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In Memoriam: Corporal Sascha Struble

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IN MEMORIAM

Corporal Sascha Struble

19 June 1984 – 6 April 2005

Sergeant First Class Steven Day
Chief Paralegal, USASETAF
Vicenza, Italy

"We cannot dedicate, we cannot consecrate, we cannot hallow this ground. The brave men, living and dead, who struggled here, have consecrated it, far above our poor power to add or detract. The world will little note nor long remember what we say here, but it can never forget what they did here."

–President Abraham Lincoln[1]

On 6 April 2005, a CH-47 Chinook helicopter crashed with eighteen Americans on board. On that day and in that crash, the Judge Advocate General's Corps lost an outstanding young Soldier—Corporal (CPL) Sascha Struble. Corporal Struble was following in his family's tradition of service to this nation by serving with the U.S. Army in the Global War on Terror. On that day, CPL Struble gave his life in the defense of freedom and in the effort to bring hope and democracy to the people of Afghanistan. Corporal Struble boarded one of two Chinook helicopters at the Forward Operating Base (FOB) Orgun-E, where he was the battalion paralegal specialist for the Red Devils of the 1st Battalion (Airborne), 508th Infantry. After leaving Orgun-E, a severe sandstorm limited aircraft visibility. In order to land, the pilots attempted to maneuver to a nearby base, FOB Ghazni. The bad weather "may have caused a fatal pilot error or technical problem,"[2] which resulted in a crash. All eighteen Americans on board perished.[3]

Corporal Sascha Struble was only twenty years old when he gave his life for his country. Yet, during the short time I knew Corporal Struble, he left an indelible mark on me. Corporal Struble was that rare individual who could bring you to smile at any moment in the day. Corporal Struble was also a professional, a paratrooper. His devotion to the Army, his job, and his country are without question.

-Staff Sergeant Ariel Cohen
Noncommissioned Officer in Charge, Criminal Law
U.S. Army Southern European Task Force (USASETAF)

[1] President Abraham Lincoln, The Gettysburg Address (Nov. 19, 1865), *available at* http://www.yale.edu/awweb/avalon/gettyb.htm.
[2] Michael Wanbaugh, *Soldier with Ties to Area Killed in Afghanistan*, SOUTH BEND TRIB., Apr. 17, 2005, at C2.
[3] *Id.*

Corporal Struble was born on 19 June 1984, in Bad Bruckeau, Germany. Patriotism runs in his family. Corporal Struble was the son of a career military Soldier. His father, Michael Struble, retired from the Army as a master sergeant. One of CPL Struble's brothers, Nick Doms, is currently in the U.S. Army, and another of his brothers, Michael Struble, recently enlisted in the U.S. Air Force. Corporal Struble is also survived by his mother, Heidi Deshazo; step-mother Teresa A. Struble; step-father, Jeff Deshazo; brother, Tony Doms; and sisters, Courtney Struble and Jessica Doms. Corporal Struble graduated in 2002 from Indian River High School in Philadelphia, New York, where he was a star athlete and an avid photography student. He considered playing minor league baseball, but instead opted to follow in his father's footsteps. "Sascha Struble took his dad with him when he enlisted in the Army in 2002, during his senior year in high school."[4]

His first assignment was as a paralegal specialist for the 2/72d Armor Battalion, Camp Casey, South Korea, located just south of the heavily armed demilitarized zone. As a young Soldier, CPL Struble grabbed every opportunity that presented itself and was determined to leave Korea with Air Assault wings. Twice in successive months he completed all of the eligibility requirements, including the twelve-mile road march, for Air Assault School. He later graduated and earned his wings. Corporal Struble volunteered to go to the field whenever possible and thrived in the field environment, seeking out training on battle tracking in the unit's tactical operations center and joining the infantrymen on opposing force (OPFOR) missions after hours. While in Korea, CPL Struble volunteered for and completed the "Manchu" march, an overnight twenty-five-mile tactical foot march with full combat gear. Corporal Struble talked about his year in Korea as one of the best in his life and always reminisced about his Army experiences there with a huge smile on his face.

> *He had just gotten off shift about an hour before and should have been getting ready for sleep. I asked him what he was doing, and he said that the infantry guys said he could go on an OPFOR mission with them. He was sweating, standing in mud almost to the top of his boots, had a full ruck, his weapon, and was grinning ear to ear. That is the type of Soldier he was.*
>
> *-Staff Sergeant Allen J. Foster*
> *Noncommissioned Officer, 2d Infantry Division*

After finishing his tour in Korea, CPL Struble again requested an overseas assignment—1st Battalion (Airborne), 508th Infantry, Vicenza, Italy,—in hopes of earning his Airborne wings and of getting deployed. He accomplished both of these tasks in addition to handling all the military justice actions out of his battalion. Corporal Struble was extremely motivated and always eager to share the workload of the other paralegals. He never called it a day before his noncommissioned officers and always made sure the judge advocates were "good-to-go" before leaving.

Corporal Struble deployed to Afghanistan in February 2005 in support of Operation Enduring Freedom VI. Based on his motivation and genuine concern for taking care of the Soldiers in his battalion, both his battalion commander and his command sergeant major fought to have him assigned with their unit at Orgun-E.

> *Due to his outstanding professionalism, hard work, and attention to detail, we fought hard to have CPL Struble forward deployed to us in Orgun. He was a true combat multiplier who took great care of our Soldiers and motivated all those around him to be all they could be.*
>
> *-Lieutenant Colonel Timothy McGuire*
> *Commander, 1/508th Infantry Battalion*

Corporal Struble could not have been more excited to receive the news. He was finally getting to work with his battalion in the field, as he had always wanted, and he was going to be stationed with them at a remote forward operating base in Orgun-E, where he hoped he would again have the opportunity to improve his soldiering skills by working alongside the infantrymen in his unit. Corporal Struble's battalion was assigned to a brigade of the 82d Airborne Division, and at the time of his death, CPL Struble was the only solo-operating paralegal in the Combined-Joint Task Force 76 area of operations. While deployed, CPL Struble continued to perform in an excellent manner.

His motivation and great attitude were models for other Soldiers. Corporal Struble had remarkable character—he was honest, trustworthy, and genuinely cared about people. Always giving one hundred and ten percent, CPL Struble was extremely proactive and was constantly helping his unit and fellow Soldiers with their legal issues at Orgun-E.

> *I was comforted to know that he was located at the battalion task force forward operating base, as I knew that the battalion was in fully capable hands. Corporal Struble's death made us all evaluate our environment and ourselves. . . . Corporal Struble was the epitome of what a young Soldier should be. He*

[4] Elizabeth Holes, LaPorte County Native Killed in Afghanistan, NWITimes.com (northwest Ind.), Apr. 16, 2006, http://nwitimes.com/articles/2005/04/16/news/top_news/0d17ad0f3bd1786256fe50015cf7e.txt.

was enthusiastic, smart, dedicated, and caring. He wanted to make the world a better place, and he wanted to help his buddies. We all evaluated ourselves against Corporal Struble, and we all realized that we came up short in one respect or another.

-Colonel Kelly Wheaton
Staff Judge Advocate, USASETAF

To know CPL Struble was to know what is good about Soldiers. During his short career in the U.S. Army, he earned the Bronze Star, Purple Heart, Army Achievement Medal, National Defense Service Medal, Afghanistan Campaign Medal, Global War on Terrorism Medal, Korean Service Medal, Overseas Service Ribbon, and the Army Service Ribbon. He was also authorized to wear the Air Assault and Parachutist Badges.

It was CPL Struble's confidence and inner strength, however, that set him apart. He was truly the All-American patriot; great at sports, quick with a laugh, and always the life of any social event. Corporal Struble had that very rare quality to somehow be both happy-go-lucky and a serious, professional paratrooper.

One look, and you knew he was bound for greatness. He was the person you always wanted on your team no matter what you were doing. His confidence was infectious. He had the uncanny ability to ease tense situations while maintaining focus on the task at hand. Nothing was too hard, no distance too great; he made everything look easy. His presence really made you better than you are.

Whether on the PT field, basketball court, or office environment, CPL Struble always provided motivation for me to give just a little more. A true American and great warrior, he passed doing what he loved most, and I will be forever a better person as a result of my association with CPL Sascha Struble.

-Chief Warrant Officer 3 Jeffery Martin
Legal Administrator, USASETAF

That day in Afghanistan, I lost a fellow warrior, I lost a paralegal, I lost a friend, and I lost a little brother. Sascha's death was a big blow to the Corps and a big blow to me personally. We lost a comrade who was destined for so much. He truly could have walked with giants.

-Sergeant First Class Steven Day
USASETAF Chief Paralegal

Overseas locations and small offices bring everyone a little closer together. Corporal Struble made an indelible impression on everyone in the Southern European Task Force (Airborne) and the 173d Airborne Brigade.

It is unanimous; he was an incredible Soldier, friend, and man, and each of us are blessed by having him in our lives, if only for a brief time. Farewell Sascha, you will not be forgotten.

Good friends are hard to find, harder to leave and impossible to forget. Sascha was a great man and even better friend to us all. My wife and I will miss you. Life will not be the same where ever we go; we will surely miss you. Until we meet again, the foot prints you left on my heart will be felt for the rest of my days.

-Sergeant Jeremy Campbell
1/508th Infantry Battalion Paralegal NCO

Foreword

Lieutenant Colonel Patricia A. Ham
Professor and Chair, Criminal Law Department
The Judge Advocate General's Legal Center & School
Charlottesville, Virginia

Welcome to the eleventh annual *Military Justice Symposium*. In two volumes of *The Army Lawyer*, the faculty of the U.S. Army Judge Advocate General's School's Criminal Law Department and two military judges endeavor to explain and explore the most significant military criminal law and procedure decisions of the 2005 term of court. Our goal is not to discuss every case from the last term that the service courts of criminal appeals, the Court of Appeals for the Armed Forces, and the Supreme Court of the United States issued, but instead to identify the most significant cases from those courts, explain their importance to military justice practice, and identify applicable trends.

This first volume of the *Military Justice Symposium* discusses cases involving the Fourth and Fifth Amendments, Instructions, Pretrial Procedures, and Evidence. The second volume will address cases involving the Sixth Amendment, as well as Crimes and Defenses, Sentencing and Post-Trial, and Unlawful Command Influence. In addition, in the second volume Major (MAJ) Jon Jackson will discuss new regulatory requirements for Army practitioners in the area of improper senior-subordinate relationships.

As a preview to the outstanding articles found in this year's *Symposium*, I will briefly summarize the highlights of each article. Lieutenant Colonel (LtCol) Mark Jamison, the department's Marine representative, discusses cases involving the Fourth Amendment in his first article as a Professor in the Criminal Law Department. According to LtCol Jamison, to outward appearances all was seemingly quiet on the Fourth Amendment front for the Court of Appeals for the Armed Forces (CAAF) 2005 term. The court decided only one Fourth Amendment case. Though *United States v. Bethea*[1] broke new ground in refining further the quantum of evidence needed to establish probable cause for a search authorization, the CAAF's 2005 term represents a Fourth Amendment incubation period for two potentially groundbreaking cases in 2006 as the CAAF continues to tackle search and seizure issues surrounding computers. The most important case pending decision in the 2006 term may be *United States v. Long*.[2] In *Long*, the Navy Judge Advocate General certified to the CAAF the question of whether a servicemember has a reasonable expectation of privacy in government e-mail. The CAAF will also consider in *United States v. Conklin*[3] whether a servicemember's consent is truly voluntary if he is not informed about an earlier constitutional violation prior to giving his consent to search his computer.

The U.S. Supreme Court did not significantly expand Fourth Amendment jurisprudence during its 2005 Term. The Court decided two cases early in the 2004 Term, and LtCol Ernie Harper addressed those cases in last year's *Symposium*.[4] In addition to those cases, the Court decided in *Muehler v. Mena*[5] whether law enforcement officials armed with a search warrant may detain the occupant of a residence by using handcuffs during the search's execution. The Fourth Amendment cases on the horizon for the Court's 2006 Term promise to break new ground and reconcile significant splits among the various judicial circuits. First, the Supreme Court will decide in *Georgia v. Randolph*[6] whether an occupant may give lawful consent to search a home if another occupant who is also present objects to the search. Second, the Court will consider in *Michigan v. Hudson*[7] whether the inevitable discovery doctrine creates a per se exception to the exclusionary rule in the event of a "knock and announce" warrant violation.

Lieutenant Colonel (LTC) Chris Fredrikson writes about the most significant cases involving the Fifth Amendment. Noting that last year was a relatively uneventful year in the area of self-incrimination law, LTC Fredrikson's article reviews two cases in which the military courts applied the basic principles of self-incrimination law: first, in *United States v.*

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[1] 61 M.J. 184 (2005).

[2] 61 M.J. 539 (N-M. Ct. Crim. App. 2005).

[3] ACM 35217, 2004 CCA LEXIS 290 (A.F. Ct. Crim. App. Dec. 30, 2004) (unpublished), *rev. granted*, 2005 CAAF LEXIS 758 (July 13, 2005).

[4] Devenpeck v. Alford, 543 U.S. 146 (2004) (articulating an objective probable cause test for a warrantless arrest); Illinois v. Caballes, 543 U.S. 405 (2005) (holding that a dog sniff during an otherwise lawful traffic stop does not implicate the Fourth Amendment).

[5] 125 S. Ct. 1465 (2005).

[6] 125 S. Ct. 1840 (2005).

[7] 125 S. Ct. 2964 (2005).

Bresnahan,[8] the CAAF looked at the totality of the circumstances in determining that the statements at issue were voluntary; and second, in *United States v. Rittenhouse*,[9] the Army Court of Criminal Appeals (ACCA) applied clearly established law in holding that, following a valid waiver, law enforcement agents have no duty to clarify a suspect's ambiguous invocation of his right to remain silent and may continue questionning the subject. Finally, LTC Fredrikson discusses *United States v. Finch*,[10] a case in which the CAAF granted review of an issue of utmost importance to the military practitioner: whether the thirty-year-old ruling in *United States v. McOmber*,[11] establishing a notification to counsel requirement, continues to properly state the law in light of subsequent Supreme Court jurisprudence and changes to Military Rule of Evidence (MRE) 305(e).[12]

Major De Fleming turns in her second article in the pretrial procedures area, which covers pleas and pretrial agreements, voir dire and challenges, and court-martial personnel. According to MAJ Fleming, the CAAF's most important and controversial decision this term in the area of court-martial personnel set limitations on a military judge's consideration of collateral matters in crafting a sentence.[13] In the area of voir dire and challenges, the CAAF issued a ground-breaking decision that the mandate of military judges to liberally grant challenges for cause applies only to defense challenges.[14] Likewise, the President, by executive order, drastically altered the voir dire landscape by amending Rule for Courts-Martial (RCM) 912(f)(4), the "But For Rule," to "preclude further consideration of the challenge of [an] excused member upon later review" if that panel member is peremptorily excused by either party.[15] In the pleas and pre-trial agreements arena, the appellate courts, as in years past, continue to reverse findings, sentences, or both, because the record of trial lacks a sufficient factual predicate outlining the accused's criminal misconduct. Additionally, the CAAF expanded the scope of legal issues deemed not waived by an accused's unconditional guilty plea.[16]

Major Chris Behan discusses and analyzes significant military appellate cases from the CAAF and the service appellate courts, proceeding sequentially through the MRE. This year's term features cases concerning the proper preservation of objections under MRE 103,[17] the independent source rule for the corroboration of a confession under MRE 304(g),[18] logical and legal relevance under MREs 401[19] and 403,[20] uncharged misconduct under MRE 404(b),[21] sexual propensity evidence under MRE 413,[22] the joint-participant exception to the marital communications privilege of MRE 504,[23] impeachment under MRE 613,[24] expert testimony under MREs 702[25] and 704,[26] adoptive admissions and MRE 801(d)(2)(B),[27] the public records

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[8] 62 M.J. 137 (2005).

[9] 62 M.J. 509 (Army Ct. Crim. App. 2005).

[10] No. 200000056, 2005 CCA LEXIS 77 (N-M Ct. Crim. App. March 10, 2005) (unpublished), *rev. granted*, 2005 CAAF LEXIS 1345 (Nov. 14, 2005).

[11] 1 M.J. 380 (C.M.A. 1976).

[12] MANUAL FOR COURTS-MARTIAL, UNITED STATES, MIL. R. EVID. 305(e) (2005) [hereinafter MCM].

[13] United States v. McNutt, 62 M.J. 16 (2005).

[14] United States v. James, 61 M.J. 132 (2005).

[15] *See* Exec. Order No. 13,387, 70 Fed. Reg. 60697 (Oct. 18, 2005); MCM, *supra* note 12, R.C.M. 912(f)(4).

[16] United States v. Farley, 60 M.J. 492 (2005) (suppression motion); United States v. Mizgala, 61 M.J. 122 (2005) (litigated Article 10 motion).

[17] MCM, *supra* note 12, MIL. R. EVID. 103.

[18] *Id.* MIL. R. EVID. 304(g).

[19] *Id.* MIL. R. EVID. 401.

[20] *Id.* MIL. R. EVID. 403.

[21] *Id.* MIL. R. EVID. 404(b).

[22] *Id.* MIL. R. EVID. 413.

[23] *Id.* MIL. R. EVID. 504.

[24] *Id.* MIL. R. EVID. 613.

[25] *Id.* MIL. R. EVID. 702.

[26] *Id.* MIL. R. EVID. 704.

[27] *Id.* MIL. R. EVID. 801(d)(2)(B).

exception to the hearsay rule of MRE 803(8),[28] and statements against interest under MRE 804.[29]

According to MAJ Behan, the strongest evidentiary trend in the 2005 term of court was the CAAF's struggle to establish the boundaries of logical and legal relevance in trials by court-martial. The CAAF wrestled with issues involving the basic definition of logical relevance,[30] the limits of legal relevance,[31] and whether specific evidentiary prohibitions should prevent logically relevant evidence from being admitted at trial.[32] The CAAF appears ideologically fractured and inconsistent on issues of relevance, making it very difficult for practitioners and military judges to apply the plain language of the MRE in making admissibility determinations.

Rounding out Volume I of this year's *Symposium*, two members of the U.S. Army Trial Judiciary, Colonel Michael Hargis and LTC Timothy Grammel, both former Criminal Law faculty members, provide an update on developments in instructions from the 2005 term. Colonel Hargis and LTC Grammel address instructional issues, including the lawfulness of military orders, conspiracy cases involving a lesser-included offense, the continuing issue of charges on divers occasions, mental responsibility, commenting on the accused's right to remain silent, and others.

The past term saw substantial changes to the *Manual for Courts-Martial*, both through executive order changes[33] and legislative amendments to the Uniform Code of Military Justice (UCMJ).[34] Lieutenant Colonel Mark Johnson addresses these changes and other significant developments in substantive crimes and defenses in the second volume of this year's *Symposium*. These developments include a much different treatment of rape and sexual assault under the UCMJ, significant changes to the statute of limitations, and several changes or additions to the enumerated Article 134 offenses. The CAAF delivered several important holdings this term interpreting the limits of the general article—Article 134—and applicable federal statutes, most notably in the area of child pornography. These decisions have an enormous impact on charging child pornography offenses overseas and arguably impact the use of other federal statutes under clause 3 of Article 134. The CAAF continued its trend in the area of modification, setting aside specifications after findings by exceptions and substitutions left no basis for appellate review; once again, the CAAF sent clear guidance of the need for certainty as to which single act of misconduct forms the basis of a modified "divers" occasions specification. Lieutenant Colonel Johnson also addresses the CAAF and service court opinions concerning inchoate crimes, indecent acts, sodomy, homicide, drug offenses, obstruction of justice, and military offenses.

Major Mike Holley addresses a host of developments in Sixth Amendment law over the course of the last year with an emphasis on the Confrontation Clause. The article begins with an examination of when an accused may waive or forfeit his right to confrontation. *United States v. Mayhew*[35] and *United States v. Jordan*[36] serve as starting points for a discussion of forfeiture. *United States v. Campbell*[37] looks at the issue of physical production of witnesses while *United States v. Rhodes*[38]

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[28] *Id.* MIL. R. EVID. 803(8).

[29] *Id.* MIL. R. EVID. 804.

[30] For example, in *United States v. Berry*, a majority of the CAAF found the appellant's uncharged acts of sexual misconduct logically relevant under MREs 401 and 402 but not legally relevant for the purposes of MRE 403 and 413. A concurring opinion argued, however, that the evidence could not be logically relevant unless it was also legally relevant. *Berry*, 61 M.J. 91, 98-99 (2005) (Crawford, J., concurring).

[31] *Compare* United States v. Rhodes, 61 M.J. 445 (2005) (holding that evidence that a key government witness suddenly forgot his testimony shortly after meeting with appellant and his attorney was more prejudicial than probative when admitted as uncharged misconduct evidence to show appellant's consciousness of guilt), *with* United States v. Hays, 62 M.J. 158 (2005) (affirming the admission of numerous pornographic pictures and e-mails against the appellant in a solicitation case and asserting that the evidence, while highly prejudicial, was extremely probative on the issue of intent to solicit another person to have sex with a child in order to create pornographic images of it).

[32] In *United States v. Brewer*, the majority held (and a blistering dissent excoriated them for so holding) that logical relevance and the Due Process Clause of the Fifth Amendment trumped the plain language of MREs 404 and 405 in drug cases involving the permissive inference of wrongful use. 61 M.J. 425 (2005).

[33] *See* Exec. Order No. 13,387, 70 Fed. Reg. 60697 (Oct. 18, 2005).

[34] Department of Defense Authorization Act, 2006, Pub. L. No. 109-163, 119 Stat. 3136 (2006).

[35] 380 F. Supp. 2d 961 (S.D. Ohio 2005).

[36] 2005 U.S. Dist. LEXIS 3289 (D. Colo. 2005).

[37] No. 200020190 (Army Ct. Crim. App. 28 June 2005) (unpublished).

[38] 61 M.J. 445 (2005).

examines the concept of legal availability of government witnesses. In *United States v. Yates*,[39] the Eleventh Circuit addressed the important topic of the appropriate use of producing adult witnesses by remote means. Major Holley discusses *Yates* and provides some suggestions on the use of remote testimony at various stages of trial. In *United States v. Israel*[40] and *United States v. James*,[41] the CAAF analyzes the appropriate limits that may be placed upon cross-examination within the context of the Confrontation Clause.

Major Holley's article also discusses the recurrent and thorny issue of hearsay and the Confrontation Clause. Courts throughout the country continue to struggle mightily to answer the fundamental question posed by *Crawford v. Washington*[42]—how does one define "testimonial"? Fortunately, military courts provided some answers to this question this past term, as have several other jurisdictions. In *United States v. Scheurer*,[43] the CAAF took up *Crawford's* question directly, providing the military practitioner valuable clues as to how to answer the "testimonial" question as well as an analytical framework for addressing *Crawford* issues generally. In *United States v. Coulter*,[44] the Navy Marine-Corps Court of Criminal Appeals addressed the *Crawford* question in the context of child sex abuse and the unavailable child witness. Major Holley's article examines these decisions as well as other military cases. Additionally, MAJ Holley considers important state court opinions dealing with interesting attempts to answer the fundamental *Crawford* question.[45] Finally, with regard to *Crawford* jurisprudence, MAJ Holley briefly examines two cases pending before the U.S. Supreme Court, cases that hopefully will address the difficulties inherent in the *Crawford* opinion.[46] Based upon these cases and others, MAJ Holley provides a suggested analytical framework for practitioners wrestling with these issues.

Major John Rothwell addresses new decisions in sentencing and post-trial in his first article for the *Symposium*. In the area of sentencing, the CAAF clarified that evidence of rehabilitative potential under RCM 1001(b)(5)(D) does not apply to defense mitigation evidence and specifically does not preclude testimony that a witness would willingly serve with an accused again.[47] In the post-trial arena, the CAAF set aside a bad-conduct discharge where an appellant was able to demonstrate on-going actual prejudice by showing that his ability to have his employment application considered was hindered due to the lengthy post-trial delay, and in so doing, the court found a denial of due process resulted from the delay, an area where CAAF can actively participate in the post-trial delay arena under its jurisdiction as proscribed by Article 67.[48]

Finally, I will discuss cases from the last term in the unlawful command influence (UCI) areas. Although the CAAF did not decide any UCI cases in its 2005 term of court, the service courts issued interesting and potentially significant opinions involving UCI by a staff judge advocate[49] and trial counsel.[50] In addition, the Navy-Marine Court of Criminal Appeals noted a disturbing trend of intemperate remarks by commanders, which the court addressed in a series of unpublished opinions. These opinions have no precedential value, but do serve as a warning and reminder to judge advocates to be proactive in this critical area of military justice practice.

On a personal note, four fine officers depart the Criminal Law Department this summer. Lieutenant Colonel Fredrikson moves to V Corps as the Chief of Criminal Law and will soon deploy to Iraq in support of Operation Iraqi Freedom; MAJ Jackson moves to the District of Columbia area; and two officers, MAJ Behan and MAJ Holley, made the difficult decision to leave the Army. Major Behan is departing to be a full-time Professor of Law at Southern Illinois University School of Law, and MAJ Mike Holley joins a litigation law firm in Texas. All four of these officers leave the Department, and the

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[39] 438 F.3d 1307 (11th Cir. 2006).

[40] 60 M.J. 485 (2005).

[41] 61 M.J. 132 (2005).

[42] 541 U.S. 36 (2004).

[43] 62 M.J. 100 (2005).

[44] 62 M.J. 520 (N-M Ct. Crim. App. 2005).

[45] State v. Siler, 843 N.E.2d 863 (Ohio Ct. App. 2005); State v. Bobadilla, 709 N.W.2d 243 (Minn. 2006).

[46] Hammon v. Indiana, 126 S. Ct. 1133 (2006); Davis v. Washington, 126 S. Ct. 1457 (2006).

[47] United States v. Griggs, 61 M.J. 402 (2005).

[48] United States v. Jones, 61 M.J. 80 (2005); *see* UCMJ art. 67 (2005).

[49] United States v. Lewis, 61 M.J. 512 (N-M. Ct. Crim. App. 2005), *rev. granted*, 2006 CAAF LEXIS 117 (Jan. 19, 2006).

[50] United States v. Mallett, 61 M.J. 761 (A.F. Ct. Crim. App. 2005).

practice of military justice throughout the Department of Defense, better for their efforts. It was a pleasure and honor to serve with them.

New Developments in Search & Seizure Law

Lieutenant Colonel M. K. Jamison, U.S. Marine Corps
Associate Professor, Criminal Law Department
The Judge Advocate General's Legal Center and School, U.S. Army
Charlottesville, Virginia

"You've got to be very careful if you don't know where you are going because you might not get there."[1]

Introduction

The October 2004 Term of the U.S. Supreme Court and the 2005 Term of the Court of Appeals of the Armed Forces (CAAF) a period marked largely of consolidation and reiteration of the Fourth Amendment's fundamental benchmark measure of probable cause as an objective metric.[2] On the horizon, however, are several cases pending before the Supreme Court and the CAAF that may significantly change the legal landscape of search and seizure law. The potentially most significant case could be handed down by the CAAF, because the Navy Judge Advocate General has requested that the CAAF rule on a servicemember's reasonable expectation of privacy in government electronic mail (e-mail).[3]

This article addresses one of the four search and seizure cases the Supreme Court handed down during its October 2004 Term and provides a preview for two upcoming search and seizure cases for the Supreme Court's October 2005 Term.[4] The article also analyzes several significant cases from the CAAF and the service courts of criminal appeals. The primary focus of the military cases analyzed in this article deal with search and seizure concepts surrounding computers and other electronic media. In the 1967 case of *Katz v. United States*,[5] the Supreme Court fundamentally changed Fourth Amendment jurisprudence by establishing a threshold expectation of privacy requirement prior to receipt of any protection under the Amendment. In this regard, Part I of this article begins with an examination of three cases from the Navy-Marine Corps Court of Criminal Appeals (NMCCA) that analyze this threshold expectation of privacy requirement within the context of

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[1] Yogi Berra, Yogi Berra Quotes: "Yogi-isms," http://www.umpirebob.com/DATA/yogiisms.htm (last visited Mar. 29, 2006).

[2] The U.S. Supreme Court's October 2004 Term began on 4 October 2004 and ended 3 October 2005. *See* Supreme Court of the United States, 2004 Term Opinions of the Court, http://www.supremecourtus.gov/opinions/ 04slipopinion.html (last visited Mar. 29, 2006). The CAAF 2005 term began on 1 October 2004 and ended 30 September 2005. *See* U.S. Court of Appeals for the Armed Forces, Opinions & Digest, http://www.armfor. uscourts.gov/Opinions.htm. (last visited Mar. 29, 2006).

[3] The issue of whether a servicemember has a reasonable expectation of privacy in computers generally, and e-mail specifically, has remained largely an open question. *See, e.g.*, Lieutenant Colonel Michael R. Stahlman, *New Developments in Search and Seizure: A Little Bit of Everything*, ARMY LAW., May 2001, at 24 (questioning whether servicemembers have a reasonable expectation of privacy when using a government computer for private and personal purposes); Lieutenant Commander Rebecca A. Conrad, *Searching for Privacy in All the Wrong Places: Using Government Computers to Surf Online*, 48 NAV. L. REV. 1 (2001) (concluding that servicemembers have, at best, a limited expectation of privacy in their private use of a government computer). *But see* U.S. DEP'T OF THE ARMY, REG. 25-2, INFORMATION ASSURANCE ch. 4, sec. 4-5, para. r(2) (14 Nov. 2003) (creating a regulatory expectation of privacy with respect to law enforcement activities whenever a Soldier uses Army information systems).

[4] Two of the search and seizure cases out of the Supreme Court's October 2004 Term were already masterfully explained and analyzed in the 2005 Military Justice Symposium. Lieutenant Colonel E. A. Harper, *Defending the Citadel of Reasonableness: Search and Seizure in 2004*, ARMY LAW., Apr. 2005, at 47-64. For an in-depth analysis of *Devenpeck v. Alford*, 543 U.S. 146 (2005) and *Illinois v. Caballes*, 543 U.S. 405 (2005), please consult Lieutenant Colonel Harper's article. The *Devenpeck* case established a firm and unanimous rebuke of the Ninth Circuit Court of Appeals's attempt to create a subjective metric for measuring probable cause. Sergeant Devenpeck arrested Mr. Alford for a violation of the Washington State Privacy Act; however, under the facts in *Devenpeck*, a Washington State Court-of-Appeals decision had previously held that Mr. Alford's conduct (surreptitious tape recording of Sergeant Devenpeck without his knowledge and consent) was not a crime under Washington State law. *See Devenpeck*, 543 U.S. at 151. Based on this fact, the Ninth Circuit held that Sergeant Devenpeck's arrest violated Mr. Alford's civil rights because it was a warrantless arrest premised on an act that was not a crime. The Ninth Circuit refused to consider Sergeant Devenpeck's alternative argument that probable cause existed to arrest Mr. Alford for other offenses because these unarticulated offenses (at the time of the arrest) were not "closely related" to the articulated arresting offense. *Id.* at 152. In a unanimous opinion, the Supreme Court reversed, holding that probable cause is an objective metric based on all facts available at the time of the arrest. In this regard, the subjective intent or subjective articulation of offenses on the part of an arresting officer is immaterial so long as the facts support probable cause to arrest. *Id.* at 153. Accordingly, the Supreme Court remanded the *Devenpeck* case to the Ninth Circuit for a determination whether the objective facts supported probable cause to arrest. In *Caballes*, the U.S. Supreme Court held in a six to two opinion (Rehnquist, CJ., took no part in the decision) that a dog sniff by a well-trained narcotics-detection dog "discloses only the presence or absence of narcotics, a contraband item." *Id.* at 409 (quoting United States v. Place, 462 U.S. 696, 707 (1983)). Thus, a dog sniff is not a search because no person has a legitimate expectation of privacy in contraband. Critical to the Court's determination was that the duration of the traffic stop was reasonable as the dog sniff occurred while the officer who stopped Mr. Caballes was still writing the speeding ticket. *Id.* at 408-09. In dicta, the Supreme Court suggested that the dog sniff could have been unreasonable if Mr. Caballes had been held as a result of the lawful traffic stop for an unreasonably long period (e.g., to accomplish the dog sniff), so as to constitute an unconstitutional seizure). The remaining Fourth Amendment case, *Brousseau v. Haugen*, 543 U.S. 194 (2004), had relatively little applicability to the military justice process in that it dealt with the legal parameters of qualified immunity.

[5] 389 U.S. 347 (1967).

computers and other digital information. Part I further discusses the consent exception to the Fourth Amendment when dealing with computers and digital information. Part II turns to an evaluation of the quantum of evidence needed to establish probable cause and how far law enforcement officials may go in detaining personnel when executing a search. Finally, Part III concludes with a look ahead to two significant cases pending before the Supreme Court that could have a lasting effect on search and seizure.

Part I: Computers and Digital Media

In 2005, the majority of military appellate cases dealing with the Fourth Amendment sought to formulate a reasonable expectation of privacy construct for e-mail and other types of digital information. It has been largely settled that a servicemember does not have a reasonable expectation of privacy in government-issued computer hardware;[6] however, there is little military jurisprudence that addresses a servicemember's privacy expectation in digital information stored on, or accessed through, a computer. This year, the NMCCA led the way in two published cases: one dealt with whether an accused had a reasonable expectation of privacy in non-content subscriber information typically given to an Internet service provider (e.g., name, address, and credit card number);[7] the other case explored whether an accused has a reasonable expectation of privacy in the content of government e-mail.[8]

A. Expectation of Privacy in Non-Content Subscriber Information

The NMCCA broke new ground in military jurisprudence when it considered Fourth Amendment applicability to non-content digital information. In *United States v. Ohnesorge*,[9] the NMCCA held that a servicemember has no reasonable expectation of privacy in subscriber information that has been provided to a commercial Internet site.[10]

Sergeant (Sgt) Jeffrey S. Ohnesorge, U.S. Marine Corps, was convicted of violating a general order by using his government-issued computer to download pornography, in violation of Article 92, Uniform Code of Military Justice (UCMJ).[11] A drilling reservist had been using Sgt Ohnesorge's government-issued computer to conduct official business during his drill period when he inadvertently discovered both adult and child pornography on the computer hard drive.[12] At the time the pornography was discovered, Sgt Ohnesorge was the unit's Information System Coordinator, responsible for the unit's software and hardware computer support.[13] The images had been stored on the "G drive," a password-protected shared drive that was accessible by other computers on the network.[14] Marine Corps officials conducted a forensic examination of the computer in question and determined that the images had been downloaded from an Internet site named EasyNews.com, which El Dorado Sales, Inc. (El Dorado) owned and operated.[15] The investigation also revealed that all the pornographic images had been downloaded from EasyNews.com through the user name "RuhRowRagy@AOL.com."[16]

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[6] *See, e.g.*, United States v. Tanksley, 50 M.J. 609, 620 (N-M. Ct. Crim. App. 1999) (holding that there is no reasonable expectation in a government-issued computer laptop "even if capable of being secured" by the servicemember), *aff'd*, 54 M.J. 169 (2000); United States v. Plush, No. 35134, 2004 CCA LEXIS 230 (A.F. Ct. Crim. App. September 21, 2005) (unpublished) (holding that Captain Plush had no reasonable expectation of privacy in his government-issued laptop when he turned the laptop into the computer maintenance section for repair). Although, the CAAF affirmed the *Tanksley* case, its dicta seems to suggest that perhaps servicemembers may have a reasonable expectation of privacy in a government computer. The CAAF stated that Navy Captain Tanksley "had, at best, a reduced expectation of privacy" in his computer. *Tanksley*, 54 M.J. at 172. Unfortunately, the CAAF did not explain what it meant by a *reduced* expectation of privacy.

[7] United States v. Ohnesorge, 60 M.J. 946 (N-M. Ct. Crim. App. 2005).

[8] United States v. Long, 61 M.J. 539 (N-M. Ct. Crim. App. 2005).

[9] *Ohnesorge*, 60 M.J. 946.

[10] *Id.* at 948.

[11] *Id.* at 946.

[12] *Id.* at 947. It was common practice within the unit work spaces to have drilling reservist use computers that had been issued to permanent personnel.

[13] *Id.*

[14] *Id.*

[15] *Id.* The pornographic images had been downloaded from the following newsgroups: sex.preteen and sex.teens. A newsgroup is a continuous public discussion forum about a particular topic. Newsgroups, unlike forum or discussion boards, are decentralized. This means that messages and images are replicated to servers worldwide. *See* PRESTON GRALLA, HOW THE INTERNET WORKS 107 (7th ed. 2004).

[16] *Ohnesorge*, 60 M.J. at 947.

Unrelated to Sgt Ohnesorge's case, the U.S. Customs Service had been conducting an investigation into possible distribution of child pornography through EasyNews.com.[17] The staff judge advocate (SJA) for Sgt Ohnesorge's general court-martial convening authority contacted U.S. Customs Service Special Agent (SA) Judith Coulter to inform her of the Naval Criminal Investigative Service (NCIS) investigation into the child pornography images downloaded through EasyNews.com by someone identified as "RuhRowRagy@AOL.com."[18] As part of her larger investigation, SA Coulter visited Mr. Jeff Minor, President of El Dorado, and requested, among other things, any subscriber information for the user name "RuhRowRagy@AOL.com."[19] Special Agent Coulter assured Mr. Minor that she would provide him with the applicable administrative subpoena for the requested subscriber information.[20] Mr. Minor requested she call her office to verify that an administrative subpoena or summons would be forthcoming, and after she complied with the request, Mr. Minor provided her with subscriber information related to "RuhRowRagy@AOL.com."[21] A search of El Dorado's database revealed that a Jeff Ohnesorge had used "RuhRowRagy@AOL.com" to subscribe to EasyNews.com.[22] Mr. Minor also gave SA Coulter the service activation date and credit card number that Sgt Ohnesorge had used to purchase his account with EasyNews.com.[23] Armed with this information, SA Coulter provided the subscriber information to the SJA and to NCIS;[24] however, it was not until two weeks after she received this information that SA Coulter provided Mr. Minor with a U.S. Customs administrative summons requesting the subscriber information "associated with 'RuhRowRagy@AOL.com.'"[25]

At trial, Sgt Ohnesorge unsuccessfully moved to suppress the EasyNews.com subscriber information arguing he had a reasonable expectation of privacy in that information.[26] On appeal, Sgt Ohnesorge argued that the military judge erred in denying his motion to suppress, advancing two theories. First, he asserted he had a reasonable expectation of privacy in his subscriber information with EasyNews.com; therefore, Mr. Minor's release of the information without a search warrant, premised on probable cause, constituted an unreasonable search under the Fourth Amendment and Military Rule of Evidence (MRE) 311.[27] Second, he argued that SA Coulter obtaining his subscriber information without a warrant or similar authority violated his rights under the Electronic Communications Privacy Act (ECPA).[28]

To assert Fourth Amendment protection against unreasonable searches and seizures, a servicemember must demonstrate a reasonable expectation of privacy in the place to be searched or item to be seized.[29] Noting this to be an issue of first impression in the military, the NMCCA, citing the CAAF's opinion in *United States v. Allen*[30] and two other federal cases, held that there is no reasonable expectation of privacy in subscriber information provided to a commercial Internet service

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[17] *Id.*

[18] *Id.*

[19] *Id.* at 948. An Internet search using the Google search engine reveals that El Dorado is headquartered in Phoenix, Arizona. *See* Eldorado, http://www.eldosales.com/ (last visited Mar. 29, 2006).

[20] *Ohnesorge*, 60 M.J. at 948.

[21] *Id.* At the time of her conversation with Mr. Minor, SA Coulter did not have a summons, subpoena, or search warrant for the requested information. *Id.*

[22] *Id.*

[23] *Id.*

[24] *Id.*

[25] *Id.*

[26] *Id.* at 947.

[27] *Id.* at 948; *see* MANUAL FOR COURTS MARTIAL, UNITED STATES, MIL. R. EVID. 311 (2005) [hereinafter MCM].

[28] *Ohnesorge*, 60 M.J. at 948. Specifically, Sergeant Ohnesorge alleged a violation Title II of the Electronic Communications Privacy Act (ECPA), 18 U.S.C.S. §§ 2510-2711 (LEXIS 2006). Title II of the ECPA has been referred to by several commentators as the "Stored Communications Act." *See* Orin Kerr, *The Future of Internet Surveillance Law: A Symposium to Discuss Internet Surveillance, Privacy and the USA PATRIOT Act: Surveillance Law: Reshaping the Framework: A User's Guide to the Stored Communications Act, and a Legislator's Guide to Amending It*, 72 GEO. WASH. L. REV. 1208 (Aug. 2004). With regard to Sergeant Ohnesorge's claim of a violation of the ECPA, the NMCCA initially noted that the ECPA does not list exclusion of evidence as a remedy for any violation, but ultimately declined to rule there had been a violation of the ECPA. *Ohnesorge*, 60 M.J. at 949. Presumably, such a finding would be unnecessary with the court's holding that Sergeant Ohnesorge did not have a reasonable expectation of privacy. Additionally, the violation of the ECPA would be relevant to the issue of Sergeant Ohnesorge's relationship with the Internet Service Provider (ISP). *See* 18 U.S.C.S. § 2703.

[29] *See* MCM, *supra* note 27, MIL. R. EVID. 311(a)(2). The concept of right to privacy as a predicate for Fourth Amendment protection can be traced to *Katz v. United States*, 389 U.S. 347 (1967). Prior to *Katz*, Fourth Amendment protection concerned itself with property rights rather than privacy rights until the Supreme Court proclaimed that the Fourth Amendment protects "people, not places." *Katz*, 367 U.S. at 351. The CAAF extended the expectation of privacy analysis to e-mail and digital media in *United States v. Maxwell*, 45 U.S. 406 (1996).

[30] 53 M.J. 402 (2000).

provider (ISP).[31] Relying on dicta in *United States v. Maxwell*,[32] the NMCAA explained that there is a fundamental difference between the content of private electronic communications and non-content information. The court found this difference particularly true in *Ohnesorge* because EasyNews.com required Sgt Ohnesorge to consent to the ISP's right to disclose any information "necessary to satisfy any law, regulation, or other government request."[33] Because Sgt Ohnesorge had no reasonable expectation of privacy in his subscriber information, he lacked any legal standing to assert either a Fourth Amendment claim or a claim of a violation of the Military Rules of Evidence.[34]

As an additional theory of admissibility, the NMCCA held that even if Sgt Ohnesorge had a reasonable expectation of privacy, the information and evidence uncovered as a result of SA Coulter's request would have been inevitably discovered through a proper authorization.[35] The NMCCA noted that SA Coulter eventually served an administrative summons for the subscriber information, and the trial counsel issued a subpoena to EasyNews.com for the same subscriber information.[36]

The NMCCA reaffirmed its holding in *Ohnesorge* in the unpublished case of *United States v. Szymcz*yk.[37] Major Wayne Szymczyk, U.S. Marine Corps, was convicted of possession of child pornography and conduct unbecoming an officer by possessing indecent computer images.[38] Major Szymczyk had a subscription with Infinity Internet Incorporated (Infinity), an ISP located in Temecula, California.[39] Using this ISP, Major Szymczyk accessed an Internet chatroom using the screen name "Aurther." Once in the chatroom, he started communicating with "SuzyQ17."[40] The "electronic conversation" turned sexual and culminated in Major Szymczyk sending "SuzyQ17" images of minors engaged in sexually explicit conduct.[41] Unfortunately for Major Szymczyk, "SuzyQ17" happened to be an undercover detective for the Miami-Dade County Police Department, who traced the screen name "Aurther" to Infinity and turned that information over to U.S. Customs officials.[42]

United States Customs officials turned the information over to the Riverside County Sheriff's Department in Riverside, California.[43] A Riverside County detective personally visited Infinity in Temecula in the hopes that Infinity would voluntarily provide the subscriber information to identify "Aurther."[44] The owner of Infinity turned over the subscriber information that revealed "Aurther" to be Major Szymczyk. Armed with this information, the Riverside County detective obtained a search warrant to search Major Szymczyk's house and computer. The search resulted in the seizure of hundreds of computer images of child pornography as well as images depicting bestiality and simulated rape.[45]

In due course, this evidence was turned over to military officials and charges were preferred and referred against Major Szymczyk. At trial, he moved to suppress the images, arguing that the search warrant contained information that had been seized from Infinity in violation of his Fourth Amendment right against a warrantless search, as well as in violation of the ECPA.[46] The military judge denied the motion to suppress.[47]

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[31] *Ohnesorge*, 60 M.J. at 948-9. Specifically, the NMCAA relied on *United States v. Hambrick*, 55 F.Supp.2d 504 (W.D.Va. 1999) and *United States v. Kennedy*, 81 F. Supp. 2d 1103 (D.Kan.2000).

[32] 45 M.J. 406 (1996)

[33] *Ohnesorge*, 60 M.J. at 949 (citing to Appellate Exhibit IV).

[34] *Id.* at 949. Military Rule of Evidence 311(b)(2) requires that an accused establish a threshold requirement of a reasonable expectation of privacy in order to assert a violation of the military rules of evidence. MCM, *supra* note 27, MIL. R. EVID. 311(b)(2).

[35] *Ohnesorge*, 60 M.J. at 950 (citing Nix v. Williams, 467 U.S. 431 (1984)).

[36] *Id.* at 948 and 950.

[37] United States v. Szymczyk, No. 200000718, 2005 CCA LEXIS 184 (N-M. Ct. Crim. App. June 23, 2005) (unpublished).

[38] *Id.* at *3.

[39] *Id.*

[40] *Id.*

[41] *Id.* at *4.

[42] *Id.* at *4-5.

[43] *Id.*

[44] *Id.*

[45] *Id.* at *5.

[46] *Id.*

On appeal, the NMCCA relied heavily on the analysis of *Ohnesorge* and concluded that Major Szymczyk had no reasonable expectation of privacy in his subscriber information with Infinity and therefore could not assert a Fourth Amendment right.[48] The NMCCA also concluded that this information would have been inevitably discovered because the Riverside County detective who requested the information was ready to request a search warrant if Infinity had decided not to voluntarily turn over the subscriber information.[49]

Both *Ohnesorge* and *Szymczyk* are relatively non-controversial with regard to a finding of no reasonable expectation of privacy in subscriber information.[50] In fact, these holdings solidify the CAAF's suggestion in *Maxwell* that there is no reasonable expectation of privacy in subscriber information communicated to an ISP.[51] The issue left open for years has been whether, and how, a Fourth Amendment expectation of privacy extends to e-mail communications.[52] This issue has now been framed by the Navy Judge Advocate General in his appeal to the CAAF in *United States v. Long*.[53]

B. Expectation of Privacy in Government E-Mail Communications

Turning from non-content digital information to content digital information, the NMCCA held, in a remarkable opinion, that a naval servicemember has a reasonable expectation of privacy in government e-mail stored on a government server. Accordingly, the potentially most significant military case decided in 2005, within the context of search and seizure law, is *United States v. Long*.[54]

Lance Corporal (LCpl) (E-3) Jennifer N. Long, U.S. Marine Corps, was convicted of wrongful use of ecstasy, ketamine, and marijuana in violation of Article 112a, UCMJ.[55] Evidence used at trial consisted of eye-witness testimony and seventeen pages of e-mail transcripts in which LCpl Long discussed, with three separate individuals, her fear of testing positive for drugs in the event of a urinalysis and her efforts to attempt to mask her drug use.[56] One of LCpl Corporal Long's friends, Corporal (E-4) "U," testified during the government's case-in-chief and authenticated some of the e-mail correspondence as a back-and-forth e-mail exchange in which LCpl Long admitted use of marijuana and ecstasy and her concern about an upcoming urinalysis test.[57]

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[47] *Id.*

[48] *Id.* at *9.

[49] *Id.* at *4 and *10.

[50] For those federal courts that have faced this particular issue, the trend has been a finding of no expectation of privacy in subscriber information. *See, e.g.*, Guest v. Leis, 255 F.3d 325 (6th Cir. 2001).

[51] *See* United States v. Maxwell, 45 M.J. 406, 418 (1996) (analogizing the relationship between a computer network subscriber and the internet service provider as similar to that between a bank and it customer); *see also* United States v. Miller, 425 U.S. 435, 443 (1976) (no expectation of privacy in financial information voluntarily conveyed to banks); *cf.* Smith v. Maryland, 442 U.S. 735 (1979) (holding no reasonable expectation of privacy in the actual numbers dialed on a telephone as the capture of the numbers does not capture content). The CAAF declined to address the reasonable expectation of privacy issue with regard to subscriber information. *See* United States v. Allen, 53 M.J. 402, 409 (2000) (stating that "[w]e need not decide what type of privacy interest attached to the [subscriber] information in this case, however, because we agree with the military judge that a warrant would have inevitably been obtained for those very same records"). The Stored Communications Act part of the Electronic Communications Privacy Act, discussed at note 28, *supra*, requires disclosure by internet service providers of subscriber information (e.g. name, address, local and long distance telephone connection records, length or service, and means and source of payment) by use of an administrative subpoena. 18 U.S.C.S. § 2703(c)(2) (2006).

[52] In *Maxwell*, the CAAF concluded that Colonel Maxwell enjoyed an expectation of privacy in the content of his e-mails that had been sent on his America Online account; however, that expectation of privacy would necessarily turn on the type of e-mail involved and the intended recipients. *Maxwell*, 45 M.J. at 419.

[53] 61 M.J. 539 (N-M. Ct. Crim. App. 2005).

[54] *Id.* The impact of *Long* depends largely on how the CAAF decides the case. If the CAAF affirms the NMCCA's opinion, it could have a significant impact within the military because servicemembers would have an expectation of privacy in their government e-mail; however, if the CAAF vacates on narrow grounds, e.g., holding that LCpl Long did not establish that she had a subjective expectation of privacy because she did not testify at trial, the impact of *Long* would be relatively insignificant and limited to its facts.

[55] *Id*. at 540; *see* UCMJ art. 112a (2005).

[56] *Long*, 61 M.J. at 541. These e-mails were characterized as strings of e-mail exchanges between LCpl Long and three different individuals. *Id.* Presumably, these strings represented a digital recording of several e-mail exchanges between LCpl Long and the three recipients of her e-mail correspondence.

[57] *Id*. at 542.

Officials from the Inspector General's Office of Headquarters, U.S. Marine Corps (IGMC), requested the e-mail transcripts that had been seized from the network administrator for Headquarters, U.S. Marine Corps.[58] The network administrator accessed and retrieved the e-mails from the government network domain server at the specific request of government enforcement officials.[59] The request was made without a search warrant or search authorization.[60] Lance Corporal Long moved to suppress the e-mails, arguing that they had been seized in violation of her Fourth Amendment rights since the seizure had been without her consent and in the absence of a search authorization.[61]

The only witness to testify during LCpl Long's suppression hearing was the senior network administrator for Headquarters, U.S. Marine Corps.[62] The network administrator testified that LCpl Long had been assigned a government computer and an e-mail account.[63] Both the computer and the e-mail account were issued for official use; however, personal use of the government computer and the e-mail system was permissible provided such use did not "interfere with official business."[64] To access her government e-mail account, LCpl Long had to create her own password to protect against unauthorized users accessing her e-mail account and the government network.[65] Every e-mail that LCpl Long sent via her government computer went through a central government system domain server, where the e-mail was copied prior to its being sent to the intended recipient.[66] These copies of sent e-mail were automatically stored on the central domain server unless the user specifically configured the e-mail account *not* to save outgoing e-mail.[67] Any system administrator could access all e-mail accounts on the central domain server.[68] The senior system administrator testified that LCpl Long's e-mails were not retrieved during routine monitoring of the network system, but at the specific request of government officials.[69]

At trial, the military judge ruled that the actions of the network administrator constituted a search for evidence without LCpl Long's consent.[70] Additionally, the military judge ruled that the request by law enforcement had been made without a search authorization premised on probable cause.[71] The military judge admitted the evidence, however, based on his finding that LCpl Long had no reasonable expectation of privacy in her government e-mail account.[72]

On appeal, LCpl Long argued that the military judge committed error when he ruled that she had no reasonable expectation of privacy in her government e-mail account.[73] The NMCCA agreed that the military judge committed error in admitting the e-mail transcripts; however, the court held that the error was harmless beyond a reasonable doubt because the evidence of Long's guilt was otherwise overwhelming.[74] Despite the court affirming the case, the Navy Judge Advocate General certified this case to the CAAF.

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[58] *Id*. at 541. Although unclear from the opinion, the investigation into LCpl Long's drug use began as an IGMC investigation. Officials from the IGMC requested the seizure of LCpl Long's e-mail.

[59] *Id.* at 540-41.

[60] *Id.* at 541.

[61] *Id*.

[62] *Id*.

[63] *Id.*

[64] *Id.*

[65] *Id.*

[66] *Id.*

[67] *Id.* Although unclear from the opinion, presumably LCpl Long did not configure her government issued computer e-mail account to delete outgoing messages. *Id.* If she had, the NMCCA would likely have mentioned that fact relative to the court's conclusion that she had a subjective expectation of privacy in her e-mail account.

[68] *Id*.

[69] *Id.*

[70] *Id.* Although unclear from the opinion, the government likely argued that LCpl Long consented to the search and seizure of the e-mails based on the "Notice and Consent to Monitoring" banner displayed each time she accessed the network via the government computer workstation. *Id.* In any event, the military judge appears to have rejected any consent theory that the government may have argued as an alternative theory of admissibility. *Id.*

[71] *Id.*

[72] *Id.* at 542.

[73] *Id.* at 540.

[74] *Id.* at 549.

The NMCCA's analysis and reasoning for why LCpl Long had a reasonable expectation of privacy is quite remarkable because two years earlier, the NMCCA reached the exact opposite holding in the unpublished case of *United States v. Geter*.[75] In any event, using *United States v. Monroe*[76]as a framework, the *Long* Court outlined the threshold requirement of establishing an expectation of privacy within the context of digital content information.[77] First, the NMCCA concluded that LCpl Long had a subjective expectation of privacy in her government e-mail account.[78] Notwithstanding that LCpl Long did not testify on the motion to establish how she had a subjective expectation of privacy, the NMCCA found a subjective expectation of privacy because her computer account required a password for access onto the government network.[79] Her use of a password to access the system "provided precautions necessary to safeguard her privacy in her e-mails, as well as her ability to exclude others from her e-mail account."[80] Additionally, the NMCCA concluded that the military judge "made no explicit finding" that LCpl Long had a subjective expectation of privacy.[81] Because of the lack of an explicit finding, the NMCCA made its own finding that LCpl Long had established a subjective expectation of privacy as to all other persons except for the network administrator.[82]

Having found a subjective expectation of privacy, the NMCCA moved to the next required step in the analytical process—whether LCpl Long's subjective expectation of privacy was "objectively reasonable."[83] Relying principally on two non-military federal cases, *Picha v. Wielgos*[84] and *United States v. Pryba*,[85] the NMCCA concluded that LCpl Long's subjective expectation of privacy was objectively reasonable.[86] The NMCCA's reliance on these two cases for the proposition that LCpl Long had a reasonable expectation of privacy is curious for several reasons. First, neither case had anything to do with electronic evidence. Second, neither case analyzed the concept of reasonable expectation of privacy. The issue in both cases dealt with whether there had been a government intrusion sufficient enough to trigger the protections of the Fourth Amendment.[87] The question of whether there is governmental intrusion sufficient to trigger Fourth Amendment protection is a separate question from whether a person has a reasonable expectation of privacy.[88]

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[75] United States v. Geter, No. 9901433, 2003 CCA LEXIS 134 (N-M. Ct. Crim. App. May 30, 2003) (unpublished), *set aside and remanded on other grounds*, United States v. Geter, 60 M.J. 344 (2004) (summary disposition). In *Geter*, the NMCCA relied on the Air Force opinion of *United States v. Monroe*, 50 M.J. 550, 558 (A.F. Ct. Crim. App. 1999), for the proposition that when dealing "solely with a U.S. government owned and operated system, in which individual e-mail accounts are provided for official use only, there is no reasonable expectation of privacy." *Geter*, 2003 CCA LEXIS 134, at *7. On remand, the NMCCA rendered its *second* opinion on 8 November 2005. United States v. Geter, No. 9901433, 2005 CCA LEXIS 362 (N-M. Ct. Crim. App. Nov. 8, 2005) (unpublished). Curiously, the *Geter* court did not cite *Long*, and contrary to *Long*, concluded that the passwords LCpl Geter needed to access his government e-mail account, existed to "protect the integrity of the command information systems, not the personal interest of the appellant [Geter]." *Id.* at *5. Accordingly, the NMCCA concluded that LCpl Geter did not have a subjective expectation of privacy and thus the seizure of his e-mail did not implicate the Fourth Amendment.

[76] 52 M.J. 326, 330 (2000)

[77] *Long*, 61 M.J. at 543.

[78] *Id*. at 544.

[79] *Id. But see Geter*, 2005 CCA LEXIS 362, at *5 (stating that passwords exist and are created to "protect the integrity of the command information systems, not the personal interests" of the servicemember).

[80] *Long*, 61 M.J. at 544.

[81] *Id*. This conclusion does not support the other part of the opinion in which the court stated that the military judge found "that the appellant [Long] had no reasonable expectation of privacy in the e-mail account." *Id.* at 542. A plain reading of that sentence speaks to her personal and therefore *subjective* expectation of privacy.

[82] *Id.* at 544.

[83] *Id.* at 543 (quoting United States v. Monroe, 52 M.J. 326, 330 (2000)).

[84] 410 F. Supp. 1214 (N.D. Ill.1976)

[85] 502 F.2d 391 (D.C. Cir. 1974)

[86] *Long*, 61 M.J. at 545-46.

[87] The *Picha* case was a civil rights case in which thirteen-year old Renee Picha sued her school principal, Mr. Raymond Wielgos, after she was stripped-searched by the female school nurse on school property. The principal ordered Ms. Picha stripped-searched based on a phone tip that led him to believe Ms. Picha possessed drugs. Whether Renee Picha had a reasonable expectation of privacy against having her person stripped-searched was not an issue before the district court. The real issue was whether the search of Renee Picha by school officials constituted government intrusion sufficient to trigger her right against an unreasonable search and seizure. *Picha*, 410 F. Supp. at 1216. In its opinion, the *Picha* court simply held that the school officials were not entitled to a directed verdict based on being immune from civil liability. *Id*. at 1221. Similarly, in *Pryba*, the issue was not whether Mr. Pryba had a reasonable expectation of privacy in the search of the package that led to his prosecution for possession of pornographic videotapes; it was whether there had been sufficient governmental action to trigger Mr. Pryba's rights against a warrantless search. Based on the suspicious behavior on the part of the sender, United Airlines officials searched the package addressed to Mr. Pryba prior to its shipment via United Airlines cargo freight and then turned the package over to the Federal Bureau of Investigation. The *Pryba* Court rejected Mr. Pryba's Fourth Amendment claim holding that the initial search of the package by United Airlines officials was done on the carrier's own initiative, independent of any governmental action or intrusion. *Pryba*, 502 F.2d at 398.

Police participation or government intrusion may be germane to two issues: (1) the level of law enforcement involvement or participation sufficient to implicate protection under the Fourth Amendment; and, (2) the reasonableness of the warrantless search or seizure based on all factors. The level of government involvement or law enforcement participation should not turn on whether a person has a reasonable expectation of privacy. Objective expectation of privacy analysis should turn on objective factors relative to the person seeking protection.[89] Motivation of government officials is relevant to an evaluation of the reasonableness of a search, not to whether an individual has a reasonable expectation of privacy.[90]

When the NMCCA focused on the level of government intrusion and the purpose of the search, it found first a reasonable expectation of privacy and then *a fortiori* a per se unreasonable search. The NMCCA appears to have adopted the same general analytical standard that the Ninth Circuit adopted in *O'Connor v. Ortega*.[91] On appeal, the Supreme Court stated that this type of analysis was incomplete.[92] In reversing the *O'Connor* case, the Supreme Court held that the Ninth Circuit erred in finding a Fourth Amendment violation after concluding that Doctor Ortega had an expectation of privacy in his office.[93] The *O'Connor* plurality opinion makes clear that the Ninth Circuit should have extended the analysis to whether or not the search was reasonable under the circumstances given the "special needs" of public employers to supervise and control the work environment.[94]

The NMCCA also parsed the concept of reasonable expectation of privacy and concluded that it depended not only on the motivation of government officials, but also on the situational relationship between LCpl Long and other government officials.[95] The *Long* Court found the search per se unreasonable and rejected the government's assertion that based on the

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> But where the search is made on the carrier's own initiative for its own purposes, Fourth Amendment protections do not obtain for the reason that only the activities of individuals or nongovernmental entities are involved. So frequently and so emphatically have the courts enunciated these principles that at least for the time being, they must be regarded as settled law.

Id. Not unlike *Picha*, the issue of whether Mr. Pryba had a reasonable expectation of privacy against officials searching the sealed package addressed to him was not a contested issue.

[88] *See, e.g.*, Skinner v. Railway Labor Executives' Ass'n, 489 U.S. 602, 614-16 (1989) (stating that to implicate protections under the Fourth Amendment, there must be "clear indices of the Government's encouragement, endorsement, and participation" in the search or seizure).

[89] *Cf.* Soldal v. Cook County, 506 U.S. 56, 69 (1992) (finding that the subjective motivation of law enforcement officials provides an unworkable framework in determining whether Fourth Amendment protections apply).

[90] *See* O'Connor v. Ortega, 480 U.S. 709 (1987) (remanding case back to Ninth Circuit finding that the issue of reasonable expectation of privacy is only a threshold consideration based on objective factors) (plurality opinion).

[91] 764 F.2d 703 (9th Cir. 1985).

[92] *See O'Connor*, 480 U.S. at 719 (stating that to "hold that the Fourth Amendment applies to searches conducted by [public employers] is only to begin the inquiry into the standards governing such searches. . . . [W]hat is reasonable depends on the context within which a search takes place"); *see also* State v. Ziegler, 637 So. 2d 109, 112 (La. 1994).

> The O'Connor Court set forth a two-pronged analysis for determining whether an employee's Fourth Amendment rights were violated by an administrative search and seizure. First, the employee must have a reasonable expectation of privacy in the area searched, or in the item seized. . . . Second, if a reasonable expectation of privacy exists, the Fourth Amendment requires that the search be reasonable under the circumstances.

Id. at 112.

[93] "To hold that the Fourth Amendment applies to searches conducted by [public employees] is only to begin the inquiry into the standards governing such searches. . . . [W]hat is reasonable depends on the context with which the search takes place." *O'Connor*, 480 U.S. at 719 (quoting New Jersey v. T.L.O., 469 U.S. 325, 337 (1985)).

[94] *Id*. at 720.

> Employers and supervisors are focused primarily on the need to complete the government agency's work in a prompt and efficient manner. An employer may have need for correspondence, or a file or report available only in an employee's office while the employee is away from the office. Or . . . employers may need to safeguard or identify state property or records in an office in connection with a pending investigation into suspected employee misfeasance. In our view, requiring an employer to obtain a search warrant whenever the employer wished to enter an employee's office, desk, or file cabinets for a work-related purpose would seriously disrupt the routine conduct of business and would be unduly burdensome. Imposing unwieldy warrant procedures in such cases upon supervisors, who would otherwise have no reason to be familiar with such procedures, is simply unreasonable.

Id. at 721-22.

[95] United States v. Long, 61 M.J. 539, 546 (N-M. Ct. Crim. App. 2005). First, the *Long* court concluded that LCpl Long enjoyed a "subjective expectation of privacy in her e-mail account as to all others but the network administrator." *Id*. at 544. Second, the *Long* Court concluded that her subjective expectation of privacy was reasonable "vis-à-vis law enforcement." Such a legal construct appears flawed as it "would be anomalous to say that the individual and his private property are fully protected by the Fourth Amendment only when the individual is suspected of criminal behavior." *O'Connor*, 480 U.S. at 715 (quoting *T.L.O.*, 469 U.S. at 335).

"Notice and Consent for Monitoring" banner LCpl Long had no reasonable expectation of privacy. The court stated that because the banner does not "mention search and seizure of evidence of crimes unrelated to unauthorized use of government computer,"[96] the banner did not provide sufficient notice to LCpl Long so as to defeat her expectation of privacy for law enforcement purposes. Although unstated, the court must have concluded that the search was unjustified at its inception and per se unreasonable.[97] This search analysis, however, is separate from the reasonable expectation of privacy analysis under *O'Connor*.[98]

In reaching its conclusion that LCpl Long had an expectation of privacy, the court also did not analyze the *character* of the evidence. The evidence supports that the e-mail transcripts the government admitted at trial were actually e-mail strings demonstrating an "electronic conversation" with three separate individuals.[99] In fact, one of the witnesses who testified against LCpl Long authenticated ten out of seventeen pages as a "string of e-mails and response e-mails between himself" and LCpl Long.[100] In this regard, the *Long* court did not analyze whether or not the e-mails had been opened, which presumably would have some bearing on LCpl Long's expectation of privacy. The CAAF in *United States v. Maxwell*[101] compared e-mail to other types of mediums and held that "[e]xpectations of privacy in e-mail transmissions depend in large part on the type of e-mail involved and the intended recipient."[102] This analysis in *Maxwell* parallels the statutory scheme of the Stored Communications Act (SCA) of the ECPA.[103] When Congress enacted the SCA, it created a statutory expectation of privacy in certain types of e-mail.[104] An analysis of the SCA reveals that statutory protections apply differently depending on the *character* of the e-mail, the starkest difference being between unopened e-mail and e-mail that has been delivered and opened.[105] It follows that the *Long* court should have followed the *Maxwell* court by analyzing the e-mails according to their character when they were seized.[106] Unfortunately, the NMCCA did not differentiate between unopened e-mail, which would implicate a greater expectation of privacy, and opened e-mail.[107] In fact, the court created a greater right to privacy in *opened* e-mail stored on a government server than in opened e-mail stored on a commercial ISP.[108]

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[96] *Long*, 61 M.J. at 544.

[97] *See O'Connor*, 480 U.S. at 725-26 (stating that searches by public employers should be judged by the "standard of reasonableness under all the circumstances. Under this reasonableness standard, both the inception and the scope of the intrusion must be reasonable").

[98] The *O'Connor* Court specifically left open the question of what the appropriate reasonableness standard should be "when an employee is being investigated for criminal misconduct." *Id.* at 729 n.*. Nevertheless, the opinion makes clear that the threshold finding of a reasonable expectation of privacy is different from whether the search is in scope and reasonable at its inception.

[99] *Long*, 61 M.J. at 541.

[100] *Id.* at 548.

[101] 45 M.J. 406, 418-19 (1996).

[102] *Id.* at 418-19.

[103] *See* 18 U.S.C.S. §§ 2701-2711 (2006). This statute was enacted as Title II of the Electronic Communications Privacy Act (ECPA), but given the formal title "Stored Wired and Electronic Communications and Transactional Records Access." According to one of the leading legal commentators on the ECPA, Associate Professor Orin S. Kerr, George Washington University Law School, the easiest and simplest way to refer to the statute is as the Stored Communications Act. *See* Kerr, *supra* note 28.

[104] *See* Kerr, *supra* note 28, at 1211 (questioning whether electronic files held by Internet Service Providers on "behalf of their users retain a Fourth Amendment reasonable expectation of privacy") (internal quotations omitted); *see also id.* n.14 (quoting United States v. Bach, 310 F.3d 197 (1st Cir. 2004) ("While it is clear to this court that Congress intended to create a statutory expectation of privacy in e-mail files, it is less clear that an analogous expectation or privacy derives from the Constitution")).

[105] To bolster its opinion, the NMCCA relied on 18 U.S.C.S. § 2702 of the Stored Communications Act. *Long*, 61 M.J. at 545. Reliance on that statute seems misplaced. The voluntary disclosure rules of 18 U.S.C.S. § 2702 are inapplicable to the case because the threshold consideration for statutory applicability is whether the "person or entity provid[es] electronic communication service to the public." *Id.* § 2702(a)(1). A government e-mail system is not available to the public so the SCA's voluntary disclosure limitations would be inapplicable. With regard to the compelled disclosure rules of the SCA, 18 U.S.C.S. § 2703, there is a fundamental difference between unopened e-mail, unopened e-mail held in electronic storage for one hundred and eighty days or less, and opened e-mail that are simply remotely stored on a server. *See* Kerr, *supra* note 28, at 1226-27. In fact, "opened e-mail held by a provider is protected" by the SCA *only* if the computer system and server "provides services to the public." *Id*. Thus, the protections of the SCA that the *Long* court mentions in its opinion are inapplicable given that the e-mail in question had been opened and read. Opened e-mail held in storage receives protection under the SCA, but only to the extent that a service provider qualifies as a "remote computing service." *See* 18 U.S.C.S. § 2703(b). To meet the definition of remote computing service, a computing service *must* provide services to the public. *See id.* § 2711(2). Since the computing services in this case dealt with a nonpublic provider, LCpl Long's opened e-mail would receive no protection under the SCA. A thorough analysis of the SCA is beyond the scope of this article; however, practitioners interested in a thorough and straight-forward analysis of the SCA, should consult Professor Kerr's article. *See* Kerr, *supra* note 28.

[106] *See Maxwell*, 45 M.J. at 419 (stating that "e-mail transmissions depend in large part on the type of e-mail involved and the intended recipient"). The evidentiary character of the e-mails in question were probably not analyzed by the military judge at trial because such a finding would have been unnecessary.

[107] *Cf.* United States v. Miller, 425 U.S. 435, 443 (1976).

Due to the potential implications of *Long*, the Navy Judge Advocate General certified the case on 7 July 2005.[109] On 13 October 2005, LCpl Long filed a cross-appeal arguing that the NMCCA erred by finding harmless error.[110] On 21 February 2006, the CAAF heard oral argument on the *Long* case and a decision is pending.[111] The holding could have potentially wide implications with regard to carving out a reasonable expectation of privacy for certain types of digital evidence contained on a government-issued computer.[112]

C. Scope of Consent on Standard Computer Consent Search Form

In *United States v. Rittenhouse*,[113] the U.S. Army Court of Criminal Appeals (ACCA) had an opportunity to analyze the scope of consent within the context of a computer search. Sergeant Josh R. Rittenhouse (SGT), U.S. Army, was suspected of possession of child pornography located on his private computer in his barracks room.[114] Sergeant Rittenhouse was ordered to report to the local Army Criminal Investigation Command (CID) where he waived his rights and executed a sworn statement.[115] Special Agent Kristie Cathers conducted the interview of SGT Rittenhouse and also requested consent to search

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> The Fourth Amendment does not prohibit the obtaining of information revealed to a third party and conveyed by him to Government authorities, even if the information is revealed on the assumption that it will be used only for a limited purpose and the confidence placed in the third party will not be betrayed.

Id. at 435.

[108] The NMCCA in *Long* would require the government to get a search authorization premised on probable cause under the Fourth Amendment for e-mail content regardless of whether the e-mail had been opened. In contrast, if LCpl Long would have had her opened e-mails stored on a public ISP, AOL for example, the protections of the SCA would apply to the extent that AOL is a remote computing service for purposes of 18 U.S.C.S. § 2703. Under this hypothetical, one option available to the government would be to compel disclosure from AOL of stored e-mails via an 18 U.S.C.S. § 2703(d) order (with notice to the customer), in which the standard is much less than probable cause. *See* 18 U.S.C.S. § 2703(d) (disclosure by a public ISP will occur if a court of competent jurisdiction issues a court order provided that the government "offers specific and articulable facts showing that there are reasonable grounds to believe that the contents of a wire or electronic communication, . . . are relevant and material to an ongoing criminal investigation").

[109] Article 67(a)(2) of the UCMJ allows the service Judge Advocates General to order any case a Court of Criminal Appeals has reviewed to be sent to the Court of Appeals for the Armed Forces for review. *See* UCMJ art. 62 (2005), 10 U.S.C. § 862 (2000), This government "appeals process" is referred to as certification, in which the applicable Judge Advocate General certifies a particular legal issue. *See* United States Court of Appeals for the Armed Forces, Rules of Practice and Procedure R.4, *available at* http://www.armfor.uscourts.gov/Rules041001.pdf. The Navy Judge Advocate General certified the following two issues:

> I. WHETHER THE NAVY-MARINE CORPS COURT OF CRIMINAL APPEALS ERRED WHEN THEY DETERMINED THAT, BASED ON THE EVIDENCE ADDUCED AT TRIAL, APPELLEE HELD A SUBJECTIVE EXPECTATION OF PRIVACY IN HER E-MAIL ACCOUNT AS TO ALL OTHERS BUT THE NETWORK ADMINISTRATOR.
>
> II. WHETHER THE NAVY-MARINE CORPS COURT OF CRIMINAL APPEALS ERRED WHEN THEY DETERMINED THAT IT IS REASONABLE, UNDER THE CIRCUMSTANCES PRESENTED IN THIS CASE, FOR AN AUTHORIZED USER OF THE GOVERNMENT COMPUTER NETWORK TO HAVE A LIMITED EXPECTATION OF PRIVACY IN THEIR E-MAIL COMMUNICATIONS SENT AND RECEIVED VIA THE GOVERNMENT NETWORK SERVER.

61 M.J. 326-27 (7 July 2005) (certificate for review).

[110] On 13 October 2005, the Court of Appeals for the Armed Forces granted LCpl Long's request to review the following issue:

> WHETHER THE LOWER COURT ERRED IN FINDING THAT THE MILITARY JUDGE'S ERROR IN ADMITTING E-MAILS SENT AND RECEIVED BY LANCE CORPORAL LONG ON HER GOVERNMENT COMPUTER WAS HARMLESS BEYOND A REASONABLE DOUBT.

62 M.J. 316 (13 Oct. 2005) (order granting review.)

[111] *See* United States Court of Appeals for the Armed Forces, Daily Journal No. 06-095, http://www.armfor.uscourts.gov/journal/2006Jrnl/2006Feb.htm (last visited Mar. 30, 2006).

[112] The CAAF could answer the question it did not address in *United States v. Monroe*, 52 M.J. 326, 330 (2000). In *Monroe*, the CAAF's holding was narrower than the Air Force Court of Criminal Appeals. Whereas, the Air Force Court concluded Staff Sergeant Monroe had no reasonable expectation of privacy, the CAAF held Monroe had "no reasonable expectation of privacy in his e-mail messages or his e-mail box *at least from the personnel* charged with maintaining the [Government-owned] EMH [electronic mail host] system." (emphasis added).

[113] 62 M.J. 509 (Army Ct. Crim. App. 2005)

[114] *Id*. at 510.

[115] In addition to the Fourth Amendment issue in *Rittenhouse*, the military judge suppressed part of Sergeant Rittenhouse's sworn statement. *Id*. at 511. Following the CID interrogation, Special Agent Cathers had requested that Sergeant Rittenhouse write down in his own words what they had discussed. She then told Sergeant Rittenhouse not to "close out" his sworn statement because she planned to follow-up his written statement with a question-and-answer session. *Id.* at 510. When Sergeant Rittenhouse finished his statement, he wrote "End of Statement." The military judge concluded that this statement constituted an ambiguous or equivocal invocation of the right to remain silent and the CID agents should have sought clarification of this ambiguous

his computer.[116] Special Agent Cathers gave SGT Rittenhouse CID Form 87-R-E, Consent to Search.[117] Sergeant Rittenhouse signed the form consenting to the search of his computer.[118] Based on his admissions and the search of his computer, he was charged with violation of Article 134, UCMJ, for possession of child pornography.[119]

Prior to entry of pleas, SGT Rittenhouse moved to suppress the search and seizure of his computer.[120] Specifically, he argued that seizure and removal of his computer were beyond the scope of his consent.[121] Sergeant Rittenhouse's argument was premised on the consent form he signed, which authorized CID to *search* his computer, but did not authorize CID to *seize and remove* his computer.[122] Because the CID form did not explicitly authorize the seizure and removal of SGT Rittenhouse's computer from the premises, the military judge ruled that all evidence seized and removed was done without consent and in violation of the Fourth Amendment.[123] Based on the military judge's suppression of the evidence, the government filed an appeal to the ACCA.[124]

The ACCA vacated the military judge's ruling to suppress the evidence.[125] The *Rittenhouse* court analyzed the language allowing for the seizure of specific evidence to include "data including deleted files and folders."[126] Based in part on this language, the court concluded that any "reasonable person reading the consent form would have understood that the computer and disks could be seized."[127] Given standard computer forensic practice, the *Rittenhouse* court held that SGT Rittenhouse's consent to search his computer necessarily included inherent authorization to seize the computer and associated data storage media.[128] Despite this holding, practitioners and law enforcement officials should pay close and careful attention to any consent form so that the verbiage in the consent form makes it explicitly clear that the computer and associated data storage media and devices may be seized for follow-on forensic analysis.[129]

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invocation. As a result, the military judge, finding a violation of Rittenhouse's Fifth Amendment right to remain silent, suppressed Rittenhouse's statements that were made subsequent to his having written "End of Statement." *Id.* As part of the government appeal, the ACCA also vacated that part of the military judge's ruling, holding that "End of Statement" may have constituted an ambiguous invocation to remain silent, but the CID agents did not have to stop questioning in order to seek clarification. The ACCA agreed it was an ambiguous invocation, but the law does not require an interrogator to stop and seek clarification of an ambiguous invocation. *Id*. at 512.

[116] *Id.* at 510.

[117] *Id*. The ACCA appended a copy of the consent form to its opinion. *Id.* at 515.

[118] *Id.*

[119] *Id*.; *see* UCMJ art. 134 (2005); 10 U.S.C. § 934 (2000).

[120] *Rittenhouse,* 62 M.J. at 510.

[121] *Id.*

[122] At the bottom of paragraph 5 of the consent form, Sergeant Rittenhouse consented to a search of "computers, hard disk drives, removable storage media, portable data storage devices, cameras, photographs, movies, manuals, notebooks, papers, and computer input and output devices;" however, the consent form also contained the following additional language:

> I am authorizing the above search(s) for the following types of property which may be *removed* by the authorized law enforcement personnel and retained as evidence under the provisions of Army Regulation 195-5, or other applicable laws or regulations:
>
> Text, graphics, electronic mail messages, and other data including deleted files and folders, containing material related to the sexual exploitation of minors; and/or material depicting apparent or purported minors engaged in sexually explicit conduct; and data and/or information used to facilitate access to, possession, distribution, and/or production of such material.

Id. at 515 (emphasis added).

[123] *Id.* at 511.

[124] *Id.* at 509. Under Article 62, UCMJ, the government may appeal any order or ruling—except for a finding of not guilty—that terminates the proceedings with respect to a charge or specification.

[125] *Id.* at 514.

[126] *Id.* at 513 n.6.

[127] *Id.* at 513.

[128] *Id.*

[129] This is particularly true given that under MRE 316, an accused may limit consent and withdraw consent at any time. *Compare* MCM, *supra* note 27, MIL.R.EVID. 316 (d)(2), *with id.* MIL.R.EVID. 314 (e)(3). In this regard, agents seizing computer assets would do well to image the computer hard drive as soon as possible after the seizure.

D. Scope of Voluntary Consent in Computer Search Following Illegal Search

The question of whether a servicemember has a reasonable expectation of privacy in government e-mail is not the only computer-type search and seizure issue that the CAAF will tackle in its 2006 term. On 13 July 2005, the CAAF granted review in *United States v. Conklin*,[130] in which the CAAF will decide the scope of consent following an initial illegal search.

Airman First Class (A1C) Steven L. Conklin, U.S. Air Force, had temporary duty orders to Keesler Air Force Base (AFB) as part of a five-phase training program.[131] He was assigned to an on-base dormitory room.[132] As part of a routine and random inspection, A1C Conklin's military training leader (MTL) inspected A1C Conklin's room.[133] Following the MTL's inspection of the dresser, A1C Conklin's computer monitor powered up and displayed an image of an actress wearing a fishnet top that clearly exposed her breasts.[134] This image was a violation of Keesler AFB dormitory regulations that prohibited the open display of nude or partially nude persons.[135] After seeing this image, the MTL contacted a senior MTL, Technical Sergeant (TSgt) Edward Schlegel, who searched A1C Conklin's computer.[136] Technical Sergeant Schlegel found a folder titled "porn" and a subfolder titled "teen."[137] He opened six to eight files, each containing images of young nude females.[138] He then secured the room and notified the Air Force Office of Special Investigations (OSI).[139] Two OSI agents contacted A1C Conklin in the dining hall and asked for consent to search his room and computer.[140] The agents did not tell A1C Conklin about the earlier inspection.[141] He consented to the search of his room and computer for evidence of child pornography.[142] The OSI agents found a large number of images of child pornography, and A1C Conklin subsequently confessed to the agents that he had borrowed some compact discs containing adult and child pornography from a friend and had copied the images onto his computer.[143]

At trial, A1C Conklin moved to suppress the images of child pornography based on the theory that the derivative evidence was seized as a result of an initial illegal search of his computer, which, in turn, rendered his consent invalid.[144] The military judge concluded that given the unique training environment, the initial search of A1C Conklin's personal computer by TSgt Schlegel was a valid inspection.[145] Additionally, the military judge concluded that A1C Conklin gave

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[130] United States v. Conklin, No. 35217, 2004 CCA LEXIS 290 (A.F. Ct. Crim App. 2004) (unpublished). On 13 July 2005, the CAAF granted A1C Conklin's appeal on the following two issues:

> I. WHETHER THE MILITARY JUDGE ERRED IN ADMITTING EVIDENCE AT TRIAL THAT WAS OBTAINED AS A DIRECT RESULT OF AN ILLEGAL SEARCH OF APPELLANT'S PERSONAL COMPUTER.
>
> II. WHETHER THE EVIDENCE PRESENTED BY THE PROSECUTION AT TRIAL WAS LEGALLY INSUFFICIENT TO SUPPORT APPELLANT'S CONVICTION FOR POSSESSING CHILD PORNOGRAPHY.

61 M.J. 330 (2005) (order granting petition for review).

[131] *Conklin*, 2004 CCA LEXIS 290 at *3.

[132] *Id.*

[133] *Id.*

[134] *Id.*

[135] The dormitory regulation in this case, *Keesler Air Force Base Instr. 32-6003*, prohibited the "open display of pictures, statues, or posters which display the nude or partially nude human body." KEESLER AIR FORCE BASE INSTR. 32-6003, DORMITORY SECURITY AND LIVING STANDARDS FOR NON-PRIOR SERVICE AIRMEN 4.2.3 (30 Aug. 2003)

[136] *Conklin*, 2004 CCA LEXIS 290, at *3-4.

[137] *Id*. at *4.

[138] *Id.*

[139] *Id.*

[140] *Id*.

[141] *Id*.

[142] *Id*.

[143] *Id*. at *4-5.

[144] *Id*.

[145] *Id*. at *8.

voluntary consent to the search of his computer.[146] The military judge admitted the evidence and A1C Conklin was convicted of possession of child pornography.[147]

On appeal, and as a threshold matter, the Air Force Court of Criminal Appeals (AFCCA) held that A1C Conklin had a reasonable expectation of privacy in his personal computer, even though the computer was located in his government dormitory room.[148] With regard to the displayed image of the partially clad actress, the AFCCA concluded that A1C Conklin had forfeited his right to privacy;[149] however, the court held that he maintained his right to privacy as to the other non-displayed content on his personal computer.[150] Once the AFCCA concluded that A1C Conklin enjoyed a reasonable expectation of privacy to the non-displayed content, the court then analyzed whether or not there was any lawful basis for TSgt Schlegel's initial warrantless search of the computer files.[151]

The AFCCA held that the stated purpose of the Keesler AFB dormitory instruction, which authorized random inspections, was to ensure "standards of cleanliness, order, décor, safety, and security."[152] Since the initial search of A1C Conklin's computer had nothing to do with "cleanliness, order, décor, safety, [or] security" of his assigned dormitory room, the AFCCA held that TSgt Schlegel's search violated the scope of the inspection exception under MRE 313.[153] The court reached this conclusion because the warrantless search of the computer was unrelated to the purpose of the instruction and therefore exceeded the authorized scope and purpose of the inspection.[154]

Nevertheless, the AFCCA, citing *United States v. Murphy*,[155] concluded that A1C Conklin's consent to the subsequent search by OSI agents was voluntary.[156] The court based its rationale of voluntary consent on the fact that A1C Conklin "was not in custody, was not evasive or uncooperative, and acknowledged that he had the legal right to refuse to give his consent."[157] The court rejected A1C Conklin's argument that the OSI agents would not have requested consent "but for" the prior illegal search by TSgt Schlegel. The *Conklin* court did not fully analyze A1C Conklin's derivative evidence argument other than to cite to *Murphy*.[158] While the *Murphy* court rejected a simple "but for" test on whether to apply the "fruit of the poisonous tree" doctrine to derivative evidence, A1C Conklin was unaware of the prior constitutional violation.[159] Doubtless, this will be the issue that the CAAF will confront in shaping the legal boundaries of the consent exception to the Fourth Amendment.[160]

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[146] *Id*.

[147] *Id*. at *9

[148] *Id*.

[149] *Id*. at *11.

[150] *Id.* at *12.

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

[152] *Id.* at *13.

[153] *Id*. *13-15; *see* MCM, *supra* note 27, MIL. R. EVID. 313.

[154] *Conklin*, 2004 CCA LEXIS 290 at *15.

[155] 39 M.J. 486 (C.M.A. 1994)

[156] *Conklin*, 2004 CCA LEXIS 290, at *16.

[157] *Id*.

[158] 39 M.J. at 486.

[159] *Compare id.* at 487 (Staff Sergeant Murphy was factually (but maybe not *legally*) aware that her rights under Article 31(b) had been violated), *with Conklin*, 2004 CCA LEXIS 290, at *4 (the OSI agents did not tell A1C Conklin about TSgt Schlegel's earlier warrantless search).

[160] According to Wayne LaFave in his hornbook *Search and Seizure, A Treatise on the Fourth Amendment*, evidence should only be admissible "if it is determined that the consent was *both* voluntary and not an exploitation of the prior illegality." *See* 3 WAYNE LAFAVE, SEARCH AND SEIZURE, A TREATISE ON THE FOURTH AMENDMENT 656 (3d ed. 1996). The CAAF heard oral argument on A1C Conklin's case on 8 November 2005.

Part II: Scope of Probable Cause for Securing Search Authorization

A. Refined Legal Definition of Probable Cause

In its only Fourth Amendment opinion of its 2005 term, the CAAF refined the legal meaning of "probable" with regard to the quantum of evidence required to establish probable cause. *United States v. Bethea*[161] established a benchmark standard for the definition of "probable" as a legal term of art.[162] *Bethea* is likely to become a lodestar for practitioners and military judges, both trial and appellate, for evaluating, in terms of objective metrics, what constitutes probable cause sufficient for the issuance of a search authorization.[163]

Air Force Master Sergeant (MSgt) Terrence A. Bethea tested positive on a random urinalysis for the cocaine metabolite at 238 nanograms per milliliter.[164] When questioned by OSI agents, MSgt Bethea maintained that he had not knowingly used cocaine.[165] Following MSgt Bethea's denial of cocaine use, OSI Special Agent Michael Tanguay requested a search authorization from the Base Magistrate, Air Force Colonel Dale Hess, to seize a hair sample from MSgt Bethea.[166] Special Agent Tanguay presented an affidavit to Colonel Hess in which SA Tanguay explained the purpose of the hair seizure and that a hair may reveal whether or not MSgt Bethea had ingested cocaine.[167] Specifically, SA Tanguay stated in his affidavit that depending on the length of a person's hair, a scientific test of the hair will detect chronic drug use as well as binge use of cocaine ingested within the last several months.[168] Special Agent Tanguay did not inform Colonel Hess that hair testing would not necessarily reveal one-time use of a small amount of cocaine.[169] Colonel Hess approved the search authorization and the analysis of MSgt Bethea's hair revealed multiple uses of cocaine.[170] Based on the hair analysis, MSgt Bethea was charged with wrongful use of cocaine on divers occasions between 17 January and 16 February 2001.[171]

Master Sergeant Bethea moved to suppress the seizure of hair based on lack of probable cause.[172] Specifically, MSgt Bethea argued that there was no probable cause to seek the hair analysis because there was no evidence of binge or chronic use from the urinalysis test.[173] In other words, no probable cause existed because there was no causal connection between the underlying urinalysis that reveals one-time use and hair drug testing that cannot detect a "specific single use."[174] Additionally, MSgt Bethea argued that SA Tanguay had withheld evidence from the magistrate because he did not inform the magistrate that hair analysis would not reveal a single use of cocaine.[175] The military judge denied the motion to suppress. He found probable cause based on his conclusion that it was "more than reasonable to assume, based on the contents of the

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[161] 61 M.J. 184 (2005).

[162] *See* WEBSTER'S UNABRIDGED DICTIONARY (Random House 2d ed. 1998) (defining probable as: "1. likely to occur or prove true; 2. having more evidence for than against; and, 3. affording ground for belief").

[163] Probable cause exists "when there is a reasonable belief that the person, property, or evidence sought is located in the place or on the person to be searched." MCM, *supra* note 27, MIL. R. EVID. 315(f)(2).

[164] *Bethea*, 61 M.J. at 184.

[165] *Id.* at 185.

[166] Colonel Dale A. Hess, U.S. Air Force, was the Yokota Air Base's primary magistrate. *Id*.

[167] *Id.*

[168] *Id.* Special Agent Tanguay's affidavit also compared urine testing for drugs and hair testing for drugs: "While urine tests can determine whether a drug was used at least once within the recent past, hair analysis potentially provides information on binge use or chronic drug use ranging from months, depending on the length of the hair and the type of hair." *Id.*

[169] *Id.*

[170] *Id.*

[171] *Id.* at 184.

[172] *Id.* at 185.

[173] *Id*. at 185-86.

[174] *Id.* at 185. Special Agent Nuckols of the OSI testified at the suppression hearing that he did not know if hair analysis can reveal only a single use; however, he did testify that hair analysis would reveal a "binge" use. Special Agent Nuckols defined binge use as "numerous uses over a short period of time, 12, 24, 36 hours." *Id*.

[175] *Id.* at 186. The military judge concluded that there was no evidence that OSI intentionally or recklessly withheld relevant information from Colonel Hess.

affidavit, that hair drug testing can detect a . . . single drug use if the hair test is performed within two months of the alleged use, regardless of how that use may be characterized."[176]

In affirming the case, the CAAF refused to engage in the "semantic" analysis of what "binge use" meant or whether hair analysis would be able to detect a single use of cocaine.[177] Without expressing an opinion of the correctness of the military judge's conclusion regarding whether or not hair analysis can detect a single use, the CAAF elegantly side-stepped the issue, and in the process, changed military jurisprudence with regard to the definition of probable cause.[178] Citing *Illinois v. Gates*[179] and *Texas v. Brown*,[180] the CAAF held that there was probable cause to support the search authorization despite the fact that hair analysis would not necessarily be indicative of a one-time use of cocaine.[181] "A probable cause determination merely requires that a person of 'reasonable caution' could believe that the search may reveal evidence of a crime; 'it does not demand any showing that such a belief be correct or more likely true than false.'"[182] The CAAF then cited several federal cases that stand for the proposition that "probable cause does not require a showing that an event is more than 50% likely."[183]

Once the CAAF refined the legal definition of probable cause, the next analytical step was easy, because the urinalysis results could be consistent with single use or multiple uses.[184] Accordingly, it was as "likely as not that evidence of cocaine use would be found in [MSgt Bethea's] hair."[185] The holding in *Bethea* is important for several reasons. First, it reflects that the proper evaluation for probable cause by appellate courts is by an objective metric.[186] Second, it refines further the legal definition of the quantum of evidence necessary for probable cause. Third, it signals a green light for commanders, magistrates, and military judges to order search authorizations for the seizure of hair based on a positive urinalysis.

B. Reasonableness of Seizure in Executing a Search Warrant

Inasmuch as the CAAF refined the definition of probable cause in *Bethea*, the Supreme Court refined and extended its earlier holding of *Michigan v. Summers*,[187] which held that when executing a search warrant on a residence, law enforcement officials have the inherent authority to detain or seize an occupant of the residence while the search is conducted. In *Muehler v. Mena*,[188] the Court further extended the limits of when a detention rises to the level of an unreasonable seizure for Fourth Amendment purposes. In doing so, the Supreme Court vacated another opinion from the Ninth Circuit.[189]

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[176] *Id.*

[177] *Id*. at 187.

[178] *Id*. at 186-87. In fact, the CAAF specifically cautioned practitioners and military judges that the court expressed no opinion as "to the correctness of the military judge's interpretation of 'binge' of the accuracy of the military judge's characterization of the ability of hair analysis to detect a single use of a controlled substance." *Id.* at 186 n.3.

[179] 462 U.S. 213 (1983).

[180] 460 U.S. 730 (1983).

[181] *Bethea*, 61 M.J. at 187.

[182] *Id.* (quoting *Brown*, 460 U.S. at 742).

[183] *Id*. (citing United States v. Olson, No. 03-CR-51-S, 2003 U.S. Dist. LEXIS 24607, at *16 (W.D. Wis. July 11, 2003) (citing United States v. Garcia, 179 F.3d 265, 269 (5th Cir. 1999)); *see also* Ostrander v. Madsen, Nos. 00-35506, 00-35538, 00-35541, 2003 U.S. App. LEXIS 1665, at *8 (9th Cir. Jan. 28, 2003) ("Probable cause is met by less than a fifty percent probability, so that even two contradictory statements can both be supported by probable cause."); Samos Imex Corp. v. Nextel Communications, Inc., 194 F.3d 301, 303 (1st Cir. 1999) ("The phrase 'probable cause' is used, in the narrow confines of Fourth Amendment precedent, to establish a standard less demanding than 'more probable than not.'"); United States v. Burrell, 963 F.2d 976, 986 (7th Cir. 1992) ("'Probable cause requires more than bare suspicion but need not be based on evidence sufficient to support a conviction, nor even a showing that the officer's belief is more likely true than false.'") (quoting Brinegar v. United States, 338 U.S. 160, 175, 93 L. Ed. 1879, 69 S. Ct. 1302 (1949)); United States v. Cruz, 834 F.2d 47, 50 (2d Cir. 1987) ("In order to establish probable cause, it is not necessary to make a prima facie showing of criminal activity or to demonstrate that it is more probable than not that a crime has been or is being committed.") (internal quotation marks and citation omitted)).

[184] *Bethea*, 61 M.J. at 188.

[185] *Id.*

[186] In this regard, the CAAF mirrors the Supreme Court's repeated pronouncements most recently articulated in a different context in *Devenpeck v. Alford*, 543 U.S. 146 (2005), that probable cause is to be evaluated based on objective factors at the time of arrest.

[187] 452 U.S. 692 (1981).

[188] 125 S. Ct. 1465 (2005).

[189] In its October 2004 Term, the Supreme Court reversed or vacated every Fourth Amendment case that came out of the Ninth Circuit. *See, e.g.*, *Devenpeck*, 543 U.S. 146 (holding that when evaluating probable cause to arrest, the touchstone is whether the facts, viewed objectively, support probable cause to arrest regardless of whether the arresting officer specifically articulates the offense at the time of arrest); *Mena*, 125 S. Ct. 1465 (vacating the Ninth

Police Officers Darin Muehler and Robert Brill obtained a broad search warrant to search a residence for weapons and evidence of gang activity.[190] They had probable cause to believe one member of the gang "West Side Locos" lived at the residence.[191] Due to the possibility that the search of the residence may involve contact with suspected armed gang members, Officers Muehler and Brill requested a Special Weapons and Tactics (SWAT) team to help secure the residence prior to the search.[192] Officer Muehler, Officer Brill, and the SWAT team executed the warrant at 0700 on 3 February 1998. Officers handcuffed, at gunpoint, Ms. Mena and three other individuals who were on the property.[193] During the search, which lasted two to three hours, the four detainees were placed in a converted garage.[194] In addition to requesting the SWAT team, Officers Muehler and Brill had contacted the Immigration and Naturalization Service (INS) because of the reasonable likelihood that the "West Side Locos" had illegal immigrants as gang members.[195] An INS officer accompanied the police officers and asked all the handcuffed detainees about their immigration status.[196]

Ms. Mena sued Officers Muehler and Brill under 42 U.S.C. § 1983 alleging that her detention in handcuffs was "for an unreasonable time and [conducted] in an unreasonable manner" in violation of her Fourth Amendment rights.[197] The district court found in her favor and awarded Ms. Mena $60,000.00.[198] The Ninth Circuit affirmed the judgment concluding that it was objectively unreasonable under the Fourth Amendment to keep Ms. Mena handcuffed during the search.[199] The Ninth Circuit held that the officers should have released Ms. Mena as soon as they ascertained that she posed no threat.[200] Additionally, the Ninth Circuit concluded that the questioning of Ms. Mena regarding her immigration status, "constituted an independent Fourth Amendment violation."[201] Finally, the court concluded that Officers Meuhler and Brill were not entitled to qualified immunity because Ms. Mena's Fourth Amendment rights were clearly established at the time of her detention.[202]

The Supreme Court vacated the Ninth Circuit's opinion and remanded the case.[203] The Court held that under the circumstances of this case, the detention of Ms. Mena in handcuffs during the search was reasonable.[204] The fact that the police had to detain and guard multiple persons made the detention all the more reasonable.[205] Because Ms. Mena's detention was reasonable, the questioning by the INS officers did not constitute an additional seizure since the detention was

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Circuit decision and holding that a two to three hour detention in handcuffs was plainly permissible under *Michigan v. Summers*, 452 U.S. 692 (1981), which held that officers executing a warrant have authority to detain occupants on the premise during search); Brosseau v. Haugen, 543 U.S. 194 (2004) (reversing the Ninth Circuit and holding that Officer Brosseau, in shooting Mr. Haugen in the back, was nevertheless entitled to qualified immunity because her action did not violate "clearly established" law).

[190] *Mena*, 125 S. Ct. at 1468.

[191] *Id.*

[192] *Id*.

[193] *Id.* Ms. Iris Mena was the only person in the house. *Id.* at 1475. The other three (a fifty-five-year-old Latina female, a forty-year-old Latino male, and a white male in his thirties) were found in trailers located in the back yard of the property. *Id.*

[194] *Id.* at 1471.

[195] *Id.* at 1468.

[196] *Id.*

[197] *Id.*

[198] *Id.*

[199] *Id.*

[200] *Id.*

[201] *Id.*

[202] *Id.*

[203] *Id.* at 1469. The late Chief Justice William Rehnquist wrote the majority opinion for the five-Justice majority. Justice Anthony Kennedy concurred in the opinion of the Court, but added the observation that it is important to mention that the opinion should not stand for the proposition that handcuffing should become a routine matter while conducting a search. Four Justices concurred in the judgment, but believed the proper course of action would be to remand the case to the Ninth Circuit in order to have that court consider Ms. Mena's additional claim that her detention in handcuffs was, in fact, extended beyond the time that the police finished their search. Id. at 1472-73. The majority of the Court declined to address the issue because the Ninth Circuit did not consider it. Id. at 1472

[204] *Id.* at 1471.

[205] *Id.*

not prolonged by the questioning.[206] Citing *Florida v. Bostick*,[207] the Supreme Court made it clear that "mere police questioning does not constitute a seizure" even if the police have no basis to suspect the individual of a crime.[208] Because the questioning of Ms. Mena did not prolong her detention, there was no additional seizure.[209]

Part III: Looking Ahead for 2006

Search and seizure jurisprudence during the Supreme Court's October 2004 Term continued a refinement of the established principle that when dealing with the Fourth Amendment the applicable touchstone is objective in nature. The Court also struck down the Ninth Circuit when it tried to step outside established Fourth Amendment precedent.[210] The Court's October 2005 Term, however, promises to break new ground by addressing significant splits among the judicial circuits: one case tests the limits of the consent exception to the Fourth Amendment and another will explore the inevitable discovery doctrine exception to the exclusionary rule.

The first Fourth Amendment case from the October 2005 Term in which the Supreme Court granted certiorari was *Georgia v. Randolph*.[211] This case involves a narrowly framed legal issue that seeks to define further the scope of consent by co-tenants.[212] Mr. and Mrs. Randolph were having marital problems and had been separated for about two months prior to the incident that formed the basis for Mr. Randolph's interlocutory appeal.[213] She had taken their son to Canada.[214] While visiting Mr. Randolph in July of 2001, Mrs. Randolph reported a domestic disturbance.[215] The police arrived outside the Randolph residence and found a distraught Mrs. Randolph.[216] She accused Mr. Randolph of kidnapping their child and using "large amounts of cocaine."[217] Shortly thereafter, Mr. Randolph arrived on the scene without the child.[218] Mr. Randolph explained to the police that he had placed the child in the custody of a neighbor because he was concerned that Mrs. Randolph would leave the country with the child.[219] Sergeant Brett Murray confronted Mr. Randolph about his wife's allegations of cocaine use and asked to search his residence.[220] Mr. Randolph refused consent.[221] The police then asked Mrs. Randolph whether she would consent to the search of the house.[222] She responded "yes" and took the police to Mr.

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[206] *Id.*

[207] 501 U.S. 429 (1991)

[208] *Mena*, 125 S. Ct. at 1471 (quoting *Bostick*, 501 U.S. at 434 ("[e]ven when officers have no basis for suspecting a particular individual, they may generally ask questions of that individual; ask to examine the individual's identification; and request consent to search his or her luggage")).

[209] *Id.* at 1471. The Court cited to *Illinois v. Caballes*, 125 S. Ct. 834 (2005) for the proposition that so long as the initial detention was otherwise lawful and the questioning did not extend the time that Ms. Mena was detained, no additional Fourth Amendment justification was required. *Id*. at 1471-72.

[210] *See, e.g.*, Devenpeck v. Alford, 543 U.S. 146 (2005) (reversing the Ninth Circuit's holding that because Sergeant Devenpeck's arrest for an unarticulated offense was not "closely related" to the one actually articulated, Sgt Devenpeck violated Mr. Alford's civil right under the Fourth Amendment); Muehler v. Mena, 125 S. Ct. 1465 (2005) (reversing the Ninth Circuit's holding that the police violated Ms. Mena's civil rights by detaining her in handcuffs for two to three hours while they searched the residence and also reversing holding of the Ninth Circuit that the questioning of her by an INS Agent while she was handcuffed constituted an independent constitutional violation of her Fourth Amendment rights).

[211] 125 S. Ct. 1840 (2005).

[212] Specifically, the question presented before the Supreme Court is as follows: "Should this Court grant certiorari to resolve the conflict among federal and state courts on whether an occupant may give law enforcement valid consent to search the common areas of the premises shared with another, even though the other occupant is present and objects to the search?" To access the actual question or questions presented, consult the U.S. Supreme Court's official website. *See* U.S. Supreme Court, 04-1067, Georgia v. Randolph, http://www.supremecourtus.gov/qp/04-01067qp.pdf (listing the question presented).

[213] Randolph v. Georgia, 590 S.E. 2d 834, 836 (Ga. Ct. App. 2003).

[214] *Id.*

[215] *Id.*

[216] *Id.*

[217] *Id.*

[218] *Id.*

[219] *Id.*

[220] *Id*.

[221] *Id*.

[222] *Id.*

Randolph's bedroom where Officer Murray observed a cut straw with cocaine residue.[223] Officer Murray then called back to the district attorney's office and was told to stop the search and obtain a warrant.[224] The ensuing search of the Randolph residence uncovered "numerous drug related items." Mr. Randolph was indicted for possession of cocaine.[225]

At trial, Mr. Randolph moved to suppress the cocaine, claiming the initial search that uncovered the cocaine residue violated his Fourth Amendment rights.[226] The trial court denied the motion and Mr. Randolph filed an interlocutory appeal with the Court of Appeals of Georgia.[227] The Georgia Court of Appeals reversed.[228] The State petitioned the Georgia Supreme Court, which affirmed the holding of the Georgia Court of Appeals.[229] The Georgia Supreme Court agreed with the appellate court that consent by one occupant is not valid in the face of another occupant who is physically present at the scene and objects to the search.[230] Based on a conflict among state and federal circuits as to this issue, the Supreme Court granted certiorari.[231]

In addition to *Randolph*, the Supreme Court will consider whether the exclusionary rule should apply in the event that a search is conducted in an unreasonable manner. In *Michigan v. Hudson*,[232] the Supreme Court will determine whether to apply the exclusionary rule for a violation of a "knock and announce" warrant.[233]

On 27 August 1998, officers from the Detroit Police Department executed a "knock and announce" warrant for Mr. Booker T. Hudson's residence.[234] Although some of the officers shouted "police, search warrant" prior to entering the residence, none of the officers knocked.[235] Instead, they waited three to five seconds to enter Mr. Hudson's house.[236] The prosecutor conceded that the police violated the "knock and announce" requirement of the search warrant.[237] The trial court suppressed the evidence found during the search.[238] The State of Michigan appealed to the Michigan Court of Appeals arguing that the holding in *People v. Stevens*[239] should control. In *Stevens*, the Michigan Supreme Court held that a "knock

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[223] *Id*.

[224] *Id.*

[225] *Id.*

[226] *Id*.

[227] *Id.*

[228] *Id*. at 840.

[229] State v. Randolph, 604 S.E.2d 835 (Ga. 2004).

[230] *Id*. at 836. The NMCCA had occasion to rule on a very similar issue as an issue of first impression in the military in *United States v. Garcia*, 57 M.J. 716, 720 (N-M. Ct. Crim. App. 2002). Based on the majority of the circuits, the NMCCA held that an *absent* co-tenant can consent if the *present* co-tenant objects. The *Garcia* case was set aside by the CAAF on other grounds. *See* United States v. Garcia, 59 M.J. 447 (2004) (setting aside conviction on ineffective assistance of counsel grounds).

[231] Subsequent to the submission of this article, but prior to its publication, the Supreme Court handed down its decision in *Randolph v. Georgia*, 126 S.Ct. 413 (2006). In a five-to-three opinion, the majority affirmed the opinion of the Georgia Supreme Court and held on narrow grounds that when a *physically present* co-occupant refuses to give consent, the consent granted by the other co-occupant is legally invalid.

[232] 125 S. Ct. 2964 (2005). To access the text of the actual question presented that the Supreme Court granted for its October 2005 Term, see U.S. Supreme Court, 04-1360, Booker T. Hudon v. Michigan, http://www.supremecourtus.gov/qp/04-01360qp.pdf.

[233] *See* Wilson v. Arkansas, 514 U.S. 385 (1995) (holding that the Fourth Amendment requires law enforcement officials executing a warrant to knock on the door and announce their presence prior to making any forcible entry); *see also* Richards v. Wisconsin, 520 U.S. 385, 387 (1997) (explaining the holding in *Wilson* and rejecting a blanket exception to the knock-and-announce requirement for felony drug cases). In *United States v. Banks*, 540 U.S. 31 (2003), the Supreme Court explained that each knock-and-announce requirement is subject to a reasonableness test depending on the facts of each case. In *Banks*, the Court concluded that after knocking and announcing, the police were justified in waiting only fifteen to twenty seconds prior to breaking down the door because the apartment was small and the search warrant was for cocaine, a substance easily disposable.

[234] Because the prior appellate history of the *Hudson* case is largely unpublished, the limited facts cited here are taken from the Brief of the United States as Amicus Curiae Supporting Respondent (Michigan). Brief for the United States as Amicus Curiae Supporting Respondent, Michigan v. Hudson, 125 S. Ct. 2964 (2005) (No. 04-1360).

[235] *Id.* at *1.

[236] *Id*.

[237] *Id*. at *2.

[238] *Id*.

[239] 597 N.W.2d 53 (Mich. 1999)

and announce" violation is not subject to suppression because the evidence would have been inevitably discovered.[240] Based on a conflict among the state supreme courts and federal circuits that have previously considered this issue, the Supreme Court granted certiorari.[241]

While there were some refinements of established Fourth Amendment concepts in 2005, this year has largely been one of incubation in which several cases have made their way up to both the CAAF and the Supreme Court. The CAAF is poised to not only decide whether servicemembers enjoy a reasonable expectation of privacy in the content of their e-mail, but also to decide if consent can be voluntary following an unconstitutional search of a computer when the person who consents is unaware of the prior constitutional violation. Additionally, the Supreme Court will determine whether to apply the exclusionary rule where there has been a "knock-and-announce" violation. It is unclear upon what path either court will embark; however, it is clear both courts know exactly where they want to go.

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[240] *Id*. at 55.

[241] 125 S. Ct. 2964 (2005). The specific question granted is as follows:

> [d]oes the inevitable discovery doctrine create a per se exception to the exclusionary rule for evidence seized after a Fourth Amendment "knock and announce" violation, as the Seventh Circuit and the Michigan Supreme Court have held, or is evidence subject to suppression after such violations, as the Sixth and Eighth Circuits, The Arkansas Supreme Court, and the Maryland Court of Appeals have held?

See U.S. Supreme Court, 04-1360, Booker T. Hudon v. Michigan, http://www.supreme courtus.gov/qp/04-01360qp.pdf. The case was argued on 9 January 2006.

"I Really Didn't Say Everything I Said":[1] Recent Developments in Self-Incrimination Law

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Introduction

Unlike 2004, a year in which the Supreme Court decided five cases in the area of self-incrimination law,[2] 2005 was relatively uneventful. Although the Supreme Court originally set expectations high when it granted certiorari in *Maryland v. Blake*,[3] the Court dashed those hopes following oral argument by simply dismissing the writ of certiorari as "improvidently granted."[4]

Military appellate courts likewise saw little need to address the area self-incrimination law last year. Although the military courts established no new legal precedent, this article reviews two relevant cases in which the military courts applied the basic principles of self-incrimination law: *United States v. Bresnahan*,[5] in which the Court of Appeals for the Armed Forces (CAAF) applied the voluntariness doctrine,[6] and *United States v. Rittenhouse*,[7] in which the Army Court of Criminal Appeals (ACCA) determined the effect of an ambiguous invocation of the right to remain silent. Finally, the article discusses *United States v. Finch*,[8] a case in which the Court of Appeals for the Armed Forces (CAAF) granted review[9] of an issue of utmost importance to the military practitioner—whether there is a notification to counsel requirement for all military interrogations.

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[1] Yogi Berra, YOGI-isms & Casey Stengel, http://www.dennisweb.com/steve/quotyogi.htm (last visited Apr. 3, 2006).

[2] *See* Major Christopher T. Fredrikson, *What's Done is Done: Recent Developments in Self-Incrimination Law*, ARMY LAW., May 2005, at 19 (providing a general overview of these five cases).

[3] 125 S. Ct. 1823 (2005). The facts of the case are as follows: At 0500, 25 October 2002, police arrested the respondent (a seventeen-year-old male) at his home and transported him to the police station. At 0511, the lead investigator, Detective William Johns, advised the respondent of his *Miranda* rights. *See* Blake v. Maryland, 849 A.2d 410, 412 (Md. 2004). The respondent invoked his right to counsel and was placed in a holding cell, wearing only boxer shorts and a t-shirt. At 0600, in accordance with a state rule requiring service of a copy of a warrant and charging document promptly after arrest, Detective Johns, accompanied by uniformed Officer Curtis Reese, went to the respondent's cell and served him with a copy of the arrest warrant and a computer printout listing the charges. The statement of charges included a charge of first degree murder with the misstated penalty of "DEATH" written in all capital letters. (Death is not a legal punishment for a minor in Maryland.) *Id.* at 413. As Detective Johns turned to leave the cell, Officer Reese said "I bet you want to talk now, huh!" in a loud and confrontational voice. *Id.* Surprised by this unexpected outburst and concerned about violating the respondent's right to counsel, Detective Johns ushered Officer Reese out of the cell, saying very loudly within the respondent's hearing, "No, he doesn't want to talk to us. He already asked for a lawyer. We cannot talk to him now." *Id.* At 0628, Detective Johns returned to the respondent's cell to give him clothing that another police officer had brought to the station. As Detective Johns handed the respondent his clothes, the respondent asked, "I can still talk to you?" *Id.* Detective Johns responded, "Are you saying that you want to talk to me now?" *Id.* The respondent replied "yes." *Id.* Detective Johns took the respondent back to the intake room and re-advised him of his *Miranda* rights. The respondent waived his rights and provided a statement. After making a statement to Detective Johns, the respondent agreed to take a polygraph test. At 0915, a polygraph test was administered after the respondent was again advised of his *Miranda* rights. The respondent made additional statements. The trial court suppressed the respondent's statements because they resulted from an unlawful police-initiated interrogation in violation of *Edwards v. Arizona*, 451 U.S. 477 (1981), which held that once a suspect invokes his right to counsel, the government cannot interrogate the suspect further unless counsel is present or the suspect initiates further communication with police. The state filed an interlocutory appeal and the Court of Special Appeals (Maryland) reversed the trial court's suppression order. *Id.* at 412. The respondent appealed to the Court of Appeals of Maryland, which agreed with the trial court, holding that the respondent did not initiate further conversation with the police; rather, his question "I can still talk to you?" was in direct response to Officer Reese's unlawful interrogation. *Id.* at 422. The United States Supreme Court granted certiorari on the following issue: When a police officer improperly communicates with a suspect after invocation of the suspect's right to counsel, does *Edwards* permit consideration of curative measures by the police, or other intervening circumstances, to conclude that a suspect later initiated communication with the police? Supreme Court of the United States, Granted & Noted List, October Term 2005, http://www.supremecourtus.gov/orders/05grantednotedlist.html (last visited Apr. 3, 2006)

[4] Maryland v. Blake, 126 S. Ct. 602 (2005). The Supreme Court gave no rationale for its decision. The Court simply stated: "The writ of certiorari is dismissed as improvidently granted." *Id.*

[5] 62 M.J. 137 (2005).

[6] *See infra* note 10.

[7] 62 M.J. 509 (Army Ct. Crim. App. 2005).

[8] No. 200000056, 2005 CCA LEXIS 77 (N-M. Ct. Crim. App. Mar. 10, 2005) (unpublished), *review granted*, 2005 CAAF LEXIS 1345 (Nov. 14, 2005).

[9] *See* United States v. Finch, 2005 CAAF LEXIS 1345 (2005).

The Voluntariness Doctrine: *United States v. Bresnahan*

The concept of voluntariness includes elements of the common law voluntariness doctrine, due process, and Article 31, Uniform Code of Military Justice (UCMJ).[10] Even if *Miranda*[11] or Article 31(b)[12] are *not* at issue, to be valid and admissible, a confession must be voluntary—the product of an essentially free and unconstrained choice by its maker.[13] In other words, a coerced confession must be suppressed even though the accused received proper rights warnings and executed a rights waiver.[14] When examining the voluntariness of a confession, it is necessary to look at the totality of the circumstances to determine whether an accused's will was overborne.[15] In assessing the totality of the circumstances, the CAAF will look to factors such as: "the condition of the accused, his health, age, education, and intelligence; the character of the detention, including the conditions of the questioning and rights warning; and the manner of the interrogation, including the length of the interrogation and the use of force, threats, promises, or deceptions."[16] Last year, the CAAF applied this totality of the circumstances analysis in *United States v. Bresnahan*,[17] holding that the statements made by the appellant in that case were voluntary.[18]

In *Bresnahan*, the appellant, Specialist (SPC) Bresnahan, and his wife, Kristen, were awakened at approximately 0430 by the crying of their three-month-old infant son, Austin.[19] "Kristen got Austin from his crib and brought him back to their bed to feed him."[20] After she finished feeding Austin, she burped him, and handed him to SPC Bresnahan.[21] When SPC Bresnahan returned Austin to his crib, he again began crying, so SPC Bresnahan tried to "soothe him" by bouncing and shaking him.[22] Shortly thereafter, SPC Bresnahan "said he laid Austin down, heard some gurgling sounds, and saw Austin vomit and then become gray."[23] Specialist Bresnahan told Kristin to call 911 and then administered cardiopulmonary resuscitation to Austin until the paramedics arrived.[24] The paramedics arrived at approximately 0515 and rushed Austin to the local civilian hospital.[25]

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[10] UCMJ art. 31(d) (2005). Article 31 (d) specifically addresses the voluntariness of statements::

> No statement obtained from any person in violation of this article, or through the use of coercion, unlawful influence, or unlawful inducement may be received in evidence against him in a trial by court-martial.

Id.

The Analysis to Military Rule of Evidence (MRE) 304(c)(2) lists examples of involuntary statements as those resulting from the following acts of coercion, unlawful influence, and unlawful inducement: infliction of bodily harm, which includes "questioning accompanied by deprivation of food, sleep, or adequate clothing;" threats of bodily harm; confinement or deprivation of privileges or necessities because a statement was not made; promises of immunity or clemency; and promises of reward or benefit, or threats of disadvantage. MANUAL FOR COURTS-MARTIAL, UNITED STATES, MIL. R. EVID. 304(c)(2) analysis, at A22-10 to A22-11 [hereinafter MCM]. For a detailed historic account of the voluntariness doctrine, see Captain Frederic I. Lederer, *The Law of Confessions: The Voluntariness Doctrine*, 74 MIL. L. REV. 67 (1976).

[11] Miranda v. Arizona, 384 U.S. 436 (1966). The Court held that in a custodial environment, police interrogations are inherently coercive; therefore police must give a suspect certain warnings concerning self-incrimination. *Id.*

[12] UCMJ art. 31(b). Article 31 (b) states:

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

Id.

[13] United States v. Bubonics, 45 M.J. 93 (1996).

[14] *Id*.

[15] *Id.* at 95.

[16] United States v. Ellis, 57 M.J. 375, 379 (2002).

[17] United States v. Bresnahan, 62 M.J. 137 (2005).

[18] *Id.*

[19] United States v. Bresnahan, No. ARMY 20010304, slip op. at *5 (Army Ct. Crim. App. June 4, 2004) (unpublished), *aff'd* 62 M.J. 137 (2005).

[20] *Bresnahan*, 62 M.J. at 139.

[21] *Bresnahan*, No. ARMY 20010304, at *6.

[22] *Id*.

[23] *Bresnahan*, 62 M.J. at 140.

[24] *Id.* at 139.

[25] *Bresnahan*, No. 20010304, at *5.

At the hospital, a computed tomography (CT) scan revealed injuries to Austin's brain, which the treating physician believed to have been caused by someone shaking the infant.[26] Hospital officials promptly notified the local police department that Austin suffered from nonaccidental head trauma and, before any physicians talked to SPC Bresnahan about his son's condition, a detective arrived at the hospital.[27] In a quiet room outside the intensive care unit, without giving any *Miranda* warnings,[28] the detective questioned SPC Bresnahan about Austin's injuries.[29]

Specialist Bresnahan told the detective that he had simply laid Austin down and Austin began choking on his formula.[30] Responding with incredulity, the detective informed SPC Bresnahan that Austin suffered from very serious brain injuries that were so severe that he might not survive.[31] She insisted that "Austin was either shaken or struck on his head"[32] and pressed for further information by telling SPC Bresnahan that the doctor needed to know what had happened in order to help his son.[33] Specialist Bresnahan then admitted that he may have shaken his son a couple of times.[34] Following this admission, the detective "demonstrated what she believed to be the classic shaken-baby syndrome maneuver,"[35] and SPC Bresnahan conceded he may have shaken Austin a couple times in the same manner.[36]

Upon the detective's request, SPC Bresnahan voluntarily left the hospital and accompanied the detective to the police station for further questioning.[37] At the police station, a "virtual tug-of-war ensued"[38] with the detective trying to get SPC Bresnahan to admit to shaking the baby and SPC Bresnahan trying to maintain that he, at most, bounced his son in an attempt to stop his crying.[39] At one point, SPC Bresnahan advised the detective that "he may have killed his son."[40] Later, SPC Bresnahan again admitted that "he may have shaken Austin."[41] After approximately forty-five minutes of questioning, the detective took SPC Bresnahan back to the hospital. At the hospital, SPC Bresnahan told a doctor that he may have shaken his son "some, a little harder than he should"[42] and that "when he put Austin down, he heard some gurgling sounds, and saw Austin vomit and become gray."[43]

Specialist Bresnahan was subsequently convicted at a general court-martial of involuntary manslaughter and sentenced to six years confinement and a dishonorable discharge.[44] Among other things, the CAAF granted review to determine whether SPC Bresnahan's admissions were voluntary.[45]

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[26] *Bresnahan*, 62 M.J. at 139.

[27] *Bresnahan*, No. 20010304, at *5.

[28] Article 31(b) warnings were not required because this was strictly a civilian investigation. *See* UCMJ art. 31(b) (2005). Also note that *Miranda* warnings were never given because SPC Bresnahan was never subjected to a custodial interrogation. *See* Miranda v. Arizona, 384 U.S. 436 (1966); *see also supra* note 11.

[29] *Bresnahan*, 62 M.J. at 139-140.

[30] *Bresnahan*, No. 20010304, at *6.

[31] *Bresnahan*, 62 M.J. at 140.

[32] *Bresnahan*, No. 20010304, at *6.

[33] *Bresnahan*, 62 M.J. at 140.

[34] *Id*.

[35] *Bresnahan*, No. 20010304, at *6.

[36] *Id*.

[37] *Bresnahan*, 62 M.J. at 140. Although SPC Bresnahan was questioned at the police station, the interrogation did not amount to a "custodial interrogation." Therefore, *Miranda* warnings were not required. *See supra* note 11.

[38] *Bresnahan*, 62 M.J. at 140.

[39] *Id*.

[40] *Id.*

[41] *Id*.

[42] *Id*.

[43] *Id*.

[44] *Bresnahan*, No. 20010304, at *6.

[45] *Bresnahan*, 62 M.J. at 139. The CAAF also granted review to determine the following: whether the military judge erred by denying a defense request for expert assistance; whether the military judge's erroneous admission of alleged prior uncharged misconduct was harmless; and whether the military judge erred by admitting "profile" evidence. *Id*.

In examining the voluntariness of SPC Bresnahan's admissions, the CAAF conducted a *de novo* review and looked to the "totality of the circumstances to determine whether the confession [was] the product of an essentially free and unconstrained choice by its maker."[46] The CAAF acknowledged that SPC Bresnahan "found himself in a stressful situation on the morning of his son's death"[47]—his son was in a critical condition and a police detective was pressuring him to confess by emphasizing that the doctor needed to know what had happened in order to save his son's life.[48] Nevertheless, the CAAF found under the totality of the circumstances that SPC Bresnahan's statements were voluntary.[49]

The CAAF first looked at the mental condition of SPC Bresnahan, noting that SPC Bresnahan, a twenty-two-year-old Army specialist with over five years in the service, demonstrated no mental deficiency or low intelligence.[50] The court then turned to the character of detention, finding that SPC Bresnahan was never in custody, cooperated freely during the questioning, and voluntarily went to the police station.[51] Finally, the court considered the manner of the interrogation, including whether the detective used "threats, promises, or deceptions."[52] The detective, who was neither confrontational nor intimidating, did not threaten, injure, detain, or question SPC Bresnahan for a prolonged amount of time.[53] The court acknowledged that the detective may have exploited SPC Bresnahan's "emotional ties" to Austin by emphasizing that the doctors needed to know what happened in order to save Austin's life.[54] Since these statements painted an "accurate picture of what was happening to Austin,"[55] however, the CAAF found that the mere existence of a causal connection between such exploitation and the making of the statement did not transform SPC Bresnahan's otherwise voluntary confession into an involuntary one.[56]

Therefore, based on the totality of the circumstances, the CAAF held that SPC Bresnahan's confession was voluntary.[57]

The Effect of an Ambiguous Invocation of the Right to Remain Silent: *United States v. Rittenhouse*[58]

If a suspect invokes his rights under Article 31(b) or *Miranda*, the interrogation must stop immediately.[59] If the suspect invokes his right to remain silent, the suspect is only entitled to a "temporary respite" from questioning, which the government must scrupulously honor.[60] If the suspect invokes his right to counsel in response to a *Miranda* warning, the government cannot interrogate the suspect further "until counsel has been made available to him, unless the accused himself initiates further communication, exchanges, or conversations with the police."[61]

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[46] *Id.* at 141 (quoting United States v. Bubonics, 45 M.J. 93, 95 (1996)).

[47] *Id*.

[48] *Id*.

[49] *Id*. at 142.

[50] *Id*. at 141.

[51] *Id*.

[52] *Id*. at 142.

[53] *Id*.

[54] *Id*.

[55] *Id*.

[56] *Id*.

[57] *Id*.

[58] 62 M.J. 509 (Army Ct Crim. App. 2005).

[59] MCM, *supra* note 10, MIL. R. EVID. 305(f)(1).

[60] Michigan v. Mosely, 423 U.S. 96 (1975). *Mosely* is considered the seminal case in this area of criminal law. In *Mosley*, the defendant exercised his right to remain silent after a police officer advised the defendant of his *Miranda* rights. *Id.* at 97. "The police officer immediately ceased the interrogation . . . and the defendant was then taken to a cell." *Id.* at 96. Several hours later, another police officer took the defendant to a different part of the building and, after advising him of his *Miranda* rights, questioned him concerning an unrelated offense. The defendant made an incriminating statement. The Court found that admission in evidence of defendant's incriminating statement did not violate *Miranda* principles. *Id.* at 97. *See also* United States v. Watkins, 34 M.J. 344 (C.M.A. 1992). In *Watkins*, the suspect invoked his right to remain silent, but did not request a lawyer. The questioning ceased and the suspect was allowed to leave the investigator's office. Later that evening, the investigator went to the suspect's military quarters to re-interview the suspect. *Id.* at 345. The investigator reminded Watkins of the earlier rights warning. The court found the investigator to have "scrupulously honored" the suspect's assertion of his right to remain silent. *Id.* at 346-47.

[61] Edwards v. Arizona, 451 U.S. 477 (1981); *see also* United States v. Harris, 19 M.J. 331 (C.M.A. 1985) (applying *Edwards* to military interrogations).

The law is quite clear that once a suspect initially waives his Article 31(b) or *Miranda* rights, only an unambiguous request for counsel will constitute an "invocation" and interrogators are not required to stop questioning to clarify an ambiguous request for counsel.[62] The legal effect of a suspect's ambiguous request to remain silent, however, evidently needed further clarification. The ACCA provided that clarification in *United States v. Rittenhouse*—holding that interrogators need not stop questioning a suspect upon an ambiguous invocation of the right to remain silent.[63]

Sergeant (SGT) Rittenhouse was charged with three violations of Article 134, UCMJ, including two specifications alleging conduct in violation of the Child Pornography Prevention Act[64] and one specification alleging conduct prejudicial to good order and discipline or service discrediting by possessing "visual depictions of minors engaging in sexually explicit conduct."[65] The government appealed "the military judge's decision to suppress evidence seized from SGT Rittenhouse's (appellee's) barracks room and to suppress oral statements and a portion of the written statement made by appellee to law enforcement officials."[66]

After receiving a report that another Soldier had seen sexually explicit pictures of children on SGT Rittenhouse's computer, the U.S. Army Criminal Investigation Command (CID) contacted SGT Rittenhouse's unit to have him report to the local CID office.[67] At the CID office, Special Agent (SA) Kristie Cathers informed SGT Rittenhouse, who the government concedes was in custody, that he was suspected of possessing child pornography. Agent Cathers also read SGT Rittenhouse his rights under Article 31, UCMJ, and *Miranda*.[68] Sergeant Rittenhouse waived his rights and agreed to make a statement without the presence of a lawyer.[69] He also signed a consent to search form, which allowed investigators to search his barracks room.[70] While other CID agents searched SGT Rittenhouse's room, SA Cathers continued interviewing SGT Rittenhouse.[71] Approximately an hour and a half into the interview, SA Cathers provided SGT Rittenhouse with a blank sworn statement form and asked him to write down what they had discussed and not to "close out" the statement since they would continue with a question-and-answer session following his written narrative.[72] Agent Cathers then left the room. When she returned, SA Cathers read SGT Rittenhouse's statement and noticed "he had written 'End of Statement' at the end of his narrative."[73] Assuming that SGT Rittenhouse "was a squared away-away NCO," who automatically wrote "End of Statement" at the end of all sworn statements, SA Cathers did not seek clarification.[74] Instead, SA Cathers lined through the words "End of Statement," directed SGT Rittenhouse to initial next to the crossed out language, and continued the interview by recording her questions and SGT Rittenhouse's answers on the remainder of the form.[75]

In addition to other motions to suppress, the defense moved to suppress all statements SGT Rittenhouse made after he allegedly invoked his right to silence by writing "End of Statement" at the end of his narrative.[76] "The military judge held that so much of [SGT Rittenhouse's] statement that preceded the words 'End of Statement' was admissible. However, she further held "that writing 'End of Statement' was an ambiguous or equivocal invocation of the right to remain silent."[77] The military judge found that SA Cathers was required to stop questioning or clarify what SGT Rittenhouse meant by writing

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[62] Davis v. United States, 512 U.S. 452 (1994).

[63] *Rittenhouse*, 62 M.J. at 512.

[64] 18 U.S.C.S. § 2252A (LEXIS 2006).

[65] *Rittenhouse*, 62 M.J. at 509-10.

[66] *Id.* at 509.

[67] *Id*. at 510.

[68] *Id*.

[69] *Id*.

[70] *Id*.

[71] *Id*.

[72] *Id*.

[73] *Id*.

[74] *Id*.

[75] *Id*. at 510-11.

[76] *Id*. at 510.

[77] *Id*. at 511.

"End of Statement"[78] before continuing the interrogation. The military judge held that any statements (oral or written) following the words "End of Statement" were inadmissible.[79]

The government appealed the military judge's decision under Article 62, UCMJ,[80] and ACCA vacated the military judge's rulings.[81] The ACCA agreed with the military judge's findings that writing "End of Statement" amounted to an ambiguous or equivocal invocation of the right to remain silent.[82] Nevertheless, the court disagreed with the military judge on the legal effect of SGT Rittenhouse's equivocal invocation.[83] The court noted that in *Davis v. United States*,[84] the Supreme Court held that following a knowing and voluntary waiver, the requirement for law enforcement to cease interrogating a suspect (i.e., the *Edwards* Bar[85]) is not triggered until and unless the suspect *clearly* requests an attorney.[86] Therefore, law enforcement need not clarify ambiguous requests for counsel.[87] Acknowledging that *Davis* involved an ambiguous invocation of the right to counsel, rather than the right to remain silent, ACCA noted that CAAF has also held that "[o]nce a suspect waives the right to silence, interrogators may continue questioning unless and until the suspect unequivocally invokes the right to silence."[88] Following these decisions, the ACCA held "that, after a suspect has waived his right to remain silent, if he subsequently makes an ambiguous or equivocal invocation of his right to remain silent, law enforcement agents have no duty to clarify the suspect's intent and may continue with questioning."[89] Accordingly, the ACCA found that SA Cathers had no duty to clarify what SGT Rittenhouse meant when he wrote "End of Statement" and, thus, vacated the military judge's ruling to suppress SGT Rittenhouse's statements.[90]

Will the *McOmber*[91] Rule Stand?

Thirty years ago, in *United States v. McOmber*, the United States Court of Military Appeals announced a notification to counsel rule requiring an investigator to afford a suspect's counsel reasonable opportunity to be present during any questioning of the suspect.[92] The court held that a statement taken in violation of this prophylactic rule is involuntary under Article 31(b), UCMJ.[93] In 1980, the President of the United States adopted the *McOmber* Rule when he promulgated Military Rule of Evidence (MRE) 305, Notice to Counsel.[94] However, in response to Supreme Court cases distinguishing the right to counsel rules under the Fifth and Sixth Amendments, the President eliminated the notification requirement from MRE 305 in 1994.[95] Nevertheless, over a decade later, the viability of the *McOmber* Rule remains uncertain, because the CAAF has never specifically overruled its holding.

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[78] *Id*.

[79] *Id*.

[80] UCMJ art. 62 (2005).

[81] *Rittenhouse*, 62 M.J. at 512.

[82] *Id*. at 511.

[83] *Id*. at 512.

[84] 512 U.S. 452, 462 (1994).

[85] Edwards v. Arizona, 451 U.S. 477 (1981) (holding that if the suspect invokes his right to counsel in response to a *Miranda* warning, the government cannot interrogate the suspect further "until counsel has been made available to him, unless the accused himself initiates further communication, exchanges, or conversations with the police.").

[86] 62 M.J. at 512. (citing *Davis*, 512 U.S. at 462).

[87] *Id*.

[88] *Id*. (quoting United States v. Lincoln, 42 M.J. 315, 320 (1995)).

[89] *Id*.

[90] *Id*.

[91] United States v. McOmber, 1 M.J. 380 (C.M.A. 1976).

[92] *Id*.

[93] *Id*.

[94] *See* MCM, *supra* note 10, MIL. R. EVID. 305(e) analysis, at A22-15 (stating that rule 305(e) "is taken from United States v. McOmber, 1 M.J. 380 (C.M.A. 1976)").

[95] *See id.*

> *1994 Amendment:* Subdivision (e) [of Mil R. Evid. 305] was amended to conform military practice with the Supreme Court's decisions in Minnick v. Mississippi, 498 U.S. 146 (1990), and McNeil v. Wisconsin, 501 U.S. 171 (1991). Subdivision (e) was

Does *McOmber* still stand or has it been broken? This term, the CAAF should issue a final determination in *United States v. Finch*,[96] a case the court granted review to determine, among other things, the continued validity of the prophylactic notification to counsel rule it set forth almost thirty years ago.[97]

Staff Sergeant (SSgt) James Finch, a recruiter in the United States Marine Corps, was under orders to have no further contact with Jennifer Keely, a recruit awaiting entry on active duty under the Delayed Entry Program.[98] Against orders, SSgt Finch met with the recruit.[99] After socializing and drinking alcohol for approximately three hours, SSgt Finch and Ms. Keely drove to a nearby lake where they drank more alcohol.[100] Although it is unclear who was driving the car when they left the lake, Keely's car hit a tree and she was killed instantly. Staff Sergeant Finch was tried by a general court-martial and convicted of "conspiracy, failure to obey a general order, failure to obey a lawful order, making a false official statement, and being drunk on duty, in violation of Articles 81, 92, 107, and 112, Uniform Code Of Military Justice, §§ 881, 892, 907, and 912. [Staff Sergeant Finch] was acquitted of involuntary manslaughter."[101]

Staff Sergeant Finch appealed his conviction to the Navy-Marine Corps Court of Criminal Appeals (NMCCA). In one of SSgt Finch's eight assignments of error, "he contends that the military judge erred in failing to suppress involuntary statements made by [SSgt Finch] in violation of his right to counsel."[102]

As part of the military investigation,[103] which was separate from a local police investigation, SSgt Finch was ordered to meet with an investigating officer from the regional recruiting station.[104] The investigating officer properly advised SSgt Finch of his rights under both Article 31(b) and *Miranda* and obtained a valid waiver of those rights.[105] The investigating officer, however, never notified SSgt Finch's civilian defense counsel of the interview.[106]

Although SSgt Finch never told the investigating officer that he had retained counsel, prior to the interview, a police detective informed the investigating officer that SSgt Finch "had retained a 'hot shot lawyer.'"[107] The defense asserted that the investigating officer's "failure to notify his civilian defense counsel renders his statements involuntary by the rule set forth in *United States v. McOmber*."[108] The military judge denied the suppression motion, finding that although the investigating officer knew SSgt Finch was represented by civilian defense counsel, he had "voluntarily waived his right to have his attorney present."[109] The military judge also found that SSgt Finch was not in custody during the interview; therefore, the *Miranda* right to counsel had not been triggered.[110]

In a cursory portion of an unpublished opinion, the NMCCA affirmed the military judge's findings on the suppression motion.[111] The NMCCA acknowledged the conflict between the current MRE 305(e) and the notification to counsel

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> divided into two subparagraphs to distinguish between the right to counsel rules under the Fifth and Sixth Amendments and to make reference to the new waiver provisions. . . .

Id.

[96] United States v. Finch, No. 200000056, 2005 CCA LEXIS 77 (N-M Ct. Crim. App. Mar. 10, 2005) (unpublished), *review granted*, 2005 CAAF LEXIS 1345 (Nov. 14, 2005).

[97] *See Finch*, 2005 CAAF LEXIS 1345.

[98] *Finch*, 2005 CCA LEXIS 77, at *2.

[99] *Id.* at *2-3.

[100] *Id*. at *4.

[101] *Id.* at *1.

[102] *Id*. at *24.

[103] The command conducted a JAGMAN Investigation. *See* U.S. DEP'T OF NAVY, JAG INSTR. 5800.7D, MANUAL OF THE JUDGE ADVOCATE GENERAL (JAGMAN) (15 Mar. 2004).

[104] *Finch*, 2005 CCA LEXIS 77, at *24.

[105] *Id.* at *29.

[106] *Id.* at *25.

[107] *Id.* at *24.

[108] *Id.* at *24 (citing United States v. McOmber, 1 M.J. 380 (C.M.A. 1976)).

[109] *Id.* at *26.

[110] *Id.* at *27.

[111] *See id.* at *29.

requirement set forth in *McOmber*.[112] Then, without any further analysis on *McOmber*, albeit citing numerous cases,[113] the NMCCA sidestepped the *McOmber* issue and found that "[e]ven assuming the continuing validity of *McOmber*, . . . the military judge could have properly concluded that [SSgt Finch] knowingly and voluntarily waived his right to have counsel present."[114] To determine the overall voluntariness of the statements, the NMCCA assessed the totality of the circumstances surrounding SSgt Finch's statement, rather than analyze the statements under *McOmber* and its progeny.[115] The court found that the statements were voluntarily made and that "[t]he absence of custody dictates that [SSgt Finch's] right to counsel under MRE 305(e)(1) was not violated."[116]

Is an investigator required to notify a suspect's counsel before interviewing that suspect? Congress, through Article 31, imposes no such requirement. The President, through the MRE, imposes no such requirement. The Supreme Court, through caselaw, even frowns on such a requirement.[117] Will the CAAF continue to impose such a requirement? In *Finch*, the court will have the opportunity to finally rule on this issue.[118]

Conclusion

The 2005 term for the military courts was an uneventful year in the area of self-incrimination. The *Bresnahan* court simply applied the well-established totality of the circumstances test to determine that statements were voluntarily made. The *Rittenhouse* court took well-established law regarding the legal effect of an ambiguous invocation of the right to counsel and applied it to an ambiguous invocation of the right to remain silent. Although military practitioners won't glean anything new from these cases, they should look forward to the CAAF's ruling in *United States v. Finch* in which the CAAF should finally settle the issue of whether an investigator is required to notify a suspect's counsel before interviewing a suspect who has waived his right to the presence of that counsel.

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[112] *See id.* at *25 (stating that "We note that 'there is some question as to whether *McOmber* continues to properly state the law owing to subsequent case law developments and changes to Mil. R. Evid. 305(e).'") (quoting United States v. Allen, 54 M.J. 854, 857 (A.F. Ct. Crim. App. 2001))).

[113] *See id.* at *27 (citing United States v. Payne, 47 M.J. 37, 44 (1997); United States v. LeMasters, 39 M.J. 490, 492 (C.M.A. 1994); United States v. Courney, 11 M.J. 594, 596 (A.F.C.M.R. 1981)).

[114] *Id.* at *27.

[115] *Id.* at *28.

[116] *Id.* at *29.

[117] *See* McNeil v. Wisconsin, 501 U.S. 171, 180-182 (1991).

[118] *See* United States v. Finch, 2005 CAAF LEXIS 1345 (2005) (granting review on the issue of "[w]hether the military judge erred to the substantial prejudice of the appellant when he failed to suppress appellant's statement in accordance with this court's ruling in *United States v. McOmber*, 1 M.J. 380 (C.M.A. 1976), and the Fifth Amendment to the United States Constitution").

Another Broken Record—The Year in Court-Martial Personnel, Voir Dire and Challenges, and Pleas and Pretrial Agreements

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Introduction

Baseball legend Yogi Berra once stated, "I always thought that record would stand until it was broken."[1] While Yogi's statement refers to a baseball statistic, his quote applies equally to trial attorneys and judges who believed that their "record" of trial would stand until it was later broken under appellate scrutiny. This article discusses recent developments in the areas of court-martial personnel, voir dire and challenges, and pleas and pre-trial agreements and focuses on issues involving potential "record-breaking" errors. This article discusses opinions from the Court of Appeals for the Armed Forces (CAAF) and the military's service courts and attempts to discern trends and practical implications for the field.[2] The CAAF's most important, and controversial, decision this term in the area of court-martial personnel set limitations on a military judge's ability to consider collateral matters in crafting a sentence.[3] In the area of voir dire and challenges, the CAAF issued a groundbreaking decision that the mandate placed on military judges to liberally grant challenges for cause applies only to defense challenges.[4] Likewise, the President, by Executive Order, drastically changed the voir dire landscape by amending Rule for Courts-Martial (RCM) 912(f)(4), the "But For Rule," to "preclude further consideration of the challenge of [an] excused member upon later review" if that member is peremptorily excused by either party.[5] In the pleas and pre-trial agreements arena, the appellate courts, as in years past, continue to reverse findings, sentences, or both because the record of trial lacks a sufficient factual predicate outlining the accused's criminal misconduct.[6]

Court-Martial Personnel

Referral Issues

Two referral issues arose this year that warrant discussion. First, the Navy-Marine Court of Criminal Appeals (NMCCA) explored the power of all convening authorities to refer a case[7] and, second, the Army Court of Criminal Appeals (ACCA) clarified the indicia needed to establish an acting commander or successor commander's personal selection of court-martial members.[8]

In *Jones*, after allegations of an improper relationship with a midshipman at the U.S. Naval Academy, the accused was reassigned to Quantico, Virginia.[9] The Quantico General Court Martial Convening Authority (GCMCA) referred to a special-court-martial the following specifications against the accused: fraternization, assault, drunk and disorderly, and

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[1] Yogi Berra, Yogi Berra Quotes: "Yogi-isms," http://www.umpirebob.com/DATA/yogiisms.htm (last visited Apr. 26, 2006).

[2] *See* Major Deidra J. Fleming, *Out, Damned Error Out, I Say! The Year in Court-Martial Personnel, Voir Dire and Challenges, and Pleas and Pretrial Agreements*, ARMY LAW., May 2005, at 1; *see also* Lieutenant Colonel Patricia A. Ham, *Crossing the I's and Dotting the T's: The Year in Court-Martial Personnel, Voir Dire and Challenges, and Pleas and Pretrial Agreements*, ARMY LAW., July 2004, at 10; Major Bradley J. Huestis, *You Say You Want a Revolution: New Developments in Pretrial Procedures,* ARMY LAW., Apr./May 2003, at 17 [hereinafter Huestis, *Revolution*]; Major Bradley J. Huestis, *New Developments in Pretrial Procedures: Evolution or Revolution?*, ARMY LAW., Apr. 2002, at 20 [hereinafter Huestis, *Evolution*].

[3] United States v. McNutt, 62 M.J. 16 (2005).

[4] United States v. James, 61 M.J. 132 (2005).

[5] *See* Exec. Order No. 13,387, 70 Fed. Reg. 60697 (Oct. 18, 2005); MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 912(f)(4) (2005) [hereinafter MCM].

[6] *See* United States v. Gilchrist, 61 M.J. 785 (Army Ct. Crim. App. 2005); United States v. Harding, 61 M.J. 526 (Army Ct. Crim. App. 2005); United States v. Jackson, 61 M.J. 731 (N-M. Ct. Crim. App. 2005); United States v. Littleton, 60 M.J. 753 (Army Ct. Crim. App. 2004); United States v. Sierra, 62 M.J. 539 (Army Ct. Crim. App. 2005).

[7] United States v. Jones, 60 M.J. 917 (N-M. Ct. Crim. App. 2005).

[8] *Gilchrist*, 61 M.J. at 785.

[9] *Jones*, 60 M.J. at 917.

indecent language.[10] At trial, the military judge dismissed the fraternization specification for failure to state an offense. The record of trial failed to reflect the status of the additional offenses, but the parties' subsequent actions on the case support the inference that, at some point, all specifications were dismissed without prejudice.[11]

After the government's dismissal of the additional offenses, a routine change of command occurred at Quantico. Thereafter, the Naval Academy Staff Judge Advocate, on behalf of the Naval Academy Superintendent (Commander), requested the new Quantico GCMCA to refer charges anew based on additional misconduct.[12] After further investigation, the new Quantico GCMCA did not re-refer any charges but stated that he would make the accused available if the Naval Academy GCMCA desired to refer charges.[13] The Naval Academy GCMCA then referred charges, including those specifications previously referred and those specifications involving the alleged additional misconduct. The military judge dismissed all the charges without prejudice on grounds of an improper referral.[14] The military judge found the referral improper for the following two reasons: (1) a disagreement existed between the two convening authorities as to an appropriate disposition that required resolution by the first common superior to both authorities and (2) the second referral was more onerous and RCM 604(b)[15] required the government to include on the record the reasons for the original withdrawal of charges and subsequent re-referral.[16]

The NMCCA scrutinized both reasons and, regarding the first issue, stated that "a command other than the one to which the accused is attached may refer charges against the accused to a court-martial."[17] The Discussion to RCM 601(b), which outlines the ability of a GCMCA to refer charges, states that:

> [t]he convening authority may be of any command, including a command different from that of the accused, but as a practical matter the accused must be subject to the orders of the convening authority or otherwise under the convening authority's control to assure the appearance of the accused at trial. The convening authority's power over the accused may be based upon agreements between the commanders concerned.[18]

The NMCCA held that the military judge incorrectly found a disagreement between the two convening authorities.[19] The Quantico GCMCA simply made the accused available to the Naval Academy GCMCA for referral of charges as provided for in the Discussion to RCM 601(b).[20] The convening authorities, however, did not disagree over who would refer the case, so it was unnecessary to raise the issue to the first common superior to both commands.[21] Further, the military judge erred in finding the re-referral more onerous and requiring an explanation by the government under RCM 604(b).[22] The court recognized that more serious offenses were referred than originally referred, but the test under RCM 604(b) is whether those more onerous specifications were "re-referred."[23] The court stated "[b]ecause [those more onerous] charges were never

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[10] *Id.* at 918.

[11] *Id.*

[12] *Id.* This alleged additional misconduct included forcible sodomy and indecent assault. *Id.*

[13] *Id.*

[14] *Id.* at 918-19. The government filed an appeal under RCM 908. *Id.*

[15] MCM, *supra* note 5, R.C.M. 604(b). The Discussion to RCM 604(b) states "the reasons for the withdrawal and later referral should be included in the record of the later court-martial, if the later referral is more onerous to the accused." *Id.* R.C.M. discussion.

[16] *Jones*, 60 M.J. at 919.

[17] *Id.*

[18] *See* MCM, *supra* note 5, R.C.M. 601(b) discussion.

[19] *Jones*, 60 M.J. at 919.

[20] *Id.* at 920.

[21] *Id.*; *see* United States v. Blaylock, 15 M.J. 190, 193-94 (C.M.A. 1983) (holding that a GCMCA frustrated in gaining referral control over an accused may elevate the case to the common superior of both GCMCAs).

[22] *Jones*, 60 M.J. at 921.

[23] *Id.*

referred to trial by the original convening authority, the Superintendent of the Naval Academy was free to refer them to court-martial without explanation" under RCM 604(b).[24]

In today's "purple"[25] environment, *Jones* emphasizes to practitioners that any convening authority may, under RCM 601(b), refer a case against any Soldier, Airman, Marine or Sailor under their command. If the servicemember is not under the convening authority's command, he may still refer charges if the accused's GCMCA agrees. Only if a disagreement exists between the accused's GCMCA and a GCMCA desiring to refer charges against a servicemember not under his command does the need arise to elevate the case to the next common superior in the chain of command. While the NMCCA affirmed *Jones*, the case also reminds practitioners to document any actions taken in a case, including the withdrawal of specifications, to clarify any factual situations for the appellate court.

The second referral issue this year involves the indicia needed to establish an acting or successor commander's personal selection of court-martial members. This issue arises when an acting or successor commander uses another GCMCA's court-martial convening order (CMCO) to refer a case. An acting or new convening authority must personally select the members listed in the CMCO[26] Until recently, ACCA opinions differed on the indicia necessary to establish an acting or successor commander's personal adoption of members from another GCMCA's CMCO.[27] One ACCA panel, in an unpublished decision, "decline[d] to adopt a presumption that a referral order by a convening authority also supports the conclusion that that convening authority personally selected or adopted the members."[28] The ACCA, in a published opinion, clarified its position this term, holding that no requirement exists for a convening authority or an acting convening authority during referral to expressly adopt a CMCO selected by another GCMCA.[29]

In *United States v. Gilchrist*, the Acting Commander, Colonel (COL) Wallace B. Hobson, Jr., referred the accused's case to CMCO Number 3, whose members were originally selected by Major General (MG) Green.[30] At court-martial, the government notified the defense that MG Green selected the members for CMCO Number 3, the military judge twice clarified that COL Hobson was the Acting Commander, and the defense did not challenge COL Hobson's personal selection of the members.[31] On appeal, appellate defense counsel asserted, for the first time, that the record of trial lacked evidence that COL Hobson personally selected the members in CMCO Number 3 as required by Article 25, UCMJ.[32] The ACCA, affirming, held that "[a]bsent evidence to the contrary, adoption can be presumed from the convening authority's action in sending the charges to a court-martial whose members were selected by a predecessor in command" without the necessity of further documentation.[33]

For Army practitioners, *Gilchrist* clears the muddy waters as to an acting commander's or successor commander's need to document his personal selection of members when using a previously selected CMCO. The mere act of referral, absent evidence to the contrary, establishes the commander's personal selection of members, as required by Article 25, UCMJ.

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[24] *Id.*

[25] Purple refers to a joint operational environment that includes servicemembers and units from all of the United States' armed forces.

[26] *See* UCMJ art. 25 (d)(2) (2005); *see also* United States v. Ryan, 5 M.J. 97, 100 (C.M.A. 1978) (holding a "convening authority's power to appoint a court-martial is one accompanying the position of command and may not be delegated").

[27] *See* United States v. Starks, No. 20020224 (Army Ct. Crim. App. Mar. 10, 2004) (unpublished) (holding that "while there is no explicit statement of adoption of the selection of court members by the successor-in-command, we are not aware of any authority that so requires"). Contrary ACCA opinions, which are no longer available on the ACCA website, required a predecessor in command to expressly adopt the panel members selected by a previous commander. *See* United States v. Jost, No. 20030975 (Army Ct. Crim. App. Mar. 29, 2005) (unpublished); United States v. Meredith, Jr., No. 20021184 (Army Ct. Crim. App. Jan. 27, 2005) (unpublished) (on file with the author). These rulings appear overruled by the *Gilchrist* decision *See infra* note 29.

[28] *Jost*, No. 20030975, at 5. The court stated "[b]y the simple expedient of attaching and correctly referencing a predecessor's recommended CMCO in the referral documents, [staff judge advocates] can ensure that the codal responsibilities of the convening authority are clearly met." *Id.*

[29] United States v. Gilchrist, 61 M.J. 785 (Army Ct. Crim. App. 2005).

[30] *Id.* at 787.

[31] *Id.* at 787-88.

[32] *Id.* at 787.

[33] *Id.* at 788 (citing United States v. Brewick, 47 M.J. 730 (N-M. Ct. Crim. App. 1997)).

Article 25, UCMJ, requires that any "request for membership of the court-martial to include enlisted persons [to] be in writing and signed by the accused or [to] be made orally on the record" by the accused.[34] Similarly, Article 16, UCMJ, requires the accused to state orally on the record or in writing his desire for his case to be tried by military judge alone.[35] Last year, the service courts issued several opinions dealing with the accused's failure to comply with Articles 25 and 16, UCMJ;[36] this past term, the CAAF dealt with the same issue.[37]

In *Alexander*, the military judge advised the accused of his forum selection rights, which the accused, through counsel, requested to defer.[38] During a later proceeding, the military judge stated that he was told an enlisted panel would hear the case; defense did not object to the military judge's statement.[39] An enlisted panel was sworn and the parties conducted voir dire and issued challenges; however, the accused never stated in writing or on the record his request for enlisted members.[40] The CAAF, affirming, stated that the accused's failure to make a personal election of forum on the record was a procedural, as opposed to jurisdictional, error.[41] The court stated "[the] right being addressed and protected in Article 25 is the right of an accused servicemember to select the forum by which he or she will be tried. The underlying right is one of forum selection, not the ministerial nature of its recording."[42] The issue then turns on whether the accused's substantial rights were materially prejudiced by the administrative error.[43] The court held if the record reflects, by a totality of the circumstances, that the accused personally elected members, then no material prejudice occurs to the accused's substantial rights.[44] The CAAF, reviewing the totality of the circumstances in *Alexander*, found that the record established the accused's personal selection of trial by panel members and concluded that the accused did not suffer material prejudice.[45]

As discussed last year:

> The obvious fix to a forum selection problem is to ensure the accused submits a personally signed written request to the court or advises the military judge on the record of his election choice [and] [e]ven if this

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[34] UCMJ art. 25(c)(1) (2005); *see* MCM, *supra* note 5, R.C.M. 903(b)(1).

[35] UCMJ art. 16.

[36] *See* Fleming, *supra* note 2, at 5-7; *see also* United States v. Andreozzi, 60 M.J. 727 (Army Ct. Crim. App. 2004) (holding that under the totality of the circumstances the accused personally directed the election of an enlisted panel); United States v. Goodwin, 60 M.J. 849 (N-M. Ct. Crim. App. 2005) (determining that the military judge's failure to advise the accused of his forum rights materially prejudiced the accused's right to forum selection and warranted reversal); United States v. Follord, No. 20020350 (Army Ct. Crim. App. Feb 15, 2005) (unpublished) (finding that numerous errors in apprising the accused of his rights to a five member officer panel did not comply with Article 16, UCMJ).

[37] United States v. Alexander, 61 M.J. 266 (2005).

[38] *Id.* at 267.

[39] *Id*. at 267-68. The military judge stated: "On Monday, I intend to impanel – I believe I was told – an enlisted panel in this case, and we're going to go forward with trial." *Id.*

[40] *Id.* at 268.

[41] *Id.* at 269-70 (citing United States v. Morgan, 57 M.J. 119 (2002); United States v. Townes, 52 M.J. 275 (2000); United States v. Turner, 47 M.J. 348 (1997); United States v. Mayfield, 45 M.J. 176 (1996)).

[42] *Id*. at 270.

[43] *Id.*

[44] *Id.*

[45] *Id.* The court identified the following factors as relevant:

> The military judge presented Appellant with his options. Appellant acknowledged his options and deferred election. The military judge subsequently stated on the record that an election had been made for a panel including members, without comment or correction by counsel or Appellant. Appellant proceeded through voir dire and trial with a panel of one-third enlisted members, without objection. Indeed, Appellant did not raise the question of selection and prejudice either in his submissions under R.C.M. 1105 or before the court below.

Id.

process is skipped at court-martial, the military judge could convene a post-trial Article 39, UCMJ session to clarify any omission.[46]

By taking notes at every court-martial session and recording whether the accused has made a personal election of forum orally on the record or in writing, government counsel and military judges could more easily track and resolve any potential error. Even if the parties fail to correct the mistake at trial, the CAAF, based on *Alexander*, seems likely to affirm the case if the accused was properly advised of his forum election rights by the military judge and the accused and his counsel failed to object to the actual forum selection on the record at court-martial.

"Bridging the Gap"[47]

During the 2005 term of court, the CAAF explored a military judge's ability to consider collateral matters in deciding an appropriate sentence for an accused.[48] In *McNutt*, the military judge revealed during the "Bridging the Gap" session that he structured the accused's sentence to take into account good time credit.[49] The military judge said he sentenced the accused to seventy days confinement, thinking under the good time credit policy that the accused would receive ten days good credit towards his sentence, so the actual amount of confinement would equal sixty days.[50] In post-trial clemency matters and on appeal, defense argued that the military judge improperly considered the Army's "good time" credit policy when it was neither judicially noticed nor admitted into evidence.[51] The government argued under RCM 1008, dealing with sentence impeachment, that: "[a] sentence which is proper on its face may be impeached only when extraneous prejudicial information was improperly brought to the attention of a member, outside influence was improperly brought to bear upon any member, or unlawful command influence was brought to bear upon any member."[52]

The ACCA then focused on whether the information was (1) extraneous, and (2) if extraneous, whether it was improperly brought before the military judge.[53] The court held the evidence was extraneous—"[the] regulation was not mentioned at trial, admitted into evidence, or judicially noticed . . . [a]s such, the information relied upon by the military judge was clearly 'extraneous.'"[54] This extraneous information, however, was not improperly before the military judge, as it was "within the general and common knowledge a military judge brings to deliberations;" and, as such, ACCA found no basis for impeaching the accused's sentence.[55]

The CAAF, reversing the ACCA decision, held that the military judge improperly considered the collateral administrative effect of "good time" credit.[56] The CAAF reasoned that "sentence determinations should be based on the facts before the military judge and not on the possibility that [the accused] may serve less time than he was sentenced to based on the Army's policy."[57] A military judge must sentence the accused based on the particular facts of the case as presented at court-martial.[58] "'Good time' credited is awarded as a consequence of the convicted servicemember's future behavior—

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[46] Fleming, *supra* note 2, at 6; *see also* United States v. Mayfield, 45 M.J. 176, 177-78 (1996) (holding that a post-trial advisement of the accused's forum rights by the military judge is authorized).

[47] "Bridging the Gap" refers to a discussion about the case between the military judge, the trial counsel, and the defense counsel after the court-martial's adjournment.

[48] United States v. McNutt, 62 M.J. 16 (2004).

[49] *Id.* at 18.

[50] *Id.* At that time of the accused's court-martial, the Army's policy was "to credit service members with 5 days per month of 'good time' on sentences of 12 months or less." *Id.*; *see* U.S. DEP'T OF ARMY, REG. 633-30, APPREHENSIONS AND CONFINEMENT: MILITARY SENTENCES TO CONFINEMENT para. 10a (28 Feb. 1989).

[51] *McNutt*, 62 M.J. at 18.

[52] MCM, *supra* note 5, R.C.M. 1008.

[53] United States v. McNutt, 59 M.J. 629 (Army Ct. Crim. App. 2003).

[54] *Id.* at 632.

[55] *Id.*

[56] *McNutt*, 62 M.J. at 20.

[57] *Id.*

[58] *Id.*

behavior that may or may not take place."[59] The CAAF, like ACCA, reminded military judges not to reveal their deliberative thought process stating "the core of the deliberative process remains privileged, and military judges should refrain from disclosing information during 'Bridging the Gap' sessions concerning their deliberations, impressions, emotional feelings, or the mental processes used to resolve an issue before them."[60]

McNutt clearly limits a military judge's ability to consider "good time" credit as a factor in crafting an accused's sentence. *McNutt*, however, leaves unanswered, what, if any, other collateral matters a military judge may consider. Conservative practitioners will likely shy away from considering any collateral matters in deference to the CAAF's "general preference for prohibiting consideration of collateral consequences."[61] Less conservative practitioners may note that the CAAF recognized that "military judges and members should not generally consider collateral consequences in assessing a sentence, this [however] is not a 'bright-line rule.'"[62] Perhaps more importantly, *McNutt* reminds all military trial judges to limit "Bridging the Gap" sessions to a critique of counsel's conduct and to curtail any discussion as to the considerations behind a particular sentence.

Voir Dire and Challenges

Overview

A panel member should not serve where "the interest of having the court-martial free from substantial doubt as to legality, fairness, and impartiality"[63] is questioned. Voir dire is the process used to obtain information regarding a member's impartiality so counsel may intelligently exercise a causal or peremptory challenge.[64] After voir dire of the members, both sides are entitled to unlimited challenges for cause and one peremptory challenge.[65] Until this term,[66] the appellate courts mandated military judges to liberally grant challenges for cause for both sides because of the parties' limited ability to use peremptory challenges.[67]

Rule for Courts-Martial 912(f)(1)(N) allows for a challenge for cause on the following two grounds: (1) actual bias and (2) implied bias.[68] "The test for actual bias is whether any bias is such that it will not yield to the evidence presented and the judge's instructions."[69] Actual bias is determined by the military judge's subjective review of the member's credibility. The CAAF gives "the military judge great deference when deciding whether actual bias exists because it is a question of fact, and the judge has observed the demeanor of the challenged member."[70] Implied bias, however, is an objective standard "viewed through the eyes of the public, focusing on the appearance of fairness."[71] While a military judge's ruling on actual bias is reviewed for an abuse of discretion, "[b]y contrast, issues of implied bias are reviewed under a standard less deferential than abuse of discretion but more deferential than *de novo*."[72]

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[59] *Id.* The CAAF also dismissed the argument that MRE 606(b), which establishes guidelines and protections for sentence impeachment inquiries, applies to military judges, especially when the military judge voluntarily reveals his deliberations. *Id.*; *see* MCM, *supra* note 5, M.R.E. 606(b).

[60] *Id*. at 20.

[61] *Id*. at 19.

[62] *Id.*

[63] MCM, *supra* note 5, R.C.M. 912(f)(1)(N).

[64] *Id.* R.C.M. 912(d) discussion. Counsel's voir dire "should be used to obtain information for the intelligent exercise of challenges." *Id.*

[65] UCMJ art. 41(a)(1) (2005).

[66] *See* United States v. James, 61 M.J. 132 (2005) (holding that the liberal grant mandate applies only to defense challenges for cause).

[67] FRANCIS A. GILLIGAN & FREDERICK I. LEDERER, COURT-MARTIAL PROCEDURE § 15-54.10 (2d ed. 1999) (citing United States v. Smart, 21 M.J. 15 (C.M.A. 1985)).

[68] United States v. Armstrong, 54 M.J. 51 (2000).

[69] United States v. Wiesen, 56 M.J. 172, 174 (2001), *recon. denied*, 57 M.J. 48 (2002).

[70] United States v. Napolitano, 53 M.J. 162, 166 (2000).

[71] United States v. Rome, 47 M.J. 467, 469 (1998).

[72] United States v. Downing, 56 M.J. 419, 422 (2002).

The Liberal Grant Mandate

Prior to *United States v. James*,[73] the CAAF directed military judges that "[t]he proper course of action is to give heed to the mandate for liberality in passing on challenges [for cause]."[74] During the 2005 term, however, the CAAF, in a unanimous decision, held that the liberal grant mandate applies only to defense challenges for cause.[75] In *James*, the accused pleaded guilty to ecstasy use and distribution.[76] During voir dire, the trial counsel questioned a member regarding her views on sentencing in drug cases.[77] The member made the following statement to the trial counsel:

> [I]t almost feels like it is a one shot deal . . . everyone has seen the Air Force Times showing the big drug bust in the Virginia area and all the [accused], and what sentences they have received . . . and it was kind of shocking to me . . . I just thought, wow, these guys made a mistake and look at the punishment for this.[78]

The member also stated that she would feel uncomfortable sitting on the case, that a "young person shouldn't be probably kicked out and put in jail or whatever," but further confirmed that she could perform her court member duties and be fair to both sides.[79] The government challenged the panel member for cause stating that her comments demonstrated an "inelastic predisposition in favor of defense."[80] The military judge granted the government's challenge finding that the member would have an extremely difficult time considering the entire range of punishments.[81]

On review, the CAAF first decided whether the "liberal grant" mandate should apply to government challenges for cause.[82] The court ruled that "[g]iven the convening authority's broad power to appoint [panel members, under Article 25, UCMJ, there is] no basis for application of the 'liberal grant' policy when a military judge is ruling on the government's challenges for cause."[83] A liberal grant policy is neither necessary nor appropriate for the government because the convening authority, at the time of panel member selection, culls through the potential panel member pool and, as required by Article 25, UCMJ, selects the "best qualified" members.[84] Additionally, the court reasoned that the government also "has ample opportunity to affect the makeup of the panel before trial defense has any opportunity for input" because the staff judge advocate may potentially excuse one third of the panel members under RCM 505(c)(1)(B).[85] The CAAF affirmed the case,

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[73] United States v. James, 61 M.J. 132 (2005).

[74] United States v. Smart, 21 M.J. 15, 17 (C.M.A. 1985); *see also* United States v. Reynolds, 23 M.J. 292, 295 (C.M.A. 1987) (stating that "[w]e again take the opportunity to encourage liberality in ruling on challenges for cause. Failure to heed this exhortation only results in the creation of needless appellate issues"); United States v. Moyar, 24 M.J. 635, 638 (A.C.M.R. 1987) (recognizing that "What is being tested is whether the trial judge adhered to the mandate to be liberal in granting challenges for cause – a judicial policy designed to compensate for the fact that a military defendant has only a single peremptory challenge.").

[75] *See James*, 61 M.J. 132.

[76] *Id.* at 133. The accused selected an enlisted panel to decide his sentence.

[77] *Id.* at 137.

[78] *Id.* at 137-38.

[79] *Id.* at 138.

[80] *Id.*

[81] *Id*. The military judge stated:

> It just seems to the court, from viewing her and viewing her expressions as she described the Air Force Times article in regard to those other cases, that she would have an extremely difficult time in sitting on this case and doing just what she promised to do, which was consider the entire range of punishments, just wavering a little bit in that area is cause for concern as well.

Id.

[82] *Id.* at 139.

[83] *Id.*; *see* UCMJ art. 125 (2005) (stating that "the convening authority shall detail . . . such members of the armed forces as, in his opinion, are best qualified for the duty by reason of age, education, training, experience, length of service, and judicial temperament). *Id.*

[84] *James*, 61 M.J. at 139.

[85] *Id.* Rule for Courts-Martial 505 states "[t]he convening authority may delegate, under regulations of the Secretary concerned, authority to excuse individual members to the staff judge advocate or legal officer or other principal assistance to the convening authority." MCM, *supra* note 5, R.C.M. 505(c)(1)(B)(i).

finding that no evidence existed that the military judge applied the liberal grant mandate to his ruling or otherwise abused his discretion in determining that the challenged panel member's responses amounted to actual bias.[86]

The CAAF's ruling is a clear change to the voir dire landscape. An increased burden is placed on the government to articulate specific defined grounds for any desired challenge for cause because the military judge is now prohibited from liberally granting the government's requested challenge. When granting a government challenge for cause, the military judge should state his specific reasoning and clarify that he did not apply the liberal grant mandate. A military judge's specific findings of fact on this issue can assist in protecting his ruling during any later appellate review. Arguably, *James* also indicates the CAAF's dissatisfaction with Article 25, UCMJ, and the court-martial panel member selection process.[87] By limiting the government's casual challenge possibilities because the convening authority selects the panel members, the CAAF appears to indirectly undermine Article 25, UCMJ. Ironically, the CAAF undercuts Article 25, UCMJ, through voir dire cases, as opposed to directly attacking the system when presented with panel selection cases.[88]

Challenges for Cause—Members' Former Interaction with Trial Counsel

Another important voir dire ruling from the CAAF this year involves the potential bias that may arise from a panel member's prior interactions with the trial counsel presenting the case.[89] In *Richardson*, a contested panel case for wrongful possession and distribution of marijuana, four panel members were identified as having a professional relationship with the trial counsel.[90] In response to the military judge's questions,[91] each member advised the military judge that their relationship with the trial counsel would not affect their ability to equally evaluate each side's case.[92] The defense counsel discussed this relationship issue with only one of the four panel members during individual voir dire.[93] After the close of individual voir dire, the defense counsel requested to briefly recall the other three members to discuss their relationship with the trial counsel.[94] The military judge denied defense's request stating "[a]ll members that have said they know [the trial counsel] said that they would not give him any special deference whether for or against him. I trust them on their word and what they've said . . . I think there's been enough that's been brought out [on that]."[95] Defense then challenged for cause, under both the "actual and implied bias" theory, the four members based on their alleged special relationship with the trial counsel.[96] The military judge granted only one of the four requested challenges based on any potential relationship bias.[97]

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[86] *James*, 61 M.J. at 139.

[87] *See* Fleming, *supra* note 2, at 4 (citing Major Christopher Behan, *Don't Tug on Superman's Cape: In Defense of Convening Authority Selection and Appointment of Court-Martial Panel Members*, 176 MIL. L. REV. 190 (2003); Information Paper, Criminal Law Division, U.S. Army, Office of the Judge Advocate General, subject: Rationale for Rule Changes in Light of *Armstrong* and *Wiesen* (6 Dec. 2002) (on file with author) [hereinafter *Armstrong* and *Wiesen* Info. Paper]).

[88] *See* Fleming, *supra* note 2, at 4; *see* United States v. Wiesen, 56 M.J. 172 (2001), *recon. denied*, 57 M.J. 48 (2002). In *Wiesen*, the court held that the military judge erred by failing to grant a defense challenge for cause based against the board president who had an actual or potential command relationship over six of the other nine members of the panel. *Id.* at 175. Because the president and the six other members formed the two-thirds majority necessary to convict, the CAAF determined an "intolerable strain [was placed on the] public perception of the military justice system." *Id.* One interpretation of *Wiesen* is that the CAAF is trying to limit the convening authority's power to select members. In 2004, however, the CAAF decided a panel selection case and refused to overhaul Article 25, UCMJ, providing that "[b]ut long ago regarding this matter of members selection, we stated 'this Court sits as a judicial body which must take that law as it finds it, and that any substitution of a new system of court selection must come from Congress.'" United States v. Dowty, 60 M.J. 163, 176 (2004) (quoting United States v. Kemp, 46 C.M.R. 152 (1973)).

[89] United States v. Richardson, 61 M.J. 113 (2005).

[90] *Id.* at 114.

[91] *Id.* at 114-15.

[92] *Id.*

[93] *Id.* at 115-16. The defense counsel asked the panel member several questions regarding his relationship with the trial counsel. *Id.* The member indicated that he had spoken to the trial counsel approximately six times regarding general legal matters and described him as a good and trusted legal advisor. *Id.*

[94] *Id.* at 116.

[95] *Id.*

[96] *Id.*

[97] *Id.* The military judge granted a challenge for cause against one of the panel members because of the member's extensive drug interdiction experiences and "to a very lesser degree his dealings with the trial counsel." *Id.* at 117.

The NMCCA, affirming, held that the record "does not clearly show that the military judge applied the correct objective standard for implied bias," but the court more importantly held that a factual basis to grant the other three challenges did not exist.[98] The court found that "the trial counsel provided advice to these [challenged] members strictly in their official capacities as commanding officer, operations officer, and executive officer, respectively"[99] and mere official legal representation between a member and a trial counsel, without additional information, does not constitute an implied bias challenge.[100]

The CAAF, reversing, held that the military judge abused his discretion by failing to reopen voir dire to further inquire into the members' relationships with the trial counsel.[101] The CAAF held that "the military judge had a responsibility to further examine the nature of the relationship[s] in the context of the implied bias review, particularly when asked to do so by defense counsel."[102] The requirement to further examine the members is enhanced when the majority of the legal advice rendered by the trial counsel to the members involves criminal law.[103] The CAAF refused to order a *Dubay*[104] hearing because "little prospect" existed that a hearing, five years after the original court-martial, would yield any determinative facts from the three members.[105] The CAAF summarized its ruling as follows:

> [T]his case should not be read to necessarily bar the participation of members who might have had previous or current official contact with the trial participants. To the contrary, we recognize that in a close-knit system like the military justice system, such situations will arise and may at times be unavoidable. But where such situations are identified, military judges should not hesitate to test these relationships for actual and implied bias. And a factual record should be created that will demonstrate to an objective observer that notwithstanding the relationships at issue, the accused received a fair trial. Member voir dire is the mechanism for doing so.[106]

Richardson clearly emphasizes the need to explore any potential panel member's relationship with the trial counsel. Failure to adequately develop the factual context of such a relationship on the record is potential error, particularly when the defense counsel asks for further inquiry. While a military judge is charged with controlling the voir dire process,[107] *Richardson* indicates that a military judge's discretion to limit questioning regarding a member's prior interaction with trial counsel is minimal to non-existent.

Challenges for Cause After Court-Martial

On an issue of first impression, the CAAF determined the standard required to order a rehearing because of a panel member's potential incorrect or false response during voir dire.[108] In *Sonego*, the accused selected officer members for sentencing after pleading guilty to ecstasy use.[109] During group voir dire, a panel member told the military judge that he did

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[98] United States v. Richardson, No. 200101917, 2003 CCA LEXIS 180, at *11 (N-M. Ct. Crim. App. Aug. 22, 2003) (unpublished) (citing United States v. Downing, 56 M.J. 419, 422 (2002)).

[99] *Id.* at *6.

[100] *Id.* at *11.

[101] *Richardson*, 61 M.J. at 119.

[102] *Id.*

[103] *Id.* at 119.

[104] United States v. Dubay, 17 C.M.A. 147 (1967) (authorizing a case's remand from an appellate court for a fact finding hearing).

[105] *Richardson*, 61 M.J. at 120 (citing *Dubay*, 17 C.M.A. 147).

[106] *Id.*

[107] *See* United States v. Dewrell, 55 M.J. 131 (2001) (affirming a military judge's discretion to control voir dire by preventing either side from conducting group voir dire); United States v. Lambert, 55 M.J. 293, 296 (2001) (holding that "neither the UCMJ nor the [MCM] gives the defense the right to individually question the members").

[108] United States v. Sonego, 61 M.J. 1 (2005).

[109] *Id.* at 2.

not have an inelastic predisposition as to the accused's punishment.[110] The members later sentenced the accused to a bad-conduct discharge (BCD), restriction to the limits of his base for two months, forfeiture of five hundred dollars pay per month for twelve months, and reduction to E-1.[111] Approximately one month after the accused's court-martial, his attorney represented another Airman for drug use.[112] During this second contested court-martial, the same panel member, serving again as a panel member, stated during voir dire that any servicemember convicted of a drug offense should receive a BCD.[113] Because the second court-martial resulted in an acquittal, a verbatim transcript was not available. Sonego's defense counsel instead submitted an affidavit to AFCCA requesting a sentence rehearing based on the panel member's different responses.[114] The AFCCA denied the defense's request for a new hearing stating that the accused failed to demonstrate that the panel member incorrectly or dishonestly answered any question at Sonego's court-martial. [115]

The CAAF granted review to determine the "measure of proof required to trigger an evidentiary hearing" based on an allegation of panel member dishonesty.[116] Noting that the federal circuits differ on this issue, the CAAF adopted a "colorable claim" test, requiring "something less than [prima facie] proof of juror dishonesty before a hearing is convened."[117] The court reasoned that the "colorable claim" standard would eliminate any frivolous claims but otherwise keep the door open for claims that could prove valid on further review.[118] The court, ordering a *Dubay* hearing, ruled that the defense attorney's affidavit constituted a "colorable claim" of juror dishonesty warranting a further evidentiary hearing.[119] Judge Crawford dissented, reasoning that the defense counsel raised the issue in an untimely manner.[120] Judge Crawford noted that the defense counsel submitted his affidavit ten months after the second court-martial, that the issue was never raised during post-trial clemency matters, that no other affidavits regarding the panel member's statement were presented to the court, and that the defense did not attempt to obtain the second court-martial's tape recordings.[121] Judge Crawford framed the issue not as a "failure to disclose a material matter of fact, but [as] a potential difference of opinion and, more importantly, [as a] question of when, if ever, [the panel member's] opinion on the matter changed."[122]

Executive Order Change to RCM 912

The most important update this year in the area of voir dire and challenges is the change to RCM 912(f)(4) by Presidential Executive Order 13,387.[123] Prior to the executive order, RCM 912(f)(4) stated:

> [w]hen a challenge for cause has been denied, failure by the challenging party to exercise a peremptory challenge against any member shall constitute waiver of further consideration of the challenge upon later review. *However, when a challenge for cause is denied, a peremptory challenge by the challenging party against any member shall preserve the issue for later review, provided that where the member who was unsuccessfully challenged for cause is peremptorily challenged by the same party, that party must state that*

[110] *Id.* The CAAF noted that the panel member was an active member who asked the military judge questions during the proceeding. *Id.*

[111] *Id.* at 1-2.

[112] *Id*. at 2.

[113] *Id.* An inelastic predisposition as to sentence exists if the member categorically states that the accused should receive a BCD. United States v. Giles, 48 M.J. 60 (1998); *see* MCM, *supra* note 5, R.C.M. 912(f)(1) discussion.

[114] *Sonego*, 61 M.J. at 3.

[115] *Id.*

[116] *Id.*

[117] *Id.* at 4.

[118] *Id.*

[119] *Id.*

[120] *Id.* at 5 (Crawford, J., dissenting). Judge Crawford also ruled that a prima facie showing, as opposed to a "colorable claim" standard, is required to order a rehearing based on potential panel member dishonesty. *Id.*

[121] *Id.* at 6 (Crawford, J., dissenting).

[122] *Id.* (Crawford, J., dissenting).

[123] *See* Exec. Order No. 13,387, 70 Fed. Reg. 60697 (Oct. 18, 2005).

> *it would have exercised its peremptory challenge against another member if the challenge for cause had been granted.*[124]

The authors of the rule and military legal scholars recognized that RCM 912(f)(4) was "a subject of controversy."[125] This controversy centered on a parties' ability to dismiss an objectionable member from court membership with a peremptory challenge while retaining the ability to litigate on appeal the appropriateness of military judge's ruling denying the member's challenge for cause.[126] The rule allowed appellate courts to review, and potentially reverse, a military judge's denied challenge for cause ruling on a potential panel member who was ultimately dismissed from the court-martial and never acted on the accused's case. Opponents to the rule argued that the Supreme Court has ruled that there is no constitutional right to a peremptory challenge, nor is "the Sixth Amendment right to an impartial jury [ ] the Fifth Amendment right to due process is violated when a defendant chooses to peremptorily challenge a juror who should have been excused for cause."[127]

The CAAF, however, focusing on the uniqueness of the military system and the parties' ability to only use one peremptory challenge per Article 41, UCMJ, disregarded the opponents' arguments.[128] In 2001, the CAAF stated "[t]o say that [the accused] cured any error by exercising his one [and only] peremptory challenge against the offending member is reasoning that, if accepted, would reduce the right to a peremptory challenge from one of substance to one of illusion only."[129] The court noted that while the Supreme Court has held the right to peremptory challenge is not constitutional,[130] the President, through RCM 912(f)(4), has the authority to afford more protections to a military accused, to include allowing review of his denied challenge for cause, and "until RCM 912(f)(4) is modified or rescinded, a military accused is entitled to its protections."[131]

In 2005, the President rejected the CAAF's reasoning and modified RCM 912(f)(4) to eliminate the accused's right to appellate review of a denied challenge for cause if a peremptory strike is used by either party on the challenged member.[132] Rule for Courts-Martial 912(f)(4)'s fifth sentence, emphasized in italics in the original rule cited above, was deleted.[133] The fourth sentence was amended as follows:

> When a challenge for cause has been denied, the successful use of a peremptory challenge by either party, excusing the challenged member from further participation in the court-martial, shall preclude further consideration of the challenge of that excused member upon later review, failure by the challenging party to exercise a peremptory challenge against any member shall constitute waiver of further consideration of the challenge upon later review.[134]

This change adopts Supreme Court precedent that a peremptory challenge is not constitutional. The amendment is also a possible response to recent reversals from the CAAF based on a military judge's denial of a challenge for cause on a member who was later peremptorily challenged.[135]

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[124] MCM, *supra* note 5, R.C.M. 912(f)(4) (emphasis added).

[125] *Id.* R.C.M. 912(f)(4) analysis, at A21-61; GILLIGAN & LEDERER, *supra* note 67, §15-57.00.

[126] GILLIGAN & LEDERER, *supra* note 67, § 15-57.00; *Armstrong* and *Wiesen* Info. Paper, *supra* note 89.

[127] United States v. Armstrong, 54 M.J. 51, 54 (2000) (citing United States v. Martinez-Salazar, 528 U.S. 304 (2000)).

[128] *See* UCMJ art. 41 (2005); United States v. Wiesen, 56 M.J. 172, 177 (2001), *recon. denied*, 57 M.J. 48 (2002); *Armstrong*, 54 M.J. at 54-55 (recognizing that in the federal system the parties have several peremptory challenges and Article 41, UCMJ provides for only one peremptory challenge unless additional members are detailed after initial causal and peremptory challenges are granted); United v. Jobson, 31 M.J. 117, 120-21 (C.M.A. 1990).

[129] *Wiesen*, 56 M.J. at 117.

[130] *See* Ross v. Oklahoma, 487 U.S. 81, 88 (1988).

[131] *Armstrong*, 54 M.J. at 55.

[132] *See* Exec. Order No. 13,387, 70 Fed. Reg. 60697 (Oct. 18, 2005).

[133] *Id.*

[134] *Id.*

[135] *See Wiesen*, 56 M.J. at 177; *Armstrong*, 54 M.J. at 55. In *Wiesen*, the accused received an initial sentence of a dishonorable discharge, confinement for twenty years, total forfeitures, and reduction to the grade of E-1 for committing sodomy and indecent act offenses against his children *Wiesen*, 56 M.J. at 173. At retrial, the accused negotiated with the government for a pretrial agreement for five years confinement, forfeiture of all pay and allowances, and reduction to E1. United States v. Wiesen, No. 9801779 (Army Ct. Crim. App. July 16, 2005) (unpublished), *aff'd*, 61 M.J. 153 (2005).

The amendment to RCM 912(f)(4) fails to diminish, and likely increases, the controversy surrounding the rule. This change, as previously discussed by the CAAF, "require[s] an accused, at his peril, to leave the objectionable member on the panel in order to obtain review of the military judge's ruling on his [denied] challenge for cause."[136] Strategically, a defense counsel must decide whether to leave a potentially undesirable member on the panel or to otherwise forego appellate review of the military judge's denial of that member's challenge for cause by striking the member from the court-martial with a peremptory challenge. Likewise, government counsel, if they want to absolutely eliminate the possibility of appellate review of the military judge's ruling, could peremptorily strike the member instead of relying on the defense to later use its peremptory challenge on the member. In that regard, a conservative trial counsel initially could even join in the defense's challenge for cause of a member who creates a close question as to bias.

Pleas

Introduction

The CAAF, in *United States v. Care*, developed the requirements for a guilty plea based on current Supreme Court law.[137] Under *Care*, a guilty plea providence inquiry must:

> [R]eflect not only that the elements of each offense charged have been explained to the accused but also that the military trial judge . . . has questioned the accused about what he did or did not do, and what he intended (where this is pertinent), to make clear the basis for a determination by the military trial judge . . . whether the acts or the omissions of the accused constitute the offense or offenses to which he is pleading guilty.[138]

In 1984, RCM 910, based generally on Article 45, UCMJ, and Rule 11 (pleas) of the Federal Rules of Criminal Procedure (FRCP), codified the *Care* requirements.[139] "The Military Judge's Benchbook provides a detailed script for the military judge to follow to ensure that the mandates of *Care* and subsequent case law expanding the required colloquy are scrupulously followed."[140]

Factual Basis for Plea—Failure to Discuss Elements

During the providence inquiry, a military judge must explain the offense's elements to the accused.[141] "If the military judge fails to do so, he commits reversible error, unless 'it is clear from the entire record that the accused knew the elements, admitted them freely, and pleaded guilty because he was guilty.'"[142] On review, the CAAF will, "rather than focusing on a technical listing of the elements of an offense, look at the context of the entire record to determine whether an accused [was] aware of the elements, either explicitly or inferentially."[143] Failure to discuss a complex offense's elements generally results in reversal whereas failure to discuss a simple offense's elements, while erroneous, is not per se prejudicial to the accused's rights if he expresses a belief in his own guilt and admits the facts necessary to sustain the element.[144] Although the military

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[136] United States v. Jobson, 31 M.J. 117, at 120-21 (C.M.A. 1990).

[137] United States v. Care, 40 C.M.R. 247 (C.M.A. 1969) (citing Boykin v. Alabama, 395 U.S. 238 (1969); Halliday v. United States, 394 U.S. 831 (1969); McCarthy v. United States, 394 U.S. 459 (1969)).

[138] *Id.* at 250.

[139] *See* MCM, *supra* note 5, R.C.M. 910 analysis, at A21-58; GILLIGAN & LEDERER, *supra* note 67, § 9-022.20.

[140] Ham, *supra* note 2, at 32. "Because there are potential dangers in the abuse of [an] abbreviated method of disposing of charges, a number of safeguards have been included" for a military providence inquiry. United States v. Felder, 59 M.J. 444, 445 (2004) (citing DAVID A. SCHLEUTER, MILITARY CRIMINAL JUSTICE 372 (5th ed. 1999)); *see* U.S. DEP'T OF ARMY, PAM. 27-9, MILITARY JUDGE'S BENCHBOOK ch. 2, sec. II (15 Sept. 2002).

[141] *See* United States v. Faircloth, 45 M.J. 172 (1996); United States v. Davenport, 9 M.J. 364 (C.M.A. 1980); *see also* MCM, *supra* note 5, R.C.M. 910 (e) discussion (stating that "the accused must admit every element of the offense(s) to which the accused pleaded guilty. . . [and o]rdinarily, the elements should be explained to the accused.").

[142] United States v. Redlinski, 58 M.J. 117, 119 (2003) (quoting United States v. Jones, 34 M.J. 270, 272 (C.M.A. 1992)).

[143] *Id.*

[144] *See id.* (recognizing that an attempt offense crime is more complex unlike some simple military offenses).

guilty plea system originally derived from federal caselaw,[145] a recent Supreme Court case demonstrates the current variance between the two systems.

This past term, the Supreme Court addressed a trial judge's failure to advise the accused on the elements of an offense.[146] In *Stumpf*, a capital case, the trial judge failed to advise the accused at the plea hearing on the specific intent element for the offense of aggravated murder.[147] The accused's attorney, however, represented that he had explained the intent element to the accused and the accused agreed with his counsel's representation.[148] After pleading guilty to aggravated murder and attempted aggravated murder, the accused received a death sentence at a contested penalty hearing before a three-judge panel.[149] On appeal, the accused argued that his plea was not voluntary or knowing because the judge failed to advise him on the specific intent element.[150] The Supreme Court stated that a judge is not personally required to advise the accused of the elements; "[r]ather, constitutional requirements may be satisfied where the record accurately reflects that the charge's nature and the crime's elements were explained to the defendant by his own, competent counsel."[151] The Supreme Court recognized that they have never required a judge to personally explain the elements of each offense to the accused.[152]

Failure to Establish a Factual Predicate or to Resolve an Inconsistent Matter or Defense

A military judge must inquire into the factual basis for the accused's plea.[153] The accused must describe all relevant facts surrounding his offense(s) to establish his guilt.[154] Rule for Courts-Martial 910(e) states that a "military judge shall not accept a plea of guilty without making such inquiry of the accused as shall satisfy the military judge that there is a factual basis for the plea."[155] A mere "yes" or "no" answer by the accused in response to the military judge's legally conclusive questions does not suffice.[156] "Mere conclusions of law recited by an accused are insufficient to provide a factual basis for a guilty plea."[157] Prior to accepting an accused's guilty plea, a military judge must resolve any inconsistent matter or defense raised either by the accused or by any other witness or evidence presented during the court-martial.[158] Article 45, UCMJ, provides the following:

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[145] *See* United States v. Care, 40 C.M.R. 247 (C.M.A. 1969) (citing Boykin v. Alabama, 395 U.S. 238 (1969); Halliday v. United States, 394 U.S. 831 (1969); McCarthy v. United States, 394 U.S. 459 (1969)).

[146] Bradshaw v. Stumpf, 125 S. Ct. 2398 (2005).

[147] *Id.* at 2405. The accused and a co-accused were charged with aggravated murder, attempted aggravated murder, aggravated robbery, and two counts of grand theft surrounding the robbery and shooting of an Ohio couple. *Id.* at 2403. The accused and his accomplice killed one individual and seriously wounded another. *Id.*

[148] *Id.* at 2405-06.

[149] *Id.* at 2403.

[150] *Id.* at 2405. The accused's displeasure with his plea and death sentence likely increased when his co-accused received a sentence of life with a possibility of parole in twenty years at a fully contested trial. *Id.* at 2403. Stumpf's trial occurred first because his accomplice fled Ohio and resisted extradition from Texas. *Id.*

[151] *Id.*

[152] *Id.*

[153] UCMJ art. 45 (2005); *see* United States v. Care, 40 C.M.R. 247 (C.M.A. 1969).

[154] MCM, *supra* note 5, R.C.M. 910(e) discussion.

[155] *Id.*

[156] United States v. Outhier, 43 M.J. 326, 330-32 (1996) (ruling that the accused's affirmative responses to the military judge that his actions could have produced grievous bodily harm were not sufficient to sustain a guilty plea to the offense of aggravated assault by a means or force likely to produce death or grievous bodily harm when the actual facts elicited did not establish a factual predicate for the charged offense); *see also* United States v. Jordan, 57 M.J. 236 (2002) (determining that an accused's mere "Yes" response to the military judge's question as to whether the accused's conduct was prejudicial to good order and discipline or service discrediting does not sustain a plea if the factual circumstances revealed by the accused do not objectively support that element).

[157] *Outhier*, 43 M.J. at 331.

[158] *Id.* "[A]n accused servicemember cannot plead guilty and yet present testimony that reveals a defense to the charge." United States v. Clark, 28 M.J. 401, 405 (C.M.A. 1989).

> If an accused, . . . after a plea of guilty[,] sets up matter inconsistent with the plea, or if it appears that he has entered the plea of guilty improvidently or through lack of understanding of its meaning and effect . . . a plea of not guilty shall be entered in the record, and the court shall proceed as though he had pleaded not guilty.[159]

An appellate court will only overturn a guilty plea if the record of trial, in its entirety, shows a substantial basis in law and fact for questioning the plea.[160] Although this rule appears to set a high standard, the CAAF and the service courts, in published and unpublished opinions, continue to reverse numerous findings and sentences because a review of the entire record of trial either fails to establish a factual predicate for the accused's plea or reveals an inconsistent matter or defense that remains unresolved on the record.[161] Over the past several years, guilty pleas involving absent without leave (AWOL) offenses[162] resulted in numerous cases in this area.[163] During the 2005 term of court, three service court opinions concerning these offenses warrant discussion.[164]

AWOL Offenses

In *Duncan*, the accused received permission from his squad leader to miss his unit's morning accountability formation in order to take his infant son to a hospital appointment.[165] The accused, however, lied to his squad leader about his son's appointment because he did not want to attend the formation and get in "trouble for not having the equipment required for that morning's formation."[166] On appeal, defense counsel asserted that the accused's plea was improvident as to the failure to repair (FTR) element of "without proper authority" because the accused had authority from his squad leader to miss formation, "albeit authority obtained by making a false statement."[167] Defense argued that the controlling factor was the accused's receipt of actual authority from his squad leader and not the manner in which that authority was obtained.[168] The ACCA, affirming, ruled that authority "preceded by the use of false statements, false documents, or false information provided by or on behalf of an accused" is still punishable as a FTR and does not constitute "proper authority" to miss formation.[169] The unit lost accountability of the accused because he was not at his morning formation nor at the hospital appointment he received permission to attend.[170]

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[159] UCMJ art. 45(a) (2002).

[160] *Jordan*, 57 M.J. at 238 (citing United States v. Prater, 32 M.J. 433, 436 (C.M.A. 1991)).

[161] *See* United States v. Gilchrist, 61 M.J. 785 (Army Ct. Crim. App. 2005); United States v. Harding, 61 M.J. 526 (Army Ct. Crim. App. 2005); United States v. Jackson, 61 M.J. 731 (N-M. Ct. Crim. App. 2005); United States v. Littleton, 60 M.J. 753 (Army Ct. Crim. App. 2004); United States v. Sierra, 62 M.J. 539 (Army Ct. Crim. App. 2005).

[162] *See* UCMJ, art. 86 (2005).

[163] *See* United States v. Pinero, 60 M.J. 31 (2004); United States v. Hardeman, 59 M.J. 389 (2004); *see also* United States v. Le, 59 M.J. 859 (Army Ct. Crim. App. 2004) (ruling that the military judge erred by failing to resolve the conflict between the accused's plea of guilty to desertion and statements indicating that the accused deserted under duress); United States v. Scott, 59 M.J. 718 (Army Ct. Crim. App. 2004) (holding an AWOL plea from 16 August 2002 through November 2002 improvident because the accused signed in with his unit on 11 September 2002); United States v. Banks, No. 20021302 (Army Ct. Crim. App. Sep. 7, 2004) (unpublished) (failing to have the accused state in his own words why he failed to report to formation); United States v. Gonzalez, No. 20020744 (Army Ct. Crim. App. July 21, 2004) (unpublished) (determining a missing movement through neglect plea was not provident where the facts conflicted as to whether the accused possessed authority to change his flight); United States v. Boyd, No. 20021264 (Army Ct. Crim. App. June 16, 2004) (unpublished) (reasoning the military judge erred by accepting the accused's plea without explaining the inability defense).

[164] United States v. Duncan, 60 M.J. 973 (Army Ct. Crim. App. 2005); United States v. Adams, 60 M.J. 912 (N-M. Ct. Crim. App. 2005); United States v. Gilchrist, 61 M.J. 785 (Army Ct. Crim. App. 2005).

[165] *Duncan*, 60 M.J. at 974. The accused also pleaded guilty to making a false official statement, larceny, wrongful appropriation, and housebreaking and received a BCD, confinement for four months, forfeiture of $700.00 pay per month for four months, and reduction to E1. *Id.* at 973.

[166] *Id.* at 974.

[167] *Id.* at 975.

[168] *Id.*

[169] *Id.* at 976.

[170] *Id.* "[A] fraud that allows one to absent himself from his unit, impairs that unit's ability to perform its primary function and 'diminishes the unit's readiness and capability to perform its mission.'" *Id.*

The NMCCA faced a similar but more complex issue this year—whether an accused's passive failure to act, as opposed to an accused's affirmative action to deceive,[171] constitutes a FTR offense.[172] In *Adams*, the military judge did not accept the accused's plea to AWOL but did accept his plea, by exceptions and substitutions, to failing to go to his appointed place of duty.[173] During the providence inquiry, the accused stated that he knew his unit had a formation, that he did not know the exact formation location, and that he purposefully avoided determining the location.[174] The accused's only effort to locate his unit involved peeking out his barrack's window. In addition, the accused intentionally avoided the on-duty barrack's noncommissioned officer who could have told him the formation location.[175] The NMCCA, recognizing that an accused's knowledge of the report location is an element of a FTR offense, held that the accused's "deliberate and conscious efforts to avoid learning of his duty nevertheless rendered his guilty plea to failing to go to his reported place of duty provident."[176] Under a "deliberate avoidance or ignorance" doctrine, a finder of fact may "rely upon a permissive inference that the accused had knowledge of the fact that the accused deliberately avoided."[177] The court acknowledged, however, that the deliberate avoidance doctrine is not commonly recognized in the military system but is consistent with federal practice.[178] Practitioners should note, before actively applying the deliberate avoidance doctrine, that the CAAF is reviewing this case and heard oral argument on 7 February 2006.[179]

The third service court case involves the reversal of an accused's conviction for going from his appointed place of duty when the record failed to establish that the accused knew he was required to report.[180] In *Gilchrist*, the accused was charged with leaving his appointed place of duty—a doctor's appointment at the William Beaumont Army Medical Center (WBAMC).[181] The stipulation of fact stated that the accused had a 0900 doctor's appointment and that his drill sergeant drove him to the appointment.[182] After dropping off the accused, the Drill Sergeant observed the accused leaving the hospital a few minutes later and running to a convenience store across the street.[183] During the providence inquiry, the accused told the military judge that he had an appointment at the hospital after lunch but his drill sergeant was busy that day and needed to drop him off at the hospital at 0900.[184] Further inquiry established the following: the drill sergeant did not tell the accused that he could not leave the hospital, the accused went to the convenience store to obtain food because it was unavailable at the hospital, and the accused's drill sergeant ordered him back into the van causing the accused to miss his appointment.[185] The ACCA reversed the accused's conviction for going from his place of duty because the record failed to establish an adequate factual predicate for the accused's plea of guilty to the offense.[186] The court found that Gilchrist did not admit that he was required to be at the hospital at 0900. Instead, Gilchrist admitted that he had to report for a medical appointment at 1300.

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[171] *Id.* at 973.

[172] United States v. Adams, 60 M.J. 912 (N-M. Ct. Crim. App. 2005).

[173] *Id*. at 914.

[174] *Id.*

[175] *Id.*

[176] *Id.* at 915.

[177] *Id.* "The rationale for the deliberate avoidance doctrine is that 'a defendant's affirmative efforts to see no evil and to hear no evil do not somehow magically invest him with the ability to do no evil." *Id.* (citing United States v. DiTommaso, 817 F.2d 201, 281 n.26 (1987)).

[178] *Id.*

[179] United States v. Adams, 60 M.J. 912 (N-M. Ct. Crim. App. 2005), *review granted*, 62 M.J. 329 (2005); *see* United States Court of Appeals for the Armed Forces, Scheduled Hearings, http://www.armfor.uscourts.gov/Feb2006.htm (last visited Apr. 27, 2006) (providing a list of scheduled hearings, including *United States v. Adams*).

[180] United States v. Gilchrist, 61 M.J. 785 (2005).

[181] *Id.* at 789.

[182] *Id.* at 789-90.

[183] *Id.* at 790.

[184] *Id.*

[185] *Id.* The military judge accepted the accused's plea but amended the time of the accused's missed appointment to 1300. *Id.*

[186] *Id.* at 791.

"Appellant's statements during the providence inquiry indicate he did not understand he was reporting to his place of duty, a 1300 doctor's appointment at WBAMC, when he arrived over four hours early."[187]

Larceny Offenses

An additional factual predicate concern covered by the service courts[188] this past term involves the government's failure to establish on the record a specific, or any, property value for larceny specifications. In *Harding*, the accused pleaded guilty to two larceny specifications charging him, on divers occasions, with stealing currency of a value in excess of $1000 dollars.[189] After trial, the convening authority approved a sentence of a bad conduct discharge and twenty-one months confinement.[190] On appeal, the defense focused on the value of the property taken during the two different timelines for the alleged divers occasions specifications.[191] During the providence inquiry, the accused stated that he stole over $1000 dollars during the two lengthy timeframes alleged, but he never admitted that he took any currency or any combination of currency valuing over $100 dollars during any single transaction within those two lengthy timeframes.[192] This is an important distinction because an increased punishment for a larceny offense exists if an accused steals property of a value more than $100 during a single transaction.[193] A punishment of five years confinement is authorized for stealing property exceeding $100 per a single transaction and a punishment of only six months confinement is authorized for stealing property equal to or less than $100 per a single transaction.[194] The ACCA recognized that "the record must show either that one item of the property stolen has . . . [over a $100] value or that several items taken at substantially the same time and place have such an aggregated value."[195] The record failed to establish that the accused stole over $100 dollars at substantially the same time during the broad two month divers occasions timeframes alleged in the two specifications, and the court amended the findings from stealing property in excess of $100 to stealing property of a value less than or equal to $100.[196] The court then re-adjusted the accused's approved confinement from twenty-one months to six months.[197]

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[187] *Id.*

[188] *See* United States v. Harding, 61 M.J. 526 (Army Ct. Crim. App. 2005); United States v. Sierra, 62 M.J. 539 (Army Ct. Crim. App. 2005); *see also* United States v. Boston, No. 20030108 (Army Ct. Crim. App. June 2, 2005) (unpublished) (amending findings from one larceny specification of over $500 to two larceny specifications of under $500 where the accused testified during the providence inquiry to taking property at two separate times of an amount under $500); United States v. Cox, No. 20030260 (Army Ct. Crim. App. June 6, 2005) (unpublished) (fixing larceny findings to correlate with the accused's plea that he did not steal military property in one specification and that he stole services, as opposed to property, in another specification); United States v. Ezelle, No. 200301560, 2004 CCA LEXIS 262 (N-M. Ct. Crim. App. Nov. 29, 2004) (unpublished) (determining that the stolen property was of "some" value, but the parties' failures to specifically assert on the record that the value exceed $500 made the plea improvident as to the aggravating element of an amount over $500); United States v. Ferrell, 2005 CCA LEXIS 272 (A.F. Ct. Crim. App. Aug. 23, 2005) (unpublished) (holding that the record failed to reflect that the accused stole property in excess of $500 and amending his specification to sustain a conviction for property of a value under $500); United States v. Irby, No. 35424, 2004 CCA LEXIS 293 (A.F. Ct. Crim. App. Dec. 30, 2004) (unpublished) (finding the accused's plea to larceny improvident but affirming the offense of wrongful appropriation where the accused stated she intended to pay back the credit card company but the military judge failed to resolve this inconsistency); United States v. West, No. 20030277 (Army Ct. Crim. App. Feb. 23, 2005) (unpublished) (reversing the accused's conviction for larceny of an amount over $500 where the stipulation of fact and the record of trial failed to establish the amount of the approximately fifteen pieces of luggage stolen by the accused in the Pittsburgh International Airport). *But see* United States v. Kerr, No. 20021064 (Army Ct. Crim. App. Mar. 29, 2005) (unpublished) (holding that the accused could not plead guilty to stealing the entire amount of his "do-it-yourself" (DITY) reimbursement but finding that the record established that he stole money in excess of $500 for each DITY claim).

[189] *Harding*, 61 M.J. at 526. The larceny offenses surrounded the accused taking and using another soldiers' ATM card. *Id.* at 527.

[190] *Id.* at 526.

[191] *Id.* at 527 (listing the timeframes as 24 August 2001 to 31 October 2001 and 1 November 2001 to 10 December 2001).

[192] *Id.*

[193] *Id.* at 528; *see* MCM, *supra* note 5, pt. IV, para. 121.e. (outlining the maximum punishment for larceny offenses). The president changed the required maximum punishment value from $100 to $500 dollars in 2002. *See* Exec. Order No. 13,262, 3 C.F.R. 210 (2003).

[194] *Harding*, 60 M.J. at 528.

[195] *Id*. (citing United States v. Christensen, 45 M.J. 617, 619 (Army Ct. Crim. App. 1997)).

[196] *Id.* at 530.

[197] *Id.*

A property value issue also arose in another ACCA opinion, *United States v. Sierra*.[198] In *Sierra*, the accused was charged with, among other offenses, obtaining services by false pretenses from an internet website, Priceline.com.[199] The stipulation of fact and the accused's providence inquiry statements contained no evidence that the use of Priceline.com had any value.[200] The ACCA noted that there was no indication in the record or from the stipulation of fact "that Priceline.com ever charged a service fee in connection with its operation [and the accused] cannot be found guilty of *wrongfully* obtaining *free* services by false pretenses."[201] The court set aside the obtaining services by false pretense specification and reassessed the accused's sentence.[202]

Practitioners should note the importance of clarifying on the record and in the stipulation of fact, the value of any property involved in a larceny-related offense. Absent a clearly defined value, the appellate courts are likely to set aside the specification, as in *Sierra*, or amend the value of the stolen property to a value under the maximum punishment limit, as in *Harding*. In *Sierra*, the ACCA did not rule that Priceline.com was a free service per se, but found that the parties failed to present evidence of the service's value. If the parties agree, and the accused admits, that the service or property has a value, even if minimal in nature, the appellate courts are likely to affirm the larceny-related specification.

Legal Issues Waived

The following motions must be raised by the accused prior to the entry of his plea, absent good cause: defects in the preferral, forwarding, investigation, or referral of charges; defects in charges or specifications; motions to suppress evidence; discovery motions; severance of charges; and denial of counsel issues.[203] Rule for Courts-Martial 905(e) specifically states that "other motions, requests, defenses or objections, except lack of jurisdiction or failure of a charge to allege an offense, must be raised before the court-martial is adjourned for that case and, unless otherwise provided in this Manual, failure to do so shall constitute waiver."[204] Other than those legal issues specifically exempted by RCM 905(e), "[m]ilitary practice recognizes very few issues that are not subject to waiver."[205] Defense waiver of a legal issue becomes paramount on appeal, as described below:

> Why is it important to "make" an appellate record by properly preserving issues at trial? The answer lies in the doctrine of waiver. Simply stated, the failure to properly preserve an issue at trial "waives" the issue for appeal. This means that an appellate court is unlikely to consider the issue. In other words, the accused has almost no chance of relief on appeal.[206]

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[198] United States v. Sierra, 62 M.J. 539 (Army Ct. Crim. App. 2005). The accused used his non-commissioned officer in charge's government credit card to obtain airline tickets on Priceline.com for a co-worker. *Id*. He was also charged with attempted larceny of military property and providing a false official statement. *Id*. at 540.

[199] *Id.*

[200] *Id.* at 543.

[201] *Id.* at 544. The court further stated that "[i]f, as we suspect, access to Priceline.com website was free, the problem with this conviction goes beyond an improvident plea. Since appellate defense counsel are correct that it is legally impossible to steal free services, the specification would fail to state an offense." *Id.*

[202] *Id*. Following his plea of guilty, the accused originally received a BCD, confinement for three months, forfeiture of $737.00 pay per month for three months, and reduction to E1. *Id.* at 539. The court reassessed the accused's sentence to a BCD, confinement for two months, forfeiture of $737.00 pay per month for two months, and reduction to E1. *Id.* at 544.

[203] MCM, *supra* note 5, R.C.M. 905(b), 905(e).

[204] *Id.* RCM 905(e); *see id.* RCM 907(b); *see also* United States v. Vaughan, 58 M.J. 29 (2003) (stating that under RCM 907(b)(1)(B) the issue of failing to state an offense is never waived); United States v. Robbins, 52 M.J. 159 (1999) (finding that a preemption doctrine claim is not waived for an assimilated offense because it involves subject matter jurisdiction); United States v. Coffey, 38 M.J. 290 (C.M.A. 1993) (holding that jurisdictional issues are not waived by the accused's failure to raise them at trial).

[205] Lieutenant Colonel Patricia A. Ham, *Making the Appellate Record: A Trial Defense Attorney's Guide to Preserving Objections—the Why and How*, ARMY LAW., Mar. 2003, at 12. Lieutenant Colonel Ham's article discusses the difference between waiver, the intentional abandonment of a known right, versus forfeiture, the failure to timely assert a right. These terms are used interchangeably in this article. Legal issues that are not subject to waiver include adjudicative (versus accusatory) command influence. *Id.* (citing United States v. Weasler, 43 M.J. 15 (1995) (holding that the defense can waive accusatorial command influence); *cf.* United States v. Baldwin, 54 M.J. 308, 310 n.2 (2001) (finding that an issue of "unlawful command influence arising during trial" is not waived by a failure of defense to object)).

[206] Ham, *supra* note 205, at 11.

Two methods exist for an accused to preserve his legal issue for appeal: (1) plead not guilty or (2) enter a conditional plea.[207] Under RCM 910(a)(2), an accused may enter "a conditional plea of guilty reserving the right, on further review or appeal, to review of the adverse determination of any specified pretrial motion" if the military judge and the government consent to such plea.[208] A plea is unconditional and subject to the waiver rules of RCM 905(b) and RCM 905(e), unless the accused specifically asserts that his plea is conditional under RCM 910(a)(2) and the government and the military judge consent. This year, the CAAF dealt with two cases involving the defense's waiver of a legal issue after the accused's entry of an unconditional guilty plea. The first case involves a suppression motion[209] and the second case involves an Article 10, UCMJ, motion.[210]

In *Farley*, a child sexual assault case, the accused made incriminating statements to two social workers, Ms. Martin and Mr. Warren.[211] The government notified the defense, under MRE 304(d)(1), that the accused made an incriminating statement to one of the social workers, Mr. Warren, but failed to list the other social worker, Ms. Martin.[212] Prior to the court-martial commencing, the government advised the defense that Ms. Martin, not Mr. Warren, would testify in the pre-sentencing phase.[213] Before the accused entered his plea of guilt, the defense counsel stated that "depending on who the government calls as witnesses, we may have some brief motions to suppress statements made by the accused." The accused's plea, however, was not conditioned on his ability to later raise a suppression motion.[214] The accused then proceeded through his providence inquiry, the military judge accepted his plea, and the government called Ms. Martin to testify.[215] The defense moved to strike Ms. Martin's testimony as "violative of the Fifth and Sixth Amendments," which the military judge denied as untimely.[216] On appeal, the CAAF noted that the two applicable MREs were unclear as to whether the accused could make a suppression motion after entry of his pleas.[217] Military Rule of Evidence 304(d)(2)(A) states that the defense may not raise a suppression motion after pleas absent good cause shown.[218] Military Rule of Evidence 304(d)(5), however, states that a plea of guilty waives a suppression motion regardless of whether the issue was raised prior to the plea.[219] The CAAF, declining to decide if a motion to suppress under the Fifth and Sixth Amendment is waived by a guilty plea under MRE 304(d)(2)(A) or MRE 304(d)(5), held error, if any, in denying the motion was harmless because of the other extensive evidence admitted against the accused.[220]

The CAAF's decision, or indecision, leaves the field practitioner, particularly a military judge, in a quandary whether to apply MRE 304(d)(2)(A) or MRE 304(d)(5). While defense counsel will clearly argue the applicability of MRE 304(d)(2)(A); the government will request the military judge to apply MRE 304(d)(5). The safest course of action for a

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[207] Ham, *supra* note 2, at 38.

[208] MCM, *supra* note 5, R.C.M. 901(a)(2); *see also* United States v. Mapes, 59 M.J. 60 (2003); United States v. Vaughn, 58 M.J. 29 (2003); United States v. Shelton, 59 M.J. 727 (Army Ct. Crim. App. 2004); United States v. Proctor, 58 M.J. 792 (A.F. Ct. Crim. App. 2003). For Army practitioners, the staff judge advocate should consult with the Chief, Criminal Law Division, prior to the government's consent to a conditional plea. *See* U.S. DEP'T OF ARMY, REG. 27-10, MILITARY JUSTICE para. 5-26b (16 Nov. 2005).

[209] United States v. Farley, 60 M.J. 492 (2005).

[210] United States v. Mizgala, 61 M.J. 122 (2005).

[211] *Farley*, 60 M.J. at 493. The accused made statements to the effect that he touched his stepdaughter and that if his mother was present he would have touched her also. *Id.*

[212] *Id.* Military Rule of Evidence 304(d)(1) states that "prior to arraignment, the prosecution shall disclose to the defense the contents of all statements, oral or written, made by the accused that are relevant to the case, known to the trial counsel, and within the control of the armed forces." MCM, *supra* note 5, M.R.E. 304(d)(1).

[213] *Farley*, 60 M.J. at 493.

[214] *Id.*

[215] *Id.*

[216] *Id.* The military judge provided the accused the opportunity to withdraw from his plea in order to make his motion, which the accused refused to accept. *Id.*

[217] *Id.*

[218] MCM, *supra* note 5, M.R.E. 304(d)(2)(A).

[219] *Id.* M.R.E. 304(d)(5).

[220] *Farley*, 60 M.J. at 493. The stipulation of fact and a videotape of the victim's statements outlined numerous instances of the accused's misconduct so that the military judge's decision to admit the one statement to Ms. Martin was harmless. *Id.*

military judge is to determine, under MRE 304(d)(2)(A), whether good cause exists to permit the defense to raise an untimely suppression motion. If the CAAF rules that MRE 304(d)(2)(A) is the applicable rule, then the military trial judge's ruling is correct. However, even if the CAAF rules that MRE 304(d)(5) trumps MRE 304(d)(2)(A) and finds that the military trial judge erroneously applied the incorrect rule, the judge's application of the more defense favorable rule mitigates against the appellate court finding that the military trial judge's error prejudiced the accused's substantial personal rights.

The second CAAF decision during the 2005 term involving waiver focused on whether a contested Article 10, UCMJ, motion is waived by an accused's unconditional guilty plea.[221] In *Mizgala*, the government released the accused from pretrial confinement after one hundred and seventeen days to prevent a speedy trial violation.[222] The defense, however, raised an Article 10 speedy trial motion, which the military judge, after applying an erroneous legal test, denied.[223] After this ruling, the accused entered an unconditional guilty plea to all charges.[224] On appeal, the AFCCA ruled that the accused's unconditional guilty plea waived appellate consideration of his denied Article 10 motion.[225] The CAAF, however, held that ordinary waiver rules do not apply when an accused unsuccessfully litigates an Article 10 speedy trial motion at court-martial because of the rule's legislative history and unique importance.[226] The CAAF stated:

> Preservation of the right to appeal adverse Article 10 rulings is not only supported by the congressional intent behind Article 10, it also maintains the high standards of speedy disposition of charges against members of the armed forces and recognizes 'military procedure as the exemplar of prompt action in bringing to trial those members of the armed forces charged with offenses.' A fundamental, substantial, personal right – a right that dates from our earlier cases – should not be diminished by applying ordinary rules of waiver and forfeiture associated with guilty pleas.[227]

After determining that the accused did not waive appellate review of his Article 10 motion by pleading guilty, the court held that the military judge's erroneous application of law did not prejudice the accused because a factual predicate did not exist for his Article 10 motion.[228]

After *Mizgala*, defense practitioners should, as before, immediately raise a motion when a potential Article 10 violation exists. Defense strategy, however, is now different because an accused may make an unconditional guilty plea to gain a sentence limitation while knowing, because of *Mizgala*, that the appellate courts will review a military judge's denial of his Article 10 motion. Unanswered, however, is whether an Article 10 motion, which is not raised at the trial level, is waived. May the accused successfully assert an Article 10 violation for the first time on appeal? The CAAF's determination that Article 10 is a "fundamental, substantial, personal right"[229] of the accused gives appellate defense counsel grounds to assert that an uncontested Article 10 motion may be raised for the first time on appeal.

Conclusion

This past term, the CAAF and the service courts issued several decisions in the areas of court-martial personnel, voir dire and challenges, and pleas and pretrial agreements. The courts focused on several potential "record-breaking" issues existing

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[221] United States v. Mizgala, 61 M.J. 122 (2005). Article 10, UCMJ, states that if an accused is placed into pretrial confinement that "immediate steps shall be taken to inform him of the specific wrong of which he is accused and to try him or to dismiss the charges and release him." UCMJ art. 10 (2005).

[222] *Mizgala*, 61 M.J at 123. Rule for Courts-Martial 707 states that a speedy trial violation occurs if the accused is not arraigned within one hundred and twenty days of his entry into pretrial confinement. MCM, *supra* note 5, R.C.M. 707(a)(2).

[223] *Mizgala*, 61 M.J. at 128. The military judge erroneously ruled that an Article 10 violation does not occur without a RCM 707 speedy trial violation and that gross negligence in processing the case is required by the government to sustain an Article 10 violation. *Id.* The correct legal test for an Article 10 violation is whether the government proceeded with reasonable diligence. *Id.*

[224] *Id.* at 123-24.

[225] *Id.* at 124. The AFCCA also held, absent the accused's waiver, that a factual predicate did not exist for the Article 10 motion. *Id.*

[226] *Id.* at 126.

[227] *Id.* at 126-27 (citing United States v. Pierce, 19 C.M.A. 225, 227 (1970)).

[228] *Id.* at 129. Although the court recognized that the processing "of this case is not stellar," the government's actions on the case reflected reasonable diligence under all the circumstances. *Id.*

[229] *Id.* at 126.

in court-martial transcripts. In the area of court-martial personnel, the CAAF's most important decision limited a trial judge's ability to craft a sentence based on collateral matters.[230] One of the CAAF's most groundbreaking decisions this year came in the area of voir dire—the ruling that a military judge may only liberally grant challenges for cause for the defense.[231] Ironically, the President, by executive order, may have created an even more revolutionary voir dire change by amending RCM 912(f)(4), the "But For Rule."[232] How these two changes will coexist and affect new cases and further appellate review remains to be seen. Last term's cases involving providence inquiry issues, such as advising the accused of the elements of the offense and obtaining a factual predicate for the offense from the accused on the record, continue to reaffirm the "CAAF and the service courts' generally paternalistic approach to the military courts-martial process, as compared to civilian practice."[233] This article provides trial practitioners with trends and practical implications from the 2005 term of court so that their records of trial will survive appellate scrutiny.

[230] *See* United States v. McNutt, 62 M.J. 16 (2005).

[231] *See* United States v. James, 61 M.J. 132 (2005).

[232] *See* Exec. Order No. 13,387, 70 Fed. Reg. 60697 (Oct. 18, 2005).

[233] *See* Fleming, *supra* note 2, at 25.

"The Future Ain't What It Used to Be":[1] New Developments in Evidence for the 2005 Term of Court

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Relevance is at the conceptual core of the Federal Rules of Evidence (FRE) and the Military Rules of Evidence (MRE). As expressed in Rules 401,[2] 402,[3] and 403,[4] evidence that is logically relevant[5] is admissible at trial, unless other rules prohibit its admission[6] or its probative value is substantially outweighed by the danger of unfair prejudice or other damage to the fact-finding process.[7] What seems simple on its face, however, is often complicated by caselaw interpretations that expand or contract the limits of relevance according to the philosophical preferences of appellate judges.

The strongest evidentiary trend in the 2005 term of court was the Court of Appeals for the Armed Forces' (CAAF) struggle to establish the boundaries of logical and legal relevance in trials by court-martial. The CAAF wrestled with issues involving the basic definition of logical relevance,[8] the limits of legal relevance,[9] and whether specific evidentiary prohibitions should prevent logically relevant evidence from being admitted at trial.[10] The CAAF appears to be ideologically fractured and inconsistent on issues of relevance, making it very difficult for practitioners and military judges to apply the plain language of the MRE in making admissibility determinations.

Relevance, however, was not the only evidentiary subject tackled by the CAAF and the service appellate courts during the 2005 term of court. This article will discuss and analyze significant evidentiary military appellate cases from the CAAF and the service appellate courts, proceeding sequentially through other military rules of evidence. This year's term addressed cases concerning the proper preservation of objections under MRE 103,[11] the independent source rule for the corroboration of a confession under MRE 304(g),[12] logical and legal relevance under MREs 401[13] and 403,[14] uncharged misconduct under MRE 404(b),[15] sexual propensity evidence under MRE 413,[16] the joint-participant exception to the marital communications

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[1] Yogi Berra, Yogi-isms, http://www.yogiberra.com/yogi-isms.html (last visited Apr. 6, 2006).

[2] MANUAL FOR COURTS-MARTIAL, UNITED STATES, MIL. R. EVID. 401 (2005) [hereinafter MCM].

[3] *Id.* MIL. R. EVID. 402.

[4] *Id.* MIL. R. EVID. 403.

[5] Military Rule of Evidence 401 defines relevant evidence as "having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." *Id.* MIL. R. EVID. 401.

[6] According to MRE 402, evidence that is logically relevant is admissible at trial unless "otherwise provided by the Constitution of the United States as applied to members of the armed forces, the code, these rules, this Manual, or any Act of Congress applicable to members of the armed forces." *Id.* MIL. R. EVID. 402.

[7] According to MRE 403, relevant evidence may be excluded "if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the members, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." *Id.* MIL. R. EVID. 403.

[8] For example, in United States v. Berry, 61 M.J. 91 (2005), a majority of the CAAF found the appellant's uncharged acts of sexual misconduct logically relevant under MREs 401 and 402 but not legally relevant for the purposes of MRE 403 and 413. *See infra* notes 189-218 and accompanying text. A concurring opinion argued, however, that the evidence could not be logically relevant unless it was also legally relevant. *Berry*, 61 M.J. at 98-99 (Crawford, J., concurring).

[9] *Compare* United States v. Rhodes, 61 M.J. 445 (2005) (holding that evidence a key government witness suddenly forgot his testimony shortly after meeting with appellant and his attorney was more prejudicial than probative when admitted as uncharged misconduct evidence to show appellant's consciousness of guilt), *with* United States v. Hays, 62 M.J. 158 (2005) (affirming the admission of numerous pornographic pictures and e-mails against the appellant in a solicitation case and asserting that the evidence, while highly prejudicial, was extremely probative on the issue of intent to solicit another person to have sex with a child in order to create pornographic images of it).

[10] In *United States v. Brewer*, 61 M.J. 425 (2005), the majority held (and a blistering dissent excoriated them for so holding) that logical relevance and the Due Process Clause of the Fifth Amendment trumped the plain language of MREs 404 and 405 in drug cases involving the permissive inference of wrongful use.

[11] MCM, *supra* note 2, MIL. R. EVID. 103.

[12] *Id.* MIL. R. EVID. 304(g).

[13] *Id.* MIL. R. EVID. 401.

[14] *Id.* MIL. R. EVID. 403.

[15] *Id.* MIL. R. EVID. 404(b).

[16] *Id.* MIL. R. EVID. 413.

privilege of MRE 504,[17] impeachment under MRE 613,[18] expert testimony under MREs 702[19] and 704,[20] adoptive admissions and MRE 801(d)(2)(B),[21] the public records exception to the hearsay rule of MRE 803(8),[22] and statements against interest under MRE 804.[23]

Cases from the 2005 Term of Court

Rule 103: Preserving Objections for Appellate Review

Military Rule of Evidence 103 requires counsel to make objections in order to preserve evidentiary issues for later appellate review. The objections must be timely and specific, and counsel must be prepared to preserve objections through offers of proof.[24] In the absence of plain error, evidentiary issues are forfeited if counsel fail to comply with the requirements of MRE 103.[25] In *United States v. Datz*,[26] the CAAF addressed MRE 103's requirements to preserve evidentiary issues for later appellate review.

The appellant in *Datz* was convicted of raping a female member of his crew after unlawfully entering her civilian quarters.[27] He conceded at trial that he and the alleged victim had participated in sexual intercourse, but he claimed it was consensual.[28]

The government's case consisted of testimony from the alleged victim and a police investigator, Special Agent (SA) Van Arsdale, who had interrogated the appellant.[29] Special Agent Van Arsdale testified that Datz had nodded affirmatively in response to the agent's statement that Datz knew he did not have consent to engage in sexual intercourse with the victim.[30] The government introduced evidence of the nod as an adoptive admission by the appellant.[31]

Special Agent Van Arsdale, however, was not the most reliable of witnesses. Testifying from memory, he could not recall the exact wording of the questions he had posed to the appellant. Instead, he testified about questions he "would have" asked the appellant.[32] As for the critical question in the case—the one that led to the appellant's alleged adoptive admission—SA Arsdale had this to say: "Again, it was something to the effect—this whole line of questioning was around the same time, and it would have been, 'She didn't in fact agree to have sex with you, did she?' or something to that effect."[33] In other words, SA Van Arsdale had observed the appellant nod affirmatively in response to a compound and ambiguous question.[34]

Defense counsel objected on grounds of relevance and prejudice and in argument to the military judge during an Article 39(a) session, questioned whether the appellant had actually manifested his adoption of or belief in the statements or was

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[17] *Id.* MIL. R. EVID. 504.

[18] *Id.* MIL. R. EVID. 613.

[19] *Id.* MIL. R. EVID. 702.

[20] *Id.* MIL. R. EVID. 704.

[21] *Id.* MIL. R. EVID. 801(d)(2)(B).

[22] *Id.* MIL. R. EVID. 803(8).

[23] *Id.* MIL. R. EVID. 804.

[24] *Id.* MIL. R. EVID. 103.

[25] *See id.*

[26] 61 M.J. 37 (2005).

[27] *Id.* at 39.

[28] *Id.*

[29] *Id.*

[30] *Id.* at 40.

[31] *Id*. at 40-41.

[32] *See id.* at 39-40 (quoting the record of trial concerning SA Van Arsdale's testimony about what he "would have asked" the appellant in several critical factual issues in the case).

[33] *Id.* at 39.

[34] *See id*. at 41 (discussing appellant's arguments on appeal that the questions were ambiguous).

merely nodding in anger or frustration.[35] Defense counsel, however, never cited MRE 801(d), the rule governing adoptive admissions,[36] to the military judge. The military judge admitted the evidence and stated that defense counsel's arguments would go to the weight but not the admissibility of the statements.[37]

On appeal, the CAAF addressed the issue of whether defense counsel waived the adoptive admissions issue by failing to properly preserve the objection under MRE 103.[38] Adopting a common-sense approach, the CAAF held that defense counsel had adequately preserved the adoptive admissions issue for appeal.[39] Military Rule of Evidence 103 requires an accused to make a timely objection, stating the specific grounds for the objection if not apparent from the context.[40] There is no requirement to cite a particular rule by number.[41] In this case, appellant's defense counsel initially objected on grounds of relevance and prejudice, but presented sufficient argument on the adoptive admissions issue to make known to the military judge the basis for his objection.[42] The CAAF rejected the government's argument on appeal—the appellant would be required to raise every possible argument in support of an objection to avoid forfeiting the issue—stating, "[i]n the heat of trial, where counsel face numerous tactical decisions and operate under time pressure, we do not require such elaboration to preserve error on appeal."[43]

The CAAF then turned to the substantive issue of whether the appellant's act of nodding his head qualified as an adoptive admission within the meaning of MRE 801(d)(2).[44] Adopting a three-element foundational analysis employed both in the federal circuit courts and in the Army and Navy service courts,[45] the CAAF held that the military judge abused his discretion in admitting the appellant's nod as an adoptive admission.[46] The test adopted by the CAAF requires a military judge to make three predicate findings before admitting evidence of an adoptive admission.[47] First, the party against whom the statement is admitted must be present when it is made. Second, the party must understand the statement. Third, the party's actions, words, or both must unequivocally acknowledge the statement he is adopting as his own.[48]

In the instant case, there were two fatal ambiguities pertaining to SA Ansdale's question: first, the agent could not remember exactly what the question was; and second, the question he asked was not only ambiguous, it was compound.[49] It was therefore impossible to know whether the appellant had understood the question or what the nodding gesture meant.[50] The CAAF further held that the military judge's error in admitting the gesture as an adoptive admission was prejudicial. The CAAF reversed and set aside the findings and sentence for the rape and unlawful entry charges.[51]

Datz is an excellent common-sense application of MRE 103. When counsel sense error but cannot remember a specific rule number, *Datz* teaches that one can preserve the issue for later appellate review by making a timely objection and making an argument that is specific enough for the military judge and the reviewing court to identify the issue. In other words, counsel should get up on their feet and start talking! Provided that all parties are discussing the same issue, any evidentiary error will be preserved for appeal. Military judges, of course, can clarify matters by asking counsel specific questions oriented on the actual written provisions of the MRE.

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[35] *See id.* at 40-41.

[36] *See* MCM, *supra* note 2, MIL. R. EVID. 801(d).

[37] *Datz*, 61 M.J. at 40-41.

[38] *Id.* at 41.

[39] *See id.* at 42-43.

[40] *See* MCM, *supra* note 2, MIL. R. EVID. 103.

[41] *Datz*, 61 M.J. at 42.

[42] *Id.*

[43] *Id.*

[44] *Id.*

[45] *See id*. (citing cases from five circuit courts of appeal and the Army and Navy courts of military review).

[46] *Id.*

[47] *Id.*

[48] *Id.*

[49] *Id.*

[50] *See id*.

[51] *Id.*

The CAAF's new approach for adoptive admissions provides counsel with a clear framework for analyzing adoptive admissions issues. In addition, *Datz* serves as a warning to trial counsel about the dangers of "gesture confessions." The questions asked must be clear and unambiguous and the gesture unequivocal before it will pass muster as an adoptive admission. Counsel facing issues involving gesture confessions should carefully read the *Datz* case as well as a CAAF case from the 2003 term of court, *United States v. Kaspers*.[52]

Military Rule of Evidence 304(g): Corroboration of Confessions and Admissions

Military Rule of Evidence 304(g) codifies the common-law principle that a criminal defendant's confession should not be admitted against him unless there is independent corroborating evidence of guilt.[53] In practice, the rule is not always easy to apply, and the CAAF's jurisprudence on corroboration has historically tended to muddy the waters rather than clarify the issues.[54] *United States v. Arnold*[55] continues the CAAF trend of shedding darkness on the corroboration rule.

The appellant in *Arnold* was convicted of one specification of wrongful distribution of ecstasy.[56] The charge arose from a September 2000 incident at a rave club involving the appellant and a group of fellow Soldiers. One of the Soldiers, Guisti, obtained ecstasy and distributed it to the others.[57] When the group's supply ran low, the appellant obtained more ecstasy and again distributed it to the group.[58] Guisti later became the subject of a Criminal Investigation Division (CID) investigation, in which he implicated the appellant in a variety of drug offenses but did not mention the appellant distributing ecstasy.[59] The appellant made a statement to CID admitting to distribution of ecstasy and also lysergic acid diethylamide **(**LSD).[60]

The government brought charges against the appellant for conspiracy to distribute LSD and distribution of LSD.[61] During an Article 32 investigation, the investigating officer determined that the LSD charges were not supported by sufficient evidence. The investigating officer, however, concluded that reasonable grounds existed to charge the appellant with conspiracy to distribute ecstasy and distribution of ecstasy.[62] The government withdrew the charge for conspiracy to distribute LSD, but went forward on charges for distribution of LSD and distribution of ecstasy. Following arraignment on those charges, the military judge granted a defense motion to reopen the Article 32 investigation to properly investigate the charge of ecstasy distribution; the subsequent reinvestigation determined that reasonable grounds existed to support the ecstasy distribution charge.[63] Guisti said nothing under oath about the appellant's ecstasy distribution at either of the Article 32 investigations.[64]

The appellant's confession was admitted against him at his court-martial.[65] Guisti testified for the government, and for the first time since the incident, stated under oath that the appellant had distributed ecstasy to him.[66] This was the only evidence corroborating the appellant's confession. On cross-examination, Guisti admitted that he had reviewed the

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[52] 58 M.J. 314 (2003). *Kaspers* featured a confession that consisted of the appellant holding up one finger in response to an Office of Special Investigations agent's question about whether the appellant had gone to Florida and used ecstasy on one occasion. At trial, the parties differed on the meaning of the gesture: the government said it amounted to a confession, and the appellant said it simply meant she had been to Florida once. *See id*. at 316. Clearly, gesture confessions are much more open to interpretation than a solid confession that has been reduced to writing and signed by the accused.

[53] *See* MCM, *supra* note 2, MIL. R. EVID. 304(g). According to rule 304(g), "An admission or a confession of the accused may be considered as evidence against the accused on the question of guilt or innocence only if independent evidence, either direct or circumstantial, has been introduced that corroborates the essential facts admitted to justify sufficiently an inference of their truth." *Id.*

[54] For a superb commentary on the CAAF's struggles with the corroboration rule, see Major Lance Miller, *Wrestling with MRE 304(g): The Struggle to Apply the Corroboration Rule*, 178 MIL. L. REV. 1 (2003).

[55] 61 M.J. 254 (2005).

[56] *Id.*

[57] *Id.* at 255.

[58] *Id.*

[59] *Id.*

[60] *Id.*

[61] *Id.*

[62] *Id.*

[63] *Id.*

[64] *See id.* at 256.

[65] *Id.* at 255.

[66] *Id.* at 256.

appellant's statements with the trial counsel prior to trial.[67] Questioned by the military judge, he stated that the subject had not come up in any previous official questioning. The military judge then asked, "So is today, in court, the first time you told that to anybody?"[68] Guisti replied that it was the first time he had done so "on the record," and, when pressed further by the military judge as to what he meant by "on the record," Guisti replied, "I told the defense attorney when she was questioning me before the Article 32."[69] Subsequent questioning established that the conversation with the defense counsel took place immediately before the reopened Article 32 investigation and about two weeks prior to trial.[70]

The defense counsel objected to Guisti's testimony on the grounds that it was inadequate corroboration for the appellant's confession; the defense did not, however, claim at trial that Guisti's testimony was not derived independent of the confession.[71] On appeal, appellant argued that Guisti's testimony was derived exclusively from reading the appellant's confession prior to the trial.[72]

The CAAF held that the military judge did not err in ruling that Guisti's testimony provided independent corroboration of the appellant's confession.[73] As a threshold matter, the court noted that the law requires that a confession be corroborated by independent evidence, which cannot be solely derived from the accused's own confession.[74] In the instant case, the CAAF found it significant that Guisti implicated the appellant for wrongful distribution of ecstasy in a private conversation with the appellant's defense counsel prior to the government's reopening of the Article 32 investigation, and prior to Guisti ever reading the appellant's confession.[75] This, according to the CAAF, was enough to demonstrate that Guisti's corroboration of the confession was independent of the confession itself. The CAAF held that the military judge did not err in admitting Guisti's testimony in corroboration of the appellant's confession.[76]

A pretrial conversation between the chief government witness and the accused's defense counsel is a slender thread upon which to hang a confession. If such a conversation represents the only independent source to corroborate the accused's confession, the CAAF's decision in *Arnold* puts defense counsel in a tenuous position when interviewing government witnesses. To avoid running afoul of the prohibition against acting as a witness and counsel in the same proceeding,[77] defense counsel may want to include third parties when interviewing government witnesses. More troubling still is the government practice in *Arnold* of showing a witness the accused's confession prior to trial;[78] had the trial counsel refrained from such activity, the independent source issue might never have arisen at trial. While it remains true that a confession is among the strongest forms of proof known to the law,[79] *Arnold* continues a disturbing trend of weakening what is required to corroborate the confession.

Military Rules of Evidence 401 and 403: Logical and Legal Relevance

In *United States v. Barnes*,[80] the Navy-Marine Court of Criminal Appeals (NMCCA) dealt with the constitutional right of a criminal accused to present logically and legally relevant evidence in his defense. The appellant in *Barnes* was an enlisted man assigned to the forward propulsion room of the USS John F. Kennedy. He was subjected to multiple incidents

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[67] *Id.*

[68] *Id.*

[69] *Id.*

[70] *See id.*

[71] *Id.*

[72] *Id.*

[73] *Id.* at 257.

[74] *Id.*

[75] *Id.*

[76] *Id.*

[77] *See, e.g.*, U.S. DEP'T OF ARMY, REG. 27-26, RULES OF PROFESSIONAL CONDUCT FOR LAWYERS para. 3-7 (1 May 1992).

[78] In an unrelated case, a government lawyer recently created a veritable firestorm of controversy by engaging in similar pretrial preparation practices. Among other things, she showed government witnesses trial transcripts, prepared witnesses in groups, and gave specific e-mail instructions to witnesses on what to say and to whom they should speak. *See Feds Probe Lawyer's Conduct in 9/11 Trial: TSA Lawyer Allegedly Coached Witnesses in Moussaoui Case*, CNN.COM, Mar. 30, 2006, http://www.cnn.com/2006/LAW/03/30/carla.martin.ap/.

[79] As the CAAF recently stated, "[A] voluntary confession of guilt is among the most effectual proofs in the law, and constitutes the strongest evidence against the party making it that can be given of the facts stated in such confession." United States v. Ellis, 57 M.J. 375, 381 (2005) (quoting Hopt v. Utah, 110 U.S. 574 (1884)).

[80] 60 M.J. 950 (N-M. Ct. Crim. App. 2005).

of severe physical abuse from his shipmates.[81] When his complaints went unheeded, he went absent without leave (AWOL).[82] Relatives persuaded him to return to the ship, where he was assigned to work in exactly the same location with the same individuals as before. Upon his return, his shipmates told him "tomorrow is a whole new day," which he interpreted to mean that he would be beaten worse than before.[83] He went AWOL again and remained absent for fifty-two months.[84]

At trial, he attempted to raise the defense of duress by introducing evidence of the abuse he suffered at the hands of his shipmates.[85] The government, however, prevailed in a pretrial motion in limine to prevent the appellant from testifying about his reasonable apprehension of death or serious bodily injury. The military judge ruled that the offenses of desertion and unauthorized absence terminated by apprehension are continuing offenses.[86] Since the appellant did not continually fear for his safety throughout the entire period of his absence, the military judge ruled that the appellant had failed to establish a necessary element of the affirmative defense of duress.[87] Accordingly, the military judge did not permit the testimony concerning the beatings and abuse aboard the ship. The military judge ruled that the issue of duress would be preserved for appeal, and the appellant pled guilty to the lesser included offense of unauthorized absence terminated by apprehension.[88]

The NMCCA held that the military judge erred by ruling that the offenses of desertion and unauthorized absence terminated by apprehension were continuing in nature; case law makes it clear they are instantaneous, not continuing offenses.[89] Thus, the appellant's state of mind at the time of his absence was critical to evaluating the affirmative defense of duress.[90] The NMCCA observed that a criminal accused has a constitutional right to present logically and legally relevant evidence at trial.[91] In this case, the appellant's evidence, if believed, could support a defense of duress and was therefore both logically and legally relevant.[92] The military judge's ruling effectively denied the appellant the right to constitutional due process and to a fair and impartial trial.[93] Accordingly, the NMCCA reversed and set aside the findings and the sentence.[94]

The NMCCA's opinion in *Barnes* confirms the basic admissibility standards of MREs 401, 402 and 403: legally and logically relevant evidence is admissible at trial unless precluded by other specific rules of evidence.[95] When a criminal accused is legally entitled to present a defense, he also has the right to present relevant evidence to support the defense. *Barnes* is a good reminder of the symbiotic relationship between the theory of the case and relevance under the rules.

In *United States v. Johnson*,[96] the CAAF examined the relevance of a criminal accused's bank records to help show motive to wrongfully distribute marijuana. The appellant in *Johnson* gave consent for police officers to search his vehicle when he was pulled over for a traffic violation while driving home on leave. The police discovered a sealed box that

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[81] *Id.* at 953-54. The abuse included beatings severe enough to leave him badly bruised and, on one occasion, caused him to urinate blood. *Id.* at 954.

[82] *Id.*

[83] *Id.*

[84] *Id.*

[85] *Id.*

[86] *Id.* at 955.

[87] *Id.*

[88] *Id.* The effect of this ruling was to permit the appellant to introduce the issue on appeal; normally, his plea of guilty would have waived any affirmative defense of duress. *Id.*

[89] *Id.* at 956.

[90] *See id.* at 955-56 (discussing the affirmative defense of duress, the military judge's erroneous ruling that desertion is a continuing offense, and the ruling's effect on the appellant's ability to raise a defense).

[91] *Id.* at 955.

[92] *Id.*

[93] *Id.* at 955-56.

[94] *Id.* at 959.

[95] *See* MCM, *supra* note 2, MIL. R. EVID. 401 (defining logical relevance); *id.* MIL. R. EVID. 402 (stating that relevant evidence is admissible unless otherwise prohibited by the Rules); *id.* MIL. R. EVID. 403 (establishing the "legal relevance" balancing test that weighs probative value against prejudicial effect of the evidence).

[96] 62 M.J. 31 (2005).

contained approximately $17,000 worth of compressed marijuana bricks.[97] The appellant claimed he was transporting the box for a friend and had no idea it contained marijuana.[98]

At appellant's trial for wrongful possession of marijuana with intent to distribute, the government introduced appellant's bank records from the previous twelve months to demonstrate a financial motive to distribute marijuana.[99] The military judge admitted the evidence over defense objection.[100]

The CAAF examined two issues: first, whether the evidence of the appellant's financial condition was relevant, and second, whether the probative value of the evidence was substantially outweighed by the danger of unfair prejudice.[101] As a threshold matter, it is noteworthy that in evaluating these issues of logical and legal relevance, both of which are the subject of specific evidentiary rules,[102] the CAAF did not once cite the MRE.[103]

On the issue of logical relevance, the CAAF held that evidence of poverty, standing alone, is only marginally relevant to demonstrate a motive to sell drugs. In this case, the government did nothing more than show that the appellant struggled financially and lived month-to-month. The CAAF observed that the appellant's financial struggles made him no different from many other servicemembers.[104] The minimal probative value of the evidence was outweighed by the danger of unfair prejudice because it permitted the panel to infer that poverty is itself a motive to commit a crime.[105] Given the strength of the government case and the incredible nature of the appellant's story, however, the error was harmless.[106]

Despite its puzzling failure to cite the MRE in ruling on an evidentiary issue, the CAAF did provide sound guidance to practitioners on evaluating when financial status evidence is relevant at trial. The threshold requirement, of course, is that counsel must show a specific relevant link between the financial status evidence and the charged offense.[107] Citing a number of state and federal cases, the CAAF listed several circumstances under which the evidence would be relevant: to show imminent and dire financial need, to illustrate unexplained wealth or living beyond one's means, or to explain a sudden and drastic change in a bank account balance.[108]

The CAAF's doctrinally sound approach on the relationship between logical relevance and admissibility in *Johnson* stands in stark contrast to *United States v. Brewer*,[109] in which a divided CAAF held that the appellant's due process rights trumped specific rules of evidence that would have prevented the appellant from raising a novel defense at court-martial.

The appellant in *Brewer*, an Air Force master sergeant with over twenty years of service,[110] tested positive for marijuana use during a random urinalysis test.[111] Following the urinalysis, the government obtained a search authorization to test a hair sample from the appellant, which also tested positive for marijuana use. Based on the hair analysis, an Air Force expert

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[97] *Id.* at 33.

[98] *Id* at 36. The appellant claimed that his friend, a fellow named B.J., had asked him to deliver the box to a person named Junior, who lived in the appellant's home town. Unfortunately for the appellant, he did not know the last names of B.J. or Junior, had no way to contact them, and had not heard from them since his arrest. *Id.*

[99] *Id.* at 33-34.

[100] *Id.* at 35.

[101] *Id.* at 34.

[102] Rules 401 and 402 define logical relevance and stand for the proposition that logically relevant evidence is admissible at trial unless otherwise prohibited by the Rules or other legal considerations. *See* MCM, *supra* note 2, MIL. R. EVID. 401, 402. Military Rule of Evidence 403 establishes the principle of legal relevance with its test that balances probative value and prejudice to the fact-finding process. *See id*. MIL. R. EVID. 403.

[103] *See generally Johnson*, 62 M.J. 31.

[104] *Id.* at 34-35.

[105] *Id.* at 35.

[106] *Id.* at 36.

[107] *Id.* at 35.

[108] *Id.*

[109] 61 M.J. 425 (2005).

[110] United States v. Brewer, 2004 CCA LEXIS 136 (A.F. Ct. Crim. App. 2004).

[111] *Brewer*, 61 M.J. at 427.

determined that the appellant had used marijuana at least thirty times during the previous twelve months.[112] The appellant was charged with using marijuana on divers occasions over a one-year period.[113]

The government relied on the testimony of the hair analysis expert and the permissive inference of wrongfulness to establish the element of wrongful use.[114] The appellant countered with a novel defense, a combination of alibi and innocent ingestion.[115] In support of the defense, the appellant offered testimony from five witnesses who had spent significant time with him the previous year and could testify that they had not seen him use marijuana or suffer from the effects of it.[116] The government moved in limine to preclude this testimony, arguing that because the appellant was not charged with marijuana use on specific dates and times, the only relevant alibi evidence he could offer would be a witness who had spent the entire year with him.[117] The military judge granted the motion, excluding the testimony of four of the witnesses, but permitting testimony from the appellant's girlfriend. The military judge also rejected the defense's motion for reconsideration at the close of the trial counsel's case.[118]

At trial, the appellant presented a type of innocent ingestion defense, introducing testimony from his girlfriend concerning the strict "no marijuana" rule the couple had in their home. The appellant also introduced testimony from a friend of his nephew, who stated that he and the nephew (who lived in the appellant's home) often smoked marijuana in the home and had once made a pot of marijuana-laced spaghetti sauce and left it on the stove.[119] Appellant's defense counsel argued in closing that the innocent ingestion probably occurred as a combination of residual smoke inhalation and ingestion of the spaghetti.[120]

On appeal, the appellant argued that the military judge erred in preventing him from using his "mosaic alibi" defense.[121] Citing MRE 401, the majority declared the evidence to be logically relevant. The appellant's witnesses would have testified that they spent a great deal of time with the appellant during the charged time period and had never seen him use drugs or appear under the influence of drugs, which the majority stated would "go to the issue of whether [the appellant] knowingly and wrongfully used drugs at least thirty times during the charged period."[122] The majority also believed that evidence from the excluded witnesses would have bolstered the appellant's innocent ingestion defense.[123] However, the majority agreed with the lower court's analysis that the evidence was not admissible under Rules 404 and 405 because it was testimony of specific instances of conduct as character evidence that did not meet any of the criteria for admissibility under those rules.[124]

Recognizing that Rules 404 and 405 could not provide a vehicle for admitting the evidence at trial, the majority then turned its attention to "the question of whether this type of testimony may be admissible on other grounds."[125] The majority first noted that the government had a tremendous advantage in this case because it was able to rely on the permissive inference of wrongful use without having to allege specific dates and times of use.[126] While accepting the validity of the government's charging decision and method of proof, the majority stated that the government's reliance on the permissive inference of wrongful use "requires that a court allow a defendant some leeway to rebut that inference by using testimony

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[112] *Id.*

[113] *Id.*

[114] *Id.*

[115] *See id*. The alibi defense, called the "mosaic alibi" defense by the lower court, *see Brewer*, 2004 CCA LEXIS 136, at *13-14, consisted of testimony from five individuals who would have claimed they had not seen any signs of drug use from the appellant during the charged timeframe. *Id.* The innocent ingestion defense involved testimony from a friend of the appellant's nephew, who would have testified that despite house rules, he and the nephew regularly smoked marijuana in the appellant's home and had once cooked a pot of marijuana-laced spaghetti that they had left on the stove. *Id.*

[116] *Brewer*, 61 M.J. at 427. These witnesses included friends, coworkers, and the appellant's live-in girlfriend. *Id.*

[117] *Id.*

[118] *Id.*

[119] *Id.*

[120] *See id.* at 441 (Baker, J., dissenting).

[121] *See id.* at 428.

[122] *Id.* at 429.

[123] *Id.*

[124] *Id.* at 428. Under MRE 404(a)(1), a criminal accused is permitted to raise evidence of his character to show action in conformity therewith. *See* MCM, *supra* note 2, MIL. R. EVID. 404(a)(1). Military Rule of Evidence 405 controls the methods of introducing character evidence at trial. Military Rule of Evidence 405(a) limits a criminal accused to using reputation or opinion testimony to prove his character. *Id.* MIL. R. EVID. 405(a).

[125] *Brewer*, 61 M.J. at 428.

[126] *See id*. at 428-29.

such as that proffered by Brewer in this case."[127] To bridge the gaping chasm between the plain language of MREs 404 and 405, which specifically prohibit evidence of this type, the majority relied on the somewhat amorphous concept of due process, declaring that the military judge's ruling violated the appellant's due process right to present witnesses in his own defense.[128] Accordingly, the majority held that the military judge, who had followed the MRE to the letter, abused his discretion in excluding the evidence.[129]

In separate opinions, two judges dissented from the majority opinion. Judge Crawford argued that the appellant could have introduced his character for law-abidingness or presented good Soldier defense evidence, but he chose not to.[130] She also noted that the Due Process clause requires the observance of basic procedural safeguards but is not a source of evidentiary rules, particularly when other rules of evidence speak to the issue.[131]

Judge Baker argued in dissent that the majority misapplied the abuse of discretion standard. With respect to three of the excluded witnesses, the military judge did not abuse his discretion because the "mosaic alibi" witnesses were not relevant to the defense of innocent ingestion.[132] Judge Baker believed that testimony from the fourth witness was relevant to the defense of innocent ingestion, but any error in excluding that witness's testimony was harmless. First, using other witnesses, the appellant was actually able to present his defense. Second, given the strength of the government's evidence rebutting the defense of innocent ingestion, exclusion of the fourth witness's testimony did not substantially influence the panel's findings.[133]

From an evidentiary standpoint, *Brewer* is a bombshell. Broadly viewed, the majority opinion essentially states that logical relevance and the due process right to present a defense trump the specific modes of proof contained in the MRE. This opens new evidentiary vistas to creative counsel who can paint military judges into constitutional corners. Counsel who believe that the specific language of the Rules inhibits their ability to call witnesses and introduce relevant evidence may consider using *Brewer* to support a more permissive approach to admission. A more narrow view would restrict the majority opinion to drug cases involving the permissive inference of wrongful use, chalking the majority opinion up as another example of the CAAF's antipathy towards the government's ability to employ the permissive inference.[134] Even a narrow interpretation of the case, however, changes the nature of the game in permissive use cases. Military judges cannot simply look at the MRE to evaluate the admissibility of defense evidence in permissive use cases; *Brewer* seems to require not only an evidentiary analysis, but also a constitutional analysis.

Military Rule of Evidence 404(b): Uncharged Misconduct

Although MRE 404(b) prevents the use of specific uncharged acts to prove propensity, the rule permits the introduction of uncharged acts for non-character purposes, including "proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident."[135] Military courts consistently apply the three-part test from *United States v. Reynolds* in deciding whether to admit evidence of uncharged acts: (1) there must be proof that the accused actually committed the uncharged acts; (2) the acts must make an issue of consequence in the proceedings more or less probable than it would be without the evidence; and (3) the evidence must survive an MRE 403 balancing test.[136] As demonstrated by recent trends in the military appellate courts, application of the *Reynolds* test occasionally proves problematic at the trial level.[137] During the 2005 term of court, the CAAF decided three cases involving uncharged misconduct and the application of the *Reynolds* test.

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[127] *Id.* at 429.

[128] *Id.* at 429-30.

[129] *Id.* at 430.

[130] *Id.* at 433 (Crawford, J., dissenting).

[131] *See id*. at 433-34.

[132] *See id*. at 440 (Baker, J., dissenting).

[133] *Id.* at 442.

[134] *See, e.g.*, United States v. Green, 55 M.J. 76 (2001); United States v. Campbell, 52 M.J. 386 (2000).

[135] MCM, *supra* note 2, MIL. R. EVID. 404(b).

[136] *See* United States v. Reynolds, 29 M.J. 105, 109 (C.M.A. 1989).

[137] For a discussion on recent cases involving the application of the *Reynolds* test to uncharged misconduct, see Major Christopher W. Behan, *New Developments in Evidence for the 2004 Term of Court*, ARMY LAW., Apr. 2005, at 8-9 and *New Developments in Evidence 2003*, ARMY LAW., May 2004, at 11-16.

United States v. Rhodes[138] is the first of this term's uncharged misconduct cases. The appellant in *Rhodes* was charged with the use and possession of psilocyn, a hallucinogenic substance found in mushrooms.[139] The government's chief witness was Senior Airman (SrA) John Daugherty, who had provided investigators with a five-page handwritten confession implicating both himself and the appellant in the offenses.[140] At trial, Daugherty claimed loss of memory, and the military judge permitted admission of his statement under MRE 804 as a statement against interest.[141]

Daugherty's memory loss and the appellant's role in his memory loss were hotly contested issues in the case. Daugherty testified that approximately four months after his confession, the appellant approached him and asked him to speak to the appellant's defense counsel.[142] Daugherty spoke to the defense counsel by telephone and later visited the counsel's office, where he signed an affidavit claiming that he no longer remembered the details of the mushroom transaction and that it was likely the appellant never went with Daugherty to purchase mushrooms. Daugherty also testified that neither the appellant nor his defense counsel suggested that he forget what had happened or lie about it.[143] The defense filed an unsuccessful pretrial motion in limine to preclude evidence suggesting that the appellant had obstructed justice by asking Daugherty to change his testimony.[144]

Applying MRE 404(b) and the *Reynolds* test, the military judge permitted the government to introduce evidence that SrA Daugherty's memory loss immediately followed a meeting with the appellant and his attorney in order to demonstrate the appellant's consciousness of guilt.[145] In his opening statement, the trial counsel told the members that Daugherty lost his memory within hours of the appellant's request that Daugherty meet with appellant's lawyer, and the evidence would prove that the appellant encouraged Daugherty to forget appellant's involvement.[146] The military judge instructed the members that evidence the appellant might have contributed to Daugherty's memory loss could be considered for the limited purpose of showing the appellant's consciousness of guilt.[147] He also instructed the members that there was nothing per se improper with the appellant or his attorney meeting with appellant's defense counsel.[148] During closing argument, the trial counsel highlighted the "unscrupulously, unusual visit" between the appellant and Daugherty, after which "Daugherty's memory [went] poof and disappeared," suggesting that the appellant and Daugherty conspired to create "this preposterous memory loss."[149]

The Air Force Court of Criminal Appeals (AFCCA) affirmed, and the CAAF granted review on the issue of whether the military judge abused his discretion in admitting evidence of the meeting between appellant and SrA Daugherty to demonstrate consciousness of guilt under MRE 404(b).[150]

The CAAF analyzed the admissibility of the uncharged misconduct evidence under the third prong of the *Reynolds* test and held that the military judge clearly abused his discretion in admitting the evidence.[151] Citing *Taylor v. Baltimore & Ohio R.R. Co*.,[152] a Second Circuit case from 1965, the CAAF pointed out that a witness's change in memory is insufficient by itself to support an inference of wrongdoing by the party benefiting from the change, an observation buttressed by Daugherty's in-court testimony that the appellant had nothing to do with his memory loss. [153] The CAAF noted the incongruity of the government relying on Daugherty's in-court testimony that his confession was accurate when given, while

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[138] 61 M.J. 445 (2005).

[139] *Id.* at 446.

[140] *Id.* at 447.

[141] *Id.* at 447-48. For a more thorough discussion of the statement against interest, *see infra* notes 333-38 and accompanying text.

[142] *Id.* at 447.

[143] *Id.*

[144] *Id.* at 448.

[145] *Id.*

[146] *Id.*

[147] *Id.* at 448-49.

[148] *Id.*

[149] *Id.* at 449.

[150] *Id.* at 446.

[151] *Id.* at 452.

[152] 344 F.2d 281, 284 (2d. Cir. 1965).

[153] *Rhodes*, 61 M.J. at 452.

at the same time disavowing his in-court testimony that the appellant had nothing to do with his memory loss.[154] The combination of these factors created the risk that the probative value of the memory loss as evidence of the appellant's guilt was substantially outweighed by the danger of unfair prejudice to the appellant.[155]

According to the CAAF, the military judge also erred by admitting the evidence for an improper purpose. It would have been permissible to admit the evidence to evaluate the truthfulness of Daugherty's claim of memory loss, but not to demonstrate appellant's consciousness of guilt.[156]

Finally, the CAAF evaluated the military judge's error for prejudice to the appellant. Where evidence is improperly admitted under MRE 404(b), the test for prejudice is whether the court can say that the judgment was not substantially swayed by the error.[157] In the instant case, the "suggestion that Appellant suborned perjury could have been crucial to the outcome" of an otherwise close case.[158] Accordingly, the CAAF reversed and set aside the findings and sentence pertaining to the psilocyn charges.[159]

Two judges dissented in separate opinions. Judge Crawford argued that all three prongs of the *Reynolds* test were satisfied and that the majority had inappropriately usurped the role of the members in speculating as to alternative explanations for the sudden change in Daugherty's testimony after his meeting with the appellant.[160] She took the majority to task for using the *Taylor* case and omitting from its opinion the inconvenient fact that the witness's memory loss in *Taylor* occurred over a period of five years, not within five months of the incident and immediately following a meeting between the witness and the appellant's defense counsel.[161] Judge Erdmann also dissented on the grounds that the majority had not properly applied the abuse of discretion standard of review to the military judge's ruling.[162] The standard is not whether the appellate court disagrees with the trial judge, but rather whether the military judge acted arbitrarily or reached a clearly untenable conclusion.[163] Given the facts and reasonable inferences arising therefrom, Erdmann would find no abuse of discretion.[164]

Rhodes is significant because it demonstrates the CAAF's continued willingness to closely examine the admission of uncharged misconduct evidence at trial and to readily substitute its judgment for that of a military judge. The "clear abuse of discretion" standard the majority employed in its analysis[165] appears to be nothing more than an announcement of strong disagreement with the facially reasonable findings and ruling of the military judge. The case illustrates the value for defense counsel of filing and litigating motions in limine in order to preserve issues for appeal. With a watered-down "clear abuse of discretion" standard, counsel can feel reasonably confident in prevailing on appeal if not at trial on uncharged misconduct issues. For military judges, *Rhodes* actually reduces the value of the CAAF's prior cases on uncharged misconduct evidence: when an appellate court applies so little deference to a judge's findings of fact, the task of recognizing and applying precedent—as the military judge attempted to do in relying on the *Reynolds* test at trial—becomes manifestly more difficult.

In *United States v. Bresnahan*,[166] another uncharged misconduct case, the CAAF found error in admitting uncharged misconduct but affirmed on grounds that the error was harmless. The appellant in *Bresnahan* was convicted of involuntary manslaughter for the shaken-baby death of his three-month-old son.[167] Evidence at trial suggested that there were just two possible perpetrators: the appellant and his wife.[168] The appellant, however, had confessed to shaking his son.[169] Rejecting a

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[154] *Id.*

[155] *See id.*

[156] *Id.* at 452-53.

[157] *Id.*

[158] *Id.*

[159] *Id.*

[160] *See id.* at 453-58 (Crawford, J., dissenting).

[161] *Id.* at 455-56.

[162] *See id.* at 458-59 (Erdmann, J., dissenting).

[163] *Id.* at 458.

[164] *Id.* at 458-59.

[165] *Id.* at 452.

[166] 62 M.J. 137 (2005).

[167] *Id.* at 138.

[168] *Id.* at 145-46.

defense motion in limine, the military judge permitted the government to introduce X-ray and autopsy evidence of non-accidental rib fractures the infant had suffered some four to eight weeks prior to the evening of his death, even though the injuries were not specifically linked to the appellant.[170] The military judge instructed the members that they could consider the evidence as an indicator that the shaken-baby injuries were not accidental.[171] The military judge further instructed the members that they could consider the injuries as bearing on the appellant's intent to shake his son only if the members concluded that the appellant had inflicted the injuries.[172] The Army Court of Criminal Appeals (ACCA) held that the military judge abused his discretion in admitting the evidence because there was no evidence the appellant had actually inflicted the uncharged injuries. Given the strength of the government case, however, the error was harmless.[173]

The CAAF affirmed, holding that it was indeed error to admit the uncharged misconduct evidence, but that it was harmless given the overwhelming strength of the government case against the appellant and the weakness of the defense case.[174] The government's case was strong, consisting of the appellant's admissions and confessions to a criminal investigator and two doctors, as well as testimony from five doctors who concluded that the child had died from being shaken. Furthermore, there was little risk of prejudice against the appellant, because the evidence helped establish at best that the shaken-baby injuries were caused by abuse rather than accident, an issue not even in dispute in the case.[175]

Bresnahan is a fairly straightforward application of the first prong of the *Reynolds* test: the proponent must show that the accused actually committed the uncharged misconduct. Although this concept seems simple, *Bresnahan* is the second child-death case in three years in which the CAAF has found error in a military judge admitting evidence of injuries not actually linked to the appellant; in 2003, the CAAF not only found error, but reversed and set aside the findings and sentence in *United States v. Diaz*, holding that the military judge erred to the prejudice of the appellant by introducing evidence of injuries that were not linked to the appellant.[176] The lesson for counsel and military judges is clear: if counsel cannot provide a clear link between the uncharged misconduct and the accused, the evidence should be excluded from trial.

United States v. Hays[177] is the CAAF's final Rule 404(b) case from the 2005 term of court. In a judge-alone mixed-plea trial, the appellant in *Hays* was convicted of, among other things, possessing child pornography and soliciting another to commit carnal knowledge with a minor.[178] The solicitation charge centered around an e-mail the appellant sent to an on-line acquaintance named J.D., in which the appellant asked J.D. if he had forced a particular nine-year-old girl to have sexual intercourse with him, requested pictures and video of sexual activity between J.D. and the nine-year-old, and promised J.D. pictures and video of the appellant raping a young girl he planned to adopt.[179]

In support of the solicitation charge, the government introduced several items of uncharged misconduct: e-mail containing pictures of minors engaging in sexually explicit conduct; pictures of adults engaging in bestiality; requests from the appellant for pictures and video of children participating in sexual activity with adults; and an e-mail to other members of his e-mail list threatening to remove them from the list if they did not provide "hardcore pix."[180] The defense unsuccessfully objected on grounds of relevance and improper character evidence.[181]

In affirming the military judge's decision to admit the evidence, the CAAF conducted a *Reynolds* analysis, evaluating the evidence in light of all three prongs of the test. The CAAF made short work of the first prong, simply stating the evidence was sufficient to show that the e-mails and images were on the appellant's computer and e-mail accounts.[182] As for the second prong, the CAAF held that the evidence made a fact of consequence in the action more probable than it would be

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[169] *Id.* at 138.

[170] *Id.* at 144.

[171] *Id.*

[172] *Id.*

[173] *Id.* at 145.

[174] *Id.*

[175] *Id.* at 145-46.

[176] *See* United States v. Diaz, 59 M.J. 79 (2003).

[177] 62 M.J. 158 (2005).

[178] *Id.*

[179] *Id.* at 161-62.

[180] *Id.* at 164.

[181] *Id.*

[182] *See id.*

without the evidence. The court rejected appellant's argument that the evidence showed nothing more than that the appellant enjoyed viewing child pornography. Instead, the court focused on the central issue with the solicitation charge—the appellant's intent to solicit another person to commit carnal knowledge with a child—and stated that the evidence was critical to evaluating the appellant's state of mind, an important component of intent evidence.[183] The CAAF also found the evidence to be relevant on the issue of motive.[184] The third prong of the *Reynolds* test was satisfied because the military judge performed an MRE 403 balancing test and ruled that the probative value of the evidence was not substantially outweighed by its prejudicial impact. Furthermore, the danger of unfair prejudice was low because the case was tried before a military judge alone, and the CAAF presumes that when evidence is admitted by a military judge for a limited purpose, the judge will consider it only for that purpose.[185]

Judge Erdmann dissented on the uncharged misconduct issue. In his opinion, the misconduct was relevant to show that the appellant liked to view child pornography, but not to show intent to seriously solicit another person to engage in carnal knowledge with a minor child.[186]

Hays is a classic example of how uncharged misconduct evidence can be used at trial for legitimate non-character purposes. The evidence went beyond merely showing that Hays was a pervert who liked to look at electronic child pornography. The evidence helped establish Hay's state of mind and his intent to not only look at child pornography, but also to participate in sexual acts with young children and to encourage other people to do so in order to satisfy his prurient interests. It was therefore critical to proving the solicitation charge against the appellant. The evidence fit the government's theory of the case in a way that clearly satisfied MRE 404(b)'s prohibition against introducing character evidence for propensity purposes only.

Closely related to uncharged misconduct under MRE 404(b) is sexual propensity evidence under MREs 413 and 414. The 2005 term of court featured two cases of note: *United States v. Berry*,[187] a CAAF case that put significant limits on the government's ability to admit uncharged sexual misconduct committed when the accused was an adolescent, and *United States v. James*,[188] a case in which the AFCCA affirmed the introduction of post-offense uncharged sexual misconduct to prove propensity.

The appellant in *Berry* performed oral sodomy on another male Soldier, SGT T, who was severely intoxicated.[189] In this "he-said/he-said" case,[190] both participants differed on whether the sodomy was consensual or forcible.[191] At trial, the government introduced evidence that when the appellant was thirteen years old, he persuaded a six-year-old boy to participate in oral sodomy with him. The evidence was proffered under MRE 413 to demonstrate that the appellant had a propensity to take sexual advantage of vulnerable victims.[192] The military judge overruled the defense objection to the evidence. Although the military judge made several findings of fact, he did not conduct a thorough MRE 403 balancing test using all the factors the CAAF set out in *United States v. Wright*,[193] a case in which the CAAF held that MRE 413 adequately preserves the accused's constitutional rights if the judge conducts a proper balancing test under MRE 403.[194] The trial counsel referred to the uncharged acts both in opening statement and closing argument, reminding the members that the uncharged acts were relevant "'because [Berry] (sic) took advantage of a person in a vulnerable position just like he did here in the case that you're deciding.'"[195] Following the appellant's conviction, the ACCA reviewed the military judge's ruling and found that the military judge had conducted an adequate balancing test.[196]

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[183] *Id.* at 164-65.

[184] *Id.* at 165.

[185] *Id.*

[186] *Id.* at 170-71.

[187] 61 M.J. 91 (2005).

[188] 60 M.J. 870 (A.F. Ct. Crim. App. 2005), *review granted* 2005 CAAF LEXIS 954 (2005).

[189] *Berry*, 61 M.J. at 93.

[190] The "he said/he said" characterization is the CAAF's own description of the case. *See id.* at 98.

[191] *Id.* at 93.

[192] *Id.*

[193] *See id.* at 93-94.

[194] *See* United States v. Wright, 53 M.J. 476 (2000).

[195] *Berry*, 61 M.J. at 94.

[196] *Id.*

The CAAF granted review on the issue of whether the military judge abused his discretion in admitting evidence of uncharged sexual misconduct committed when the appellant was an adolescent.[197] The CAAF began its opinion by reviewing the threshold requirements for admissibility of uncharged sexual acts under MRE 413: (1) the accused must be charged with an offense of sexual assault; (2) the evidence proffered must be evidence of the defendant's commission of another instance of sexual assault; and (3) the evidence must be relevant under MREs 401 and 402.[198] Logical relevance, however, is not sufficient alone for admitting uncharged sexual acts—the evidence must also pass the legal relevance test of MRE 403.[199] The CAAF cited not only MRE 403, but also the enhanced *Wright* factors a military judge should consider.[200]

Signaling its ultimate holding in the case, the majority noted that where a military judge is required to conduct a balancing test under MRE 403 and "does not sufficiently articulate his balancing on the record," the CAAF will grant less deference to his ruling than otherwise.[201] The majority held that the evidence was logically relevant under MRE 401 and 402 because it could tend to show a propensity to take sexual advantage of a vulnerable victim.[202] The military judge erred to the prejudice of the accused, however, by not conducting a detailed rule 403 balancing test on the record as required by *Wright*.[203] Although the military judge addressed several of the *Wright* factors, he only emphasized those that tended to support admission of the testimony and failed to address the remaining factors.[204] In the majority's view, the differences between the appellant's charged offense and the uncharged misconduct were significant enough to hold that the military judge abused his discretion in admitting the evidence.[205]

One of the most significant differences in the *Berry* case between the charged and uncharged misconduct had to do with the age of the appellant for each incident. The charged incident took place when the appellant was an adult and with an adult victim, but the uncharged incident occurred when the appellant was just thirteen years old with a six-year-old victim.[206] Citing a 2004 case, *United States v. McDonald*,[207] in which the CAAF found evidence of adolescent uncharged sexual misconduct irrelevant for 404(b) plan and intent purposes, the CAAF noted that significant differences exist between adolescents and adults.[208] The court warned that military judges must exercise great caution "[w]hen projecting on a child the mens rea of an adult or extrapolating an adult mens rea from the acts of a child";[209] the differences in time, experience and maturity constitute significant intervening circumstances for *Wright* and MRE 403 purposes.[210]

The CAAF also examined the potential of the uncharged misconduct to distract the fact-finder, another *Wright* factor not specifically addressed by the military judge. In this case, the prosecutor's repeated references to the six-year-old victim "characterized Berry in the eyes of the members as a child molester, one of the most unsympathetic characterizations that can be made."[211] What limited probative value the evidence had was outweighed by the danger that the members would consider the evidence for an improper purpose.[212]

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[197] *Id.*

[198] *Id.* at 95.

[199] *See id.*

[200] *Id.* As listed by the CAAF in *Berry*, those facts include: the strength of proof of the prior act, the probative weight of the evidence, the potential to present less prejudicial evidence, the possible distraction of the fact-finder, the time needed to prove the prior conduct, the temporal proximity of the prior event, the frequency of the acts, the presence of any intervening circumstances, and the relationship between the parties. *Id.*

[201] *See id.* at 96.

[202] *Id.*

[203] *Id.*

[204] The judge found that the proof of the prior act was strong, its proof would not take an excessive amount of time at trial, and the victim of the uncharged act, like the victim in *Berry*, was in a vulnerable position. *Id.* The judge did not address the probative weight of the evidence, the frequency of the acts, the temporal proximity of the prior act, the presence of intervening circumstances, or the distraction of the factfinder. *Id.*

[205] *Id.* at 96-97.

[206] *Id*.

[207] 59 M.J. 426 (2004).

[208] *Berry*, 61 M.J. at 96-97.

[209] *Id.* at 97.

[210] *See id.*

[211] *Id.*

[212] *Id.*

The court held that the military judge abused his discretion in admitting the appellant's uncharged adolescent sexual misconduct against him and that the error materially prejudiced the appellant's substantial rights.[213] Accordingly, the court set aside the appellant's conviction for forcible sodomy.[214]

Judge Crawford concurred in the result and agreed with the majority that the military judge abused his discretion under MRE 403.[215] However, she objected to the majority's conclusion that the appellant's adolescent sexual misconduct was logically relevant to the charged offense. In a rather confusing tautology, her concurring opinion stated that evidence must be logically relevant before it can be legally relevant, but if the evidence is not legally relevant, it cannot be logically relevant.[216] This formula ignores the basic structure of MREs 401 and 403, which certainly suggest that logically relevant evidence under MRE 401 might not be legally relevant for the purposes of MRE 403.[217] In her view, happenstance of similar conduct does not create logical relevance, particularly when the uncharged misconduct was committed by an adolescent.[218]

The majority opinion in *Berry* goes a long way towards resolving potentially unfair applications of MRE 413. Coupled with last year's opinion in the *McDonald* case, it is fair to say that uncharged adolescent sexual misconduct is presumptively inadmissible under the MRE. To overcome the presumption and to bridge the gulf between the adolescent and adult mindset, counsel bear a heavy burden. Expert testimony about the state of mind of the accused as an adolescent and as an adult will almost certainly be required. One can envision circumstances under which adolescent sexual misconduct would be admissible or a continuing course of conduct, misconduct committed in the later teen years if the accused is being tried as a young adult, or compelling factual similarities—but they will be exceptions to a general rule, and under *Berry*, very difficult exceptions to obtain.

But *Berry* goes beyond adolescent sexual misconduct. The opinion ends the almost reflexively automatic admission of uncharged sexual misconduct permitted under a facial analysis of the rules. By making it clear that the *Wright* factors are not a menu, but rather a checklist to be taken seriously, *Berry* increases the burden on military judges to carefully weigh not only similarities between charged and uncharged sexual misconduct, but also to meticulously analyze the differences.

In addition, the differing interpretations by CAAF members concerning such seemingly basic concepts as logical and legal relevance create intriguing opportunities for future litigation. A pure analysis of MRE 401 would suggest that almost anything is logically relevant at trial,[219] but if Judge Crawford's analysis in the concurring opinion gains traction with the court, the legal relevance principles of MRE 403 could potentially play a significant role in evaluating logical relevance under MRE 401.

Less revolutionary than *Berry*, but still significant, is the AFCCA's case of *United States v. James*.[220] The appellant in *James* was a youth leader at the base chapel. He developed a romantic interest in a fifteen-year-old girl that led to sexual activity, including fondling and what the victim called "clothes sex"—simulated sexual intercourse while wearing clothing.[221] These offenses occurred on 17 June and 7 July of 2001.[222] At his trial for indecent acts, the military judge permitted the government to call, over defense objection, another teenage girl who testified that the appellant had participated in similar activities with her *after* the charged offenses: 16 July, 23 July, and 2 August 2001.[223]

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[213] *Id.*

[214] *Id.* at 98.

[215] *Id.* at 98-102 (Crawford, J., concurring).

[216] *Id.* at 98-99.

[217] *See* MCM, *supra* note 2, MIL R. EVID. 401; *id.* MIL R. EVID. 402; *id.* MIL R. EVID. 403; *see also supra* notes 5-7 and accompanying text.

[218] *Berry*, 61 M.J. at 100.

[219] For a though-provoking discussion of this, see David Crump, *On the Uses of Irrelevant Evidence*, 34 HOUS. LAW REV. 1 (1997) (suggesting that a pure approach to MRE 401 renders almost anything logically relevant under MRE 401).

[220] 60 M.J. 870 (A.F. Ct. Crim. App. 2005), review granted 2005 CAAF LEXIS 954 (2005). The CAAF granted review on the following issue:

> Whether the military judge erred when he admitted evidence that appellant engaged in sexual acts with another female under the age of 16 where (a) the alleged acts occurred subsequent to the charged acts, and (b) the evidence admitted was of such an unfairly prejudicial nature as to contribute to the members arriving at a verdict on an improper basis.

United States v. James, 2005 CAAF LEXIS 954 (2005).

[221] *James*, 60 M.J. at 871.

[222] *Id.*

[223] *Id.*

The AFCCA examined the issue of whether the military judge abused his discretion by permitting the government to introduce post-offense uncharged sexual propensity evidence under MRE 414.[224] As a threshold issue, the AFCCA determined that the admissibility requirements of *United States v. Wright*, a case decided pursuant to MRE 413, also apply to cases decided under MRE 414; the only significant difference between Rules 413 and 414 is the applicability of the latter to offenses of child molestation.[225]

The AFCCA then addressed whether MRE 414 prohibits the introduction of post-offense uncharged misconduct. The appellant argued that the legislative history of Rules 413 and 414 supports the admission of pre-offense uncharged misconduct only. Rejecting appellant's argument, the AFCCA adopted a plain-language approach to interpreting the rule. Nothing in the text of MRE 414 prohibits the introduction of post-offense uncharged sexual misconduct.[226] Further buttressing its position, the AFCCA observed that the *Wright* case itself involved an issue of post-offense uncharged misconduct.[227] Additionally, the weight of authority both in the military and the federal courts permits the admissibility of post-offense uncharged acts under Rule 404(b).[228]

The AFCCA next examined the evidence under the *Wright* factors. The evidence met the threshold requirements for admissibility: (1) the appellant was charged with an offense of child molestation; (2) evidence was proffered of uncharged acts of child molestation; and (3) the evidence was relevant under MRE 401/402.[229] Although the military judge did not make the enhanced *Wright* 403 findings on the record, the AFCCA was satisfied that by permitting both sides to argue prejudice under MRE 403, the military judge properly considered the *Wright* factors.[230] The AFCCA went a step further and briefly addressed each of the *Wright* factors, concluding that the evidence met the *Wright* admissibility standards. Accordingly, the AFCCA held that the military judge did not abuse his discretion in admitting the post-offense uncharged misconduct under MRE 414.[231]

The CAAF has granted review of *James*, and in the light of *Berry*, it will be interesting to see whether the military judge's perfunctory approach to the *Wright* factors will survive further review. The AFCCA, of course, touched on the *Wright* factors, but only briefly. The issue of post-offense uncharged misconduct seems less significant than whether the military judge conducted a thorough review of the evidence under the *Wright* factors. Counsel and military judges should not hesitate to consider the admission of probative post-offense sexual propensity evidence, but the better practice is to adopt the thorough analysis of the evidence suggested in *Berry* than to fail to explicitly address the *Wright* factors or to breeze through them as the military judge and the AFCCA did in *James.*

Privileges

Although the MREs and FREs are identical in most respects, the two systems differ considerably in their approach to the law governing privileges. Privileges under the Federal Rules of Evidence (FRE) are "governed by the principles of common law as they may be interpreted by the courts of the United States in the light of reason and experience;"[232] there are no codified privileges in the federal rules. The MRE, in contrast, contain nine codified privileges.[233] In addition, the MRE apply a relatively rigid hierarchy to the development of privilege law in which the *Manual for Courts-Martial* (*MCM*) takes clear precedence over "the principles of common law generally recognized in the trial of criminal cases in the United States district courts pursuant to rule 501 of the Federal Rules of Evidence.[234]" Any new privileges under FRE 501 must be

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[224] *Id*. at 870.

[225] *Id.* at 871.

[226] *Id.* at 872.

[227] *Id.*

[228] *Id.*

[229] *Id.* at 873.

[230] *Id.*

[231] *Id.*

[232] FED. R. EVID. 501.

[233] *See generally* MCM, *supra* note 2, MIL. R. EVID. 502 (Lawyer-client privilege) 503 (Communications to clergy), 504 (Husband-wife privilege), 505 (Classified information), 506 (Government information other than classified information), 507 (Identity of informant), 508 (Political vote), 509 (Deliberations of courts and juries), 513 (Psychotherapist-patient privilege).

[234] *Id.* MIL. R. EVID. 501.

"practicable" for application in trials by courts-martial, "and not contrary to or inconsistent with the Code, these rules, or this Manual."[235]

Military appellate courts have exercised a great deal of restraint in expanding military privileges. Taking to heart the hierarchy in MRE 501, they have been reluctant to adopt new federal privileges,[236] modify existing privileges,[237] or expand exceptions to privileges.[238] This conservatism is based on the principle that a worldwide system of justice with ad-hoc courts and significant lay involvement requires greater certainty and stability than the Article III courts of the United States.[239]

Military Rule of Evidence 504: Marital Communications Privilege

Military Rule of Evidence 504,[240] the husband-wife privilege, protects confidential communications made between spouses during a marriage.[241] There are several exceptions to the privilege: when the communication involves a crime against the person or property of the other spouse or a child of either, when the parties were involved in a sham marriage, or when the marriage is a vehicle for prostitution or interstate transportation for immoral purposes.[242] In addition, there are two closely related exceptions recognized in many jurisdictions. The first is the crime-fraud exception, which involves communications made between spouses in order to further a crime or fraud; the key to the exception is the intent of the parties at the time the communication was made.[243] The second is the joint-participant exception for "marital confidences that relate to ongoing or future crimes in which the spouses were joint participants at the time of the communication";[244] the key to the joint-participant exception is the status of the parties with respect to the illegal venture at the time the communication was made.[245]

The appellant in *United States v. Davis*,[246] under investigation for possession of child pornography, consented to the search and seizure of his home computer by CID.[247] As a CID agent was enroute to appellant's home, appellant called his wife and ordered her to delete several files from the computer and empty the recycle bin. She complied, but CID was able to recover thousands of images of child pornography.[248] Over defense objection, the military judge permitted the government to elicit testimony from the appellant's wife regarding the order to delete the files. The military judge ruled that appellant's statements to his wife were admissible under a "partnership in crime/crime-fraud exception to the marital communications privilege."[249]

The ACCA reviewed the military judge's decision to admit the evidence for abuse of discretion. The court reviewed the basic structure of MRE 504, including the limits of its exceptions, and then discussed the applicability of the joint-participant and crime-fraud exceptions in Army courts-martial.[250] In *United States v. Martel*,[251] a 1985 case, the Army Court of Military Review (now ACCA) recognized the joint-fraud exception to the marital communications privilege. However, in a confusing

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[235] *Id.*

[236] *See, e.g.*, United States v. Rodriguez, 54 M.J. 156 (2000) (declining to adopt the psychotherapist-patient privilege of Jaffee v. Redmond, 518 U.S. 1 (1996)).

[237] *See, e.g.*, United States v. Napoleon, 46 M.J. 279 (1997) (declining to extend the clergyman privilege to include an NCO who was a lay minister in his off-duty time).

[238] *See, e.g.*, United States v. McCollum, 58 M.J. 323 (2003) (rejecting the "de facto child" exception to the marital communications privilege).

[239] MCM, *supra* note 2, MIL. R. EVID. 501 app., at A22-37.

[240] *Id.* MIL. R. EVID. 504.

[241] *Id.*

[242] *See id.* MIL. R. EVID. 504(c)(2).

[243] STEPHEN A. SALTZBURG, MICHAEL M. MARTIN, AND DANIEL J. CAPRA, 2 FEDERAL RULES OF EVIDENCE MANUAL § 501.02[8], at 501-82 (8th ed. 2003).

[244] CHRISTOPHER B. MUELLER & LAIRD KIRKPATRICK, EVIDENCE (3d. ed. 2003).

[245] SALTZBURG, *supra* note 243, at 501-82.

[246] 61 M.J. 530 (Army Ct. Crim. App. 2005).

[247] *Id.* at 531.

[248] *Id.* at 531-32.

[249] *Id.* at 532.

[250] *Id.* at 534.

[251] 19 M.J. 917 (A.C.M.R. 1985).

development nearly a decade later, in *United States v. Archuleta*,[252] the court declined to follow *Martel* and held, without expressly overruling *Martel*, that there is no provision in MRE 504 for a joint-participant exception.[253] The ACCA also noted that the Air Force Court of Military Review adopted a crime-fraud exception to the marital communications privilege in 1990[254] in the case of *United States v. Smith*.[255]

The ACCA declined to resolve the apparent conflict between *Archuleta* and *Martel*, simply stating that the statements at issue in *Davis* would be privileged even if *Martel* properly adopted the joint participant exception.[256] The ACCA adopted the military judge's findings that both the appellant and his wife were knowing participants in criminal activity at the point when she began deleting files at the appellant's request. However, the ACCA did not agree that the communications were made in furtherance of a joint criminal venture.[257] Carefully parsing the timeline of the day's events, the ACCA found that the appellant's request to destroy files was made *prior* to the beginning of the joint criminal venture. Accordingly, it was privileged. It would not fall under a joint-participant exception because it preceded the joint criminal venture, which depends on the status of the parties in relation to the criminal enterprise at the time the statement was made.[258]

The ACCA conceded that the appellant's statement would not be protected under a crime-fraud exception to the marital communications privilege, but the court declined to adopt the crime-fraud exception.[259] The court noted that MRE 504 is quite clear in the scope of the marital communications privilege. And where "a military rule promulgated by the President treats of an issue, recourse to Federal law—even though the rule may be similar—is not necessary, and, in fact, is not permitted."[260] Applying the rigid hierarchy of MRE 501 in interpreting the privilege,[261] the ACCA stated, "in the absence of a constitutional, statutory, or regulatory requirement to the contrary, the decision as to whether, when, and to what extent" any crime-fraud exception would apply belongs to the President, not the ACCA.[262]

Accordingly, the ACCA held that the military judge abused his discretion in allowing the wife to testify in contravention of the marital communications privilege. Applying the four-factor test of *United States v. Kerr*,[263] however, the ACCA held that the error was harmless—the strength of the government case was overwhelming; the defense case claim of innocent possession was weak and undermined by other evidence admitted in the case; the statement was material and important for its inculpatory value; and the statement's quality was not significant because it had been repeated to other people and other admissible evidence was available concerning the appellant's possession of child pornography.[264]

The significance of *Davis* lies in its classic approach to interpreting military privilege law. Although federal common law can be a source of military privilege law, it takes a subordinate position to codified military privileges, the MCM, and the purposes of military law. Novel interpretations of privilege law—particularly those that strip a criminal accused of protections—should be narrowly construed at courts-martial.[265] *Davis* is also significant because it establishes that the crime-fraud exception does not exist in Army courts-martial. Although the limits of the joint-participant exception in light of *Martel* and *Archuleta* remain unresolved, *Davis* does clarify that the timing of the communication in relation to the criminal enterprise is critical. If the communication occurs prior to the start of the venture, it will be privileged and not subject to the exception.

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[252] 40 M.J. 505 (A.C.M.R. 1994).

[253] *Id.* at 506; *see Davis*, 61 M.J. at 535.

[254] *Id.*

[255] 30 M.J. 1022, 1025-27 (A.F.C.M.R. 1990).

[256] *See Davis*, 61 M.J. at 535.

[257] *Id.* at 536.

[258] *Id.*

[259] *Id.*

[260] *Id.* (quoting United States v. McConnell, 20 M.J. 577, 583 (N.M.C.M.R. 1985)).

[261] *See* MCM, *supra* note 2, MIL. R. EVID. 501.

[262] *Davis*, 61 M.J. at 536.

[263] 51 M.J. 401 (1999).

[264] *Davis*, 61 M.J. at 537.

[265] *See id.* at 537 n.11.

Opinion Testimony

Military Rule of Evidence 702 permits experts to testify concerning scientific, technical, or specialized knowledge that will help a trier of fact better understand the evidence or determine a fact at issue.[266] An expert occupies a unique position in a trial: unlike most other witnesses, the expert is not limited to fact testimony based on personal knowledge of the case[267] but is entitled to testify "in the form of an opinion or otherwise."[268] Because of the expert's special status at trial, the rules require the expert's testimony to be based on "sufficient facts or data" and to be "the product of reliable principles and methods" applied "reliably to the facts of the case."[269] The CAAF decided several cases this term pertaining to the qualifications and reliability of expert testimony, the proper role of the expert at trial, and the scope of expert testimony.

The CAAF addressed expert qualifications and reliability in *United States v. Billings.*[270] The appellant in *Billings* was the leader of the Gangster Disciples, a violent gang at Fort Hood that went on a crime spree in the summer of 1997 that included two killings and numerous other offenses.[271] Members of the gang robbed an apartment owner of cash and a Cartier Tank Francaise watch. The watch was never recovered, but the government did have photographs of the appellant wearing a similar watch that were admitted at trial to link the appellant to the robbery.[272]

The government called a local jeweler to testify as an expert in Cartier watch identification. The jeweler did not sell Cartier watches, nor had he ever actually seen a Cartier Tank Francaise watch. Defense counsel requested a full *Daubert* hearing to examine the qualifications of the expert, but the military judge denied the request.[273] At trial, comparing photographs of the stolen watch with a Cartier Tank Francaise watch advertisement, the jeweler testified that the watch in the photograph had similar characteristics to those found in Cartier watches. He also testified that based on the photograph, the watch appeared to be made of solid gold rather than gold plate.[274]

On appeal, the CAAF examined the qualifications of the expert and the reliability of his methods and testimony. As a threshold matter, the CAAF reiterated that the six-factor test first promulgated by the Court of Military Appeals (CMA) in *United States v. Houser*[275] still applies to expert qualifications and testimony at trial.[276] The first prong of the *Houser* test—the qualifications of the expert—was easily satisfied in *Billings*. Under MRE 702, an expert can be qualified by virtue of specialized knowledge or training.[277] In this case, even though the jeweler had little experience dealing with Cartier watches, he did have twenty-five years of experience as a jeweler, and his expertise was helpful to the panel.[278]

The appellant also argued that by comparing the watch in the photograph with a Cartier watch advertisement, the expert did nothing the panel members could not have done for themselves.[279] The CAAF disagreed, stating that the standard is not whether the jury could reach *any* conclusion without expert assistance, but whether the jury would be able to "determine intelligently and to the best possible degree the particular issue without enlightenment from those having a specialized understanding of the subject."[280] In this case, the expert knew more about Cartier watches than the panel members, and the CAAF held that the military judge did not abuse his discretion in qualifying the jeweler as an expert in Cartier watch identification.[281]

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[266] MCM, *supra* note 2, MIL. R. EVID. 702.

[267] *See id.* MIL. R. EVID. 602.

[268] *Id.* MIL. R. EVID. 702.

[269] *Id.*

[270] 61 M.J. 163 (2005).

[271] *Id.* at 165.

[272] *Id.*

[273] *Id.*

[274] *Id.* at 165-66.

[275] 36 M.J. 392 (C.M.A. 1993). Those factors include: (1) the qualifications of the expert; (2) the subject matter of the expert testimony; (3) the basis for the testimony; (4) the legal relevance of the evidence; (5) the reliability of the evidence; and (6) the probative value of the evidence must outweigh other considerations under MRE 403. *Id.*

[276] *Billings*, 61 M.J. at 166.

[277] *See* MCM, *supra* note 2, MIL. R. EVID. 702.

[278] *Billings*, 61 M.J. at 167.

[279] *Id.*

[280] *Id.* (quoting *Houser*, 36 M.J. at 398).

[281] *Id.* at 166-67.

The CAAF then addressed the reliability of the expert's method of determining that the watch in the photograph was made of real gold rather than gold plate. Citing *General Electric Co. v. Joiner*,[282] the CAAF noted that an expert's opinion must be connected to the underlying data by more than the *ipse dixit*—or mere assertion—of the expert.[283] Military Rule of Evidence 702 and the controlling Supreme Court cases of *Daubert v. Merrell Dow Pharmaceuticals, Inc.*[284] and *Kumho Tire Co. v. Carmichael*[285] require the military judge to exercise a gatekeeping function to determine the reliability of methods employed by expert witnesses.[286] Although the defense requested it, the military judge conducted no such analysis in this case.

The court reminded practitioners and military judges that the *Daubert* reliability factors—(1) whether a theory can be or has been tested; (2) whether the theory or technique has been subjected to peer review or publication; (3) the known or potential rate of error; and (4) whether the theory or technique is generally accepted—are a baseline for evaluating the reliability of expert testimony.[287] If those factors are not applicable, then it is up to the proponent of the evidence to identify alternative indicia of reliability.[288] In this case, the government failed in its burden to establish the reliability of the jeweler's testimony through the *Daubert* factors or alternative indicia of reliability, and the military judge abused his discretion by permitting the jeweler to identify solid gold in a photograph.[289] Given the circumstances of the case, however, the error was harmless, and the CAAF affirmed.[290]

Billings is an excellent primer for new counsel on the basic principles of expert witness testimony at courts-martial. The case reiterates the value of the six-factor *Houser* test in evaluating the qualifications of expert witnesses. In order to expedite resolution of expert witness issues at trial and on appeal, counsel would be well advised to frame expert witness requests and motions according to the *Houser* factors. By affirming the military judge's decision to qualify as an expert a veteran jeweler with little Cartier watch experience, *Billings* also highlights the generous approach of MRE 702 concerning expert witness qualification—an expert can be qualified on the basis of knowledge, skill, experience, training, or education. So long as the expert can help the panel members make a better, more informed decision than they would make in the absence of the expert, the qualification standards of MRE 702 will be met. Finally, *Billings* emphasizes two critical components of a reliability determination: the proponent's responsibility to demonstrate the reliability of the expert's methods using either the *Daubert* factors or alternative indicia of reliability; and the military judge's function as a gatekeeper to keep unreliable expert methodology away from the panel members.

In another expert witness case this term, the CAAF addressed an issue involving false confession experts. The appellant in *United States v. Bresnahan*[291] confessed to shaking his three-month-old son, an act that led to the child's death. He unsuccessfully sought to suppress the confession both at trial and on appeal, claiming that the interrogation tactics employed by law enforcement personnel rendered his confession involuntary.[292] He also requested the services of an expert assistant, Dr. Richard Leo, to help the defense evaluate a possible false confession defense.[293] According the defense, Dr. Leo would assist in evaluating the vulnerability of the appellant's confession and the interrogation techniques used by investigators.[294] Using enigmatic and circular language, the military judge denied the defense request, stating, "defense counsel is searching for evidence that would assist in her defense of the accused, but with little evidence to indicate such evidence exists."[295] The defense did not present a false confession defense at trial.[296]

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[282] 522 U.S. 136 (1997).

[283] *Billings*, 61 M.J. at 168.

[284] 509 U.S. 579 (1993).

[285] 526 U.S. 137 (1999).

[286] *Billings*, 61 M.J. at 168.

[287] *Id.*

[288] *Id.*

[289] *Id.* at 168-69.

[290] *Id.* at 169-70. Those factors included the fact that the watch photographs were already in evidence, the defense was able thoroughly to explore the issue of the jeweler's competence in voir dire and cross-examination, and the government presented a very strong case against the appellant concerning the theft of the watch by members of a gang that she directed and controlled. *Id.*

[291] 62 M.J. 137 (2005). For a more thorough discussion of the facts of *Bresnahan*, see *supra* notes 166-173 and accompanying text.

[292] *Id.* at 140-42.

[293] *Id.* at 143.

[294] *Id.* at 142.

[295] *Id.*

[296] *Id.*

On appeal, the CAAF addressed whether the military judge abused his discretion in denying the defense's request for a false confession expert consultant. The majority recognized that an accused is entitled to expert assistance on trial, but only on a showing of necessity.[297] Citing past case law, the majority stated that necessity requires more than the mere possibility of assistance from a requested expert, but rather a showing of a reasonable probability that an expert would be of assistance to the defense and that denial of the expert would result in a fundamentally unfair trial.[298] The majority also referred to the three-prong *Gonzalez* test for evaluating expert assistance requests, which requires counsel to show the following: (1) why the expert assistance is needed, (2) what the expert assistance would accomplish for the accused; and (3) why the defense counsel is unable to gather and present the evidence themselves.[299]

The majority found that the primary failure of the defense case was in meeting prong one of the *Gonzalez* test—necessity.[300] The majority conceded that the confession was important evidence in the trial and that Dr. Leo would have benefited the defense in its case preparation.[301] However, adopting the findings of the military judge, the majority held that the defense never established the necessity for expert assistance, because the defense counsel failed to present any evidence of abnormal mental condition, submissive personality, or anything else suggesting that the confession was actually false.[302] Without that evidence, it was not an abuse of discretion for the military judge to deny the request, although the court noted that it would likewise not have been an abuse of discretion to grant the request.[303]

Judges Erdmann and Effron dissented on the denial of the false confession expert consultant.[304] Arguing that the majority opinion now makes it more difficult for defense counsel to request expert consultants to evaluate their cases, the dissent would have found that the appellant met the requirements of *Gonzalez* to justify expert assistance: the defense established why the assistance was needed, what expert assistance would accomplish to help the appellant, and why defense counsel was unable to gather and present the evidence herself.[305] According to the dissent, the circular reasoning of the majority opinion establishes a new standard whereby the defense must first demonstrate that a defense actually exists before obtaining expert assistance in order to evaluate whether the defense is available.[306]

Bresnahan presents an interesting wrinkle to the dilemmas counsel face when trying to obtain expert consultants at trial. The opinion appears to enhance the requirements for proving necessity, at least for novel defenses such as false confession. In all cases involving expert consultant requests, counsel must thoroughly educate themselves on the issues. The defense counsel in *Bresnahan* apparently understood the issues, but did not develop a threshold set of facts sufficient to convince a military judge the expert could be of assistance in this particular case. If the dissent's characterization of *Bresnahan* is correct—and not simply limited to the somewhat difficult area of false confessions—the enhanced factual predicates required to demonstrate necessity for an expert consultant will require defense counsel to jump through yet another hoop when requesting expert assistance. Military Rule of Evidence 104 could potentially be of great utility to counsel and military judges in resolving these issues. The rule permits military judges to determine preliminary questions concerning witness qualifications, existence of privileges, or the admissibility of evidence.[307] The key to MRE 104 is its flexibility: the court is not bound by the rules of evidence in making these preliminary determinations.[308] Accordingly, defense counsel should consider the use of affidavits, hearsay, telephonic communication, and other methods of getting information to a military judge to establish the factual predicates now required in evaluating requests for expert consultants to help evaluate the existence of a defense.

The CAAF's final expert case of the 2005 term is *United States v. Hays*,[309] in which the court examined the permissible scope of an expert's opinion on the ultimate issue in the case. During appellant's trial for solicitation of the offense of carnal

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[297] *Id.*

[298] *Id.* 143 (citing United States v. Gunkle, 55 M.J. 26, 31 (2005)).

[299] *Id.* (citing United States v. Gonzalez, 39 M.J. 459, 461 (C.M.A. 1994)).

[300] *See id.*

[301] *Id.*

[302] *Id.*

[303] *Id.*

[304] *Id.* at 147-49 (Erdmann, J., dissenting).

[305] *Id.* at 148-49.

[306] *Id.* at 147-48.

[307] MCM, *supra* note 2, MIL. R. EVID. 401.

[308] *See id.* MIL. R. EVID. 401(a).

[309] 62 M.J. 158 (2005). For additional discussion of the facts of this case, see *supra* notes 177-186 and accompanying text.

knowledge, the government introduced an e-mail written by the appellant to someone known as J.D. In the e-mail, the appellant asked J.D. if he had yet engaged in sexual intercourse with "your 9yo" and requested pictures if J.D. had. The appellant also discussed his plans to adopt a little girl, sexually abuse her, photograph the abuse, and send pictures to J.D. [310]

The government called an FBI expert to testify on the behavioral aspects of individuals who victimize children. The expert testified that the e-mail was an attempt by the appellant to entice J.D. to abuse a child and photograph the acts, with a promise that the appellant would return the favor at a future date.[311] Defense counsel objected that this testimony was impermissible ultimate opinion testimony, but the military judge overruled the objection.[312] On appeal, the CAAF held that the military judge did not abuse her discretion in permitting the expert to testify about the meaning of appellant's e-mail. Although the expert's testimony used words associated with the concept of solicitation, he did not testify that there was a solicitation as a matter of law. The testimony was within his area of expertise.[313] The majority also found it significant that the trial occurred before a military judge alone, who would be presumed to properly use and consider expert testimony.[314] Judge Erdmann dissented, arguing that the expert's opinion did in fact go to the ultimate issue of the case—why the appellant sent the e-mail to J.D.[315]

Hays is perhaps limited in its significance as an evidence case. A military judge could easily grasp the distinction between the factual solicitation and solicitation as a matter of law. The issue might well have been different had the case been tried before a panel of members. Perhaps *Hays'* greatest value to practitioners is its illustration of the outer limits of permissible expert testimony on ultimate issues. In this case, the expert went to the very edge of the line but did not quite cross over. Counsel should always know just where the line of permissible testimony is, and government counsel in particular should ensure their witnesses don't come close to crossing it.

Hearsay

The 2005 term of court was relatively quiet in terms of hearsay. The CAAF clarified the requirements for adoptive admissions in *United States v. Datz*,[316] decided a case under the public records exception of MRE 803(8) in *United States v. Taylor*,[317] and addressed statements against penal interest in *United States v. Rhodes*.[318]

Military Rule of Evidence 803(8): Public Records

The public records exception to the hearsay rule, MRE 803(8),[319] rarely finds its way into the opinions of military appellate courts. But this year, the CAAF decided a case based on the rule in *United States v. Taylor*.[320] At the appellant's trial for desertion, the government introduced two exhibits into evidence to help prove absence from and return to duty. The first exhibit (PE2) was a copy of a declaration of desertion message that also contained additional, undecipherable content at the bottom of the document. It was admitted at trial as a personnel accountability document under MRE 803(8) over defense objection on grounds of relevance, hearsay, improper foundation, and authentication. The exhibit was not authenticated, and the foundation witness had not compared it to the original.[321] The second exhibit (PE3) was an e-mail known as a declaration of return from desertion message. The e-mail was prepared based on information obtained from a deserter warrant (DD 553) and movement orders. Defense counsel objected to the document on the grounds that it was "hearsay within hearsay," but the military judge admitted it under MRE 803(8).[322]

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[310] *Id.* at 161-62.

[311] *Id.* at 165.

[312] *Id.*

[313] *Id.* at 165-66.

[314] *Id.* at 165.

[315] *Id.* at 169, 171-72 (Erdmann, J., dissenting).

[316] 61 M.J. 37 (2005). The adoptive admissions issue has already been discussed in this article at *supra* notes 26-52 and accompanying text.

[317] 61 M.J. 157 (2005).

[318] 61 M.J. 445 (2005).

[319] MCM, *supra* note 2, MIL. R. EVID. 803(8).

[320] *Taylor*, 61 M.J. at 157.

[321] *Id.* at 157-60.

[322] *Id.* at 160-62.

The CAAF granted review on whether the admission of the two documents violated the appellant's confrontation rights under the 2004 Supreme Court case *United States v. Crawford*,[323] and also specified review on two additional issues, including whether, apart from *Crawford*, the military judge abused his discretion in admitting the documents.[324] The court never reached the confrontation clause issue, instead holding that the military judge erred in admitting the documents because they did not satisfy the public records exception to the hearsay rule.

In reaching its holding, the CAAF examined the admissibility determinations of each of the documents in turn. Because of the undecipherable content at the bottom of the message, PE2 (the declaration of desertion message) did not qualify as a personnel accountability document within the meaning of MRE 803(8).[325] Nor was it admissible as "matters observed pursuant by duty imposed by law as to which there was a duty to report," because the government could not explain the undecipherable content at the bottom of the message.[326] Finally, PE2 was not an admissible copy under MRE 1005 because it was not authenticated, had not been compared to an original by the foundation witness, and there was no demonstration that the government had exercised reasonable diligence in finding an attested or compared copy.[327]

In order for PE3 (declaration of return message) to be admissible, the underlying documents that were used to create it would also have been required to be admissible under a hearsay exception.[328] The government provided no information about identity or duties of the person who had created the DD553 and even less information about the production and preparation of the movement orders.[329]

Because the case against *Taylor* relied considerably on the two improperly admitted documents to establish the elements of the offense, their admission was prejudicial to the appellant and likely had a substantial effect on the findings.[330] Accordingly, the CAAF reversed and set aside the findings in this case.[331]

Although the penalty for improper foundations in *Taylor* seems harsh, the case sends an important message to the field: evidentiary foundations, particularly in hearsay cases, are not to be lightly dismissed. The source of a document, the reason it is kept, and what is contained on its face are all critical aspects of admissibility. In addition, the foundational purpose of a hearsay exception—what makes it reliable—is also important. Defense counsel and military judges should pay careful attention to the subtext of the CAAF's holding: the court will seek to avoid ruling on constitutional confrontation issues if there are simpler grounds, such as improper foundation or inadmissible hearsay. Defense counsel should not hesitate to attack hearsay evidence on parallel constitutional and foundational grounds.

Military Rule of Evidence 804: Statements Against Interest

Statements against penal interest can be admissible if the declarant is unavailable and the statement "so far tend[s] to subject the declarant to . . . criminal liability . . . that a reasonable person in the position of the declarant would not have made the statement unless the person believed it to be true."[332] *United States v. Rhodes*[333] presents the interesting issue of a statement against interest that implicates not only the declarant, but also another person—in this case, the appellant. During the appellant's trial for possession and use of psilocin, a government witness, SrA Daugherty, claimed memory loss concerning the five-page handwritten confession he made that implicated him and the appellant in the misconduct.[334] Daugherty persisted in his claim of memory loss, so the military judge declared him unavailable for the purposes of MRE

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[323] 541 U.S. 36 (2004).

[324] *Taylor*, 61 M.J. at 158.

[325] *Id.* at 160.

[326] *Id.*

[327] *Id.*

[328] *Id.* at 160-61.

[329] *Id.* at 161.

[330] *Id.* at 161-62.

[331] *Id.* at 162.

[332] MCM, *supra* note 2, MIL. R. EVID. 804(b)(3).

[333] 61 M.J. 445 (2005).

[334] *Id.* at 446-47. For a more thorough discussion of the facts of this case, see *supra* notes 138-150 and accompanying text.

804(b)(3) and permitted the government to introduce the statement against the appellant, albeit with strict conditions on its use.[335]

The CAAF held that the military judge did not abuse his discretion in admitting the statement. Daugherty was available for confrontation purposes because he was present at trial and subject to cross-examination.[336] He was unavailable, however, within the meaning of MRE 804 because he persisted in a claim of memory loss.[337] The key to declarations against penal interest is their inculpatory nature. The mere fact that others are implicated in a statement against penal interest does not change its essential inculpatory nature.[338]

Conclusion

In a wide variety of cases, the military appellate courts decided evidentiary issues that will make a difference in the courtroom. Whether counsel are emboldened by *Brewer* to try novel evidentiary arguments based on the due process clause, constrained by *Berry* from introducing instances of uncharged adolescent sexual misconduct, or inspired by *Taylor* to pay attention to hearsay rules and evidentiary foundations, it is no stretch to paraphrase the inimitable Yogi Berra:[339] after the 2005 term of court, the evidentiary future in military courtrooms just ain't what it used to be.

[335] *Id.* at 447-48. The military judge set five conditions for the statement's use: (1) if the government introduced the statement, it also had to introduce Daugherty's affidavit claiming lack of memory and the possibility that the appellant had not accompanied Daugherty to purchase the mushrooms; (2) the government had to introduce the declaration during Daugherty's testimony; (3) the government could not introduce any statements Daugherty made at his interrogation other than those in the handwritten statement; (4) the defense could question either Daugherty or the OSI agent who took the confession about Daugherty's interrogation; (5) if the defense introduced any part of the confession into evidence, the government could introduce the rest of it.

[336] *Id.* at 449-50.

[337] *Id.* at 450.

[338] *Id.* at 451.

[339] *See* Yogi Berra, Yogi-isms, http://www.yogiberra.com/yogi-isms.html (last visited Apr. 6, 2006).

Annual Review of Developments in Instructions—2005

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This annual installment of developments in instructions covers cases decided by military appellate courts during the Court of Appeals for the Armed Forces' (CAAF) 2005 term.[1] As with earlier reviews on instructions, this article addresses new cases from the perspective of substantive criminal law, evidence, and sentencing. This article is written for military trial practitioners, and it frequently refers to the relevant paragraphs in the *Military Judges' Benchbook* (*Benchbook*).[2] The *Benchbook* remains the primary resource for drafting instructions.

Substantive Criminal Law

Military Judge's Responsibility to Determine Lawfulness of an Order: United States v. Deisher[3]

Obedience to lawful orders is at the very heart of military discipline. In *United States v. New*,[4] the CAAF held that, in a case involving an order to wear United Nations accoutrements with the U.S. Army uniform, the military judge properly decided the issue of lawfulness of the order as a question of law. In *United States v. Jeffers*,[5] where the accused challenged the necessity of his company commander's no-contact order, the CAAF reiterated that lawfulness is a question of law. The court held that the military judge did not err in determining lawfulness of the alleged order and not submitting the issue to the members. Since *New*, it is black letter law that the legality of an order is a question of law to be decided by the military judge. When questions of fact and law are inextricably intertwined, however, the procedural steps for applying this rule may be confusing. In *United States v. Deisher*, the CAAF provided additional guidance to military judges on their responsibilities when the lawfulness of an order is at issue.

Airman (Amn) Deisher was charged, *inter alia*, with failure to obey a lawful order from Staff Sergeant (SSgt) Hazen, a Security Forces Investigator, to have no contact with Amn Pennington.[6] During a pretrial session, the defense counsel moved to dismiss the charge because it did not have the legal attributes of a lawful order. The defense counsel argued that the communication lacked the clarity of a lawful order, did not have a definite duration, and exceeded the investigator's authority.[7] The parties litigated the motion based on two exhibits—a memorandum from SSgt Hazen written a month after the incident and subsequent testimony at the Article 32 investigation.[8] The trial counsel argued that the panel members, rather than the military judge, should resolve the issue of lawfulness of the order.[9] The defense counsel disagreed. When the military judge suggested that the question of whether the order had been given was a question of fact to be decided by the members, the defense counsel responded that that was only one of the questions at issue, and the military judge had to resolve the remaining questions raised by the defense counsel.[10]

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[1] The 2005 term began on 1 October 2004 and ended on 30 September 2005.

[2] U.S. DEP'T OF ARMY, PAM. 27-9, LEGAL SERVICES: MILITARY JUDGES' BENCHBOOK (15 Sept. 2002) [hereinafter BENCHBOOK].

[3] 61 M.J. 313 (2005).

[4] 55 M.J. 95 (2001).

[5] 57 M.J. 13 (2002).

[6] *Deisher*, 61 M.J. at 314.

[7] *Id.*

[8] *Id.*

[9] *Id.* at 315.

[10] *Id.*

The military judge denied the motion to dismiss.[11] The military judge's written ruling included the following:

> Based on the proffered facts, the court cannot find as a matter of law the alleged order was unlawful. The defense motion is essentially an argument that the evidence is insufficient to establish either that an order was given or that it was lawful. These are questions of fact for the members to determine.[12]

During the trial on the merits, SSgt Hazen testified that he was investigating the accused concerning an altercation with Amn Pennington. Staff Sergeant Hazen testified that he initially issued a no-contact order to the accused in a vehicle on the way to the medical clinic. Staff Sergeant Hazen could not recall the specific words, but he testified that when the accused expressed concern about what might happen to him, SSgt Hazen told the accused, "Let's get this behind you. Don't worry about it. Just don't have any more contact with Pennington. Don't get yourself in any more trouble."[13] Staff Sergeant Hazen testified that the accused responded with "I know. I know."[14]

Staff Sergeant Hazen testified that he issued a second no-contact order at the clinic in front of the accused's first sergeant. Staff Sergeant Hazen testified that, to the best of his recollection, he said to the accused, "In front of your first sergeant, I'm giving you a lawful order to have no contact with Airman Pennington; and if he approaches you, let somebody in your chain of command know or let me know and we'll take care of it as soon as possible."[15] Staff Sergeant Hazen testified that the accused nodded his head.[16]

Staff Sergeant Hazen testified that he issued a third no-contact order on the way from the clinic to the base. He testified that he said, "You could make a career out of this. Let's not screw up any more, and don't have any more contact with Pennington."[17] Staff Sergeant Hazen testified that the accused acknowledged this statement with something to the effect of "I know. I know. I'm going to stay out of trouble. I'm going to be okay."[18]

During cross-examination, SSgt Hazen stated that the only statement he felt comfortable testifying under oath about was the statement at the clinic.[19] Also, SSgt Hazen did not mention any no-contact orders in his report, and he did not speak to the accused's chain of command about the no-contact orders.[20]

After instructing the members on the elements of violating a lawful order, the military judge instructed the members on what is required for an order to be lawful.[21] The military judge gave the instruction from the old note 4 to paragraph 3-16-2 of the *Benchbook*.[22] The CAAF issued its opinion in *United States v. New* six months before the trial in *Deisher*,[23] but the model instruction in the *Benchbook* had not yet been changed.[24]

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[11] *Id.*

[12] *Id.*

[13] *Id.*

[14] *Id.*

[15] *Id*. at 315-16.

[16] *Id*. at 316.

[17] *Id*.

[18] *Id.*

[19] *Id*.

[20] *Id*.

[21] *Id*. at 317.

[22] *See* BENCHBOOK, *supra* note 2, para. 3-16-2 n.4.

[23] *Deisher*, 61 M.J. at 318.

[24] On 10 February 2004, the model instructions in paragraphs 3-14-2, 3-15-2, 3-16-1, 3-16-2, and 3-16-3 were changed to reflect the holding in *United States v. New*. Because of the CAAF's opinion in *United States v. Deisher*, the new note 4 in paragraph 3-16-2 and identical notes in paragraphs 3-14-2, 3-3-15-2, 3-16-1, and 3-16-3 do not accurately state the law. Those notes provide an instruction for those rare circumstances where the question of lawfulness is intertwined with questions of fact and should be submitted to the members with appropriate guidance. The issue of lawfulness does not ever need to be submitted to the members. However, the last two sentences of that note may be helpful as a format for an instruction, if the content of the order is in dispute and the military judge makes a preliminary ruling that an order with specific language would be lawful but an order with other specific language would not be lawful. *See* BENCHBOOK, *supra* note 2, para. 3-16-2 (IC, 10 Feb. 2004).

The CAAF held that the military judge erred when he ruled that both the predicate factual aspects of the issue of lawfulness and the actual issue of lawfulness were matters to be resolved by the members.[25] The court reiterated that "the legality of the order is an issue of law that must be decided by the military judge, and not the court-martial panel."[26] In the previously quoted language of the military judge's ruling, it was unclear whether the military judge made an affirmative determination that the order was lawful. The CAAF found a "significant likelihood" that the military judge did not do so and that the issue was resolved only by the panel.[27] The court reversed the conviction of failure to obey a lawful order and set aside the sentence.[28]

In ruling on a motion to dismiss on grounds that the alleged order was unlawful, the military judge should make a preliminary ruling whether certain communication under a set of specific circumstances constitutes a lawful order. This finding may necessarily require the military judge to make threshold contingent factual conclusions to determine whether the order at issue was lawful. This preliminary ruling on the lawfulness of an order, however, does not relieve the government of its burden to prove each element of the offense. The court-martial panel must still resolve all factual issues pertinent to the elements.[29]

Deisher confirms that the lawfulness of an order is a question of law that must be decided by the military judge. It also clarifies that a military judge need not instruct the members on what is required for an order to be lawful. The military judge must resolve any necessary preliminary factual questions relating to lawfulness and determine the lawfulness of the order.

Conspiracy to Commit Unpremeditated Murder

In *United States v. Shelton*,[30] the CAAF reversed a conviction for conspiracy to commit unpremeditated murder.[31] *Shelton* highlights an important point concerning the mens rea requirement for the offense of conspiracy under Article 81 of the Uniform Code of Military Justice (UCMJ). If the underlying offense has an element requiring a certain result, then the agreement must include the intent to achieve that result.

Sergeant (SGT) Shelton was charged with, inter alia, the premeditated murder of Private First Class (PFC) Chafin and conspiracy with SGT Seay to commit the premeditated murder of PFC Chafin.[32] In accordance with the defense counsel's request, the military judge instructed the members of the court on the lesser included offenses of unpremeditated murder and conspiracy to commit unpremeditated murder.[33] When instructing on the elements of unpremeditated murder, the military judge properly instructed the members that the offense required that "at the time of the killing, the accused had the intent to kill or inflict great bodily harm on PFC Chafin."[34] When instructing on the elements of conspiracy to commit unpremeditated murder, the military judge properly instructed the members that the offense required that the accused "entered into an agreement with SGT Bobby D. Seay II to commit unpremeditated murder."[35] However, when providing the required instruction on the elements of the offense within which the accused was charged—conspiracy to commit premeditated murder—the military judge instructed the members that the elements of the object of the conspiracy were "the same as set forth in the instruction on the lesser included offense of unpremeditated murder," without specifically repeating

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[25] *Deisher*, 61 M.J. at 318.

[26] *Id*. at 317.

[27] *Id*. at 318.

[28] *Id*. at 319.

[29] *Id*. at 317. It is important to remember that lawfulness of the order is not an element, so factual issues pertinent to lawfulness do not need to be submitted to the members, unless they are also pertinent to one or more of the elements.

[30] 62 M.J. 1 (2005).

[31] *Id*. at 5. The court affirmed the lesser included offense of conspiracy to commit aggravated assault, the findings as to the remaining offenses, and the sentence. *Id*. The court consisting of officer members adjudged a sentence of a dishonorable discharge, confinement for life, total forfeiture of pay and allowances, and reduction to the grade of E-1. *Id*. at 2.

[32] *Id*.

[33] *Id*. at 4.

[34] *Id*.

[35] *Id*.

the elements.[36] The officer panel convicted the accused of, inter alia, unpremeditated murder and conspiracy to commit unpremeditated murder.[37]

Based on these instructions, the CAAF found that the members could have convicted the accused of conspiracy to commit unpremeditated murder based on an intent to inflict great bodily harm.[38] The court held that, "[i]f the intent of the parties to the agreement was limited to the infliction of great bodily harm, their agreement was to commit aggravated assault, not unpremeditated murder."[39] Therefore, the CAAF affirmed a finding of guilty of only the lesser included offense of conspiracy to commit aggravated assault.[40]

Although the court did not discuss at any length the law of conspiracy, a brief analysis of the elements of the offense will show the court was correct. The two elements of a conspiracy are: (1) an agreement to commit an offense under the Uniform Code of Military Justice; and (2) an overt act by one or more of the conspirators to effect the object of the conspiracy.[41] The issue in this case involved the first element. The agreement must be to bring about the actual commission of the offense. If one of the elements of the offense requires a certain result, such as the death of a person, then a conspiracy to commit that offense would require an agreement to bring about that result.[42] Therefore, even though an intent to either kill or inflict great bodily harm is sufficient for unpremeditated murder, conspiracy to commit unpremeditated murder would necessarily require an intent to kill.[43]

The trial practitioner can glean two lessons from this case. First, if an offense requires a certain result, then a conspiracy to commit that offense requires an agreement to bring about that result. This would apply not only to conspiracy to commit unpremeditated murder, but also to conspiracy to commit other offenses such as maiming. Second, military judges must be cautious when cross-referencing during instructions on findings. It is unclear whether the military judge in this case intended to instruct the members that an intent to inflict great bodily harm was sufficient for conspiracy to commit unpremeditated murder or whether that was done inadvertently when cross-referencing to the instruction on unpremeditated murder that had already been given. In most cases where conspiracy and the underlying offense are charged, the military judge should first instruct on the underlying offense and then refer back to the elements and definitions when instructing on conspiracy. In cases like *Shelton*, however, the military judge should restate the elements of the underlying offense and highlight the differences for the members.

Variance by Excepting the Language "On Divers Occasions"

In *United States v. Augspurger*,[44] the CAAF again addressed an ambiguous finding of guilty resulting from the members excepting the words "on divers occasions" from a specification and not clearly disclosing upon which single occasion the conviction was based.[45]

Airman Basic Augspurger was charged, *inter alia*, with wrongfully using marijuana "on divers occasions" between 15 October 2001 and 20 February 2002.[46] The government presented evidence of three separate allegations of wrongful use of marijuana. The evidence for one of the allegations consisted of a positive urinalysis result and a confession to smoking marijuana at an off-base apartment with friends on 1 December 2001. The evidence for the other two allegations consisted of

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[36] *Id.*

[37] *Id.*

[38] *Id.* at 5.

[39] *Id.*

[40] *Id.*

[41] UCMJ art. 81 (2005); *see also* MANUAL FOR COURTS-MARTIAL, UNITED STATES pt. IV, ¶ 5b (2005) [hereinafter MCM]; BENCHBOOK, *supra* note 2, para. 3-5-1c.

[42] *See* 2 WAYNE R. LAFAVE, SUBSTANTIVE CRIMINAL LAW § 12.2(c)(2), at 276-79 (2d ed. 2003).

[43] *Shelton*, 62 M.J. at 5. Similarly, even though an intent to either kill or inflict great bodily harm is sufficient for unpremeditated murder, attempted unpremeditated murder requires a specific intent to kill. United States v. Roa, 12 M.J. 210, 212 (C.M.A. 1982); *see* BENCHBOOK, *supra* note 2, para. 3-4-2c.

[44] 61 M.J. 189 (2005).

[45] The CAAF has started to refer to this as a "*Walters* violation." *See* United States v. Scheurer, 62 M.J. 100, 112 (2005) (referring to United States v. Walters, 58 M.J. 391 (2003)).

[46] *Augspurger*, 61 M.J. at 189-90.

the testimony of another Airman, who had been previously convicted of drug use, that he had seen the accused smoke marijuana on two separate occasions in January and February 2002.[47]

The members found the accused guilty of the specification of wrongful use of marijuana except the words "on divers occasions."[48] The members did not indicate on which of the three occasions they based their finding.[49] The defense counsel requested that the military judge have the members clarify their findings, but the military judge declined to do so.[50]

On appeal, the Air Force Court of Criminal Appeals (AFCCA) held that the military judge erred by not requiring the members to specify on which of the occasions they based their finding.[51] However, the AFCCA concluded that it was able to determine beyond a reasonable doubt that the members convicted the accused of the December 2001 use, and the Air Force court modified the findings to resolve the ambiguity.[52]

The CAAF found that the Air Force court erred.[53] When the accused is found guilty, except the words "on divers occasions," then the accused has been found *guilty* of misconduct on a single occasion and *not guilty* of the remaining occasions.[54] "Where the findings do not disclose the single occasion on which the conviction is based, the Court of Criminal Appeals cannot conduct a factual sufficiency review or affirm the findings because it cannot determine which occasion the servicemember was convicted of and which occasion the servicemember was acquitted of."[55]

In *Augspurger*, the CAAF makes it clear that it is the trial judge's responsiblity to ensure that the findings, as announced, clearly state the factual basis for the offense. During the trial, there are two opportunities for the military judge to accomplish this. First, during the instructions on findings, the military judge should instruct the members that if they except the words "divers occasions," they must specify which allegation was the basis of their finding. Second, if there is an ambiguity when the military judge is examining the findings worksheet prior to announcement, the military judge should instruct the members to clarify their findings.[56]

This case reiterates for trial practitioners the lessons learned from *Walters*. Fortunately, when this situation arises now, there are approved interim changes to the *Benchbook* that provide guidance and model instructions.[57] If a specification alleges "on divers occasions" and the evidence is such that the members might find the accused guilty of not more than one occasion, then the military judge should provide an appropriate variance instruction. Also, the findings worksheet should be tailored to assist the members in announcing an unambiguous verdict. In addition, when reviewing the findings worksheet before the findings are announced, the military judge must instruct the members to clarify their findings if the worksheet shows a finding of guilty except the words "on divers occasions" without exceptions or substitutions specifying upon which occasion the finding of guilt is based. Because this situation is relatively common, trial practitioners must remain vigilant to avoid committing a "*Walters* violation."

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[47] *Id*. at 190.

[48] *Id*.

[49] *Id*.

[50] *Id*.

[51] *Id*. at 191.

[52] *Id*.

[53] *Id*. at 192.

[54] *Id*. at 190.

[55] *Id*.

[56] *Id*. at 192.

[57] On 16 September 2003, after the *Walters* opinion, the Army Trial Judiciary approved an interim change (IC) to the *Benchbook* that added the new paragraph 7-25. It contains notes with guidance for the military judge, the definition for "divers occasions," and a model instruction for the members when the military judge's review of the findings worksheet reveals a finding of guilty except the words "on divers occasions" without specifying which one occasion. *See* BENCHBOOK, *supra* note 2, para. 7-25 (IC, 16 Sept. 2003).

In *United States v. Green*,[58] the AFCCA set aside a conviction for desertion.[59] The central issue at trial was mental responsibility. The accused was a noncommissioned officer with nineteen years and six months on active duty. He absented himself from his unit and was living on the streets for several months.[60] The defense provided evidence, including expert testimony, supporting its argument that the accused was not mentally responsible at the time of the offense.[61] The government's expert witness opined that the accused was not suffering from a mental disease or defect and was probably malingering.[62] The military judge gave the standard instruction on mental responsibility, including the definition of clear and convincing evidence as "proof which will produce . . . a firm belief or conviction as to the facts sought to be established."[63] The military judge then gave the Air Force's tailored definition of proof beyond a reasonable doubt as "proof that leaves you firmly convinced of the accused's guilt."[64]

The Air Force court concluded that the military judge erred in not adequately instructing the members on the distinction between these burdens of proof. During prefatory instructions to the members, the military judge instructed them that proof beyond a reasonable doubt is a more stringent standard than the preponderance standard generally used in administrative hearings.[65] However, the members were not instructed on any distinction between proof beyond a reasonable doubt and clear and convincing evidence.[66] Because of the semantic similarity between "firm belief or conviction" and "firmly convinced," the court found that it was critical for the military judge to instruct the members on how to differentiate between the two

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[58] 62 M.J. 501 (A.F. Ct. Crim. App. 2005).

[59] *Id*. at 504.

[60] *Id*. at 502.

[61] *Id*.

[62] *Id*. at 502-03.

[63] *Id*. at 503. The *Benchbook* provides the following definition for "clear and convincing evidence.

> By clear and convincing evidence I mean that measure or degree of proof which will produce in your mind a firm belief or conviction as to the facts sought to be established. The requirements of clear and convincing evidence does not call for unanswerable or conclusive evidence. Whether the evidence is clear and convincing requires weighing, comparing, testing, and judging its worth when considered in connection with all the facts and circumstances in evidence.

BENCHBOOK, *supra* note 2, para. 6-4.

[64] *Green*, 62 M.J. at 503.

[65] *Id*. Although the opinion does not quote this part of the instructions given to the members in this case, the Air Force Supplement to the *Benchbook* contains the following definition of "reasonable doubt" in both the Preliminary Instructions in paragraph 2-5 and the Closing Substantive Instructions on Findings in paragraph 2-5-12.

> A "reasonable doubt" is a conscientious doubt, based upon reason and common sense, and arising from the state of the evidence. Some of you may have served as jurors in civil cases, or as members of an administrative board, where you were told that it is only necessary to prove that a fact is more likely true than not true. In criminal cases, the government's proof must be more powerful than that. It must be beyond a reasonable doubt. Proof beyond a reasonable doubt is proof that leaves you firmly convinced of the accused's guilt. There are very few things in this world that we know with absolute certainty, and in criminal cases the law does not require proof that overcomes every possible doubt. If, based on your consideration of the evidence, you are firmly convinced that the accused is guilty of the offense charged, you must find (him) (her) guilty. If, on the other hand, you think there is a real possibility that the accused is not guilty, you must give (him) (her) the benefit of the doubt and find (him) (her) not guilty.

U.S. DEP'T OF ARMY, PAM. 27-9, LEGAL SERVICES: MILITARY JUDGES' BENCHBOOK para. 2-5 (15 Sept. 2002) (Air Force Supplement).

The standard *Benchbook* preliminary instruction on "reasonable doubt" is a follows.

> A reasonable doubt is an honest, conscientious doubt, suggested by the material evidence, or lack of it, in the case. It is an honest misgiving generated by insufficiency of proof of guilt. Proof beyond a reasonable doubt means proof to an evidentiary certainty, although not necessarily to an absolute or mathematical certainty. The proof must exclude every fair and reasonable hypothesis of the evidence except that of guilt.

BENCHBOOK, *supra* note 2, para. 2-5. The standard *Benchbook* closing substantive instruction on "reasonable doubt," when mental responsibility is in issue, is a follows.

> By reasonable doubt is intended not a fanciful or ingenious doubt or conjecture, but an honest, conscientious doubt suggested by the material evidence or lack of it in the case. It is an honest misgiving generated by insufficiency of proof of guilt. Proof beyond a reasonable doubt means proof to an evidentiary certainty although not necessarily to an absolute or mathematical certainty. The proof must be such as to exclude not every hypothesis or possibility of innocence, but every fair and rational hypothesis except that of guilt.

Id. para. 2-5-12. This instruction is virtually identical to the closing substantive instruction when mental responsibility is not in issue, except for some quotation marks and a comma that are insubstantial.

[66] *Green*, 62 M.J. at 503.

standards.[67] The Air Force court held, "When the 'clear and convincing' standard is employed, the military judge must, at a minimum, clearly instruct the members that it is an intermediate standard; higher than a mere probability, but not as high as 'proof beyond a reasonable doubt.'"[68]

This case is significant for those practicing in the Air Force, but less important for those practicing in the other services. The potential confusion in this case was created by the language of the tailored Air Force instruction on "reasonable doubt" when it was used in conjunction with the standard *Benchbook* instruction on "clear and convincing evidence," along with distinguishing "proof beyond a reasonable doubt" from "preponderance of the evidence" but not "clear and convincing evidence." This potential confusion is not present when using the standard *Benchbook* instruction on "reasonable doubt" and when "proof beyond a reasonable doubt" is not distinguished from "preponderance of the evidence." However, a broader lesson for all from this case is that trial practitioners must strive to keep instructions clear and understandable for the court members.

Evidence

Character for Truthfulness: United States v. Diaz[69]

Chief Petty Officer Diaz testified on his own behalf at trial and several witnesses testified to his character for truthfulness. Prior to instructions, the defense requested Instruction 7-8-1 from the *Benchbook* regarding the accused's character for truthfulness. Specifically, the defense sought the language that states "[e]vidence of the accused's character for truthfulness may be sufficient to cause a reasonable doubt as to his guilt."[70] The military judge denied the defense request, stating that truthfulness was not a pertinent character trait given that the accused was charged with molesting his daughter.[71]

The NMCCA agreed with the military judge that truthfulness was not a pertinent character trait in this case under Military Rule of Evidence (MRE) 404(a)(1). Accordingly, the accused's character for truthfulness did not "bear *directly* on guilt or innocence,"[72] and the requested instruction was not legally correct. Recognizing that the testimony was offered only to support the accused's character for truthfulness after it had been attacked at trial (under M.R.E. 608(a)), the NMCCA held the military judge correctly instructed the members that they could consider the proffered character evidence when determining the accused's believability.[73]

This case illustrates the different ways that evidence of an accused's character for truthfulness may apply in any given case. When charged with an offense for which a truthful character trait would be "pertinent," such as false official statement, Instruction 7-8-1 may be appropriate.[74] However, if truthfulness is not a "pertinent" character trait, evidence of such a character trait is admissible only as it bears on the accused's credibility,[75] and Instruction 7-8-3 of the *Benchbook* should be used.

Article 112a and the Inference of Wrongfulness: United States v. Brewer[76]

Air Force Master Sergeant (MSgt) Ronald Brewer was charged with wrongful use of marijuana. The government's evidence consisted of both urinalysis and hair analysis test results. At trial, the government relied upon the permissible inference to show the accused's use of marijuana was wrongful.[77]

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[67] *Id.*

[68] *Id.* at 504. The court further suggested, when the need for an instruction on "clear and convincing evidence" is apparent at the beginning of trial, providing a tailored instruction distinguishing between the various burdens of proof instead of the standard Air Force instruction discussing only preponderance and beyond a reasonable doubt. *Id.* n.4.

[69] 61 M.J. 594 (N-M. Ct. Crim. App. 2005).

[70] *See* BENCHBOOK, *supra* note 2, instr. 7-8-1.

[71] *Diaz*, 61 M.J. at 608.

[72] *Id.* at 609 (citing United States v. Yarborough, 18 M.J. 452, 457 (C.M.A. 1984)).

[73] *Id.* This instruction was consistent with Instruction 7-8-3 of the BENCHBOOK.

[74] *See* MCM, *supra* note 41, MIL. R. EVID. 404(a)(1).

[75] *See id.* MIL. R. EVID. 608(a).

[76] 61 M.J. 425 (2005).

At trial, the military judge strayed from the model Article 112a instructions in the *Benchbook*, instructing the officer and enlisted members as follows:

> To be punishable under Article 112a, use of a controlled substance must be wrongful. Use of a controlled substance is wrongful if it is without legal justification or authorization.
>
> Use of a controlled substance is not wrongful if such act or acts are: (a) done pursuant to legitimate law enforcement activities (for example, an informant who is forced to use drugs as part of an undercover operation to keep from being discovered is not guilty of wrongful use); (b) done by authorized personnel in the performance of medical duties or experiments; or (c) done without knowledge of the contraband nature of the substance (for example, a person who uses marijuana, but actually believes it to be a lawful cigarette or cigar, is not guilty of wrongful use of marijuana).
>
> Use of a controlled substance may be inferred to be wrongful in the absence of evidence to the contrary. However, the drawing of this inference is not required.
>
> *The burden of going forward with evidence with respect to any such exception in any court-martial shall be upon the person claiming its benefit.*
>
> *If such an issue is raised by the evidence presented, then the burden is on the United States to establish that the use was wrongful.*
>
> Knowledge by the accused of the presence of the substance and knowledge of its contraband nature may be inferred from the surrounding circumstances. However, the drawing of the inference is not required.
>
> . . .
>
> [T]he burden of proof to establish the guilt of the accused beyond a reasonable doubt is on the government. The burden never shifts to the accused to establish innocence or to disprove the facts necessary to establish each element of the offense.[78]

On appeal, MSgt Brewer challenged the military judge's instructions as erroneous. The CAAF found the military judge's instructions had turned the permissive inference of wrongfulness into an improper "mandatory rebuttable presumption" and reversed.[79]

The CAAF focused on the two paragraphs above in italics—taken from the explanation section of the *Manual for Courts-Martial* and not found in the model instruction contained in the *Benchbook*. The CAAF held that the military judge's failure to explain the term "burden of going forward" and use of the term "exception" may have led the members to believe the accused had a "responsibility to prove that one of the exceptions applies" or that only when the accused so proves does the burden "shift[] back to the Government to show wrongful use."[80] As a result, the CAAF found a reasonable member could have interpreted the instructions as saying wrongfulness was presumed unless the accused proved an exception, thus improperly creating a mandatory presumption of wrongfulness.[81]

The CAAF found error in the portions of the instruction taken from the *MCM* (and not included in the model *Benchbook* instruction). Importantly, *Brewer* does not hold that the Article 112a *Benchbook* instruction regarding the permissive inference of wrongfulness is erroneous.[82] Had the military judge used the *Benchbook* instruction, instructional error likely would not have occurred.

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[77] *Id.* at 427; *see* MCM, *supra* note 41, para. 37c(5); BENCHBOOK, *supra* note 2, instr. 3-37-2d.

[78] *Brewer*, 61 M.J. at 430. It appears that the military judge drew these instructions (with the exception of the last paragraph) directly from the *MCM*. MCM, *supra* note 41, para. 37c(5). The majority opinion states that these instructions were taken "almost verbatim" from the *Benchbook*. Although the above instruction also appears in the *Benchbook* (with the exception of the italicized language), as the dissent correctly notes, the instructions are nearly verbatim from the *MCM*.

[79] *Brewer*, 61 M.J. at 432.

[80] *Id.* at 431.

[81] *Id.*

[82] BENCHBOOK, *supra* note 2, instr. 3-37-2d.

Findings Arguments Run Amuck: Comment on Constitutional Rights
United States v. Carter[83]

Airman Carter was charged with committing indecent acts with Amn D while he and Amn D were alone in a barracks room. Airman D was the only government witness and the defense presented no evidence, instead focusing only on challenging the alleged victim's credibility.[84]

During opening argument on findings, the trial counsel repeatedly referred to the government's evidence of the accused's misconduct as "uncontroverted" or "uncontested."[85] At the conclusion of the defense argument on findings, the military judge instructed the members that the accused had an absolute right not to testify and the members must disregard the accused's failure to testify.[86] Significantly, after defense argument, the trial counsel in rebuttal again repeated the theme that the government evidence was "uncontradicted."[87] The military judge did not further instruct the members on the accused's right to remain silent and the panel later returned a finding of guilty. The AFCCA reversed, finding plain error.[88] The Air Force Judge Advocate General certified the issue for review by the CAAF.[89]

Reviewing the totality of the situation, the CAAF affirmed the AFCCA's reversal, finding the trial counsel's comments to be impermissible comments on the accused's right to remain silent, which shifted the burden of proof from the government.[90]

Although the Discussion to Rule for Court-Martial (RCM) 919(b)[91] does not explicitly preclude trial counsel from arguing the government's evidence is unrebutted, when the accused and the victim are the only two people present at the time of the alleged offenses, certainly the direct implication is that the rebuttal must come from the accused.[92] Thus, such comments by the government are improper.

Defense counsel must be alert to situations that could be interpreted as a comment on their client's right to remain silent and must object.[93] Likewise, even without defense objection, the military judge should sua sponte instruct the members on the accused's right to remain silent, the presumption of innocence, and the burden of proof[94] when the trial counsel's argument implies the defense has an obligation to present evidence.[95]

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[83] 61 M.J. 30 (2005)

[84] The case indicates that the defense did intend on calling one witness, but when the government objected to that witness' testimony, the defense decided not to call the witness and rested at the close of the government's case. *Id.* at 32.

[85] *Id.*

[86] BENCHBOOK, *supra* note 2, instr. 7-12. The defense did not object to the propriety of the trial counsel's comments and the military judge did not further address them.

[87] *Carter*, 61 M.J. at 33.

[88] *Id.* (citing 2003 CCA LEXIS 257).

[89] *Id.* at 31.

[90] *Id.* at 34.

[91] "Trial counsel may not argue the prosecution's evidence is unrebutted if the only rebuttal could come from the accused." MCM, *supra* note 41, R.C.M. 919(b) Discussion.

[92] As the CAAF noted, "[o]nly [the accused] possessed information to contradict the Government's sole witness." *Carter*, 61 M.J. at 34.

[93] Failure to do so results in the appellate courts evaluating the issue under a plain error analysis – distinctly less favorable to the accused than had the issue been preserved by objection.

[94] Although the *Benchbook* does not have a single instruction addressing all these issues for use by the military judge in situations such as these, the *Benchbook* does address these issues thus:

> The accused has an absolute right to remain silent (BENCHBOOK, *supra* note 2, instr. 7-12);
>
> The accused is presumed not guilty until proven otherwise by the government (BENCHBOOK, *supra* note 2, sec. V, paras. 2-5 and 2-5-12); and
>
> The government carries the burden of proof and the burden never shifts to the defense (*Id.*).

Although the members would have heard each of these instructions by the end of trial, the military judge could remind the members of these instructions should the situation dictate.

[95] The CAAF implies that had the military judge repeated his instruction to the members regarding the accused's right to remain silent after the trial counsel's closing argument, the result may have been different: "Although the military judge instructed the members that they were not to make adverse inferences from [the accused's] decision to remain silent, we agree with the majority opinion below that trial counsel's subsequent rebuttal [argument] vitiated any curative effect." *Carter*, 61 M.J. at 35.

Findings Arguments Run Amuck: A Litany
United States v. Fletcher[96]

Technical Sergeant Fletcher elected to be tried by members and took the stand in his own defense. He denied using cocaine and presented evidence of his character for truthfulness, his church affiliation, and his good family life.[97]

Tempers apparently flared between trial and defense counsel during trial. During the findings argument, the trial counsel inappropriately injected her own personal beliefs and opinions, improperly vouched for the government's evidence and witnesses, provided her own personal views of the evidence and the accused's guilt, and made disparaging remarks about both the defense counsel and the accused's credibility.[98]

There were no defense objections to the majority of the trial counsel's improper actions. Finding plain error, however, the CAAF reversed.[99]

Addressing the role of the military judge during argument, the CAAF again reiterated that curative instructions by the military judge (even absent objection) may remedy an error. The CAAF noted that the military judge "did not make any effort to remedy any misconduct other than a few statements to which defense counsel objected."[100] Although the military judge provided the standard *Benchbook* instruction that the arguments of counsel are not evidence,[101] he took no further action in response to the trial counsel's argument.

As a repeated theme this term, the CAAF touched upon the military judge's sua sponte obligation to give corrective instructions to the members in response to improper argument by counsel. Whether the improper argument is by the government or the defense, the military judge should be prepared to interrupt, advise the members that the objectionable portion of the argument is improper and direct them to disregard it.[102]

The Military Judge Going Too Far: Instructing on the Accused's Failure to Testify:
United States v. Forbes[103]

At his court-martial, Quartermaster First Class Forbes did not testify. Concerned that the members might draw an adverse inference from his silence, the military judge told counsel that he intended to give the standard *Benchbook* instruction on the accused's failure to testify.[104] The defense objected. The military judge decided to give the instruction anyway.[105]

Last year's annual review of instructions article discussed the NMCCA response to this case. On appeal, the NMCCA held that giving the instruction over defense objection was error and, applying a presumption of prejudice, found the error prejudicial.[106]

When evaluating whether the military judge properly gave the instruction over defense objection, the NMCCA said the military judge must balance the defense objection to the request against the "case-specific interests of justice."[107] By

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[96] 62 M.J. 175 (2005).

[97] *Id.* at 178.

[98] Appendix I to the Court's opinion contains the entire findings argument by the government.

[99] *Fletcher*, 62 M.J. at 185.

[100] *Id.*

[101] *See* BENCHBOOK, *supra* note 2, sec. V, para. 2-5-9.

[102] The CAAF specifically said the military judge "should have interrupted trial counsel before [s]he ran the full course of [her] impermissible argument. Corrective instructions at an early point might have dispelled the taint of the initial remarks." *Fletcher*, 62 M.J. at 185 (quoting United States v. Knickerbocker, 2 M.J. 128, 129 (C.M.A. 1977)).

[103] 61 M.J. 354 (2005).

[104] BENCHBOOK, *supra* note 2, instr. 7-12.

[105] The military judge did not make a record of specific concerns that caused him to give the instruction, other than a generalized concern that the members might hold the accused's failure to testify against him. Although the military judge told counsel that he would not give the instruction last, he did. When that error was pointed out by the defense after instructions, the military judge admitted the error was his. However, he denied a request for mistrial.

[106] United States v. Forbes, 59 M.J. 934 (N-M. Ct. Crim. App. 2004).

[107] *Id.* at 939.

analogy, the NMCCA compared that balancing to the balancing test under MRE 403. The NMCCA stated the deference they would give the military judge's analysis as follows:

> When a military judge gives a fail-to-testify instruction over defense objection after having identified the case-specific "interests of justice" that support his decision and articulating his analysis of those interests relative to the defense election, then he should be accorded great deference under a standard of review of abuse of discretion. If he identifies the interests of justice in question but does not articulate his balancing of those interests with the defense election, he is accorded less deference. If he does not identify interests of justice at all, the standard of review is de novo.[108]

If the reviewing court finds error on the military judge's part, the NMCCA said prejudice to the accused should be presumed, with the government bearing the burden to rebut it:

> When a military judge commits error by giving this instruction over defense objection in the absence of articulated case-specific interests of justice, a presumption of prejudice results. The Government then bears the burden of showing by a preponderance of the evidence why the appellant was not prejudiced by the instruction. Admittedly, this may be a difficult burden for the Government to bear. But, this court did not write the Rule, and on the issue of an appropriate test for prejudice, we feel compelled to take our cues from the President's language that so clearly favors the military accused.[109]

Finding the military judge had erred and that the government had not carried its burden, the NMCCA reversed.

The Judge Advocate General of the Navy certified two questions to the CAAF: (1) Did the NMCCA err in finding the instruction was error, and (2) Did the NMCCA err in presuming prejudice?[110] The CAAF answered no to both questions, specifically adopting the NMCCA's framework for review.[111]

Citing MRE 301(g),[112] the CAAF emphasized that the decision to give this instruction belongs to the defense, with one exception. The military judge may give the instruction over defense objection when it is "necessary in the interests of justice."[113]

The reason given by the military judge was to "protect the accused from any adverse feelings by the members."[114] The CAAF determined that this "generalized fear" alone is insufficient to override the defense decision against the instruction.[115] Unfortunately, the military judge made no "case-specific" findings of necessity, nor did he articulate his analysis of those against the defense objection to the instruction. Finding no case-specific circumstances in their de novo review, the CAAF affirmed the NMCCA's reversal.[116]

In future cases, if the military judge gives the failure to testify instruction over defense objection, the trial counsel should ensure that the military judge makes "case specific" findings of necessity on the record and articulates why those factors outweigh the defense objection to the instruction.[117]

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[108] *Forbes*, 61 M.J. at 358.

[109] *Id.* at 359.

[110] *Id.* at 355-56.

[111] *Id.* at 356.

[112] Rule 301(g) and the Drafter's Analysis for MRE 301(g), which makes it clear that the intent is to "leave[] that decision solely within the hands of the defense . . . in all but the most unusual circumstances." MCM, *supra* note 41, MIL. R. EVID. 301(g).

[113] *Id.*

[114] *Forbes*, 61 M.J. at 357.

[115] *Id.* at 359.

[116] *Id.* at 360.

[117] The factors included should go beyond the potential—that arguably exists in every case—that the members might "hold it against the accused" if he did not testify. For example, if questions from the members repeatedly indicate a desire to hear from the accused or repeatedly question why the accused did not testify, such an instruction may be necessary, over defense objection, "in the interests of justice."

The Military Judge Going Too Far: Comment on Right to Silence:
United States v. Andreozzi[118]

During Staff Sergeant (SSG) Andreozzi's general court-martial for a litany of serious offenses against his wife, the defense called a high school friend as a character witness. Three times during that witness's testimony, he stated the accused had told him he wanted to "preserve his marriage."[119] The military judge sustained the first objection. The military judge also sustained the second objection, but in addition told the members "to disregard the 'testimony with regard to what [the accused] might have told his friend.'"[120] In apparent frustration, the military judge gave the following instruction after sustaining the third objection:

> Members of the court, you can't consider that part of the testimony. It[']s not before you. It is hearsay testimony. The trial counsel has not had an opportunity to cross examine the person who allegedly made the statement; therefore you may not consider it.[121]

The military judge denied a motion for mistrial based upon improper comment on the accused's right to silence.[122] When the defense rested without the accused testifying, the military judge gave the standard *Benchbook* instruction on the accused's right to silence. He gave the instruction again during findings instructions.

On appeal, the Army Court of Criminal Appeals (ACCA) determined that the military judge's third instruction to the members was an erroneous comment on the accused's right to silence.[123] Given the two specific instructions on the accused's right to silence, however, the ACCA determined the error was harmless and affirmed.

Trial work can be a frustrating business for military judges and counsel. Attempts by military judges to educate the members as to why certain evidence is impermissible, borne of that frustration, may also inadvertently result in constitutional error. Ruling upon the objection, without comment further than assuring the members will disregard the evidence, may be advisable in such challenging situations.

Sentencing

Unsworn Statements and Sentence Comparison: United States v. Barrier[124]

Following his conviction for wrongfully using drugs, Senior Airman (SrAmn) Barrier included the following in his unsworn statement to the members:

> When deciding whether your sentence should include some amount of confinement, I know that each case has to be decided on its own merits. But I also believe that similar cases should receive similar punishments. Such as last year, Senior Airman Watson from Tyndall was charged with using ecstasy and the confinement portion of his sentence was only three months.[125]

Senior Airman Watson was not a co-accused nor was he charged with conspiring with Barrier—he was merely another airman convicted of drug use. After the accused's unsworn statement, the military judge, over defense objection, gave the following instruction to the members, based on the 2000 AFCCA case of *United States v. Friedmann*:[126]

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[118] 60 M.J. 727 (Army Ct. Crim. App. 2004).

[119] *Id.* at 742.

[120] *Id.*

[121] *Id.*

[122] BENCHBOOK, *supra* note 2, instr. 7-12.

[123] The ACCA cited *United States v. Mobley*, 31 M.J. 273, 279 (C.M.A. 1990) ("It is black letter law that a trial counsel [or military judge] may not comment directly, indirectly, or by innuendo, on the fact that an accused did not testify in his defense."). *Andreozzi*, 60 M.J. at 742.

[124] 61 M.J. 482 (2005).

[125] *Id.*

[126] 53 M.J. 800 (A.F. Ct. Crim. App. 2000).

> Now, during the accused's unsworn statement, he alluded to a case of another individual who the accused had stated had received a certain degree of punishment. In rebuttal, the trial counsel offered you Prosecution Exhibit 6, which was the court-martial order from that case which stated what that individual got in that case.
>
> The reason I mention this is for the following reason, and that is because, in fact, the disposition of other cases is irrelevant for your consideration in adjudging an appropriate sentence for this accused. You did not know all the facts of those other cases, or other cases in which sentences were handed down, nor anything about those accused in those cases, and it is not your function to consider those matters at this trial. Likewise, it is not your position to second guess the disposition of other cases, or even try to place the accused's case in its proper place on the spectrum of some hypothetical scale of justice.
>
> Even if you knew all the facts about other offenses and offenders, that would not enable you to determine whether the accused should be punished more harshly or more leniently because the facts are different and because the disposition authority in those other cases cannot be presumed to have any greater skill than you in determining an appropriate punishment.
>
> If there is to be meaningful comparison of the accused's case to those of other [sic] similarly situated, it would come by consideration of the convening authority at the time that he acts on the adjudged sentence in this case. The convening authority can ameliorate a harsh sentence to bring it in line with appropriate sentences in other similar cases, but he cannot increase a light sentence to bring it in line with similar cases. In any event, such action is within the sole discretion of the convening authority.
>
> You, of course, should not rely on this in determining what is an appropriate punishment for this accused for the offenses of which he stands convicted. If the sentence that you impose in this case is appropriate for the accused and his offenses, it is none of your concern as to whether any other accused was appropriately punished for his offenses.
>
> You have the independent responsibility to determine an appropriate sentence, and you may not adjudge an excessive sentence in reliance upon mitigation action by higher authority.[127]

On appeal, SrA Barrier argued the military judge interfered with his "largely unfettered" right to provide information in his unsworn statement.[128] The CAAF disagreed and affirmed. Providing further guidance to the bench and bar, the CAAF stated that when the accused brings such sentence comparison information to the attention of the members, the military judge may appropriately address three areas.[129] First, the military judge may tell the members "that in the military justice system[,]. . . the members are required to adjudge a sentence based upon their evaluation of the evidence without regard to the disposition of other cases. . . ."[130] Second, the military judge's instruction may say "to the extent that the [military justice] system provides for sentence comparison, that function is not part of the members' deliberations; [but] it is a power assigned to the convening authority and Court of Criminal Appeals. . . ."[131] Finally, the military judge may tell the members "in the course of determining an appropriate punishment, . . . [they] may not rely upon the possibility of sentence reduction by the convening authority or the Court of Criminal Appeals."[132]

Significantly, the court said that such sentence comparison evidence—not of a co-accused, but merely of someone similarly situated—is irrelevant as extenuation and mitigation under RCM 1001 and may be appropriately excluded "if the military judge determines that an instruction would not suffice to place the statement in proper context for the members."[133]

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[127] *Barrier*, 61 M.J. at 483. Although an instruction of similar import currently exists in the BENCHBOOK, *supra* note 2, sec. V, para. 2-5-23, the military judge's instruction here was much more detailed.

[128] *Id.* at 484 (citing United States v. Grill, 48 M.J. 131, 133 (1998)).

[129] *Id.* at n.2.

[130] *Id.*

[131] *Id.*

[132] *Id.* at 484.

[133] *Id.* at 486.

This language is a narrowing of the court's opinion in *United States v. Grill*, where the military judge was reversed for barring the accused from referring in his unsworn statement to the sentences received by his civilian co-accused.[134]

Unsworn Statements and Polygraph Evidence:
United States v. Johnson[135]

Although not specifically involving an instructions issue, this case is another in the CAAF's trend this term to restrict the information presented to the court by an accused through an unsworn statement.

Technical Sergeant Johnson was accused of trafficking in marijuana. Before trial, he took a private polygraph test after which the examiner concluded the accused was not deceptive. Notwithstanding, the accused was tried and convicted. Prior to making his unsworn statement at trial, the accused apparently provided the substance of that statement to the military judge. His proposed unsworn statement referred to passing the polygraph test. The military judge prohibited him from including any reference to his exculpatory polygraph test in his unsworn statement.[136]

Citing *Grill* for the proposition that the allocution right in an unsworn statement is largely unfettered and broadly construed, the accused argued that the military judge erred in preventing him from addressing the polygraph in his unsworn statement. On appeal, the CAAF disagreed and affirmed.[137]

Discussing the unsworn statement and its limits, the court said the unsworn statement "remains a product of RCM 1001(c) and thus remains defined in scope by the rule's reference to matters presented in extenuation, mitigation and rebuttal."[138] Finding that an exculpatory polygraph result does not fit into any of these categories, but instead is contrary to existing caselaw that prohibits relitigating findings during sentencing,[139] the CAAF found the military judge appropriately excluded those references from the accused's unsworn statement.

Although *Grill* allows the military judge to appropriately instruct the members on how to use otherwise inadmissible information from an unsworn statement, *Barrier* makes clear that the military judge may use his discretion to prohibit some information outright, instead of later instructing the members. *Johnson* goes one step further and makes clear that information conveyed through the unsworn statements must meet the definitional requirements of RCM 1001(c) as either extenuation, mitigation, or rebuttal, before it is a permissible part of an unsworn statement.

Unsworn Statements and a Co-Accused's Acquittal:
United States v. Sowell[140]

Seaman Stacie Sowell's situation rounds out the CAAF's handling of unsworn statements.

Seaman Sowell was charged with conspiracy and larceny involving government computers. Two co-conspirators were never charged, and a third, Petty Officer (PO) Elliot, was acquitted of "substantively identical charges."[141] Petty Officer Elliot testified for the accused that they never talked about stealing computers and never took any of the computers. Trial counsel challenged PO Elliot's credibility, arguing on findings that, as a co-conspirator, she had a motive to lie.[142]

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[134] United States v. Grill, 48 M.J. 131 (1998). Judge Crawford said she "mourn[s the Court's] . . . missed opportunity to clarify, modify, or overrule this Court's opinion in *United States v. Grill*. . . ." *Barrier*, 61 M.J. at 486. Many may agree. Citing *United States v. Mamaluy*, 10 C.M.R. 102 (C.M.A. 1959), the *Barrier* majority said "It has long been the rule of law that the sentences in other cases cannot be given to court-martial members for comparative purposes." Query: If that has always been the case, why was the military judge reversed in *Grill?*

[135] 62 M.J. 31 (2005).

[136] *Id*. at 37.

[137] *Id.* at 38.

[138] *Id*. at 37.

[139] The CAAF eschewed the common term "impeachment of the verdict" in favor of the term relitigation of the findings. *Id.* at 37 n.2.

[140] 62 M.J. 150 (2005).

[141] *Id*. at 151.

[142] *Id.*

After her conviction, Seaman Sowell sought to tell the members that PO Elliott had been acquitted. The military judge prevented the accused from doing so.[143]

On appeal, the accused contended that the military judge's actions interfered with her right to make an unsworn statement, as set forth in *Grill*. In response, government appellate counsel argued that reference to the acquittal would impeach the findings, as both the accused and Elliott faced the same charges. Additionally, the government argued that it would be impermissible sentence comparison, citing *Mamaluy*.[144]

The CAAF agreed with the defense and reversed, but on different grounds.[145] The CAAF held that under the specific facts of this case, trial counsel's argument on findings opened the door and therefore such a comment by the accused was proper rebuttal under RCM 1001(c). Because the trial counsel had referred to Petty Officer Elliott as a "co-conspirator," he implied that she was also guilty of the offenses with which the accused was charged. Thus, in the CAAF's view, what would otherwise have been improper extenuation and mitigation evidence became appropriate RCM 1001(c) rebuttal evidence, as part of an unsworn statement.[146]

The result notwithstanding, *Sowell* represents a continuation of the trend this term to limit the scope of the court's prior opinion in *Grill*, allowing the military judge more flexibility to deal with sentence comparison information in unsworn statements.

Conclusion

The cases from the CAAF's 2005 term provide many lessons on instructions for military justice practitioners. The *Benchbook* is the primary resource for instructions, and varying from the standard *Benchbook* instructions should only be done for good reason and with careful deliberation. The *Benchbook* should only be the first step, however, because it might not adequately reflect new caselaw or cover the law in a unique situation. Military judges must pay attention to detail in order to provide clear and accurate instructions to the members. Also, military judges must be ready to stop improper arguments and provide curative instructions. Instructions to the members require careful thought because they are critical to a fair trial.

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[143] *Id.*

[144] *Id.* at 152 (citing United States v. Mamaluy, 10 C.M.R. 102 (C.M.A. 1959)).

[145] One might think that such information would clearly be allowed under *Grill* – in fact, the CAAF reversed the military judge in *Grill* for failing to allow the accused to include arguably similar information in his unsworn statement: that "no charges have ever been brought against [a civilian co-accused], and may never be brought against him." United States v. Grill, 48 M.J. 131, 132 (1998). However, following its framework for analysis from *Johnson*, the CAAF in *Sowell* characterized the comment as appropriate rebuttal based on the facts of this case – not generally appropriate, as they did for the comment in *Grill*.

[146] "Ordinarily, such information might properly be viewed in context as impeaching the member's findings. As the Court of Criminal Appeals concluded, . . . *Mamaluy* remain[s] good law. However, we conclude under the limited circumstances of this case, that the Government's argument on findings opened the door to proper rebuttal. . . ." *Sowell*, 62 M.J. at 152.

Book Review

GULAG: A HISTORY[1]

MAJOR WILLIAM J. DOBOSH, JR.[2]

The detention facility at Guantanamo Bay has become the gulag of our times, entrenching the practice of arbitrary and indefinite detention in violation of international law.[3]

In June 2005, Amnesty International's scathing comparison of a U.S. military detention center to the Gulag drew the ire of several political commentators[4] and revived an ominous word from the lexicon of the Soviet Union. "Gulag"[5] refers to the vast network of Soviet prison labor camps that began under Vladimir Lenin[6] and continued until the Soviet Union dissolved in the 1990s.[7] In light of the ongoing Global War on Terrorism (GWOT),[8] U.S. military detention centers for enemy combatants could expand. Because increasing numbers of commanders may seek advice on detention operations, judge advocates should study detention center issues and develop the ability to contend with any associated international criticism.[9]

Contending with Amnesty International's criticism must begin with an account of the Gulag, such as Anne Applebaum's award-winning[10] *Gulag: A History*. In *Gulag*, Applebaum provides general readers[11] a survey of the "social, cultural, and political framework" of the Gulag camps[12] and illuminates the Gulag's memorable human drama. Applebaum extensively researched her account,[13] and her impressive array of sources includes government archives, interviews, personal memoirs and earlier, more definitive works on the Gulag.[14] In key sections of the work, however, Applebaum avoids using the

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[1] ANNE APPLEBAUM, GULAG: A HISTORY (2003).

[2] U.S. Army. Written while assigned as a student, 54th Graduate Course, The Judge Advocate General's Legal Center and School (TJAGLCS), U.S. Army, Charlottesville, Virginia. I appreciate the efforts of Major Sean Watts, Professor, International and Operational Law Department, TJAGLCS, and Ms. Tahseen F. Ali, Esq., who contributed insightful editorial comments during pre-publication rewrites of this review.

[3] IRENE KHAN, *Foreword* to ANNUAL REPORT OF AMNESTY INTERNATIONAL (2005), *available at* http://web/amnesty.org/report2005/message-eng.

[4] *See, e.g.*, Neil Cavuto, *Does Gitmo Matter?*, FOXNEWS.COM, June 14, 2005, http://www.foxnews.com/story/0,2933,159571,00.html (fearing that "[w]e're more inclined to look after the needs of those who hate us [i.e., prisoners in Guantanamo Bay] than to consider for a moment [victims of September 11th terrorist incidents]"); James S. Robbins, *Got Gulag? North Korea Does*, NAT'L REV. ONLINE, June 9, 2005, http://www.nationalreview.com/robbins/robbins200506090745.asp (blasting the reference "both for its fallaciousness, and the implicit trivializing of the Soviet Gulag system in which tens of millions were imprisoned and uncountable numbers died"); Cathy Young, *A Long Way from the Gulag*, BOSTON GLOBE, June 6, 2005, at A13 (calling the Amnesty International comment a "broadside" that goes "so far in the other direction").

[5] "GULAG" was initially an acronym for *g*lavnoe *u*pravlenie *l*agerei, which means "Main Camp Administration." APPLEBAUM, *supra* note 1, at 50 (emphasis added). It referred to the department of the Soviet secret police responsible for managing the prison labor camps, *id.*, and later to the system of Soviet concentration camps generally. *Id.* at xxv.

[6] *Id.* at 8–9.

[7] *Id.* at 562.

[8] During the summer of 2005, Department of Defense officials sometimes referred to the GWOT as the Global Struggle Against Violent Extremism. *See, e.g.*, Tom Regan, *The 'Rebranding' of the War on Terror*, CHRISTIAN SCI. MONITOR, July 28, 2005, http://www.csmoniotr.com/2005/0728/daily/Update.html.

[9] *See* Lieutenant Colonel Paul Kantwill, *Foreword*, ARMY LAW., July 2005, at 1 (stating that international and operational law "has become a core competency of all military attorneys").

[10] *Gulag* won both the 2004 Pulitzer Prize for Non-Fiction and Britain's Duff-Cooper Prize. AnneApplebaum.com, Bio, http://www.anneapplebaum.com/bio.html (last visited Mar. 20, 2006) [hereinafter Applebaum Bio].

[11] Applebaum defines a "general reader" as a reader who lacks "any specialized knowledge of Soviet history." APPLEBAUM, *supra* note 1, at xxvi.

[12] *Id.* at xviii, xxiii.

[13] Her bibliography includes twenty-nine interviews, *id.* at 653–54, during which Applebaum's Russian language skills clearly paid huge dividends. As one reviewer noted, she "dearly spent hundreds of hours listening to former prisoners, former guards, and local researchers" throughout the former Soviet Union. Lawrence Uzell, *Remembering the Gulag; Gulag: A History*, FIRST THINGS: A MONTHLY J. ON RELIGION & PUB. LIFE (Nov. 1, 2003) (book review). The depth of these accounts gives *Gulag* an unforgettable personal flavor. The book also gains considerable authenticity from Applebaum's access to previously sealed archival materials concerning the Gulag. APPLEBAUM, *supra* note 1, at 565 ("[T]his book itself is testimony to the abundance of newly available [archival] information.").

[14] *See, e.g., id.* at 88–89 (quoting VARLAM SHAMALOV, KOLYMA TALES 369 (John Glad trans., Penguin Books 3d ed. 1994) (1980)) (Kalamov's description of camp life in the "Berzin era"); *id.* at 362–63 (quoting 2 ALEKSANDR I. SOLZHENITSYN, THE GULAG ARCHIPELAGO, 1918–1956: AN EXPERIMENT IN LITERARY INVESTIGATION 252–54 (Thomas P. Whitney trans., 1973)) (Solzhenitsyn's discussion of "trusties," prisoners who collaborated with camp authorities); Steven Merritt Miner, *The Other Killing Machine*, N.Y. TIMES, May 11, 2003, sec. 7, at 11 (book review) ("[A] great deal of what Applebaum writes about . . . has been told before.").

Gulag's history to critically analyze American detention policies in the GWOT. While Applebaum's rich historical narrative makes *Gulag* interesting reading, her failure to explore a broader range of contemporary lessons, such as the U.S. government's detainee policies in the GWOT, prevents it from being indispensable.

Gulag contains three substantive sections: two sections explain the history of the camps, and one section describes daily life in the camps.[15] Applebaum conveys a wealth of information in her two historical sections. She painstakingly describes the origins of Soviet concentration camps during Lenin's "Red Terror" in 1918,[16] their re-designation as the Gulag after 1928,[17] and their expansion from the Solovetsky Archipelago across the entire landscape of the Soviet Union.[18] She recounts the Gulag's growth under Stalin, who envisioned the camps as a source of cheap labor for Soviet economic development,[19] including massive public works projects.[20] Finally, Applebaum explains the Gulag's steady decline under Stalin's successors.[21]

Because Applebaum does not presume that her readers have any specialized knowledge of Soviet history, she methodically develops the Gulag narrative. The copious detail in the historical sections might be overwhelming. For more patient readers, however, these sections will situate the rise and fall of the Gulag labor camps within the larger context of Soviet history and show that the Gulag was an inescapable reality of Soviet life.[22] The most memorable part of *Gulag* for general readers may be its middle section that describes the daily lives of camp prisoners, guards, and administrators. This collection of anecdotes is probably Applebaum's greatest contribution to Gulag literature.[23] Each personal story provides a compelling glimpse into the prisoners' suffering, from arrest to transport to confinement in the dreadful camps.

These vignettes also expose the inept management that consistently undermined the Gulag's productivity and exacerbated the misery of the *zeks* (Gulag prisoners). Applebaum explains that "in principle," the camps' operational guidelines should have maximized worker productivity.[24] In practice, these guidelines were rarely applied due to the administrator's frequent incompetence and occasional cruelty.[25] Although Stalin apparently tied so much of his nation's economic fortunes to the Gulag, the actual conditions in the camps likely hampered camp productivity and Soviet economic growth. He apparently never understood—possibly due to either misinformation from subordinates or his own willful ignorance and denial—that the capacity to work tends to decline when people are cold, starving, poorly housed, and neglected. The stories that Applebaum has compiled illustrate the folly of Stalin's vision and the dreariness of Gulag life better than any matter-of-fact account ever could.

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[15] APPLEBAUM, *supra* note 1, at xxvi (explaining the structure of the book).

[16] *Id.* at 9.

[17] The Communist Party Politburo decided in 1928 that all Soviet prisoners would be sent to prison labor camps run by the secret police. *Id.* at 50. That year, the secret police changed the name of the department for camp management to "Main Camp Administration," or GULAG. *Id.*; *see supra* note 5 (explaining the Russian meaning of "GULAG").

[18] APPLEBAUM, *supra* note 1, at 20 ("In the survivors' folklore, Solovetsky was . . . remembered as the first camp of the Gulag."), 36–37 (describing the Gulag's spread). Stalin also moved "special exiles," who were often "rounded up at the same time and for the same reasons as Gulag prisoners," to "remote exile villages" in uninhabited, resource-laden regions of the Soviet Union. *Id.* at xxvi.

[19] *Id.* at 49. Stalin's World War II strategy included a vital role for the camps, with some camps serving as resource extraction centers, *see id.* at 90, and others producing ammunition and war materiel. *Id.* at 450 (noting that thirty-five camps made ammunition, twenty camps made army uniforms, and thousands of inmates built railways, roads, and other infrastructure). Even more importantly, the Gulag provided almost one million badly needed conscripts for the Red Army. *Id.* at 446.

[20] *Id.* at 62. The first such project was the 141-mile White Sea Canal between the Baltic Sea and the White Sea. *Id.* Over the course of twenty months, thousands of prisoners from Gulag camps dug the canal with flimsy, handmade tools in extreme climatic conditions. *Id.* at 64–65. Its human costs were enormous: approximately 25,000 canal workers died from exhaustion, starvation, or exposure. *Id.* at 65. The finished canal was only twelve feet deep, making it useless for most commercial vessels. *Id.* at 64.

[21] *Id.* at 477–78. Widespread amnesty and prisoner releases began under Lavrenty Beria. *Id.* at 479 (explaining that Beria extended amnesty to: (1) prisoners with sentences of five years or less; (2) pregnant women; (3) women with minor children; and (4) prisoners under age eighteen). They continued under Nikita Khrushchev. *Id.* at 509 (noting that 617,000 prisoners were released in the ten months after Khrushchev's speech criticizing Stalin in 1956).

[22] *See* David Remnick, *Seasons in Hell: How the Gulag Grew*, NEW YORKER, Apr. 7, 2003, *available at* http://www.newyorker.com/critics/books/?030414crbo_books (book review) ("[The Gulag] was everywhere. There were camps not only in the frozen wastes of the Siberian north and the Far East but in every corner of the [Soviet] Empire, including the biggest cities.").

[23] Other critics agree with this assessment. *See id.* ("[T]he book's emotional power is in [Applebaum's] portrait of the victims and what they endured.").

[24] APPLEBAUM, *supra* note 1, at 185.

[25] For example, camp guards and administrators were rarely top-notch members of the secret police, *id.* at 259–60, and they were sometimes apparent sadists. *See id.* at 272–75. Prisoners often arrived in the camps weakened from their long transport trips and unable to work. *Id.* at 175. They were housed in crowded barracks where professional criminals ruled over a strict and violent caste system, with the knowledge and approval of camp administrators. *Id.* at 282–83. Although the official Gulag workday never exceeded eleven hours, *id.*, with a mandatory eight hours of sleep each night, *id.* at 193, actual workdays often topped sixteen hours. *Id.* at 192.

Unfortunately, Applebaum's historical account is more elaborate documentation than thoughtful analysis of the Gulag system. Applebaum's organization of *Gulag* compounds this deficiency. Applebaum devotes Part Two of *Gulag* to personal vignettes about camp life, but details of camp life also seep into the book's ostensibly historical sections, Parts One and Three. The result is a narrative that sometimes feels repetitive. Details of horrible working conditions and meager food portions are shocking initially, but they grow increasingly less poignant with each subsequent rehashing.

In addition, Applebaum never settles on defining the ultimate goal of the camps, but she fleetingly hints at several possibilities: increasing Soviet economic output, consolidating Stalin's political power, and satisfying Stalin's twisted sense of paranoia.[26] Perhaps it is too much to expect a historical overview to draw analytical conclusions. Nonetheless, such conclusions would have given context to the historical details that Applebaum has documented so meticulously.

Most troubling, however, is Applebaum's surreptitious transformation from neutral historian to political commentator in *Gulag*'s introduction and epilogue, both of which occupy extremely noticeable locations in the book. Applebaum's background explains how she could so effortlessly assume this role. She served as the Warsaw correspondent for the *Economist* magazine (1986–88) and as the foreign editor and deputy editor of the *Spectator* magazine (1988–92) before becoming an opinion-editorial columnist and editorial board member of the *Washington Post*.[27] Applebaum's political writing seems mildly conservative.[28] In *Gulag*, though, her rhetoric leans far enough to the right that conservative reviewers have written fawningly about the book, sometimes launching outrageous attacks against less enthusiastic critics.[29]

Applebaum injects political commentary primarily through her explanation of the Gulag's historical significance: (1) a better understanding of "old Communist threats to Western civilization" is made "all the more necessary" by "the emergence of new terrorist threats to Western civilization;"[30] (2) understanding the Gulag lets American readers "understand our own history" and remember "what mobilized us" and "what inspired us" during the Cold War;[31] and (3) understanding "how different societies have transformed their neighbors and fellow citizens from people into objects" can lead to an understanding of "the darker side of our own human nature."[32] In short, Applebaum uses the history of the Gulag to reveal the general depravity of humans and the specific malevolence of the Soviet Union and Communism. Beyond these trite observations, Applebaum's commentary offers little contemporary insight.

Of course, *Gulag* is not an ideological rant and, through most of its six hundred seventy-seven pages, is instead a fairly evenhanded historical survey. Yet when Applebaum uses political commentary as bookends for her substantive sections, she takes a measured risk. Readers who disagree with her philosophy might find that it tarnishes the rest of *Gulag*. They might reasonably question whether Applebaum has lapsed into tired Cold War propaganda: "a constant focus on victims of communism [that] helps convince the public of enemy evil . . . ."[33] For example, Applebaum devotes a separate chapter to maltreatment of political dissidents after the Gulag had formally dissolved.[34] In light of Applebaum's Cold War views, this chapter looks more like a recursive illustration of the vileness of the Soviet regime than a description of an integral part of the Gulag's history.

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[26] *See, e.g.*, *id.* at 45–49 (describing Stalin's use of the camps to extract resources as part of his Five Year Plans), 94–95 (describing role of the camps in confining political prisoners during the Great Terror of 1937–38), 105 (noting the mass execution of "enemies of the state" within the camps).

[27] Applebaum Bio, *supra* note 10.

[28] *See, e.g.*, Anne Applebaum, *Blaming the Messenger*, WASH. POST, May 18, 2005, at A17 (mildly criticizing the Bush Administration for its tactic of blaming *Newsweek* for an allegedly erroneous story of *Koran* desecration at Guantanamo Bay, Cuba, that sparked protests in Pakistan and Afghanistan); Anne Applebaum, *Defending Bolton*, WASH. POST, Mar. 9, 2005, at A21 (asserting that there is a role in global affairs for the United Nations "as long as that role is limited"); Anne Applebaum, *Planning for Next Time*, WASH. POST, Sept. 7, 2005, at A25 (observing in a detached, clinical, and emotionless manner that future emergency plans should focus on people who lack the means to evacuate areas of pending disaster and who may act "irrationally").

[29] *See, e.g.*, Juliana Pilon, *Capturing the Apocalypse*, AM. ENTERPRISE, Sept. 1, 2003, at 52 (calling *Gulag* "nothing short of a masterpiece"); *see also* David Frum, *A Must Read*, NAT'L REV., May 5, 2003, at *1 (calling *Gulag* a "titanic achievement: learned and moving and profound" and railing against a "peevishly ungenerous" review of *Gulag* by David Remnick, editor of the *New Yorker*). Remnick's "ungenerous" review called Applebaum's book "ambitious," "well-documented," assembled with "extraordinary care," and having "emotional power." Remnick, *supra* note 22.

[30] APPLEBAUM, *supra* note 1, at xxiii.

[31] *Id.* at 576.

[32] *Id.*

[33] EDWARD S. HERMAN & NOAM CHOMSKY, MANUFACTURING CONSENT: THE POLITICAL ECONOMY OF THE MASS MEDIA **lxiii** (2002).

[34] *See* APPLEBAUM, *supra* note 1, at 528–51 (political dissident chapter), 547–51 (describing psychotherapy-based torture of political prisoners after 1960).

Readers might also question Applebaum's perfunctory attempt to silence dissenting voices on the Cold War. Many of these critics plausibly argue that rather than being a necessary crusade, as Applebaum claims, the Cold War could have been a convenient means to justify increased American military spending[35] and corporate-friendly foreign and economic policies.[36] Applebaum's curt dismissal of such alternative views as mere "confusion"[37] does not serve her readers well. Instead, it demonstrates the extent to which Applebaum embraces the traditional Western version of the Cold War and refuses to adequately even consider competing interpretations.[38] This approach might be acceptable in an op-ed column, but it could weaken her status as a historian in *Gulag*.

Moreover, Applebaum's retrospection seems to be an end in itself rather than a means to improve future U.S. policies. Applebaum expressly denies the "cliché" that she wrote *Gulag* to prevent a similar tragedy from happening again.[39] Furthermore, she does not encourage American readers to use the history of the Gulag to analyze the practices of their own government.[40] Studying the Gulag could raise broader issues for readers, such as the complexity of defining crimes and administering justice; the potential for abuse and corruption within prison systems anywhere; the inconsistency between official American commitment to human rights and official American indifference to the Gulag during World War II;[41] a comparison of the GWOT label of "enemy combatants"[42] with the Gulag label of "enemies of the state;"[43] and the consequences of maintaining secret American detention centers for "enemy combatants."[44] By subtly closing the door to such inquiry, Applebaum seems to have chosen comfortable acceptability over contemporary relevance. Her choice is disappointing.[45]

In conclusion, *Gulag* would have had more intellectual power without Applebaum's disputable Cold War rhetoric. By focusing on one interpretation of the recent past and on philosophical vagaries about human nature, Applebaum misses the opportunity to produce a truly meaningful work. Instead, she is content to dutifully resurrect old ghosts of the Soviet menace as indirect justification for the current Administration's war on "new threats to Western civilization."[46] *Gulag* does allow readers to learn historical facts and glimpse the human tragedy of prisoner camp life, but it does not inspire them to use this knowledge for important modern applications. Readers of *Gulag*, especially those serving as judge advocates, must undertake this analysis on their own.

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[35] *See* GORE VIDAL, *The Last Empire*, *in* THE LAST EMPIRE: ESSAYS 1992–2000, at 317 (2001) ("Suddenly, we were faced with the highest income taxes in American history to pay for more and more weapons . . . . all because *the Russians were coming*."); Bruce Clark, *Red Scare: Fifty Years After His Death, Stalin's Crimes Are Still Morally Shocking*, WASH. MONTHLY, Apr. 1, 2003, at 46 (book review) ("With full knowledge of the Soviet Union's crimes against its own subjects, it is still possible to argue that at certain times, America and its allies stoked the fires of superpower competition and put humanity's survival at risk.").

[36] *See* NOAM CHOMSKY, HEGEMONY OR SURVIVAL: AMERICA'S QUEST FOR GLOBAL DOMINANCE 149 (2003) ("The new global order [after WWII] was to be subordinated to the needs of the U.S. economy and subject to U.S. political control as much as possible.").

[37] APPLEBAUM, *supra* note 1, at 576 (claiming that "[c]onfusion is already rife" concerning the Cold War's purpose).

[38] The degree to which this ideology might have crept into *Gulag* is also problematic. *See* Lynne Viola, *The Gray Zone*, NATION, Oct. 13, 2003 (reviewing ANNE APPLEBAUM, GULAG: A HISTORY (2003)) ("It seems . . . at worst hubristic to exploit the gulag in an effort to rewrite the cold war and create a usable past for the supposed victory of the West . . . .").

[39] *See* APPLEBAUM, *supra* note 1, at 577.

[40] *See id.* at 575–77.

[41] *See* Clark, *supra* note 35 (explaining that since 11 September 2001, our government has been increasingly willing to overlook brutality from allies in the GWOT).

[42] *See* Hamdi v. Rumsfeld, 542 U.S. 507, 510, 518 (2004) (explaining that the Authorization for the Use of Military Force in 2001 allowed the President to use "all necessary and appropriate force" in response to the terrorist incidents of September 11, 2001, and thereby authorized detention of enemy combatants as a "fundamental and accepted . . . incident to war").

[43] *See* APPLEBAUM, *supra* note 1, at 5–6, 102 (explaining that the term was a malleable classification that swept in vast numbers of seemingly innocent Soviet citizens).

[44] AMNESTY INTERNAT'L, ANNUAL REPORT OF AMNESTY INTERNAT'L: UNITED STATES OF AMERICA (2005), *available at* http://web.amnesty.org/report2005/usa-summary-eng (accusing the United States military of managing the secret detentions of persons with "high intelligence value" at undisclosed locations around the world).

[45] With respect to the "enemy combatant" issue, Applebaum might have already sent the manuscript for *Gulag* to print before widespread allegations of Guantanamo Bay (GITMO) prisoner abuse surfaced. But in an op-ed piece responding to Amnesty International's "gulag of our times" comment in June 2005, Applebaum primarily distinguished GITMO from the Gulag as a matter of scope and degree. Anne Applebaum, *Amnesty's Amnesia*, WASH. POST, June 8, 2005, at A21, (noting, in response to Amnesty International's criticism, that because U.S. military detention centers are not "intrinsic to our political system," they are "not 'similar in character' to the gulag at all"). Notably, Applebaum's response failed to specifically address Amnesty's narrow concerns of incommunicado detentions without due process, which was certainly a staple of the Gulag system. *Id.*

[46] APPLEBAUM, *supra* note 1, at xxiii.

Announcements

Invitation to the 2006 Basic Intelligence Law Course 5F-F41

The Judge Advocate General's Legal Center and School

July 17-18, 2006

This two-day course is for practitioners who are new to the field of intelligence law and is designed to achieve the following objectives:

a. Introduce new practitioners to the field of intelligence law; provide a historical context with which to view, understand, and apply existing laws, regulations and policies; and provide an overview of the organization, roles, and functions of the intelligence community.

b. Provide a basic understanding of the legal framework in which the intelligence community operates, to include the principle sources of intelligence law, with a focus on Executive Order 12333, Department of Defense Directive 5240.1, Department of Defense Directive 5240.1-R, and the service regulations which implement these authorities.

c. Introduce practitioners to principles and mechanisms involved in conducting intelligence oversight.

d. Provide an introduction to the intelligence disciplines of counterintelligence, human intelligence, and signals intelligence with discussion focused on the unique legal issues and concerns which arise in each field.

e. Provide practical experience which will enable new practitioners to identify, research, and address basic intelligence related legal issues.

This course, which is co-sponsored by The Judge Advocate General's Legal Center and School and the United States Army Intelligence Command, will be a unique opportunity for new practitioners in the intelligence and operational field to gain exposure to the growing field of intelligence law. The course will provide the basic tools and lay the groundwork necessary for new practitioners to identify and address intelligence related legal issues. Additionally, since the course will be open to representatives from each of the components of the intelligence community, the course will provide an opportunity to interact with a broad spectrum of intelligence professionals.

The course is open to military or civilian attorneys employed by the U.S. Government assigned or pending assignment to an intelligence unit or organization, or special operations/mission unit and military attorneys who provide operational law advice to commanders. Attendance is also open to U.S. government employees assigned or pending assignment to positions requiring an understanding of intelligence law as it relates to the investigation of national security cases. This course will be limited to those individuals who have fewer than two years of experience in the intelligence community or in support of intelligence operations. Security clearance required: Secret. This course is classified "SECRET."

The Points of Contact for this course are Ms. Vicki Taylor and Sergeant First Class Michelle Norvell. Ms. Taylor can be contacted by email at vicki.taylor@mi.army.mil. Sergeant First Class Norvell can be contacted by email at michelle.norvell@mi.army.mil. Both Ms. Taylor and Sergeant First Class Norvell can be contacted telephonically at (703) 706-2555.

Attendance is by invitation only. Individuals wishing to attend this course must request an application from Ms. Taylor at the email address above. Failure to adequately address the justification portion of the application form may result in non-selection. **All attendees wishing to participate in the Basic Intelligence Law Course must also enroll in and attend the Advanced Intelligence Law Course from July 19-21, 2006.**

Invitation to the 2006 Advanced Intelligence Law Course 5F-F43

The Judge Advocate General's Legal Center and School

July 19-21, 2006

This course is designed to bring practitioners who are new to the field of intelligence law together with more experienced members of the community to achieve the following objectives:

a. Provide an opportunity to engage in-depth discussions of emerging issues and specialized areas of intelligence law to include issues surrounding collection of intelligence in the cyber age;

b. Provide an opportunity to examine intelligence issues which are the object of current national and international debate such as domestic surveillance and domestic collection activities; and

c. Provide a forum to discuss intelligence reform and the intelligence oversight process.

This course, which is co-sponsored by The Judge Advocate General's Legal Center and School and the United States Army Intelligence Command, will be a unique opportunity for new practitioners in the intelligence and operational fields to interface with more seasoned intelligence law practitioners. It will provide all participants an opportunity to gain exposure to current and anticipated intelligence law issues relevant to the future of the intelligence community. Since the course will be open to representatives from each of the components of the intelligence community, the course will provide an opportunity to interact with a broad spectrum of intelligence professionals.

The course is open to military or civilian attorneys employed by the U.S. Government assigned or pending assignment to an intelligence unit or organization, or special operations/mission unit and military attorneys who provide operational law advice to commanders. Attendance is also open to U.S. government employees assigned or pending assignment to positions requiring an understanding of intelligence law as it relates to the investigation of national security cases. Priority of selection will be for those individuals selected to attend the Basic Intelligence Law Course. Security clearance required: Secret. This course is classified "SECRET."

The Points of Contact for this course are Ms. Vicki Taylor and Sergeant First Class Michelle Norvell. Ms. Taylor can be contacted by email at vicki.taylor@mi.army.mil. Sergeant First Class Norvell can be contacted by email at michelle.norvell@mi.army.mil. Both Ms. Taylor and Sergeant First Class Norvell can be contacted telephonically at (703) 706-2555.

Attendance is by invitation only. Individuals wishing to attend this course must request an application from Ms. Taylor at the email address above. Failure to adequately address the justification portion of the application form may result in non-selection.

To provide the maximum flexibility and the opportunity to address the most current issues, individual attendees seeking CLE credits will be required to coordinate and process Continuing Legal Education (CLE) requests directly with their state Bar Associations. The Staff Judge Advocate, U.S. Army INSCOM will provide course outlines, instructor biographies and, if necessary, certify attendance. Continuing Legal Education requests for the Advanced Intelligence Law Course will not be processed by The Judge Advocate General's Legal Center and School.

1st Legal Aspects of Information Operations Course (5F-F44)

The Judge Advocate General's Legal Center and School

26-30 June 2006

Scope: This course focuses on the evolving role of judge advocates in information operations (IO). Topics to be addressed will include: doctrine and objectives of IO at the strategic, operational, and tactical levels; IO as a use of force under international law; application of targeting principles and the law of war to IO; IO rules of engagement; intelligence law aspects of IO; and applicable foreign and domestic law affecting IO. Discussions of recent information operations campaigns and the legal issues associated with those campaigns will offer attendees practical insight for dealing with IO issues in future operations.

Prerequisites: Military attorneys and U.S. Government civilian attorneys serving in or pending assignment to a position that requires knowledge of information operations. Prior attendance at the Law of War Course (5F-F42), the Judge Advocate Officer Basic Course (5-27-C20), or service equivalent, is required. Permission to attend by exception to these prerequisites must be obtained from the Chair of the International and Operational Law Department. This course requires a SECRET security clearance, confirmation of which must be received by the School before the course begins. Security clearances must be confirmed in writing by the sending unit's security manager.

Appointment of Regimental Historian and Archivist

Fred L. Borch, who retired last year after twenty-five years of active duty service as an Army judge advocate (JA), assumed duties on 7 March 2006 as the Judge Advocate General's Corps' (JAG Corps) Regimental Historian and Archivist at The Judge Advocate General's Legal Center and School (TJAGLCS). As a result, the Corps now has a permanent focal point for all Regimental history-related activities. In addition to establishing an on-going history program that will capture the history of the Regiment as it unfolds in Afghanistan, Iraq, and future military operations, the Regimental Historian and Archivist is tasked with creating a world-class archive for Army JAG Corps history. This includes collecting, cataloging, and safeguarding documents, photographs, and other items of historical significance at TJAGLCS. Of particular interest are photographs (35mm and high resolution digital) of Army lawyers, legal administrators, and legal specialists in deployed environments; JA After Action Reports; and similar documentary summaries from military operations. Personal narratives from members of the Regiment about their experiences in military operations also are of interest. Consequently, Active and Reserve Component, National Guard, and civilian members of the Regiment—everywhere—are solicited to search their offices, personal file cabinets, and other storage areas for any items of historical interest. You may contact Fred Borch at (434) 971-3249 (DSN 521-3249);Fred.Borch@hqda.army.mil;or Mr. Fred Borch, Regimental Historian and Archivist, TJAGLCS, 600 Massie Road, Charlottesville, Virginia 22903-1781.

CLE News

1. Resident Course Quotas

a. Attendance at resident continuing legal education (CLE) courses at The Judge Advocate General's Legal Center and School, U.S. Army (TJAGLCS), is restricted to students who have confirmed reservations. Reservations for TJAGSA CLE courses are managed by the Army Training Requirements and Resources System (ATRRS), the Army-wide automated training system. If you do not have a confirmed reservation in ATRRS, attendance is prohibited.

b. Active duty service members and civilian employees must obtain reservations through their directorates training office. Reservists or ARNG must obtain reservations through their unit training offices or, if they are non-unit reservists, through the U.S. Army Personnel Center (ARPERCOM), ATTN: ARPC-OPB, 1 Reserve Way, St. Louis, MO 63132-5200.

c. Questions regarding courses should be directed first through the local ATRRS Quota Manager or the ATRRS School Manager, Academic Department at 1 (800) 552-3978, extension 3307.

d. The ATTRS Individual Student Record is available on-line. To verify a confirmed reservation, log into your individual AKO account and follow these instructions:

> Go to Self Service, My Education. Scroll to Globe Icon (not the AARTS Transcript Services). Go to ATTRS On-line, Student Menu, Individual Training Record. The training record with reservations and completions will be visible.
>
> If you do not see a particular entry for a course that you are registered for or have completed, see your local ATTRS Quota Manager or Training Coordinator for an update or correction.

e. The Judge Advocate General's School, U.S. Army, is an approved sponsor of CLE courses in all states that require mandatory continuing legal education. These states include: AL, AR, AZ, CA, CO, CT, DE, FL, GA, ID, IN, IA, KS, KY, LA, ME, MN, MS, MO, MT, NV, NH, NM, NY, NC, ND, OH, OK, OR, PA, RI, SC, TN, TX, UT, VT, VA, WA, WV, WI, and WY.

2. TJAGLCS CLE Course Schedule (May 2006 - September 2007) (http://www.jagcnet.army.mil/JAGCNETINTERNET/HOMEPAGES/AC/TJAGSAWEB.NSF/Main?OpenFrameset (click on Courses, Course Schedule))

Due to implementation of the Basic Officer Leadership Course (BOLC), the dates of all courses scheduled after October 2006 are subject to change. Please check the School web site and the most recent *The Army Lawyer* for the most up-to-date schedule.

ATTRS No.	Course Title	Dates
GENERAL		
5-27-C22	54th Graduate Course	15 Aug 05 – thru 25 May 06
5-27-C22	55th Graduate Course	14 Aug 06 – thru 24 May 07
5-27-C22	56th Graduate Course	13 Aug 07 – thru 23 May 08
5-27-C20	170th Basic Course	30 May – 23 Jun 06 (Phase I – Ft. Lee)
		23 Jun – 31 Aug 06 (Phase II – TJAGSA)
*5-27-C20	171st Basic Course	22 Oct – 3 Nov 06 (Phase I – Ft. Lee)
		3 Nov – 31 Jan 06 (Phase II – TJAGSA)
5-27-C20	172d Basic Course	4 Feb – 16 Feb 07 (Phase I – Ft. Lee)
		16 Feb – 2 May 07 (Phase II – TJAGSA)
5F-F70	37th Methods of Instruction Course	20 – 21 Jul 06
5F-F70	38th Methods of Instruction Course	19 – 1 Jul 07
5F-F1	192d Senior Officers Legal Orientation Course	12 – 16 Jun 06

5F-F1	193d Senior Officers Legal Orientation Course	11 – 15 Sep 06
5F-F1	194th Senior Officers Legal Orientation Course	13 – 17 Nov 06
5F-F1	195th Senior Officers Legal Orientation Course	5 – 9 Feb 07
5F-F1	196th Senior Officers Legal Orientation Course	26 – 30 Mar 07
5F-F1	197th Senior Officers Legal Orientation Course	11 – 15 Jun 07
5F-F1	198th Senior Officers Legal Orientation Course	10 – 14 Sep 07
5F-F3	13th RC General Officers Legal Orientation Course	24 – 26 Jan 07
5F-F52	36th Staff Judge Advocate Course	5 – 9 Jun 06
5F-F52	37th Staff Judge Advocate Course	4 – 8 Jun 07
5F-F52-S	9th Staff Judge Advocate Team Leadership Course	5 – 7 Jun 06
5F-F52-S	10th Staff Judge Advocate Team Leadership Course	4 – 6 Jun 07
5F-F55	2007 JAOAC (Phase II)	7 – 19 Jan 07 (**See CLE News section, paragraph 6 for prerequisite information**.)
5F-JAG	2006 JAG Annual CLE Workshop	2 – 6 Oct 06
JARC-181	2006 JA Professional Recruiting Seminar	11 – 14 Jul 06
JARC-181	2007 JA Professional Recruiting Seminar	17 – 20 Jul 07
ADMINISTRATIVE AND CIVIL LAW		
5F-F21	5th Advanced Law of Federal Employment Course	25 – 27 Oct 06
5F-F22	60th Law of Federal Employment Course	23 – 27 Oct 06
5F-F23	58th Legal Assistance Course	15 – 19 May 06
5F-F23	59th Legal Assistance Course	30 Oct – 3 Nov 06
5F-F23	60th Legal Assistance Course	14 – 18 May 07
5F-F24	31st Admin Law for Military Installations Course	26 Feb – 2 Mar 07
5F-F28	Tax Year 2006 Basic Income Tax CLE	11 – 15 Dec 06
5F-F29	24th Federal Litigation Course	31 Jul – 4 Aug 06
5F-F29	25th Federal Litigation Course	30 Jul – 3 Aug 07
5F-F202	5th Ethics Counselors Course	16 – 20 Apr 07
5F-F24E	2006 USAREUR Administrative Law CLE	18 – 22 Sep 06
5F-F24E	2007 USAREUR Administrative Law CLE	10 – 13 Sep 07
5F-F26E	2006 USAREUR Claims Course	27 Nov – 1 Dec 06
5F-F28E	Tax Year 2006 USAREUR Basic Income Tax CLE	4 – 8 Dec 06
5F-F28P	Tax Year 2006 PACOM Basic Income Tax CLE	8 – 12 Jan 07

CONTRACT AND FISCAL LAW		
5F-F10	156th Contract Attorneys Course	17 – 28 Jul 06
5F-F10	157th Contract Attorneys Course	23 Jul – 3 Aug 07

5F-F11	2006 Government Contract Law Symposium	5 – 8 Dec 06
5F-F12	75th Fiscal Law Course	30 Oct – 3 Nov 06
5F-F12	76th Fiscal Law Course	30 Apr – 4 May 07
5F-F13	3d Operational Contracting Course	12 – 16 Mar 07
5F-F101	7th Procurement Fraud Course	31 May – 2 Jun 06
5F-F102	6th Contract Litigation Course	16 – 20 Apr 07
5F-F15E	2007 USAREUR Contract & Fiscal Law CLE	27 – 30 Mar 07
N/A	2007 Maxwell AFB Fiscal Law Course	5 – 8 Feb 07
CRIMINAL LAW		
5F-F31	12th Military Justice Managers Course	21 – 25 Aug 06
5F-F31	13th Military Justice Managers Course	20 – 24 Aug 07
5F-F33	50th Military Judge Course	23 Apr – 11 May 07
5F-F34	26th Criminal Law Advocacy Course	11 – 22 Sep 06
5F-F34	27th Criminal Law Advocacy Course	12 – 23 Mar 07
5F-F34	28th Criminal Law Advocacy Course	10 – 21 Sep 07
5F-F35	29th Criminal Law New Developments Course	29 Nov – 2 Dec 05
5F-F35	30th Criminal Law New Developments Course	14 – 17 Nov 06
5F-301	9th Advanced Advocacy Training	16 – 19 May 06
5F-301	10th Advanced Advocacy Training	15 – 18 May 07
INTERNATIONAL AND OPERATIONAL LAW		
5F-F42	86th Law of War Course	10 Jul – 14 Jul 06
5F-F42	87th Law of War Course	29 Jan – 2 Feb 07
5F-F42	88th Law of War Course	16 – 20 Jul 07
5F-F44	1st Legal Aspects of Information Operations Course	26 – 30 Jun 06
5F-F44	2d Legal Aspects of Information Operations Course	25 – 29 Jun 07
5F-F45	6th Domestic Operational Law Course	30 Oct – 3 Nov 06
5F-F47	46th Operational Law Course	31 Jul – 11 Aug 06
5F-F47	47th Operational Law Course	26 Feb – 9 Mar 07
5F-F47	48th Operational Law Course	30 Jul – 10 Aug 07
LEGAL ADMINISTRATORS COURSES		
7A-270A1	17th Legal Administrators Course	19 – 23 Jun 06
7A-270A1	18th Legal Administrators Course	18 – 22 Jun 07
7A-270A2	7th JA Warrant Officer Advanced Course	10 Jul – 4 Aug 06
7A-270A2	8th JA Warrant Officer Advanced Course	9 Jul – 3 Aug 07
7A-270A0	13th JA Warrant Officer Basic Course	30 May – 23 Jun 06
7A-270A0	14th JA Warrant Officer Basic Course	29 May – 22 Jun 07

PARALEGAL AND COURT REPORTING COURSES		
512-27DC4	11th Speech Recognition Training	23 Oct – 3 Nov 06
512-27DC5	20th Court Reporter Course	24 Apr – 23 Jun 06
512-27DC5	21st Court Reporter Course	31 Jul – 29 Sep 06
512-27DC5	22d Court Reporter Course	29 Jan – 30 Mar 07
512-27DC5	23d Court Reporter Course	23 Apr – 22 Jun 07
512-27DC5	24th Court Reporter Course	30 Jul – 28 Sep 07
512-27DC6	7th Court Reporting Symposium	30 Oct – 3 Nov 06
512-27D/20/30	18th Law for Paralegal NCOs Course	26 Mar – 6 Apr 07
512-27DCSP	2d Combined Sr. Paralegal NCO Course	12 – 16 Jun 06
512-27DCSP	3d Combined Sr. Paralegal NCO Course	11 – 15 Jun 07

3. Naval Justice School and FY 2006 Course Schedule

Please contact Monique E. L. Cover, Other Services Quota Manager/Analyst, SRA International, Inc., Naval Personnel Development Command, Code N72, NOB, 9549 Bainbridge Ave., N-19, Room 121, at (757) 444-2996, extension 3610 or DSN 564-2996, extension 3610, for information about the courses.

Naval Justice School Newport, RI		
CDP	**Course Title**	**Dates**
0257	Lawyer Course (030)	5 Jun – 4 Aug 06
0257	Lawyer Course (040)	7 Aug – 6 Oct 06
NA	Brigade Oriented Legal Team (030)	7 – 11 Aug 06 (NJS)
0259	Legal Officer Course (202)	12 – 30 Jun 06
900B	Reserve Lawyer Course (020)	11 – 15 Sep 06
914L	Law of Naval Operations (020)	18 – 22 Sep 06
850T	SJA/E-Law Course (010)	30 May – 9 Jun 06
850T	SJA/E-Law Course (020)	24 Jul – 4 Aug 06
850V	Law of Military Operations (010)	12 – 23 Jun 06
961D	Military Law Update Workshop (Officer) (010)	20 – 21 May 06 (East)
961D	Military Law Update Workshop (Officer) (020)	17 – 18 Jun 06 (West)
961J	Defending Complex Cases (010)	17 – 21 Jul 06
525N	Prosecuting Complex Cases (010)	10 – 14 Jul 06
4048	Estate Planning (010)	14 – 18 Aug 06
7487	Family Law/Consumer Law (010)	22 – 26 May 06
748K	National Institute of Trial Advocacy (010)	24 – 28 Oct 06 (Camp Lejeune)
748K	National Institute of Trial Advocacy (020)	30 Jan – 3 Feb 06 (San Diego)
748K	National Institute of Trial Advocacy (030)	22 – 26 May 06 (Hawaii)

748B	Naval Legal Service Command Senior Officer Leadership (010)	21 – 25 Aug 06
0258	Senior Officer (NewPort) (050)	10 – 14 Jun 06
0258	Senior Officer (NewPort) (060)	14 – 18 Aug 06
0258	Senior Officer (NewPort) (070)	25 – 29 Sep 06
2622	Senior Officer (Fleet) (090)	10 – 14 Jul 06 (Pensacola)
2622	Senior Officer (Fleet) (100)	28 Aug – 1 Sep 06 (Pensacola)
7878	Legal Assistance Paralegal Course (010)	22 – 26 May 06
932V	Coast Guard Legal Technician Course (010)	11 – 22 Sep 06
846L	Senior Legalman Leadership Course (010)	24 – 28 Jul 06
846M	Reserve Legalman Course (Phase III) (010)	8 – 19 May 06
961G	Military Law Update Workshop (Enlisted) (010)	TBD
961G	Military Law Update Workshop (Enlisted (020)	TBD
4040	Paralegal Research & Writing (030)	17 – 28 Jul 06 (San Diego)
4046	SJA Legalman (020)	30 May – 9 Jun 06 (Newport)
627S	Senior Enlisted Leadership Course (130)	22 – 24 May 06 (Norfolk)
627S	Senior Enlisted Leadership Course (140)	19 -21 Jul 06 (Millington)
627S	Senior Enlisted Leadership Course (150)	1 – 3 Aug 06 (San Diego)
627S	Senior Enlisted Leadership Course (160)	16 – 18 Aug 06 (Norfolk)
627S	Senior Enlisted Leadership Course (170)	12 – 14 Sep 06 (Pendleton)
Naval Justice School Detachment Norfolk, VA		
0376	Legal Officer Course (050)	5 – 23 Jun 06
0376	Legal Officer Course (060)	24 Jul – 11 Aug 06
0376	Legal Officer Course (070)	11 – 29 Sep 06
0379	Legal Clerk Course (060)	5 – 16 Jun 06
0379	Legal Clerk Course (070)	31 Jul – 11 Aug 06
0379	Legal Clerk Course (080)	11 – 22 Sep 06
3760	Senior Officer Course (050)	15 –19 May 06
3760	Senior Officer Course (060)	26 – 30 Jun 06
3760	Senior Officer Course (070)	17 – 21 Jul 06 (Millington)
3760	Senior Officer Course (080)	28 Aug – 1 Sep 06
4046	Military Justice Course for SKA/Convening Authority/Shipboard Legalman (030)	10 – 21 Jul 06
Naval Justice School Detachment San Diego, CA		
947H	Legal Officer Course (050)	8 – 26 May 06
947H	Legal Officer Course (060)	12 – 30 Jun 06
947H	Legal Officer Course (070)	14 Aug – 1 Sep 06

947J	Legal Clerk Course (060)	8 – 19 May 06
947J	Legal Clerk Course (070)	12 – 23 Jun 06
947J	Legal Clerk Course (080)	14 – 25 Aug 06
3759	Senior Officer Course (070)	5 – 9 Jun 06 (San Diego)
3759	Senior Officer Course (080)	24 – 28 Jul 06 (San Diego)
3759	Senior Officer Course (090)	11 – 15 Sep 06 (Pendleton)

4. Air Force Judge Advocate General School Fiscal Year 2006 Course Schedule

Please contact Jim Whitaker, Air Force Judge Advocate General School, 150 Chennault Circle, Maxwell AFB, AL 36112-5712, commercial telephone (334) 953-2802, DSN 493-2802, fax (334) 953-4445) for information about attending the listed courses.

Air Force Judge Advocate General School Maxwell AFB, AL	
Course Title	**Dates**
Paralegal Apprentice Course, Class 06-D	24 Apr – 6 Jun 06
Operations Law Course, Class 06-A	15 – 25 May 06
Negotiation & Appropriate Dispute Resolution Course, Class 06-A	22 – 26 May 06
Air National Guard Annual Survey of the Law (Class 06-A & B) (Off-Site)	2 – 3 Jun 06
Air Force Reserve Annual Survey of the Law (Class 06-A & B) (Off-Site)	2 – 3 Jun 06
Staff Judge Advocate Course, Class 06-A	12 – 23 Jun 06
Law Office Management Course, Class 06-A	12 – 23 Jun 06
Paralegal Apprentice Course, Class 06-E	19 Jun – 1 Aug 06
Environmental Law Update Course, Class 06-A	28 – 30 Jun 06
Computer Legal Issues Course, Class 06-A	10 – 14 Jul 06
Legal Aspects of Information Operations Law Course, Class 06-A	12 – 14 Jul 06
Reserve Forces Paralegal Course, Class 06-A	17 – 28 Jul 06
Judge Advocate Staff Officer Course, Class 06-C	17 Jul – 15 Sep 06
Paralegal Craftsman Course, Class 06-C	1 Aug – 8 Sep 06
Paralegal Apprentice Course, Class 06-F	14 Aug – 26 Sep 06
Trial & Defense Advocacy Course, Class 06-B	18 – 29 Sep 06

5. Civilian-Sponsored CLE Courses

For addresses and detailed information, see the March 2006 issue of *The Army Lawyer*.

6. Phase I (Correspondence Phase), Deadline for RC-JAOAC 2007

The suspense for submission of all RC-JAOAC Phase I (Correspondence Phase) materials is ***NLT 2400, 1 November 2006***, for those judge advocates who desire to attend Phase II (Resident Phase) at TJAGLCS in January 2007. This requirement includes submission of all JA 151, Fundamentals of Military Writing, exercises.

This requirement is particularly critical for some officers. The 2007 JAOAC will be held in January 2007 and is a prerequisite for most judge advocate captains to be promoted to major.

A judge advocate who is required to retake any subcourse examinations or "re-do" any writing exercises must submit the examination or writing exercise to the Non-Resident Instruction Branch, TJAGLCS, for grading by the same deadline (1 November 2006). If the student receives notice of the need to re-do any examination or exercise after 1 October 2006, the notice will contain a suspense date for completion of the work.

Judge advocates who fail to complete Phase I correspondence courses and writing exercises by 1 November 2006 will not be cleared to attend the 2007 JAOAC. If you have not received written notification of completion of Phase I of JAOAC, you are not eligible to attend the resident phase.

If you have any additional questions, contact LTC Jeff Sexton, commercial telephone (434) 971-3357, or e-mail jeffrey.sexton@hqda.army.mil

7. Mandatory Continuing Legal Education Jurisdiction and Reporting Dates

Jurisdiction	**Reporting Month**
Alabama**	31 December annually
Arizona	15 September annually
Arkansas	30 June annually
California*	1 February annually
Colorado	Anytime within three-year period
Delaware	Period ends 31 December; confirmation required by 1 February if compliance required; if attorney is admitted in even-numbered year, period ends in even-numbered year, etc.
Florida**	Assigned month every three years
Georgia	31 January annually
Idaho	31 December, every third year, depending on year of admission
Indiana	31 December annually
Iowa	1 March annually

Kansas	Thirty days after program, hours must be completed in compliance period 1 July to June 30
Kentucky	10 August; completion required by 30 June
Louisiana**	31 January annually; credits must be earned by 31 December
Maine**	31 July annually
Minnesota	30 August annually
Mississippi**	15 August annually; 1 August to 31 July reporting period
Missouri	31 July annually; reporting year from 1 July to 30 June
Montana	1 April annually
Nevada	1 March annually
New Hampshire**	1 August annually; 1 July to 30 June reporting year
New Mexico	30 April annually; 1 January to 31 December reporting year
New York*	Every two years within thirty days after the attorney's birthday
North Carolina**	28 February annually
North Dakota	31 July annually for year ending 30 June
Ohio*	31 January biennially
Oklahoma**	15 February annually
Oregon	Period end 31 December; due 31 January
Pennsylvania**	Group 1: 30 April Group 2: 31 August Group 3: 31 December
Rhode Island	30 June annually
South Carolina**	1 January annually
Tennessee*	1 March annually

Texas	Minimum credits must be completed and reported by last day of birth month each year
Utah	31 January annually
Vermont	2 July annually
Virginia	31 October Completion Deadline; 15 December reporting deadline
Washington	31 January triennially
West Virginia	31 July biennially; reporting period ends 30 June
Wisconsin*	1 February biennially; period ends 31 December
Wyoming	30 January annually

* Military exempt (exemption must be declared with state).
**Must declare exemption.

Current Materials of Interest

1. The Judge Advocate General's On-Site Continuing Legal Education Training and Workshop Schedule (2005-2006)

Note: Due to funding constraints, there have been significant changes to this on-site schedule. This list is current as of 2 February 2006. Please confirm the course date with the listed-POCs before traveling to the on-site.

ATRRS No.	Dates	Location/Unit	Departments Assigned	POC
014	19-21 May 06	Kansas City, MO 8th LSO/89th RRC	Criminal Law; Contract & Fiscal Law	COL Meg McDevitt SFC Larry Barker (402) 554-4400, ext. 227 mmcdevitt@bqlaw.com larry.r.barker@us.army.mil
015	20-21 May 06	Nashville, TN 139th LSO	Criminal Law; International & Operational Law	COL Gerald Wuetcher (502) 564-3940, ext. 259

2. The Judge Advocate General's School, U.S. Army (TJAGLCS) Materials Available through the Defense Technical Information Center (DTIC)

Each year, TJAGSA publishes deskbooks and materials to support resident course instruction. Much of this material is useful to judge advocates and government civilian attorneys who are unable to attend courses in their practice areas, and TJAGSA receives many requests each year for these materials. Because the distribution of these materials is not in its mission, TJAGSA does not have the resources to provide these publications.

To provide another avenue of availability, some of this material is available through the Defense Technical Information Center (DTIC). An office may obtain this material through the installation library. Most libraries are DTIC users and would be happy to identify and order requested material. If the library is not registered with the DTIC, the requesting person's office/organization may register for the DTIC's services.

If only unclassified information is required, simply call the DTIC Registration Branch and register over the phone at (703) 767-8273, DSN 427-8273. If access to classified information is needed, then a registration form must be obtained, completed, and sent to the Defense Technical Information Center, 8725 John J. Kingman Road, Suite 0944, Fort Belvoir, Virginia 22060-6218; telephone (commercial) (703) 767-8273, (DSN) 427-8273, toll-free 1-800-225-DTIC, menu selection 2, option 1; fax (commercial) (703) 767-8228; fax (DSN) 426-8228; or e-mail to reghelp@dtic.mil.

If there is a recurring need for information on a particular subject, the requesting person may want to subscribe to the Current Awareness Bibliography (CAB) Service. The CAB is a profile-based product, which will alert the requestor, on a biweekly basis, to the documents that have been entered into the Technical Reports Database which meet his profile parameters. This bibliography is available electronically via e-mail at no cost or in hard copy at an annual cost of $25 per profile.Contact DTIC at www.dtic.mil/dtic/current.html.

Prices for the reports fall into one of the following four categories, depending on the number of pages: $7, $12, $42, and $122. The DTIC also supplies reports in electronic formats. Prices may be subject to change at any time.Lawyers, however, who need specific documents for a case may obtain them at no cost.

For the products and services requested, one may pay either by establishing a DTIC deposit account with the National Technical Information Service (NTIS) or by using a VISA, MasterCard, or American Express credit card. Information on establishing an NTIS credit card will be included in the user packet.

There is also a DTIC Home Page at http://www.dtic.mil to browse through the listing of citations to unclassified/unlimited documents that have been entered into the Technical Reports Database within the last twenty-five years to get a better idea of the type of information that is available. The complete collection includes limited and classified documents as well, but those are not available on the web.

Those who wish to receive more information about the DTIC or have any questions should call the Product and Services Branch at (703)767-8267, (DSN) 427-8267, or toll-free 1-800-225-DTIC, menu selection 6, option 1; or send an e-mail to bcorders@dtic.mil.

Contract Law

AD A301096	Government Contract Law Deskbook, vol. 1, JA-501-1-95.
AD A301095	Government Contract Law Desk book, vol. 2, JA-501-2-95.
**AD A265777	Fiscal Law Course Deskbook, JA-506-93.

Legal Assistance

A384333	Soldiers' and Sailors' Civil Relief Act Guide, JA-260 (2006).
AD A333321	Real Property Guide—Legal Assistance, JA-261 (1997).
AD A326002	Wills Guide, JA-262 (1997).
AD A346757	Family Law Guide, JA 263 (1998).
AD A384376	Consumer Law Deskbook, JA 265 (2004).
AD A372624	Legal Assistance Worldwide Directory, JA-267 (1999).
AD A360700	Tax Information Series, JA 269 (2002).
AD A350513	Uniformed Services Employment and Reemployment Rights Act (USAERRA), JA 270, Vol. I (2006).
AD A350514	Uniformed Services Employment and Reemployment Rights Act (USAERRA), JA 270, Vol. II (2006).
AD A329216	Legal Assistance Office Administration Guide, JA 271 (1997).
AD A276984	Legal Assistance Deployment Guide, JA-272 (1994).
**AD A360704	Uniformed Services Former Spouses' Protection Act, JA 274 (2005).
AD A326316	Model Income Tax Assistance Guide, JA 275 (2001).
AD A282033	Preventive Law, JA-276 (1994).

Administrative and Civil Law

AD A351829	Defensive Federal Litigation, JA-200 (2000).
AD A327379	Military Personnel Law, JA 215 (1997).
AD A255346	Financial Liability Investigations and Line of Duty Determinations, JA-231 (2006).
**AD A347157	Environmental Law Deskbook, JA-234 (2002).
AD A377491	Government Information Practices, JA-235 (2000).
AD A377563	Federal Tort Claims Act, JA 241 (2000).
AD A332865	AR 15-6 Investigations, JA-281 (1998).

Labor Law

AD A360707	The Law of Federal Employment, JA-210 (2000).
AD A360707	The Law of Federal Labor-Management Relations, JA-211 (2001).

Criminal Law

AD A302672	Unauthorized Absences Programmed Text, JA-301 (2003).
AD A302674	Crimes and Defenses Deskbook, JA-337 (2005).
AD A274413	United States Attorney Prosecutions, JA-338 (1994).

International and Operational Law

AD A377522	Operational Law Handbook, JA-422 (2005).

* Indicates new publication or revised edition.
** Indicates new publication or revised edition pending inclusion in the DTIC database.

3. The Legal Automation Army-Wide Systems XXI—JAGCNet

a. The Legal Automation Army-Wide Systems XXI (LAAWS XXI) operates a knowledge management and information service called JAGCNet primarily dedicated to servicing the Army legal community, but also provides for Department of Defense (DOD) access in some cases. Whether you have Army access or DOD-wide access, all users will be able to download TJAGSA publications that are available through the JAGCNet.

b. Access to the JAGCNet:

(1) Access to JAGCNet is restricted to registered users who have been approved by the LAAWS XXI Office and senior OTJAG staff:

(a) Active U.S. Army JAG Corps personnel;

(b) Reserve and National Guard U.S. Army JAG Corps personnel;

(c) Civilian employees (U.S. Army) JAG Corps personnel;

(d) FLEP students;

(e) Affiliated (U.S. Navy, U.S. Marine Corps, U.S. Air Force, U.S. Coast Guard) DOD personnel assigned to a branch of the JAG Corps; and, other personnel within the DOD legal community.

(2) Requests for exceptions to the access policy should be e-mailed to:

LAAWSXXI@jagc-smtp.army.mil

c. How to log on to JAGCNet:

(1) Using a Web browser (Internet Explorer 6 or higher recommended) go to the following site: http://jagcnet.army.mil.

(2) Follow the link that reads "Enter JAGCNet."

(3) If you already have a JAGCNet account, and know your user name and password, select "Enter" from the next menu, then enter your "User Name" and "Password" in the appropriate fields.

(4) If you have a JAGCNet account, *but do not know your user name and/or Internet password*, contact the LAAWS XXI HelpDesk at LAAWSXXI@jagc-smtp.army.mil.

(5) If you do not have a JAGCNet account, select "Register" from the JAGCNet Intranet menu.

(6) Follow the link "Request a New Account" at the bottom of the page, and fill out the registration form completely. Allow seventy-two hours for your request to process. Once your request is processed, you will receive an e-mail telling you that your request has been approved or denied.

(7) Once granted access to JAGCNet, follow step (c), above.

4. TJAGSA Publications Available Through the LAAWS XXI JAGCNet

For detailed information of TJAGLCS Publications available through the LAAWS XXI JAGCNet, see the March 2006, issue of *The Army Lawyer*.

5. TJAGLCS Legal Technology Management Office (LTMO)

The TJAGLCS, U.S. Army, Charlottesville, Virginia continues to improve capabilities for faculty and staff. We have installed new computers throughout TJAGLCS, all of which are compatible with Microsoft Windows XP Professional and Microsoft Office 2003 Professional.

The TJAGLCS faculty and staff are available through the Internet. Addresses for TJAGLCS personnel are available by e-mail at jagsch@hqda.army.mil or by accessing the JAGC directory via JAGCNET. If you have any problems, please contact LTMO at (434) 971-3257. Phone numbers and e-mail addresses for TJAGLCS personnel are available on TJAGLCS Web page at http://www.jagcnet.army.mil/tjagsa. Click on "directory" for the listings.

For students who wish to access their office e-mail while attending TJAGLCS classes, please ensure that your office e-mail is available via the web. Please bring the address with you when attending classes at TJAGLCS. If your office does not have web accessible e-mail, forward your office e-mail to your AKO account. It is mandatory that you have an AKO account. You can sign up for an account at the Army Portal, http://www.jagcnet.army.mil/tjagsa. Click on "directory" for the listings.

Personnel desiring to call TJAGLCS can dial via DSN 521-7115 or, provided the telephone call is for official business only, use the toll free number, (800) 552-3978; the receptionist will connect you with the appropriate department or directorate. For additional information, please contact the LTMO at (434) 971-3264 or DSN 521-3264.

6. The Army Law Library Service

Per *Army Regulation 27-1*, paragraph 12-11, the Army Law Library Service (ALLS) must be notified before any redistribution of ALLS-purchased law library materials. Posting such a notification in the ALLS FORUM of JAGCNet satisfies this regulatory requirement as well as alerting other librarians that excess materials are available.

Point of contact is Mrs. Dottie Evans, The Judge Advocate General's School, U.S. Army, ATTN: CTR-MO, 600 Massie Road, Charlottesville, Virginia 22903-1781. Telephone DSN: 521-3278, commercial: (434) 971-3278, or e-mail at Dottie.Evans@hqda.army.mil.

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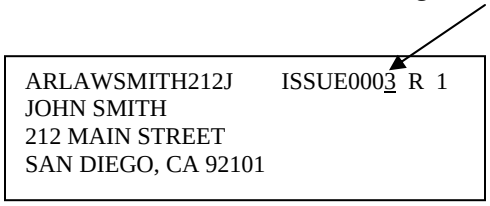

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