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Military Justice Symposium II

Articles

Book Reviews

Katy Bar the Door[1]—2006 New Developments in Fourth Amendment Search and Seizure Law

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The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.[2]

Introduction

Search and seizure law's history is a struggle for clarity in an atmosphere of ambiguity.[3] The U.S. Supreme Court further clarified Fourth Amendment law in the October 2005 term[4] by addressing exceptions to the warrant requirement,[5] probable cause,[6] and the application of the exclusionary rule.[7] The 2006 Term of the Court of Appeals for the Armed Forces (CAAF)[8] addressed two cases anticipated to be significant in the search and seizure concepts surrounding computers and other electronic media.[9] Therefore, Part I of this article discusses two of the five search and seizure cases decided by the Supreme Court, and Part II discusses the two CAAF cases which "analyze the threshold expectation of privacy requirement within the context of computers and other digital media."[10]

I. 2005 Term U.S. Supreme Court Cases—Addressing Significant Splits Among Judicial Circuits

In the October 2005 term, the Court sought to settle Fourth Amendment jurisprudence where previous Court precedent or state court interpretation of Court precedent has created a difference of opinion, and therefore ripened into justiciability. For example, the Court had ruled that warrantless search is permissible with the consent of one co-occupant in the other's

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[1] World Wide Words, *Katy bar the door*, http://www.worldwidewords.org/qa/qa-kat1.htm (last visited Sept. 24, 2007). An American expression, more common in the South than elsewhere meaning: "watch out," "get ready for trouble," and, "a desperate situation at hand." This idiom is intended to warn the reader not to ignore these new developments in search and seizure law.

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

[3] "The Fourth Amendment, it has been aptly noted, has 'both the virtue of brevity and the vice of ambiguity.'" WAYNE R. LAFAVE, SEARCH AND SEIZURE 8 (4th ed. 2004) (quoting J. LANDYSKI, SEARCH AND SEIZURE AND THE SUPREME COURT 42 (1966)). *See also* LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 117 (2nd ed. 1985). "The federal Constitution was marvelously supple . . . [i]t turned out to be neither too tight nor too loose. It was in essence a frame, a skeleton, an outline for the form of government; on specifics, it mostly held its tongue." *Id*.

[4] The U.S. Supreme Court's October 2005 term began on 3 October 2005 and ended 1 October 2006. *See* Supreme Court of the United States, 2005 Term Opinions of the Court, http://www.supremecourtus.gov/opinions/05slipopinion.html (last visited Sept. 24, 2007).

[5] *See infra* sec. I.A, Georgia v. Randolph (*Randolph II*), 547 U.S. 103 (2006) (addressing the warrantless search of a shared dwelling pursuant to consent granted by one tenant over the express refusal by a physically present co-tenant); and, Brigham City v. Stuart, 126 S. Ct. 1943 (2006) (addressing the Emergency Aid Doctrine and considers whether police may enter a home without a warrant when they have an objectively reasonable basis for believing that an occupant is seriously injured or imminently threatened with such injury).

[6] *See* United States v. Grubbs, 547 U.S. 90 (2006) (addressing whether "anticipatory search warrants" are constitutionally permissible); Samson v. California, 126 S. Ct. 2193 (2006) (addressing whether suspicionless search was a reasonable condition of parole which advanced state interests and severely diminished the inmate's expectation of privacy while on parole. The State of California had substantial legitimate interests in reducing recidivism and thereby promoting reintegration and positive citizenship, and requiring individualized suspicion to support the search of the inmate would undermine those interests. Further, the constitutional requirement that the search be reasonable did not preclude the suspicionless search, and the inmate's limited privacy rights were protected by the prohibition of searches which were arbitrary, capricious, or harassing.).

[7] *See* Hudson v. Michigan, 126 S. Ct. 2159 (2006)

[8] The CAAF 2006 term began on 1 October 2005 and ended 30 September 2006. *See* U.S. Court of Appeals for the Armed Forces, Opinions & Digest, http://www.armfor.uscourts.gov/2006Term.htm (last visited Sept. 24, 2007).

[9] *See infra* sec. II, United States v. Conklin, 63 M.J. 333 (2006) (addressing whether consent to a subsequent search is the antidote to the poison of an earlier unlawful search), and sec. II.A, United States v. Long *(Long II*), 64 M.J. 57 (2006) (addressing whether a service member had a reasonable expectation of privacy in the e-mail communications sent and received via the Headquarters Marine Corps computer network server).

[10] *See* Lieutenant Colonel M. K. Jamison, USMC, *New Developments in Search & Seizure Law*, ARMY LAW., Apr. 2006, at 9 (identifying these four emerging cases as significant in furthering the body of Fourth Amendment law). This article may be viewed as an addendum or continuation of Lieutenant Colonel Jamison's article.

absence,[11] but left unsettled whether the consent is valid "in the face of the refusal of another physically present occupant."[12] Additionally, left unsettled, is whether every Fourth Amendment violation results in application of the exclusionary rule.[13] In 2006 the Supreme Court lead the way in two important cases: first, by defining the scope of consent by co-tenants when they are both physically present,[14] and second, whether to apply the exclusionary rule for a violation of a "knock and announce" warrant.[15]

A. Scope of Consent by Co-Tenants

The Supreme Court in *Georgia v. Randolph* (*Randolph II*) demonstrates judicial agility in assessing Fourth Amendment reasonableness in warrantless searches based on consent.[16] "The Fourth Amendment recognizes a valid warrantless entry and search of a premises when the police obtain the voluntary consent of an occupant who shares, or is reasonably believed to share, common authority over the property, and no present co-tenant objects."[17] In assessing reasonableness, the Court gives "great significance to widely shared social expectations" to establish the authority over the property.[18] Hence, the issue becomes whether such an evidentiary seizure is likewise lawful with the permission of one occupant over the express refusal of the other who is present at the scene.[19]

In May 2001, Scott Randolph and his wife, Janet, separated due to marital problems.[20] Mrs. Randolph returned to Canada with her son, but came to visit Mr. Randolph two months later.[21] On the morning of 6 July, after a domestic dispute, Mr. Randolph left with their son.[22] Mrs. Randolph called the police complaining that her husband had taken her son away.[23] When the police arrived Mrs. Randolph "told them that her husband was a cocaine user whose habit had caused financial troubles."[24] Mr. Randolph explained that he had taken the child to a neighbor's house out of concern his wife would again leave the country with him.[25] Mr. Randolph also denied cocaine use.[26]

Officer Murray went with Mrs. Randolph to collect her son from the neighbors.[27] Upon their return, Mrs. Randolph renewed her complaint about her husband's drug use to the police, and "volunteered that there were 'items of drug evidence' in the house."[28] Police Sergeant Murray asked Mr. Randolph for permission to search the house, which he unequivocally refused.[29] Next, the police officer turned to Mrs. Randolph and asked her consent to search, which she gave.[30] Officer Murray was then led upstairs where he observed, "a section of a drinking straw with a powdery residue he suspected to be

[11] United States v. Matlock, 415 U.S. 164 (1974).

[12] *See Randolph II*, 547 U.S. 103 (2006).

[13] Hudson v. Michigan, 126 S. Ct. 2159 (2006).

[14] *Randolph II*, 547 U.S. at 103.

[15] *Hudson*, 126 S. Ct. at 2159.

[16] *Randolph II*, 547 U.S. at 103.

[17] *Id.*

[18] *Id.*

[19] *Id.*

[20] *Id.* at 106.

[21] *Id.*

[22] *Id.* at 107.

[23] *Id.*

[24] *Id.*

[25] *Id.*

[26] *Id.*

[27] *Id.*

[28] *Id.*

[29] *Id.*

[30] *Id.*

cocaine."[31] After leaving the house and consulting with the district attorney (who advised him to stop the search and obtain a warrant), Officer Murray returned to the house at which time Mrs. Randolph withdrew her consent to search.[32] Upon securing a search warrant, the police returned to the home and seized additional evidence of drug use, which was used as the basis to indict Mr. Randolph for possession of cocaine.[33]

Mr. Randolph moved to suppress the evidence "as products of a warrantless search of his house unauthorized by his wife's consent over his express refusal."[34] The Georgia Superior Court (trial court) denied his motion and ruled that Mrs. Randolph had common authority to consent to the search.[35] The Court of Appeals of Georgia reversed the Superior Court, and was affirmed by the State Supreme Court, finding that "the consent to conduct a warrantless search of a residence given by one occupant is not valid in the face of the refusal of another occupant who is physically present at the scene to permit a warrantless search."[36] The Supreme Court of Georgia distinguished the Court's holding in *United States v. Matlock*, which held that "the consent of one who possesses common authority over premises or effects is valid as against the absent, non-consenting person with whom the authority is shared,"[37] because Mr. Randolph was not "absent" from the conversation or the "colloquy" on which the police relied for consent.[38] The Supreme Court granted certiorari to resolve "whether one occupant may give law enforcement effective consent to search shared premises, as against a co-tenant who is present and states a refusal to permit a search."[39]

The Supreme Court addresses consent in terms of reasonableness. "The constant element in assessing Fourth Amendment reasonableness in the consent cases, then, is the great significance given to widely shared social expectations, which are naturally enough influenced by the law of property, but not controlled by its rules."[40] Citing precedent, the Court further supported this proposition by explaining that a reasonable expectation of privacy is "reasonable if it has 'a source outside of the Fourth Amendment, either by reference to concepts of real or personal property law or to understandings that are recognized and permitted by society.'"[41] Although having not previously dealt with the reasonableness of a police entry upon reliance of a co-tenant subject to challenge by the other present co-tenant, the Court took a step forward in an earlier case.[42] In *Minnesota v. Olsen*, the Court found that overnight guests "have a legitimate expectation of privacy in their temporary quarters."[43] So, utilizing this previous reasoning the court recognizes if "customary expectation of courtesy or deference is a foundation of Fourth Amendment rights of a houseguest, it presumably should follow that an inhabitant of shared premises may claim at least as much, and it turns out that the co-inhabitant naturally has an even stronger claim."[44] The Court subsequently affirmed the Supreme Court of Georgia and held that "a physically present co-occupant's stated refusal to permit entry renders warrantless entry and search unreasonable and invalid to him."[45]

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[31] *Id.*

[32] *Id*. In fact, the police took the drinking straw and the Randolphs to the police station. *Id*.

[33] *Id*.

[34] *Id*.

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

[36] *Id*. (citing Georgia v. Randolph (*Randolph I*), 604 S.E.2d 835, 836 (2004)).

[37] *Id*. (citing United States v. Matlock, 415 U.S. 164, 170 (1974)).

[38] *Id*. at 108-10. "The state supreme court stressed that the officers in Matlock had not been 'faced with the physical presence of joint occupants, with one consenting to the search and the other objecting." *Id*. at 108 (citing *Randolph I*, 604 S.E.2d at 837).

[39] *Id*. at 108. The Court wanted to resolve this split of authority on this issue. Four courts of appeal have considered this question and concluded that consent remains effective in the face of an express objection. *Id*. at n.1. *See* United States v. Morning, 64 F.3d 531, 533-36 (9th Cir. 1995); United States v. Donlin, 982 F.2d 31, 33 (1st Cir. 1992); United States v. Hendrix, 595 F.2d 883, 885 (D.C. Cir. 1979); United States v. Sumlin, 567 F.2d 684, 687-88 (6th Cir. 1977). *Randolph II*, 547 U.S. at 108 n.1. Many state courts addressing this issue have reached that same conclusion. *See, e.g.*, Love v. State, 138 S.W.3d 676, 680 (2003); Laramie v. Hysong, 808 P.2d 199, 203-05 (Wyo. 1991); *but cf.* State v. Leach, 782 P.2d 1035, 1040 (1989) (en banc) (requiring consent of all present co-occupants). *Randolph II*, 547 U.S. at 108 n.1.

[40] *Randolph II*, 547 U.S. at 110-11.

[41] *Id.* (citing Rakas v. Illinois, 439 U.S. 128, 144 n.12 (1978)).

[42] *Id*. at 111-13.

[43] *Id*. (citing Minnesota v. Olsen, 495 U.S. 91, 99 (1990)).

[44] *Id*.

[45] *Id*. at 103-05.

The Court draws a fine line in its holding in *Randolph II* and makes a pragmatic decision.[46] It recognizes the "simple clarity of complementary rules, one recognizing the co-tenant's permission when there is no fellow occupant on hand, the other according dispositive weight to the fellow occupant's contrary indication when he expresses it."[47] The majority also clearly identifies the holding's limitations too.[48] For example, the holding only applies where an objecting tenant is physically present—the police may not sequester or physically remove a potentially objecting co-tenant from the scene, nor do the police need to seek out other non-present tenants.[49] And in an effort to blunt the dissent's point that the decision will prevent police from assisting abused spouses who seek to authorize police entry into a home they share with a non-consenting abuser, the majority emphasize that the exigent circumstances[50] exception to a warrant requirement still exists.[51] Furthermore, they counter the dissent by saying that the cooperative spouse can still tell all she knows to the police to present to a magistrate to get a warrant.[52] This also reminds us that "[t]he informed and deliberate determinations of magistrates empowered to issue warrants as to what searches and seizures are permissible under the Constitution are to be preferred over the hurried action of officers."[53]

In sum, *Randolph II* addresses a narrowly framed issue and holding which upholds a co-tenant's privacy right.[54] Despite the dissent's perception the court has created constitutional law in this case, the majority has simply and logically defined an ambiguity and split of authority of the Court's previous precedents.[55]

B. The Scope of the Exclusionary Rule in Fourth Amendment "Knock and Announce" Violations

The second significant case from the Supreme Court regarding Fourth Amendment law is *Hudson v. Michigan* for its refinement of the exclusionary rule.[56] The exclusionary rule is a rule that excludes or suppresses evidence obtained in violation of an accused person's constitutional rights.[57] This case addresses the issue of remedy; that is, whether the exclusionary rule is to universally apply in response to all constitutional rights violations, specifically a violation of the knock and announce rule.[58]

The facts are not in dispute. The police executed a warrant against Booker Hudson for drugs and firearms at his home and found both rock cocaine and a loaded gun hidden in his furniture.[59] He was "charged under Michigan law with unlawful drug and firearm possession."[60]

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[46] *Id.* at 121-22.

[47] *Id*.

[48] *Id.*

[49] *Id*.

[50] "While a search warrant must necessarily rest upon previously obtained information, unannounced entry is excused only on the basis of exigent circumstances existing at the time an officer approaches a sit to make an arres or execute a warrant." LAFAVE, *supra* note 3, at 695 (citing Parsley v. Superior Court, 513 P.2d 611 (Cal. 1973)).

[51] *Randolph II*, 547 U.S. at 118. Chief Justice Roberts and Justice Scalia make several pointed comments in their dissent; e.g. co-occupants have "assumed the risk that one of their number might permit a common area to be searched"; voluntary consent is "reasonable"; and, shifting social expectations is not a promising foundation on which to ground a constitutional rule. *Id*. at 127-29.

[52] *Id*. at 116.

[53] *Id*. (citing United States v. Lefkowitz, 285 U.S. 452, 464 (1932)).

[54] *Randolph II*, 547 U.S. 103.

[55] *See* United States v. Matlock, 415 U.S. 164 (1974) (recognizing the permissibility of an entry made with the consent of one co-occupant in the other's absence); Minnesota v. Olson, 495 U.S. 91 (1990) (holding that overnight houseguests have a legitimate expectation of privacy in their temporary quarters); Illinois v. Rodriguez, 497 U.S. 177 (1990) (recognizing the permissibility of an entry made with the consent of one co-occupant in the other's absence, in this case, where the defendant was asleep in the apartment).

[56] Hudson v. Michigan, 126 S. Ct. 2159 (2006).

[57] BLACK'S LAW DICTIONARY 587 (7th ed. 1999).

[58] In criminal procedure, "[t]he requirement that the police knock at the door and announce their identity, authority, and purpose before entering a residence to execute an arrest or search warrant." *Id*. at 876. A violation of the knock and announce rule is analyzed under the Fourth Amendment reasonableness requirement. The exclusionary rule is designed to prevent police misconduct. *Cf.* United States v. Calandra, 414 U.S. 338, 351 (1974). "[I]t does not follow that the Fourth Amendment requires adoption of every proposal that might deter police misconduct." *Id*.

[59] *Hudson*, 126 S. Ct. at 2163.

[60] *Id*.

What is in contention is the effect of the fact the police only waited "three to five seconds" after announcing their presence, entering Hudson's home, and executing the valid warrant.[61] Michigan has "conceded that the entry was a knock-and-announce violation."[62] Hudson moved to suppress all the inculpatory evidence discovered, arguing that the premature police entry violated his Fourth Amendment rights.[63] The Michigan trial court agreed with Hudson and granted his motion.[64] The Michigan Court of Appeals, on interlocutory appeal,[65] did not agree and reversed.[66] The Michigan Supreme Court refused to hear the case and "denied leave to appeal."[67] Hudson was consequently convicted of drug possession.[68] The Michigan court of appeals and supreme court rejected his Fourth Amendment claim on appeal and affirmed the conviction.[69] The U.S. Supreme Court granted certiorari to decide whether the exclusionary rule is appropriate for violation of the knock-and-announce requirement.[70]

The knock and announce rule is steeped in common law and provides the cornerstone for reasonable searches and seizures under the Fourth Amendment.[71] The Supreme Court case of *Wilson v. Arkansas*, observes "[a]n examination of the common law of search and seizure leaves no doubt that the reasonableness of a search of a dwelling may depend in part on whether law enforcement officers announced their presence and authority prior to entering."[72] Although acknowledging this common law privilege, but yet not having held so before, the Court holds that the "common law 'knock and announce' principle forms a part of the reasonableness inquiry under the Fourth Amendment."[73]

The purpose of the knock-and-announce rule is three fold. First, the rule is designed to protect life and limb.[74] For example, an unannounced entry may provoke violence in supposed self-defense by the surprised residence.[75] Second, the rule gives individuals "opportunity to comply with the law and to avoid destruction of property occasioned by a forcible entry."[76] And lastly, the knock-and-announce rule protects privacy and dignity. It "assures the opportunity to collect oneself before answering the door."[77] These three purposes make tangible the Court's holding that the knock-and-announce rule as the cornerstone of Fourth Amendment reasonableness violations.

In case of a Fourth Amendment violation, the federal exclusionary rule is applied.[78] Evidence that is unlawfully seized from home without a warrant in violation of the Fourth Amendment is suppressed.[79] Suppression is meant to deter police

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[61] *Id*. at 2162.

[62] *Id*. at 2163. *See supra* note 58.

[63] *Id*.

[64] *Id.*

[65] An interlocutory appeal is an appeal that occurs before the trial court's final ruling on the entire case. BLACK'S LAW DICTIONARY, *supra* note 57, at 96.

[66] The court of appeals cites *People v. Vasquez*, and *People v. Stevens*, which both held that "suppression is inappropriate when entry is made pursuant to warrant but with proper 'knock and announce.'" *Hudson*, 126 S. Ct. at 2162 (citing People v. Vasquez, 602 N.W.2d. 376, 379 (Mich. 1999) (per curium); People v. Stevens, 597 N.W.2d 53, 57 (Mich. 1999)).

[67] *Id*.

[68] *Id*.

[69] *Id.*

[70] *Id*. (citing Wilson v. Arkansas, 514 U.S. 927, 937 (1995) which specifically declined to decide whether the exclusionary rule is appropriate for violation of the knock-and-announce requirement). *Id*.

[71] *Hudson*, 126 S. Ct. at 2172 (citing *Wilson*, 514 U.S. at 932. *Wilson* traces the lineage of the knock-and-announce rule back to the 13th Century). *Id*.

[72] *Id*. (citing *Wilson*, 514 U.S. at 931).

[73] The court has "little doubt that the Framers of the Fourth Amendment thought that the method of an officer's entry into a dwelling was among the factors to be considered in assessing the reasonableness of a search or seizure." *Id.*

[74] *Hudson*, 126 S. Ct. at 2165 (citing McDonald v. United States, 335 U.S. 451, 460-61 (1948)).

[75] *Id*.

[76] *Id.* (citing Richards v Wisconsin, 520 U.S. 385, 393 (1997)).

[77] *Id*. (citing *Richards*, 520 U.S. at 393 n.5. The knock-and-announce rule protects against sudden entrances and permits residents to prepare for the entry of the police. As Richards notes: "The brief interlude between announcement and entry with a warrant may be the opportunity that an individual has to pull on clothes or get out of bed."). *Id*.

[78] Weeks v. United States, 232 U.S. 383 (1914). The exclusionary rule for Fourth Amendment violations was applied to the states through the Fourteenth Amendment. *See* Mapp v. Ohio, 367 U.S. 643 (1961).

[79] *Weeks*, 232 U.S. at 391-92.

misconduct. In fact, the Court has said that "[t]he driving legal purpose underlying the exclusionary rule, namely, the deterrence of unlawful government behavior, argues strongly for suppression."[80]

The majority begins its analysis in Mr. Hudson's case by declaring suppression is not warranted.[81] Justice Scalia, writing for the majority, immediately identifies the controversial nature of the exclusionary rule and rejects its "[i]ndiscriminate application"[82] and seeks to hold it to be applicable only "where its remedial objectives are thought most efficaciously served";[83] that is where its deterrence benefits outweigh its "substantial social costs."[84] The Court is therefore reluctant to expand it,[85] and have placed a high burden on those urging its application due to its "costly toll."[86]

The "cost" to use the exclusionary rule in Mr. Hudson's case does not outweigh its deterrence benefits. Mr. Hudson argues that "without suppression there will be no deterrence of knock-and-announce violations at all."[87] The Court counters by observing that the knock-and-announce rule does not protect "one's interest in preventing the government from seeing or taking evidence described in a warrant."[88] The greater deterrence for violators of the knock-and-announce rule is the threat of civil litigation[89] and the "increasing professionalism of police forces, including a new emphasis on internal police discipline."[90] In fact, the Court demonstrates little sympathy for Mr. Hudson's case by identifying precedent where greater egregious conduct has produced evidence which the Court has not excluded, and therefore the majority openly wonders why the Court should take a more generous approach in this case.[91]

In sum, the Court holds that the "[r]esort to the massive remedy of suppressing evidence of guilt is unjustified" in the case of a knock-and-announce violation.[92] The Court, balancing the "social costs" and the deterrence effect, sees no benefit in excluding evidence that they believe would be inevitably discovered due to the lawful warrant to search Mr. Hudson's home.[93]

> The effect of the Fourth Amendment is to put the courts of the United States and Federal officials, in the exercise of their power and authority, under limitations and restraints as to the exercise of such power and authority, and to forever secure the people, their persons, houses, papers and effects against all unreasonable searches and seizures under the guise of law. This protection reaches all alike, whether accused of crime or not, and the duty of giving to it force and effect is obligatory upon all entrusted under our Federal system with the enforcement of the laws. The tendency of those who execute the criminal laws of the country to obtain conviction by means of unlawful seizures and enforced confessions, the latter often obtained after subjecting accused persons to unwarranted practices destructive of rights secured by the Federal Constitution, should find no sanction in the judgments of the courts which are charged at all times with the support of the Constitution and to which people of all conditions have a right to appeal for the maintenance of such fundamental rights.

Id.

[80] *Hudson*, 126 S. Ct. at 2173. The court cites *Elkins v. United States*, which states the purpose of the exclusionary rule is "to deter-to compel respect for the constitutional guaranty . . . by removing the incentive to disregard it." Elkins v. United States, 364 U.S. 206, 217 (1960).

[81] *Hudson*, 126 S. Ct. at 2165.

[82] *Id*. at 2162 (quoting United States v. Leon, 468 U.S. 897, 908 (1984)).

[83] *Id.* at 2163. *See* United States v. Calandra, 414 U.S. 338, 348 (1974).

[84] *Hudson*, 126 S. Ct. at 2163 (quoting *Leon*, 468 U.S. at 907. Substantial social costs refer to setting the guilty free and the dangerous at large). *Id*. (citations omitted).

[85] *Id*. *See* Colorado v. Connelly, 479 U.S. 157, 166 (1986).

[86] *Hudson*, 126 S. Ct. at 2163. *See* Pennsylvania Bd. of Prob. and Parole v. Scott, 524 U.S. 357, 364-65 (1998).

[87] *Hudson*, 126 S. Ct. at 2166.

[88] *Id*. at 2165.

[89] *Id*. *See, e.g*., Correctional Servs. Corp. v. Malesko, 534 U.S. 61, 70 (2001). "The threat of litigation and liability will adequately deter federal officers . . . ." *Id.*

[90] *Hudson*, 126 S. Ct. at 2165.

[91] *Id*. at 2167. *See also* Segura v. United States, 468 U.S. 796 (1984); New York v. Harris, 495 U.S. 14 (1990); United States v. Ramirez, 523 U.S. 65 (1998). *But see* the dissent which says "the driving legal purpopse underlying the exclusionary rule, namely, the deterrence of unlawful government behavior, argues strong for suppression. *Hudson*, 126 S. Ct. at 2173.

[92] *Hudson*, 126 S. Ct. at 2168.

[93] The dissent finds the majority's opinion a miscarriage of justice and a misapplication of the law. First, Justice Breyer, writing for the minority, is unconvinced by the majority's argument that deterrence of future knock-and-announce violations is met by the fear of civil lawsuits and a more professional police force. Furthermore, Breyer sees court precedent supporting suppression of evidence in Mr. Hudson's case. There are only a number of instances where the Court has declined to apply the exclusionary rule: where there is a specific reason to believe that application of the rule would "not result in appreciable deterrence, for example in instances of executing a defective search warrant in "good faith"; or, where admissibility in proceedings other than

The Court's holding is very narrow, but indicative of a conservative approach in applying the exclusionary rule. The application of this holding for judge advocates is equally narrow, but useful in evaluating the reasonableness analysis of such situations. A violation of the Fourth Amendment knock-and-announce rule, without more, will not result in suppression of evidence at trial. [94]

II. 2006 Term CAAF Cases—Computers and Digital Media

The applicability of the Fourth Amendment to digital media, computers and e-mail, continues to be shaped whereas it is relatively well-established for investigations involving physical evidence.[95] For example, police entering a home or opening one's private packages constitute a "search," and taking physical property is "seizing" it.[96] The question is how does the Fourth Amendment apply to computers and digital evidence?[97] Specifically, do we have an expectation of privacy in e-mail not only in our personal e-mail accounts, but in our work or government e-mails?

In the 2006 Term, CAAF cases continue to explore Fourth Amendment treatment of computers and digital media.[98] Last year the Navy-Marine Corps Court of Criminal Appeals (NMCCA) courageously addressed computers and digital media in *United States v. Ohnesorge*[99] and *United States v. Long* (*Long II*).[100] Additionally, the Air Force Court of Criminal Appeals does their part in setting the stage for 2006 CAAF term of court by addressing the scope of voluntary consent in a computer search following an illegal search in *United States v. Conklin*.[101] This article will address CAAF's analysis and decision in *Long II* and *United States v. Conklin* and their impact within the military justice system.

A. Expectation of Privacy in Government E-Mail Communications

The CAAF's decision in *Long II* is bold within the context of search and seizure law. The court addressed the NMCCA decision upon the Navy Judge Advocate General certification of two issues, and one issue submitted by the Appellee and Cross-Appellant:

> I. WHETHER THE NAVY-MARINE CORPS COURT OF CRIMINAL APPEALS ERRED WHEN [IT] DETERMINED THAT, BASED ON THE EVIDENCE ADDUCED AT TRIAL, APPELLEE HELD A

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criminal trials was at issue. Moreover, the minority take issue with Justice Scalia's application of the inevitable discovery exception in his assertion that "the police would have executed the warrant they had obtained, and would have discovered the gun and drugs inside the house." Breyer cites *Murray v. United States*, 487 U.S. 533, 542 (1988) which states that "[t]he inevitable discovery exception rests upon theprincipl that the remedial purposes of the exclusionary rule are not served by suppressing evidence discovered through a "later, lawful seizure" that is "genuinely independent of an earlier, tainted one." *Id.*

[94] Stephanie Francis Ward, *Court Backs Evidence Found in 'Knock-Announce' Case*, http://www.abanet.org/journal/ereport/jn16hudson.html (last visited June 16, 2006). Prosecutors say Justice Scalia's opinion represents a common sense approach to executing warrants. Defense counsels say they fear more violent searches, more paramilitary type raids. *Id.*

[95] ORIN S. KERR, COMPUTER CRIME LAW 298 (2006).

[96] *Id.*

[97] *Id.*

[98] *See* United States v. Long (*Long II*), 64 M.J. 57 (2006); United States v. Conklin, No. 35217, 2004 CCA LEXIS 290 (A.F. Ct. Crim. App. Dec. 30, 2004) (unpublished).

[99] United States v. Ohnesorge, 60 M.J. 946 (N-M. Ct. Crim. App. 2005). The NMCCA broke new ground in military jurisprudence when it considered Fourth Amendment applicability to non-content digital information. The court held that a service member has not reasonable expectation of privacy in subscriber information that has been provided to a commercial Internet site. *Id.* at 948. *See* Jamison, *supra* note 10, at 9.

[100] United States v. Long (*Long I*), 61 M.J. 539 (N-M. Ct. Crim. App. 2005). The NMCAA held that a naval servicemember has a reasonable expectation of privacy in government e-mail stored on a government server. Lieutenant Colonel Jamison identified this as the most significant case in 2005. Jamison, *supra* note 10, at 9. Likewise, it is the most significant case in 2006 as CAAF decides to affirm NMCCA reasonable expectation of privacy in government e-mail. *Id.* at 13.

[101] *Conklin*, 2004 CCA LEXIS at *290. The CAAF granted Conklin's appeal on the following two issues:

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

Id.

> SUBJECTIVE EXPECTATION OF PRIVACY IN HER E-MAIL ACCOUNT AS TO ALL OTHERS BUT THE NETWORK ADMINISTRATOR.
>
> II. WHETHER THE NAVY-MARINE CORPS COURT OF CRIMINAL APPEALS ERRED WHEN [IT] DETERMINED THAT IT IS REASONABLE, UNDER THE CIRCUMSTANCES PRESENTED IN THIS CASE, FOR AN AUTHORIZED USER OF THE GOVERNMENT COMPUTER NETWORK TO HAVE A LIMITED EXPECTATION OF PRIVACY IN THEIR E-MAIL COMMUNICATIONS SENT AND RECEIVED VIA THE COMPUTER NETWORK SERVER.[102]
>
> III. WHETHER THE LOWER COURT ERRED IN FINDING THAT THE MILITARY JUDGE'S ERROR IN ADMITTING E-MAILS SENT AND RECEIVED BY LANCE CORPORAL LONG ON HER GOVERNMENT COMPUTER WAS HARMLESS BEYOND A REASONABLE DOUBT.[103]

The CAAF upheld the NMCCA holding that a naval servicemember has a reasonable expectation of privacy in government e-mail stored on a government server, making it binding upon all service courts.[104]

The facts in *Long* (*II*)[105] are particularly dramatic for a case of drug use in military. Lance Corporal (LCpl) (E-3) Long, U.S. Marine Corps, was charged with using ecstasy,[106] ketamine,[107] and marijuana[108] with fellow Marines in the barracks.[109] The evidence against LCpl Long consisted of eyewitness testimony[110] and e-mails that she had sent to her friends in which she discussed her fear of urinalysis testing and efforts to mask her drug use.[111] Officials investigating the case requested that the senior network administrator[112] retrieve LCpl Long's e-mails from the government server.[113] "No search warrant or authorization accompanied the request."[114] At trial, LCpl Long moved to suppress her e-mails as an unreasonable search and seizure and therefore in violation of her Fourth Amendment rights.[115]

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[102] *Long II*, 64 M.J. at 59.

[103] *Id*.

[104] *Long I*, 61 M.J. 539.

[105] *Long II*, 64 M.J. 57.

[106] Ecstasy, or MDMA (methylenedioxymethamphetamine) "is a synthetic, psychoactive drug chemically similar to the stimulant methamphetamine and the hallucinogen mescaline. [Ecstacy] is an illegal drug that acts as both a stimulant and psychedelic, producing an energizing effect, as well as distortions in time and perception and enhanced enjoyment from tactile experiences." U.S. Drug Enforcement Administration, *MDMA (Ecstasy)*, http://www.dea.gov/concern/mdmap.html (last visited Sept. 24, 2007).

[107] Ketamine is an anesthetic (predominate legitimate use is as a veterinary anaesthetic) that is abused for its hallucinogenic properties. It produces effects similar to those associated with phencyclidine (PCP). *Ketamine Fast Facts*, http://www.usdoj.gov/ndic/pubs4/4769/4769p.pdf (last visited Sept. 24, 2007).

[108] Marijuana is the dry, shredded green/brown mix of flowers, stems, seeds, and leaves of the plant *Cannabis Sativa*. The main active chemical in marijuana is delta-9-tetrahydrocannabinol (THC) which produces a series of cellular reactions in the brain that lead to the high that users attribute to smoking marijuana. U.S. Drug Enforcement Administration, *Marijuana*, http://www.dea.gov/concern/marijuana.html (last visited Sept. 24, 2007).

[109] *Long I*, 61 M.J. at 540.

[110] Three enlisted Marines testified for the prosecution regarding the appellant's use of ecstasy, ketamine, and marijuana. *Id.* at 542. All three testified that LCpl Long had used ecstasy in their presence and two of them testified that they had observed the appellant using ketamine and marijuana in their presence. *Id.* The witnesses testified that they used ecstasy, ketamine, and marijuana, described the drugs and the effects they felt from using the drugs. *Id*.

[111] Three e-mail strings discussed LCpl Long's attempts to mask her drug use. *Id.* at 539. Testimony came from a fellow-Marine, Corporal "U" who had been friends with LCpl Long since 1998:

> He testified that they kept in contact with each other primarily by e-mail. Cpl U testified that he had a face-to-face conversation with the appellant in August of 2000 in which she told him that there was a urinalysis upcoming, and at the time, [Long] appeared to be worried about it. Cpl U also stated that the appellant admitted to him during their conversation that she had used marijuana and ecstasy. He stated that the conversation continued thereafter by exchange of e-mails, copies of which were contained in pages 10 through 17 of Prosecution Exhibit 1.

Id.

[112] The network administrator, Headquarters, Marine Corps, was Mr. Flor Asesor. *Id*.

[113] The e-mails in question were retrieved as the result of a specific request by law enforcement officials to provide any e-mails related to LCpl Long's drug use. *Id.*

[114] *Id.* at 541.

[115] *Id*.

The senior network administrator for Headquarters, Marine Corps (HQMC) was the only witness to testify at the motion hearing.[116] He authenticated the login banner, which was displayed when a user logged onto his government office computer:

> This is a Department of Defense computer system. This computer system, including all related equipment, networks and network devices (specifically including Internet access), are provided only for authorized U.S. Government use. DoD computer systems may be monitored for all lawful purposes, including to ensure that their use is authorized, for management of the system, to facilitate protection against unauthorized access, and to verify security procedures, survivability and operational security. Monitoring includes active attacks by authorized DoD entities to test or verify the security of this system. During monitoring, information may be examined, recorded, copied and used for authorized purposes. All information, including personal information, placed on or sent over this system may be monitored. Use of this DoD computer system, authorized or unauthorized, constitutes consent to monitoring of this system. Unauthorized use may subject you to criminal prosecution. Evidence of unauthorized use collected during monitoring may be used for administrative, criminal, or other adverse action. Use of this system constitutes consent to monitoring for these purposes.[117]

Mr. Asesor, the network administrator, explained the computer user requirements and his ability to monitor and access these individual accounts. For instance, he testified that each individual user of the computer system had a unique password known only to them—users were required to change their password every ninety days.[118] "Although issued for official use, personal use of Government computers and e-mail accounts was permissible as long as such use did not interfere with official business or constitute a prohibited use under departmental regulations."[119]

Additionally, Mr. Asesor testified that he did not have access to user passwords, and could only access these accounts when he locked the user from the account.[120] As the network administrator, however, he was able to access the entire network or any part of it, including personal e-mails sent by individual users.[121] Despite the permissible monitoring as described in the Department of Defense (DOD) banner, he described a general policy to avoid examining e-mails and their respective content because of "privacy issues."[122]

In response to her motion, the military judge found that the "network administrator's actions constituted a search for evidence and that there was not actual consent by [LCpl Long] to this search."[123] Additionally, he found there was "no search authorization issued based on probable cause."[124] He denied the motion to suppress, finding that LCpl Long had no reasonable expectation of privacy in her e-mail that she had been sent on her government-issued computer and that had been "electronically stored" on the government's server.[125]

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[116] *Id*.

[117] *Id*.

[118] *Id*.

[119] *Id*.

[120] *Id*.

[121] *Id*.

> E-mails originating from or being received by a Government computer within the network went to a central Government system domain server for delivery to their intended recipients via the domain server network or the internet. Copies of sent e-mails remained on the domain server unless the user specifically set up their e-mail account to not save outgoing messages. Even e-mails thereafter deleted by the user could be retrieved using a "restore" function. A system administrator could access all e-mail accounts serviced by the domain server.

Id.

[122] *Long II*, 64 M.J. 57, 60 (2006).

[123] *Long I*, 61 M.J. at 541.

[124] *Id*.

[125] *Id*. at 542. Under a Fourth Amendment analysis there first has to be a government intrusion, and if so, then the individual has to have a reasonable expectation of privacy. *See generally* Military Rules of Evidence 311(c) and 311(a)(2) respectively. MANUAL FOR COURTS-MARTIAL, UNITED STATES, MIL. R. EVID. 311(a)(2), 311(c) (2005) [hereinafter MCM].

The NMCCA reviewed the military judge's ruling using an abuse of discretion standard.[126] The court found no error regarding the military judge's findings of fact, and, therefore adopted them as their own.[127] But, the court took issue with the military judge's conclusion as to whether LCpl Long had a reasonable expectation of privacy in her government e-mail account.

The NMCCA concluded that the military judge should have suppressed the e-mails. "The court held that [LCpl Long] had a reasonable expectation of privacy in the e-mails sent and received on her government computer."[128] The court applied the two-part Supreme Court *Katz* test[129] adopted in *United States v. Monroe*[130] in examining LCpl Long's expectation of privacy as it relates to e-mail messages.[131] First, the court found that LCpl Long had a subjective expectation of privacy by implication of her use of the required password system.[132] Second the court found this expectation objectively reasonable vis-à-vis the law enforcement search.[133] Or, rather, she did not have an objectively reasonable expectation of privacy as towards networking monitoring for systems maintenance.[134]

The NMCAA conflated their analysis of LCpl Long's reasonable expectation of privacy regarding her government e-mail account.[135] For instance, the court relies on cases where there has been government intrusion or police participation to conclude an objectively reasonable expectation of privacy.[136] Their intrusion analysis is separate from the reasonable expectation of privacy analysis as established by *Katz v. United States*.[137] Instead, the NMCAA relies on "situational" reasonable expectation of privacy; that is, a reasonable expectation of privacy in relation to the network administrator, and, separately, law enforcement.[138]

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[126] *Long I*, 61 M.J. at 543 (citing United States v. Ayala, 43 M.J. 296, 298 (1995)). The court must determine whether the military judge's findings of fact are clearly erroneous or the conclusions of law are incorrect. The court reviews the question of whether the military judge correctly applied the law *de novo*. *Id*.

[127] *Id*.

[128] *Id.* at 546.

[129] Katz v. United States, 389 U.S. 347 (1967). Justice Harlan's concurring opinion explains that a person's "reasonable expectation of privacy" has a subjective and objective component. *Id.* at 361. First, the individual must have "exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as 'reasonable.'" *Id*.

[130] United States v. Monroe, 52 M.J. 326 (2000) (holding that where a government owned system in which users login and consent to monitoring, under a totality of circumstances the user has no reasonable expectation of privacy in his e-mail messages or e-mail box at least from the personnel charged with the maintaining the system).

[131] *Long I*, 61 M.J. at 544 (citing *O'Connor*, the court does not see "[a]n expectation of privacy does not have to be an 'all-or-nothing" idea." O'Connor v. Ortega, 480 U.S. 709, 721 (1987). In fact they look to other factors to determine whether an expectation of privacy exists, e.g. "the amount of control the employee has over the area in question or the evidence seized; whether the employee took precautions to safeguard the privacy; and whether the employee could exclude others from the area or items of evidence."). *Id.* at 543 (citing United States v. Mendoza, 281 F.3d 712, 715 (8th Cir.)).

[132] *Id*. at 544.

[133] *Id*. "Nowhere does the banner mention search and seizure of evidence of crimes unrelated to unauthorized use of a Government computer." *Id*.

[134] *Id*. The banner informs the user that the government computer system can be monitored for unauthorized use and protection of the system. *Id*.

[135] *See generally* Jamison, *supra* note 10, at 15. Lieutenant Colonel Jamison expertly dissects the NMCAA's analysis in *Long's* case.

[136] *See* Picha v. Wielgos, 410 F. Supp. 1214 (N.D. Ill. 1976) "Where the police have significant participation, Fourth Amendment rights cannot leak out the hole of presumed consent to a search by an ordinarily non-governmental party." *Id*. at 1219. Basically there is a great expectation of privacy when police are involved; when the searches of students by law enforcement in instigating the search was critical in determining the students' limited expectation of privacy. United States v. Pryba, 502 F.2d 391 (D.C. Cir. 1974).

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

[138] The court compares the facts in *Monroe* with that of *Pryba*. In *Monroe*, system administrators discovered pornography while monitoring the system for the cause of a system slowdown. The court found the administrators properly turned over the evidence to law enforcement pursuant to the stored electronic communications, 18 U.S.C. § 2702 (2000). The stored electronic communications act offers statutory protection for system administrators who turn over electronic evidence of a crime to law enforcement when they inadvertently discover it in the course of their duties maintaining or operating the network computer system. *Long I*, 61 M.J. at 545 (citing United States v. Monroe, 52 M.J. 326, 328, 331 (2000)). In *Pryba*, which involved "the discovery of pornographic material by a commercial carrier as a result of [their] employee conducting a search of a package based on the suspicious actions of the sender, . . ."

> Where the search is made at the behest of or with the assistance of law enforcement officers, there must be probable cause, and in appropriate instances an authorizing warrant, if the search is to pass constitutional muster. But where the search is made on the carrier's own initiative for its own purposes, Fourth Amendment protections do not obtain for the reason that only the activities of individuals or nongovernmental entities are involved. So frequently and so emphatically have the courts enunciated and applied these principles that, at least for the time being they must be regarded as settled law.

Id. at 545-46 (quoting *Pryba*, 502 F.2d at 398).

Therefore the court finds that once the administrator

> becomes the agent of law enforcement, . . . either through conducting a search for criminal activity at their request or by permitting

The *Katz* test for when a reasonable expectation of privacy is violated is predicated on the person searched.[139] The two-prong test analyzes: (1) the actual expectation of privacy (subjective); and (2) whether that expectation of privacy is one that society is prepared to recognize as reasonable (objective).[140] In LCpl Long's case, the NMCAA finds no reasonable expectation of privacy vis-à-vis the network administrator because of the login banner warning of monitoring by the network administrator.[141] But, the court finds that LCpl Long possesses a reasonable expectation of privacy vis-à-vis law enforcement due to the lack of a warning regarding law enforcement monitoring of the e-mail network.[142] The court supports their assessment of LCpl Long's reasonable expectation of privacy by citing a greater expectation of privacy when law enforcement is involved in a search.[143]

The Navy Judge Advocate General disagreed, and certified two issues for review by CAAF.[144] The CAAF focused their analysis on the ultimate question of whether LCpl Long had a reasonable expectation of privacy in the e-mail communications sent and received via the Headquarters Marine Corps (HQMC) computer network server.[145] They held that LCpl Long did have a subjective expectation of privacy in these e-mails; that this expectation of privacy was objectively reasonable; and that NMCCA erred in admitting these e-mails as the trial court's error was not harmless beyond a reasonable doubt.[146]

The CAAF relied on the Supreme Court's holding in *O'Connor v. Ortega* in evaluating privacy expectations in the workplace.[147] *O'Connor* recognized the existence of privacy in the workplace where privacy expectations may be reduced by virtue of office practices, procedures, or regulation.[148] Here, CAAF finds that the policies and practices of Headquarters, Marine Corps reaffirmed, rather than reduced LCpl Long's expectation of privacy in her e-mails.[149]

The court considered a number of policy and practices in assessing LCpl Long's expectation of privacy in her government e-mail. First, CAAF gave significant weight to the network administrator's testimony in which he "repeatedly emphasized the agency practice of recognizing the privacy interests of users in their e-mails."[150] He supports his position by discussing the limited network access available to him for monitoring e-mails, and the fact that there was no monitoring of

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> them to participate actively in his monitoring and administering function, he loses that special status afforded him under the law and becomes equally subject to the requirements of the 4th Amendment regarding probable cause and proper search authorization.

Id.

[139] *Katz*, 389 U.S. at 347, 361. ("[T]he Fourth Amendment protects people, not places.").

[140] *Id*.

[141] *Long I*, 61 M.J. at 546.

[142] *Id*.

[143] *Id*. *See supra* note 129.

[144] *See supra* sec. I.A:

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

Long II, 64 M.J. 57, 59 (2006).

[145] *Id*. at 62.

[146] *Id*. at 66 (In reviewing de novo whether admitting the e-mails was harmless error beyond a reasonable doubt, CAAF found it could not conclude that the erroneous admission of the e-mails was harmless beyond a reasonable doubt. "Perhaps most important to our determination of the harmless error is trial counsel's reliance on the e-mails in his presentation to the court members."). *Id*.

[147] O'Connor v. Ortega, 480 U.S. 709 (1987).

[148] *Long II*, 64 M.J. at 61. *O'Connor v. Ortega* holds that the need for a search warrant based on probable cause was not required for legitimate workplace searches conducted by supervisors. There are two situations where employer searches into zones of privacy are legitimate even if not supported by normal Fourth Amendment warrant and probable cause requirements: (1) where the search is for noninvestigatory, work related purposes; (2) search by the employer is investigatory, but involves matters of workplace misconduct. *Id*. (citing *O'Connor*, 480 U.S. at 715).

[149] *Id.* at 64.

[150] *Id*. at 63.

individual e-mail accounts because it is "a privacy issue."[151] The CAAF found that this privacy issue was further supported by the fact that LCpl Long had a password known only to her.[152]

In fact, CAAF viewed the password requirements for e-mail as not only indicative of Long's privacy expectation, but as a business practice that reinforces this expectation. Specifically, passwords are needed to access individual e-mail accounts and users need to change them periodically to ensure "privacy."[153] This practice, in addition to the lenient HQMC policy for using government e-mail and e-mail servers for personal use, provides a foundation for CAAF's "totality of the circumstances" analysis.[154]

The CAAF concluded their analysis by focusing on the importance of the login banner. Simply, the court agreed with NMCCA that LCpl Long consented to monitoring for systems maintenance, not for law enforcement purposes. By recognizing the specificity within a login banner's language, CAAF creates a qualified expectation of privacy in government e-mails. The court therefore, found LCpl Long's expectation of privacy in government e-mail as objectively reasonable by virtue of the rules, regulations, practices and procedures at HQMC.

Judge Crawford provided a vociferous dissent to the majority's assessment of LCpl Long's reasonable expectation of privacy.[155] She wrote that a reasonable expectation of privacy is not divisible: "Once frustration of the original expectation of privacy occurs, the Fourth Amendment does not prohibit governmental use of the . . . information . . . ."[156] Therefore, the fact that the communication was obtained for law enforcement purposes has no bearing on LCpl Long's expectation of privacy.[157] Additionally, Judge Crawford was unpersuaded by the use of passwords for accessing her e-mail account.[158] Instead, the personal account was her work account and communication fell within the scope of work-related communications. Perhaps her most damning criticism was reserved for the network administrator and the majority's reliance on his testimony. "The perception of one administrator in a department as large as the Department of Defense . . . is not binding on the Department itself. The belief of an administrator is even more attenuated considering how computers are used on the job."[159]

The *Long II* decision is fundamentally a fact specific case. It can be distinguished from other CAAF cases in which the court did not find an objectively reasonable expectation of privacy in government e-mails. For instance, in *United States v. Monroe*, CAAF decided that there was no reasonable expectation of privacy from system administrators when the login banner warned that administrators could monitor usage.[160] The search in *Long II* went beyond monitoring by administrators and was a quest for evidence at the direction of law enforcement and therefore subject to Fourth Amendment probable cause requirements.[161]

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[151] *Id*.

[152] *Id*. at 64.

[153] *Id*. "The e-mails retrieved in this case were from Appellee's account on an unclassified government computer system on which she was authorized limited personal use and were not obtained for maintenance or monitoring purposes." *Id*.

[154] *Id.*

[155] *Id*. at 67 (Crawford, J., dissenting).

[156] *Id*. (citing *Randolph II*, 547 U.S. 103, 132 (2006) (quoting United States v. Jacobsen, 466 U.S. 109, 117 (1984))). *See supra* sec. I.A.

[157] *Id*. at 67-68.

> [Long] in the present case was aware of and consented to the monitoring and archiving of electronic communications originating from her government computer. She therefore could not have a reasonable expectation of privacy in those communications. That the communications were obtained specifically for law enforcement purposes has no bearing on her expectation of privacy.

Id.

[158] *Id.* at 69.

[159] *Id*.

[160] *Id*. (citing United States v. Monroe, 52 M.J. 326, 330 (2000)).

[161] *Id*. at 65.

1. Search Authorizations for Computer Files in Light of United States v. Long

The question then becomes: Does the *Long II* case require a search authorization in every instance where user e-mail is sought from a government computer or network? What framework should the judge advocate in the field or fleet follow? The United States Navy Deputy Assistant Judge Advocate General (Navy Deputy AJAG-Criminal Law) has made sage recommendations in this regard.[162]

The Navy Deputy AJAG-Criminal Law recommends the following five factor Fourth Amendment analysis. First, the most important factor is "the purpose of the search."[163] Citing the Supreme Court's decision in *O'Connor v. Ortega*, he reminds us that "the traditional Fourth Amendment and probable cause requirements are not necessary: (1) when the search is for non-investigatory, work-related purposes; and (2) when the search is investigatory but the individual is suspected for workplace misconduct."[164] Searches for "work-related purposes" and "workplace misconduct" are distinguished from searches for law enforcement purposes.[165] In *United States v. Simons*, for example, the Fourth Circuit, "upheld investigatory workplace misconduct searches, often for child pornography, of government computers conducted without a warrant even if a criminal investigation is ongoing provided that the search is conducted by a supervisor."[166]

Second, the language of the login banner is crucial in assisting courts in determining whether there is a reasonable expectation of privacy.[167] This was certainly the issue in the *Long II* case, which determined a reasonable expectation of privacy as it related to law enforcement searches "when the banner warned that only administrators could monitor usage."[168] The memorandum also notes the 11th Circuit case of *United States v. Angevine* "stating no expectation of privacy when banner warned 'all electronic mail messages are presumed to be public records and contain no right to privacy.'"[169] Currently, the Department of Defense (DOD) is revising the login banner to accommodate the *Long II* holding and provide uniformity across all service branches.[170]

Third, the courts look at user contracts.[171] For example, in *United States v. Maxwell*, the CAAF found that the servicemember had a reasonable expectation of privacy in his American Online subscriber information because the AOL user agreement "stated that privacy protection was provided as part of the service."[172]

Fourth, the courts evaluate the network administrator's practices, policies, and procedures.[173] In *Long II*, the court devoted a substantial amount of their analysis emphasizing the administrator's recognition of the user's privacy interest in e-mail.[174] Of note is CAAF's reliance on only one of many DOD network administrators in making their decision.[175] If an

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[162] E-mail Memorandum, Deputy Assistant Judge Advocate General (Criminal Law), to All Navy and Marine Corps Judge Advocates, subject: Search Authorizations for Computer Files in Light of *United States v. Long*, 64 M.J. 57 (C.A.A.F. 2006), Part II (1 June 07) [hereinafter E-mail Memorandum] (on file with author), *available at* https://wwwa.nko.navy.mil/portal/splash/index.jsp.

[163] *Id*.

[164] *Id*. (citing O'Connor v. Ortega, 480 U.S. 709, 725-26 (1987).

[165] *Id*. (citing *Monroe*, 52 M.J. at 328).

[166] *Id*. (citing United States v. Simons, 206 F.3d 392, 400 (4th Cir. 2000). The memorandum also notes the holding in *United States v. Slanina*, 283 F.3d 670, 679 (5th Cir. 2002), where "the Fifth Circuit agreed that such a workplace misconduct search for child pornography was proper even when the supervisor was a law enforcement agent.").

[167] *Id*.

[168] *Id*. (citing *Long II*, 64 M.J. 59, 63 (2006)).

[169] *Id*. (citing United States v. Angevine, 281 F.3d 1130, 1134 (10th Cir. 2002)).

[170] E-mail from Richard Aldrich, Contractor, Office of the Assistant Secretary of Defense, Networks and Information Integration, Defense-wide Information Assurance Program, to Major Stephen Stewart, USMC, Professor, The Judge Advocate General's Legal Center and School, U.S. Army (21 June 2007, 05:08 PM) (on file with author). Revisions continue in regards to the banner. Concerns have been made regarding the professional responsibility considerations; to wit: attorney-client privilege in regard to a reasonable expectation of privacy and the privacy of communications. *Id*.

[171] E-mail Memorandum, *supra* note 162.

[172] *Id*. (citing United States v. Maxwell, 45 M.J. 406, 417 (1996)).

[173] *Id*.

[174] *Id*. (citing *Long II*, 64 M.J. 57, 64 (2006)).

[175] *Long II*, 64 M.J. at 64.

administrator testifies consistent with DOD information system policy,[176] then a warrant prior to looking at e-mails is less probable.[177]

Fifth, federal courts have looked to the employee's relationship to the item seized in assessing privacy interests. In *United States v. Angevine*, the 11th Circuit observed that by deleting computer files, the employee "suggested he did not intend to keep the items private."[178] Therefore, a service member who keeps items on a shared drive where others may view it, vice one who keeps items on an individual drive and labels the materials "private" would have a lesser expectation of privacy.[179]

The type of stored information, especially contraband, is another factor to consider.[180] The court in *Angevine* notes that it "had never stated the Fourth Amendment protects an employee who downloads child pornography in violation of the employer's computer policy." In this case the employee was admonished not to download material in violation of federal law. Contrarily, the *Long II* case "centered on e-mail admissions unrelated to a violation of the employer's policy"—her personal messages sent via e-mail were authorized.[181]

Fourth Amendment search and seizure law is fact dependent, and instances involving stored electronic communications are not exceptions. The greater concern for government lawyers is creating an expectation of privacy in e-mail when none is intended. Therefore evaluating these situations with the above listed factors will facilitate a decision as to whether a search authorization is indeed necessary.

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

In *United States v. Conklin*, the CAAF looks beyond the question of whether a servicemember has a reasonable expectation of privacy in government e-mail, to the scope of consent following an initial illegal search.[182] What Conklin's case challenges is the perception that consent cures all prior improper searches and seizures.

Airman First Class (A1C) Conklin was a student at Keesler Air Force Base (AFB) as part of a five-week training program.[183] He was assigned to an on-base dormitory room.[184] As part of a routine and random inspection, A1C Conklin's military training leader (MTL) inspected A1C Conklin's room.[185] After having inspected A1C Conklin's dresser, A1C Conklin's computer monitor powered up automatically and the display had a picture of an actress's exposed breasts.[186] This image was a violation of Keesler AFB dormitory regulations that prohibited the open display of nude or partially nude persons.[187] Once the image display came up, the MTL contacted a senior MTL who started searching A1C Conklin's computer.[188]

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[176] E-mail Memorandum, *supra* note 162. Department of Defense policy that users have no right of privacy in any information that is transmitted, received, or stored by a DOD information system. *Id*.

[177] *Id*.

[178] *Id*. (citing United States v. Angevine, 281 F.3d 1130, 1134 (11th Cir. 2002)).

[179] *Id*. (Pay attention to "(1) the employee's relationship to the items seized; (2) whether the item was in the immediate control of the employee when it was seized; and (3) whether the employee took actions to maintain his privacy in the item."). *Angevine*, 281 F.3d at 1134.

[180] E-mail Memorandum, *supra* note 162.

[181] *Id*. (citing *Long II*, 64 M.J. 57, 64 (2006)).

[182] United States v. Conklin, 63 M.J. 333 (2006).

[183] Steven L. Conklin was a nineteen-year-old Airman First Class. *Id*. at 334.

[184] *Id*.

[185] *Id*.

[186] *Id*.

[187] *Id*. at 335. KEESLER AIR FORCE BASE INSTR. 32-6003, DORMITORY SECURITY AND LIVING STANDARDS FOR NON-PRIOR SERVICE AIRMEN 4.2.3 (30 Aug. 2003).

[188] *Conklin*, 63 M.J. at 335.

The senior MTL found a folder titled "porn" and a subfolder titled "teen."[189] He opened six to eight joint photographic experts group (JPEG) files, each containing images of young nude females.[190] At this time, the senior MTL secured the room and notified the Air Force Office of Special Investigations (OSI).[191]

Two OSI agents contacted A1C Conklin at the chow hall and asked for his consent to search his room and computer.[192] The agents did not tell A1C Conklin about the earlier inspection.[193] He consented to the search of his room and of his computer for evidence of child pornography.[194] The OSI agents found a large number of images of child pornography and A1C Conklin subsequently confessed to the agents that he had borrowed some compact discs containing adult and child pornography from a friend and had copied those discs onto his computer.[195]

At trial, A1C Conklin moved to suppress the evidence based on the theory that the derivative evidence was seized as a result of an illegal search of his computer.[196] Conklin unsuccessfully argued that the OSI agents went beyond the bounds of an inspection and that the actions of the senior MTL were actually a subterfuge for a search.[197] The military judge denied his motion and held that the unique training environment at Keesler AFB justified more intrusive inspections than would normally be permitted in a non-training environment.[198] Conklin was convicted of possession of child pornography in violation of the Child Pornography Prevention Act of 1996,[199] and received a bad conduct discharge, reduction to the lowest enlisted pay grade, and confinement for six months.[200]

As a threshold matter, the Air Force Court of Criminal Appeals (AFCCA) held that A1C Conklin had a reasonable expectation of privacy in his personal computer, even though the computer was located in his government dormitory room.[201] With regard to the open display of the partially nude actress, the AFCCA concluded that A1C Conklin had forfeited his right to privacy under the "plain view" doctrine.[202] However, the court held that he maintained his right to privacy as to the other non-displayed content on his personal computer.[203] The stated purpose of the Keesler AFB dormitory instruction, which authorized random inspections, was to ensure "standards of cleanliness, order, décor, safety, and security."[204] Since the searching of the computer had nothing to do with "cleanliness, décor, safety, or security," the AFCCA held that the senior MTL violated the scope of the inspection under Military Rule of Evidence 313[205] because the search of the computer was unrelated to the purpose of the instruction.[206]

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[189] *Id*.

[190] *Id*.

[191] *Id*.

[192] *Id.*

[193] *Id*.

[194] *Id*.

[195] Airman First Class Conklin explained that he had copied several discs which he had received from another airman. *Id.* The disc contained images of mostly adults, but some appeared to be of girls between the ages of thirteen and seventeen. He stated that he intended, but failed, to delete those images. *Id*.

[196] *Id*.

[197] *Id*.

[198] *Id.*

[199] 18 U.S.C. § 2252A (2000).

[200] *Conklin*, 63 M.J. at 335. "The convening authority remitted the punitive discharge pursuant to a decision of the Air Force Clemency and Parole Board." *Id*.

[201] *Id*.

[202] *Id*. "The rule permitting a police officer's warrantless seizure and use as evidence of an item observed in plain view from a lawful position or during a legal search when the officer has probable cause to believe that the item is evidence of a crime." BLACKS LAW DICTIONARY, *supra* note 57, at 1171. *See, e.g*., Arizona v. Hicks, 480 U.S. 321 (1987).

[203] *Conklin*, 63 M.J. at 335.

[204] *Id*.

[205] MCM, *supra* note 125, MIL. R. EVID. 313.

[206] *Conklin*, 63 M.J. at 335.

Consequently, AFCCA held that the senior MTL violated A1C Conklin's rights under the Fourth Amendment by searching his computer.[207] Nevertheless, the court concluded that Conklin's consent was voluntary and his voluntary consent effectively waived any expectation of privacy that A1C Conklin had in his computer.[208]

The CAAF acknowledged A1C Conklin's privacy interest in his personally owned computer, located on a military installation, in a military dormitory room shared with another servicemember.[209] While recognizing the limited expectation of privacy in a barracks room,[210] the CAAF acknowledged that an individual has a reasonable expectation of privacy in files kept on a personally owned computer.[211] Therefore, the court rejected the analogy that the search of the computer files is like searching a desk drawer in a "neat and orderly" military inspection.[212] Instead, CAAF treated computer files as if they are contents of a non-transparent container.[213] Therefore, opening of the computer files by the senior MTL went beyond the scope of an authorized inspection.[214]

But CAAF granted review, and focused their attention, as to whether consent to a subsequent search is the antidote to the poison created by the earlier unlawful search.[215] In other words, did A1C Conklin's consent to search cure the earlier Fourth Amendment violation?[216] The court held, in quite understated fashion, that consent to a search does not cure all ills.[217] In fact, "[i]f appellant's consent, albeit voluntary, is determined to have been obtained through exploitation of the illegal entry, it cannot be said to be sufficiently attenuated from the taint of that entry."[218]

The court used *Brown v. Illinois* factors to determine if consent was an independent act of free will, not voluntariness, to remove the taint of the illegal search.[219] The Supreme Court in *Brown* held that the question of free will must be answered on the facts of each case looking at (1) the temporal proximity of the unlawful police activity and the subsequent act (consent); (2) the presence of intervening circumstances; and (3) the purpose and flagrancy of the official misconduct.[220]

Applying this three-prong test, the CAAF determined that all three favor A1C Conklin.[221] First, the court identified the three hour time delay between the time that the Senior MTL, Technical Sergeant Schlegel (TSgt) "began opening files on [A1C Conklin's] computer and the time [Conklin] consented to the search" as the temporal proximity between the illegal conduct and the consent.[222] The court opines, "it appears that everything happened before lunch."[223]

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[207] *Id*.

[208] *Id*. at 337.

[209] *Id*.

[210] *Id*. The CAAF reminds us that "the threshold of a barracks/dormitory room does not provide the same sanctuary as the threshold of a private room." (citing United States v. McCarthy, 38 M.J. 398, 403 (C.M.A. 1993) (holding that "barracks room does not afford the same protections from arrest as a private room.")). *Id*.

[211] *Id*.

[212] *Id*.

[213] *Id*.

[214] *Id*.

[215] *Id*. at 334. "Evidence derivative of an unlawful search, seizure, or interrogation is commonly referred to as the 'fruit of the poisonous tree' and is generally not admissible at trial." *Id*. (citing Nardone v. United States, 308 U.S. 338, 341 (1939)).

[216] *Id*. at 338.

[217] *Id*.

[218] *Id*. (quoting United States v. Khamsouk, 57 M.J. 282, 290 (2002)).

[219] Brown v. Illinois, 422 U.S. 590 (1975).

[220] *Id*. at 603. The CAAF also cites a Fifth Circuit case as almost identical to the Conklin fact pattern which states:

> To determine whether the defendant's consent was an independent act of free will, breaking the causal chain between the consent and the constitutional violation, we must consider three factors: (1) the temporal proximity of the illegal conduct and the consent; (2) the presence of intervening circumstances; and (3) the purpose and the flagrancy of the initial misconduct.

Conklin, 63 M.J. at 338-39 (citing United States v. Hernandez, 279 F.3d 302, 307 (5th Cir. 2002)).

[221] *Conklin*, 63 M.J. at 339.

[222] *Id*.

[223] *Id*.

Second, the CAAF found no intervening circumstances sufficient to remove the taint of the initial illegal search.[224] The court relies on a but-for analysis. The OSI agents would not have been interested in talking to A1C Conklin but for "the information relayed to them as a direct result of the unlawful search that had just taken place."[225] "There were no intervening circumstances that would sever the causal connection between the two searches."[226] In other words, the two searches were not independent.

Finally, the court examined the government's conduct and admitted it was a close call as to whether the action of TSgt Schlegel was flagrant. The CAAF found Schlegel's conduct unnecessary and unwise.[227] Although finding no bad motive or intent,[228] TSgt Schlegel had several legitimate options available to him to which he failed to avail himself.[229] For example, instead of expanding the scope of a legitimate inspection into private files on a personal computer, he could have secured the computer and charged the A1C Conklin for the open display of the nude image, presented the evidence to the commanding officer for a search authorization, then consulted with the staff judge advocate.[230]

Thus, seeking guidance, the court looked to the similar fact pattern of *United States v. Hernandez*.[231] In *Hernandez* the Fifth Circuit held that the police officer's conduct was not flagrant, but the drug seizure was still inadmissible because "the causal connection between the violation and the consent was not broken."[232] The CAAF, likewise, saw Conklin's situation in the same light where they concluded there was a causal connection between the illegal search and the act of obtaining consent.[233] Furthermore, the court concluded that the illegal search is the only factor that led to the request for consent, and therefore the "exploitation of the information obtained from the illegal search was flagrant even if the search itself was not."[234] Therefore, [A1C Conklin's] "consent was not 'an independent act of free will'[235] sufficient to cure the poisonous effects of the unlawful search."[236]

In sum, a divided CAAF concluded, "that the military judge erred in not granting [Conklin's] motion to suppress."[237] It further reaffirmed the fundamental purpose of the exclusionary rule as to deter improper law enforcement conduct—citing the request for Conklin's consent as a direct result of, and immediately following, an unlawful search.[238]

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[224] *Id*.

[225] *Id.*

[226] *Id*.

[227] *Id*.

[228] *Id*. at 335. Technical Sergeant Schlegel had previously sought legal advice from AFOSI in a similar incident, and relied upon the advice in Conklin's case. Unfortunately, the advice was erroneous. *Id*.

[229] *Id*.

[230] *Id.*

[231] *Id*. at 340 (citing United States v. Hernandez, 279 F.3d 302 (5th Cir. 2002)).

[232] *Id*.

[233] *Id*.

[234] *Id.*

[235] *Id.* (citing *Hernandez*, 279 F.3d at 307).

[236] *Id*.

[237] *Id*. Judges Baker and Crawford provide a robust dissent. Both jurists identify flaws in the majority's interpretation of the *Brown* factors. Specifically, in regard to the temporal proximity prong, the dissent identifies three factors the majority failed to consider in assessing whether Conklin consented of his own free will. First, that Conklin was not in custody when he was asked for consent. Second, he did not know of the prior unlawful act, and therefore consented out of a "sense of futility." (citing Commonwealth v. Pileeki, 818 N.E.2d 596, 600 (2004) (quoting Darwin v. Connecticut, 391 U.S. 346, 351 (1968))). Third, Conklin was apprised that the search was to look for child pornography, and thus aware of the request context. Next, the dissent argues that the majority misapplies the exclusionary rule because the illegal search was not intentional and flagrant. Additionally, the dissent cites *Stone v. Powell*, which states the exclusionary rule has "never been interpreted to proscribe the introduction of illegally seized evidence in all proceedings or against all persons." *Id*. at 341 (citing Stone v. Powell, 428 U.S. 465, 488 (1976)). Hence, "applying the concepts of proportionality essential to justice embodied in the exclusionary rule, the legal policy purposes of the exclusionary rule would not otherwise be served through application of the rule in this case." *Id*. at 342.

[238] *Id.*

III. Looking Ahead for 2007

The 2006 symposium article insightfully saw that judicial term as one of culmination and decision where the previous year was one of incubation.[239] The decisions were indeed bold in terms of consent, reasonable expectation of privacy, and the scope of suppression in "knock and announce" rule violations.[240] The upcoming term of court does not have the excitement or pregnancy that last year's term possessed. Nonetheless, the Supreme Court granted certiorari on a California Fourth Amendment case which addresses the issue of standing. Specifically, whether a passenger in a car, when the car was momentarily stopped by a police officer for a traffic stop, was seized for Fourth Amendment purposes when additional facts do not indicate he was the subject of the officer's investigation.

In *People v. Brendlin* (*Brendlin I*),[241] officers stopped a car to check its registration, and asked the driver and passenger for their identification.[242] One of the officers recognized the passenger as one of the Brendlin brothers, Scott or Bruce, who had absconded from parole supervision. During the inquiry, the passenger falsely identified himself as "Bruce Brown."[243] The officer returned to his police vehicle and verified that Bruce Brendlin was a parolee at large and had an outstanding no-bail warrant for his arrest.[244] The police then placed Brendlin under arrest. Afterwards, the police found drug paraphernalia.[245]

Brendlin moved to suppress the drug evidence seized from the Buick.[246] The trial court determined that he had not been seized within the meaning of the Fourth Amendment until the police officer took him into custody, and therefore, "lacked standing to suppress the items seized from the Buick."[247] The California Court of Appeal reversed and held that a traffic stop necessarily results in a detention, and hence a seizure.[248] The California Supreme Court reversed and emphasized that unless the passenger of a vehicle was the subject of the traffic stop investigation or show of authority, he is not seized.[249]

As Brendlin argued before the California Supreme Court, the Supreme Court has not decided whether a passenger is necessarily seized by virtue of a traffic stop (although dicta from the Court has "strongly hinted" in that direction).[250] The Supreme Court moved towards deciding this issue. The Court granted certiorari to decide whether a traffic stop subjects a passenger, as well as a driver, to Fourth Amendment seizure.[251]

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[239] Jamison, *supra* note 10, at 25.

[240] *See Randolph II*, 547 U.S. 103 (2006), *Long II*, 64 M.J. 57 (2006), and Hudson v. Michigan, 126 S. Ct. 2159 (2006), respectively.

[241] People v. Brendlin (*Brendlin I*), 136 P.3d 845 (Cal. 2006), *cert. granted*, Brendlin v. California (*Brendlin II*), 127 S. Ct. 1145 (2007).

[242] *Id*. at 847.

[243] *Id*.

[244] *Id*.

[245] *Id*.

> Police found an orange syringe cap on defendant's person during a search incident to arrest. They found two hypodermic needles (one of which was missing a syringe cap), two baggies containing a total of 12.43 grams of marijuana, and a baggie containing 0.46 grams of methamphetamine on [the driver's] person during a patsearch and a subsequent search incident to her arrest. Materials used in manufacturing methamphetamine were found in the back seat of the Buick.

Id.

[246] *Id.*

[247] *Id*.

[248] *Id*.

[249] *Id*. at 855.

[250] *Id*. at 850. The court cites *Delaware v. Prouse* as an example where the Supreme Court "observed that 'stopping an automobile and detaining its occupants constitute a 'seizure' within the meaning of [the Fourth Amendment], even though the purpose of the stop is limited and the resulting detention quite brief.'" 440 U.S. 648, 653 (1979).

[251] *Brendlin II*, 127 S. Ct. 1145 (2007). Since submitting this article for publication, the Supreme Court decided Brendlin v. California (*Brendlin III*) and held that when a "police officer makes a traffic stop . . . a passenger is seized [in addition to the driver] as well and so may challenge the constitutionality of the stop." Brendlin v. California (*BrendlinIII*), 127 S. Ct. 2400, 2403 (2007).

IV. Conclusion

The jurists continue to seek clarity in the verbiage of ambiguity that is the Fourth Amendment. This past term was no exception, and indeed yielded additional case law to assist citizens, police officers, and lawyers alike for interpreting our Fourth Amendment protections. As has been noted before, search and seizure law is "largely one of defense, retrenchment, counterattack."[252] This year the law did not disappoint. The issues of consent, reasonableness, and use of the exclusionary rule dominated the Supreme Court and CAAF's Fourth Amendment docket. Likewise, next year's docket will provide a new offensive for Fourth Amendment clarity.

[252] Lieutenant Colonel Ernest Harper, USMC, *Defending the Citadel of Reasonableness: Search and Seizure in 2004*, ARMY LAW., Apr. 2005, at 1.

The Framers' Sixth Amendment Prescriptions: Cross-Examination and Counsel of Choice

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Introduction

The Sixth Amendment does not require mere reliability or fairness, but rather that reliability and fairness be tested in a particular manner, by cross examination and counsel of choice respectively.

The 2006 term included significant Sixth Amendment cases including the first Supreme Court case on confrontation[1] since *Crawford v. Washington*[2] and two Court of Appeals for the Armed Forces (CAAF) cases on the business records exception after *Crawford*.[3] Two confrontation cases decided early in the 2007 term also require brief mention, though a detailed analysis will wait for further developments in the law.[4] In addition to the confrontation cases, the Supreme Court decided a case that spells out the meaning of the right to counsel.[5]

This article reviews the Confrontation Clause analysis for testimonial hearsay statements in the wake of *Crawford*, including the reasoning followed by most courts, including the CAAF, for nontestimonial hearsay statements.[6] The article then describes the Supreme Court's reasoning regarding statements made during police interrogation in *Davis v. Washington*[7] before covering the military courts' treatment of documentary evidence under the business records exception to the hearsay rules in *United States v. Magyari*[8] and *United States v. Rankin* (*Rankin I*).[9] Finally, this article addresses *United States v. Gonzalez-Lopez*, where the Supreme Court further defined the meaning of the Sixth Amendment right to counsel.[10]

Confrontation Clause Analysis Before and After *Crawford*[11]

Before *Crawford* was decided in 2004, confrontation clause analysis was governed by *Ohio v. Roberts*,[12] decided in 1980. *Roberts* held that a hearsay statement must possess sufficient indicia of reliability to be admitted into evidence.[13] There were two methods available for showing indicia of reliability, either the statement fell within a firmly rooted hearsay exception, or the statement possessed particularized guarantees of trustworthiness.[14] The idea was that if a statement possessed sufficient indicia of reliability, then cross examination would add nothing to the search for truth, and could therefore be dispensed with.

In order to find that a statement possessed particularized guarantees of trustworthiness, a court could consider non-exclusive factors including spontaneity and consistent repetition, mental state of the declarant, use of terminology unexpected

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[1] "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." U.S. CONST. amend. VI.

[2] 541 U.S. 36 (2004).

[3] United States v. Rankin (*Rankin I*), 63 M.J. 552 (N-M. Ct. Crim. App. 2006); United States v. Magyari, 63 M.J. 123 (2006).

[4] Whorton v. Bockting, 127 S. Ct. 1173 (2007); United States v. Rankin (*Rankin II*), 64 M.J. 348 (2007).

[5] United States v. Gonzalez-Lopez, 126 S. Ct. 2557 (2006).

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

[7] Davis v. Washington, 126 S. Ct. 2266 (2006).

[8] 63 M.J. 123.

[9] *Rankin I*, 63 M.J. 552 (N-M. Ct. Crim App. 2006).

[10] 126 S. Ct. 2557.

[11] Crawford v. Washington, 541 U.S. 36 (2004); *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 (providing a more detailed look at *Crawford*).

[12] 448 U.S. 56 (1980).

[13] *Id.* at 66.

[14] *Id.*

of a child of similar age, lack of motive to fabricate, use of open-ended, non-leading questions, repeated emphasis on truthfulness, and declarations against the declarant's interest.[15] Importantly, a court was limited to the circumstances surrounding the making of the statement when analyzing its reliability.[16] Extrinsic evidence was not permitted.[17]

Crawford changed the analysis by describing two distinct categories of hearsay statements, testimonial and nontestinonial.[18] *Crawford* holds that testimonial hearsay cannot be admitted unless the declarant is unavailable and there has been a prior opportunity for cross examination.[19] The *Crawford* Court conducted a historical analysis of confrontation and determined that the right to cross examination was intended to combat the abuses inherent in the civil law system of criminal procedure, particularly the use of ex parte affidavits against an accused.[20]

The *Crawford* Court did not define the term "testimonial," in fact they specifically left its definition for later development.[21] They did, however, describe three forms of core testimonial evidence: (1) ex-parte in court testimony, (2) extrajudicial statements in formalized trial materials, and (3) statements made under circumstances that would cause a reasonable witness to believe they could be used later at trial.[22] The first two forms are fairly straightforward in application, however, the third form has resulted in controversy.[23]

The Court also discussed various factors that would indicate that a statement was testimonial. The involvement of government agents in production of a statement, for example, tends to lead to the conclusion that the statement is testimonial.[24] Statements made to police officers in the course of interrogations are the most prominent example of this type of testimonial statement.[25] The Court acknowledged there was more than one definition of the term interrogation, and noted that under the facts in *Crawford*, statements "knowingly given in response to structured police questioning," would qualify under any definition.[26] Categorizing statements made in response to police interrogation was precisely the issue addressed by the Court this term in *Davis*.[27]

On the other hand, the Court also described factors that would militate against a statement being categorized as testimonial. One example given by the Court of a statement that would not be considered testimonial was a remark made to a casual acquaintance.[28] Another example was a statement that would qualify for admission under the business records exception to the hearsay rules.[29] This became the focus of military caselaw this term in *Rankin I*[30] and *Magyari*.[31]

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[15] Idaho v. Wright, 497 U.S. 805, 821 (1990) (providing factors for use in analyzing the reliability of hearsay statements made by child witnesses in child sexual abuse cases); United States v. Ureta, 44 M.J. 290, 296 (1996) (giving examples of factors to consider when looking at the circumstances surrounding the making of a hearsay statement when the declarant is unavailable).

[16] *Wright*, 497 U.S. at 819.

[17] This was confusing to many lawyers and judges, since this limit on extrinsic evidence only applied to the Confrontation Clause analysis. Once a statement passed the Confrontation Clause hurdle, extrinsic evidence was perfectly acceptable for analysis under the hearsay rules. Another source of confusion in military caselaw is the fact that the CAAF has stretched the meaning of circumstances surrounding the making of the statement to include statements made close in time, yet before the actual making of a particular statement in at least one case. *See* United States v. Ureta, 44 M.J. 290 (1996).

[18] Crawford v. Washington, 541 U.S. 36, 51 (2004).

[19] *Id.* at 68.

[20] *Id.* at 50.

[21] *Id.*

[22] *Id.* at 51-52.

[23] Much post-*Crawford* litigation has been focused on the meaning of the third form of core testimonial statements. *See* Richard D. Friedman, *Symposium:* Crawford *and Beyond: Exploring the Future of the Confrontation Clause in Light of Its Past: Grappling with the Meaning of "Testimonial*," 71 BROOK. L. REV. 241 (Fall 2005).

[24] *Crawford*, 541 U.S. at 53.

[25] *Id.* at 52.

[26] *Id.* at 53.

[27] Davis v. Washington, 126 S. Ct. 2266 (2006).

[28] *Crawford*, 541 U.S. at 51.

[29] *Id.*

[30] *Rankin I*, 63 M.J. 552 (N-M. Ct. Crim. App. 2006).

[31] United States v. Magyari, 63 M.J. 123 (2006).

Davis v. Washington[32]

In his concurrence to the opinion in *Crawford*,[33] then Chief Justice Rehnquist described the Court's treatment of testimonial hearsay as follows:

> The Court grandly declares that "[w]e leave for another day any effort to spell out a comprehensive definition of 'testimonial.'". . . But the thousands of federal prosecutors and the tens of thousands of state prosecutors need answers as to what beyond the specific kinds of "testimony" the Court lists, . . . is covered by the new rule. They need them now, not months or years from now. Rules of criminal evidence are applied every day in courts throughout the country, and parties should not be left in the dark in this manner.[34]

Following the court's opinion in *Crawford*, many practitioners believed the Court would define the term testimonial in their next confrontation case, which turned out to be *Davis*.[35] Unfortunately the Court limited its holding in *Davis* to the situation of police interrogation, and left open almost as many questions as it answered.[36]

Davis was actually a two-case opinion, covering both *Davis v. Washington* and *Hammon v. Indiana*.[37] Both cases involve statements taken during police interrogation, following domestic disputes. These statements were later admitted at trial in lieu of live witness testimony.[38]

In *Davis v. Washington*, Michelle McCottry called 911 but hung up before speaking to anyone during an ongoing altercation with her former boyfriend, Davis.[39] When the 911 dispatcher reversed the call and reached McCottry, she asked a series of questions that elicited responses, including the facts that the former boyfriend was still there, that he was jumping on McCottry, and that his name was Davis.[40] The police responded, arriving a few minutes later, and observed that McCottry appeared upset and looked like she had sustained recent injuries.[41] McCottry failed to appear at trial, and the accused was convicted based on the transcript of the 911 phone call[42] and the testimony from the police officers who responded to the scene.

In *Hammon v. Indiana*, police responded to a reported domestic disturbance and found Amy Hammon standing on the porch, while her husband remained inside the house.[43] Police interviewed Amy in the living room, while her husband was kept physically separated from her in the kitchen.[44] Amy jotted down a brief statement alleging that her husband had hit her and broken furniture during the earlier altercation.[45] When she failed to appear at the bench trial, the judge considered both the testimony of the officer who interviewed her at the scene, and the handwritten "affidavit," written by Amy that night.[46]

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[32] *Davis*, 126 S. Ct. 2266.

[33] *Crawford*, 541 U.S. at 69 (Rhenquist, C.J., concurring).

[34] *Id.* at 75.

[35] *Davis*, 126 S. Ct. 2266.

[36] *Id.* at 2273-74.

[37] *Id.* at 2266.

[38] *Id.*

[39] *Id.* at 2270.

[40] *Id.* at 2271.

[41] *Id.*

[42] *Id.*

[43] Hammon v. Indiana, 126 S. Ct. 2266, 2272 (2006).

[44] *Id.*

[45] *Id.*

[46] *Id.*

The issue in both cases was whether statements made during the police interrogations[47] (i.e., the 911 call made in *Davis* and the officer testimony in *Hammon*) are inadmissible testimonial hearsay statements under *Crawford v. Washington*.[48] The Court held in *Davis* 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. They 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.[49]

The Court in *Davis* compared the facts of the two cases contained therein to the facts of *Crawford*.[50] *Crawford*, itself, involved the classic case of police interrogation at the station house,[51] however these two cases present more difficult questions about what situations qualify as police interrogation and whether the statements derived from them are considered testimonial.[52] The Confrontation Clause applies only to testimonial hearsay, that is, statements made by witnesses against the accused, those who bear testimony.[53] "An 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."[54] That said, not every statement made to a government official, or even every statement made during an "interrogation" should be considered testimonial.[55]

In analyzing *Davis v. Washington*, the Court cited four differences between the interrogations in *Crawford* and *Davis* respectively.[56] First, McCottry was describing events as they occurred, where Sylvia Crawford was describing past events.[57] Second, McCottry was facing an ongoing emergency, her assailant was still present, while Crawford was making her statement from the police station.[58] Third, the questions asked of McCottry were necessary to resolve the emergency, rather than just to learn what had already occurred from Crawford.[59] Finally, the statement made by McCottry was completely informal, frantically answering the dispatcher on the phone, whereas Crawford was calmly answering police questions at the station house.[60] From these comparisons, the Court concluded that the circumstances surrounding the interrogation in *Davis* objectively indicate that its primary purpose was to summon police assistance in response to an ongoing emergency, rather than to gather evidence for future use at trial.[61] The Court also points out that an interrogation might begin with the primary purpose of enabling a police response to an emergency and later evolve into a testimonial statement, and that courts can address these situations through motions in limine and redacting testimonial portions of statements.[62]

The Court had an easier time with the interrogation in *Hammon v. Indiana*, noting that although the situation was less formal than that in *Crawford*, the interrogation was nonetheless conducted by a police officer after the emergency had passed, and was directed toward the investigation of past events.[63] The police arrived and questioned the parties while keeping them

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[47] *Davis*, 126 S. Ct. at 2274 n.2. The Court reasoned that even if the 911 operator is not a member of the police, he or she is at least an agent of the police such that questioning should be considered police interrogation. *Id.*

[48] *Id.* at 2270 (citing Crawford v. Washington, 541 U.S. 36 (2004)).

[49] *Id.* at 2273-74.

[50] *Id.* at 2276-77.

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

[52] *Davis*, 126 S. Ct. at 2270.

[53] *Id.* at 2274.

[54] *Crawford*, 541 U.S. at 51.

[55] *Davis*, 126 S. Ct. at 2274.

[56] *Id.* at 2276-80.

[57] *Id.* at 2276.

[58] *Id.*

[59] *Id.*

[60] *Id.* at 2277.

[61] *Id.*

[62] *Id.*

[63] Hammon v. Indiana, 126 S. Ct. 2266, 2278 (2006).

physically separated.[64] The statements given in *Hammon* and *Crawford* are similar to statements the government would likely elicit on direct examination at trial, and are inherently testimonial.[65] The Court explained that exigencies surrounding initial police response to an emergency might often mean that initial inquiries could produce non-testimonial statements, but in cases like *Hammon*, where the scene is secure and there is no ongoing emergency, even initial inquiries will be considered testimonial.[66]

Justice Thomas concurred in the judgment in *Davis*, and dissented in *Hammon*.[67] He argued that only statements possessing some degree of formality ought to be considered testimonial, as the closest approximation in modern times to the ex parte examination evils the Confrontation Clause was designed to guard against.[68]

The Supreme Court opinion in *Davis* is important to judge advocates because although the holding was limited to circumstances of police interrogation, some courts, including the CAAF, have applied the primary purpose analysis used in *Davis* to their own consideration of testimonial statements in other circumstances in other cases.[69]

United States v. Rankin (Rankin I)[70]

In *Rankin I*, the appellant began a period of unauthorized absence in 1993, and returned more than seven years later.[71] He was convicted of violating Article 86, Uniform Code of Military Justice (UCMJ),[72] and sentenced to ninety-one days confinement and a Bad Conduct Discharge (BCD).[73] The government's case consisted of several personnel records documenting appellant's absence, and two live witnesses who testified for the purpose of laying the foundation for admission of the documents.[74] There was no live witness testimony by anyone with first-hand knowledge of the circumstances surrounding appellant's unauthorized absence.[75]

The issue in the case was whether the documentary evidence admitted against appellant at trial violated his Sixth Amendment right to confront the witnesses against him.[76] In other words, the case examined whether service records documenting appellant's absence should be considered testimonial hearsay requiring unavailability and a prior opportunity for cross-examination for admissibility.[77] The Navy-Marine Corps Court of Appeals (NMCCA) held that the service record entries documenting the appellant's period of unauthorized absence were not testimonial statements for the purposes of the Confrontation Clause.[78]

In so holding, the court first reviewed the Confrontation Clause analysis after *Crawford*, observing that the first step in the analysis is whether a statement is testimonial or non-testimonial.[79] In determining the personnel documents were non-testimonial, the court looked at three factors.[80] First, the documents admitted were routine personnel accountability

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[64] *Id.*

[65] *Id.*

[66] *Id.* at 2279.

[67] *Id.* at 2281 (Thomas, J., dissenting).

[68] *Id.* at 2282.

[69] *See, e.g.*, *Rankin II*, 64 M.J. 348 (2007); People v. Hrubecky, No. 2006RI005491, 2006 N.Y. Misc. LEXIS 3859 (N.Y. Crim. Ct. Dec. 13, 2006); N.J. v. Buda, 912 A.2d 735 (N.J. Super. Ct. App. Div. 2006); State v. Alvarez, 143 P.3d 668 (Ariz. Ct. App. 2006).

[70] *Rankin I*, 63 M.J. 552 (N-M. Ct. Crim. App. 2006).

[71] *Id.* at 553.

[72] UCMJ art. 86 (2005).

[73] *Rankin I*, 63 M.J. at 552.

[74] *Id.*

[75] *Id.* at 553.

[76] *Id.*

[77] *Id.*

[78] *Id.* at 554.

[79] *Id.* at 553 (citing Crawford v. Washington, 541 U.S. 36 (2004)).

[80] *Id.* at 554.

documents, not prepared by the prosecution or police in preparation for trial.[81] Second, the primary purpose for these documents was administrative, rather than evidentiary.[82] Third, the information contained in the documents was mainly objective in nature, i.e. times, places, and identifying data.[83] Any subjective or narrative data contained in the documents was redacted before admission.[84] After deciding the documents were non-testimonial, the court then followed the *Ohio v. Roberts*[85] indicia of reliability analysis and found that the documents fell within a firmly rooted hearsay exception, the business records exception.[86]

The CAAF first considered admission of documentary evidence under the business records exception post-*Crawford* in *United States v. Magyari*, a case involving admission of a urinalysis lab report.[87]

United States v. Magyari[88]

The facts in *Magyari* replicate the typical urinalysis based drug case in the military today. Appellant's urine sample tested positive for methamphetamine after a random urinalysis conducted on 12 February 1998.[89] The only evidence presented at trial was the lab report, three chain of custody witnesses involved in the collection of the sample, and a civilian quality assurance officer from the lab.[90] The civilian witness from the lab testified about the procedures followed at the testing facility in general, however, he did not personally participate in testing appellant's sample.[91]

The issue presented was whether, in light of *Crawford*, appellant was denied his Sixth Amendment right to confront the witnesses against him where the government's case consisted solely of appellant's positive urinalysis.[92] In other words, did the lab reports constitute testimonial hearsay statements, such that the declarants, i.e. the lab technicians that tested the sample and produced the reports, should be required to testify at court-martial.[93]

The CAAF held that "in the context of random urinalysis screening, where the lab technicians do not equate specific samples with particular individuals or outcomes, and the sample is not tested in furtherance of a particular law enforcement investigation, the data entries of the technicians are not 'testimonial' in nature."[94]

The CAAF began its reasoning by reviewing the Supreme Court's analysis in *Crawford*.[95] In *Crawford*, the Supreme Court held that a testimonial statement can only be admitted against an accused if the declarant is present at trial or there has been a prior opportunity for cross-examination.[96] However, if a statement is considered nontestimonial, then admissibility is still governed by whether the statements possess sufficient indicia of reliability.[97] The Court did not provide a comprehensive definition of testimonial versus nontestimonial, but it did identify three forms of core testimonial evidence: (1) ex-parte in court testimony, (2) extrajudicial statements in formalized trial materials, and (3) statements made under

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[81] *Id.*

[82] *Id.*

[83] *Id.*

[84] *Id.*

[85] 448 U.S. 56 (1980).

[86] *Rankin I*, 63 M.J. at 555.

[87] *Magyari*, 63 M.J. 123 (2006).

[88] *Id.*

[89] *Id.* at 124.

[90] *Id.*

[91] *Id.*

[92] *Id.*

[93] *Id.*

[94] *Id.*

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

[96] *Id.* at 68.

[97] *Magyari*, 63 M.J. at 127 (citing Ohio v. Roberts, 448 U.S. 56 (1980)).

circumstances that would cause a reasonable witness to believe they could be used at trial.[98] The Court also provided a few examples of testimonial hearsay, including prior testimony at a preliminary hearing, before a grand jury, or at a former trial, and police interrogations.[99] The question in *Magyari* was whether the lab reports should be considered testimonial or nontestimonial.[100] Appellant argued that the reports were testimonial, falling under the third *Crawford* category as statements made in preparation for trial, since the lab technicians would have known that the reports could be used later at trial.[101] The Government argued that the lab reports were business records and, by their nature, nontestimonial.[102] The CAAF found that under the circumstances of this case, the lab reports were nontestimonial business records.[103] Importantly, however, the court refused to say that all lab reports would be considered nontestimonial.[104] In dicta, the court laid out some scenarios where lab reports might be considered testimonial (e.g., where an accused is already under investigation, and where testing is initiated by the prosecution to discover incriminating evidence).[105] The court even cited civilian cases where lab reports were considered testimonial, including where the government sought to admit DNA evidence in a rape case and an affidavit prepared by hospital personnel in a DUI case.[106]

Magyari is important because it considers the classic military drug use case based on random urinalysis testing and finds the lab reports nontestimonial. If the court had held otherwise, then military prosecutors would be forced to call multiple witnesses from the lab to testify in an otherwise straightforward drug use court-martial. Aside from its holding, the *Magyari* opinion also sheds light on the CAAF's thinking regarding when lab reports might be considered testimonial.[107] Government counsel should not be lulled to sleep by the holding in *Magyari*, and defense counsel should sit up and take note, because given different facts, it seems clear that the CAAF is prepared to find a lab report testimonial in the future, even if it would otherwise qualify under the hearsay rules for admission as a business record.[108]

Besides the confrontation cases already discussed, another aspect of the Sixth Amendment was addressed by the Supreme Court last term in *United States v. Gonzalez-Lopez*.[109] In *Gonzalez-Lopez*, the Court ruled that the Sixth Amendment right to counsel guarantees not just the presence of counsel, but counsel of choice, when a defendant does not require appointed counsel.[110]

United States v. Gonzalez-Lopez[111]

In *Gonzalez-Lopez*, respondent was charged with conspiracy to distribute a hundred kilograms of marijuana.[112] His family hired a lawyer, John Fahle, to represent him.[113] Respondent subsequently chose another attorney, Joseph Low, to represent him instead.[114] Both lawyers represented respondent at an evidentiary hearing, where Low's provisional

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[98] *Crawford*, 541 U.S. at 51-52.

[99] *Id.* at 52.

[100] *Magyari*, 63 M.J. at 126.

[101] *Id.*

[102] *Id.* at 127. The *Crawford* opinion contains language citing documents admitted under the business records exception to the hearsay rules as an example of statements that were by their very nature nontestimonial. *Crawford*, 541 U.S. at 56.

[103] *Magyari*, 63 M.J. at 128.

[104] *Id.* at 127.

[105] *Id.*

[106] *Id.* (citing People v. Rogers, 8 A.D.3d 888, 891 (N.Y. App. Div. 2004), and Las Vegas v. Walsh, 91 P.3d 591, 595 (Nev. 2004), *modified by* 100 P.3d 658 (Nev. 2004)).

[107] *Id.*

[108] The ACCA recently found a lab report testimonial where the report identified marijuana as the substance obtained after appellant had been arrested. United States v. Williamson, 65 M.J. 706, 718 (Army Ct. Crim. App. 2007).

[109] *Gonzalez-Lopez*, 126 S. Ct. 2557 (2006).

[110] *Id.* at 2560.

[111] *Gonzalez-Lopez*, 126 S. Ct. 2557.

[112] *Id.* at 2560.

[113] *Id.*

[114] *Id.*

appearance was accepted by the magistrate on condition he immediately file for admission pro hac vice.[115] Later, during that same hearing, the magistrate revoked Low's provisional appearance on grounds that he violated a court rule against double teaming on cross by passing a note to the other lawyer.[116] A few days later, respondent decided he only wanted Low to represent him, and Low filed an application for pro hac vice admission.[117] This application was denied by the district court and by the Eighth circuit on appeal.[118] Attorney Fahle, meanwhile, filed a motion to withdraw and for sanctions against Low, accusing Low of contacting his client without his consent in violation of the rules of professional conduct.[119] Low countered with a motion to strike.[120] The district court granted Fahle's motion to withdraw and denied Low's motion to strike explaining that it had denied his motion for pro hac vice admission because Low had violated the rule against communicating with a represented party in a separate case before it.[121] Respondent eventually hired a local attorney, Karl Dickhaus, to represent him.[122] Low made another application for admission and was again denied.[123] Low was also not permitted contact with respondent other than the night before the last day of trial.[124] At trial, respondent was represented by Mr. Dickhaus and, found guilty.[125] After trial, the district court granted Fahle's motion for sanctions against Low for violating the rule against contacting represented parties.[126] Respondent appealed, and the Eighth circuit vacated the conviction, holding that the district court had misinterpreted the rule against contacting represented parties in both this case and in the matter it relied upon in denying Low's application for pro hac vice admission.[127] The district court's denials were therefore erroneous and violated respondent's Sixth Amendment right to paid counsel of his choosing.[128]

The issue decided by the Court was whether a trial court's erroneous deprivation of a criminal defendant's choice of counsel entitles him to a reversal of his conviction?[129] The Court answered in the affirmative and held that a trial court's erroneous deprivation of a criminal defendant's choice of counsel does entitle him to reversal of his conviction.[130]

The Court has previously held that a defendant that does not require appointed counsel has the right to be defended by any otherwise qualified counsel who he can afford or who is willing to represent him.[131] The government agreed that the respondent in this case was deprived of his right to choose his counsel, however, the government contended that the violation is not complete unless defendant can show that substitute counsel was ineffective under *Strickland v. Washington*.[132] The argument was basically that if the trial was fair, then the respondent's rights were not violated. This government argument was similar to the state of confrontation law before *Crawford v. Washington*, where a statement could satisfy the Confrontation Clause by merely possessing indicia of reliability sufficient to find it trustworthy.[133] In *Crawford*, the Court, said confrontation does not just require that evidence be reliable, but that it be tested in a particular fashion, i.e. cross-examination.[134] In the same way, the right to counsel of choice does not merely guarantee a fair trial, but instead that a

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[115] *Id.* Low was a California attorney; however, the case was in the United States District Court for the Eastern District of Missouri, thus he needed to be admitted pro hac vice in order to represent Gonzalez-Lopez. *Id.*

[116] *Id.*

[117] *Id.*

[118] *Id.*

[119] *Id.*

[120] *Id.*

[121] *Id.*

[122] *Id.*

[123] *Id.*

[124] *Id.* A U.S. Marshall sat between Low and the respondent at trial to make sure there was no contact between the two. *Id.*

[125] *Id.*

[126] *Id.*

[127] *Id.* at 2561.

[128] *Id.*

[129] *Id.* at 2560.

[130] *Id.* at 2566.

[131] *Id.* at 2561 (citing Wheat v. United States, 486 U.S. 153 (1988), and Caplin & Drysdale v. United States, 491 U.S. 617 (1989)).

[132] *Id.* (citing Strickland v. Washington, 466 U.S. 668 (1984)). *Strickland* requires ineffective conduct and prejudice.

[133] Crawford v. Washington, 541 U.S. 36 (2004) (citing Ohio v. Roberts, 448 U.S. 56 (1980)).

[134] *Id.* at 69.

particular guarantee of fairness be provided, i.e. that the accused choose who is to defend him.[135] The Court reasoned that deprivation of the right to counsel of choice is complete when the accused is prevented from being represented by the lawyer he chooses, regardless of the quality of representation he ends up with.[136]

Looking Ahead: *United States v. Rankin (*Rankin II*)*[137] and *Whorton v. Bockting*[138]

Two cases decided after the end of the 2007 term require brief mention due to their potential for immediate impact on military jurisprudence. The CAAF delivered its opinion in *Rankin II*, refining their analysis of testimonial hearsay statements after *Crawford* and *Davis*.[139] In February, the Supreme Court delivered an opinion in *Whorton* that may affect the analysis of nontestimonial hearsay statements.[140]

The NMCCA opinion in *Rankin I*[141] was detailed above; however, the CAAF opinion in the same case was released 31 January 2007.[142] The CAAF affirmed the lower court, finding that three of the four documents introduced by the government were nontestimonial, and that although the fourth may have qualified as testimonial, the information it contained was cumulative with information in the other three.[143] In analyzing the four documents, the CAAF conducted a three factor analysis, looking first at prosecution involvement in the making of the statement.[144] Second, the court asked whether the reports merely catalogued unambiguous factual matters.[145] And third, the court used a primary purpose analysis derived from *Davis v. Washington*.[146] After using the three factors to find that three of the four documents were nontestimonial, the court went on to conduct the confrontation analysis from *Ohio v. Roberts*[147] to conclude that the documents were properly admitted under the business records exception to the hearsay rules.[148]

This case is important because it describes an analysis for determining whether documents are testimonial, and uses a primary purpose test derived from *Davis* as part of that analysis. Interestingly, although *Davis* itself was limited to the circumstances of police interrogation, the CAAF in *Rankin II* used the primary purpose test outside the context of police interrogation in determining whether a statement was testimonial.[149]

Also of significance in the CAAF opinion in *Rankin II* is the fact that the court conducted the *Roberts* Confrontation Clause analysis after finding three of four statements to be nontestimonial.[150] This is consistent with the CAAF's previous

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[135] *Gonzalez-Lopez*, 126 S. Ct. at 2562.

[136] *Id.* at 2563.

[137] *Rankin II*, 64 M.J. 348 (2007).

[138] *Whorton*, 127 S. Ct. 1173 (2007).

[139] *Rankin II*, 64 M.J. at 352.

[140] *Whorton*, 127 S. Ct. 1173.

[141] *Rankin I*, 63 M.J. 552 (N-M. Ct. Crim. App. 2006).

[142] *Rankin II*, 64 M.J. 348.

[143] *Id.* at 352. The three nontestimonial documents were: PE5, a letter from the command to the appellant's mother, notifying her that he was an unauthorized absentee; PE 6, a computer generated document known as a "page 6," that showed the date the unauthorized absence began; and PE 10, a copy of a naval message informing recipients that appellant had been apprehended. The testimonial document, PE 11, was a copy of a notice for civilian law enforcement to the effect that appellant was a deserter and asking for assistance in apprehending him. *Id.* at 350.

[144] *Id.* at 352.

[145] *Id.*

[146] *Id.*

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

[148] *Rankin II*, 64 M.J. at 353.

[149] *Id.* at 352.

[150] *Id.* at 353 (citing *Roberts*, 448 U.S. 56).

jurisprudence in confrontation after *Crawford*;[151] however, the continued vitality of the *Roberts* analysis is in question following the Supreme Court's reasoning in *Whorton*.[152]

Whorton v. Bockting is a case about the retroactive effect of *Crawford* on cases final after direct review, but considered in a collateral proceeding.[153] While an important issue because of the possible impact of having to relook a multitude of cases, a more fundamental issue is apparently resolved at the end of the opinion. *Crawford* clearly overruled *Roberts* where it applied to testimonial statements, although the opinion left open its effect on nontestimonial statements.[154] The opinion in *Whorton* contains language that indicates nontestimonial statements no longer require Confrontation Clause analysis.[155]

The holding in *Davis* described when a statement made during police interrogation would qualify as testimonial.[156] The court found that the statement in *Davis v. Washington* was nontestimonial[157] while the statement in *Hammon v. Indian*a was testimonial.[158] For *Hammon*, that was the end of the line, however for *Davis*, presumably the confrontation analysis in *Roberts* was still required. Yet the Court did not analyze the statement under *Roberts* at all, but simply affirmed the judgment of the Washington state Supreme Court.[159] There currently appears to be a split in state and federal courts on whether Confrontation Clause analysis is required at all for nontestimonial statements after *Crawford*.[160] The CAAF, however, has held that nontestimonial statements still require confrontation analysis under *Roberts*.[161] The controversy appears to have been resolved by the Court in *Whorton*.[162]

In its analysis of whether the procedural rule announced in *Crawford* is a watershed rule requiring retroactive application,[163] the Court in *Whorton* stated:

> Under *Roberts*, an out-of-court nontestimonial statement not subject to prior cross-examination could not be admitted without a judicial determination regarding reliability. Under *Crawford*, on the other hand, the Confrontation Clause has no application to such statements and therefore permits their admission even if they lack indicia of reliability.[164]

The holding in *Whorton* is that *Crawford* is not retroactive to cases already final on direct review, however, part of the basis for that holding is that *Crawford's* impact on criminal procedure is equivocal.[165] *Crawford* results in the admission of fewer testimonial statements, while exempting nontestimonial statements from confrontation analysis entirely.[166] Thus, it is not clear that in the absence of *Crawford* the likelihood of an accurate conviction was seriously diminished under the *Roberts*

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[151] Crawford v. Washington, 541 U.S. 36 (2004); United States v. Scheurer, 62 M.J. 100 (2005); United States v. Magyari, 63 M.J. 123 (2006); *see* Major Michael R. Holley, *"It Was Impossible to Get a Conversation Going, Everybody Was Talking Too Much": Synthesizing New Developments in the Sixth Amendment's Confrontation Clause*, ARMY LAW., June 2006, 1, 15.

[152] Whorton v. Bockting, 127 S. Ct. 1173 (2007).

[153] *Id.*

[154] *Crawford*, 541 U.S. at 68.

[155] *Whorton*, 127 S. Ct. 1173.

[156] Davis v. Washington, 126 S. Ct. 2266 (2006).

[157] *Id.* at 2277.

[158] *Id.* at 2280.

[159] *Id.*

[160] *See, e.g.*, United States v. Tolliver, 454 F.3d 660 (7th Cir. 2006) (finding that *Davis* holds that nontestimonial hearsay is not subject to the Confrontation Clause); *but see* Harkins v. State, 143 P.3d 706 (Nev. 2006) (finding that nontestimonial statements are subject to analysis under *Roberts*).

[161] Ohio v. Roberts, 448 U.S. 56 (1980). *See Rankin II*, 64 M.J. 348 (2007); United States v. Magyari, 63 M.J. 123 (2006); United States v. Scheurer, 62 M.J. 100 (2005).

[162] *Whorton*, 127 S. Ct. 1173.

[163] The general rule on retroactivity of new rules comes from *Teague v. Lane*, 489 U.S. 288 (1989). *Teague* says a new rule applies retroactively in a collateral proceeding only if the rule is substantive or is a watershed rule of criminal procedure implicating the fundamental fairness and accuracy of a criminal proceeding. *Id.* In order to qualify as watershed, a new rule must be necessary to prevent an impermissibly large risk of an inaccurate conviction, and must alter the understanding of the bedrock elements essential to the fairness of a proceeding. *Id.*

[164] Whorton v. Bockting, 127 S. Ct. 1173 (2007).

[165] *Id.*

[166] *Id.*

analysis.[167] Since the Crawford rule did not significantly alter the fundamental fairness of criminal proceedings, it is not considered a watershed rule requiring retroactive effect on cases already final on direct review.[168]

It seems unlikely that CAAF will continue to require the *Roberts* analysis for nontestimonial hearsay statements after *Whorton*, although for the time being that is still the law in courts-martial.[169] More detailed analysis is almost certain in next year's symposium, undoubtedly with military confrontation cases decided after *Whorton*.

Conclusion

Last term was an important one for Sixth Amendment jurisprudence, particularly in the Confrontation Clause arena. The Supreme Court, in *Davis*, gave us a little more guidance on how to determine whether a statement is testimonial,[170] as did the CAAF in the military context in *Rankin I*.[171] The Court also precisely defined the meaning of the right to counsel in *Gonzalez-Lopez*.[172] The CAAF decided two cases prior to *Davis*[173] and one after,[174] which further developed its confrontation analysis after *Crawford*. Perhaps most importantly, though decided after the 2006 term, the Court made it clear in *Whorton* that confrontation clause analysis is no longer required at all for nontestimonial statements.[175]

[167] *Id.*

[168] *Id.*

[169] *See Rankin II*, 64 M.J. 348 (2007); United States v. Magyari, 63 M.J. 123 (2006); United States v. Scheurer, 62 M.J. 100 (2005).

[170] Davis v. Washington, 126 S. Ct. 2266 (2006).

[171] *Rankin I*, 63 M.J. 552 (N-M. Ct. Crim. App. 2006); *Magyari*, 63 M.J. 123.

[172] United States v. Gonzalez-Lopez, 126 S. Ct. 2557 (2006).

[173] *Rankin I*, 63 M.J. 552; *Magyari*, 63 M.J. 123.

[174] *Rankin II*, 64 M.J. 348.

[175] Whorton v. Bockting, 127 S. Ct. 1173, 1178 (2007).

The Year in Voir Dire and Challenges, and Pleas and Pretrial Agreements

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Introduction

Case law in voir dire and panel member challenges, pleas and pre-trial agreements has continued to develop during this most recent Court of Appeals for the Armed Forces (CAAF) term.[1] In the area of voir dire and challenges, the CAAF focused on two issues: (1) implied bias, and (2) the timing of peremptory challenges under Article 41, Uniform Code of Military Justice (UCMJ).[2] In *United States v. Moreno*, the court held that a member's extensive knowledge of and prior inquiry into the case required his excusal under an implied bias theory.[3] In *United States v. Leonard*, the court found that a member's prior interaction with the alleged victim necessitated his dismissal on implied bias grounds.[4] The CAAF, in *United States v. Dobson*, clarified that the parties may use their peremptory challenge, if, after the issuance of all challenges for cause, Article 16, UCMJ quorum,[5] which requires five members for a general court-martial or three members for a special court-martial, is met but Article 25, UCMJ quorum,[6] requiring panel composition of at least one-third enlisted members, is lacking.[7] In the pleas and pre-trial agreements arena, the CAAF, as exemplified in *United States v. Gosselin*,[8] *United States v. Phillippe*,[9] and *United States v. Gaston*,[10] continues to reverse findings, sentences, or both, because the record of trial lacks a sufficient factual predicate outlining the accused's criminal misconduct. Lastly, in the area of pretrial agreements, the CAAF, in *United States v. Lundy*, determined that specific performance by the government of a pretrial agreement term is feasible years after the initial court-martial if the accused fails to demonstrate the term's materiality.[11]

Voir Dire and Challenges

Overview

Rule for Court-Martial (RCM) 912(f)(1)(N) states that a member should not serve when "the interest of having the court-martial free from substantial doubt as to legality, fairness, and impartiality"[12] is raised. Two grounds exist for a challenge for cause against a member: (1) actual bias; and (2) implied bias.[13] Whether an actual bias exists is determined by the military

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[1] *See* Major Deidra J. Fleming, *Another Broken Record—The Year in Court-Martial Personnel, Voir Dire and Challenges, and Pleas and Pretrial Agreements*, ARMY LAW., April 2006, at 36 [hereinafter Fleming, *Broken Record*]; Major Deidra J. Fleming, *Out, Damned Error Out, I Say! The Year in Court-Martial Personnel, Voir Dire and Challenges, and Pleas and Pretrial Agreements*, ARMY LAW., May 2005, at 45 [hereinafter Fleming, *Error Out*].

[2] UCMJ art. 41 (2005).

[3] 63 M.J. 129, 134 (2006).

[4] 63 M.J. 398, 403 (2006).

[5] UCMJ art. 16.

[6] UCMJ art. 25.

[7] 63 M.J. 1, 10 (2006).

[8] *Gosselin*, 62 M.J. 349 (2006) (overturning a wrongful introduction of a controlled substance onto a base specification because the providence inquiry failed to establish the accused's guilt).

[9] *Phillippe*, 63 M.J. 307 (2006) (narrowing the length of time for an absent without leave (AWOL) specification because the accused stated during his unsworn sentencing testimony that he attempted to return to military control).

[10] *Gaston*, 62 M.J. 404 (2006) (reversing the accused's absent without out leave terminated by apprehension conviction because the record failed to establish a factual predicate for the accused's plea).

[11] 63 M.J. 299, 304 (2006).

[12] MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 912(f)(1)(N) (2005) [hereinafter MCM].

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

judge's subjective review of the member's credibility. "The test for actual bias is whether any bias is such that it will not yield to the evidence presented and the judge's instructions."[14] The CAAF gives "the military judge great deference when deciding whether actual bias exists because it is a question of fact, and the judge has observed the demeanor of the challenged member."[15] Implied bias focuses on the member's status or life experiences and whether, as "viewed through the eyes of the public," their continued panel membership is fair and appropriate.[16] While a military judge's ruling on actual bias is reviewed for an abuse of discretion; "[b]y contrast, issues of implied bias are reviewed under a standard less deferential than abuse of discretion but more deferential than *de novo*."[17] Implied bias arises when "regardless of an individual member's disclaimer of bias, most people in the same position would be prejudiced, [that is biased]."[18]

Member's Case or Witness Knowledge

This past term, the CAAF reversed two cases because of the implied bias of a panel member.[19] In *United States v. Leonard*, the CAAF centered on a panel member's prior interaction with an alleged rape victim[20] and in *U.S. v. Moreno* the court centered on a panel member's prior investigation of an alleged rape.[21]

In *Leonard*, a contested rape case, the military judge denied defense's challenge for cause against two panel members: Lieutenant Colonel (LTC) D, whose own daughter had been raped five years earlier; and Captain (CPT) P, who frequently interacted with the alleged rape victim.[22] The defense used their sole peremptory challenge against LTC D but failed to preserve for appeal the military judge's ruling denying LTC D's challenge for cause.[23] Pursuant to the then existing RCM 912(f)(4),[24] the defense failed to state that "but for" the denial of LTC D's challenge for cause they would have exercised their peremptory challenge against another member.[25]

On appeal, the issue turned on whether the defense waived appellate review of the denied challenge for cause against CPT P by their failure to comply with RCM 912(f)(4) when peremptorily striking LTC D.[26] The court held that the RCM 912(f)(4) "but for" requirement applied only to the peremptorily struck member, LTC D, so the denied challenge for cause against CPT P was reviewable.[27] The CAAF then held that the military judge abused his discretion by denying the challenge

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

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

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

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

[18] *Napolitano*, 53 M.J. at 167.

[19] United States v. Leonard, 63 M.J. 398 (2006); United States v. Moreno, 63 M.J. 129 (2006).

[20] *Leonard*, 63 M.J. 398.

[21] *Moreno*, 63 M.J. 129.

[22] *Leonard*, 63 M.J. at 400-01. The court did not give the panel members' full names. *Id.*

[23] *Id.*

[24] An amendment to RCM 912(f)(4), adopted after the accused's court-martial, eliminated the "but for" rule. *See* Exec. Order No. 13,387, 3 C.F.R. 178 (2006), *reprinted in* 10 U.S.C. §§ 801-946; MCM, *supra* note 12, R.C.M. 912(f)(4). The old RCM 912(f)(4) "but for" rule stated:

> When a challenge for cause has been denied, failure by the challenging party to exercise a peremptory challenge against any member shall constitute waiver of further consideration of the challenge upon later review. However, when a challenge for cause is denied, a peremptory challenge by the challenging party against any member shall preserve the issue for later review, provided that where the member who was unsuccessfully challenged for cause is peremptorily challenged by the same party, that party must state that it would have exercised its peremptory challenge against another member if the challenge for cause had been granted.

MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 912(f)(4) (2002).

[25] *Leonard*, 63 M.J. at 401.

[26] *Id.* at 403.

[27] *Id.*

for cause against CPT P.[28] The CAAF stated "CPT P, [a pilot,] acknowledged that he had encountered CH, [the victim] at least once a week. Most importantly he revealed that her responsibilities for his flying gear included packing his parachute and servicing his pilot helmet. This relationship must have been one of trust."[29] This "significant relationship of trust" between CPT P and the victim created an appearance of unfairness in the court-martial process which warranted the excusal of CPT P under an implied bias theory.[30]

Similarly, in *United States v. Moreno*, the military judge denied defense's challenge for cause against a panel member.[31] In *Moreno*, the accused, who worked in the comptroller's disbursing office, was convicted of rape by an officer panel.[32] The eventual panel president, LTC F, the deputy comptroller, obtained pretrial knowledge of the accused's case through his own investigative efforts and newspaper articles.[33] LTC F described his efforts as "simply fact finding" so he had a "complete picture" of the incident to report to his boss, the comptroller.[34] The military judge granted seven of defense's eight requested challenges for cause but denied the challenge for cause against LTC F without providing any findings for his decision.[35] The CAAF held that LTC F's "inquiry went beyond a routine passing of information to a superior. . . he subjectively believed he knew all there was to know – that he had the 'complete picture'" of the case.[36] Under an implied bias standard, an objective observer could reasonably question LTC F's impartiality and the military judge erred in denying defense's challenge for cause.[37]

The *Leonard* and *Moreno* opinions spotlight the CAAF's willingness to invoke the implied bias doctrine. While a panel member may not demonstrate actual bias, military judges and counsel must remain sensitive to the appearance of any possible implied bias issues. Military judges, when denying a challenge for cause, need to make findings of fact on both actual and implied grounds. If a military judge fails to make these findings of facts, the trial counsel should request such a ruling.

Challenges for Cause – Timing of Challenges

The CAAF, this year, addressed the timing of casual challenges under Article 41, UCMJ.[38] In *United States v. Dobson*, the accused selected an enlisted panel to hear her contested premeditated murder case.[39] After the military judge granted challenges for cause and peremptory challenges the general court-martial convening authority (GCMCA) needed to twice detail additional members for the court-martial to obtain one-third enlisted members, as requested by the accused and required by Article 25, UMCJ.[40] The CAAF, in their opinion, provided the following chart as to the progression of the panel's composition:

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[28] *Id.*

[29] *Id.*

[30] *Id.*

[31] *Moreno*, 63 M.J. 129 (2006).

[32] *Id.* at 132.

[33] *Id.* at 132-33. The court did not give LTC F's full name. *Id.*

[34] *Id.* at 133.

[35] *Id.*

[36] *Id.* at 134-35.

[37] *Id.* at 135.

[38] UCMJ art. 41 (2005).

[39] 63 M.J. 2, 3 (2006). The accused was charged with the premeditated murder of her husband. *Id.*

[40] *Id.* at 7. Article 25 (c) states "the accused may not be tried by a general or special court-martial the membership of which does not include enlisted members in a number compromising at least one-third of the total membership of the court," if the accused requests court-martial by enlisted panel. UCMJ art. 25(c).

Panel Composition[41]	Total	Officer	Enlisted
Initial	10	6	4
After 1st causal challenges	7	5	2 (No 25 quorum)
After 1st peremptory challenges	5	4	1
After 1st additions	10	6 *(added 2)*	4 *(added 3)*
After 2nd causal challenges	8	6	2 (No 25 quorum)
After 2nd peremptory challenges	7	5	2
After 2nd additions	10	5 *(added 0)*	5 *(added 3)*
After 3rd causal challenges	9	5	4
Final (after 3rd peremptory challenges)	8	5	3

The issue on appeal was whether the military judge erred by granting the parties' peremptory challenges when the one-third enlisted membership quorum was broken after the first and second round of challenges for cause were granted.[42] Even so the panel membership never dropped below five members as required for a general court-martial under Article 16, UCMJ.[43] The defense, on appeal, argued that the military judge should not have granted the parties' peremptory challenges once the one-third enlisted quorum was broken under Article 25, even though the total membership requirements of Article 16 were met.[44] Article 41, UCMJ states that if the exercise of challenges for cause drops panel membership below Article 16 requirements that additional members will be detailed and peremptory challenges will not be granted at that time.[45] Article 41, however, does not address panel membership falling below Article 25 one-third enlisted requirements.[46] The CAAF held that the military judge did not err by granting peremptory challenges when Article 25 quorum was lacking but Article 16 quorum was satisfied.[47] The CAAF reasoned that "[t]he enlisted representation requirement in Article 25 employs a percentage, not an absolute number, [unlike Article 16,] . . . [a]s a result, there are circumstances in which an enlisted representation deficit under Article 25 can be corrected through exercise of a peremptory challenge against an officer."[48]

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[41] *Dobson*, 63 M.J. at 8.

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

[43] *Id.* at 7. *See* UCMJ art. 16.

[44] *Id.* at 8-9. The defense also objected to the GCMCA detailing additional officers to the panel after the first challenges for cause were granted as an attempt to dilute enlisted representation. *Id.* at 9-10. The CAAF stated that the accused is entitled only to one-third enlisted membership and the rules do not "require the [GCMCA] to add only the minimum number and type [of members] necessary to address a deficit under Article 16 or 25." *Id*. at 10.

[45] *See* UCMJ art. 41. Article 41 states:

> If the exercise of a challenge for cause reduces the court below the minimum number of members required by [Article 16], all parties shall . . . either exercise or waive any challenge for cause then apparent against the remaining members of the court before additional members are detailed to the court. However, peremptory challenges shall not be exercised at that time.

Id.

[46] *Dobson*, 63 M.J. at 9.

[47] *Id.*

[48] *Id.*

Pleas

Introduction

The CAAF, in *United States v. Care*, developed the requirements for a guilty plea from then current Supreme Court precedent.[49] *Care* states that a guilty plea providence inquiry must:

> [R]eflect not only that the elements of each offense charged have been explained to the accused but also that the military trial judge . . . has questioned the accused about what he did or did not do, and what he intended (where this is pertinent), to make clear the basis for a determination by the military trial judge . . . whether the acts or the omissions of the accused constitute the offense or offenses to which he is pleading guilty.[50]

"In 1984, RCM 910, based generally on Article 45, UCMJ and the Federal Rules of Criminal Procedure (FRCP) 11 (Pleas), codified the *Care* requirements."[51] "Because there are potential dangers in the abuse of [an] abbreviated method of disposing of charges, a number of safeguards have been included" for a military providence inquiry.[52] One of these safeguards includes requiring the accused to provide the military judge with an underlying factual predicate for the offenses to which the accused pleads guilty.[53]

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

As discussed in last year's symposium article, a military judge must inquire into the factual basis for the accused's plea.[54] The accused must describe all relevant facts surrounding his offense(s) to establish his guilt.[55] Rule for Court-Martial 910(e) states that a "military judge shall not accept a plea of guilty without making such inquiry of the accused as shall satisfy the military judge that there is a factual basis for the plea."[56] A mere "yes" or "no" answer by the accused in response to the military judge's legally conclusive questions does not suffice.[57] "Mere conclusions of law recited by an accused are insufficient to provide a factual basis for a guilty plea."[58] A military judge must resolve any inconsistent matter or defense raised either by the accused or by any other witness or evidence presented during the court-martial.[59] Article 45, UCMJ states "[i]f an accused, . . . after a plea of guilty[,] sets up matter inconsistent with the plea, or if it appears that he has entered the plea of guilty improvidently or through lack of understanding of its meaning and effect . . . a plea of not guilty shall be entered in the record, and the court shall proceed as though he had pleaded not guilty."[60] An appellate court will only

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[49] 40 C.M.R. 247 (C.M.A. 1969) (citing Boykin v. Alabama, 395 U.S. 238 (1969); Halliday v. United States, 394 U.S. 831 (1969); McCarthy v. United States, 394 U.S. 459 (1969)).

[50] *Id.* at 250.

[51] *See* Fleming, *Broken Record*, *supra* note 1, at 47. *See* MCM, *supra* note 12, R.C.M. 910 analysis, at A21-58.

[52] United States v. Felder, 59 M.J. 444, 445 (2004) (citing DAVID A. SCHLEUTER, MILITARY CRIMINAL JUSTICE 372 (5th ed. 1999)).

[53] *See* MCM, *supra* note 12, R.C.M. 910 analysis, at A21-58.

[54] UCMJ art. 45 (2005); *Care*, 40 C.M.R. 247 (C.M.A. 1969). The sentences from footnote fifty-one to footnote fifty-nine incorporate a verbatim discussion of the law from last year's symposium article. *See* Fleming, *Broken Record*, *supra* note 1, at 48-49.

[55] MCM, *supra* note 12, R.C.M. 910(e) discussion.

[56] *Id.* R.C.M. 910(e).

[57] United States v. Outhier, 45 M.J. 326, 330-32 (1996) (ruling that the accused's affirmative responses to the military judge that his actions could have produced grievous bodily harm were not sufficient to sustain a guilty plea to the offense of aggravated assault by a means or force likely to produce death or grievous bodily harm when the actual facts elicited did not establish a factual predicate for the charged offense). *See also* United States v. Jordan, 57 M.J. 236 (2002) (determining that an accused's mere "yes" response to the military judge's question as to whether the accused's conduct was prejudicial to good order and discipline or service discrediting does not sustain a plea if the factual circumstances revealed by the accused do not objectively support that element).

[58] *Outhier*, 45 M.J. at 331.

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

[60] UCMJ art. 45(a) (2005).

overturn a guilty plea if the record of trial, in its entirety, shows a substantial basis in law and fact for questioning the plea.[61] Although this appears to define a high standard, the CAAF and the service courts, in published and unpublished opinions, continue to reverse numerous findings and sentences because a review of the entire record fails to establish a factual predicate for the accused's plea or an inconsistent matter or defense remains unresolved on the record.[62] Over the past couple of years, Article 86, UCMJ,[63] absent without leave (AWOL) offenses resulted in numerous cases in this area.[64] This year, the CAAF issued two opinions involving AWOL offenses warranting discussion.[65]

AWOL Offenses

In *United States v. Gaston*, during the providence inquiry, the accused told the military judge that his 2003 AWOL was terminated by apprehension when his "dormitory manager" came to his room and told him that his squadron was looking for him.[66] On review, the CAAF noted that the military judge's inquiry was "bare bones" and the court looked to the entire record, to include the accused's testimony during a pretrial motion, to clarify the facts surrounding the accused's interaction with his dormitory manager.[67] During a pretrial motion, the accused said that the dormitory manager told him that his squadron was looking for him, that the accused told the manager he would get dressed and meet him down at the dormitory's front, and that the manager said he would call the accused's first sergeant to pick him up.[68] In its reversal, the CAAF held that the record failed to show that the accused's contact with the dormitory manager established a return to military control.[69] The court reasoned:

> Nothing in the record establishes that the dorm manager believed Gaston had committed an offense or that the dorm manager had the authority to take him into custody. Without this authority, the mere fact that the dorm manager made contact with Gaston while he was on base and in his dormitory room is not sufficient to establish that Gaston was under military control.[70]

The CAAF amended the finding to the lesser-included offense of AWOL and affirmed the sentence.[71]

Similarly, in *United States v. Phillippe*, the accused pleaded guilty to being AWOL.[72] The accused, however, in an unsworn statement given during sentencing, stated that he twice attempted to return to military control.[73] The accused first

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

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

[63] UCMJ art. 86.

[64] *See* United States v. Pinero, 60 M.J. 31 (2004); United States v. Hardeman, 59 M.J. 389 (2004); United States v. Duncan, 60 M.J. 973 (Army Ct. Crim. App. 2005); United States v. Adams, 60 M.J. 912 (N-M. Ct. Crim. App. 2005); *Gilchrist*, 61 M.J. 785.

[65] United States v. Gaston, 62 M.J. 404 (2006); United States v. Phillippe, 63 M.J. 307 (2006). The CAAF also issued an opinion involving the doctrine of deliberate avoidance. *See* United States v. Adams, 63 M.J. 223, 226 (2006) (finding the "deliberate avoidance" doctrine applicable the court reasoned that "a literal application of actual knowledge to Article 86, UCMJ, offenses would result in absurd results in a military context. Servicemembers might avoid their duties and criminal sanction by hunkering down in their barracks rooms or off-base housing, taking care to decline all opportunity to learn of their appointed place of duty at formation or through the receipt of orders."). *See also* United States v. Harrow, 62 M.J. 649 (A.F. Ct. Crim. App. 2006) (overturning AWOL specification because a substantial conflict existed as to whether the accused's mental health status precluded her ability to report); United States v. Estes, 62 M.J. 544 (Army Ct. Crim. App. 2005) (stating that "[w]e decline to take our sister court's position that ownership or control of a barracks building is the determining factor in whether a soldier is absent from his unit while remaining in those barracks . . . [a] unit is comprised of soldiers, not buildings.").

[66] *Gaston*, 62 M.J. at 405-06. The accused's dormitory manager was apparently a Department of Defense civilian employee. *Id.*

[67] *Id.* at 406-07.

[68] *Id.* at 407.

[69] *Id.*

[70] *Id.*

[71] *Id.* at 408.

[72] *Phillippe*, 63 M.J. 307 (2006).

[73] *Id.* at 308.

attempted to return to military control at an Air Force base in Montana right after 11 September 2001.[74] The accused alleged that Air Force personnel refused to take him under military control because no warrant for his arrest existed and he lacked a military identification card.[75] In the summer of 2002, on his second attempt to return to military custody, the accused tried to meet his hometown recruiter in Illinois to sign papers to resolve his AWOL status.[76] The Army Court of Criminal Appeals (ACCA) affirmed the conviction when it held the accused's unsworn statement raised no more than a "mere possibility" that he attempted to terminate his AWOL.[77] The ACCA stated "[i]n neither circumstance did [the accused] ever submit to actual or constructive military control. As such, [the accused's] assertions evince nothing 'more than an inchoate desire to return at an earlier date.'" [78] Subsequently, the CAAF in reversing the ACCA, held that the accused's unsworn statement about his first attempt to return to military control after 11 September 2001 raised a matter factually inconsistent with pleading guilty to an almost three year AWOL.[79] While the accused's statement did not affirmatively sustain the defense of voluntary termination, once the issue was raised the military judge was required to further inquire into the potential validity of the defense.[80] The CAAF then proceeded to affirm a shorter AWOL, ending on 11 September 2001, when the accused allegedly attempted to return to military control at the Montana Air Force base.[81]

The cases of *Gaston* and *Phillippe* emphasize the CAAF's close review and scrutiny of the factual predicate underlying an accused's providence inquiry. During a providence inquiry, a military judge must obtain detailed information from the accused surrounding the offenses. Any inconsistent statement given by the accused during the providence inquiry or even in the sentencing phase of the courts-martial, as in *Phillippe*, requires a re-opening of and further inquiry and resolution by the military judge. Without this further inquiry, the record is incomplete and potential appellate reversal exists.

Drug Offenses

While the CAAF focused on AWOL offenses in *Gaston* and *Phillippe*, a more controversial case dealing with factual predicate issues this recent term involved a drug offense.[82] In *United States v. Gosselin*, the accused, stationed in Germany, was approached by another airman about driving to the Netherlands to purchase hallucinogenic mushrooms.[83] During the providence inquiry for wrongfully introducing hallucinogenic mushrooms onto a base, the accused admitted that he and the co-accused drove to the Netherlands to purchase mushrooms, that he was present when the mushrooms were purchased, that he knew the mushrooms were in the co-accused's car when they reached the base gate, and that he also used mushrooms that night from roughly the same bag in which the mushrooms were purchased.[84] During the providence inquiry the accused also stated that his main desire in traveling to the Netherlands was to buy a dragon statue.[85]

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[74] *Id.*

[75] *Id.*

[76] *Id.*

[77] *Id.* at 309

[78] *Id.* (citing United States v. Acemoglu, 45 C.M.R. 335 (C.M.A. 1972)).

[79] *Id.* at 311.

[80] *Id.*

[81] *Id.* at 312.

[82] United States v. Gosselin, 62 M.J. 349 (2006). The service courts also reviewed drug offense cases. *See* United States v. Denaro, 62 M.J. 663 (C.G. Ct. Crim. App. 2006) (finding that the accused's plea to wrongfully interfering with an adverse administrative proceeding, and conspiracy to do such, was provident because it was reasonable to conclude that an adverse administrative proceeding would commence against his coworker based on a positive cocaine urinalysis and the accused intended to assist his coworker in masking her results); United States v. Thomas, No. 200401690, 2005 CCA LEXIS 404 (N-M. Ct. Crim. App. 2005), *review granted*, 63 M.J. 469 (2006) (holding, on an issue of first impression, that to sustain a plea of guilty to the wrongful introduction of a controlled substance onto an installation an accused is not required to know at the time of the offense that he entered a military installation).

[83] 62 M.J. 349, 350 (2006).

[84] *Id.* at 350-51.

[85] *Id.* at 350. The accused was apparently successful in obtaining a dragon statue but the opinion, unfortunately, did not provide a further description of the statue. *Id.*

The military judge repeatedly asked the accused to describe his original purpose for his trip to the Netherlands and advised him that mere presence at a crime scene could not establish co-conspirator vicarious liability or an aiding and abetting offense.[86] The military judge twice recessed the courts-martial for the accused to discuss his case with his defense counsel.[87] After the second recess, the defense counsel stated that the accused was pleading guilty under an "aiding and abetting" theory, however, the accused never affirmatively agreed on the record with his counsel's representations.[88] Specifically, the defense counsel stated that:

> Gosselin agreed to go to [the Netherlands] knowing that [the co-accused] intended to purchase mushrooms, Gosselin did nothing to discourage this, Gosselin indicated he had been there before and could help navigate, Gosselin did help navigate on the way there, Gosselin voluntarily went into the shop where he knew [the co-accused] intended to purchase the mushrooms, and Gosselin knew [the co-accused] bought the mushrooms and knew they were in the car and yet Gosselin said nothing to the gate guard when they entered the base.[89]

In the appeal to the Air Force Court of Criminal Appeals (AFCCA), the court found a satisfactory factual basis existed to sustain the accused's plea to aiding and abetting the co-accused.[90] The court consistently referenced the military judge's methodical and pressing inquiry of the accused as a basis in affirming the conviction.[91] The CAAF, however, reversed the plea finding that "[t]he providence inquiry failed to establish that Gosselin intended to facilitate [the] introduction of mushrooms onto a military installation or assisted or participated in the commission of the offense."[92] The court noted that the accused never personally indicated on the record that he provided navigational assistance to the Netherlands.[93] Even if the accused provided navigational assistance to the Netherlands, the court noted that it would only sustain an offense of aiding and abetting the purchase of marijuana but that action would not "translate into an affirmative act for the later separate offense of introduction of the mushrooms onto the base."[94] The accused's conclusory statements that he was a mere party to the offense and that he owed a duty to tell the base gate guards about the drugs in response to leading questions by the military judge were not sufficient because "[c]onclusions of law alone do not satisfy" providence inquiry requirements.[95]

Gosselin underlines the military judge's burden to ensure that the accused's statements establish a sound factual predicate for a plea and not raise an inconsistent matter or possible defense. While this mission is easier said than done, *Gosselin* reminds military judges to conduct an open ended inquiry with the accused and to refrain from the temptation of using otherwise leading questions to obtain conclusory responses from an accused.

Unintended Consequences

The issue of unintended consequences involves the government's failure to comply with an unambiguous pretrial agreement (PTA) term. Typically, the problem involves the convening authority's inability to defer or suspend automatic or

[86] *Id.* at 351.

[87] *Id.*

[88] *Id.*

[89] *Id.* The accused, however, never admitted on the record that he provided navigational assistance. *Id.*

[90] United States v. Gosselin, 60 M.J. 768, 770-71 (A.F. Ct. Crim. App. 2004).

[91] *Id.* at 769. The court noted that the inquiry took up twenty-two pages of a hundred page record. *Id.*

[92] *Gosselin*, 62 M.J. at 352.

[93] *Id.* Judge Crawford, in dissent, found that the majority failed to follow Supreme Court precedent in the jurisprudence of guilty pleas, which allows for sustaining the plea based on the defense counsel's representations as to the actions supporting the accused's plea to aiding and abetting the offense. *Id.* at 354-58 (Crawford, J., dissenting). *See* Bradshaw v. Stumpf, 545 U.S. 175 (2005) (holding that a judge is not required to advise the accused of the elements himself "[r]ather, constitutional requirements may be satisfied where the record accurately reflects that the charge's nature and the crime's elements were explained to the defendant by his own, competent counsel.").

[94] *Gosselin*, 62 M.J. at 352-53.

[95] *Id.* at 353.

adjudged forfeitures because of a regulatory restriction.[96] "If the Government does not fulfill its promise, even through inadvertence, the accused is 'entitled to the benefit of any bargain on which his guilty plea was premised.'"[97] The following remedial options exist: (1) the government's specific performance, (2) the accused's withdrawal from the plea, or (3) the government's provision of alternative relief, as agreed to by the accused.[98] This past term, the CAAF explored the ability of the government to specifically perform a PTA term years after the initial court-martial.[99]

In United States v. Lundy (*Lundy I*), the accused entered into a pretrial agreement term, whereby the convening authority agreed to defer any and all reductions and forfeitures until the sentence was approved and, at action, to suspend all adjudged and to waive any and all automatic reductions and forfeitures.[100] For sexually assaulting his children, the accused, a staff sergeant (E-6), was sentenced to a dishonorable discharge, confinement for twenty-three years, and a reduction to the pay grade of E-1.[101] Per Articles 58a and 58b, UCMJ the imposed discharge and confinement in excess of six months subjected the accused to an automatic reduction and forfeitures.[102] At action, the convening authority attempted to suspend the accused's automatic reduction to provide the accused's family with waived forfeitures at the E-6 rate, as opposed to the E-1 rate, as provided for in the pretrial agreement.[103] The parties, however, overlooked Army Regulation (AR) 600-8-19, which precluded the convening authority from suspending an automatic reduction unless the convening authority also suspended the confinement and the discharge triggering the automatic reduction.[104] The convening authority did not suspend the accused's confinement or discharge causing the accused's family to receive forfeitures at the E-1 rate.[105]

The CAAF, reversing the ACCA, held if the government fails to comply with a material term of a pretrial agreement three options exist: (1) the government's specific performance of the term, (2) the accused's withdrawal from the pretrial agreement, or (3) alternative relief, if the accused consents to such relief.[106] "Because [the AR 600-8-19] regulatory impediment resulted from a departmental action rather than a statutory mandate . . . the Army was free to modify the regulation, create an exception, or grant a waiver."[107] The court remanded the case for ACCA to determine if the government could specifically perform by receiving a waiver to AR 600-8-19 or if the parties could agree to an alternate form of relief.[108]

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[96] *See* United States v. Mitchell, 50 M.J. 79 (1999) (holding if the convening authority agrees to suspend forfeitures the accused fails to receive the benefit of his bargain if payment of the forfeitures does not occur because of a regulatory restriction). *Accord* United States v. Williams, 53 M.J. 293 (2000); United States v. Hardcastle, 53 M.J. 299 (2000); United States v. Smith, 56 M.J. 271 (2002); United States v. Perron, 58 M.J. 78 (2003).

[97] *Smith*, 56 M.J. at 272 (quoting United States v. Bedania, 12 M.J. 373, 375 (C.M.A. 1982)).

[98] *Perron*, 58 M.J. at 82.

[99] United States v. Lundy (*Lundy IV*), 63 M.J. 299 (2006). Procedurally, the *Lundy* case traveled extensively through the appellate courts; starting at ACCA, proceeding to the CAAF, remanded back to ACCA, then finally back at the CAAF. *See* United States v. Lundy (*Lundy I*), 58 M.J. 802 (Army Ct. Crim. App. 2003); United States v. Lundy (*Lundy II*), 60 M.J. 52 (2004); United States v. Lundy (*Lundy III*), 60 M.J. 941 (Army Ct. Crim. App. 2005); United States v. Lundy (*Lundy IV*), 63 M.J. 299 (2006).

[100] *Lundy I*, 58 M.J. 802, 803 (Army Ct. Crim. App. 2003). The sentences from footnote ninety-six to one hundred and eleven incorporate a verbatim discussion of *Lundy* from a previous symposium article. *See* Fleming, *Error Out*, *supra* note 1, at 66-67.

[101] *Lundy II*, 60 M.J. at 53. The pretrial agreement limited the accused's confinement to eighteen years. *Id.* at 56.

[102] UCMJ arts. 58a, 58b (2005).

[103] *Lundy II*, 60 M.J. at 55.

[104] *Id. See* U.S. DEP'T OF ARMY, REG. 600-8-19, ENLISTED PROMOTIONS AND REDUCTIONS para. 7-1d (1 May 2000).

[105] *Lundy II*, 60 M.J. at 57.

[106] *Id.* at 60 (citing United States v. Perron 58 M.J. 78 (2003*). See Lundy I*, 58 M.J. 802 (Army Ct. Crim. App. 2003) (holding that the convening authority technically erred but no material prejudice accrued to the accused requiring government's remedial action because the accused's family was adequately compensated with transitional compensation which the ACCA determined the accused's family was not entitled to because they were receiving waived forfeitures during the same time period).

[107] *Lundy II*, 60 M.J. at 58. Additionally, the CAAF held an accused's family could receive transitional compensation while also receiving either deferred or waived forfeitures if the receipt of transitional compensation was based on the accused's discharge. *Id.* at 58-60.

[108] *Id*. at 60.

On remand, the ACCA affirmed the convening authority's specific performance.[109] On January 3, 2005, the Secretary of the Army (SA) granted an exception to AR 600-8-19 in this case, allowing the convening authority to suspend the accused's rank reduction without requiring the convening authority to suspend the discharge or the confinement triggering that automatic reduction.[110] This exception permitted the government to provide the accused's family forfeitures at the E-6 rate.[111] The accused, however, alleged that the government's specific performance was impossible in 2005 because his family needed the agreed upon support at the time of his initial incarceration in May 2000.[112] The ACCA succinctly stated "[a]lthough [the accused] argues that specific performance at this late date is, in actuality, a form of alternative relief because the timing of payments is a material provision of his pretrial agreement, he has failed to demonstrate such materiality."[113] The government, however, failed to seek approval from the SA for an interest payment on the difference between the E-6 and E-1 amounts.[114] The ACCA ruled it did not have the authority to provide the approximately three thousand dollars in interest owed on the original amount to the accused.[115] The ACCA remanded the case to the SA to approve the interest payment or to otherwise return the case for the ACCA to set aside the findings and sentence.[116] In October, 2005 the SA approved the three thousand dollar interest payment and the government paid the accused's wife.[117] Subsequently, the CAAF granted review to determine whether the SA's actions constituted specific performance by the government.[118]

In the summer of 2006, the CAAF, affirming the ACCA as to the propriety of specific performance, found that the accused failed to show that the timing of the payment was a material term.[119] The court stated that the accused "bears the burden of establishing that a term or condition of the agreement was material to his decision to plead guilty."[120] The accused did not complain to the convening authority about the failure to make full payment for thirteen months.[121] The failure to complain "negates [the accused's] assertion that the timing of the payment was material to his decision to plead guilty because [the accused] appears not to have been concerned whether or not his wife had received the benefit of the agreement at the time it was due."[122]

The four separate *Lundy* opinions, spanning three years of scrutiny of appellate review, demonstrate the confusion and problems that arise when the government agrees to a pretrial agreement provision in contravention of a controlling regulation. While easier said than done, practitioners should attempt to determine if any regulatory restriction affects a proposed pretrial agreement term.

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[109] *See* United States v. Lundy (*Lundy III)*, 60 M.J. 941 (Army Ct. Crim. App. 2005).

[110] *Id*. at 943.

[111] *Id.*

[112] *Id.* at 942.

[113] *Id.* at 944.

[114] *Id.*

[115] *Id.* at 944-45.

[116] *Id.* at 945.

[117] United States v. Lundy (*Lundy IV)*, 63 M.J. 299, 301 (2006).

[118] *Id.*

[119] *Id.* at 304.

[120] *Id.* at 302.

[121] *Id.* at 304.

[122] *Id.*

Conclusion

This past term, the CAAF issued several decisions in the areas of voir dire and challenges, and pleas and pretrial agreements. These cases, involving implied bias[123] and the factual predicate underlying a court's providence inquiry,[124] reaffirm the CAAF's generally paternalistic approach to the military courts-martial process.

[123] United States v. Moreno, 63 M.J. 129 (2006); United States v. Leonard, 63 M.J. 398 (2006).

[124] United States v. Gosselin, 62 M.J. 349 (2006); United States v. Phillippe, 63 M.J. 307 (2006); United States v. Gaston, 62 M.J. 404 (2006).

Annual Developments in Sentencing & Post-Trial—2006

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Introduction

The 2006 term for the Court of Appeals of the Armed Forces (CAAF) and service courts produced a number of significant cases in the areas of both sentencing and post-trial. Contrasted with the 2005 court term where so many sentencing cases dealt with the defense case and, in particular, the accused's unsworn statement, the 2006 court term seemed to focus on the Government's case. Accordingly this article will focus on a sampling of cases pertaining to Government evidence under Rule for Court-Martial (RCM) 1001(b).[1] In the post-trial arena, the landmark case of *United States v. Moreno*,[2] and the processing timelines that it established, was a major decision across the services. Since *Moreno* was discussed in last year's symposium, this article will focus on post-trial cases that have been issued since the *Moreno* decision.

Sentencing

From the 2006 new developments cases in sentencing, this article will cover issues involving: personnel records under RCM 1001(b)(2);[3] aggravation evidence under RCM 1001(b)(4);[4] rehabilitative potential evidence under RCM 1001(b)(5);[5] and post-confinement forfeitures under RCM 1107(d)(2).[6]

RCM 1001(b)(2) Evidence[7]

The case of *United States v. Reyes*[8] highlights the problems that can arise when the trial counsel, defense counsel, and the military judge all fail to examine the documents offered and admitted into evidence. In *Reyes*, an enlisted panel found Corporal (Cpl) Reyes guilty of assault, conspiracy to commit assault, and drunk and disorderly conduct.[9] The panel further found Cpl Reyes not guilty of one assault charge, modified a charge of conspiracy to commit assault, and reduced a specification of assault with a deadly weapon (baseball bat) to the lesser included offense of assault consummated by battery.[10] The facts of the court-martial stemmed from a couple of late night brawls involving two groups of Marines.[11]

During the sentencing phase, the government offered an exhibit (PE 6), which the trial counsel described as "excerpts from [Appellant's] Service Record Book."[12] Though not completely clear from the record, this exhibit appears to have been offered under RCM 1001(b)(2).[13] Even though the accused was only a corporal (E-4), his Service Record Book was a voluminous 139-page exhibit.[14] The military judge admitted PE 6 without objection from trial defense counsel.[15] Not until

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

[2] 63 M.J. 129 (2006).

[3] MCM, *supra* note 1, R.C.M. 1001(b)(2).

[4] *Id.* R.C.M. 1001(b)(4).

[5] *Id.* R.C.M. 1001(b)(5).

[6] *Id.* R.C.M. 1007(d)(2).

[7] *Id.* R.C.M. 1001(b)(2).

[8] 63 M.J. 265 (2006).

[9] *Id*.

[10] *Id*. at 266.

[11] *Id*.

[12] *Id*.

[13] MCM, *supra* note 1, R.C.M. 1001(b)(2).

[14] *Reyes*, 63 M.J. at 266.

the record reached the Navy-Marine Corps Court of Criminal Appeals (NMCCA) was it discovered that a number of "unrelated documents were '[t]ucked between the actual excerpts' of the Service Record book."[16] These additional documents included, among others:

- the entire military police investigation;
- the SJA's Article 34 pretrial advice;
- inadmissible photographs;
- inadmissible hearsay; and
- appellant's offer to plead guilty to charges on which the members had found appellant not guilty.[17]

In analyzing the case, the CAAF applied the plain error analysis set forth in *United States v. Powell* in which they held "in the absence of objection at trial, the reviewing court will apply a plain error analysis under which Appellant must show that there was error, that the error was plain or obvious, and that the error materially prejudiced a substantial right."[18] In *Reyes*, the NMCCA correctly determined that the military judge erred in admitting the extraneous material.[19] Moreover, the military judge incorrectly instructed the panel that they could adjudge a dishonorable discharge, where in actuality only a bad-conduct discharge was authorized for the offenses which Cpl Reyes was convicted.[20] The NMCCA found that there were errors and that they were plain and obvious. However, they determined that these errors were not prejudicial to the accused.[21]

The CAAF found differently. They determined that Cpl Reyes met his burden by establishing that, given the errors, the panel might have been "substantially swayed" in adjudging a sentence.[22] Given the inadmissible evidence presented to the panel, the military judge's instruction to deliberate on *all of the evidence presented*, and the erroneous punitive discharge instruction, the CAAF was not confident that these errors did not influence the panel to adjudge a punitive discharge.[23] Accordingly, the sentence was set aside and a rehearing authorized. The obvious practice pointer to be learned from this case is for all parties, whether trial counsel, defense counsel, or military judge, to review every page of every document being offered and admitted into evidence.

RCM 1001(b)(4) Evidence[24]

Aggravation evidence under RCM 1001(b)(4) is an oft-contested portion of any sentencing case.[25] In many cases, the issues surrounding it stem from either what is or what is perceived to be uncharged misconduct being introduced by the government. Under RCM 1001(b)(4),

> The trial counsel may present evidence as to any aggravating circumstances *directly relating to or resulting from the offenses of which the accused has been found guilty*. Evidence in aggravation includes, but is not limited to, evidence of financial, social, psychological, and medical impact on or cost to any person or

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[15] *Id.*

[16] *Id*.

[17] *Id*. at 266-67. With respect to the inadmissible evidence contained in PE 6, the CAAF quoted the NMCCA opinion:

> We are at a loss as to how the trial counsel could in good faith represent to the military judge that these materials were excerpts from the appellant's service record without a further explanation as to their contents. We are equally perplexed by the trial defense counsel's failure to object to the introduction of these portions of the exhibit, and by the military judge's failure to inquire further before admitting the exhibit.

Id. at 267 (quoting United States v. Reyes, No. 200301064, 2005 CCA LEXIS 132, *4-*5 (N-M. Ct. Crim. App. Apr. 29, 2005) (unpublished)).

[18] *Id* (citing United States v. Powell, 49 M.J. 460, 463-65 (1998)).

[19] *Id*. Additionally, the CAAF found that defense counsel's failure to object constituted deficient performance. *Id.*

[20] *Id.*

[21] *Id.*

[22] *Id*. at 268.

[23] *Id*. at 267-68.

[24] MCM, *supra* note 1, R.C.M. 1001(b)(4).

[25] *Id.*

> entity who was the victim of an offense committed by the accused and evidence of significant adverse impact on the mission, discipline, or efficiency of the command directly and immediately resulting from the accused's offense.[26]

During the 2006 term, the CAAF issued *United States v. Bungert*[27] whose primary issue dealt with aggravation evidence introduced during the government's sentencing case. In 2003, Avionics Technician Third Class Bungert was asked to give a voluntary urine sample.[28] He did. A few days later, Bungert informed his commander that his urine would test positive.[29] Ever the mission-focused Coast Guardsman, Bungert selflessly offered to turn in eleven other drug users from the hangar deck in exchange for "a deal."[30] All of the individuals named by Bungert submitted to command directed urinalyses, and six of the eleven were interviewed by the Coast Guard Investigative Service (CGIS).[31] There was nothing in the evidence that any of the eleven individuals "dimed out" by Bungert had ever used narcotics.[32] Ultimately, Bungert pled guilty to, and was convicted of *inter alia*, distributing and using methamphetamines.[33]

During the sentencing phase of Bungert's court-martial, the government called two witnesses. The crux of each witness's respective testimony dealt with the sideshow investigation that resulted from Bungert's implications of the eleven individuals.[34] Bungert's supervisor testified that as a result appellant's allegations, "the base was shut down for a day, the command was locked down and a base-wide urinalysis was conducted, flight operations were cancelled and maintenance operations were shut down."[35] Additionally, the CGIS agent who investigated the case testified about the amount of time he spent investigating the eleven individuals implicated by Bungert.[36] The trial defense counsel made no objection to the testimony of either witness.[37] Moreover, during trial counsel's sentencing argument, he focused on the testimony of the two witnesses and the baseless allegations. Additionally, he asked the military judge to take into consideration the wasted time and energy of the individuals who were involved in the investigation.[38] Again, the trial defense counsel did not object.[39]

Since this issue was first raised on appeal, the court applied a plain error analysis. To establish plain error, appellant must show: "(1) that there was error, (2) that the error was plain or obvious, and (3) that the error materially prejudiced one of his substantial rights."[40] All three prongs must be satisfied. In the present case, the court did not address the first two prongs because Bungert failed to establish the third prong, that he was prejudiced in any substantial way from the testimony of the government's witnesses.[41]

The practice pointer to be taken away from this case is primarily for defense counsel. Object! Make the argument that the evidence is not proper aggravation evidence—that it is uncharged misconduct. If the objection is sustained, that is good for your client. If that objection fails, object with Military Rule of Evidence (MRE) 403[42] which will force the military judge to conduct a balancing test on the record.

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

[27] 62 M.J. 346 (2006).

[28] *Id.* at 347.

[29] *Id.*

[30] *Id.* Of these eleven other drug users, Bungert claimed that he had specific knowledge through personal contact about six of the individuals. *Id.* He suspected the other five to be involved in drug use. *Id.*

[31] *Id.*

[32] *Id.*

[33] *Id.*

[34] *Id.*

[35] *Id.*

[36] *Id.*

[37] *Id.*

[38] *Id.*

[39] *Id.*

[40] *Id.* at 348.

[41] *Id.* Although Bungert's counsel argued that both witnesses comprised the government's entire case in aggravation, they failed to explain how the sentence might have been different without the testimony. *Id.*

[42] MCM, *supra* note 1, MIL. R. EVID. 403.

RCM 1001(b)(5) Evidence[43]

During the sentencing phase of a court-martial, the sentencing authority may consider evidence of an accused's rehabilitative potential.[44] Rule for Court-Martial 1001(b)(5) permits a witness to testify about an accused's rehabilitative potential.[45] The trial counsel, through witnesses, may present this opinion testimony provided each witness: (1) "possess[es] sufficient information and knowledge about the accused to offer a rationally-based opinion that is helpful to the sentencing authority;"[46] (2) bases his or her opinion upon "relevant information and knowledge" relating to the accused's personal circumstances;[47] and (3) limits his or her opinion to "whether the accused has rehabilitative potential and to the magnitude or quality of any such potential."[48] Witnesses may not present opinion testimony "regarding the appropriateness of a punitive discharge or whether the accused should be returned to the accused's unit."[49] On the other hand, the defense is not completely hampered by the limitations of RCM 1001(b)(5).[50] However, should the defense present "evidence that could not be introduced by the prosecution under RCM 1001(b)(5),"[51] such as whether a witness would welcome the accused back in the unit, "the door may be opened for the prosecution to present [contradictory] evidence in rebuttal."[52]

During the 2006 court term, the CAAF addressed the rehabilitative potential question when it rendered its *United States v. Hill* decision.[53] The appellant, a thirty-nine-year-old physician's assistant, pled guilty to seven specifications of dereliction of duty and conduct unbecoming an officer.[54] The specifications all stemmed from various sexual indiscretions the appellant took with various enlisted female patients during their sick call visits to the clinic.[55] During the defense's sentencing case, the defense counsel called the appellant's battalion commander who testified about rehabilitative potential.[56] Specifically, defense counsel asked whether the battalion commander thought appellant should be returned to his unit.[57] The battalion commander responded that he would "not want [appellant] back as a clinician, but as an officer, a platoon leader . . . ."[58] During cross-examination, the trial counsel delved further into the witnesses's response indicating he would take him back as a platoon leader.[59]

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[43] *Id.* R.C.M. 1001(b)(5).

[44] United States v. Griggs, 61 M.J. 402, 407 (2005).

[45] MCM, *supra* note 1, R.C.M. 1001(b)(5).

[46] *Id.* R.C.M. 1001(b)(5)(B).

[47] *Id.* R.C.M. 1001(b)(5)(C). However, "the opinion of the witnesses or deponent regarding the severity or nature of the accused's offense or offenses may not serve as the principal basis for an opinion of the accused's rehabilitative potential." *Id.*

[48] *Id.* R.C.M. 1001 (b)(5)(D).

[49] *Id.*

[50] United States v. Griggs, 61 M.J. 402, 410 (2005). Although defense witnesses can testify that they would work with or welcome an accused back at the unit, they still are not still permitted to testify about whether or not an accused should receive a punitive discharge. *Id.* at 409-10.

[51] United States v. Hill, 62 M.J. 271, 272 (2006).

[52] *Id.*

[53] *Id.*

[54] *Id.*

[55] *Id.* at 272-73.

[56] *Id.* at 273.

[57] *Id.* The colloquy between the defense counsel and the witness from the record of trial is set forth as follows:

> Q. Now, sir, the Judge has to make several decisions today. One of them is whether or not [Appellant] should remain in the Army, and I'm not going to ask you whether you think he should remain [in] the Army, but if the decision is made for him to remain in the Army, do you believe he could be a - - would you take him back into the battalion?
>
> A. I'd have no qualms with that.
>
> Q. What do you base that answer on, sir?
>
> A. Based on the potential that he's shown me. Let me caveat that and say I would not want him back as a clinician, but as an officer, a platoon leader, I feel that he would succeed.

Id.

[58] *Id.*

[59] *Id.*

> Q. If you had a platoon leader who sexually assaulted one of his subordinates, would you expect that person to stay in your battalion?
>
> A. The question was, if the Judge's decision was to retain him in the Army, and he chose my battalion, would I accept that, and I said yes. If I was sitting in that panel over there as a juror, would I allow him to remain in the Army, no --[60]

At that moment, the trial judge promptly jumped in, stating that the battalion commander's remarks were "not responsive" and consisted of testimony "that a witness is not allowed to make."[61]

After the court-martial, the military judge conducted a "Bridge the Gap"[62] session with counsel for both parties. During that session, he made a comment that "[he] was thinking of keeping him until his commander said he didn't want him back," or words to that effect.[63] Based on the trial judge's comment, the defense counsel raised this as an issue in his post-trial submission to the convening authority.[64] In turn, the convening authority ordered a post-trial 39(a).[65]

At the post-trial 39(a), the post-trial judge pondered whether the trial judge considered the battalion commander's inadmissible testimony when adjudging the sentence.[66] Ultimately, the post-trial judge found that the trial judge's remark "constituted incompetent evidence that could not be used to impeach the sentence under Military Rule of Evidence (MRE) 606(b)."[67] Moreover the post-trial judge found that "even if the trial judge's comments could be considered, there was no evidence that the battalion commander . . . 'ever opined, either directly or euphemistically, that the accused should be discharged'"[68]

Following affirmation by the Army Court of Criminal Appeals (ACCA), the case was appealed to CAAF which determined that the record failed to definitively establish "whether the trial judge was referring to: (1) the testimony of the battalion commander that he would not want Appellant back in his unit *as a clinician*, or (2) the battalion commander's remarks about not retaining Appellant *in the Army* if he was on the panel."[69] The court further determined that the defense bore the burden of disproving the first explanation and showing that the trial judge relied on the second explanation, the inadmissible testimony.[70] In this case, the defense did not meet its burden. The CAAF noted that appellant "opened the door" as to views pertaining to the retention of Appellant in the unit.[71] Thus, the trial judge was permitted to consider the testimony that the battalion commander would not want appellant back as a clinician.[72] Furthermore, with respect to the second alternative, the CAAF noted that "the trial judge expressly stated that the battalion commander's remarks were 'not

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[60] *Id.*

[61] *Id.*

[62] *Id.* United States v. Hill, 62 M.J. 271, 273 (2006). "Bridge 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 (C.M.A. 1992).

[63] *Hill*, 62 M.J. at 273

[64] *Id.* at 274.

[65] *Id.*

[66] *Id.*

[67] *Id.*

[68] *Id.* Specifically, concerning the Bridge the Gap remarks, the post-trial judge made the following findings of fact:

> [The] remarks [during the informal Bridge the Gap discussion] are not evidence that he considered extraneous information. [The trial judge's] comment that the commander said he didn't want him back is consistent with [the commander's] admitted testimony that he didn't want him back as a *clinician*. Most importantly, [the commander] ***never*** testified the accused should be discharged. He was not permitted to complete his answer to the question the defense identifies as resulting in the impermissible opinion. A fair reading of the record supports the conclusion that [the trial judge] cut off [the commander's] answer once it became clear that [the commander] was giving his opinion as a juror not as the accused's commander. [The trial judge, during the sentencing proceeding,] appropriately cut off the answer since the witness was improperly invading the province of the sentencing authority.

Id. The post-trial judge added: "In the context of his entire testimony as a defense witness, [the commander] clearly indicated his support for the accused's continued service in the Army." *Id.*

[69] *Id.* at 275. (emphasis added).

[70] *Id.*

[71] *Id.*

[72] *Id.*

responsive' and consisted of testimony 'that a witness is not allowed to make.'"[73] Given this, the court rested on the presumptions that the military judge knows the rules of evidence, considers only admissible testimony, and follows his own evidentiary rulings.[74]

Post-Confinement Forfeitures

Issues dealing with post-confinement forfeitures are somewhat of a hybrid of sentencing and post-trial. This is certainly an easily over-looked area to which chiefs of justice need to be attuned to in an effort to avoid any subtle pitfalls. The issue in *United States v. Stewart*[75] involved whether forfeitures were improperly imposed on Airman First Class Stewart's pay and allowances after he was released from confinement and returned to active status. Stewart entered the room of a fellow servicemember and, while she was unconscious, indecently assaulted and videotaped her unclothed body.[76] Contrary to his pleas, a panel found him guilty of one specification each of unlawful entry, indecent assault and indecent acts.[77] On 13 October 2001, the panel adjudged a sentence of reduction to the grade of Airman Basic (E-1), confinement for fifteen months and forfeiture of all pay and allowances.[78] The members did not adjudge a punitive discharge.[79] The forfeiture of all pay and allowances took effect on 27 October 2001.[80] Following his term of confinement, Stewart was returned to active duty on 14 April 2002.[81] However, until 31 August 2002, the Defense Finance and Accounting Service (DFAS) continued to withhold total forfeitures.[82] The DFAS correctly determined that Airman Stewart, following his release from confinement, should have only forfeited up to a maximum of two-thirds pay.[83] Airman Stewart was reimbursed the amount of pay and allowances erroneously withheld.[84] This determination was presumably based on the non-binding discussion to RCM 1107(d)(2) which states, "[w]hen an accused is not serving confinement, the accused should not be deprived of more than two-thirds pay for any month as a result of one or more sentences by court-martial and other stoppages or involuntary deductions, unless requested by the accused."[85]

The discussion to RCM 1107(d)(2) follows CAAF's 1987 decision in *United States v. Warner*[86] in which it held that if a service member is released from confinement and still in a duty status, no more than two-thirds pay may be withheld from his pay.[87] Furthermore, in *United States v. Lonnette*,[88] a decision rendered subsequent to *Stewart*, the CAAF held "if a sentence 'provides for' continued forfeiture of all pay and allowances after a servicemember is released from confinement but before execution of the discharge, that portion of the sentence should be amended to provide for forfeiture of two-thirds pay until the discharge is executed."[89] Both *Warner* and *Lonnette*, and the discussion to RCM 1107(d)(2), are based on the overarching policy concern that an accused "should not be deprived of all means of supporting himself or his family while on active duty."[90]

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[73] *Id.*

[74] *Id.* at 276.

[75] 62 M.J. 291 (2006).

[76] *Id.* at 292.

[77] *Id.*

[78] *Id.*

[79] *Id.*

[80] *Id.*

[81] *Id.* at 291.

[82] *Id.*

[83] *Id.*

[84] *Id.*

[85] MCM, *supra* note 1, R.C.M. 1107(d)(2) discussion.

[86] 25 M.J. 64 (C.M.A. 1987).

[87] *Stewart*, 62 M.J. at 293.

[88] 62 M.J. 296 (2006).

[89] *Stewart*, 62 M.J. at 293 (citing *Warner*, 25 M.J. at 67).

[90] *Id.*

Though this policy was in effect at the time the *Stewart* trial occurred, the appellate courts in *Stewart* had a more fundamental question with which to wrestle. What exactly did the members intend when adjudging a sentence that included forfeiture of all pay and allowances but no punitive discharge? There are two ways of answering this question. As the court recognized, "[o]n the one hand, this sentence could be read to reflect the members' intent to sentence Appellant to continuous forfeitures so long as he was in the armed forces."[91] It is plausible that the members intended this to be the case because there was nothing in the adjudged sentence that limited the forfeitures. Thus, as the government argued, the members intended total forfeitures subject to the operation of applicable law and regulation.[92] On the other hand, as the court conversely surmised "in light of RCM 1003(b)(2), the discussion of RCM 1107(d)(2), and *Warner*, [the] sentence could be read to reflect the members' intent to sentence Appellant to forfeiture of all pay and allowances during that period in which he was in confinement."[93]

In reaching its decision, the CAAF recognized its earlier opinion in *Waller v. Swift*[94] in which it held that an accused cannot receive a sentence harsher than that adjudged by the panel.[95] Moreover, for ambiguous sentences, as in *Stewart*, an accused cannot be subjected to a "greater sentence than that which is clearly indicated."[96] Since the adjudged sentence did not expressly specify partial forfeitures, the court affirmed only those forfeitures "coterminous with the time Appellant spent in confinement."[97] Specifically, the CAAF held:

> [W]here a sentence to forfeiture of all pay and allowances is adjudged, such sentence shall run until such time as the servicemember is discharged or returns to a duty status, whichever comes first, unless the sentencing authority expressly provides for partial forfeitures post-confinement. The sentencing authority shall specify the duration and the amount of such partial forfeitures, subject to R.C.M. 1103(b)(2), the discussion accompanying R.C.M. 1107(d)(2), and *Warner*.[98]

A sentencing instruction from the military judge to cover this potential issue is unlikely.[99] Therefore, chiefs of justice and staff judge advocates (SJAs) need to remain vigilant of situations such as that in *Stewart* where the adjudged sentence includes confinement and total forfeitures but no punitive discharge.

Post-Trial

In the world of post-trial, no case during last year's term of court was larger than *United States v. Moreno*.[100] Although a 2006 case, *Moreno* hit with such an impact that it was included in the 2006 New Developments Symposium II.[101] Instead of replowing the ground discussed in last year's article, a few cases that followed will be discussed from the 2006 term to show that, if nothing else, the sky is in fact not falling. Additionally, the article will discuss the combined case of *United States v.*

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[91] *Id.*

[92] *Id.*

[93] *Id.*

[94] 30 M.J. 139, 143 (C.M.A. 1990).

[95] *Stewart*, 62 M.J. at 294.

[96] *Id.*. The CAAF further expounded on the principle of ambiguous sentences, stating:

> The principal that an accused should not be subjected to an ambiguous, uncertain sentence is grounded in longstanding United States jurisprudence. "Sentences in criminal cases should reveal with fair certainty the intent of the court and exclude any serious misapprehensions by those who must execute them." *United States v. Daugherty*, 269 U.S. 360, 363, 46 S. Ct. 156, 70 L. Ed. 309 (1926). A sentence that is so ambiguous that a reasonable person cannot determine what the sentence is may be found illegal. *United States v. Earley*, 816 F.2d 1428, 1430 (10th Cir. 1987). However, not all ambiguous sentences are illegal. *Id*. at 1431. A sentence need not be so clear as to eliminate every doubt, but sentences should be clear enough to allow an accused to ascertain the intent of the court or of the members. *See Id.*

Id.

[97] *Id.*

[98] *Id.*

[99] Colonel Michael J. Hargis & Lieutenant Colonel Timothy Grammel, *Annual Review of Developments in Instructions—2006*, ARMY LAW., May. 2007, at 48.

[100] 63 M.J. 129 (2006).

[101] Major John T. Rothwell, "I Made a Wrong Mistake": Sentencing & Post-Trial in 2005, ARMY LAW., June. 2006, at 41.

Alexander, *United States v. Vanderschaaf*,[102] both certified for review by The Judge Advocate General (TJAG) of the Army and containing a common issue, whether the respective convening authorities had actually approved the adjudged findings when the SJA's recommendations (SJARs) were silent as to the aggravating language.

Post-Trial Processing

By now, most chiefs of justice have "120" tattooed on their forearms. This number references the standard set in *Moreno* as the number of days for the government to get a case processed through the system from the end of trial to action by the convening authority.[103] Though not a complete return to the draconian ninety-day standard established in *Dunlap v. Convening Authority*,[104] failure by the government to meet this 120-day standard will trigger a rebuttable presumption of unreasonable delay which will in turn trigger the *Barker v. Wingo*[105] four pronged analysis.[106] When analyzing a case for unreasonable post-trial delay, the appellate courts will examine: (1) the length of the delay; (2) the reasons for the delay; (3) whether the appellant (or defense counsel) has asserted the right to speedy post-trial processing; and (4) prejudice suffered by the appellant.[107] If the court concludes that an appellant has been denied the due process right to speedy post-trial review and appeal, the court will grant relief unless it is convinced beyond a reasonable doubt that the constitutional error is harmless.[108] Generally, if appellant cannot show that he has been materially prejudiced by the delay, the courts do not examine the other three factors. In many post-trial delay cases, the prejudice factor is the most difficult prong for an appellant to establish.

Following the *Moreno* decision, the CAAF rendered more decisions in which the appellant was granted relief to a certain degree. In *United States v. Toohey*,[109] 2240 days (6.1 years) elapsed from the end of trial until a decision was rendered by the service court. Applying the *Barker* analysis, the CAAF found that the first three prongs weighed heavily in appellant's favor.[110] They further found that even where there is no finding of prejudice suffered by an appellant, they will find a "due process violation only when, in balancing the other three factors, the delay is so egregious that tolerating it would adversely affect the public's perception of fairness and integrity of the military justice system."[111]

In addition to examining whether there was a due process violation as a result of the delay, the CAAF looked at whether relief was due appellant under Article 66(c), Uniform Code of Military Justice (UCMJ).[112] This provision of the Code says that the "Court of Criminal Appeals [CCA] 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."[113] The CAAF determined that the service court in this case "applied an erroneous legal standard and thus abused its

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[102] 63 M.J. 269 (2006).

[103] Specifically, the court indicated that there would be a presumption of unreasonable delay in cases where it took more than: (1) 120 days to get a record processed from the end of trial to action; (2) 30 days to get a record mailed and docketed at the service court; or (3) 18 months for the service court to render a decision. *Moreno*, 63 M.J. at 143.

[104] 48 C.M.R. 751 (C.M.A. 1974).

[105] 407 U.S. 514, 530 (1972).

[106] *Moreno*, 63 M.J. at 142.

[107] *Id.* (citing *Barker*, 407 U.S. at 530).

[108] United States v. Kreutzer, 61 M.J. 293, 298 (2005) (citing Chapman v. California, 386 U.S. 18, 24 (1967)).

[109] United States v. Toohey (*Toohey II*) 63 M.J. 353 (2006). Appellant, contrary to his pleas, was convicted of rape and assault consummated by battery. *Id.* at 355. On 13 August 1998, he was sentenced to reduction to E-1, forfeiture of all pay and allowances, confinement for twelve years and a dishonorable discharge. *Id.* at 357. The transcript was 943 pages and the ROT was composed of eleven volumes. United States v. Toohey (*Toohey I*), 60 M.J. 703, 710 (N-M. Ct. Crim. App. 2004).

[110] *Toohey II*, 63 M.J. at 362.

[111] *Id.*

[112] UCMJ art. 66(c) (2005).

[113] *Id.* 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 such findings of guilty and 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 weight the evidence, judge the credibility of witnesses, and determine controverted questions of fact, recognizing that the trial court saw and heard the witnesses.

Id.

discretion"[114] when it required that a case "rise to the level of 'most extraordinary' before the court would consider exercising its unique Article 66(c), UCMJ, authority."[115] The service courts were cautioned that the fundamental inquiry should be whether the sentence was appropriate "in light of all circumstances, and no single predicate criteria of 'most extraordinary' should be erected to foreclose application of Article 66(c), UCMJ, consideration of relief."[116] Notably, CAAF expressed concern that the CCA did not view the 2240 days of delay in Toohey's case as being among "the most extraordinary of circumstances."[117]

Since *Toohey* was remanded to the lower court, the CAAF did not fashion a specific relief. It did, however, remind the lower court of the non-exhaustive range of relief options set forth in *Moreno*[118] and recommended that it should allow the parties the "opportunity to address the issue of meaningful relief in light of the due process violation and the circumstances of this case."[119]

Another unreasonably long post-trial delay case was *United States v. Harvey*.[120] In addition to the more prevalent issue pertaining to unlawful command influence, the government took 2031 days (5.6 years) to complete post-trial and appellate review.[121] Despite being neither an unusually long record nor a complex case, it took over one year for the convening authority to take action in appellant's case.[122] It then took another 701 days for appellant's case to be briefed by her assigned appellate defense counsel.[123] The government took 210 days to file a responsive brief before the NMCCA.[124] After the case had been fully briefed and submitted to the NMCCA, it took 555 days before the lower court rendered a decision.[125]

The CAAF again analyzed this case applying the four *Barker* factors.[126] In reviewing the prejudice factor, CAAF placed an emphasis on their conclusion that Harvey's appeal was meritorious with respect to an unlawful command influence issue (UCI).[127] However, despite being successful on the UCI issue, the court still did not find that appellant had suffered prejudice.[128] Nonetheless, when balancing all four *Barker* factors, the CAAF viewed the delay in this case, just as in *Toohey*, to have been "so egregious that tolerating it would adversely affect the public's perception of the fairness and integrity of the military justice system."[129] The findings and sentence were set aside and a rehearing was authorized.[130] Because no other meaningful relief could be provided, the CAAF ordered in the event that a rehearing is held resulting in a conviction and a

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[114] *Toohey II*, 63 M.J. at 362.

[115] *Id.*

[116] *Id.*

[117] *Id.* (citing United States v. Toohey (*Toohey I*), 60 M.J. 703, 710 (N-M. Ct. Crim. App. 2004)).

[118] *Id.* at 363. In *Moreno* the CAAF determined that a rehearing was the appropriate remedy. United States v. Moreno, 63 M.J. 129, 143 (2006). The court indicated that it had considered a range of options it had at its disposal such as directing a day-for-day credit for each day of unreasonable and unexplained delay. *Id.* However, they determined that such a remedy would have no meaningful effect because Moreno had already served the full term of adjudged confinement. *Id.* Furthermore, the court considered dismissing the charge and specification with prejudice:

> Dismissal would be a consideration if the delay either impaired Moreno's ability to defend against the charge at a rehearing or resulted in some other evidentiary prejudice. See *Tardif*, 57 M.J. at 224 (citing United States v. Timmons, 22 C.M.A. 226, 227, 46 C.M.R. 226, 227 (1973); United States v. Gray, 22 C.M.A. 443, 445, 47 C.M.R. 484, 486 (1973)).

Id. However the court found no such evidence. *Id.* Ultimately, because they had to set aside the sentence in order to permit a rehearing, there was no direct sentence relief that we could be granted to the accused. *Id.* As such, the court determined in the event a rehearing was conducted resulting in a conviction, the maximum authorized punishment could be no worse than a punitive discharge. *Id.* at 143-44.

[119] *Toohey II*, 63 M.J. at 363.

[120] *Harvey*, 64 M.J. 13 (2006).

[121] *Id.* at 23.

[122] *Id.*

[123] *Id.*

[124] *Id.*

[125] *Id.*

[126] Barker v. Wingo, 407 U.S. 514, 530 (1972).

[127] *Harvey*, 64 M.J. at 24.

[128] *Id.*

[129] *Id.* (quoting United States v. Toohey (*Toohey II*), 63 M.J. 353, 363 (2006)).

[130] *Id.*

sentence, the convening authority may approve no portion of the sentence other than a punitive discharge.[131]

Not all unreasonably lengthy post-trial delays result in the appellant getting any relief as evidenced by *United States v. Allison*.[132] The post-trial process in Mess Management Specialist Seaman Allison's case took 1867 days (5.1 years) from trial to appellate decision by the CCA.[133] The CAAF found that the lengthy delay denied Allison of his right to speedy review and appeal.[134] However, considering the entire record taking into account all the circumstances of the case and finding no merit in Allison's main appellate issue, they determined that the error was harmless beyond reasonable doubt and no relief was warranted.[135]

For Army chiefs of justice, the sky does not appear to be falling. Moreover, processing times in Army jurisdictions have noticeably improved. For example in fiscal year 2006, out of 1149 records processed, the average processing time from the end of trial to action was 149 days (See Appendix).[136] Since 11 June 2006, when the *Moreno* processing standards took effect, out of 624 records processed, the average time has dropped to 104 days.[137]

Staff Judge Advocate's Recommendations and Promulgating Orders

The convening authority is not required to take action on the findings.[138] However, in the convening authority's sole discretion, he may:

> (1) Change a finding of guilty to a charge or specification to a finding of guilty to an offense that is a lesser included offense of the offense stated in the charge or specification; or (2) Set aside any finding of guilty and (A) Dismiss the specification, and if appropriate the charge, or (B) Direct a rehearing in accordance with subsection (e) of [RCM 1107].[139]

With respect to the action on sentence, the convening authority may "disapprove a legal sentence, in whole or in part, mitigate the sentence, and change a punishment to one of a different nature as long as the severity of the punishment is not increased."[140] When taking action, the convening authority *must* consider three things: (1) the result of trial, (2) the SJAR, and (3) any matters submitted by the accused under RCM 1105.[141] The convening authority *may* consider: the record of trial, personnel records of the accused, and such other matters as the convening authority deems appropriate.[142]

The appellate case of *United States v. Alexander*; *United States v. Vanderschaaf*[143] involved two unrelated cases with an identical issue that was certified for review by The Judge Advocate General of the Army. The Army court in both cases did not approve the findings reached by their respective general courts-martial, and in both cases, ordered that certain aggravating language appearing in the respective promulgating orders be deleted.

Specialist (SPC) Alexander, in a case originating out of Afghanistan, was originally charged both with using and distributing marijuana on divers occasions "while receiving special pay under 37 U.S.C. § 310."[144] This quoted language

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[131] *Id.*

[132] 63 M.J. 365 (2006).

[133] *Id.* at 366-67.

[134] *Id.* at 371.

[135] *Id.*

[136] Email from Clerk of Court, Army Court of Criminal Appeals, to author (June 4, 2007) (on file with author).

[137] *Id.*

[138] MCM, *supra* note 1, R.C.M. 1107(c).

[139] *Id.*

[140] *Id.* R.C.M. 1107(d).

[141] *Id.* R.C.M. 1107(b)(3)(A) (emphasis added).

[142] *Id.* R.C.M. 1107(b)(3)(B) (emphasis added).

[143] 63 M.J. 269 (2006).

[144] *Id.* at 270.

increases the maximum period of confinement by five years for each offense.[145] At a general court-martial before a military judge sitting alone, he pled guilty to both offenses.[146] In the SJAR to the convening authority, the "while receiving special pay" language was omitted from the gist of the offense section of the document.[147] The SJA recommended that the convening authority reduce the adjudged confinement to comply with the terms of the pretrial agreement but did not make a specific recommendation as to the findings.[148] Accordingly, the convening authority's action reduced the period of confinement, as recommended by the SJA, but was silent with respect to the findings.[149]

Following the convening authority's action, the promulgating order was finalized.[150] The action portion of the promulgating order was identical to the convening authority's action.[151] However, unlike the SJAR, the description of the specifications in the promulgating order included "while receiving special pay under 37 U.S.C. § 310," the language that was omitted from the SJAR.[152]

Turn now to Private (PVT) Vanderschaaf's case. There the appellant was charged with multiple specifications in violation of Article 112a, UCMJ.[153] Each specification correctly stated the offenses and included the aggravating language that the offenses had been committed "on divers occasions."[154] Similar to SPC Alexander, PVT Vanderschaaf pled guilty at a general court-martial before a military judge sitting alone.[155] In the SJAR to the convening authority, the "on divers occasions" language was omitted form the gist of the offense section.[156] The SJAR also recommended that the convening authority reduce the adjudged period of confinement to comply with the terms of the pretrial agreement but was silent with respect to findings.[157] The convening authority's action followed the SJA's advice.[158] The promulgating order that followed contained "on divers occasions" in the specification description.[159]

In neither case, under RCM 1105[160] and 1106,[161] did the defense object to the wording of the respective specification descriptions.[162] The issue in each case was first raised before the Army service court. In both cases, ACCA agreed with the appellants.[163] In doing so, ACCA found that the respective convening authorities approved the findings of guilty only with respect to the language contained in the SJARs.[164] In other words, with respect to *while receiving special pay under 37 U.S.C. § 310* in SPC Alexander's case and *on divers occasions* in PVT Vanderschaaf's case, those portions of the findings were disapproved.[165] Accordingly, the Army court ordered issued corrected promulgating orders in each case, deleting the language at issue.[166] The Judge Advocate General of the Army certified both cases for review by the CAAF.[167]

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[145] UCMJ art. 112a (2002).

[146] *Alexander*, 63 M.J. at 270.

[147] *Id.* at 270-71.

[148] *Id.* at 271.

[149] *Id.*

[150] *Id.*

[151] *Id.*

[152] *Id.*

[153] *Id.*

[154] *Id*.

[155] *Id.*

[156] *Id.* at 272.

[157] *Id.*

[158] *Id.*

[159] *Id.*

[160] MCM, *supra* note 1, R.C.M. 1105.

[161] *Id.* R.C.M. 1106.

[162] *Alexander* 63 M.J. at 271; *Vanderschaaf*, 63 M.J. at 272.

[163] *Alexander* 63 M.J. at 271; *Vanderschaaf*, 63 M.J. at 272.

[164] *Alexander* 63 M.J. at 271; *Vanderschaaf*, 63 M.J. at 272.

[165] *Alexander* 63 M.J. at 271; *Vanderschaaf*, 63 M.J. at 272.

[166] *Alexander* 63 M.J. at 271; *Vanderschaaf*, 63 M.J. at 272.

The CAAF, however, disagreed with Army court.[168] In reaching their decision, four of the judges determined that the requirements of RCM 1106(d)(3)(A)[169] were met in both cases.[170] "[T]he SJA's recommendation may provide the convening authority with 'concise information' about the findings, 'without specifying exactly what acts the appellant was found guilty of or what language was excepted or substituted.'"[171] "Although disapproval of the findings requires express action by the convening authority, the convening authority is not required to take express action to approve the findings."[172] Therefore, in both cases, the language contained in the SJAR's was sufficient in providing a "general depiction of the offense, without the necessity for reciting the details of each element and aggravating factor."[173]

Despite the court's ruling, the CAAF did provide some practical guidance to SJA offices in recognizing that "the potential for error could be reduced if the recommendation prepared by an SJA included the findings portion of a proposed promulgating order, thereby providing greater assurance of congruence between the recommendation and the promulgating order."[174]

Conclusion

The 2006 court term proved to be quite eventful in the areas of both sentencing and post-trial. In the past couple of court terms significant cases were decided in both areas. Since the bulk of courtroom time is spent handling guilty pleas and conducting sentencing cases, both trial counsel and defense counsel need to remain intimately familiar with the RCM 1001 and the case law that interprets it. Similarly, since there are still a number of cases still in the appellate queue, none of the services are by any means out of the *Moreno* woods. It will certainly be an interesting year to see how the courts handle post-trial delay cases if the processing time cases continue to decline.

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[167] *Alexander* 63 M.J. at 271; *Vanderschaaf*, 63 M.J. at 272.

[168] *Id*. at 276.

[169] MCM, *supra* note 1, R.C.M. 1106(d)(3)(A).

[170] *Alexander*, 63 M.J. at 276.

[171] *Id.* at 276 (quoting United States v. Gunkle, 55 M.J. 26, 33 (2001) (citation and quotation marks omitted)).

[172] *Id.*

[173] *Id.*

[174] *Id.*

Appendix

Pre-*Moreno* Court-Martial Processing Time
2006
Army Wide[175]

Average Number of Days							
	Records used	Preferral to first 39a	First 39a to Termination	Termination to Action	Action to Dispatch	Dispatch to Rec'd by Clerk of Ct.	Total Days
GCM	815	89	23	149	30	9	300
SPCM	334	56	6	147	17	8	234
OVERALL	1149	79	18	149	26	9	281

Post-*Moreno* Court-Martial Processing Time
Cases terminated after 11 June 2006
Army Wide[176]

Average Number of Days							
	Records used	Preferral to first 39a	First 39a to Termination	Termination to Action	Action to Dispatch	Dispatch to Rec'd by Clerk of Ct.	Total Days
GCM	420	87	24	102	22	9	244
SPCM	204	50	10	107	13	8	188
OVERALL	624	75	19	104	19	9	226

[175] E-mail from Clerk of Court, Army Court of Criminal Appeals , to author (June 4, 2007) (on file with author).

[176] *Id.*

To Err Is Human, to Obtain Relief Is Divine[1]

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Introduction

Though few in number, this past year saw significant case developments in the areas of ineffective assistance of counsel (IAC), prosecutorial misconduct, pretrial restraint, and speedy trial. The Supreme Court weighed in on whether the defense can engage in prospective waivers of the right to speedy trial,[2] and the Court of Appeals for the Armed Forces (CAAF) clarified when 305(k)[3] credit is appropriate for restriction tantamount to confinement.[4] The CAAF visited when trial counsel should warn a witness about potential perjury,[5] and the Army Court of Criminal Appeals (ACCA) addressed whether a defense counsel can waive his client's right to make an unsworn statement during sentencing.[6]

It's Miller Time!

Perhaps most notable during the past year was CAAF's expansion of the expected competence of a defense attorney in the case of *United States v. Miller*.[7] Interior Communications Electrician Third Class Miller served aboard the USS *Harry S. Truman*, where he had access to a common computer on board the ship.[8] He established a password protected account on that common computer to store approximately 100 pornographic images.[9] Miller pled guilty at a general court martial to misuse of a government computer, receiving child pornography, and possession of visual depictions of minors engaged in sexually explicit conduct.[10] The military judge accepted Miller's pleas and sentenced him to confinement for a year, reduction to E-1, and a bad conduct discharge.[11] The Navy-Marine Court of Criminal Appeals affirmed both the findings and sentence.[12]

On appeal, Miller claimed that, upon his release from the Navy, the law of his home state required him to register as a sex offender, and that his home state's court system sentenced him to three years confinement for violating the state sex offense registration statute.[13] He further claimed that he learned of this sex offender registration requirement for the first time at his transition from the Navy brig to civilian life.[14]

The CAAF granted review of three issues. The first issue concerned whether there had been ineffective assistance of appellate defense counsel due to his lack of extensive communications with the appellant.[15] The second and third issues concerned trial defense counsel's alleged failure to inform his client that conviction of possession of child pornography

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[1] ALEXANDER POPE, AN ESSAY ON CRITICISM, *available at* http://poetry.eserver.org/essay-on-criticism.html (last visited Oct. 1, 2007).

[2] Zedner v United States, 126 S. Ct. 1976 (2006).

[3] MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 305(k) (2005) [hereinafter MCM] (providing remedies for improper pretrial confinement).

[4] United States v. Regan, 62 M.J. 299 (2006).

[5] United States v Edmond, 63 M.J. 343 (2006), *pet. for rev. granted*, 64 M.J. 397 (2007).

[6] United States v Dobrava, 64 M.J. 503 (Army Ct. Crim. App. 2006).

[7] *Miller*, 63 M.J. 452 (2006).

[8] *Id.* at 454.

[9] *Id.*

[10] *Id.*

[11] *Id.*

[12] *Id.*

[13] *Id.* at 455.

[14] *Id.*

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

triggered certain sex offender reporting requirements; specifically whether such an alleged failure constituted IAC, and whether it rendered improvident the accused's pleas.[16]

Appellate Ineffective Assistance of Counsel

What we have here is failure to communicate.[17]

Appellant argued that his detailed appellate defense counsel never personally communicated with him, that he did not raise any issues on his behalf before the Navy court, and that he did not question whether the photographs met the statutory definition of child pornography.[18] Detailed appellate counsel sent the appellant a letter introducing himself, explaining his role, and counseling that the appellant should reply with any issues he wished to raise within twenty days.[19] However, four days after sending the letter, appellant's appellate counsel submitted a brief to the court identifying no issues for relief.[20]

The court first noted that the two-pronged test for ineffective assistance of appellate counsel is the same as that for a trial defense counsel: (1) whether counsel's performance was so deficient that he was not effectively fulfilling his constitutional role to ensure a fair trial; and (2) whether counsel's deficient performance actually prejudiced the accused so as to deny him a fair trial.[21]

In *United State v. Polk*, the CAAF had modified the two original prongs of the test and added a third.[22] The prevailing test for ineffective assistance of counsel in military courts is now:

> (1) "Are the allegations made by appellant true; and, if they are, is there a reasonable explanation for counsel's actions in the defense of the case?"; (2) If the allegations are true, "did the level of advocacy 'fall[] measurably below the performance . . . [ordinarily expected] of fallible lawyers?'"; and (3) "If ineffective assistance of counsel is found to exist, 'is . . . there . . . reasonable probability that, absent the errors, the fact finder would have had a reasonable doubt respecting guilt?'"[23]

Applying *Polk* to appellant's claim of appellate IAC, the court held that appellate counsel should have waited longer than four days to give appellant an opportunity to respond, but since the appellant never responded to the letter (not within or after twenty days), appellant suffered no prejudice and hence there was no ineffective assistance of appellate counsel.[24] Though clearly not a preferred method of representation, the court's holding supports the proposition that appellate counsel may effectively represent a client without ever engaging him in dialogue.

It does much more harm than good. Your collateral damage is very heavy.[25]

The CAAF next turned to the issue of whether the accused's plea was involuntary and therefore failed to meet the requirements of RCM 910(d).[26] Appellant argued that because he was not informed by his trial defense counsel or the military judge that persons convicted by military courts of possessing child pornography would have to register as sex offenders, his plea was not voluntary.[27] Appellant's argument raised the issue of what effects collateral consequences of

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[16] *Id.* at 453.

[17] COOL HAND LUKE (VHS Warner Home Video 1967).

[18] *Miller*, 63 M.J. at 455.

[19] *Id.* at 456.

[20] *Id.*

[21] *Id.* at 455-56 (citing Strickland v. Washington, 466 U.S. 668, 687 (1984)).

[22] 32 M.J. 150, 153 (C.M.A. 1991)).

[23] *Miller*, 63 M.J. at 456 (quoting *Polk*, 32 M.J. at 153) (internal citations omitted).

[24] *Id.*

[25] Former Secretary of Defense Caspar Weinberger, Brainy Quote, *available at* http://www.brainyquote.com/quotes/authors/c/caspar_weinberger.html (last visited Oct. 1, 2007).

[26] MCM, *supra* note 3, R.C.M. 910(d) (requiring that a plea be voluntary).

[27] *Miller*, 63 M.J. at 456.

criminal activity have on a guilty plea. A collateral consequence is a penalty for committing an offense over and above those adjudged in a criminal sentence.[28] In analyzing Miller's collateral consequence of having to register as a sex offender, the court looked to *United States v. Bedania* and *United States v. Williams* for guidance:

> [W]hen collateral consequences of a court-martial conviction -- such as administrative discharge, loss of a license or a security clearance, removal from a military program, failure to obtain promotion, deportation, or public derision and humiliation -- are relied upon as the basis for contesting the providence of a guilty plea, the appellant is entitled to succeed only when the collateral consequences are major and the appellant's misunderstanding of the consequences (a) results foreseeably and almost inexorably from the language of a pretrial agreement; (b) is induced by the trial judge's comments during the providence inquiry; or (c) is made readily apparent to the judge, who nonetheless fails to correct that misunderstanding. In short, chief reliance must be placed on defense counsel to inform an accused about the collateral consequences of a court-martial conviction and to ascertain his willingness to accept those consequences.[29]

The court found in the instant case that the accused's apparent misunderstanding about his obligation to register as a sex offender did not arise from the terms of the pretrial agreement, nor did it arise from comments of the military judge, nor was it apparent to the military judge during providence.[30] Accordingly, there was no basis to find the accused's plea involuntary.[31]

Having addressed Miller's claims of ineffective assistance of appellate counsel and lack of a provident plea, CAAF next analyzed Miller's claim of IAC for his *trial* defense counsel's apparent failure to warn him that he would be required to register as a sex offender. Relying on *Polk*,[32] and reviewing the decisions of several federal circuits, the CAAF found that "Appellant did not receive ineffective assistance of trial defense counsel."[33] Conceding that "the requirement of registering as a sex offender is a serious consequence of a conviction," the court nonetheless reasoned that such mandatory registration "is a consequence that is separate and distinct from the court-martial process. This consequence is a result of, but not part of, the court-martial process."[34] Therefore, failure of trial defense counsel to inform his client of these collateral consequences did not rise to the level of IAC.[35]

I haven't dismissed you yet.[36]

Although the court had disposed of all the issues raised by Miller, it wasn't finished. Though not finding IAC, the court qualified its opinion by stating that "information of this type may have been helpful to Appellant in understanding the consequences of his guilty plea, in accepting those consequences, and in pleading guilty."[37] Sketching a brief history of sex offender registration requirements in state and federal law, the court observed that every state and the federal government require sex offender registration.[38] The court also noted that a Department of Defense (DOD) Instruction, 1325.7, identifies those offenses which require mandatory registration.[39] Though not requiring defense counsel to become knowledgeable about the "plethora" of state sex offender laws, the court did express an expectation that counsel will be aware of the federal registration statute as well as the DOD Instruction.[40] The court highlighted that registration requirements may affect an

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[28] *Id.* at 457 (citing BLACK'S LAW DICTIONARY 278 (8th ed. 1999)).

[29] *Id.* (quoting United States v. Bedania, 12 M.J. 373, 376 (C.M.A. 1982); United States v. Williams, 53 M.J. 293, 296 (2000)).

[30] *Id.*

[31] *Id.* at 457.

[32] *Polk*, 32 M.J. 150, 153 (C.M.A. 1991).

[33] *Miller*, 63 M.J. at 457-58.

[34] *Id.*

[35] *Id.* at 458.

[36] A FEW GOOD MEN (Columbia Pictures 1992).

[37] *Miller*, 63 M.J. at 458.

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

[39] *Id.* at 459 (citing U.S. DEP'T OF DEFENSE, INSTR. 1325.7, ADMINISTRATION OF MILITARY CORRECTIONAL FACILITIES AND CLEMENCY AND PAROLE AUTHORITY enclosure 27 (17 July 2001)).

[40] *Id.*

accused's decisions before and at trial and will certainly impose legal obligations after conviction.[41] In light of the impact a registration requirement has on a prospective convict and the fact that it is not onerous for a counsel to be generally aware that certain offenses trigger registration requirements, the court created a new rule.

The New Rules

Effective ninety days after the opinion,[42] military counsel are required to advise an accused prior to trial that conviction of a triggering offense imposes a registration requirement.[43] Counsel are required also to state on the record that they have done so.[44] The CAAF actually used the word "should," not the word "required," and noted that failure to notify an accused would not be per se ineffective assistance of counsel.[45] The court stated that it would "carefully consider" such a failure in evaluating allegations of ineffective assistance.[46] The court sought to fulfill two functions by imposing the rule. First, it would "promote a professional dialogue" between the accused and counsel by requiring discussion on a legal issue which is probably new to the accused.[47] Second, the court sought to give an accused a full opportunity to consider the impact of registration requirements on his or her decisions at trial.[48]

J'accuse![49] *The Dissenting Concurrence*

Judge Crawford concurred in the result, agreeing that the failure of counsel to advise of the registration requirements did rise to the level of ineffective assistance of counsel.[50] However, Judge Crawford was troubled by the court's "continuing pattern of engaging in judicial rulemaking by usurping the authority of the President as delegated to him by Congress pursuant to Article 36(a), Uniform Code of Military Justice."[51] She viewed the new requirement as a judicial overstretch which violated the separation of powers doctrine.[52]

Noting the majority's lack of specifics regarding how the rule should be implemented,[53] Judge Crawford examined many significant collateral consequences that counsel are not required to warn an accused of prior to entry of plea.[54] She also noted that the American Bar Association suggests that defense counsel advise a defendant of the collateral consequences of his plea, but does not require this advice.[55] Judge Crawford closed by calling the new rule in *Miller* "a step down the slippery slope of judicial rulemaking [that] lays the foundation for creating a future laundry list of potential collateral consequences that military judges and defense counsel will have to discuss with an accused before his or her plea is accepted as provident or voluntary."[56] Rightly or not, however, the new rule is here.

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[41] *Id.*

[42] *Id.* The case was decided 29 August 2006 and the rule became effective 27 November 2006. CITE for this statement.

[43] *Id.*

[44] *Id.*

[45] *Id.*

[46] *Id.*

[47] *Id.*

[48] *Id.*

[49] Taken from the title of Emile Zola's open letter to French President Felix Faure regarding the so-called Dreyfus Affair. Wikipedia, *Dreyfus affair*, http://en.wikipedia.org/wiki/Dreyfus_Affair (last visited Oct. 1, 2007).

[50] *Miller*, 63 M.J. at 460.

[51] *Id.* at 459 (citing 10 U.S.C. § 836(a) (2000)).

[52] *Id.* at 460.

[53] *Id.* at n.3. "The majority opinion . . . does not address the requirements for trial defense counsel to advise an accused of the consequences of a conviction for one of the enumerated offenses in the event there is a contested case." *Id.*

[54] *Id.* at 460. These include deportation, loss of professional license, loss of vocational license (piloting), exposure to consecutive sentences, other immigration consequences, loss of franchise rights (voting), loss of eligibility to work as a civil servant, loss of freedom of travel, diminished access to firearms, even loss of a driver's license. *Id.*

[55] *Id.* at 461.

[56] *Id.* at 462.

Bad Initiative: *United States v. Dobrava*[57] and the Limits of Counsel Discretion

As for now, I'm in control here.[58]

Just as the CAAF engaged in rule making in *United States v. Miller*, the Army appellate court came close to undertaking some rulemaking of its own in the case of *United States v. Dobrava*.[59] Consistent with his pleas, a military judge sitting as a court-martial convicted Staff Sergeant (SSG) Dobrava of larceny and making a false official statement.[60] According to appellant's affidavit, as the government gave its sentencing argument, defense counsel turned to appellant and said, "Oh I am sorry, I forgot to put you on for your unsworn statement."[61] The court sentenced SSG Dobrava to five months confinement, a bad conduct discharge, and reduction to the grade of E-1.[62] The convening authority approved all elements of the sentence except the five months confinement, which he reduced to three months per the terms of a pretrial agreement.[63]

On appeal to the ACCA, SSG Dobrava alleged ineffective assistance of counsel for his defense counsel's failure to put him on the stand for an unsworn statement when he wanted to do so.[64]

In an affidavit to the ACCA, the trial defense counsel responded by claiming that the omission was "unplanned, but not inadvertent."[65] Defense counsel alleged in his affidavit that he had advised SSG Dobrava early in the representation to prepare an unsworn statement, but that he saw no such statement until he noticed his client writing notes on an index card during a break in the sentencing proceeding.[66] Concerned that an excellent mitigation case would be "diluted" by a thoughtless and hastily written unsworn statement, counsel resolved to omit the unsworn statement without discussing the matter with SSG Dobrava.[67] Defense counsel thereby sought to acquit himself by running under the broad umbrella of judicial deference usually accorded to counsel's tactical decisions.

Distinguishing an attorney's tactical decisions from those decisions personal to an accused, the court quoted the Supreme Court's decision in *Florida v. Nixon*:

> [C]ertain decisions regarding the exercise or waiver of basic trial rights are of such moment that they cannot be made for the defendant by a surrogate. *A defendant . . . has the ultimate authority to determine whether* to plead guilty, waive a jury, *testify in his or her own behalf*, or take an appeal. Concerning those decisions, an attorney must both consult with the defendant and obtain consent to the recommended course of action.[68]

The court also cited CAAF's holding in *United States v. Marcum*.[69] In *Marcum*, with his client being tried in absentia, counsel submitted a draft unsworn statement authored by the accused before his departure.[70] Finding this impermissible, CAAF held that the "decision to make an unsworn statement is personal to the accused." [71]

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[57] *Dobrava*, 64 M.J. 503 (Army Ct. Crim. App. 2006).

[58] Secretary of State Alexander Haig, in response to a reporter's question as to who was in charge of the White House in the wake of the 30 March 1981 assassination attempt on President Ronald Reagan. Wikipedia, *Alexander Haig*, http://en.wikipedia.org/wiki/Alexander_Haig (last visited Oct. 1, 2007).

[59] *Dobrava*, 64 M.J. 503.

[60] *Id.*

[61] *Id.* at 504.

[62] *Id.* at 503.

[63] *Id.* at 503-04.

[64] *Id.* at 504.

[65] *Id.* at 505.

[66] *Id.* at 504.

[67] *Id.* at 504-05.

[68] *Id.* at 506 (quoting Florida v. Nixon, 543 U.S. 175, 187 (2004)) (alteration in original) (internal citations omitted).

[69] *Marcum*, 60 M.J. 198 (2004).

[70] *Id.* at 208-09.

[71] *Id.*

Questioning why defense counsel did not have time during a break in the proceedings to discuss an unsworn statement with his client, or why he did not ask the judge for a recess to do the same, the ACCA found that counsel's "performance at sentencing . . . fell below the objective standard of reasonableness."[72]

Prejudice

The court then turned to whether counsel's deficient performance prejudiced the appellant. Appellant asserted that he wanted to use the unsworn statement to talk about his family, his future plans, his contrition, and desire to remain in the service.[73] The court speculated that precisely such expressions coupled with the favorable sentencing testimony and an exemplary service record may have persuaded the military judge to shorten his sentence or even permit retention in the Army.[74] Accordingly, the court found that the appellant met his burden of showing ineffective assistance of counsel, and set aside the sentence.[75]

The New Rules: Part II

While CAAF required a bold step for defense counsel with regard to collateral matters, the Army court encouraged greater caution from trial courts and defense counsel in the area of unsworn statements. In a closing footnote, the court encouraged counsel to memorialize any decision by the accused not to offer unsworn testimony in writing and to attach such a memorandum to the record as an appellate exhibit.[76] The court further encouraged military judges to be alert to an accused's failure to offer unsworn remarks and conduct an inquiry to ensure the waiver was knowing and intelligent.[77] The Army court however, declined to make its guidance mandatory and did not suggest that failure to do so would trigger "careful consideration" of any particular outcome.[78] While the impact of ACCA's guidance on defense practice may be unclear, it is very clear that no one but the accused may waive his right to make an unsworn statement.[79]

United States v Edmond:[80] *Prosecutorial Overreach*

Your Honor, the witness has rights[81] *(and so does the accused!)*

In *United States v. Edmond*, CAAF addressed improper conduct by both trial and defense counsel.[82] Staff Sergeant Edmond was a supply sergeant accused of, *inter alia*, wrongful disposition of military property and conspiracy to commit larceny.[83] He was specifically accused of ordering cell phones via the unit supply system and then unlawfully converting those cell phones to his private use.[84] He was alleged to have conspired with Derrick McQueen, a Soldier who had left the service via administrative discharge prior to Edmond's trial.[85] Staff Sergeant Edmond's trial defense counsel located

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[72] *Dobrava*, 64 M.J. at 506.

[73] *Id.*

[74] *Id.* at 507. The ACCA found IAC despite the fact that the pre-trial agreement reduced the adjudged confinement by forty percent, and despite the fact that the convening authority deferred reduction in rank and waived automatic forfeitures for six months. *Id.* at 503-04. It also is unclear why ACCA issued a published opinion in this case when, on appeal, the government did not oppose a sentencing rehearing for appellant. *Id.* at 505.

[75] *Id.* at 508.

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

[77] *Id.*

[78] *Id.*

[79] *Id.* at 506.

[80] *Edmond*, 63 M.J. 343 (2006), *pet. for rev. granted*, 64 M.J. 397 (2007).

[81] A FEW GOOD MEN (Columbia Pictures 1992).

[82] *Edmond*, 63 M.J. at 344-45.

[83] *Id.*

[84] *Id.* at 346.

[85] *Id.*

McQueen and interviewed him. Despite McQueen telling Edmond's defense counsel that "he did not believe his testimony could help Edmond and that he did not want to testify," defense counsel nonetheless subpoenaed McQueen for trial.[86] On the day of trial, McQueen arrived and was interviewed by the trial counsel, who arranged a meeting with McQueen, himself and the Special Assistant U.S. Attorney (SAUSA) for the staff judge advocate's office.[87] While each party to the meeting recounted a slightly different version of the meeting, it is clear that the trial counsel and the SAUSA told McQueen that if he testified in a way that corroborated SSG Edmond's defense, he would be committing perjury.[88] The SAUSA later wrote in an affidavit that she told McQueen that "the government would seek justice" if McQueen testified.[89] Trial counsel told McQueen that he "could either testify or not testify."[90] After McQueen expressed an intent to leave, trial counsel told him he was "free to go."[91] McQueen immediately left without speaking to the accused's defense counsel.[92]

At the conclusion of the defense case, trial and defense counsel entered into a stipulation of fact stating that, if McQueen was called to testify, he would invoke his privilege against self-incrimination.[93] Trial counsel later argued to the members that they could not hear from McQueen whether there was a conspiracy between him and the accused because McQueen had invoked his right against self-incrimination.[94]

On appeal to ACCA, SSG Edmond alleged prosecutorial misconduct and ineffective assistance of counsel.[95] The Army court commissioned a *DuBay* hearing,[96] which unearthed the facts as expressed above, and found no prosecutorial misconduct or ineffective assistance of counsel.[97] The ACCA therefore affirmed the findings and sentence.[98]

Prosecutorial Misconduct

The CAAF looked first to the *DuBay* finding that trial counsel's conversation with McQueen was a good faith attempt to inform and protect McQueen.[99] The court reviewed a holding by the Court of Appeals for the Ninth Circuit, which found that warnings for perjury are generally only justified when a prosecutor has a strong basis for believing there is a "direct conflict between the witness' proposed testimony and her own prior [sworn] testimony."[100] The court then looked to the record. In his *DuBay* testimony, trial counsel cited McQueen's demeanor and the fact that his testimony was in conflict with two government witnesses as evidence that he would commit perjury.[101] The court pointed out that all three witnesses, McQueen and the two government witnesses, might all testify truthfully and be in conflict due to differing memories, understandings, or interpretations of past events.[102] The court then looked at the nature of trial counsel's "advice" to McQueen. The trial counsel had said "I know this is a lie . . . I am going to make sure the SAUSA sits in and listens to you testify to that . . . ."[103] The court found a direct parallel between these facts and the Ninth Circuit holding cited above. The federal court held that

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[86] *Id.*

[87] *Id.*

[88] *Id.*

[89] *Id.* at 347. The SAUSA's affidavit also made it clear that McQueen was told that he was not being pressured not to testify but "'as officers of the court, [they] merely wanted to make sure he was informed before he testified.'" *Id.*

[90] *Id.* at 346.

[91] *Id.*

[92] *Id.*

[93] *Id.* at 347.

[94] *Id.* at 352.

[95] *Id.* at 345.

[96] United States v. Dubay, 37 C.M.R. 411 (C.M.A. 1967).

[97] *Edmond*, 63 M.J. at 345.

[98] *Id.*

[99] *Id.* at 348-49.

[100] *Id.* (quoting United States v. Vavages, 151 F.3d 1185, 1190 (9th Cir. 1998)).

[101] *Id.* at 348.

[102] *Id.* at 349.

[103] *Id.* The Special Assistant U.S. Attorney (SAUSA) would be responsible for trying civilians on base.

when a prosecutor combines a standard perjury admonition with a clear statement of belief that proposed testimony would be a lie, the prosecutor has substantially interfered with the witness's decision to testify.[104] The court found the *DuBay* judge's findings to be clearly erroneous and found that the trial counsel's actions unlawfully dissuaded a material defense witness from testifying.[105] The court hastened to add that it does not seek to discourage a trial judge or counsel from advising witnesses of the penalty for testifying falsely, but that the warning cannot be emphasized to the point where they threaten or intimidate a witness.[106]

The court found ample references in the record to identify trial counsel as being responsible for giving McQueen an option to leave, and viewed this as "problematic" as there is no ambiguity in RCM 703's requirements[107] that the defense be entitled to compulsory process.[108]

Ineffective Assistance of Counsel

The court, having found prosecutorial misconduct, declined to examine prejudice to the accused caused by that misconduct without first visiting the issue of ineffective assistance of counsel. The court in effect found it difficult to parse out the impact of the prosecutorial misconduct from the impact of defense counsel's "acquiescence and inaction."[109] At the *DuBay* hearing, Edmond's defense counsel admitted that he did not speak to McQueen on the day of trial, and conceded that he "probably should have."[110] The CAAF found this concession "striking in light of [defense counsel's] stated belief that McQueen had testimony that was favorable to his client, even if he could not remember what that testimony would have been."[111] The CAAF also found this concession disturbing in light of McQueen's *DuBay* testimony that would have corroborated the accused's version of events.[112] Therefore, CAAF held that defense counsel's failure to interview McQueen, and subsequent entry into the stipulation of fact, demonstrated deficient performance, when he could have taken simple steps to secure the testimony of a witness he had previously deemed relevant and necessary to his defense.[113]

Prejudice

The court then looked to the combined prejudice arising from the prosecutorial misconduct and the ineffective assistance of counsel. McQueen's testimony would have directly refuted two charges before the court, larceny and conspiracy.[114] The court chided defense counsel for not just failing to procure McQueen's testimony, but also for entering "the stipulation of fact into evidence, thereby placing before the members the information that Edmond's coconspirator could not testify without incriminating himself," thus implying that Edmond was also guilty.[115] Trial counsel's comment during closing that the panel could not hear from McQueen because he had invoked his right against self-incrimination served to exacerbate defense counsel's mistakes.[116] Because hearing McQueen's testimony may have resulted in a different verdict, the court found prejudice to the accused and set aside findings for the larceny and conspiracy charges, as well as the sentence.[117]

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[104] *Id.* (citing *Vavages*, 151 F.3d at 1190)).

[105] *Id*.

[106] *Id.* at n.5.

[107] MCM, *supra* note 3, R.C.M. 703.

[108] *Id.* at 350.

[109] *Id.*

[110] *Id.* at 351.

[111] *Id.*

[112] *Id.*

[113] *Id.*

[114] *Id.* at 352.

[115] *Id.*

[116] *Id.*

[117] *Id.*

United States v. Regan[118]

I'm Gonna Make Her an Offer She Cannot Refuse

In *United States v. Regan*, the CAAF addressed whether mandatory inpatient drug treatment results in pretrial confinement credit under RCM 305(k).[119] After testing positive a third time for cocaine, the accused's acting commander gave her an ultimatum: go to inpatient drug treatment, or go to pretrial confinement.[120] The accused selected treatment but after three weeks in the program was disenrolled and placed in pretrial confinement.[121] While enrolled, she was only permitted to leave the facility with escorts, there were secure doors to the facility, she was limited in her visits to the gift shop, and was denied a three hour pass to eat dinner with her daughter.[122] The trial judge awarded twenty-one days of *Mason* credit[123] for her twenty-one days in the facility, but denied her request for additional credit under RCM 305(k).[124] Though awarding *Mason* credit because the accused had "no choice" between inpatient treatment and confinement, the trial judge denied 305(k) credit, finding that the inpatient facility's restrictions "were for legitimate medical reasons." [125]

On appeal to CAAF,[126] the accused sought additional pretrial confinement credit under the provisions of RCM 305.[127] Rule for Court-Martial 305(k) authorizes confinement credit for violations of RCM 305's provisions, such as the requirement for a forty-eight hour review by a neutral and detached officer, the seventy-two hour commander's review, and the seven day magistrate's review.[128] Rule for Court-Martial 305(k) credit is only available for restriction tantamount to confinement when the conditions of such restrictions constitute actual physical restraint.[129] The CAAF noted that, while the accused was subject to physical restraint such as locked doors and constant escort, nothing in her restraint distinguished her from any other inpatient.[130] The facility treated her as a patient and not a prisoner.[131] The court also noted that the accused wanted this treatment and that she did not remain in the facility against her will.[132] Accordingly, the CAAF found no error in declining to give appellant additional RCM 305(k) credit.[133]

Zedner v. United States:[134] *Hurry Up and Wait*

You can't lose what you don't own.

The Speedy Trial Act of 1974 generally requires a federal criminal trial to begin within seventy days after a defendant is charged or makes an initial appearance.[135] The Act is similar to RCM 707[136] in that it allows for a number of authorized

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[118] *Regan*, 62 M.J. 299 (2006).

[119] *Id.*

[120] *Id.* at 300.

[121] *Id.*

[122] *Id.* at 301.

[123] United States v. Mason, 19 M.J. 274 (C.M.A. 1985) (day-for-day credit is given for pretrial restriction equivalent to confinement).

[124] *Regan*, 62 M.J. at 301. Rule for Courts-Martial 305(k) provides for "administrative credit against the sentence adjudged for any confinement served as a result of" noncompliance with other provisions of RCM 305. MCM, *supra* note 3, R.C.M. 305(k).

[125] *Regan*, 62 M.J. at 301.

[126] The Air Force Court of Criminal Appeals had affirmed the findings and sentence. *Id.* at 299.

[127] *Id.*

[128] MCM, *supra* note 3, R.C.M. 305.

[129] *Id.*; *see also* United States v. Rendon, 58 M.J. 221, 224-25 (2003). To come within the scope of R.C.M. 305, then, "the conditions or terms of the restriction constitute physical restraint depriving an accused of his or her freedom." *Id.* at 224.

[130] *Regan*, 62 M.J. at 302.

[131] *Id.*

[132] *Id.*

[133] *Id.*

[134] *Zedner*, 126 S. Ct. 1976 (2006).

[135] 18 U.S.C. §§ 3161–3174 (2000).

delays to "stop" the speedy trial clock.[137] Among the reasons for delay under the Speedy Trial Act is a catch-all, authorizing a federal judge to authorize delay whenever the "ends of justice" outweigh the public's and defendant's interest in a speedy trial.[138] Upon successful motion, a district court must dismiss the charges, but has discretion to dismiss with or without prejudice.[139]

In *Zedner*, the defendant was charged with fraud of a public institution for attempting to pass $10 million dollars in bonds of poor quality.[140] At the district court's third status conference, the judge agreed to grant the defendant another continuance, but only if the defendant would waive his Speedy Trial Act claims "for all time."[141] Once the judge granted the continuance, the defendant's trial was repeatedly delayed.[142] The defendant was ultimately tried seven years after his original indictment.[143] The district court denied defendant's speedy trial motion, citing his earlier "all time" waiver.[144]

The Second Circuit upheld the conviction on the grounds that, while a defendant's waiver of speedy trial rights may be ineffective because of the public interest served by compliance with the act, an exception is justified when the delay is occasioned in part by the defendant's conduct.[145] The court likely was referring to delay caused in part by defendant's bizarre conduct and the required subsequent inquiry into his competence.[146]

Disagreeing with both lower courts, the Supreme Court began its analysis by noting that the Speedy Trial Act contains no opt-out provision for a defendant.[147] Rather than protecting the rights solely of the defendant, the Court emphasized the Act's concomitant protection of the public's right to speedy trials.[148] Contrasting a prospective waiver with the retrospective waiver permitted by 18 U.S.C. § 3161(a)(2), the Court found that, unlike a prospective waiver, the prosecution and court do not know whether a defendant will retrospectively waive his speedy trial rights, and thus there is incentive even with retrospective waivers to bring a case to trial.[149] According to the Court, the Act also specifies that speedy trial violations must be identified prior to trial to avoid such defense gamesmanship as nullifying a long and costly trial in its late stages, only after it has gone poorly for the defense.[150]

Finding a 91-day delay not excludable from the speedy trial clock despite defendant's prospective speedy trial waiver, the Court reversed the Second Circuit and remanded to the district court, with instructions for the district court to decide whether the Speedy Trial Act violation warranted dismissal of the case with or without prejudice.[151]

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[136] MCM, *supra* note 3, R.C.M. 707. Unlike the Speedy Trial Act's seventy day requirement, RCM 707(a) requires the government to bring an accused to trial within 120 days of either preferral or imposition of restraint. *Id.*

[137] *See, e.g.*, 18 U.S.C. § 3161(h)(1) (delay resulting from other proceedings regarding the defendant); *id.* § 3161(h)(3) (unavailability of defendant or essential witness); *id.* § 3161(h)(4) (defendant unable or incompetent to stand trial). Rule for Court-Martial 707((b)(3)(E) excludes periods during which "appellate courts have issued stays in the proceedings," when the accused is "absent without authority," when the accused is incompetent or in the custody of the Attorney General, and when the military judge or convening authority authorize pretrial delays. MCM, *supra* note 3, R.C.M. 707(b)(3)(E).

[138] 18 U.S.C. § 3161(h)(8).

[139] *Zedner*, 126 S. Ct. at 1984.

[140] Some bonds were issued by the "Ministry of Finance of the U.S.A." and contained misspellings like "Onited States," "Cgicago," and "Dhtladelphla (Philadelphia)." *Id.* at 1981.

[141] *Id.* "Petitioner's counsel responded that the defense would 'waive for all time.'" *Id.* At the court's request, both the defendant and his counsel also signed a written waiver. *Id.* at 1982.

[142] Among the reasons for delay was the defendant's attempt to subpoena the President, the Secretary of the Treasury, and late Chinese leader "Chiang Kai-Shek." *Id.*

[143] *Id.* at 1983.

[144] *Id.* at 1982-83.

[145] *Id.* at 1983.

[146] The petitioner was at one point ruled incompetent to stand trial and hospitalized for several months after which he was "found to be delusional but competent to stand trial and he was released." *Id.* at 1982-83.

[147] *Id.* at 1985.

[148] *Id.* "That public interest cannot be served, the Act recognizes, if defendants may opt out of the Act entirely." *Id.*

[149] *Id.* at 1986.

[150] *Id.* at 1986-87.

[151] *Id.* at 1990. Rule for Courts-Martial 707 also provides a trial judge discretion to dismiss a case for a speedy trial violation with or without prejudice. MCM, *supra* note 3, R.C.M. 707(d)(1).

Application to the Military

Though RCM 707, rather than the Speedy Trial Act, applies to military trials, *Zedner* may by analogy prevent prospective waivers of RCM 707.[152] Rule for Court-Martial 705(c)(1)(B) prohibits the waiver of speedy trial rights as part of a pretrial agreement.[153] So the issue is moot, since no accused would prospectively waive his right to speedy trial without some inducement from the government. Or would he? In 1994, the Court of Military Appeals (COMA) addressed a related issue in *United States v. Montanino*.[154] Facing court-martial, Specialist (SPC) Montanino began working with a military defense counsel who subsequently deployed to the Sinai peninsula.[155] Prior to his arraignment, SPC Montanino declined to have a new military defense counsel assigned and instead requested a delay until the return of his original defense counsel, who was expected to return in approximately three months.[156] Specialist Montanino's counsel ultimately returned within three months, and the trial proceeded.[157] Specialist Montanino moved to dismiss his case prior to trial in accordance with RCM 707.[158] The trial court declined to grant his motion, holding the Trial Defense Service responsible for the delay.[159]

In affirming the trial court's decision,[160] the COMA pointed out that the appellant could have requested his detailed counsel *and* demanded speedy trial, which would have required the government to return the detailed defense counsel or prove that he was not reasonably available.[161] Because "appellant voluntarily agreed to the delay, however," the court found no speedy trial violation.[162]

In a *Montanino* scenario, *Zedner* raises the question of what if counsel had not returned in a timely fashion. Had Montanino's counsel been deployed for five, six, or eight months, particularly if the expectation had been three, would *Montanino* still stand for the proposition that the accused's request for a delay tolled the speedy trial clock? The author submits the answer is no. At a minimum the government would have been required to periodically extend the delay, perhaps thirty days at a time. The impact of *Zedner* is to perhaps prohibit an accused from agreeing to a blanket delay until the government meets some condition within its control.[163]

Conclusion

The 2006 term had some important developments in the areas of ineffective assistance of counsel, prosecutorial misconduct, pretrial restraint, and speedy trial The Supreme Court ruled that a defendant cannot prospectively "forever waive" his speedy trial rights.[164] The CAAF expanded the zone of competence required of defense counsel, requiring them to be conversant in the area of sex offender registration,[165] told prosecutors to beware of trying to dissuade a witness from

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[152] MCM, *supra* note 3, R.C.M. 707.

[153] *Id.* at R.C.M. 707(c)(1)(B).

[154] *Montanino*, 40 M.J. 364 (C.M.A. 1994).

[155] *Id.*

[156] *Id.* at 365. The government in the case requested that the defense counsel be declared unavailable per Army Regulation 27-10, mandating the detailing of substitute counsel. The military judge declined by stating:

> The U.S. government sent him there, and . . . can bring him back. Until the U.S. government makes some effort to get him back and fails in that effort, I'm not prepared to say that . . . [Captain S is] unavailable and that substitute counsel needs to be appointed. . . . I'm not prepared to say that he's unavailable because I'm not sure anyone here has told me that if requested, that he wouldn't be returned for whatever it takes to try the case. . . .

Id.

[157] *Id.*

[158] *Id.*

[159] *Id.*

[160] The Army Court of Military Review also had affirmed the trial court. *Id.* at 364.

[161] *Id.* at 366.

[162] *Id.* Judge Wiss dissented from the decision on the grounds that it was unreasonable to expect a fundamentally unrepresented accused (as his counsel was in Egypt, while he was in Fort Drum, NY) to have known and exercised his rights. *Id.*

[163] *E.g.*, the return of a military witness, or counsel.

[164] Zedner v. United States, 126 S. Ct. 1976 (2006).

[165] United States V. Miller, 63 M.J. 452 (2006).

testifying,[166] and distinguished illegal pretrial confinement from pretrial restriction otherwise entitled to sentence credit.[167] Finally, the ACCA suggested that the waiver of an accused's unsworn statement be memorialized as an appellate exhibit, and that the military judge discuss such a waiver with the accused on the record.[168]

[166] United States v. Edmond, 63 M.J. 343 (2006), *pet. for rev. granted*, 64 M.J. 397 (2007).

[167] United States v. Regan, 62 M.J. 299 (2006).

[168] United States v Dobrava, 64 M.J. 503, 508 n.2 (Army Ct. Crim. App. 2006).

Confronting the Mortal Enemy of Military Justice: New Developments in Unlawful Command Influence

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Introduction

The past term brought three important cases from the Court of Appeals for the Armed Forces (CAAF) to the area of unlawful command influence.[1] They serve as a reminder that unlawful command influence is still "the mortal enemy of military justice,"[2] and that all military justice practitioners must be vigilant to prevent even the appearance of impropriety in this area.[3] These cases also illustrate once again that the CAAF is willing to address issues of unlawful command influence with severe and even drastic remedies, including setting aside the findings and sentence with prejudice.[4]

Improper Outside Influence on Panel Members—Command Policy in the Deliberation Room

United States v. Pope[5]

Staff Sergeant (SSG) Pope was an Air Force recruiter involved in unprofessional conduct with three prospective applicants.[6] His conduct consisted of inappropriate language and touching both inside and outside the recruiting office.[7] Contrary to his pleas, SSG Pope was convicted of violating a lawful general regulation, maltreatment and assault.[8] During the sentencing phase of SSG Pope's trial, the government moved to introduce a letter signed by Brigadier General Peter U. Sutton, Commander of the Air Force Recruiting Service, admonishing recruiters not to have unprofessional relationships with applicants.[9] The purpose of introducing the letter at that point was to demonstrate "the aggravating nature of Appellant's conduct because he had knowledge of what standard of conduct was expected of recruiters, and notwithstanding, chose to conduct himself otherwise."[10] The defense counsel objected on the grounds of Rule for Courts-Martial (R.C.M.) 403[11] and argued that the letter impermissibly introduced command policy into the sentencing process.[12] The military judge disagreed and admitted the letter, noting that the letter did not seem to advocate a policy of punitive separation from the Air Force for

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[1] United States v. Pope, 63 M.J. 68 (2006); United States v. Harvey (*Harvey II*), 64 M.J. 13 (2006); United States v. Lewis, 63 M.J. 405 (2006).

[2] *Lewis*, 63 M.J at 407 (quoting United States v. Gore, 60 M.J. 178, 178 (2004) (quoting United States v. Thomas, 22 M.J. 388, 393 (C.M.A. 1986))).

[3] "The 'appearance of unlawful command influence is as devastating to the military justice system as the actual manipulation of any given trial.'" *Id.* (quoting United States v. Simpson, 58 M.J. 368, 374 (2003) (quoting United States v. Stoneman, 57 M.J. 35, 42-43 (2002))).

[4] *See id.* at 417.

[5] *Pope*, 63 M.J. 68 (2006).

[6] *Id.* at 70-71.

[7] *Id*.

[8] *Id*. at 69.

[9] *Id*. at 75. Paragraph four of the letter stated:

> Remember, "integrity first" and "service before self" are two of our core values. These two types of misconduct violate those principles. The citizens of this country demand that we treat our applicants respectfully, equitably, and ethically. This command and the U.S. Air Force will accept nothing less. If you choose to ignore these important rules for the sake of your own pleasure or esteem, you should not be surprised when, once you are caught, *harsh adverse action follows.*

Id. at 73 (emphasis added).

[10] *Id*. at 75.

[11] MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 403 (2005) [hereinafter MCM].

[12] *Pope*, 63 M.J. at 75 ("Defense counsel's specific concern was the statement seemingly endorsed 'harsh adverse action.'").

these offenses.[13] Staff Sergeant Pope was ultimately sentenced to fifteen months confinement, total forfeitures, reduction to E-1, and a bad-conduct discharge.[14] The Air Force Court of Criminal Appeals affirmed in an unpublished opinion.[15]

Before the CAAF, SSG Pope claimed, in part, that it was error for the military judge to admit (over defense objection) the letter offered at sentencing which argued Air Force core values and endorsed "harsh adverse action" for those who committed his offenses.[16] The court held that admitting the letter raised the appearance of improper influence because it conveyed the command's view that harsh action should be taken against an accused.[17] Moreover, the letter was introduced without the benefit of a limiting instruction.[18]

In discussing the letter the court noted that, "A policy directive may be promulgated to improve discipline; however, it must not be used as leverage to compel a certain result in the trial itself."[19] "Thus, we have condemned references to command policies or views which in effect bring the commander into the deliberation room."[20] Such a practice raises the specter of command influence,[21] and in this case the court was not convinced beyond a reasonable doubt that the members were not influenced by the letter.[22] The CAAF set aside the sentence with a rehearing on sentence authorized.[23]

Pope has several lessons for military justice practitioners. First, staff judge advocates and government representatives should carefully screen policy letters for language implicating military justice, especially language insinuating certain results in disposition of offenses or sentence at courts-martial.[24] Second, government counsel should contemplate the utility of introducing this type of evidence at trial, especially for aggravation purposes at sentencing. The trial counsel's role is to do justice, and introducing such policy statements unnecessarily raises the specter of unlawful command influence.[25] Third, the Court in *Pope* never specifically held that this language constituted unlawful command influence, or even that the military judge abused her discretion by admitting the letter.[26] Rather, the CAAF found the effect of this policy letter "troubling," and reversed the sentence to avoid the appearance of command influence.[27] This is a clear signal that the CAAF will cast a wide net in this area, and any small benefit from this type of aggravation is easily outweighed by the chance of reversal.

Military Judges also have much to think about. First, the CAAF's approach in this case is unique in recent command influence jurisprudence. They avoided using the *Biagase* framework, under which military judges have clear guidance concerning raising and litigating issues of unlawful command influence.[28] Does this mean that in the area of policy letters or command policy guidance that military judge's need not apply *Biagase*? Recent cases suggest otherwise, and military judges may want to view this case as an anomaly for that purpose.[29] This discussion leads to another difficult issue for military

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[13] *Id.*

[14] *Id.* at 69.

[15] *Id. See* United States v. Pope, No. 34921, 2004 CCA LEXIS 204 (A.F. Ct. Crim. App. Aug. 30, 2004).

[16] *Pope*, 63 M.J. at 69.

[17] *Id.* at 76 (quoting United States v. Hawthorne, 22 C.M.R. 83, 87 (C.M.A. 1956) ("This Court has consistently held that any circumstance which gives even the appearance of improperly influencing the court-martial proceedings against the accused must be condemned.").

[18] *Id.*

[19] *Id.* at 75 (quoting United States v. Fowle, 22 C.M.R. 139, 141 (C.M.A. 1956)).

[20] *Id.* (quoting United States v. Grady, 15 M.J. 275, 276 (C.M.A. 1983)).

[21] *Id.* at 76 (citing *Grady*, 15 M.J. at 276). "Such a practice invades the province of the sentencing authority by raising the spectre of command influence." *Grady*, 15 M.J. at 276.

[22] *Id.* (citing United States v. Thomas, 22 M.J. 388, 394 (C.M.A. 1986)).

[23] *Id.*

[24] *See generally* United States v. Rivers, 49 M.J. 434 (1998) (discussing policy letters and remedial actions). Allegations of unlawful command influence raised concerning division commander's five-page policy letter on physical fitness and physical training which addressed other fitness issues such as weight, smoking, drinking and drugs: "there is no place in our Army for illegal drugs or *for those who use them*.". *Id.* at 438 (emphasis added).

[25] *See supra* note 20.

[26] *Pope*, 63 M.J. at 75-76.

[27] *Id.* at 76.

[28] *See generally* United States v. Biagase, 50 M.J. 143 (1999) (discussing the *Biagase* framework in detail in this article *infra*, at pages 70-71).

[29] *See* United States v. Dugan, 58 M.J. 253, 258 (2003) (applying the *Biagase* standard to a case involving alleged improper consideration of prior convening authority "commander's call" statements during sentencing deliberations).

judges: should they (or could they) craft limiting instructions that would cure apparent unlawful command influence like that presented in this case? Precedent notwithstanding, it seems this approach is eclipsed by a broader view and definition of apparent unlawful command influence now embraced by the CAAF.[30] Again, it is unclear why the court referred to this possible remedy referenced in *Grady*, when the *Grady* court counseled caution in this area.[31] Military judges are wise to remember their role as the last sentinel,[32] and ensure that courts-martial proceedings are unencumbered by ill-advised policy statements.[33]

Finally, this case serves as a reminder to defense counsel to object at trial if the government seeks to introduce this type of evidence, even if the issue is still available on appeal.[34] When confronted with this objection, military judges will be more likely to exercise caution to ensure a fair trial, and the accused will increase their chances for a fair and just sentence.

Improper Outside Influence on Panel Members—The Commander in the Courtroom (literally)

United States v. Harvey[35]

Lance Corporal (LCpl) Harvey was convicted at special court-martial of conspiracy, false official statement, communicating a threat, and several drug offenses involving LSD, methamphetamine, cocaine, and wrongfully inhaling aerosol.[36] Harvey was eventually sentenced to sixty days confinement, forfeiture of $639.00 pay per month for two months, reduction to E-1, and a bad-conduct discharge.[37]

The convening authority at the time of LCpl Harvey's court-martial was convened and the charges referred was Major (Maj) P.J. Laughlin, Commanding Officer of Headquarters and Headquarters Squadron, Marine Corps Air Station, Yuma, Arizona.[38] One officer and three enlisted members eventually heard the case.[39] By the time trial commenced, Lieutenant Colonel M.L. Saunders had succeeded Maj Laughlin in command and was therefore the convening authority; Maj Laughlin was now the executive officer.[40] During the government's closing argument on findings, Maj Laughlin was present in the courtroom wearing a flight suit.[41] The military judge noticed his presence and discussed it on the record at an Article 39(a)[42] session.[43] Defense counsel moved for a mistrial based on the apparent recognition of the original convening authority by several panel members and the fact that the President of the panel was very familiar with Maj Laughlin.[44] The military judge denied the motion for mistrial, but offered defense counsel the opportunity to voir dire the members or provide a limiting instruction.[45] Defense counsel declined both of those options and no party took any further action to address unlawful

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[30] *See supra* note 3.

[31] United States v. Grady, 15 M.J. 275, 276 (1983). "At that point, the matter of command policy was obviously so fixed in the members' minds that only comprehensive limiting instructions could have cured the error." *Id*.

[32] *See* United States v. Rivers, 49 M.J. 434, 443 (1998). "The military judge is the last sentinel protecting an accused from unlawful command influence." *Id*. *See also* Lieutenant Colonel Patricia A. Ham, *Revitalizing the Last Sentinel: The Year in Unlawful Command Influence*, ARMY LAW., May 2005, 1.

[33] "A trial must be kept 'free from substantial doubt with respect to legality, fairness and impartiality.' . . . A judicial system operates effectively only with public confidence--and, naturally, that trust exists only if there also exists a belief that triers of fact act fairly." United States v. Stringer, 17 C.M.R. 122, 132-33 (C.M.A. 1954) (quoting MANUAL FOR COURTS-MARTIAL, UNITED STATES ¶ 62f(13) (1951)). "This appearance of impartiality cannot be maintained in trial unless the members of the court are left unencumbered from powerful external influences." *Grady*, 15 M.J. at 276.

[34] *See* United States v. Baldwin, 54 M.J. 308, 310 (2001). "We reject the Government's claim of waiver. 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.". *Id*. at 310 n.2.

[35] United States v. Harvey (*Harvey II*), 64 M.J. 13 (2006).

[36] *Id*. at 16.

[37] *Id.*

[38] *Id*. at 15.

[39] *Id*.

[40] *Id*.

[41] *Id*.

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

[43] *Harvey II*, 64 M.J. at 15.

[44] *Id*. at 16.

[45] *Id*.

command influence.[46] On appeal, the Navy-Marine Court of Criminal Appeals (NMCCA) affirmed, holding that the defense had failed to raise the issue of unlawful command influence.[47]

Before the CAAF, LCpl Harvey asserted that the military judge at trial failed to conduct a complete inquiry to establish what impact the original convening authority's presence had on the proceedings, and further erred in summarily denying the defense motion for a mistrial.[48] Lance Corporal Harvey also asserted prejudicial post-trial delay in the processing of his case, and the court specified one issue concerning sentence reassessment.[49]

The court began its discussion by emphasizing the statutory prohibition against unlawful command influence[50] and the court's pivotal role in protecting against it.[51] The CAAF also emphasized its role concerning oversight of the military justice system; a responsibility shared with commanders, staff judge advocates, military judges, and others involved with military justice.[52] The court highlighted the military judge's role as the "last sentinel" in the trial process to protect a court-martial from unlawful command influence.[53]

The primary focus under *Biagase* is the duty of the military judge to allocate the burdens between the prosecution and the defense.[54] To discharge this duty, the military judge engages in a two-step process.[55] First, the defense must raise the issue of unlawful command influence.[56] "The test is "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."[57] The burden then shifts to the government which has three options: "[T]he

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[46] *Id*.

[47] United States v. Harvey (*Harvey I*), 60 M.J. 611, 614 (N-M. Ct. Crim. App. 2004). The Court noted the low threshold of "some evidence" for raising unlawful command influence, but noted that it must be more than speculation.

> In this case that test was not met. The only undisputed fact in this case, in issue, is that the officer who convened the court-martial was present in the courtroom during closing arguments of counsel on findings. Record at 341. We believe the military judge correctly concluded that this alone was not enough to raise UCI at trial.

Id.

[48] *Harvey II*, 64 M.J. at 16 Specifically, Harvey claimed that: (1) the facts surrounding the convening authorities presence in the courtroom demonstrated some evidence of unlawful command influence; (2) the military judge failed to conduct further inquiry to establish the impact of that presence; (3) the military judge erred by not shifting the burden to the government to disprove unlawful command influence; and, (4) the Government did not rebut the existence of unlawful command influence beyond a reasonable doubt.. *Id*. at 16-17.

[49] *Id*. at 16. The court never ultimately addressed the specified issue because of the remedy in this case. *Id*. at 15.

[50] *Id.*

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

Id. (quoting UCMJ art. 37(a) (2005)).

[51] *Id.* at 17 ("The importance of this prohibition is reflected in our observation, that 'a prime motivation for establishing a civilian Court of Military Appeals was to erect a further bulwark against impermissible command influence.'") (quoting United States v. Gore, 60 M.J. 178, 185 (2004) (quoting United States v. Thomas, 22 M.J. 388, 393 (C.M.A. 1986))).

[52] *Id*.

[53] *Id*. at 18.

> Illustrative of this shared responsibility to protect against unlawful command influence, in *Biagase*, we explicitly stated that a primary duty of the military judge in a court-martial is to protect against unlawful command influence. Indeed, *Biagase* underscored the role of the military judge as the "last sentinel," an essential guard at the trial level, to protect against unlawful command influence.

Id. (citing United States v. Biagase, 50 M.J. 143, 152 (1999) (quoting United States v. Rivers, 49 M.J. 434, 443 (1998))); *see also* Ham, *supra* note 32.

[54] *Id*.

[55] *Id*.

[56] *Id*. The court noted that this initial showing must be more than speculation, but because of the impact upon the public perception of a fair trial the threshold is low. *Id*. (citing United States v. Johnson, 54 M.J. 32, 34 (2000), *Biagase*, 50 M.J. at 150, and United States v. Johnston, 39 M.J. 242, 244 (1994)).

[57] *Id*. (citing *Biagase*, 50 M.J. at 150, and *Johnston*, 39 M.J. at 244)).

government must prove beyond a reasonable doubt: (1) that the predicate facts do not exist; or (2) that the facts do constitute unlawful command influence; or (3) that unlawful command influence will not prejudice the proceedings or did not affect the findings and sentence."[58] "On appeal, an appellant must '(1) show facts which, if true, constitute unlawful command influence; (2) show that the proceedings were unfair; and (3) show that the unlawful command influence was the cause of the unfairness.'"[59]

The CAAF held that trial developments in *Harvey* met the low threshold burden of "some evidence" of unlawful command influence, and that the military judge failed to inquire adequately into the issue.[60] Specifically, the original convening authority was present in the courtroom wearing a flight suit when throughout the case the government consistently characterized Harvey's conduct as a threat to the aviation community.[61] Second, the record revealed that panel members personally knew the original convening authority; and that defense counsel characterized the relationship between the original convening authority and the senior member of the panel as being "intimately familiar."[62] In addition, defense counsel had unsuccessfully challenged that senior member of the panel for cause because she personally knew the original convening authority was also a subordinate member of the present convening authority's command.[63] Finally, defense counsel noted in the record that the "panel was looking over our shoulder" during the entire closing argument, and this assertion was never explored further by the trial court.[64] The military judge's error in concluding that unlawful command influence had not been raised was then compounded by his failure to shift the burden to the government to rebut the existence of unlawful command influence or demonstrate a lack of prejudice.[65] The court specifically noted that the military judge was not required to grant a mistrial; rather, "as the 'last sentinel' at trial to protect against unlawful command influence, the military judge had a duty to inquire further into this matter."[66]

The CAAF acknowledged that a court-martial is open to the public,[67] and that convening authorities are not barred from attending.[68] The court cautioned, however, that "the presence of the convening authority at a court-martial may raise issues."[69] Before a convening authority attends a court-martial he should consider carefully the impact of his presence on the proceedings.[70] The court went on to encourage convening authorities to "initiate a dialogue" with the staff judge advocate and trial counsel before entering the courtroom.[71] This would allow the trial counsel an opportunity to alert the military judge and defense counsel and allow any issues to be litigated in advance.[72]

Ultimately the court set aside the findings and sentence without prejudice.[73] Noting the impact of dilatory post-trial processing, the court also held that if the rehearing resulted in a conviction and sentence, the convening authority may approve no portion of the sentence exceeding a punitive discharge.[74] Judge Crawford and Judge Baker both filed dissenting opinions, arguing that the defense did not meet the low threshold of showing "some evidence" of unlawful command

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[58] *Id.* (quoting *Biagase*, 50 M.J. at 151).

[59] *Id.* (quoting United States v. Dugan, 58 M.J. 253, 258 (2003) (citing United States v. Stombaugh, 40 M.J. 208, 213 (1994))).

[60] *Id.* at 19.

[61] *Id.*

[62] *Id.* at 19-20. The court afforded this assertion little weight, as voir dire had already established there was no "relationship" between the two. *Id.* at 20 n.25.

[63] *Id.* at 20.

[64] *Id.* at 21.

[65] *Id.*

[66] *Id.*

[67] *Id.* at 20. "The sixth amendment right to a public trial belongs to the defendant rather than the public; a separate first amendment right governs the interests of the public and the press in attending a trial." *Id.* (quoting 5 WAYNE R. LAFAVE ET AL., CRIMINAL PROCEDURE § 24.1(a), at 450 (2d ed. 1999)).

[68] *Id.* The Court noted, however, that the right to attend a court-martial is not absolute, and is subject to the discretion of the military judge (citing United States v. Short, 41 M.J. 42, 43 (1994), and MCM, *supra* note 11, R.C.M. 806(b)). *Id.*

[69] *Id.*

[70] *Id.*

[71] *Id.*

[72] *Id.*

[73] *Id.* at 25.

[74] *Id.*

influence.[75]

Harvey is clear guidance to practitioners that convening authorities should be discouraged from attending courts-martial. The CAAF's recommended procedures for addressing this issue speak volumes about the potential problems associated with convening authority's attending courts-martial; it is hard to conceive of a situation in which the government's interest's would be served by encouraging a convening authority to do so. *Harvey* also highlights the role of the military judge in ensuring that unlawful command influence does not affect the proceedings. Military judges must not be remiss in their "affirmative responsibilities to avoid the appearance of evil in his courtroom and to foster public confidence in court-martial proceedings."[76] The threshold for establishing "some evidence" is very low, and military judges are safe in erring on the side of caution in placing the appropriate burden on the government to rebut the presence of unlawful command influence or the lack of any effect on the proceedings.[77]

Unlawful Command Influence by Staff Members—The Overzealous SJA

United States v. Lewis[78]

In *Lewis*, the CAAF began by reminding military justice practitioners that "[u]nlawful command influence is the mortal enemy of military justice."[79] "Where it is found to exist, judicial authorities must take those steps necessary to preserve both the actual and apparent fairness of the proceeding."[80] The CAAF made this point exceedingly clear by dismissing the findings and sentence with prejudice, a result all the more noteworthy due to its rarity[81] and used only as a drastic measure when alternatives are not available.[82]

Pursuant to his pleas, a military judge sitting as a general court-martial convicted LCpl Lewis of various drug offenses involving ecstasy, ketamine, LSD, and methamphetamine.[83] The military judge sentenced Lewis to five years confinement, total forfeitures, reduction to E-1 and a dishonorable discharge.[84]

A civilian defense counsel (CDC) represented LCpl Lewis before the military judge.[85] The CDC did not appear at the first session of the court-martial, the arraignment, when the detailed military defense counsel appeared for LCpl Lewis. Neither side had any voir dire or challenge against the military judge at that time.[86] The detailed military defense counsel then indicated that Lewis had retained a CDC.[87] During a subsequent government requested Article 39(a) session, government counsel conducted voir dire of the military judge and challenged her impartiality because: (1) she presided over two companion cases; (2) she had a prior professional relationship with this particular CDC while the CDC was on active duty; (3) the number of cases presided over by the military judge at which the CDC appeared; (4) the military judge's social relationship with the CDC, including any personal contact since the *Lewis* case began; (5) the fact that in a prior case the military judge had been voir dired about her relationship with this particular CDC; (6) the fact that in yet another prior case

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[75] *Id*. at 27-28. However, Judge Baker argued that although the law does not require military judges to proactively intervene absent some evidence of unlawful command influence, they should as a matter of *legal policy* in cases like *Harvey* (where the UCI door was left ajar), and therefore agreed with the disposition of the case. *Id*. at 28.

[76] *Id*. at 20-21 (quoting United States v. Rosser, 6 M.J. 267, 273 (C.M.A. 1979)).

[77] *Id*. at 20. "Again, we reaffirm that the law of unlawful command influence establishes a low threshold for the defense to present "some evidence" of unlawful command influence." (citing United States v. Biagase, 50 M.J. 143, 150 (1999)).

[78] United States v. Lewis (*Lewis II*), 63 M.J. 405 (2006).

[79] *Id*. at 407 (quoting United States v. Gore, 60 M.J. 178, 178 (2004) (quoting United States v. Thomas, 22 M.J. 388, 393 (C.M.A. 1986))).

[80] *Id*. (citing United States v. Rivers, 49 M.J. 434, 443 (1998), and United States v. Sullivan, 26 M.J. 442, 444 (1998)).

[81] This is only the third case known to the author in which the findings and sentence have been dismissed with prejudice since adoption of the modern Uniform Code of Military Justice. *See* Ham, *supra* note 32, at 1 (noting United States v. Hunter, 13 C.M.R. 53, 53 (C.M.A. 1953) and United States v. Gore, 60 M.J. 178 (2004) as two other examples).

[82] *Lewis*, 63 M.J. at 416 (citing United States v. Cooper, 35 M.J. 417, 422 (C.M.A. 1992)).

[83] *Id.* at 406, 407.

[84] *Id*. at 407.

[85] *Id*.

[86] *Id*.

[87] *Id*. The CDC was a former Marine judge advocate who had attained the rank of colonel. *Id*.

this military judge had been questioned about electronic mail messages generated by the CDC, was requested to recuse herself, and that she had subsequently expressed displeasure to another government counsel over that incident; and finally, (7) the fact that the military judge had detailed herself to the case after learning that the CDC would represent the accused, the extent of communications with the CDC about the *Lewis* case, and the military judge's receipt of CDC generated email concerning prosecutorial misconduct.[88] The trial counsel then moved the military judge to recuse herself and the military judge denied the motion.[89]

The trial counsel then requested that the military judge reconsider her denial of the motion, and presented a previously prepared written pleading.[90] The written pleading contained an allegation by a Marine Colonel that he had observed the CDC and the military judge exiting a play together after the military judge had already presided over the arraignment in the *Lewis* case and been copied on numerous electronic messages by the CDC.[91] This was the first time that the government had notified the military judge of this information, despite the detailed voir dire conducted earlier. On several occasions during the first voir dire, the trial counsel paraphrased for the record that the social interaction between the CDC and the military judge was limited to "at the barn only."[92] During this second and further voir dire the military judge explained that she had forgotten attending the play, and denied the motion for reconsideration, noting that during occasional social interaction they never discussed pending trials.[93] The trial counsel then requested a continuance to file a government appeal and a continuance in order to seek a stay of the proceedings; the military judge denied both requests.[94]

Based on the prosecution's actions, the defense filed a motion concerning prosecutorial misconduct.[95] The defense called the Staff Judge Advocate (SJA) as a witness, who testified that he advised the trial counsel regarding voir dire, and informed that counsel of things that he had learned in regards to the military judge and this particular CDC.[96] In explaining some of his advice the SJA stated that, "there was some evidence out there that, in fact, the defense lawyer had been on a date with the judge while this case was pending."[97] The SJA testified that he contacted the Head of Appellate Government Division about a government appeal or extraordinary writ, at which time he discussed apparent discrepancies in the military judge's responses on the record, as well as his "own personal bias" observations.[98] The SJA's testimony included direct exchanges with the CDC.[99]

The next day the military judge reconsidered her ruling and decided to recuse herself.[100] During her detailed remarks on the record, she conceded her emotional state over the incident, and reiterated her belief that the relationship she shared with the CDC was not improper.[101] However, the military judge had consulted with the circuit military judge and now decided to grant the motion.[102] "I'm granting the motion for recusal for two reasons: One, in an abundance of caution, interpreting appearance of impropriety at its broadest possible meaning; and two, because my emotional reaction to the slanderous conduct of the SJA has invaded my deliberative process on the motions."[103]

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[88] *Id*. at 407-08.

[89] *Id*. at 409.

[90] *Id*.

[91] *Id*.

[92] *Id*. The military judge indicated in earlier questioning that she and the CDC boarded horses at the same barn and saw each other there occasionally. *Id*. at 408.

[93] *Id*.

[94] *Id*.

[95] *Id*.

[96] *Id*. at 409-10.

[97] *Id*. at 410.

[98] *Id*.

[99] *Id*. The personal nature of this confrontation is reflected in the CDC's consideration of withdrawal from the case. *Id*. Lewis's mother later testified that the SJA's testimony appeared to be a "personal vendetta." *Id*. at 410 n.2.

[100] *Id*.

[101] *Id*.

[102] *Id*.

[103] *Id.* at 411. "I now find myself second guessing every decision in this case. Did I favor the government to protect myself from further assault? Did I favor the accused to retaliate against the government[?]" *Id*.

A second military judge was detailed and also recused himself because of personal bias, and because he could not set aside the SJA's treatment of the previous military judge.[104] A third military judge heard an expedited defense motion,[105] and a fourth military judge presided over additional motions and trial.[106] Although the fourth final trial judge denied a motion to dismiss for unlawful command influence, he did grant a motion for a change of venue, disqualified the SJA and the convening authority form taking post-trial action in the case, and barred the SJA from attending the remainder of the trial.[107]

On appeal, the NMCCA found the SJA's actions advising the trial counsel on the "voir dire assault of the [military judge]," his unprofessional behavior as a witness, and his inflammatory testimony, created a bias in the military judge and constituted unlawful command influence.[108] However, the court below held there was no prejudice to Lewis, whose trial was ultimately heard by diligent, deliberate judges.[109]

Before the CAAF, Lewis claimed that it was error for the NMCCA to hold that the actions of the SJA and the trial counsel were harmless beyond a reasonable doubt.[110] The CAAF held that improperly seeking recusal of the military judge was actual unlawful command influence.[111] The Court was now only concerned with whether the government had demonstrated beyond a reasonable doubt that the proceedings were untainted by unlawful command influence.[112]

The court held that the "orchestrated effort" to unseat the military judge exceeded any right conferred upon the government to challenge a military judge.[113] "But for the government's attack upon MAJ CW [the military judge], it appears unlikely that there existed grounds for disqualification."[114]

> The record reflects that the SJA—a staff officer to and legal representative for the convening authority—was actively engaged in the effort to unseat MAJ CW as military judge. The trial counsel, who was provided advice on voir diring MAJ CW by the SJA, became the tool through which this effort was executed."[115]

The court noted that the trial counsel initially part of the unlawful command influence, remained an active member of the prosecution, undermining the government's later actions and remedial steps.[116]

The CAAF then addressed the impact of apparent unlawful command influence, emphasizing the need to maintain the "confidence of the general public in the fairness of the court-martial proceedings."[117] The "appearance of unlawful command

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[104] *Id.*

[105] *Id*. The third military judge heard a motion to release Lewis from pretrial confinement and released him the same day. *Id*.

[106] *Id*.

[107] *Id*. at 412.

[108] United States v. Lewis (*Lewis I*), 61 M.J. 512, 518 (N-M. Ct. Crim. App. 2005). There can be no doubt that but for the unprofessional actions of the trial counsel and the SJA, Lewis would have been tried by the initial military judge. *Id*.

[109] *Id*.

[110] *Lewis II*, 63 M.J. at 407. The first issue granted was the following: "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 RELATIONSHIP WITH THE CIVILIAN DEFENSE COUNSEL AMOUNTED TO UNLAWFUL COMMAND INFLUENCE BUT WERE HARMLESS BEYOND A REASONABLE DOUBT." *Id*. at n.1.

[111] *Id*. at 412, 413. "Because the conclusion of the Navy-Marine Court of Criminal Appeals is the law of the case, we need not determine whether Lewis has met the burden of raising the issue nor need we review whether the Government has demonstrated beyond a reasonable doubt that there was no command influence." *Id*. at 413.

[112] *Id*.

[113] *Id*. at 414. Rule for Courts-Martial 902(d)(2) allows either party to question the military judge concerning possible grounds for disqualification. MCM, *supra*, note 11. However, the court noted earlier that, "Neither the government nor the defense at a court-martial is vested with the power to designate, detail, or select the military judge. Conversely, neither party can usurp the authority of the service secretaries or Judge Advocates General by removing or unseating properly certified and detailed military judges." *Lewis II*, 63 M.J. at 414.

[114] *Lewis II*, 63 M.J. at 414.

[115] *Id*.

[116] *Id*.

[117] *Id*. at 415 (quoting United States v. Stoneman, 57 M.J. 35, 42 (2002) (quoting United States v. Rosser, 6 M.J. 267, 271 (C.M.A. 1979))).

influence is as 'devastating to the military justice system as the actual manipulation of any given trial.'"[118] The CAAF views the perception of fairness in the military justice system through the "eyes of a reasonable member of the public."[119] The appearance of unlawful command influence exists where an objective, disinterested observer would harbor a significant doubt about the fairness of the proceeding.[120]

Applying the test to this case, "a reasonable observer would have significant doubt about the fairness of this court-martial in light of the government's conduct with respect to MAJ CW."[121] The court held that neither actual nor apparent unlawful command influence had been cured beyond a reasonable doubt in this case, and dismissed the charges and specifications with prejudice.[122] "We do not do so lightly, but the nature of the unlawful conduct in this case, combined with the unavailability of any other remedy that will eradicate the unlawful command influence and ensure the public perception of fairness in the military justice system, compel this result."[123]

Lewis is a glaring example of the fact that staff officers can also be implicated and scrutinized for unlawful command influence. Although recusal motions concerning the military judge are sometimes appropriate, the government should balance the impact on the case with the perception created by those viewing the proceedings. *Lewis* also reminds us that the CAAF continues to view unlawful command influence as the "mortal enemy" of military justice, and will take drastic steps to ensure that it does not interfere with the court-martial process.[124] Finally, Judge Effron's concurrence serves as guidance to military judges and to the respective service courts of criminal appeals to consider dismissal without prejudice as a remedy in cases like *Lewis*.[125] This would allow the charges and specifications to proceed through channels untainted by the previous conduct.[126]

Conclusion

The past year was an active one for the CAAF in the area of unlawful command influence. Taken together these cases should remind practitioners that vigilance is necessary to protect our military justice system from unlawful interference. Practitioners are also on notice that the CAAF will not be afraid to address the "mortal enemy" with draconian measures to ensure not only the actual fairness of the military justice system but the appearance of fairness by all those that practice within it.

[118] *Id*. (quoting United States v. Simpson, 58 M.J. 368, 374 (2003) (quoting *Stoneman*, 57 M.J. at 42-43)).

[119] *Id*. at 415.

[120] *Id*.

[121] *Id*.

[122] *Id*. at 416.

[123] *Id*.

[124] *Id*. The gravity of the courts opinion in this respect is seen in its suggestion that investigations or sanctions may have restored public confidence in the military justice system. The court also expressed concern that there appeared to be no response from Marine Corps supervisory authorities. *Id*.

[125] *Id*. at 417.

[126] *Id*.

WASHINGTON'S SPIES[1]

REVIEWED BY CAPTAIN ROBERT L. MARTIN[2]

"How beautiful is death, when earn'd by virtue! Who would not be that youth? What pity it is that we can die but once for our country!"[3] This particular line from Joseph Addison's play "Cato" is the likely basis for the final words attributed to one of America's first spies, Nathan Hale—"I regret that I have but one life to lose for my country."[4] We may never know Hale's actual last words, but Alexander Rose has brought to life the deeds of the American Revolution's best known spy, as well as chronicling the role played by other colonial secret agents in *Washington's Spies*.[5]

The use of scouts and the gathering of intelligence has always been a part of military operations.[6] For the military forces of our nation during the American Revolution, the art of spying was anything but art. In *Washington's Spies*, Rose takes his reader down the shadowy and winding roads of early-American espionage, shedding light on those who silently served this nation in its infancy.[7] While the journey is an interesting one, Rose needlessly takes us down many side roads, eventually winding back to the starting point. If you do not mind the occasional detour, the drive to the destination is not otherwise too unpleasant.

Washington's Spies is a well researched and documented account of American and British intelligence gatherers of the 1700s. Within the book' 280-plus pages, Rose uses more than 750 endnotes, citing to his nearly 300 listed sources of information.[8] It appears that the primary sources detailing the activities of these early "intelligencers,"[9] known as the Culper Ring,[10] are the surviving letters transmitted between General George Washington and his field operatives.[11] It is from these written accounts that Rose tells the story of the Revolutionary War's un-sung heroes.

The thoroughly documented *Washington's Spies* reveals a new chapter in the otherwise well-known history of the American Revolution; however, the overall work is not without its shortcomings. These flaws, while not fatal to the readability of the book, may further narrow the likely audience of early American military history and/or espionage buffs.

At nearly 300 pages of primary text, *Washington's Spies* is hardly a lengthy read, but at times it proves to be a somewhat difficult one. Within the first chapter it becomes apparent that average readers may want to keep a dictionary handy, and not just for the quoted passages from the 1700s.[12] Rose's writing style, at times, reads as if the book was actually authored in the eighteenth century.[13] There are also specific references made by Rose throughout the book which, when left unexplained,

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[1] ALEXANDER ROSE, WASHINGTON'S SPIES: THE STORY OF AMERICA'S FIRST SPY RING (2006).

[2] Florida Army National Guard. Written while a student in the 55th Judge Advocate Officer Graduate Course, The Judge Advocate General's Legal Center and School, U.S. Army, Charlottesville, Virginia.

[3] JOSEPH ADDISON, CATO act 4, sc. 4, *available at* http://www.constitution.org/addison/cato_act4.htm (last visited Sept. 17, 2006).

[4] ROSE, *supra* note 1, at 31.

[5] According to Rose, the "I regret" quote was attributed to Hale years later by "William Hull and others." ROSE, *supra* note 1, at 31-32. However, the Nathan Hale Official website acknowledges that his final words are not known, but that Hale paraphrasing from the popular play *Cato* would not have been unusual for an educated military officer of this era to have uttered such a line. Nathan Hale website, *available at*, http://ursamajor.hartnet.org/als/nathanhale/Chronology.htm#words (follow "Those Famous Last Words" hyperlink) (last visited Apr. 18, 2007).

[6] ROSE, *supra* note 1, at 96, 199.

[7] ROSE, *supra* note 1.

[8] *Id.* at 283-361.

[9] *Id.* at 96.

[10] *Id.* at 75.

[11] *Id.* at 88.

[12] Rose describes Benedict Arnold's betrayal as having "poleaxed Washington." *Id.* at 196. Being unfamiliar with this term, I later found that "poleaxed," as used by Rose, likely meant "to strike down or kill." *See* WEBSTER'S UNABRIDGED DICTIONARY 1496 (2d ed. 1998).

[13] For example, Rose provides this description of Nathan Hale: "Born on June 6, 1755, the sixth child in a large family, Nathan Hale was of good and middling, and most respectable, Connecticut stock." ROSE, *supra* note 1, at 3.

leaves the reader wondering what the author is trying to say. For example, when Rose discusses Benedict Arnold, he describes Arnold as "a heroic and valiant soldier" but also as "a low, sly Iago among traitors."[14] Readers unfamiliar with the Shakespeare play *Othello* will simply not appreciate the villainous "Iago" reference.[15]

A more contemporary remark that is equally vague is found in Rose's comparison of two members of the spy ring, Townsend and Woodhull.[16] Townsend is described as "the tortured, flawed Oskar [sic] Schindler to Woodhull's selfless Raoul Wallenberg."[17] Many readers may know Schindler's name from the film detailing his good works during the Nazi Holocaust of World War II.[18] Wallenberg's name, however, is not as well known. While Wallenberg is credited with saving between 100,000 to 300,000 Hungarian Jews during World War II, the reference simply may be lost on some readers.[19]

When describing persons, places and events, Rose often pays careful attention to detail and leaves few facts to the imagination. In other areas, Rose presumes his reader's knowledge level, sometimes leaving them in the dark. While Alexander Rose was born in the United States, it is likely that his years in Australia and his Cambridge University education provided him with intimate knowledge of Great Britain's monetary system.[20] This frame of reference is one his American readers likely do not possess, but efforts to enlighten them are rarely offered.[21] The payments made to the American agents during the war were made in British pounds, rather than the nearly worthless Continental currency.[22] While his detailed accounts of the monies paid is accurately reflected in "pounds," no frame of reference is given to the reader to put these facts in perspective. Most notably is a breakdown of the Culper Ring's expenses, all reflected as pounds and further denominations from which most readers will come away wondering if these amounts were significant or not.[23]

Among the challenges posed to the reader is Rose's effort to paint a vivid picture with generous details for each person who played any role in (or were even peripheral to) the covert missions featured in the book. While helpful in introducing the main figures, the background information included for the lesser players and events often proves to be more of a distraction. For example, five pages of text are dedicated to the "Great Fire" in New York City before we learn it is simply background information and not related to the story of the spy ring at all.[24]

These unrelated distractions are not isolated passages and occur throughout *Washington's Spies*. Does it add to the tales of intrigue that a portrait of Culper Ring member Robert Townsend was sketched by a nephew in 1812, and the specific street address where the nephew studied art later in life?[25] Perhaps this fact would have carried a bit more importance if the sketch were included as an illustration, but inexplicably, it is not.[26] The inclusion of copious details not only extends to lengthy pedigrees tracing bloodlines back several generations, but also in real property descriptions of locations that were merely the backdrop of certain occurrences.[27] A more concise and to the point telling of this story would do much in holding a reader's attention.

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[14] *Id.* at 196.

[15] WILLIAM SHAKESPEARE, OTHELLO.

[16] ROSE, *supra* note 1, at 276.

[17] *Id.*

[18] *See, e.g.*, SCHINDLER'S LIST (Universal Studios 1993). *See also* The Holocaust, *Oscar Schindler: Rake – and Saviour*, http://www.auschwitz.dk/Schindler2.htm (last visited Sept. 18, 2007).

[19] Jan Larsson, International Raoul Wallenberg Foundation, *Raoul Wallenberg's Biography*, http://www.raoulwallenberg.net/?en/wallenberg/raoul-wallenberg-s-biography.611.htm (last visited Sept. 18, 2007).

[20] Alexander Rose, Biography, http://rosewriter.com/Alexander%20Rose/Bio.html (last visited Sept. 18, 2007).

[21] It is finally explained that Benedict Arnold's monetary payment for West Point was about $500,000 in today's dollars. ROSE, *supra* note 1, at 198.

[22] *Id.* at 99.

[23] *Id.* at 265.

[24] *Id.* at 35-39.

[25] *Id.* at 134.

[26] *Id.*

[27] *Id.* at 79, 135.

In spite of the occasional sidebar, for those with an interest in American history and the beginnings of our military intelligence operations, this book will not otherwise disappoint you. Rose's painstaking descriptions of trivial matters may add little to the story, but his attention to detail when focusing on the book's main topic and central characters is invaluable. The story of the heroic Culper Ring is one deserving of telling, and Rose does their stories justice.

Rose often lets the Culper Ring members tell their own story through the writings they left behind so many years ago. Several of these writings are reproduced as illustrations in the center of the book, and translated for the reader.[28] The exploits of these early agents demonstrate their courage, their fears, and the mistakes that were made along the way. At first blush, many of their tools and tactics may seem primitive, but when viewed in the context of the era, their accomplishments are remarkable. The development of invisible inks,[29] a code dictionary,[30] using secret couriers,[31] and dead-drops[32] all seem as if they came from the twentieth century, and not from the days of the American Revolution.

In addition to telling the story of the Culper Ring, Rose also provides an interesting look at George Washington and his role in their missions. Interestingly, Washington had served as an intelligence officer during the French and Indian War.[33] The correspondence between the Culper Ring and Washington illustrates his temperament (and occasional lack of) [34] as well as his foresightedness in the intelligence arena.[35] Although some of Washington's instructions to his operatives were somewhat shortsighted, such as those to Lieutenant Brewster in 1778: "[D]o not spare any reasonable expense to come at early and true information; always recollecting, and bearing in mind, that vague and uncertain accounts of things . . . is more disturbing and dangerous than receiving none at all."[36]

Outside of his role with the Culper Ring, Washington's leadership, intelligence as well as the evidence of the strain of command during these difficult years are all evident from his writings and actions detailed in the book.[37] During the early part of the war, Washington had lost his hold of the city of New York,[38] his Army had shrunk from 20,000 to 3,000 or so, and he had suffered losses in several battles.[39] However, it was during these dark times that his intelligence gathering activities as well as the covert passing of disinformation worked to his advantage.[40]

Beyond the story of Washington's Culper Ring, Rose also includes some of the known British intelligence operations. Most notably is the story of Benedict Arnold's betrayal of his country and the unfortunate demise of his British handler, Major Andre'.[41] Countering the dismal tale of Arnold's deceit is the humorous tale of the "Hiram Affair" and the cunning of this so-called "triple agent."[42]

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[28] *Id.* at 178.

[29] *Id.* at 107.

[30] *Id.* at 121.

[31] *Id.* at 102.

[32] *Id.* at 199.

[33] *Id.* at 96.

[34] *Id.* at 265-66.

[35] For example, Washington saw the value of an invisible ink for his agents use and appropriated hospital supplies to accommodate that need. *Id.* at 108.

[36] *Id.* at 67-68 (quoting a Letter from George Washington to Lieutenant Caleb Brewster (Aug. 8, 1778)).

[37] *E.g. id.* at 64-65.

[38] *Id.* at 13-14.

[39] *Id.* at 41.

[40] *E.g., id.* at 41.

[41] *Id.* at 196-212.

[42] *Id.* at 244.

Washington's Spies begins slowly devoting much of the first chapter to the best known spy of the Revolution, Nathan Hale, whose covert career ended almost as quickly as it began.[43] Rose continues to provide background information in the second chapter and it is not until the third chapter that we begin to learn the exploits of the Culper Ring.[44] While the interim tales of intrigue prove an interesting read, the book ends as slowly as it began, wrapping up loose ends and completing the life stories of America's first spies.[45]

The story told in *Washington's Spies* is not one just to be relegated to the dusty shelf with other history books. The current war on terror depends heavily on intelligence and while some of the methods have changed since the day of the Culper Ring, the goals remain the same today. While Rose's work is satisfactory overall, the slow pace and tedious details may prompt the casual reader to walk away before the spying gets underway. But for the student of military history, *Washington's Spies* should sufficiently hold their attention, in spite of Rose winding about to the historical, but anticlimactic, end.

[43] *Id.* at 1-34.

[44] *Id.* at 67.

[45] *Id.* at 273.

CONFESSIONS OF AN ECONOMIC HIT MAN[1]

REVIEWED BY MAJOR KAY K. WAKATAKE[2]

Economic hit men (EHMs) are highly paid professionals who cheat countries around the globe out of trillions of dollars. They funnel money from the World Bank, the U.S. Agency for International Development (USAID), and other foreign "aid" organizations into the coffers of huge corporations and the pockets of a few wealthy families who control the planet's natural resources. Their tools include fraudulent financial reports, rigged elections, payoffs, extortion, sex, and murder. They play a game as old as empire, but one that has taken on new and terrifying dimensions during this time of globalization. I should know; I was an EHM.[3]

The attacks on 11 September 2001 affected scores of people around the nation. Americans were shocked by the horrific acts, and many took action.[4] Some volunteered to assist in the recovery efforts of the World Trade Center and the Pentagon, while others signed up for military service.[5] John Perkins, author of *Confessions of an Economic Hit Man*, decided to publish his tell-all autobiography about his regrettable work as an EHM. He believed that he and other EHMs helped create a global empire that spurred worldwide anti-American sentiment that ultimately resulted in the 9/11 attacks.

Confessions of an Economic Hit Man spins an entertaining tale of cloak-and-dagger storylines.[6] Mr. Perkins not only writes about his own experiences and thoughts, but he provides necessary historical background and context to events occurring at the time. Although the background and context may be educational, Mr. Perkins' role as an EHM may be more historical fiction than actual history. This is because there are serious issues with Perkins' credibility, there is an absence of any corroborating witnesses or writings, and there are impeaching inconsistencies within the book itself and in Perkins' life after writing it.

The book begins with Perkins' childhood. He grew up in a working class family and attended a private high school where his father worked as a teacher, and most of his classmates were from the upper class.[7] He then attended Middlebury College, which he considered an extension of the upper class snobbery he observed in high school.[8] After college, he interviewed with the National Security Agency (NSA), but joined the Peace Corps instead and lived in the Ecuadorian Amazon.[9] This was in 1970, during the height of the Vietnam War, and service in the Peace Corps allowed him to defer the draft.[10] After the Peace Corps, he returned to Boston where he worked for consulting firm Chas. T. Main (Main).[11] Thus began his career as an EHM, traveling to strategically important countries such as Indonesia, Saudi Arabia, Iran, Panama, Colombia, and Ecuador.[12]

Under the guise of an economist, his job as an EHM was to create a bright forecast for an underdeveloped country should it become "modernized."[13] Perkins exaggerated the extent of the modernization, knowing that the country would not

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[1] JOHN PERKINS, CONFESSIONS OF AN ECONOMIC HIT MAN (2006).

[2] U.S. Army. Written while assigned as a student, 55th Judge Advocate Officer Graduate Course, The Judge Advocate General's Legal Center and School, U.S. Army, Charlottesville, Virginia.

[3] PERKINS, *supra* note 1, at xi.

[4] Sarah Kershaw, *Duty Calls. So Do Cats in Trees: Sept. 11 Inspires a Rush to City's Volunteer Fire Squads*, N. Y. TIMES, July 4, 2002, at B1.

[5] Bill Pennington, *Ex-N.F.L. Player Is Killed In Combat*, N. Y. TIMES, Apr. 24, 2004, at D1.

[6] PERKINS, *supra* note 1.

[7] *Id.* at 3-5. Perkins father taught languages at "Tilton School, a boys' boarding school in rural New Hampshire. . . . The students were mostly scions of wealthy families from Buenos Aires, Caracas, Boston, and New York." *Id.* at 3.

[8] *Id.* at 5. "Middlebury was, in my perception, merely an inflated version of Tilton—albeit in rural Vermont instead of rural New Hampshire." *Id.*

[9] *Id.* at 8-10.

[10] *Id.* at 9.

[11] *Id.* at 11.

[12] *Id.* at 12.

[13] *Id.* at 17-18.

progress as forecasted.[14] Unable to pay back loans borrowed for modernization, the country would thus become indebted to the lenders, the United States, and its corporations.[15] Perkins sums up the process nicely:

> We are an elite group of men and women who utilize international financial organizations to foment conditions that make other nations subservient to the corporatocracy running our biggest corporations, our government, and our banks. Like our counterparts in the Mafia, EHMs provide favors. These take the form of loans to develop infrastructure—electric generating plants, highways, ports, airports, or industrial parks. A condition of such loans is that engineering and construction companies from our own country must build all these projects. . . . If an EHM is completely successful, the loans are so large that the debtor is forced to default on its payments after a few years. When this happens, then like the Mafia we demand our pound of flesh. This often includes one or more of the following: control over United Nations votes, the installation of military bases, or access to precious resources such as oil or the Panama Canal. Of course, the debtor still owes us the money—and another country is added to our global empire.[16]

Despite luxurious accommodations in foreign countries, he describes his encounters with common citizens, people who would be negatively impacted by the nefarious modernization he is selling.[17] Visiting the hidden parts of the country where tourists do not venture, he describes the slums, the poor, the prostitutes, the lepers, and the outcasts.[18] Eventually, his affection for these people would work at his conscience and cause him to write his book.[19] After each encounter with the downtrodden, he would retreat to his first-class accommodations and console himself "with a promise that someday [he] would expose the truth."[20] Whatever he has exposed, Perkins' internal struggle between "the good life" and his own guilt over hurting the impoverished citizens of underdeveloped nations permeates his tale.[21]

Perkins sees himself as a modern Paul Revere.[22] While riding through New England towns warning "The British are coming!" Revere exposed the enemy and destroyed its element of surprise.[23] Perkins imagines himself exposing the United States as an expanding global and evil empire.[24] He writes, "This story *must be told.* We live in a time of terrible crisis—and tremendous opportunity. The story of this particular economic hit man is the story of how we got to where we are and why we currently face crises that seem insurmountable."[25] He takes advantage of the shock of 9/11, as people try to understand why terrorists attacked the United States, by writing that the global empire brought this upon itself.[26] Perkins rationalizes:

> Nothing in *Confessions* is seditious. I am a loyal American whose forefathers fought in most of our major wars including the Revolution. I wrote this book because I believe we are a great nation and that we can do much better than to continue building an empire that is hated by millions. I hoped I would inspire us to improve ourselves and the world our children will inherit.[27]

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[14] *Id.* at xx.

[15] *Id.*

[16] *Id.*

[17] *See, e.g.*, *id.* at 48-53.

[18] *Id.* at 29.

[19] *Id.* at 255.

[20] *Id.* at 32.

[21] *See, e.g.*, *id.* at 31, 161, 254.

[22] *Id.* at 259.

[23] *Id.* at 257.

[24] *Id.* at 256-57.

[25] *Id.* at 258.

[26] *Id.* at xiv, 224.

[27] *Id.* at 270.

Perkins' Credibility

Seditious or patriotic, Perkins creates a threshold problem for readers—his own credibility. Perkins was a liar by profession when he was employed as an EHM.[28] He admits to being quite skilled at exaggerating economic forecasts in order to make westernization appealing to underdeveloped countries.[29] Perkins suggests that his working class roots led him to succumb to the inducement of money, and therefore made him an ideal EHM.[30] In fact, he admits that he never even thought of himself as a bona fide economist, having graduated with a bachelor of science in businesses administration, with an emphasis on marketing.[31] His studies of American literature explain where Perkins learned to embellish a story and make it more readable and glamorous.[32] He also admits that he became "chief economist" at Main due to his willingness to fabricate favorable reports for his company.[33] It takes little imagination and only a modicum of critical thinking to conclude that in order to sell his book, Perkins may have fabricated and sensationalized much of it.

Not so, says Perkins.[34] His conscience made him tell the truth.[35] But the sheer length of time that he was an EHM belies the notion that his conscience got the better of him.[36] Had he been in the EHM business for only a year or two, his claim that his conscience got the better of him might be credible. However, the fact that he spent over a decade lying to client after client indicates he really bought into the EHM role.[37] The well-established theory of cognitive dissonance[38] suggests that even if Perkins may have found his work *initially* repugnant or unethical, the years he spent toiling in those tainted fields more likely eased than tortured his conscience. In other words, the longer Perkins worked as an EHM, the more *comfortable* he probably became with it.[39] Despite occasional bouts of guilt, the fact is that he never did anything about it. Indeed, one critic aptly commented, "For a man who had second thoughts about his work for 9 of the 10 years he was there, the evidence he presents is very sparse."[40] As if in response, Perkins concedes that during ten years as an EHM, he often questioned his actions, sometimes feeling guilty about it, yet eventually rationalized staying in the system.[41]

After leaving Main in 1980 because his conscience allegedly got the better of him, Perkins sold out again and became "a highly paid expert witness – primarily for U.S. electric utility companies seeking to have new power plants approved for construction by public utilities commissions."[42] One of his jobs required him "to justify, under oath, the economic feasibility of the highly controversial Seabrook nuclear power plant."[43] He tries to convince us that only after he became an expert witness did he begin to disagree with what he was to testify.[44] He explains that with more research into the field, he

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[28] *Id.* at 18.

[29] *Id.* at 62-63.

[30] *Id.* at 8. The NSA "focused on my upbringing, my attitudes toward my parents, the emotions generated by the fact I grew up as a poor puritan among so many wealthy, hedonistic preppies." *Id.*

[31] *Id.* at 161.

[32] *Id.*

[33] *Id.* "My status as chief economist and as manager of Economics and Regional Planning could not be attributed to my capabilities in either economics or planning; rather, it was a function of my willingness to provide the types of studies and conclusions my bosses and clients wanted, combined with a natural acumen for persuading others through the written word." *Id.*

[34] *Id.* at xii-xiii.

[35] *Id.*

[36] *Id.* at 175.

[37] *Id.*

[38] Cognitive dissonance is the "psychological conflict resulting from incongruous beliefs and attitudes held simultaneously." MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 240 (11th ed. 2003).

[39] The theory of cognitive dissonance was first introduced by psychologist Leon Festinger (1919-1989) in his 1957 publication *A Theory of Cognitive Dissonance*. An example Festinger used was the habitual smoker, who knows that smoking is bad for his health but continues to smoke. He experiences dissonance between his knowledge that smoking is bad and his behavior of smoking. He can reduce the dissonance by either stopping to smoke or to start to believe that smoking is not really harmful to his health. COGNITIVE DISSONANCE: PROGRESS ON A PIVOTAL THEORY IN SOCIAL PSYCHOLOGY (Eddie Harmon-Jones & Judson Mills eds. 1999).

[40] Saleh AA Younis, *The Problems with "Confessions of an Economic Hitman,"* Feb. 4, 2006, http://www.awate.com/artman/publish/article _4368.shtml (reviewing PERKINS, *supra* note 1).

[41] PERKINS, *supra* note 1, at 145.

[42] *Id.* at 180.

[43] *Id.*

[44] *Id.* at 190-91.

discovered that there were "many alternative forms of energy . . . technically superior and more economical than nuclear power" and he quit as an expert witness.[45] What an epiphany! Surely, an energy company would not hire an expert witness just so he could receive on-the-job training. No, he was hired because his opinions were consistent with his client, or at least he knew that for a sufficient fee, he would testify favorably for his client.

Without modesty Perkins confesses to his own fantastic imagination. He writes, "I visualized myself as a dashing secret agent, heading off to exotic lands, lounging beside hotel swimming pools, surrounded by gorgeous bikini-clad women, martini in hand. Although this was merely fantasy, I would discover that it held elements of truth."[46] The line between fantasy and truth, however, remains blurred by Perkins' poor credibility.[47]

Lack of Corroboration

Perkins fails to present corroborating witnesses and documents to support his escapades around the world. He claims to have befriended people who are now (conveniently) dead.[48] For example, he says he was a close personal friend of the former President of Panama Omar Torrijos, who later died in a fiery plane crash.[49] Supposedly, Torrijos fell victim to a CIA assassination plot because he refused to give in to the United States' wishes about control over the Panama Canal.[50] There are, of course, no letters, photographs, or other physical evidence of the alleged friendship with Torrijos, much less the assassination plot. Perkins only refers to unrecorded oral conversations.[51] As another example, Perkins says one assignment required convincing a Saudi official, whom he called "Prince W," to support "modernization" of Saudi Arabia.[52] When Perkins discovered that Prince W had a weakness for blonde women, he funded several secret rendezvous for the prince to gain his support.[53] Who is Prince W, and if Perkins is writing a tell-all book, why protect him now? Perkins also describes a secret meeting with a mysterious, disfigured man in Iran who predicted the overthrow of the Shah in 1978, but of course he does not identify this individual either.[54]

What about documentation? Perkins alleges that he was recruited by the National Security Agency to work as an EHM.[55] Yet, he has no documentation showing that he was on their payroll, no letter welcoming him to the NSA, no correspondence of any kind. Naturally, he explains that because the work of EHMs was unethical, the government did not want any connection to be made to it.[56] Therefore, he was paid by his consulting firm Main, not the NSA.[57] But the allegation that the NSA recruited him as an EHM is most unlikely because "the NSA is a cryptological organization (codemaking and codebreaking), not an economic organization."[58] The mission of the NSA has nothing to do with economic blackmail, but is as follows: "*The ability to understand the secret communications of our foreign adversaries while protecting our own communications -- a capability in which the United States leads the world -- gives our nation a unique advantage.*"[59]

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[45] *Id.* at 191.

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

[47] Landon Thomas, Jr., *Confessing to the Converted*, N.Y. TIMES, Feb. 19, 2006, sec. 3, at 1 (reviewing PERKINS, *supra* note 1). "In the wake of the controversy over James Frey, who embellished aspects of his own best-selling tale of personal redemption, 'A Million Little Pieces,' one feels obliged to ask: Is it all true?" *Id.*

[48] PERKINS, *supra* note 1, at xi.

[49] *Id.*

[50] *Id.* at 186.

[51] *Id.* at 186-89.

[52] *Id.* at 105.

[53] *Id.*

[54] *Id.* at 133.

[55] *Id.* at 7-12.

[56] *Id.* at 22.

[57] *Id.*

[58] U.S. Dep't of State, International Information Programs, *Confessions -- or Fantasies – of an Economic Hitman?* http://usinfo.state.gov/media/Archive/2006/Feb/02-767147.html (last visited Sept.18, 2007).

[59] National Security Agency, Central Security Service, *Mission Statement*, http://www.nsa.gov/about/about00003.cfm (last visited Sept. 18, 2007).

Internal and Subsequent Inconsistencies

Finally, Perkins effectively impeaches himself and his work with his book's own inconsistencies. First, he vilifies globalization for indebting a developing nation to the United States both politically and financially.[60] Globalization, however, brings electricity and running water to undeveloped nations, thus raising the standard of living. Perkins does not address these or any other benefits; he is less than even-handed in his description of the effects of globalization. On this point, Sebastian Mallaby observed:

> Perkins likes to invoke Indonesia, the scene of his first hit-man assignment. The way he tells it, the development economists who persuade Indonesia to borrow money around 1970 were peddling a ludicrous idea – that Indonesia's economy could spring from the dark age to the modern age in a mere generation. Well, Indonesia's infant mortality and adult illiteracy rates each fell by two-thirds over the next three decades, and life expectancy shot up by 19 years. If the corporatocracy was trying to lay Indonesia low, this was a funny way of doing it.[61]

Perkins even contradicts himself within the book itself. He claims that threats and bribes prevented him from publishing it years earlier.[62] For instance, in the chapter titled "I Take a Bribe," he teases the reader with a *noir* chapter title, but upon closer scrutiny we learn it was not a bribe at all.[63] He was hired on retainer by Stone & Webster Engineering Corporation (SWEC), and was simply told that they value their privacy.[64] While he initially labels his employment a "bribe," he retracts the characterization later and says he merely *understood* that his hiring was only to prevent him from writing the book.[65] The fact is he was hired by SWEC simply to be an expert witness, not to prevent him from writing a book. To allege SWEC had any interest in keeping secret the author's work for Main is to peer into the mind of this fanciful dramatist.

While he accuses the global empire of exploiting the citizens of underdeveloped nations and its resources, he himself began to exploit the Amazon in the past decade.[66] In 1991, he began offering the well-heeled tours through the Amazon, eventually creating his own organization to handle the profitable tours.[67] If turning an uninhabited location of primitive peoples into a commercialized vacation spot is not exploitation, what is? Paul Revere indeed.

In the movie *Forrest Gump*, the fictional title character experiences significant events firsthand and has an effect on history.[68] Likewise, Perkins places himself in significant historic events as if he had an impact on them. In the end, rather than warning us about real economic or foreign policy coming home to roost, Perkins has created *Confessions of an Economic Forrest Gump.*

This book is an easy read, but lacks leadership lessons for the military audience. If Perkins wanted to convey anything of substance, it would be to consider how one's actions could impact the local and global society. He wrote this book in order to have a positive impact on society's conscience.[69] Perkins took up his role as an EHM because it benefited him materially, but it had a negative impact on the global society. Likewise, military leaders should consider how their decisions impact not only their subordinates, but also the mission as a whole, and society's views of the military or the United States. The decision to strike a schoolhouse housing militants might be tactically wise, but the backlash from the local community and in the media could be more detrimental in the long run. Periodically, leaders should take a step back and look at the big picture to determine the best course of action.

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[60] PERKINS, *supra* note 1, at 20-21.

[61] Sebastian Mallaby, *The Facts Behind the 'Confessions,'* WASH. POST, Feb. 27, 2006, at A15 (criticizing author John Perkins, whom he recently met on a radio show).

[62] PERKINS, *supra* note 1, at xii.

[63] *Id*. at 200-02.

[64] *Id.* at 202.

[65] *Id.* at 200-02.

[66] *Id.* at 219.

[67] *Id.*

[68] FORREST GUMP (Paramount Pictures 1994).

[69] PERKINS, *supra* note 1, at xvi.

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 2007 - October 2008) (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	56th Judge Advocate Officer Graduate Course	13 Aug 07 – 22 May 08
5-27-C22	57th Judge Advocate Officer Graduate Course	11 Aug 08 – 22 May 09
5-27-C20 (Ph 2)	174th JAOBC/BOLC III	9-Nov 07 – 6-Feb 08
5-27-C20 (Ph 2)	175th JAOBC/BOLC III	22 Feb – 7 May 08
5-27-C20 (Ph 2)	176th JAOBC/BOLC III	18 Jul – 1 Oct 08
5F-F1	199th Senior Officers Legal Orientation Course	22 – 26 Oct 07
5F-F1	200th Senior Officers Legal Orientation Course	28 Jan – 1 Feb 08
5F-F1	201st Senior Officers Legal Orientation Course	24 – 28 Mar 08
5F-F1	202d Senior Officers Legal Orientation Course	9 – 13 Jun 08
5F-F1	203d Senior Officers Legal Orientation Course	8 – 12 Sep 08
5F-F3	14th RC General Officer Legal Orientation Course	13 – 15 Feb 08
5F-F52	38th Staff Judge Advocate Course	2 – 6 Jun 08
5F-F52S	11th SJA Team Leadership Course	2 – 4 Jun 08

5F-F55	2008 JAOAC (Phase II)	7 – 18 Jan 08
5F-JAG	2007 JAG Annual CLE Conference	1 – 5 Oct 07
JARC-181	2008 JA Professional Recruiting Conference	15 – 18 Jul 08

NCO ACADEMY COURSES		
600-BNCOC	2d BNCOC Common Core	4 – 25 Jan 08
600-BNCOC	3d BNCOC Common Core	10 – 28 Mar 08
600-BNCOC	4th BNCOC Common Core	8 – 29 May 08
600-BNCOC	5th BNCOC Common Core	4 – 22 Aug 08
512-27D30 (Ph 2)	1st Paralegal Specialist BNCOC	2 Nov – 7 Dec 07
512-27D30 (Ph 2)	2d Paralegal Specialist BNCOC	29 Jan – 29 Feb 08
512-27D30 (Ph 2)	3d Paralegal Specialist BNCOC	2 Apr – 2 May 08
512-27D30 (Ph 2)	4th Paralegal Specialist BNCOC	3 Jun – 3 Jul 08
512-27D30 (Ph 2)	5th Paralegal Specialist BNCOC	26 Aug – 26 Sep 08
512-27D40 (Ph 2)	1st Paralegal Specialist ANCOC	2 Nov – 7 Dec 07
512-27D40 (Ph 2)	2d Paralegal Specialist ANCOC	29 Jan – 29 Feb 08
512-27D40 (Ph 2)	3d Paralegal Specialist ANCOC	2 Apr – 2 May 08
512-27D40 (Ph 2)	4th Paralegal Specialist ANCOC	3 Jun – 3 Jul 08
512-27D40 (Ph 2)	5th Paralegal Specialist ANCOC	26 Aug – 26 Sep 08
WARRANT OFFICER COURSES		
7A-270A2	9th JA Warrant Officer Advanced Course	7 Jul – 1 Aug 08
7A-270A0	15th JA Warrant Officer Basic Course	27 May – 20 Jun 08
7A-270A1	19th Legal Administrators Course	16 – 20 Jun 08
7A270A3	2008 Senior Warrant Officer Symposium	4 – 8 Feb 08
ENLISTED COURSES		
512-27D/20/30	19th Law for Paralegal Course	24 – 28 Mar 08
512-27DC5	25th Court Reporter Course	28 Jan – 28 Mar 08
512-27DC5	26th Court Reporter Course	21 Apr – 20 Jun 08
512-27DC5	27th Court Reporter Course	28 Jul – 26 Sep 08
512-27DC6	8th Court Reporting Symposium	29 Oct – 2 Nov 07
512-27DC7	3d Redictation Course	7 – 18 Jan 08
512-27DC7	4th Redictation Course	31 Mar – 11 Apr 08
512-27D-CLNCO	10th BCT NCOIC Course	16 – 20 Jun 08
512-27DCSP	17th Senior Paralegal Course	16 – 20 Jun 08
5F-F58	2008 BCT Symposium	4 – 8 Feb 08

ADMINISTRATIVE AND CIVIL LAW		
5F-F21	6th Advanced Law of Federal Employment Course	17 – 19 Oct 07
5F-F22	61st Law of Federal Employment Course	15 – 19 Oct 07
5F-F23	61st Legal Assistance Course	29 Oct – 2 Nov 07
5F-F23	62d Legal Assistance Course	5 – 9 May 08
5F-F202	6th Ethics Counselors Course	14 – 18 Apr 08
5F-F23E	2007 USAREUR Legal Assistance CLE	5 – 8 Nov 07
5F-F24	32d Administrative Law for Installations Course	17 – 21 Mar 08
5F-F24E	2008 USAREUR Administrative Law CLE	15 – 19 Sep 08
5F-F26E	2007 USAREUR Claims Course	15 – 19 Oct 07
5F-F28	2007 Income Tax Law Course	10 – 14 Dec 07
5F-F28E	7th USAREUR Income Tax CLE	3 – 7 Dec 07
5F-28H	8th Hawaii Income Tax CLE	14 – 18 Jan 08
5F-F28P	8th PACOM Income Tax CLE	7 – 11 Jan 08
5F-F29	26th Federal Litigation Course	6 – 10 Aug 08
CONTRACT AND FISCAL LAW		
5F-F10	159th Contract Attorneys Course	3 – 11 Mar 08
5F-F10	160th Contract Attorneys Course	23 Jul – 1 Aug 08
5F-F101	8th Procurement Fraud Course	26 – 30 May 08
5F-F103	8th Advanced Contract Law Course	7 – 11 Apr 08
5F-F11	2007 Government Contract Law Symposium	4 – 7 Dec 07
5F-F12	77th Fiscal Law Course	22 – 26 Oct 07
5F-F12	78th Fiscal Law Course	28 Apr – 2 May 08
5F-F13	4th Operational Contracting	12 – 14 Mar 08
5F-F14	26th Comptrollers Accreditation Fiscal Law Course	15 – 18 Jan 08
5F-F15E	2008 USAREUR Contract Law CLE	12 – 15 Feb 08
8F-DL12	2d Distance Learning Fiscal Law Course	4 – 8 Feb 08

CRIMINAL LAW		
5F-F31	13th Military Justice Managers Course	15 – 19 Oct 07
5F-F33	51st Military Judge Course	21 Apr – 9 May 08
5F-F34	29th Criminal Law Advocacy Course	4 – 15 Feb 08
5F-F34	30th Criminal Law Advocacy Course	8 – 19 Sep 08
5F-F35	31st Criminal Law New Developments Course	5 – 8 Nov 07
5F-F35E	2008 USAREUR Criminal Law CLE	15 – 18 Jan 08
INTERNATIONAL AND OPERATIONAL LAW		
5F-F41	4th Intelligence Law Course	23 – 27 Jun 08
5F-F42	89th Law of War Course	28 Jan – 1 Feb 08
5F-F42	90th Law of War Course	7 – 11 Jul 08
5F-F43	4th Advanced Intelligence Law Course	25 – 27 Jun 08
5F-F44	3d Legal Issues Across the IO Spectrum	14 – 18 Jul 08
5F-F45	7th Domestic Operational Law Course	29 Oct – 2 Nov 07
5F-F47	49th Operational Law Course	25 Feb – 7 Mar 08
5F-F47	50th Operational Law Course	28 Jul – 8 Aug 08
5F-F47E	2008 USAREUR Operational Law CLE	28 Apr – 2 May 08

3. Naval Justice School and FY 2008 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 (010) Lawyer Course (020) Lawyer Course (030) Lawyer Course (040)	15 Oct – 14 Dec 07 22 Jan – 21 Mar 08 2 Jun – 1 Aug 08 4 Aug – 3 Oct 08
BOLT	BOLT (010) BOLT (010) BOLT (020) BOLT (020) BOLT (030) BOLT (030)	9 – 12 Oct 07 (USN) 9 – 12 Oct 07 USMC) 24 – 28 Mar 08 (USMC) 24 – 28 Mar 08 (USN 4 – 8 Aug 08 (USMC) 4 – 8 Aug 08 (USN)
961F	Coast Guard Judge Advocate Course (010)	9 – 12 Oct 07

900B	Reserve Lawyer Course (010) Reserve Lawyer Course (020)	10 – 14 Mar 08 22 – 26 Sep 08
850T	SJA/E-Law Course (010) SJA/E-Law Course (020)	12 – 23 May 08 28 Jul – 8 Aug 08
786R	Advanced SJA/Ethics (010) Advanced SJA/Ethics (020)	24 – 28 Mar 08 (San Diego) 14 – 18 Apr (Norfolk)
850V	Law of Military Operations (010)	16 – 27 Jun 08
4044	Joint Operationals Law Training (010)	21 – 24 Jul 08
0258	Senior Officer (010) Senior Officer (020) Senior Officer (030) Senior Officer (040) Senior Officer (050) Senior Officer (060) Senior Officer (070)	22 – 26 Oct 07 (Newport) 10 – 14 Mar 08 (Newport) 5 – 9 May 08 (Newport) 9 – 13 Jun 08 (Newport) 21 – 25 Jul 08 (Newport) 18 – 22 Aug 08 (Newport) 22– 26 Sep 08 (Newport)
4048	Estate Planning (010)	21 – 25 Jul 08
961M	Effective Courtroom Communications (010) Effective Courtroom Communications (020)	29 Oct – 2 Nov 07 (Norfolk) 28 Jan – 1 Feb 08 (Bremerton)
748A	Law of Naval Operations (010) Law of Naval Operations (020)	3 – 7 Mar 08 15 – 19 Sep 08
7485	Litigating National Security (010)	29 Apr – 1 May 08 (Andrews AFB)
748K	USMC Trial Advocacy Training (010) USMC Trial Advocacy Training (020) USMC Trial Advocacy Training (030) USMC Trial Advocacy Training (040)	22 – 26 Oct 07 (Camp Lejeune) 12 – 16 May 08 (Okinawa) 19 – 23 May 08 (Pearl Harbor) 15 – 19 Sep 08 (San Diego)
2205	Defense Trial Enhancement (010)	12 – 16 May 08
3938	Computer Crimes (010)	19 – 23 May 08 (Newport)
961D	Military Law Update Workshop (Officer) (010) Military Law Update Workshop (Officer) (020)	TBD TBD
961J	Defending Complex Cases (010)	18 – 22 Aug 08
525N	Prosecuting Complex Cases (010)	11 – 15 Aug 08
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)	5 – 9 Nov 07 (Pensacola) 14 – 18 Jan 08 (Pensacola) 14 Jan – 18 Feb 08 (Bahrain) 3 – 7 Mar 08 (Pensacola) 14 – 18 Apr 08 (Pensacola) 28 Apr – 2 May 08 (Naples, Italy) 9 – 13 Jun 08 (Pensacola) 16 – 20 Jun 08 (Quantico) 23 – 27 Jun 08 (Camp Lejeune) 14 – 18 Jul 08 (Pensacola)

	Senior Officer (Fleet) (110)	11 – 15 Aug 08 (Pensacola)
961A (PACOM)	Continuing Legal Education (010) Continuing Legal Education (020)	4 – 5 Feb 08 (Yokosuka) 1 – 2 May 08 (Naples)
7878	Legal Assistance Paralegal Course (010)	31 Mar – 5 Apr 08
03RF	Legalman Accession Course (010) Legalman Accession Course (020) Legalman Accession Course (030)	1 Oct – 14 Dec 07 22 Jan – 4 Apr 08 9 Jun – 22 Aug 08
846L	Senior Legalman Leadership Course (010) Senior Legalman Leadership Course (010)	18 – 22 Aug 08
049N	Reserve Legalman Course (Phase I) (010)	21 Apr – 2 May 08
056L	Reserve Legalman Course (Phase II) (010)	5 – 16 May 08
846M	Reserve Legalman Course (Phase III) (010)	19 – 30 May 08
5764	LN/Legal Specialist Mid-Career Course (010) LN/Legal Specialist Mid-Career Course (020)	15 – 26 Oct 07 5 – 16 May 08
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)	21 Apr – 2 May 08 16 – 27 Jun 08 (Norfolk) 14 – 25 Jul 08 (San Diego)
4046	SJA Legalman (010) SJA Legalman (020)	25 Feb – 7 Mar 08 (San Diego) 12 – 23 May 08 (Norfolk)
Pending	Prosecution Trial Enhancement (010)	4 – 8 Feb 08
7487	Family Law/Consumer Law (010)	31 Mar – 4 Apr 08
627S	Senior Enlisted Leadership Course (Fleet) (010) Senior Enlisted Leadership Course (Fleet) (020) Senior Enlisted Leadership Course (Fleet) (030) Senior Enlisted Leadership Course (Fleet) (040) Senior Enlisted Leadership Course (Fleet) (050) Senior Enlisted Leadership Course (Fleet) (060) Senior Enlisted Leadership Course (Fleet) (070) Senior Enlisted Leadership Course (Fleet) (080) Senior Enlisted Leadership Course (Fleet) (090) Senior Enlisted Leadership Course (Fleet) (100) Senior Enlisted Leadership Course (Fleet) (110) Senior Enlisted Leadership Course (Fleet) (120) Senior Enlisted Leadership Course (Fleet) (130) Senior Enlisted Leadership Course (Fleet) (140) Senior Enlisted Leadership Course (Fleet) (150) Senior Enlisted Leadership Course (Fleet) (160) Senior Enlisted Leadership Course (Fleet) (170)	5 – 7 Oct 07 (Norfolk) 6 – 8 Nov 08 (San Diego) 7 – 9 Jan 08 (Jacksonville) 14 – 16 Jan 08 (Bahrain) 4 – 6 Feb 08 (Yokosuka 11 – 13 Feb 08 (Okinawa 20 – 22 Feb 08 (Norfolk) 18 – 20 Mar 08 (San Diego) 31 Mar – 2 Apr 08 (Norfolk) 14 – 16 Apr 08 (Bremerton) 22 – 24 Apr 08 (San Diego) 28 – 30 Apr 08 (Naples) 19 – 21 May 08 (Norfolk) 8 – 10 Jul 08 (San Diego) 4 – 6 Aug 08 (Millington) 25 – 27 Aug 08 (Pendleton) 2 – 4 Sep 08 (Norfolk)

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)	15 Oct – 2 Nov 07 26 Nov – 14 Dec 07 28 Jan – 15 Feb 08 10 – 28 Mar 08 28 Apr – 16 May 08 2 – 20 Jun 08 7 – 25 Jul 08 8 – 26 Sep 08
0379	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)	22 Oct – 2 Nov 07 26 Nov – 7 Dec 07 4 – 15 Feb 08 10 – 21 Mar 08 21 Apr – 2 May 08 7 – 18 Jul 08 8 – 19 Sep 08
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)	5 – 9 Nov 07 7 – 11 Jan 08 (Jacksonville) 25 – 29 Feb 08 7 – 11 Apr 08 23 – 27 Jun 08 4 – 8 Aug 08 (Millington) 25 – 29 Aug 08
4046	Military Justice Course for SJA/Convening Authority/Shipboard Legalman (020)	16 – 27 Jun 08

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)	1 – 19 Oct 07 26 Nov – 14 Dec 07 7 – 25 Jan 08 25 Feb – 14 Mar 08 5 – 23 May 08 9 – 27 Jun 08 28 Jul – 15 Aug 08 8 – 26 Sep 08

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)	15 – 26 Oct 07 26 Nov – 7 Dec 07 7 Jan – 18 Jan 08 31 Mar – 11 Apr 08 5 – 16 May 08 9 – 20 Jun 08 28 Jul – 8 Aug 08 8 – 18 Sep 08
3759	Senior Officer Course (010) Senior Officer Course (020) Senior Officer Course (030) Senior Officer Course (040) Senior Officer Course (050)	29 Oct – 2 Nov 07 (San Diego) 4 – 8 Feb 08 (Yokosuka) 11 – 15 Feb 08 (Okinawa) 31 Mar – 4 Apr 08 (San Diego) 14 – 18 Apr 08 (Bremerton)

	Senior Officer Course (060) Senior Officer Course (070) Senior Officer Course (080)	28 Apr – 2 May 08 (San Diego) 2 – 6 Jun 08 (San Diego) 25 – 29 Aug 08 (Pendleton)
2205	CA Legal Assistance Course (010)	TBD
4046	Military Justice Course for Staff Judge Advocate/ Convening Authority/Shipboard Legalmen (010)	25 Feb – 7 Mar 08

4. Air Force Judge Advocate General School Fiscal Year 2008 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**
Judge Advocate Staff Officer Course, Class 08-A	9 Oct – 13 Dec 2007
Paralegal Apprentice Course, Class 08-01	10 Oct – 30 Nov 2007
Area Defense Counsel Orientation Course, Class 08-A	15 – 19 Oct 2007
Defense Paralegal Orientation Course, Class 08-A	15 – 19 Oct 2007
Paralegal Craftsman Course, Class 08-01	24 Oct – 7 Dec 2007
Advanced Environmental Law Course, Class 08-A (Off-Site Wash DC Location)	29 – 30 Oct 2007
Reserve Forces Judge Advocate Course, Class 08-A	3 – 4 Nov 2007
Deployed Fiscal Law & Contingency Contracting Course, Class 08-A	27 – 30 Nov 2007
Computer Legal Issues Course, Class 08-A	3 – 4 Dec 2007
Legal Aspects of Information Operations Law Course, Class 08-A	5 – 7 Dec 2007
Federal Employee Labor Law Course, Class 08-A	10 – 14 Dec 2007
Paralegal Apprentice Course, Class 08-02	3 Jan – 22 Feb 2008
Trial & Defense Advocacy Course, Class 08-A	7 – 18 Jan 2008
Air National Guard Annual Survey of the Law, Class 08-A & B (Off-Site)	25 – 26 Jan 2008
Air Force Reserve Annual Survey of the Law, Class 08-A & B (Off-Site)	25 – 26 Jan 2008
Military Justice Administration Course, Class 08-A	28 Jan – 1 Feb 2008
Legal & Administrative Investigations Course, Class 08-A	4 – 8 Feb 2008
Total Air Force Operations Law Course, Class 08-A	8 – 10 Feb 2008
Homeland Defense/Homeland Security Course, Class 08-A	11 – 14 Feb 2008
Judge Advocate Staff Officer Course, Class 08-B	19 Feb – 18 Apr 2008
Paralegal Apprentice Course, Class 08-03	25 Feb – 11 Apr 2008

Paralegal Craftsman Course, Class 08-02	3 Mar – 11 Apr 2008
Interservice Military Judges' Seminar,Class 08-A	1 – 4 Apr 2008
Senior Defense Counsel Course , Class 08-A	14 – 18 Apr 2008
Paralegal Apprentice Course, Class 08-04	15 Apr – 3 Jun 2008
Environmental Law Course , Class 08-A	21 – 25 Apr 2008
Area Defense Counsel Orientation Course, Class 08-B	21 – 25 Apr 2008
Defense Paralegal Orientation Course, Class 08-B	21 – 25 Apr 2008
Advanced Trial Advocacy Course, Class 08-A	29 Apr – 2 May 2008
Reserve Forces Judge Advocate Course, Class 08-A	3 – 4 May 2008
Advanced Labor & Employment Law Course, Class 08-A	5 – 9 May 2008
Operations Law Course, Class 08-A	12 – 22 May 2008
Negotiation and Appropriate Dispute Resolution Course, Class 08-A	19 – 23 May 2008
Environmental Law Update Course (DL), Class 08-A	28 – 30 May 2008
Reserve Forces Paralegal Course, Class 08-B	2 – 13 Jun 2008
Paralegal Apprentice Course, Class 08-05	4 Jun – 23 Jul 2008
Senior Reserve Forces Paralegal Course, Class 08-A	9 – 13 Jun 2008
Staff Judge Advocate Course, Class 08-A	16 – 27 Jun 2008
Law Office Management Course, Class 08-A	16 – 27 Jun 2008
Judge Advocate Staff Officer Course, Class 08-C	14 Jul – 12 Sep 2008
Paralegal Apprentice Course, Class 08-06	29 Jul – 16 Sep 2008
Paralegal Craftsman Course, Class 08-03	31 Jul – 11 Sep 2008
Trial & Defense Advocacy Course, Class 08-B	15 – 26 Sep 2008

5. Civilian-Sponsored CLE Courses

For addresses and detailed information, see the March 2007 issue of *The Army Lawyer*.

6. Phase I (Correspondence Phase), Deadline for RC-JAOAC 2008

The suspense for submission of all RC-JAOAC Phase I (Correspondence Phase) materials is ***NLT 2400, 1 November 2007***, for those judge advocates who desire to attend Phase II (Resident Phase) at TJAGLCS in January 2008. This requirement includes submission of all JA 151, Fundamentals of Military Writing, exercises.

This requirement is particularly critical for some officers. The 2008 JAOAC will be held in January 2008 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 2007). If the student receives notice of the need to re-do any examination or exercise after 1 October 2007, 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 2007 will not be cleared to attend the 2008 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 regarding attendance at Phase II (Residence Phase) or completion of Phase I writing exercises, contact LTC Jeff Sexton, commercial telephone (434) 971-3357, or e-mail jeffrey.sexton@hqda.army.mil.

For system or help desk issues regarding JAOAC or any on-line or correspondence course material, please contact the Distance Learning Department at jagc.training@hqda.army.mil or commercial telephone (434) 971-3153.

7. Mandatory Continuing Legal Education Jurisdiction and Reporting Dates

Jurisdiction	**Reporting Month**
Alabama**	31 December annually
Arizona	15 September annually
Arkansas	30 June annually
California*	1 February annually
Colorado	Anytime within three-year period
Delaware	Period ends 31 December; confirmation required by 1 February if compliance required; if attorney is admitted in even-numbered year, period ends in even-numbered year, etc.
Florida**	Assigned month every three years
Georgia	31 January annually
Idaho	31 December, every third year, depending on year of admission
Indiana	31 December annually
Iowa	1 March annually
Kansas	Thirty days after program, hours must be completed in compliance period 1 July to June 30
Kentucky	10 August; completion required by 30 June
Louisiana**	31 January annually; credits must be earned by 31 December
Maine**	31 July annually
Minnesota	30 August annually

Mississippi**	15 August annually; 1 August to 31 July reporting period
Missouri	31 July annually; reporting year from 1 July to 30 June
Montana	1 April annually
Nevada	1 March annually
New Hampshire**	1 August annually; 1 July to 30 June reporting year
New Mexico	30 April annually; 1 January to 31 December reporting year
New York*	Every two years within thirty days after the attorney's birthday
North Carolina**	28 February annually
North Dakota	31 July annually for year ending 30 June
Ohio*	31 January biennially
Oklahoma**	15 February annually
Oregon	Period end 31 December; due 31 January
Pennsylvania**	Group 1: 30 April Group 2: 31 August Group 3: 31 December
Rhode Island	30 June annually
South Carolina**	1 January annually
Tennessee*	1 March annually
Texas	Minimum credits must be completed and reported by last day of birth month each year
Utah	31 January annually
Vermont	2 July annually
Virginia	31 October Completion Deadline; 15 December reporting deadline
Washington	31 January triennially
West Virginia	31 July biennially; reporting period ends 30 June
Wisconsin*	1 February biennially; period ends 31 December

Wyoming	30 January annually

* Military exempt (exemption must be declared with state).
**Must declare exemption.

Current Materials of Interest

1. The Judge Advocate General's On-Site Continuing Legal Education Training and Workshop Schedule (2007-2008).

Date	Unit/Location	ATTRS Course Number	Topic	POC
13-14 Oct 07	Kansas National Guard Washburn Univ. School of Law Topeka, KS		Trial Defense Service, Ethics and Emergency Response Issues	MAJ Matt Oleen (785) 274-1337/1027 Matt.oleen@us.army.mil

The consolidated list of the on-sites for Fiscal Year 2008 will be published in the next issue of The Army Lawyer.

2. The Judge Advocate General's School, U.S. Army (TJAGLCS) Materials Available Through The Defense Technical Information Center (DTIC).

Each year, TJAGSA publishes deskbooks and materials to support resident course instruction. Much of this material is useful to judge advocates and government civilian attorneys who are unable to attend courses in their practice areas, and TJAGSA receives many requests each year for these materials. Because the distribution of these materials is not in its mission, TJAGSA does not have the resources to provide these publications.

To provide another avenue of availability, some of this material is available through the Defense Technical Information Center (DTIC). An office may obtain this material through the installation library. Most libraries are DTIC users and would be happy to identify and order requested material. If the library is not registered with the DTIC, the requesting person's office/organization may register for the DTIC's services.

If only unclassified information is required, simply call the DTIC Registration Branch and register over the phone at (703) 767-8273, DSN 427-8273. If access to classified information is needed, then a registration form must be obtained, completed, and sent to the Defense Technical Information Center, 8725 John J. Kingman Road, Suite 0944, Fort Belvoir, Virginia 22060-6218; telephone (commercial) (703) 767-8273, (DSN) 427-8273, toll-free 1-800-225-DTIC, menu selection 2, option 1; fax (commercial) (703) 767-8228; fax (DSN) 426-8228; or e-mail to reghelp@dtic.mil.

If there is a recurring need for information on a particular subject, the requesting person may want to subscribe to the Current Awareness Bibliography (CAB) Service. The CAB is a profile-based product, which will alert the requestor, on a biweekly basis, to the documents that have been entered into the Technical Reports Database which meet his profile parameters. This bibliography is available electronically via e-mail at no cost or in hard copy at an annual cost of $25 per profile.Contact DTIC at www.dtic.mil/dtic/current.html.

Prices for the reports fall into one of the following four categories, depending on the number of pages: $7, $12, $42, and $122. The DTIC also supplies reports in electronic formats. Prices may be subject to change at any time. Lawyers, however, who need specific documents for a case may obtain them at no cost.

For the products and services requested, one may pay either by establishing a DTIC deposit account with the National Technical Information Service (NTIS) or by using a VISA, MasterCard, or American Express credit card. Information on establishing an NTIS credit card will be included in the user packet.

There is also a DTIC Home Page at http://www.dtic.mil to browse through the listing of citations to unclassified/unlimited documents that have been entered into the Technical Reports Database within the last twenty-five years to get a better idea of the type of information that is available. The complete collection includes limited and classified documents as well, but those are not available on the web.

Those who wish to receive more information about the DTIC or have any questions should call the Product and Services Branch at (703)767-8267, (DSN) 427-8267, or toll-free 1-800-225-DTIC, menu selection 6, option 1; or send an e-mail to bcorders@dtic.mil.

Contract Law

AD A301096 Government Contract Law Deskbook, vol. 1, JA-501-1-95.

AD A301095 Government Contract Law Desk book, vol. 2, JA-501-2-95.

AD A265777 Fiscal Law Course Deskbook, JA-506-93.

Legal Assistance

A384333 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.

3. The Legal Automation Army-Wide Systems XXI—JAGCNet

a. The Legal Automation Army-Wide Systems XXI (LAAWS XXI) operates a knowledge management and information service called JAGCNet primarily dedicated

to servicing the Army legal community, but also provides for Department of Defense (DOD) access in some cases. Whether you have Army access or DOD-wide access, all users will be able to download TJAGSA publications that are available through the JAGCNet.

b. Access to the JAGCNet:

(1) Access to JAGCNet is restricted to registered users who have been approved by the LAAWS XXI Office and senior OTJAG staff:

(a) Active U.S. Army JAG Corps personnel;

(b) Reserve and National Guard U.S. Army JAG Corps personnel;

(c) Civilian employees (U.S. Army) JAG Corps personnel;

(d) FLEP students;

(e) Affiliated (U.S. Navy, U.S. Marine Corps, U.S. Air Force, U.S. Coast Guard) DOD personnel assigned to a branch of the JAG Corps; and, other personnel within the DOD legal community.

(2) Requests for exceptions to the access policy should be e-mailed to:

LAAWSXXI@jagc-smtp.army.mil

c. How to log on to JAGCNet:

(1) Using a Web browser (Internet Explorer 6 or higher recommended) go to the following site: http://jagcnet.army.mil.

(2) Follow the link that reads "Enter JAGCNet."

(3) If you already have a JAGCNet account, and know your user name and password, select "Enter" from the next menu, then enter your "User Name" and "Password" in the appropriate fields.

(4) If you have a JAGCNet account, *but do not know your user name and/or Internet password*, contact the LAAWS XXI HelpDesk at LAAWSXXI@jagc-smtp.army.mil.

(5) If you do not have a JAGCNet account, select "Register" from the JAGCNet Intranet menu.

(6) Follow the link "Request a New Account" at the bottom of the page, and fill out the registration form completely. Allow seventy-two hours for your request to process. Once your request is processed, you will receive an e-mail telling you that your request has been approved or denied.

(7) Once granted access to JAGCNet, follow step (c), above.

4. TJAGSA Publications Available Through the LAAWS XXI JAGCNet

For detailed information of TJAGLCS Publications available through the LAAWS XXI JAGCNet, see the March 2007, issue of *The Army Lawyer*.

5. TJAGLCS Legal Technology Management Office (LTMO)

The TJAGLCS, U.S. Army, Charlottesville, Virginia continues to improve capabilities for faculty and staff. We have installed new computers throughout TJAGLCS, all of which are compatible with Microsoft Windows XP Professional and Microsoft Office 2003 Professional.

The TJAGLCS faculty and staff are available through the Internet. Addresses for TJAGLCS personnel are available by e-mail at jagsch@hqda.army.mil or by accessing the JAGC directory via JAGCNET. If you have any problems, please contact LTMO at (434) 971-3257. Phone numbers and e-mail addresses for TJAGLCS personnel are available on TJAGLCS Web page at http://www.jagcnet.army.mil/tjagsa. Click on "directory" for the listings.

For students who wish to access their office e-mail while attending TJAGLCS classes, please ensure that your office e-mail is available via the web. Please bring the address with you when attending classes at TJAGLCS. If your office does not have web accessible e-mail, forward your office e-mail to your AKO account. It is mandatory that you have an AKO account. You can sign up for an account at the Army Portal, http://www.jagcnet.army.mil/tjagsa. Click on "directory" for the listings.

Personnel desiring to call TJAGLCS can dial via DSN 521-7115 or, provided the telephone call is for official business only, use the toll free number, (800) 552-3978; the receptionist will connect you with the appropriate department or directorate. For additional information, please contact the LTMO at (434) 971-3264 or DSN 521-3264.

6. The Army Law Library Service

Per *Army Regulation 27-1*, paragraph 12-11, the Army Law Library Service (ALLS) must be notified before any redistribution of ALLS-purchased law library materials. Posting such a notification in the ALLS FORUM of JAGCNet satisfies this regulatory requirement as well as alerting other librarians that excess materials are available.

Point of contact is Mrs. Dottie Evans, The Judge Advocate General's School, U.S. Army, ATTN: CTR-MO, 600 Massie Road, Charlottesville, Virginia 22903-1781. Telephone DSN: 521-3278, commercial: (434) 971-3278, or e-mail at Dottie.Evans@hqda.army.mil.

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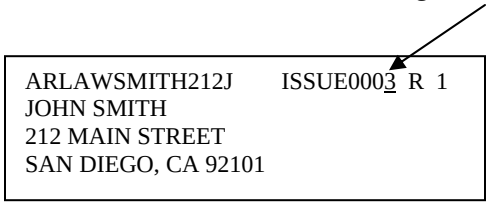

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