors, but the instruction came about largely in response to trial counsel's cross-examination of two defense sentencing witnesses who testified about the accused's good military character and were impeached with information regarding the extremist links. The government rested on its stipulation during sentencing. *Id.* at 3.

[71] The court clearly would have found the evidence to be proper aggravation in any event, but it noted a final reason for upholding the military judge's instruction: "The trial defense counsel did not object to the limiting instruction as given." *Id.* at 8.

Defense counsel must prepare the case and the accused to avoid inadvertently supplying the aggravation to the government. In *United States v. Briggs*,[72] the accused testified under oath during sentencing. In response to his counsel's questions, the accused described how he bought large amounts of cocaine, split it up, distributed it, and received his money. Surprised, the defense counsel asked the judge to instruct the members to disregard the testimony. The judge wryly observed that it was "pretty hard to tell them to disregard what they've already heard, especially when it's properly in there,"[73] but the trial counsel volunteered that he would not argue the testimony. The judge's admonition that members "give due consideration" to all sentencing evidence but "keep in mind that the accused is to be only sentenced for the crimes that he's been found guilty of committing" was held sufficient.[74]

### *Conclusion*

Sentencing practice will be made both simpler and more complicated by the changes to the forfeiture provisions. No longer will the focus of attention be the sentencing authority. Instead, the convening authority will be able, within strict limits, to offer minimal financial relief to those accused service members who have dependents.

Because Change 7 to the *Manual* was so recent, the courts have not yet begun to report cases interpreting the new rules governing rehabilitative testimony. Regardless, it is at least true that counsel and judges have more clearly delineated boundaries in which to argue about rehabilitative potential. The *Manual* changes, however, are largely a ratification and codification of several years worth of case law. That case law has developed ummistakeably in the direction of interpreting rehabilitative testimony very restrictively while allowing for ample aggravation and victim impact testimony.

## Post-Trial Procedures

*"It is at the level of the convening authority that an accused has his best opportunity for relief."*[75]

A military accused enjoys a unique window, after trial and before the appellate process begins, in which the convening authority may alter the findings or sentence handed down by the court-martial. The government has a number of obligations during the post-trial phase. Some of them are largely ministerial, but failure to carry out these obligations fairly and judiciously can harm the accused and the court-martial process.

Although no monumental changes in post-trial procedures occurred in 1995, military courts over the past year showed a continued willingness to permit judges to aggressively use post-trial Article 39(a) sessions to ferret out error (just as the *Manual* caught up with case law and ratified judges' authority in this area). Additionally, some *Manual* changes made it easier to correct technical errors in post-trial documents, and the law regarding ineffective assistance of counsel continued to develop. The CAAF also gave a ringing endorsement to the procedures by which suspended sentences are vacated.

### *Expanded Post-trial Authority for Judges*

For years, military judges have enjoyed increased authority to hold post-trial Article 39(a) sessions. It is now clearer than ever that the last slap of the judge's gavel, following pronouncement of sentence, is not necessarily the end of a court-martial. In the past year, the *Manual* was amended to formalize judicial authority that some sources trace to 1968,[76] which has been asserted with increasing force and frequency in recent years.

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[72] 42 M.J. 367 (1995).

[73] *Id.* at 369.

[74] *Id.*

[75] United States v. Boatner, 43 C.M.R. 216, 217 (C.M.A. 1971).

[76] United States v. Griffith, 27 M.J. 42, 47 (C.M.A. 1988). In this case, Chief Judge Everett said that the judge's authority to hold hearings and make corrections until authentication of the record of trial—without awaiting an appellate court order—was "implicit in the establishment of the position and title of 'military judge' . . . [in] 1968, and was given more force by the extensive 1984 amendments to the Manual, which, for example, reduced the scope of the written post-trial review required of the office of the staff judge advocate."

Broadly, the recent changes aim to permit maximum corrections, close in time, at the trial level. They also incorporate case law that makes clear that military judges, like most of their civilian counterparts, may take action on behalf of an accused without waiting for an order from an appellate court.

The rules now permit a military judge, before authentication, at the request of any party or *sua sponte*, to "reconsider any ruling, other than one amounting to a finding of not guilty."[77] The discussion to the altered rule makes clear that the standard for reconsideration is still governed by R.C.M. 917(d).[78] While a judge may not change his ruling granting a motion for a finding of not guilty, he or she may now reconsider a denial of such a motion any time before authenticating the record of trial.[79]

In related changes, similar authority was extended to judges to call post-trial Article 39(a) sessions, again without awaiting appellate court approval, to investigate or resolve "any matter which arises after trial and which substantially affects the legal sufficiency of any findings of guilty or the sentence . . . [and] to reconsider any trial ruling that substantially affects the legal sufficiency of any findings of guilty or the sentence."[80] This fully empowers a judge to clean up the record or to clarify issues such as unlawful command influence or witness or panel tampering, without involving appellate courts or the convening authority.[81]

Coupled with judges' wide latitude in calling post-trial sessions is an enhanced expectation by appellate courts that, in appropriate instances, military judges will use it aggressively. In two recent instances, appellate courts found military judges erred by failing to take aggressive action in post-trial hearings. In *United States v. Singleton*,[82] the military judge was found to have abused his discretion in not granting a defense request for a new rape trial based on newly discovered evidence, which included threatening phone calls from the victim's boyfriend (not the accused), the victim's inconsistent statement, and her boyfriend's weak alibi.[83]

*United States v. Knight*[84] involved outrageous court member misconduct. The trial judge conducted an inquiry but found no prejudice, a finding ratified by the staff judge advocate (SJA) and convening authority. However, the Army Court of Criminal Appeals[85] overturned the conviction. In *Knight*, three senior enlisted panel members rode to and from the trial with a junior enlisted soldier, who was an emergency medical technician and who was present for the entire trial including sessions from which panel members were excluded. The members engaged the junior soldier in discussions about the trial, found out about proceedings conducted in their absence, and sought his opinions on certain trial-related medical issues such as bruising (the accused was charged with sex crimes).[86] Notwithstanding the trial judge's finding that there was a "clear and positive showing that improper communications did not and could not influence"[87] the verdict, the Army court found the judge, the SJA, and the convening authority were "remiss in their affirmative responsibility to avoid the appearance of evil in the courtroom and to foster public confidence in court-martial proceedings."[88]

This decision pre-dated the changes to R.C.M. 905(f) and 1102(b)(2), but it illustrates the trend that many judges asserted the authority before the change ratified the evolving status quo. Moreover, it reflects that the mere existence of that authority is not a panacea as judges' decisions in this realm remain subject to review for abuse of discretion.

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[77] MCM, *supra* note 1, R.C.M. 905(f).

[78] *Id.* R.C.M. 905(f), Discussion. A motion for a finding of not guilty "shall be granted only in the absence of some evidence which, together with all reasonable inferences and . . . presumptions, could reasonably tend to establish every essential element of an offense charged . . . [when] viewed in the light most favorable to the prosecution." *Id.* R.C.M. 917(d).

[79] "A ruling denying a motion for a finding of not guilty may be reconsidered at any time prior to authentication of the record of trial." *Id.* R.C.M. 917(f).

[80] *Id.* R.C.M. 1102(b)(2).

[81] Support for this concept had been advanced in United States v. Scaff, 29 M.J. 60, 65 (C.M.A. 1989), another opinion by then Chief Judge Everett, in which he built on the rationale he put forth in *Griffith*, supra. As with R.C.M. 905(f), the standard of review is governed by R.C.M. 917(d). *See id.* R.C.M. 1102(d)(2) discussion.

[82] 41 M.J. 200 (C.M.A. 1994).

[83] *Id.* at 204-07.

[84] 41 M.J. 867 (Army Ct. Crim. App. 1995).

[85] On 5 October 1994, Congress changed the name of the United States Army Court of Military Review to the United States Army Court of Criminal Appeals. National Defense Authorization Act for Fiscal Year 1995, Pub. L. No. 103-337, 108 Stat. 2663 (1994) (codified at 10 U.S.C.§ 941 n. (1995)). For the purpose of this article, the name of the court at the time of the decision is the name that will be used in referring to that decision.

[86] *Knight*, 41 M.J. at 868.

[87] *Id.* at 869.

[88] *Id.* at 871.

*Deliberative Privilege Rigorously Applied*

Developing case law continues to demonstrate that the Military Rules of Evidence set a high standard for inquiring into members' and judges' deliberations. Inquiry is barred into the discussions and debate that led to a finding unless one of three exceptions exist. The three exceptions are: (1) extraneous prejudicial information improperly brought to the members' attention, (2) improper outside influence, and (3) unlawful command influence.[89] The purpose of the rule, of course, is to ensure free and unfettered discussion by panel members and to protect them from having to publicly expose or account for their thinking processes.[90]

While members generally may not smuggle outside information into the deliberation room, courts will not intrude when the information is generally of a subjective nature.[91] The CAAF recently held that a post-trial hearing was not required on discovery that a member told other members he thought that the accused would serve one-third of his adjudged sentence even though the result was that the panel tripled a five year sentence to fifteen years.[92] Such "intrinsic" information, based on a member's "generalized common knowledge . . . experience, training, and schooling . . . does not fall within the exceptions to" the deliberative privilege.[93]

A trial judge was also upheld when he denied a defense request for a post-trial Article 39(a) session to probe a member's comment that the sentence would have been much less had the accused cooperated with police.[94] This comment was not taken to mean that the panel considered extraneous matters, and the deliberative privilege was found to bar consideration of this statement.[95]

Similarly, in *United States v. Brooks*,[96] the CAAF found that the deliberative privilege precluded a military judge from entering a finding of not guilty when he concluded that the members may have come to a finding of guilty after improperly computing their votes. In *Brooks*, the panel president, on routine questioning by the military judge, said the members had reached an absolute majority." When the judge asked whether he meant majority but not the required two-thirds, the president responded affirmatively, and the judge ultimately entered a finding of not guilty and declared a mistrial as to the sentence.[97] The CAAF accepted the government's appeal and ruled that the judge conducted an improper inquiry into the deliberative and voting process, and it reiterated the three narrow grounds of Military Rule of Evidence 606(b).[98] The CAAF ruled that the accused was properly convicted.

*Privilege Applies Against Judges Too*

The CAAF's determination to restrict inquiries into judges' deliberative processes was made clear in *United States v. Gonzalez*.[99] In *Gonzalez*, the CAAF ruled that a judge may not second-guess his own sentence simply because he or she changes his or her mind. When conducting a mandated post-trial hearing on the accused's fitness to assist his counsel on appeal, the judge said he "would not have sentenced [the accused] without the benefit of further psychological testing and evaluation . . . [in light of] his prior history of possible mental disease or defect."[100] The CAAF held that Military Rule of Evidence 606(b) covers judges as well as members. At the post-trial "stage it was not his prerogative to reconsider the sentence," and none of the three factors permitting inquiry into sentence deliberations was present here.[101] Besides, the case was beyond the period in which reconsideration

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[89] MCM, *supra* note 1, MIL. R. EVID. 606(b).

[90] The rule strikes a balance "between the necessity for accurately resolving criminal trials in accordance with rules of law on the one hand, and the desirability of promoting finality in litigation and of protecting members from harassment and second-guessing on the other hand. The result permits court-members to testify with respect to *objective* manifestations of impropriety . . . but prohibits their testimony if the alleged transgression is *subjective* in nature." STEPHEN A. SALTZBURG, ET AL., MILITARY RULES OF EVIDENCE, at 633 (3d. ed. 1991).

[91] *Id.* at 633.

[92] United States v. Straight, 42 M.J. 244 (1995).

[93] *Id.* at 250. The anomalous nature of this case—which essentially provides that members may receive such information from each other, without a quality check, although they may not be instructed on such matters by the judge—adds fuel to the fire lit later in 1995 by Chief Judge Sullivan, who called for a discussion of "truth in sentencing" in the military. United States v. Boone, 42 M.J. 308, 314 (1995) (Sullivan, C.J., dissenting).

[94] United States v. Combs, 41 M.J. 400 (1995).

[95] *Id.* at 401.

[96] 42 M.J. 484 (1995).

[97] *Id.* at 485.

[98] MCM, *supra* note 1, MIL. R. EVID. 606(b); *Combs*, 41 M.J. at 486-87.

[99] 42 M.J. 373 (1995) (per curiam).

[100] *Id.* at 374.

[101] *Id.* at 375.

was permitted,[102] and the information about the accused's mental health was insufficient to warrant a rehearing or to call into question adequacy of defense counsel.[103]

*Gonzalez* illustrates the linkage between the deliberative privilege and possible sentence reconsideration. Although its holding that judges as well as members generally may not have their thinking processes exposed or inquired into is elemental, it points out two potentially competing concerns of the systemic interest in integrity and finality of convictions, and the accused's interest in a fair and just result. The judge in *Gonzalez* was most interested in fairness to the accused, choosing to expose his thinking process in an effort to insert information into the record that might warrant a sentence adjustment. However, the competing interest in the finality of convictions and the desire not to compel panels or judges to account for how they make their decisions clearly outweighs occasional interest in fine-tuning a sentence for the accused.

Finally, while it is clear that courts will interpret the privilege narrowly, the method of conducting post-trial inquiries appears to be adaptable to operational requirements.[104]

### *SJA's Post-trial Recommendation*

Courts have sent less than consistent messages regarding the post-trial recommendation of the SJA required after trial by R.C.M. 1106[105] and Article 60, UCMJ,[106] which is colloquially referred to as the "post-trial review." On the one hand, courts continue to emphasize the unique opportunity for clemency provided by the post-trial process. They also, however, tend to indulge significant errors, suggesting that the process is *pro forma*, and that they are willing to apply waiver against defense counsel who fail to spot errors in post-trial reviews and do not raise them in their submissions under R.C.M. 1105[107] and 1106. Still, the more consequential the error, the more likely that the reviewing courts will return a case for a new review and action.

### *Disqualification*

The circumstances under which the SJA is disqualified from signing the post-trial recommendation have become murkier as a result of a Navy-Marine Court of Criminal Appeals decision that increases the standard set by the COMA. In *United States v. Bygrave*,[108] the Navy-Marine court held that the accused is entitled to a fair and impartial post-trial recommendation by one free from *any* connection with the controversy. This standard contrasts with that set in *United States v. Lynch*[109] in which the COMA held that disqualification was not required in the absence of a "material factual dispute" or "legitimate factual controversy."[110] It is a considerably looser and more rational standard than the *Bygrave* requirement of freedom from *any* connection with the controversy.

In *Bygrave*, the SJA made public comments, through the press, six days after the accused's trial for infecting two people with HIV. The SJA said the accused, "just killed two or three people," adding that the message of the sentence (four years, bad-conduct discharge) was that "a violation will get you serious brig time and a boot from the Navy."[111] The SJA subsequently authored the post-trial recommendation. The Navy-Marine court held that the recommendation was improper and ordered a new recommendation and action.

Clearly, the SJA should have been disqualified under the *Lynch* standard even though this standard is not a perfect fit. The issue was less a factual controversy than one of temperament or predisposition. Nevertheless, the facts in *Bygrave* did not require the court to leap to such a broad, all-encompassing standard as freedom from *any* connection with controversy, especially when less

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[102] "[A] sentence may be reconsidered at any time before such sentence is announced in open session of the court." MCM, *supra* note 1, R.C.M. 1009(a).

[103] *Gonzalez*, 42 M.J. at 375. Though the judge stated on the record that it "'clearly was, I believe a mistake on my part [to] rely upon trial defense counsel'" to present information regarding the accused's mental history during the sentencing phase of trial, the CAAF did not question the adequacy of counsel. *Id.* at 374, 375.

[104] *See, e.g.*, United States v. Reed, 41 M.J. 755 (C.G. Ct. Crim. App. 1995). Here the court held that the judge acted properly in posing written questions to the accused, with his consent and after consultation with counsel, rather than reconvening the court, which would have required all parties from diverse locations to address contradictions discovered while reading the record for authentication between statements made at the providence inquiry and in an unsworn statement at sentencing.

[105] MCM, *supra* note 1, R.C.M. 1106.

[106] UCMJ art. 60 (1988).

[107] MCM, *supra* note 1, R.C.M. 1105.

[108] 40 M.J. 839 (N.M.C.M.R. 1994).

[109] 39 M.J. 223, 228 (C.M.A. 1994).

[110] *Id.*

[111] *Bygrave*, 40 M.J. at 845.

radical standards exist.[112] An SJA should be disqualified from performing duties required under Article 60, UCMJ, and R.C.M. 1106 if he or she has taken a premature position on the appropriateness of a sentence. Such conduct clearly signals a predisposition that would cloud the analysis that the SJA must present to the convening authority *after* receiving and analyzing defense post-trial submissions.[113]

*Bygrave* appears to place the Navy on a different footing, and provides ammunition for other services to ask the CAAF to change its standard. Established precedent in this area clearly demonstrates that an SJA can have some connection with the controversy, such as being a nominal accuser or being required to testify at Article 39(a)[114] session on panel selection process, and not be tainted to the point of being unable to deliver a fair post-trial recommendation.[115]

### *Precision Required on Findings*

While courts forgive many post-trial errors, they will require exactitude in recitation of findings. In *United States v. Diaz*,[116] the post-trial review omitted reference to findings of guilty on two charges, and the convening authority acted on the sentence only, not mentioning findings. The COMA found the action was in error regarding two omitted charges, which it disapproved.[117]

### *How Sloppy Before Error Is "Plain"?*

Courts seem willing to believe that lawyers went to law school so they would not have to take any more math classes. Two recent cases show that mere errors in arithmetic are not necessarily fatal.

In *United States v. Royster*,[118] a gross error in the post-trial recommendation's calculation of the maximum punishment (listed as thirty-five years and a dishonorable discharge when it was really eighteen *months* and a bad-conduct discharge) was not plain error because there was "no clear indication that the [convening authority's] action was actually affected by his exposure to the erroneous information."[119] To be plain error at this stage, an error must not only be obvious but must also have unfair prejudicial impact on an accused's substantial rights, and it must be raised in a timely manner by the accused.

In *United States v. Bernier*,[120] the post-trial recommendation recited that an accused used heroin on "divers occasions" when he really only used it once. This was not plain error partly because the convening authority went beyond the pretrial agreement in cutting confinement from nine months (ten months were adjudged) to three months.

These cases leave an unanswered issue—the extent to which a post-trial recommendation is anything other than a formality. The post-trial recommendation was radically changed in 1984 when it was a voluminous document that summarized and analyzed the court-martial in detail.[121] Now, it only requires a recitation of certain facts,[122] and a recommendation regarding the convening authority's action.[123]

Courts' willingness to overlook errors in the post-trial recommendation, coupled with application of waiver, lend support to the argument that something short of precision is required at this stage. *United States v. Zaptin*[124] featured numerous errors in the post-trial process. The author of the post-trial recommendation was the nominal accuser, and the promulgating order failed to

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[112] *See, e.g.*, United States v. Engle, 1 M.J. 387, 389 (C.M.A. 1976) (citation omitted) ("conduct by a staff judge advocate may be so antithetical to the integrity of the military justice system as to disqualify him from participation" in the post-trial process).

[113] The court also made clear that contact with the media concerning the procedural aspects of courts-martial is not, by itself, disqualifying. However, immediate expression of complete satisfaction with the severity of a sentence would lead any reasonable observer to conclude that the author was predisposed. *Id.*

[114] UCMJ art. 39(a) (1988).

[115] *See also* United States v. Caritativo, 37 M.J. 175 (C.M.A. 1993) (fact that pretrial advice had been attacked at trial did not automatically disqualify SJA to act post-trial).

[116] 40 M.J. 335 (C.M.A. 1994).

[117] *Id.* at 345.

[118] No. 9400201 (Army Ct. Crim. App. 20 Apr. 1995) (unpub.).

[119] *Id.*

[120] 42 M.J. 521 (C.G. Ct. Crim. App. 1995).

[121] *See* MCM, *supra* note 1, pt. IV, ¶ 85b, Revised (1969).

[122] The post-trial recommendation must include the findings and sentence, a recommendation as to clemency made in conjunction with the sentence [this clause is new in 1995], information regarding pretrial restraint and pretrial agreement, and a summary of the accused's service record. *Id.* R.C.M. 1106(d)(3).

[123] *Id.* R.C.M. 1106(d)(3)(F).

[124] 41 M.J. 977 (N.M. Ct. Crim. App. 1995).

summarize offenses on which the accused was arraigned. However, the court relied on waiver and the absence of prejudice to affirm the conviction. Perhaps because the post-trial recommendation is a more skeletal document than before 1984 and because the defense has ample opportunity to review it, challenge it, and respond to it,[125] courts rarely require a new review and action even when information in it is radically inaccurate.

### *"For Want of a 'U', the War Was Lost?"*

Courts continue to have special sensitivity regarding items in the accused's personnel records that should be brought to the attention of the convening authority before taking action on a case. The government was shaken from its lethargy in 1993 by *United States v. Demerse*[126] when the COMA held that the government had an independent duty to ensure that the post-trial recommendation accurately reflected the accused's awards regardless of whether the defense submitted information regarding the awards at trial or post-trial and regardless of defense failure to object to the omission.

In *United States v. Perkins*,[127] the Navy-Marine court held that an SJA may rely on the accused's official record in preparing the post-trial recommendation. The case involved a number of minor inaccuracies including the government's admission that a typist inadvertently recorded the accused's Article 15 as having the date of "21 Jan 89" when it was really "21 Jun 89."[128] The case is important, at least for the sea services, because it makes clear that there is no need to inquire into the accuracy of the record, particularly when the accused does not question accuracy of the recommendation in a timely manner.[129]

These rulings are consistent. The point of *Demerse* is to reinforce the government's independent duty, "to include [in the post-trial recommendation] length and character of service, awards and decorations received."[130] This duty exists regardless of any effort on the part of the accused. *Demerse* may fairly be read to place special emphasis on accused soldiers who served in Vietnam, a principle that can reasonably be applied to soldiers who have served in later operations, including Lebanon, the Gulf, Somalia, and Bosnia. *Perkins* does not undercut that obligation; it simply means that the government is sufficiently diligent if it scours its own records for evidence of such conduct.

### *Simplicity in the Post-trial Recommendation*

Although a minor change in the rules now requires that clemency recommendations *made on the record* be addressed in the post-trial recommendation,[131] the post-trial recommendation itself remains a summary document onto which the courts are hesitant to graft additional requirements.[132] The COMA held in *United States v. Corcoran*[133] that, notwithstanding the high institutional preference for treatment of self-reporting child abusers, the SJA is not required in the post-trial recommendation (or the addendum) to recite compliance with Department of Defense or Department of the Army policy directives regarding child abuse. The unambiguous force of *Corcoran* should deter efforts to apply this principle to other areas, such as drug and alcohol counseling, in which the military offers behavioral or physiological assistance or counseling for conduct that might also involve a crime.

One potentially complicated or misleading case merits attention. Normally, the post-trial recommendation is limited to material contained in the record of trial or relevant documents such as the accused's personnel records. The COMA held in 1994, however, that additional appropriate matters may be included in the post-trial recommendation. In *United States v. Drayton*,[134] the COMA held that the accused was not prejudiced by the SJA's

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[125] In its submissions under MCM, *supra* note 1, R.C.M. 1105, 1106.

[126] 37 M.J. 488 (C.M.A. 1993).

[127] 40 M.J. 575 (N.M.C.M.R. 1994).

[128] *Id.* at 577 (emphasis added).

[129] The court noted, pointedly, that the accused made his first complaints about the accuracy of the post-trial recommendation "more than a year after he had been given the opportunity to complain and had not done so." *Id.* Again, the onus will remain on defense counsel to use the opportunities that the Rules provide to examine and respond to the post-trial recommendation.

[130] MCM, *supra* note 1, R.C.M. 1106 (d)(3)(C).

[131] *Id.* R.C.M. 1106(d)(3).

[132] For example, the COMA recently moderated an earlier ruling regarding the extent to which a post-trial review must address multiplicity. In *United States v. Russett*, 40 M.J. 184 (C.M.A. 1994), the court clarified *United States v. Beaudin*, 35 M.J. 385 (C.M.A. 1992), holding that the post-trial review only needs to address the judge's multiplicity determination when the issue is raised in the defense submission. *Accord* United States v. Reed, 41 M.J. 755 (C.G. Ct. Crim. App. 1995) (SJA not required, in post-trial recommendation, to inform convening authority that judge found several offenses multiplicious for sentencing).

[133] 40 M.J. 478 (C.M.A. 1994). *Accord* United States v. Brown, 40 M.J. 625 (N.M.C.M.R. 1994) (family advocacy policies do not limit convening authority's authority under R.C.M. 1107; if convening authority acted under such limitations he would be abdicating his authority under Art. 60, UCMJ, and a new action would be required).

[134] 40 M.J. 447 (C.M.A. 1994).

error of including Article 32 testimony in the post-trial recommendation even though the post-trial recommendation ordinarily may not include matters outside the record to support the sufficiency of evidence (which the post-trial recommendation is not required to address). The court found the material harmless because the accused also introduced matters outside the record (asserting unknowing ingestion) in an attempt to attack the conviction—albeit in response to the post-trial recommendation.[135]

*Drayton* seems to permit a sort of defensible, anticipatory breach of the rule against including non-record information in the post-trial recommendation, on the grounds that the accused might rely on non-record information in his R.C.M. 1105[136] matters. This rationale is hard to defend and must not be interpreted by the government as a green light for creative supplementation of post-trial recommendations. The better practice, clearly, is to restrict a post-trial recommendation to matters in the trial record. In *Drayton*, the contested information came from the Article 32 investigation, but was not offered at trial. This is not, then, part of the record.

While the rule permits inclusion in the post-trial recommendation of "any additional matters deemed appropriate by the staff judge advocate . . . includ[ing] matters outside the record,"[137] that provision was not at work in this case. The court instead looked at a sort of constructive anticipatory notice, reasoning that the augmented post-trial recommendation preempted a not-yet-crafted, but ultimately audacious, defense submission. Judge Sullivan's dissent is more instructive and less reckless, asserting that there is no basis in the rules for allowing the government to supplement a post-trial recommendation in the manner used in *Drayton*.[138]

### *Ineffective Assistance During Sentencing and Post-Trial*

Few areas are more difficult to anticipate or correct than claims of ineffective assistance of counsel, especially during sentencing and post-trial procedures. There are two broad concerns regarding ineffective assistance of counsel: (1) whether counsel are rendering effective assistance, and (2) whether the record *reflects* the quality of their assistance. Concerns about the record can, at times, drive counsel's decisions, advice, or strategy, not always for the better. This is especially true in the post-trial realm. Just as the courts show signs of deferring to counsel's well-considered choices during sentencing, they seem to be tightening their scrutiny of post-trial representation.

Perhaps because there is little risk for the defense at this stage of the proceedings, limiting the traditional deference to unstated or less objectively discernable tactical considerations, courts are especially willing to scrutinize and publicly identify cases of ineffective post-trial assistance. The courts have sent three clear messages to defense counsel: (1) failure to submit matters will step up the level of scrutiny, (2) special care must be accorded to any matters submitted directly by the accused, and (3) counsel are expected to insert their legal and prudential judgments in shaping the parts of the clemency package not directly generated by the accused.

### *Indulge the Accused . . .*

In a case that was important for a number of reasons,[139] the CAAF ruled in *United States v. Lewis*[140] that a defense counsel must essentially submit what his client furnishes him even when, as here, counsel believes it would be counter-productive. The CAAF held that counsel's unilateral decision to do otherwise—omitting the accused's handwritten letter urging financial clemency and questioning the fairness of the system—constituted "deficient," though not prejudicial performance.[141]

### *. . . But Shape the Clemency Package*

While the CAAF sent a clear message in *Lewis* that counsel must defer to their clients' decisions in submitting post-trial matters, it also has delivered what, at first blush, may appear to be contradictory guidance. In *United States v. MacCulloch*,[142] the defense counsel failed to "winnow out" an unfavorable letter, written by the accused's civilian defense counsel and submitted by the accused's mother, that undercut the case for clemency.[143] The

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[135] *Id.* at 451.

[136] MCM, *supra* note 1, R.C.M. 1105.

[137] *Id.* R.C.M. 1106(d)(5).

[138] "The majority cites no authority for its implied holding that extra-record evidence may be included in the SJA's addendum in rebuttal to extra-record evidence of innocence presented in appellant's clemency petition." United States v. Dresen, 40 M.J. 462 (C.M.A. 1994) (Sullivan, C.J., dissenting) (footnote omitted).

[139] For further discussion of *Lewis*, see Donna M. Wright, *Sex, Lies and Videotape: Child Sexual Abuse Cases Continue to Create Appellate Issues and Other Developments in the Areas of Sixth Amendment, Discovery, Mental Responsibility, and Nonjudicial Punishment*, ARMY LAW., Mar. 1996, at 72.

[140] 42 M.J. 1 (1995).

[141] *Id.* at 4.

[142] 40 M.J. 236 (C.M.A. 1994).

[143] The accused's mother submitted, along with her own letter, a post-trial letter to her from the accused's civilian defense counsel, in which he portrayed her accused son in a negative light. The military counsel included this letter, along with the letter from the mother, in the post-trial submission.

court emphasized the defense counsel's responsibility to *advise* a client of the danger of such an approach, but it did not suggest that counsel's decision regarding the contents of the clemency packet is final. The court said that the "defense counsel was required to make an evaluative judgment on what items . . . were to be submitted to the convening authority" and, if he "thought some matters should not be submitted, he should have so advised appellant."[144]

Unquestionably the letter was damaging, and its submission reflected inattention and haste.[145] What remains unclear is the extent to which the defense counsel had clear authority to exclude the letter even after the consultation that the majority urges and especially if such consultation yields a negative or noncommittal response from the accused.

### *Reconciling* MacCulloch *and* Lewis

*MacCulloch* and *Lewis* can, to some degree, be reconciled by analogy to the respective rights and responsibilities of the accused and counsel at trial. *Lewis* stands for the accused's rights while *MacCulloch* stands for the rights and responsibilities accorded to counsel. Just as, for example, a decision whether to testify and the contents of that testimony are the accused's inviolable decision, *Lewis* makes clear that the contents of *the accused's contribution* to the post-trial package are to be determined by him alone. Similarly, an accused may contribute to broader decisions regarding trial strategy—for example, whom to call as witnesses, scope of cross-examination and argument—but these decisions are entrusted to the attorney after consultation with his client. The CAAF explicitly stated that defense "counsel do not have the authority unilaterally to refuse to submit [post-trial] matters which the client desires to submit. Counsel's duty is to *advise*, but the final decision as to what, if anything, to submit rests with the accused."[146]

*MacCulloch* should extend this same principle to the post-trial process and comes tantalizingly close to doing so: That is, counsel should be expected to craft and shape the post-trial package except for the accused's own contribution. The majority acknowledges this general principle—that the defense attorney has editing rights for clemency submissions—but does not make it explicit and says nothing about how a dispute between counsel and client will be resolved.

The Army court extended this principle in an unpublished opinion, holding that the submission of unartfully written materials from an accused and his mother did not constitute ineffective assistance in the context of the entire, well-prepared clemency package.[147] The *MacCulloch* majority nearly implies—by citing trial decisions that are the province of the defense counsel—that such is the responsibility of the defense counsel, but does not go beyond exhorting counsel to evaluate the submissions and give their best advice to their clients. At the most elementary level, the court simply seems to be encouraging counsel and accused to talk to each other, and for counsel not to make precipitous decisions without consulting clients.[148] What remains unclear is when counsel can say no.

### *Submit Something*

Courts frequently incant that failure to submit matters does not constitute *per se* ineffective assistance, but it certainly invites scrutiny and is likely to constitute ineffective assistance in a significant case when available mitigating information does not reach the convening authority. In *United States v. Cobe*,[149] an accused was convicted of three indecent acts with a minor and sentenced to thirty months confinement and a dishonorable discharge. The defense failed to point out that the conduct was relatively non-intrusive touching outside the victim's clothes, that a Navy psychiatrist said the accused was not a pedophile, that his con-

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[144] *Id.* at 239.

[145] In his dissent, Chief Judge Sullivan returns the court to the facts, which often ground a case such as this, and which can tempt a court to make pronouncements that sweep more broadly than necessary. The Chief Judge reminds the court that the military counsel was fired the day after trial and re-hired "*one day*[] prior to the date for post-trial submissions," at which time the accused "expressly directed him to submit matters which he would receive from his parents. The unwinnowed letter was one such matter." *Id.* at 240 (Sullivan, C.J., dissenting) (emphasis in original).

[146] *Id.* at 240 (emphasis added). The court follows this quotation immediately with citations to R.C.M. 1106(f)(1), 1105(a) and (d), but none of these provisions is explicit regarding the absolute duty of the counsel to defer to the client's wishes. The supporting string citation also includes *United States v. MacCulloch*, 40 M.J. 236 (C.M.A. 1994), for the proposition that counsel should advise the accused about the packet's contents, but as this article makes clear, there is at least one pivotal difference between the two cases: *Lewis* involved a submission written by the accused, and *MacCulloch* did not.

[147] In *United States v. Hood*, No. 9500624 (Army Ct. Crim. App. 22 Dec. 1995) (unpub.), the defense counsel, without consultation, submitted a letter from the accused's mother, in which she described rude treatment at the hands of the accused's chain of command, and a letter from the accused that contained grammatical and spelling errors. The court found that the accused's draft "was unsigned and contained . . . errors, [but that] it vividly conveyed" his concerns, and that his "mother's correspondence reflected her sincere belief" about her treatment. *Id.* slip op. at 2. Moreover, these documents were part of "a detailed, well-articulated and persuasive summary of clemency matters most favorable to the appellant," for which the court credited the counsel, failing to find ineffective assistance of counsel where, as in *Sittingbear*, the accused could not provide "any evidence" that there were "other meaningful matters" that the defense counsel could have submitted. *Id.*

[148] *Lewis* also addresses the standards for determining ineffective assistance of counsel and gives courts additional leeway in requiring some showing of ineffectiveness before the burden is shifted to the defense counsel to explain his conduct. Already *Lewis* has been cited in decisions in which courts have refused to require the defense counsel to rebut claims of ineffective assistance of counsel. *See, e.g.*, United States v. Horsman, No. 9400825 (Army Ct. Crim. App. 26 Jan. 1996) (unpub.).

[149] 41 M.J. 654 (N.M. Ct. Crim. App. 1994).

duct was treatable, and that he was personally remorseful and amenable to treatment.[150] The defense's failure to raise any of these issues confounded the court, especially in light of the relative ease of submitting such matters:

> There is no other rational explanation . . . that could justify the failure to submit a clemency petition. Preparation of such a petition is not an onerous task; it may require no more than simply copying certain pages of the record of trial and forwarding them with a cover letter . . . Finally, at that point in the proceedings, there was nothing to lose.[151]

It also is not enough to assume that such materials are included in the record of trial, so that the convening authority is somehow on notice of their existence. Counsel must consider a post-trial submission to be a sort of highlight film of the best that the defense can offer. To operate on the assumption that the convening authority will read the record of trial is both legally wrong[152] and, in most instances, factually incorrect.[153]

### *Court Makes Corrections*

The Army Court's analog to *Cobe* contains similar analysis. In *United States v. Aflague*,[154] the court held that when there is no logical reason for counsel's failure to submit matters on behalf of an accused, and where the record glaringly calls for the submission of such matters, the presumption of counsel effectiveness has been overcome. This requires an appellate court to do something to cleanse the record of the apparent error. Aflague received ten years confinement and a dishonorable discharge for unpremeditated murder, but the civilian defense counsel failed to submit any post-trial matters.[155] Rather than return the record for defense submissions and a new review and action, the court chose to reduce the sentence by two years[156] based on considerations of judicial economy and the presence of "ample mitigation and extenuation evidence that . . . might have resulted in the sentence being reduced even further."[157] Still, the near requirement to submit clemency matters is not absolute, especially when it is clearly the decision of the accused and counsel.[158]

### *Unsolicited Submissions*

Another area calling for caution on the part of SJAs is over the transom submissions made on behalf of the defense that are sent directly to the government. The government must be careful in handling such materials, which it receives from time to time, either because those writing for the accused are not sure where to send their materials or, in high profile cases, unsolicited material is submitted. The government should be concerned any time it independently receives communications that more properly come from the defense, but there is no clear guidance on what to do with such materials.

In *United States v. Reister*,[159] a favorable clemency letter was sent through the SJA to the convening authority.[160] The Navy-Marine court held that forwarding such letters to defense counsel is the proper course of action. The court ruled that the convening authority is under no obligation to consider such letters and that the SJA acted properly in forwarding the letter to the defense.[161] The clarity of the case is slightly dimmed, however,

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[150] *Id.* at 655.

[151] *Id.* at 656.

[152] The record of trial is listed among the items that the convening authority *may* consider but is not required to read. MCM, *supra* note 1, R.C.M. 1107(b)(3)(B)(i).

[153] In *Cobe*, the court noted the fiction of assuming that the convening authority reads the record of trial. The SJA recommendation advised the convening authority to suspend all confinement in excess of forty-two months, evidently to comply with a pretrial agreement. "Had he [the convening authority] read the record thoroughly, he would have seen that the appellant was only sentenced to thirty months. Considering all of the above, we are left with little confidence that he read the record." *Cobe*, 41 M.J. at 656, n.2.

[154] 40 M.J. 501 (A.C.M.R. 1994).

[155] *Id.* at 501. This failure occurred even though the civilian defense counsel sought a three week delay for submission of post-trial matters. *Id.* The opinion implies that a delay was granted, notwithstanding R.C.M. 1105, which limits such delays to twenty days beyond the initial ten day period.

[156] *Id.*

[157] *Id.* at 504. The court acknowledged that ten years was significantly less than the maximum punishment of life in prison, but emphasized the failure to raise significant extenuation and mitigation to the attention of the convening authority.

[158] *See, e.g.*, United States v. Scott, 40 M.J. 914 (A.C.M.R. 1994). No ineffective assistance of counsel was found where the accused clearly directed his defense counsel not to submit clemency matters, and the accused was not prejudiced. The documents in the record of trial sufficiently established that the record and recommendation were properly served.

[159] 40 M.J. 666 (N.M.C.M.R. 1994).

[160] The letter was from the mother of a Marine whom Reister had helped. *Id.* at 671-72.

[161] It was forwarded to the defense the day the commanding general took action. *Id.* at 671.

by a sort-of implicit harmless error analysis, in which the court found that the disputed letter likely would not have mattered because the convening authority received twenty-five other letters and gave substantial sentence relief.[162] If the convening authority is under no obligation to consider such submissions, then the fact that the accused received significant relief should be irrelevant. The government must remember that the defense alone is charged with shaping its post-trial package, and it alone can determine whether a letter, even one meant to support an accused, contains the type of information and tone that is conducive to obtaining clemency.

### *Assessing Potential Ineffective Assistance Claim Versus Need to Take Action*

Claims of ineffective assistance of counsel are not only headaches for the defense, they are also headaches for the government. The government's goal is not only to obtain proper convictions but to obtain convictions that survive appellate review. The government, therefore, has a stake in correcting claims of ineffective assistance of counsel at the source. The government is, of course, in an uncomfortable position any time it appears to look over the shoulder of defense counsel and their clients. The attorney-client relationship should be inviolate, and the defense should find the government attention unwelcome. Nevertheless, the government needs to assess potential indicators of ineffective assistance to determine whether to selectively insert itself. Such action should not take the form of direct contact with an accused, but may entail frank, documented discussions with civilian defense counsel and with military counsel and their supervisors when the government detects strong indicators of defense ineffective assistance.

In *United States v. Dresen*,[163] the defense counsel was found to be ineffective when, in her clemency brief, she asked for approval of a punitive discharge, coupled with reduced confinement, without obtaining the accused's permission. Although such an offer is not impermissible,[164] it should prompt the government to investigate the possible lack of the accused's consent before staffing the action to the convening authority.

The court set a very high standard for submission of a request for a punitive discharge. It wrote that "when defense counsel does seek a punitive discharge or does concede the appropriateness of such a discharge—even as a tactical step . . . counsel must make a record that such advocacy is pursuant to the accused's wishes."[165] In this case, the court found that "the defense counsel erred in her advocacy of a bad-conduct discharge—even as an implied *quid pro quo* for substantially reduced confinement—when acceptance of the discharge flew squarely in the face of appellant's desire to avoid it."[166] The result was a finding of prejudice to the accused, and the action was set aside.

As is often the case, the accused, in this instance, appears to have been difficult to work with. However, a request for approval of a bad-conduct discharge (BCD), in a case in which an accused with more than eighteen years service received one year's confinement, a BCD and forfeitures, should have caused heightened concern.[167] Specifically, it would be proper, on receipt of the accused's R.C.M. 1105 matters, to seek written clarification of the accused's desires. It would be wise to memorialize this exchange in the addendum to the post-trial recommendation when finally advising the convening authority about what action to take in the case. Any time an accused or defense counsel asserts amenability to a punitive discharge, government antennae should be deployed. It is not *per se* impermissible for the accused or counsel to assert amenability to a punitive discharge at trial or afterwards, but it warrants considerable skepticism and scrutiny by all parties.

### *Substitution of Counsel Problems*

The burden remains on the government to ensure that it protects the accused's rights when taking action on a case. Special concerns arise when counsel are substituted, a possibility made increasingly likely by unforeseen, short-fuse deployments, and the perpetual rotation of defense counsel. In *United States v. Hultgren*,[168] the Navy-Marine court found that the deployment to Somalia was a "military exigency" and an "extraordinary circumstance" justifying a change of defense counsel after trial but before conclusion of the post-trial phase. The substitute counsel,

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[162] *Id.* The accused was convicted of sexual offenses, aggravated assault, and fraternization. The convening authority reduced the adjudged seven years confinement to four years and suspended two of the four years. *Id.*

[163] 40 M.J. 462 (C.M.A. 1994).

[164] *Id.* at 465 (citations omitted).

[165] *Id.*

[166] *Id.*

[167] The accused, an Air Force technical sergeant with more than eighteen years of service, was convicted of disobeying a lawful order and repeated marijuana use. He proceeded *pro se* on the merits and, *inter alia*, argued on the merits that his marijuana use never hurt his duty performance and "was justified 'as a sedative to relax and ease the tension' of problems at work" and an alcoholic wife. *Id.* at 464.

[168] 40 M.J. 638 (N.M.C.M.R. 1994).

however, did not communicate with the accused and, therefore, did not develop an attorney-client relationship sufficient for preparation of the clemency petition. Thus, the convening authority's action based on the clemency petition was set aside.[169]

Courts will not hold the government responsible for ineffective assistance of counsel *per se* but for failing to take action when there is some evidence of an irregularity in the attorney-client relationship. This high level of responsibility is enough for the government to justify the occasional inquiry into the attorney-client relationship that the defense normally will want to protect. In *United States v. Cornelious*,[170] remand was required to determine whether the accused was substantially prejudiced by the convening authority's failure to ensure that the accused had substitute counsel for post-trial matters after the accused alleged ineffective assistance of counsel at trial.[171] The fact that he made an assertion of ineffective assistance of counsel put the government on notice that special care should be paid to the post-trial package.[172] If a post-trial submission arrives under the signature of a putatively ineffective counsel, it should at least warrant a *documented* inquiry into the continued relationship between the accused and the lawyer.

### *Assessing Potential Ineffective Assistance Claims*

Cases in which sentences have been adjusted or remanded due to ineffective assistance of counsel encourage attention to the following factors:

1. *Earlier Experience with the Defense Counsel at Issue.* This principle applies most clearly to the few counsel, often civilians, who have been notably dilatory in their post-trial work. Counsel establish discernable patterns in their conduct. The government in general and individual jurisdictions in particular can be held to be on notice about a counsel's propensities and be expected to act with extra caution.[173]

2. *Defense Counsel's Performance at Trial.* No necessary relationship exists between counsel's competence in the courtroom and in post-trial matters, but a counsel who evidences poor trial preparation may be a likely candidate for poor post-trial work, and the government may be held to have been on notice about this likelihood.[174]

3. *Notice of Lateness.* The extent to which the government is on notice about possible late arrival of submissions—and their projected date of arrival—also factors into the decision of whether to act at the deadline or to cajole a response out of the accused. There is, of course, no basis for extending an action beyond thirty days[175] even though SJAs and convening authorities should be liberal in granting the twenty day extensions beyond the permitted ten days for submitting matters.[176]

4. *Gravity of Offenses.* Courts simply pay more attention when the stakes are higher.

5. *Existence of Pretrial Agreement.* Courts are more likely to find harmless error when the accused already has bargained for his sentence.

### *Ineffective Assistance and Sentencing*

Military courts do not hesitate to scrutinize the preparation and presentation of the defense case in sentencing, but the courts also show a willingness to recognize that the counsel responsible for trying the case normally has the best sense of an effective strategy. Counsel can invite unwanted attention by putting on an obviously superficial or poorly prepared defense case in sentencing.

In *United States v. Boone*,[177] the CAAF remanded the case so that the defense could explain why, after the accused's rape conviction, the accused's mother, uncle, a career officer, and others in the accused's chain of command were not called during sen-

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[169] *Id.* at 641.

[170] 41 M.J. 397 (1995).

[171] *Id.* at 399.

[172] *Id.* at 398.

[173] *See, e.g.*, United States v. Carmack, 37 M.J. 765, 769, n. 2 (A.C.M.R. 1993) (citations omitted) (court cites particular defense counsel for poor post-trial performance, noting "[t]his is not the first time that [the attorney] was found to have provided his client with inadequate sentencing or post-trial representation").

[174] In *Cornelious*, for example, the defense counsel was not necessarily ineffective at trial, but his client complained about the counsel's trial performance. *Cornelious*, 41 M.J. at 398.

[175] "If, within the 10-day period, the accused shows that additional time is required for the accused to submit such matters, the convening authority or that authority's staff judge advocate may, for good cause, extend the 10-day period for not more than 20 additional days." MCM, *supra* note 1, R.C.M. 1105(c)(1).

[176] A 1995 Manual change gives SJAs the authority to grant, but not deny, the twenty day delays that the defense may seek for extension of the ten day period in which to submit post-trial matters. *Id.* R.C.M. 1105(c)(1).

[177] 42 M.J. 308 (1995).

tencing. The defense case consisted solely of the accused's short unsworn statement, and the court said it could "discern no tactical reason . . . for the meager defense presentation" by an indifferent civilian defense counsel.[178] The result, after *twenty-three minutes* of deliberation, was a sentence that included sixty years confinement and a dishonorable discharge.[179]

Two months earlier, the CAAF indicated that a factor as arbitrary as the length of the defense case will not be the sole determinant of ineffective assistance of counsel. In *United States v. Ingham*,[180] the defense counsel's choice not to call certain witnesses, and short but "direct, to the point" sentencing argument, did not constitute ineffective assistance of counsel.[181] The court found that, under the circumstances, the counsel's tactics were sound and that the defense counsel had weighed other options, including inadvertently bolstering the government case or opening the door to other evidence.

In other cases, the CAAF also showed deference to well-considered defense tactics. In *United States v. Loving*,[182] a death penalty case, defense counsel's decision not to present expert mitigation testimony was upheld as a reasonable tactical choice, given the defense witness's vulnerability on cross-examination.[183]

The CAAF has signaled an encouraging willingness not to inquire into every assertion of ineffective assistance of counsel. In *United States v. Sittingbear*,[184] the Army court clearly placed the burden on the accused to present *prima facie* evidence of ineffective assistance of counsel before shifting the burden to the government. Sittingbear claimed that his counsel failed to call eight witnesses in extenuation and mitigation. The court found the accused's ineffective assistance of counsel claim did not meet the *Strickland-Lewis*[185] threshold to even require the defense to justify not calling the witnesses, especially when the accused could not say what the witnesses would have said.[186]

Given the paternalism inherent in many aspects of the military justice system, claims of ineffective assistance of counsel will always arise, often capturing the attention of appellate courts. Nonetheless, the recent cases provide some indication that attention to detail and well-considered, even if imperfect, tactical decisions normally will avert a finding of ineffective assistance of counsel during the sentencing and post-trial phases.

### *"New Matter" in Addendum*

Because the post-trial phase is one of great consequence[187] and contention, there is increased pressure on the government to respond to assertions made in the defense's post-trial submissions. After receipt of defense clemency matters, the government is permitted, but not obliged, to prepare an addendum to the post-trial review.[188] Frequently, this entails little more than acknowledging, and providing a vehicle for tracking defense submissions, and altering or reiterating the recommendation regarding findings and sentence that were contained in the post-trial review.

Because of the structural concern for the defense opportunity to respond to information that the government provides to the convening authority, case law developed the requirement that an addendum containing new matter be served on the defense, which would then grant the accused another opportunity to respond. This requirement was codified in a 1995 *Manual* change.[189] The rule requires a certificate of service or proper substitute service on the accused and the identical response structure as the post-trial review: ten days to respond, and the opportunity to seek a twenty day extension, which the SJA may also grant but not deny.[190]

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[178] Perhaps not incidentally a retired judge advocate colonel and former military judge.

[179] *Id.* at 309.

[180] 42 M.J. 218 (1995).

[181] *Id.* at 226. For concerns about merits witnesses, *see id.* at 224-25.

[182] 41 M.J. 213 (1994), *cert. granted* 116 S. Ct. 39 (1995). The Supreme Court heard arguments in *Loving*, which involves the constitutionality of certain aspects of the military death penalty on 9 January 1996, and a decision is expected before the end of the 1995 term.

[183] An expert forensic psychiatrist would have presented some favorable testimony, but would have been forced to acknowledge on cross-examination that the accused had "a classic 'sociopathic personality' and could very easily commit similar crimes in the future." *Id.* at 250.

[184] 42 M.J. 750 (Army Ct. Crim. App. 1995).

[185] Strickland v. Washington, 466 U.S. 668 (1984); United States v. Lewis, 42 M.J. 1 (1995).

[186] *Id.* at 752.

[187] In the Lincolnesque words of Judge Crawford: "One of the last best chances an appellant has is to argue for clemency by the convening authority." United States v. MacCulloch, 40 M.J. 236, 239 (C.M.A. 1994).

[188] MCM, *supra* note 1, R.C.M. 1106(f)(7).

[189] *Id.* R.C.M. 1106(f)(7).

[190] *Id.* R.C.M. 1105(c)(1).

This rule serves two functions. First, it ensures that the defense is notified of any new material. This precludes the government from smuggling information to the convening authority and gives the defense the opportunity to seek to place it in context. Second, it deters the government from adding new matter, because of the opportunity to respond that is triggered every time that new material is inserted.

The key question, of course, is what constitutes new matter. The term is not clearly defined in the *Manual* or case law. It is safe to assume, however, that an item is new matter if it comes from outside the record of trial. This means that even if the information is in the accused's record somewhere, that is not enough to justify its insertion into the post-trial process for the first time at the addendum phase, without treating it as new matter.

In *United States v. Harris*,[191] the SJA mentioned three Articles 15 for the first time in the addendum. Two of the Articles 15 had been admitted at trial, but the Army court ordered a new review and action on the theory that it cannot discern what iota of extra information might have affected the convening authority's decision and, therefore, it refused to apply a harmless error analysis. "[W]e should not presume to speculate whether a particular adverse matter or possible defense rebuttal thereto, if any, would influence the convening authority in his exclusive exercise of clemency powers."[192]

In *United States v. Haire*,[193] the defense raised legal issues in its post-trial submission that were not discussed in the SJA recommendation. The government then addressed these issues for the first time in the addendum, and the record contained no proof that the addendum was served on the defense. The action was set aside.[194]

In *United States v. Sliney*,[195] an unpublished but instructive decision of the Army court, the government was found to have erred in including clearly new matter in the addendum without providing the defense the opportunity to respond. The material included a letter from the victim (wife) expressing her fear of future attack, and one from a victim-witness liaison stating that the victim was hiding from the accused and that the accused might further victimize the victim by failing to provide for his family.[196] The case was returned for a new action.

Again, the problem was not the relevancy of the materials that the government submitted. A victim's continued fear of the accused and an official's assessment of future dangerousness may be appropriate information for a convening authority to consider when making a clemency decision. The problem in *Sliney* was that the information went to the convening authority without being presented to the defense. The defense cannot be circumvented when presenting such information to the person who will decide, *inter alia*, whether (or how much of) the adjudged sentence should be approved.

It is important to understand that the courts are not saying that it is inappropriate to consider new matter. Frequently, in fact, it can place in context or effectively refute an assertion made by the defense. The point is simply that if the government is going to provide such information to the convening authority the defense should know about it because only then can the defense plea for context or provide further information that may cast the new matter in a different light. It is a rule of fairness and completeness, and SJAs should keep this in mind when assessing (1) whether the information is new matter and (2) whether there is a real need to prolong the post-trial process by including it in the addendum. Most important for practitioners is the fact that an otherwise legally correct action consumes additional counsel and court time, with a possible windfall for the accused, because of failure to comprehend that such information is new matter and then to make a reasoned judgment either to serve it on the accused or not to include the information at all.[197]

### *Postponing—Deferring Confinement*

Convening authorities occasionally face the problem of determining the confinement status of a convicted soldier serving time in a nonmilitary prison under the sentence of a civilian court. Change 8 to the *Manual* permits a convening authority to postpone service of confinement without the accused's consent until after the accused is permanently released by a state or foreign

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[191] 43 M.J. 3 (Army Ct. Crim. App. Oct. 11, 1995).

[192] *Id.* (citations omitted).

[193] 40 M.J. 530 (C.G.C.M.R. 1994).

[194] *Id.* at 532.

[195] No. 9400011 (Army Ct. Crim. App. 11 May 1995) (unpub.).

[196] *Id.* slip op. at 3. *See also* Memorandum, United States Army Disciplinary Barracks, Fort Leavenworth, KS, ATZL-SJA-DS, to Staff Judge Advocate, United States Army Infantry Center and Fort Benning, subject: Request for Suspension of Pay - Victim (8 Mar. 1994).

[197] In another recent case, the Army court signaled its hard line on new matter, ruling that the government's inclusion for the first time in the addendum information regarding the victim's having been a victim in a prior incident involving the accused was new matter. The government's failure to serve it on the accused for comment required a new action. United States v. Mitchell, No. 9401529 (Army Ct. Crim. App. 11 Dec. 1995) (unpub).

country.[198] A corollary rule, inserted at the same time, provides that time spent in custody of civilian or foreign authorities after a convening authority has postponed the service to confinement is not counted as time served in military confinement.[199]

*Cleaning up the Action*

SJA offices frequently find themselves correcting errors in convening authority actions and promulgating orders. Recent *Manual* changes permit the government, before publication *or* official notice to the accused, to recall and modify any action.[200] After publication or notice, but before forwarding (mailing) the record, the government may recall and modify an action "as long as [it] does not result in action less favorable to the accused than the earlier action."[201]

These changes seem to be concessions to the realities of word processors and haste. If, for example, a convening authority signs an action which, it is promptly discovered, failed to include the punitive discharge, the government may generate a new action so long as neither publication nor notice has occurred. If either has occurred, it seems the government will still be able to locally correct "technical errors" such as typographical mistakes, but will still have to elevate significant errors (for example, mischaracterizing findings or sentence) to the Clerk of Court's office for adjustment. Neither the text of the rule nor the discussion defines publication or notice. Publication likely means production of the promulgating order, but official notice is not further defined, raising questions about local practices that may include informal publication of manifests of convening authority action and other documents that the defense may plausibly assert constitute official notice.

*Taking Action: Converting, Suspending and Vacating Punishments*

When taking action in a case, the convening authority has virtually unlimited flexibility. While the convening authority may not approve findings or sentence more severe than adjudged by the trial court, the convening authority may take any other action, including total disapproval of findings[202] or sentence.[203] This plenary authority must be exercised with an understanding that certain actions can inadvertently increase a sentence. Additionally, the provisions regarding suspending or vacating punishment carry important limitations on the convening authority and protections for the accused.

In certain circumstances, the convening authority may alter the form of punishment received. The *Manual* permits the convening authority to "change a punishment to one of a different nature, as long as the severity of the punishment is not increased."[204] This means, for example, that the convening authority may convert a punitive discharge to a term of confinement. The convening authority may not, however, do the converse. In *United States v. Barratt*,[205] the Army court ruled that "a punitive discharge, as a matter of law, is not a lesser included punishment of confinement."[206]

In *Barratt*, the accused pleaded guilty, and the military judge sentenced him to sixteen months confinement, total forfeitures, and reduction to private E-1. The convening authority substituted a bad-conduct discharge (BCD) for ten of the sixteen months of confinement and approved a sentence of six months confinement, total forfeitures, reduction to private *and* a BCD. Although the accused expressly requested such a conversion in his R.C.M.

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[198] MCM, *supra* note 1, R.C.M. 1107(d)(3). The rule applies to soldiers who are in state or foreign custody and returned to the military for court-martial and then returned to the state or foreign country pursuant to "mutual agreement or treaty." *Id.* Importantly, the deferment must be reflected in the action that the convening authority takes on the court-martial. *Id.*

[199] *Id.* R.C.M. 1113(d)(2)(A)(1)(iii).

[200] *Id.* R.C.M. 1107(f)(2).

[201] *Id.*

[202] *Id.* R.C.M. 1107(c).

[203] *Id.* R.C.M. 1107(d).

[204] *Id.*

[205] 42 M.J. 734 (Army Ct. Crim. App. 1995).

[206] *Id.* at 735.

1105 submission, the convening authority's action still violated the law that requires that punitive discharges be adjudged by courts-martial.[207] The court affirmed the total forfeitures, reduction to private E-1, but only six months confinement.

As the military tries cases of increasing sensitivity and complexity, there is greater cause for convening authorities to consider using their authority, granted in R.C.M. 1108, to suspend punishments. While convening authorities may attach conditions to such suspensions, appellate courts will scrutinize the terms of such suspensions and any later vacations of such punishments.

In *United States v. Spriggs*,[208] the COMA affirmed a convening authority's right to attach conditions to suspended punishments (in this instance completing a sex offender program), but held that the uncertain and open-ended period of time required to fulfill the condition made the period of suspension of the discharge and reduction in grade "unreasonably long."[209] The court commended the parties' efforts "to creatively and effectively address the best interests of the individual accused and of society in a meaningful way,"[210] but not the "unreasonably long and open-ended period of time for completion of one of the conditions."[211]

The Navy-Marine court, by contrast, upheld a long suspension. In *United States v. Ratliff*,[212] the accused was sentenced to, *inter alia*, fifteen years confinement and a dishonorable discharge. The convening authority suspended "for the duration of the appellant's confinement, plus one more year, confinement in excess of 10 years."[213] The court held: "Placing him on probation for approximately 11 of those years is not unreasonably long."[214] It is important to note, as the court observed, that the Secretary of the Navy, unlike his Army counterpart, has not exercised his authority to define what is a reasonable period of suspension.[215] There is some authority to suggest that even when a service secretary has set such a limit, it may be bargained away as part of a pretrial agreement.[216]

### *Vacating Suspended Punishments*

When a convening authority wants to consider vacating all or part of a suspended sentence, the procedures dictated in Article 72, UCMJ,[217] and R.C.M. 1109 must be followed.[218] These provisions require conducting a hearing by the special court-martial convening authority and a decision by the general court-martial convening authority.[219]

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[207] *See* MCM, *supra* note 1, R.C.M. 1003(b)(6). This principle is further amplified in the discussion to the rule. "One form of punishment may be changed to a less severe punishment of a different nature, as long as the changed punishment is one that the court-martial could have adjudged. For example, a bad-conduct discharge adjudged by a special court-martial could be changed to confinement for 6 months (but not vice versa)." MCM, *supra* note 1, R.C.M. 1107(d) discussion. The court noted that *Waller v. Swift*, 30 M.J. 139 (C.M.A. 1990), is an inapt source of support for the sentence conversion at issue in *Barrat* because it involved conversion of a BCD to time, which is lawful.

[208] 40 M.J. 158 (C.M.A. 1994).

[209] *Id.* at 163.

[210] *Id.*

[211] *Id.*

[212] 42 M.J. 797 (N.M. Ct. Crim. App. 1995).

[213] *Id.* at 802.

[214] *Id.*

[215] MCM, *supra* note 1, R.C.M. 1108(d) provides, "[t]he period of suspension shall not be unreasonably long. The Secretary concerned may further limit by regulations the period for which the execution of a sentence may be suspended." The Secretary of the Army has done so in *Army Regulation 27-10*, providing a scale of escalating maximums for periods of suspension, culminating in general courts-martial, for which a "reasonable period" shall not exceed "[t]wo years or the portion of any unexecuted portion of confinement (that portion of approved confinement unserved as of the date of action), whichever is longer." DEP'T OF ARMY, REG. 27-10, LEGAL SERVICES: MILITARY JUSTICE, para. 5-29b(4) (8 Aug. 1994).

[216] In *United States v. Bernier*, 42 M.J. 521 (C.G. Ct. Crim. App. 1995), the Coast Guard court held that despite the Coast Guard's regulatory maximum of eighteen months suspension, there were two reasons to permit a longer suspension in this case: (1) the accused bargained for the longer time period in his pretrial agreement, and (2) the accused was a repeat cocaine addict for whom longer period of suspension served the salutary purpose of rehabilitation "with potential return to prison hanging over his head." *Id.* at 523-24.

[217] UCMJ art. 72 (1988).

[218] MCM, *supra* note 1, R.C.M. 1109.

[219] When the Government seeks to vacate a suspended sentence of a special court-martial that includes a BCD or any suspended sentence of a general court-martial, the special court-martial convening authority must hold a hearing after notifying the accused of, *inter alia*, the alleged violation, the right to be present and to call and cross-examine witnesses. He must then make a summarized record, from which the general court-martial convening authority will decide whether a condition of suspension was violated and whether the suspended punishment will be vacated. *Id.* R.C.M. 1109; UCMJ, art. 72.

This process was ratified in *United States v. Connell*.[220] The court found that Article 72 and R.C.M. 1109 provide sufficient due process protections to the accused because the special court-martial authority is not structurally inhibited from being a neutral and detached hearing officer. Further, the court reasoned, the accused receives full due process rights in such proceedings (notice, counsel, opportunity to be heard), and the general court-martial convening authority makes the final decision[221] which, according to the concurring opinion of Judge Cox, provides greater due process than civilians in equivalent proceedings.[222]

The majority opinion by the late Judge Wiss is a sharply reasoned treatment of a process with which most counsel are unfamiliar but which builds in numerous checks at each stage. Judge Wiss showed little patience with the defense claim that the special and general court-martial convening authorities are institutionally incapable of responsibly handling their vacation authority: "Appellant has offered no basis for his brash broadside on the sincerity and integrity of these officers in fulfilling these responsibilities—that they would unthinkingly follow the recommendations of their subordinates—and it is worthy of no further consideration by this Court."[223]

*Conclusion*

There is no dramatic or unmistakable trend in this area except the courts' signal that they will continue to take these issues seriously, and the willingness of the drafters of the Uniform Code of Military Justice to alter the post-trial process to conform to reality (as in the provisions on revising convening authority actions) and to implement the clear direction of case law. Practitioners continue to make a great number of technical errors which the courts indulge to some degree, though not in an obviously predictable fashion (for example, overlooking tremendous computational errors but insisting on precision in reflecting a soldier's awards).

It would be a mistake for staff judge advocates and convening authorities to view post-trial responsibilities as merely ministerial, and not take their responsibilities and soldier's rights seriously. It would be poor judgment for defense counsel to rely on courts to do their work for them in this realm; they must aggressively assert their clients' interests throughout the post-trial phase, scrutinize all government documents and, when appropriate, seek judicial intervention.

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[220] 42 M.J. 462 (1995), *petition for cert. pending*.

[221] *Id.* at 463-64.

[222] The military procedure, Judge Cox reasoned, "provides a greater assurance of reliability and fairness than does the traditional judge-probationer hearing." *Id.* at 468 (Cox, J., concurring) (citation omitted). The CAAF also chided the government for taking the position that a lesser standard of review was appropriate because a soldier has a mere property interest in a punitive discharge. The court found a punitive discharge to be "quite closely akin to a liberty interest" and was emphatic that the same standard of review applies under Article 72, regardless of the type of punishment to be vacated. *Id.* at 465.

[223] *Id.*

# TJAGSA Practice Notes

*Faculty, The Judge Advocate General's School*

## *International and Operational Law Notes*

*International Law Note*

### International Criminal Tribunal for the Former Yugoslavia Update[1]

*Background*

Since I last reported on the International Criminal Tribunal for the Former Yugoslavia (Tribunal) much has happened, yet nothing has happened. In October 1995, the Tribunal had just continued the Tadic case to May 1996. In October, the decision by the Appeals Chamber regarding the interlocutory appeal on jurisdiction had just been filed. The Trial Chamber had not heard argument on the double jeopardy or vagueness and multiplicious counts objections. Meanwhile, peace negotiations were just beginning in Dayton, Ohio.

A great deal of debate about the ineffectiveness of the Tribunal has ensued because only a few people have been indicted by the Tribunal and that only one person is in the Tribunal's custody despite the issuance of other indictments. The peace negotiations in Dayton, Ohio were plagued with pressures to negotiate for the surrender of indicted suspects to the Tribunal as a condition for the Dayton Peace Accord. It remains questionable whether Serbian President Slobodan Milosevic, a possible war criminal himself, should have even been at the negotiation table. The Dayton Peace Accord does not require Ratko Mladic and Radovan Karadzic to be removed from their military and political leadership positions in spite of pressure by some to make that a condition of the Dayton Peace Accord. No amnesty was granted for those charged with war crimes in Bosnia. This was feared to be a condition that the Bosnian Serbs would require; specifically as to Mladic, Karadzic, and Milosevic.[2]

*New Indictments*

The first Croatian indicted by the Tribunal was Croatian military officer Ivica Rajic whose troops are accused of committing attacks on the Muslim village of Stupni Do. He was also charged by the Bosnian Croat authorities with murder of fellow soldiers. On 5 December 1995, Ivica Rajic was acquitted on the murder charges brought by Bosnian Croat officials due to lack of evidence. The language in the Dayton Peace Accord requires all parties to cooperate with the Tribunal and requires all parties, including the Bosnian Croat Federation, to hold anyone in custody "for a period of time sufficient to permit appropriate consultation with Tribunal authorities."[3] In spite of the Dayton Peace Accord's provisions and the promise of the Bosnian Croat Federation President Kresjimir Zubak to turn Rajic over to the Tribunal, even if he was acquitted in the murder trial, Bosnian Croat Federation officials freed him. President Zubak now says that the Croat province of Bosnia will not recognize the Tribunal's arrest warrant.[4]

On 9 November 1995, the Tribunal announced the indictment of three senior officers of the Yugoslav Peoples Army (JNA) for mass killings at Ovcara in the Eastern Slavonian region of Croatia on 20 November 1991.[5] Those indicted include Mile Mirksic, at that time a colonel in the JNA and commander of the Belgrade-based Guards Brigade and since 1995 the commanding officer of the Army of the Republic of Serb Krajina. Also indicted were

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[1] For the initial article on the same subject *see* TJAGSA Practice Notes, International and Operational Law Notes, International Law Note, *International Criminal Tribunal for the Former Yugoslavia*, ARMY LAW., Nov. 1995, at 46. This update covers the Tribunal's work through 1 January 1996.

[2] Stephen Engelberg, *Panel Seeks U.S. Pledge on Bosnia War Criminals*, N.Y. TIMES, Nov. 3, 1995, A1.

[3] General Framework Agreement for Peace in Bosnia and Herzegovina, Nov. 21, 1995, Croatia-Bosnia-Serbia, Annex 1A: Military Aspects of the Peace Settlement, Art. IX (Prisoner Exchanges) [hereinafter Dayton Peace Accord].

[4] Stephen Engelberg, *Bosnian Croat Sought by Tribunal Is Freed Despite Pledge*, N.Y. TIMES, Dec. 8, 1995, A18.

[5] Confirmation of the Indictment, *The Prosecutor of the Tribunal Against Mile Mrksic, Miroslav Radic and Veselin Sljivancanin*, Case No. IT-95-13-I, Tribunal (Nov. 7, 1995).

> "Considering that the relevant parts of the record submitted to me by the Prosecutor show that on 20 November 1991, soldiers under the authority of the Yugoslav People's Army (JNA) arrested at least 300 unarmed men in the hospital at Vukovar. Most of these men were transported by bus to Ovcara, a former collective farm near Vukovar. As they descended from the buses, they were systematically beaten and robbed of their possessions. They were assembled in one of the farm buildings and for several hours were again beaten. The beatings allegedly caused the death of at least two men. The great majority of the men were then taken in small groups to an isolated place near Ovcara where a mass execution occurred. As of today, of the 300 men arrested at the hospital during the operation, 261 are still missing. The exact identification of the individuals appears in the indictment."

*Id.*

Miroslav Radic, a JNA captain and commander of a special infantry unit of the Guards Brigade, and Veselin Sljivancanin, a JNA major who served as a security officer for the Guards Brigade and who now commands a JNA Brigade in Montenegro. All three men are alleged to be individually responsible for the mass murders and for the acts of their subordinates under command responsibility theories.

These men are each charged with two counts of crimes against humanity (beatings and killings), violations of the laws or customs of war (cruel treatment and murder), and grave breaches (willfully causing great suffering and willful killing). More arrests as a result of this investigation are expected.[6] It is reported that Croatian President Franjo Tudjman promoted Miroslav Radic seven days after Radic was indicted as a war criminal, and this promotion caused a great deal of controversy in the Dayton peace talks.[7]

On 14 November 1995, the Tribunal accused six more individuals of war crime violations. The indictment includes charges against the Vice President of the Croatian Community of Herceg-Bosna (HZ-HB) Dario Kordic and the Chief of Staff of the Croatian Defense Council (HVO) Tihofil Blaskic and four other prominent members of HZ-HB: Commander Mario Cerkez of an HVO brigade, Mayor Ivan Santic of Vitez, former Chief of Police of Vitez Pero Skipljak, and Commander Zlatko Aleksovski of the prison facility at Kaonik.[8] They are charged with individual responsibility as well as command responsibility. The charges allege persecution on political, racial, and religious grounds of the Bosnian Muslim population of the Lasva Valley area between May 1992 and May 1993. Officials of Herzeg-Bosna, the Croat entity that is to be merged into the Federation, flatly refuses to hand them over to the Tribunal.[9]

This indictment charges the individuals with the deaths of over one thousand Bosnian Muslim civilians, use of civilians as human shields, killing of civilians, deportation of civilians, firing on an undefended town and killing people there, as well as harassment and intimidation of Muslims. The press release notes that, to date, "the HVO still controls this area and Muslims expelled from the area have no homes, property or livestock to return to."[10] These acts are charged as grave breaches, crimes against humanity, and violations of the laws or customs of war.

*Interlocutory Appeal on Jurisdiction*

The Appeals Chamber's decision on the defense motion for interlocutory appeal on jurisdiction did not adopt the Trial Chamber's rulings. Rather, the Appeals Chamber, unlike the Trial Chamber, felt it could address the issues of whether or not the United Nations Security Council (UNSC) had the power under Chapter VII of the United Nations (UN) Charter to establish the Tribunal and whether the Tribunal has an improper grant of primacy. The Trial Chamber, in its 7 July 1995 decision, said it lacked jurisdiction to consider those issues.

The Appeals Chamber examined three grounds of appeal raised by the Appellant in his pleading. The first ground of appeal attacked the validity of the establishment of the Tribunal. The Trial Chamber had agreed with the Prosecutor that the Tribunal lacked authority to review its establishment by the UNSC and that, in any case, the question of whether the UNSC in establishing the Tribunal complied with the UN Charter was a political question and not a justiciable question.[11]

The Appeals Chamber ruled that the Tribunal has jurisdiction to examine the plea against its jurisdiction based on the invalidity of its establishment by the UN Security Council (SC). The Appeals Chamber found the Tribunal to be established in accordance with UN Charter procedures and that the Tribunal provides all necessary safeguards of a fair trial.[12]

Secondly, the Appeals Chamber considered the attack by the appellant on the primacy of the Tribunal over national courts. This is a challenge specifically to Article 9 of the Tribunal statute. The chamber stated that: "[T]he principle of *Jus de non Evocando*" is not breached by the transfer of jurisdiction to an International

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[6] *Id.*

[7] William Drozdiak, *War Crimes Tribunal Indicts Six Bosnian Croats For Crimes Against Muslims*, WASH. POST, Nov. 14, 1995, A8.

[8] Indictment, *The Prosecutor of the Tribunal against Dario Kordic, Tihofil Also Known As Tihomir Blaskic, Mario Cerkez, Ivan Also Known As Ivica Santic, Pero Skopljak, Zlatko Aleksovski*, Case No. IT-95-14-I, Tribunal (Nov. 2, 1995).

[9] Massimo Calabresi, Dean Fischer, Mark Thompson & Alexandra Stiglmayer, *Divided by Hate*, TIME, Dec. 18, 1995, at 54.

[10] *The Vice-President of Herceg-Bosna and Five Other Prominent Bosian Croats Indicted for the "Ethnic Cleansing" of the Lasva Valley Area*, International Tribunal for Former Yugoslavia Press and Information Office, CC/PIO/025-E, Nov. 13, 1995, at 3 [hereinafter Tribunal PIO].

[11] Decision on the Defense Motion on Jurisdiction, *Prosecutor v. Dusko Tadic a/k/a "Dule"*, Case No. IT-94-I-T, Tribunal (Aug. 10, 1995).

[12] Decision on the Defense Motion For Interlocutory Appeal on Jurisdiction, *Prosecutor of the Tribunal Against Dusko Tadic*, Case No. IT-94-1-AR72, Tribunal, at 8 (Oct. 2, 1995).

Tribunal created by the UNSC. No rights of the accused are infringed or threatened, the accused will be removed from his national forum, but he will be brought before a tribunal at least equally fair, more distanced from the facts of the case and taking a broader view of the matter."[13]

Finally, the Appeals Chamber agreed with the Trial Chamber regarding the attack on the subject matter jurisdiction of the Tribunal. It found that Article 2 (grave breaches) of the Tribunal statute applies only to international armed conflicts. On the other hand, Article 3 (violations of laws or customs of war) and Article 5 (crimes against humanity) of the Tribunal statute are within the jurisdiction of the Tribunal regardless of the nature of the underlying conflict.[14]

*Amendment of Tadic Indictment*

The prosecution amended its indictment against Dusko Tadic. On 1 September 1995, the court confirmed the modified indictment and allowed enlargement of the time period during which Tadic is alleged to have committed war crimes. The indictment now encompasses the period "between about May 23 and about December 31, 1992 at Omarska, Keraterm, and Trnopolje camps."[15] All of the counts in the initial indictment remain unchanged but for the manner in which they are written. The total number of counts pending against Dusko Tadic have actually been reduced as a result of the amendment. The original indictment charged separate counts of crimes against humanity, grave breaches, and violations of the customs of war for each victim. The amended indictment charges only one count each of crimes against humanity, grave breaches, and violations of the customs of war for each category of victims. This reduces the former 132 count indictment to a 36 count indictment, including the three additional counts added by the amendment. Additional charges include a count of crimes against humanity for persecution on political, racial, and religious, or both grounds; a count of grave breaches for unlawful deportation or transfer or unlawful confinement of a civilian; and another count of crimes against humanity for deportation.[16]

The Defense filed additional pretrial motions based on the amended indictment. These motions alleged the amended indictment is "even more vague than the initial indictment, still unreasonably contains a concurrence of crimes for the same behavior and exposes the accused to a double prosecution in the case of Keraterm" as a result of evidence obtained by the German officials.[17] Argument was heard on the modified defense motions in late October 1995. The trial chamber ruled on these motions 14 November 1995.[18]

*Tadic Pretrial Motions*

The motions decided by the Court on 14 November 1995 include the issues of vagueness of the indictment, double-jeopardy, duplicitous counts, and an amended prosecutor's motion for protection of witnesses. The Trial Chamber, presided over by Judge McDonald, found that the indictment, as amended, failed to provide a sufficient description of the specific acts engaged in by the accused and that Counts 1-3 failed to establish clear violations of international humanitarian law. The Trial Chamber did find, however, that Counts 4-36 sufficiently identified the accused, that specific facts of the incident were stated, and that the indictment reflects a clear violation of international humanitarian law.[19] The Trial Chamber delayed ruling on the issue of duplicitous counts by stating that it would be most appropriately addressed at the time of sentencing.[20] The Trial Chamber denied Tadic's motion to dismiss due to "*non-bis-in-idem*," finding that a trial had not begun in Germany and that the transfer of Tadic to the Tribunal was not contrary to treaties on transfer of criminal proceedings.[21]

Trial has been postponed until May 1996, so defense counsel can prepare their defense and interview possible witnesses.

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[13] *Id.* at 34.

[14] *Id.* at 48, 50, 73.

[15] Indictment (Amended), *Prosecutor of the Tribunal against Dusko Tadic a/k/a "Dule" a/k/a Dusan, Goran Borovnica*, Case No. IT-94-1-T, Tribunal (Sept. 26, 1995). The time period previously charged crimes committed between 24 May and 30 August 1992. The original charges included the areas of Kozarac, Jaskici, and Sivci, as well as the Omarska camp. Now the indictment alleges that the crimes occurred at Omarska, Keraterm, and Trnopolje camps. Keraterm camp was located at a former ceramic factory in Prijedor. Conditions there were similar to the Omarska Camp. Trnopolje Camp was located at a former school where men, women, and children were detained. It is alleged that female detainees were sexually abused and that other detainees were murdered and otherwise physically and psychologically abused. *Id.* ¶ 2.7.

[16] *Id.* Counts 1-3.

[17] Indictment (Amended), *Accused Faces Additional Charges*, Tribunal, PIO, CC/PIO/19-E, The Hague, Sept. 26, 1995.

[18] Decision on the Defense Motion on the Form of the Indictment, *The Prosector v. Dusko Tadic a/k/a "Dule"*, Case No. IT-94-1-T, Tribunal (Nov. 14, 1995).

[19] *Id.* at 3.

[20] *Id.* at 6.

[21] Decision on the Defense Motion on the Principle of "Non-Bis-In-Idem", *The Prosecutor v. Dusko Tadic a/k/a "Dule"*, Case No. IT-94-1-T, Tribunal (Nov. 14, 1995).

*Protective Measures for Witnesses*

The Prosecution's motion to attempt to protect the identity of a witness was heard in camera on 25 October 1995. The Prosecution changed its request for anonymity to a request for confidentiality. Prosecutors asked the Trial Chamber to conceal the witness's identity from the public and media, to deny defense access to certain particulars concerning the witness's relatives, and to delay disclosure of the witness's name to the defense. The parties agreed on the type of information to be withheld, and the Trial Chamber granted the measures requested. The Trial Chamber also noted that a person does not cease to qualify for protective measures merely because of a criminal record.[22]

*New Indictments Conferred Against Leaders*

The second indictment filed by the Tribunal against Radovan Karadzic and Ratko Mladic on 16 November 1995 is based on atrocities committed in July 1995 against the Bosnian Muslim population of the UN-designated "safe area" of Srebrenica.[23] The alleged crimes result from attacks in the Srebrenica region (paragraphs 4-6 of the Indictment), events occurring in Potocari around a UN military compound (para's 7-15 of the Indictment), attacks on Muslims who had surrendered or were fleeing to Tuzla (paragraphs 16-23 of the indictment), and mass executions near Karakaj (paragraphs 24-31 of the indictment).[24] The twenty count indictment includes crimes of genocide (1 count), crimes against humanity (10 counts), and violations of the laws or customs of war (9 counts). Specifically included are acts involving the execution and burial in mass graves of thousands of Muslim men, the burial of hundreds of men who were alive, the mutilation and slaughter of men and women, the murder of children, and the torturing and killing of families in the presence of each other.

These indictments reflect the most current crimes which have been charged to date. These events occurred shortly before the release of the original indictments against Mladic and Karadzic. The events themselves were thoroughly reported in newspaper articles which quote Ratko Mladic as saying to the men rounded up at Srebrenica: "Don't be afraid, nothing will happen to you. Not a single hair will be missing from your head. We just need you for the exchange." The survivor of the mass executions who told this story to the *Washington Post* also said he knew it was Mladic. Among other reasons, he stated that the commander of the Bosnian Serb force announced to them, while they were being confined: "Hello, neighbors, do you know who I am? If you don't know, I am Ratko Mladic. You have a chance to see me now."[25]

These acts also exposed the UN Protection Force (UNPROFOR) as the paper tiger of which its critics had long complained. Clearly, UN Peacekeepers were of no assistance in the area. In hindsight, Srebrenica marked a decisive turning point in the brutal three and one-half year war between the Bosnian Serbs and the Muslim-led Bosnian government. The fall of Srebrenica helped shame Western governments, including the United States, into finally drawing the line against Serb aggression and approving a strategy of massive air strikes to protect the remaining safe areas.[26]

*The Dayton Peace Accord*

Judge Richard Goldstone, Chief Prosecutor for the Tribunal, had asked that any peace agreement for Bosnia call for surrender of the indicted Serb leaders, Radovan Karadzic and General Ratko Mladic.[27] The General Framework Agreement for Peace in Bosnia and Herzegovina—popularly known as the Dayton Peace Accord—reached between the Republic of Bosnia and Herzegovina, the Republic of Croatia, and the Federal Republic of Yugoslavia created at Wright-Patterson Air Force Base in Dayton, Ohio attempts to put an end to the conflict and atrocities. Although the Dayton Peace Accord requires all parties to "cooperate fully in the investigation and prosecution of war crimes,"[28] it falls short of requiring the parties to apprehend indicted persons and turn them over to the Tribunal. The Dayton Peace Accord does bar

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[22] Decision on the Prosecutor's Motion Requesting Protective Measures for Witness L, *The Prosecutor v. Dusko Tadic a/k/a "Dule"*, Case No. IT-94-1-T, Tribunal, at 5 (Nov. 14, 1995).

[23] *Radovan Karadzic and Ratko Mladic Accused of Genocide Following the Take-Over of Srebrenic*, Tribunal, PIO, CC/PIO/026-E, at 1 (Nov. 16, 1995).

[24] Indictment, *The Prosector of the Tribunal v. Radovan Karadzic and Ratko Mladic*, Case No. IT-95-18-I, Tribunal (Nov. 15, 1995).

[25] Michael Dobbs and Christine Spolar, *Anybody who moved or Screamed was Killed-Survivor Tells of Brutal Murders*, WASH. POST, Oct. 26, 1995, A1.

[26] *Id.* A24.

[27] Anthony Lewis, *No Peace without Justice*, N.Y. TIMES, Nov. 20, 1995, editorial page.

[28] Dayton Peace Accord, *supra* note 3, Article IX, Cooperation, at 2.

indicted war criminals from holding office.[29] Cooperation with the Tribunal is a common theme in all the agreements which were entered into and in the annexes to the Dayton Peace Accord.[30]

The agreements regarding prisoner exchanges and rights of refugees address violations of international humanitarian law (annexes 1 and 7, respectively, of the Dayton Peace Accord). Regarding prisoner exchanges, the agreement states:

> "(g) each party shall comply with any order or request of the International Tribunal for Former Yugoslavia for the arrest, detention, surrender of or access to persons who would otherwise be released and transferred under this Article but who are accused of violations within the jurisdiction of the International Tribunal. Each party must detain persons reasonably suspected of such violations for a period of time sufficient to permit appropriate consultation with the Tribunal authorities."[31]

The Agreement on Refugees and Displaced Persons (Annex 7), Art VI—Amnesty, requires:

> "any returning refugee or displaced person charged with a crime, other than a serious violation of International humanitarian law as defined in the statute of the International Criminal Tribunal for the Former Yugoslavia since January 1, 1991 or a common crime unrelated to the conflict, shall upon return enjoy an amnesty. In no case shall charges for crimes be imposed for political or other inappropriate reasons or to circumvent the application of amnesty."[32]

Not all parties involved in making peace in Bosnia welcome the Dayton Peace Accord. General Ratko Mladic, on 2 December 1995, attacked the Dayton Peace Accord by saying, "we cannot allow our people to come under the rule of butchers."[33] Even though he is an indicted war criminal, General Mladic still possesses a great deal of authority in Grdavica and other Sarajevo neighborhoods.[34] These people want nothing to do with an agreement that turns them out of their homes. The Bosnian Serbs scheduled a referendum to ask citizens whether they should accept the Dayton Peace Accord.[35] The single question referendum asked residents if they wanted "Serbian Sarajevo to become a part of the territory of Bosnia-Herzegovina Federation Muslim Croat entity and to come under its state authority."[36] The residents voted "No"; however, western diplomats and UN officials said this is meaningless.[37] The Dayton Peace Accord was signed on 14 December 1995, as agreed, and NATO troops moved in to bring peace to the area.[38]

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[29] *Id.* Constitution of Bosnia-Herzegovina, Art IX, General Provisions, Peace Accord, Annex 4, at 8.

[30] The Dayton Peace Accord is made up of the General Framework Agreement and eleven annexes as follows:

General Framework Agreement
Annex 1A: Military Aspects of the Peace Settlement
NATO-Bosnia SOFA and related side letters
NATO Croatia SOFA
NATO-FRY SOFA
Annex 1B: Regional Stabilization
Annex 2: Inter-Entity Boundary
Annex 3: Elections
Annex 4: Constitution
Annex 5: Arbitration
Annex 6: Human Rights
Annex 7: Refugees and Displaced Persons
Annex 8: Commission to Preserve National Monuments
Annex 9: Bosnia and Herzegovina Public Corporations
Annex 10: Civilian Implementation
Annex 11: International Police Task Force

[31] Dayton Peace Accord, *supra* note 3, at 8.

[32] *Id.* Annex 7: Refugees and Displaced Persons, Art. VI (Amnesty), at 2.

[33] Mark Thompson, *The Peacekeepers Paradox*, TIME, Dec. 11, 1995, at 54.

[34] Christine Spolar, *Sarajevo Serbs Talk of Defying Dayton Accord*, WASH. POST, Dec. 6, 1995, A1.

[35] *Id.* A29, col. 1.

[36] Christine Spolar, *Serbs Release Pilots Downed In Bosnia Raid*, WASH. POST, Dec. 13, 1995, A31.

[37] Christine Spolar, *Contingent of 22 Marines arrives in Sarajevo for Peacekeeping*, WASH. POST, Dec. 11, 1995, A20.

[38] *Id.*

*Conclusion*

As the Tribunal began its third year of operation, fifty-two alleged war criminals had been indicted, but only one is in the custody of the Tribunal. Parties to the Dayton Peace Accord seem to be circumventing its intent. The Bosnia Croat Federation freed an indicted war criminal thereby refusing to recognize the authority of the Tribunal or its arrest warrants.[39] President Momir Bulatovic of Montenegro, a close ally of Serbian President Milosevic, quickly pointed out that the Dayton Peace Accord does not call for the extradition of indicted officers and that cooperation, such as arrest and extradition, are not part of the Agreement—the only legal obligation is to investigate.[40] Milosevic's government still refuses to allow the Tribunal to open a liaison office in Belgrade, and there has been no response to the Tribunal's forwarding of the arrest warrants for the three Yugoslav Army officers, which were sent to Belgrade on 9 November 1995.[41]

The Tribunal operates on an assumption that the various states will provide their full cooperation. The Tribunal has no enforcement agencies, and it cannot execute arrest warrants, seize evidentiary material, compel witnesses to give testimony, or search crime scenes. For all of these purposes, the Tribunal must rely on the various states' authorities. Major Mills.

## *Legal Assistance Items*

The following notes advise legal assistance attorneys of current developments in the law and in legal assistance program policies. You may adopt them for use as locally published preventive law articles to alert soldiers and their families about legal problems and changes in the law. We welcome articles and notes for inclusion in this portion of *The Army Lawyer*; send submissions to The Judge Advocate General's School, ATTN: JAGS-ADA-LA, Charlottesville, VA 22903-1781.

### Office Management Note

*TJAGSA Legal Assistance Publications on CD-ROM*

If you have not had a chance to work with the new Legal Automation Army-Wide Systems (LAAWS) JAG CD-ROM, you may not know that many TJAGSA Legal Assistance Branch publications are loaded directly on the CD-ROM.[42] To review these publications, users need only load the CD-ROM, access the CD-ROM drive, and type "CD-ROM." A menu offers users the choice of searching TJAGSA publications using a word search program, or reviewing full copies of the publications themselves. Printing publication extracts or complete copies is also an option.

Publications from TJAGSA Legal Assistance Department will continue to be available for downloading in electronic format from the LAAWS Bulletin Board System. Hard copies of publications can also be ordered through the Defense Technical Information Center. Information on both these sources can be found in the Current Material of Interest section of this issue of *The Army Lawyer*. Major Block.

### Family Law Note

*Reductions in Disposable Retired Pay Triggered by the Dual Compensation Act*

In October 1995, a legal assistance practice note in *The Army Lawyer* addressed reductions in disposable retired pay associated with receipt of Veterans' Administration (VA) disability pay.[43] A recent case from North Dakota, Knoop v. Knoop,[44] focuses on the impact of the Dual Compensation Act[45] on disposable retired pay. Like VA disability pay, the Dual Compensation Act has the potential to disrupt divisions of military retired pay in divorce significantly.

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[39] Engelberg, *supra* note 4.

[40] Jane Perlez, *In Montenegro an Indicted Soldier is Still a Hero*, N.Y. TIMES, Jan. 5, 1996.

[41] *Id.*

[42] The latest CD-ROM in production is dated February 1996.

[43] *See TJAGSA Practice Notes, Legal Assistance Items, Reductions in Disposable Retire Pay Triggered by Receipt of VA Disability Pay: A Basis for Reopening a Judgement of Divorce?*, ARMY LAW., Oct. 1995, at 28.

[44] 542 N.W.2d 114 (N.D. Sup. Ct. 1996).

[45] 5 U.S.C.A. §§ 5531-5404 (1995).

In *Knoop*, a former spouse, who had been awarded a 36.5% share of her husband's military retirement pay, initiated contempt proceedings when he reduced payments to her. After retirement, the former service member initiated payments of approximately $800 to the former spouse as her share of military retired pay.[46] Several months later, the retiree accepted a civil service position. As required by the Dual Compensation Act, he waived a significant share of his military retired pay as a condition of accepting the new position.[47] He then applied a proportionate reduction to his former spouse's share resulting in a downward reduction in her payments from $800 to just over $500. The former spouse filed suit challenging this reduction.[48]

The retiree's decision to reduce payments to his former spouse was based on the assumption that references to retirement pay found in the parties' property division referred to "disposable retired pay" as it is defined by the Uniformed Services Former Spouses' Protection Act (USFSPA).[49] "Disposable retired pay" equals gross retired pay minus specific deductions, one of which is retired pay waived under the Dual Compensation Act when accepting post-retirement government employment.[50] If a former spouse's share of retired pay is stated in terms of a percentage of "disposable retired pay," waivers of retired pay that reduce the "disposable retired pay" will also affect the former spouse's share.

In disputing the unilateral reduction in payments from the retiree, the former spouse maintained that the court was not required to interpret the term "retirement pay" as used in the property division to mean the same as "disposable retired pay" as used in the USFSPA.[51] She insisted that her share should be determined consistent with the plain language of the trial court's order, "36.5% of retirement pay remaining after deduction of federal withholding."

The North Dakota Supreme Court rejected the retiree's argument that the law requires use of the statutory definition of "disposable retired pay." Finding that the statutory definition of disposable retired pay" does create limits on what must be paid in divisions of military retired pay as property, the court nevertheless refused to bind the parties to the use of specific definitions as long as those limits were not exceeded. In the present case, use of the plain language of the underlying order (that is, 36.5% of gross retired pay minus federal withholdings) would not cause payments to the former spouse in excess of the limits provided in the USFSPA. Recognizing the lack of precision in the order, the court dismissed the contempt proceedings, but remanded the case for further clarification by the lower court in light of its holding.

In most situations, the underlying issues in *Knoop*, and the impact of retired pay waivers in general, can be avoided with thoroughly drafted property division orders. In addition to considering the limits of state law and the USFSPA, practitioners should fully specify the understandings and expectations of the parties regarding valuation of military retired pay as property. For example, the parties might agree to valuation of military retired pay based on no waivers, or they may anticipate specific waivers, or they may consent to continuing jurisdiction for a court to revisit the issue of property in the event of waiver. In the alternative, the parties may agree to a savings provision that adjusts the former spouse's share to prewaiver levels by increasing his or her share of retired pay or requiring payments from other sources. Former spouses may also consider exchanging all or part of their interests in military retired pay for other assets of mutually agreed upon value.

Property divisions involving military retired pay present special challenges to practitioners. Anticipating and addressing potential impacts of the definition of disposable retired pay is only one such challenge. Other challenges include facilitating direct payment, addressing jurisdictional questions, and protecting the former spouse's interests in retired pay through insurance or the Survivor Benefit Plan. In addition to previous notes in *The Army Lawyer* addressing these issues, readers may wish to review a two-part article that appeared in the July/August and October issues of the Florida Bar Journal entitled *The Ten Commandments of Military Divorce: Representing the Nonmilitary Spouse*. The author, Commander Peter Cushing, is a judge advocate in the Naval Reserve. Major Block.

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[46] The payments were made directly by the retiree to the former spouse. The parties made no provision for direct payment of the former spouse's share from the Defense Finance and Accounting Service.

[47] The actual reduction associated with his Dual Compensation Act waiver was from $2465 to $1620 per month. *Knoop*, at 115.

[48] *Id.* at 116.

[49] *See* 10 U.S.C. § 1408(a)(4) (1995).

[50] *Id.* § 1408(a)(4)(B).

[51] *Id.* § 1408.

## Tax Note

*Amount of Time to File for a Tax Refund*

How long does a taxpayer who fails to file an income tax return have to claim a refund? If the taxpayer has not received any notices from the Internal Revenue Service (I.R.S.), the taxpayer has three years to file a return and claim a refund.[52]

The Supreme Court has recently determined that if the taxpayer receives a notice of deficiency more than two years after failing to file a return, the taxpayer can only receive a refund of taxes paid within the last two years if the taxpayer files a petition in the Tax Court.[53] The Tax Court can only award a refund of taxes paid within the preceding two years because it lacks jurisdiction to award a refund of taxes paid more than two years prior to the date that the Commissioner mailed the notice of deficiency.[54]

In *Commissioner v. Lundy*, the respondent, Mr. Lundy, did not file his 1987 income tax return, which was due on 15 April 1988. On 26 September 1990, the Commissioner mailed Mr. Lundy a notice of deficiency. Three months later, Mr. Lundy filed his 1987 income tax return and claimed a refund. Mr. Lundy then filed a petition with the Tax Court. The Tax Court held that if a taxpayer has not filed a return by the time a notice of deficiency is mailed, and the notice of deficiency is mailed more than two years after the date on which the taxes were paid (Internal Revenue Code (I.R.C.) § 6512(b)(3)(B) limits the Tax Court's jurisdiction to two years).[55]

Because Mr. Lundy's 1987 taxes were withheld from his pay, they were deemed paid on 15 April 1988, the due date of his return.[56] The Tax Court only had jurisdiction to award a refund for taxes paid on or after 26 September 1988, which was two years prior to the date the Commissioner mailed Mr. Lundy the notice of deficiency. Thus, the Tax Court did not have jurisdiction to give Mr. Lundy a refund.

The United States Court of Appeals for the Fourth Circuit (Fourth Circuit) reversed and determined the look back period should be three years.[57] This conclusion was at odds with every other court of appeals' decision that had addressed the issue, all of which agreed with the Tax Court's determination.[58] To resolve the conflict, the Supreme Court granted certiorari.[59]

The Supreme Court reversed the Fourth Circuit and held that I.R.C. § 6512(b)(3)(B) limits the Tax Court to a two-year look back period. Thus, when the Commissioner mails a notice of deficiency more than two years after the taxpayer has failed to file a return and the taxpayer files a petition in Tax Court, the Tax Court can only award a refund for taxes paid during the two years preceding the date the Commissioner mailed the notice of deficiency.

Although this is certainly not a favorable ruling for taxpayers, there is a way around this two-year look back limitation. When a taxpayer receives a notice of deficiency more than two years after failing to file a return, the taxpayer should pay the amount of taxes alleged due on the notice of deficiency, file a return, and make a claim for a refund. If the I.R.S. denies the claim for refund, the taxpayer should file a suit in the United States District Court or the United States Court of Federal Claims. These courts have a three-year look back period.[60] The I.R.C. § 6512(b)(3)(B) only imposes a two-year look back limit on the Tax Court.

Legal Assistance Attorneys should use caution when advising a taxpayer who has received a notice of deficiency, but is actually entitled to a refund upon the proper filing of his or her tax return. Major Henderson.

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[52] I.R.C. § 6511(a) (RIA 1995).

[53] Commissioner v. Lundy, 116 S. Ct. 649 (1996).

[54] *Id.*

[55] 65 T.C.M. § 3011 (CCH 1993).

[56] I.R.C. § 6513(b)(1) (RIA 1995).

[57] 45 F.3d 856 (4th Cir. 1995).

[58] *See* Davison v. Commissioner, 9 F.3d 1538 (2d Cir. 1993) (unpublished opinion); Allen v. Commissioner, 23 F.3d 406 (6th Cir. 1994) (unpublished disposition); Galuska v. Commissioner, 5 F.3d 195 (7th Cir. 1993); and Richards v. Commissioner, 37 F.3d 587 (10th Cir. 1994).

[59] 115 S. Ct. 2244 (1995).

[60] I.R.C. § 6511 (RIA 1995).

## Results of a Recent Survey Rating Army Legal Support by Contracting and Facilities Management Personnel

*Foreword*

What are contracting and facilities management personnel saying about their legal support, and what do they want most from their lawyers? Diverse opinions were voiced in response to a recent questionnaire sent to 150 installation management personnel and associated contracting offices from major and subordinate Army commands, including FORSCOM, TRADOC, and AMC. The principal objective of the survey, originated by the Contracts Subcommittee of the Army Chief of Staff for Installation Management's (ACSIM) Public Works Business Practices Committee, was to gather information on the facilities contracting process.

The Contracts Subcommittee was established by the ACSIM to review and improve the installation support contracting process. Subcommittee members include personnel from the Office of the Secretary of the Army for Research, Development, and Acquisition; the United States Army Center for Public Works; and the major commands and the installation directorates of contracting and public works. Functional representatives included engineering, contracting, and legal personnel.

One of the primary objectives of the Contracts Subcommittee is to provide an informal pipeline identifying ideas to improve facilities' contracting processes. The questionnaire requested that respondents classify themselves as either installation management or contracting personnel. A broad range of questions addressed the base operations workload, sources of funding, automation system use, training, the relationship between contracting personnel and facilities management, acquisition planning, credit cards, and problems impacting service to customers. Additionally, the questionnaire requested that both installation management and contracting support personnel rate their legal support.

Although the ratings varied widely, the average rating for legal support fell just above average throughout the Army—6 on a scale of 1 to 10 with 10 being the best. The majority of legal advice was provided in the contracting arena. Responses were also divided between organizations supported by large legal offices and those having one or two attorneys. The most frequently listed comments received in the survey are provided below. The numerical ratings were directly related to written comments in every category. As an example, a numerical rating of 8 would be accompanied by the comment "good quality work" or "good because of quality." Correspondingly, comments such as "poor quality" or "issues of quality" supported a rating of 2 or lower.

*Defining Quality Legal Work*

Defining quality in the legal profession is not as easy as it may seem. Measuring quality in service organizations can be very subjective. A current example is the O.J. Simpson case where attorneys on both sides have prior reputations for providing excellent service. From a lay person's perspective, would there be a consensus on the quality of the defense team, as opposed to the prosecution, in that case? Both teams of lawyers in the Simpson trial were competent, but it is difficult to say which team was better. To help define "quality legal work," consider the following.

*Timeliness*

Timeliness was the most common response accompanying numerical ratings. If the numerical rating was low, comments were, for example, "slow decisions" or "difficult to obtain immediate response for short-fused/unusual/complex items." Based on the number of comments on the subject, timely responses are an overriding concern in the field.

It was difficult to determine whether the comments were based on daily occurrences or whether they were limited to short suspense items. If a legal review for a solicitation or award routinely takes several days, action should be taken to change the process to accelerate the turn around time. Limiting the types of actions to be reviewed (within regulations) and specifically defining the portions of solicitations and awards, or both, which will be reviewed help reduce review time. Additionally, providing a checklist of common problems discovered during the course of legal reviews to the contracting office and facilities engineers may help avoid those problems in the future.

A comment such as "some decisions take 2-3 weeks" could reflect several problems. Frequently, the lawyer is dependent on the acquisition planning team (APT) to provide documents and factual statements necessary to complete such a review. Responsiveness to a lawyer's requirements frequently falls back on the same contracting and facilities personnel requesting legal support.

In part, the feeling that attorneys take too much time to render advice could be driven by the requestors' lack of understanding of the nature of the work. Investigation and fact gathering often take much more time than research or writing. A legal opinion encompasses an effort to understand all of the facts surrounding a problem, sorting out the important ones, and identifying and analyzing potential alternatives in a logical manner. This is a process that nonlawyers may not fully appreciate. While no one should spend unnecessary time solving problems, everyone should be aware that quality is sometimes sacrificed for speed. The problem could be addressed by providing legal support early in project development through active participation on the APT, thereby enhancing a lawyer's familiarity with acquisition strategy, background, and objectives.

*Explains Legal Opinions*

In conjunction with good ratings, survey responders commented that "legal opinions were fully explained." This can be contrasted with negative comments that "case law [should have

been] provided." Providing a full explanation for a recommended action allows the contracting officer to weigh alternatives and make a fully informed decision. The ramifications of certain actions must be fully explained to ascertain the most favorable outcome. All affected personnel should know the rationale behind a recommendation.

On the other hand, time and workload constraints may prohibit detailed written analysis. Only as a result of litigation does the need to document files become blindingly apparent. A well written summary of the facts can save case after case once corporate memory is gone. Although fully explained opinions often require additional time and effort, they are a necessity.

*Knowledge of Contract Law*

Many of the comments noted that attorneys had "limited experience" or "does not know construction law," with one comment stating that "usually advisor is an inexperienced CPT, by the time they are trained, they are PCS'd." Similarly, many comments indicate that understaffing is a problem. In a small office with inexperienced counsel, it can be difficult to be responsive.

If turnover is a problem, The Office of the Judge Advocate General (OTJAG) could be requested to provide longer rotations for personnel assigned to small offices. Additionally, if personnel are rotated within an office, consideration should be given to allowing longer rotations or assigning personnel from other stations to assist. A higher headquarters also could provide additional assistance in completing nonroutine actions if an office lacks experience in unusual matters. Additionally, the electronic bulletin boards have contracting conferences through which ideas are shared by experienced personnel.

*Dedicated v. Nondedicated*

Most respondents had dedicated legal support—specific attorneys designated to service installation facilities and contracting personnel.

Significantly lower ratings were generated by those installations that did not have dedicated staff.

These survey results should not be surprising. The absence of dedicated support could be perceived as eroding the "team" concept. Also, some facility contracting issues assigned to nondedicated personnel are given low priority because of the dollar value.

*Unwillingness to Litigate Small Dollar Value Claims*

Recommendations not to litigate small claims are often made because the cost of litigation substantially outweighs the claimed amount. A tightly knit local contractor community usually performs the facility's contracting. Contractors and subcontractors talk freely, and news of the government's reluctance to pursue claims below a certain dollar value travels fast. This can result in additional claims by contractors and poor performance in critical areas of support.

*Redundant Legal Reviews at Higher Levels*

Local regulations or established procedures sometimes require contract actions above certain dollar values to be forwarded to higher headquarters for review and approval. An analysis of the delays in processing compared to the value added by the additional reviews may resolve this issue.

*Cannot Do Attitude*

A restrictive attitude is one of the most common complaints, in many variations, against government lawyers. It could reflect frustration with the necessity for compliance with the many laws and regulations of the contracting process. If lawyers are consistently being brought into issues at the last moment when there is less flexibility in choosing alternative actions or planning strategy, it may appear as though they are rigidly interpreting regulations. Customers who have invested time and effort in the project may be less receptive to suggestions.

*Conclusion*

Attorneys should be active members of the APT. If they are, they can provide valuable advice on the best alternative for accomplishing an action. Once attorneys have been brought into the process at an early stage, they will be familiar enough with the regulations and the specific situation to find ways to do things effectively and quickly.

Coming up with innovative ways of getting the job done should be encouraged and praised to make it a sought after objective. It is imperative that the attorney adopt the goal of the customer as their own. Once this process is in place, the goal can be accomplished by the best legal means possible.

For more information on the results of the recent Survey Rating Army Legal Support by Contracting and Facilities Management Personnel, please contact Maria Esparraguera of the Business Practices Committee, Contracts Subcommittee, at (908) 532-3336, DSN 992-3336.

# Joint Service Committee on Military Justice Report

*Office of The Judge Advocate General*

## Analysis of the National Defense Authorization Act Fiscal Year 1996 Amendments to the Uniform Code of Military Justice

### Introduction.

On 10 February 1996, the President signed into law the National Defense Authorization Act for Fiscal Year (FY) 1996.[1] This resulted in the most significant number of amendments to the Uniform Code of Military Justice (UCMJ) in more than ten years. This article analyzes these changes by setting out the text of the change, giving a historical background on the origin of the amendment when known, and analyzing the amendment's impact on military justice practice and procedure.

Most of the FY 1996 amendments have their origin as proposals from the Army, Navy, Air Force, Marine Corps or Coast Guard members of the Joint Service Committee on Military Justice (JSC). The JSC assists the President in fulfilling his responsibilities under Article 36, UCMJ.[2] This provision requires the President to prescribe for courts-martial those "principles of law and rules of evidence generally recognized in the trial of criminal cases in the United States district courts."[3] Courts-martial need not mirror federal court practice because Article 36 states that procedures or rules "contrary to or inconsistent with" the UCMJ or not "practicable" need not be followed.[4] Generally, however, the JSC makes proposals to Congress that reflect developments in federal civilian criminal law.

Additionally, the JSC assists the Secretary of Defense in his responsibilities, as first announced in Executive Order (EO) 12484, to conduct an annual "review" of the *Manual for Courts-Martial* (*Manual*), and to "recommend to the President any appropriate amendments."[5] Again, the JSC generally makes proposals to the President that keep the *Manual* current with developments in the *Federal Rules of Criminal Procedure, Federal Rules of Evidence*, and constitutional law as announced by the United States Supreme Court.

In examining the changes to the UCMJ, it is striking that while some of the amendments were recently proposed, more than a few were recommended by the JSC nearly ten years ago. This illustrates that the military criminal justice system is evolutionary, rather than revolutionary; changes come slowly to the UCMJ. This should not come as a surprise, however, given that the military criminal justice system is a mature system of law.

Although most of the statutory changes become effective immediately, the JSC will work, in the coming months, to draft an EO implementing these legislative amendments in the Rules for Courts-Martial (R.C.M.) in the *Manual*. Republication of the *Manual* will occur after this EO is signed by the President.

### Article 1. Definitions.

Section 1141(b) of the Act changes Article 1 by adding two new subsections as follows:

> (15) The term 'classified information' means (A) any information or material that has been determined by an official of the United States pursuant to law, an Executive Order, or regulation to require protection against unauthorized disclosure for reasons of national security, and (B) any restricted data, as defined in section 11(y) of the Atomic Energy Act of 1954 (42 U.S.C. 2014(y)).
>
> (16) The term 'national security' means the national defense and foreign relations of the United States.

Both of these definitions are essentially identical to those used in the Classified Information Procedures Act.[6] They were added to the change to Article 62(a)(1), Appeals Relating to Disclosure of Classified Information, which is discussed below.

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[1] Pub. L. No. 104-106, 110 Stat. 186 (1996) (to be codified at 10 U.S.C.).

[2] 10 U.S.C. § 836 (1988).

[3] *Id.*

[4] *Id.*

[5] Exec. Order No. 12,484, 49 Fed. Reg. 28,825 (1984).

[6] 18 U.S.C. app. III, § 1 (1988).

**Article 32. Pretrial investigations.**

Section 1131 of the Act amends Article 32 as follows:

> Section 832 (article 32) is amended—(1) by redesignating subsection (d) as subsection (e); and (2) by inserting after subsection (c) the following new subsection (d): (d) If evidence adduced in an investigation under this article indicates that the accused committed an uncharged offense, the investigating officer may investigate the subject matter of such offense without the accused having first been charged with the offense, if the accused—(1) is present at the investigation; (2) is informed of the nature of each uncharged offense investigated; and (3) is afforded the opportunities for representation, cross examination, and presentation prescribed in subsection (b).

This amendment creates a new subsection authorizing an Article 32 Investigating Officer (IO) to investigate uncharged offenses when, during the course of an Article 32 hearing, the evidence indicates that the accused may have committed such offenses.

This change to the UCMJ was proposed by the Army at a JSC meeting in early November 1985. Its genesis, however, is a recommendation from the September 1983 *Report to the [Army] Judge Advocate General by the Wartime Legislation Team* (*WALT Report*).[7] The *WALT Report* recommended that any "additional misconduct identified during the pretrial investigation . . . [should be allowed] to be charged without a new investigation." The *WALT Report* contains a draft amendment to the UCMJ that is virtually identical to the amendment passed by Congress.[8]

Of course, the *WALT Report* concerned only improvements to the UCMJ needed in combat situations; this amendment to Article 32 applies in war or peace. When this amendment was first proposed at a JSC meeting, at least one JSC service representative expressed concern that permitting an IO to investigate uncharged misconduct might result in an IO expanding the scope of an investigation into areas not envisaged by the authority ordering the investigation. Concerns about an overly energetic IO, however, were outweighed by the JSC's acknowledgement that the amendment promotes judicial economy. An IO who discovers that the accused has committed uncharged misconduct no longer must interrupt the investigation to seek preferral and joinder of new charges. Provided the accused has notice of the nature of the uncharged misconduct, is present, is represented by counsel at the hearing, and has the right to examine the evidence and exercise his other rights under R.C.M. 405 and Article 32(d), allowing the IO to investigate misconduct discovered in the course of the investigation promotes economy in the military justice system. Additionally, the accused benefits by having all alleged misconduct investigated at one time and place, and this increases the chances that weak or baseless charges will be eliminated. In sum, the change promotes both economy and fairness in the military justice system.

**Article 47(b). Refusal to Testify Before Court-Martial.**

Section 1111 of the Act amends Article 47(b) as follows:

> Section 847(b) (article 47(b) is amended—(1) in the first sentence, by inserting 'indictment or' after 'shall be tried on'; and (2) in the second sentence, by striking out 'shall be' and all that follows and inserting in lieu thereof 'shall be fined or imprisoned, or both, at the court's discretion.'

This amendment removes the limitations on punishment that may be imposed by a federal district court for a civilian witness's refusal to honor a subpoena to appear or testify before a court-martial. This change leaves the amount of imprisonment or fine to the discretion of the district court. Given that title 18 United States Code (U.S.C.) §§ 401-02 do not limit a federal district court's power to punish contempt of its authority, this amendment now provides for uniform treatment of witnesses who refuse to appear or testify at courts-martial.

The JSC representative of the Court of Appeals for the Armed Forces (CAAF) first proposed this amendment in May 1986 when he asked the JSC Working Group to study "eliminat[ing] the present maximum punishment for a civilian witness's refusal to appear." The CAAF representative suggested that the "appropriate punishment" should be left to the discretion of the federal district courts. The CAAF's interest in this issue grew out of concerns by then Chief Judge Everett that a civilian witness who refused to appear or testify at a court-martial was subject only to misdemeanor punishment.

**Article 57(a). Effective Date for Forfeitures of Pay and Allowances and Reduction in Grade by Sentence of Court-Martial.**

Section 1121 of the Act amends Article 57(a) as follows:

> (a) EFFECTIVE DATE OF SPECIFIED PUNISHMENTS.—Subsection (a) of section 857 (article 57) is amended to read as follows:

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[7] Report to The Judge Advocate General by the Wartime Legislation Team, Lieutenant Colonel E.A. Gates and Major Gary V. Casida (Sept. 1983) [hereinafter WALT Report].

[8] *Id.* at 33, 50-51, E-7.

(a)(1) Any forfeiture of pay or allowances or reduction in grade that is included in a sentence of a court-martial takes effect on the earlier of—

(A) the date that is 14 days after the date on which the sentence is adjudged; or

(B) the date on which the sentence is approved by the convening authority.

(2) On application by an accused, the convening authority may defer a forfeiture of pay or allowances or reduction in grade that would otherwise become effective under paragraph (1)(A) until the date on which the sentence is approved by the convening authority. Such a deferment may be rescinded at any time by the convening authority.

(3) A forfeiture of pay or allowances shall be applicable to pay and allowances accruing on and after the date on which the sentence takes effect.

(4) In this subsection, the term 'convening authority,' with respect to a sentence of a court-martial, means any person authorized to act on the sentence under section 860 of this title (article 60).

(b) APPLICABILITY.—The amendment made by subsection (a) shall apply to a case in which a sentence is adjudged by a court-martial on or after the first day of the first month that begins at least 30 days after the date of enactment of this Act.

As early as March 1988, the JSC adopted a Navy proposal to amend Article 57(a) to make forfeitures of pay and allowances and reduction in grade effective on announcement of sentence. Continued JSC interest in a UCMJ amendment coalesced with the Department of Defense's (DOD) subsequent policy decision that a convicted service member, where forfeitures are adjudged, should not benefit from his misconduct by receiving a windfall of pay and allowances during the often lengthy delay between announcement of sentence and convening authority action. As a result, the DOD proposed making forfeitures and reductions effective on announcement of sentence in its draft for the FY 1996 Authorization Act. Shortly after the DOD's draft Act reached Congress, however, newspaper, radio, and television articles about "pay for prisoners"[9] heightened the congressional interest in the issue. Consequently, the proposed amendment to Article 57(a) is closely linked to the "pay for prisoners" controversy and the newly created Article 58b. The latter, which effectively ends the payment of pay and allowances to most service members receiving felony-level sentences, is discussed below.

A few comments on the new Article 57(a) are appropriate. First, Congress has made this provision applicable "to a case in which the sentence is adjudged . . . on or after the first day of the first month that begins at least 30 days after the date of the enactment of this Act." This means that the effective date of this forfeiture and reduction provision is 1 April 1996.

Second, subsection (a)(1)(A) operates to make forfeitures and reductions effective on the earlier of either fourteen days after a sentence is adjudged or when the convening authority approves that sentence.

Initially, the DOD suggested to Congress that forfeitures and reductions take effect on announcement of sentence. Congress, however, opted first for a twenty day delay. The rationale was that a twenty day grace period would give an accused adequate time to ask the convening authority for a deferment of any forfeitures or a reduction. A subsequent amendment offered by Senator Barbara Boxer, and approved by the conference committee and then both houses, reduced this twenty day period to fourteen days.

### Article 57a. Deferment of Confinement.

Section 1123 of the Act creates a new Article 57a by splitting the existing Article 57 into two parts and adding new language. Subparagraphs (a), (b), and (c) of Article 57 remain intact, but subparagraphs (d) and (e) are redesignated as Article 57a (a) and (b), respectively, and a new subparagraph (c) has been added to the new Article 57a. The changes are as follows:

DEFERMENT OF CONFINEMENT.

(a) DEFERMENT. Subchapter VIII is amended—(1) by inserting after subsection (c) of section 857 (article 57) the following: § 857a. Art. 57a. Deferment of sentences; (2) by redesignating the succeeding two subsections as subsection (a) and (b); (3) in subsection (b), as redesignated by paragraph (2), by striking out 'postpone' and inserting in lieu thereof 'defer'; and (4) by inserting after subsection (b), as redesignated by paragraph (2), the following: (c) In any case in which a court-martial sentences a person to confinement and the sentence to confinement has been

[9] *See, e.g.*, Russell Carollo & Cheryl Reed, *Cashing in Behind Bars: Prisoners on Payroll*, DAYTON DAILY NEWS, Dec. 18, 1994, at 1A, 12A; John Martin, *Pay for Jailed Military Personnel* (ABC WORLD NEWS TONIGHT television news broadcast, 6:30 p.m., Jan. 11, 1995).

ordered executed, but in which review of the case under section 867(a)(2) of this title, article 67(a)(2) is pending, the Secretary concerned may defer further service of the sentence to confinement while that review is pending.

The amendment to the new Article 57a(b) eliminates the use of the word postpone that appeared in (e)(1) of the previous version of Article 57. As defer or deferment is the term used in the military justice system, and postpone is not, it makes sense to use the former.

Note that the new Article 57a(b)(1)-(2) retains the convening authority's power to defer the running of a court-martial sentence to confinement with a state imposed sentence to confinement when a prisoner delivered to military authorities under the Interstate Agreement on Detainers Act, 18 U.S.C. § 2, is later returned to state authorities for completion of the state sentence after completion of his trial by court-martial.

The new Article 57a(c) permits a service secretary to defer an accused's confinement when a Judge Advocate General orders a court-martial to be forwarded to the CAAF for review under Article 67(a)(2). The Air Force first proposed this change to the UCMJ during a November 1990 JSC meeting, probably in response to *Moore v. Adkins*.[10] *Moore* requires that the accused be released from confinement pending such an appeal unless the Government shows that the accused is a flight risk or a potential threat to the community. Although *Moore* makes sense as a matter of law and policy, the decision had the effect of undercutting the punitive effect of any subsequent Government success at the CAAF. Because the accused's sentence to confinement continued to run after his release, every day the accused spent out of jail during the pendency of the appeal acted to reduce the total confinement to be served. In sum, the accused benefited by having a reduced sentence to confinement even though the accused lost on appeal.

In its initial proposal for a deferment of confinement pending an Article 67(a)(2) appeal, the Air Force proposed giving the convening authority the power to stop the running of any sentence to confinement when an accused was released from the confinement facility pending the Government appeal. The DOD, in its proposed amendment to Article 57, similarly suggested to Congress that the service secretaries *be authorized to give any Judge Advocate General, or commanding officer*, the power to defer further service of a sentence to confinement that has been ordered executed. In amending the UCMJ, however, Congress decided to limit the power to defer confinement to the service secretaries.

### Article 58b. Sentences: Forfeiture of Pay and Allowances During Confinement.

Section 1122 of the Act creates Article 58b with the following language:

(a)(1) A court-martial sentence described in paragraph (2) shall result in the forfeiture of pay and allowances due that member during any period of confinement or parole. The forfeiture pursuant to this section shall take effect on the date determined under section 857(a) of this title (article 57(a)) and may be deferred as provided in that section. The pay and allowances forfeited, in the case of a general court-martial, shall be all pay and allowances due that member during such period and, in the case of a special court-martial, shall be two-thirds of all pay and allowances due that member during such period.

(2) A sentence covered by this section is any sentence that includes—(A) confinement for more than six months or death; or (B) confinement for six months or less and a dishonorable or bad-conduct discharge or dismissal.

(b) In a case involving an accused who has dependents, the convening authority or other person acting under section 860 of this title (article 60) may waive any or all of the forfeitures of pay and allowances required by subsection (a) for a period not to exceed six months. Any amount of pay or allowances that, except for a waiver under this subsection, would be forfeited shall be paid, as the convening authority or other person taking action directs, to the dependents of the accused.

(c) If the sentence of a member who forfeits pay and allowances under subsection (a) is set aside or disapproved or, as finally approved, does not provide for a punishment referred to in subsection (a)(2), the member shall be paid the pay and allowances which the member would have been paid, except for the forfeiture, for the period during which the forfeiture was in effect.

Under § 1122(b) of the Act, Article 58b applies to courts-martial sentences adjudged "on or after the first day of the first month that begins at least 30 days after the date of the enactment of this Act." This means that Article 58b is effective for sentences adjudged on or after 1 April 1996.

This completely new provision in the UCMJ grew out of the prisoner pay controversy. The DOD and the services were satisfied with the existing framework—created by the Congress in

[10] 30 M.J. 249 (C.M.A. 1990).

1950—that permitted pay and allowances to continue to be paid to service members serving sentences to confinement. At that time, there were virtually no support programs or money available in civilian communities to support the family members of service members sentenced to jail. Consequently, for compassionate reasons, Congress authorized military courts to allow service members in jail to receive some or all of their pay and allowances so that their families would be neither hungry nor homeless.

Although the nature of today's all-volunteer armed forces differs greatly from the conscript armed forces of the 1950s and 1960s, many of the same compassionate reasons still exist for allowing flexibility in the sentencing of offenders. That said, public outcry against "pay for prisoners" resulted in a reexamination of the existing policy and a decision to create Article 58b.

The table and accompanying notes below show the effect of Article 58b.

**TABLE 1: OPERATION OF ARTICLE 58b, UCMJ**

| | General Courts-Martial | Bad Conduct Discharge (BCD) Special Courts-Martial |
|---|---|---|
| Death | TF | N/A |
| Confinement more than 6 month | TF during confinement or parole | N/A |
| Dismissal, DD, BCD *and* confinement for 6 months or less | TF during confinement or parole | 2/3 forfeitures during any confinement or parole |
| Dismissal, DD, BCD *only* | * | * |
| Confinement less than 6 months *only* | * | * |

* Approved forfeitures limited by adjudged forfeitures

Notes:

1. Summary courts-martial are unaffected as are straight or non-BCD special courts-martial.

2. A BCD special courts-martial is *only* affected if a punitive discharge is adjudged, with automatic forfeitures running for the period of confinement adjudged. For example, if the accused has an announced sentence of a BCD and forty-five days, then forfeiture of two-thirds pay will run for forty-five days. On the other hand, if no BCD is adjudged, then regardless of the amount of confinement in the sentence, no automatic forfeitures occur and any forfeitures adjudged will limit approved forfeitures.

3. A general courts-martial sentence to more than six months confinement, regardless of whether a punitive discharge was adjudged, results in total forfeitures of pay and allowances during the period of confinement. A sentence of less than six months confinement, accompanied by a punitive discharge, results in the automatic forfeiture of all pay and allowances during the period of confinement.

4. Because the automatic forfeitures only apply during a period of confinement, no automatic forfeitures applies if the sentence contains no confinement. For example, a general or BCD special courts-martial sentence not including confinement will not trigger the forfeiture provisions of new Article 58b. Note that the *Manual* prohibition on approving total forfeitures where there has been no sentence to confinement remains unaffected by Article 58b.[11]

Although Congress severely limited the pay and allowances going directly to confined service members, it nonetheless recognized that an accused's family members might need financial support. Consequently, under the new Article 58b(b), the convening authority may defer forfeitures for up to six months and direct payment of the money to the accused's dependents. This provision does not affect the provisions of title 10 governing transitional compensation for abused dependents.[12] Consequently, the family members of the accused may receive both. A staff judge advocate advising a convening authority, however, may want to tell that authority that available transitional compensation benefits may make an involuntary allotment under (b) unnecessary.

### Article 60(b). Submission of Matters to the Convening Authority for Consideration.

Section 1132 of the Act amends Article 60(b) as follows:

> Section 860(b)(1) (article 60(b)(1)) is amended by inserting after the first sentence the following: Any such submission shall be in writing.

[11] *See* MANUAL FOR COURTS-MARTIAL, United States, R.C.M. 1107(d)(2) discussion (1995) [hereinafter MCM].

[12] The FY 1994 DOD Authorization Act authorized payment of monthly transitional compensation for abused family members under 10 U.S.C. § 1059. The implementing *DOD Instruction 1342.24, Transitional Compensation for Abused Dependents*, was published on 23 May 1995. The benefits apply to dependents of soldiers who have been on active duty for more than thirty days and who on or after 30 November 1993 have been separated from active duty under a court-martial sentence resulting from a dependent abuse offense; or administratively separated from active duty if the basis for separation includes a dependent abuse offense. A dependent abuse offense is conduct by a soldier involving abuse of the spouse or a dependent child of the soldier. This is a criminal offense defined by 10 U.S.C. §§ 801-940 or other federal or state code provision applicable to the jurisdiction where the act of abuse is committed.

This amendment grew out of dissatisfaction with *United States v. Davis*,[13] which the CAAF announced that Article 60(b)(1) did not restrict an accused's post-trial submissions to the convening authority to only written matters. Consequently, when Davis submitted a lengthy videotape, the convening authority had to consider it—and to the extent R.C.M. 1105(b) purported to limit the accused to written submissions, it was clearly inconsistent with Article 60. The change to Article 60 now makes clear that although a convening authority may consider any matters, he or she is *only required* to consider written matters.

**Article 62(a). Appeal by the United States.**

Section 1141 of the Act creates a new government right to appeal with the following language:

> (a) APPEALS RELATING TO THE DISCLOSURE OF CLASSIFIED INFORMATION.—Section 862(a)(1) (article 62(a)(1)) is amended to read as follows:
>
> > (a)(1) In a trial by court-martial in which a military judge presides and in which a punitive discharge may be adjudged, the United States may appeal the following (other than an order or ruling that is, or that amounts to, a finding of not guilty with respect to the charge or specification):
> >
> > (A) An order or ruling of the military judge which terminates the proceedings with respect to a charge or specification.
> >
> > (B) An order or ruling which excludes evidence that is substantial proof of a fact material in the proceeding.
> >
> > (C) An order or ruling which directs the disclosure of classified information.
> >
> > (D) An order or ruling which imposes sanctions for nondisclosure of classified information.
> >
> > (E) A refusal of the military judge to issue a protective order sought by the United States to prevent the disclosure of classified information.
> >
> > (F) A refusal by the military judge to enforce an order described in subparagraph (E) that has previously been issued by appropriate authority.

This amendment, first proposed by the Air Force at a JSC meeting in September 1988, is intended to permit Government interlocutory appeal of rulings disclosing classified information. This right to appeal, however, only applies to BCD-special and general courts-martial over which a military judge presides.[14]

**Article 76b. Lack of Mental Capacity or Mental Responsibility: Commitment of Accused for Examination and Treatment.**

Section 1133 of the Act creates a new Article 76b with the following language:

> (a) PERSONS INCOMPETENT TO STAND TRIAL.
>
> > (1) In the case of a person determined under this chapter to be presently suffering from a mental disease or defect rendering the person mentally incompetent to the extent that the person is unable to understand the nature of the proceedings against that person or to conduct or cooperate intelligently in the defense of the case, the general court-martial convening authority for that person shall commit the person to the custody of the Attorney General.
> >
> > (2) The Attorney General shall take action in accordance with section 4241(d) of title 18.
> >
> > (3) If at the end of the period for hospitalization provided for in section 4241(d) of title 18, it is determined that the committed person's mental condition has not so improved as to permit the trial to proceed, action shall be taken in accordance with section 4246 of such title.
> >
> > (4)(A) When the director of a facility in which a person is hospitalized pursuant to paragraph (2) determines that the person has recovered to such an extent that the person is able to understand the

[13] 33 M.J. 13 (C.M.A. 1991).

[14] Article 62(a)(1) only permits a Government appeal from courts-martial over which a military judge presides because it is possible to convene a BCD-special court-martial without a military judge. *See* 10 U.S.C. § 819 (1988).

nature of the proceedings against the person and to conduct or cooperate intelligently in the defense of the case, the director shall promptly transmit a notification of that determination to the Attorney General and to the general court-martial convening authority for the person. The director shall send a copy of the notification to the person's counsel.

(B) Upon receipt of a notification, the general court-martial convening authority shall promptly take custody of the person unless the person covered by the notification is no longer subject to this chapter. If the person is no longer subject to this chapter, the Attorney General shall take any action within authority of the Attorney General that the Attorney General considers appropriate regarding the person.

(C) The director of the facility may retain custody of the person for not more than 30 days after transmitting the notifications required by subparagraph (A).

(5) In the application of section 4246 of title 18 to a case under this subsection, references to the court that ordered the commitment of a person, and to the clerk of such court, shall be deemed to refer to the general court-martial convening authority for that person. However, if the person is no longer subject to this chapter at a time relevant to the application of such section to the person, the United States district court for the district where the person is hospitalized or otherwise may be found shall be considered as the court that ordered the commitment of the person.

(b) PERSONS FOUND NOT GUILTY BY REASON OF LACK OF MENTAL RESPONSIBILITY.

(1) If a person is found by a court-martial not guilty only by reason of lack of mental responsibility, the person shall be committed to a suitable facility until the person is eligible for release in accordance with this section.

(2) The court-martial shall conduct a hearing on the mental condition in accordance with subsection (c) of section 4243 of title 18. Subsections (b) and (d) of that section shall apply with respect to the hearing.

(3) A report of the results of the hearing shall be made to the general court-martial convening authority for the person.

(4) If the court-martial fails to find by the standard specified in subsection (d) of section 4243 of title 18 that the person's release would not create a substantial risk of bodily injury to another person or serious damage of property of another due to a present mental disease or defect—(A) the general court-martial convening authority may commit the person to the custody of the Attorney General; and (B) the Attorney General shall take action in accordance with subsection (e) of section 4243 of title 18.

(5) Subsections (f), (g), and (h) of section 4243 of title 18 shall apply in the case of a person hospitalized pursuant to paragraph (4)(B), except that the United States district court for the district where the person is hospitalized shall be considered as the court that ordered the person's commitment.

(c) GENERAL PROVISIONS.

(1) Except as otherwise provided in this subsection and subsection (d)(1), the provisions of section 4247 of title 18 apply in the administration of this section.

(2) In the application of section 4247(d) of title 18 to hearings conducted by a court-martial under this section or by (or by order of) a general court-martial convening authority under this section, the reference in that section to section 3006A of such title does not apply.

(d) APPLICABILITY.

(1) The provisions of chapter 313 of title 18 referred to in this section apply according to the provisions of this section notwithstanding section 4247(j) of title 18.

(2) If the status of a person as described in section 802 of this title (article 2)

> terminates while the person is, pursuant to this section, in the custody of the Attorney General, hospitalized, or on conditional release under a prescribed regimen of medical, psychiatric, or psychological care or treatment, the provisions of this section establishing requirements and procedures regarding a person no longer subject to this chapter shall continue to apply to that person notwithstanding the change of status.

This new legislation takes effect "at the end of the six-month period beginning on the date of the enactment of this Act" and applies to charges referred to courts-martial after that date. The new Article 76b becomes effective for courts-martial referred after 11 August 1996.

This new UCMJ provision concerns the commitment of an accused who is either incompetent to stand trial or who is acquitted by reason of insanity. It grew out of Senator Strom Thurmond's desire to have a mechanism for dealing with a soldier who was incompetent to stand trial or who was found not guilty by reason of a lack of mental responsibility.

As early as 1988, the JSC also recognized a need for commitment procedures for individuals found not guilty by reason of lack of mental responsibility and concluded that the problem needed a legislative "fix."[15]

The new Article 76b plugs the military justice system into the title 18 framework for handling an accused in federal district court who is incompetent to stand trial or is found not guilty by reason of lack of mental responsibility.[16] This is accomplished by giving a general court-martial convening authority the power to place the accused in the custody of the Attorney General.

The plain language of the new article suggests that the decision whether an accused is incompetent may be made by the convening authority after referral but prior to trial or by a military judge after referral. Presumably, the military judge would conduct a hearing under Article 39(a) to determine any such incompetency under R.C.M. 909. As for the accused who is found not guilty after a successful defense pursuant to R.C.M. 917(k)(1), the military judge must conduct a post-trial session in accordance with title 18, § 4243.

In authoring the legislation, the drafters refer to title 18, §§ 4241(d), 4243, 4246 and 4247. Section 4241(d) prescribes procedures for determining the competence of an accused to stand trial in the United States district courts. It provides that after a court finds, by a preponderance of the evidence, that an accused is suffering from a mental disease or defect making him unable to understand the nature of the proceedings against him or otherwise assist in his defense, then the Attorney General "shall hospitalize" the accused "for a reasonable period of time, not to exceed four months, as is necessary to determine whether there is a substantial probability that in the foreseeable future he will attain the capacity to permit the trial to proceed." Section 4241(d) further provides that such hospitalization may continue longer than four months—"for an additional reasonable period of time" until the accused's "mental condition is so improved that trial may proceed." Section 4241 does not, however, allow an accused to be hospitalized indefinitely with a view toward trial. Rather, "[i]f, at the end of the time period specified, it is determined that the [accused's] mental condition has not so improved as to permit the trial to proceed,"[17] then the accused's continued hospitalization for treatment is governed by § 4246.

Section 4246 controls the hospitalization of a person due for release but suffering from mental disease or defect. It provides that if an accused "due for release" is "suffering from mental disease or defect," and if that accused was committed to the custody of the Attorney General under § 4241(d), then the accused will not be released. Rather, the accused will be committed to the custody of the Attorney General. The Attorney General in turn "shall release" the accused "to the appropriate official of the State in which the [accused] is domiciled . . . for custody, care, and treatment."[18]

Section 4247, referenced in subparagraphs (c)(1) and (2) of Article 76b, defines a "suitable facility" and specifies the requirements for a psychiatric or psychological examination conducted "pursuant to this chapter." These provisions apply to decisions made by a general court-martial convening authority or military judge under Article 76b.

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[15] The 1991 and 1992 DOD Authorization Acts also included provisions for the study and regulation of mental health evaluations of service members. The result of these studies was the DOD's promulgation of *DOD Directive 6490.1*. Some services implemented instructions on the basis of this directive. For example, the Navy issued *SECNAVINST 6320.24*, 14 December 1994.

[16] Sections 4241-4247 of title 18 were enacted when the federal civilian criminal justice system discovered it lacked an established procedure to handle the incompetent defendant. This deficiency first surfaced prominently when John Hinkley attempted to assassinate President Reagan. As a result of Hinkley's acquittal, the Congress amended title 18, creating a procedure whereby the Attorney General of the United States takes custody of the incompetent individual and commits him or her to treatment.

[17] 18 U.S.C. § 4241(d) (1988).

[18] *Id.* §§ 4246(a), (d).

Table 2 shows the application of these title 18 provisions to the UCMJ:

**TABLE 2: EFFECT OF ARTICLE 76b**

| | UCMJ provision | Title 18 provision | Effect |
|---|---|---|---|
| Incompetent soldier (charges not referred to trial) | N/A | N/A | N/A |
| Incompetent accused (charges referred) | 76b(a) | 4241(d), 4246, 4247 | General court-martial convening authority complies with 4247(b), title 18; MJ conducts Art. 39a hearing to determine competency; accused is represented by counsel; shall be afforded an opportunity to testify, present evidence, and to confront and cross-examine witnesses; if accused is incompetent, then committed to custody of Attorney General for hospitalization |
| Found not guilty only by reason of lack of mental responsibility | 76b(b) | 4243 | Accused is hospitalized until eligible for release; accused has burden of proving that his release will not create a substantial risk of bodily injury to another person or serious damage of property |
| Post-conviction incompetency | N/A | N/A | N/A |

These general comments and Table 2 aside, a number of important issues are not addressed by Article 76b. Who convenes the hearing? Does the judge or do the members hear the issue? What about representation of the accused *after* his commitment to the Attorney General? What appellate review is possible of the military judge's decision? These and other thorny issues will require study before *Manual* implementation.

Military justice practitioners should note that the legislation passed by the 104th Congress does not specifically address the situation in which an accused becomes mentally ill while incarcerated. Consequently, it appears that the new procedures cannot be used to resolve post-conviction incompetency.

Similarly, as Table 2 indicates, Article 76b probably does not apply to a soldier who is found to be incompetent to stand trial *prior* to the *referral* of charges. At first glance, subsection (a)(1) might suggest that such cases are covered by the new statute, but § 1133(c), governing the effective date of Article 76b, states that the new article "shall apply with respect to charges referred to courts-martial."[19] Therefore, unless a soldier's case is referred to trial, the framework created by Article 76b does not apply. This means that an incompetent accused ordinarily will be examined by a Physical Evaluation Board (PEB), which then may medically discharge the accused from the service. After discharge, the accused may receive treatment from the Veterans' Administration and may also be committed by state authorities to a state institution. All treatment and commitment procedures, however, are *ad hoc*; a state institution is not required to hospitalize a service member discharged due to mental disease or defect. Of course, if a general court-martial convening authority is dissatisfied with the result that follows from the PEB process, then that convening authority apparently could refer a case to trial to take advantage of the procedures created by Article 76b.

The military adoption of this rule is purely prophylactic. As yet, there has been no military equivalent of Hinkley; Article 76b looks ahead so that when a similar situation develops, the military criminal justice system will be prepared to resolve it. The best feature of the Article 76b is that it does not create a new, parallel UCMJ commitment system; rather, it dovetails title 10 prosecutions into an existing title 18 framework. This conserves judicial and other resources, and although details will have to be implemented by EO in the *Manual*, it is a good example of a logical, sound change in the system.

### Article 95. Resistance, Flight, Breach of Arrest, and Escape.

Section 1112 of the Act amends Article 95 as follows:

> Article 95. Resistance, flight, breach of arrest, and escape. Any person subject to this chapter who—(1) resists apprehension; (2) flees from apprehension; (3) breaks arrest; or (4) escapes from custody or confinement; shall be punished as a court-martial may direct.

First proposed by the Army at the JSC meeting in September 1991, the intent of this amendment is to reverse the CAAF decisions in *United States v. Harris*[20] and *United States v. Burgess*.[21] In both cases, the court held that resisting apprehension does not include fleeing from apprehension despite the authority of the 1951 and 1969 *Manuals*[22] and early military case law.[23]

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[19] Pub. L. No. 104-106, § 1133, 110 Stat. 186 (1996) (to be codified at 10 U.S.C.).

[20] 29 M.J. 169 (C.M.A. 1989).

[21] 32 M.J. 446 (C.M.A. 1991).

[22] MCM, *supra* note 10, pt. IV, ¶ 174a.

[23] United States v. Mercer, 11 C.M.R. 812, 817-818 (A.F.B.R. 1953).

Resistance to and flight from apprehension should be expressly deterred and punished under military law. Rather than being a merely incidental or reflexive action, flight from apprehension in the context of the armed forces may have a distinct and cognizable impact on military discipline. A long standing and special concern about fleeing apprehension exists in the military. For example, Article 7(c) gives officers the authority to quell affrays and apprehend service members consistent with that authority. Consequently, this amendment to the UCMJ supports the needs of good order and discipline.

**Article 120. Carnal knowledge.**

Section 1113 of the Act amends Article 120 as follows:

> (a) GENDER NEUTRALITY.—Subsection (b) of section 920 (article 120) is amended to read as follows:
>
> > (b) Any person subject to this chapter who, under circumstances not amounting to rape, commits an act of sexual intercourse with a person—(1) who is not that person's spouse; and (2) who has not attained the age of sixteen years; is guilty of carnal knowledge and shall be punished as a court-martial may direct.
>
> (b) MISTAKE OF FACT.—Such section (article) is furthered amended by adding at the end the following new subsection:
>
> > (d)(1) In a prosecution under subsection (b), it is a defense that—(A) the person with whom the accused committed the act of sexual intercourse had at the time of the alleged offense attained the age of twelve years; and (B) the accused reasonably believed that the person had at the time of the alleged offense attained the age of sixteen years.
> >
> > (2) The accused has the burden of proving a defense under paragraph (1) by a preponderance of evidence.

This change to the law grew out of an Army proposal to have the UCMJ mirror more closely the provisions of title 18, § 2243.[24] Given the requirement under Article 36 that military criminal law reflect developments in title 18, the adoption of a mistake of fact defense for carnal knowledge is appropriate. Where a defense counsel previously hoped for an equitable acquittal in a carnal knowledge case, counsel now may argue that the victim's physical attributes, consumption of alcohol, possession of an identification card showing that the victim is at least sixteen years of age, and other similar facts and circumstances may show the required reasonable belief.

Practitioners should note that carnal knowledge continues to be a strict liability offense where the victim is under the age of twelve years. What constitutes a preponderance of the evidence under Article 120, and any procedural guidance on instructing the court members in such a prosecution likely will be addressed in *Manual* implementation at a later date.

**Article 137(a). Time after accession for initial instruction in the Uniform Code of Military Justice.**

Section 1152 of the Act amends Article 137 as follows:

> Section 937(a)(1) (article 137(a)(1)) is amended by striking out 'within six days' and inserting in lieu thereof 'within fourteen days.'

This amendment was first proposed by the JSC in response to a request from the Staff Judge Advocate at the Army's Training and Doctrine Command to give additional flexibility to trainers of basic trainees. The amendment does not preclude conducting UCMJ training in a shorter period of time. Rather, it adds eight more days to give greater flexibility in the recruit training process.

[24] Note, however, that the age differential provision of 18 U.S.C. § 2243(a) is absent from the amendment to Article 120. Under § 2243(a), even if the victim is under age sixteen, no prosecution of an accused can occur unless the victim "is at least four years younger" than the accused. This means that if the accused is eighteen, and the victim is fifteen, there is no violation of § 2243(a). While the drafters of the mistake of fact amendment to Article 120 did want to follow changes in title 18, they did not believe that this provision of § 2243(a) was appropriate as a matter of policy.

**Miscellaneous and Technical Provisions.**

The National Defense Authorization Act for FY 1996 also established five miscellaneous provisions affecting military justice. One is purely technical[25] and needs no discussion. Another also needs no examination because it concerns the authority for Article III judges to sit on the CAAF.[26] Consequently, this article only discusses the three remaining miscellaneous provisions effecting military justice: (1) the creation of an advisory panel on UCMJ jurisdiction over civilians accompanying the armed forces in time of armed conflict; (2) the "equalization of accrual of service credit for officers and enlisted members;" and (3) the end of retired pay for reservists with twenty year letters who are discharged by sentence of a court-martial.

Section 1151 of the Act is titled "Advisory Committee on Criminal Law Jurisdiction over Civilians Accompanying the Armed Forces in Time of Armed Conflict." It establishes an advisory committee to study the propriety of amending Article 2, UCMJ, to expand jurisdiction over United States government civilian and contract civilian employees accompanying the Armed Forces on contingency operations.

The creation of this study group is a compromise between those desiring expanded jurisdiction and those opposed to it. The desire for expanded jurisdiction grew out of the *WALT Report* of 1983, which proposed amendment of Article 2(a)(10) to give jurisdiction over those persons serving with or accompanying an armed force in the field in time of declared or undeclared war.[27]

In 1990, the JSC again proposed amendment of Article 2(a)(10) as suggested by the *WALT Report*. The DOD, however, suggested the use of the phrase "in time of armed conflict" and that became the DOD position. Note that the advisory committee—composed of at least five individuals nominated jointly by the Attorney General and the Secretary of Defense—is tasked not only with studying the propriety of expanding jurisdiction under Article 2 but also is to look at possible expanded jurisdiction under title 18 or even the creation of new Article 1 courts to handle criminal misconduct committed by civilians accompanying the armed forces in time of armed conflict. Presumably, these would be Article 1 magistrate courts of some type. The Advisory Committee is to report its findings to Congress no later than 17 January 1997. The report's findings likely will determine whether an amendment to Article 2 is enacted in the future.

Although not a part of the package amending the UCMJ, two other miscellaneous provisions amending title 10 deserve comment. These are the amendment to § 972 of title 10 and the creation of § 12740 of title 10, which are both contained in the FY 1996 National Defense Authorization Act. The amendment to the first provision eliminates the differences between officer and enlisted accrual of service credit so that officers who have bad time do not have that time count towards length of service for retirement purposes. The creation of the second provision ends the disparity between regular and reserve component personnel dismissed or punitively discharged by sentence of court-martial. The relevant portions of the amendment to § 972 follows:

> Section 561. Equalization of Accrual of Service Credit for Officers and Enlisted Members.
>
> (a) Enlisted Service Credit.—Section 972 of title 10, United States Code, is amended—
>
> * * *
>
> (3) is confined by military or civilian authorities for more than one day in connection with a trial, whether before, during or after the trial, or
>
> (b) Officers Not Allowed Service Credit for Time Lost.—In the case of an officer of an armed force who after the date of the enactment of the National Defense Authorization Act for Fiscal Year 1996—(1) deserts; (2) is absent from his organization, station, or duty for more than one day without proper authority, as determined by competent authority; (3) is confined by military or civilian authorities for more than one day in connection with a trial, whether before, during, or after the trial; or (4) is unable for more than one day, as determined by competent authority, to perform his duties because of intemperate use of drugs or alcoholic liquor, or because of disease or injury resulting from misconduct; the period of such deser-

[25] Congress changed the references to the Courts of Military Review to the Courts of Criminal Appeals in article 66(f) of the UCMJ to reflect their new names. Pub. L. No. 104-106, § 1153, 110 Stat. 186 (1996) Technical Amendment (to be codified at 10 U.S.C.); on 5 October 1994, the National Defense Authorization Act for FY 1995, Pub. L. No. 103-337, 101 Stat. 2663 (1994), changed the names of the United States Courts of Military Review and the United States Court of Military Appeals (codified at 10 U.S.C. § 866 n. (1995) and 10 U.S.C. § 941 n. (1995), respectively). The name of the Army appellate court is the United States Army Court of Criminal Appeals and the name of the appellate court of all services is the United States Court Criminal of Appeals for the Armed Forces.

[26] Pub. L. No. 104-106, § 1142, 110 Stat. 186 (Repeal of Termination of Authority for Chief Judge of the United States to Designate Article III Judges for Temporary Service on the Court of Appeals for the Armed Forces) (to be codified at 10 U.S.C.).

[27] WALT Report, *supra* note 7, at 13-17, app. F-1 to 101.

tion, absence, confinement, or inability to perform duties may not be counted in computing, for any purpose other than basic pay under section 205 of title 37, the officer's length of service.

Prior to this change to § 972, officers who deserted, were incarcerated, or otherwise were unfit or absent for duty, did not have such bad time subtracted from any computation or calculation of their length of service. That is, an officer confined by sentence of court-martial continued to accrue good time for retirement purposes. Such good time continued until the approval of the officer's dismissal if one were adjudged as part of a court-martial sentence. However, a lengthy period of confinement might be counted towards retirement. Enlisted members enjoyed no such benefit in the calculation of their length of service; time spent in confinement or otherwise unfit or absent for duty was bad time. Consequently, the significance of the change to § 972 is that it ends the windfall in length of service computation previously enjoyed by officers convicted and confined by courts-martial.

The last miscellaneous provision in title 10 worth examining is the new § 12740. The full text is as follows:

> Sec. 632: DENIAL OF NON-REGULAR SERVICE RETIRED PAY FOR RESERVES RECEIVING CERTAIN COURTS-MARTIAL SENTENCES.
>
> Section 12740. Eligibility: denial upon certain punitive discharges or dismissals.
>
> (d) A person who is convicted of an offense under the Uniform Code of Military Justice (chapter 47 of this title), and whose executed sentence includes death, a dishonorable discharge, a bad conduct discharge, or (in the case of an officer) a dismissal is not eligible for retired pay under this chapter.

As early as May 1986, the Air Force proposed amending title 10 to correct the anomaly whereby a reservist dismissed from the service by sentence of a court-martial nonetheless had an automatic entitlement to retirement pay if that reservist had received a so-called "twenty year letter." The policy behind the Air Force proposal and the resulting amendment is to eliminate the disparate treatment between those in the regular and reserve components. Prior to this change, a reservist who had approved retirement because of twenty years qualifying service as a reservist and then was court-martialed and punitively discharged from the service did not lose his or her retirement. Because a member of the regular component who was retirement eligible and then court-martialed and punitively discharged did lose any right to retirement, § 1331 was changed to eliminate this discriminatory and unfair treatment. This provision applies to courts-martial sentences adjudged after 10 February 1996.

**Conclusion.**

These many and varied amendments to the UCMJ now require *Manual* implementation. The JSC will begin drafting an EO to accomplish a number of *Manual* changes and invites all interested military justice practitioners to suggest ways to best accomplish this task. Lieutenant Colonel Fred L. Borch, Office of the Judge Advocate General, Joint Service Committee on Military Justice Working Group, Washington, D.C.

# USALSA Report

*United States Army Legal Services Agency*

## *Environmental Law Division Notes*

### Recent Environmental Law Developments

The Environmental Law Division (ELD), United States Army Legal Services Agency, produces *The Environmental Law Division Bulletin* (*Bulletin*), designed to inform Army environmental law practitioners of current developments in the environmental law arena. The *Bulletin* appears on the Legal Automated Army-Wide Systems Bulletin Board Service, Environmental Law Conference, while hard copies will be distributed on a limited basis. The content of the latest issue is reproduced below.

### Editor's Note

The March *Bulletin* officially launched the ELD's new procedure of distributing the *Bulletin* via electronic mail. The *Bulletin* will be sent by E-mail each month, as well as by United States mail, to all those who have provided me with their E-mail addresses. If you have sent me your E-mail address and you only receive this month's *Bulletin* via United States mail, please contact me so that I can correct the problem. Otherwise, I will proceed to delete you from the United States mail list so that you only receive the *Bulletin* via E-mail. If you have not yet sent me your E-mail address, please do so as soon as possible. Thank you for your cooperation in this effort. Ms. Fedel.

### Interim Guidance Issued

The Environmental Protection Agency (EPA) issued interim guidance on federal enforceability of limitation on the potential to emit (PTE) in light of two recent federal court decisions, *National Mining Association v. EPA*[1] and *Chemical Manufacturers Ass'n v. EPA*.[2] A source's PTE is the amount that determines whether a source is "major" under various Clean Air Act (CAA) programs.

The EPA's former position had been that only federally enforceable measures were limits on a source's PTE. This requirement still applies to the CAA Title V and Hazardous Air Pollutant programs. It no longer applies to the PSD/NSR program, unless a state has implemented rules requiring federal enforceability as a condition of limiting the PTE.

This provision impacts installations that are major sources under the PSD/NSR program in their applicable SIP. The impact depends a great deal on when, and if, the EPA amends this provision. The EPA indicated that promulgating regulations reinstating this requirement has a high priority within the agency. Lieutenant Colonel Olmscheid.

### Clean Water Act Enforcement

The United States Supreme Court has denied certiorari in a case, *United States v. Hopkins*,[3] in which the Second Circuit upheld a conviction for a knowing violation of the Clean Water Act (CWA). The appellant in *Hopkins* was convicted in the United States District Court for the District of Connecticut of falsifying, tampering with, or rendering inaccurate a monitoring device, violating restrictions of a discharge permit issued pursuant to the CWA, and conspiracy. He was sentenced to twenty-one months imprisonment and ordered to pay a $7500 fine. At trial, the jury was instructed that it was not necessary for the government to prove that the defendant intended to violate the law or had any specific knowledge of the particular statutory, regulatory, or permit requirements imposed under the CWA. This instruction was the appellant's principal grounds for appeal.

The Second Circuit held that the CWA section establishing criminal penalties for any person who "knowingly" violates the statute does not require proof that the defendant knew he was violating the CWA or a permit issued thereunder, only that he knew the nature of his acts. The holding in the *Hopkins* case is consistent with that in *United States v. Weitzenhoff*,[4] which was discussed in the February 1995 ELD Bulletin. As I indicated at that time, environmental law specialists should ensure that the appropriate individuals at their installation are aware of this line of cases. Major Saye.

### The EPA Appeals *Wausau* Decision and Issues Guidance on Supporting Penalty Calculations

The EPA has taken defiant action in response to Chief Administrative Law Judge John Lotis's decision in the case *In re Employers Insurance Company of Wausau and Group Eight Technology, Inc.*[5] In that decision, Chief Judge Lotis ruled that the EPA's penalty policies for environmental violations do not bind

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[1] 59 F.3d 1351 (D.C. Cir. 1995).

[2] No. 89-1514 (D.C. Cir. 1995).

[3] 53 F.3d 533 (2nd Cir. 1995), *cert. denied*, 64 U.S.L.W. 3484 (U.S. Jan. 16, 1996) (No. 95-609).

[4] 35 F.3d 1275 (9th Cir. 1993), *cert. denied*, 115 S.Ct. 939 (1995),

[5] TSCA-V-C-66-90, 1995 TSCA LEXIS 15 (1995).

judicial penalty decisions, unless those policies are promulgated through a formal public notice and comment rulemaking process under the Administrative Procedure Act. The *Wausau* decision obligates the EPA, through evidence presented at the hearing, to support any findings, assumptions, or determinations on which its assessed penalty rests. Then, as long as the hearing judge has "considered" the policy, he or she is free to apply the penalty policy or to depart from it, basing the decision solely on the strength of the parties' evidence.[6] In the *Wausau* decision, Judge Lotis lowered the assessed fine under the Toxic Substances Control Act from $78,000 to $66,000.

*Appeal of Decision*

The EPA has appealed the *Wausau* decision, urging the EPA Environmental Appeals Board (EAB) to overturn the ruling, and assess an appropriate penalty or remand the penalty assessment for explanation by the administrative law judge. In its administrative appeal brief, filed 15 December 1995, the EPA argues that the applicable environmental statute, not its penalty policy, dictates the amount of an assessed penalty for violation of that statute.[7] The EPA contends that the respective environmental penalty policies are merely "useful tools" in interpreting the statutory penalty guidance; it is the statute, not the penalty policies, that control the agency's penalty practice.

Significantly, one approach taken by the EPA was to argue that the defendants in the case did not dispute the proposed penalty of $78,000. It remains to be seen whether this position is accepted by the EAB, but it should place military practitioners on notice that, when a penalty is assessed against your installation, tacit acceptance of the penalty may be used against you in further proceedings.

*Issuance of Policy Guidance*

Pending an EAB decision on the *Wausau* case, the EPA has issued internal policy guidance directing its attorneys to build a case for administrative fines sought in enforcement actions. The guidance document (Memorandum) was written by Robert Van Heuvelen, Director of EPA's Office of Regulatory Enforcement and dated 15 December 1995, the same date as the appellate brief.[8]

The Memorandum specifically cites the *Wausau* case, commenting that, "[w]e think the decision in the Wausau [sic] case is inconsistent with decisions on the use of penalty policies by the Environmental Appeals Board." The Memorandum echoes the arguments made in the appellate brief, stating that the EPA's penalty policies "are not substantive rules under the Administrative Procedures Act," but rather are "a mix of legal interpretations, general policy and procedural guidance in how EPA should allocate its enforcement resources and exercise its enforcement discretion." The penalty amount sought in the complaint, according to the Memorandum, is "based upon the relevant statutory factors." This claim is suspect, considering the Memorandum's plain directive that "the penalty amount pled should be calculated pursuant to [the] applicable penalty policy."

The Memorandum directs its attorneys to follow specific procedures, some of which military practitioners may find helpful. For example, "[i]n the prehearing exchange or hearing, the facts relevant to determining an appropriate penalty under the particular statute should be presented as evidence." This directive will hopefully arrest the practice in some Regions of refusing to disclose the penalty calculation worksheets and accompanying narratives. Of course, the allowance that the materials be presented in prehearing exchange or at hearing fails to address the discovery problem directly.

Also, the Memorandum instructs the EPA attorneys to maintain a "case 'record' file," which documents all factual information relied upon in developing the penalty amount pled in the complaint. At the very least, this internal requirement that penalties must be factually supported should preclude assessment of an arbitrary penalty amount. Unfortunately, the directive uses permissive, rather than mandatory, language by stating that, "[i]n the prehearing exchange, EPA counsel *may* provide the Respondent with copies of relevant documents from the case file." The accompanying footnote, however, provides that only final disclosable documents should be maintained in the case record file. This suggests a policy that the documents in that file are to be disclosed in prehearing exchange. If you encounter a problem obtaining disclosure of the EPA penalty calculation worksheets and narratives, cite to this EPA guidance as support for your position. Captain Anders.

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[6] *Id. See also*, United States Army Legal Services Agency, Environmental Law Division, *Environmental Law Bulletin*, Vol. 3, No. 2, at 5 (Nov. 1995).

[7] In re Employers Insurance Company of Wausau and Group Eight Technology Inc., Brief for Appellant, EPA EAB, TSCA Appeal No. 95-6, December 15, 1995.

[8] *See* Memorandum, United States Environmental Protection Agency, Office of Regulatory Enforcement, to Environmental Protection Agency Regional Offices, subject: Use of Penalty Policies in Administrative Cases (15 Dec. 1995).

### Policy on Ordnance and Explosives

On 5 July 1995, the Directorate of Military Programs for the United States Army Corps of Engineers issued a Memorandum for the Commander, United States Army Engineer Division, Huntsville, Alabama that provides new guidance on the technical terms that should be used in addressing ordnance and explosives issues. The United States Army Engineering and Support Center, Huntsville, (CEHNC) (formerly the Mandatory Center of Expertise (MCX) and Design Center for Explosive Ordnance (EXO), Huntsville, (CEHND) is the Corp's center of expertise for issues involving ordnance and explosives, such as when the Corps has been hired to coordinate response actions involving unexploded ordnance (UXO) at closed, transferring, or transferred ranges. The guidance directs that all USACE actions to reduce the risk of endangerment from ordnance and explosives, the term "ordnance and explosives (OE)" will replace the term "ordnance and explosive waste (OEW)." The guidance further directs that terms related to cleanup of hazardous, toxic, and radioactive materials, such as "waster" and "remediation," will be avoided unless they directly apply to the circumstances.

This guidance should be adhered to by all installations that are dealing with UXO issues, as it is a direct reflection of the position that the Department of the Army has taken in negotiating UXO cleanups with federal and state regulators. Environmental law specialists should ensure that this guidance is followed in all environmental documentation that addresses UXO concerns. Ms. Fedel.

### United States Supreme Court Hears *KFC Western* Argument

On 10 January 1996, the United States Supreme Court heard arguments in *KFC Western, Inc. v. Meghrig*.[9] The issue before the Court was whether cost recovery actions are available pursuant to the Resource Conservation and Recovery Act's imminent hazard citizen suit provisions,[10] The Ninth Circuit decision would allow a § 6972(a)(1)(B) cost recovery where the conditions at the time or remediation *may* have presented an imminent and substantial endangerment, *even* where the endangerment has been abated by the remediation. Ms. Fedel.

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[9] 49 F.3d 518 (9th Cir. 1995), *cert. granted*, Meghrig v. KFC Western, Inc., No. 95-83 (Sept. 27, 1995).

[10] 42 U.S.C. § 6972(a)(1)(B) (1988).

# Claims Report

*United States Claims Service*

## *Personnel Claims Note*

### Damage to Waterbeds

Payment for damage to waterbeds is often a problem. Carriers frequently deny liability contending that the member caused the trouble by failing to drain the waterbed mattress properly.

The Comptroller General considered this issue in Andrews Forwarders, Inc.[1] The carrier denied liability for damage to a waveless waterbed mattress arguing that the member failed to drain it fully. The carrier contended that the damage to the "bunched up bladders" was due to the water that remained in the mattress. The service member claimed it was not repairable.

The Comptroller General found that no evidence supported the carrier's allegation and that the carrier failed to make any inventory notations indicating water remained in the mattress. The Comptroller General also held that the presumption of carrier liability for improper packing and shipping remained unrebutted and found the carrier liable.

The Comptroller General also referred to a message from the Military Traffic Management Command discussing waterbeds.[2] This message indicates that a service member must fully drain waterbed mattresses. If a service member fails to drain a mattress adequately, the carrier can refuse to ship the waterbed to the destination. However, the carrier must indicate on the inventory its reason for refusing to ship the waterbed. Additionally, the carrier and the service member must sign the inventory. If the carrier refuses to ship the waterbed, the service member assumes responsibility for the waterbed.

Field claims offices, when confronting a carrier who denies liability for damage to waterbeds, should keep the decision in *Andrews Forwarders, Inc.* in mind when responding to the carrier's denial. Ms. Schultz.

### Mildew Damage

A carrier picked up a shipment from nontemporary storage and prepared an extensive rider, but took no exceptions for mildew damage. The service member failed to indicate mildew damage at delivery, but sixteen days later submitted a nine page DD Form 1840R indicating extensive mildew damage. Out of 113 items ultimately claimed on the DD Form 1844, forty-eight of them had some form of mildew damage.

An Army quality control inspector confirmed the mildew damage and odor to many of the items. He also noted dead mites and crickets in three of the boxes. The service member corroborated the damage on three separate estimates and provided an extensive statement describing the damage.

A month after delivery, the carrier sent an inspector to the service member's home. The inspector agreed that a few items suffered mildew damage, but found that a majority of the items showed no signs of mildew damage or odor. The inspector believed that most mildew was not severe and could easily be wiped off or cleaned by the service member without any cost.

Following the Army's offset of this claim, the carrier appealed to the Comptroller General. The carrier contended that there was little mildew damage and argued that a number of the items did not have to be formally cleaned, but could be washed by the service member. The carrier indicated that the service member could clean his mildewed boots with polish. The Comptroller General upheld the offset in *National Claims Services, Inc.*, B-261292, December 5, 1995. The Comptroller General held that "[a] property owner is entitled to recover the cost of such repairs or replacements that are necessary to restore him to the position he would have occupied had there been no loss to the shipment."

The Comptroller General noted the disparity between the carrier's account of the lack of severity of the mildew damage and the service member's account of the severity of the mildew damage. The Comptroller General found the service member's case was well documented by his statements, the damage claims forms, the quality control inspector's observations, and three estimates. The Comptroller General noted that "[o]ur office will not question an agency's calculation of the value of damages to a shipment of household goods without clear and convincing evidence from the carrier that the agency acted unreasonably."

Field claims offices should keep this Comptroller General Decision in mind when confronting a situation where a carrier denies the existence of mildew, or contends that it is much less severe than the member claims. It illustrates the importance of the claimant's detailed account of the damage, detailed estimates of repair, and timely inspections. Ms. Schultz.

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[1] Andrews Forwarders, Inc., B-258966, February 15, 1995, aff'd B-258966.2, December 5, 1995.

[2] Message, Headquarters, Dep't of Army, Material Traffic Management Command, MTOP-QE, subject: Shipment of Waterbeds (040915Z Jan 95).

## *Tort Claims Note*

### Law Applicable to Scope of Employment Determinations Under the Military Claims Act

The Military Claims Act (MCA)[3] is a limited waiver of the sovereign immunity of the United States. Under the MCA, the United States may compensate claimants for damage to property, both real and personal, and personal injury or death. These damages must be caused by a civilian officer or employee of a military department or a member of the Army, Navy, Air Force, Marine Corps or Coast Guard, acting within the scope of employment, or otherwise incident to the noncombat activities of that military department under regulations prescribed by the secretary of the military department.

The Department of the Army regulation implementing the MCA is *Army Regulation (AR) 27-20*, chapter 3.[4] Tort claims under the MCA will be evaluated under general principles of law applicable to private individuals in the majority of American jurisdictions.[5] Unlike the Federal Tort Claims Act (FTCA) "scope of employment" analysis, which applies state law, scope of employment under the MCA is determined by federal law.[6] Guidance from reported cases under the Federal Tort Claims Act (FTCA)[7] will be followed.

Scope of employment under the MCA is determined by federal law and application of FTCA case law on the issue.[8] A service member acting within the scope of employment under the FTCA, and the MCA by analogy, will be in the "line of duty" by definition.[9] A line of duty determination does not, however, necessarily compel a finding of scope of employment. Absent misconduct by the service member, line of duty is generally presumed.[10] Scope of employment for the FTCA and the MCA are based on application of agency principles of *respondeat superior* under state law.

Under traditional principles of *respondeat superior* as applied by the federal courts, the following questions provide a frame of reference when evaluating whether an individual was acting within the scope of employment: (1) Was the act one that the employee normally performs?; (2) Was the employee acting within the general authority of the employer?; (3) Was the individual acting in furtherance of the employer's business?; and (4) Was the individual's action under taken, at least in part, for the purpose of serving or benefitting the employer?[11] While the answers to these questions provide a framework for analysis, the novel aspects of the military relationship must also be kept in mind when making determinations about scope of employment issues under the MCA.

Claims personnel must make specific factual determinations in every case that raises the scope of employment issue. The scope issue arises repeatedly in situations involving service members or civilian employees on official travel, using official vehicles or a privately owned vehicles, and the inevitable accident. In general, when a civilian employee or service member of a military department is traveling on official business in an official vehicle, the individual is presumed to be acting within the scope of employment.

The scope of employment presumption can be rebutted by showing that the individual mixed personal business with official business. In *Del Rio v. United States*,[12] the service member's conduct was held not in scope where he stopped at his mother's house while en route from official business to Homestead Air Force Base. The scope presumption can also be rebutted by showing that the individual detoured from the direct route between two points. For example, in *Guthrie v. United States*,[13] a recruiter who deviated from the stated route was held to be acting outside of scope.

When applying the specific facts of these cases to the framework set forth above, the courts concluded that the facts were indicative of a personal motivation for the individual's actions, as

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[3] 10 U.S.C. § 2733 (1988).

[4] DEP'T OF ARMY, REG. 27-20, LEGAL SERVICES: CLAIMS (1 Aug. 1995) [hereinafter AR 27-20].

[5] *Id.* para. 3-8(a)(1)(a).

[6] *Id.* para. 3-8(a)(3)(b).

[7] 28 U.S.C. § 2671-1680 (1988).

[8] AR 27-20, *supra* note 4, para. 3-8(3)(b).

[9] 28 U.S.C. § 2671 (1988).

[10] *See generally*, DEP'T OF ARMY, REG. 600-8-1, PERSONAL AFFAIRS: ARMY CASUALTY OPERATION/ASSISTANCE/INSURANCE (20 Oct. 1994).

[11] *See generally*, Taber v. Maine, 67 F.3d 1029 (2d Cir. 1995) *reversing* 45 F.3d 598 (2d Cir. 1994); Vollendorf v. United States, 951 F.2d 215 (9th Cir. 1991); Attalah v. United States, 955 F.2d 776 (1st Cir. 1992); and Chancellor by Chancellor v. United States, 1 F. 3d 438 (6th Cir. 1993).

[12] No. 88-0414-CIV (S.D. Fla. 1989).

[13] 392 F.2d 858 (7th Cir. 1968).

opposed to a furtherance of the government's business. The individuals were therefore acting outside the scope of their employment at the time of their accidents.

The same analysis is applied when a civilian employee or service member is involved in official travel using a government owned vehicle or a privately owned vehicle (POV). To be considered within scope, use of a POV must be expressly authorized in writing on the official travel orders. In *McCluggage v. United States*,[14] an airman was traveling under orders directing him from his permanent military station in Kentucky for temporary duty at Fort George G. Meade, Maryland. His commanding officer expressly authorized him to use his POV. His orders did not authorize any leave or delay en route. However, the orders did authorize variations in his itinerary. As a result of potentially dangerous weather conditions, the service member decided to avoid the most direct route through the mountains and chose to travel on the Ohio Turnpike. While on the Ohio Turnpike in his POV, he was involved in an automobile accident. In applying Ohio law, the court held that the service member was acting within the scope of his employment, even though he detoured from the most direct route. The court relied on the following facts: (1) there was express permission for the servicemember to use his POV, (2) the service member was performing a service for his employer in traveling from one duty station to another, (3) the service member was considered by the Air Force to be on duty at the time, and (4) the service member was subject to the direction and control of his employer in the operation of the POV.[15]

In contrast, in *Kirchoffner v. United States*,[16] the court found that a civilian employee of the Air Force was on a frolic and detour and, therefore, outside the scope of his employment. The employee here was driving a government owned vehicle and involved in an accident that occurred approximately fifty miles from Williston, North Dakota, the location where the employee had been authorized to spend the night. The employee and his supervisor had left Williston to find a place to eat dinner. They never found the restaurant they were looking for and stopped in another town where they had alcoholic drinks and watched a televised sports event. When the accident occurred, between midnight and one o'clock, the employee's blood alcohol content was twice the legal limit. Under North Dakota law, the employee therefore was not performing any act in furtherance of his employer's business at the time of the accident and was outside the scope of his employment.

The scope of employment issue also arises when individuals are traveling on permanent change of station orders and using POVs. In *Platis v. United States*,[17] an airman who was on military travel status with an authorized delay en route was determined to be acting within scope when the most direct route between duty stations and his leave route were identical. However, the marine in *McSwain v. United States*[18] was on military travel status with an authorized delay en route was determined outside the scope of employment. He was not traveling on the most direct route between duty stations because his leave route deviated from the most direct route. In *McSwain*, the appellate court found that, at the time of the automobile accident, the service member was at a place that was a substantial geographic deviation from the direct route between duty stations as a result of an independent and personal motive; therefore, it reversed the district court's finding that the service member was acting within scope. In rendering its opinion, the court in *McSwain* noted that most of the cases holding the government responsible in situations involving travel to a new duty station in a POV rely, at least in part, on the service member traveling on a substantially direct route to the new duty station.[19]

Whenever a POV is involved in official travel, the investigation and analysis must include a determination of whether a POV was expressly authorized for travel on the official travel orders. In *Stone v. United States*,[20] the court determined that a sailor was not within scope when he had an accident in his POV en route to his new duty station. His official travel orders directed him to use commercial transportation; use of his POV was not authorized.

As a general rule, a reservist is within scope when traveling in a POV to or from the duty station for the two week period of active duty for training if use of a POV is expressly authorized in the reservist's orders. However, when a reservist is traveling in a POV to or from a weekend drill, the reservist will be found not within scope. The reservist will be found in the line of duty and will be entitled to military benefits, including convenience pay (that is, continued in active duty status for pay purposes only), but the reservist will not be within scope of military duty for purposes of the MCA.

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[14] 392 F.2d 395 (6th Cir. 1968).

[15] *Id.* at 396, 397.

[16] 765 F. Supp. 598 (D.N.D. 1991).

[17] 409 F.2d 1009 (10th Cir. 1970).

[18] 18. 422 F.2d 1086 (3d Cir. 1970).

[19] *Id.* at 1090.

[20] 408 F.2d 995 (5th Cir. 1986).

Specific intentional torts such as assault and battery are excluded by statute from consideration under the FTCA and excluded by regulation under the MCA.[21] However, factual situations that involve intentionally tortious behavior or criminal behavior may also require an analysis of the scope of employment issue, especially where allegations of sexual misconduct are involved. In those situations, the question becomes one of negligent supervision of a government employee and the outcome depends upon whether there was a special relationship between the victim and the government.

In *Simmons v. United States*,[22] a counselor who engaged in sexual intercourse with a patient was held within scope; however, in *Doe v. United States*,[23] a service member who exposed himself and suggested sexual acts was held not within scope. In *Turner v. United States*,[24] a male recruiter who subjected female applicants to a *complete* physical examination, including body cavities, was held not within scope. The distinction in these cases can be drawn in the acts being performed at the time of the tortious conduct; if the acts are reasonably related to job duties, then the acts may be within scope.

For a comprehensive compilation of federal cases analyzing the scope of employment issue, see the *USARCS Federal Tort Claims Act Handbook*, Section II, B, 3. Ms. Skelly-Nolen.

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[21] 28 U.S.C. § 2680(h) (1988); AR 27-20, *supra* note 4, para. 3-4.

[22] 805 F.2d 1363 (9th Cir. 1986).

[23] 618 F. Supp. 503 (D.S.C. 1984), *aff'd* 769 F.2d 174 (4th Cir. 1985).

[24] 595 F. Supp. 708 (W.D. La. 1984).

# Guard and Reserve Affairs Items

*Guard and Reserve Affairs Division, OTJAG*

## The Judge Advocate General's Reserve Component (On-Site) Continuing Legal Education Schedule

The following is a current schedule of The Judge Advocate General's Reserve Component (On-Site) Continuing Legal Education Schedule. *Army Regulation 27-1, Judge Advocate Legal Services*, paragraph 10-10a, requires that all United States Army Reserve (USAR) judge advocates assigned to Judge Advocate General Service Organization units or other troop program units must attend the On-Site training within their geographic area each year. All other USAR and Army National Guard judge advocates are encouraged to attend the 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. *If you have any questions about this year's continuing legal education program, please contact the local action officer listed below or call Major Eric Storey, Chief, Unit Liaison and Training Officer, Guard and Reserve Affairs Division, Office of The Judge Advocate General, (804) 972-6380, (800) 552-3978 ext. 380.* Major Storey.

## THE JUDGE ADVOCATE GENERAL'S RESERVE COMPONENT (ON-SITE) CONTINUING LEGAL EDUCATION TRAINING, ACADEMIC YEAR 1995-1996

| DATE | CITY, HOST UNIT AND TRAINING SITE | ACTION OFFICER |
|---|---|---|
| 27-28 Apr | Columbus, OH<br>9th LSO<br>Clarion Hotel<br>7007 N. High St.<br>Columbus, OH 43085<br>(614) 436-0700 | CPT Mark Otto<br>9th LSO<br>765 Taylor Station Rd.<br>Blacklick, OH 43004<br>(614) 692-5434<br>DSN: 850-5434 |
| 26-28 Apr<br>Note: 2.5 days | St. Louis, MO<br>89th RSC/MO ARNG<br>**CANCELLED**<br>(314) 421-1776 | LTC John O'Mally<br>8th LSO<br>(816)836-7031 |
| 4-5 May | Gulf Shores, AL<br>81st RSC/AL ARNG<br>Gulf State Park Resort Hotel<br>21250 East Beach Blvd.<br>Gulf Shores, AL 36542<br>(334) 948-4853 | LTC Eugene E. Stoker<br>Counsel, MS JW-10<br>Boeing Defense Space Group<br>Missiles Space Division<br>P.O. Box 240002<br>Huntsville, AL 35806<br>(205) 461-3629<br>FAX: 3209 |
| 18-19 May | Tampa, FL<br>174th LSO/65th ARCOM<br>Sheraton Grand Hotel<br>4860 W. Kennedy Blvd.<br>Tampa, FL 33609<br>(813)286-4400 | LTC John J. Copelan, Jr.<br>Broward County Attorney<br>115 S Andrews Ave, Ste 423<br>Fort Lauderdale, FL 33301<br>(305) 357-7600 |

# 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 a confirmed reservation. 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 non-unit reservists, through 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 5F-F10**

Class Number—**133d** Contract Attorneys' 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.

## 2. TJAGSA CLE Course Schedule

**1996**

**April 1996**

| | |
|---|---|
| 1-5 April: | 135th Senior Officers' Legal Orientation Course (5F-F1). |
| 15-18 April: | 1996 Reserve Component Judge Advocate Workshop (5F-F56). |
| 15-26 April: | 5th Criminal Law Advocacy Course (5F-F34). |
| 22-26 April: | 24th Operational Law Seminar (5F-F47). |
| 29 April- 3 May: | 44th Fiscal Law Course (5F-F12). |
| 29 April- 3 May: | 7th Law for Legal NCOs' Course (512-71D/20/30). |

**May 1996**

| | |
|---|---|
| 13-17 May: | 45th Fiscal Law Course (5F-F12). |
| 13-31 May: | 39th Military Judge Course (5F-F33). |
| 20-24 May: | 49th Federal Labor Relations Course (5F-F22). |

**June 1996**

| | |
|---|---|
| 3-7 June: | 2d Intelligence Law Workshop (5F-F41). |
| 3-7 June: | 136th Senior Officers' Legal Orientation Course (5F-F1). |
| 3 June - 12 July: | 3d JA Warrant Officer Basic Course (7A-550A0). |
| 10-14 June: | 26th Staff Judge Advocate Course (5F-F52). |
| 17-28 June: | JATT Team Training (5F-F57). |
| 17-28 June: | JAOAC (Phase II) (5F-F55). |

**July 1996**

| | |
|---|---|
| 1-3 July: | Professional Recruiting Training Seminar |
| 1-3 July: | 27th Methods of Instruction Course (5F-F70). |
| 8-12 July: | 7th Legal Administrators' Course (7A-550A1). |
| 8 July - 13 September: | 140th Basic Course (5-27-C20). |
| 22-26 July: | Fiscal Law Off-Site (Maxwell AFB) (5F-12A). |
| 24-26 July: | Career Services Directors Conference. |
| 29 July - 9 August: | 137th Contract Attorneys' Course (5F-F10). |
| 29 July - 8 May 1997: | 45th Graduate Course (5-27-C22). |
| 30 July - 2 August: | 2d Military Justice Managers' Course (5F-F31). |

**August 1996**

| | |
|---|---|
| 12-16 August: | 14th Federal Litigation Course (5F-F29). |
| 12-16 August: | 7th Senior Legal NCO Management Course (512-71D/40/50). |

| | |
|---|---|
| 19-23 August: | 137th Senior Officers' Legal Orientation Course (5F-F1). |
| 19-23 August: | 63d Law of War Workshop (5F-F42). |
| 26-30 August: | 25th Operational Law Seminar (5F-F47). |

**September 1996**

| | |
|---|---|
| 4-6 September: | USAREUR Legal Assistance CLE (5F-F23E). |
| 9-11 September: | 2d Procurement Fraud Course (5F-F101). |
| 9-13 September: | USAREUR Administrative Law CLE (5F-F24E). |
| 16-27 September: | 6th Criminal Law Advocacy Course (5F-F34). |

**3. Civilian Sponsored CLE Courses**

**1996**

**April 1996**

| | |
|---|---|
| 18 & 19, UT: | 8th Annual Advanced International Law Institute Dallas, TX |
| 26, UT: | The Jury Trial—Fundamentals from Voir Dire to Final Argument Dallas , TX |

**May 1996**

| | |
|---|---|
| 2 & 3, UT: | Evidence and Discovery Symposium Austin, TX |
| 9 & 10, UT: | 3rd Annual Conference on Labor and Employment Law Dallas, TX |
| 16 & 17, UT: | 2nd Annual Computer Law Conference: Communicating and Conducting Business On-Line Austin, TX |

**June 1996**

| | |
|---|---|
| 6 & 7, UT: | 6th Annual Conference on State and Federal Appeals Austin, TX |

**July 1996**

| | |
|---|---|
| 21-26, APA: | 31st Annual Seminar/Workshop New Orleans, LA |

**For further information on civilian courses, please contact the institution offering the course. Addresses of sources of CLE courses are as follows:**

| | |
|---|---|
| AAJE: | American Academy of Judicial Education<br>1613 15th Street, Suite C<br>Tuscaloosa, AL 35404<br>(205) 391-9055 |
| ABA: | American Bar Association<br>750 North Lake Shore Drive<br>Chicago, IL 60611<br>(312) 988-6200 |
| ALIABA: | American Law Institute-American Bar Association Committee on Continuing Professional Education<br>4025 Chestnut Street<br>Philadelphia, PA 19104-3099<br>(800) CLE-NEWS (215) 243-1600 |
| ASLM: | American Society of Law and Medicine<br>Boston University School of Law<br>765 Commonwealth Avenue<br>Boston, MA 02215<br>(617) 262-4990 |
| CCEB: | Continuing Education of the Bar<br>University of California Extension<br>2300 Shattuck Avenue<br>Berkeley, CA 94704<br>(510) 642-3973 |
| CLA: | Computer Law Association, Inc.<br>3028 Javier Road, Suite 500E<br>Fairfax, VA 22031<br>(703) 560-7747 |
| CLESN: | CLE Satellite Network<br>920 Spring Street<br>Springfield, IL 62704<br>(217) 525-0744 (800) 521-8662. |
| ESI: | Educational Services Institute<br>5201 Leesburg Pike, Suite 600<br>Falls Church, VA 22041-3203<br>(703) 379-2900 |
| FBA: | Federal Bar Association<br>1815 H Street, NW., Suite 408<br>Washington, D.C. 20006-3697<br>(202) 638-0252 |
| FB: | Florida Bar<br>650 Apalachee Parkway<br>Tallahassee, FL 32399-2300<br>(904) 222-5286 |
| GICLE: | The Institute of Continuing Legal Education<br>P.O. Box 1885<br>Athens, GA 30603<br>(706) 369-5664 |

GII: Government Institutes, Inc.
966 Hungerford Drive, Suite 24
Rockville, MD 20850
(301) 251-9250

GWU: Government Contracts Program
The George Washington University
National Law Center
2020 K Street, N.W., Room 2107
Washington, D.C. 20052
(202) 994-5272

IICLE: Illinois Institute for CLE
2395 W. Jefferson Street
Springfield, IL 62702
(217) 787-2080

LRP: LRP Publications
1555 King Street, Suite 200
Alexandria, VA 22314
(703) 684-0510 (800) 727-1227.

LSU: Louisiana State University
Center of Continuing Professional
Development
Paul M. Herbert Law Center
Baton Rouge, LA 70803-1000
(504) 388-5837

MICLE: Institute of Continuing Legal
Education
1020 Greene Street
Ann Arbor, MI 48109-1444
(313) 764-0533 (800) 922-6516.

MLI: Medi-Legal Institute
15301 Ventura Boulevard, Suite 300
Sherman Oaks, CA 91403
(800) 443-0100

NCDA: National College of District Attorneys
University of Houston Law Center
4800 Calhoun Street
Houston, TX 77204-6380
(713) 747-NCDA

NITA: National Institute for Trial Advocacy
1507 Energy Park Drive
St. Paul, MN 55108
(800) 225-6482
(612) 644-0323 in (MN and AK).

NJC: National Judicial College
Judicial College Building
University of Nevada
Reno, NV 89557
(702) 784-6747

NMTLA: New Mexico Trial Lawyers'
Association
P.O. Box 301
Albuquerque, NM 87103
(505) 243-6003

PBI: Pennsylvania Bar Institute
104 South Street
P.O. Box 1027
Harrisburg, PA 17108-1027
(800) 932-4637 (717) 233-5774

PLI: Practising Law Institute
810 Seventh Avenue
New York, NY 10019
(212) 765-5700

TBA: Tennessee Bar Association
3622 West End Avenue
Nashville, TN 37205
(615) 383-7421

TLS: Tulane Law School
Tulane University CLE
8200 Hampson Avenue, Suite 300
New Orleans, LA 70118
(504) 865-5900

UMLC: University of Miami Law Center
P.O. Box 248087
Coral Gables, FL 33124
(305) 284-4762

UT: The University of Texas
School of Law
Office of Continuing Legal
Education
727 East 26th Street
Austin, TX 78705-9968

**4. Mandatory Continuing Legal Education Jurisdictions and Reporting Dates**

| Jurisdiction | Reporting Month |
|---|---|
| Alabama** | 31 December annually |
| Arizona | 15 September annually |
| Arkansas | 30 June annually |
| California* | 1 February annually |
| Colorado | Anytime within three-year period |
| Delaware | 31 July biennially |
| Florida** | Assigned month triennially |
| Georgia | 31 January annually |
| Idaho | Admission date triennially |
| Indiana | 31 December annually |
| Iowa | 1 March annually |

| Jurisdiction | Reporting Month |
|---|---|
| Kansas | 30 days after program |
| Kentucky | 30 June annually |
| Louisiana** | 31 January annually |
| Michigan | 31 March annually |
| Minnesota | 30 August triennially |
| Mississippi** | 1 August annually |
| Missouri | 31 July annually |
| Montana | 1 March annually |
| Nevada | 1 March annually |
| New Hampshire** | 1 August annually |
| New Mexico | prior to 1 April annually |
| North Carolina** | 28 February annually |
| North Dakota | 31 July annually |
| Ohio* | 31 January biennially |
| Oklahoma** | 15 February annually |
| Oregon | Anniversary of date of birth—new admittees and reinstated members report after an initial one-year period; thereafter triennially |
| Pennsylvania** | 30 days after program |
| Rhode Island | 30 June annually |
| South Carolina** | 15 January annually |
| Tennessee* | 1 March annually |
| Texas | 31 December annually |
| Utah | End of two year compliance period |
| Vermont | 15 July biennially |
| Virginia | 30 June annually |
| Washington | 31 January triennially |
| West Virginia | 31 July annually |
| Wisconsin* | 1 February annually |
| Wyoming | 30 January annually |

* Military Exempt

** Military Must Declare Exemption

For addresses and detailed information, see the February 1996 issue of *The Army Lawyer*.

# Current Material of Interest

## 1. TJAGSA Materials Available Through Defense Technical Information Center

Each year, TJAGSA publishes deskbooks and materials to support resident instruction. Much of this material is useful to judge advocates and government civilian attorneys who are unable to attend courses in their practice areas. The School receives many requests each year for these materials. Because the distribution of these materials is not in the School's mission, TJAGSA does not have the resources to provide these publications.

To provide another avenue of availability, some of this material is available through the Defense Technical Information Center (DTIC). An office may obtain this material in two ways. The first is through a user library on the installation. Most technical and school libraries are DTIC "users." If they are "school" libraries, they may be free users. The second way is for the office or organization to become a government user. Government agency users pay five dollars per hard copy for reports of 1-100 pages and seven cents for each additional page over 100, or ninety-five cents per fiche copy. Overseas users may obtain one copy of a report at no charge. The necessary information and forms to become registered as a user may be requested from: Defense Technical Information Center, 8725 John J. Kingman Road, Suite 0944, Fort Belvoir, VA 22060-6218, telephone: commercial (703) 767-9087, DSN 427-9087.

Once registered, an office or other organization may open a deposit account with the National Technical Information Service to facilitate ordering materials. Information concerning this procedure will be provided when a request for user status is submitted.

Users are provided biweekly and cumulative indices. These indices are classified as a single confidential document and mailed only to those DTIC users whose organizations have a facility clearance. This will not affect the ability of organizations to become DTIC users, nor will it affect the ordering of TJAGSA publications through DTIC. All TJAGSA publications are unclassified and the relevant ordering information, such as DTIC numbers and titles, will be published in *The Army Lawyer*. The following TJAGSA publications are available through DTIC. The nine-character identifier beginning with the letters AD are numbers assigned by DTIC and must be used when ordering publications. These publications are for government use only.

### Contract Law

| | |
|---|---|
| AD A301096 | Government Contract Law Deskbook, vol. 1, JA-501-1-95 (631 pgs). |
| AD A301095 | Government Contract Law Deskbook, vol. 2, JA-501-2-95 (503 pgs). |
| AD A265777 | Fiscal Law Course Deskbook, JA-506(93) (471 pgs). |

### Legal Assistance

| | |
|---|---|
| AD B092128 | USAREUR Legal Assistance Handbook, JAGS-ADA-85-5 (315 pgs). |
| AD A263082 | Real Property Guide—Legal Assistance, JA-261(93) (293 pgs). |
| AD A281240 | Office Directory, JA-267(94) (95 pgs). |
| AD B164534 | Notarial Guide, JA-268(92) (136 pgs). |
| AD A282033 | Preventive Law, JA-276(94) (221 pgs). |
| AD A266077 | Soldiers' and Sailors' Civil Relief Act Guide, JA-260(93) (206 pgs). |
| AD A297426 | Wills Guide, JA-262(95) (517 pgs). |
| AD A268007 | Family Law Guide, JA 263(93) (589 pgs). |
| AD A280725 | Office Administration Guide, JA 271(94) (248 pgs). |
| AD A283734 | Consumer Law Guide, JA 265(94) (613 pgs). |
| AD A289411 | Tax Information Series, JA 269(95) (134 pgs). |
| AD A276984 | Deployment Guide, JA-272(94) (452 pgs). |
| AD A275507 | Air Force All States Income Tax Guide, April 1995. |

### Administrative and Civil Law

| | |
|---|---|
| AD A285724 | Federal Tort Claims Act, JA 241(94) (156 pgs). |
| AD A301061 | Environmental Law Deskbook, JA-234(95) (268 pgs). |
| AD A298443 | Defensive Federal Litigation, JA-200(95) (846 pgs). |
| AD A255346 | Reports of Survey and Line of Duty Determinations, JA 231-92 (89 pgs). |
| AD A298059 | Government Information Practices, JA-235(95) (326 pgs). |
| AD A259047 | AR 15-6 Investigations, JA-281(92) (45 pgs). |

### Labor Law

| | |
|---|---|
| AD A286233 | The Law of Federal Employment, JA-210(94) (358 pgs). |

*AD A291106 The Law of Federal Labor-Management Relations, JA-211(94) (430 pgs).

**Developments, Doctrine, and Literature**

AD A254610 Military Citation, Fifth Edition, JAGS-DD-92 (18 pgs).

**Criminal Law**

*AD A302674 Crimes and Defenses Deskbook, JA 337(94) (297 pgs).

*AD A302672 Unauthorized Absences Programmed Text, JA 301(95) (80 pgs).

*AD A302445 Nonjudicial Punishment, JA-330(93) (40 pgs).

*AD 302312 Senior Officers Legal Orientation, JA 320(95) (297 pgs).

AD A274407 Trial Counsel and Defense Counsel Handbook, JA 310(95) (390 pgs).

AD A274413 United States Attorney Prosecutions, JA-338(93) (194 pgs).

**International and Operational Law**

AD A284967 Operational Law Handbook, JA 422(95) (458 pgs).

**Reserve Affairs**

AD B136361 Reserve Component JAGC Personnel Policies Handbook, JAGS-GRA-89-1 (188 pgs).

**The following United States Army Criminal Investigation Division Command publication also is available through DTIC:**

AD A145966 Criminal Investigations, Violation of the U.S.C. in Economic Crime Investigations, USACIDC Pam 195-8 (250 pgs).

*Indicates new publication or revised edition.

**2. Regulations and Pamphlets**

a. *The following provides information on how to obtain* Manuals for Courts-Martial, *DA Pamphlets, Army Regulations, Field Manuals, and Training Circulars.*

(1) The United States Army Publications Distribution Center (USAPDC) at Baltimore, Maryland, stocks and distributes Department of the Army publications and blank forms that have Army-wide use. Contact the USAPDC at the following address:

Commander
U.S. Army Publications
Distribution Center
2800 Eastern Blvd.
Baltimore, MD 21220-2896

(2) Units must have publications accounts to use any part of the publications distribution system. The following extract from *Department of the Army Regulation 25-30, The Army Integrated Publishing and Printing Program*, paragraph 12-7c (28 February 1989), is provided to assist Active, Reserve, and National Guard units.

b. The units below are authorized publications accounts with the USAPDC.

(*1*) *Active Army.*

(*a*) *Units organized under a PAC.* A PAC that supports battalion-size units will request a consolidated publications account for the entire battalion except when subordinate units in the battalion are geographically remote. To establish an account, the PAC will forward a DA Form 12-R (Request for Establishment of a Publications Account) and supporting DA 12-series forms through their DCSIM or DOIM, as appropriate, to the Baltimore USAPDC, 2800 Eastern Boulevard, Baltimore, MD 21220-2896. The PAC will manage all accounts established for the battalion it supports. (Instructions for the use of DA 12-series forms and a reproducible copy of the forms appear in DA Pam 25-33.)

(*b*) *Units not organized under a PAC.* Units that are detachment size and above may have a publications account. To establish an account, these units will submit a DA Form 12-R and supporting DA 12-series forms through their DCSIM or DOIM, as appropriate, to the Baltimore USAPDC, 2800 Eastern Boulevard, Baltimore, MD 21220-2896.

(*c*) *Staff sections of FOAs, MACOMs, installations, and combat divisions.* These staff sections may establish a single account for each major staff element. To establish an account, these units will follow the procedure in (*b*) above.

(2) *ARNG units that are company size to State adjutants general.* To establish an account, these units will submit a DA Form 12-R and supporting DA 12-series forms through their State adjutants general to the Baltimore USAPDC, 2800 Eastern Boulevard, Baltimore, MD 21220-2896.

(3) *USAR units that are company size and above and staff sections from division level and above.* To establish an account, these units will submit a DA Form 12-R and supporting DA 12-series forms through their supporting installation and CONUSA to the Baltimore USAPDC, 2800 Eastern Boulevard, Baltimore, MD 21220-2896.

(4) *ROTC elements.* To establish an account, ROTC regions will submit a DA Form 12-R and supporting DA 12-series forms through their supporting installation and TRADOC DCSIM to the Baltimore USAPDC, 2800 Eastern Boulevard, Baltimore, MD 21220-2896. Senior and junior ROTC units will submit a DA Form 12-R and supporting DA 12-series forms through their supporting installation, regional headquarters, and TRADOC DCSIM to the Baltimore USAPDC, 2800 Eastern Boulevard, Baltimore, MD 21220-2896.

Units not described above also may be authorized accounts. To establish accounts, these units must send their requests through their DCSIM or DOIM, as appropriate, to Commander, USAPPC, ATTN: ASQZ-NV, Alexandria, VA 22331-0302.

c. Specific instructions for establishing initial distribution requirements appear in DA Pam 25-33.

**If your unit does not have a copy of *DA Pam 25-33*, you may request one by calling the Baltimore USAPDC at (410) 671-4335.**

(1) Units that have established initial distribution requirements will receive copies of new, revised, and changed publications as soon as they are printed.

(2) Units that require publications that are not on their initial distribution list can requisition publications using *DA Form 4569*. All *DA Form 4569* requests will be sent to the Baltimore USAPDC, 2800 Eastern Boulevard, Baltimore, MD 21220-2896. You may reach this office at (410) 671-4335.

(3) Civilians can obtain DA Pams through the National Technical Information Service (NTIS), 5285 Port Royal Road, Springfield, VA 22161. You may reach this office at (703) 487-4684.

(4) Air Force, Navy, and Marine Corps judge advocates can request up to ten copies of DA Pams by writing to USAPDC, ATTN: DAIM-APC-BD, 2800 Eastern Boulevard, Baltimore, Maryland 21220-2896. You may reach this office by telephone at (410) 671-4335.

### 3. The Legal Automation Army-Wide Systems Bulletin Board Service

a. The Legal Automation Army-Wide Systems (LAAWS) operates an electronic bulletin board service (BBS) primarily dedicated to serving the Army legal community by providing the Army and other Department of Defense (DOD) agencies access to the LAAWS BBS. Whether you have Army access or DOD-wide access, all users may download The Judge Advocate General's School, United States Army (TJAGSA), publications that are available on the LAAWS BBS.

b. Access to the LAAWS BBS:

(1) Army access to the LAAWS BBS is currently restricted to the following individuals (who can sign on by dialing commercial (703) 806-5772, or DSN 656-5772):

(a) Active duty Army judge advocates;

(b) Civilian attorneys employed by the Department of the Army;

(c) Army Reserve and Army National Guard (NG) judge advocates on active duty, or employed by the federal government;

(d) Army Reserve and Army NG judge advocates *not* on active duty (access to OPEN and RESERVE CONF only);

(e) Active, Reserve, or NG Army legal administrators; Active, Reserve, or NG enlisted personnel (MOS 71D);

(f) Civilian legal support staff employed by the Army Judge Advocate General's Corps;

(g) Attorneys (military and civilian) employed by certain supported DOD agencies (e.g. DLA, CHAMPUS, DISA, Headquarters Services Washington);

(h) Individuals with approved, written exceptions to the access policy. Request for exceptions to the access policy should be submitted to:

LAAWS Project Office
ATTN: LAAWS BBS SYSOPS
9016 Black Rd., Ste 102
Fort Belvoir, VA 22060-6208

(2) DOD-wide access to the LAAWS BBS currently is restricted to all DOD personnel dealing with military legal issued (who can sign on by dialing commercial (703) 806-5791, or DSN 656-5791.

c. The telecommunications configuration is 9600/2400/1200 baud; parity-none; 8 bits; 1 stop bit; full duplex; Xon/Xoff supported; VT 100/102 or ANSI terminal emulation.

d. After signing on, the system greets the user with an opening menu. Members need only answer the prompts to call up and download desired publications. The system will ask new users to answer several questions and tell them they can use the LAAWS BBS after they receive membership confirmation, which takes approximately twenty-four to forty-eight hours.

e. *The Army Lawyer* will publish information on new publications and materials available through the LAAWS BBS.

**4. Instructions for Downloading Files from the LAAWS BBS**

Instructions for downloading files from the LAAWS BBS are currently being revised. If you have a question or a problem with the LAAWS BBS, leave a message on the BBS. Personnel needing uploading assistance may contact SSG Aaron P. Rasmussen at (703) 806-5764.

**5. TJAGSA Publications Available Through the LAAWS BBS**

The following is a current list of TJAGSA publications available for downloading from the LAAWS BBS (Note that the date UPLOADED is the month and year the file was made available on the BBS; publication date is available within each publication):

| FILE NAME | UPLOADED | DESCRIPTION |
|---|---|---|
| RESOURCE.ZIP | June 1994 | A Listing of Legal Assistance Resources, June 1994. |
| ALLSTATE.ZIP | April 1995 | 1995 AF All States Income Tax Guide for use with 1994 state income tax returns, January 1995. |
| ALAW.ZIP | June 1990 | *Army Lawyer/Military Law Review* Database ENABLE 2.15. Updated through the 1989 *Army Lawyer* Index. It includes a menu system and an explanatory memorandum, ARLAWMEM.WPF. |
| BULLETIN.ZIP | April 1995 | List of educational television programs maintained in the video information library at TJAGSA of actual classroom instructions presented at the school and video productions, November 1993. |
| CHILDSPT.ASC | November 1995 | A Guide to Child Support Enforce Against Military Personnel, October 1995. |
| CHILDSPT.WP5 | November 1995 | A Guide to Child Support Enforcement Against Military Personnel, October 1995. |
| CLG.EXE | December 1992 | Consumer Law Guide Excerpts. Documents were created in WordPerfect 5.0 or Harvard Graphics 3.0 and zipped into executable file. |
| DEPLOY.EXE | March 1995 | Deployment Guide Excerpts. Documents were created in Word Perfect 5.0 and zipped into executable file. |
| FTCA.ZIP | December 1995 | Federal Tort Claims Act, August 1994. |
| FOIAPT1.ZIP | November 1995 | Freedom of Information Act Guide and Privacy Act Overview, September 1993. |
| FOIAPT.2.ZIP | November 1995 | Freedom of Information Act Guide and Privacy Act Overview, September 1993. |
| FSO 201.ZIP | October 1992 | Update of FSO Automation Program. Download to hard only source disk, unzip to floppy, then A:INSTALLA or B:INSTALLB. |
| JA200.ZIP | November 1995 | Defensive Federal Litigation, August 1995. |
| JA210.ZIP | November 1994 | Law of Federal Employment, September 1994. |
| JA211.ZIP | April 1995 | Law of Federal Labor-Management Relations, December 1994. |

| FILE NAME | UPLOADED | DESCRIPTION |
|---|---|---|
| JA231.ZIP | October 1992 | Reports of Survey and Line of Duty Determinations—Programmed Instruction, September 1992 in ASCII text. |
| JA234.ZIP | November 1995 | Environmental Law Deskbook, Volumes I and II, September 1995. |
| JA235.ZIP | August 1995 | Government Information Practices Federal Tort Claims Act, August 1995. |
| JA241.ZIP | September 1994 | Federal Tort Claims Act, August 1994. |
| JA260.ZIP | March 1994 | Soldiers' & Sailors' Civil Relief Act, April 1994. |
| JA261.ZIP | October 1993 | Legal Assistance Real Property Guide, June 1993. |
| JA262.ZIP | July 1995 | Legal Assistance Wills Guide, June 1995. |
| JA265A.ZIP | June 1994 | Legal Assistance Consumer Law Guide—Part I, June 1994. |
| JA265B.ZIP | June 1994 | Legal Assistance Consumer Law Guide—Part II, June 1994. |
| JA267.ZIP | December 1994 | Legal Assistance Office Directory, July 1994. |
| JA268.ZIP | March 1994 | Legal Assistance Notarial Guide, March 1994. |
| JA269.ZIP | January 1994 | Federal Tax Information Series, December 1993. |
| JA271.ZIP | May 1994 | Legal Assistance Office Administration Guide, May 1994. |
| JA272.ZIP | February 1994 | Legal Assistance Deployment Guide, February 1994. |
| JA274.ZIP | March 1992 | Uniformed Services Former Spouses Protection Act Outline and References. |
| JA275.ZIP | August 1993 | Model Tax Assistance Program. |
| JA276.ZIP | July 1994 | Preventive Law Series, July 1994. |
| JA281.ZIP | November 1992 | 15-6 Investigations, August 1992 in ASCII text. |
| JA285.ZIP | January 1994 | Senior Officers Legal Orientation Deskbook, January 1994. |
| JA301.ZIP | December 1995 | Unauthorized Absences Programmed Text, August 1995. |
| JA310.ZIP | December 1995 | Trial Counsel and Defense Counsel Handbook, May 1995. |
| JA320.ZIP | December 1995 | Senior Officer's Legal Orientation Text, November 1995. |
| JA330.ZIP | December 1995 | Nonjudicial Punishment Programmed Text, August 1995. |
| JA337.ZIP | December 1995 | Crimes and Defenses Deskbook, July 1994. |
| JA422.ZIP | May 1995 | OpLaw Handbook, June 1995. |
| JA501-1.ZIP | August 1995 | TJAGSA Contract Law Deskbook Volume 1, May 1993. |
| JA501-2.ZIP | August 1995 | TJAGSA Contract Law Deskbook, Volume 2, May 1993. |
| JA501-3.ZIP | August 1995 | TJAGSA Contract Law Deskbook,Volume 3, May 1993. |
| JA501-4.ZIP | August 1995 | TJAGSA Contract Law Deskbook, Volume 4, May 1993. |
| JA501-5.ZIP | August 1995 | TJAGSA Contract Law Deskbook,Volume 5, May 1993. |
| JA501-6.ZIP | August 1995 | TJAGSA Contract Law Deskbook, Volume 6, May 1993. |
| JA501-7.ZIP | August 1995 | TJAGSA Contract Law Deskbook, Volume 7, May 1993. |
| JA501-8.ZIP | August 1995 | TJAGSA Contract Law Deskbook, Volume 8, May 1993. |

| FILE NAME | UPLOADED | DESCRIPTION |
|---|---|---|
| JA501-9.ZIP | August 1995 | TJAGSA Contract Law Deskbook, Volume 9, May 1993. |
| JA505-11.ZIP | July 1994 | Contract Attorneys' Course Deskbook, Volume I, Part 1, July 1994. |
| JA505-12.ZIP | July 1994 | Contract Attorneys' Course Deskbook, Volume I, Part 2, July 1994. |
| JA505-13.ZIP | July 1994 | Contract Attorneys' Course Deskbook, Volume I, Part 3, July 1994. |
| JA505-14.ZIP | July 1994 | Contract Attorneys' Course Deskbook, Volume I, Part 4, July 1994. |
| JA505-21.ZIP | July 1994 | Contract Attorneys' Course Deskbook, Volume II, Part 1, July 1994. |
| JA505-22.ZIP | July 1994 | Contract Attorneys' Course Deskbook, Volume II, Part 2, July 1994. |
| JA505-23.ZIP | July 1994 | Contract Attorneys' Course Deskbook, Volume II, Part 3, July 1994. |
| JA505-24.ZIP | August 1995 | Contract Attorneys' Course Deskbook, Volume II, Part 4, July 1994. |
| JA506.ZIP | November 1995 | Fiscal Law Course Deskbook, October 1995. |
| JA508-1.ZIP | April 1994 | Government Materiel Acquisition Course Deskbook, Part 1, 1994. |
| JA5082.ZIP | April 1994 | Government Materiel Acquisition Course Deskbook, Part 2, 1994. |
| JA508-3.ZIP | April 1994 | Government Materiel Acquisition Course Deskbook, Part 3, 1994. |
| 1JA509-1.ZIP | November 1994 | Federal Court and Board Litigation Course, Part 1, 1994. |
| 1JA509-2.ZIP | November 1994 | Federal Court and Board Litigation Course, Part 2, 1994. |
| 1JA509-3.ZIP | November 1994 | Federal Court and Board Litigation Course, Part 3, 1994. |
| 1JA509-4.ZIP | November 1994 | Federal Court and Board Litigation Course, Part 4, 1994. |
| 1PFC-1.ZIP | March 1995 | Procurement Fraud Course, March 1995. |
| 1PFC-2.ZIP | March 1995 | Procurement Fraud Course, March 1995. |
| 1PFC-3.ZIP | March 1995 | Procurement Fraud Course, March 1995. |
| 41JA5061.ZIP | June 1995 | Forty-first Fiscal Law Course, May 1995. |
| 41JA5062.ZIP | June 1995 | Forty-first Fiscal Law Course, May 1995. |
| 41JA5063.ZIP | June 1995 | Forty-first Fiscal Law Course, May 1995. |
| 41JA5064.ZIP | June 1995 | Forty-first Fiscal Law Course, May 1995. |
| JA509-1.ZIP | March 1994 | Contract, Claim, Litigation and Remedies Course Deskbook, Part 1, 1993. |
| JA509-2.ZIP | February 1994 | Contract Claims, Litigation, and Remedies Course Deskbook, Part 2, 1993. |
| JA510-1.ZIP | June 1995 | Sixth Installation Contracting Course, May 1995. |
| JA510-2.ZIP | June 1995 | Sixth Installation Contracting Course, May 1995. |
| JA510-3.ZIP | June 1995 | Sixth Installation Contracting Course, May 1995. |
| JAGBKPT1.ASC | January 1996 | JAG Book, Part 1, November 1994. |
| JAGBKPT2.ASC | January 1996 | JAG Book, Part 2, November 1994. |
| JAGBKPT3.ASC | January 1996 | JAG Book, Part 3, November 1994. |
| JAGBKPT4.ASC | January 1996 | JAG Book, Part 4, November 1994. |
| OPLAW95 | December 1995 | Operational Law Deskbook 1995. |

| FILE NAME | UPLOADED | DESCRIPTION |
|---|---|---|
| YIR93-1.ZIP | January 1994 | Contract Law Division 1993 Year in Review, Part 1, 1994 Symposium. |
| YIR93-2.ZIP | January 1994 | Contract Law Division 1993 Year in Review, Part 2, 1994 Symposium. |
| YIR93-3.ZIP | January 1994 | Contract Law Division 1993 Year in Review, Part 3, 1994 Symposium. |
| YIR93-4.ZIP | January 1994 | Contract Law Division 1993 Year in Review, Part 4, 1994 Symposium. |
| YIR93.ZIP | January 1994 | Contract Law Division 1993 Year in Review text, 1994 Symposium. |
| YIR94-1.ZIP | January 1995 | Contract Law Division 1994 Year in Review, Part 1, 1995. Symposium. |
| YIR94-2.ZIP | January 1995 | Contract Law Division 1994 Year in Review, Part 2, 1995 Symposium. |
| YIR94-3.ZIP | January 1995 | Contract Law Division 1994 Year in Review, Part 3, 1995 Symposium. |
| YIR94-4.ZIP | January 1995 | Contract Law Division 1994 Year in Review, Part 4, 1995 Symposium. |
| YIR94-5.ZIP | January 1995 | Contract Law Division 1994 Year in Review Part 5, 1995 Symposium. |
| YIR94-6.ZIP | January 1995 | Contract Law Division 1994 Year in Review, Part 6, 1995 Symposium. |
| YIR94-7.ZIP | January 1995 | Contract Law Division 1994 Year in Review, Part 7, 1995 Symposium. |
| YIR94-8.ZIP | January 1995 | Contract Law Division 1994 Year in Review, Part 8, 1995 Symposium. |
| YIR95ASC.ZIP | January 1996 | Contract Law Division 1995 Year in Review. |
| YIR95WP5.ZIP | January 1996 | Contract Law Division 1995 Year in Review. |

Reserve and National Guard organizations without organic computer telecommunications capabilities, and individual mobilization augmentees (IMA) having bona fide military needs for these publications, may request computer diskettes containing the publications listed above from the appropriate proponent academic division (Administrative and Civil Law, Criminal Law, Contract Law, International and Operational Law, or Developments, Doctrine, and Literature) at The Judge Advocate General's School, Charlottesville, VA 22903-1781.

Requests must be accompanied by one 5 1/4 inch or 3 1/2 inch blank, formatted diskette for each file. In addition, requests from IMAs must contain a statement which verifies that they need the requested publications for purposes related to their military practice of law.

Questions or suggestions on the availability of TJAGSA publications on the LAAWS BBS should be sent to The Judge Advocate General's School, Literature and Publications Office, ATTN: JAGS-DDL, Charlottesville, VA 22903-1781. For additional information concerning the LAAWS BBS, contact the System Operator, SSG Aaron P. Rasmussen, Commercial (703) 806-5764, DSN 656-5764, or at the following address:

LAAWS Project Office
ATTN: LAAWS BBS SYSOPS
9016 Black Rd, Ste 102
Fort Belvoir, VA 22060-6208

**6. Articles**

The following information may be useful to judge advocates:

Charles R. Honts & Bruce D. Quick, *The Polygraph in 1995: Progress in Science and Law*, 71 N.D. L. Rev. 987 (1995).

Daniel E. Murray, *Check Scams—The Facts Remain the Same, Only the Law Changes*, 49 U. Miami L. Rev. 607 (1995).

Charles W. Ehrhardt & Ryon M. McCabe, *Child Sexual Abuse Prosecutions: Admitting Out-of-Court Statements of Child Victims and Witnesses in Louisiana*, 23 S.U. L. Rev. 1 (1995).

**7. TJAGSA Information Management Items**

a. The TJAGSA Local Area Network (LAN) is now part of the OTJAG Wide Area Network (WAN). The faculty and staff are now accessible from the MILNET and the internet. Addresses for TJAGSA personnel are available by e-mail through the TJAGSA IMO office at godwinde@otjag.army.mil.

b. Personnel desiring to call TJAGSA via DSN should dial 934-7115. The receptionist will connect you with the appropriate department or directorate. The Judge Advocate General's School also has a toll free number: 1-800-552-3978. Lieutenant Colonel Godwin (ext. 435).

**8. The Army Law Library Service**

a. With the closure and realignment of many Army installations, the Army Law Library System (ALLS) has become the point

of contact for redistribution of materials 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.

b. Law librarians having resources available for redistribution should contact Ms. Nel Lull, JAGS-DDL, The Judge Advocate General's School, United States Army, 600 Massie Road, Charlottesville, VA 22903-1781. Telephone numbers are DSN: 934-7115, ext. 394, commercial: (804) 972-6394, or facsimile: (804) 972-6386.

c. The following materials have been declared excess and are available for redistribution. Please contact the library directly at the address provided below:

Staff Judge Advocate
HQ, I Corps and Fort Lewis
ATTN: AFZH-JA (CW3 Gardner)
Fort Lewis, Washington 98433-5000
COM (206) 967-0701

* Corpus Juris Secundum, 173 Vols. (no updates since 1992)

Staff Judge Advocate
USAEC & Fort Leonard Wood
Building 1705, Attn: ATZT-JA
Fort Leonard Wood, Missouri 65473-5000
POC WO1 Holbrook
COM (314) 596-0625
DSN 581-0625

* American Jurisprudence 2d, last update 1987

* American Jurisprudence Proof of Facts, last update 1986

* United States Statutes at Large, last update 1993

* Vernon's Annotated Missouri Statutes, complete set of 66 books, last full update 1992

Division Law Library
USACOE, Missouri River Division
P.O. Box 103, Downtown Station
Omaha, Nebraska 68101
POC Christine T. Carmichael
COM (402) 221-3229

* Federal Reporter 1st Series, Vols. 1-300

* American Law Reports Annotated, Series 1, Vols. 1-175

* Northeastern Reporter, Vols. 1-200

* Northeastern Reporter Digest, 68 Vols., 1933-1969

* Pacific Digest, Vols. 1-40

* Pacific Reporter 1st Series, Vols. 1-300

* Court of Claims Reports, Vols. 104-159

* Modern Federal Practice Digest, 81 Vols., 1960-1967

* West's Federal Practice Digest 2d Series, 105 Vols., 1976-1982

* Digest of Opinions, 19 Vols., 1958-1959

Staff Judge Advocate
HQ, USA Garrison
Bldg. 2257, Huber Road
Fort Meade, Maryland 20755-5030
POC LTC Warren G. Foote
COM (609) 562-2455
DSN 944-2455

* Atlantic Reporter (1st series only)

* Federal Reporter (1st series only)

* Atlantic Reporter Digest (1st series only)

* Page on Wills

* Blashfield Auto Law, 1992

* Modern Legal Forms, 1984

* Court Martial Reports (5 sets)

* Military Justice Reporters (1 series)

* Vale Pennsylvania Digests, 1982

* New Jersey Practice Digests, 1990

* New Jersey Law Digests, 1986

* West New Jersey Digests, 1990

* All Shepard's citations for United States Supreme Court Reporter; Federal Register; Federal Supplement; and Atlantic Reporters (current through 1990)

*U.S. Government Printing Office: 1996 - 404-577/40001

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*Chief of Staff*

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