THE ARMY LAWYER

Headquarters, Department of the Army

Department of the Army Pamphlet 27-50-397

June 2006

Military Justice Symposium II

Articles

Editor, Major Anita J. Fitch
Assistant Editor, Captain Colette E. Kitchel
Technical Editor, Charles J. Strong

The Army Lawyer (ISSN 0364-1287, USPS 490-330) is published monthly by The Judge Advocate General's Legal Center and School, Charlottesville, Virginia, for the official use of Army lawyers in the performance of their legal responsibilities. Individual paid subscriptions to *The Army Lawyer* are available for $45.00 each ($63.00 foreign) per year, periodical postage paid at Charlottesville, Virginia, and additional mailing offices (see subscription form on the inside back cover). POSTMASTER: Send any address changes to The Judge Advocate General's Legal Center and School, 600 Massie Road, ATTN: ALCS-ADA-P, Charlottesville, Virginia 22903-1781. The opinions expressed by the authors in the articles do not necessarily reflect the view of The Judge Advocate General or the Department of the Army. Masculine or feminine pronouns appearing in this pamphlet refer to both genders unless the context indicates another use.

The Editor and Assistant Editor thank the Adjunct Editors for their invaluable assistance. The Board of Adjunct Editors consists of highly qualified Reserve officers selected for their demonstrated academic excellence and legal research and writing skills. Prospective candidates may send Microsoft Word versions of their resumes, detailing relevant experience, to the Technical Editor at charles.strong@hqda.army.mil

The Army Lawyer welcomes articles from all military and civilian authors on topics of interest to military lawyers. Articles should be submitted via electronic mail to charles.strong@hqda.army.mil or on 3 1/2" diskettes to: Editor, *The Army Lawyer*, The Judge Advocate General's Legal Center and School, U.S. Army, 600 Massie Road, ATTN: ALCS-ADA-P, Charlottesville, Virginia 22903-1781. Articles should follow *The Bluebook, A Uniform System of Citation* (18th ed. 2005) and *Military Citation* (TJAGLCS, 11th ed. 2006). Manuscripts will be returned on specific request. No compensation can be paid for articles.

The Army Lawyer articles are indexed in the *Index to Legal Periodicals*, the *Current Law Index*, the *Legal Resources Index*, and the *Index to U.S. Government Periodicals*. *The Army Lawyer* is also available in the Judge Advocate General's Corps electronic reference library and can be accessed on the World Wide Web by registered users at http://www.jagcnet.army.mil/ArmyLawyer.

Address changes for official channels distribution: Provide changes to the Editor, *The Army Lawyer*, The Judge Advocate General's Legal Center and School, 600 Massie Road, ATTN: ALCS-ADA-P, Charlottesville, Virginia 22903-1781, telephone 1-800-552-3978, ext. 396 or electronic mail to charles.strong@hqda.army.mil.

Issues may be cited as ARMY LAW., [date], at [page number].

Articles

Book Review

"It Was Impossible to Get a Conversation Going, Everybody Was Talking Too Much":[1] Synthesizing New Developments in the Sixth Amendment's Confrontation Clause

Major Michael R. Holley
Professor, Criminal Law Department
The Judge Advocate General's Legal Center and School
Charlottesville, Virginia

The U.S. Constitution accords the accused the fundamental right of confrontation.[2] How this right is properly satisfied is the subject of extensive debate, a fair measure of which has occurred during the past year. This article attempts to synthesize this varied debate into one understandable conversation—a conversation that will hopefully assist the military justice practitioner with the application of this keenly important constitutional demand.

Part I: The Demands of the Constitution

The language of the Confrontation Clause is straightforward. The Sixth Amendment states that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him."[3] The Supreme Court gave this sparse phrase significant exposition in a series of carefully considered opinions culminating with *Crawford v. Washington*.[4] *Crawford*, however, does not address all that needs to be said regarding the Confrontation Clause. Practitioners must take care because contradictory and overlapping statements regarding the demands of the Sixth Amendment can operate to confuse rather than to clarify. This article provides a simplified analysis that may serve as the basic framework for considering questions involving the Confrontation Clause and begins with the situation in which the right of confrontation may be waived or forfeited.

Part II: Producing the Witness or Demonstrating Waiver or Forfeiture

Forfeiture and Waiver

The right of confrontation is not absolute,[5] and the criminal accused may forfeit his right to confront a witness.[6] Alternatively, the accused may waive his right.[7]

Waiver of the right to confront witnesses is fairly commonplace and is an established exception to the demands of confrontation. Accused servicemembers routinely waive their right to confront a specific witness or witnesses during the course of a guilty plea.[8] An accused may also waive the right to confront witnesses during the trial on the merits.[9] For example, in *United States v. Bridges*, the accused was charged with assaulting his children.[10] The accused's wife refused to answer any questions after the government called her as a witness.[11] The accused declined the opportunity to cross-examine his wife and declined an invitation by the military judge to recall her at a later point in the proceedings.[12] The government

---

[1] Quote DB, Quotes of Yogi Berra, http://www.quotedb.com/quotes/1314 (last visited June 21, 2006) [hereinafter Quotes of Yogi Berra].

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

[3] *Id.*

[4] 541 U.S. 36 (2004).

[5] *See* Wright v. Idaho, 497 U.S. 805, 813 (1990) (conceding that the Sixth Amendment does not prohibit all hearsay statements although confrontation has not occurred at trial).

[6] *Crawford*, 541 U.S. at 62.

[7] Brookhart v. Janis, 384 U.S. 1 (1966).

[8] *See* Boykin v. Alabama, 395 U.S. 238 (1969); *see also* United States v. Hansen, 59 M.J. 410 (2004).

[9] *See* Brookhart v. Janis, 384 U.S. 1, 4 (1966) (holding that although the accused may waive his right to confront witnesses, he had not affirmatively done so in this case).

[10] 55 M.J. 60 (2001).

[11] *Id.* at 61.

[12] *Id.*

later admitted certain hearsay statements of the wife.[13] The accused objected to the admission of the hearsay statements as a denial of his right to confront the witness, but the Court of Appeals for the Armed Forces (CAAF) held that the accused waived his right to confront the witness.[14]

Although waiver is common, a special variant of waiver deserves additional consideration—the invocation of the doctrine of forfeiture. Forfeiture is an equitable doctrine,[15] which lends itself to wide interpretation and uneven application.[16] A brief examination of forfeiture is warranted because the Supreme Court has clearly stated that forfeiture can extinguish the right to confront a witness[17] and because forfeiture is being used with increasing frequency. Two cases are particularly instructive in sounding out this principle.

United States v. Mayhew[18] is representative of the typical forfeiture case. The defendant killed his ex-girlfriend and kidnapped their daughter, Kristina.[19] After fleeing across several states, the police stopped Mayhew but not before he shot himself and fatally wounded Kristina.[20] Before Kristina died, she made several statements that the government admitted as evidence against the defendant during his trial.[21] Principally relying on the Sixth Circuit's opinion in *United States v. Garcia-Meza*,[22] the *Mayhew* court found that the defendant forfeited his right to confront his daughter.[23] The *Mayhew* court reasoned that the fact that the defendant was charged with the underlying murder was not a bar to the government proving by a preponderance of evidence that the defendant's wrongdoing was responsible for the witness's absence.[24] Furthermore, the court found that the motivation for the murder of the daughter was not dispositive.[25] The *Mayhew* court found it unnecessary that the government prove the defendant intended to procure the unavailability of the witness.[26] Rather, the court maintained that the doctrine of forfeiture was an equitable doctrine such that the defendant should not benefit in any way from his wrongdoing.[27]

In stark contrast to *Mayhew*, the court in *United States v. Jordan* found no forfeiture under somewhat similar facts.[28] At the time of the offense, defendant Mark Jordan was an inmate of a federal prison.[29] Jordan stabbed another inmate in the

---

[13] *Id.*

[14] *Id.* at 64. Judge Sullivan, joined by Judge Baker, concurred but found that waiver was not as clear as the majority opined. Judge Sullivan pointed to other cases where waiver had been affirmative and clear.

[15] *Id.* at 62.

[16]

> "Equity" in its broadest and most general signification, . . . denotes the spirit and heart of fairness, justness, and right dealing which would regulate the intercourse of men with men. . . . In this sense its obligation is ethical rather than jural, and its discussion belongs to the sphere of morals. It is grounded in the precepts of the conscience, not in any sanction of positive law. . . . In a restricted sense, the word denotes equal and impartial justice . . . ; justice, that is, as ascertained by natural reason or ethical insight, but independent of the formulated body of law.

Gilles v. Dep't of Human Res. Dev., 521 P.2d 110, 116 n.10 (Cal. 1974). This case, and the doctrine of forfeiture, are very expertly and thoughtfully discussed by Judge Comparet-Cassani in her article on the subject. *See* Joane Comparet-Cassani, *Crawford and the Forfeiture by Wrongdoing Exception*, 42 SAN DIEGO L. REV. 1185 (2005).

[17] Crawford v. Washington, 541 U.S. 36, 62 (2004).

[18] 380 F. Supp. 2d 961 (D. Ohio 2005).

[19] *Id*. at 963.

[20] *Id.*

[21] *Id.*

[22] 403 F.3d 364, 370-71 (6th Cir. 2005).

[23] *Mayhew*, 380 F. Supp. 2d at 968. The Sixth Circuit reasoned in *Garcia-Meza* that the requirements of the federal hearsay rules, as captured by FRE 804(b)(6), were not controlling as to the constitutional analysis. The doctrine, said the Sixth Circuit, was an equitable one and there was no requirement that the government prove that the defendant specifically intended to procure the unavailability of the witness, regardless of what the evidentiary rule may require. *Garcia-Meza*, 403 F.3d at 370.

[24] *Mayhew*, 380 F. Supp. 2d at 968.

[25] *Id.* at 966.

[26] *Id.*

[27] *Id.*

[28] 2005 U.S. Dist. LEXIS 3289 (D. Colo. 2005).

back with a sharpened piece of steel, apparently in connection with a drug debt.[30] The inmate died from the injury seven hours later, but not before making several statements implicating the defendant.[31] At the time of the defendant's trial, the government sought to introduce the inmate's incriminating statements as either dying declarations or excited utterances.[32] The court rejected both theories.[33] Additionally, the government argued that the defendant forfeited his right to confront the witness.[34] The court rejected this argument, as well.[35] With respect to forfeiture, the court pointed to the language of Federal Rule of Evidence (FRE) 804(b)(6).[36] This rule, the court said, requires that the wrongdoing be intended to procure the witness's absence.[37] Further, the court found that the government simply had not proven that the defendant's intent at the time of the stabbing was to procure the witness's absence.[38] The *Jordan* court identified the following as an "archetypical" illustration of the doctrine of forfeiture:

> [A] defendant's murder of a witness who was scheduled to testify against the defendant in an upcoming case *unrelated* to the case in which the defendant is charged with the witness' murder. The defendant sets out to kill the witness to prevent her from testifying against him about something she witnessed in the past related to a crime other than her own murder.[39]

In essence, the court found the doctrine of forfeiture inapplicable to a case where the by-product of the alleged murder is the unavailability of the witness.[40]

The *Mayhew* and *Jordan* cases highlight the great differences in approaches to the equitable doctrine of forfeiture which are the subject of some debate. A recent law review article, *Expanding Forfeiture Without Sacrificing Confrontation After Crawford*,[41] captures this debate. The article states that prior to the *Crawford* case, forfeiture was primarily limited to circumstances where a witness was intentionally killed to prevent the witness from testifying about a prior crime.[42] This limitation was, as noted above, the essence of the analysis of *Jordan*.[43] After *Crawford*, courts are increasingly using forfeiture to fit situations such as the one in *Mayhew* where the murder of the victim establishes forfeiture as a by-product.[44] For the practitioner, caution is appropriate. The doctrine of forfeiture by wrongdoing is a long held, well-established, and recently reaffirmed principle that can be an exception to the normal demands of the Confrontation Clause.[45] There are, however, few relative certainties that attend this doctrine, but arguably there are at least three. First, the majority of jurisdictions require the government to prove the accused's wrongdoing by a preponderance of the evidence.[46] Second, any conduct, not simply illegal conduct, which causes the witness to absent himself from trial, may be sufficient under the

---

[29] *Id.* at *1.

[30] *Id.* at *2.

[31] *Id.*

[32] *Id.*

[33] *Id.* at *16.

[34] *Id.* at *11.

[35] *Id.* at *15.

[36] FED. R. EVID. 804(b)(6).

[37] *Jordan*, at *13.

[38] *Id.* at *15.

[39] *Id.* at *14.

[40] *Id.* at *15.

[41] Joshua Deahl, *Expanding Forfeiture Without Sacrificing Confrontation After Crawford*, 104 MICH. L. REV. 599 (2005).

[42] *Id.*

[43] *Jordan*, 2005 U.S. Dist. LEXIS 3289, at *14; Deahl, *supra* note 41, at 601.

[44] *Mayhew*, 380 F. Supp. 2d at 968; Deahl, *supra* note 41, at 601.

[45] Crawford v. Washington, 541 U.S. 36, 62 (2004).

[46] *See* United States v. Dhinsa, 243 F.3d 635 (2d Cir. 2001) (requiring proof by a preponderance of the evidence); *see also* United States v. Rivera, 292 F. Supp. 2d 827 (E.D. Va. 2003); United States v. Scott, 284 F.3d 758 (7th Cir. 2002); United States v. Price, 265 F.3d 1097 (10th Cir. 2001); United States. v. Zlatogur, 271 F.3d 1025 (11th Cir. 2001); United States v. Cherry, 217 F.3d 811 (10th Cir. 2000); United States v. Emery, 186 F.3d 921 (8th Cir. 1999). *But see* United States v. Thevis, 665 F.2d 616, 631 (5th Cir. 1982) (requiring a "clear and convincing" standard).

forfeiture doctrine.[47] Third, when the government can prove that the accused undertook the wrongdoing with the specific intent of procuring the absence of the witness, the doctrine of forfeiture is clearly invoked.[48] Beyond these principles, it is somewhat unclear how far and how safely the doctrine may be extended. Courts, confronted with the sometimes seemingly harsh bar of *Crawford*, may be tempted to extend the forfeiture doctrine somewhat aggressively,[49] particularly in cases involving domestic violence and child abuse.[50] Other courts have established clear limits to the doctrine.[51] The careful practitioner must closely study the issue and factual circumstances before making his argument to support or attack the doctrine of forfeiture.[52]

Producing the Witness for Cross Examination

Waiver and forfeiture are exceptions; production is the rule. The best and most direct way to satisfy the Confrontation Clause is to simply produce the witness and allow the defense counsel to adequately cross-examine.

Satisfying Confrontation When the Witness Is Present

Witness production, or witness availability, is a concept more complex that it initially appears. Take, for example, the case of the witness who is physically present at trial. A witness who refuses to testify is generally considered unavailable for hearsay and confrontation purposes.[53] This is true whether the witness decides before he reaches the courtroom that he will not answer questions or whether the witness makes this decision on the witness stand.[54] Thus, a witness who "freezes" on the witness stand should be considered unavailable for hearsay and confrontation purposes.[55] Sometimes, however, a witness may be unavailable under the hearsay rules, but available for confrontation purposes. Consider the witness who invokes his privilege against self-incrimination. Under Military Rule of Evidence (MRE) 804(a)(1), this witness would be considered unavailable for hearsay purposes.[56] Assuming this witness could be given testimonial immunity, however, the witness would *not* be unavailable for confrontation purposes because the government can make the witness available through a grant of

---

[47] *See* People v. Hampton, 2005 Ill. App. LEXIS 1188 (Ill. App. Ct. 2005) ("We conclude that any conduct by an accused intended to render a witness against him unavailable to testify is wrongful and may result in forfeiture of the accused's privilege to be confronted by that witness."); *see also* Steele v. Taylor, 684 F.2d 1193, 1201-02 (6th Cir. 1982) (finding that defendant's coercive control over intimate partner who would be a witness against him is deemed forfeiture).

[48] United States v. Houlihan, 92 F.3d 1271, 1279-80 (1st Cir. 1996) (finding that murder of a man who had the potential to be a witness against the defendant in a drug trial clearly established the defendant's forfeiture of the right to confront the witness).

[49] *See* United States v. Montague, 421 F.3d 1099 (10th Cir. 2005). In *Montague*, the government showed that the defendant, after his arrest, repeatedly communicated with his wife in violation of a no-contact court order. *Id.* at 1101. She subsequently invoked her marital privilege. *Id.* Notably, the defendant should have been able to abide by the no-contact order since he was confined during the relevant time period. *Id.* Nevertheless the court concluded that when the defendant's wife visited him in jail, he could have opted not to speak to her. *Id.* at 1103. This option, combined with other evidence of intimidation, satisfied the Tenth Circuit that the decision of the trial court to apply the doctrine of forfeiture by wrongdoing was not clearly erroneous. *Id.* at 1104.

[50] *See* Laurie E. Martin, *Child Abuse Witness Protections Confront* Crawford v. Washington, 39 IND. L. REV. 113 (2005); *see also* Myrna Raeder, *Crawford and Beyond: Exploring the Future of the Confrontation Clause in Light of Its Past: Remember the Ladies and the Children Too:* Crawford*'s Impact on Domestic Violence and Child Abuse Cases*, 71 BROOKLYN L. REV. 311 (2005).

[51] *See* People v. Melchor, 841 N.E.2d 420 (Ill. App. Ct. 2005). After shooting a man to death, the defendant became a fugitive for over ten years. *Id.* at 422. During this time the only eye witness died of a drug overdose, but did so only after a co-defendant had been tried and acquitted in a trial in which the eye witness testified. *Id.* Upon Melchor's re-arrest and subsequent trial, the court admitted the statements of the now deceased eye-witness. The Illinois appellate court held that this admission of the hearsay statements of the eye-witness violated the defendant's right to confrontation. *Id.* at 436. The appellate court further held that the doctrine of forfeiture by wrongdoing was inapplicable since the defendant's misconduct of fleeing trial had no causal connection to the eye-witness' death. *Id.*

[52] For further discussion as to why the current extension of the forfeiture doctrine is inconsistent with precedent, see James F. Flanagan, *Forfeiture by Wrongdoing and Those Who Acquiesce in Witness Intimidation: A Reach Exceeding Its Grasp and Other Problems with Federal Rule of Evidence 804(b)(6)*, 51 DRAKE L. REV. 459 (2003). For a contrary view on the subject, see Paul Grimm & Jerome Deise, *Hearsay, Confrontation, and Forfeiture by Wrongdoing:* Crawford v. Washington*, a Reassessment of the Confrontation Clause*, 35 U. BALT. L.F. 5 (2004).

[53] MANUAL FOR COURTS-MARTIAL, UNITED STATES, MIL. R. EVID. 804(a)(1) (2005) [hereinafter MCM]; *see also In re T.T.*, 815 N.E.2d 789, 797 (Ill. App. Ct. 2004).

[54] *In re T.T.*, 815 N.E.2d at 797; *see also In re Rolandis G.*, 817 N.E.2d 183 (Ill. App. Ct. 2004).

[55] *In re T.T.*, 815 N.E.2d at 797.

[56] MCM, *supra* note 53, MIL R. EVID. 804(a)(1).

testimonial immunity.[57] Consider, too, the fairly common situation where the witness agrees to testify but then claims a loss of memory regarding the events at issue. Military Rule of Evidence 804(a)(3) defines this witness as "unavailable" when he "testifies to a lack of memory of the subject matter of the declarant's statement."[58] Does it follow then that the "forgetful" witness is also unavailable for confrontation purposes?

The CAAF clearly answered this question in *United States v. Rhodes*.[59] Staff Sergeant (SSgt) Rhodes was charged with a variety of drug offenses.[60] The case against SSgt Rhodes heavily relied upon the testimony of an accomplice, Senior Airman (SrA) Daughtery.[61] Senior Airman Daughtery previously made a confession that implicated both himself and SSgt Rhodes.[62] After meeting with SSgt Rhodes and his defense counsel, SrA Daughtery subsequently recanted and signed an affidavit claiming that he no longer remembered SSgt Rhodes's involvement in the drug offenses.[63]

At trial, SrA Daughtery persisted in his claim of lack of memory.[64] After making "extensive findings of fact and conclusions of law," the military judge admitted the previous confession of SrA Daughtery as a statement against interest and provided several conditions for its use.[65] The defense cross-examined SrA Daughtery "at length."[66]

On appeal, SSgt Rhodes argued that the court denied his right to confrontation.[67] Staff Sergeant Rhodes pointed to a footnote in the *Crawford* opinion that stated that the Confrontation Clause "does not bar admission of a statement so long as the declarant is present at trial to defend or explain it."[68] The CAAF rejected this innovative argument by referring back to an earlier Supreme Court case, *United States v. Owens*.[69] The CAAF found that *Crawford* had not overruled *Owens* by using the phrase "to defend or explain it."[70] The CAAF stated, "[A]s *Owens* makes clear, the declarant's explanation may be that he or she has no recollection of the underlying event, and the defense can meaningfully confront a witness who claims such a lack of memory."[71] The CAAF determined SrA Daughtery was available for confrontation purposes, but, because of his claim of lack of memory, was unavailable for purposes of hearsay.[72] The statements against interest, which required a finding of unavailability for hearsay purposes,[73] did not violate the accused's confrontation rights since, for confrontation purposes, the witness was in fact available.[74]

Rhodes reminds the practitioner that rules of hearsay and the Confrontation Clause, though related in many ways, are distinct legal requirements. A witness may be available for confrontation purposes and unavailable for hearsay purposes. Additionally, *Rhodes* indicates that questions of availability and unavailability for confrontation purposes may be more complicated than they initially appear—the focus of the next section of this article.

---

[57] *See* United States v. Simpson, 60 M.J. 674, 678 (2004).

[58] MCM, *supra* note 53, MIL. R. EVID. 804(a)(3).

[59] 61 M.J. 445 (2005). The *Rhodes* case is further discussed in Major Christopher W. Behan's article, *"The Future Ain't What It Used to Be": New Developments in Evidence for the 2005 Term of Court*, ARMY LAW., Apr. 2006, at 65-66.

[60] *Rhodes*, 61 M.J. at 446.

[61] *Id*. at 447.

[62] *Id*.

[63] *Id*.

[64] *Id*.

[65] *Id*.

[66] *Id*. at 448.

[67] *Id.* at 449.

[68] *Id*. at 450 (citing Crawford v. Washington, 541 U.S. 36, 59 n.9 (2004)).

[69] *Id.* (citing United States v. Owens, 484 U.S. 554 (1988)).

[70] *Id.*

[71] *Id.*

[72] *Id.*

[73] MCM, *supra* note 53, MIL. R. EVID. 804(b)(3).

[74] *Rhodes*, 61 M.J at 450.

Satisfying Confrontation When the Witness Is Not Physically Present

While *Rhodes* provides an interesting evaluation of the issues surrounding *legal availability*, the more common Confrontation Clause question for practitioners involves *physical availability*. For defense witnesses, the question of physical availability is one of compulsory process and beyond the scope of this article. For government witnesses, however, the issue of the physical production of witnesses falls squarely within the boundaries of the Confrontation Clause. What is to be made of the witness who does not testify because he is not physically available at trial? A safe assumption can be made that a *truly unavailable* witness is unavailable for both hearsay and confrontation purposes. The ultimate question, then, is when is a witness who is not physically present at trial truly unavailable?

The question of true unavailability is, at times, difficult to answer because the test for witness availability is fairly nebulous. The Supreme Court provides a foundation for witness unavailability in *Barber v. Page*: "In short, a witness is not 'unavailable' . . . unless the prosecutorial authorities have made a good-faith effort to obtain his presence at trial."[75] The Army Court of Criminal Appeals (ACCA) has gone further by stating that "the Government must exhaust every reasonable means to secure the witness' live testimony."[76] Unfortunately, what may be considered "good-faith" and "reasonable" is in the eye of the beholder. As a result, determining when a witness is physically unavailable may vary from courtroom to courtroom. For this reason, *United States v. Campbell*,[77] although it is an unpublished service court opinion, is worth considering.

Staff Sergeant (SSG) Campbell was charged with several offenses, including disobeying a lawful command from a senior commissioned officer.[78] The government relied upon two witnesses to prove the disobedience charge.[79] The two witnesses were members of a Special Forces unit and were deployed with their unit on separate missions to Columbia and Honduras.[80] The deployment had been planned several months in advance.[81] Initially, the witnesses would have been present for the trial, but a defense delay moved the trial date into the time frame of the deployment.[82]

Prior to trial, the government sought and obtained approval from the military judge to depose the two witnesses.[83] The trial began on 17 February 2002 and ended on 22 February 2002.[84] The witnesses deployed on 27 January 2002 with a scheduled return date of 29 March 2002. After hearing testimony from another member of the witnesses' unit, the military judge determined that the two witnesses were unavailable at the time of trial due to "the location of the witnesses, the nature of the military operations, the degree of difficulty in obtaining these witnesses[']personal appearance prior to April [2002], the length of time the accused has already spent in pretrial confinement, and that the accused is entitled to have his day in court."[85] The military judge subsequently admitted the depositions over defense objection, and the accused was convicted of a variety of offenses.[86]

Upon review, the Army court first looked to the language of Article 49(d)(2) of the Uniform Code of Military Justice (UCMJ),[87] which was incorporated into MRE 804(a)(6), to determine when a deposition may be admissible.[88] Article 49

---

[75] 390 U.S. 719, 724 (1968).

[76] United States v. Dieter, 42 M.J. 697 (Army Ct. Crim. App. 1995).

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

[78] *Id.* at *1.

[79] *Id.* at *2, *4. There were actually three witnesses at issue, but one of the witnesses testified concerning an aggravated assault. The use of this witness's deposition, though erroneous, did not prejudice the accused and so will not be discussed here.

[80] *Id.* at *3.

[81] *Id.* at n.3.

[82] *Id.* at *3.

[83] *Id.*

[84] *Id.*

[85] *Id.* at *2.

[86] *Id.*

[87] UCMJ art. 49 (2005).

[88] *Campbell*, No. 200020190, at *5.

states that a deposition may be used if the witness "by reason of death, age, sickness, bodily infirmity, imprisonment, military necessity, nonamenability to process, or other reasonable cause, is unable or refuses to appear and testify in person at the place of trial or hearing."[89] The court then analyzed the specific facts of the case. After first concluding that the witnesses could have traveled back to Fort Bragg for the trial, the court found that it was incapable of taking judicial notice of the difficulties of travel.[90] Given the court's inability to take judicial notice of these difficulties combined with the government's failure to establish these facts at trial, the Army court was forced to conclude that the government failed to meet their burden of demonstrating unavailability.[91]

The court, however, went further. Looking back to a case from the Vietnam era, the court quoted *United States v. Davis*[92] in finding that with developments in transportation, depositions would not be admitted under the rubric of military necessity "short of war or an armed conflict."[93] Additionally, the Army court referenced previous decisions by the Court of Military Appeals in *United States v. Vanderwier*[94] and *United States v. Cokeley*[95] that counseled strongly for delay rather than a finding of unavailability in most cases.[96] Examining the specific facts of the case, the court found that the military judge erred by not delaying the trial for two days to permit the witnesses to fly to Fort Bragg or by not delaying the trial for six weeks to allow the witnesses to complete their deployment.[97] This failure, said the court, was an abuse of discretion.

Campbell, like most availability cases, is very fact specific. Although the precedential value of *Campbell* may be slight, the ultimate message of the case is certain: strong facts made clear and distinct by the military judge on the record are essential prior to a finding of unavailability. Counsel would be unwise to assume that basic efforts to demonstrate physical unavailability will be sufficient. Instead, counsel should ensure that such efforts are exhaustive, imminently reasonable, and on the record. Military judges, likewise, must be very careful in making findings of fact and conclusions of law with regard to availability and must strongly consider delaying the case if such a delay will make an unavailable witness available. Finally, defense counsel should press the government very hard to demonstrate that a witness is truly physically unavailable for trial and, when appropriate, demand a continuance if doing so will rectify the problem or, at a minimum, preserve the issue for appeal.

The physical production of witnesses at trial represents the confluence of strong, competing currents. The Confrontation Clause demands that witnesses be physically present at trial.[98] Against this demand are the difficulties inherent in the physical production of witnesses—remote location, illness, military operations, refusal of the witness to travel, etc. The military prosecutor may find himself with a trial at Fort Lewis, Washington, a civilian victim in an Iraqi village, and a military witness in the jungles of Columbia. It is at such a confluence that the possibility of using remote testimony may present itself.[99] A trial counsel who can produce a witness by remote means, such as video-teleconference, would apparently satisfy all demands. Nevertheless, the likelihood of using remote testimony is itself remote in the aftermath of *United States v. Yates*.[100]

Before considering *Yates*, however, a quick review of the law on remote testimony may be helpful. The starting point is *Maryland v. Craig*,[101] a case involving child abuse in which the child victim testified by one-way closed circuit television

---

[89] *Id*. (citing UCMJ art. 49).

[90] *Id.* at *5.

[91] *Id*. at *9.

[92] 41 C.M.R. 217, 223 (C.M.A. 1970).

[93] *Campbell*, No. 200020190, at *8.

[94] 25 M.J. 263 (C.M.A. 1987).

[95] 22 M.J. 225 (C.M.A. 1986).

[96] *Campbell*, No. 200020190, at *8.

[97] *Id.* at *9.

[98] U.S. CONST. amend. VI.

[99] As stated above, defense counsel also have an interest in procuring witnesses, but this interest would find itself within the context of the Compulsory Process of the Sixth Amendment and not the Confrontation Clause.

[100] 438 F.3d 1307, 1310 (11th Cir. 2006).

[101] 497 U.S. 836 (1990).

with a defense counsel and a prosecutor present.[102] The accused, jury, judge, and other counsel viewed the testimony in the courtroom. In upholding the Maryland statute prescribing this particular method of remote testimony, the Court held that the "Confrontation Clause reflects a preference for face-to-face confrontation at trial, a preference that must occasionally give way to considerations of public policy and necessities of the case."[103] The Court also stated that the "preference" for "face-to-face confrontation" may give way if it is necessary to further an important public policy but only where the reliability of the testimony can otherwise be assured.[104] Even with this case-specific finding, courts must attempt to preserve as many of the elements of confrontation—physical presence, oath, cross-examination, and observation of the witness's demeanor by the trier of fact—as possible.[105]

Rule for Court-Martial (RCM) 914a and MRE 611d followed the *Craig* decision and were largely validated in *United States v. McCollum*.[106] But even prior to *McCollum*, and in circumstances not involving a child witness, various federal courts tested the outer boundaries of *Craig* when utilizing video-teleconferences for witnesses who were unwilling or unable to be physically present at trial. Perhaps the most significant of these cases was *United States v. Gigante*.[107] In this case, the government asserted that Mr. Vincent Gigante was the boss of the Genovese crime family and supervised its criminal activity.[108] Gigante was subsequently convicted of racketeering; criminal conspiracy, under the Racketeer Influenced and Corrupt Organization statute; conspiracy to commit murder; and a labor payoff conspiracy.[109] The government proved its case using six former members of the Mafia, including Peter Savino.[110] Savino was allowed to testify via closed circuit television because he was in the Federal Witness Protection Program and because he was in the final stages of an inoperable, fatal cancer.[111] Finding "exceptional circumstances," the Second Circuit held the trial judge did not violate Gigante's right to confront Savino.[112] As a result, *Gigante* is considered an early and important step in extending the use of remote testimony beyond the child witness.

The military took an additional step toward extending the use of remote testimony in *United States v. Shabazz*[113] when the Navy-Marine Corps Court of Criminal Appeals (NMCCA) examined the issue of remote testimony of an adult witness. In *Shabazz*, the adult witness to an assault and maiming refused to travel from the United States to a court-martial in Okinawa.[114] After considering and rejecting several options, the military judge permitted the use of remote testimony stating that such a method of taking the witness's testimony was "far better than a deposition."[115] The NMCCA, in analyzing the confrontation issue, looked to *Craig* and *Gigante* finding that the age of the witness was not dispositive but simply a factor in deciding "whether denial of face-to-face confrontation at trial is necessary to further an important public policy."[116] The NMCCA found the accused's confrontation rights were violated but only because the trial judge did not do enough to control the reliability of testimony from the remote location.[117]

---

[102] *Id*.

[103] *Id*. at 849.

[104] *Id*. at 850.

[105] *Id*. at 846.

[106] 58 M.J. 323 (2003). For a thorough examination of *McCollum*, see Major Robert Wm. Best, *2003 Developments in the Sixth Amendment: Black Cats on Strolls*, ARMY LAW., July 2004, at 55.

[107] 166 F.3d 75 (2d Cir. 1999).

[108] *Id*. at 78.

[109] *Id.*

[110] *Id.*

[111] *Id.*

[112] *Id.* at 81; *see also* State v. Sewell, 595 N.W.2d 207, 211 (Minn. Ct. App. 1999) (holding that the use of remote testimony for critically injured witness who could not travel did not violate the defendant's confrontation rights).

[113] 52 M.J. 585, 590 (N-M. Ct. Crim. App. 1999).

[114] *Id*. at 591.

[115] *Id*.

[116] *Id.* at 594.

[117] *Id.* Apparently neither the military judge nor the trial counsel took any steps to ensure that the witness in the United States was able to answer the questions posed without any additional assistance from an off-camera source.

Gigante, *Shabazz*, and other similar cases suggested a movement toward increased use of remote testimony in situations involving adults. That movement ran into a brick wall in *United States v. Yates*.[118]

In *Yates*, the trial judge, over defense objection, permitted two key government witnesses in Australia to testify via two-way video teleconferencing.[119] The two witnesses were unwilling to travel to the United States for trial.[120] Both witnesses were sworn in and then questioned and cross-examined by counsel.[121] The defendants, the jury, and the judge could see the testifying witnesses on monitors and the witnesses could see the temporary courtroom.[122] The Eleventh Circuit originally held that the procedure violated the defendants' right to confront witnesses against them.[123] The opinion, however, was subsequently vacated and heard in an en banc hearing.[124]

Upon rehearing, the Eleventh Circuit again found that the use of two-way video teleconferencing violated the defendant's right of confrontation.[125] The court applied the *Craig* standard—"a defendant's right to confront accusatory witnesses may be satisfied absent a physical, face-to-face confrontation at trial only where denial of such confrontation is necessary to further an important public policy and only where the reliability of the testimony is otherwise assured."[126] The court considered and rejected the government's arguments that *Craig* was inapplicable. First, the government argued that the two-way video conference was superior to the one-way procedure.[127] Second, the government contended that since the two-way video-conference was superior to testimony taken by deposition under the federal rules, the two-way video method should be utilized whenever a deposition would be otherwise allowed.[128]

The Eleventh Circuit quickly dismissed the government's first argument by stating that two-way video conferencing is not distinguishable from one-way video conferencing.[129] The Eleventh Circuit found that the Second Circuit in *Gigante* erred in holding that it was distinguishable.[130] The court identified four other circuits that agreed that confrontation via a two-way video conference is not the constitutional equivalent of face-to-face confrontation.[131] "The simple truth," the court stated, "is that confrontation through a video monitor is not the same as physical face-to-face confrontation."[132]

The *Yates* court also criticized the government's second argument—the superiority of the video conference to a deposition.[133] The court pointed out that during a deposition the accused has the opportunity for a physical face-to-face confrontation.[134] The court also emphasized that the Supreme Court rejected a proposed amendment to the Federal Rules of Criminal Procedure that would have allowed two-way video conferencing.[135] The Eleventh Circuit stated that Justice Antonin Scalia commented that the proposed rule would be "contrary to the rule enunciated in *Craig*" in that such a

---

[118] 438 F.3d 1307 (11th Cir. 2006).

[119] *Id.* at 1310.

[120] *Id*.

[121] *Id.* The original courtroom did not have video teleconferencing capabilities, so the trial was moved to the U.S. Attorney's Office.

[122] *Id*.

[123] 391 F.3d 1182 (11th Cir. 2004).

[124] 404 F.3d 1291 (11th Cir. 2005).

[125] *Yates*, 438 F.3d at 1318.

[126] *Id.* at 1312 (quoting Maryland v. Craig, 497 U.S. 836, 850).

[127] *Id*.

[128] *Id.*

[129] *Id*. at 1313.

[130] *Id*.

[131] *Id.* The Sixth, Eighth, Ninth, and Tenth Circuits concurred. Only the Second Circuit (in *Gigante*) does not.

[132] *Id*. at 1315.

[133] *Id*. at 1315-17.

[134] *Id.* at 1317.

[135] *Id*. at 1314.

technique would not limit remote testimony to "instances where there has been a 'case-specific finding' that is 'necessary to further an important public policy.'"[136]

The Eleventh Circuit, in finding that the *Craig* standard had not been satisfied, stressed the importance of necessity, stating that "*Craig* requires that furtherance of the important public policy make it *necessary* to deny the defendant his right to a physical face-to-face confrontation."[137] The court had serious concerns that the government's "important public policy" was limited to "expeditiously and justly resolving the case"[138] Such policies are important, said the court, but these policies will always be present to some degree in any criminal prosecution.[139] The court found that necessity under these circumstances simply did not exist, particularly when another alternative, the deposition, was available to the government.[140]

The Eleventh Circuit and Second Circuit justices seem to have differing viewpoints regarding the use of remote testimony. The Eleventh Circuit's reasoning, however, may be the better of the two since it flows directly from and is more faithful to the *Craig* standard. Assuming military courts follow *Yates* vice *Gigante*, four lessons can be drawn regarding the use of remote testimony for adult witnesses.

First, absent extraordinary circumstances, remote testimony involving adult witnesses will likely violate the Confrontation Clause. *Yates* seems to foreclose remote testimony, but only upon a cursory reading. Notably, the Eleventh Circuit suggests that had the trial court in *Gigante* held the necessary evidentiary hearings and applied the *Craig* standard, remote testimony would have likely satisfied the Confrontation Clause.[141] *Gigante*, said the Eleventh Circuit, had a very unusual set of circumstances that would have demonstrated the necessity of remote testimony because the witness in question was "a former mobster participating in the Federal Witness Protection Program . . . at an undisclosed location, and . . . was in the final stages of inoperable, fatal cancer."[142] Absent such unique circumstances, Confrontation Clause demands are not likely to be met. Although such extraordinary circumstances may arise in a future military case, they must be viewed in light of the second lesson.

The second lesson concerns depositions. Government counsel who are faced with a witness who is unwilling or unable to travel to the court-martial should use depositions if at all possible. Defense counsel who are faced with remote testimony at trial should mention the availability of depositions to the government in an effort to deprive the prosecution of its ability to establish necessity. (Notably, the defendant in *Gigante* refused to attend a previously ordered deposition).[143] *Yates* makes it very clear that since the deposition is a recognized means of satisfying the Confrontation Clause, depositions should be used if the witness will be otherwise unavailable at the time of trial.[144] When a deposition can be used, remote testimony is essentially prohibited.

The third lesson is perhaps more subtle. Given the fundamental definition of physical confrontation, counsel should carefully consider the use **of** telephonic or video conference testimony at Article 32 hearings. A fair inference from the *Yates* opinion and others is that reliance upon either one of these techniques at the Article 32 hearing will often fail to satisfy the Confrontation Clause if later introduced as evidence at trial. This is not to say that video conference testimony or even telephonic testimony is inappropriate at an Article 32 hearing. Rather, the trial counsel who later tries to rely upon this testimony because the witness is unavailable at trial may be prevented from arguing that the Confrontation Clause has been previously satisfied.[145] Additional issues are also raised at this point, such as whether the absence of an objection at the

---

[136] *Id.*

[137] *Id*. at 1316 (emphasis added).

[138] *Id*.

[139] *Id.* ("All criminal prosecutions include at least some evidence crucial to the Government's case, and there is no doubt that many criminal cases could be more expeditiously resolved were it unnecessary for witnesses to appear at trial.").

[140] *Id*. at 1316.

[141] *Id.* at 1313.

[142] *Id.*

[143] *Gigante*, 166 F.3d 75, 79 (2d Cir. 1999).

[144] *Yates*, 438 F.3d at 1316.

[145] There is yet further nuance to this issue. In military trials, the prior opportunity for cross-examination is most likely to occur at the Article 32 hearing, or, in some cases, during a deposition conducted pursuant to RCM 702. One interesting technique currently in vogue at Article 32 hearings in some jurisdictions of Army practice is for counsel to announce that it is their intention to question a witness simply for discovery purposes and not for impeachment purposes. If the witness is later unavailable for trial, then the defense counsel objects not on confrontation grounds but on hearsay grounds.

Article 32 hearing would waive the physical presence component of confrontation at a later trial. Presumably, it would not.[146] This issue of prior opportunity to cross-examine the witness has gained new importance in light of *Crawford* since such an opportunity, combined with a finding of unavailability, may be the only means to admit testimonial hearsay.[147]

The fourth lesson is one of remote testimony generally and not necessarily of *Yates.* *Yates* involved the physical production of adult witnesses on the merits. Questions remain concerning *Yates* applicability at other stages of trial. The pre-sentencing case, around which so much of the military practitioner's world revolves, does not implicate the Confrontation Clause.[148] Thus, for the majority of military guilty pleas, remote testimony may be a useful tool because it allows the production of government aggravation witnesses through a reasonably responsive media without the associated financial costs required by travel or the impediment to mission caused by the witness's absence from his unit. Likewise, recent changes in Article 39, UCMJ, have opened up new avenues for using remote testimony during pre-trial sessions.[149] As a result, remote testimony may be permissible for pre-trial sessions not bearing on guilt.

Judicial analysis for using remote testimony is not uniform. These four lessons, however, should aid military counsel in negotiating witness availability issues.

Limiting Cross Examination

Producing the witness does not satisfy the Confrontation Clause if a full opportunity for cross-examination is limited.[150] During the last term, the CAAF explored this important concept in *United States v. Israel*[151] and *United States v. James.*[152]

Airman First Class (A1C) Israel was charged with the wrongful use of cocaine.[153] The government's case relied upon the normal urinalysis process.[154] The defense aimed at attacking this process.[155] On 19 May 2001, A1C Israel submitted a urine sample at MacDill Air Force Base (MacDill).[156] The MacDill Drug Testing Program Manager, Mr. Mahala, sent the sample to the Brooks Air Force Drug Testing Laboratory (Brooks) where it was tested on 30 May 2001.[157]

Through Mr. Mahala the government established how the sample was taken and shipped to Brooks.[158] Mr. Mahala could not remember the specific sample, but he testified about his standard procedures for collecting and shipping urine samples.[159]

The specific objection is that the hearsay exception under MRE 804(b)(1), former testimony, is inapplicable because the rule requires that the questioner at trial have a "similar motive" as on the prior occasion. Defense counsel then argue that since the motive at the Article 32 hearing—discovery—and the motive at the trial impeachment differ, the hearsay exception is inapplicable. Counsel would be well advised to read *United States v. Connor*, prior to undertaking such an advanced and risky tact. *See* United States v. Connor, 27 M.J. 378 (C.M.A. 1989).

[146] *See* Johnson v. Zerbst, 304 U.S. 458, 464 (U.S. 1938) ("A waiver is ordinarily an intentional relinquishment or abandonment of a known right or privilege.").

[147] Crawford v. Washington, 541 M.J. 36, 69 (2004).

[148] United States. v. McDonald, 55 M.J. 173 (2001).

[149] 18 U.S.C.S. § 839 (LEXIS 2006). The corresponding National Defense Authorization Act provides further guidance on when remote testimony may be used for Article 39(a) sessions. National Defense Authorization Act for Fiscal Year 2006, Pub. L. No. 109-163, 119 Stat. 3136 (2006). An executive order changing the appropriate RCM is now required. Additionally, *Army Regulation 27-10* must be changed to fulfill the Secretarial authorization requirement. These changes contemplate arraignments and other sessions without members to be conducted even in the physical absence of the parties. Additionally, the provisions make allowances for witness who may appear via video teleconference on issues "not bearing on guilt" as well as rare allowances for witnesses whose testimony does "bear on guilt." These changes will be discussed in greater detail once AR 27-10 has been appropriately modified.

[150] Davis v. Alaska, 415 U.S. 308 (1974).

[151] 60 M.J. 485 (2005).

[152] 61 M.J. 132 (2005).

[153] *Israel*, 60 M.J. at 486.

[154] *Id.*

[155] *Id.*

[156] *Id*. at 487.

[157] *Id*.

[158] *Id.*

[159] *Id.*

Prior to cross-examination, the government made a motion in limine to preclude the defense counsel "from presenting evidence on cross of Mr. Mahala, as well as be precluded from any mention at all of the Drug Demand Urinalysis' untestable rates . . . from MacDill Air Force Base."[160] The defense argued that the presence of certain untestable samples raised a fair inference in procedural irregularities since an untestable rate indicated that something had gone wrong with the procedure involved in collecting and shipping urine samples.[161] The military judge granted the government motion and precluded the defense from cross examining Mr. Mahala about the untestable samples.[162]

Next, the government focused on the procedures at Brooks. Dr. Haley, an expert witness, testified about the various tests the Brooks laboratory used to ascertain the presence of cocaine. Dr. Haley stated that the gas chromatography/mass spectrometry testing process was considered the "gold standard in drug testing. "[163] Dr. Haley also testified about the various control systems used to prevent testing errors.[164]

Prior to the cross-examination of Dr. Haley, the military judge held an Article 39(a), UCMJ, session to address evidence the defense sought to introduce in its cross-examination of Dr. Haley.[165] This evidence included a May 2001 calibration error, a 1997 incident where a laboratory employee erroneously annotated a specimen sample, a 1999 incident where an employee falsified documents to cover up an error, an August 2000 false-positive blind quality control sample, and log book errors made in April 2001.[166] The military judge determined that this evidence was "totally irrelevant . . . none of that stuff has anything to do with this particular testing in this particular case."[167]

The CAAF disagreed, in part, with both of the trial court's rulings. With regard to MacDill's untestable rates, the CAAF found that questions of irregularity in the process of collecting samples were relevant, particularly when the witness's testimony relied upon a presumption of regularity.[168] The CAAF found that the military judge abused his discretion in prohibiting the defense from using this evidence in cross-examination.[169]

With regard to the errors at Brooks, the CAAF first found that the calibration error in May 2001 was erroneously excluded.[170] The calibration errors, of which there were two during the relevant time period, indicated procedural irregularities in the testing process.[171] As a result, the CAAF held that the military judge abused his discretion by excluding this evidence.[172] In making this finding, the CAAF stated the following:

> [I]n those cases where the Government relies on the general reliability of testing procedures, evidence related to the testing process that is closely related in time and subject matter to the test at issue may be relevant and admissible to attack the general presumption of regularity in the testing process.[173]

Next, the CAAF found that the judge committed error by prohibiting the defense counsel from cross-examining Dr. Haley regarding the false-positive blind quality control sample in August 2000.[174] This evidence, too, went to the regularity

---

[160] *Id.*

[161] *Id.*

[162] *Id.*

[163] *Id.*

[164] *Id.*

[165] *Id.* at 488.

[166] *Id.*

[167] *Id.*

[168] *Id.* at 488, 489.

[169] *Id.* at 489.

[170] *Id.*

[171] *Id.*

[172] *Id.*

[173] *Id.*

[174] *Id.* at 489-90.

and accuracy of the testing process.[175] Simply because this evidence concerned an event that occurred nine months earlier did not diminish its relevance in the court's assessment.[176] This was particularly true when the government characterized the laboratory's testing procedures as "the gold standard" and the "Mercedes" of drug testing processes.[177] This heightened characterization of the testing procedures opened the door to a broader time frame during which laboratory errors would be relevant to challenge the testing process.[178]

With regard to the remaining evidence, the CAAF found that the military judge had not abused his discretion.[179] The May 1997 erroneous annotation of a drug sample was irrelevant to the reliability of the test results.[180] Although the employee who made the erroneous annotation in 1997 was involved with Israel's test, his involvement was limited to only reviewing the data.[181] This incident was simply too far removed "in both subject matter and time" to be relevant to the reliability of the tests.[182] The 1999 incident of falsifying a sample was also found irrelevant.[183] The employee in question had not been employed at the time of Israel's test.[184] The CAAF found that this incident was related to the accused's test only in that both occurred at Brooks.[185] Finally, the CAAF found that log book errors in April 2001 were irrelevant because the individuals involved in that incident did not access any areas where Israel's sample was tested or stored.[186]

The CAAF made these rulings with an eye toward guaranteeing the confrontation rights of the accused. The wholesale denial of the evidence in question was error that constituted a violation of the accused's constitutional rights.[187] Such a violation requires reversal unless the error was harmless beyond a reasonable doubt.[188] Because the government relied so heavily upon the regularity of the drug testing process, and particularly so where the government characterizes the process as the "gold standard," the CAAF held the error was not harmless beyond a reasonable doubt when the defense was prevented from appropriately contesting the "gold standard."[189] The CAAF reversed the decision and set aside the findings and sentence.[190]

The CAAF also addressed the limits of cross-examination in *United States v. James*.[191] In this case, Airman (AMN) James pleaded guilty to wrongful use and distribution of ecstasy.[192] In pre-sentencing proceedings before a panel, the government called Airman Basic (AB) Rose, the accused's "best friend," as an aggravation witness.[193] Previously, AB Rose had been tried by a general court-martial in which he pleaded guilty pursuant to a pre-trial agreement.[194] Rose testified that

---

[175] *Id.* at 489.

[176] *Id.* at 490.

[177] *Id.*

[178] *Id.*

[179] *Id.*

[180] *Id.*

[181] *Id.*

[182] *Id.*

[183] *Id.*

[184] *Id.*

[185] *Id.*

[186] *Id.*

[187] *Id.* at 491.

[188] *Id.*

[189] *Id.*

[190] *Id.*

[191] 61 M.J. 132 (2005).

[192] *Id.* at 133.

[193] *Id.* at 134.

[194] *Id.*

the accused introduced him to ecstasy.[195] Rose also testified that AMN James had used and distributed ecstasy on a number of occasions.[196]

Airman Basic Rose's pretrial agreement limited his punishment to eighteen months from a maximum possible punishment of fifty-two years.[197] Airman Basic Rose in fact received eighteen months from the military judge.[198] At the time of AMN James's trial, AB Rose was still pending a clemency hearing.[199]

After testifying for the government, the defense sought to cross-examine AB Rose.[200] The military judge precluded the defense from cross-examining AB Rose concerning the specific terms in his pretrial agreement.[201] On appeal, AMN James contended that this preclusion violated his Sixth Amendment right to confront the witnesses against him.[202]

The CAAF held that the military judge did not violate AMN James's confrontation rights,[203] citing to the Supreme Court in *Delaware v. Van Arsdall* concerning the following limits of cross-examination:

> [T]rial judges retain wide latitude insofar as the Confrontation Clause is concerned to impose reasonable limits on such cross-examination based on concerns about, among other things, harassment, prejudice, confusion of the issues, the witness' safety, or interrogation that is repetitive or only marginally relevant.[204]

The CAAF found that the military judge permitted an otherwise full opportunity to cross-examine AB Rose.[205] The CAAF found it important that the members knew that AB Rose entered into a pretrial agreement in his own trial where he pleaded guilty and entered into a stipulation of fact, that he received immunity for his testimony in AMN James's court-martial, that his agreement required him to cooperate with the government against his best friend, and that his clemency hearing was still pending.[206] This last point, that his clemency hearing was still pending, was important to the CAAF[207] because "Rose's only 'continuing incentive' identified in this case was that his clemency appeal was pending before the convening authority and if he testified favorably he would be able to inform the convening authority that he cooperated with the Government in James's trial."[208] The CAAF seems to have left open the possibility that preventing the defense from exploring the specifics of Rose's agreement might have violated AMN James's core constitutional rights had AB Rose not already been sentenced. Taken with *Israel*, the CAAF in *James* assisted counsel in clarifying both the guarantee and the limits of cross-examination.

Having considered various statements this article now examines the common situation of hearsay in the context of the Confrontation Clause.

---

[195] *Id.*

[196] *Id.*

[197] *Id.* This raises the tactical issue for trial counsel of "overcharging" when dealing with a co-accused. It seems unlikely that this much of a sentencing cap was ever needed, but might the subsequent disparity between the maximum punishment and the benefit of the pre-trial agreement have the effect of disproportionately influencing some panel-members?

[198] *Id.*

[199] *Id.*

[200] *Id.*

[201] *Id.*

[202] *Id.* Interestingly and as stated above, the CAAF had previously held that the Confrontation Clause does not apply to presentencing, though the Due Process Clause does. United States. v. McDonald, 55 M.J. 173 (2001). Nevertheless, the reasoning of *James* occurs within the context of the Confrontation Clause.

[203] *James*, 61 M.J. at 136.

[204] *Id*. at 134 (citing United States v. Bahr, 33 M.J. 228 (C.M.A. 1991)) (citing to Delaware v. Van Arsdall, 475 U.S. 673, 678-679 (1986)).

[205] *Id.* at 136.

[206] *Id*.

[207] *Id.*

[208] *Id.*

Part III: Hearsay and the Sixth Amendment

Background

> *"The law is a sort of hocus-pocus science, that smiles in yer face while it picks yer pocket: and the glorious uncertainty of it is of more use to the professors than the justice of it."*[209]

Statements made by out-of-court declarants are common in courts-martial. Such statements first raise the issue of confrontation and second the issue of hearsay. Whether the particular statement satisfies the Confrontation Clause has become somewhat of a guessing game in the aftermath of *Crawford v. Washington*.[210] Fortunately during its 2006 term, the Supreme Court further defined "testimonial" in *United States v. Davis* and *United States v. Hammon*, two cases that will no doubt be discussed in next year's symposium.[211] Whether these cases will answer all the necessary questions posed by the *Crawford* decision or will simply create additional issues remains to be seen. This article will not dwell on the deep issues of *Crawford* nor will it hazard to predict the impact of *Davis* and *Hammon*. Rather, it will simply review the principal military cases dealing with *Crawford* from the 2005 term. First, however, a cursory review of *Crawford* may be helpful.[212]

Review of Crawford v. Washington

In *Crawford*, the Supreme Court held that when "testimonial" statements are at issue, the only indicium of reliability sufficient to satisfy constitutional demands is confrontation.[213] This confrontation must take place at trial, or the court must find the witness unavailable at the time of trial and demonstrate counsel's prior opportunity to cross-examine the witness.[214] And, as previously mentioned and discussed above, the Supreme Court left open the possibility of forfeiture.[215] The critical term for triggering this rule is, of course, "testimonial."

The Supreme Court partially answered the question of what statements might be classified as "testimonial" by first suggesting various definitions that might fully explain the nature of a testimonial statement.[216] From these proposed, but not fully adopted, definitions, the Supreme Court recognized several concrete examples of testimonial statements and several examples of nontestimonial statements.[217] Statements that should be considered nontestimonial, said the Court, include business records and statements made in furtherance of a conspiracy.[218] Additionally, the Court suggested that dying declarations may be treated as nontestimonial statements as an exception to the general rule.[219] Interestingly, the Court seemed to strongly suggest that nontestimonial statements are altogether exempted from Confrontation Clause scrutiny.[220]

---

[209] Charles Macklin (1690–1797), Irish actor, dramatist. CHARLES MACKLIN, SIR ARCHY MACSARCASM, LOVE À LA MODE act 2, sc. 1 (1759), *available at* http://www.bartleby.com/66/25/37225.html.

[210] 541 U.S. 36 (2004).

[211] 2006 U.S. LEXIS 4886 (2006) (declaring that statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency; also providing that statements are testimonial when the circumstances objectively indicate that there is no such ongoing emergency and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution).

[212] For an excellent discussion of *Crawford* and its legal and logical underpinnings, see Major Robert Wm. Best, *To Be or Not To Be Testimonial? That Is the Question: 2004 Developments in the Sixth Amendment*, ARMY. LAW., Apr. 2005, at 65 and Best, *supra* note 106, at 55.

[213] *Crawford*, 541 U.S. at 68-69.

[214] *Id*. at 68.

[215] *Id*. at 62.

[216] *Id.* at 51-52 (These definitions include "*ex parte* in-court testimony or its functional equivalent—that is, material such as affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine, or similar pretrial statements that declarants would reasonably expect to be used prosecutorially"; "extrajudicial statements . . . contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions"; and "statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial.").

[217] *Id.* at 52.

[218] *Id.* at 56.

[219] *Id*. at 52 n.6.

[220] *Id.* at 68. ("Where nontestimonial hearsay is at issue, it is wholly consistent with the Framers' design to afford the States flexibility in their development of hearsay law—as does *Roberts*, and as would an approach that exempted such statements from Confrontation Clause scrutiny altogether.").

Few courts, however, have been willing to embrace this suggestion[221] and the old paradigm of *Ohio v. Roberts* has been consistently maintained.[222]

With regard to clearly testimonial statements, the Supreme Court offered examples such as ex parte testimony at a preliminary hearing,[223] a plea allocution showing the existence of a conspiracy,[224] grand jury testimony,[225] prior trial testimony,[226] and "statements taken by police officers in the course of interrogations."[227] What "in course of interrogations" means is a subject of intense debate and not a small amount of confusion. Similarly, the character of statements that do not fall neatly within the specified examples is also a subject of great speculation and argument. The practitioner is left with the following difficult question: if the statement does not fall within any of the enumerated examples, when does it become "testimonial?" This article considers several approaches to that question in the context of military courts-martial.

Review of Military Cases Analyzing Crawford v. Washington

The CAAF courageously took up the challenge of defining "testimonial" in *United States v. Scheurer*.[228] Before a military judge, SrA Schuerer pleaded guilty to two specifications of wrongful use of methamphetamine and not guilty to a number of other drug related offenses.[229] Evidence was elicited that at various times SrA Schuerer used drugs by himself, with his wife, and with other individuals.[230] Additionally, SrA Scheurer and his wife, AMN Anne Scheurer, purchased drugs and supplied them to others, including a high school student.[231] Over a period of approximately eight months, Anne discussed her own drug use as well as that of her husband with SrA Sherry Sullivan, an acquaintance.[232] Anne described the Scheurer's efforts to purge their systems of drugs and told SrA Sullivan of her fears that investigators from the Air Force Office of Special Investigations (AFOSI) were monitoring the Scheurer's conduct.[233] Eventually, SrA Sullivan contacted AFOSI and agreed to wear a monitoring device in order to record Anne's admissions.[234] Senior Airman Sullivan ultimately recorded two conversations with Anne regarding the Scheurer's drug use.[235]

---

[221] *See* United States v. Scheurer, 62 M.J. 100, 106 (2005) ("We agree with the conclusion of every published appellate court decision that has considered this issue since *Crawford*: *Ohio v. Robert*s requirement for particularized guarantees of trustworthiness continues to govern confrontation analysis for nontestimonial statements.").

[222] Ohio v. Roberts, 448 U.S. 56, 66 (1980).

> In sum, when a hearsay declarant is not present for cross-examination at trial, the Confrontation Clause normally requires a showing that he is unavailable. Even then, his statement is admissible only if it bears adequate "indicia of reliability." Reliability can be inferred without more in a case where the evidence falls within a firmly rooted hearsay exception. In other cases, the evidence must be excluded, at least absent a showing of particularized guarantees of trustworthiness.

Id.

Unavailability is not always required, however, for nontestimonial hearsay. *See* White v. Illinois**,** 502 U.S. 346, 348-49 (1992) (stating that there is no requirement of a finding of unavailability for admittance of a witness' statement as a spontaneous declaration or medical examination exception); *see also* United States v. Inadi, 475 U.S. 387, 395-96 (1986) (stating that there is no requirement for unavailability to admit co-conspirator's statement in furtherance of a conspiracy).

[223] *Crawford*, 541 U.S. at 52.

[224] *Id*. at 64.

[225] *Id*.

[226] *Id.* at 65.

[227] *Id*. at 52.

[228] 62 M.J. 100, 106 (2005).

[229] *Id.* at 103.

[230] *Id.* at 102.

[231] *Id.*

[232] *Id.*

[233] *Id.*

[234] *Id.*

[235] *Id.*

Based on these recordings, the government preferred charges against SrA Schuerer. The defense counsel moved to suppress Anne's statements to SrA Sullivan.[236] In response, the government called Anne as a witness.[237] Anne invoked the spousal incapacity rule and refused to testify against her husband.[238] The government next called SrA Sullivan who described her conversations with Anne.[239] The military judge made "detailed findings of fact" and "extensive conclusions of law" in determining that Anne was unavailable as a witness, that her statements were statements against her own interest within the meaning of MRE 804(b)(3), and that the circumstances surrounding the making of the statements overcame any presumption of unreliability.[240] After applying the MRE 403 balancing test,[241] the military judge ruled that the statements were admissible against SrA Schuerer provided that they were to be accompanied by instructions to the members explaining how the evidence could be considered.[242] After the military judge determined that the statements were admissible, SrA Schuerer changed his choice of forum to military judge alone. After SrA Scheuer pleaded guilty to two specifications of wrongful use, the military judge convicted him of the remaining contested specifications with the exception of one specification of wrongful use of cocaine and one specification of wrongful distribution of lysergic acid diethylamide.[243]

The issue before the CAAF was whether the military judge violated SrA Schuerer's Sixth Amendment right to confrontation by admitting an accomplice statement against him without requiring that all references to SrA Schuerer be redacted.[244] The court held that the military judge did not violate SrA Schuerer's Sixth Amendment right to confrontation by admitting Anne's statements.[245] The CAAF drew a comparison between *Crawford* and the instant case because both cases involved incriminating statements made by the defendant's spouse who subsequently did not testify because of a spousal privilege.[246] Just as in *Crawford*, Anne's unavailability at trial forced the issue of whether or not her statements could be characterized as testimonial or nontestimonial.[247]

In determining the character of Anne's statements, the CAAF relied upon the reasoning of the Third Circuit in *United States v. Hendricks*.[248] The CAAF first stated that Anne's statements "'neither fall within nor are analogous to any of the specific examples of testimonial statements mentioned by *Crawford*.'"[249] Next, the CAAF, quoting *Hendricks*, reasoned that Anne's statements did not qualify as testimonial based upon any of the definitions suggested by *Crawford*.[250] Anne's statements were not an "'ex parte in-court testimony or its functional equivalent,' nor are they 'extrajudicial statements . . . contained in formalized . . . materials."'[251] Finally, the CAAF pointed to the *Hendricks* rationale that statements unknowingly made to a government informer lack a formality present in the *Crawford* contemplation of testimonial.[252]

---

[236] *Id.*

[237] *Id.*

[238] *Id.*

[239] *Id.*

[240] *Id.* at 102-03.

[241] *See* MCM, *supra* note 53, MIL. R. EVID. 403.

[242] *Scheurer*, 62 M.J. at 103.

[243] *Id.*

[244] *Id.* at 104.

[245] *Id.* at 108.

[246] *Id.* The spousal privilege rule under Washington state law and the military's spousal incapacity rule differ in operation. In Washington, the defendant can invoke the privilege. Military Rule of Evidence 504(a), however, provides that it is the witness spouse, not the accused, who decides whether or not to testify. MCM, *supra* note 53, MIL. R. EVID. 504(a). Significantly, *Scheurer* overrules a previous case, *United States v. Hughes*, where the court held that a spouse who invoked spousal incapacity to benefit the accused wife or husband was still available for confrontation purposes. United States v. Hughes, 28 M.J. 391 (C.M.A. 1989). Following *Scheurer*, a spouse who invokes his spousal capacity is now *unavailable* for confrontation purposes.

[247] *Crawford* applies only to testimonial statements. Crawford v. Washington, 541 U.S. 36, 43-54 (2004).

[248] *Scheurer*, 62 M.J. at 105 (citing United States v. Hendricks, 395 F.3d 173 (3d Cir. 2005)).

[249] *Id.* at 105.

[250] *Id.* (citing *Hendricks*, 395 F.3d at 181).

[251] *Id.*

[252] *Id*.

"Statements 'cannot be deemed testimonial' if the declarants 'did not make the statements thinking that they would be available for use at a later trial.'"[253]

Finally, the CAAF addressed the involvement of government officers in the production of testimony.[254] To resolve this issue, the CAAF juxtaposed two critical ideas captured from the *Crawford* opinion. The first warned about the involvement of government officials in the production of a statement: "Involvement of government officers in the production of testimony with an eye toward trial presents unique potential for prosecutorial abuse—a fact borne out time and again throughout a history with which the Framers were keenly familiar."[255] The second focused exclusively on the declarant: "[A]n accuser who makes a formal statement to government officers bears testimony in a sense that a person who makes a casual remark to an acquaintance does not."[256] Without any real discussion about the relationship between these two ideas, the CAAF concluded that Anne's statements fell within the second idea and were nontestimonial in nature.[257]

In addressing the issue of the character of Anne's statement, the CAAF raised an interesting question. In dicta, the court allowed for a future situation in which government involvement in the production of a statement could, irrespective of the declarant's expectations, render a statement testimonial.[258] In the instant case, the CAAF found that since the government's role in obtaining Anne's statements "amounted only to facilitation, not direction or suggestion," the role of government and the attendant issues of formality of the statement were essentially rendered moot.[259]

Having determined that the statement was nontestimonial, the CAAF applied the *Ohio v. Roberts* reliability analysis.[260] Anne's statements were admitted as statements against interest, a hearsay exception that is not firmly rooted and must therefore bear particularized guarantees of trustworthiness.[261] Statements against interest bear the additional constitutional burden of being presumptively unreliable.[262] Based on the circumstances surrounding the making of these statements, however, the CAAF found that the military judge correctly concluded that the statements bore the requisite particularized guarantees of trustworthiness.[263] Specifically, the CAAF pointed to the following circumstances as bearing sufficient particularized guarantees of trustworthiness to overcome the presumption of unreliability: the statements were truly self-incriminating, the statements were made almost daily over an eight-month period, the statements indicated a consciousness of the possibility of prosecution, and there was no animosity between Anne and SrA Sullivan.[264]

The practitioner should pay particular attention to the CAAF's analysis in arriving at its determination that the statements at issue were nontestimonial. The court first surveyed the enumerated examples in *Crawford* for clearly testimonial statements. The court then considered the underlying definitions considered by the *Crawford* Court. Finally, the court blended the form, or formality of the statement, with the expectations of the declarant in making the statements. The court readily concluded that statements made unknowingly to a government informant would be non-testimonial, provided that the government simply "facilitated" the statements.

---

[253] *Id.*

[254] Though never fully defined, "government officers" would likely include anyone operating in an official, rather than private, capacity to investigate an alleged crime.

[255] Crawford v. Washington, 541 U.S. 36, 56 (2004).

[256] *Id*. at 51.

[257] *Scheurer*, 62 M.J. at 106.

[258] *Id.* at 105. For an application of this principle, see State v. Siler, 843 N.E.2d 863 (Ohio Ct. App. 2005). In *Siler*, a three-year-old child witness to his mother's murder had no expectation that his statements would be used at trial. Nevertheless, the detective's formal questioning of the child caused the statement to be testimonial in nature.

[259] *Id.* at 106.

[260] *Id.*

[261] *Id.* at 107.

[262] *Id*. (citing Lilly v. Virginia, 527 U.S. 116 (1999)).

[263] *Id.* at 107-08.

[264] *Id.*

The facts of *Schuerer* are intriguing. However, statements made to an unknown informant are certainly the exception, and not the rule, with regard to most criminal prosecutions. A much more common circumstance was addressed by the NMCCA in *United States v. Coulter*.[265]

In *Coulter*, a military judge convicted the accused, Electrician's Mate Second Class (EM2) Coulter, of committing an indecent act upon a child under the age of 16.[266] The court found that EM2 Coulter was left alone in a bedroom with KL, a two-year old girl.[267] When KL's father, Hull Technician Second Class (HT2) L, re-entered the bedroom he noticed KL positioned on a bed in an unusual manner with EM2 Coulter sitting nearby.[268] Coulter immediately leapt to his feet and began acting in a nervous manner, crossing his arms one moment and then shoving his hands into his pockets the next.[269] Coulter then left the home in a somewhat abrupt manner.[270] Hull Technician Second Class L asked KL why she had been sitting on the bed in such an odd manner.[271] KL did not respond.[272] Hull Technician Second Class L took KL downstairs where, in response to the same question, KL pulled her underwear down, pointed to her vaginal area, and said, "He touched me here."[273] Hull Technician Second Class L located his wife and relayed KL's comments to her.[274] The wife then asked the little girl if EM2 Coulter had touched her.[275] KL again pulled down her underwear and, while pointing to her vaginal area, said, "He touched me here."[276] Subsequent medical examinations corroborated KL's claim by revealing injuries consistent her statement.[277] At EM2 Coulter's trial, KL was ruled incompetent to testify pursuant to MRE 601 because of her age and thus unavailable.[278] The military judge admitted KL's statements to her mother and father under the residual hearsay exception.[279]

On appeal, the NMCCA considered whether the military judge violated EM2 Coulter's Sixth Amendment right to confrontation by admitting the statements of an unavailable child witness through her mother and father against EM2 Coulter. The court held that there was no violation.[280] The court analyzed the Confrontation Clause in a somewhat unusual manner, beginning with the hearsay exception, moving to an analysis of the requirements of *Ohio v. Roberts*, and finishing with a look at *Crawford*.[281]

The court first analyzed the hearsay exception at issue—residual hearsay.[282] The court correctly found that by offering the statement under the residual hearsay exception, the government was required to demonstrate that the statement possessed "equivalent circumstantial guarantees commensurate with the other exceptions to the hearsay rule."[283] This language, taken from the text of the MRE 807[284] and *United States v. Giambra*,[285] is somewhat confusing because it is the same language

---

[265] 62 M.J. 520 (N-M. Ct. Crim. App. 2005).

[266] *Id.* at 522.

[267] *Id.*

[268] *Id.*

[269] *Id.* at 523.

[270] *Id.*

[271] *Id.*

[272] *Id.*

[273] *Id.*

[274] *Id.*

[275] *Id.*

[276] *Id.*

[277] *Id.*

[278] *Id.* at 525.

[279] *Id.*

[280] *Id.* at 528.

[281] *Id.* at 525-28.

[282] *Id.* at 525.

[283] *Id.*

[284] MCM, *supra* note 53, MIL. R. EVID. 807.

used for testing some statements under the Confrontation Clause.[286] The confusion was compounded by the NMCCA's reliance on *United States v. Donaldson*.[287] *Donaldson* considered a similar statement made by a child victim under a purely hearsay analysis.[288] In doing so, *Donaldson* suggested the following reliability factors that the *Coulter* court adopted: (1) the mental state and age of the declarant, (2) the spontaneity of the statement, (3) the use of suggestive questioning, and (4) whether the statement can be corroborated.[289]

Considering these factors, including the corroborating medical examination, the service court concluded that the statements of KL met the circumstantial guarantees of trustworthiness for admission as hearsay under MRE 807.[290] The court even went further adding that "[f]or the same reasons, we are also satisfied that the evidence carries the particularized guarantees of trustworthiness required to meet the *Roberts* standard."[291] This is unfortunate because the Supreme Court previously limited the estimation of whether a statement contains the requisite guarantees of trustworthiness to the taking of the statement itself, foreclosing the option of considering extrinsic evidence.[292] Arguably, then, the *Coulter* court erred in conflating the standards for MRE 807 with the constitutional demands of confrontation as presented in *Roberts*.[293] Interestingly, the *Coulter* court added in a footnote that the statement might also be considered admissible as a present sense impression.[294]

The NMCCA next considered the implications of *Crawford* in admitting KL's statements.[295] In a somewhat less nuanced analysis than the CAAF's reasoning in *Scheurer*, the *Coulter* court found that the statements fell outside the definition of a testimonial statement.[296] First, the court concluded that KL's statements did not "fall within, or were analogous to" the specific examples of testimonial statements found in any of *Crawford's* definitions of testimonial.[297] The court then reasoned that an objective witness would not reasonably believe that such statements would be used later at trial.[298] Additionally, the court pointed out that "the motivation behind HT2 L and Mrs L's questioning" was not to procure and preserve a "solemn declaration or affirmation made for the purpose of establishing or proving some fact."[299] Finally, the court found that KL's statements were not the product of a situation that bore a "kinship to the abuses at which the Confrontation Clause was directed," but was instead a product of "the normal and expected parental instinct to protect their cherished offspring."[300] The statements, then, were nontestimonial. Having found the statement to be nontestimonial in nature, the court properly applied *Roberts* to the hearsay statement.[301] Accordingly, the NMCCA found that the trial court did not err in admitting the statements against the accused.[302]

---

[285] 33 M.J. 331 (C.M.A. 1991).

[286] *See* Ohio v. Roberts, 448 U.S. 56, 66 (1980).

[287] *Coulter*, 62 M.J. at 525 (citing United States v. Donaldson, 58 M.J. 477 (2003)).

[288] *Donaldson*, 58 M.J. at 488.

[289] *Coulter*, 62 M.J. at 525 (citing *Donaldson*, 58 M.J. at 488).

[290] *Id.*

[291] *Id.*

[292] Idaho v. Wright, 497 U.S. 805, 823 (1990).

[293] The determination of whether the statement can be corroborated by extrinsic evidence may be relevant to whether the statement satisfies the requirements of the hearsay exception. With regard to the Confrontation Clause, however, the court is limited to the circumstances surrounding the taking of the statement and cannot rely upon extrinsic evidence. *See* Lilly v. Virginia, 527 U.S. 116, 137-38 (1999); *Wright*, 497 U.S. at 820, 823.

[294] *Coulter*, 62 M.J. at 526, n.3. Whether the hearsay exception of "present sense impression" is firmly rooted is a subject of some debate. *See* Gutierrez v. McGinnis, 389 F.3d 300, 303 (2d Cir. 2004) ("[t]he question of whether the present sense impression is a "firmly rooted" hearsay exception remains open."); *see also* United States v. Murillo, 288 F.3d 1126, 1137 (9th Cir. 2002) (stating that the government concedes and the court agrees that no caselaw supports classifying the present sense impression as "firmly rooted").

[295] *Coulter*, 62 M.J. at 526.

[296] *Id.* at 528.

[297] *Id.*

[298] *Id.*

[299] *Id.*

[300] *Id.*

[301] *Id.*

[302] *Id.*

Coulter, like *Scheurer*, assists the practitioner in providing a slightly different analytical framework for confrontation questions. The NMCCA began with a purely hearsay analysis. This technique has a distinct advantage—if a statement fails to satisfy the hearsay requirements, the practitioner has no need to enter the wilderness of a confrontation analysis. If, on the other hand, the hearsay requirements are satisfied, one of two broad confrontation tests will be applied—*Roberts* or *Crawford*. The question as to which test applies comes back to the original question—what does testimonial mean? The *Coulter* court made fairly quick work of this issue. The facts of *Coulter* strongly favor a nontestimonial characterization. Very simply, there was no government involvement in the production of the statement. Without governmental involvement, there is no real issue of the "unique potential for prosecutorial abuse" dangers contemplated by the framers. The absence of government involvement also addresses concerns regarding the form of the statement. Clearly KL's statement did not fall within either of the specific examples of testimonial statements nor did it fit within the broad definitions of a testimonial statement provided by *Crawford*. Finally, the issue of the declarant's expectations was also a fairly easy question to resolve. The statements at issue resulted from a spontaneous, traumatic conversation between the young, naïve girl and her sincerely and intensely interested parents. These statements, the court readily determined, were not of such a nature that the declarant would expect the statements to be used prosecutorially at a later date. As a result, the *Coulter* court appears to have rightly concluded that KL's statements were nontestimonial.

Coulter provides one additional lesson to the practitioner, or at least a reminder of an old lesson. This case again suggests that multiple theories of admissibility should be offered by trial counsel when hearsay is at issue. For example, and as was the case in *Coulter*, a present sense impression might be considered a firmly rooted hearsay exception and, as such, would satisfy the Confrontation Clause, assuming the statement is characterized as nontestimonial. Other firmly rooted hearsay exceptions, most notably excited utterances and statements made for medical diagnosis and treatment, would almost certainly satisfy the Confrontation Clause analysis.[303] Similarly, an opponent to the statement might find it useful to articulate exactly why the statement does not satisfy the requirements of any particular hearsay exception. With regard to statements that are not firmly rooted, such as residual hearsay as in *Coulte*r, or statements against interest as in *Scheurer*, the defense counsel can rightfully force the government to remain within the bounds of the making of the statement itself and forbid treading into the territory of extrinsic evidence.

From the perspective of determining whether a statement is testimonial or not, *Coulter* is a straightforward case. Perhaps equally straightforward are cases involving business records. *Crawford* clearly lists business records under the category of nontestimonial statements.[304] Applying this guidance, the NMCCA held in *United States v. Rankin*[305] that the underlying documents used to prove an unauthorized absence charge were non-testimonial. Similarly, in another unpublished opinion, the service court in *United States v. Ryan*[306] held that urinalysis results in a wrongful use case were not testimonial in nature. More significantly is *United States v. Maygari*, a CAAF case that also held that the results of a urinalysis were not testimonial in nature.[307] For the practitioner today, business records are generally nontestimonial in nature. Though not without exception,[308] this rule is the closest sure a thing in Confrontation Clause jurisprudence as can be found.

Conclusion

Many statements were made this term regarding the Confrontation Clause. Those statements lend themselves to an intelligent, understandable conversation to the careful listener. In reverse order of presentation in this article, consider once again the following seemingly disparate comments.

First, when the declarant is not present at trial and hearsay is not at issue, the fundamental question is one of categorization. Whether a statement is testimonial or nontestimonial in nature is a matter of careful legal analysis, a pattern of which is provided in the *Scheurer* opinion. For hearsay that is testimonial in nature, only production of the witness or a

---

[303] Idaho v. Wright, 497 U.S. 805, 827 (1990).

[304] Crawford v. Washington, 541 U.S. 36, 56 (2004).

[305] No. 200101441, 2005 CCA LEXIS 354 (N-M. Ct. Crim. App. Nov. 10, 2005) (unpublished).

[306] No. 9900374, 2005 CCA LEXIS 407 (N-M. Ct. Crim. App. Dec. 30, 2005) (unpublished).

[307] 62 M.J. 123 (2006).

[308] *See* People v. Rogers, 780 N.Y.S.2d 393, 397 (N.Y. App. Div. 2004) (blood test generated in anticipation of trial by prosecution testimonial in nature); *see also* People v. Hernandez, 794 N.Y.S.2d 788, 789 (N.Y. Sup. Ct. 2005) (fingerprint records testimonial in nature); Commonwealth v. Carter, 861 A.2d 957 (Pa. Super. Ct. 2004) (lab report identifying substance as cocaine testimonial in nature).

demonstration of unavailability coupled with a prior opportunity to cross-examine will satisfy constitutional demands. If the hearsay is nontestimonial in nature, the critical question becomes one of classifying the hearsay as firmly rooted or bearing particularized guarantees of trustworthiness. If the hearsay is of the latter classification, then care should be taken to look only at the circumstances of the taking of the statement and not at extrinsic evidence. If the hearsay is of the former classification, firmly rooted, then generally the constitutional demands will be satisfied. Second, if the witness is not produced at trial, the court must determine whether the witness is truly unavailable. Practitioners should take care in discerning the difference between legal availability, physical availability, availability for the purpose of the Confrontation Clause, and availability for the purpose of hearsay. *Rhodes* and *Campbell* are instructive in this regard. Practitioners should take care when the witness testifies in some way other than in-person, in-court testimony. Here, *Yates* and the question of remote testimony is instructive. Third, for the witness who does testify, proper latitude must be given for cross-examination in order to satisfy the Confrontation Clause, a point emphasized by both *Israel* and *James*. Fourth and finally, in rare cases, the Confrontation Clause may be satisfied even in the absence of the witness if waiver or forfeiture may be established, a proposition perhaps best considered in light of the *Mayhew* and *Jordan* opinions. Together these varied statements really do lend themselves to a conversation—a conversation of key importance to the military justice practitioner.

Forks in the Road: Recent Developments in Substantive Criminal Law

Lieutenant Colonel Mark L. Johnson
Professor, Criminal Law Department
The Judge Advocate General's Legal Center and School, U.S. Army
Charlottesville, Virginia

Introduction

"When you come to a fork in the road, take it.[1]

The past year brought substantial changes to the *Manual for Courts-Martial* (*MCM*),[2] both by executive order[3] and the 2006 National Defense Authorization Act (NDAA).[4] These changes significantly impact the present and future practice of military justice, especially in the area of sexual misconduct. In addition, the past term brought several decisions from the Court of Appeals for the Armed Forces (CAAF) interpreting federal statutes and examining their scope under General Article 134, Uniform Code of Military Justice (UCMJ).[5] Of these decisions, the most important signal a fundamental change in regulating child pornography overseas. The CAAF also issued several decisions reinforcing trends from past terms, most notably in the area of pleadings and modification. This article discusses all of these changes and important decisions and also highlights opinions from the past term concerning solicitation, indecent acts, drug offenses, and obstruction of justice.

Amendments to the *MCM*

The first section of this article discusses the new statute of limitations provisions contained in Executive Order 13,387[6] and the 2006 NDAA.[7] Next, this article summarizes other executive order changes dealing with lawfulness of orders, drunken or reckless operation of a vehicle, patronizing a prostitute, threat or hoax, and unreasonable multiplication of charges. Finally, the article focuses on recent changes to the UCMJ, including a new offense for stalking[8] and greatly expanded treatment for sexual misconduct under Article 120, UCMJ.[9]

Statute of Limitations, Article 43 UCMJ

It ain't over till it's over.[10]

On 24 November 2003, Congress passed the 2004 NDAA.[11] That legislation expanded the statute of limitations for certain child abuse offenses to the victim's twenty-fifth birthday.[12] As noted in a previous symposium article, those changes to the statute of limitations left two unanswered questions.[13] First, did Congress really intend to create a more lenient posture for those who raped a child rather than an adult?[14] Second, is the legislation retroactive?[15]

---

[1] Yogi Berra Quotes, http://www.digitaldreamdoor.com/pages/quotes/yogiberra.html (last visited July 13, 2006) [hereinafter Yogi Berra Quotes].

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

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

[4] *See* National Defense Authorization Act for Fiscal Year 2006, Pub. L. No. 109-163, §§ 551-553, 119 Stat. 3136 (2006).

[5] MCM, *supra* note 2, pt. IV. ¶ 60.

[6] 70 Fed. Reg. 60697 (the executive order is effective thirty days after signing).

[7] National Defense Authorization Act for Fiscal Year 2006 § 553.

[8] *Id.* § 551.

[9] *Id.* § 552.

[10] Yogi Berra Quotes, *supra* note 1.

[11] National Defense Authorization Act for Fiscal Year 2004, Pub. L. No. 108-136, 119 Stat. 3257 (2003).

[12] *See id*.

[13] Major Jeffrey C. Hagler, *Duck Soup: Recent Developments in Substantive Criminal Law*, ARMY LAW., July 2004, at 81.

[14] *See id*. Rape is a capital crime with no statute of limitations; therefore, the new legislation effectively modified that rule in the case of child rape.

[15] *See id*.

The 2006 NDAA addressed the first question by making it clear that there is no statute of limitations for murder, rape, or any other offense punishable by death.[16] The special rules for child abuse offenses now also extend to the life of the child or within five years after the date the offense was committed, whichever is longer.[17] The 2006 NDAA amended Article 43, subparagraph (B), UCMJ, to include any offense committed in connection with child abuse offenses and not merely those offenses committed in conjunction with sexual or physical abuse.[18] In addition, "any offense" punishable by Article 120 replaces "rape or carnal knowledge" in subsection (i), most likely in anticipation of the new sexual misconduct scheme discussed later in this article.[19] Finally, child abuse offenses now specifically include kidnapping[20] and acts that involve abuse of a person who has not attained the age of eighteen years and would constitute an offense under the following provisions of title 18 of the U.S. Code: chapter 110, sexual exploitation and other abuse of children; chapter 117, transportation for illegal sexual activity and related crimes; or section 1591, sex trafficking of children by force, fraud, or coercion.[21]

The discussion accompanying Rule for Courts-Martial (RCM) 907(b)(2) was amended to address retroactivity by limiting RCM 907(b)(2) applicability to those offenses committed on or after 24 November 1998.[22] The analysis added for this change further indicates that although the expired period (on or before 23 November 1998) is beyond reach, the period from 24 November 1998 to 23 November 2003 may be extended.[23] Although the Court in *United States v. Stogner* specifically avoided that issue, the drafters are arguably on solid ground.[24]

Lawfulness of Orders, Article 90 UCMJ

Part IV, paragraph 14c(2)(a), was amended to clarify that lawfulness of an order should be determined by the military judge, not the trier of fact.[25] The analysis accompanying Article 90 cites *United States v. New*[26] as the basis for this change.

Drunken or Reckless Operation of Vehicle, Aircraft, or Vessel, Article 111 UCMJ[27]

Article 111, UCMJ, was last amended by the 2004 NDAA.[28] The portion of Executive Order 13,387 addressing changes to Part IV, paragraph 35 should be ignored.[29] The correct statutory and implementing provisions for Article 111, UCMJ, are included in the *MCM* 2005 edition.[30]

---

[16] *See* National Defense Authorization Act for Fiscal Year 2006, Pub. L. No. 109-163, § 553, 119 Stat. 3136 (2006).

[17] *See id*.

[18] *See id.*

[19] *See id.*; *see infra* pages 9-15.

[20] National Defense Authorization Act for Fiscal Year 2006 § 553.

[21] *Id*.

[22] *See* Exec. Order No. 13,387, 70 Fed. Reg. 60697, 60707-60708 (Oct. 18, 2005).

[23] *Id*. at 60708 (citing Stogner v. California, 539 U.S. 607, 609 (2003)).

[24] *See Stogner*, 539 U.S. at 607, 618 ("Even where courts have upheld extensions of unexpired statutes of limitations (extensions that our holding today does not affect), they have consistently distinguished situations where limitations periods have *expired*." (citation omitted)).

[25] 70 Fed. Reg. at 60712.

[26] *See id.* (citing United States v. New, 55 M.J. 95, 100-01 (2001); *see also* Colonel Michael J. Hargis & Lieutenant Colonel Timothy Grammel, *Annual Review of Developments in Instructions—2005*, ARMY LAW., Apr. 2006, at 80 (discussing the recent case of United States v. Deisher, 61 M.J. 313 (2005), which reinforced the military judge's role in determining the lawfulness of an order).

[27] UCMJ art. 111 (2005). Although not a change to the *MCM* per se, practitioners should review *United States v. Scheurer*, 62 M.J. 100, 109-110 (2005) (holding that Article 111 includes both the operation, and the physical control of a vehicle while impaired. "Physical control" could include the following possible actions: sitting behind and leaning against the steering wheel; sitting in the drivers seat of a parked car with one's hands on the wheel and the key in the ignition but without the engine running; and sitting behind the wheel with the key in the ignition. Unless the government proves beyond a reasonable doubt that the accused was in the driver's seat, rather than the front passenger's seat, the government has not proven an Article 111 offense (citing United States v. Barnes, 24 M.J. 534, 535 (A.C.M.R. 1987))).

[28] National Defense Authorization Act for Fiscal Year 2004, Pub. L. No. 108-136, 117 Stat. 1392 (2003).

[29] *See* Lieutenant Colonel Michele Shields, *The National Defense Authorization Act for Fiscal Year 2006, Amendments to the Uniform Code of Military Justice*, Joint Service Committee on Military Justice Report, Criminal Law Division, Office of the Judge Advocate General (stating that changes to correct the error in EO 13,387 concerning Article 111 are included in the draft EO currently being reviewed at the Office of Management and Budget (OMB)); E-mail with attachment from LTC Michele Shields, Chief, Policy Branch, Criminal Law Division, Office of the Judge Advocate General, U.S. Army, to LTC

Pandering and Prostitution, Article 134 UCMJ

Part IV, paragraph 97, was amended by adding the offense of patronizing a prostitute.[31] The elements of this new offense include the following: (a) that the accused had sexual intercourse with another person, not the accused's spouse; (b) that the accused compelled, induced, enticed, or procured such person to engage in an act of sexual intercourse in exchange for money or other compensation; (c) that this act was wrongful; and (d) that, under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the Armed Forces or was of a nature to bring discredit upon the Armed Forces.[32] The maximum punishment chart, Appendix 12, was amended by designating the same maximum punishment for patronizing a prostitute as for prostitution,[33] which currently includes a dishonorable discharge, forfeiture of all pay and allowances, and confinement for one year.[34]

Threat or Hoax, Article 134 UCMJ

Executive Order 13,387 brought several changes to Part IV, paragraph 109, of the *MCM*.[35] The title was changed from "Threat or Hoax: Bomb" to "Threat or hoax designed or intended to cause panic or public fear."[36] The word "bomb" was removed from both the threat and hoax categories, and the offense was amended to include threats or hoaxes involving weapons of mass destruction; biological or chemical agents, substances or weapons; or hazardous materials.[37] Finally, paragraph 109e and the maximum punishment chart, Appendix 12, were amended by increasing the maximum confinement from five to ten years.[38]

Preferral of Charges, R.C.M. 307

Rule for Court-Martial 307(c)(4) was amended by making the first sentence of the discussion, which concerns unreasonable multiplication of charges, part of the rule.[39] That sentence reads, "What is substantially one transaction should not be made the basis for an unreasonable multiplication of charges against one person."[40] The analysis accompanying RCM 307(c)(4) reflects *United States v. Quiroz*,[41] which identifies the prohibition against the unreasonable multiplication of charges as "a long-standing principal" of military law.[42]

New UCMJ Article 120a—Stalking

The 2006 NDAA implemented dramatic changes to Article 120 of the UCMJ.[43] The first of those changes is the new Article 120a for stalking, effective 6 July 2006.[44] The new offense includes any person subject to the code who:

Mark Johnson, Professor, Criminal Law Department, The Judge Advocate General's Legal Center and School, U.S. Army (28 Mar. 2006) (on file with author) [hereinafter OTJAG Email].

[30] OTJAG Email, *supra* note 29.

[31] 70 Fed. Reg. at 60701.

[32] *Id*.

[33] *Id.* at 60714.

[34] MCM, *supra* note 2, app. 12.

[35] *See* 70 Fed. Reg. at 60701-60702.

[36] *Id*.

[37] *Id*.

[38] *See id.* at 60714; MCM, *supra* note 2, app. 12.

[39] *See* 70 Fed. Reg. at 60697.

[40] *Id*.

[41] *See* 55 M.J. 334 (2001).

[42] *See* 70 Fed. Reg. at 60707; *see also* United States v. Roderick, 62 M.J. 425 (2006) (holding that military judge may dismiss charges and specifications as an unreasonable multiplication of charges at findings).

[43] *See* National Defense Authorization Act for Fiscal Year 2006, Pub. L. No. 109-163, §§ 551-552, 119 Stat. 3136 (2006).

[44] *See id*. § 551.

> (1) wrongfully engages in a course of conduct directed at a specific person that would cause a reasonable person to fear death or bodily harm, including sexual assault, to himself or herself or a member of his or her immediate family; (2) who has knowledge, or should have knowledge, that the specific person will be placed in reasonable fear of death or bodily harm, including sexual assault, to himself or herself or a member of his or her immediate family; and (3) whose acts induce reasonable fear in the specific person of death or bodily harm, including sexual assault, to himself or herself or to a member of his or her immediate family.[45]

"Course of conduct" is defined as "repeated maintenance of visual or physical proximity to a specific person" or "repeated conveyance of verbal threats, written threats, or threats implied by conduct, or a combination of such threats, directed at or toward a certain person."[46] "Repeated conduct" is defined as two or more occasions, and "immediate family" is defined as a

> spouse, parent, child, or sibling of the person, or any other family member, relative, or intimate partner of the person who regularly resides in the household of the person or who within the six months preceding the commencement of the course of conduct regularly resided in the household of the person.[47]

This new provision is loosely based on the federal statute used as a guideline for state stalking legislation.[48] The provision also codifies the practice of charging this offense under General Article 134, UCMJ.[49] The new legislation provides more uniform application and better notice to servicemembers of the prohibited conduct.[50] The U.S. Army's Office of the Judge Advocate General, Criminal Law Division, recently published an information paper with proposed implementation guidance, including elements, maximum punishment (three years confinement), and a sample specification.[51] Although the statute was effective 6 July 2006, the executive order implementing these provisions is not yet signed.[52] To determine the maximum punishment before the executive order is signed, practitioners are urged to argue that stalking is closely related to the UCMJ offenses of communicating a threat or offering a type of assault with an unloaded firearm.[53] In the alternative, counsel could argue that stalking is closely related to the analogous federal crime, which has a maximum period of five years confinement.[54]

New UCMJ Article 120—Rape, Sexual Assault, and Other Sexual Misconduct

Effective 1 October 2007, the UCMJ will greatly expand the provisions for charging sexual offenses under Article 120, including far more detailed definitions for rape and sexual assault.[55] These changes are the result of recent efforts by Congress to examine and update the UCMJ's sexual offense provisions. The Ronald W. Reagan National Defense Authorization Act for Fiscal Year 2005 required the Secretary of Defense to propose changes regarding sexual offenses in the UCMJ "to conform more closely to other Federal Laws and regulations that address sexual assault."[56] As a result, the Joint Service Committee on Military Justice created a subcommittee to review the federal statutes and all the state statutes.[57]

---

[45] *Id*.

[46] *Id*.

[47] *Id*.

[48] *See* H.R. REP. NO. 109-089 (2006); *see also* 18 U.S.C.S. § 2261A (LEXIS 2006).

[49] *See* United States v. Saunders, 59 M.J. 1, 17-18 (2003) (charging under General Article 134 justified in part on the prevalence of state statutes, albeit in many different forms).

[50] *See* National Defense Authorization Act for Fiscal Year 2006, Pub. L. No. 109-163, §§ 551, 119 Stat. 3136 (2006).

[51] E-mail from COL Flora Darpino, Chief, Criminal Law Division, Office of The Judge Advocate General, U.S. Army, to LTC Patricia Ham,, Professor and Chair, Criminal Law Department, The Judge Advocate General's Legal Center and School, U.S. Army (12 June 2006) (e-mail with attachment on file with author).

[52] *Id*.

[53] *Id*.

[54] *Id*.

[55] National Defense Authorization Act for Fiscal Year 2006, § 552.

[56] H.R. REP. NO. 109-89 (2006) (citing The Ronald W. Reagan National Defense Authorization Act for Fiscal Year 2005, Pub. L. No. 108-375, 118 Stat. 1811 (2004)).

[57] SEX CRIMES AND THE UCMJ: A REPORT FOR THE JOINT SERVICE COMMITTEE ON MILITARY JUSTICE (Feb 2005), http://www.defenselink.mil/dodgc/php/

Although the subcommittee concluded that no changes were necessary, it did include several options for changing the UCMJ.[58] It is generally accepted that "Option 5" of the six options contained in the report is the basis for the new legislation.[59]

The new sexual assault provision provides a "series of graded offenses relating to rape, sexual assault and other sexual misconduct, based on the presence or absence of aggravating factors."[60] The categories for rape, sexual assault, and other sexual misconduct under the new Article 120 include: (a) rape; (b) rape of a child; (c) aggravated sexual assault; (d) aggravated sexual assault of a child; (e) aggravated sexual contact; (f) aggravated sexual abuse of a child; (g) aggravated sexual contact with a child; (h) abusive sexual contact; (i) abusive sexual contact with a child; (j) indecent liberty with a child; (k) indecent act; (l) forcible pandering; (m) wrongful sexual contact; and (n) indecent exposure.[61]

There are numerous and detailed definitions that the practitioner will have to master including, but not limited to, the following: (1) sexual act; (2) sexual contact; (3) grievous bodily harm; (4) dangerous weapon or object; (5) force; (6) threatening or placing another in fear under (a) rape or (e) aggravated sexual contact; (7) threatening or placing another in fear under (c) aggravated sexual assault or (h) abusive sexual contact; (8) bodily harm; (9) child; (10) lewd act; (11) indecent liberty; and (12) indecent conduct.[62] The two most important of these definitions are "sexual act" and "sexual contact." Sexual act is defined as contact between the penis and vulva; or penetration of a genital opening by hand, finger, or other object with intent to abuse, humiliate, harass, or degrade, or to arouse or gratify sexual desire.[63] Sexual contact is defined as intentional touching, directly or through clothing, of the genitalia, anus, groin, breast, inner thigh, or buttocks, or causing another to do the same, with an intent to abuse, humiliate, or degrade, or to arouse or gratify sexual desire.[64] Most of the offenses are best understood by applying these two definitions in different contexts, from most to least aggravating.[65]

Also effective on 1 October 2007 are expanded aggravating factors under Article 118(4), felony murder, and an expanded statute of limitations under Article 43, UCMJ.[66] Under the new felony murder, "Rape" is replaced with rape, rape of a child, aggravated sexual assault, aggravated sexual assault of a child, aggravated sexual contact, aggravated sexual abuse of a child, and aggravated sexual contact with a child.[67] Under the new statute of limitations, Article 43(a), "rape," is replaced with "rape, or rape of a child."[68]

One of the most significant changes under the new statute is that "without consent" will no longer be an element for rape.[69] Under the new provision, consent and mistake of fact as to consent are affirmative defenses for rape, aggravated sexual assault, aggravated sexual contact, and abusive sexual contact.[70] Another major difference is that unlike the current provision, the burden is on the accused to prove the affirmative defenses of consent and mistake of fact by a preponderance of the evidence.[71] After this burden is met, the prosecution must disprove the defense beyond a reasonable doubt.[72]

---

docs/subcommittee_reportMarkHarvey1-13-05.doc [hereinafter SEX CRIMES AND THE UCMJ]; *see also* U.S. DEP'T OF DEFENSE, DIR. 5500.17, ROLE AND RESPONSIBILITIES OF THE JOINT SERVICE COMMITTEE ON MILITARY JUSTICE (May 2003).

[58] SEX CRIMES AND THE UCMJ, *supra* note 57.

[59] E-mail from House Armed Services Committee attorney (and member of drafting committee for new sexual assault legislation), to LTC Mark Johnson, Professor, Criminal Law Department, The Judge Advocate General's Legal Center and School, U.S. Army (9 Mar. 2006) [hereinafter Option 5 Email] (on file with the author).

[60] H.R. REP. NO. 109-89 (2006).

[61] National Defense Authorization Act for Fiscal Year 2006, Pub. L. No. 109-163, § 552(a), 119 Stat. 3136 (2006).

[62] *Id.*

[63] *Id.*

[64] *Id.*

[65] *Id.*

[66] *Id.* § 552(d), (e).

[67] *Id.* § 552(d).

[68] *Id.* § 552(e).

[69] *Id.* § 552(a). The current elements for rape under UCMJ art. 120(a) are: that the accused committed the act of sexual intercourse; and that the act of sexual intercourse was done by force and without consent. UCMJ art. 120(a) (2005).

[70] National Defense Authorization Act for Fiscal Year 2006 § 552(a).

[71] *Id.*

[72] *Id.*

The provisions concerning consent and mistake of fact as to consent raise several specific concerns. First, is the question of whether the accused has satisfied the preponderance of the evidence standard a question of law or fact? The statute does not specify, and arguments are apparent for either approach. For example, the affirmative defense of mistake of fact as to age in carnal knowledge also shifts the burden of proof by a preponderance of the evidence to the defense and is ultimately for the panel to decide.[73] In those cases, however, the instruction provides an absolute defense, and the instructor is only given after the military judge determines that the defense is "in issue."[74] Because the initial defense burden under the new statute acts only to shift the burden back to the government, the question of whether the initial burden has been met is arguably best framed as one of law for the military judge. Additionally, it would seem difficult (as a matter of law and fact) for a panel to find by a preponderance of the evidence that the victim consented or that there was mistake of fact as to consent and then find beyond a reasonable doubt that the victim did not consent or that there was no mistake of fact.

Problems in practical application are joined by constitutional concerns. Although a similar District of Columbia statute, which was cited as the basis for this new rule, also places the initial burden on the accused, it does not shift the burden back to the government.[75] As noted in the cases cited for this new provision, even that approach is not without danger.[76] One of the main concerns here is the availability of consent (or affirmative defense) evidence on the issue of force, which the government must still prove beyond a reasonable doubt.[77] Several jurisdictions shift the burden of affirmative defenses, requiring varied levels of proof to do so.[78] However, shifting the burden from the accused at a preponderance of the evidence standard back to the government at a beyond a reasonable doubt standard (by statute) charts new waters for the UCMJ, and the cited authority in "Option 5" does not provide a clearly supported basis for the journey.

Several challenges also lie ahead in implementing the new rape and sexual misconduct scheme. First, it may be difficult for military courts to determine the precedent upon which they should rely on when interpreting the new statute. "Option 5" cites various sources of law, including federal, state, and military law.[79] While most sections cite fairly specific bases for a particular provision, that is not always the case. For example, when discussing consent and mistake of fact as to consent, "Option 5" references caselaw from two different federal circuits and the CAAF.[80] This is further complicated by two other factors. First, the legislative history and committee notes do not specifically cite "Option 5" as the source for the legislation, although this is generally accepted to be the case.[81] Second, Congress did not adopt several recommendations contained within "Option 5," including the recommendation that forcible sodomy be addressed under rape or that consensual sodomy be placed within a category of sexual misconduct punishable if prejudicial to good order and discipline or service discrediting.[82] Clearly, certain portions of "Option 5" do not represent the intent of Congress.

The second major challenge is interpreting the relationship between the new statute and existing Article 134 offenses that specifically address the same conduct. Several existing UCMJ provisions directly conflict with the new statute, including indecent acts and liberties with a child, indecent acts with another, and indecent exposure.[83] Other offenses may also conflict; for example, are the offenses of indecent assault and assault with intent to commit rape now preempted in certain cases?[84] Practitioners will need clear guidance on how to proceed in this area.

---

[73] MCM, *supra* note 2, R.C.M. 916(j)(2); U.S. DEP'T OF ARMY, PAM. 27-9, LEGAL SERVICES: MILITARY JUDGE'S BENCHBOOK para. 3-45-2 n.3 (15 Sept. 2002) [hereinafter BENCHBOOK].

[74] MCM, *supra* note 2, R.C.M. 920(e)(3). A defense is "in issue" when "some evidence" has been admitted upon which members might rely. *Id.* R.C.M. 920(e)(3) discussion.

[75] SEX CRIMES AND THE UCMJ, *supra* note 57, at 247 (citing D.C. CODE ANN. § 22-3007 (2004)).

[76] *Id.* at 249 (citing Hicks v. United States, 707 A.2d 1301, 1303-1304 (D.C. App. 1998) and Russell v. United States, 698 A.2d 1007, 1016-1017 (D.C. App. 1997) (both cases were reversed because instructions improperly limited consideration of constitutionally relevant evidence)).

[77] *Id. See generally* Martin v. Ohio, 480 U.S. 228 (1987) (cited by both *Hicks*, *supra* note 76 and *Russell*, *supra* note 76).

[78] Marlene A. Attardo, *Defense of Mistake of Fact as to Victim's Consent in Rape Prosecution*, 102 A.L.R. 5th 447 (2006).

[79] SEX CRIMES AND THE UCMJ, *supra* note 57, at Option 5.

[80] *Id*. at 249.

[81] Option 5 Email, *supra* note 59.

[82] SEX CRIMES AND THE UCMJ, *supra* note 57, Option 5, at 233 and 293-99.

[83] *See* National Defense Authorization Act for Fiscal Year 2006, Pub. L. No. 109-163, § 552, 119 Stat. 3136 (2006); UCMJ art. 134 (Indecent acts or liberties with a child, Indecent acts with another, and Indecent exposure).

[84] *See* National Defense Authorization Act for Fiscal Year 2006 § 552; MCM, *supra* note 2, pt. IV, ¶¶ 63, 64, and 60c.(5).

Finally, counsel and military judges will need elements, procedural rules, and instructions for the *Military Judge's Benchbook* (*Benchbook*) by the effective date of the statute. This will be difficult, given the extremely complex nature of the legislation. The new scheme specifically applies to offenses occurring on or after 1 October 2007.[85] Given the statute of limitations for rape and child abuse offenses,[86] military practitioners will operate under the old and new system for quite some time. Keeping counsel and military judges versed in both systems and using the correct formats when trying cases will require vigilance by everyone practicing and teaching military justice.

The General Article

During the past term, the CAAF issued several important decisions interpreting the parameters of General Article 134, UCMJ, especially in the area of applying and interpreting federal statutes under Clause 3, Crimes and offenses not capital. This section of the article examines the scope of the General Article within a diverse range of offenses covering child pornography, explosives, soliciting a minor, and use of unlawful substances.

Child Pornography—Martinelli,[87] Reeves,[88] *and* Hays[89]

United States v. Martinelli was a watershed case in Article 134 jurisprudence, and the first of three cases to examine the Child Pornography Protection Act (CPPA) during the 2005 term.[90] While stationed in Germany, Specialist (SPC) Martinelli visited an off-post Internet café to view and download child pornography.[91] While there, he searched Internet websites and chat rooms to communicate with those willing to send him the images.[92] Martinelli received these images through electronic mail on personal *Hotmail* or *Yahoo!* accounts or by accessing websites containing the images.[93] Martinelli downloaded the images to the hard drive of the Internet café computer.[94] He attached and transmitted some of the images to others via his *Yahoo!* or *Hotmail* accounts and copied still more images to a separate disk.[95] Martinelli took the disk back to his barracks room on Cambrai Fritsch Kaserne, a U.S. Army installation, where he loaded some of the images onto the hard drive of his personal computer.[96] Martinelli pleaded guilty to obstructing justice in violation of Article 134 and to sending, receiving, reproducing, and possessing child pornography under Article 134, Clause 3, in violation of section 2252A of the CPPA.[97]

In a three-to-two decision, the CAAF held that the CPPA has no extraterritorial application.[98] The court harmonized the seminal cases of *Equal Opportunity Commission v. Arabian American Oil Co.*[99] and *United States v. Bowman*[100] by holding that the only classes of criminal statutes exempt from the presumption against extraterritoriality are those statutes aimed at obstructions and frauds against the government.[101] The CAAF held that child pornography does not fall in this category but

---

[85] *See* National Defense Authorization Act for Fiscal Year 2006 § 552.

[86] *See id.* § 553 (codified at 10 U.S.C.S. § 843 (LEXIS 2006).

[87] United States v. Martinelli, 62 M.J. 52 (2005).

[88] United States v. Reeves, 62 M.J. 88 (2005).

[89] United States v. Hays, 62 M.J. 158 (2005).

[90] *Martinelli*, 62 M.J. at 52. The CPPA consists of 18 U.S.C. §§ 2251, 2252, 2252A, and 2260(b) (2000).

[91] *Id.* at 55.

[92] *Id*.

[93] *Id*.

[94] *Id*.

[95] *Id*.

[96] *Id*.

[97] *Id*. Article 134, UCMJ, has three clauses. Clause I includes conduct prejudicial to good order and discipline, Clause 2 includes service discrediting conduct, and Clause 3 incorporates non-capital federal crimes or assimilates state statutes under 18 U.S.C. § 13 (2000). *See* MCM, *supra* note 2, pt. IV, para. 60c.

[98] *Martinelli*, 62 M.J. at 54.

[99] 499 U.S. 244 (1991).

[100] 260 U.S. 94 (1922).

[101] *Martinelli*, 62 M.J. at 57.

is a crime that "affects the peace and good order of the community," generally applicable only within territorial boundaries.[102]

The CAAF's inquiry then turned to whether the CPPA gave any indication of congressional intent to extend its coverage extraterritorially.[103] The first three categories of section 2252A involve the movement of child pornography in "interstate or foreign commerce," while the final two categories can involve either "interstate or foreign commerce" or the "situs" of the accused.[104] The court was not persuaded that using interstate or foreign commerce was anything more than a straightforward reference to the Commerce Clause and certainly was not the "clear expression" required to overcome the presumption against extraterritoriality.[105] The CAAF then examined the situs definitions referenced in the statute and dismissed each in turn.[106] First, the CAAF held that references to "Indian country" reflect the "unique, and inherently domestic, relationship between the United States Government and American Indians."[107] Second, the CAAF held that "[t]he special maritime and territorial jurisdiction of the United States" provision as applied extraterritorially was the subject of complex litigation that inherently demonstrated "something less than a 'clear expression' of congressional intention" to extend its reach to the boundaries of a foreign nation.[108] Finally, the CAAF held that "any land or building owned by, leased to, or otherwise used by or under control of the United States Government" did not "provide clear evidence of a congressional intent that the statute should apply outside the boundaries of the United States."[109] Rather, this language could just as easily apply to "national parks, federal office buildings, and domestic military installations."[110]

After determining that there was no extraterritorial application, the CAAF held that domestic application was possible under a "continuing offense" theory for material that flowed through servers in the United States (specifications one through three).[111] The only specification that had domestic application in *Martinelli*, however, involved sending pornographic material into the United States through email servers (specification 1).[112] The CAAF then held that Martinelli's plea to that specification was improvident under *Ashcroft v. Free Speech Coalition*[113] and *United States v. O'Connor*,[114] because of the focus on the unconstitutional definition of child pornography and the lack of focus on "actual" versus "virtual" images.[115]

While holding that the pleas to specifications one through four were deficient under the CPPA,[116] the CAAF noted that lesser included offenses under Clause 1 or Clause 2 of Article 134[117] were still possible.[118] The CAAF distinguished its holdings in *United States v. Sapp* and *United States v. Augustine* because those cases did not involve the constitutional dimension present in *O'Connor*.[119] The difference between the CAAF's inquiry under the higher *O'Connor* standard and the

---

[102] *Id.* at 58.

[103] *Id*. at 59.

[104] *Id*.

[105] *Id*. at 60.

[106] *Id*.

[107] *Id*.

[108] *Id*. (citing United States v. Corey, 232 F.3d 1166 (9th Cir. 2000) (holding that special maritime and territorial jurisdiction applies to property inside U.S Air Bases in Japan) and United States v. Gatlin, 216 F. 3d 207 (2d Cir. 2000) (holding that special maritime and territorial jurisdiction does not include housing complexes inside U.S Army installations in Germany)).

[109] *Martinelli*, 62 M.J. at 61.

[110] *Id*.

[111] *Id*. at 62-64 (citing United States v. Moncini, 882 F.2d 401 (9th Cir. 1989)).

[112] *Id.* at 63-64 (noting that nothing in the record indicated U.S. connection with reproducing or receiving child pornography).

[113] 535 U.S. 234 (2002).

[114] 58 M.J. 450, 452-53 (2003) (holding *Ashcroft* requires "actual" character of visual depictions as a factual predicate to guilty plea under the CPPA).

[115] *Martinelli*, 62 M.J. at 65-66.

[116] *Id*. at 66 (holding specification one deficient under *O'Connor* and specifications two through four deficient because the CPPA did not apply to Martinelli's conduct in the first place).

[117] MCM, *supra* note 2, pt. IV. ¶ 60c(2) and (3).

[118] *See O'Connor*, 58 M.J. at 454-55 (holding that although improvident in this case, lesser included offenses under Clause 1 or 2 of Article 134 are possible if servicemembers demonstrate a clear understanding of which acts were prohibited and why those acts were prejudicial to good order and discipline or service discrediting). *Cf*. United States v. Sapp, 53 M.J. 90 (2000); United States v. Augustine, 53 M.J. 95 (2000) (holding that lesser included offenses to the CPPA based specifications under Clause 2 (service discrediting conduct) were provident).

[119] *Martinelli*, 62 M.J. at 66.

"review under the less strict *Augustine/Sapp* standard is a qualitative difference."[120] The court stated that "[t]he critical inquiry here is whether the record reflects an appropriate discussion of and focus on the character of the conduct at issue as service-discrediting or prejudicial to good order and discipline."[121] When constitutionally protected language is implicated, the record must "conspicuously reflect" the clear understanding of the prohibited conduct required under *O'Connor*.[122] In this case, there was no discussion of service discrediting conduct or prejudice to good order and discipline in connection with the CPPA specifications, precluding lesser included offenses under the "stricter scrutiny" of *O'Connor* and *Mason.*[123] Specifications one through four, which were based on the CPPA, and the sentence were set aside.[124] Chief Judge Gierke and Judge Crawford both registered strong dissents.[125]

In *United States v. Reeves*, the CAAF again considered the CPPA in an overseas environment.[126] Sergeant (SGT) Reeves was stationed in Germany where all of his misconduct occurred.[127] He used the on-post library computers to receive and download child pornography, and he printed the images using library printers.[128] Various pornographic images were also found in his vehicle and quarters.[129] In addition, SGT Reeves engaged in filming (from about 200 feet) the genital areas of young German girls near Hanau, Germany, particularly focusing on one of the girls to see into her shorts.[130]

Reeves pleaded guilty to possessing and receiving child pornography and using a minor to engage in sexually explicit conduct for the purpose of producing a visual depiction of such conduct under Article 134, Clause 3, in violation of the CPPA.[131] The CAAF held that under the *Martinelli* analysis, the CPPA, including section 2251, was not extraterritorial.[132] Further, because none of Reeves's conduct continued into the United States, his conduct did not have domestic application.[133] Finally, although the language in the specifications did not raise "constitutional concerns" as outlined in *O'Connor, Mason*, and *Martinelli*, there was no discussion of whether Reeves's conduct was service discrediting or prejudicial to good order and discipline.[134] Therefore, the CAAF was also precluded from affirming lesser included offenses under *Sapp* and *Augustine*.[135] The CAAF set aside the CPPA based specifications and the sentence.[136] As in *Martinelli,* both Chief Judge Gierke and Judge Crawford registered strong dissents.[137]

In *United States v. Hays*, the CAAF once again addressed CPPA applicability and the possibility of lesser included offenses under Clauses 1 and 2 of Article 134, UCMJ.[138] Specialist Hays pleaded guilty to distributing, receiving, possessing, and soliciting others to distribute and receive child pornography under Article 134, Clause 3, in violation of the

---

[120] *Id*. at 66-67 ("Although the understanding required of the servicemember remains the same, we require a clearer more precise articulation of the servicemember's understanding under *O'Connor* than we require in the cases where the accused's First Amendment rights are not implicated").

[121] *Id*. at 67; *see* United States v. Mason, 60 M.J. 15 (2004). In *Mason*, the military judge also used unconstitutional language but *sua sponte* discussed Clauses 1 and 2 of Article 134 with the accused. "The difference between *Mason* and *O'Connor* was that the military judge in *Mason* specifically discussed the character of the underlying conduct and Mason agreed that his conduct was both service discrediting and prejudicial to good order and discipline." *Martinelli*, 62 M.J. at 67.

[122] *Martinelli*, 62 M.J. at 67.

[123] *Id*. at 66-67 (under the facts of this case, Martinelli's pleas would have been improvident even under the less strict *Sapp/Augustine* standard due to the lack of any discussion concerning prejudice to good order and discipline or service discrediting conduct).

[124] *Id*. at 68.

[125] *Id.* at 68 and 77 (Gierke, C.J., concurring in part and dissenting in part, and Crawford, J., dissenting).

[126] 62 M.J. 88 (2005).

[127] *Id*. at 91.

[128] *Id*.

[129] *Id*.

[130] *Id*.

[131] *Id*. at 90.

[132] *Id*. at 92-93.

[133] *Id*. at 94.

[134] *Id.* at 96.

[135] *Id*.

[136] *Id*.

[137] *Id*. at 96 and 97 (Gierke, C.J., concurring in part and dissenting in part, and Crawford, J., dissenting).

[138] 62 M.J. 158 (2005).

CPPA.[139] The government charged these offenses as occurring solely in Germany.[140] The CAAF held that under the *Martinelli* analysis, the CPPA-based specifications were not extraterritorial.[141] Further, the CAAF assumed that the plea inquiry did not implicate Hays's First Amendment rights,[142] thus placing the lesser included analysis under *Sapp* and *Augustine*, rather than *Mason* and *Martinelli*.[143] Although the military judge did not discuss with Hays whether his conduct was service discrediting or prejudicial to good order and discipline with regard to the first three CPPA specifications, he was clearly aware of the impact of his conduct on the image of the armed forces.[144] The CAAF affirmed the CPPA based specifications after replacing references to the CPPA with service discrediting conduct.[145]

The implications of *Martinelli, Reeves, and Hays* are potentially far reaching. As Judge Crawford noted in her *Martinelli* dissent, the application of other federal statutes extraterritorially may be in question.[146] Ironically, spouses and contractors may now be held to a higher standard under the Military Extraterritoriality Jurisdiction Act than servicemembers.[147] As discussed in last year's symposium, convictions under Article 134 for child pornography may not accomplish the ultimate goals of the statute, and in some cases it is foreseeable that Clause 1 and 2 will not apply to certain conduct now included within the CPPA.[148] Of course, it is still possible to charge child pornography offenses under the CPPA overseas if the government can prove the "domestic" relationship as defined by the CAAF in *Martinelli.*[149] Unless domestic relationship evidence is introduced in a stipulation of fact, however, it may be difficult for the government to establish the required nexus. Whatever the implications may be, trial counsel should include service discrediting or prejudicial to good order and discipline language in CPPA-based specifications regardless of location[150] or charge these offenses under Clause 1 or Clause 2 of Article 134 in the first instance.[151] Defense counsel must be vigilant to ensure that the government is charging child pornography properly in light of CAAF precedent and the facts of each case, exploiting the difficulties of proof or charging to the benefit of their clients.

Storing Stolen Explosives—United States v. Disney[152]

In *Disney*, the CAAF considered the applicability and reach of the Commerce Clause[153] to a federal statute under Clause 3 of Article 134, UCMJ.[154] Hospital Corpsman First Class Walter Disney, a Navy SEAL, was accused of stealing ordnance from several military training events.[155] Contrary to his pleas, he was convicted of one specification of larceny of military

---

[139] *Id*. at 166.

[140] *Id*. at 167.

[141] *Id*.

[142] *Id*.

[143] *Id*. at 168.

[144] *Id*. When discussing the final CPPA based specification, Hays admitted that it "was bringing discredit upon the Armed Forces," and that it might tend to make those outside the military think less of Soldiers. *Id*.

[145] *Id*. at 169.

[146] United States v. Martinelli, 62 M.J. 52, 83 (2005) (citing as an example the Espionage Act of 1900, 18 U.S.C. § 792-99 (2000)).

[147] Military Extraterritorial Jurisdiction Act of 2000 (MEJA), Pub. L. No. 106-523, 114 Stat. 2488 (codified at 18 U.S.C. §§ 3261-67 (2000) (extending extraterritoriality of certain federal statutes to those employed by or accompanying the force).

[148] Major Jeffrey C. Hagler, *Measure for Measure: Recent Developments in Substantive Criminal Law*, ARMY LAW., May 2005, at 75-77. In addition, the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001 (USA PATRIOT ACT), Pub. L. No. 107-56, 115 Stat. 272 (2001), may not solve this problem overseas. *See* 18 U.S.C. § 7(3), (9) (2000); 18 U.S.C.S. § 3261 (LEXIS 2004); *see also* United States v. Dewitt, Army No. 20031281 (May 25, 2006).

[149] *Martinelli*, 62 M.J. at 62-64.

[150] *See* United States v. Mason, 60 M.J. 15 (2004); *see* Hagler, *supra* note 148.

[151] *See* United States v. Irvin, 60 M.J. 23 (2004) (holding that child pornography may be charged directly under Clause 1 or Clause 2 of Article 134 whether "virtual" or "actual"); *see* Hagler, *supra* note 148.

[152] 62 M.J. 46 (2005).

[153] U.S. CONST. art 1, § 8, cl. 3.

[154] *Disney*, 62 M.J. at 46.

[155] *Id*. at 47.

property and, pursuant to his pleas, he was convicted of one specification of storing stolen explosives in violation of 18 U.S.C. § 842 (h)[156] under Articles 121 and 134, Clause 3.[157]

Disney challenged the constitutionality of the statute as applied to his offense because his conduct lacked a substantial nexus to interstate commerce.[158] The CAAF held that 18 U.S.C. § 842 (h) is a constitutional exercise of Congress's authority under the Commerce Clause and is constitutional as applied to Disney.[159] As a threshold matter, the CAAF held that Disney has standing to contest the constitutionality of the statute on Commerce Clause grounds.[160] Congress, however, clearly has the authority to legislate an activity if the activity exerts a substantial economic effect on interstate commerce.[161] In this case, the statute in question is a constitutional exercise of the congressional commerce power.[162]

The CAAF also held that 18 U.S.C. § 842 is constitutional as applied to Disney's conduct.[163] First, the statute regulates economic activity and Disney's conduct fell within the scope of that regulation.[164] Second, the statute includes an express jurisdictional element.[165] Third, the statute's history demonstrates "that Congress found the illegal use and unsafe storage of contraband explosives to be a substantial hazard to interstate commerce."[166] Fourth, there is a rational basis for concluding that Disney's conduct has substantial direct implications for commerce.[167] Finally, the Court noted that their decision was in accord with every other court that has considered this issue after *United States v. Lopez*.[168]

Disney represents the CAAF's willingness to extend constitutional protections to servicemembers absent contrary legislative intent from Congress.[169] On the other hand, *Disney* stands for the proposition that the CAAF will extend deference to Congress when interpreting the effect of prohibited conduct on interstate commerce. The ability to incorporate federal statutes under Clause 3 of Article 134 remains a useful tool when the incorporated statutes more accurately capture misconduct than existing UCMJ provisions.

---

[156] 18 U.S.C. § 842(h) (2000).

[157] *Disney*, 62 M.J. at 47.

[158] *Id.* at 48.

[159] *Id*. at 50.

[160] *Id*. at 49. We would anticipate an express legislative statement were Congress to deprive servicemembers of the procedural right to challenge the constitutionality of statutes under which they were convicted pursuant to Article 134, Clause 3, a right heretofore recognized in military law and practice. *Id.* at 49; *see, e.g.*, United States v. O'Connor, 58 M.J. 450 (2003) (reversing Article 134, Clause 3 conviction for violation of federal child pornography statute on First Amendment grounds).

[161] *Disney*, 62 M.J. 46, at 49.

> Congress may regulate three broad categories of conduct pursuant to its commerce power: the channels of interstate commerce, such as highways and rail lines; the instrumentalities of interstate commerce, or persons or things in interstate commerce, such as vehicles and goods; and those activities that substantially affect interstate commerce, such as intrastate coal mining or hotels catering to interstate guests.

Id. at 49 (citing United States v. Lopez, 514 U.S. 549, 558, which held that the statute criminalizing possession of a handgun on school property did not regulate economic activity).

[162] *Id.* at 50.

[163] *Id.*

[164] *Id*.

[165] *Id.*

[166] *Id.* at 51 (citing Pub. L. No. 91-452, § 1102, 84 Stat. 922 (1970)).

[167] *Id*. Disney diverted explosives away from regulated interstate market to "his garage where federal regulations no longer applied regarding their storage or possible reentry into the marketplace." *Id.* at 51.

[168] *Id*.

[169] *See* H.F. "Sparky" Gierke, *The Use of Article III Case Law in Military Jurisprudence*, ARMY LAW., Aug. 2005, at 25 (providing an excellent discussion of the CAAF's considerations when addressing constitutional and federal statutory questions).

Soliciting a Minor—United States v. Brooks[170] *and* United States v. Amador[171]

In *United States v. Brooks*, the CAAF once again interpreted the meaning of a federal statute as applied to a servicemember.[172] Specialist Brooks exchanged emails with an online acquaintance, Mrs. N, eventually requesting that she arrange a sexual encounter for him with a fictitious eight-year-old girl.[173] Brooks subsequently went to a hotel to meet Mrs. N's sister instead and was apprehended by CID agents.[174] He never communicated directly with a minor or a person he believed was a minor.[175] Brooks was convicted of violating 18 U.S.C. § 2422(b)[176] under Article 134, Clause 3, for attempting to commit the offense of carnal knowledge with a victim under the age of twelve and wrongfully soliciting an individual under the age of eighteen to engage in a criminal sexual act.[177] After noting that this was an issue of first impression,[178] the CAAF held that a conviction under § 2422(b) does not require direct inducement of a minor nor does it require an actual minor.[179] The court noted *United States v. Bailey*, where the Sixth Circuit held that the relevant intent is the intent to persuade or to attempt to persuade, not the intent to commit the actual sexual act.[180] In this case, Brooks acted with the intent to induce a minor to engage in unlawful sexual activity and then completed the attempt with actions that strongly corroborated the required culpability.[181]

In *United* States *v. Amador*, the Air Force Court of Criminal Appeals addressed the same statute.[182] Airman Basic Amador sent several messages over the Internet to "krystall," believing she was thirteen years old.[183] They planned a sexual encounter and agreed to meet at a mall; however, krystall was actually a state patrol officer who apprehended him at the rendezvous point.[184] Amador pleaded guilty to using a facility or means of interstate commerce to attempt to knowingly entice a child under eighteen years of age to engage in sexual activity in violation of 18 U.S.C. § 2422(b),[185] under Article 134, Clause 3.[186] The Air Force Court held that the military judge did not abuse his discretion in accepting Amador's plea.[187] An actual minor is not required for an attempt conviction under § 2422(b).[188] Further, Amador took substantial steps toward enticing krystall to have sex with him in violation of the statute.[189]

Taken together, cases like *Brooks* and *Amador* stand for the proposition that law enforcement personnel are acting well within the statute by posing as underage victims of sexual predators. In fact, they need not even pose as minors in arranging for the sexual act. Trial counsel are well advised, however, to ensure that the kinds of "substantial steps" taken towards

---

[170] 60 M.J. 495 (2005).

[171] 61 M.J. 619 (A.F. Ct. Crim. App. 2005).

[172] *Brooks*, 60 M.J. at 495.

[173] *Id.* at 496.

[174] *Id.*

[175] *Id*. at 498.

[176] 18 U.S.C. § 2422(b) (2000) (coercion and enticement).

[177] *Brooks*, 60 M.J. at 496.

[178] *Id*. at 497.

[179] *Id*. at 498. The CAAF noted this case was almost indistinguishable from *United States v. Murrell*. *United States v. Murrell*, 368 F.3d 1283 (11th Cir. 2004).

[180] *Brooks*, 60 M.J. at 498 (citing United States v. Bailey, 228 F.3d 637 (6th Cir. 2000), *cert. denied*, 532 U.S. 1009).

[181] *Id.* at 498- 99 (Brooks arrived at the designated hotel meeting place with a stuffed tiger, a musical water globe, a light source with artificial flowers, and a knife). *Id*. at 496.

[182] 61 M.J. 619 (A.F. Ct. Crim. App. 2005).

[183] *Id*. at 621.

[184] *Id*.

[185] 18 U.S.C. § 2422(b) (2000) (coercion and enticement).

[186] *Amador*, 61 M.J. at 624.

[187] *Id*.

[188] *Id*. at 622 (citing United States v. Brooks, 60 M.J. 495, 498 (2005)).

[189] *Id.* (Amador acknowledged during his providence inquiry that the only reason he did not have sex with the thirteen-year-old girl is that she turned out to be a law enforcement officer).

completing the crime in *Brooks* and *Amador* are presented on findings, whether through witnesses in a contested case or through the stipulation of fact in a guilty plea setting.

The General Article, Unlawful Substances, and Preemption—United States v. Erickson[190]

In *Erickson*, the CAAF examined the use of unlawful substances not directly covered by Article 112a, UCMJ.[191] Airman First Class Erickson pleaded guilty to several drug related charges and specifications, including wrongful inhalation of nitrous oxide, in violation of Article 134, Clause 1.[192] During the plea inquiry, he admitted that inhaling nitrous oxide impaired his thinking and could damage his brain.[193] The CAAF held his plea provident based on these admissions.[194] The CAAF noted that he understood this impairment would undermine his capabilities and readiness to perform military duties, thus creating a direct and palpable effect on good order and discipline.[195] The CAAF also took judicial notice that many states have recognized the harmful effects of nitrous oxide by criminalizing this conduct.[196] The CAAF emphasized that such state action is not necessary to sustain a conviction under Article 134; however, it underscores the absence of a basis to question the factual sufficiency of Erickson's plea.[197]

The CAAF also held that this charge was not preempted by Article 112a.[198] For preemption to apply, it must be shown that Congress intended the other punitive article to cover a class of offenses in a complete way. Simply because the offense charged under Article 134 embraces all but one element of an offense under another article does not trigger the preemption doctrine.[199] In this case, the history of Article 112a reflects congressional intent not to cover every drug related offense in a complete way.[200] Therefore, Article 112a does not preclude the Armed Forces from using Article 134 to cover substances capable of producing a mind-altered state and not covered by Article 112a.[201]

Practitioners can take several lessons from *Erickson*. First, trial counsel do not have to find a violation of Article 112a to charge an abuse of mind-altering substances. When servicemembers engage in activity that is prejudicial to good order and discipline or service discrediting, government counsel are free to charge it as just that, rather than searching for a specific drug under Article 112a.[202] The CAAF also strongly suggested that government counsel would not be prohibited from assimilating applicable state statutes covering certain controlled substances not covered under Article 112a.[203] Finally, defense counsel are reminded that *Erickson* was a guilty plea. The government may have a much tougher time proving prejudice to good order and discipline when facing other mind altering substances without the kind of evidence present in this case.[204]

---

[190] 61 M.J. 230 (2005); *see* United States v. Glover, 50 M.J. 476 (1999) (wrongful inhalation of Dust-Off).

[191] *Erickson*, 61 M.J. 230; UCMJ art. 112(a) (2005) (wrongful use, possession, etc., of controlled substances).

[192] *Erickson*, 61 M.J. at 231.

[193] *Id*. at 232.

[194] *Id*. at 233.

[195] *Id*. at 232.

[196] *Id*. at 233.

[197] *Id*.

[198] *Id*.; *see* MCM, *supra* note 2, pt. IV, ¶ 60c(5) (providing that the preemption doctrine prohibits application of Article 134 to conduct covered by Articles 80 through 132).

[199] *Erickson*, 61 M.J. at 233 (citing United States v. Kick, 7 M.J. 82 (C.M.A. 1979)).

[200] *Id*. ("Article 112a 'is intended to apply solely to offenses within its express terms. It does not preempt prosecution of drug-related offenses under Article 92, 133, or 134 of the UCMJ.'"). *Id.* (citing S. Rep. No. 98-53, at 29 (1983)).

[201] *Id*.

[202] *See* UCMJ art. 112a(b)(1)-(3) (2005).

[203] *See* MCM, *supra* note 2, pt. IV, ¶60c(4)(c).

[204] *Erickson*, 61 M.J. at 233 ("Likewise, we note that our decision does not preclude an accused, in the future, from challenging the propriety of a similar inhalation charge under Article 134 in terms of the sufficiency of the impact on good order and discipline.").

"*This is like déjà vu all over again.*"[205]

Pleadings and Modification—United States v. Augspurger,[206] United States v. Rollins,[207] *and* United States v. Scheurer[208]

In a series of cases, the CAAF again visited the area of pleadings modification, emphasizing the safeguards necessary when deleting "divers" occasions by exceptions and substitutions. This section of the article examines three principal cases in that area and offers practical advice on how to limit appellate error. This article also alerts practitioners to several potential problems in applying these standards.

United States v. Augspurger was the first case in the 2005 term to discuss the issues created when panels delete the word "divers" by exceptions and substitutions without clarifying which conduct formed the basis for their findings.[209] The CAAF, however, has consistently voiced its concern and described procedures to eliminate this problem.[210] The CAAF is unwilling to assume that a service court of appeals can determine the basis for a finding of guilt in this situation, absent clear evidence from the record.[211]

Airman Basic Augspurger was charged, inter alia, with use of marijuana on divers occasions.[212] Evidence was presented for three separate uses between on or about October 2001 and February 2002.[213] The panel found Augspurger guilty but excepted the words "on divers occasions" with no clarification.[214] Adding to the confusion were issues associated with instructing the members concerning prior Article 15 punishment that was administered for the drug use described in Augspurger's confession.[215] The CAAF reversed the Air Force Court, setting aside the sentence and dismissing the specification,[216] emphasizing that the military judge should have instructed the panel members on the need to clarify their findings if they struck "divers occasions."[217] In this case there was no basis for the Air Force Court to review and affirm the conviction.[218]

United States v. Rollins was the next case to address the area of pleadings modification, where the issues were the role of the convening authority at action and the effect of the statute of limitations.[219] Senior Master Sergeant Rollins was charged with numerous offenses, including attempted rape on divers occasions and indecent acts on divers occasions.[220] The panel found him not guilty of attempted rape, but guilty of indecent assault and indecent acts on divers occasions.[221] Both of the specifications for which Rollins was found guilty included periods that would later be time-barred by the holding in *United States v. McElhaney*.[222] The convening authority modified the findings to include only the dates not affected by the statute of

---

[205] Yogi Berra Quotes, *supra* note 1.

[206] 61 M.J. 189 (2005).

[207] 61 M.J. 338 (2005).

[208] 62 M.J. 100 (2005).

[209] *Augspurger*, 61 M.J. 189.

[210] *See* United States v. Seider, 60 M.J. 36 (2004); United States v. Walters, 58 M.J. 392 (2003).

[211] *Augspurger*, 61 M.J. at 192.

[212] *Id.* at 189-90.

[213] *Id*. at 190.

[214] *Id*.

[215] *Id.* The military judge instructed the members that if they found the accused guilty based on the incident connected to the previous Article 15, this would constitute evidence in mitigation. The trial counsel later argued that this was proper evidence in aggravation. *Id*. at 191.

[216] *Id*. at 193.

[217] *Id*. at 192.

[218] *Id*. (citing United States v. Walters, 58 M.J. 392 (2003) and United States v. Seider, 60 M.J. 36 (2004)).

[219] 61 M.J. 338 (2005).

[220] *Id*. at 339-40.

[221] *Id*. 341.

[222] *Id*. (citing United States v. McElhaney, 54 M.J. 120, 126 (2000)) (holding that the federal statute of limitations applicable under 18 U.S.C. § 3283 did not supplant UCMJ art. 43).

limitations.[223] The CAAF held that the military judge erred by not providing the panel with instructions that focused their attention on the period not barred by the statute of limitations.[224] The convening authority's action did not cure this prejudice and the affected findings were set aside.[225]

The CAAF's decision in *United States v. Scheurer*[226] was the final case to address the problem of ambiguous findings. In this case, however, the record was clear as to the conduct substantiating at least one of the specifications.[227] Senior Airman Scheurer was charged with numerous offenses, including two specifications of drug use on divers occasions (Specifications 3 and 5).[228] The military judge excepted out divers occasions for both specifications; however, there was more than one use for each specification and no clarification of which incident resulted in the finding of guilt.[229] The CAAF held that Specification 5 was based on only two possible uses, and the record was clear upon which incident the military judge based his findings.[230] Conversely, the finding of guilty as to specification 3 was set aside because the court could not determine upon which incident the conviction was based.[231]

As the CAAF has noted in several successive cases, language in specifications should clearly put the accused and reviewing courts on notice of what conduct served as the basis for the findings. In addition, trial counsel should strongly consider breaking out separate incidents into separate specifications to avoid problems of determining upon which incident a conviction was based. In the most serious cases (i.e., child sexual abuse) where the evidence may be confusing, separate specifications will make it clear for the military judge and panel members which allegations form the basis for findings of guilty or not guilty on the findings worksheet. If confronted with divers occasions specifications, the military judge should instruct the members that if they except out "divers occasions," they should refer to the specific allegation by using a specific date or other relevant facts.[232]

While the CAAF addressed several issues in this area, two interesting questions remain. First, for purposes of appellate review, what is the real difference between a finding of guilt "excepting out divers occasions" and a finding of guilt based on two out of three incidents comprising a divers occasions specification? The CAAF addressed this question in *Walters* by citing the fundamental difference between findings of guilty and not guilty.[233] However, if the real concern is the service court's obligation to affirm the factual basis for each specification under Article 66, UCMJ, that rationale is not entirely persuasive.[234] Will these cases force the government to abandon divers occasions pleading, leading to the inevitable problems with unreasonable multiplication of charges? The second question concerns the level of detail in findings that certain cases may require. Could these instructions at some point be equated with the requirement for special findings?[235] Would this in turn cause more or less certainty in appellate litigation? Confronting these issues may be necessary as this area of law continues to develop.

Drug Offenses and Multiplicity—United States v. Dillon[236]

In *United States v. Dillon*, the accused pleaded guilty, inter alia, to two separate specifications for the simultaneous use of ecstasy and methamphetamine.[237] At the time of ingestion, Dillon believed he was only consuming ecstasy; however, the

---

[223] *Id*. at 342.

[224] *Id*. at 342-43 (citing United States v. Thompson, 59 M.J. 432 (2004)).

[225] *Id*. at 343.

[226] 62 M.J. 100 (2005).

[227] *Id*. at 112.

[228] *Id.* at 110.

[229] *Id*. at 110-11.

[230] *Id.* at 111-12.

[231] *Id*. at 112; *see* United States v. Augspurger, 61 M.J. 189 (2005); United States v. Walters, 58 M.J. 391 (2003).

[232] *See* Hargis & Grammel, *supra* note 26 (discussing *Augspurger* and approved interim changes to the *Benchbook* for model instructions in this area).

[233] *Walters*, 58 M.J. at 396.

[234] *Id.* at 394-95.

[235] MCM, *supra* note 2, R.C.M. 918a(2)(b); *see id.* at discussion (stating that members may not make special findings).

[236] 61 M.J. 221 (2005).

[237] *Id*. at 224.

pills also contained methamphetamine.[238] In a unanimous opinion, the CAAF affirmed the Air Force Court of Criminal Appeals (AFCCA).[239] Possession or use may be wrongful even though an accused does not know the precise identity of the substance at the time of possession or ingestion, as long as he knows it is a controlled substance.[240] This case is distinguishable from *United States v. Stringfellow* because Dillon pleaded guilty to two separate specifications rather than one duplicitous specification.[241]

The CAAF also held that the specifications were not multiplicious.[242] Relying on the Army Court's holding in *United States v. Inthavong*,[243] the CAAF held that Article 112a is modeled on 21 U.S.C. § 841(a).[244] The purpose of the new 112a was to give commanders greater tools to combat drug abuse, stop unnecessary litigation caused by charging under the general regulations, incorporate the flexibility of the Comprehensive Drug Abuse and Control Act,[245] and better align with federal practice.[246] The use of the phrases "a controlled substance" and "a substance described in subsection (b)" were intended to permit separate specifications for each substance and satisfy the requirements of *United States v. Teters*[247] and *Blockburger v. United States*.[248] "The conduct that Congress prohibited and that the government sought to punish is the use of two controlled substances at the same time and place."[249] Each drug may involve different producers and distributors and should be treated separately.[250] Although government counsel can now clearly charge separate specifications for simultaneous use of different controlled substances, defense counsel are reminded that some cases may require motions concerning unreasonable multiplication of charges[251] or consolidation for sentencing.[252]

Solicitation—United States v. Hays[253]

In *United States v. Hays*, the accused was convicted of multiple charges, including soliciting another to rape a child.[254] This charge was based on Hays's request to an Internet acquaintance, JD, that he share pictures of a sexual encounter between JD and a nine-year-old girl.[255] The Army Court of Criminal Appeals (ACCA) disapproved the finding of guilty for soliciting the rape of a child, but approved the lesser offense of soliciting another person to commit carnal knowledge.[256] The CAAF agreed with the ACCA's analysis,[257] finding that the court did not broaden the definition of solicitation and that the evidence supported a finding of legal sufficiency.[258] Hays's inquiry into whether JD had engaged in sexual intercourse with

---

[238] *Id*. at 222

[239] *Id.* at 224.

[240] *Id*. at 222 (citing United States v. Mance, 26 M.J. 244, 254 (C.M.A. 1988)).

[241] *Id*. (citing United States v. Stringfellow, 32 M.J. 335 (C.M.A. 1991)) (Stringfellow pleaded guilty to a single use of cocaine and amphetamine/methamphetamine).

[242] *Id.* at 223.

[243] 48 M.J. 628 (Army Ct. Crim. App. 1998) (holding that simultaneous distribution of different drugs can legally be charged as separate specifications of distribution under art. 112a); *see also* United States v. Ray, 51 M.J. 511 (N-M. Ct. Crim. App. 1999) (holding that intentional simultaneous use of two different controlled substances may be charged separately as two specifications of wrongful use under art 112a).

[244] *Dillon*, 61 M.J. at 223.

[245] 21 U.S.C.S. § 841(a) (LEXIS 2006).

[246] *Dillon*, 61 M.J. at 223.

[247] 37 M.J. 370 (C.M.A. 1993).

[248] 284 U.S. 304 (1932).

[249] *Dillon*, 61 M.J. at 224.

[250] *Id*.

[251] *See* United States v. Quiroz, 55 M.J. 334 (2001).

[252] *See* MCM, *supra* note 2, R.C.M. 906 (b)(12) and R.C.M. 1003(c)(1)(C).

[253] 62 M.J. 158 (2005).

[254] *Id*. at 160.

[255] *Id*. at 161.

[256] *Id*. at 160.

[257] *Id*. at 162.

[258] *Id*. at 163.

the nine-year-old girl was followed immediately by requests for pictures and promises of a quid pro quo.[259] Under all the circumstances, a reasonable factfinder could have found Hays's inquiry was a serious request to commit carnal knowledge.[260] Finally, the CAAF held that neither the *MCM* nor the UCMJ precludes a conviction for solicitation merely because the object is predisposed towards the crime (rejecting the requirement set forth in *United States v. Dean*, 44 M.J. 683 (Army Ct. Crim. App. 1996)).[261]

Indecent Acts—United States v. Rollins[262] *and* United States v. Johnson[263]

Senior Master Sergeant Rollins was convicted of several Article 134 offenses, including an indecent act with a minor, JG, "by giving him a pornographic magazine and suggesting that they masturbate together."[264] Rollins claimed that this specification was deficient because there was no active participation by JG and because Rollins's activities were protected under the First Amendment.[265] The conviction for the indecent act specification was affirmed by the CAAF.[266] The court found that a reasonable factfinder could conclude that Rollins committed a service discrediting indecent act with another by giving a person under the age of eighteen a pornographic magazine to stimulate mutual masturbation while in a parking lot open to the public.[267] Further, the court noted this case does not involve the exchange of constitutionally protected material; however, even if it did, "[T]he military has a legitimate interest in deterring and punishing sexual exploitation of young persons by members of the armed forces because such conduct can be prejudicial to good order and discipline, service discrediting, or both."[268] The First Amendment does not protect this conduct.[269]

In *United States v. Johnson*, the accused pleaded guilty to several UCMJ Article 134 offenses, including indecent acts with another.[270] The indecent act specification was based on Johnson's actions while in Hobart, Australia.[271] Johnson and two other Marines took two local females to a hotel, where all drank alcohol.[272] At some point, Johnson stopped in a hotel room for a few minutes to observe one of the Marine's having sex with one of the females.[273] During that time Johnson said, "that's my dog," to which the Marine replied, "I'm handling my business."[274] In his first assignment of error, Johnson claimed that his plea to indecent acts with another was improvident because he was merely an observer and not a participant in the act.[275] The NMCCA affirmed the indecent act specification,[276] holding that Johnson's conduct in watching and encouraging his friend's sexual encounter constituted active participation and was sufficient to support the charge and its specification.[277]

---

[259] *Id*. at 162.

[260] *Id*. at 163.

[261] *Id*.; *see* Major Christopher Behan, "*The Future Ain't What It Used to Be": New Developments in Evidence for the 2005 Term of Court*, ARMY LAW., Apr. 2006, at 67-68 (discussing *Hays* for purposes of propensity evidence).

[262] 61 M.J. 338 (2005).

[263] 60 M.J. 988 (N-M. Ct. Crim. App. 2005).

[264] *Rollins*, 61 M.J. at 343.

[265] *Id*.

[266] *Id*. at 345.

[267] *Id*. at 344.

[268] *Id*. at 344-45.

[269] *Id*. (citing Parker v. Levy, 417 U.S. 733, 743-52 (1974)).

[270] 60 M.J. 988, 989 (2005).

[271] *Id*.

[272] *Id*.

[273] *Id*.

[274] *Id*.

[275] *Id*.

[276] *Id*. at 990.

[277] *Id.* (citing United States v. McDaniel, 39 M.J. 173, 175 (C.M.A. 1994) (*McDaniel* was an Air Force recruiter who instructed applicants to disrobe, change positions, and bounce up and down while being secretly videotaped)).

Obstruction of Justice—United States v. Reeves[278]

Staff Sergeant Andrea Reeves, a technical school instructor, engaged in relationships with trainees in violation of applicable lawful regulations.[279] She was ultimately convicted of disobeying a general regulation, violating two additional orders, and obstructing justice for telling a trainee not to speak to investigators and to seek counsel.[280] Although not alleged in the specification, Reeves also gave the trainee money to offset financial difficulties.[281] The specified and granted issues before the CAAF were whether as a matter of law Reeve's conduct was obstruction of justice,[282] and whether, under the facts of this case, the evidence was legally sufficient.[283] The CAAF held as a matter of law that Reeves could be convicted of obstructing justice.[284] She was not a disinterested party, and one who advises, with a corrupt motive, that a witness exercise a constitutional right may obstruct the administration of justice.[285] Under the facts of this case, a rational trier of fact could have found beyond a reasonable doubt that Reeves's actions were wrongful.[286]

Although this case may serve to dissuade potential interference with government witnesses, trial counsel should be cautious in prosecuting under this theory. Truly disinterested parties should not normally be singled out for prosecution after advising servicemembers of their basic rights.[287]

Conclusion

The past term brought substantial changes to the *MCM* and the UCMJ, most notably in the area of sexual offenses. Many challenges lie ahead in implementing these changes and coming to terms with the implications for our present framework. The past term also brought significant decisions from the CAAF interpreting the scope and reach of federal statutes under the UCMJ and the use of General Article 134. These decisions greatly affect the rights of servicemembers in the United States and the ability to prosecute some offenses overseas. The CAAF also reinforced trends from past terms and brought clarification to several open questions presented by the service courts. Whether or not the reader agrees with these developments, it is certainly clear that Congress and the CAAF came to several forks in the road and took them.[288]

---

[278] 61 M.J. 108 (2005).

[279] *Id*. at 109.

[280] *Id*. (Reeves called the trainee "pretty frequently" at home and "a few times at work" to tell her not to speak with investigators and to get a defense counsel). *Id*.

[281] *Id*. at 109-10.

[282] *Id*. (Reeves argued that one who advises a witness to invoke a constitutional right is not engaged in a wrongful act). *Id.* at 110.

[283] *Id*. at 109.

[284] *Id*. at 110-11.

[285] *Id*. at 111.

[286] *Id*. ("[T]he tone, frequency, and background of Appellant's calls raised legitimate questions of fact for the members regarding the wrongfulness and intent of the calls.").

[287] *Id*. at 110 ("Without more, a person's advice to another to invoke certain rights, where the advice given is honest and uncorrupt, should not as a matter of law sustain a conviction.").

[288] Yogi Berra Quotes, *supra* note 1.

"I Made a Wrong Mistake":[1]
Sentencing & Post-Trial in 2005

Major John Rothwell
Associate Professor, Criminal Law Department
The Judge Advocate General's Legal Center and School, U.S. Army
Charlottesville, Virginia

Introduction

The 2005 term for the Court of Appeals of the Armed Forces (CAAF) and service courts produced several significant cases pertaining to both sentencing and post-trial. The sentencing cases involve issues of improper questions being asked and improper answers being given. The post-trial cases involve a number of cases concerning errors in the staff judge advocate's recommendations (SJARs) and two significant and somewhat earth-shattering cases that grabbed the attention of every military justice practitioner**s**. This article addresses these noteworthy and important cases.

In the area of sentencing, *United States v. Griggs*[2] was arguably the most significant case dealing with, and hopefully settling, the question of whether Rule for Court-Martial (RCM) 1001(b)(5)(D), which limits the scope of presentenc**ing** opinions to rehabilitate potential,[3] applies to the defense sentencing case. In *Griggs*, the court clarified that evidence of rehabilitative potential under RCM 1001(b)(5)(D) does not apply to defense mitigation evidence.[4] Moreover, the rule does not preclude testimony that a witness would willingly serve with an accused again.

In terms of post-trial procedures, *United States v. Jones*[5] likely was the court's most important ruling during its 2005 term. In *Jones*, the CAAF granted substantial relief to an accused who demonstrated difficulty in securing civilian employment due to the lengthy delay in the government's processing of his post-trial matters. In rendering its decision, the court found denial of due process resulted from the delay.[6] The CAAF concluded that Jones suffered as a result of the government failing to provide timely post-trial processing and appellate review of his case.[7] Although not a case from the 2005 term, *United States v. Moreno*[8] is also a noteworthy case and is important to mention in the area of post-trial.

Sentencing

Sentencing Evidence

To kick off the discussion of the various "wrong mistakes," an examination of *United States v. Griggs*[9] is certainly an appropriate place to begin. A court-martial panel tried and convicted Senior Airman Griggs of various drug-related offenses.[10] During the presentencing segment of his case, the defense counsel offered six letters with opinions commenting specifically on Grigg's rehabilitative potential in the Air Force as opposed to generally being a productive member of

---

[1] Yogi Berra Quotes, DigitalDreamDoor.com, http://www.digitaldreamdoor.com/pages/quotes/yogiberra.html (last visited Jan. 25, 2006).

[2] 61 M.J. 402 (2005).

[3] MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 1001(b)(5)(D) (2005) [hereinafter MCM].

[4] *Id.* at 409.

[5] 61 M.J. 80 (2005).

[6] *Id*. at 85.

[7] *Id. United States v. Moreno*, issued by the CAAF on 11 May 2006, significantly overshadowed *Jones.*

[8] 63 M.J. 129 (2006).

[9] 61 M.J. 402 (2005).

[10] *Id.* at 403. In accordance with his plea, the court-martial convicted Jones of wrongful use of marijuana. Contrary to his pleas, the court-martial convicted him of wrongful use of methylenedioxymethamphetamine (MDMA), a.k.a. ecstasy, and two specifications of distribution of ecstasy under Art. 112a, Uniform Code of Military Justice (UCMJ). *Id.*

society.[11] The government counsel objected to the letters on the grounds that the statements were recommendations for retention and would confuse the members.[12] The military judge sustained the trial counsel's objection. Eventually, the defense counsel conceded the issue, agreeing with the military judge that RCM 1001(b)(5)(D) applied to the defense as well as the prosecution.[13] Accordingly, the military judge ordered the following underscored language redacted from the defense exhibits:

> I have no doubt SrA Griggs will continue to be an asset to the mission of the squadron and Air Force. I can honestly say his future is not in my hands, but I ask the panel to have compassion and SrA Griggs is given a second chance to be a productive member of the United States Air Force.
>
> I would still like to be able to work with SrA Griggs. In fact I have two airmen I'd gladly trade just to keep him. I feel the Air Force could use more airmen like him. Even with the stress of a pending court-martial he has remained dedicated, motivated, and faithful till [sic] the end.
>
> I would not hesitate to have SrA Griggs working for me or with me. I continue to hear, "This is not a one mistake Air Force" so I feel SrA Griggs can learn a valuable lesson from this experience.
>
> I believe strongly that everyone deserves a second chance to prove him or herself. I have no doubt SrA Griggs will continue to be an asset to the mission of the squadron and Air Force. I ask the panel to have compassion and SrA Griggs is given a second chance to be a productive member of the United States Air Force.
>
> I am convinced that he has learned from this experience and can still be of great potential to the United States Air Force . . . . We seem to "eat our young" sometimes and see the only course of action is to toss them out after investing so much time, effort, and money.[14]

The adjudged and approved sentence included reduction to E-1, forfeiture of all pay and allowances, confinement for 150 days, and a bad-conduct discharge.[15] The issue certified by the CAAF on appeal was whether the Air Force Court of Criminal Appeals (AFCCA) prejudicially erred in holding that the military judge did not abuse his discretion in applying RCM 1001(b)(5)(D)[16] to defense sentencing evidence.[17] The CAAF determined that the excluded evidence may have substantially influenced the panel in adjudging the sentence in Grigg's case.[18] Accordingly, CAAF ordered a rehearing. Distinguishing *Griggs* from other cases, the court stated that "the better view is that RCM 1001(b)(5)(D) does not apply to defense mitigation evidence, and specifically does not preclude evidence that a witness would willingly serve with the accused again."[19] The CAAF found this to be consistent with the structure of RCM 1001(b)(5)(D).[20] The CAAF further noted that so-called "retention evidence," such as that offered in this case, is a classic matter in mitigation, which is expressly

---

[11] *Id.* at 406.

[12] *Id.*

[13] *Id.*

[14] *Id.*

[15] *Id.* at 403.

[16] Rule for Court-Martial 1001(b) covers matters to be presented by the prosecution. Rule for Court-Martial 1001(b)(5)(D) covers the scope of a witness's opinion when offering rehabilitative potential evidence. Specifically it states:

> An opinion offered under this rule is limited to whether the accused has rehabilitative potential and the magnitude or quality of any such potential. A witness may not offer an opinion regarding the appropriateness of a punitive discharge or whether the accused should be returned to the accused's unit. *Id.*

MCM, *supra* note 3, R.C.M. 1001(b)(5)(D) (2005).

[17] *Jones*, 61 M.J. at 403.

[18] *Id.* at 410.

[19] *Id.* at 409.

[20] *Id.*

permitted to be presented by the defense.[21] It further cautioned, however, that "if an accused 'opens the door' by bringing witnesses before the court to testify that they want him or her back in the unit, the government is permitted to prove that such evidence is not a consensus view of the command."[22]

For practitioners, although this case seems to be favorable to the defense by allowing retention evidence to be presented as mitigation evidence, if the government is prepared in advance for this evidence, it has the opportunity to present fairly damaging rebuttal evidence, thereby negating the defense's mitigation evidence.[23]

United States v. Gorence[24] is another 2005 sentencing case addressing the extent of permissible questioning by trial counsel. In *Gorence*, the government counsel offered evidence during presentencing from the accused's personnel records reflecting three disciplinary infractions during his seventeen months of military service.[25] During the defense sentencing case, Gorence's mother testified on behalf of her son.[26] At the conclusion of defense counsel's direct examination of the mother, the government conducted no cross examination.[27] The military judge, however, asked the accused's mother several questions regarding whether her son had a substance abuse problem.[28] The government counsel then followed the military judge by asking Gorence's mother a series of questions about whether her son had used marijuana while he was in high school.[29] The defense counsel objected to these questions.[30] The military judge overruled the objection, stating that he was not going to consider her answer for any uncharged misconduct purposes.[31] Gorence's mother went on to state that she believed that Gorence had experimented with marijuana while in high school.[32]

The following issues were presented on appeal: (a) whether the AFCCA improperly conducted its appellate review under Article 66(c), UCMJ,[33] by considering evidence outside the record in violation of *United States v. Holt*,[34] and (b) whether the military judge abused his discretion by permitting the trial counsel to elicit information from the accused's mother concerning Gorence's pre-service drug use to "rebut" matters to which the military judge himself "opened the door."[35] The CAAF distinguished *Gorence* from *Holt*. While *Holt* held that a court of criminal appeals "may not resurrect

---

[21] *Id.*

[22] *Id.* at 410 (citing United States v. Aurich, 31 M.J. 95, 96-97 (1990)).

[23] *See* United States v. Barrier, 61 M.J. 482, 483 (2005).

[24] 61 M.J. 171 (2005).

[25] *Id.* at 172.

[26] *Id.*

[27] *Id.*

[28] *Id.*

[29] *Id.*

[30] *Id.* at 173.

[31] *Id.*

[32] *Id.*

[33] UCMJ art. 66 deals with review by the Service Courts of Criminal Appeals. Specifically, Article 66(c) states:

> In a case referred to it, the Court of Criminal Appeals may act only with respect to the findings and sentence as approved by the convening authority. It may affirm only such findings of guilty and the sentence or such part or amount of the sentence, as it finds correct in law and fact and determines, on the basis of the entire record, should be approved. In considering the record, it may weigh the evidence, judge the credibility of witnesses, and determine controverted questions of fact, recognizing that the trial court saw and heard the witnesses.

UCMJ art. 66 (2005).

[34] 58 M.J. 227 (2003). The CAAF has held that Article 66(c) limits the courts of criminal appeals "to a review of the facts, testimony, and evidence presented at the trial, and precludes a Court of Criminal Appeals from considering 'extra-record' matters when making determinations of guilt, innocence, and sentence appropriateness." United States v. Mason, 45 M.J. 483, 484 (1997) (citing United States v. Bethea, 46 C.M.R. 223, 224-25 (C.M.A. 1973)); *see also* United States v. Reed, 54 M.J. 37, 43 (2000); United States v. Dykes, 38 M.J. 270, 272 (C.M.A. 1993).

[35] *Gorence*, 61 M.J. at 171.

excluded evidence during appellate review under Art. 66(c),"[36] here the court of criminal appeals "did not resurrect any *excluded* evidence, [but] rather . . . found an alternative foundational basis for the rebuttal evidence *considered* by the military judge."[37] The CAAF also noted that, if there was error, it was harmless.[38] In reaching its decision, the court focused on the fact that Gorence was tried by military judge alone and that the judge did not give significant weight to the accused's mother's testimony that Gorence used drugs in high school.[39] Moreover, the military judge stated that he was not going to "impose any other punishment for experimental use in high school."[40]

In contrast, *United States v. McNutt*[41] was a case not of saying the wrong thing on the record, but of saying the wrong thing off the record. Following McNutt's trial, the military judge met with defense and government counsel to conduct a "Bridging the Gap" session.[42] During this meeting, the military judge explained to both counsel that he sentenced the accused to seventy days of confinement rather than sixty days because he was aware of the correctional facilities' policy of granting five days of confinement credit per month for sentences that include less than twelve months of confinement.[43] The Army Court of Criminal Appeals (ACCA) affirmed the sentence on the basis that the trial "judge's knowledge about the Army policy was extraneous but properly within the common knowledge of a military judge and that Military Rule of Evidence 606(b) . . . did not provide a basis for impeaching McNutt's sentence."[44]

On appeal, the issue before the CAAF was whether the military judge erred in adjudging the sentence by "considering the collateral administrative effect of the Army regional correctional facilities' policy of granting a service member five days confinement credit per month for sentences which include less than twelve months of confinement . . . ."[45] The court determined that the military judge improperly considered the collateral administrative effect of the "good-time" policy in determining McNutt's sentence and, as a result, this error prejudiced McNutt.[46] In reaching this conclusion, the court restated the longstanding rule that "[c]ourts-martial [are] to concern themselves with the appropriateness of a particular sentence for an accused and his offense, without regard to the collateral administrative effects of the penalty under consideration."[47] In a judge-alone case, as at a trial with members, "collateral consequences are not germane."[48]

The CAAF considered the military judge's statements and concluded that he improperly lengthened McNutt's sentence by ten days.[49] Having found substantial prejudice under UCMJ art. 59(a), the CAAF returned the case to ACCA to determine an appropriate remedy.[50]

---

[36] *Id.* at 174 (quoting *Holt*, 58 M.J. at 232-33).

[37] *Id.* (emphasis added).

[38] *Id.*

[39] *Id.*

[40] *Id.*

[41] 62 M.J. 16 (2005).

[42] *Id.* at 17. "Bridging the Gap" sessions are informal post-trial meetings intended to be used as professional and skill development for trial and defense counsel. *See* United States v. Copening, 34 M.J. 28, 29 n.* (C.M.A. 1992).

[43] *McNutt*, 62 M.J. at 17.

[44] *Id.* Military Rule of Evidence 606(b) protexts the confidentiality of panel deliberations. *See* MCM, *supra* note 3, MIL. R. EVID. 606(b)..

[45] *Id.*

[46] *Id.*

[47] *Id.* at 19 (quoting United States v. Griffin, 25 M.J. 423, 424 (C.M.A. 1988)).

[48] *Id.*

[49] *Id.* at 23.

[50] *Id.* UCMJ art. 66 defines the service courts' power to order remedies. *See* UCMJ art. 66 (2005).

Accused's Unsworn Statement

Rule for Courts-Martial 1001(c)(2) permits an accused to testify, make an unsworn statement, or both in extenuation, mitigation, or to rebut matters presented by the prosecution, or for all purposes whether or not the accused testified prior to findings.[51] An accused's unsworn statement is an area of sentencing that is almost, but not completely, without bounds, the accused can say just about anything he wants to say. However, if an accused talks about matters in his unsworn statement that are otherwise inadmissible, the military judge, if he finds it necessary, can address such comments with an appropriate instruction to members. Likewise, if an accused makes a statement of fact that is not accurate, the government may rebut that portion of the accused's unsworn statement with extrinsic evidence. An accused's right to make an unsworn statement "is a valuable right . . . [that has] long been recognized by military custom."[52] However, the right of an accused "to make a statement in allocution is not wholly unfettered."[53]

During the 2005 term, the CAAF heard three cases dealing with an accused's allocution rights.[54] In *United States v. Barrier*, a panel of officers sentenced Barrier, pursuant to his pleas, for two specifications of drug use in violation of Article 112a, UCMJ.[55] During the presentencing phase, Senior Airman Barrier provided an unsworn statement. A portion of that statement contained the following language:

> 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.[56]

Following Barrier's unsworn statement, and over defense counsel's objection, the military judge issued what is known as the *Friedmann* instruction[57] to the panel members.[58] In essence, the military judge instructed the members that they were not to rely on the disposition that occurred in other cases in determining what should be an appropriate punishment for the accused in the present case.[59]

---

[51] Rule for Court-Martial 1001(c)(2) provides:

> (A) *In general.* The accused may testify, make an unsworn statement, or both in extenuation, in mitigation or to rebut matters presented by the prosecution, or for all three purposes whether or not the accused testified prior to findings. The accused may limit such testimony or statement to any one or more of the specifications of which the accused has been found guilty. This subsection does not permit the filing of an affidavit of the accused.
>
> (B) *Testimony of the accused* . The accused may give sworn oral testimony under this paragraph and shall be subject to cross-examination concerning it by the trial counsel or examination on it by the court-martial, or both.
>
> (C) *Unsworn statement* . The accused may make an unsworn statement and may not be cross-examined by the trial counsel upon it or examined upon it by the court-martial. The prosecution may, however, rebut any statements of facts therein. The unsworn statement may be oral, written, or both, and may be made by the accused, by counsel, or both.

MCM, *supra* note 3, R.C.M. 1001(c)(2).

[52] United States v. Rosato, 32 M.J. 93, 96 (1991) (citations omitted).

[53] United States v. Grill, 48 M.J. 131, 133 (1998).

[54] United States v. Johnson, 62 M.J. 31 (2005), United States v. Sowell, 62 M.J. 150 (2005), and United States v. Barrier, 61 M.J. 482 (2005).

[55] *Barrier*, 61 M.J. at 482-83.

[56] *Id.* at 483. During rebuttal, the trial counsel smartly presented the promulgating order from Senior Airman (SrA) Watson's case showing that SrA Watson had actually received four months confinement, forfeitures, reduction to E-1, and a bad-conduct discharge. *Id.*

[57] The *Friedmann* instruction comes from the case of *United States v. Friedmann*, 53 M.J. 800 (A.F. Ct. Crim. App. 2000), wherein the accused, during his unsworn statement, told the members that two of the four airmen who pled guilty to drug use with him received nonjudicial punishment and administrative discharges. He then asked the members to allow his commander to administratively discharge him in lieu of adjudging a punitive discharge. In response, the military judge instructed the members to disregard the possibility that the accused might be administratively discharged and to disregard the sentences given to others in related cases. United States v. Friedmann, 53 M.J. 800 (A.F. Ct. Crim. App. 2000).

[58] *Barrier*, 61 M.J. at 483.

[59] *Id.* The full text of the instruction pertaining to this issue in the *Barrier* case is as follows:

On appeal, Barrier contended that the military judge's instruction "interfered with his right of allocution."[60] The CAAF held that the judge's instruction correctly applied the longstanding tenet set forth in *United States v. Mamaluy*, namely that "sentences in other cases cannot be given to court-martial members for comparative purposes."[61] Such evidence is neither extenuation, mitigation, nor rebuttal evidence within the meaning of RCM 1001(c). The CAAF concluded that the military judge acted within his discretion by instructing the panel members that the comparative sentencing information offered during the accused's unsworn statement was irrelevant and should be disregarded.[62]

In *United States v. Sowell*,[63] a court-martial panel tried Sowell and found him guilty of conspiracy to commit larceny and larceny of two government computers in violation of Articles 81 and 121, UCMJ, respectively.[64] Two of Sowell's three co-conspirators were not court-martialed but were subsequently administratively discharged from the service.[65] The third co-conspirator, Fire Controlman Third Class (FC3) Elliott, was court-martialed and acquitted of identical charges prior to Sowell's court proceedings.[66] Fire Controlman Third Class Elliott testified on Sowell's behalf at trial and stated that she and the accused never talked about stealing computers, she herself never took any computers, and she never saw the accused take any computers.[67] Following FC3 Elliott's testimony, a panel member asked her, "what legal actions have been taken/or are pending against you for this incident?"[68] The trial counsel objected to the question based on relevance, and the military judge sustained the objection.[69]

> 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.

Id.

[60] *Id.*

[61] *Id.* at 485 (quoting United States v. Mamaluy, 10 C.M.R. 102, 106 (C.M.A. 1959)).

[62] *Id.* at 485-86.

[63] 62 M.J. 150 (2005).

[64] *Id.* at 151.

[65] *Id.*

[66] *Id.*

[67] *Id.*

[68] *Id.*

[69] *Id.*

During her findings argument, the trial counsel challenged the credibility of FC3 Elliott's testimony.[70] She described how FC3 Elliot, the co-conspirator, had the biggest motive to lie.[71] Defense counsel made no objection to these comments.[72] In an Article 39(a) session,[73] before the trial's pre-sentencing phase, the trial counsel requested that the military judge instruct the defense not to disclose evidence of FC3 Elliott's acquittal to the panel members.[74] Pointing to *United States v. Grill*,[75] the defense counsel responded that if his client wished to disclose such evidence in her unsworn statement, it was her right to do so.[76] The military judge granted the government's motion, stating that referring to Elliott's acquittal would be "'irrelevant and direct impeachment of the verdict of the members . . . .'"[77]

On appeal, the United States Navy-Marine Corps Court of Criminal Appeals (NMCCA) reversed and remanded for a rehearing on the sentence.[78] Dissatisfied with NMCCA's decision, the government sought and obtained an en banc rehearing.[79] Before the full NMCCA panel, a four-to-three majority reversed the previous panel's decision and reinstated the military judge's ruling and the accused's sentence.[80] The issue certified before the CAAF was whether the NMCCA erred when it held that the military judge did not abuse his discretion by restricting the accused's unsworn statement, not allowing her to state that the co-conspirator had been acquitted.[81]

The CAAF reversed NMCCA's decision as to the sentence.[82] Following *Grill*, the court restated that although the right of allocution is "*generally* considered unrestricted," it is not "*wholly* unrestricted."[83] The court distinguished *Sowell*, however, finding that the "tenor of trial counsel's argument on findings opened the door" to proper rebuttal during Sowell's unsworn statement on sentencing.[84] The court focused on the fact that the trial counsel was aware of FC3 Elliott's acquittal the previous week and FC3 Elliott's status was already an issue with at least one panel member.[85] In CAAF's view, the trial counsel's references to FC3 Elliott as a co-conspirator implied that FC3 Elliott was guilty of the same offense as Sowell and therefore had a motive to lie.[86] Accordingly, "Appellant should have been permitted an opportunity to fairly respond to the implications of trial counsel's argument on findings."[87] The CAAF found that the military judge's error in not permitting Sowell to reference Elliot's acquittal could have had a "'substantial influence' on the sentence adjudged."[88]

---

[70] *Id.*

[71] *Id.*

[72] *Id.*

[73] UCMJ art. 39(a) (2005).

[74] *Sowell*, 62 M.J. at 151.

[75] 48 M.J. 131 (1998) (upholding an accused's right to present an unsworn statement and recognizing such right as "broadly construed for decades").

[76] *Sowell*, 62 M.J. at 151.

[77] *Id.*

[78] United States v. Sowell, 59 M.J. 552 (N-M. Ct. Crim. App. 2003).

[79] *Sowell*, 62 M.J. at 151.

[80] *Id.* (ruling that any mention of Elliot's acquittal would have challenged the members' decision on findings, and was thus not relevant).

[81] *Id.*

[82] *Id.* at 153.

[83] *Id.* at 152 (quoting United States v. Grill, 48 M.J. 131, 132 (1998)).

[84] *Id.* at 153.

[85] *Id.* at 152, 153.

[86] *Id.* at 152.

[87] *Id.* at 153.

[88] *Id.* (quoting United States v. Pablo, 53 M.J. 356, 359 (2000)).

United States v. Johnson was yet another unsworn statement case decided by CAAF this term.[89] *Johnson* involved two friends, both Air Force staff sergeants, who were traveling in separate vehicles from Oklahoma City to Monroe, Louisiana.[90] While traveling through east Texas, local law enforcement stopped Staff Sergeant (SSgt) Johnson for a routine traffic violation.[91] During the stop, SSgt Johnson consented to a search of his vehicle.[92] The search revealed that SSgt Johnson was transporting a box containing marijuana.[93] Contrary to his pleas, a general court-martial composed of members convicted the accused of wrongful possession of marijuana and possession with intent to distribute in violation of Article 112a, UCMJ.[94]

Prior to his court-martial, SSgt Johnson took a privately administered polygraph examination arranged by his defense counsel.[95] The private polygrapher concluded that the accused was not deceptive when he denied knowing that he transported the marijuana.[96] During the presentencing phase of the court-martial, SSgt Johnson sought to refer to his "exculpatory" polygraph test during his unsworn statement.[97] The accused's proposed unsworn statement included the following language:

> Never in my wildest dreams did I ever once imagine that my life would end here in your hands especially after I took and passed a polygraph. I was asked point blank if I knew there was marijuana in the box to which I responded no. The polygrapher found no deception with my answers. I was hopeful at that point based on the fact that I did pass, I would not face charges again; however, that was not to be and now my future is in your hands.[98]

The military judge ruled that a reference by the accused to his polygraph test results were inadmissible.[99]

On appeal, the CAAF looked at whether the military judge erred by directing the accused not to discuss a polygraph examination during his unsworn statement when a limiting instruction to the members would have been sufficient to address the military judge's concerns while still preserving SSgt Johnson's allocution rights.[100] The court ruled that the military judge did not err in preventing SSgt Johnson from discussing his polygraph results during his unsworn statement.[101] Supporting its decision, the court found "that an accused is entitled to vigorously contest his innocence on findings, but is not entitled to do so on . . . sentencing."[102] Staff Sergeant Johnson's statement that "[t]he polygrapher found no deception with my answers. I was hopeful at that point that based on the fact that I did pass, I would not face charges again[,]" could not reasonably have been offered for any reason other than to suggest to the members that their findings were wrong.[103]

---

[89] 62 M.J. 31 (2005).

[90] *Id.* at 32.

[91] *Id.* at 33.

[92] *Id.*

[93] *Id.*

[94] *Id.* at 32.

[95] *Id.* at 36.

[96] *Id.*

[97] *Id.*

[98] *Id.* at 36-37.

[99] *Id.* at 37. Specifically, "the military judge ruled that polygraph test results were not permitted under either Military Rule of Evidence (MRE) 707 or RCM 1001(c). The military judge further explained that such information would impeach the verdict and thus precluded the accused from including any reference to the polygraph test results in his unsworn statement." *Id.* Military Rule of Evidence 707(a) specifically states, "notwithstanding any other provision of law, the results of a polygraph examination, the opinion of a polygraph examiner, or any reference to an offer to take, failure to take, or taking of a polygraph examination, shall not be admitted into evidence." MCM, *supra* note 3, MIL. R. EVID. 707a.

[100] United States v. Johnson, 62 M.J. 31, 32 (2005).

[101] *Id.* at 37.

[102] *Id.*

[103] *Id.*

Furthermore, the court was not persuaded that exculpatory polygraph information qualifies as extenuation, mitigation, or rebuttal under RCM 1001(c).[104]

Post-Trial

In addition to the ever-large number of unpublished SJAR error cases, there were several post-trial processing cases as well. The most significant post-trial case decided during the 2005 term was undoubtedly *United States v. Jones*.[105] The accused, a Marine lance corporal (LCpl), pleaded guilty to two specifications of unauthorized absence and two specifications of missing movement by design in violation of Articles 86 and 87, UCMJ.[106] The military judge sentenced LCpl Jones to reduction to E-1, confinement for forty-five days, and a bad-conduct discharge.[107] The guilty plea proceedings lasted only fifty-five minutes and resulted in a short, thirty-seven page record of trial (ROT).[108] However, it took over six months (187 days)[109] for the record of trial to be transcribed, authenticated, and served on LCpl Jones's defense counsel.[110] The SJAR's post-trial recommendation was not prepared until 253 days after sentencing.[111] The SJAR was served on defense counsel nine days later.[112] The convening authority took action on the 289th day.[113] The record of trial was not received at the NMCCA until 9 January 2001 (363 days).[114]

During this delay, Jones was released from custody and had applied for a position as a truck driver with U.S. Xpress.[115] While on appellate leave in May and June of 2000, Jones completed a course of study at a truck driver's school and received a truck driver's license.[116] He submitted to the NMCCA his own declaration and declarations from three officials of a potential employer stating that he would have been considered for employment or actually hired if he had possessed a Certificate of Release or Discharge from Active Duty, DD Form 214, even if his discharge was less than honorable.[117] The employer was aware of Jones's court martial and conviction.[118] The government presented no information to rebut any of these declarations.[119]

---

[104] *Id.*

[105] 61 M.J. 80 (2005).

[106] *Id.* at 81.

[107] *Id.*

[108] *Id.*

[109] The number in this and subsequent notes refers to the number of days from the conclusion of Jones's trial.

[110] *Jones*, 61 M.J. at 81.

[111] *Id.*

[112] *Id.*

[113] *Id.*

[114] *Id.*

[115] *Id.* at 82.

[116] *Id.*

[117] Specifically, the accused submitted three declarations from various personnel associated with U.S. Xpress Enterprises. *Id.* at 82.

A position with U.S. Xpress would have produced an average salary of $ 3,500 to $ 4,000 per month, in addition to substantial employee benefits. When Jones did not obtain a position with U.S. Xpress, he obtained alternative employment as a delivery truck driver earning about $7 to $10 per hour working part-time or through temporary agencies. *Id.*

[118] *Id.*

[119] *Id.*

Despite calling these delays "excessive," the NMCCA found no prejudice.[120] On appeal, the issue before the CAAF was whether the excessive post-trial delay prejudiced the accused.[121] The CAAF held that Jones's unrebutted declarations were sufficient to demonstrate ongoing prejudice.[122]

In reaching its decision, the court examined the following four factors from the speedy trial analysis of *Barker v. Wingo*[123] to determine whether LCpl Jones's due process rights were violated: (1) the length of the delay; (2) the reasons for the delay; (3) the accused's assertion of the right to a timely appeal; and (4) prejudice to the accused.[124] When analyzing these four factors, the court looks at the length of delay first. The length of delay serves as a "triggering mechanism."[125] "'[U]nless there is a period of delay that appears, on its face, to be unreasonable under the circumstances, there is no necessity for inquiry into other factors that go into the balance.'"[126] The CAAF quickly determined that the post-trial delay in the present case was "facially unreasonable," and therefore examined the remaining three factors.[127] The court found that Jones demonstrated ongoing actual prejudice by showing that his ability to have his employment application considered was hindered due to the lengthy post-trial delay.[128] The CAAF concluded that setting aside the bad-conduct discharge was a remedy proportionate to the prejudice that the unreasonable post-trial delay had caused.[129] Whether the accused would have been offered the job was not relevant in the court's decision; however, the employer's requirement for potential employee's to submit a DD Form 214 and the accused's lack of a DD Form 214 were relevant.[130] Moreover, the government presented no evidence to counter the four declarations submitted by LCpl Jones.[131]

New Post-Trial Processing Standards

Though not a case from the 2005 term, *United States v. Moreno*[132] is so significant in the post-trial arena that it warrants special mention in this article. The CAAF issued *Moreno* on 11 May 2006. In addition to hearing an implied bias issue, the CAAF addressed whether the accused's due process right to timely review of his appeal was denied.[133] Moreno pleaded not guilty to rape in violation of Article 120, UCMJ.[134] The panel members convicted Moreno and sentenced him to reduction to E-1, forfeiture of all pay and allowances, confinement for six years, and a dishonorable discharge.[135]

On appeal, Corporal Moreno asserted that he was denied due process because there was unreasonable delay in the 1,688 days between the end of his trial and the date that the NMCCA rendered its decision in the case.[136] The following is a chronology of certain key post-trial events:

---

[120] *Id.* at 83.

[121] *Id.* at 84.

[122] *Id.* at 85.

[123] 407 U.S. 514, 530 (1972).

[124] *Jones*, 61 M.J. at 83 (citing Toohey v. United States, 60 M.J. 100, 102 (2004) (citing *Barker*, 407 U.S. at 530)).

[125] *Id*.

[126] *Id.* (citing *Toohey*, 60 M.J. at 102). For clarification as to what now constitutes a presumption of unreasonable delay, see the discussion of *United States v. Moreno*, *infra*.

[127] *Id.*

[128] *Id.* at 84.

[129] *Id.* at 86.

[130] *Id.* at 85.

[131] *Id.*

[132] 63 M.J. 129 (2006).

[133] *Id*. at 132.

[134] *Id.*

[135] *Id.*

[136] *Id.*

- Accused sentenced on 29 September 1999.
- 746-page ROT authenticated on 4 May 2000 (208 days).
- Convening authority took action on 31 January 2001 (490 days).
- Case docketed at NMCCA (566 days).
- Eighteen defense motions for enlargement of time granted before defense brief filed on 20 March 2003 (1,268 days)[137]
- Government filed its brief on 29 October 2003 (1,491 days)
- NMCCA issued unpublished decision on 13 May 2004 (1,688 days).[138]

The CAAF has recognized that servicemembers convicted of crimes enjoy a due process right to a timely review and appeal of their courts-martial convictions.[139] As in *United States v. Jones*,[140] the CAAF applied the four *Barker v. Wingo* factors in *Moreno*.[141] In looking at the "prejudice" factor, the court will assess whether or not an accused has been prejudiced by looking at three interests: "(1) prevention of oppressive incarceration pending appeals; (2) minimization of anxiety and concern of those convicted awaiting the outcome of their appeals; and (3) limitation of the possibility that a convicted person's grounds for appeal, and his or her defenses in case of reversal and retrial, might be impaired."[142]

In examining the *Barker* factors, the court concluded that due to the "unreasonably lengthy delay, the lack of any constitutionally justifiable reasons for the delay, and the prejudice suffered by Corporal Moreno as a result of oppressive incarceration and anxiety," he was denied his due process right to speedy review and appeal.[143] Before addressing appropriate relief in his case, the court laid out specific post-trial processing standards.

In an effort to curb excessive delay in the appellate process[144] and remedy those instances where there are unreasonable delay and due process violations, the CAAF fashioned the following standards. For those cases completed more than thirty days after the date of the court's opinion (for post-*Moreno* cases), the CAAF will apply a presumption of unreasonable delay that will trigger the *Barker* four-factor analysis if the following three factors are present:

(1) the action of the convening authority is not taken within 120 days of the completion of the trial;

(2) the record of trial is not docketed by the service Court of Criminal Appeals within 30 days of the convening authority's action; or

(3) appellate review is not completed and a decision is not rendered within 18 months of docketing the case before the Court of Criminal Appeals.[145]

In terms of relief, the CAAF set aside the findings and sentence because of another issue in the case and ruled that "a rehearing may be ordered."[146] Specifically addressing relief for the post-trial delay, the court held that if a rehearing results "in a conviction and sentence, the convening authority may approve no portion of the sentence exceeding a punitive discharge."[147]

---

[137] A motion for enlargement is a thirty day extension of time to file an appellate brief.

[138] *Moreno*, 63 M.J. at 133.

[139] Toohey v. United States, 60 M.J. 100, 101 (2004).

[140] United States v. Jones, 61 M.J. 80, 83 (2005).

[141] *Moreno*, 63 M.J. at 135. As mentioned in the *Jones* discussion *supra*, the four *Barker v. Wingo* factors are: (1) the length of the delay; (2) the reasons for the delay; (3) the accused's assertion of the right to a timely appeal; and (4) prejudice to the accused.

[142] *Id.* at 138-39 (citations omitted).

[143] *Id.* at 141.

[144] "Moreno's case is not an isolated case that involves excessive post-trial delay issues." *Id.* at 142.

[145] *Id.*

[146] *Id.* at 144.

[147] *Id.*

Conclusion

Although there were some key decisions handed down under the sentencing heading, they were no doubt overshadowed this year by these post-trial cases. Military justice practitioners will feel the impact of both *Jones* and *Moreno*. Exactly what impact it will have remains to be seen. Undoubtedly, there will be significant discussion pertaining to *Moreno* over the course of the year as SJA offices look for ways to cut post-trial processing times on pre-*Moreno* cases, while closely monitoring the clock on post-*Moreno* cases. Additionally, the military services may seek to make policy adjustments, in an effort to deal with post-trial processing, backlogs, and appellate review.

Still Waters Run Deep? The Year in Unlawful Command Influence

LTC Patricia A. Ham
Professor and Chair, Criminal Law Department
The Judge Advocate General's School
Charlottesville, Virginia

"*Smooth runs the water where the brook is deep;*
And in his simple show he harbours treason.
The fox barks not when he would steal the lamb.
No, no, my sovereign, Gloucester is a man
Unsounded yet, and full of deep deceit."[1]

* * *

"*We have deep depth.*"[2]

Introduction

Unlawful command influence is "the improper use, or perception of use, of superior authority to interfere with the court-martial process."[3] It is the "ultimate threat to the impartiality of military criminal law."[4] Congress attempted to eradicate this pernicious evil when it enacted the Uniform Code of Military Justice (UCMJ) in 1951, and, in particular, when it prohibited unlawful command influence in Article 37 of the Code.[5] Article 37 is not limited to unlawful command influence by commanders. Rather, it applies to all those acting with the "mantle of command authority," such as staff judge advocates and others who speak on behalf of the convening authority.[6]

Congress directed other provisions of the UCMJ against the problem of command influence, as well. For example, Article 6, UCMJ, requires convening authorities "at all times [to] communicate directly with their Staff Judge Advocates in matters of military justice"[7] and also requires The Judge Advocate General or "senior members of his staff . . . [to] make frequent inspection in the field in supervision of the administration of military justice."[8] The UCMJ created the Court of Appeals for the Armed Forces' (CAAF) predecessor, the Court of Military Appeals (COMA), which was filled with civilian

---

[1] WILLIAM SHAKESPEARE, KING HENRY VI, pt. II, act 3, sc. 1.

[2] Yogi Berra, *Yogi Berra Quotes*, BRAINYQUOTE, http://www.brainyquote.com/quotes/authors/y/yogi_berra.html (last visited June 20, 2006).

[3] 2 FRANCIS A. GILLIGAN & FREDRIC I LEDERER, COURT-MARTIAL PROCEDURE § 18-28.00 (2d ed. 1999).

[4] *Id*. § 15-90.00.

[5] *Id*. Article 37, UCMJ, states, in pertinent part:

> Art. 37. Unlawfully influencing action of court
>
> (a) No [convening] authority, nor any commanding officer, may censure, reprimand, or admonish the court or any member, military judge, or counsel thereof, with respect to the findings or sentence adjudged by the court, or with respect to any other exercise of its or his functions in the conduct of the proceeding. No person subject to this chapter may attempt to coerce or, by any unauthorized means, influence the action of a court-martial or any other military tribunal or any member thereof, in reaching the findings or sentence in any case, or the action of any convening, approving, or reviewing authority with respect to his judicial acts .

10 U.S.C.S. § 837(a) (LEXIS 2005). While not punitive, violations of Article 37 can be enforced through the provisions of Article 98, UCMJ, which states, in pertinent part, that "Any person . . . who knowingly and intentionally fails to enforce or comply with any provision of this chapter regulating the proceedings before, during, or after trail of an accused, shall be punished as a court-martial may direct." UCMJ art. 98(b) (2005).

[6] United States v. Stombaugh, 40 M.J. 208, 211 (C.M.A. 1994); *see* United States v. Kitts, 23 M.J. 105, 108 (C.M.A. 1986) ("A staff judge advocate generally acts with mantle of command authority.").

[7] UCMJ art. 6(b).

[8] *Id*. art. 6(a). Judge advocates commonly refer to these inspections as "Article 6 visits."

judges, to "erect a further bulwark against impermissible command influence."[9] It is not an exaggeration to state that the central driving force behind Congress's enactment of the UCMJ, including many of its cornerstone provisions, was an attempt to eliminate the improper influence of command authority over the court-martial process.

With that history as a backdrop, the 2004-2005 term of court marks the first time since the inception of the annual *Military Justice Symposium* eleven years ago[10] that the CAAF did not issue any opinions addressing unlawful command influence. There were, however, some notable decisions from the service courts. In addition, there are cases involving unlawful command influences pending decision by the CAAF in the 2005-2006 term that ends on 30 September 2006.

The CAAF's lack of activity this past term should not cause practitioners to conclude that the military justice system has "solved the problem" of unlawful command influence. It remains the "mortal enemy of military justice"[11]—the single most dangerous assault on the fairness, and appearance of fairness, of the system. Due to the preeminent role of the commander in the military justice system,—he decides what cases go to trial,[12] selects the members of the panel who decide guilt or innocence and, where necessary, an appropriate sentence,[13] and he acts on cases after trial by bestowing mercy if he so chooses[14]—improper use of command authority to interfere with the court-martial process potentially impacts servicemembers' most cherished fundamental rights. Depending on the form of interference involved in a particular case, unlawful command influence could affect the presumption of innocence, the right to a fair trial embodied in the Due Process Clause of the Fifth Amendment, the right to present a defense, the right to compulsory process of witnesses, and the right to effective assistance of counsel guaranteed by the Sixth Amendment, or the right to a fair and impartial panel guaranteed by Article 25 of the UCMJ.[15] Simply stated, unlawful command influence turns "military justice" into an oxymoron.

This article discusses three published cases the service courts of criminal appeals issued during the 2004-2005 term. The cases deal with unlawful command influence allegations in court member selection, improper arguments of trial counsel, and inappropriate attempts by the staff judge advocate and trial counsel to cause a military judge to recuse herself. All three cases concern allegations that participants in the military justice system *other than commanders* attempted either directly or indirectly tried to manipulate the process.

This article then discusses a series of cases alleging that commanders' intemperate remarks constituted unlawful command influence. The Navy-Marine Court of Criminal Appeals (NMCCA) was concerned enough about this apparently recurring issue that it commented on it in one of the cases.[16] Despite its obvious concern, the court did not publish any of these opinions, so the holdings do not have precedential value.[17] They nonetheless have merit as both a warning and a reminder to judge advocates to remain constantly vigilant and proactive in this critical area.

---

[9] *See* United States v. Thomas, 22 M.J. 388, 393 (C.M.A. 1986) (citing *A Bill to Unify, Consolidate, Revise, and Codify the Articles of War, the Articles for the Government of the Navy, and the Disciplinary Laws of the Coast Guard, and to Enact and Establish a Uniform Code of Military Justice: Hearing on H.R. 2498 Before a Subcomm. Of the House Comm. On Armed Services*, 81st Cong., 1st Sess. 608 (1949)). *See generally* Patricia A. Ham, *Revitalizing the Last Sentinel: The Year in Unlawful Command Influence*, ARMY LAW., May 2005, at 1.

[10] Colonel Larry Morris, Chair of the Criminal Law Department from 1995-98, originated the *Military Justice Symposium* in March 1996. *The Army Lawyer* has published an annual review of criminal law cases every spring since that inception.

[11] United States v. Thomas, 22 M.J. 388, 393 (C.M.A. 1986) (citations omitted).

[12] *See* UCMJ art. 22-24; MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 601 (2005) [hereinafter MCM].

[13] *See* UCMJ art. 25.

[14] *See id.* art. 60; MCM, *supra* note 12, R.C.M. 1107.

[15] *Thomas*, 22 M.J. at 393.

[16] United States v. Fortune, No. 200300779, 2005 CCA LEXIS 119, *12 (N-M. Ct. Crim. App. Apr. 13, 2005) (unpublished). See *infra* notes 136-145, and accompanying text for a full discussion of the decision.

[17] It is important to note that unreported or unpublished decisions issued on or after 1 January 2007 can be cited in federal courts of appeal. Joseph P. Beckman, *Appellate Procedure: Supreme Court Approves Modified Rule on Unpublished Opinions*, July 2006, http://discussions.abanet.org/litigation/mo/Premium-lt/columns/litigationnews/july2006/0706_article_unpubopinion.html.

Unlawful Command Influence in Court Member Selection

Servicemembers are not entitled to trial by jury nor are they entitled to a representative cross-section of the military community, a jury of their peers, or a jury that is randomly selected, all of which are contrary to the rights guaranteed to civilian citizens by the Sixth Amendment.[18] Instead, servicemembers have a right to a fair and impartial panel under Article 25, UCMJ.[19] This right is "the cornerstone of the military justice system."[20] The convening authority employs the criteria Congress set forth in Article 25 to select the members of the court-martial panel.[21]

A convening authority may not "stack" a court-martial to achieve a desired result.[22] "Improper court stacking may occur by inclusion or exclusion."[23] "Court-stacking does not deprive the court-martial of jurisdiction, but it is 'a form of unlawful command influence.'"[24] "An element of unlawful court stacking is improper motive. Thus, where the convening authority's motive is benign, systematic inclusion or exclusion may not be improper."[25]

Unlawful command influence in the court-martial panel selection process may also occur when a subordinate stacks the list of panel nominees presented to the convening authority.[26] *United States v. McKinney* involved an allegation against a staff judge advocate advising a convening authority on the methodology of panel selection.[27] Specifically, Staff Sergeant McKinney alleged that unlawful command influence occurred during panel member selection in his general court-martial at Hickam Air Force Base (AFB), Hawaii.[28] Based on flawed pretrial advice that the staff judge advocate drafted under the provisions of Article 34, UCMJ,[29] McKinney contended, inter alia, that the convening authority improperly excluded categories of officers from consideration as panel members and thereby engaged in "court-stacking."[30]

---

[18] United States v. Dowty, 60 M.J. 163, 169 (2004); *see* United States v. Upshaw, 49 M.J. 111, 116 (1998) (Effron, J., dissenting).

[19] *Dowty*, 60 M.J. at 169.

[20] *Id.* (citing United States v. Hilow, 39 M.J. 439, 442 (C.M.A.1991)).

[21] UCMJ art. 25 (2005). The convening authority personally selects the members by determining who, "in his opinion, are best qualified for the duty by reason of age, education, training, experience, length of service, and judicial temperament." *Id*. art. 25(d)(2).

[22] *Upshaw*, 49 M.J. at 113

[23] *Id*. (citing United States v. Smith, 27 M.J. 242 (CMA 1988) (involving female members who were selected because the case involved a sex crime); United States v. McClain, 22 M.J. 124, 126 (C.M.A. 1986) (involving systematic exclusion of junior officers and enlisted members in pay grade E-6 and below to avoid "unusual sentences"); United States v. Daigle, 1 M.J. 139, 140-141 (C.M.A. 1975) (involving the exclusion of lieutenants and warrant officers); *see also* United States v. Yager, 7 M.J. 171, 173 (CMA 1979) (permitting exclusion of soldiers in pay grades E-1 and E-2 as presumptively unqualified under Article 25(d)).

[24] *Upshaw*, 49 M.J. at 113. (citing United States v. Lewis, 46 M.J. 338, 341 (1997) and United States v. Hilow, 32 M.J. 439, 441 (C.M.A. 1991)).

[25] *Id*. (citing *Lewis*, 46 M.J. at 340-41) (finding that a disproportionate number of female members were detailed but no evidence of improper motives); *Smith*, 27 M.J. at 249 (holding that it is not improper to insist that an "important segment of the military community - such as blacks, Hispanics, or women" be included)).

[26] *Upshaw*, 49 M.J. at 113.

[27] 61 M.J. 767 (A.F. Ct. Crim. App. 2005), *rev. denied*, 2005 CAAF LEXIS 1486 (Dec. 20, 2005). Two unpublished Air Force cases concern the same issue and same advice by the staff judge advocate. *See* United States v. Brooks, No. ACM 35420, 2005 CCA LEXIS 277 (A.F. Ct. Crim. App. Aug. 30, 2005) (unpublished); United States v. Carr, No. ACM 35300, 2005 CCA LEXIS 278 (A.F. Ct. Crim. App. Aug. 25, 2005) (unpublished).

[28] A general court-martial composed of officer members convicted Staff Sergeant McKinney, contrary to his pleas, of one specification of damage to non-military property, one specification of larceny, and two specifications of communicating threats, in violation of Articles 109, 121, and 134, UCMJ. *McKinney*, 61 M.J. at 768. Pursuant to his pleas, the court-martial convicted him of one specification of adultery, in violation of Article 134, UCMJ. *Id.* The panel sentenced him to a dishonorable discharge, confinement for six years, forfeiture of all pay and allowances, a contingent fine of $30,000 (additional confinement for one year if fine is not paid), and reduction to the grade of E-1. *Id*. The convening authority approved the adjudged sentence. *Id*.

[29] Article 34, UCMJ, requires that, prior to referring a case to general court-martial, the convening authority must seek binding advice from his staff judge advocate. Article 34 reads, in pertinent part:

> The convening authority may not refer a specification under a charge to a general court-martial for trial unless he has been advised in writing by the staff judge advocate that-
>
> (1) the specification alleges an offense under this chapter;
> (2) the specification is warranted by the evidence indicated in the report of investigation under [Article 32, UCMJ] . . .; and
> (3) a court-martial would have jurisdiction over the accused and the offense.

In addition to the staff judge's advocate's recommendations under Article 34,—that there is jurisdiction over the accused and offense; that there is probable cause to believe that a crime was committed and the accused committed it; and that the specification states an offense[31]—the staff judge advocate's pretrial advice in *McKinney* also contained recommendations to assist the convening authority's panel selection process.[32] After recounting the Article 25, UCMJ, criteria the convening authority must apply to his personal selection of members, the staff judge advocate advised the commander of the following: "At Tab 2 is a listing of officers assigned to Hickam AFB. You may select any of these officers as court-members. *Additionally, I have eliminated officers who would most likely be challenged for cause (i.e., JAGs [Judge Advocates], chaplains, IGs [Inspectors General], or officers in the accused's unit)".*[33] The accused contended that by eliminating JAGs, chaplains, and IGs, "the [staff judge advocate,] and thus the convening authority, raised doubts about the fairness of the panel selection process, which doubts should be resolved in the appellant's favor."[34]

The Air Force court analyzed the issue under the guidelines the CAAF set forth in *United States v. Biagase*.[35] Under *Biagase*, the defense bears the initial burden to present "some evidence" of facts which, if true, "constitute unlawful command influence, and that the alleged unlawful command influence has a logical connection to the court-martial in terms of its potential to cause unfairness in the proceedings."[36]

> Once raised, the burden shifts to the government to show either there was no unlawful command influence or the unlawful command influence will not affect the proceedings, or if raised on appeal, did not affect the proceedings. . . . The government may carry its burden in any one of three ways. First, the government may disprove the predicate facts on which the allegation of unlawful command influence is based. Second, the government can persuade the military judge or the appellate court that the facts do not constitute unlawful command influence. Third, at the trial level, the government can produce evidence proving that the unlawful command influence will not affect the proceedings in this case; on appeal, the government can persuade the appellate court that the unlawful command influence had no prejudicial impact on the court-martial. Regardless of which of the three options the government chooses, its burden of persuasion is the same at trial and on appeal: beyond a reasonable doubt. [37]

Applying this framework, the Air Force court found "no basis for concluding that unlawful command influence occurred."[38] While the court did not endorse the staff judge advocate's advice, it found no improper motive—an element of court-stacking—by him or the convening authority.[39] To the contrary, the staff judge advocate "acted to promote trial efficiency and to 'protect the fairness of the court-martial, rather to improperly influence it.'"[40] The officers the staff judge advocate excluded from the convening authority's selection are those most likely to be removed by challenges for cause or peremptory challenges at trial and "whose presence on a panel might itself raise questions about the fairness and impartiality of the proceedings."[41] Accordingly, McKinney failed to satisfy the first *Biagase* criterion.[42] Even if there was unlawful

---

UCMJ art. 34(a) (2005). The staff judge advocate must also recommend what action the convening authority should take regarding each specification. UCMJ art. 34(b). In contrast to the binding staff judge advocate's advice Article 34(a) mandates, this recommendation is not binding on the convening authority. *Id.*

[30] *McKinney*, 61 M.J. at 768.

[31] *See* UCMJ art. 34(a).

[32] *McKinney*, 61 M.J. at 769.

[33] *Id*. (emphasis added).

[34] *Id*.

[35] 50 M.J. 143 (1999).

[36] *Id*. at 150.

[37] Ham, *supra* note 9, at 3 (footnotes and internal quotations omitted).

[38] *McKinney*, 61 M.J. at 769.

[39] *Id*.

[40] *Id*. at 770 (quoting United States v. Brocks, 55 M.J. 614, 617 (A.F. Ct. Crim. App. 2001), *aff'd*, 58 M.J. 11 (2002)).

[41] *Id*. at 769 (citations omitted).

command influence, the court determined that the proceedings were fair, and the defense lodged no objection to the selection process at trial. Accordingly, the second and third *Biagase* criteria were not met either.[43]

What should practitioners learn from *McKinney*? Unless one's particular service formally excludes categories of personnel from consideration for service as panel members, those personnel are eligible to serve. For example, the court noted in *McKinney* that an Air Force regulation excludes chaplains from consideration.[44] An Army regulation excludes chaplains, medical, dental, and veterinary officers, and IGs from service as panel members and permits nurses and medical specialist corps personnel to serve as members only when nurses or medical specialist corps personnel are "involved in the proceedings."[45] The Navy and Marine Corps have a policy similar to the Air Force policy.[46]

McKinney cited previous cases that disparaged the selection of lawyers and IGs as panel members.[47] Additional caselaw also recommends excluding military police from consideration.[48] Finally, the Air Force court previously upheld excluding members of the accused's own unit from consideration.[49] Despite these prior rulings, *McKinney* "did not endorse" the staff judge advocate's panel selection advice, which apparently relied on those prior decisions.[50] "To the contrary, the convening authority should give appropriate consideration to all categories of members who may legitimately be assigned court-martial duty."[51] *McKinney's* view is that mere judicial disparagement is not enough to per se exclude these personnel from consideration for selection as panel members. Nonetheless, motive is key, and without a nefarious motive to drive a particular result by the exclusions, such exclusions will not result in appellate relief for an accused.

Improper Attempt to Influence Members—Trial Counsel Argument

"The history of military justice is filled with examples of court members attempting to comply with the real or perceived desires of the convening authority (their commander) as to findings or sentence or both."[52] Prior to the UCMJ, the convening authority was not prohibited from actually reprimanding the members if he was unhappy with the findings or sentence in a particular case. These reprimands were known as "skin letters."[53] As a result, "it was customary in many commands to

---

[42] *Id*.

[43] *Id*.

[44] *Id*. at 770 (citing U.S. DEPT OF AIR FORCE, INSTR. 52-101, PLANNING AND ORGANIZING para. 2.1.7 (1 May 1999)).

[45] U.S. DEP'T OF ARMY, REG. 27-10, MILITARY JUSTICE paras. 7-2–7-6 (16 Nov. 2005).

[46] U.S. DEP'T OF NAVY, SEC'Y OF THE NAVY INSTR. 1730.7B, RELIGIOUS MINISTRY SUPPORT WITH THE DEPARTMENT OF THE NAVY (12 Oct. 2000).

[47] *McKinney*, 61 M.J. at 769 (citing United States v. Hedges, 29 C.M.R. 458, 459 (C.M.A. 1960) (selecting lawyers and IGs as panel members creates the "appearance of a hand-picked court")).

[48] United States v. Swagger, 16 M.J. 759, 760 (A.C.M.R. 1983) ("At the risk of being redundant - we say again - individuals assigned to military police duties should not be appointed as members of courts-martial. Those who are the principal law enforcement officers at an installation must not be.").

[49] United States v. Brocks, 55 M.J. 614, 617 (A.F. Ct. Crim. App. 2001), *aff'd*, 58 M.J. 11 (2002) (summary disposition); *see also* United States v. Simpson, 55 M.J. 674, 691-92 (Army Ct. Crim. App. 2001), *aff'd*, 58 M.J. 68 (2003) (absent improper motive, convening authority's deliberate exclusion of personnel assigned to appellant's unit from court-martial selection did not violate Article 25, UCMJ).

[50] *McKinney*, 61 M.J. at 770.

[51] *Id*.

[52] GILLIGAN & LEDERER, *supra*, note 3, § 15-90.00.

[53] *A Bill to Unify, Consolidate, Revise, and Codify the Articles of War, the Articles for the Government of the Navy, and the Disciplinary Laws of the Coast Guard, and to Enact and Establish a Uniform Code of Military Justice: Hearing on H.R. 2498 Before a Subcomm. Of the House Comm. On Armed Services*, 81st Cong. 722, 785 (1949). The legislative history of the UCMJ includes the following example of one such "skin letter" issued to an officer who later testified before Congress about the letter:

> Headquarters __ Corps
> Office of the Commanding General
> APO __, U.S. Army
> 12 May 1945
>
> Subject: In adequate sentence by court

sentence the convicted accused to the maximum to permit the convening authority to do what he wished with the offender,"[54] by the convening authority setting the sentence after trial. By prohibiting improper command influence over the members and court-martial proceedings, Congress sought to ensure that servicemembers could not be "convicted and sentenced by a court-martial which was not free from external influences tending to disturb the exercise of a deliberate and unbiased judgment."[55]

To ensure that the commander's views do not improperly influence the members' deliberations on sentence, trial counsel are prohibited from "purport[ing] to speak for the convening authority or any higher authority, or refer[ring] to the views of such authorities or any policy directive relative to punishment."[56] Failure to object to improper argument waives the issue for appeal in the absence of plain error.[57] Whether the trial counsel presented argument in violation of this prohibition, and thereby engaged in unlawful command influence, was the issue the Air Force Court of Criminal Appeals faced in *United States v. Mallett.*[58]

Pursuant to his pleas, a panel of officers sitting as a general court-martial convicted Airman First Class Mallett of wrongfully using cocaine on divers occasions.[59] The members sentenced Mallett to a bad-conduct discharge, confinement for twelve months, and reduction to E-1.[60] On appeal, Mallet alleged that trial counsel's improper sentencing argument injected unlawful command influence into the proceedings. Specifically, the trial commander referred to "commander's calls" where the commander "would warn us to stay away . . . not to use drugs."[61] After stating that the commander could not impose any particular punishment, but could only send the charges to court-martial, the trial counsel then posited, "what would a commander say to get his unit's attention and say, 'I mean business about drugs,' if he had the authority to be the judge and jury in a case where you are, in essence, the jury deciding this?"[62] Rejecting lesser sentences as not "scary" enough, the trial counsel concluded that a sentence that would "get people's attention" is "18 months [of] confinement and a bad conduct discharge."[63] Trial defense counsel did not object to the argument.

> To: Lt. Col. John P. Oliver, headquarters __
> 1. I have read a summary of the testimony in the case of Private __,Company __, __th Signal Battalion and am not pleased with the outcome. I do not consider the court to have performed its duty.
> 2. The decision of the court is the decision of all its members for which all must be held accountable. It would seem the court undertook to determine whether this man should have been tried by general court rather than a determination of his guilt or innocence from the evidence. Then, after finding him guilty of offenses warranting severe punishment, only a minor sentence was imposed. It is not my intention, when a case is referred to a general court-martial, that any sentence imposed be one which a special court-martial might have given. I desire in the future that this be kept in mind.
>
> _____
> Major General, U.S. Army, Commanding

Id. at 741 (statement of Colonel John P. Oliver, JAG, Reserve, Legislative Counsel of the Reserve Association of America).

[54] *Id*.

[55] United States v. Littrice, 13 C.M.R. 43, 52 (C.M.A. 1953) (command's pretrial orientation of members improperly influenced court-martial, necessitating reversal of findings and sentence).

[56] MCM, *supra* note 12, R.C.M. 1001(g).

[57] *Id*. Unobjected to error may merit relief if there is (1) error that is (2) plain and obvious, that (3) materially prejudices an appellant's substantial rights. United States v. Powell, 49 M.J. 460, 463 (1998).

[58] 61 M.J. 761 (A.F. Ct. Crim. App. 2005).

[59] *Id*. at 762.

[60] *Id*. The convening authority reduced the confinement to eight months but otherwise approved the adjudged sentence. *Id*.

[61] *Id*.

[62] *Id*.

[63] The entire objectionable portion of the trial counsel's argument was set forth in the court's opinion:

> I was trying to think about how could I articulate the need for deterrence and the value of deterrence. How could I paint a picture of this that's not just abstract legal talk? I think back to commander's calls that I've been at where the commander would warn us to stay away, and in as bold terms as they could, not to use drugs. Bad things can happen to you in your career if you do.
>
> You've been at those commander's calls. And you know that you never hear more than that. Why is that? Because the commander

Despite the lack of defense objection, the court held that the trial counsel's comments were improper under Rule for Courts-Martial (RCM) 1001(g) and amounted to plain error.[64] The trial counsel's argument implied that "unnamed commanders" favored the sentence he proposed.[65] "Moreover, the trial counsel cloaked himself with the 'mantle of command authority,' thereby creating the appearance of unlawful command influence."[66] The comments were improper because they brought the views of outside commanders into the courtroom.[67] Further, the argument rendered the proceedings unfair, and the improper argument was the cause of the unfairness.[68] The trial counsel's eleven references to the commander during the argument rendered the error more than "a brief slip of the tongue."[69] Accordingly, Mallett suffered prejudice and was entitled to relief in the form of setting aside the sentence.[70]

The dissent took issue with the majority's conclusion that the trial counsel acted with the "mantle of command authority" and that the trial counsel's argument amounted to unlawful command influence.[71] Although the dissent agreed that the trial counsel's comments were "poorly conceived and obviously not influenced by common sense or critical thought," the dissent concluded that "a bad argument is not necessarily an improper one."[72] Assessing the comments in light of the entire court-martial, including that the comments were hypothetical; the defense failed to object; the military judge instructed the members that arguments of counsel "may not be considered as the recommendation or opinion of anyone other that that counsel"; and the members failed to adjudge the trial counsel's requested sentence of eighteen months' confinement, the dissent concluded that the comments did not constitute unlawful command influence and were not improper under RCM 1001(g).[73]

> doesn't necessarily have the authority to decide to impose a bad conduct discharge, or to impose a period of confinement for 18 months. Why not? Because the commander can prefer charges and then it comes to a court, it comes to a group just like this. It's out of the commander's hands in a lot of ways.
>
> But when you think about what if a commander could do that, what if a commander did stand up at commander's call and was able to make a promise, "If you use cocaine in my unit, this will happen to you." Make that a policy letter or something. What if the commander had the authority to do that in a unit full of airmen identical to this accused right here? What would he or she say to get their attention? Would he say, "Don't use cocaine or you'll get 40 days restriction to base, dang it?" I don't think he would. Why? Because that's not very scary, is it?
>
> Would she say, "Don't use cocaine or you'll get 30 days extra duties?" No, she wouldn't say that. That is not scary. That doesn't get people's attention. What would a commander say to get his unit's attention and say, "I mean business about drugs," if he had the authority to be the judge and jury in a case where you are, in essence, the jury deciding this?
>
> I submit that a sentence that would get people's attention, that would make airmen stand up and listen, and would possibly have the effect of keeping us from having so many of these cases involving airmen who have gone down this road of using cocaine and other illegal drugs is 18 months [of] confinement and a bad conduct discharge. That gets your attention. And if that doesn't get your attention, then nothing's going to get your attention.

Id.

[64] *Id.* at 764-65.

[65] *Id*. at 764.

[66] *Id*.

[67] *Id*.

[68] *Id*.

[69] *Id*.

[70] *Id.* at 765.

[71] *Id*. (Smith, J., dissenting).

[72] *Id* at 766.

[73] *Id*. at 767.

Mallett is an interesting case because of the Air Force court's majority analysis. The court applies a plain error analysis to what it concludes is an unlawful command issue. Plain error is normally the doctrine courts employ to determine if relief is warranted despite the defense's waiver or forfeiture of an issue by failing to object at trial.[74] However, unlawful command influence of the sort involved in *Mallett* is not waiveable.[75] Accordingly, when framed as unlawful command influence and not improper argument in violation of RCM 1001(g), the court should not subject the issue to a plain error analysis. Rather, the *Biagase* framework is the correct analysis.[76] The *Mallett* court reviewed the *Biagase* framework only as part of its analysis under the plain error doctrine.[77]

The dissent in *Mallett* asserts that the majority stretches the notion of the "mantle of command authority" too far by concluding that the notion applies to the trial counsel's comments.[78] According to the dissent, this principle reaches commanders, convening authorities, and staff judge advocates or "other participant[s] in [the] case," but not improper arguments by trial counsel where there is "no evidence . . . of direct improper involvement" by one of the entities the principle covers.[79]

Whether the trial counsel's statements in *Mallett* are categorized as improper argument in violation of RCM 1001(g) or unlawful command influence in violation of Article 37, UCMJ, there is no question that the arguments were ill-advised and ill-conceived. The commander's views on appropriate punishment, hypothetical or not, have no place in the courtroom. "A trial must be kept free from substantial doubt with respect to fairness and impartiality. . . . This appearance of impartiality cannot be maintained in trial unless the members of the court are left unencumbered from powerful external influences."[80]

Improper Actions of the Trial Counsel and Staff Judge Advocate

Actions of personnel other than commanders and convening authorities also took center stage in *United States v. Lewis.*[81] In *Lewis*, the NMCCA held that the unprofessional actions of the staff judge advocate that successfully resulted in the military judge recusing herself constituted unlawful command influence.

A military judge sitting as a general court-martial convicted Lance Corporal Lewis, pursuant to his pleas, of various drug offenses involving ecstasy, ketamine, lysergic acid diethylamide, and methamphetamine, and sentenced him, inter alia, to five years confinement and a dishonorable discharge.[82] A civilian defense counsel (CDC) represented Lewis at trial. The CDC did not appear at the first session of the court-martial, the arraignment. Neither side, however, had any voir dire or challenge of the military judge at the arraignment or at a second court session where the accused entered pleas.[83]

---

[74] *See* United States v. Powell, 49 M.J. 460 (1998); *see supra* note 56 (outlining the test for plain error in the military justice system as set forth by the CAAF in *Powell*).

[75] *See, e.g.*, United States v. Baldwin, 54 M.J. 308, 310 n.2 (2001) ("We have never held that an issue of unlawful command influence arising during trial may be waived by a failure to object or call the matter to the trial judge's attention.") (citing *cf.* United States v. Weasler, 43 M.J. 15 (1995) (finding that a pretrial agreement initiated by the accused waived any objection to unlawful command influence in the preferral and referral of charges)); United States v. Richter, 51 M.J. 213, 224 (1999)).

[76] In a pre-*Biagase* case addressing an improper argument/unlawful command influence issue, the COMA, the CAAF's predecessor, refused to apply RCM 1001(g)'s waiver provision. United States v. Sparrow, 33 M.J. 139, 141 (C.M.A. 1991) (while "we might, in other circumstances, apply the rule of waiver set out in R.C.M. 1001(g)," the court declined to do so because of its "'special interest'" in the possibility of illegal command influence."). *Mallett* cites *Sparrow's* refusal to apply waiver, but nonetheless proceeds to analyze the issue using plain error. *Mallett*, 61 M.J. at 763, 764-65.

[77] *Mallett*, 61 M.J. at 764-65.

[78] *Id*. at 765 (Smith, J., dissenting) (citing United States v. Stombaugh, 40 M.J. 208, 211 (C.M.A. 1994)).

[79] *Id.*

[80] United States v. Grady, 15 M.J. 275, 276 (C.M.A. 1983) (setting aside the sentence where trial counsel repeatedly referred to the Strategic Air Command's policies on drug use and stated that the members were "somewhat bound to adhere to those polices in deciding on a sentence"). "What is improper is the reference of such policies before members in a manner which in effect brings the commander into the deliberation room." *Id*.

[81] 61 M.J. 512 (N-M. Ct. Crim. App. 2005), *pet. granted*, 62 M.J. 448 (2006).

[82] *Id*. at 513. The convening authority approved the adjudged sentence but suspended confinement in excess of fort-two months. *Id*.

[83] *Id*. at 514.

During a third court session to hear motions, the trial counsel conducted voir dire of the military judge and challenged her impartiality:

> [S]he presided over two companion cases . . . [she had a] prior professional relationship with the [CDC] while the latter was on active duty . . . [the military judge's] social interaction with the [CDC], and because [the military judge] expressed displeasure to another trial counsel in a court-martial occurring over a year before wherein that trial counsel inquired into whether there had been ex-parte contact with the [CDC] regarding an upcoming case.[84]

The trial counsel moved for the military judge's recusal; the military judge denied the motion.[85] The trial counsel requested the military judge reconsider her denial of the motion and presented a previously prepared written pleading in support of her request. The military judge, however, denied the trial counsel's motion for reconsideration.[86] Finally, the trial counsel requested a continuance to file a government appeal. The military judge denied the request.[87]

Based on the trial counsel's actions, the defense filed a motion to dismiss for prosecutorial misconduct and unlawful command influence.[88] Over the course of a three-day hearing on the defense motion, the trial counsel who moved for the military judge's recusal "conducted all examination and cross-examinations of witnesses for the Government."[89] The trial counsel even appeared as a government witness and was "examined by a third trial counsel detailed to the case solely for that purpose."[90] The trial counsel's testimony took up "120 pages of this 1068-page record of trial, over ten percent of the entire trial and a majority of the motion."[91]

The defense called the staff judge advocate, a lieutenant colonel, as a witness on the motion.[92] He testified that he advised the trial counsel regarding trial tactics, voir dire, and the motion to recuse. He further testified that he assisted the trial counsel by conducting caselaw research, providing relevant citations, and calling the Head of Appellate Government Division regarding voir dire and the motion to recuse.[93] The staff judge advocate also characterized an incident where the military judge and the CDC were seen together as if on a "date, implying they were engaged in a homosexual relationship."[94] The staff judge advocate was combative on the witness stand, including addressing comments to the CDC, interrupting the CDC, and arguing with the CDC. The following exchange provides a flavor of the staff judge advocate's testimony on the motion:

> Witness (SJA): If you really want to get tacky – and I'll tell you what else I told [the Head of Appellate Government].
>
> TC: Yes, sir, if you would, sir.
>
> Witness: I said that the judge –

---

[84] *Id.*

[85] *Id.*

[86] *Id.*

[87] *Id.*

[88] *Id.*

[89] *Id.*

[90] *Id.*

[91] *Id.*

[92] *Id.* at 515.

[93] *Id.*

[94] *Id.*

CDC: Objection. I don't think anybody really wants to get tacky, and I think he's made his point as to how he has –

Witness: I have more to say. I'm not finished. Thanks you.

CDC: I'm making an objection, sir.
Witness: I haven't finished my point.[95]

On the third day of the hearing, the military judge recused herself without ruling on the motion because she could not remain impartial following the government's attack on her character.[96] A second military judge was detailed to the case. After reading the motion, exhibits, and transcript of the proceedings, the second judge also recused himself because he was so "shocked and appalled" at the trial counsel and staff judge advocate's conduct that he "was not convinced he could remain impartial."[97] Finally, a third judge heard an expedited defense motion, and a fourth judge presided over additional motions and the accused's trial.[98] The trial judge granted a motion for a change of venue, disqualified the staff judge advocate and the convening authority from taking post-trial action in the case, and barred the staff judge advocate from attending the remainder of the trial.[99]

On appeal, Lewis alleged that the court should dismiss his case due to the conduct of the trial counsel and the staff judge advocate, and he alleged that the trial counsel and staff judge advocate's actions of forcing the military judge to recuse herself amounted to unlawful command influence. While the NMCCA agreed that the actions of the trial counsel and staff judge advocate amounted to unlawful command influence, the court found no prejudice and declined to grant any relief.[100]

The court determined that the trial counsel and staff judge advocate's actions were "unprofessional" and "a gross abuse of their respective positions of responsibility."[101] The court described the trial counsel's voir dire and the staff judge's advocate's behavior as "crass, contemptuous . . . [and] display[ing] nothing but disrespect for the military judge."[102] In particular, the court attacked the actions of the staff judge advocate—"a representative of the convening authority"—in advising the trial counsel on the "voir dire assault of the MJ. . . . his unprofessional behavior as a witness[,] and his inflammatory testimony."[103] To the extent that these acts "created a bias in the military judge, the facts establish[ed] clearly that there was unlawful command influence on this court-martial."[104] But for the trial counsel and the staff judge advocate's unprofessional actions, the initial military judge would have tried Lewis. However, because diligent, deliberate judges ultimately heard Lewis's case, there was no prejudice.[105]

The CAAF granted review of three issues in the *Lewis* case, including the unlawful command influence assertion.[106] The court heard argument on the issues on 2 May 2006, and a decision is expected prior to the end of the court's term on 30 September 2006.[107]

---

[95] *Id*

[96] *Id*.

[97] *Id*.

[98] *Id*. at 516.

[99] *Id*.

[100] *Id.* at 520-21.

[101] *Id*. at 517.

[102] *Id*.

[103] *Id*. at 518.

[104] *Id*.

[105] *Id*.

[106] United States v. Lewis, 62 M.J. 448 (2006). The three granted issues are:

I. WHETHER THE LOWER COURT ERRED WHEN IT HELD THAT THE IN-COURT ACCUSATIONS BY THE STAFF JUDGE ADVOCATE AND TRIAL COUNSEL THAT THE MILITARY JUDGE WAS INVOLVED IN A HOMOSEXUAL

Lewis soundly demonstrates the presumption that the staff judge advocate is presumed to act with the mantle of command authority. When the staff judge advocate uses the mantle in an improper manner, unlawful command influence can result. *Lewis* also demonstrates that, despite a staff judge advocate's grossly improper actions that cause a military judge to actually recuse herself as a result, there is no relief available where other competent judges hear the case.

Intemperate Remarks by the Command

Finally, a series of three cases this past term from the NMCCA are noteworthy in several respects. First, all of the cases involve intemperate remarks by commanders that are alleged to constitute unlawful command influence or unlawful pretrial punishment. Second, although the cases caused one appellate judge to note the troubling trend of intemperate remarks, the court failed to either grant relief to any appellant or publish any of the opinions so that they would carry precedential weight. Third, one of the cases in particular demonstrates the ameliorative effects of curative remedial actions in the wake of improper remarks by the command. Fourth, the cases stand as a reminder to judge advocates to be proactive with the command in this critical area of military justice.

The first case, *United States v. Baro*,[108] involved an intemperate email. Pursuant to mixed pleas, Baro was convicted by a panel of officer and enlisted members sitting as a general court-martial of violating a general order by drinking under the age of twenty-one, disorderly conduct, and assault consummated by a battery while stationed in Okinawa, Japan.[109] The incidents occurred while Baro was on liberty. Baro's trial took place on 4 February 2001. On 23 January 2001, the commanding general "sent an email to his subordinates regarding his views on liberty incidents."[110] The commanding general's position was "'[g]et tough on these guys BEFORE they act'" and "'[s]quash them after they violate the laws and rules.'" [111] The Chief of Staff forwarded the email to commanders and executive officers "with his own spin" on the issue, "emphasizing the role of leadership in preventing liberty incidents and urging commanders to be 'tough' when they take offenders to nonjudicial punishment."[112]

The two senior members of the panel saw the email and were challenged for cause on unrelated grounds.[113] Two other officer panel members saw the email but "did not take it as policy" and a third officer panel member did not see the email.[114] Baro also claimed that members read newspaper articles concerning handling and preventing liberty incidents during the trial.[115] In fact, the military judge observed one or more members reading a newspaper, *The Stars and Stripes*, which contained "an article on the strained relationship between Marine leadership and local civilian leaders over their respective

---

RELATIONSHIP WITH THE CIVILIAN DEFENSE COUNSEL AMOUNTED TO UNLAWFUL COMMAND INFLUENCE BUT WERE HARMLESS BEYOND A REASONABLE DOUBT.

II. WHETHER THE GOVERNMENT DENIED APPELLANT HIS RIGHT TO A SPEEDY TRIAL UNDER THE UNITED STATES CONSTITUTION AND ARTICLE 10, UNIFORM CODE OF MILITARY JUSTICE (UCMJ), 10 U.S.C. § 810.

III. WHETHER APPELLANT WAS DENIED DUE PROCESS OF LAW WHERE HE SERVED HIS ENTIRE SENTENCE OF FORTY-TWO MONTHS CONFINEMENT BEFORE THE LOWER COURT REACHED A DECISION IN HIS CASE.

Id.

[107] *See* United States Court of Appeals for the Armed Forces, Scheduled Hearings, http://www.armfor.uscourts.gov/May2006.htm (last visited July 2, 2006).

[108] No. 200200429, 2005 CCA LEXIS 151 (N-M. Ct. Crim. App. May 9, 2005) (unpublished)

[109] *Id*. at *1; *see* UCMJ arts. 92, 134, 128 (2005). The members sentenced the Baro to forfeiture of $1042.80 per month for six months, reduction to E-1, and a bad-conduct discharge. No. 200200429, 2005 CCA LEXIS 151, at *1. The convening authority approved only so much of the adjudged sentence that included forfeiture of $695.00 pay per month for six months, reduction to E-1, and a bad-conduct discharge. *Id*. at *1-2.

[110] *Id*. at *11.

[111] *Id*. at *12.

[112] *Id*.

[113] *Id*.

[114] *Id*.

[115] *Id*. at *13.

roles in preventing and handling liberty incidents."[116] The military judge conducted voir dire of the panel members during trial and was satisfied that the members remained impartial and able to perform their duties.[117]

Surprisingly, the court found "no evidence" of unlawful command influence, and determined that Baro did not meet his burden of presenting "some evidence" of unlawful command influence.[118] Further, the court found that the military judge's actions avoided "even the appearance of evil in the courtroom."[119]

The court's decision in *Baro* is a bit disconcerting. The standard the defense must meet to raise an issue of unlawful command influence is "some evidence," the same quantum of evidence required to raise any issue of fact.[120] This burden is not very demanding. Baro faced trial for "liberty incidents" and, less than two weeks before his trial, the commanding general sent an extremely injudicious email directing that commanders "squash" those who commit liberty incidents. The language the commanding general chose is not subtle. His message is not in the "grey area" of impropriety—it is unquestionably a "command expectation" on disposition or adjudication.[121] The timing of the message, less than two weeks prior to Baro's trial, is also troubling.[122] The CAAF "previously recognized the difficulty of a subordinate ascertaining for himself or herself the actual influence a superior has on that subordinate."[123] Nonetheless, the court determined that Baro had not even met his threshold burden of presenting some evidence of unlawful command influence.

Finally, the court completely failed to discuss or analyze the issue of apparent unlawful command influence—whether the commanding general's remarks "placed an intolerable strain on public perception of the military justice system"[124] despite the CAAF's insistence that "military judges and appellate courts must consider apparent as well as actual unlawful command influence."[125]

> [D]isposition of an issue of unlawful command influence falls short if it fails to take into consideration the concern of Congress and this Court in eliminating even the appearance of unlawful command influence at courts-martial. . . . The appearance of unlawful command influence is as devastating to the military justice system as the actual manipulation of any given trial.[126]

The court's rationale would be much more convincing if it found some evidence of unlawful command influence sufficient to shift the burden to the government and that the government successfully carried its burden beyond a reasonable doubt.

The second case, *United States v. Davis*,[127] involves a commander's injudicious comments to a formation of Sailors. Specifically, Davis alleged that the decision to charge him with some of the offenses of which he was convicted resulted from the commander's comments, which amounted to unlawful command influence.[128]

---

[116] *Id*.

[117] *Id.*

[118] *Id*. at *12-13, 14.

[119] *Id*. at *13-14 (quoting United States v. Stoneman, 57 M.J. 35, 42 (2002)).

[120] United States v. Ayala, 43 M.J. 296, 300 (1995).

[121] *See* United States v. Simpson, 58 M.J. 368, 375 (2003) (discussing use of the phrase "zero tolerance" in the context of unlawful command influence).

[122] *See* United States v. Baldwin, 54 M.J 304, 310 (2001) (discussing the use of command meetings to influence a court-martial sentence); United States v. Brice, 19 M.J. 170, 171-72 (C.M.A.1985).

[123] United States v. Gerlich, 45 M.J. 309, 313 (1996).

[124] *Simpson*, 58 M.J. at 374 (quotation omitted).

[125] *Id*.

[126] *Id*. (quoting United States v. Stoneman, 57 M.J. 35, 42-43 (2002)).

[127] No. 200000604, 2005 CCA LEXIS 161 (N-M. Ct. Crim. App. May 20, 2005) (unpublished).

[128] *Id*. at *3.

Pursuant to his pleas, Davis was convicted by a special court-martial composed of officer and enlisted members of indecent language, two specifications of indecent assault, and numerous other charges, including wrongful appropriation.[129] Prior to referring the charges, but after placing Davis into pretrial confinement, the ship's commanding officer held an "all-hands assembly on the ship's flight deck to give a farewell" address.[130] The commanding officer stated that two crewmen were "caught stealing from a shipmate," that "thievery will not be tolerated,"[131] and that the "guilty individuals would face hard time."[132] "Finally, the [commanding officer] discussed possible acts of sexual harassment and advised the crew that any person enduring such treatment should come forward.[133] Although the commanding officer did not mention the Davis's name, it was common knowledge that he was suspected of committing the misconduct the commanding officer discussed.[134] "According to the appellant, these remarks led to the referral of two specifications involving indecent assault and the use of indecent language."[135]

A new commanding officer took over prior to the Davis's guilty plea. The new commanding officer took significant corrective actions to ameliorate the prior commanding officer's unwise remarks. While the new commanding officer initially referred the charges and specifications to a special court-martial, he ultimately withdrew the charges without prejudice and forwarded them to the next superior commander.[136] In addition, the new commanding officer gathered the prospective trial witnesses and, with Davis's defense counsel present, explained that "he did not expect a particular outcome with respect to appellant's court-martial" and instructed all witnesses to "testify truthfully."[137] All of the witnesses called to testify said the first commanding officer's comments "had no bearing on their ability to tell the truth."[138] Further, the military judge issued a standing order to produce all defense witnesses and any witness feeling pressure was to report those concerns to the military judge.[139]

The court held that Davis met his burden of producing "some evidence suggesting unlawful command influence."[140] The court, however, found that the "[g]overnment proved beyond a reasonable doubt that no unlawful command influence existed."[141] The successor commander took effective action to "stamp out even the appearance of unlawful command influence," and the military judge's "prophylactic" orders ensured that any "potential unlawful command influence that might have existed in [the] case had no possible effect on the court-martial."[142]

The final case, *United States v. Fortune*, also involved a commander's alleged imprudent remarks to a formation of servicemembers.[143] A special court-martial composed of officer and enlisted members convicted Fortune, contrary to his pleas, of wrongful use of cocaine (two specifications) and sentenced him, inter alia, to confinement for ninety days and a bad-

---

[129] *Id.* at *1-2; *see* UCMJ arts. 134, 121. The members sentenced the appellant to seventy-four days confinement and a bad-conduct discharge. *Davis*, 2005 CCA LEXIS 161, at *1-2. The convening authority approved the adjudged sentence. *Id*. at *2.

[130] *Id*. at *21.

[131] *Id*.

[132] *Id*. at *22.

[133] *Id*.

[134] *Id*.

[135] *Id*.

[136] *Id*.

[137] *Id.* at *22-23.

[138] *Id*. at *23.

[139] *Id*.

[140] *Id*.

[141] *Id*.

[142] *Id* at 24 (citing United States v. Rivers, 49 M.J. 434, 443 (1998) (designating the military judge as the last guardian of the bridge over which unlawful command influence must not pass)).

[143] No. 200300779, 2005 CCA LEXIS 119 (N-M. Ct. Crim. App. 2005) (unpublished).

conduct discharge.[144] Fortune alleged on appeal that remarks by his company commander at a company formation constituted unlawful pretrial punishment.[145] "During the formation, [the company commander] reminded the unit of the Marine Corps policy on drugs and stated that an E-4 in the company had tested positive for drugs and was still wearing his rank but would be held accountable."[146] Fortune was never "paraded" in front of the unit nor was his name ever mentioned during the commander's remarks to the formation.[147]

The court held that the company commander's comments "served a legitimate, nonpunitive purpose" and did not constitute unlawful pretrial punishment.[148] The remarks were "cautionary and clearly designed to warn members of the unit of the consequences of illegal drug activity which was an ongoing problem for the command."[149]

In his concurring opinion, Senior Judge Price wrote separately to "address a troubling trend in the hope that judge advocates might be alerted and exercise appropriate preventive action."[150] The judge noted that several cases the court recently decided include "substantiated allegations of commanders making statements during unit formations and similar gatherings that raised issues of unlawful command influence."[151] All judge advocates should "endeavor to prevent, deter, and eliminate" unlawful command influence.[152]

How do judge advocates comply with Senior Judge Price's admonition? What can commanders say about military justice without risking running afoul of the prohibition against unlawful command influence? There are some basic guidelines that will assist judge advocates in advising their commanders and some recent high profile occurrences that demonstrate appropriate comments by high-ranking commanders.

Commanders should avoid speaking about specific cases if at all possible. There is a significant risk that comments about particular cases will veer into inappropriate areas or that the comments will trickle down and be interpreted as guidance concerning what the commander thinks is an appropriate disposition or punishment. In fact, the CAAF recognizes that the "confluence" of such comments as they relate to pending courts-martial is an issue.[153]

If the commander feels he must comment about a particular pending case or investigation, he should remember the following shorthand phrase as guidance: "Talk offense, not offender; Talk process, not results."[154] In the first instance, the commander should avoid comments that characterize an alleged offender, for example, calling an accused a "scumbag," "druggie," "thief," or "troublemaker." These characterizations, along with stigmatizing an accused, may impinge on the accused's presumption of innocence and may impact his ability to find witnesses willing to testify in his defense. In the second instance, the commander should avoid comments that potential witnesses, members, and subordinate commanders may interpret as describing "what should happen" to an alleged offender. Those three participants in the military justice system must all make decisions independent of the desires or perceived desires of higher commanders and convening authorities. Subordinate commanders must independently decide how to dispose of alleged misconduct that occurs in their commands;[155] potential witnesses for both the government and the defense must feel free to come forward and provide

---

[144] *Id*. at *1.

[145] *Id*. at *2-3. At trial, Fortune alleged that these remarks amounted to unlawful command influence. *Id.*

[146] *Id*. at *7.

[147] *Id*.

[148] *Id*. at *7-8.

[149] *Id*. at *7.

[150] *Id*. at *12.

[151] *Id*.

[152] *Id*.

[153] *See* United States v. Baldwin, 54 M.J 304, 310 (2001); United States v. Brice, 19 M.J. 170, 171-72 (C.M.A.1985).

[154] This is not the author's original idea. The author inherited this guideline phraseology in materials the author received when she became Chair of the Criminal Law Department at The Judge Advocate General's School in July 2004. The author does not know the originator of this phrase.

truthful testimony without concern for potential negative repercussions; and court-martial panel members must decide guilt or innocence and, if necessary, an appropriate sentence particularized to the accused based only on legal and competent evidence properly before them and the instructions of the military judge.

The commanding general's comments in *Baro* and the first commanding officer's comments in *Davis* both violate the proscription to "talk offense, not offender; Talk process not results."[156] For example, "[s]quash them when they violate the rules"[157] evinces to lower commanders and panel members what *results* the higher commander thinks should occur in particular cases. These comments are simply wrong. Phrases such as "[t]hievery will not be tolerated" and "guilty individuals will face hard time"[158] also send the wrong message and concentrates on the *results* the commander believes is appropriate in a particular case.

In these scenarios, talking about the *offense*, rather than the *offender*, might mean describing the impact of liberty incidents or larceny by shipmates on the deployability of a unit, or the ability of a unit to accomplish its mission. For example, "Larceny among shipmates destroys the trust and esprit de corps that are essential to mission accomplishment" and "Liberty violations denigrate the good will between our armed forces and the host nation." In the drug use area, it might mean describing the effects of drug use on a Soldier's readiness. For example, "Illegal drug use renders a Soldier mission incapable."

Similarly, comments that discuss *process*, rather than *results* are appropriate. Two recent high profile incidents provide excellent examples of this guidance. The first incident involved an allegation in Iraq in November 2004 that a Marine shot an unarmed man in a mosque. An embedded cameraman recorded the entire event, parts of which were replayed on television and posted on news websites.[159] Army General George V. Casey spoke about the incident by stating that, "It's being investigated, and justice will be done . . . That's the way we operate. This whole operation was about the rule of law, and justice will be done."[160] Marine Lieutenant General John F. Sattler, at the time the Commander of the 1st Marine Expeditionary Force, also focused on process when he stated: "Let me make it perfectly clear: We follow the law of armed conflict. We hold ourselves to a high standard of accountability. The facts of this case will be thoroughly pursued."[161]

The second example involves the Haditha incident—an investigation into potential wrongdoing by Marines in Haditha, Iraq that resulted in the deaths of twenty-four civilians.[162] As of this writing, the investigation is still ongoing and no Marines have been charged with any criminal offenses. The Chairman of the Joint Chiefs of Staff, General Peter Pace, made the following statements concerning the investigations: "I understand it's going to be a couple of more weeks before those investigations are complete, and we should not prejudge the outcome . . . . We will find out what happened, and we'll make it public . . . but to speculate right now wouldn't do anybody any good." [163]

---

[155] *See* MCM, *supra* note 12, R.C.M. 306(a) ("A superior commander may not limit the discretion of a subordinate commander to act on cases over which authority has not been withheld."); *see also* United States v. Hawthorne, 22 C.M.R. 83, 89 (C.M.A. 1956) (finding that a command policy directing disposition of offenders violates the UCMJ).

[156] *Supra* note 153.

[157] United States v. Baro, No. 200200429, 2005 CCA LEXIS 152, *12 (N-M. Ct. Crim. App. May 9, 2005) (unpublished).

[158] United States v. Davis, No. 200000604, 2005 CCA LEXIS 161, *21,-22 (N-M. Ct. Crim. App. May 20, 2005) (unpublished).

[159] *See, e.g.*, Anthony Shadid, *U.S. Commander in Iraq Calls Shooting"Tragic*," WASH. POST, Nov. 16, 2004, at A15..

[160] *Id*.

[161] Thomas E. Ricks, *Marines Probe Apparent Slaying of Wounded Iraqi*, WASH. POST, Nov. 16, 2004, at A14.

[162] *See, e.g.*, John D. Banusiewicz, *Pace: Ongoing Probes Will Yield Facts About Haditha Incident*, May 29, 2006, ARMED FORCE INFO. SERVICE, http://www.defenselink.mil/news/May2006/20060529_5277.html (last visited July 5, 2006) (quoting an interview with General Pace on CNN's "American Morning" news program).

[163] *Id*.

Generals Pace, Casey, and Sattler's remarks about these high-profile incidents provide outstanding examples of the guidance to "talk process, not results." Judge advocates are wise to follow these templates in advising commanders.

If a commander makes misguided comments, there are a number of corrective actions that the commander or the military judge can take to alleviate the potential damage the comments can cause. *Davis* provides a partial listing of these ameliorative actions: the commander can withdraw the charges and send the case forward to the next higher authority; a non-offending commander can address potential witnesses to assure them he neither expects nor desires any particular outcome and to stress their duty to provide truthful testimony; and a military judge can order the government to produce all witness the defense requests.[164] These and numerous other actions can assuage the effects of intemperate remarks.[165]

A commander can also effectively retract or clarify offending remarks as well. To be effective, however, the retraction or clarification must be sincere, complete, and widely disseminated. *United States v. Rivers* contains a sterling example of an effective retraction.[166] In *Rivers*, the commanding general issued a policy letter containing the following comment: "[T]here is no place in the Army for drugs *or for those who use them*."[167] The italicized portion of the comment violates the guidance to talk offense, not offender and talk process, not results. Subordinate commanders, potential witnesses, or panel members could interpret the comments as the commander's instruction not to retain a drug-using Soldier.

The commander retracted the offending comment by recalling the initial policy letter and reissuing a replacement that did not contain the offending language.[168] He also issued the following statement:

> Due to an administrative oversight, a policy memorandum, subject: Physical Fitness and Physical Training, dated 30 July 1993, inaccurately presented my view toward drug offenders.
>
> a. Any suggestion that I believe all drug offenders must be discharged from the service is simply an inaccurate reading of both my personal and professional philosophy. My intent in issuing the policy was to convey my thoughts on physical training, health, and life-style issues. The memorandum was not intended and should not be read to express a command philosophy on drug offenders. The memorandum was replaced with a corrected copy, dated 27 August 1993.
>
> b. My policy on the disposition of military justice cases is expressed above. I strongly believe all soldiers deserve an individual assessment of their cases.[169]

The commander's statement, along with other remedial actions by the military judge, ensured that Rivers' trial was free from the taint of unlawful command influence.[170]

---

[164] United States v. Davis, No. 200000604, 2005 CCA LEXIS 161, *22-23 (N-M. Ct. Crim. App. May 20, 2005) (unpublished)..

[165] Helpful cases discussing remedies for unlawful command influence include the following: United States v. Biagase, 50 M.J. 143 (1999); United States v. Rivers, 49 M.J. 434 (1998); United States v. Francis, 54 M.J. 636 (Army Ct. Crim. App. 2000); United States v. Clemons, 35 M.J. 770 (A.C.M.R. 1992).

[166] *Rivers*, 49 M.J. at 439.

[167] *Id*. at 438 (emphasis added).

[168] *Id*. at 439.

[169] *Id*. (quoting the Commanding General's memorandum).

[170] *Id.* at 443. There were allegations of unlawful command influence in addition to the issue involving the commander's memorandum. The court found:

> [A]s a result of the prompt corrective actions taken by the Government, as well as the exhaustive factfinding hearings and comprehensive judicial orders initiated by the military judge in this case, we are satisfied that appellant was not deprived of any witnesses on the merits or on sentencing. The military judge is the last sentinel protecting an accused from unlawful command influence. In this case, the military judge performed his duty admirably. His aggressive and comprehensive actions ensured that any effects of unlawful command influence were purged and that appellant's court-martial was untainted.

Id.

Conclusion—Looking Ahead to Next Term

The 2005-2006 term of court will feature at least two unlawful command influence decisions. The first expected decision is *United States v. Lewis*, which involves the crass acts of the trial counsel and staff judge advocate that caused the military judge to recuse herself. In addition, the 2005-2006 term of court should also feature an opinion that addresses the propriety of the convening authority's physical presence in the courtroom during proceedings with members and the military judge's role in handling the issue. *United States v. Harvey* granted review of the following issue, as well as one other unrelated issue: Whether the lower court erred in affirming the military judge's denial of a mistrial, when the military judge failed to inquire into the circumstances of the convening authority's presence at trial or to require the government to disproves the existence of unlawful command influence once that issue was raised.[171] The court heard arguments on 11 October 2005 and a decision is pending.[172] All those who study and practice military justice should look forward to the CAAF's continuing jurisprudence in this vital area.

[171] United States v. Harvey, 61 M.J. 50 (2005).

[172] The lower court opinion is found at United States v. Harvey, 60 M.J. 611 (N-M. Ct. Crim. App. 2004).

Improper Superior Subordinate Relationships and Fraternization: Marriage and Change in Status

Major Jon S. Jackson
Professor, Criminal Law Department
The Judge Advocate General's Legal Center and School, United States Army
Charlottesville, Virginia

"*Ninety percent of the game is half mental.*"[1]

Introduction

It is 12 June 2006, and you are assigned as a brigade combat team (BCT) judge advocate (JA). As you begin to settle into your office after an exhausting physical training session, the phone rings. It is the brigade commander's secretary. The secretary requests that you report to the brigade commander's office as soon as possible. You ask the secretary if there is anything specific the brigade commander wants to discuss. The secretary states, "I am quite sure it deals with a couple of inappropriate relationships that came to the command's attention over the weekend." You thank the secretary for the information and head out the door to see the brigade commander.

You arrive at the brigade commander's office and take a seat with your notebook and beret in hand. The brigade commander steps out of his office a few minutes later and asks you to come in and close the door behind you. As you begin to take your seat, he states "over the weekend two relationships have come to my attention that might violate Army policy. I need your advice on how to deal with these relationships as soon as possible."

The brigade commander then begins to give you the details of the two relationships. In the first situation, a lieutenant in alpha company announced that he will be marrying a specialist from a different BCT located on the installation. The wedding is planned for 17 June 2006, less than a week away. Until the announcement of the marriage, no one had any idea the two were romantically involved.

In the second situation, a warrant officer in the brigade is dating a staff sergeant (SSG) in a separate brigade. The evidence makes it clear that the relationship began more than two months ago when both parties were SSGs at different battalions within the brigade. The SSG is now assigned to a different brigade on the same installation. The couple has been seen together off the installation holding hands and kissing. There is no evidence that the two engaged in any public displays of affection while on-post or in uniform.

After receiving the information, you tell the brigade commander you want time to research the issues and you will get him an answer by close of business. The brigade commander asks that you return at 1800 to discuss what action, if any, should be taken in reference to these relationships. You agree and move out smartly to begin your research.

A. The Current Army Policy

The current Army policy that addresses improper superior subordinate relationships and fraternization became effective on 2 March 1999[2] and was further clarified on 1 February 2006.[3] The clarifications have a direct impact on the above scenarios and are the subject of this article.[4]

---

[1] YOGI-isms & Casey Stengel, Yogi Berra, http://www.dennisweb.com/steve/quotyogi.htm (last visited July 21, 2006).

[2] U.S. DEP'T OF ARMY, REG. 600-20, ARMY COMMAND POLICY (15 July 1999) [hereinafter AR 600-20, 15 July 1999].

[3] U.S. DEP'T OF ARMY, REG. 600-20, ARMY COMMAND POLICY (1 Feb. 2006) [hereinafter AR 600-20, 1 Feb. 2006].

[4] *Id.*

The current policy is punitive in nature.[5] When a JA is confronted with an issue involving an improper superior subordinate relationship it is important to follow a specific methodology. First, the JA must determine if the relationship involves a Soldier and another servicemember of a different rank. The policy does not apply to relationships between Soldiers and civilians. Second, the JA must determine if the relationship is strictly prohibited by the current regulation—*Army Regulation 600-20* (*AR 600-20*). *Army Regulation 600-20* strictly prohibits officers, including warrant and commissioned officers, from engaging in certain relationships with enlisted members.[6] Finally, if the relationship is not strictly prohibited, for example a relationship between two enlisted members of different ranks, the JA must determine if there are any adverse effects from the relationship.[7]

Even if the relationship is strictly prohibited or prohibited by its effect, there are several exceptions that may apply.[8] For example, ongoing business relationships between officer and enlisted personnel are strictly prohibited.[9] Exceptions, however, exist for certain business relationships between officer and enlisted personnel, including one-time business transactions (e.g., the sale of a car) and landlord-tenant relationships.[10] Certain personal relationships are also prohibited between officer and enlisted personnel.[11] One exception to the prohibition against certain personal relationships is marriage.[12]

B. Marriage

When the current Army policy prohibiting certain personal relationships between officer and enlisted personnel went into effect on 2 March 1999, it included an exception for marriage.[13] The regulation did not, however, include an explanation on how to deal with the officer-enlisted relationship that occurred prior to the marriage. Many commanders and JAs were left to guess as to how to deal with a scenario where the officer and enlisted member were suddenly married, and no one in the command knew that a relationship existed. The 1 February 2006 changes to *AR 600-20* attempt to address this scenario.[14]

The current marriage exception to improper superior-subordinate relationships allows commanders to take "appropriate command action based on the prior fraternization."[15] The exception requires the command to have evidence of the prior fraternization before taking action.[16] The regulation gives additional guidance to commanders and insists commanders "carefully consider all the facts and circumstances in reaching a disposition that is appropriate."[17] The regulation goes on to advise commanders that they "should take the minimum action necessary to ensure that the needs of good order and discipline are satisfied."[18]

---

[5] AR 600-20, 1 Feb. 2006, *supra* note 3, para. 4-16 ("violations of paragraph 4-14b, 4-14c, and 4-15 may be punished under Article 92, Uniform Code of Military Justice, as a violation of a lawful general regulation.").

[6] *Id.* The regulation states in pertinent part: "Certain types of personal relationships between officers and enlisted personnel are prohibited. Prohibited relationships include—(1) Ongoing Business relationships . . . (2) Dating, shared living accommodations . . . and intimate or sexual relationships . . . (3) Gambling." *Id.* para. 4-14c.

[7] Relationships between servicemembers of different rank are prohibited if they (1) compromise, or appear to compromise, the integrity of supervisory authority or the chain of command; (2) cause actual or perceived partiality or unfairness; (3) involve, or appear to involve, the improper use of rank or position for personal gain; (4) are, or are perceived to be, exploitative or coercive in nature; or (5) create an actual or clearly predictable adverse impact on discipline, authority, morale, or the ability of the command to accomplish its mission. *Id.* para. 4-14b.

[8] *Id.* para. 4-14.

[9] *Id.* para. 4-14c(1).

[10] *Id.*

[11] *See supra* note 6 and accompanying text.

[12] AR 600-20, 1 Feb. 2006, *supra* note 3, para. 4-14c(2)a.

[13] AR 600-20, 15 July 1999, *supra* note 2, para. 4-14c(2)a (stating that the prohibitions against dating, shared living accommodations, and intimate or sexual relationships between officers and enlisted personnel do not apply to "[m]arriages that predate the effective date of this policy or are entered into prior to March 1, 2000").

[14] AR 600-20, 1 Feb. 2006, *supra* note 3, para. 4-14c(2)a.

[15] *Id.*

[16] *Id.*

[17] *Id.*

[18] *Id.*

In the first scenario that the brigade commander presented to you as the BCT JA, there are several options available. First, the command can choose to do nothing and allow the marriage between the officer and enlisted member to proceed without command interference. If the commander chooses this course of action, he should still counsel the officer and enlisted member that after the marriage both Soldiers are expected to conduct themselves appropriately while on-duty and to observe military customs and courtesies. As a second option, the command could initiate an inquiry to determine if evidence exists of the prior inappropriate relationship. If the inquiry reveals evidence of the relationship, the commander may take appropriate disciplinary action, which, based on the evidence uncovered, can include a variety of options ranging from counseling to disciplinary action.

C. Change in Status.

Prior to 1 February 2006, *AR 600-20* also included an exception for inappropriate superior-subordinate personal relationships between officer and enlisted members when there was a change in status.[19] Change in status meant that the officer in the relationship was previously enlisted and became an officer through warrant officer school or a commissioning program.[20] The original exception for change in status was interpreted to apply to relationships when the servicemembers were already married. Therefore, this exception had little, if any, effect because of the preexisting exception for marriage.[21]

The revised version of *AR 600-20* attempts to clarify the change in status exception to only include strictly prohibited relationships between officer and enlisted personnel.[22] The change in status exception now applies when a relationship between two enlisted members changes to a relationship between an enlisted member and an officer after one of the enlisted members becomes an officer through warrant officer school or a commissioning program.[23] The exception allows such relationships to continue, but "the couple must terminate the relationship permanently or marry within either one year of the actual start date of the program, before the change in status occurs, or within one year of the publication date of this regulation, whichever occurs first."[24]

Because of this change, commanders are now required to determine if the relationship existed when both members were enlisted. If the relationship did not exist prior to the change in status of one of the servicemembers, the exception does not apply.[25] Judge advocates should assist commanders in making this determination by gathering all the necessary facts about the relationship and making an appropriate recommendation to the command.

In the second hypothetical relationship, the change in status exception clearly applies. First, the relationship began after 1 February 2006, when the current change in status exception came into force.[26] Second, the warrant officer and staff sergeant began dating prior to the warrant officer's change in status. Since the relationship falls under the change in status exception, the servicemembers must terminate their relationship or marry on or before 1 June 2007.[27]

---

[19] AR 600-20, 15 July 1999, *supra* note 2, para. 4-14c(2)b.

[20] *Id.*

[21] *See* Major Charles H. Rose III, *Rank Relationships: Charging Offenses Arising From Improper Superior Subordinate Relationships and Fraternization*, ARMY LAW., Apr. 2001, at 86.

[22] *Army Regulation 600-20,* 1 Feb. 2006, para. 4-14c(2)b provides the following:

> Situations in which a relationship that complies with this policy would move into non-compliance due to a change in status of one of the members (for instance, a case where two enlisted members are dating and one is subsequently commissioned or selected as a warrant officer). In relationships where one of the enlisted members has entered into a program intended to result in a change in their status from enlisted to officer, the couple must terminate the relationship permanently or marry within either one year of the actual start date of the program, before the change in status occurs, or within one year of the publication date of this regulation, whichever occurs later.

AR 600-20, 1 Feb. 2006, *supra* note 3, para. 4-14c (2)b

[23] *Id.*

[24] *Id.*

[25] *Id.*

[26] *Id.*

[27] *Id.*

D. Conclusion

Based on recent changes to *AR 600-20*, it is clear that the area of improper superior subordinate relationships continues to evolve. Judge advocates should continue to monitor changes to regulations and caselaw in this area.

THE VIETNAM WAR ON TRIAL[1]

REVIEWED BY MAJOR ANDRAS M. MARTON[2]

[Brigadier General George H.] Young reportedly began this crisis conclave by telling the others: "Only five of us know about this."[3]

As history bears out and as *The Vietnam War on Trial* highlights, not "only five knew about this"[4] but rather, the whole world would came to know of the massacre of over 500 unarmed Vietnamese civilian men, women, and children[5] in the city of My Lai during the Vietnam War.[6] As facts of the murderous killings of these innocent civilians on 16 March 1968, reached across the sea to the United States,[7] the name First Lieutenant (1LT) William L. Calley, Jr.[8] became not just a household name but also an unsuspecting symbol for the greater war in Vietnam.[9]

This review analyzes the structure and content of *The Vietnam War on Trial*, identifies strengths and weaknesses of what Professor Michal R. Belknap included or should have discussed, and concludes with the work's value to today's military leader and judge advocate. In the book, Belknap captivatingly takes the reader from 1LT Calley's childhood, through his military training and military service in Vietnam, to his court-martial, and various post-trial appeals and legal challenges. Belknap skillfully paints 1LT Calley's political trial[10] as a backdrop for his primary canvas of discussing the legal and political fallout generated by the My Lai massacre.[11] As Belknap explains, 1LT Calley's trial drove the entire U.S. public to challenge the very underpinnings of the Vietnam War.[12] This single trial changed the political landscape of the nation, influencing U.S. President Richard M. Nixon and the national leadership in Congress, to alter its course and position in Vietnam.[13]

---

[1] MICHAL R. BELKNAP, THE VIETNAM WAR ON TRIAL: THE MY LAI MASSACRE AND THE COURT-MARTIAL OF LIEUTENANT CALLEY (2002). Michael Belknap is currently a professor of constitutional law at California Western School of Law, San Diego, California. *Id*. at back cover. Belknap served as a U.S. Army Infantry lieutenant during the Vietnam War. *Id*. at 2. Professor Belknap "is an historian-turned-lawyer." California Western School of Law, Faculty, *Michal R. Belknap*, *at* http://www.cwsl.edu/main/faculty (last visited Sept. 3, 2005). He taught history at the University of Texas while he earned his Juris Doctor at its law school, taught history at the University of Georgia, and currently teaches as an adjunct professor of history at the University of California, San Diego. *Id*.

[2] U.S. Army. Written while assigned as a student, 53d Judge Advocate Officer Graduate Course, The Judge Advocate General's Legal Center and School, U.S. Army, Charlottesville, Virginia.

[3] BELKNAP, *supra* note 1, at 83. Brigadier General (BG) Young served as the Assistant Division Commander for the Americal Division, the senior command element over Charlie Company, 1st Battalion, 20th Infantry, to which 1LT Calley was assigned. *Id.* at 37, 82-83. The others present at this meeting on 18 March 1968, to discuss what to do about the events on 16 March, were the acting 11th Brigade Commander, Colonel Oran Henderson; Task Force Barker Commander, Lieutenant Colonel (LTC) Frank Barker; LTC John L. Holladay, 123d Aviation Battalion Commander; and Company B, 123d Aviation Company Commander, Major Frederic Watke. *Id*. at 83.

[4] *Id.*

[5] *See id*. at 78.

[6] *See id.* at 1 (stating that the massacre at My Lai "was a crime that 'stung the national conscience,' as Telford Taylor observed in a 1970 book" entitled *Nuremberg and Vietnam: An American Tragedy* (1970)). NUREMBERG AND VIETNAM: AN AMERICAN TRAGEDY (1970). The investigation into the events at My Lai, reveled that 1LT Calley not only ordered his Soldiers to round up unarmed men, women, and children in the city but literally to mow them down. *See id*. at 69-77. First Lieutenant Calley, himself, killed some of these victims at point blank range with his rifle. *See id*. at 73. The United States ultimately charged 1LT Calley with four specifications of premeditated murder for killing 107 unarmed My Lai residents at a trail junction and ditch, killing a monk, and committing assault with intent to commit murder on a baby. *See id.* at 114, 188. A general court-martial convicted him of all specifications, but for only twenty-two of the murders and sentenced 1LT Calley to life in prison. *See id*. at 188, 190.

[7] *See id*. at ix.

[8] *See id*. at 1.

[9] *See generally id*. at 191-215 (detailing the U.S. public outcry upon discovery of the events at My Lai).

[10] *See id*. at 2-3.

[11] *See id*. at 5.

[12] *See generally id*. at 191-256. Belknap notes, quoting from *Time* magazine, the Calley "case embodied everything that was wrong with the war [in Vietnam]. It also fed mounting pressures to end that increasing unpopular conflict." *Id*. at 1.

[13] *See id*. at 191-256.

Belknap describes in remarkable detail each of the key events leading up to, and the major players ultimately involved in, the My Lai massacre and the various prosecution and defense counsel in the ensuing trial of 1LT Calley.[14] The *Bibliographical Essay* explains that Belknap relied upon well over ninety-five different primary and secondary sources—from books to court-martial transcripts to the personal files of White House officials[15]—certainly quelling any skepticism about the authenticity of the facts and information Belknap provides.[16]

Although Belknap offers fascinating background information, he spends far too long—nearly three chapters—scrolling through statistic after statistic, thereby detracting from his narrative.[17] He covers a broad spectrum of statistics, from the money requested and spent by the U.S. government on the Vietnam War;[18] to increasing troop numbers;[19] to polls, statistics, and letters on the American population's disapproval of the war and 1LT Calley's conviction.[20]

Belknap further provides a virtual laundry list of polls from various sources that track every legal and political action and reaction that are both distracting and confusing. Belknap could have better served his readers by simply averaging the various polls or citing the more generic labels of "majority" and "minority" views.[21] Similarly, Belknap discusses the conditions the Soldiers endured in Vietnam and the structure and tactics of the Vietcong,[22] which, while informative, failed to tie into the book's primary focus on 1LT Calley's trial and its aftermath.

The book's major weakness concerns information Belknap did not provide. Most noticeably missing is any insight from 1LT Calley himself. Belknap attempted to interview 1LT Calley, but the former officer never responded to Belknap's requests.[23] First Lieutenant Calley would gain little if he provided an interview at this point since whatever he says would likely ignite another firestorm of commentary and criticism especially in light of the volatility his trial created and the feeding frenzy mentality of today's media. Also conspicuously missing in this book were any maps to accompany Belknap's description of Charlie Company's movements on the day of the massacre,[24] photographs of the massacre[25] or even a photo of 1LT Calley, or a chain of command diagram. Maps and photos would have provided a visual context of the events in My Lai and driven home the brutality and senseless slaughter of innocent civilians on that fateful day in Vietnam. From a military perspective, although perhaps unavailable, it would have helped to know the ranks of more of the characters Belknap discusses as he unfolds the events of 16 March 1968,[26] to understand who outranked or led the other Soldiers he describes.

---

[14] *See id*. at 23, 27-31, 33-39, 48, 53-54, 56, 144-49.

[15] *See id*. at 269-282. More specifically, Belknap's sources about the My Lai massacre and 1LT Calley, impressively, range from books; dozens of news articles; at least twenty-six boxes of actual court-martial transcripts of the 1LT Calley trial; 1LT Calley's appellate cases and their corresponding records; congressional and Department of Defense reports, hearings, investigations, and records; scholarly articles; manuscript material in the official Presidential Office Files; poll statistics; and many letters sent by the American public found in the White House Central Files and the various courts in which this case appeared. *Id*.

[16] Aside from his extraordinary research, Belknap explains the military and legal acronyms and jargon he uses throughout the book, thereby assisting non-military readers. *See, e.g.*, *id*. at 36, 37, 44-46, 50, 55, 49, 68, 73, 88, 99, 100, 101, 114, 132, 146, 149, 152, 153, 159, 175, 181, and 194. Belknap also provides an extremely helpful eleven-page chronology at the end of the book, delineating the interplay of the Vietnam War, the massacre and subsequent trials, and key political events. *See id*. at 257-68.

[17] *See generally id*. at 7-36, 130-33, 193-99, 204-15.

[18] *See id*. at 8-10, 17 (detailing President John F. Kennedy's approval of additional funds to fight the Vietnam War and the war's cost).

[19] *See id*. at 8-10, 13, 15.

[20] *See id*. at 20-22, 193-97, 199, 204, 207-15.

[21] It is interesting, however, to compare the public perception of the 1LT Calley trial with that of the more recent famous murder trial, the O.J. Simpson case. Although not as polarized as the 1LT Calley verdict (where seventy-nine percent disagreed in a Gallup Poll with Calley's conviction and life sentence), fifty-six percent disagreed with O.J. Simpson's acquittal in a Gallup Poll just after his trial. *See* 1995 Gallup-CNN/USA Today Poll, The O.J. Simpson Trial: Opinion Polls (Oct. 3, 1995), http://www.law.umkc.edu/faculty/projects/ftrials/Simpson/polls.html.

[22] *See* BELKNAP, *supra* note 1, at 43-48.

[23] *See id*. at xiv.

[24] *See, e.g.*, *id*. at 50-54, 59-60.

[25] *See, e.g.*, *id*. at 66, 120.

[26] *See id*. at 62-72. Belknap refers to the Soldiers involved with My Lai, either directly or as witnesses, mostly by name with no rank. Occasionally, he cites what military job they held leaving the civilian reader still wondering what rank they held and what, if any authority, they had over the Soldiers committing atrocities at My Lai. For example, Belknap refers to "one of Brooks's men, Thomas Partsch . . . . Another member of the Second Platoon, Vernardo Simpson. . . . Platoon Sergeant Jay Buchanon . . ." *Id*. at 65.

Despite Belknap's remarkable and meticulous detail, the book lacks legal analysis. Belknap, as a constitutional and criminal law professor, could have better explained the legal aspects of the cases and acts to which he cites.[27] For example, Belknap discusses the questions asked of the witnesses called by the military panel in 1LT Calley's court-martial,[28] but he never explains the legal authority that grants this unique privilege in a court-martial,[29] which is generally foreign to the civilian court-system.

Interestingly, Belknap notes that Soldiers deploying to Vietnam were actually trained on the 1949 Geneva Convention on the Laws of War (explaining that "persons taking no active part in hostilities . . . must be treated humanely") and the 1907 Hague Convention on Land Warfare (prohibiting attack or bombardment of undefended towns and villages).[30] Soldiers carried two pocket-sized cards "at all times" explaining how to treat civilians and prisoners.[31] In fact, 1LT Calley admitted to receiving training on the Geneva Convention but that he "can't remember any of the classes."[32] Even more astounding, 1LT Calley, taught a class where he "read off a [Pentagon] SOP of 'Do's and Don'ts,'" including "not [to] assault the women."[33] Instead of Belknap driving home the importance of these well-established legal requirements on Soldiers in Vietnam and today—or even explaining the legal significance of the Conventions—he focused on the legally rejected principle of "following the orders of their superiors—absolutely and without reservation . . . ."[34]

While Belknap rebukes the efforts of 1LT Calley's defense team with regard to his extenuation and mitigation case,[35] he fails to discuss thoroughly what the defense could have done under the Manual for Courts-Martial.[36] Belknap should have provided a brief explanation of the appellate process and legally permissible intervention by civilian leadership.[37] A reader without a legal background may be confused trying to understand mechanically how 1LT Calley could appeal his conviction. The law allows 1LT Calley to appeal through the military appellate system while simultaneously seeking habeas corpus[38] relief through the "civilian" federal court system, and ultimately seeking final relief from the Supreme Court.

Another missing aspect of the book is Belknap's own interpretation and personal views on the Vietnam War and 1LT Calley's trial, especially considering the detail Belknap provides discussing what others have said about these events. Belknap provides innuendoes as to his perspective in a few places but he generally maintains a balanced and objective review of this entire historical event. Belknap's unique perspective as a "historian-turned-lawyer," law professor, and Vietnam War Army officer, would provide the reader an insider's perspective to what was going on at the time and assist in relating the events to today's justice system.[39] Belknap does take noticeable positions lauding the efforts of 1LT Calley's prosecution, while ridiculing the dismal efforts of his defense.[40] Nonetheless, since Belknap's purpose really seemed to be the political

---

[27] *See, e.g.*, *id*. at 150, 152, 163, 172, 180-81, 229, 253. Belknap does note that the *Jencks Act* provides that "in any federal criminal prosecution, once a government witness testifie[s] on direct examination, the United States ha[s] to produce for in camera inspection any statements he had made previously that were in its possession." *Id*. at 152.

[28] *See, e.g.*, *id*. at 179-80.

[29] *See* MANUAL FOR COURTS-MARTIAL, UNITED STATES, MIL. R. EVID. 614 (2005).

[30] *See* BELKNAP, *supra* note 1, at 42.

[31] *See id.* Titled "Nine Rules," the first card admonished Soldiers "to remember that they were guests in South Vietnam, to make friends with the people, to treat the women politely and with respect, and to avoid 'loud, rude, or unusual behavior.'" *Id.* The second card, "The Enemy in Your Hands," "informed Soldiers explicitly that 'mistreatment of any captive is a criminal offense' and that 'all persons in your hands, whether suspects, civilians, or combat captives, must be protected against violence, insults, curiosity, and reprisals of any kind.'" *Id*.

[32] *Id*.

[33] *Id*. at 43.

[34] *Id*.

[35] *Id*. at 189.

[36] *See* MANUAL FOR COURTS-MARTIAL, UNITED STATES ch. XIII, ¶ 75(c) (1969) (proscribing for the first time extenuating and mitigating rules).

[37] *See* BELKNAP, *supra* note 1, at 237-54.

[38] A writ employed to bring a person before a court, most frequently to ensure that the party's imprisonment or detention is not illegal. BLACK'S LAW DICTIONARY 715 (8th ed. 2004).

[39] *See* BELKNAP, *supra* note 1 (detailing Belknap's background).

[40] *See generally* BELKNAP, *supra* note 1, at 144-67 (discussing the performance of the prosecution and defense).

consequences of 1LT Calley's trial—despite Belknap's legal background—he provides little personal commentary or lengthy analysis on these issues.

Belknap also unduly gibes President Richard M. Nixon on a few occasions. As the book explains, President Nixon, in an effort to quell public outcry over the verdict, involved himself with the case as soon as the decision was announced by ordering 1LT Calley to house arrest while he awaited the results of his appeal.[41] President Nixon further vowed to review the case personally after final action in the case but before carrying out any final sentence.[42] After the court-martial convening authority[43] and the Secretary of Defense ultimately remitted 1LT Calley's life sentence down to ten years,[44] and despite the public objections of the trial and verdict in the first place, President Nixon ultimately decided, "no further action by me in this matter is necessary or appropriate."[45] Belknap jeers, "This is how Nixon fulfilled the promise he had made three years earlier to an outraged and applauding public to personally and finally decide the Calley case."[46] Belknap also brands President Nixon a "hypocrite" after Nixon refused to appoint a presidential commission to investigate the massacre and study war crimes in Vietnam.[47] Nixon felt that defense attorneys would argue that such an inquiry would prejudice 1LT Calley's case; a claim Belknap found duplicitous considering Nixon publicly announced his belief in the guilt of other high-profile defendants.[48]

Belknap's criticism of President Nixon, however, is logically inconsistent. He states, "President Nixon recognized how angry the public was, but his efforts to exploit the powerful emotions unleashed by the court-martial of [1LT] Calley failed because he did not understand the disaffection with the Vietnam War and the resentment of authority that fueled them."[49] Quite the contrary, President Nixon's memoirs note, "I felt that many of the commentators and congressmen who professed outrage about My Lai were not really as interested in the moral questions raised by the Calley case as they were interested in using it to make political attacks against the Vietnam War."[50] Moreover, President Nixon spent three days[51] focusing on the 1LT Calley case and what he should do "as public opinion continue[d] to mount [against the war]."[52] Belknap himself comments, although with another barb at President Nixon, "Grasping the breadth and depth of public hostility to the verdict, [he] shamelessly exploited public reaction against it to advance his own political agenda."[53] It seems apparent that President Nixon was aware of the hostility towards the war and resentment of the political leadership. Belknap's criticism may have found traction on how Nixon responded to the public's perceptions instead of his failure to understand the public's sentiment.

Despite these weaknesses, what can a contemporary reader learn from yet another book about the Vietnam War? Belknap provides the best answer:

> The young men and women of [today's] generation asked to bear the burdens of this new war [the Global War on Terrorism] can learn a great deal from the experiences of their predecessors who fought the one in Vietnam that ended three decades ago. Among those lessons are how and why good people do bad things, and who is responsible for crimes committed on the battlefield.[54]

---

[41] *See id*. at 198.

[42] *See id*. at 201.

[43] *See id*. at 237.

[44] *See id*. at 245.

[45] *Id*. at 246.

[46] *Id*. at 200.

[47] *See id*. at 136.

[48] *See id*. The other high-profile defendants Belknap references are Charles Manson and Angela Davis. *Id*.

[49] *Id*. at 215.

[50] *Id*. at 135; *see also* JOHN SACKS, LIEUTENANT CALLEY: HIS OWN STORY 269 (1971) (an "as-told-to" autobiographical account of 1LT Calley).

[51] *See* BELKNAP, *supra* note 1, at 197-200.

[52] *Id*. at 197.

[53] *Id*. at 4.

[54] *Id*. at 2.

The recent uncovering of the atrocities of prisoner abuse at the Abu Ghraib prison in Iraq, the subsequent trials of the U.S. military offenders, and its political impact on the national political scene, are eerily similar to the publicity circus surrounding 1LT Calley's trial. While the maltreatment at Abu Ghraib[55]—although appalling—pales in comparison to the senseless slaughter of 500 unarmed civilians at My Lai, the political fallout experienced after 1LT Calley's trial is strikingly similar to the commentators and anti-war advocates of today. Today's activists are wringing their hands to blame the entire armed services, President George W. Bush, and his administration, instead of focusing on the few actually involved in the scandal.[56]

Although thirty years separate the events of My Lai and Abu Ghraib, *The Vietnam War on Trial* is clearly applicable to today's military leader and judge advocate. Written before the news of Abu Ghraib made headlines, "[t]he story of My Lai as here retold becomes the story of all the atrocities of war. The lessons learned are as applicable to our war in Korea, and our military actions in Libya, Panama, Kosovo, and against the Taliban regime in Afghanistan."[57]

Other similarities exist between the events preceding My Lai[58] and the events preceding the abuses at the Abu Ghraib prison abuses. For example, a mortar attack wounded then-Army Specialist (SPC) Armin J. Cruz, Jr., on 20 September 2003, shortly after his unit assigned him to Abu Ghraib.[59] For those stationed at Abu Ghraib, "[t]he prison had been under almost daily attacks during the fall, and soldiers and commanders assigned there have described living in constant fear."[60] As for SPC Cruz, "One of his closest friends, Sergeant Travis Friedrich, was one of the two soldiers killed in the attack [among others injured]. Asked by [the military judge] if he wanted to punish the detainees for 'what happened to your friends,' Cruz responded, 'Yes, sir.'"[61]

Specialist Cruz and other Soldiers, forced detainees to crawl naked on the floor and handcuffed them together in sexually humiliating positions following these mortar attacks.[62] "In an attempt to explain his behavior that night," SPC Cruz said that he "did not see the men as three detainees but rather as 'three guys who killed two soldiers, injured me, injured my boss.'"[63] Analogously, the Soldiers in Charlie Company, and 1LT Calley himself, "felt a desire for revenge against every villager, regardless of age or gender. All of them were part of the problem."[64]

---

[55] *See* Transcript of Brigadier General Janis L. Karpinski, *Prison Abuse Scandal, Abu Ghraib*, WASH. POST, May 14, 2004, *at* http://www.washingtonpost.com/wp-dyn/articles/A24845-2004May13.html. Army Reserve BG Karpinski, at the time of the abuse scandal and the interview, served as the Commander, 800th Military Police Brigade responsible for the Abu Ghraib prison. *Id.* According to news sources, several of the prison guards at Abu Ghraib abused Iraqi prisoners by having them pose naked for photos, "pointing at [their] genitals and holding a naked Iraqi detainee on a leash." *Iraq Abuse Photos "Taken For Fun,"* BBC NEWS, Aug. 4, 2004, *at* http://news.bbc.co.uk/1/hi/world/americas/3529984.stm (including a partially masked photograph of the "pointing at the genitals"). Another news source notes that guards put naked prisoners in cages for days at a time. Rajiv Chandrasekaran & Scott Wilson, *Mistreatment of Detainees Went Beyond Guards' Abuse*, WASH. POST, May 11, 2004, at A1, *available at* http://www.washingtonpost.com/wp-dyn/articles/A15492-2004May10.html. The article further notes that the guards used pepper spray on inmates who disobeyed orders; handcuffed inmates to the four corners of a bed; "us[ed] prisoners as their playthings; humiliated them in ways that eventually turned sexual, including simulated sodomy; and other such abuses." *Id.*

[56] *See, e.g.*, Jackson Diehl, *Refusing to Whitewash Abu Ghraib*, WASH. POST, Sept. 13, 2004, at A21, *available at* http://www.washingtonpost.com/wp-dyn/articles/A17060-2004Sep12.html. In addition to noting comments from various congressional officials, the article advocates,

> Cynics will not be surprised to learn that senior military commanders and Bush administration officials are on the verge of avoiding any accountability for the scandal of prisoner abuse in Iraq and Afghanistan—despite the enormous damage done by that affair to U.S. standing in Iraq and around the world; despite the well-documented malfeasance and possible criminal wrongdoing by those officials; despite the contrasting prosecution of low-ranking soldiers.
>
> President Bush and Defense Secretary Donald H. Rumsfeld still refuse to acknowledge the established facts of the case, much less respond to them.

Id.

[57] BELKNAP, *supra* note 1, at xi.

[58] *See id.* at 57. Belknap describes how the night before the assault on My Lai, Captain Medina, the Charlie Company Commander, gave a "pep talk" following a funeral for Sergeant George Cox killed when he tripped a booby trap on patrol, essentially motivating his company to "destroy the village" of My Lai. *Id.* at 57-58. As Belknap notes, "it was time to settle the score . . . it was a time for revenge." *Id.* at 58.

[59] *See* Jackie Spinner, *Soldier Pleads Guilty to Prisoner Abuse*, WASH. POST, Sept. 12, 2004, at A24, *available at* http://www.washingtonpost.com/wp-dyn/articles/A13311-2004Sep11.html.

[60] *Id.*

[61] *Id.*

[62] *See id.*

[63] *Id.*

[64] *See* BELKNAP, *supra* note 1, at 56.

What the My Lai massacre revealed about the United States, provides even more poignant evidence of *The Vietnam War on Trial*'s applicability today, especially in light of the Abu Ghraib prison scandal. Belknap suggests,

> A democratic nation that holds itself and its principles of self-determination and freedom as a light unto the nations of the world was complicit in the [My Lai] slaughter . . . . My Lai not only was emblematic of the difficulties American troops faced by intervening in a civil war abroad but also became a focal point for protesters at home.[65]

In much the same way, the prisoner abuse at Abu Ghraib serves as a modern day embarrassment for the United States and its' military and has certainly angered many people abroad.[66] To avoid perpetuating this socio-political pattern of military mistrust based on the actions of a few versus the integrity of the majority, all readers can benefit from Belknap's historical perspective on the My Lai massacre and 1LT Calley's trial. By learning from this past tragedy, leaders and judge advocates can hope to avoid the maxim, "Those who cannot remember the past are condemned to repeat it,"[67] and prevent the need for a BG Young-type comment that "only five of us know about this." Instead, the United States will be able to focus its attention on the hard work and professionalism of the thousands of Soldiers who uphold the nation's freedoms every day and personify this country's great principles as a light unto all nations.

---

[65] *Id*. at x.

[66] *See* Ed Finn, *International Media Condemns U.S. Torturers*, SLATE, May 6, 2004, *at* http://slate.msn.com/id/2100092; *see, e.g.*, International Commission of Jurists, African Human Rights and Access to Justice Programme (AHRAJ), Vol. 2, Iss. 5 (May 2004), *available at* http://www.icj-kenya.org/ahraj/ahraj_2_5_0504.pdf.

> ICJ members . . . and the African human rights community are deeply concerned by recent reports on the treatment of prisoners at Abu Ghraib in Iraq. The reports of sadistic, wanton, and criminal abuses are obscene and shocking. The international human rights community has registered disapproval of the systematic and illegal abuse of detainees at the Abu Ghraib prison, notorious for state sponsored torture in the Saddam Hussein era. The African human rights community joins the international community in condemning the deliberate dehumanization of prisoners, by American soldiers, which amounts to torture and is contrary to established international human rights treaties.

Id.

[67] JOHN BARTLETT, FAMILIAR QUOTATIONS 588 (16th ed. 1992) (quoting U.S. (Spanish-born) philosopher George Santayana (1863-1952), 1 THE LIFE OF REASON (1905)).

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 (June 2006 - October 2007) (http://www.jagcnet.army.mil/JAGCNETINTERNET/HOMEPAGES/AC/TJAGSAWEB.NSF/Main?OpenFrameset (click on Courses, Course Schedule))

ATTRS. No.	Course Title	Dates
	GENERAL	
5-27-C22	55th Graduate Course	14 Aug 06 – 24 May 07
5-27-C22	56th Graduate Course	13 Aug 07 – 23 May 08
5-27-C20	171st JA Officer Basic Course	22 Oct – 3 Nov 06 (BOLC III) Ft. Lee
		3 Nov 06 – 31 Jan 07 (BOLC III) TJAGSA
5-27-C20	172d JA Officer Basic Course	4 – 16 Feb 07 (BOLC III) Ft. Lee
		16 Feb – 2 May 07 (BOLC III) TJAGSA
5-27-C20	173d JA Officer Basic Course	1 – 13 Jul 07 (BOLC III) Ft. Lee
		13 – Jul – 26 Sep 07 (BOLC III) TJAGSA **(Tentative)**
5F-F70	38th Methods of Instruction Course	26 – 27 Jul 07
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	29 Jan – 2 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	14 – 16 Feb 07
5F-F52	37th Staff Judge Advocate Course	4 – 8 Jun 07
5F-F52-S	10th Staff Judge Advocate Team Leadership Course	4 – 6 Jun 07
5F-F55	2007 JAOAC (Phase II)	7 – 19 Jan 07
5F-JAG	2007 JAG Annual CLE Workshop	1 – 5 Oct 07
JARC-181	2007 JA Professional Recruiting Seminar	17 – 20 Jul 07
NCO ACADEMY COURSES		
512-27D30 (Phase 2)	6th Paralegal Specialist BNCOC	11 Sep – 6 Oct 06
512-27D30 (Phase 2)	001-07 Paralegal Specialist BNCOC	6 Nov – 8 Dec 06
512-27D30 (Phase 2)	002-07 Paralegal Specialist BNCOC	28 Jan – 2 Mar 07
512-27D30 (Phase 2)	003-07 Paralegal Specialist BNCOC	2 Apr – 4 May 07
512-27D30 (Phase 2)	004-07 Paralegal Specialist BNCOC	2 Apr – 4 May 07
512-27D30 (Phase 2)	005-07 Paralegal Specialist BNCOC	11 Jun – 13 Jul 07
512-27D30 (Phase 2)	006-07 Paralegal Specialist BNCOC	13 Aug – 14 Sep 07
512-27D40 (Phase 2)	001-07 Paralegal Specialist ANCOC	6 Nov – 8 Dec 06
512-27D40 (Phase 2)	002-07 Paralegal Specialist ANCOC	28 Jan – 2 Mar 07
512-27D40 (Phase 2)	003-07 Paralegal Specialist ANCOC	11 Jun – 13 Jul 07
512-27D40 (Phase 2)	004-07 Paralegal Specialist ANCOC	13 Aug – 14 Sep 07
WARRANT OFFICER COURSES		
7A-270A1	18th Legal Administrators Course	2 – 6 Apr 07
7A-270A2	8th JA Warrant Officer Advanced Course	9 Jul – 3 Aug 07
7A-270A0	14th JA Warrant Officer Basic Course	29 May – 22 Jun 07
ENLISTED COURSES		
5F-F58	2007 Paralegal Sergeants Major Symposium	5 – 9 Feb 07

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
512-27DC6	8th Court Reporting Symposium	29 Oct – 3 Nov 07
512-27D/20/30	18th Law for Paralegal NCOs Course	26 – 30 Mar 07
512-27D/40/50	16th Senior Paralegal Course	5 – 9 Mar 07
512-27D-CLNCO	9th Chief Paralegal/BCT NCO Course	5 – 9 Mar 07
ADMINISTRATIVE AND CIVIL LAW		
5F-F21	5th Advanced Law of Federal Employment Course	18 – 20 Oct 06
5F-F21	6th Advanced Law of Federal Employment Course	17 – 19 Oct 07
5F-F22	60th Law of Federal Employment Course	16 – 20 Oct 06
5F-F22	61st Law of Federal Employment Course	15 – 19 Oct 07
5F-F23	59th Legal Assistance Course	30 Oct – 3 Nov 06
5F-F23	60th Legal Assistance Course	7 – 11 May 07
5F-F23	61st Legal Assistance Course	29 Oct – 2 Nov 07
5F-F24	31st Admin Law for Military Installations Course	19 – 23 Mar 07
5F-F28	2006 Income Tax Course	11 – 15 Dec 06
5F-F29	25th Federal Litigation Course	30 Jul – 3 Aug 07
5F-F202	5th Ethics Counselors Course	23 – 27 Apr 07
5F-F23E	2006 USAREUR Legal Assistance CLE	23 – 27 Oct 06
5F-F23E	2007 USAREUR Legal Assistance CLE	22 – 26 Oct 07
5F-F24E	2006 USAREUR Administrative Law CLE	18 – 22 Sep 06
5F-F24E	2007 USAREUR Administrative Law CLE	17 – 21 Sep 07
5F-F26E	2006 USAREUR Claims Course	16 – 20 Oct 06
5F-F26E	2007 USAREUR Claims Course	15 – 19 Oct 07
5F-F28E	2006 USAREUR Income Tax CLE	4 – 8 Dec 06
5F-F28P	2007 PACOM Income Tax CLE	6 – 9 Nov 06
5F-F28H	2006 HAWAII Income Tax CLE	13 – 17 Nov 06

CONTRACT AND FISCAL LAW		
5F-F10	157th Contract Attorneys Course	12 – 20 Mar 07
5F-F11	2006 Government Contract Law Symposium	5 – 8 Dec 06
5F-F12	75th Fiscal Law Course	23 – 27 Oct 06
5F-F12	76th Fiscal Law Course	30 Apr – 4 May 07
5F-F13	3d Operational Contracting Course	21 – 23 Mar 07
5F-F102	6th Contract Litigation Course	9 – 13 Apr 07
5F-F15E	2007 USAREUR Contract & Fiscal Law CLE	13 – 16 Feb 07
N/A	2007 Maxwell AFB Fiscal Law Course	5 – 8 Feb 07
5F-F14	Comptrollers Accreditation Fiscal Law Course (Washginton, DC)	16 – 19 Jan 07
5F-F14	Comptrollers Accreditation Fiscal Law Course (Yuma, AZ)	22 – 26 Jan 07
5F-F14	Comptrollers Accreditation Fiscal Law Course (Ft. Monmouth, NJ)	5 – 8 Jun 07
CRIMINAL LAW		
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	5 – 16 Feb 07
5F-F34	28th Criminal Law Advocacy Course	10 – 21 Sep 07
5F-F35	30th Criminal Law New Developments Course	6 – 9 Nov 06
5F-301	10th Advanced Advocacy Training	29 May – 1 Jun 07
5F-F35E	2007 USAREUR Criminal Law CLE	29 Jan – 2 Feb 07
INTERNATIONAL AND OPERATIONAL LAW		
5F-F42	3d Advanced Intelligence Law Course	27 – 29 Jul 07
	48th Operational Law Course	30 Jul – 10 Aug 07
5F-F42	87th Law of War Course	29 Jan – 2 Feb 07
5F-F42	88th Law of War Course	9 – 13 Jul 07
5F-F44	2d Legal Aspects of Information Operations Course	16 – 20 Jul 07
5F-F45	6th Domestic Operational Law Course	13 Nov – 17 Nov 06
5F-F45	7th Domestic Operational Law Course	29 Oct – 2 Nov 07
5F-F47	47th Operational Law Course	26 Feb – 9 Mar 07

5F-F47	48th Operational Law Course	6 – 17 Aug 07

3. Naval Justice School and FY 2007 Course Schedule

Please contact Jerry Gallant, Registrar, Naval Justice School, 360 Elliot Street, Newport, RI 02841 at (401) 841-3807, extension 131, for information about the courses.

Naval Justice School Newport, RI		
CDP	**Course Title**	**Dates**
0257	Lawyer Course (040) Lawyer Course (010) Lawyer Course (020) Lawyer Course (030) Lawyer Course (040)	7 Aug – 6 Oct 06 16 Oct – 15 Dec 06 22 Jan – 23 Mar 07 4 Jun – 3 Aug 07 13 Aug – 12 Oct 07
BOLT	BOLT (010) BOLT (010) BOLT (020) BOLT (020) BOLT (030) BOLT (030)	10 – 13 Oct 06 (USMC) 10 – 13 Oct 06 (NJS) 26 – 30 Mar 07 (USMC) 26 – 30 Mar 07 (NJS) 6 – 10 Aug 07 (USMC) 6 – 10 Aug 07 (NJS)
961F	Coast Guard Judge Advocate Course (010)	10 – 13 Oct 06
900B	Reserve Lawyer Course (020) Reserve Lawyer Course (010) Reserve Lawyer Course (020)	11 – 15 Sep 06 7 – 11 May 07 10 – 14 Sep 07
914L	Law of Naval Operations (020) Law of Naval Operations (Reservists) (010) Law of Naval Operations (Reservists) (020)	18 – 22 Sep 06 14 – 18 May 07 17 – 21 May 07
850T	SJA/E-Law Course (010) SJA/E-Law Course (020)	29 May – 8 Jun 07 6 – 17 Aug 07
850V	Law of Military Operations (010)	11 – 22 Jun 07
786R	Advanced SJA/Ethics (010) Advanced SJA/Ethics (020)	26 – 30 Mar 07 (San Diego) 16 – 20 Apr 07 (Norfolk)
748K	National Institute of Trial Advocacy (010)	23 – 27 Oct 06 (Camp Lejeune)
	National Institute of Trial Advocacy (020)	14 – 18 May 07 (San Diego)
0258	Senior Officer (070) Senior Officer (010) Senior Officer (020) Senior Officer (030) Senior Officer (040) Senior Officer (050) Senior Officer (060)	25 – 29 Sep 06 (New Port) 30 Oct – 3 Nov 06 (New Port) 8 – 12 Jan 07 (New Port) 12 – 16 Mar 07 (New Port) 7 – 11 May 07 (New Port) 23 – 27 Jul 07 (New Port) 24 – 28 Sep 07 (New Port)
4048	Estate Planning (010)	23 – 27 Jul 07
No CDP	Prosecuting Trial Enhancement Training (010)	22 – 26 Jan 07

7487	Family Law/Consumer Law (010)	16 – 20 Apr 07
7485	Litigating National Security (010)	5 – 7 Mar 07
748B	Naval Legal Service Command Senior Officer Leadership (010)	20 – 31 Aug 07
2205	Defense Trial Enhancement (010)	8 – 12 Jan 07
3938	Computer Crimes (010)	21 – 25 May 07 (Norfolk)
961D	Military Law Update Workshop (Officer) (010) Military Law Update Workshop (Officer (020)	TBD TBD
961M	Effective Courtroom Communications (010) Effective Courtroom Communications (020)	4 – 8 Dec 06 (Jacksonville) 26 – 30 Mar 07 (San Diego)
961J	Defending Complex Cases (010)	16 – 20 Jul 07
525N	Prosecuting Complex Cases (010)	9 – 13 Jul 07
2622	Senior Officer (Fleet) (010) Senior Officer (Fleet) (020) Senior Officer (Fleet) (030) Senior Officer (Fleet) (040) Senior Officer (Fleet) (050) Senior Officer (Fleet) (060) Senior Officer (Fleet) (070) Senior Officer (Fleet) (080) Senior Officer (Fleet) (090) Senior Officer (Fleet) (100) Senior Officer (Fleet) (110) Senior Officer (Fleet) (120) Senior Officer (Fleet) (130)	13 – 17 Nov 06 (Pensacola, FL) 11 – 15 Dec 06 (Pensacola, FL) 29 Jan – 2 Feb 07 (Yokosuka, Japan) 5 Feb – 9 Feb 07 (Okinawa, Japan) 12 – 16 Feb 07 (Pensacola, FL) 26 – 30 Mar 07 (Pensacola, FL) 2 – 6 Apr 07 (Quantico, VA) 9 – 13 Apr 07 (Camp Lejeune, NC) 23 – 27 Apr 07 (Pensacola, FL) 23 – 27 Apr 07 (Naples, Italy) 4 – 8 Jun 07 (Pensacola, FL) 9 – 13 Jul 07 (Pensacola, FL) 27 – 31 Aug 07 (Pensacola, FL)
961A	Continuing Legal Education (PACOM) (010) Continuing Legal Education (EUCOM) (020)	29 – 30 Jan 07 (Yokosuka, Japan) 23 – 24 Apr 07 (Naples, Italy)
7878	Legal Assistance Paralegal Course (010)	16 Apr – 20 Apr 07
3090	Legalman Course (010) Legalman Course (020)	16 Jan – 30 Mar 07 16 Apr – 29 Jun 07
932V	Coast Guard Legal Technician Course (010)	10 – 21 Sep 06
846L	Senior Legalman Leadership Course (010)	23 – 27 Jul 07
049N	Reserve Legalman Course (Phase I) (010)	9 – 20 Apr 07
056L	Reserve Legalman Course (Phase II) (010)	23 Apr – 4 May 07
846M	Reserve Legalman Course (Phase III) (010)	7 – 18 May 07
5764	LN/Legal Specialist Mid-Career Course (010) LN/Legal Specialist Mid Career Course (020)	16 – 27 Oct 06 17 – 28 Sep 07

961G	Military Law Update Workshop (Enlisted) (010) Military Law Update Workshop (Enlisted (020)	TBD TBD
4040	Paralegal Research & Writing (010) Paralegal Research & Writing (020) Paralegal Research & Writing (030)	19 – 30 Mar 07 (Newport) 7 – 18 May 07 (Norfolk) 16 – 27 Jul 07 (San Diego)
4046	SJA Legalman (020)	29 May – 7 Jun 07 (Newport)
627S	Senior Enlisted Leadership Course (010) Senior Enlisted Leadership Course (020) Senior Enlisted Leadership Course (030) Senior Enlisted Leadership Course (040) Senior Enlisted Leadership Course (050) Senior Enlisted Leadership Course (060) Senior Enlisted Leadership Course (070) Senior Enlisted Leadership Course (080) Senior Enlisted Leadership Course (090) Senior Enlisted Leadership Course (100) Senior Enlisted Leadership Course (110) Senior Enlisted Leadership Course (120) Senior Enlisted Leadership Course (130) Senior Enlisted Leadership Course (140) Senior Enlisted Leadership Course (150) Senior Enlisted Leadership Course (160) Senior Enlisted Leadership Course (170) Senior Enlisted Leadership Course (180)	11 – 13 Oct 06 (Norfolk) 23 – 25 Oct 06 (San Diego) 8 – 10 Nov 06 (Norfolk) 10 – 12 Jan 07 (Mayport) 29 – 31 Jan 07 (Pendleton) 30 Jan – 1 Feb 07 (Yokosuka, Japan) 6 – 8 Feb 07 (Okinawa, Japan) 21 – 23 Feb 07 (Norfolk) 20 – 22 Mar 07 (San Diego) 28 – 30 Mar 07 (Norfolk) 25 – 27 Apr 07 (Norfolk) 24 – 26 Apr 07 (Bremerton) 1 – 3 May 07 (San Diego) 23 – 25 May 07 (Norfolk) 17 – 19 Jul 07 (San Diego) 18 – 20 Jul 07 (Great Lakes) 15 – 17 Aug 07 (Norfolk) 28 – 30 Aug 07 (Pendleton)
Naval Justice School Detachment Norfolk, VA		
0376	Legal Officer Course (010) Legal Officer Course (020) Legal Officer Course (030) Legal Officer Course (040) Legal Officer Course (050) Legal Officer Course (060) Legal Officer Course (070) Legal Officer Course (080)	16 Oct – 3 Nov 06 27 Nov – 15 Dec 06 29 Jan – 16 Feb 07 5 – 23 Mar 07 30 Apr – 18 May 07 4 – 22 Jun 07 23 Jul – 10 Aug 07 10 – 28 Sep 07
0379	Legal Clerk Course (080) Legal Clerk Course (010) Legal Clerk Course (020) Legal Clerk Course (030) Legal Clerk Course (040) Legal Clerk Course (050) Legal Clerk Course (060) Legal Clerk Course (070) Legal Clerk Course (080)	11 – 22 Sep 06 16 – 27 Oct 06 4 – 15 Dec 06 22 Jan – 2 Feb 07 5 – 16 Mar 07 2 – 13 Apr 07 4 – 15 Jun 07 30 Jul – 10 Aug 07 10 – 21 Sep 07
3760	Senior Officer Course (010) Senior Officer Course (020) Senior Officer Course (030) Senior Officer Course (040) Senior Officer Course (050) Senior Officer Course (060) Senior Officer Course (070)	13 – 17 Nov 06 8 – 12 Jan 07 (Mayport) 26 Feb – 2 Mar 07 2 – 6 Apr 07 25 – 29 Jun 07 16 – 20 Jul 07 (Great Lakes) 27 – 31 Aug 07

4046	Military Justice Course for SJA/Convening Authority/Shipboard Legalmen (030)	18 – 29 Jun 07
Naval Justice School Detachment San Diego, CA		
947H	Legal Officer Course (010) Legal Officer Course (020) Legal Officer Course (030) Legal Officer Course (040) Legal Officer Course (050) Legal Officer Course (060) Legal Officer Course (070) Legal Officer Course (080)	2 – 20 Oct 06 27 Nov – 15 Dec 06 8 – 26 Jan 07 26 Feb – 16 Mar 07 7 – 25 May 07 11 – 29 Jun 07 30 Jul – 17 Aug 07 10 – 28 Sep 07
947J	Legal Clerk Course (010) Legal Clerk Course (020) Legal Clerk Course (030) Legal Clerk Course (040) Legal Clerk Course (050) Legal Clerk Course (060) Legal Clerk Course (070) Legal Clerk Course (080)	2 – 13 Oct 06 6 – 17 Nov 06 27 Nov – 8 Dec 06 8 – 19 Jan 07 2 – 13 Apr 07 7 – 18 May 07 11 – 22 Jun 07 30 Jul – 10 Aug 07
3759	Senior Officer Course (090) Senior Officer Course (010) Senior Officer Course (020) Senior Officer Course (030) Senior Officer Course (040) Senior Officer Course (050) Senior Officer Course (060) Senior Officer Course (070) Senior Officer Course (080)	11 – 15 Sep 06 (Pendleton) 30 Oct – 3 Nov 06 (San Diego) 29 Jan – 2 Feb 07 (Pendleton) 12 – 16 Feb 07 (San Diego) 2 – 6 Apr 07 (San Diego) 23 – 27 Apr 07 (Bremerton) 4 – 8 Jun 07 (San Diego) 20 – 24 Aug 07 (San Diego) 27 – 31 Aug 07 (Pendleton)
2205	CA Legal Assistance Course (010)	5 – 9 Feb 07 (San Diego)
4046	Military Justice Course for SJA/Convening Authority/Shipboard Legalmen (010)	26 Feb – 9 Mar 07

4. Air Force Judge Advocate General School Fiscal Year 2007 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**
Federal Employee Labor Law Course, Class 07-A	2 – 6 Oct 06
Paralegal Apprentice Course, Class 07-01	2 Oct – 15 Nov 06

Judge Advocate Staff Officer Course, Class 07-A	10 Oct – 14 Dec 06
Paralegal Craftsman Course, Class 07-01	16 Oct – 21 Nov 06
Advanced Environmental Law Course, Class 07-A (Off-Site Wash DC Location)	30 – 31 Oct 06
Deployed Fiscal Law & Contingency Contracting Course, Class 07-A	28 Nov – 1 Dec 06
Paralegal Apprentice Course, Class 07-02	8 Jan – 21 Feb 07
Claims & Tort Litigation Course, Class 07-A	8 – 12 Jan 07
Air National Guard Annual Survey of the Law, Class 07-A & B (Off-Site)	19 – 20 Jan 07
Air Force Reserve Annual Survey of the Law, Class 07-A & B (Off-Site)	19 – 20 Jan 07
Computer Legal Issues Course, Class 07-A	22 – 26 Jan 07
Legal Aspects of Information Operations Law Course, Class 07-A	22 – 24 Jan 07
Trial & Defense Advocacy Course, Class 07-A	29 Jan – 9 Feb 07
Total Air Force Operations Law Course, Class 07-A	9 – 11 Feb 07
Homeland Defense Course, Class 07-A	12 – 16 Feb 07
Fiscal Law Course (DL), Class 07-A	12 – 16 Feb 07
Paralegal Craftsman Course, Class 07-02	13 Feb – 20 Mar 07
Judge Advocate Staff Officer Course, Class 07-B	20 Feb – 20 Apr 07
Paralegal Apprentice Course, Class 07-03	2 Mar – 13 Apr 07
Environmental Law Update Course (DL), Class 07-A	26 – 30 Mar 07
Paralegal Craftsman Course, Class 07-003	2 Apr – 4 May 07
Interservice Military Judges' Seminar, Class 07-A	10 – 13 Apr 07
Advanced Trial Advocacy Course, Class 07-A	23 – 27 Apr 07
Paralegal Apprentice Course, Class 07-04	22 Apr – 5 Jun 07
Environmental Law Course , Class 07-A	30 Apr – 4 May 07
Reserve Forces Judge Advocate Course, Class 07-A	7 – 11 May 07
Reserve Forces Paralegal Course, Class 07-A	7 – 18 May 07
Operations Law Course, Class 07-A	14 – 24 May 07
Military Justice Administration Course, Class 07-A	21 – 25 May 07
Accident Investigation Board Legal Advisors' Course, Class 07-A	4 – 8 Jun 07
Staff Judge Advocate Course, Class 07-A	11 – 22 Jun 07

Law Office Management Course, Class 07-A	11 – 22 Jun 07
Paralegal Apprentice Course, Class 07-05	18 Jun – 31 Jul 07
Advanced Labor & Employment Law Course, Class 07-A	25 – 29 Jun 07
Negotiation and Appropriate Dispute Resolution Course, Class 07-A	9 – 13 Jul 07
Judge Advocate Staff Officer Course, Class 07-C	16 Jul – 14 Sep 07
Paralegal Craftsman Course, Class 07-04	7 Aug – 11 Sep 07
Paralegal Apprentice Course, Class 07-06	13 Aug – 25 Sep 07
Reserve Forces Judge Advocate Course, Class 07-B	27 – 31 Aug 07
Trial & Defense Advocacy Course, Class 07-B	17 – 28 Sep 07
Legal Aspects of Sexual Assault Workshop, Class 07-A	25 – 27 Sep 07

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.

1. 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	Servicemembers 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 A452505 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 (2005).

AD A452516 Environmental Law Deskbook, JA-234 (2006).

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.

2. 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.

3. 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*.

4. 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.

5. 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.

Individual Paid Subscriptions to *The Army Lawyer*

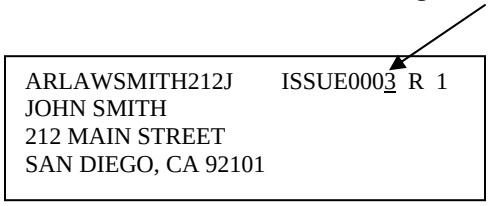
Attention Individual Subscribers!

The Government Printing Office offers a paid subscription service to *The Army Lawyer*. To receive an annual individual paid subscription (12 issues) to *The Army Lawyer*, complete and return the order form below (photocopies of the order form are acceptable).

Renewals of Paid Subscriptions

When your subscription is about to expire, the Government Printing Office will mail each individual paid subscriber only one renewal notice. You can determine when your subscription will expire by looking at your mailing label. Check the number that follows "ISSUE" on the top line of the mailing label as shown in this example:

A renewal notice will be sent when this digit is 3.



The numbers following ISSUE indicate how many issues remain in the subscription. For example, ISSUE001 indicates a subscriber will receive one more issue. When the number reads ISSUE000, you have received your last issue unless you renew.

You should receive your renewal notice around the same time that you receive the issue with ISSUE003.

To avoid a lapse in your subscription, promptly return the renewal notice with payment to the Superintendent of Documents. If your subscription service is discontinued, simply send your mailing label from any issue to the Superintendent of Documents with the proper remittance and your subscription will be reinstated.

Inquiries and Change of Address Information

The individual paid subscription service for *The Army Lawyer* is handled solely by the Superintendent of Documents, not the Editor of *The Army Lawyer* in Charlottesville, Virginia. Active Duty, Reserve, and National Guard members receive bulk quantities of *The Army Lawyer* through official channels and must contact the Editor of *The Army Lawyer* concerning this service (see inside front cover of the latest issue of *The Army Lawyer*).

For inquiries and change of address for individual paid subscriptions, fax your mailing label and new address to the following address:

United States Government Printing Office
Superintendent of Documents
ATTN: Chief, Mail List Branch
Mail Stop: SSOM
Washington, D.C. 20402

United States Government INFORMATION
PUBLICATIONS ★ PERIODICALS ★ ELECTRONIC PRODUCTS

Army Lawyer and Military Review SUBSCRIPTION ORDER FORM

Order Processing Code: 5937

Easy Secure Internet: bookstore.gpo.gov
Toll Free: 866 512-1800
Phone: 202 512-1800
Fax: 202 512-2104
Mail: Superintendent of Documents, PO Box 371954, Pittsburgh, PA 15250-7954

☐ **YES,** enter my subscription(s) as follows:

_____subscription(s) of the *Army Lawyer* (ARLAW) for $50 each ($70 foreign) per year.

_____subscription(s) of the *Military Law Review* (MILR) for $20 each ($28 foreign) per year. The total cost of my order is $_____.

Prices include first class shipping and handling and is subject to change.

Personal name (Please type or print)

Company name

Street address City, State, Zip code

Daytime phone including area code

Purchase Order Number

Check method of payment:

☐ Check payable to Superintendent of Documents

☐ SOD Deposit Account ☐☐☐☐☐☐ – ☐

☐ VISA ☐ MasterCard ☐ Discover/NOVUS ☐ American Express

☐☐☐☐☐☐☐☐☐☐☐☐☐☐☐☐

☐☐☐☐ (expiration date)

Thank you for your order!

Authorizing signature

11/02

By Order of the Secretary of the Army:

PETER J. SCHOOMAKER
General, United States Army
Chief of Staff

Official:

JOYCE E. MARROW
Administrative Assistant to the
Secretary of the Army
0621504

Department of the Army
The Judge Advocate General's Legal Center & School
U.S. Army
ATTN: JAGS-ADA-P, Technical Editor
Charlottesville, VA 22903-1781

PERIODICALS