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Articles

Book Reviews

"Out of the Mouth[s] of Babes"[1]: Can Young Children Even Bear Testimony?

Major Rebecca K. Connally[*]

I. Introduction

One simple word: testimonial,[2] has taken on a life and persona of its own. She has been elusive in definition, yet powerful in application. She confuses practitioners, yet claims to be transparent. Unapologetically, she complicates the heart of the Sixth Amendment's confrontation clause[3] and for over two and a half years, state and federal courts alike have grappled with her meaning, simply because her creator refused to define her.

The Supreme Court's decision in *Crawford v. Washington*[4] significantly altered the landscape [5] in admitting out-of-court statements in criminal trials. The Court effectively cut a swath through the forest of Sixth Amendment jurisprudence, yet failed to provide adequate direction for trial lawyers who find themselves in the midst of this territory. The Court, attempting to fashion a bright-line rule for out-of-court statements,[6] created a path of uncertainty when it failed to provide a sufficient definition of testimonial.

Of particular concern to many practitioners is the effect of *Crawford*'s holding on the prosecution of child abuse cases.[7] *Crawford*'s result renders a child's testimonial utterance inadmissible in the subsequent prosecution.[8] Many times in a child abuse prosecution, the main evidence available to prosecutors is the child's statements. Striking a balance between the accused's and the accuser's rights is an arduous task for practitioners. Society has an indelible interest in protecting the defenseless and justice is as important for them as it is for those they accuse. *Crawford*'s intention of safeguarding the accused may result in silencing the voices of their victims. In an effort to strike this delicate balance, this article suggests a framework for analyzing the testimonial nature of children's statements. Specifically, a rebuttable presumption should exist that, at a certain age, children are incapable of uttering a testimonial statement because of their inability to appreciate its possible and intended use at a future legal proceeding. This method not only keeps true to *Crawford*'s aim of safeguarding the constitutional provisions for the accused, it also ensures society's interest in protecting young children.

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[1] *Psalm* 8:2.

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[2] *See* Crawford v. Washington, 541 U.S. 36, 68 (2004). Suggested by the briefs and adopted by the Supreme Court in *Crawford*, this word will appear throughout this article without quotation marks and is sometimes referred to using a female pronoun.

[3] The Sixth Amendment states, in pertinent part that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." U.S. CONST. amend. VI.

[4] 541 U.S. 36.

[5] *See* Lieutenant Commander Kevin R. O'Neil, Article, Essay & Note: *Navigating the Confrontation Clause Waters after* Crawford v. Washington*; Where Have We Gone and Where Are We Headed?*, 51 NAVAL L. REV. 175 (2005).

[6] Without expanding on the definition of testimonial, the Supreme Court provided that, at a minimum it applies to prior ex parte testimony and police interrogations. *See Crawford*, 541 U.S. at 68.

[7] *See, e.g.*, Victor Vieth, *Keeping the Balance True: Admitting Child Hearsay in the Wake of* Crawford v. Washington, 16 UPDATE EXPRESS 12 (2004); Myrna Raeder, Crawford *and Beyond: Exploring the Future of the Confrontation Clause in Light of Its Past: Remember the Ladies and the Children Too:* Crawford*'s Impact on Domestic Violence and Child Abuse Cases*, 71 BROOKLYN L. REV. 311 (2005). *See generally* Richard D. Friedman, Features, *Adjusting to Crawford: High Court Decision Restores Confrontation Clause Protection*, 19 CRIM. JUST. 4, 10 (2004) (recognizing that children's statements will test the meaning of "testimonial"). *But see* Laurie E. Martin, Note: *Child Abuse Witness Protections Confront* Crawford v. Washington, 39 IND. L. REV. 113 (2005) (asserting that *Crawford* is not a barrier to child abuse prosecutions).

[8] If the only evidence in a child abuse prosecution is the child's hearsay statement, then determining the statement's testimonial character will be outcome determinative. *See generally* Interview with MAJ David Coombs, Professor, Criminal Law Dep't, TJAGLCS, in Charlottesville, Va. (Feb. 23, 2007).

II. *Crawford v. Washington*

The Supreme Court, in no uncertain terms, stopped the direction of travel of the current hearsay law and changed its course. Through its holding in *Crawford v. Washington*, the Court effectively overruled the *Ohio v. Roberts*[9] approach to hearsay in the testimonial sense of the word.[10] No longer is "reliability" the litmus test of determining admissibility of hearsay statements. Instead, *Crawford* mandates the exclusion of all testimonial statements, regardless of reliability, where there is a non-testifying declarant and an accused without a prior opportunity to cross-examine.[11] The radical departure from two decades of confrontation jurisprudence emerged from the Court's interpretation of the Framers' intent when inserting the phrase, "to be confronted with the witnesses against him"[12] into the text of the Sixth Amendment.

A. Overview—Facts and Holding

Michael Crawford appealed his assault and attempted murder conviction claiming the State's introduction of his wife's pre-recorded custodial statement violated his Sixth Amendment right to confront the witnesses against him.[13] Since his wife was a suspect at the time of her interrogation, the State offered her admissions as a statement against penal interest and the court found that it bore sufficient "guarantees of trustworthiness."[14] Michael Crawford invoked the marital privilege which turned Sylvia Crawford into a non-testifying declarant. This allowed the lower court to admit her station-house statement using the reliability analysis governing at the time.[15] Michael Crawford, then not having an opportunity to cross-examine a key witness, sought redress under the Constitution's Confrontation Clause.[16] On 8 March 2004, the Supreme Court answered his call and restored the protections provided by the Sixth Amendment by creating a line of demarcation between confrontation jurisprudence and the law of hearsay.[17]

The Supreme Court did not simply rule Sylvia Crawford's statements inadmissible under the hearsay rules. Instead, they clarified how the Confrontation Clause affects hearsay statements in the present day by traveling back in time to the trial of Sir Walter Raleigh.[18] Writing for the majority, Justice Scalia carefully recalled the English and American legal history leading up to the establishment of the Confrontation Clause.[19] Speaking for the Framers, Scalia noted that their primary concern was the "principal evil at which the Confrontation Clause was directed[—]the civil-law mode of criminal procedure, and particularly its use of *ex parte* examinations as evidence against the accused."[20] Consequently, the Court barred from admission all testimonial statements, regardless of reliability, where the declarant is unavailable, unless the accused had a prior opportunity for cross-examination.[21]

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[9] 448 U.S. 56 (1980). The seminal case at the time, *Roberts* set forth a definite two-step framework to analyze hearsay statements. *See generally id.* First, the declarant must be deemed unavailable at trial. *Id.* at 65. Next, the court examined the hearsay statement through the lens of reliability—admitting the statement if it fell within a firmly rooted hearsay exception or possessed other "indicia of reliability." *Id.* In the end, unless the statement bore "particularized guarantees of trustworthiness," the law demanded exclusion. *Id.* at 66.

[10] *See Crawford*, 541 U.S. at 66.

[11] *See generally id.* at 59–61.

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

[13] *See Crawford*, 541 U.S. at 40.

[14] *See id.* at 38–42.

[15] *See id*. at 40.

[16] *See id.* at 42.

[17] *See generally id.*; *see also* John Robert Knoebber, *Say That to My Face: Applying an Objective Approach to Determine the Meaning of Testimony in Light of* Crawford v. Washington, 51 LOY. L. REV. 497 (Fall 2005).

[18] *See Crawford*, 541 U.S. at 44.

[19] *See id.* at 43–50.

[20] *See id.* at 50 (emphasis in original).

[21] *See id.* at 54. Again, the Court standing in the Framers' shoes, imputed to them their disapproval of the admission of testimonial statements where defendants were denied the right of confrontation. *Id.* at 53, 58.

B. Testimonial—Elusive by Nature

The Supreme Court in *Crawford* clearly departed from the *Roberts* framework for determining admissibility of out-of-court statements in favor of the testimonial approach.[22] Claiming that reliability is an "amorphous"[23] standard that can easily be manipulated providing an "unpredictable"[24] framework with "vague standards,"[25] the Court exchanged that framework for the simple word: testimonial.[26] Unfortunately, the Court failed to define *their* meaning of the word testimonial, and unapologetically did so with the knowledge of the uncertainty it created.[27] Although it failed to articulate an analytical framework for determining what is testimonial, the Court explicitly stated that it applied "at a minimum to prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and to police interrogations."[28] Recognizing that "[v]arious formulations of [the] core class of 'testimonial' statements" exist, [29] the Court declined to adopt any of them; effectively leaving it up to the lower courts to decide how to define and ultimately apply testimonial. As a result, judges and scholars have struggled with which "core class" to utilize as the gatekeeper: is it the one proffered by the Petitioner's Brief,[30] the one found in Justice Thomas' concurring opinion in *White v. Illinois*,[31] the one suggested by the National Association of Criminal Defense Lawyers Amici Brief,[32] a combination of all three, or possibly even one created through the evolution of this new precedent? In order to properly define and apply testimonial in the context of child abuse cases, this article suggests the use of a rebuttable presumption together with a standardized approach as the appropriate framework.

III. Bearing Testimony—The Child Declarant

The Supreme Court's rationale in *Crawford v. Washington* set forth few definitive standards; however, the Court was certain when explaining that the Confrontation Clause's main concern governed those who "bore testimony."[33] The Court rationalized this premise with the Sixth Amendment's phrase: "witness against."[34] In other words, for a declarant's utterances to be testimonial, they must bear witness against another. The Court further explained that testimony is "'[a]

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[22] *See generally id.* at 63.

[23] *Id.*

[24] *Id.* at 68 n.10.

[25] *Id.* at 68.

[26] The term testimonial has also proven to be vague, amorphous, and definitionally unpredictable.

[27] *See generally Crawford*, 541 U.S. at 68. The Court noted that "our refusal to articulate a comprehensive definition in this case will cause interim uncertainty. But it can hardly be any worse than the status quo." *Id.* at note 10.

[28] *See id.* at 68. The Court further explained that their concept of interrogations is loosely defined, again recognizing that there are other definitions for interrogations as there are for testimonial. *Id.* at 53 n.4.

[29] Taking excerpts from three different sources, the Court suggested several examples of testimonial statements:

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

Id. at 51–52 (citations omitted).

[30] *See id.* at 51 (citing Brief for Petitioner at 23, Crawford v. Washington, 541 U.S. 36 (2004) (No. 02-9410)). The Petitioner's brief argued for a rule that prohibits the prosecution from introducing "ex parte in-court testimony or its functional equivalent—that is, material such as affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine, or similar pretrial statements that declarants would reasonably expect to be used prosecutorially." Petitioner's Brief at 23, *Crawford*, 541 U.S. 36 (No. 02-9410).

[31] *See Crawford*, 541 U.S. at 52 (citing White v. Illinois, 502 U.S. 346, 365 (1992) (Thomas, J., concurring)). In his concurring opinion, Justice Thomas suggested that the "Confrontation Clause is implicated by extrajudicial statements only insofar as they are contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions." *See White*, 502 U.S. at 365.

[32] *See Crawford*, 541 U.S. at 52 (citing Brief of Amici Curiae National Association of Criminal Defense Lawyers at 3, Crawford v. Washington, 541 U.S. 36 (2004) (No. 02-9410)). In their analysis of determining when a statement is a testimonial one, amici argues that "[n]ot every statement uttered, and later used at trial, is testimonial . . . [however] an out of court statement is testimonial *only* when the circumstances indicate that a reasonable declarant at the time would understand that the statement would later be available for use at a criminal trial." Brief of Amici Curiae National Association of Criminal Defense Lawyers at 22, *Crawford*, 541 U.S. 36 (No. 02-9410) (emphasis added).

[33] *See Crawford*, 541 U.S. at 51.

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

solemn declaration or affirmation made *for the purpose of* establishing or proving some fact.'"[35] Implied in this definition is the relevance of the declarant's purpose and intent when making the statement. The crucial question is this: is the statement itself testimonial once uttered, or do the circumstances surrounding the statement make it so? This article argues that the label "testimonial" does not attach once the words are spoken, but is created through the attendant circumstances. The declarant must make a "solemn declaration" and *know* that they are "bearing witness"—and in order to be a witness, the declarant must understand the consequences of his utterances.[36] A declarant cannot bear witness, unless he is able to appreciate the consequences of his statements and anticipate the intended use of those statements in an adversarial proceeding.[37] Consequently, this article proffers that children under five-years-old[38] are presumptively incapable of uttering a testimonial statement. This article does not argue for a categorical exclusion of all children's statements from the requirements of the Confrontation Clause; doing so is violative not only of *Crawford*'s holding, but of the Constitution as well.[39] Rather, this article suggests that a presumption should exist at which point the burden shifts to the party seeking exclusion of the statement to show the testimonial nature of the statement. Specifically, the presumption may be rebutted by considering the following eleven factors: (1) the declarant's age; (2) the declarant's mental capacity; (3) the declarant's understanding and intent when making the statement; (4) whether the statement was elicited or volunteered; (5) the recipient's status; (6) the recipient's role; (7) the recipient's prior knowledge of allegations and facts contained therein; (8) the recipient's manner of questioning (open-ended/leading); (9) the recipient's contact with law enforcement personnel; (10) the presence of law enforcement personnel during the taking of the statement; and (11) the primary purpose for making the statement.[40] If the opposing party fails to meet the burden, the statement is not testimonial and is therefore admissible, subject to evidentiary restrictions. In order to understand why young children are incapable of making testimonial statements, it is necessary to first examine what factors make a statement testimonial.

IV. Factors Determining Testimonial Hearsay

The Supreme Court's decision in *Crawford* is monumental not only for what it articulated but also for the areas on which it remained silent. Allowing lower courts to interpret the meaning of testimonial encouraged liberal analysis which eventually led to the inconsistent interpretation and application of the term.[41] Lower courts consider a variety of factors when determining the testimonial character of hearsay statements. Although the Supreme Court declined to provide a clear definition of testimonial when deciding the statement's testimonial nature, lower courts examine the nature of the statement, the recipient's status and role when procuring the statement, and the purpose behind making the statement. It is clear that a single factor alone cannot determine the testimonial character of a declarant's statement. This is particularly important when examining utterances from a child declarant. Lower courts should resist the temptation to simply rely on one of the Court's

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[35] *Crawford*, 541 U.S. at 51 (emphasis added) (citing 1 N. WEBSTER, AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE (1828)).

[36] *See generally* Friedman, *supra* note 7. Friedman proffers that if the declarant does not realize that they are "creating evidence," then sometimes, even the attendant circumstances, do not turn the statement into a testimonial one. *Id.* By way of example, he explains that the government's surreptitious recording of two "criminal confederates" does not turn their words into testimonial statements because they did not expect their statements to fall in the hands of law enforcement. *Id.*

[37] *See id.* Friedman argues that a certain amount of knowledge of the consequences is a necessary predicate to becoming a witness, in the testimonial sense of the word. *Id.* Additionally, he explains that even though young children may not be able to comprehend the precise nature of the legal system, their words may be testimonial if they understand that their statement may lead to adverse consequences. *Id.*

[38] *See generally* John R. Christiansen, *Washington Survey: The Testimony of Child Witnesses: Fact, Fantasy, and the Influence of Pretrial Interviews*, 62 WASH. L. REV. 705 (1987) (citing multiple studies on children's cognitive abilities that state most cognitive skills in memory and recall develop between the ages of five and ten); *see also* State v. Johnson, 2006 Ohio 5195, at *10 (Ohio Ct. App. 2006) (children over ten are presumed competent to testify), *remanded for resentencing hearing*, 116 Ohio St. 3d 541 (Ohio 2008).

[39] *See also* Daniel E. Monnat & Paige A. Nichols, *The Kid Gloves Are Off: Child Hearsay after* Crawford v. Washington, 30 CHAMPION 18, 20 (Jan./Feb. 2006) (cautioning courts from establishing any policy-based child-hearsay exceptions to *Crawford*). *See generally* Commonwealth v. DeOliveria, 849 N.E.2d 218, 225–26 (Mass. 2006) (declining to adopt a per se rule that exempts children's statements to medical personnel from testimonial analysis).

[40] The primary purpose of the statement should be interpreted consistently with the holdings in *Davis v. Washington*, 547 U.S. 813 (2006) and *United States v. Rankin*, 63 M.J. 348 (2007). The primary purpose test encompasses the recipient's purpose for eliciting the statement as well as the declarant's purpose for making the statement; *see also* discussion *infra* Part VI.B.3.

[41] *See generally e.g.*, People v. E.H. (*In re E.H.*), 823 N.E.2d 1029, 1036 (Ill. App. Ct. 2005) (focused on accusatory nature of K.R.'s statement), *rev'd and remanded*, 2007 Ill. App. LEXIS 724 (Ill. App. Ct. 2007) (after appellate court was directed to decide nonconstitutional issues first, the court ruled that B.R.'s statements were inadmissible hearsay); State v. Snowden, 867 A.2d 314, 325 (Md. 2005) (using the objective witness approach); State v. Scacchetti, 711 N.W.2d 508, 514 (Minn. 2006) (beginning the analysis examining the status and purpose of the questioner); State v. Blue, 717 N.W.2d 558, 564 (N.D. 2006) (looking to the purpose of the questioner in determining the statement's testimonial composition); Rangel v. State, 199 S.W.3d 523, 535 (Tex. App. 2006) (determining four-year-old child's statement to be testimonial based on *Davis* test—that the declarant was able to perceive that her words would be used to establish or prove some fact); Lagunas v. State, 187 S.W.3d 503, 519 (Tex. App. 2005) (beginning their testimonial analysis considering the declarant's age and sophistication).

suggested formulations before labeling the hearsay as testimonial; however, many fail to first inquire as to whether the child declarant is capable of making a testimonial statement.

A. Nature of the Statement

If a child declarant utters an accusatory statement, that fact alone is insufficient to transform the statement into a testimonial one. Accusations made by children, without more, should not be interpreted as "bearing testimony."[42] Relying solely on the accusatory nature of the statement to guide the decision of determining its testimonial content and ignoring other relevant factors has led to inconsistent, and sometimes illogical, conclusions.[43]

If a child identifies someone as the alleged abuser during a conversation with a caregiver or an examination by a medical professional, the statement is not instantly transformed into a testimonial one simply because it is accusatory. One appellate court examining two separate cases arrived at opposite conclusions when they examined the accusatory nature of the statement. In *In re E.H.*[44] and *People v. R.F.*,[45] the First Division of the Illinois appellate court examined statements that two young children made to their family members. The court in *In re E.H.* focused only on the nature of the statement when attaching a label to the children's hearsay statements.[46] There, the grandmother overheard her granddaughters talking, at which time the grandmother inquired into the substance of their conversation.[47] Without further prompting, the granddaughters stated that they were talking about how the defendant made them lick her "front behind" and "back behind."[48] Moving for the statement's admissibility, the State argued that the declarant must be aware that they are "bearing witness" before the statement is considered testimonial.[49] However, adopting an accusatory approach, the appellate court dismissed the State's argument, and also discounted the relevance of the listener's status.[50] Finding the granddaughters' statements to their grandmother testimonial, the Illinois court disregarded *Crawford*'s position on casual statements that are off-handed or overheard.[51] The court specifically held that "it is the nature of the testimony rather than the official or unofficial nature of the person testifying that determines the applicability of *Crawford* and the *confrontation clause*."[52]

Less than one week later, the same appellate court decided the case of *People v. R.F.*[53] This time, the Illinois appellate court did not take such a bold position in their ruling and seemed to step away from their reliance on the accusatory nature of the statement as a dispositive factor.[54] Here, the court found the three-year-old's statement to her mother and grandmother

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[42] *But see* Robert P. Mosteller, Crawford v. Washington*: Encouraging and Ensuring the Confrontation of Witnesses*, 39 U. RICH. L. REV. 511, 544 (2005) (suggesting that when a statement is accusatory and intended to be conveyed beyond those who would be expected to keep it confidential—it should be considered testimonial).

[43] *See, e.g.*, *In re E.H.*, 823 N.E.2d at 1037 (children's statement to grandmother held testimonial because the statement concerned the "fault and identity" of the perpetrator, and therefore accusatory), *rev'd and remanded*, 2007 Ill. App. LEXIS 724 (after appellate court was directed to decide nonconstitutional issues first, the court ruled that B.R.'s statements were inadmissible hearsay); *DeOliveria*, 849 N.E.2d at 224 (conceding that the portion of the child's statement to the treating physician that identifies the perpetrator should be redacted). *But see* People v. Vigil, 127 P.3d 916, 925 (Colo. 2006) (child's statement to father identifying the perpetrator held nontestimonial); *Scacchetti*, 711 N.W.2d 508 (statements from three-year-old to nurse practitioner with the Midwest Children's Resource Center, identifying perpetrator held nontestimonial because made for the purposes of treatment); State v. Vaught, 682 N.W.2d 284, 326 (Neb. 2004) (holding child's statement to physician was nontestimonial even when it identified the perpetrator); State v. Fisher, 108 P.3d 1262, 1269 (Wash. Ct. App. 2005) (child's statements to physician identifying perpetrator held nontestimonial and made in the course of treatment).

[44] 823 N.E.2d 1029 (Ill. App. Ct. 2005), *rev'd and remanded as to B.R.*, 2007 Ill. App. LEXIS 724 (Ill. App. Ct. 2007).

[45] 825 N.E.2d 287 (Ill. App. Ct. 2005).

[46] *See In re E.H.*, 823 N.E.2d at 1037.

[47] *Id.* at 1031.

[48] *Id.* The children's conversation with the grandmother occurred approximately one year after the alleged incident with the delay being attributed to a threat from the perpetrator. *Id.*

[49] *See id.* at 1034.

[50] *See generally id.* at 1041–44 (Quinn, J., dissenting) (expressing his concern that the majority fails to consider the recipient's status in the testimonial equation).

[51] The court in *In re E.H.* ignored *Crawford's* position that one who makes a "casual remark to an acquaintance" is not "bearing witness." *See generally In re E.H.*, 823 N.E.2d 1029, 1031; *see also infra* text accompanying note 65. Multiple jurisdictions have relied on that phrase from *Crawford* of "off hand, overheard remarks" to hold that most statements to family members and friends are generally nontestimonial in nature. *See, e.g.*, United States v. Franklin, 415 F.3d 537 (6th Cir. 2005); United States v. Manfre, 368 F.3d 832, 838 (8th Cir. 2004).

[52] *In re E.H.*, 823 N.E.2d at 1037 (emphasis in original).

[53] 825 N.E.2d 287 (Ill. App. Ct. 2005).

[54] *Id.* at 295.

identifying her father as the alleged perpetrator, to be nontestimonial.[55] Almost in direct contradiction to their previous ruling, the Illinois court emphasized the fact that the child's statements were made to family members and "were not 'testimonial' under *Crawford*."[56] The court was conspicuously silent as to the statement's accusatory nature and instead focused on the recipient's status. The First Division of the Illinois appellate court reached contradictory conclusions on these cases with similar facts when they placed different weight on the statement's accusatory character.

Another court acknowledged the accusatory nature argument, yet quickly dismissed it in favor of a broader analysis. In *State v. Mizenko*, the Montana Supreme Court noted that appellant's desire to categorize all substantive and accusatorial hearsay as testimonial, "would require courts to exclude more evidence than the Sixth Amendment requires."[57] Instead, the court considered other factors in addition to the statement's nature, when deciding which label to attach.[58] Holding the statement nontestimonial, the *Mizenko* court relied on whether or not the declarant had "reason to believe that her statement would be used prosecutorially."[59] Although the declarant made an accusatory statement identifying her attacker, that alone, did not morph her hearsay statement into a testimonial one.

Without sufficient direction, courts will continue to rely on their own vague and amorphous definitions of testimonial statements, inevitably resulting in inconsistent rulings. If a child declarant's statement is neither accusatory nor substantive, then the prosecution would rarely seek its admission. Courts must resist the seemingly simplistic accusatory-nature approach to test the testimonial composition of statements. When children utter something accusatory it does not necessarily mean that they are "bearing testimony."[60] As this paper suggests, certain children are incapable of making testimonial statements, even when they make accusatory ones.

B. Circumstances Surrounding the Statement

Since the Supreme Court decided to allow lower courts to search for definitions of testimonial, many courts have examined the attendant circumstances of the particular hearsay statement to assist in their analysis. Without concrete guidance, judges attempt to fit the circumstances into one of the formulations *Crawford* suggests.[61] This method, as applied to child declarants, fails to recognize a child's inability to make testimonial statements, regardless of the circumstances. Nonetheless, courts persist in seeking shelter under the shoddy framework set out in *Crawford v. Washington*. The Supreme Court's reference to "involvement of government officers"[62] causes judges and scholars to attach undue significance to that factor. Albeit an important consideration when determining whether a declarant "bears testimony," utilizing it as the sole barometer invites abuse.[63] The Court declined to definitively state that involvement of Government officers creates a per se testimonial statement, inferring that it is not the sole determining factor.[64] Therefore, most jurisdictions examine the statement's attendant circumstances to guide them in their quest towards an appropriate definition of testimonial. When courts analyze the circumstances surrounding the statement, they often examine to whom the statement was made, the purpose for making the statement and the presence of Government involvement in creating the statement.

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[55] *Id.*

[56] *Id.* In their opinion, the majority affirmatively states, "*Crawford* does not apply to statements made to nongovernmental personnel, such as family members or physicians." *Id.*

[57] 127 P.3d 458, 461 (Mont. 2006) (noting that the Supreme Court in *Crawford* recognized situations where a casual remark, although accusatory, is not testimonial) (citing Crawford v. Washington, 541 U.S. 36 (2004)).

[58] *See generally id.* at 467 n.7 (adopting the reasonable declarant approach).

[59] *Id.* at 465.

[60] *See generally* United States v. Saget, 377 F.3d 223, 227 (2d Cir. 2004) (interpreting Crawford to suggest that whether a person "bears testimony" is determined by their awareness of the potential prosecutorial use of such statement).

[61] *See Crawford*, 541 U.S. at 51–52; *see also supra* note 29.

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

[63] Nevertheless, the Supreme Court stated in the affirmative, that the "[i]nvolvement of government officers in the in the production of testimony with an eye toward trial presents *unique potential* for prosecutorial abuse." *Id.* at 56 n.7 (emphasis added).

[64] However, several courts have used the recipient's status as a *nongovernmental* officer as a dispositive factor in their testimonial analysis. *See, e.g.*, United States v. Manfre, 368 F.3d 832, 838 (8th Cir. 2004) (holding statements to loved ones nontestimonial and inapplicable under *Crawford v. Washington*); People v. R.F., 825 N.E.2d 287, 295 (Ill. App. Ct. 2005) (holding that statements made to family members were nontestimonial under *Crawford*); People v. Rolandis G., 817 N.E.2d 183, 189 (Ill. App. Ct. 2004) (statements from seven-year-old to mother nontestimonial); State v. Krasky, 736 N.W.2d 636, 643 (Minn. 2007) (statement from sexual assault victim to nurse practitioner held nontestimonial); State v. Williams, 2006 Tenn. Crim. App. LEXIS 920, at *40 (2006) (statement from four-year-old to mother nontestimonial); State v. Walker, 118 P.3d 935, 942 (Wash. Ct. App. 2005) (statement of sexual assault victim to mother identifying the perpetrator held nontestimonial).

1. Recipient's Status and Role

Currently, many courts examine the recipient's status and role when determining the testimonial nature of the declarant's statement, rather than first inquiring whether a child declarant is able to become a "witness against" the alleged perpetrator. In the post-*Crawford* era, courts generally consider child declarants' statements made to specific categories of individuals to be of a nontestimonial nature.[65]

a. Statements to Family Members

Children may disclose allegations of abuse to family members, close relatives, and sometimes to friends. As a result, family members take the child to medical practitioners who, in turn, may refer them to social workers or family advocacy centers. Meanwhile, the child declarant makes multiple statements to various other individuals. *Crawford* distinguishes between statements made to Government officers and "casual remarks to acquaintance[s]" by definitively stating that the latter is not "bear[ing] testimony."[66] Children often seek comfort or refuge when disclosing to family members, and do not intend to "bear testimony."[67] Parents, when talking to their children about unusual behavior that may be indicators of abuse, are concerned about their child's health and well-being, and are not intent on securing testimony for a potential prosecution.[68] The child, when responding to their concerned parent, is not making a "solemn declaration or affirmation."[69] The child is simply explaining what happened or describing the source of pain or injury. Consequently, a majority of courts conclude that statements to family members or friends are nontestimonial.[70]

Sometimes children cannot fully understand the adverse consequences of their statements—they only know they are relaying information to a loved one or caregiver. This type of statement to family members is inherently nontestimonial. Some courts fail to recognize the statement for what it is: a statement to mom, dad, grandmother, or a friend describing fear, pain or injury. Instead, these courts blindly adhere to one of *Crawford*'s formulations to reach their desired conclusions about the statement's testimonial character. These courts often overlook the abilities or inabilities of a child to even understand the consequences of their statements. The court in *In re E.H.*, determined a two-year-old's statement to her grandmother to be testimonial because it identified the perpetrator.[71] The Illinois court's analysis disregarded not only the recipient's status and role, but also the crucial question of whether the young child was even capable of understanding the nature and consequence of her statement. Failure to understand the reasons behind the child declarant's statement to a family member or other non-governmental person, results in illogical conclusions.

b. Statements to Medical Personnel and Other Nongovernmental Individuals

A majority of jurisdictions examining statements made to other nongovernmental actors, such as medical practitioners and other private agents, generally hold such statements to be nontestimonial.[72] In conducting their testimonial analysis,

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[65] *See* cases cited *supra* note 64.

[66] *See Crawford*, 541 U.S. at 51.

[67] *See, e.g.*, People v. Vigil, 127 P.3d 916, 925 (Colo. 2006) (stating that "[a]n objectively reasonable seven-year-old child would foresee his father and his father's friend using his statements to comfort and protect him."); *Walker*, 118 P.3d at 942 (describing that the "exchange between [mother] and [daughter] was that of a conversation between a concerned parent and an upset child, nothing more.").

[68] *See* Pantano v. State, 138 P.3d 477, 483 (Nev. 2006).

[69] *See Crawford*, 541 U.S. at 51.

[70] *See supra* note 64; *see also* United States v. Coulter, 62 M.J. 520, 528 (N-M. Ct. Crim. App. 2005) (two-year-old's statement to parents nontestimonial); *Vigil*, 127 P.3d at 925 (seven-year-old's statement to father and father's friend nontestimonial); People v. R.F., 825 N.E.2d 287, 295 (Ill. App. Ct. 2005) (three-year-old's statement to mother and grandmother held nontestimonial); State v. Mizenko, 127 P.3d 458, 467 (Mont. 2006) (citing cases in numerous jurisdictions holding statements to family members, friends and other nongovernmental actors nontestimonial); State v. Spencer, 169 P.3d 384 (Mont. 2007) (three-year-old child abuse victim's statement to school counselor and foster mother nontestimonial); State v. Shafer, 128 P.3d 87 (Wash. 2006) (child's statements to mother and mother's friend held nontestimonial).

[71] *See generally In re E.H.*, 823 N.E.2d 1029 (Ill. Ct. App. 2005); *see also supra* text accompanying notes 44–52 discussing the court's analysis in *In re E.H.*

[72] *See, e.g.*, United States v. Peneaux, 432 F.3d 882, 896 (8th Cir. 2005) (holding that statements made to physician seeking to give aid or treatment are presumptively nontestimonial); People v. Cage, 155 P.3d 205, 218–20 (Cal. 2007) (child's statement to physician in emergency room lacked solemnity and formality and held nontestimonial); *Vigil*, 127 P.3d at 925 (child's statement to physician held nontestimonial); State v. Scacchetti, 711 N.W.2d 508, 516 (Minn. 2006) (statements from three-year-old to nurse practitioner with the Midwest Children's Resource Center, held nontestimonial because made for the purposes of treatment); State v. Krasky, 736 N.W.2d 636, 641–43 (Minn. 2007) (statement from sexual assault victim to nurse practitioner held

courts examine the recipient's role in receiving or procuring the statement. Some of the roles include conducting medical examinations, ascertaining the health and safety of children, and investigating an alleged crime. If the recipient's role is to aid in treatment and not to participate in the investigation, courts view the resulting statements as nontestimonial.[73]

In both *State v. Johnson*,[74] and *People v. Cage*,[75] the two courts examined a physician's role in procuring the statement and recognized it was to assist in the child's treatment and was not part of the investigative process. In *Johnson*, the prosecution sought introduction of the nine-year-old's statements contained in medical records.[76] Admitting the statements, the court articulated that "statements made by child abuse victims to medical providers are not testimonial in nature."[77] Further, the court reasoned that the child made the statements to the medical staff to aid in her treatment and not to investigate the acts she alleged.[78] Similarly, the court in *People v. Cage*, considered the doctor's various roles and duties in conducting examinations concerning suspected child abuse.[79] Specifically, the court noted that the treating physician was under a statutory duty to report child abuse allegations.[80] The court acknowledged that a reporting statute did not obligate the doctor to investigate the allegations.[81] Instead, the doctor's role was to examine and treat the patient. The mandatory reporting statute did not transform the physician's role into an investigative agent of law enforcement.[82]

The court in *Lollis v. State*,[83] examined the roles of a nongovernmental actor in procuring statements from three young children.[84] Despite defendant's argument that the licensed therapist received over 70% of her cases from a government agency, Child Protective Services (CPS), the court did not consider the therapist's role to be an agent of the government.[85] Rather, the court recognized that the therapist's primary obligation was to treat the patients and "to play the role of a friend, rather than an imposing governmental figure."[86]

Sometimes, when courts solely rely on the recipient's role, they largely ignore the declarant's ability to understand that role. Consequently, courts have reached inconsistent results when using the recipient's role as the determinative factor.[87] A doctor, whose *role* it is to conduct medical examinations, may then be required to report any allegation or finding of child sexual abuse to the authorities. This secondary role does not suddenly transform the declarant's statement from nontestimonial to testimonial, even when it contains Government involvement.[88] In *People v. Vigil*,[89] a seven-year-old child gave statements to a doctor alleging sexual abuse. The appellate court noted that the physician was a member of a child

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nontestimonial); State v. Vaught, 682 N.W.2d 284, 291 (Neb. 2004) (holding child's statement to physician was nontestimonial); State v. Fisher, 108 P.3d 1262, 1269 (Wash. Ct. App. 2005) (child's statements to physician identifying perpetrator held nontestimonial and made in the course of treatment).

[73] *See* State v. Johnson, 2006 Ohio 5195 (Ohio Ct. App. 2006); *Cage*, 155 P.3d 205; *see also* cases cited *supra* note 72.

[74] 2006 Ohio 5195, *remanded for resentencing hearing*, 2008 Ohio 69 (Ohio 2008).

[75] 155 P.3d 205.

[76] *See Johnson*, 2006 Ohio 5195, at *21.

[77] *Id.* (citing State v. Sheppard, 842 N.E.2d 561, 567 (Ohio Ct. App. 2005)).

[78] *See id.*

[79] *See Cage*, 155 P.3d 205.

[80] *Id.* at 219–20.

[81] *Id.*

[82] *Id.*

[83] 232 S.W.3d 803 (Tex. App. 2007).

[84] *Id.* at 808.

[85] *Id.*

[86] *Id.* The court acknowledged that the statements were made in the absence of an emergency, but found that fact alone does not turn the statements into testimonial ones. *Id.* The court noted the relationship between the children and therapist was primarily one of counseling rather than trial preparation. *Id.* at 809.

[87] *See generally* People v. Sisavath, 13 Cal. Rptr. 3d 753, 758 (Cal. Ct. App. 2004) (four-year-old's statement to Multi Disciplinary Interview Center forensic interviewer held testimonial); People v. Vigil, 104 P.3d 258 (Colo. Ct. App. 2004), *aff'd in part, rev'd in part*, 127 P.3d 916 (Colo. 2006), *cert. denied* 2006 LEXIS 6532 (Oct. 2, 2006) (child's statement to physician who was a member of a child protection team held nontestimonial); State v. Snowden, 867 A.2d 314, 329 (Md. 2005) (eight- and ten-year-olds' statements to social worker testimonial).

[88] *See generally* State v. Scacchetti, 711 N.W.2d 508, 515 (Minn. 2006). The court noted that the fact that the nurse may be subsequently required to testify regarding the sexual abuse examination conducted does not "transform the medical purpose of the assessments into a prosecutorial purpose."

[89] 104 P.3d 258, *aff'd in part, rev'd in part*, 127 P.3d 916 (Colo. 2006), *cert. denied* 2006 LEXIS 6532 (Oct. 2, 2006).

protection team, he routinely examined children alleging sexual abuse, he often testified as an expert in child abuse cases, was asked to conduct a "forensic sexual abuse examination," and he spoke with the police prior to the examination.[90] Although the court recognized the recipient's status was a nongovernmental officer, it emphasized his secondary role and relied on his association with the police officer immediately prior to the examination.[91] Consequently, the appellate court found the child's statement to the physician was testimonial and remanded the case for a new trial.[92] Reversing the appellate court's decision, the Colorado Supreme Court not only recognized the physician's status, role, and purpose in conducting the examination, it went on to consider the child's level of appreciation of the potential use of the statement at a later proceeding.[93] The court explicitly stated, "[t]he fact that the doctor was a member of a child protection team does not, in and of itself, make him a government official absent a more direct and controlling police presence."[94] The Colorado Supreme Court recognized that the physician's duties may associate him with Government actors, but found that fact unpersuasive—whereas the appellate court's shortsightedness led it to an incorrect conclusion. In *Vigil*, the state appellate and supreme courts examined one statement to the same recipient, but reached opposite conclusions based on the importance they placed on the recipient's role. Courts examine the roles of the parties, the circumstances surrounding the statement, and the level of Government involvement, yet they reach inconsistent conclusions as a result of emphasizing one factor while ignoring others. Courts reach equally incompatible conclusions when they attribute more importance to Government involvement surrounding the declarant's statement than they do other relevant factors.[95]

c. Presence of Government Involvement

In the post-*Crawford* era, courts carefully scrutinize statements made in connection with Government individuals, sometimes disregarding the recipient's status and the declarant's intent. In *People v. Sisavath*,[96] the court found unpersuasive the recipient's status as a private, nongovernmental entity and focused primarily on the level of Government participation in eliciting the hearsay statement. In *Sisavath*, a four-year-old spoke to a trained forensic interviewer at a private center, unaffiliated with any Government agency.[97] The prosecutor and an investigator with the district attorney's office observed the interview.[98] In finding the statement testimonial, the court dismissed the State's argument that the interview was conducted at a neutral location, by a private individual, and not for a prosecutorial purpose, and instead, relied on the level of Government involvement surrounding the child's statements.[99]

Similarly, if the recipient's role involves some form of Government participation then some courts find the resulting statements to be testimonial.[100] This analysis clearly disregards the child's age or ability to understand the situation and the prosecutorial consequences of their statements. In *State v. Blue*,[101] the recipient's role was to conduct a forensic interview of

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[90] *See Vigil*, 104 P.3d at 265.

[91] *Id.*

[92] *Id.*

[93] *See* People v. Vigil, 127 P.3d 916, 924 (Colo. 2006).

[94] *See id.* at 923–24.

[95] *See, e.g.*, People v. Sisavath, 13 Cal. Rptr. 3d 753, 758 (Cal. Ct. App. 2004) (four-year-old's statement to Multi Disciplinary Interview Center forensic interviewer held testimonial); State v. Snowden, 867 A.2d 314, 329 (Md. 2005) (eight- and ten-year-olds' statements to social worker testimonial); State v. Blue, 717 N.W.2d 558, 564 (N.D. 2006) (four-year-old child's statement to forensic interviewer held testimonial); Rangel v. State, 199 S.W.3d 523, 535 (Tex. App. 2006) (four-year-old's statement to child protective services worker held testimonial). *But see* Commonwealth v. DeOliveria, 849 N.E.2d 218, 224 (Mass. 2006) (six-year-old's statement to social worker nontestimonial); State v. Bobadilla, 709 N.W.2d 243, 255 (Minn. 2006) (three-year-old's statement to forensic interviewer nontestimonial).

[96] 13 Cal. Rptr. 3d 753.

[97] *Id.*

[98] *Id.*

[99] *Id.* Without expounding, the court fell back on the formulaic phrase: "made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial." *Id.* (citing Crawford v. Washington, 541 U.S. 36, 51–52 (2004)). Choosing to rely on this formulation, the court ignored the other proffered formula, "pretrial statements that *declarants* would reasonably expect to be used prosecutorially." *See generally Crawford*, 541 U.S. at 51–52 (emphasis added).

[100] *See, e.g.*, United States v. Bordeaux, 400 F.3d 548 (8th Cir. 2005), *reh'g en banc denied*, 2005 U.S. App. LEXIS 9866 (8th Cir. May 27, 2005); *Snowden*, 867 A.2d 314; State v. Mack, 101 P.3d 349 (Or. 2004). Most courts when reaching this conclusion rely heavily on *Crawford's* assertion that "[s]tatements taken by police officers in the course of interrogations are also testimonial under even a narrow standard." *Crawford*, 541 U.S. at 52. *But see Bobadilla*, 709 N.W.2d 243; People v. Geno, 683 N.W.2d 687 (Mich. Ct. App. 2004), *rev. denied*, 471 Mich. 921 (Mich. 2004).

[101] 717 N.W.2d 558 (N.D. 2006).

a child witness. Here, the four-year-old's mother took her to the local Child Advocacy Center where a nongovernmental employee conducted a videotaped forensic interview. In holding that the statement was testimonial, the North Dakota Supreme Court considered the level of Government involvement in procuring the statement.[102] In reaching their conclusion, the court relied on *Crawford*'s concerns over Government involvement in the production of testimony and held that "[s]tatements made to non-government questioners acting in concert with or as an agent of the government are likely to be testimonial."[103] The court failed to consider whether the four-year-old was even capable of understanding the nature of the interview or the adverse consequences of the statements.[104] When courts focus solely on the presence of governmental involvement they reach narrowly tailored results that do not accurately reflect whether the child understands the situation or the purpose in making the statement.[105] Courts continue to flounder in the aftermath of *Crawford*, emphasizing the need for more specific guidance, especially involving young child declarants.

Whether the statement is to a family member, doctor, social worker, private agent or even a forensic interviewer, courts are unable to employ structured analysis in determining the testimonial aspects of statements. The recipient's status and role are relevant factors when determining the testimonial nature of a child's statement. However, when the equation fails to account for the declarant's maturity and ability to understand the recipient's status or role, the testimonial calculation is incomplete. The previous cases involve statements to nongovernmental personnel with little or no Government involvement and those with significant Government participation, yet the courts are unable to agree on the importance of the governmental role.[106] They are equally perplexed on the relevance of the recipient's role.[107] The confusion displayed by the courts is a result of their failure to consider a crucial part of the equation: the child declarant's abilities to foresee the potential use of their statements.[108]

2. Primary Purpose

Prior to the Supreme Court's additional guidance provided in *Davis v. Washington* and *Indiana v. Hammon*, setting out the "primary purpose" test,[109] lower courts inconsistently and haphazardly analyzed the recipient's purpose in procuring the statement.[110] In doing so, these courts minimized the declarant's intent. It is necessary to consider the declarant's purpose in

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[102] *Id.* at 561.

[103] *Id.* at 564. The Supreme Court in *Crawford* noted that those types of statements present a "unique *potential* for prosecutorial abuse," yet never affirmatively ruled them to be testimonial. *See generally Crawford*, 541 U.S. at 56 n.7 (emphasis added). In support of their conclusion, the Supreme Court of North Dakota listed several other jurisdictions where courts have found statements to be testimonial when procured during similar interviews. *See Blue*, 717 N.W.2d at 564.

[104] *But see Bobadilla*, 709 N.W.2d 243. In *Bobadilla*, the Minnesota Supreme Court similarly examined a young child's statement to a forensic interviewer. Here, the court actually recognized that a child of such a young age would not "understand the legal system and the consequences of statements made during the legal process." *Id.* at 256. The three-year-old child disclosed allegations of abuse to his mother who, in turn, took him to the emergency room for an examination. *Id.* at 246–47. A police officer arrived at the hospital, met with the parents, and eventually forwarded his report to the Kandiyohi County Family Service Department. *Id.* As a result, a child-protection worker met and interviewed the child at the law enforcement center. In examining the recipient's role, the court found that the interviewer was not acting "*to a substantial degree* in order to produce a statement for trial." *Id.* at 256. Rather, the court relied on the governing statutory purpose of protecting the health and welfare of the child, and found this was an overriding factor in the testimonial analysis. *Id.* at 255. In *Bobadilla*, the facts indicated more government involvement than in the *Blue* case. However, the courts reached different conclusions based on the significance they placed on the level of government involvement.

[105] *See, e.g.*, People v. Sisavath, 13 Cal. Rptr. 3d 753, 758 (Cal. Ct. App. 2004) (four-year-old's statement to forensic interview specialist at the local county's Mulitdisciplinary Interview Center was held testimonial where both the prosecuting attorney and an investigator from the district attorney's office were present); People *ex rel.* R.A.S., 111 P.3d 487, 490 (Colo. Ct. App. 2004) (four-year-old child's videotaped statement to a police investigator held testimonial "even [under] the narrowest formulation under the Court's definition of the term."); *Snowden*, 867 A.2d at 325–-26 (eight- and ten-year-olds' statements to social worker held testimonial who had previously received a police report concerning the allegations).

[106] *See also Snowden*, 867 A.2d at 316. This case involved two children ages eight and ten who made allegations of sexual abuse. A licensed social worker with Child Protective Services Division interviewed the children pursuant to Maryland practice in cases involving allegations of sexual abuse. *Id.* At the time of the interview, an investigation into the allegations was currently underway. The appellate court deemed the amount of government involvement a "weighty factor" in determining the testimonial nature of the statement. *Id.* at 327 n.17.

[107] *See, e.g.*, *Blue*, 717 N.W.2d 558; *Bobadilla*, 709 N.W.2d 243.

[108] *See generally Sisavath*, 13 Cal. Rptr. 3d 753. The court mentioned in passing, the declarant's ability to understand the potential prosecutorial purpose of the statement. The court declined to consider whether a four-year-old would anticipate the potential consequences of the statement in favor of the "objective *observer*." *Id.* at 758 n.3.

[109] *See generally* Davis v. Washington, 547 U.S. 813 (2006). The primary purpose test examines the interview from both the recipient's and declarant's perspectives. *See* discussion *infra* Part IV.B.3. *But see* State v. Siler, 116 Ohio St. 3d 39, 47 (Ohio 2007) (analyzing *Davis*'s holding to mean that the declarant's expectations are irrelevant).

[110] *See supra* notes 95, 100.

making the statement, as it provides additional guidance in the testimonial calculation. This is not to say that the recipient's purpose in taking the statement is to be minimized or ignored. There are times where the recipient may either subconsciously or consciously manipulate the declarant's words or thoughts to support the desired outcome.[111] Thus, it is conceivable where a young child declarant, completely unaware of the potential prosecutorial use of his statement, is also unaware of the recipient's motives in procuring the statement. Judges must be vigilant and give appropriate consideration to the true purpose behind the statement's existence when analyzing the testimonial character of a child declarant's statement.

When the recipient's purpose is to develop testimony for trial, courts uniformly find the declarant's statement testimonial, regardless of the declarant's purpose in making the statement.[112] In *State v. Blue* and *State v. Snowden*, the courts determined that the interviewer's purpose in eliciting the statements was to develop testimony for trial.[113] In *Blue*, the court relied on Merriam-Webster's definition of "forensic" when determining the questioner's purpose in interviewing the child.[114] In *Snowden*, the court examined the Maryland statute that allows the State to substitute the child's testimony for that of another.[115] Both courts arrived at the same conclusion: the children's statements were testimonial because they were prepared in anticipation for trial.[116] However, the *Blue* court ignored the feasibility of the four-year-old declarant's purpose in making the statement. Whereas the *Snowden* court actually considered the likelihood of the eight- and ten-year-old's objective and subjective awareness of the situation and factored it into their testimonial calculation.[117] Had the court in *Blue* decided to acknowledge the mental capacity of its four-year-old declarant and not simply rely on Webster's definition of "forensic," the result may have been decidedly different.

If the purpose in making or procuring the statement is for medical treatment, courts usually conclude the statement is nontestimonial.[118] In *State v. Scacchetti*, the court examined the child declarant's statement to the nurse during a medical assessment interview and held the statement nontestimonial.[119] Considering the recipient's status and statement's purpose, and that the nurse was not a Government agent, the court concluded the statement was nontestimonial.[120]

More importantly, courts acknowledge that medical personnel and social workers are sometimes involved in providing testimony in the resulting prosecution.[121] These courts remain steadfast in recognizing the original purpose surrounding the statement rather than allowing subsequent events to transform the inherent nontestimonial quality of the statement. Unambiguous, the *Scacchetti* opinion addressed the effect, if any, of a secondary purpose noting that:

> [T]he record here indicates that [the nurse's] purpose in interviewing and examining [the child] was to assess her medical condition . . . .
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> . . . .
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> . . . Moreover, the mere fact that [the nurse] may be called to testify in court regarding sexual abuse cases does not transform the medical purpose of the assessments into a prosecutorial purpose . . . . Thus, even if we were to conclude that [the nurse's] assessments of [the child] had, as a secondary purpose,

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[111] *See generally* Mosteller, *supra* note 42, at 569 (noting concern over possible governmental manipulation of the witness in creating the evidence).

[112] *See, e.g.*, *Blue*, 717 N.W.2d 558; State v. Snowden, 867 A.2d 314 (Md. 2005).

[113] *See Blue*, 717 N.W.2d at 564; *Snowden*, 867 A.2d at 329.

[114] *See Blue*, 717 N.W.2d at 564. *But see* State v. Bobadilla, 709 N.W.2d 243 (Minn. 2006).

[115] *See Snowden*, 867 A.2d at 330.

[116] *See Blue*, 717 N.W.2d at 564; *Snowden*, 867 A.2d at 329.

[117] *See Snowden*, 867 A.2d at 326. Briefly, the court mentioned that the capacity of young children to comprehend the situation is a factor for consideration. *Id.* at 328. The court declined to accept it as a dispositive factor. *Id.*

[118] *See e.g.*, United States v. Peneaux, 432 F.3d 882, 896 (8th Cir. 2005) (holding statements given to pediatrician for diagnosis and treatment are "presumptively nontestimonial."); Ohio v. Muttart, 875 N.E.2d 944, 957 (Ohio 2007) (holding that statements to medical personnel that are made for purposes of diagnosis or treatment are nontestimonial "because they are not even remotely related to the evils which the Confrontation Clause was designed to avoid."); *see also* cases cited *supra* note 72.

[119] *See* 711 N.W.2d 508 (Minn. 2006) (three and a half-year-old child abuse victim).

[120] *See id.* at 516 (citing *Peneaux*, 432 F.3d at 896). In *Peneaux*, the foster parents took the child to a pediatrician about marks they noticed on his body. *Peneaux*, 432 F.3d at 896. The pediatrician testified regarding the child's statements and the court found no Confrontation Clause violation because the interview lacked substantial government involvement. *Id.*; *see also* State v. Vaught, 682 N.W.2d 284, 326 (Neb. 2004) (finding no government involvement in procuring the child's statement to the emergency room physician, the court held the statement nontestimonial and admissible).

[121] *See, e.g.*, *Scacchetti*, 711 N.W.2d at 515; People v. Vigil, 127 P.3d 916, 923–24 (Colo. 2006).

> the preservation of testimony for trial, [the child's] statement would still not be testimonial. Because the broad purpose of [the nurse's] assessments was [the child's] medical health, any subsequent testimony that [the nurse] was required to give did not change her assessment purpose.[122]

Here, the *Scacchetti* court used the eight factors proffered in *State v. Wright*,[123] and emphasized the original purpose of the nurse's interview.[124] The court did not elaborate on the declarant's purpose for making the statement, however, it stated that one of the central considerations is "the purpose of the statements from the perspective of the declarant and from the perspective of the government questioner."[125] If more courts factored the declarant's purpose into the testimonial equation, they may enjoy more accurate and consistent findings.

Regardless of a prevailing medical purpose surrounding the statement, some courts disregard this purpose and find the resulting statement to be testimonial relying on the statement's accusatory nature or the presence of Government involvement.[126] In *Commonwealth v. DeOliveria* the court recognized the child declarant's statements were made to medical personnel seeking to diagnose and treat.[127] The court acknowledged that patients have a self interest in their own treatment that motivates them to relay accurate information during the examination.[128] Logical analysis concludes that since the patient is motivated by self interest, they cannot *also* be concerned with potential prosecutorial uses of their statements. However, this court did not take a logical approach in testing the nature of the children's statements. The court redacted the portion of the statement identifying the perpetrator and stuck on it a testimonial label.[129] In its testimonial equation this jurisdiction confused *testimonial* with *accusatory*, which yielded an illogical and inaccurate result.

Not surprisingly, other courts place less weight on the accusatory nature of the child's statement when the purpose of the examination was for medical diagnosis and treatment.[130] In *State v. Vaught*, the court held that the four-year-old's statement identifying the perpetrator was made during the course of treatment and not in the development of testimony and was therefore, nontestimonial.[131] It is incongruent to conclude that a young child uttering a single sentence, "Daddy hurt me in my bottom," is capable of recognizing the potential prosecutorial use of only a few words out of the entire sentence. Judges must scrutinize the recipient's role when procuring the statement but also consider the declarant's purpose and understanding when making the statement.

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[122] *Scacchetti*, 711 N.W.2d at 515 (citing *Bobadillia*, 709 N.W.2d at 255).

[123] 701 N.W.2d 802 (Minn. 2005), *vacated and remanded*, 126 S. Ct. 2979 (2006). In *Wright*, the Minnesota Supreme Court's first post-*Crawford* (yet pre-*Davis*) case, the court delineated eight factors to assist them in analyzing a 911 call: (1) whether the declarant was a victim or observer; (2) the declarant's purpose in speaking with the officer; (3) whether it was the police or the declarant who initiated the conversation; (4) the location where the statements were made; (5) the declarant's emotional state when the statements were made; (6) the level of formality and structure of the conversation between the declarant and officer; (7) the officer's purpose in speaking with the declarant; and (8) if and how the statements were recorded. *Wright*, 701 N.W.2d at 812–13. Using those factors, the *Wright* court found the 911 call nontestimonial. The recent *Krasky* decision utilized the *Wright* factors when examining the testimonial character of a child's statement to a sexual assault nurse. *See* State v. Krasky, 736 N.W.2d 636, 641 (Minn. 2007).

[124] *Scacchetti*, 711 N.W.2d at 515–16.

[125] *See id.* at 513 (quoting *Bobadillia*, 709 N.W.2d at 250) (noting that neither the declarant's nor the nurse's purpose was to produce a statement for trial). *But see, e.g.*, State v. Blue, 717 N.W.2d 558 (N.D. 2006); State v. Snowden, 867 A.2d 314 (Md. 2005).

[126] *See* Commonwealth v. DeOliveria, 849 N.E.2d 218, 224 (Mass. 2006) (accusatory portion of statement to physician testimonial). *But see* United States v. Rodriguez-Rivera, 63 M.J. 372, 381 (2006) (although not deciding a testimonial issue under *Crawford*, the court determined that the presence of government involvement did not change the medical purpose of the interview under Military Rules of Evidence 803(4)).

[127] *See DeOliveria*, 849 N.E.2d at 224.

[128] *See id*.

[129] *See id*.

[130] *See, e.g.*, *Scacchetti*, 711 N.W.2d at 516 (accusatory statements from three-year-old to nurse practitioner with the Midwest Children's Resource Center, held nontestimonial because made for the purposes of treatment); State v. Vaught, 682 N.W.2d 284, 326 (Neb. 2004); State v. Fisher, 108 P.3d 1262, 1269 (Wash. Ct. App. 2005) (child's statements to physician identifying perpetrator held nontestimonial and made in the course of treatment).

[131] *See Vaught*, 682 N.W.2d at 326.

3. Reconciling the Recipient's Role and the Statement's Purpose

In *Davis v. Washington*[132] and *Hammon v. Indiana*,[133] the Supreme Court attempted to clarify the relevance of the recipient's role in procuring the statement and the declarant's purpose in making the statements. The *Davis* cases were the first cases issued by the Supreme Court after *Crawford* to interpret statements made to law enforcement officials and they also addressed excited utterances made to 911 operators.[134] In *Davis*, the Supreme Court held that a witness's statement identifying the perpetrator during a 911 call was a nontestimonial statement.[135] In the companion case, *Hammon*, the Court held a victim's affidavit to police officers who responded to a domestic disturbance call was a testimonial statement.[136] The Supreme Court focused on the purpose, timing and nature of the two hearsay statements and specifically limited its ruling to situations involving police interrogations.[137] Again, the Court declined to elaborate on their definition and interpretation of testimonial. However, the Court did proffer that when determining whether a person is bearing witness, it is necessary to examine the statement's surrounding circumstances such as the level of formality governing the statement as well as the statement's nature and purpose.[138] In deciding whether statements to law enforcement qualify as testimonial or nontestimonial, the Court specifically held:

> 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.[139]

The Court acknowledged that their holding does not address situations involving statements made to persons other than law enforcement personnel.[140] Interestingly, in dicta, the Court noted that the Confrontation Clause requires analysis of the declarant's statements rather than the interrogator's questions.[141] The facts of *Davis* did not lend themselves to consideration of whether the declarants anticipated the prosecutorial use of their statements. However, the Court's "primary purpose" test places more emphasis on the declarant than the questioner.[142] If the declarant's purpose is to report an immediate emergency in order to seek relief or assistance, then it is not reasonable to assume that they are simultaneously appreciating the potential prosecutorial consequences of the statement.

Davis's "primary purpose" analysis incorporates the declarant's intent when making the statement.[143] This ruling clarifies the role of law enforcement in an attempt to address lower courts' rigid and inconsistent interpretation of police interrogation. The Supreme Court's opinion emphasizes the relevance of the declarant's viewpoint and the importance of factoring the declarant's intent into the testimonial equation.[144]

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[132] 547 U.S. 813 (2006).

[133] *Id.*

[134] *See id.*

[135] *Id.* at 828.

[136] *Id.* at 833.

[137] *See id.* at 822 n.1.

[138] *See id.* at 827.

[139] *Id.* at 822 (emphasis added).

[140] *See id*. at 822 n.1. Similarly, a recent Ohio supreme court case made a narrow ruling regarding a child declarant's statement to law enforcement personnel. *See* State v. Siler, 116 Ohio St. 3d 39, 47 (Ohio 2007). The Ohio court narrowly held that a child's statements elicited during a police interrogation are testimonial, regardless of the child declarant's age, understanding, or cognitive abilities. *Id*. at 41.

[141] *See Davis*, 547 U.S. at 822 n.1. When the Court noted that the testimonial analysis should focus more on the declarant's statements rather than the interrogator's questions, they acknowledged the importance of the declarant's perspective. The Court also recognized that statements made where interrogation was lacking, could be deemed testimonial because the "Framers were no more willing to exempt from cross-examination volunteered testimony or answers to open-ended questions than they were to exempt answers to detailed interrogation." *Id.*

[142] *See id*.; *see also* text accompanying note 141

[143] *Davis*, 547 U.S. at 822 n.1. When the Court noted that the declarant's statements, rather than the interrogator's questions, were key to examining the testimonial character of the statement, they acknowledged the importance of the declarant's perspective and intent. *But see Siler*, 116 Ohio St. 3d at 47 (analyzing *Davis*'s holding to mean that the declarant's expectations are irrelevant).

[144] Another court that carefully examined the purpose of the interview as well as the declarant's ability to understand the statement was *State v. Bobadilla*, 709 N.W.2d 243 (Minn. 2006). *See supra* note 104 for a brief discussion of the *Bobadilla* case. As previously discussed, the *Bobadilla* court held that a three-year-old's statement during a forensic interviewer was nontestimonial. *Id.* at 256. Although the *Bobadilla* decision predates *Davis* by four months, it

At first glance, the Supreme Court appears to have issued dichotomous opinions in *Crawford* and *Davis*. A more careful analysis reveals that *Crawford*'s emphasis on the declarant's ability to foresee a prosecution and *Davis*'s "primary purpose" test are not mutually exclusive. The Supreme Court's opinion never wavered on the fact that the defendant "shall enjoy the right . . . to be confronted with witnesses against him," and that witnesses within the meaning of the Sixth Amendment are those who "bear testimony."[145] However, the Court stopped short of fully articulating a method to assist lower courts in determining when a declarant is bearing testimony.

C. Determining the Standard

The Supreme Court failed to adopt any of its proffered formulations of the "core class" of testimonial statements, leaving courts to construct their own framework. In analyzing the testimonial nature of a non-testifying child declarant's statement, it is essential to examine the declarant's understanding when making the statement. Did the child possess the requisite knowledge that the statement may be used in a potential prosecution? The answer must employ both an objective and a subjective test. If the *child* does not understand the resulting consequences of the statement, i.e., that it will cause an investigation into the alleged misconduct that results in eventual prosecution, then the statement should not be considered testimonial.[146] In order to "bear testimony" or be a witness against the accused, the child declarant must have some ability to comprehend how the statement will be used and the consequences of such statements. The child's age, maturity, and cognitive development are all factors in making this determination. A framework is necessary to adequately and appropriately analyze the testimonial composition of child declarants' statements.

The following two formulations proffered by the Supreme Court in *Crawford* have caused lower courts to inconsistently and inappropriately apply them to child abuse cases resulting in inaccurate outcomes: "similar pretrial statements that *declarants* would *reasonably* expect to be used prosecutorially"[147] and "statements that were made under circumstances which would lead an *objective witness* reasonably to believe that the statement would be available for use at a later trial."[148] The Supreme Court in *Crawford* did not outline a particular method to determine whose perspective is controlling: the one making the statement, the one eliciting the statement, or the objective observer. Consequently, courts and commentators alike tend to devise and apply their own interpretations of *Crawford*'s suggested formulations.[149] In one formulation, the Court seems to suggest that the declarant's understanding is a relevant factor; however, the next one makes reference to an "objective witness." Consequently, many courts have picked one, blended the two, or ignored them altogether.[150] The different approaches courts and scholars use when examining the testimonial nature of children's statements include: declarant-centric; objective witness; and objective child in the declarant's position.[151] Not all courts apply those standards when deciding the testimonial quality of the statement. Some courts avoid the decision altogether and base their conclusion on the other suggested methods.[152]

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shows that some courts have attempted to reconcile the recipient's role with the declarant's intent in making the statement; *see also supra* text accompanying notes 119–20.

[145] *See, e.g.*, Crawford v. Washington, 541 U.S. 36, 51 (2004); *Davis*, 547 U.S. 813 (citing U.S. CONST. amend. VI).

[146] *See generally* Richard D. Friedman, *Children As Victims and Witnesses in the Criminal Trial Process: The Conundrum of Children, Confrontation and Hearsay*, 65 L. & CONTEMP. PROB 243, 249–52 (2002) (discussing the differences when children provide information versus knowingly reporting misconduct).

[147] *Crawford*, 541 U.S. at 51 (Brief for Petitioner at 23) (emphasis added)

[148] *Id.* at 52 (Brief for Petitioner at 23) (emphasis added) (quoting White v. Illinois, 502 U.S. 346, 365 (1992).

[149] *See generally* Matthew M. Staab, *Child's Play: Avoiding the Pitfalls of* Crawford v. Washington *in Child Abuse Prosecution*, 108 W. VA L. REV. 501, 522 (Winter 2005) (proposing combining *Crawford's* first and third suggested formulations); *see also* People v. Sisavath, 13 Cal. Rptr. 3d 753, 759 (Cal. Ct. App. 2004) (adopting an objective observer/bystander approach).

[150] *See, e.g.*, *Sisavath*, 13 Cal. Rptr. 3d 753, at 757 n.3 (preferring the objective-observer approach, the court recognized that some may interpret the Supreme Court's reference to mean an objective witness in the *same* category as the declarant – "here, an objective four year old. But we do not think so."); People v. Vigil, 127 P.3d 916, 926 (Colo. 2006) (reasoning that an objective seven-year-old child would reasonably be interested in feeling better and that would not be able to anticipate their statements to the doctor may be used prosecutorially); State v. Snowden, 867 A.2d 314, 329 (Md. 2005) (preferring the objective-witness standard, the court stated, "we are satisfied that an objective test, using an objective person, rather than an objective child of that age is the appropriate test . . ."); State v. Brigman, 632 S.E.2d 498, 506 (N.C. Ct. App. 2006) (concluding that a reasonable child under three years of age would not be able to know that their statement might be used prosecutorially); State v. Blount, 2005 N.C. App. LEXIS 2606, at *11 (Dec. 6, 2005) (holding that under the circumstances, a reasonable child in the victim's position would not have any reason to know or believe that their statements may be used prosecutorially).

[151] *See* cases cited *supra* note 150.

[152] *See generally* Rangel v. State, 199 S.W.3d 523, 535 (Tex. App. 2006) (finding the four-year-old's statements testimonial by using the analysis in *Davis v. Washington*, and stating, "we need not decide what the appropriate standard should be because we determine that [the child's] statement was testimonial on other grounds.").

1. Declarant-Centric

The declarant-centric approach emphasizes what the actual declarant knew or should have known at the time he was making the statement.[153] In other words, the approach encompasses whether or not the actual declarant had reason to believe that his statement might be used in a future prosecution.[154] This standard originated from the Supreme Court's own words: "statements that *declarants* would reasonably expect to be used prosecutorially."[155] Attractive for its simplicity, this subjective approach, however, requires judges to ascertain the actual child's thought process on a particular occasion. Through their opinion, the Court inferred in its formulations that the declarant's expectation is relevant. Yet, in dicta, the Court mentioned that cross-examination was the only appropriate tool with which to test the declarant's perception.[156] With these conflicting thoughts it is not surprising why lower courts are struggling to fashion an appropriate standard to measure testimonial statements. Several scholars and judges criticize the declarant-centric approach and claim it is too vague and manipulable.[157] Therefore, the declarant-centric approach is most often subsumed in the third standard: the objective child in the declarant's position.[158] Some courts have undeniably disregarded *Crawford*'s reference to the declarant's expectation in favor of the objective witness approach.[159]

2. Objective Adult

Some jurisdictions ignore the specific child declarant's intent in favor a broader, more objective approach when analyzing hearsay statements.[160] In *State v. Snowden* and *People v. Sisavath*, the two courts minimized, if not discounted, any effect of the declarant's understanding in reaching their decision regarding the statements' testimonial nature.[161] The court in *Snowden* examined the statements from two children, aged eight- and ten-years-old, to a state social worker.[162] In the opinion, the court essentially equated the social worker to a police investigator and stated:

> [I]n the context of 'police interrogations,' we are directed by *Crawford* to conclude that the proper standard to apply to determine whether a statement is testimonial is whether the statements were made under circumstances that would lead an objective declarant reasonably to believe that the statement would be available for use at a later trial.[163]

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[153] *See e.g.*, *Vigil*, 127 P.3d 916; *Brigman*, 632 S.E.2d at 506; State v. Muttart, 2006 Ohio 2506 (Ohio Ct. App. 2006), *aff'd in part, rev'd on other grounds*, 875 N.E.2d 944 (Ohio 2007).

[154] *See generally* United States v. Scheurer, 62 M.J. 100 (2005). In *Scheurer*, the court examined a hearsay statement from an adult declarant to an acquaintance who was wearing a monitoring device. *Id.* at 102. The court determined that the statements were not testimonial since the declarant did not anticipate their use at a later trial when making them. *Id.* at 105 (citing United States v. Hendricks, 395 F.3d 173 (3d Cir. 2005)); *see also* cases cited *infra* note 158.

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

[156] *Id.* at 66.

[157] *See generally* Stephanie McMahon, Note: *The Turbulent Aftermath of* Crawford v. Washington*: Where Do Child Abuse Victims' Statements Stand?*, 33 HASTINGS CONST. L.Q. 361, 385 (2006) (listing three potential problems with a "declarant-centric" approach).

[158] *See, e.g.*, State v. Krasky, 736 N.W.2d 636 (Minn. 2007) (court considered what the actual seven-year-old declarant thought); State v. Blount, 2005 N.C. App. LEXIS 2606, at *11 (Dec. 6, 2005) (applied a reasonable child in the victim's position approach); State v. Johnson, 2006 Ohio 5195, at *22 (Ohio Ct. App. 2006) (unreasonable for the declarant to realize statements available for use at later trial), *remanded for resentencing hearing*, 116 Ohio St. 3d 541 (Ohio 2008); *Muttart*, 2006 Ohio 2506, at *20 (court considered that a five- and six-year-old child would not expect their statements to physicians to be used in a later prosecution), *aff'd in part rev'd on other grounds*, 875 N.E.2d 944 (Ohio 2007); State v. Dezee, 2005 Wash. App. LEXIS 104, at *12 (Wash. Ct. App. 2005) (concluding that the nine-year-old child could not reasonably believe that her statements would be used in a later trial).

[159] *See, e.g.*, People v. Sisavath, 13 Cal. Rptr. 3d 753, 758 n.3 (Cal. Ct. App. 2004) (deciding to employ an objective observer standard and not one standing in the child's shoes); State v. Snowden, 867 A.2d 314, 325 (Md. 2005) (using the objective witness approach).

[160] *See, e.g.*, *Snowden*, 867 A.2d 314; *see also* United States v. Coulter, 62 M.J. 520, 527 (N-M. Ct. Crim. App. 2005) (holding that the circumstances "would not lead an objective witness to reasonably believe that the statements would be available for use at a later trial."). *But see* United States v. Scheurer, 62 M.J. 100, 105 (2005).

[161] *Snowden*, 867 A.2d at 325; *Sisavath*, 13 Cal. Rptr. 3d at 758 n.3.

[162] *Snowden*, 867 A.2d at 325. The court noted that "[u]sing these *objective* standards in the present case, it is clear that an *ordinary* person in the position of any of the declarants would have anticipated the sense that her statements to the sexual abuse investigator potentially would have been used to 'prosecute' Snowden." *Id.* (emphasis added).

[163] *Id.* (citing Crawford v. Washington, 541 U.S. 36 (2004)). In passing, the court noted that the eight- and ten-year-old declarants were aware of the purpose of the questions, and, in the court's opinion, were *actually* aware of their statement's prosecutorial potential. *See id.* at 326.

Similarly, the court in *Sisavath* strictly relied on the "objective witness" language from *Crawford*, and refused to factor the declarant's expectations into the testimonial equation.[164] In a footnote, the court recognized that Supreme Court's "objective witness" language may be interpreted to mean "an objective witness in the same category of persons as the actual witness—here, an objective four year old."[165] However, the court declined to accept that interpretation and devised their own "objective observer" standard.[166] In both *Snowden* and *Sisavath*, the two courts ignored the declarant-expectation formulation the Supreme Court suggested.[167] If courts are not employing the objective adult standard, they sometimes merge it with the declarant-centric approach and create a hybrid: an objective child in the declarant's position.

3. Objective Child

Relying on the objective adult approach ignores the specific cognitive abilities or inabilities of a child declarant. Yet, courts continue to struggle with whether *Crawford's* "objective person" language refers to the declarant, an objective witness, or a completely unrelated bystander. Several jurisdictions interpret *Crawford's* formulation to mean an objective child in the declarant's position.[168] A child's reasonable expectations when providing statements to a social worker or school counselor are vastly different than adults' expectations. When judges consider whether a similarly situated child witness in the declarant's position could reasonably anticipate the prosecutorial use of their statements, they remain faithful to *Crawford's* consideration of the declarant's expectations when making the statement.

The court in *State v. Blount* analyzed a four-year-old declarant's statement to a counselor and therapist using the objective child approach.[169] Relying on their supreme court's interpretation of *Crawford*, the opinion in *Blount* held that "a reasonable child in the victim's position would have no reason to know or believe her statements would be used in a subsequent trial."[170] Similarly, the appellate court in *State v. Scacchetti*, considered what a young child in the declarant's position would understand when talking to a pediatric nurse at a children's clinic.[171] On appeal, the defense argued that the child's statements fell under the scrutiny of *Crawford's* broadest suggested formulations.[172] Dismissing that argument, the appellate court noted that in order for the statement to be testimonial, the appellant must show that a reasonable child of the declarant's age would anticipate the use of her statements in a future prosecution.[173] Not all jurisdictions apply a *purely* objective child approach. Some courts refer to the standard as the objective witness approach, yet in their analysis, apply the objective child reasoning.[174]

The court in *In re* D.L.[175] blended the objective witness language with the objective child analysis in its testimonial calculation. Initially, in *In re* D.L., the court used the "objective witness" language, but in its holding noted that "there were no circumstances to indicate the victim, *or a reasonable child of her age*, would have believed her statements were for anything other than medical treatment."[176] Similarly, in *People v. Vigil*,[177] the court examined the testimonial character of a

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[164] *Sisavath*, 13 Cal. Rptr. 3d at 758.

[165] *Id.* at note 3.

[166] *Id.* at 758.

[167] *See generally Crawford*, 541 U.S. at 51 (suggesting that testimonial statements may be those where the *declarant* would reasonably expect them to be used prosecutorially).

[168] *See, e.g.*, State v. Blount, 2005 N.C. App. LEXIS 2606, at *11 (Dec. 6 2005). However, as previously discussed, a few courts devise their own interpretations and consider whether an objective observer, not the actual child declarant, would reasonably foresee a subsequent prosecution. *See, e.g.*, *Sisavath*, 13 Cal. Rptr. 3d at 758 n.3 (deciding to employ an objective observer standard an not one standing in the child's shoes); *Snowden*, 867 A.2d at 325 (using the objective witness approach).

[169] *Blount*, 2005 N.C. App. LEXIS 2606, at *11.

[170] *Id.*

[171] *See generally* State v. Scacchetti, 690 N.W.2d 393 (Minn. Ct. App. 2005) (citing with approval the appellate court's use of the reasonable child standard), *aff'd*, 711 N.W.2d 508 (Minn. 2006).

[172] *Id.* at 396 (referencing *Crawford*'s suggestion that statements are testimonial when they would lead an objective witness to foresee their use at trial).

[173] *Id.*

[174] *See infra* text accompanying notes 175–80; *see also* Lollis v. State, 232 S.W.3d 803, 806 (Tex. App. 2007) (using the standard of an objectively reasonable declarant standing in the shoes of the actual declarant); Lagunas v. State, 187 S.W.3d 503, 520 (Tx. App. 2005) (using the perspective of an objective declarant considering the age and state of mind of actual declarant).

[175] 2005 Ohio 2320 (Ohio Ct. App. 2005).

[176] *Id.* at *10 (emphasis added).

hearsay statement through a reasonable child's perspective. The Colorado supreme court considered the testimonial nature of a seven-year-old's statements to the examining physician. In finding the statements were nontestimonial the court held:

> [No] objective witness in the position of the child would believe that his statements to the doctor would be used at trial. Rather, an objective seven-year-old child would reasonably be interested in feeling better and would intend his statements to describe the source of his pain and symptoms. In addition, an objectively reasonable seven-year-old child would expect that a doctor would use his statements to make him feel better and to formulate a medical diagnosis. He would not foresee the statements being used in a later trial.[178]

The court used an objective approach when considering the child declarant's perspective.[179] Utilizing the objective child approach appropriately considers the reasonable expectations of a child while safeguarding the rights of the accused.[180] In order for a child to "bear witness" in a testimonial sense, they must understand and comprehend the statement's future prosecutorial use. Nevertheless, there are other courts who, without regard to the declarant's understanding or perspective, find statements testimonial on other grounds.

4. Other Grounds

A few courts have completely doffed *Crawford*'s postulated formulations and donned the *Davis* approach.[181] The courts in *State v. Blue*[182] and *Rangel v. State*,[183] considered statements from four-year-olds to a forensic interviewer and a child protective services worker, respectively. Acknowledging *Crawford*'s "objective witness" language, the court in *Blue* considered the forensic interviewer's *purpose* in eliciting the statement.[184] Without addressing whether the four-year-old was able to anticipate the statement's adversarial use, the court simply noted that the interviewer's purpose was to prepare for trial.[185] The court awkwardly threw in the *Davis*'s language regarding an "ongoing emergency" but failed to specifically apply it to the facts of the case.

The court in *Rangel*[186] acknowledged that many courts have struggled in their application of *Crawford's* formulations and *Davis*'s "primary purpose" test,[187] and recognized *Vigil*'s application of the objective witness standard.[188] Refusing to consider whether an objective person in the child's position could foresee the statement's adverse consequences, the court decided the statement was testimonial by applying the *Davis* analysis to 911 calls.[189] Specifically, the court noted that the four-year-old was describing past events and that she would also be able to understand that her statement may be used to prove some event.[190] The court imputed more knowledge onto this four-year-old than would ordinarily be expected of a child

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[177] 127 P.3d 916 (Colo. 2006).

[178] *Id*. at 926.

[179] *See id*.

[180] *Id.* at 925 (citing United States v. Summers, 414 F.3d 1287 (10th Cir. 2005)).

[181] *See supra* Part IV.B.3 for a discussion of the *Davis* approach.

[182] 717 N.W.2d 558 (N.D. 2006).

[183] 199 S.W.3d 523 (Tx. Ct. App. 2006).

[184] *See Blue*, 717 N.W.2d at 564.

[185] *See id.* at 565.

[186] 199 S.W.3d 523.

[187] *See id*. at 534–35.

[188] *See id.* at 533. The court acknowledged *Vigil's* use of the objective person standard, but declined to utilize that approach and stated, "we need not decide what the appropriate standard should be because we determine that [the child's] statement was testimonial on other grounds." *Id.* at 533–34.

[189] *See id*. at 534–35.

[190] *See id.* at 535. The court stated:

> [W]e believe, either under a subjective standard or an objective standard, that a four-year-old child would be able to perceive this as meaning that her words would be used to establish or prove some fact—i.e., that he sexually assaulted her—and that the establishment of that fact was necessary so that a person in authority, whether the investigator or someone else, would make appellant stop.

Id.

of that age. Simply because the child declarant described past events, does not transform her statement into a testimonial one. Except for present sense impressions relayed during an event, every other hearsay statement will inevitably describe past events. The court in *Rangel*, in its desire to pioneer a new standard for determining the testimonial ability of child declarants, misapplied the *Davis* holding and established incorrect precedent.

When lower courts misapply standards or create new ones, they establish bad precedent through inconsistent results. Conflicting and illogical application of the disparate analytical standards emphasize the need to adhere to a single, workable solution. A standardized approach is necessary to assist courts in their treacherous travels toward understanding the statement's true testimonial nature. Appropriate analysis in the testimonial calculation considers not only the Confrontation Clause's concerns but the declarant's expectations as well. The desired end is an applicable formula that incorporates all relevant and determinative factors. Whether or not the child declarant was able to reasonably foresee the statement's prosecutorial use, must be viewed from the perspective of a child and not an adult. It is important to examine what a similarly situated child reasonably believed at the time of the utterance.

The objective child in the declarant's position approach incorporates the child's expectations.[191] In other words, it is not what a reasonable adult would understand in the child's position. That approach is illogical and does not accurately reflect a child declarant's perspective. To analyze a child's statement from the adult's perspective incorrectly warps the true meaning and purpose of the utterance. Rather, the appropriate standard is whether a reasonable *child* in the declarant's position has reason to believe or anticipate that their statement could be used prosecutorially. When young children are unable to appreciate the statement's adverse consequences, they are incapable of uttering testimonial declarations. However, blindly adhering to this approach without considering the statement's surrounding circumstances may present a "unique potential for prosecutorial abuse."[192] For example statements that are clearly testimonial in nature—i.e., those carefully elicited through interrogations, or with substantial Government involvement, with an eye toward trial, may be erroneously deemed nontestimonial because a very young child lacked the ability to clearly appreciate the potential consequences of their allegations. Therefore, courts must accurately apply the correct standard while considering all dispositive factors present in the surrounding circumstances.[193]

VI. The Rebuttable Presumption

Some young children are incapable of making testimonial statements because they either lack the competency or capacity to "bear testimony." It is imperative to determine the child's competency—not only in their ability to testify as a witness, but also in their capacity to understand their statement's possible adverse consequences. A child declarant who "bears testimony" and thus, becomes a "witness against" in a constitutional sense, should be able to appreciate the intended use of their statements, at the time of utterance. The child's cognitive and mental development is also a determining factor when assessing the testimonial character of their statements.[194] Competency as a witness and testimonial capacity seem interrelated. However, they are two distinct concepts. Competency refers to the child's cognitive ability to understand the difference between a truth and a lie and the resulting consequences of uttering falsehoods at the time of trial.[195] Testimonial capacity refers to a child's ability to anticipate their statement's adverse consequences at the time the statement was made. Although separate concepts, competency and capacity sometimes collide, further complicating the testimonial analysis. One of the components of the testimonial equation is the declarant's ability to understand and comprehend the future adversarial use of his statements. Therefore, a child who lacks the competence to testify at trial, most likely lacks the capacity to utter testimonial statements. One commentator succinctly stated that

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[191] *See generally* State v. Blount, 2005 N.C. App. LEXIS 2606, at *11 (Dec. 6 2005) (reasonable child in the victim's position).

[192] *See* Crawford v. Washington, 541 U.S. 36, 56 n.7 (2004).

[193] *See, e.g.*, Lollis v. State, 232 S.W.3d 803, 807 (Tex. App. 2007) (utilizing ten factors to assist in determining the testimonial character of a statement).

[194] *See generally* McMahon, *supra* note 157, at 386–87 (briefly acknowledging that children's cognitive and mental abilities are a factor in determining the testimonial nature of their statements).

[195] *See generally* Thomas D. Lyon, *Child Witnesses and the Oath: Empirical Evidence*, 73 S. CAL. L. REV. 1017. A judge examining a child's competency prior to allowing their testimony will consider their ability to tell the truth, adequately express their thoughts, and understand the consequences of telling lies. *Id.* at 1029. The judge then determines whether the child possesses the appropriate level of mental and psychological characteristics required to accurately understand and recall the events that comprise the subject of their testimony. *Id.* at 1045. Based on these factors, if the judge determines the child lacks the requisite competence, the child declarant is prevented from testifying. Under the Military Rules of Evidence, competency determination is left to the discretion of the military judge. *See* MANUAL FOR COURTS-MARTIAL, UNITED STATES, MIL. R. EVID. 601 (2008) [hereinafter MCM].

> [b]ecause the objective, reasonable declarant and a competent individual likely possess the same characteristics, it is doubtful whether a trial court could find, on one hand, that a child is incompetent to testify at trial but, on the other hand, that the same child at an earlier time could make a testimonial statement which he reasonably believed could be used at a future trial.[196]

It is in these rare cases where the concept of competency and capacity overlap that gives rise to the need to adequately understand the differences while appreciating the similarities.

Although other scholars and courts either discount or disregard the relevance of the specific declarant's state of mind,[197] it is an essential fact in determining whether the declarant is capable of bearing testimony. An overly literal translation of the objective-child-declarant approach may result in a categorical determination that *all* children's statements are nontestimonial, since young children do not fully comprehend the prosecutorial process. The accurate and realistic measure of a child's capacity to understand the *prosecutorial use* of their statements, is whether or not they know and understand that they are *telling on someone*, and as a result, that person may *get in trouble* because of their telling.[198] Therefore, a determinative factor in a child declarant's capacity to "bear testimony," is their awareness of the potential adverse results of their statements.[199] The child's age, cognitive and mental development, and level of understanding may render them incapable of uttering testimonial statements.

The Confrontation Clause applies to "witnesses against" the accused.[200] To be a "witness against," one must "bear testimony."[201] In deciding whether a child declarant intended to "bear testimony," courts must determine if a reasonable child in the declarant's position was aware of the statement's adverse consequences. The declarant's understanding, expectations, and intent are relevant factors in the testimonial equation. In *People v. Vigil*, the court noted that "[e]xpectations derive from circumstances, and among other circumstances, a person's *age* is a pertinent characteristic for analysis."[202] Children under five years old have limited cognitive abilities that prevent them from comprehending the relevant facts of a given situation.[203] Consequently, they cannot fully appreciate and understand all the circumstances surrounding the statement, as could an older child or an adult. These young children, lacking in the capacity to foresee an adverse use of their statements, are presumptively unable to make testimonial statements.[204] However, the same characteristics that prohibit them from comprehending the consequences of their statements also make them easily susceptible to manipulation.[205] In other words, a child declarant may be blissfully unaware of the interviewer's motive to develop their testimony for use at a later trial. The child's age and cognitive inability to comprehend those motives does not and should not automatically render their resulting statements nontestimonial. An accused does not forfeit his constitutional

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[196] *See* Staab, *supra* note 149, at 522; *see also* State v. Krasky, 736 N.W.2d 636, 642 n.6 (Minn. 2007) (noting that it would be "an odd outcome" to find the child not competent to testify as a result of her age and understanding, yet to find the resulting statements testimonial).

[197] *See generally* Monnat & Nichols, *supra* note 39, at 20–21; State v. Snowden, 867 A.2d 314, 325 (Md. 2005). *But see* Friedman, *supra* note 7, at 10 (noting that the declarant's understanding is relevant to the testimonial analysis).

[198] *See generally* Friedman, *supra* note 7, at 10. One of the authors in the National Association of Criminal Defense Lawyers' amicus brief in *Crawford*, Professor Friedman proffered the phrase used as *Crawford's* third formulation: "statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial." *See generally* Crawford v. Washington, 541 U.S. 36, 52 (2004). Professor Friedman also recognizes that sometimes children communicate their situation with little or no understanding of the consequences—but in order to be a "witness" in the Confrontation sense, they must have some capacity to anticipate their statement's eventual use. Friedman, *supra* note 7, at 10. Friedman suggests that a child, without any understanding of the legal system, can still bear testimony, if they knew that by "telling a police officer about a bad thing that a person did would likely cause that person to be punished." *Id.*

[199] *See* People v. Vigil, 127 P.3d 916, 925 (Colo. 2006) (citing United States v. Summers, 414 F.3d 1287 (10th Cir. 2005)).

[200] *See generally* U.S. CONST. amend. VI.

[201] *See generally Crawford*, 541 U.S. at 51; United States v. Cromer, 389 F.3d 662, 675 (6th Cir. 2004) (stating that "[t]he proper inquiry . . . is whether the declarant intended to bear testimony against the accused."); Lagunas v. State, 187 S.W.3d 503, 514 (Tx. App. 2005) (stating that "[t]he Confrontation Clause applies to those who 'bear testimony'").

[202] *See, e.g.*, *Vigil*, 127 P.3d at 925 (emphasis added) (citing *Lagunas*, 187 S.W.3d 503); State v. Scacchetti, 711 N.W.2d 508, 515–16 (Minn. 2006) (finding no reasonable three-year-old would anticipate the use of the statements in a future trial).

[203] *See, e.g.*, McMahon, *supra* note 157, at 386–87; Christiansen, *supra* note 38.

[204] *See supra* notes 37, 195; *supra* text accompanying note 196. If a child is ruled incompetent to testify based on their inability to understand the importance of taking an oath and the resulting adverse consequences for testifying falsely, then it stands to reason that the same child would not understand or anticipate the potential prosecutorial use of their statements.

[205] Dissenting in the Supreme Court's ruling in *Maryland v. Craig*, that testifying through closed-circuit television was not violative of the Confrontation Clause, Justice Scalia noted several studies on children's vulnerability to suggestions and stated, "[t]he 'special' reasons that exist for suspending one of the usual guarantees of reliability in the case of children's testimony are perhaps matched by 'special' reasons for being particularly insistent upon it in the case of children's testimony." 497 U.S. 836, 868 (1990) (Scalia, J., dissenting).

rights solely based on his accuser's mental capacity, or lack thereof. This article does not argue for a categorical exclusion of all young children's statements from the testimonial equation.[206] Rather, it proffers that the child's age and cognitive abilities place the burden on the opposing party to expose improper motives through a thorough examination into the statement's attendant circumstances.[207]

Accepting the presumption that young children are powerless to utter testimonial statements, does not, in itself, create a per se rule that eviscerates the need for testimonial analysis. Some courts are reluctant to create a rule where excited utterances and statements made for medical treatment are inherently nontestimonial.[208] However, they are not equally hesitant when treating statements made to law enforcement officers as testimonial.[209] A per se rule is similar to a categorical exclusion in that they both fail to consider the circumstances surrounding the statement. At least one court expressed a concern in treating all statements from child declarants as per se nontestimonial.[210] Courts do not have to "conclude as a matter of law"[211] that a young child's statement may *never* be testimonial. Instead, a court may employ the rebuttable presumption analysis. A rebuttable presumption establishes a rule *and* creates avenues for exceptions to the rule.

Using the rebuttable presumption that young children lack testimonial capacity not only addresses public policy concerns about subjecting children to additional traumatic events, it also maintains adequate protections for the accused.[212] When a child is so young that they are incapable of understanding their statement's adverse consequences, then it follows that they are unable to "bear testimony." It is in those situations that the Confrontation Clause is not implicated.

After the presumption is established, the burden shifts to the opposing party to prove that the statement is testimonial.[213] The critical determinative factors incorporate the declarant's and recipient's status, roles and intent. The opposing party must examine the circumstances surrounding the statement using the eleven factors:[214] (1) the declarant's age; (2) the declarant's

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[206] *See also* Monnat & Nichols, *supra* note 39, at 20–21 (counseling against a per se exclusion of children's statements from the Confrontation Clause analysis); Knoebber, *supra* note 17, at 520 (criticizing the categorical approach to testimonial determinations). *See generally* State v. Snowden, 867 A.2d 314, 328–29 (Md. 2005) (refusing to create a per se rule that children are incapable of making testimonial statements).

[207] The concept of rebuttable presumption is not foreign to military justice. For example, in *United States v. Trani*, 3 C.M.R. 27 (C.M.A. 1952), the court concluded that it is a "long-standing principle of military law that the command of a superior officer is clothed with a presumption of legality, and that the burden of establishing the converse devolves upon the defense." *Id*. at 30. The defense can overcome the presumption by showing through clear and convincing evidence that the order was illegal. *Id.*; *see also* Captain Frederic L. Borch, III, *The Lawfulness of Military Orders* ARMY LAW., Dec. 1986, at 47. In addition to the presumption of lawfulness of military orders, there are presumptions that exist in the voluntariness of confessions. Once the government makes an affirmative showing that the accused's statement is voluntary, the accused may then rebut the presumption and challenge its admissibility by showing factors indicating involuntariness. *See* MCM, *supra* note 195, MIL. R. EVID. 304.

[208] *See generally* Commonwealth v. DeOliveria, 849 N.E.2d 218, 226 (Mass. 2006). The court acknowledged the argument that young children's statement to medical professionals should not be deemed testimonial. *Id.* They declined to adopt such a broad rule. *Id.* at n.10. However, they considered the child's age a determinative factor in the testimonial analysis. In finding the six-year-old child's statement was nontestimonial, the court stated, "[l]ogic informs that a six year old child can have little or no comprehension of a criminal prosecution in which the child's words might be introduced as evidence against another person in a court of law." *Id*. at 225; *see also* Lagunas v. State, 187 S.W.3d 503, 514 (Tx. App. 2005) (we need not decide now whether, as a general rule, statements by children are inherently non-testimonial). *But see* United States v. Peneaux, 432 F.3d 882, 896 (8th Cir. 2005) (statements to medical practitioners presumptively nontestimonial).

[209] *See, e.g.*, United States v. Coulter, 62 M.J. 520, 527–28 (N-M. Ct. Crim. App. 2005) (noting that statements derived from police interrogation present a risk of abuse) (citing United States v. Cromer, 389 F.3d 662, 675 (6th Cir. 2004)); People *ex rel.* R.A.S., 111 P.3d 487, 490 (Colo. Ct. App. 2004) (four year-old child's videotaped statement to a police investigator held testimonial "even [under] the narrowest formulation under the Court's definition of the term."); State v. Siler, 116 Ohio St. 3d 39, 50 (Ohio 2007) (holding child declarant's statement made during police interrogation is testimonial regardless of age or cognitive abilities); *see also* cases cited *supra* note 95. *But see* Davis v. Washington, 547 U.S. 813, 827–28 (2006). The Supreme Court considered whether a statement made to a 911 operator could be considered nontestimonial. The holding did not establish an *exception*, rather it established a rule that statements made during an ongoing emergency are plainly nontestimonial. *See id.*

[210] *See generally* State v. Snowden, 867 A.2d 314, 328–29 (Md. 2005). The court acknowledged and commented on the research conducted by The American Prosecutor's Research Institute on young children's limited cognitive and developmental skills. *Id.* Additionally, they recognized that there may be certain situations where a child's age and maturity level may render them unable to understand the testimonial nature of their statements. *Id.* In dicta, the court stated, "we are unwilling to conclude that, as a matter of law, young children's statements cannot possess the same testimonial nature as those of other, more clearly competent declarants." *Id*. However, the court noted that the circumstances revealed that the eight- and ten-year-old children were *actually* aware of the nature of their statements. *Id*. at 326.

[211] *See id*. at 328.

[212] *But see id.* at 329 (stating that giving too much consideration to the child's age "overlooks the fundamental principles underlying the *Confrontation Clause*").

[213] *See supra* note 207. The opposing party may challenge the voluntariness or admissibility of a confession by showing that the circumstances surrounding the statement made it an involuntary one. Likewise, the defense can use the eleven factors identified by the author in Parts III and this section, to show that the young child's statement was testimonial.

[214] The eleven factors proffered in this paper are derived from researching the various approaches courts utilized when analyzing the testimonial capacity of children's statements.

mental capacity; (3) the declarant's understanding and intent when making the statement; (4) whether the statement was elicited or volunteered; (5) the recipient's status; (6) the recipient's role; (7) the recipient's prior knowledge of allegations and facts contained therein; (8) the recipient's manner of questioning (open-ended/leading); (9) the recipient's contact with law enforcement personnel; (10) the presence of law enforcement personnel during the taking of the statement; and (11) the primary purpose for making the statement. A careful analysis using these eleven factors will appropriately safeguard any constitutional concerns governing testimonial statements. Appropriate application of the eleven factors will assist the opposing party in exposing improper motives and agendas affecting the child's statement. Even where the child's youth and cognitive abilities prevent them from appreciating the adverse consequences, situations exist that may give rise to testimonial statements. These factors will aid in revealing the underlying testimonial nature of a *seemingly* typical interview. The rebuttable presumption adequately addresses concerns befalling the accused as well as the accuser. Utilizing the rebuttable presumption approach will promote consistency in analysis and results and aid in defining the elusive nature of a testimonial statement.

VII. Conclusion

She eludes our understanding, escapes our grasp and is so detrimental if applied improperly. Defining testimonial is sometimes a seemingly unattainable goal. The Supreme Court's failure to adopt any of their three suggested formulations of testimonial statements has left scholars and courts to their own devising.[215] Lower courts have become stuck in the quagmire that the Supreme Court's opinion in *Crawford v. Washington* created. Therefore, it is imperative when analyzing the testimonial nature of child declarants' statements, that courts emerge from the quicksand and review the true meaning of the phrase "bearing testimony." Lower courts' inconsistent interpretations of the Supreme Court's opinion in *Crawford*, and their potential misapplication of the Court's rule in *Davis*, emphasize the need for a clear, workable, and analytical approach.

First, when analyzing a child declarant's testimonial capacity, it is imperative to examine the child's age, cognitive development, and ability to understand the potential adverse consequences of their statements. As an aid in assessing the declarant's awareness of the attendant circumstances, courts should adopt the following standard: a reasonable child in the declarant's position. For a child declarant to become a testimonial witness, the child must first understand and appreciate the potential prosecutorial use of their statement. The child declarant need not understand the exact nature of prosecutorial proceedings, however, it is sufficient that they are aware of and intend some adverse results when making their statements. If the child declarant is too young and their limited cognitive development prevents them from appreciating their statement's adverse consequences, their statements are presumptively nontestimonial. By applying the eleven factors,[216] the opposing party may rebut the presumption through an adequate showing that the statement possesses all the requisite qualities of being testimonial. This structured approach enables courts to balance the accused's constitutional rights and society's need to protect the safety, health, and welfare of children. The Supreme Court in *Crawford* left "for another day"[217] the unenviable and difficult task of defining testimonial. Until it can be defined for all situations, today is the day it can be defined for those involving children.

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[215] *See, e.g.*, Ariana J. Torchin, *A Multidimensional Framework for the Analysis of Testimonial Hearsay Under* Crawford v. Washington, 94 GEO. L.J. 581 (January 2006); Mosteller, *supra* note 42; Staab, *supra* note 149; *see also* State v. Mizenko, 127 P.3d 458, 471 (Mont. 2006) (Nelson, J. dissenting) (arguing, in his nearly-150 page dissent, why the majority's approach to testimonial analysis was flawed).

[216] *See* discussion *supra* Parts III, VI, identifying the eleven factors.

[217] Crawford v. Washington, 541 U.S. 36, 68 (2004) ("[W]e leave for another day any effort to spell out a comprehensive definition of 'testimonial.'").

Military Members Posing in Sexually Explicit Pictures

Major Kelly L. McGovern[*]

Introduction

The Global War on Terrorism spurred an increase in the media coverage of military matters over the last several years. Unfortunately, it appears that some Soldiers, Sailors, Airmen, and Marines capitalized on this media attention for their own personal gain.[1] They seized the opportunity to become famous and posed in sexually explicit photos for magazines and on websites.[2] Commanders face difficult decisions disciplining servicemembers in these cases because there is no clear cut, punitive prohibition against military members posing in sexually explicit photographs for the public's view.[3]

Former Air Force Drill Sergeant Michelle Manhart posed in and out of uniform for the February 2007 edition of *Playboy* magazine.[4] Photos included Manhart in uniform yelling and holding weapons under the headline, "Tough Love."[5] On the subsequent pages, Manhart appeared "partially clothed, wearing her dog tags while working out, as well as completely nude."[6] The pictures hit the stands in January 2007, and the Air Force immediately relieved her of her duties pending an investigation.[7] The Air Force then took administrative action against Manhart.[8] She received a letter of reprimand for violating the uniform regulation and discrediting the armed forces.[9] The Air Force also administratively demoted Manhart from staff sergeant to senior airman.[10] In February, she was voluntarily discharged from the Air Force citing reasons of personal convenience.[11]

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[1] Former Air Force Staff Sergeant (SSgt) Michelle Manhart stated in a *CNN* interview that she had unsuccessfully "pursued Playboy" magazine in the past, but "then came this opportunity [to appear in the February 2007 issue of Playboy] and I definitely did not pass it up." *Anderson Cooper 360 Degrees* (CNN television broadcast Jan. 12, 2007) (transcript available at http://transcripts.cnn.com/TRANSCRIPTS/0701/ 12/ acd.01.html) (interview by Anderson Cooper with SSgt Manhart).

[2] "Manhart's punishment gave her sudden celebrity [status], setting off a media blitz, online debates, talk show spats and more." Patrick Winn, *Airman Who Lost Job for Posing Nude Speaks Out*, A.F. TIMES, Apr. 12, 2007, *available at* http://www.airforcetimes.com/news/2007/04/af_playboy_manhart_070409. "She is hustling to spin her high-profile punishment into a lasting celebrity career. In days, she'll go to her next high-profile modeling gig, with People for the Ethical Treatment of Animals. Manhart will pose wearing only an American flag for the group's 'I'd Rather Go Naked than Wear Fur' national campaign." *Id.*

[3] Violations of the military uniform regulations are not punitive. *See* U.S. DEP'T OF ARMY, REG. 670-1, WEAR AND APPEARANCE OF ARMY UNIFORMS AND INSIGNIA (3 Feb. 2005) [hereinafter AR 670-1]. The Uniform Code of Military Justice (UCMJ) does not specifically forbid posing naked for public photographs, although the conduct may meet the elements of indecent exposure. UCMJ art. 120 ¶ b(14) (2008). Major General (MG) Charles Dunlap Jr., the Air Force's Deputy Judge Advocate General, explained the gap in the UCMJ by stating, "the UCMJ wasn't designed to be a "cookbook of prohibited activities. . . . There is no possible way to legislate every single thing that will undermine good order and discipline, or discredit the military." Winn, *supra* note 2.

[4] PLAYBOY (Feb. 2007).

[5] FOXNews.com, *Air Force Staff Sergeant Relieved of Duties After Posing Nude in* Playboy, Jan. 12, 2007, http://www.foxnews.com/story/0,2933,243178,00.html.

[6] *Id.*

[7] *Id.*

[8] Winn, *supra* note 2.

[9] *Id.*

[10] *Id.*

[11] *Id.*

Days before deploying to Iraq in August of 2006, a group of female National Guard Soldiers posed naked in 232 pictures.[12] The females selectively concealed parts of their bodies with military rifles and covered their breasts with American flag decals.[13] There have been other incidents of females posing in photos while deployed as well. One example is a military police guard, Private First Class Deanna Allen, who made headlines around the world when she "bared her breasts during a mud-wrestling escapade last year at the main U.S. prison for enemy detainees."[14] Military men have also posed in sexually explicit photos for *Playgirl* magazine and on-line homosexual websites.[15]

The harm could impact the military on multiple levels. A service member who poses naked risks losing the ability to perform his/her job with dignity and respect.[16] The effect of the naked photos circulating in a unit negatively detracts from the mission at hand. In addition, the widespread media attention brings discredit to the military whose servicemembers are expected to uphold the highest values and standards. Commanders need to know their options range from imposing non-judicial punishment under the newly revised Article 120 of the Uniform Code of Military Justice (UCMJ) to administratively discharging service members for violating the UCMJ and the *Joint Ethics Regulation* (*JER*).

Non-Judicial Punishment Options

Commanders can choose to handle these situations using non-judicial punishment, with an Article 15 under the UCMJ.[17] "Non-judicial punishment provides commanders with an essential and prompt means of maintaining good order and discipline and also promotes positive behavior changes in service members without the stigma of a court-martial conviction."[18]

For servicemembers serving in the Central Command (CENTCOM) area of operations (AO), which includes Kuwait, Iraq, or Afghanistan, creating pornography or sexually explicit photographs constitutes a violation of General Order 1 (GO 1).[19] A commander in the CENTCOM AO may charge the servicemember who takes a sexually explicit photograph of another person, as well as the servicemember posing in the picture, with a violation of UCMJ Article 92, section one, as a violation of or failure to obey a lawful general order.[20]

For servicemembers serving in the Continental United States or in other areas of the world, a commander may charge a Soldier for violating Article 120, of the UCMJ for indecent exposure.[21] If a service member intentionally exposes his or her genitalia, anus, buttocks, or female areola or nipple, in an indecent manner, in any place where the conduct involved may reasonably be expected to be viewed by people other than the servicemember's family or household, then the servicemember

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[12] *See Soldiers Will Face Sanctions for Posing in Nude Photos*, ASSOC. PRESS STATE & LOCAL WIRE, Nov. 8, 2006, at 3:10 p.m. GMT.

[13] *Id.*

[14] *Breast-Baring Soldier Released from Service*, SAN JOSE MERCURY NEWS (Cal.), Feb. 19, 2005, at 14A. Several of the photos were printed in the Sunday edition of the *New York Daily News* which resulted in an investigation and disciplinary action. *GI Demoted for Iraq Mud Wrestling*, Feb. 7, 2005, http://www.cbsnews.com/stories/2005/02/07/iraq/main672070.shtml ("Allen was demoted from specialist to private first class and placed on restriction for participating in the event.").

[15] Male Soldier eliminated from an Army Special Forces unit at Fort Bragg for failing to seek approval for outside employment when he posed in sexually explicit pictures for a magazine. Interview with Major John Jurden, TJAGLCS, Charlottesville, Va. (Jan. 22, 2007); seven paratroopers from the 82d Airborne Division at Fort Bragg were charged with violations of the UCMJ when they performed homosexual acts in videos on a website in 2006. *Soldiers Charged in Web Porn Case: Men Accused of Performing Sex Acts for Money While Being Filmed*, ASSOC. PRESS STATE & LOCAL WIRE, Feb. 24, 2006, 9:55 p.m. EST, *available at* http://msnbc.msn.com/id/11550024/print/1/displaymode/1098.

[16] Manhart's trainer, who was a former staff sergeant, admitted it would be tough for her to cede authority that the job demands after young service members had been "peering over her glowing curves in an adult magazine." Winn, *supra* note 2.

[17] Depending on the date and location of the offense and the rank of the servicemember, a commander may be able to impose nonjudicial punishment pursuant to UCMJ articles 92, 120, 133, or 134 (2008) or UCMJ art. 134, ¶ 88 (2005).

[18] MANUAL FOR COURTS-MARTIAL, UNITED STATES pt. V, ¶ 1-c (2008) [hereinafter MCM].

[19] Central Command General Order 1 prohibits the "introduction, possession, transfer, sale, creation or display of any pornographic or sexually explicit photograph . . . ." Headquarters, Multi-National Corps–Iraq, Gen. Order No. 1 (12 Feb. 2005).

[20] UCMJ art. 92 (2008).

[21] *Id.* art. 120, ¶ b(14). In the previous version of the UCMJ, indecent exposure was an Article 134 offense. *Id.* art. 134, ¶ 88 (2005). If the act of indecent exposure occurred before 1 October 2007, the offense must be charged under the former 2005 edition of UCMJ art. 134, ¶ 88. *See* MCM, *supra* note 18, App. 27. If the act occurred after 1 October 2007, the appropriate charge would be pursuant to the new UCMJ art. 120, ¶ b(14) (2008).

violated Article 120 and may be found guilty of indecent exposure.[22] Although the UCMJ does not specifically prohibit making sexually explicit photos for public viewing, it can be argued that the elements of the offense include posing nude for pictures with the intent that those photographs will be made public.[23]

A commander may also elect to create a specification under Article 134, clause two, for a general violation of service discrediting conduct, but the case law currently differs among the services as to what actually constitutes "service discrediting." For instance, the Army requires at least one civilian be aware of the pictures and the military status of the offender.[24] The Air Force and Coast Guard follow a lower threshold with a literal reading of the *Manual for Courts-Martial* which states that "a tendency of the misconduct to discredit the service" suffices.[25]

An officer who poses for public pornographic pictures can be charged with violating Article 133 of the UCMJ, conduct unbecoming of an officer and a gentleman.[26] This offense only requires that a commissioned officer, cadet, or midshipmen engage in conduct that is unbecoming which includes behavior that dishonors or disgraces the person as an officer, or compromises their character or standing as an officer.[27]

Even though a range of violations seem to exist under the UCMJ, there still is no perfect match. To avoid resistance from the accused and to expedite these high profile, controversial cases, many commanders opt to take adverse administrative actions against servicemembers instead.

Violations of Regulations

Service members who pose in sexually explicit pictures for profit may violate various portions of the *JER*,[28] as well as uniform regulations. The *JER* contains provisions that require servicemembers to seek approval before engaging in outside employment. Officers in the rank of O-7 or above must seek permission from their commander for outside employment while on active duty.[29] Those officers are prohibited from accepting outside employment which conflicts with, or otherwise

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[22] UCMJ art. 120 (2008). The explanation section states that "indecent" generally signifies that form of immorality relating to sexual impurity that is not only grossly vulgar, obscene, and repugnant to common propriety, but also tends to excite lust and deprave morals with respect to sexual relations. *Id.* ¶ c(3).

[23] There are no cases of indecent exposure under the newly revised UCMJ art. 120, but previous cases suggest that the intent and public view requirements would be satisfied by a servicemember willfully posing for nude photographs, coupled with the knowledge that the pictures will be made public. *See* United States v. Graham, 56 M.J. 266 (2001) (recognizing the facts of the case establish the intent to expose oneself in a public place or where the act is certain to be observed); *see also* United States v. Shaffer, 46 M.J. 94 (1997) (defining "public view"); United States v. Stackhouse, 37 C.M.R. 99, 101 (C.M.A. 1967) (quoting Hearn v. Dist. of Columbia, 178 A.2d 434, 437 (D.C. Mun. App. 1962)) ("The required criminal intent [for indecent exposure] is usually established by some action by which a defendant draws attention to his exposed condition or by a display in a place so public that it must be presumed it was intended to be see by others.").

[24] United States v. Green, 39 M.J. 606 (A.C.M.R. 1994) (holding that the public must be aware of the misconduct and that the person committing the wrongdoing is a service member. Green admitted to being married and committing adultery and the judge asked him if he thought his bad behavior would be prejudicial to the good order and discipline or service discrediting, but the Soldier did not understand the definition of service discrediting. The court found his conduct was prejudicial to good order and discipline, but since other Soldiers rather than civilians witnessed Green and his mistress go into the barracks it would not constitute service discrediting misconduct because it would not have the tendency to lower the esteem, etc. in the civilian community.).

[25] *See* United States v. Mead, 63 M.J. 724 (A.F. Ct. Crim. App. 2006) (rejecting the Army standard in *United States v. Green*, and holding that the only requirement is for there to be "a tendency to discredit the service." The government did not present any specific evidence to show how the accused's possession of child pornographic images on his computer would discredit the service, but the Air Force Court adopted the Coast Guard view that there need only be the potential to be service discrediting.); United States v. Nygren, 53 M.J. 716 (C.G. Ct. Crim. App. 2000) (rejecting the Army standard in *United States v. Green*, and establishing that the public need not be aware of the misconduct because the an offense which is against the law tends to discredit the service. The government charged Nygren with underage drinking and the court determined that since a statute criminalizes the conduct it is service discrediting.); *see also* United States v. Brown, No. 36695, 2007 CCA LEXIS 534 (A.F. Ct. Crim. App. Nov. 16, 2007) (following the Air Force Standard in *United States v. Mead*).

[26] UCMJ art. 133 (conduct unbecoming of an officer and gentleman).

[27] *Id.* Note that "gentleman" includes both male and female commissioned officers, cadets and midshipmen. *Id.*

[28] *See* U.S. DEP'T OF DEFENSE, 5500.7-R, JOINT ETHICS REG., ¶¶ 2-206, 2-303, 3-306 (23 Mar. 06) [hereinafter JER].

[29] *See id.* ¶¶ 2-206, 3-306. The *JER* requires those Department of Defense (DoD) employees who are required to file a financial disclosure report to obtain written approval before engaging in a business activity or accepting compensation for outside employment with a prohibited source. *Id.* This requirement only applies to officers in the rank of O-7 or above because they are the only servicemembers who are required to file the financial disclosure statement. *Id.* at Appendix C.

interferes with, the performance of their official duties.[30] For all other servicemembers, the *JER* provides a provision that commanders may require servicemembers under their jurisdiction to report any outside employment or activity prior to engaging in the employment or activity.[31] It also empowers commanders to "prohibit the employment or activity if he believes that the proposed outside activity will detract from readiness or pose a security risk."[32] However, the *JER* also states that "[i]f action is not taken to prohibit the employment or activity, the [servicemember] is free to engage in the employment or activity in keeping with other restrictions of this Regulation."[33] Therefore, it is important for commanders to publish local policies governing outside employment which specifically prohibit posing in sexually explicit photographs or videos. Otherwise, servicemembers who profit from appearing nude in public photographs or videos may not have committed any violation.[34]

The military does permit some public appearances, even if there is a possibility of personal gain. For instance, Second Lieutenant Kelly George participated in the Miss USA pageant[35] and Captain Timothy Bobinski was a contestant on the game show *Jeopardy!*[36] Air Force Major General Dunlap explained that servicemembers can seek approval to appear on game shows which can "humanize our troops in the right way and introduce them to a public that may or may not personally know anyone in the military."[37] He went on to say that "[t]he key is obtaining permission before making an appearance or taking a job."[38]

It is also unlawful to use public office for private gain, but unless a commander has a policy in place, this regulatory prohibition only applies to officers.[39] *Playboy* magazine recruited Air Force Staff Sergeant Michelle Manhart because she served in the military. "The magazine was curious about her nails-tough job: Breaking down and building up young Air Force recruits as a training instructor."[40] *Playboy* publicist, Theresa Hennessey said that when "[t]he photographers found out Michelle was in the military . . . that was very intriguing to them."[41] It is likely that they would not have been asked to participate in the photos, but for their official position as a servicemember. Therefore, they are using their public office for private gain, but it will only be illegal for enlisted members if a commander clearly prohibits it in a policy letter.[42]

Many of these servicemembers appearing in these sexually explicit photographs were partially clothed in a military uniform or posed with military weapons.[43] When Army personnel wear portions of their uniform while posing in sexually explicit photos, they violate Army Regulation (AR) 670-1.[44] Section 1-10(j)(1) prohibits wearing the Army uniform when

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[30] *Id.* ¶¶ 2-206, 3-306.

[31] *Id.* ¶ 2-303.

[32] *Id.* ¶ 2-303(a).

[33] *Id.* ¶ 2-303(b)

[34] *Id.* ¶ 2-303.

[35] Winn, *supra* note 2.

[36] Staff Sergeant Rhiannon Willard, *Elmendorf Pilot to Appear on* 'Jeapoardy!,' A.F. TIMES, Mar. 3, 2008, *available at* http://www.af.mil/news/story.asp?id=123086983 (*Jeopardy!* (Sony Pictures broadcast Mar. 6, 2008)).

[37] *Id.*

[38] *Id.*

[39] The standards for ethical conduct for employees of the executive branch is contained in Title 5, part 2635 of the C.F.R. 5 C.F.R. § 2635 (2008). Enlisted members are specifically excluded from part 2635, and the general provision states that "[e]ach agency with jurisdiction over enlisted members of the uniform services shall issue regulations defining ethical conduct obligations of enlisted members." *Id.* § 2635.103. Officers do fall within the purview of 5 C.F.R. part 2635, and subpart G governs the misuse of their government position. *Id.* § 2635.702. An officer "shall not use his public office for his own private gain, for the endorsement of any product, service or enterprise . . . ." *Id.* Specifically, an officer "shall not use or permit the use of his government position or title or any authority associated with his public office in a manner that is intended to . . . provide any benefit, financial or otherwise, to himself or to friends, relatives, or persons with whom the employee is affiliated in a nongovernmental capacity." *Id.* ¶ (a).

[40] Winn, *supra* note 2.

[41] *Id.*

[42] *See* 5 C.F.R. §§ 2635.103, 2635.702 (2008).

[43] *See, e.g., Air Force Staff Sergeant Relieved of Duties After Posing Nude in Playboy*, *supra* note 5; *Soldiers Will Face Sanctions for Posing in Nude Photos*, *supra* note 12.

engaged in off duty employment.[45] Also, section 1-10(j)(4) prohibits wearing the Army uniform when it would bring discredit upon the Army.[46] The regulation emphasizes that we are a uniformed service judged by the manner in which Soldiers wear their uniform, on and off duty, and commanders must ensure Soldiers comply with the Army's standards.[47] In addition, servicemembers who pose in sexually explicit photos with machine guns or military equipment violate a punitive provision of the *JER*.[48] The *JER* only permits using military equipment for official purposes, and since there is no exception for posing in sexually explicit photographs, servicemembers can be charged with violating a regulation under Article 92, UCMJ.[49]

Besides the *JER* prohibition against using military equipment for unofficial purposes, none of the other relevant portions of the *JER*, or the applicable sections of AR 670-1 are punitive. Therefore, violations of those regulatory provisions cannot be used in a court-martial or in a non-judicial punishment proceeding. However, they may serve as an additional reason for separation when administratively discharging a servicemember or issuing a reprimand.

Administrative Elimination Procedures

Most cases involving Soldiers posing for sexually explicit photos result in the administrative discharge of the servicemember.[50] The Soldier's appearance in such photographs, the associated widespread media coverage, and the inability of the servicemembers to perform their duties with respect, lead many commanders to the conclusion that the servicemember should be separated from the military.

Enlisted Army Soldier separations are governed by AR 635-200.[51] A Soldier in the Army who poses in sexually explicit photos for public viewing can be discharged under Chapter 14-12(c) for the commission of a serious offense.[52] The underlying conduct, whether it is disobeying a regulation, violating a General Order, or indecent exposure, qualifies as a serious offense because each of the offenses could result in a punitive discharge if the Soldier were to go to a court-martial. It is not necessary to charge the Soldiers with those offenses, but it is necessary to notify the servicemember of the serious offense which serves as the basis for the involuntary separation.

Officer eliminations are governed by AR 600-8-24.[53] An officer who publicly poses for sexually explicit photos could be eliminated for misconduct, moral or professional dereliction, which includes section (8) conduct unbecoming of an officer and a gentlemen.[54] Since the basis of the officer's elimination is misconduct, the discharge should be characterized as General, under honorable conditions, or Other than Honorable.[55]

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[44] *See* AR 670-1, *supra* note 3, para. 1-10(j).

[45] *Id.* para. 1-10(j)(1).

[46] *Id.* para. 1-10(j)(4).

[47] *See id.* para. 1-7.

[48] *See* JER, *supra* note 28 ¶ 2-301(b). The *JER* mandates that federal government resources, including personnel, equipment, and property, shall be used by DOD employees for official purposes only. *Id.* This provision of the *JER* is printed in bold italics meaning that it constitutes a general order or regulation within the meaning of UCMJ art. 92 (2008), and is punitive. U.S. DEP'T OF DEFENSE, DIR. 5500.07, STANDARDS OF CONDUCT para. 2.2.6.1 (29 Nov. 2007).

[49] JER, *supra* note 28, ¶ 2-301(b); UCMJ art. 92 (2008).

[50] *See, e.g.*, Sig Christenson, *Airman Defends Baring All in* Playboy, SAN ANTONIO EXPRESS-NEWS, Jan. 12, 2007, at 1B. Two Navy women who previously appeared in *Playboy* were discharged shortly thereafter. *Id.* Fredrica Spilman posed for *Playboy* in 1998 and Navy Petty Officer Sherry Lynne White appeared in the magazine in 2000. *Id.*

[51] U.S. DEP'T OF ARMY, REG. 635-200, ACTIVE DUTY ENLISTED ADMINISTRATIVE SEPARATIONS (6 June 2005).

[52] *Id.* para. 14-12(c).

[53] U.S. DEP'T OF ARMY, REG. 600-8-24, OFFICER TRANSFERS AND DISCHARGES (12 Apr. 2006).

[54] *Id.* para. 4-2(b).

[55] *See id.* para. 1-22a (stating that honorable discharges are for eliminations that do not involve misconduct).

Conclusion

The servicemembers who pose in sexually explicit photos for *Playboy* or on internet websites, often fail to realize that their off duty efforts to individually profit or gain publicity actually taints the entire military organization. Servicemembers need to be educated and informed that they will face serious ramifications for posing in sexually explicit photos which are then made public. They need to be aware that this type of conduct off duty will not be tolerated and is not protected by their constitutional First Amendment rights as members of the military. The military "may impose restrictions on the speech of military personnel whenever the speech poses a significant threat to discipline, morale, or esprit de corps."[56] Therefore, commanders can prohibit servicemembers from engaging in publicly viewed sexually explicit photographs because it threatens the good order and discipline of the service. However, since no bright line rule or prohibition exists, leaders should seek the advice of their servicing Judge Advocate and need to be advised of their legal options before they do so.

[56] Captain John A. Carr, *Free Speech in the Military Community: Striking a Balance Between Personal Rights and Military Necessity*, 45 A.F. L. REV. 303, 306 (1998).

Limitations on the Wearing of the Uniform by Members of the Armed Services at Non-Military Events

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The appropriateness of wearing a military uniform at non-military events is a frequent topic of discussion, especially during a time of war.[1] Whether attending an event that is political, religious, partisan, nonpartisan or somewhere in between, servicemembers who wear the military uniform at non-military events may unwittingly place themselves in the crosshairs of Department of Defense (DOD) and service regulations regarding authorized wear of the uniform. Consider, for example, recent incidents involving servicemembers and the wear of military uniforms which will be discussed further in this article:

- An Army garrison commander (colonel) appeared in Class A uniform on stage near President Bush during a 2004 presidential campaign rally held off-post in a nearby town.

- A Navy chaplain appeared in uniform at a political protest and news conference held outside the gates of the White House. The event was held to protest a Navy policy requiring that prayers at official, nonreligious events be nonsectarian and nondenominational.

- An Air Force reserve major running as a candidate for civil office decided to prominently display his Class A military photograph on the front page of his campaign's website and on the front page of campaign literature.

- A Marine corporal, wearing part of his utility uniform, protested the Iraq war by conducting a mock patrol with other protesters at an anti-war event in Washington D.C.

- An Army three-star general gave numerous speeches in uniform at religious-oriented events such as church services, men's fellowship groups, and nondenominational prayer breakfasts. The speeches were made in a personal capacity without prior authorization from superiors.

- Two Army and two Air Force general officers, an Air Force colonel, an Army chaplain (colonel) and an Army lieutenant colonel appeared in a promotional video endorsing a religious organization while in uniform.

- An Army chief warrant officer attempted to wear his uniform in court while jurors heard testimony in a wrongful death lawsuit filed by his father's estate. Lawyers for the other side filed a motion to prevent the Soldier from wearing the uniform in court.

- An Army reserve captain wore her uniform while testifying before a state legislative committee hearing in favor of a hotly debated state education bill. Her intent in wearing the uniform was to enhance her credibility before the committee.

These and similar incidents throughout the country spur interest and concern from commanders, servicemembers, and legal advisors alike. Under what circumstances may a servicemember wear his or her uniform at a non-military event? Or, turning the question around, under what circumstances is a servicemember *prohibited* from wearing the uniform at these events? Fortunately, the DOD and the military services have issued considerable guidance on this issue.

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[1] *See* Tom A. Peter, *For U.S. Military Veterans, A Free-Speech Dispute*, CHRISTIAN SCI. MONITOR, June 8, 2007, *available at* http://www.csmonitor.com/2007/0608/p03s03-usmi.html?page=1 (regarding three Marines in the individual ready reserve who wore parts of their uniforms during an anti-war demonstration). However, not all disputes about the wear of the uniform are associated with the war. *See* Lori Heffland, *Protest in Uniform Causes Controversy*, CLEARWATER TIMES, Sept. 11, 2006 (regarding an Army noncommissioned officer who repeatedly wore her uniform while speaking her mind at a Largo, Florida City Commission meeting).

DOD Policy

As is obvious by the title, *Wearing of the Uniform*, DOD Instruction (DODI) 1334.01 is a good starting point for Judge Advocates (JAs) and servicemembers researching this issue.[2] Paragraph 3.1.3 states that absent approval by a competent authority, members of the Armed Services (including retired members and members of Reserve components) are prohibited from wearing the uniform when "participating in activities such as unofficial public speeches, interviews, picket lines, marches, rallies or any public demonstration, which may imply Service sanction of the cause for which the demonstration or activity is conducted."[3]

Although DODI 1344.01 lists other situations where the wear of the uniform is prohibited,[4] paragraph 3.1.3 covers most situations encountered by servicemembers, especially in a time of vigorous public debate, emotion, and opinion associated with the ongoing combat operations. Paragraph 3.1.2 includes an additional "catch-all" provision that prohibits the wearing of the uniform "[d]uring or in connection with furthering political activities, private employment or commercial interests, when an inference of official sponsorship for the activity or interest may be drawn."[5] The unambiguous intent of the policy is to restrain servicemembers from engaging in conduct that implies or suggests military sanction of a particular event or activity, especially political events. Simply put, the best way to ensure compliance is to stay out of the military uniform when attending these events.

Consistent with, and serving as a compliment to DODI 1334.01, is DOD Directive (DODD) 1325.6, *Guidelines for Handling Dissident and Protest Activities Among Members of the Armed Forces.*[6] Paragraph 3.5.6 entitled "Off-Post Demonstrations by Members" states in part, "[m]embers of the Armed Forces are prohibited from participating in off-post demonstrations . . . when they are in uniform in violation of DOD Directive 1334.1."[7] The reference to DOD Directive (DODD) 1334.1 is outdated due to its cancellation and reissuance as DODI 1334.01 that same month. Regardless, DODD 1325.6 underscores the general prohibition laid out in DODI 1334.01.

Another important DOD directive is the recently updated DODD 1344.10, *Political Activities by Members of the Armed Forces.*[8] Although the directive's primary focus is to provide general guidance regarding political activity of servicemembers, such as voting, making monetary contributions, attending partisan and nonpartisan political meetings, running for political office and holding political office,[9] it also directly addresses when to stay out of the military uniform. For example, paragraph 4.1.1.3 states that a servicemember on active duty may "[j]oin a partisan or nonpartisan political club and attend its meetings when not in uniform."[10] Further, paragraph 4.1.1.4 states that a servicemember may serve as an election official under specific conditions, to include when such service "is performed when not in uniform."[11] Finally, paragraph E3.1.1 states that servicemembers taking part in local nonpartisan political activity shall not "wear a uniform."[12]

As with DODI 1334.01, the directive also addresses what not to do while *in* uniform, stating in paragraph E3.2.3 that servicemembers engaging in permissible political activity shall "[r]efrain from participating in any political activity while in military uniform."[13] Also, the directive now clarifies how political candidates or nominees may use photographs of

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[2] U.S. DEP'T OF DEFENSE, INSTR. 1334.01, WEARING OF THE UNIFORM (26 Oct. 2005) [hereinafter DODI 1334.01].

[3] *Id.* para. 3.1.3.

[4] Such as at events associated with extremist and subversive organizations, activities in connection with private employment or commercial interests, and when the wearing of the uniform may tend to bring discredit upon the Armed Forces. *Id.* paras. 3.1.1, 3.1.2 & 3.1.4.

[5] *Id.* para. 3.1.2.

[6] U.S. DEP'T OF DEFENSE, DIR. 1325.6, GUIDELINES FOR HANDLING DISSIDENT AND PROTEST ACTIVITIES AMONG MEMBERS OF THE ARMED FORCES (1 Oct. 1996). The directive applies to both active component and reserve component servicemembers.

[7] *Id.* para. 3.5.6.

[8] U.S. DEP'T OF DEFENSE, DIR. 1344.10, POLITICAL ACTIVITIES BY MEMBERS OF THE ARMED FORCES (19 Feb. 2008) [hereinafter DOD DIR. 1344.10].

[9] *See, e.g.*, *id.* para. 4.

[10] *Id.* para. 4.1.1.3.

[11] *Id.* para. 4.1.1.4. The paragraph also states that such service must not be in representation of a partisan political party, must not interfere with the performance of military duties, and must have prior approval from the servicemember's Service Secretary. *Id.*

[12] *Id.* para. E3.1.1.

[13] *Id.* para. E3.2.3.

themselves in their military uniform.[14] Prior to the recent update, guidance on the use by political candidates of their military photographs was rather murky. The new guidance is much more clear: candidates may use such photographs in campaign literature (to include Web sites, videos, television, and conventional print advertisements) "when displayed with other non-military biographical details,"[15] when accompanied by a prominent and clearly displayed disclaimer,[16] and when the use of the photograph is not the "primary graphic representation in any campaign media, such as a billboard, brochure, flyer, Web site, or television commercial."[17] Hence, a candidate's inclusion of his Class A military photograph on page three of his campaign brochure with other photographs of his life (such as a family photograph, a hunting photograph, and a marathon photograph) is acceptable. However, placing the military photograph front and center on page one of the brochure is not acceptable.

It is important for servicemembers to be aware of two other new provisions in the updated DODD 1344.10. First, at paragraph 4.1.5, the directive warns against engaging in any activity that may be viewed as directly or indirectly associating the DOD or the military departments with a partisan political activity, even those activities not expressly prohibited by the directive.[18] In other words, if it is a close call, avoid the uniform. Second, the directive is now punitive, stating plainly that it is a lawful general regulation and that violations of paragraphs 4.1 through 4.5 are punishable under Article 92, the Uniform Code of Military Justice, "Failure to Obey Order or Regulation."[19] Judge Advocates must emphasize with commanders and servicemembers alike that the DOD has raised the stakes with regard to wearing the military uniform in non-duty settings.

To summarize the DOD guidance, broad principles emerge. First, servicemembers should refrain from wearing the uniform when engaged in events associated with political activity. Second, servicemembers should refrain from wearing the uniform on any occasion when the wear of the uniform may reasonably be viewed as military sanction of the event or activity, whether political or not. Third, if the servicemember is still inclined to wear the uniform, obtaining prior approval should be the rule and not the exception, especially when giving a public speech or participating in a public event.

Service Regulations

Predictably, the military services mirror DOD policy. In fact, most of the language in service regulations proscribing the wear of the uniform at non-military events is taken verbatim from DOD guidance. For example, Army Regulation (AR) 670-1, *Wear and Appearance of Army Uniforms and Insignia*, states at paragraph 1-10j:

> Wearing Army uniforms is prohibited in the following situations:
> (1) In connection with the furtherance of any political or commercial interests, or when engaged in off-duty civilian employment.
> (2) When participating in public speeches, interviews, picket lines, marches, rallies, or public demonstrations, except as authorized by competent authority.
> (3) When attending any meeting or event that is a function of, or is sponsored by, an extremist organization.
> (4) When wearing the uniform would bring discredit upon the Army.
> (5) When specifically prohibited by Army regulations.[20]

The prohibition is quite broad, especially the provision in subparagraph 1-10j(2) prohibiting the wear of the Army uniform when participating in *public speeches* and *interviews*. As with DOD guidance, however, this broad prohibition is tempered by the caveat, "except as authorized by competent authority."

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[14] Numerous veterans, retirees, and current reserve component servicemembers have run for elective office in recent years. *See* Peter Slevin, *Vets Running for Congress Fight 'One-Issue' Label*, WASH. POST, Mar. 21, 2006, at A03, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2006/03/20/AR200602001778.html.

[15] DOD DIR. 1344.10, *supra* note 8, para. 4.3.1.2.

[16] *Id.* The disclaimer must state that the military photographs do not imply endorsement by the DOD or the particular Military Department of the candidate/servicemember. *Id.*

[17] *Id.* para. 4.3.2.1.

[18] *Id.* para. 4.1.5.

[19] *Id.* para. 4.6.4.

[20] U.S. DEP'T OF ARMY, REG. 670-1, WEAR AND APPEARANCE OF ARMY UNIFORMS AND INSIGNIA para. 1-10j (3 Feb. 2005) [hereinafter AR 670-1].

Army Regulation 600-20, *Army Command Policy*, reiterates the political activities guidelines found in DODD 1344.10.[21] It is also consistent with, and compliments, the Army uniform regulation, AR 670-1. The Army command policy regulation states that active duty Army personnel may attend partisan and nonpartisan political meetings or rallies as a spectator when not in uniform,[22] join a political club and attend its meetings when not in uniform,[23] serve as an election official if such service "is performed while out of uniform,"[24] and take part in local nonpartisan activity when not in uniform.[25] Regarding reserve component (RC) personnel, the regulation states that, regardless of the length of an active duty tour, RC personnel must "[r]efrain from participating in any political activity while in military uniform, as proscribed by AR 670-1."[26]

Other service regulations parallel the Army regulations and are in virtual lock-step with DOD guidance. In fact, the uniform regulations of the Navy and Marine Corps quote the former DODD 1334.1 (now DODI 1334.01) verbatim.[27] The Air Force[28] and Coast Guard[29] uniform regulations provide handy charts listing situations when personnel may and may not wear the uniform, with language pulled directly from DODI 1334.01.[30] Accordingly, the regulatory guidance for the wear of the uniform at non-military events is generally the same across the services.

Resolving the Scenarios

In light of the previous discussion on the substantial DOD and service guidance on the wear of the uniform, how should the scenarios presented earlier in this article be resolved?

- *The Army garrison commander who appeared on stage in Class A uniform at a political campaign rally.* This was an actual case investigated by the Army Reserve[31] and an obvious violation of standards. The event was a partisan political event—a presidential campaign rally. The officer's attendance violated DOD and Army policy stating that attendance at partisan political rallies as a spectator is authorized only when not in uniform.[32] Further, the wear of the uniform while on stage clearly implies Service sanction of the event.[33]

- *The Navy chaplain who appeared in uniform at a public demonstration outside the White House.* The issue here is not what the chaplain was protesting, or whether the demonstration was a political or religious event. The issue centers on the fact that it was a public demonstration.[34] The chaplain's participation in a public

[21] U.S. DEP'T OF ARMY, REG. 600-20, ARMY COMMAND POLICY para. 5-3, App. B (7 June 2006).

[22] *Id.* para. 5-3a(1)c).

[23] *Id.* App. B, para. B-2c

[24] *Id.* App. B, para. B-2d. As with DODD 1344.10, this paragraph also states that such service must not be in representation of a partisan political party, must not interfere with military duties, and must have prior approval. *Id.*

[25] *Id.* para. 5-3b(1) & App. B, para B-5.

[26] *Id.* App. B, para. B-6c.

[27] U.S. DEP'T OF NAVY, NAVPERS 156651, GENERAL UNIFORM REGULATION para. 1401 (n.d.); U.S. MARINE CORPS, ORDER P1020.34G , MARINE CORPS UNIFORM REGULATIONS para. 11002 (31 Mar. 2003).

[28] U.S. DEP'T OF AIR FORCE, INSTR. 36-2903, DRESS AND PERSONAL APPEARANCE OF AIR FORCE PERSONNEL tbl.1.3 (2 Aug. 2006).

[29] U.S. COAST GUARD, COMDTINST M1020.6E, UNIFORM REGULATIONS para 1.B.2. (2 July 2003).

[30] The charts mirror the language used in DODI 1334.01. *See* DODI 1334.01, *supra* note 2, paras. 3.1.2, 3.1.3 & 3.1.4.

[31] Graeme Zielinski, *Army Inquiry Finds Commander Violated Rules at Bush Rally; Fort McCoy Leader Was Onstage in Uniform*, MILWAUKEE J. SENTINEL, Aug. 26, 2004.

[32] DOD DIR. 1344.10, *supra* note 8, para. 4.1.1.9; AR 670-1, *supra* note 19, para. 1-10j(2).

[33] DODI 1334.01, *supra* note 2, paras. 3.1.2 and 3.1.3; DOD DIR. 1344.10, *supra* note 8, para. 4.1.5.

[34] The event included a press conference in front of the White House designed to protest against the Navy policy requiring non-sectarian prayers in all but chapel settings. *See* Ron Strom, *Christian Chaplain to Be Court-Martialed?*, WORLDNETDAILY.COM, May 4, 2006, http://www.wnd.com/news/article.asp?ARTICLE_ID=50054. The chaplain was later convicted at court-martial for violating a direct order not to attend the demonstration while in uniform. *See Chaplain Who Prayed 'In Jesus' Name' Convicted*, WORLDNETDAILY.COM, Sept. 13, 2006, http://www.wnd.com/news/article.asp?ARTICLE_ID=51973.

demonstration while in uniform violated DODI 1334.01, paragraph 3.1.3 because it implies Service sanction for the cause of the protest.[35]

- *The Air Force reserve officer who displayed his Class A military photograph on the front page of his website and in campaign literature.* This example reflects anecdotal accounts of actions by some reserve component candidates for civil office in recent elections. The new guidance in DODD 1344.10 clearly prohibits this activity. The military photograph was a primary graphic representation used in campaign media and not displayed with other non-military biographical information.[36]

- *The Marine corporal who wore part of his utility uniform during anti-war protest activities.* Two provisions of DODI 1334.01 are applicable here. Paragraph 3.1.3 prohibits the corporal from wearing the uniform when participating in public demonstrations.[37] Additionally, paragraph 3.1.4 prohibits wearing the uniform when it may tend to bring discredit upon the Armed Forces.[38] Most would agree that the corporal's conduct in wearing a partial uniform at an anti-war demonstration, with nametag and service insignia torn off, brings discredit to the military.[39]

- *The Army general who gave speeches in uniform at religious-oriented events*: This was an actual case investigated by the DOD Inspector General's (DOD IG) office.[40] A straightforward reading of AR 670-1, paragraph j(2) and DODI 1334.01 paragraph 3.1.3 suggests that the standards were violated because the officer gave public speeches in uniform without obtaining approval to wear the uniform. The DOD Inspector General investigation, however, raised interesting questions regarding the standards, such as, whether speeches in places of worship are really "public" speeches and whether a general officer at that level of authority is a "competent authority" authorized to self-approve the wearing of the uniform for his own speeches. The conclusion was that the terms "public speeches" and "competent authority" potentially lacked clarity and that the analysis should focus on whether an appearance in uniform "'may imply Service sanction' for a cause for which an activity is conducted."[41] As a result, on the narrow issue of whether the general improperly wore the uniform while engaged in a non-military religious public speaking event, the DOD IG report concluded there was no regulatory violation.[42] It should be pointed out that this case involved a general officer faced with different circumstances than that faced by the typical servicemember. For the typical servicemember not in a position to "self-approve" the wearing of the uniform, the teaching point is that, even at non-military religious events, the servicemember must be careful to avoid leaving the impression that the military sanctions the event and the event's cause. It is one thing to merely attend a non-military religious event in uniform as a spectator or in some other customary capacity.[43] It is quite another to give a speech in uniform at a non-military religious event, especially if the speech includes comments regarding national security issues, combat operations and the like. The safe approach for servicemembers is to stay out of uniform when speaking at non-military religious events. However, if they insist on wearing the uniform, they would be wise to gain prior approval in accordance with DODI 1334.01 and applicable Service regulations.

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[35] DODI 1334.01, *supra* note 2, para. 3.1.3.

[36] DOD DIR. 1344.10, *supra* note 8, paras. 4.3.1.2 and 4.3.2.1.

[37] DODI 1334.01, *supra* note 2, para. 3.1.3.

[38] *Id.* para. 3.1.4.

[39] The Marine's actions prompted the Marine Corps to initiate administrative separation action against him. *See Iraq Vet Faces Penalty for War Protest*, ASSOC. PRESS, May 31, 2007, *available* at http://www.cbsnews.com/stories/2007/05/31/national/main2870895.shtml.

[40] Department of Defense Office of the Inspector General, Alleged Improprieties Related to Public Speaking: Lieutenant General (LTG) William G. Boykin, U.S. Army Deputy Undersecretary of Defense for Intelligence (5 Aug. 2004) [hereinafter LTG Boykin, DOD Investigation], *available at* http://www.dodig.mil/fo/foia/err.htm. In addition to making comments about his personal and spiritual life, the general infused his speeches with information pertaining to national security issues, U.S. policy toward Israel, the war on terrorism, Islamic extremism, and combat operations. *Id.* at 8.

[41] *Id.* at 19.

[42] The uniform issue was just one of a number of issues investigated by the DOD Office of the Inspector General with regard to the officer's speeches. Ultimately, the investigation concluded that the officer committed other violations in relation to the speeches by failing to clear his speeches with proper authority, failing to preface his remarks with a sufficient disclaimer and failing to report travel reimbursement from one non-Federal entity. *Id.* at 10, 15, 37.

[43] Such as attending church off-post in uniform or participating in a wedding.

- *The numerous general officers and other officers who appeared in uniform in a promotional video endorsing a religious organization.* This was an actual case investigated by the DOD IG's office.[44] The investigation determined that the officers violated DODI 1334.01 and their service regulations by appearing in uniform in the videos without approval to wear the uniform, and that the appearance in uniform without the required approval implied Service sanction of the religious organization.[45]

- *The Army warrant officer who attempted to wear his uniform in court during a civil trial.* Nothing in DOD or Army guidance restricts the Soldier from wearing his uniform at a court proceeding. The wear of the uniform in this situation does not imply the Army's sanction of the proceedings and does not bring discredit to the Army. Whether the wear of the uniform will somehow unduly prejudice the court proceedings is a matter for the judge to decide. In this case, the judge allowed the servicemember to wear the uniform in court.[46]

- *The Army Reserve captain who wore her uniform while testifying before a state legislative committee hearing.* This example reflects anecdotal accounts of actions by some reserve component servicemembers involved in state and local political issues. Although the officer's non-duty testimony before the committee is a permissible political activity, she is prohibited from participating in any political activity while in military uniform.[47] Also, the wear of the uniform implies Service sanction of the event.[48]

Conclusion

War, politics, religion, and other hotly debated topics often intersect with issues of military service in a free society. A servicemember in uniform represents a powerful American institution held in high regard by most Americans.[49] Through DOD guidance and corresponding service regulations, broad principles emerge regarding the wear of the uniform in non-military settings, such as the requirement to refrain from wearing the uniform at political events or when it may imply military sanction, and the emphasis on seeking prior approval to wear the uniform. By applying these principles, servicemembers will successfully avoid most conflicts involving the wear of the uniform in non-military settings.

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[44] Department of Defense Office of the Inspector General, Alleged Misconduct by DOD Officials Concerning Christian Embassy (20 July 2007), *available at* http://www.dodig.mil/fo/foia/err.htm.

[45] *Id.* at 16, 19, 24, 27, 30, 35, 39. A number of other issues were investigated during the DOD IG investigation. This article addresses only the uniform issue.

[46] This case occurred in the Common Pleas Court of Miami County, Ohio. The judge ruled that the Soldier could wear his uniform because it merely represented his job. *See Judge: OK to Wear Military Uniform in Court*, ASSOC. PRESS STATE & LOCAL WIRE, 23 Mar. 2006.

[47] DODI 1334.01, *supra* note 2, para. 3.1.2.

[48] *Id.* para. 3.1.3.

[49] The Harris Poll #22, at tbl. 2A (Mar. 2, 2006), *available at* http://www.harrisinteractive.com/harris_poll/index.asp?PID=646. The poll has consistently shown over a number of years that U.S. adults give the military the highest ratings when asked in what institutions do they place a great deal of confidence.

Implied Bias: A Suggested Disciplined Methodology

Colonel Louis J. Puleo, USMC[*]

Introduction

In recent years, the Court of Appeals for the Armed Forces (CAAF) has addressed the issue of implied bias arising from defense counsel's challenge for cause against a member of the court-martial panel. With a growing sense of frustration, the court has become increasingly critical of military judges who do not specifically address the issue of implied bias on the record and articulate their reasons for denying the challenge in light of the court's liberal grant mandate. The current analysis employed by the appellate courts when reviewing the judge's decision leads to an ad hoc approach that necessarily relies on the subjective view of the facts.[1] This article suggests a more disciplined way of reviewing implied bias.

An accused is entitled to a trial composed of impartial and unbiased panel members.[2] This is a constitutionally,[3] statutorily, and regulatory based right.[4] Under Rule for Courts-Martial (RCM) 912(f)(1)(N), "A member shall be excused for cause whenever it appears that the member: . . . Should not sit as a member in the interest of having the court-martial free from substantial doubt as to legality, fairness, and impartiality."[5] The rule addresses both actual and implied bias challenges,[6] although its primary focue is implied bias[7] and "reflects the President's concern with avoiding even the perception of bias, predisposition, or partiality."[8] While not requiring counsel to state that his challenge is for both implied and actual bias, counsel preserves the implied bias issue if challenging the panel member broadly under RCM 912(f)(1)(N) grounds or when articulating reasons that reasonably raise an implied bias concern.[9] Furthermore, there is a duty on the part of the military judge to sua sponte recognize an implied bias issue.[10]

Actual and Implied Bias

The doctrine of implied bias protects the accused's right to a court-martial free from substantial doubt as to the legality, fairness, and impartiality[11] of the proceedings and abates the real and perceived potential for command influence on panel members' deliberations.[12] To ensure the perception of fairness, recognizing the convening authority's role in panel member

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[1] *See* United States v. Wiesen, 56 M.J. 172, 175 (2001). The court addressed the criticism leveled by the dissent in *United States v. Rome*, 47 M.J. 467, 472 (1998) (Crawford, J., dissenting) (accusing the court of adopting an "I know it when I see it" analysis when applying an implied bias standard). Therein the court answers that while the case law may "evolve" the focus remains on the public perception and appearance of fairness. *Wiesen*, 56 M.J. at 175. It is this "evolution" that presents a problem for the trial courts. *Id.*

[2] *Wiesen*, 56 M.J. at 174; MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 912(f)(1)(N) (2008) [hereinafter MCM].

[3] *Wiesen*, 56 M.J. at 174.

[4] United States v. Leonard, 63 M.J. 398 (2006); United States v. Modesto, 43 M.J. 315, 318 (1995).

[5] MCM, *supra* note 2, R.C.M. 912(f)(1)(N).

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

[7] United States v. Strand, 59 M.J. 455, 458 (2004).

[8] United States v. Minyard, 46 M.J. 229, 231 (1997) (quoting United States v. Lake, 36 M.J. 317, 323 (C.M.A. 1993)).

[9] United States v. Armstrong, 54 M.J. 51, 53 (2000) (rejecting plain error review on implied bias challenge first raised on appeal and finding a challenge under R.C.M. 912(f)(1)(N) "'encompasses 'both actual and implied bias.' Actual bias and implied bias are separate legal tests, not separate grounds for challenge.") (citations omitted). *But see* United States v. Ai, 49 M.J. 1 (1998) (applying a plain error review for implied bias, finding that the defense did not preserve a challenge on implied bias grounds when he did not specifically raise the implied bias challenge during trial). The clear weight of authority favors the holding in *Armstrong*. *See* United States v. Hollings, 65 M.J. 116 (2007) (despite defense's challenge to a member under R.C.M. 912(f)(1)(G), disqualification if the panel member acted as a legal officer in the case, the court, without addressing waiver or a plain error standard of review, applied an implied bias analysis).

[10] MCM, *supra* note 2, R.C.M. 912(f)(4).

[11] United States v. Leonard, 63 M.J. 398, 402 (2006) ("The two purposes of R.C.M. 912(f)(1)(N) are to protect the actual fairness of the court-martial and to bolster the appearance of fairness of the military justice system in the eyes of the public."); MCM, *supra* note 2, R.C.M. 912(f)(1)(N).

[12] United States v. Clay, 64 M.J. 274, 277 (2007).

selection and accounting for the limit of one peremptory challenge per side,[13] the court has established a "liberal grant mandate" that applies to defense challenges only.[14] Responsible for "preventing both the reality and the appearance of bias,"[15] the military judge advances the interests of justice and protects the accused's right to an impartial panel by addressing perceptions of unfairness early in the proceedings.[16] Thus, the military judge should err on the side of caution by liberally granting defense challenges against panel members during voir dire. Whether the challenge is for actual or implied bias, the burden of persuasion is placed on the party making the challenge and it is his responsibility to make the record to support the basis of the challenge.[17] However, even in absence of a challenge, if the perception of fairness would be jeopardized by the presence of a panel member, the military judge has a sua sponte duty to apply the implied bias analysis.

The finding of implied bias requires the court to look objectively and dispassionately at the record and ask whether there is too high a risk, based upon the reasons advanced by counsel, that the public will perceive something less than a court composed of fair and impartial panel members. "Implied bias is 'viewed through the eyes of the public, focusing on the appearance of fairness.'"[18] The "public" is imputed with the awareness of the provision of Article 25, Uniform Code of Military Justice (UCMJ),[19] and the military justice system. Implied bias will exist when most people in the same position as the panel member would be prejudiced or biased.[20]

Conversely, actual bias is any bias which will not yield to the military judge's instructions and the evidence presented at trial.[21] In determining whether actual bias exists, the appellate court will look through the eyes of the military judge or panel member.[22] Because the analysis is subjective, the question is "essentially one of credibility, and therefore largely one of demeanor."[23] While the appellate court will not overturn the trial judge's ruling unless he abuses his discretion, greater deference will be given to the military judge's rulings on actual bias.[24]

This is not true for implied bias. As the test is objective, that is through the eyes of the public, the appellate court will afford the military judge less deference when reviewing an implied bias issue and apply a "standard that is less deferential than abuse of discretion, but more deferential than de novo review."[25]

This "less-than-more-than" standard is further refined in "close cases," that is cases where the perception of legality, fairness, or impartiality is jeopardized by a panel member's participation in the court-martial proceedings.[26] As explained herein, what factors are necessary to constitute a close case is a matter of debate. However, whatever its meaning, when the court finds a close case the standard of review is even less deferential than the less-than-more-than standard if the military judge fails to address implied bias and does not articulate his rationale for denying the challenge in the context of the liberal grant mandate.[27] This even-less deferential option is an adaptation from CAAF's holding in *United States v. Rome* that

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[13] Unlike the Federal Rules of Criminal Procedure, which grant the defendant several peremptory challenges, Article 41, Uniform Code of Military Justice, affords an accused only one peremptory challenge. Thus, attempts to apply a rules-type analysis regarding peremptory challenges into the military justice system have been rejected. *See Armstrong*, 54 M.J. 51.

[14] United States v. James, 61 M.J. 132, 139 (2005) (finding no basis for the applying the liberal grant mandate to government challenges).

[15] *Clay*, 64 M.J at 277.

[16] *Id.*

[17] MCM, *supra* note 2, R.C.M. 912.

[18] United States v. Briggs, 64 M.J. 285, 286 (2007) (citation omitted).

[19] UCMJ art. 25 (2008).

[20] *See Briggs*, 64 M.J. at 286 ("Implied bias exists when, 'regardless of an individual member's disclaimer of bias, most people in the same position would be prejudiced [that is biased].'" (alteration in original) (citation omitted)); United States v. Leonard, 63 M.J. 398, 401 (2006); *see also Armstrong*, 54 M.J. at 53–54 (noting that the "most people in the same position" test infuses an element of actual bias into the implied bias analysis).

[21] United States v. Reynolds, 23 M.J. 292, 294 (C.M.A. 1987)

[22] United States v. Napoleon, 46 M.J. 279, 283 (1997); United States v. Daulton, 45 M.J. 212, 217 (1996).

[23] *Reynolds*, 23 M.J. at 294 (quoting Patton v. Yount, 467 U.S. 1025, 1038 (1984)).

[24] *Daulton*, 45 M.J. at 217.

[25] United States v. Moreno, 63 M.J. 129, 134 (2006).

[26] United States v. Clay, 64 M.J. 274, 277 (2007).

[27] *Id.* ("A military judge who addresses implied bias by applying the liberal grant mandate on the record will receive more deference on review than one that does not.").

absent actual bias "implied bias should be invoked rarely."[28] This phrase, seemingly simple and straight-forward and having nothing to do with the deference given to the military judge by the appellate courts during review, has been transformed into a standard of review by *United States v. Clay*.[29] *Clay* instructs that the phrase "implied bias . . . invoked rarely" does not mean that the implied bias doctrine should rarely be applied to overturn a military judge's ruling denying a defense challenge.[30] Rather, it means that when the military judge considers the challenge on the grounds of implied bias, "recognizes his duty to liberally grant defense challenges, and place[s] his reasoning on the record," it would be rare that the appellate court would overturn his decision under a standard that is less deferential abuse of discretion, but more deferential than de novo.[31] When, however, the military judge does not apply these three factors to a defense challenge in close cases, his decision is given even less deference than the less deferential than abuse of discretion, but more deferential than de novo standard.[32] How close *Clay's* new standard comes to a de novo review is uncertain, but even when the military judge fails to articulate the three *Clay* factors on the record he is still entitled to a modicum of discretion by the reviewing authorities.[33]

Clay also reminds military judges and practitioners that the findings of fact necessary to support denying a defense challenge against a panel member are different for implied bias. Unlike challenges involving actual bias, the military judge's finding that a panel member's assurances of impartiality and disclaimers of bias are credible will be less determinative during the appellate court's review for implied bias.[34] Because the implied bias test is objective, the appellate courts are more concerned about the public's perception, as it is reflected in the "cold appellate record," and less about the military judge's subjective conclusions about a panel member's creditability, which is based upon nuances not reflected on the written record of trial, when that member disclaims any bias.[35]

The Law

While the implied bias test is theoretically objective, its application is necessarily subjective.[36] Like beauty, implied bias is in the eye of the judicial beholder. Whether the public will perceive the presence of a certain member on the panel as jeopardizing the impartiality of the proceedings is inherently a subjective determination. This has led to an ad hoc analysis that depends on the particular view of the appellate court as to whether a case is "close" and how much discretion should be afforded the military judge's decision. In order to avoid this dilemma as well as the issue, the court seems to imply that when confronted with any defense challenge for cause, the military judge must recognize and apply the liberal grant mandate, even in absence of a specific implied bias challenge by the trial defense counsel. When the military judge recognizes his obligations under an implied bias analysis, the "less-than-more-than" review standard applies. When he does not, the less deferential *Clay* standard applies. Thus, it would seem that the military judge should reflexively apply the implied bias standard against any-and-all defense challenges.[37] This prophylactic approach, however, is indecisive and leads to a rote application of the law that does not truly identify when a case requires an implied bias analysis and the application of the liberal grant mandate.

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[28] 47 M.J. 467, 469 (1998). The "invoked rarely" concept relies upon the holding of *United States v. Lavender*, 46 M.J. 465, 489 (1997), which cites *Smith v. Phillips*, 455 U.S. 209, 222–23 (1982) (O'Conner, J., concurring), for the proposition that implied bias should be "applied only in 'extreme' or 'extraordinary' cases."

[29] *Clay*, 64 M.J. 274.

[30] The court in *Clay* turns the phrase "invoked rarely" into a standard of review. This is at odds with the original intent of the phrase. *See id*.; *Rome* 47 M.J. at 470 (questioning member's impartiality because of the member's relationship with a prosecution witness, the trial counsel, and the enlisted member of the panel, as well as his prior involvement in another court-martial that led to issues of unlawful command influence "created the rare occasion where the implied-bias doctrine should have been invoked . . . .").

[31] *Clay*, 64 M.J. at 277.

[32] *Id*.

[33] United States v. Hollings, 65 M.J. 116, 119 (2007).

[34] United States v. Strand, 59 M.J. 455, 460 (2004) (quoting United States v. Youngblood, 47 M.J. 338, 341 (1997)) ("[D]isclaimers of bias, . . . , are not dispositive with regard to implied bias . . . . Nonetheless, a 'member's unequivocal statement of a lack of bias can . . . carry weight' when considering the application of implied bias.").

[35] *Clay*, 64 M.J. at 277–78.

[36] *See* United States v. Rome, 47 M.J. 467, 472 (1998) (Crawford, J., dissenting) ("In reaching its conclusion in all these cases [on implied bias], the majority applied a subjective public perception rule.").

[37] United States v. Townsend, 65 M.J. 460 (2008) (Baker, J., dubitante) ("Why would a military judge take a chance, where, in fact, the accused has objected to the member sitting on his court and preserved the issue? Why take the chance that an appellate court will disagree and reset the clock after years of appellate litigation?").

The subjectivity of the objective standard is best illustrated in the court's decision in *United States v. Townsend*, wherein the majority found that the challenged panel member, who was attending law school at night, did not raise the specter of implied bias.[38] The panel member's activities and associations raising the possible question of implied bias included: (1) taking a course in criminal law as part of his night law school curriculum; (2) wanting to become a criminal prosecutor in order to put "the bad guys in jail" and "keep the streets safe"; (3) having mixed views of defense counsel, with a high regard for military defense counsel but a "lesser respect for some of the ones you see on TV, out in the civilian world"; (4) having a close family member in law enforcement; and, (5) having a "healthy respect for law enforcement, and people in authority."[39] That same panel member, however, affirmed that he would follow the military judge's instructions, hold the government to its burden of proof, apply the presumption of innocence, put aside any outside legal notions he may harbor in favor of the evidence introduced at trial, and weigh a witness' credibility in accordance with the judge's instruction.[40] The defense counsel challenged the panel member for cause under RCM 912(f) citing the panel member's "hardened" view toward criminal cases based upon his legal training, his desire to become a prosecutor, and his familial relationship with members of the law enforcement community.[41] Furthermore, the panel member's impartiality was suspect when he implied that he would impute greater credibility to the testimony of law enforcement officials, expressed a desire to "put the bad guys away," and, stated that he had less respect for defense counsel than for prosecution counsel.[42] The military judge denied the challenge finding that the panel member was "extremely genuine and sincere," understood his role as court member, had neither a pro-government nor pro-defense slant, would follow the judge's instructions and would hold the government to its burden, making a decision solely on the evidence introduced at trial.[43] The majority held that the military judge did not abuse his discretion, even without a specific articulation of the liberal grant mandate, finding that these circumstances did not make this a close case.[44] Therefore, the military judge's failure to apply the implied bias-liberal grant mandate was not fatal.

The *dubitante* opinion starts with the phrase "[t]he liberal grant mandate exists for cases like these."[45] Given the tenor and nature of a *dubitante* opinion,[46] it is clear that a difference of opinion existed over the "close case" issue. While the failure to engage in the *Clay* analysis in a "close case" is not necessarily fatal,[47] it does invoke the less deferential *Clay* standard of review, thus jeopardizing the case on appeal.

Suggested Approach to Implied Bias

In order to depart from an *ad hoc* approach in "close cases" where the liberal grant mandate is necessarily invoked and the *Clay* factors become nearly determinative, a more disciplined view is suggested. A review of both federal and military precedent reveals five general situations giving rise to implied bias. While these categories are necessarily broad, they do allow both parties and judges to better articulate a cogent rationale for exercising a challenge on an implied bias standard rather than relying on how the appellate court will view the panel member's circumstances and responses during voir dire. The five categories break down as follows:

> 1. Where evidence exists on the record of some relationship between a panel member and some aspect of the litigation. This would include situations where the panel member: (a) evidences a potential for substantial emotional involvement or investment in the case that would adversely affect impartiality;[48] (b) had or has a close tie

[38] *Id.*

[39] *Id.*

[40] *Id.*

[41] *Id.*

[42] *Id.*

[43] *Id.*

[44] *Id.*

[45] *Id.*

[46] *Dubitante*, "Doubting. This term was usually placed in a law report next to a judge's name, indicating the judge doubted a legal point but was unwilling to state it was wrong." BLACK'S LAW DICTIONARY 537 (8th ed. 2004).

[47] *See* United States v. Downing, 56 M.J. 419 (2002) (finding no abuse of discretion in denying accused's challenge despite absence on the record of the military judge's consideration of the liberal grant mandate).

[48] United States v. Napoleon, 46 M.J. 279, 285 (1997) (Crawford, J., concurring).

with someone who was a victim of the same or similar crime as that currently before the court; and, (c) has a close relationship, either personally or professionally, with one of the parties or witnesses to the litigation.[49]

2. The panel member conceals or misleads the court concerning important facts during voir dire in order to serve on the court and render judgment in the case.

3. There was extensive rehabilitation required or pursued by the trial counsel or military judge in order to "save" the panel member, which gives rise to a reasonable question of fairness.

4. The panel member has an extensive level of pretrial knowledge or involvement with the case.

5. Questions of command influence are raised.

Examples of each category of cases follow. It is beyond the scope of this article to provide an exhaustive or comprehensive list of cases to support each category and there are cases which defy neat classification but rather turn on an amalgamation of factors, each of which would otherwise be insignificant. However, in an attempt to build a "better mousetrap" one need not eschew the "new and improved" version merely because some mice slip through.

Relationship Between the Panel Member and Some Aspect of the Litigation

This category is the broadest and represents three different factual situations: (1) emotional involvement or investment; (2) similarity between the crimes before the court and prior victimization; and, (3) close ties with parties to the litigation. It is recognized that a case may be viewed as falling into one or more of these scenarios based upon one's view of facts. However, the exact subcategory is merely a means to describe the specific relationship within the broader relationship context.

Evidence of a Substantial Emotional Involvement or Investment with the Case

United States v. Clay[50] represents this type of implied bias. In *Clay* the challenged panel member was Colonel (Col) J who, during voir dire, expressed the view that if a person was convicted of raping a young female, a crime he considered "as serious [an] offense as I can think of," "[he] would be merciless within the limits of the law."[51] The accused was facing one specification of rape and two specifications of indecent assault. Colonel J had two young daughters, ages fifteen and seven. Upon further questioning Col J admitted he could follow the military judge's instructions and consider the full range of punishment despite his earlier statement. He added, "I just wanted to be candid about my own moral convictions with regard to [the crime of rape]."[52]

The court found that "[o]n paper, Col J's reference to his young daughters might suggest an emotive content to his answers that may have been less apparent in person,"[53] but went on to balance other factors such as his reference to his moral conviction concerning the crime of rape.[54] Thus, Col J's answers, taken together, would create a perception of someone who might be seen as having an inelastic attitude during sentencing.[55] However, it was his statement regarding his "moral conviction" about the charge of rape, when viewed in the context of his family situation, that gave rise to a disqualifying relationship between the panel member and the offenses charge—a relationship based upon an emotional involvement, or as the court states, reveals an "emotive content."[56]

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[49] Smith v. Phillips, 455 U.S. 209, 222 (1982) (O'Connor, J., concurring) (setting out situations under which implied bias would exist including: (1) when the juror is an employee of the prosecuting agency, (2) when the juror was a close relative to a trial participant or involved in the charged offenses, or (3) when the juror was a witness in the trial).

[50] 64 M.J. 274 (2007).

[51] *Id.* at 275.

[52] *Id.* at 276.

[53] *Id.* at 278.

[54] *Id.*

[55] *Id.* ("His answers, taken together, create the perception that if Col J, the senior member of the panel, were convinced of Appellant's guilt he would favor the harshest sentence available, without regard to the other evidence.").

[56] *Id.*

In *United States v. Miles*,[57] the court found that the military judge abused his discretion when he failed to grant the defense's challenge to a panel member whose "personal experience with the effects of drug abuse" gave rise to implied bias.[58] The panel member's emotional experience arising from the death of his ten-year-old nephew, as a result of the mother's prenatal use of cocaine, raised some "serious doubts in the minds of a reasonable observer about the fairness of [a] trial" involving the wrongful use of cocaine.[59] The court found that when a "particularly traumatic similar crime was involved . . . denial of a challenge for cause violated the liberal-grant mandate."[60]

Either the Panel Member or a Close Relation was a Victim of a Crime Similar to the Crime Charged

In *United States v. Terry*, a case involving rape, the court found that the military judge abused his discretion in denying a challenge against a panel member whose former girlfriend, whom he intended to marry, was the victim of a rape six years prior.[61] Finding that the challenged panel member's "pronounced and distinct" relationship with his former girlfriend, who became pregnant as a result of the rape and who named the child after the panel member, created, through the eyes of an objective observer, doubts about the fairness of the accused's trial.[62]

While *Terry* is an appropriate example of the implied bias that may arise from a panel member's close relationship with a victim of a crime similar to that charged, it is also an example of the court's ad hoc subjective analysis that can lead to different conclusions based upon the court's point of view. In *Terry*, the military judge's denial of defense's challenge against two panel members was, inter alia, the basis for appeal. Major (Maj) H's wife was raped by her stepfather when she was a teenager, and Captain (Capt) A had two previous girlfriends who were the victims of rape and, as indicated above, at one point he had intended to marry the second girlfriend. In Maj H's case the court found that the military judge did not abuse his discretion by denying the defense's challenge, under an implied bias analysis, because: (1) of the amount of time that transpired between the rape and the court-martial (ten to twelve years); (2) the event was never reported to authorities and the wife never received counseling; (3) there appeared to be some sort of acceptance within the family over the event; (4) Maj H spoke only infrequently about the incident with his wife and had not mentioned the incident during the last five years; and (5) Maj H's reluctance to speak about the issue during voir dire was due, in the court's opinion, to his desire to protect his wife's reputation rather than as a source of personal distress.[63]

Captain A's circumstances, from the court's view, presented two different and distinct scenarios. The crime against one of his former girlfriends offered no implied bias concerns because the rape occurred prior to their dating relationship and because Capt A described her as "more of an acquaintance." The second girlfriend who had been raped and with whom Capt A had a closer relationship and had intended to wed, presented a different matter. Although the rape had happened more than seven years prior to trial, Capt A had not spoken with the woman for over six years, and Capt A had since married another woman, the court still surmised that "it is likely that given the strength of his relationship with the victim he may well have maintained this resentment [that his close friend had been hurt]."[64]

Both Maj H and Capt A stated under oath that they were able to put these matters aside and judge the case solely on the evidence presented, thus justifying the military judge's finding of no actual bias.[65] However, as stated previously, such disclaimers do not provide sufficient grounds to dispel an implied bias.[66] Thus, the court applied its own implied bias analysis to each panel member. The court found that the circumstances surrounding Maj H's exposure to a crime similar to that facing the accused did not objectively jeopardize the perception of fairness or impartiality of the accused's court-

[57] 58 M.J. 192 (2003).

[58] *Id*. at 195.

[59] *Id*.

[60] *Id*.

[61] 64 M.J. 295 (2007).

[62] *Id*. at 297.

[63] *Id*. at 304.

[64] *Id*. at 304–05.

[65] *Id.* at 303–04.

[66] United States v. Strand, 59 M.J. 455, 460 (2004).

martial.[67] The circumstances surrounding Capt A's exposure and close relationship to a rape victim, however, raised the specter of implied bias and should have been subject to the court's liberal grant mandate. Absent the military judge's "clear signal" that she applied the "right law," that is the implied bias analysis and liberal grant mandate, the court found that the military judge abused her discretion by not granting the challenge for cause against Capt A.[68]

Terry leaves one with the sense of uncertainty. While the court distinguished the circumstances between Maj H and Capt A to justify its decision, an objective observer would be hard pressed to rationalize such neat distinctions. Is it not more likely that Maj H would harbor a greater sense of resentment and his presence as a panel member would be more likely to jeopardize the perception of fairness and impartiality because of his current family situation, than would Capt A because of circumstances in his distant past? The answer begs the question. Despite assertions to the contrary, the court will invoke a de novo review, when the military judge does not articulate the implied bias analysis and apply the liberal grant mandate on the record. Whether the court would have looked differently at the facts of the case had the military judge applied the *Clay* factors, is speculative. What is not speculative is the long line of cases declaring that "[m]ilitary judges are presumed to know and follow the law absent clear evidence to the contrary."[69] Yet, despite this presumption, in *Terry* the court was quick to note that there was no "clear signal" on the record that the military judge applied the "right law."[70] Thus, when confronted with a challenge for cause to a panel member, unless there is specific evidence to the contrary, the military judge is presumed not to know or follow the law regarding implied bias.

Panel Member's Close Relationship to One of the Parties or Witnesses to the Litigation or an Associational Link Between the Panel Member and One of the Parties to the Litigation

In *United States v. Armstrong*, the challenged panel member, Lieutenant Commander (LCDR) T, disclosed that he worked in the same office with the lead investigator in the accused's case.[71] The agent involved was not only a witness but also a member of the prosecution team who was present at the counsel table during the trial.[72] Further, LCDR T attended daily meetings during which the accused's case was discussed and, at times, disparaging comments were made about the accused.[73] Lieutenant Commander T was also "involved in the law enforcement mission of the Coast Guard," being a member of the intelligence community.[74] Despite his assurances of impartiality and the military judge's finding that LCDR T's disclaimer of bias was credible, the Coast Guard Court of Criminal Appeals reversed, holding that it was unable to ascertain whether or not the military judge considered implied bias in her decision to deny the defense's challenge for cause.[75] The court found that the associational link between the panel member and the investigative agent created a perception of "unfairness and prejudice" not assuaged by the claims of impartiality.[76]

In *United States v. Harris*,[77] a case involving larceny, the court found implied bias stemming, in part, from the panel member's association with two of the victims who worked with the panel member and had previously discussed the thefts with him.[78] This professional relationship with the victims[79] and the position he held as the chairman of the resources

[67] *Terry*, 64 M.J. at 304 ("There are a number of factor in Maj H's situation that tend to ameliorate his exposure to the crime, dispelling the appearance of implied bias.").

[68] *Id.* at 305.

[69] United States v. Erickson, 65 M.J. 221, 225 (2007).

[70] *Terry*, 64 M.J. at 305.

[71] 54 M.J. 51, 52 (2000)

[72] *Id.*

[73] *Id.*

[74] *Id.*

[75] *Id.* at 53.

[76] *Id.*

[77] 13 M.J. 288 (C.M.A. 1982) (finding the military judge's decision denying the challenge to be erroneous as a matter of law under implied bias grounds but affirmed the conviction, finding no prejudice to the accused).

[78] The court found that the information conveyed to the member was "little more than what was conveyed to the other members by the allegations in the specifications." *Id*. at 289 n.2.

protection committee responsible for base anti-theft measures were sufficient to raise "'an appearance of evil' in the eye of disinterested observers."[80]

In *United States v. Leonard*, a case involving rape, the court found implied bias on the part of a panel member who relied on the victim of the rape to service his flight helmet and pack his parachute.[81] This "significant relationship of trust" gave rise to a perception of unfairness when the linchpin of the government's case relied upon the credibility of the victim.[82] Notably, a second panel member, Lieutenant Colonel (LTC) D, who was subject to the defense's unsuccessful challenge for cause, had a daughter who was the victim of rape. However, the defense had failed to preserve its challenge against LTC D thus the court did not rule on the merits of that challenge.[83]

In *United States v Minyard*,[84] the challenged panel member was the wife of the law enforcement agent responsible for investigating the accused's crimes.[85] Although the agent never discussed the case with his wife, the wife admitted that she had overheard portions of a phone conversation during which her husband stated "more money?"[86] When she later asked him about the conversation he merely stated it was related to a case he was working and the suspect "took more money."[87] Upon the defense counsel's challenge, the trial counsel indicated that the agent would not be called as a witness and did not anticipate the agent being referred to during the course of the trial.[88] Denying the challenge, the military judge found the panel member sincere in her statements that she knew nothing about the case and had not formed an opinion as to the accused's guilt.[89] Upon review, the court found the judge abused his discretion in not granting the defense's challenge on the grounds of implied bias.[90] Specifically, the court stated, the panel members "participation in a case investigated by her husband does not pass the test of public confidence contemplated by RCM 912(f)(1)(N)."[91]

Panel Member Misleads or Conceals Important Facts from the Court

Misleading statements to the military judge or omissions of certain matters during voir dire do not necessarily lead to an implied bias challenge.[92] Often it is not because the panel member omitted or misstated a detail or some relevany information that gives rise to a challenge; rather, it is the implication of the omitted or misstated fact itself that gives rise to implied bias concerns.[93]

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[79] *Id*. at 291; *id*. at 293 (Cook, J., concurring) ("By far the most significant of the allegedly disqualifying factors cited was [the member's] professional relationship with two of the seven theft victims.").

[80] *Id*. at 292. The other basis upon which appellant relied in his implied bias challenge was the fact that the challenged member wrote or endorsed the officer efficiency reports of three of the other members of the panel.

[81] 63 M.J. 398 (2006).

[82] *Id*. at 403.

[83] MCM, *supra* note 2, R.C.M. 912(f)(4), in order to preserve the challenge for cause, a counsel must exercise his preemptory against any member, "provided that when 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." In this case the defense waived review of the challenge related to LTC D by exercising its peremptory challenge against LTC D, but failed to state that he would have used the peremptory challenge against another member if the challenge for cause against LTC D had been granted.

[84] 46 M.J. 229 (1997).

[85] *Id*. at 230.

[86] *Id*.

[87] *Id*.

[88] *Id*.

[89] *Id*. at 230–31.

[90] *Id*. at 231–32.

[91] *Id*. at 231.

[92] *See* Gutierrez v. Dretke, 392 F.Supp.2d 802 (D.C.W.D. Tex. 2005) (finding that bias cannot be presumed because of juror's failure to disclose a prior felony during voir dire). The issue of omissions or misstatements by the member leads to the question of whether the member's misconduct jeopardized the accused's right to a fair and impartial trial. *See* United States v. Mack, 41 M.J. 51, 54 (C.M.A. 1994) (citing McDonough Power Equip., Inc. v. Greenwood, 464 U.S. 548, 556 (1984)) (requiring a new trial when the omission or misstatement was related to a material question and when the honest answer would have given rise to valid basis for challenge for cause).

[93] United States v. Albaaj, 65 M.J. 167 (2007).

For example in *United States v. Albaaj*, the panel member, who was not challenged, did not disclose that he knew and had harbored ill-feelings toward the accused's brother, a defense witness.[94] Despite being asked by the military judge to disclose any grounds that may impact a panel member's impartiality, and being specifically asked if any of the panel members knew a person named "Emad," the name of the accused's brother, the panel member gave negative answers.[95] Further, when Emad was called to testify, the panel member did not inform the judge of his acquaintance with the witness.[96] As later discovered, the panel member previously worked with Emad and had sent various e-mails which were critical of Emad's work and questioned his honesty.[97]

During a post-trial *DuBay* hearing,[98] ordered by the Court of Criminal Appeals on the issue of panel member misconduct, the *DuBay* judge found that the panel member did not fail to honestly answer the questions during voir dire and his later failure to disclose his knowledge was not done in bad faith.[99] The CAAF was skeptical of these findings. In setting aside the findings and sentence, the court relied on implied bias grounds that would have formed the basis of a challenge had the defense been aware of the association between the panel member and the witness.[100] It was not, however, the fact that the panel member failed to disclose his relationship with Emad; rather, it was that he had a relationship with a defense witness and had formed an opinion about the credibility of that witness that led to a finding of implied bias.[101]

Unlike *Albaaj*, the implied bias under this subcategory is one that exists because the panel member misstates or omits facts in order to sit on that particular court-martial and render judgment. As such, the misstatement or omission itself is the underlying basis for the finding of implied bias. For example, in *Dyer v. Calderon*,[102] a murder case, a juror stated "no" when asked whether anyone close to the juror had ever been a victim of a crime or had a close relative or friend accused of a crime.[103] As discovered after findings, the juror's brother had been the victim of murder, her estranged husband was then in jail, and numerous relatives had been accused of various criminal activities.[104] She also lied when she claimed that she was never the victim of a crime.[105] When confronted with the obvious inconsistency concerning her brother's death, the juror explained that she thought her brother's death was an accident.[106] A review of the court records, however, disclosed that the juror's brother had been pistol-whipped and then shot in the back of the head, hardly the circumstances of an accident.[107] The Ninth Circuit found, based upon the juror's repeated lies, implied bias drawing the inference that her lies were designed to secure a seat on the jury and allow her to pass judgment on the sentence.[108] It is the pervasiveness of the omissions or misstatements that leads one to objectively question the juror's motivation for concealing matters that would otherwise disqualify him:

> The individual who lies in order to improve his chances of serving has too much of a stake in the matter to be considered indifferent. Whether the desire to serve is motivated by an overactive sense of civic duty, by

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[94] *Id*. at 168.

[95] *Id*.

[96] *Id*. at 169.

[97] *Id*.

[98] United States v. DuBay, 37 C.M.R. 147 (C.M.A. 1967); United States v. Dykes, 38 M.J. 270, 272 (C.M.A. 1993) ("The purpose of such a 'DuBay hearing' is to enable a military judge at the trial level to make the findings of fact and conclusion of law on collateral matters when the record is incomplete or 'resort to affidavits [is] unsatisfactory.'").

[99] *Albaaj*, 65 M.J at 169.

[100] *Id*. at 171.

[101] *Id*.

[102] Dyer v. Calderon, 151 F.3d 970 (9th Cir. 1998).

[103] *Id*. at 972.

[104] *Id*. at 972–73, 980–81.

[105] *Id*. at 980.

[106] *Id*. at 972.

[107] *Id*. at 973.

[108] *Id*. at 982.

> a desire to avenge past wrongs, . . . or by some other unknown motive, this excess of zeal introduces the kind of unpredictable factor into the jury room that the doctrine of implied bias is meant to keep out.[109]

Panel Member Undergoes Extensive Questioning in Order to Rehabilitate the Panel Member during Voir Dire

In *United States v. Townsend*,[110] the court recognized that

> [i]t might be possible that a particular member of a court-martial would require rehabilitation to such an extent that the rehabilitation itself would give rise to reasonable questions about the fairness of the proceeding . . . . The need to engage in extensive rehabilitation . . . may present the very type of "close" situation that supports application of the liberal grant mandate.[111]

While there is no military precedent dealing directly with this particular category, there certainly comes a point during voir dire when objectively one would question whether the public's perception of fairness and impartiality is jeopardized by allowing a panel member, who was subject to extensive rehabilitation by the trial counsel or military judge, to serve on the panel. It is likely, however, that this category does not stand alone; rather, the need to engage in extensive rehabilitation will arise because the member's circumstances fall into one or more of the other categories of implied bias.

Panel Member Has an Extensive Level of Pretrial Knowledge or Involvement with the Case

United States v. Moreno[112] represents the type of extensive pretrial knowledge and involvement that will give rise to an implied bias concern. The accused, who worked in the disbursing office of the base comptroller, was charged with rape.[113] The challenged panel member, Lieutenant Colonel (LtCol) F, was the deputy comptroller and, upon being advised that a rape had occurred, decided to personally investigate the matter in order to brief the comptroller.[114] To gather the facts, LtCol F reviewed certain logbooks with entries related to the rape, spoke with some of the duty officers who had knowledge of the incident, and read various articles in the newspaper.[115] It also appears that LtCol F made specific recommendations when he briefed the comptroller about the case.[116] Lieutenant Colonel F's interest in the case continued as he gathered facts about the accused's case and also tracked the case of Moreno's co-accused through newspaper accounts.[117] The court described LtCol F's involvement as "an active interest," stressing that his personal investigation of the facts in order to brief the comptroller and his continued interest in both Moreno and his co-accused's cases led one to conclude that he had "an excessive level of pretrial knowledge about the incident," which jeopardized the perception of fairness and impartiality.[118]

United States v. Napoleon, offers an example at the other end of the spectrum.[119] In *Napoleon*, the challenged panel member had heard about the accused's case through a staff briefing and through newspaper accounts.[120] From these he learned a limited number of details including that the crime had occurred at the Noncommissioned Officer's Club, the victim worked in the commissary, and the event involved a stabbing.[121] Describing the panel member's pretrial knowledge as

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[109] *Id*.

[110] 65 M.J. 460 (2008).

[111] *Id*.

[112] 63 M.J. 129 (2006).

[113] *Id*. at 132.

[114] *Id*. at 132–33.

[115] *Id*. at 133.

[116] *Id*. at 134–35.

[117] *Id*. at 134.

[118] *Id*.

[119] 46 M.J. 279 (1997).

[120] *Id*. at 282.

[121] *Id*.

"limited and general,"[122] the court found that the military judge did not abuse his discretion by denying the challenge, even under an implied bias analysis.[123]

Aspects of Command Influence

In *United States v. Youngblood*,[124] the challenged panel members attended a staff meeting during which the wing commander and his staff judge advocate (SJA) discussed military standards, command responsibility, and discipline. During the meeting examples of offenses and the punishments awarded were discussed, including a case involving child abuse where, in the opinion of the SJA, the commander in question "underreacted," "had shirked his or her leadership responsibilities," and should have been disciplined for his handling of the case.[125] Following the SJA's remarks, the wing commander added that he had forwarded "a letter to that commander's new duty location expressing the opinion that 'that officer had peaked.'"[126]

Of the three panel members who attended the staff meeting, one was excused based upon the defense's challenge and the other two remained despite the challenge.[127] Focusing on the perceived message conveyed during the staff meeting, rather than the actual remarks, the court found that the "subtle pressure exerted by the members' perceptions of what they heard" raised the specter of implied bias.[128] In failing to grant the defense's challenge to the other two panel members, the military judge failed to "appreciate that the same sword of Damocles was hanging over the heads [of the other two panel members]."[129] Thus, it was "asking too much" of the panel members' to render an impartial judgment against the possible career consequences alluded to by the wing commander.[130]

In *United States v. Wiesen*,[131] the court found the military judge abused his discretion when he failed to grant the defense challenge to a panel member who was the supervisor and performance evaluation rater for six of the other panel members.[132] Despite assurances from each of the six panel members that they would not be influenced by the senior rater, and the fact that a superior-subordinate relationship is not a per se disqualification, the court still found the numbers in the case placed "an intolerable strain on public perception of the military justice system."[133] The holding relies on the courts finding that "in this case the President of the panel and his subordinates comprised the two-thirds majority sufficient to convict, a factual scenario outside the margin of tolerance reflected in our case law."[134] This "margin" of disqualifying implied bias exists somewhere between three panel members[135] who share a performance rating relationship and six panel members, as in this case.

Conclusion

These categories are an attempt to infuse some order into the implied bias analysis and do not necessarily dictate a finding of reversible error if a case falls within one of the categories. These are not *per se* implied bias disqualifiers, but

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[122] *Id*. at 283.

[123] Implied bias was also raised because the member knew one of the law enforcement agents involved in the case who was called as a prosecution witness. *Id*. at 282.

[124] 47 M.J. 338 (1997).

[125] *Id*. at 340.

[126] *Id*.

[127] *Id*. at 341.

[128] *Id*. at 342.

[129] *Id*.

[130] *Id*.

[131] 56 M.J. 172 (2001).

[132] *Id*. at 173–74, 177.

[133] *Id*. at 175.

[134] *Id*.

[135] *See* United States v. Murphy, 26 M.J. 454 (C.M.A. 1988), and United States v. Harris, 13 M.J. 288 (C.M.A. 1982) (implying that two, as in *Murphy*, and possibly three, as in *Harris*, members of the panel having a senior-subordinate, performance rating relationship may not raise implied bias concerns).

factual scenarios that make a case "close," as was the concern in *Clay*.[136] The burden still rests upon the challenging party to make the appropriate record and develop facts that convince the military judge, and later an appellate court, that a substantial doubt as to the fairness, integrity, or impartiality of the proceeding exists when viewed objectively through the eyes of the public. Admittedly, in the end it is still a matter of subjective evaluation by both the trial and appellate judges. However, the categories suggest some structure to the implied bias analysis rather than the "we'll know it when we see it" approach.

In making a challenge for cause the defense should specifically state that the challenge is based upon the implied bias grounds under RCM 912(f)(1)(N); rather than allowing the appellate court to divine his intentions. The defense counsel should use the categories presented as a basis upon which to develop the factual predicate for a finding of implied bias. Identifying specific categories of implied bias, placing the burden on the challenging party to develop the facts during voir dire, and tying a particular panel member's circumstances to the question of whether the public would view those facts adversely to the fairness and impartiality of the court-martial, would remove the ad hoc analysis currently employed by the appellate courts. It would also sharpen the military judge's focus to the central issue: "was [she] satisfied that an objective public observer would find [the panel member's involvement] consonant with a fair and impartial system of military justice?"[137]

In the case of *United States v. Bragg*,[138] an implied bias case currently before the CAAF, the Government, during oral argument, asked the court to adopt these categories. It remains to be seen whether the court will do so and bring some structure into the implied bias arena.

[136] These categories serve to assist both the military judge and counsel in applying an implied bias standard. It may also solve the appellate court's struggle "to define the scope of implied bias," and resolve "what that scope should be." *Wiesen*, 56 M.J. at 175.

[137] United States v. Terry, 64 M.J. 295, 303 (2007) (quoting United States v. Downing, 56 M.J. 419, 422 (2002)).

[138] 2007 CCA LEXIS 44 (N-M.C. Ct. Crim. App. Feb. 21, 2007), *review granted*, No. 07-0382/MC, 2007 CAAF LEXIS 1526 (Nov. 16, 2007).

Book Reviews

BAND OF SISTERS: AMERICAN WOMEN AT WAR IN IRAQ[1]

REVIEWED BY MAJOR TYESHA E. LOWERY[2]

I. Introduction

"There's no change of policy as far as I'm concerned. *No women in combat*."[3] Those are the words spoken by our Commander-in-Chief, President Bush, in January 2005, but reality tells a far different story. Reality is that in today's fight, servicewomen are just as intimately engaged in, relied upon, and as critical to mission success as their male counterparts.[4] Since 2003, over 155,000 servicewomen have deployed to Iraq and Afghanistan.[5] Over 430 servicewomen have been injured, and at least 70 have been killed.[6]

Without overtly debating the ever-controversial combat exclusion policy[7] or touting the tenets of feminism,[8] author Kirsten Holmstedt attempts to "get real" with her readers in *Band of Sisters: American Women at War in Iraq.* By featuring the real-life stories of twelve women from all services and with a variety of backgrounds, Holmstedt alerts her readers that "[t]here are no front lines out there."[9] In today's military, women are not only being engaged by the enemy but are also successfully engaging the enemy. Though Holmstedt strays from her stated goal of "tak[ing] a close look at how the experiment of women in combat is playing out,"[10] and though her work fails to substantiate her conclusion that the experiment has been a success,[11] *Band of Sisters* is, nevertheless, worthy of reading. Readers cannot help but be captivated, enlightened, and inspired in reading *Band of Sisters*.

II. Background

Holmstedt, a graduate of the Drake University School of Journalism,[12] wrote *Band of Sisters* as part of her degree requirement for a master of fine arts in creative nonfiction from the University of North Carolina-Wilmington.[13] Holmstedt, who lived close to the Marine Corps Base Camp Lejeune, saw the large number of women going off to war.[14] She wondered what these women were feeling. Were they scared? Were they mentally and physically equipped?[15]

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[1] KIRSTEN HOLMSTEDT, BAND OF SISTERS: AMERICAN WOMEN AT WAR IN IRAQ (2007).

[2] U.S. Army. Student, 56th Judge Advocate Officer Graduate Course, The Judge Advocate General's Legal Ctr. and Sch., U.S. Army, Charlottesville, Va.

[3] Martha McSally, *Women in Combat: Is the Current Policy Obsolete?*, 14 DUKE J. GENDER L. & POL'Y 1011, 1012 (2007) (quoting Rowan Scarborough & Joseph Curl, *Despite Pressure, Bush Pledges "No Women in Combat,"* WASH. TIMES, Jan. 12, 2005, at A01) (emphasis added).

[4] *See* HOLMSTEDT, *supra* note 1, at 309.

[5] *Id*. at inside front cover.

[6] *Id.*

[7] *See id.* at xxii.

[8] *See* The Happy Feminist, Women in Combat: Arguments that Don't Matter to Me, Nov. 14, 2005, http://happyfeminist.typepad.com/happyfeminist/2005/11/women_in_combat.html.

[9] HOLMSTEDT, *supra* note 1, at xvii (quoting Marine Captain Amy McGrath).

[10] *See id.*

[11] *See id.* at 312.

[12] *Id.* at inside back cover.

[13] Drake University, E-Blue Alumni Newsletter, *Drake Grad Covers Women at War*, June 8, 2007, http://www.drake.edu/news/dbletter/eblue/archive.php?mode=nay&year=2007&offset=&newsletter=100&article=1914 [hereinafter Drake University, E-Blue Alumni Newsletter].

[14] *Id.*

[15] HOLMSTEDT, *supra* note 1, at xii–xiii.

One of Holmstedt's friends once told her, "Some people are interested in how a clock works, but you're more interested in what makes the clockmaker tick."[16] Keeping in mind Holmstedt's nature and her primary purpose in writing the book (i.e., to be creative) will help readers understand why Holmstedt relies more on perceptions, emotions, and feelings,[17] rather than empirical data or other sources in reaching her ultimate conclusion that the experiment has been a success.[18]

III. Organization and Content

With its vivid imagery and frank collection of events, *Band of Sisters* is well-organized and easy-to-read. Each chapter chronicles the experiences of different women serving in Iraq in varying services and roles with varying reactions. Yet, these women share the common band of "courage, pride, and physical, mental, and emotional strength."[19]

First, Holmstedt masterfully captivates and holds the attention of readers with her word choice and vivid imagery. For example, she begins the first chapter profiling the combat experiences of Marine Lance Corporals Carrie Blais and Priscilla Kispetik who were involved in a firefight with insurgents while patrolling the city of Haditha with other Marines.[20] Holmstedt writes,

> Without hesitation, Blais fired two shots, hitting her target in the right leg. His leg jerked and he fell. . . .
> The Iraqi started crawling toward his weapon.
> "Finish it," the staff sergeant yelled.
> Blais fired two more shots. The Iraqi stopped moving as his white robe turned red[21]

Similarly, Holmstedt makes readers see, through her words, the horrific explosion that Marine Gunnery Sergeant Yolanda Mayo encountered:

> The explosion had catapulted vehicle parts in every direction. Human remains were scattered on the ground. Mayo saw a leg in one area, still attached to a shoe, and the rest of the body was lying somewhere else. . . . Blood was splattered everywhere. Rivaling the horrifying sight were the odors of charred flesh and burning oil.[22]

It is vivid imagery like this that grabs the reader's attention and holds it until the very end.

Second, Holmstedt frankly recounts the experiences of heroic women. Most of the women featured in *Band of Sisters* had some type of contact with the enemy (i.e., engaged the enemy or were engaged by the enemy). In addition to the experiences already referenced, Holmstedt recounts the story of U.S. Army Captain Robin Brown, the first female pilot to be shot down in combat and survive.[23] When insurgents shot down her helicopter over Fallujah with a heat-seeking missile, Brown and her co-pilot remained amazingly calm and relied on their tactical training to land the helicopter safely and to protect them on the ground until rescued.[24] Holmstedt also recounted the inspiring story of Marine Captain Vernice Armour, the first black female combat pilot.[25] For Armour, it was not about being first.[26] "It was about not wanting to be average."[27]

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[16] Drake University, E-Blue Alumni Newsletter, *supra* note 13.

[17] *See* HOLMSTEDT, *supra* note 1, at xvi–xvii.

[18] *See id.* at 312.

[19] *Id.* at 314.

[20] *Id.* at 1–25.

[21] *Id.* at 20.

[22] *Id.* at 246.

[23] *Id.* at 27–51, inside back cover.

[24] *Id.* at 32–42, 46, inside back cover.

[25] *Id.* at 155–83.

Holmstedt profiles several other women like Captain Armor, such as Lieutenant Colonel Polly Montgomery, "the first female commander of a combat squadron in the Air Force"[28] and Marine Lance Corporal Chrissy DeCaprio, a .50 cal gunner of a scout vehicle.[29] Simply put, Holmstedt featured stories essentially about "not wanting to be average."[30]

IV. Analysis

Holmstedt met her ancillary goal of acknowledging the contributions that women are making in Iraq[31] but deviated somewhat from her stated goal of "taking a close look at how the experiment of women in combat is playing out."[32] Though Holmstedt failed to define "in combat," she led readers to believe that the experiment involved more than simply looking at women in a war zone. In her introduction, she states that many servicewomen have "found themselves in vicious fire fights, under attack by mortar and rockets, and taking hostile fire in the air."[33] This intimates that the experiment would involve taking a look at servicewomen who are conducting missions that make enemy contact highly probable. After all, what is experimental about women simply being in a combat zone? Holmstedt herself acknowledges that thousands of servicewomen served in the combat zones of War World I, Vietnam, the Gulf War, and other conflicts.[34] The majority of Americans realize that the countless servicewomen who have deployed to Iraq have provided invaluable support. It is the fact that servicewomen are now conducting missions where enemy contact is likely that is "experimental."[35]

For the most part, Holmstedt focused on the truly experimental by profiling servicewomen who either engaged the enemy or were engaged by the enemy.[36] However, Holmstedt deviated from her stated goal by including "The Little Bird that Could," the story of Petty Officer Third Class Marcia Lillie, U.S. Navy.[37] Holmstedt uses this story to lend credence to her conclusion that the experiment has been a success,[38] but Lillie's experience was not experimental and does not support Holmstedt's conclusion.

In March 2003, Lillie deployed to the Mediterranean Sea in support of operations in Iraq.[39] As a member of the flight deck crew of the carrier USS *Truman*, Lillie operated the carrier's elevators and was responsible for transporting items such as munitions from hangar bays to aircraft.[40] During her second deployment, Lillie served as a "tractor king," towing aircraft about the carrier.[41] Though Holmstedt recounts several close calls, like the time that the wind picked Lillie up and tossed

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[26] *Id.* at 183.

[27] *Id.*

[28] *Id.* at 187, 185–215.

[29] *Id.* at 139–53.

[30] Major L. Tammy Duckworth, *Foreword* to HOLMSTEDT, *supra* note 1, at x (referring to Marine Captain Vernice Armour's story).

[31] *Id.* at 314.

[32] *Id.* at xvii.

[33] *Id.* at xx.

[34] *Id.* at xviii–xix.

[35] *See* Ann Scott Tyson, *For Female GIs, Combat Is a Fact*, WASH. POST, May 13, 2005, at A01, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2005/05/12/AR2005051202002.html.

[36] *See supra* Sec. III, Organization and Content (discussing the profiles of these servicewomen).

[37] *Id.* at 115–37.

[38] *See* HOLMSTEDT, *supra* note 1, at 312.

[39] *Id.* at 117.

[40] *Id.* at 119–20.

[41] *Id.* at 129.

her[42] and the time that one of the aircrafts that Lillie was towing jack-knifed,[43] there is nothing experimental about Lillie's story. At the time of Lillie's first deployment, "women had been serving on ships for nearly a decade."[44] Lillie experienced the same occupational hazards that she would have experienced in garrison or in a non-deployed environment. While Lillie's contributions were vital in combating the enemy, her story adds little credence to Holmstedt's ultimate conclusion that the experiment is a success.[45] Holmstedt likely included Lillie's story in the interests of fair coverage to all the services.

Second, even if Holmstedt had stayed the course and only featured women whose positions frequently encounter enemy contact, it still would have been impossible to conclude that the experiment has been a success based solely on the lives of twelve servicewomen. In her closing remarks Holmstedt asked, "What more evidence do the American people need to prove that the experiment of women in combat has been a success?"[46] For starters, her work should have included more interviews, quotes, and opinions from the men that these women fought alongside. Undoubtedly, Holmstedt talked with many men[47] in researching the lives of the women profiled. Yet, their thoughts and opinions are not adequately represented.[48]

In a recent interview with Judy Woodruff of the Public Broadcasting Service (PBS), Holmstedt discussed servicemen's opinions of women in combat.[49] Holmstedt acknowledged that not all servicemen (including junior-ranking and senior-ranking) accept women in combat[50] and that even some servicemen who believe in women in combat, refuse to show their support openly.[51]

> Well, I [Holmstedt] talked to one general on the phone, and he said that, at a cocktail party, he might say that he's opposed to women in combat and doesn't like it, but, really, he does believe in women in combat and he thinks they're doing wonderful things.
>
> So there is an outward support or lack of support. There's a contradiction right now. I just think people are really—some men, and the ones who have been around for a while in the military, the older echelon—I think that they're more resistant to supporting women openly. And I think that that reflects all the way down, because women are still, I believe, treated like second-class citizens because of that male mentality.[52]

The "male mentality" is exactly what Holmstedt failed to adequately address in *Band of Sisters*. She should have given readers the thoughts of those young male corporals that Lance Corporals Carrie Blais and Priscilla Kispetik patrolled the streets of Haditha with.[53] Why not tell Captain Robin Brown's story of the "Shoot Down" through the eyes of her male co-

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[42] *Id.* at 128–29.

[43] *Id.* at 130–31.

[44] *Id.* at 122.

[45] *See id.* at 312.

[46] *Id.*

[47] *Id.* at xv.

[48] While Holmstedt mentions the thoughts of servicemen on occasion, she fails to cite her sources in most instances. Her work contains very few quotations or references that are directly attributed to the men she interviewed.

[49] *Newshour: Women's Combat Roles Evolving in Iraq, Afghanistan* (PBS television broadcast July 5, 2007) (interview of Kirsten Holmstedt by Judy Woodruff), *available at* http://www.pbs.org/newshour/bb/military/july-dec07/women_07-05.html.

[50] *Id.*

[51] *Id.*

[52] *Id.*

[53] *See* HOLMSTEDT, *supra* note 1, at 1.

pilot Chief Warrant Officer Two Jeff Sumner?[54] Did Captain Amy McGrath actually get into the "domain, fraternity, and team"[55] of the male-dominated Green Knights like she thought? The questions go on and on.

As admonished earlier, readers should keep in mind that Holmstedt wrote *Band of Sisters* to be creative. *Band of Sisters* was not written to be controversial, debatable, or dicey. Without commentary from males lending support to the women's beliefs that males perceived them as equals, readers are essentially left with self-serving stories of women's perceptions of successful integration into the non-existent front lines. Because Holmstedt relied primarily on self-serving stories, her conclusion that the experiment has been a success[56] remains unsubstantiated.

V. Modern Day Applicability

Despite the criticism, *Band of Sisters* merits reading. For American society in general, for servicemen in particular, and for women especially, *Band of Sisters* has great modern day applicability. The debate over the combat exclusion policy is alive and well, and many Americans are unaware that, despite the policy, the nature of the fight in Iraq leaves us no choice.[57] Women are in combat, and Americans should know this. For servicemen in particular, if the experiment of women in combat is truly to be a success, servicemen need to be educated. While many servicemen readily admit that there are many men that are physically, mentally, and emotionally incapable of fighting on the front lines, they are reluctant, if not recalcitrant, in admitting that the converse is also true. Perhaps, in reading *Band of Sisters*, these servicemen will see that there are many servicewomen who are physically, mentally, and emotionally capable of fighting in combat. For women especially, whether young or old, military or civilian, who wants to be average[58] when you are capable of doing the extraordinary?

VI. Conclusion

Nothing in this review should be construed to minimize the invaluable contributions that servicewomen are making in Iraq. Servicewomen are being called to do, and are doing, extraordinary heroic things in Iraq.[59] Many serve as part of the brave "lioness teams"[60] that accompany infantrymen onto the dangerous streets of cities like Ramadi and Talil in Iraq. Stories like those shared in *Band of Sisters* are real and *Band of Sisters* merits reading if for no other reason than to applaud the efforts of servicewomen, who like their male counterparts, are proudly and willingly answering the call to make the ultimate sacrifice in support of freedom.

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[54] *See id.* at 27–51.

[55] *Id.* at 101.

[56] *See id.* at 312.

[57] *See* Tyson, *supra* note 35.

[58] *See* HOLMSTEDT, *supra* note 1, at x.

[59] Major Tyesha E. Lowery served as the Brigade Judge Advocate for the Second Brigade Combat Team, Second Infantry Division, Ramadi, Iraq from August 2004–August 2005.

[60] "Lioness teams" were teams of females who were operationally tasked to conduct missions with our infantrymen.

THE PRICE OF LIBERTY: PAYING FOR AMERICA'S WARS[1]

REVIEWED BY MAJOR S. CHARLES NEILL[2]

What do you think? If a man owns a hundred sheep, and one of them wanders away, will he not leave the ninety-nine on the hills and go to look for the one that wandered off? And if he finds it, I tell you the truth, he is happier about that one sheep than about the ninety-nine that did not wander off.[3]

In *The Price of Liberty: Paying for America's Wars*, Robert T. Hormats,[4] examines how the United States has financed every major armed conflict from the Revolutionary War to the War on Terror, as well as Cold War rearmament.[5] He uses this historical analysis to support a simple argument: "The long war on terrorism requires a sound long-term financial strategy."[6] He concludes that a "sound" strategy means that debt should only be assumed in emergencies and that the government must promptly re-pay the debt to preserve the country's creditworthiness and, thereby, its ability to borrow money in the future.[7] Beyond fiscal policy, *The Price of Liberty* is also about a leader's responsibility to make hard choices and to bear the brunt of those choices.[8] In a broader sense, Hormats uses his book to call stray sheep back to the fiscal fold and argue for a new direction in the War on Terror. Unfortunately, the book fails to draft a real roadmap for this new direction and dismisses the difficult political consequences of changing course.

The Price of Liberty devotes its first chapter to Alexander Hamilton's tenure as the first Secretary of Treasury and his principled stance to honor the nation's debts.[9] Using a technique that is repeated throughout the book, Hormats flushes out historical details to illustrate fiscal leadership.[10] In 1782, the new Congress assumed the debts of the Confederation Congress, including "debt certificates" issued to buy goods and services during the war.[11] Hamilton fought to ensure the new government valued these debt certificates equally, despite a popular proposal for Congress to pay wealthy speculators less for their bonds.[12] Hamilton ultimately prevailed and his vision and fortitude set the standard with which we measure other fiscal policy makers.[13]

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[1] ROBERT D. HORMATS, THE PRICE OF LIBERTY: PAYING FOR AMERICA'S WARS (2007).

[2] U.S. Army. Student, 56th Judge Advocate Officer Graduate Course, The Judge Advocate General's Legal Ctr. & Sch., U.S. Army, Charlottesville, Va. The author thanks Lieutenant Colonel Ian Corey for suggesting this book and for his invaluable comments and suggestions for this review.

[3] *Matthew* 18:12–13.

[4] Hormats is the vice-chairman of Goldman Sachs (International) and Managing Director for Goldman, Sachs & Company. Gerald L. Musgrave, *The Price of Liberty: Paying for America's Wars*, 42 BUS. ECON. 60 (July 2007) (reviewing ROBERT D. HORMATS, THE PRICE OF LIBERTY: PAYING FOR AMERICA'S WARS (2007)). He has spent most of his professional life advocating free trade and globalization and worked in public service as an assistant Secretary of State and economic advisor to Henry Kissinger. *Id*.

[5] HORMATS, *supra* note 1. In January 1790, Alexander Hamilton, the first Secretary of Treasury, wrote that the debt of the Revolutionary War was the "price of liberty." *Id*. at xiv.

[6] *Id.* at xxi.

[7] *Id*. at 90, 299.

[8] *See id*. at 280–81.

[9] *Id.* at 1–27.

[10] *See id.* at 19–20 (in a contentious debate, Secretary Hamilton successfully persuaded the federal government to assume the states' debts from the Revolutionary War); *id*. at 72–73, 92 (during the Civil War, President Abraham Lincoln and his Secretary of Treasury structured income and inheritance taxes to target the wealthy); *id*. at 161–62 (during World War II, President Franklin D. Roosevelt vetoed a popular revenue act that would not accrue sufficient funds and would grant "indefensible special privileges to favored groups").

[11] *Id.* at 15–16. These bonds were initially issued to farmers, veterans, and merchants, but speculators later bought them for pennies on the dollar when the Confederation looked insolvent. *Id*. at 16.

[12] Several members of the new Congress resented speculators who had purchased certificates for "bargain prices" when the Confederation government looked insolvent; these members proposed paying speculators using a complicated formula that would repay the original certificate holder the money he or she lost selling the bond, after which the speculator would receive the bargain purchase price plus interest. *Id.* at 16. Hamilton opposed the sliding scale for bond payments, heeding philosopher Montesquieu's warning that "a breach in public faith cannot be made on a certain number of subjects without seeming to be made on all." *Id.* at 17.

[13] *Id.* at 17.

More than three generations later, Abraham Lincoln mandated that the Civil War be financed with an "equity of economic sacrifice."[14] In August 1861, Congress passed the first national income tax, which affected only the very wealthy.[15] Throughout the Civil War, the rich carried the bulk of the income tax burden.[16] To finance the escalating conflict, the tax rate steadily increased and, with almost every increase, a faction of congressional leaders and newspapers derided the financial choices.[17] Like many of the stories in *The Price of Liberty*, the facts are not as important as the fortitude of the decisionmakers. Lincoln was determined to hold the Union together and implored a system of equitable taxation; as Hormats correctly concludes, "[P]olitical resentment was reduced because the wealthy had to pay an income tax and an inheritance tax."[18] As set forth below, the nation's populist demand for shared sacrifice during the Civil War grew exponentially during the first world war.

During the build-up to World War I, Americans embraced progressive finance.[19] Like the income tax structure during the Civil War, the pre-World War I system excluded the vast majority of citizens, and added a progressive surtax on higher incomes.[20] In mid-1915, when America was on the brink of war, Secretary of Treasury William McAdoo assumed the monumental task of financing the nation's armed forces.[21] Unlike the prior wars, which were fought with rifles and cannons, McAdoo had to finance planes, tanks, ships, and a huge force for a war fought an ocean away.[22] On 2 April 1917, Woodrow Wilson made the case for war to a joint session of Congress and candidly described the projected costs.[23] Once the United States entered the war, citizens bought war bonds en masse, thus effectively giving normal Americans a shared stake in the war.[24]

Franklin D. Roosevelt advanced "shared sacrifice" during World War II, overcoming incredible and bitter disputes with Congress. As background, Hormats lays out Roosevelt's fiscal philosophy; because of a "sense of tax justice," Roosevelt favored a "highly progressive tax system with a minimum burden on those with low incomes."[25] Several books have documented Roosevelt's battles with Congress during World War II,[26] so Hormats focuses on the President's decision to make the case for sacrifice directly to the electorate.[27] Roosevelt's plea to the people worked; Congress passed the 1942

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[14] *Id.* at 58.

[15] *Id.* at 66. The tax was a flat 3% on incomes above $800, while the average annual income was $150. *Id.*

[16] Hormats accurately labels this tax policy "The Sacrifice of the Wealthy." *Id.* at 71. In 1862, the new revenue bill set a 3% tax bracket for those making $600 in annual income, with a 5% tax rate for those making over $10,000. *Id*. at 68. In 1864, the first bracket rose to 5%, a new 7.5% bracket was set for those making between $5,000 and $10,000, and the top bracket increased to 10%. *Id*. at 72.

[17] Senator Ira Harris claimed, "'The very best men in New York by hundreds, nay thousands, have been crushed and overthrown' by the income tax." *Id*. at 72. *The New York Express* claimed the graduated rate structure put "an exclusive burden on industry, enterprise, and labor." *Id*. at 73.

[18] *Id.* at 93.

[19] The Progressive Movement focused on overhauling the tax system to weaken the corporate forces that Progressives believed disproportionately influenced government. *Id*. at 100. In 1898, millionaire Andrew Carnegie triggered the popular progressive movement, arguing that "concentration of wealth" was fundamentally inconsistent with the "American system of equality and democracy." *Id*.

[20] *Id.* at 104.

[21] *Id.* at 106–07.

[22] *Id.* at 107. Hormats calculates that "the federal government spent ten times more paying for World War I than it had for the Civil War." *Id.*

[23] *Id.* at 113 (summarizing Wilson's warnings that the government would have to borrow "adequate credit" and that the costs of war should be "sustained . . . as far as they can equitably be sustained by the present generation, by well conceived taxation"). Once the United States entered the war, McAdoo successfully marketed "Liberty Bonds" directly to the American people. *Id.* at 121–22. McAdoo's policy of "capitalizing patriotism" flourished, with widespread volunteer bond drives that became the "financial front" for the war. *Id.* at 123. To his credit, McAdoo's treasury department issued small-denomination bonds (valued at $50 and $100); over 19 million Americans fought on the financial front by buying these less-expensive bonds. *Id*. at 125.

[24] *Id.* at 132–33 ("During World War I, high levels of patriotism at the outset, combined with populist and progressive support, enabled the government to transform the country's tax system and sharply increase revenues.").

[25] *Id.* 151. Roosevelt vehemently opposed a national sales tax, terming it a "spare-the-rich" tax because of its disproportionate impact on citizens with lower incomes. *Id*. at 154.

[26] *See generally* DORIS KEARNS GOODWIN, NO ORDINARY TIME: FRANKLIN AND ELEANOR ROOSEVELT: THE HOME FRONT IN WORLD WAR II 486 (1994) (following a call from the Senate Majority Leader to override Roosevelt's veto of a spending bill, "practically every senator stood on his feet and clapped," showing widespread opposition to Roosevelt).

[27] For example, to preempt opposition against rationing, Roosevelt asked citizens to accept "the blunt fact . . . that every single person in the United States is going to be affected by this program." HORMATS, *supra* note 1, at 155. True to his word, Roosevelt ensured that everyone, regardless of position or income, received the same allotment of ration stamps. *Id.* Later, facing Congressional opposition to the Revenue Act of 1942, Roosevelt took his case to the people in a fireside chat: "[W]ars are not won by people who are concerned primarily with their own comfort, their own convenience, and their own pocketbooks." *Id.* at 156.

revenue act which doubled the number of taxpayers and increased the rates for income taxes, estate taxes, and corporate taxes.[28] The FDR model stands as a lesson about genuine sacrifice shared in a country united by a purpose. Unfortunately, as set forth below, Presidents over the next six decades slowly muted Roosevelt's call for shared sacrifice.

In four chapters on the Cold War, Hormats painstakingly recounts the fiscal challenges of the Korean War, Vietnam War, and Reagan-era rearmament.[29] Despite the bottomless well of detail in these chapters, each conflict offers only minor significance in the context of financing armed conflicts. During the Korean War,[30] which spanned the administrations of Harry Truman and Dwight Eisenhower, the public slowly withdrew support when there were no "clear-cut military results."[31] Following that conflict, Eisenhower believed the Cold War would be fought for decades, so he capitalized on his military experience to employ long-term military budget planning and the public supported his plans.[32] Unfortunately, the Eisenhower approach was largely abandoned by Lyndon Johnson.[33]

During the initial escalation of the Vietnam War, Johnson assured the public that "no major tax or spending changes were necessary, calmly asserting that the conflict in Vietnam" would not affect domestic programs.[34] Instead of asking for shared sacrifice, Johnson aimed to keep the war as "painless and concealed as possible."[35] Ultimately, Johnson did not honestly disclose the costs of war and the public lost trust in his fiscal policies.[36] Taking a page from Johnson's script, Ronald Reagan assured the public that his "bold rearmament plan and equally bold tax cuts" could be accomplished with no real sacrifices from the citizenry.[37] Reagan managed this hat trick with significant deficit spending and, eventually, tax increases.[38] The Reagan legacy is notable for the unprecedented peacetime military build-up, but "Ronald Reagan did not see it as a time of peace."[39] Against this historical background, Hormats implies that George W. Bush has fashioned himself in the Reagan mold, but has actually mirrored Johnson.

In his analysis of Cold War military spending, Hormats meanders without developing a clear thesis. The lessons learned from this era, according to Hormats, are so pedestrian that they deviate from the more-cogent early chapters. For example, from the Korean War, Eisenhower "saw how the country turned away from supporting high military budgets when the conflict stalled."[40] This conclusion, that the public will stop supporting an unpopular war, is so self-evident that the lengthy historical summary seems superfluous. Similarly, historians should learn from Johnson the simple accounting principle that the budget cannot support robust social programs and a major armed conflict unless revenue is increased.[41] Hormats dismisses the real lessons from this era that Presidents routinely oppose necessary tax increases to bolster support for war. Each leader assesses the tipping point of the American people, determining when a shared sacrifice will become an unsupportable burden. This political balancing act would have made for a more interesting read.

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[28] *Id.* at 157.

[29] *Id.* at 173–250.

[30] The United States never formally declared war against North Korea; Truman labeled American intervention as a "police action." *Id.* at 184.

[31] *Id.* at 204.

[32] *Id.* at 205 (noting that Eisenhower "lectured his administration colleagues and members of Congress that defense budgets had to be structured for a decades-long war, not a relatively quick conflict.).

[33] *Id.* at 225–26.

[34] *Id.* at 209.

[35] *Id.* at 210 (quoting Johnson biographer Doris Kearns Goodwin).

[36] *Id.* at 225.

[37] *Id.* at 229–31. As Hormats succinctly writes, "Americans were especially willing to support the president's bold rearmament plan because they were not asked to endure higher taxes to pay for it." *Id*. at 231. Budgets were plagued by deficits, but Reagan deflected criticism with "wildly optimistic deficit projections." *Id*. at 236.

[38] *Id.* at 250.

[39] *Id*. at 227.

[40] *Id.* at 205.

[41] *Id*. at 225–26.

In the final chapter on George W. Bush, Hormats concludes that the administration often misled the country about the Iraq War by giving false short- and long-term estimates.[42] As examples, in Fall 2002, a White House official publicly estimated the war would cost between $100 and $200 billion; within days, the Office of Management and Budget (OMB) offered an estimate of $50 to $60 billion.[43] Then in September 2003, the administration sent Congress the first of several emergency supplemental bills, requesting an additional $87 billion for operations in Afghanistan and Iraq.[44] President Bush sent similar supplemental spending legislation to Congress in 2004, 2005, and 2006, often within weeks of sending normal annual budget requests.[45] Hormats criticizes this use of supplemental spending for expenditures that he believes the Department of Defense should have been able to reasonably predict, to include post-conflict operations in Iraq and Afghanistan.[46] Using parsed phrasing normally reserved for politicians, Hormats carefully notes, "Bush administration officials defended their approach, using arguments that earlier had caused the Johnson administration to lose its credibility."[47] In more precise terms, the administration used supplemental requests to fund operations in Iraq and Afghanistan without real Congressional oversight, creating faux emergencies that supposedly required immediate budget approval.[48] The Iraq Study Group criticized these supplemental appropriations for eroding "budget discipline and accountability."[49] Because the supplemental requests are generally not reviewed with the rest of the federal budget, Congress and the administration can avoid the tough budgetary choices (and attendant debate) that are supposed to ensure accountability.[50] While Hormats lays much of the blame for this economic shell game at the steps of the White House, he laments that Congress failed to create a "long-haul strategy" for taxes, discretionary spending, and entitlements, that would make more funding available for the military.[51] Ironically, during consideration of the 2005 supplemental spending bill, several senators claimed they would vote against future supplemental bills, only to approve them in the following two years.[52]

The Price of Liberty blossoms on the rare occasions that it tackles leadership. Hamilton believed a well-defined debt was a "national blessing" because it unified the country and Lincoln believed that war bonds made normal citizens shareholders in the Union's victory.[53] These fiscal policies should be one part of a larger plan to rally the nation behind a war and are missing in the war on terrorism. In a pointed critique of Bush, Hormats summarizes FDR's bitter disputes with Congress and

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[42] *Id.* at 263–64.

[43] *Id.* at 263 (noting that "White House economic advisor Lawrence Lindsey publicly estimated that a war with Iraq could cost roughly $100 billion to $200 billion," an estimate that Mitch Daniels, Director of the Office of Management and Budget dismissed as "very, very high" before offering his own prediction that "$50 billion to $60 billion was more likely"). Secretary of Defense Donald Rumsfeld publicly claimed the OMB estimate was "something under $50 billion," and went so far as to dismiss a question about a $300 billion estimate as "baloney." *Id*.

[44] *Id*. at 266. At the time, Congress was already reviewing a $400 billion defense bill. *Id*.

[45] *Id*.

[46] *Id*. at 266–67.

[47] *Id*. at 266.

[48] For example, an $82 billion emergency supplemental bill in 2005 included $5 billion for modularizing brigades, a program that was publicly announced in 2003. Jonathan Weisman & Shailagh Murray, *Congress Approves $82 Billion for Wars*, WASH. POST, May 11, 2005, at A1.

[49] HORMATS, *supra* note 1, at 267.

[50] *See generally* Weisman & Murray, *supra* note 48, at A1 ("Members of Congress complain that the emergency process denies lawmakers' oversight powers and keeps Iraq costs off the deficit projections for future years.").

[51] HORMATS, *supra* note 1, at 277–78.

[52] In 2005, Senator Chuck Hagel called the supplementals "dangerously irresponsible." Weisman & Murray, *supra* note 48, at A1. Senator John McCain similarly said: "We're more serious. We all know what's being done. There's greater and greater resistance." *Id*. *The Washington Post* even quoted an unnamed "senior GOP congressional aide" as saying the 2005 supplemental spending bill "is going to be the last one." *Id*. However, in 2006, Congress passed a $94 billion "emergency" supplemental appropriation to fund operations in Iraq and Afghanistan as well as relief projects related to Hurricane Katrina; the bill provided $65.8 billion for military operations and was immediately signed by the President. Robert Pear, *Bush Signs Spending Bill for Wars and Hurricanes*, N.Y. TIMES, June 16, 2006, at A24. Despite the rhetoric surrounding the 2005 supplemental bill, the Senate passed the 2006 bill by a vote of 98 to 1. *Id*. Senator McCain, though he voted for the 2006 bill, again criticized the use of supplemental spending measures: "'We are carving gigantic holes in the system. Since 2001, the administration has sought to fund the war operations almost entirely through emergency supplemental appropriations measures." *Id*. Senator John W. Warner, Chairman of the Armed Services Committee, echoed Senator McCain's sentiments, though he also voted for the supplemental, arguing: "It is now time for the administration to present these costs as part of the regular budgeting process." *Id.* Finally, in May 2007, Congress passed another emergency supplemental appropriation for Iraq and Afghanistan; the measure provided $96 billion for military operations and passed the House by a vote of 280 – 142 and the Senate by a vote of 80 – 14. *House Votes*, WASH. POST, May 31, 2007, at GZ19. By mid-2007, seven supplemental appropriations bills were passed by Congress to fund operations in Iraq and Afghanistan. Mark Udall, *Changing Course in Iraq*, DENV. POST, June 6, 2007, at B7.

[53] HORMATS, *supra* note 1, at 82.

adds that "there is no evidence that the president ever accused legislators of a lack of patriotism."[54] In the last four paragraphs of a short chapter on the Vietnam War, Hormats chastises Lyndon Johnson's "stubborn stance against tax increases," his "refusal to level with the American people" about the price of fighting the war while maintaining the Great Society, and his decision to issue "years of confusing budget numbers and cost underestimates."[55] The author concludes that this trifecta "destroyed congressional and public trust in the president and his fiscal policies."[56] Again, the parallel to Bush is unmistakable.

The leadership critique has been the subject of better books. I read *The Price of Liberty* just weeks after finishing Ron Suskind's markedly better *The Price of Loyalty: George W. Bush, the White House, and the Education of Paul O'Neill.*[57] Where *The Price of Liberty* often reads like a series of footnotes looking for text, the Suskind book paints a vivid picture of the decision-making process in the Bush White House, viewed by former Secretary of Treasury Paul O'Neill. In one passage, O'Neill recalls a lengthy economic working session with Bush and senior staff members.[58] Following a back-and-forth between the principals, O'Neill is shocked by the meeting's "haphazard, improvised quality, the way portentous issues had been raised and spun and tossed about, untethered by the weight of their consequences."[59] Hormats' book uses historical anecdotes to criticize the Bush administration for not making tough, unpopular decisions necessary to finance the war on terrorism,[60] but the O'Neill account concludes the current White House has a broken policy apparatus that fails to cogently consider options.[61] While both may be fair arguments, the current war is vastly different from both the Civil War and World War I, and the citizens governed by Bush are vastly different from those governed by Lincoln or Wilson.[62] It seems unfair to judge Bush against history when the war waged against a hidden enemy instead of another nation and the times are so different.

In his attempt to pull the stray administration into the fold, Hormats offers a series of solutions to funding the War on Terror. Unfortunately, the solutions are too vague for a reader to reasonably gauge them.[63] Even if these solutions could be measured, *The Price of Liberty* fails to account for the political realities that cause presidents to claim the country can afford "guns and butter alike."[64] Without assessing the political consequences of his proposals, Hormats fails to present a complete

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[54] *Id.* at 171.

[55] *Id.* at 225.

[56] *Id.*

[57] RON SUSKIND, THE PRICE OF LOYALTY: GEORGE W. BUSH, THE WHITE HOUSE, AND THE EDUCATION OF PAUL O'NEILL (2004) (summarizing Paul O'Neill's two-year tenure as Treasury Secretary, including several closed-door planning sessions between O'Neill and Bush).

[58] *Id*. at 295–306.

[59] *Id*. at 306. *See also id.* at 44 ("Without a process that included strongly positioned honest brokers and a rigorous, disinterested vetting of various proposals, O'Neill said, 'all you've got are kids rolling around on the lawn.'").

[60] In his introduction, Hormats examines Bush's policy during this "war on terrorism" and asserts that the administration's financial decisions during the war have been a "substantial departure from past practices," particularly the decision to adopt a "wave of nonsecurity-related spending, including billions of dollars for items of low national priority." HORMATS, *supra* note 1, at xviii.

[61] SUSKIND, *supra* note 57, at 97 ("It was a broken process, O'Neill thought, or rather no process at all; there seemed to be no apparatus to assess policy and deliberate effectively, to create coherent governance."). John DiIulio, former head of the Bush Administration's Faith-based Initiative, similarly provided a 3,000-word memorandum to a reporter "articulating his concerns that the administration lacked even the most basic policy apparatus." *Id*. at 322.

[62] R. Randall Kelso, *Narcissism, Generation X, the Corporate Elite, and the Religious Right Within the Modern Republican Party: A Set of "Friendly" Observations for President Bush*, 24 CARDOZO L. REV. 1971, 1982–83 (2003) (noting that Generation X is made up of individuals born from 1961 to 1981 who generally "have short attention spans, want immediate gratification, and want information packaged easily for them and presented in a spoon-fed manner," traits that are "typical of children who have never grown up"). *But see* Bryan G. Stewart, *Generation X at War*, ORLANDO SENTINEL, Apr. 26, 2003 ("I am proud to be a member of Generation X, which is sometimes described as those born between 1965 and 1980. . . . As the war progresses in Afghanistan and Iraq, I have seen the acts of my chronological peers, and they are not acts of self-indulgence. They are acts of bravery, determination, and sacrifice."); Thomas L. Friedman, *Generation Awaits Call to Greatness*, BALTIMORE SUN, Dec. 12, 2001, at 27A ("There is a deep hunger in America post-Sept. 11 in many people who feel this is their war in their back yard, and they would like to be summoned by the president to do something more than go shopping."). In the month following the September 11th attacks, Bush "urge[d] Americans to go shopping, get on an airplane–in effect, to live normal lives." *Washington's Mixed Message*, N.Y. POST, Oct. 12, 2001, at 36. In December 2006, five years after the attacks, President Bush echoed these comments in prepared remarks at a press conference, saying to the American people, "I encourage you all to go shopping more," while also saying "this war on terror is the calling of a new generation." Dana Milbank, *Having a Loud Microphone, With Not Much to Say*, WASH. POST, Dec. 21, 2006, at A2.

[63] *See* HORMATS, *supra* note 1, at 294 ("[T]he Pentagon will have to constantly reallocate resources to meet fundamental priorities"); *id*. at 288 ("Unless mandatory payments are reined in . . . America's defense and homeland security expenses, will be squeezed.").

[64] Biographer Doris Kearns Goodwin wrote that Johnson, during Vietnam, "flatly refused to consider a tax increase, sticking to his initial position that the American nation could afford guns and butter alike." *Id.* at 210.

proposal for fiscal change. The widespread use of emergency supplemental appropriations to fund military operations may be one of the most important fiscal issues of the day, but Hormats does not address the quid pro quo relationship between Congress and the White House that sustains emergency spending bills.[65] For a book so entrenched in the details and history of fiscal decision making, the short shrift given to actually fixing current fiscal problems is glaring.

The Price of Liberty is a dense and challenging book that ultimately rewards the reader who can work through it. Fiscal issues, particularly during armed conflicts, are not glamorous but they are vitally important. The way the United States funds a war is not only important for victory but also a reflection of the nation's values. In describing fiscal hardships from prior conflicts, Hormats extols the simple virtues of conservative spending and shared national sacrifice, suggesting that those are the values that should define our nation. In many ways, *The Price of Liberty* is a guide for future shepherds. Its historical lessons prove that real leaders can steer a flock down the right path, even if the path is difficult. The only open question is whether we have shepherds willing to accept the challenge of moving the flock in the right direction.

[65] The supplemental appropriations for Iraq and Afghanistan routinely include unrelated (and costly) spending. For example, the Senate attempted to add the following to the 2006 supplemental: "$4 billion for agricultural subsidies, $1.1 billion for the Gulf Coast fishing industry, $594 million for highway projects unrelated to Hurricane Katrina, and $700 million for rerouting a rail line in Mississippi." Jonathan Weisman, *Unrelated Items Part of Iraq Bills Since War Began*, WASH. POST, Apr. 4, 2007, at A3. In that same bill, Bush requested "$2.3 billion for bird flu preparations" as well as "$2 billion to fortify the border with Mexico and pay for his effort to send National Guardsmen to the southern frontier." *Id*. The president and members of Congress benefit from the lack of accountability and urgency of these supplemental appropriations, so they will likely continue. *See id*. ("[I]n almost all cases over the past four years, special-interest funding provisions have been the fruits of congressional opportunism by well-placed senators or House members grabbing what they could for their constituents on the one bill that had to be passed quickly.").

CLE News

1. Resident Course Quotas

a. Attendance at resident continuing legal education (CLE) courses at The Judge Advocate General's Legal Center and School, U.S. Army (TJAGLCS), is restricted to students who have confirmed reservations. Reservations for TJAGSA CLE courses are managed by the Army Training Requirements and Resources System (ATRRS), the Army-wide automated training system. If you do not have a confirmed reservation in ATRRS, attendance is prohibited.

b. Active duty service members and civilian employees must obtain reservations through their directorates training office. Reservists or ARNG must obtain reservations through their unit training offices or, if they are non-unit reservists, through the U.S. Army Personnel Center (ARPERCOM), ATTN: ARPC-OPB, 1 Reserve Way, St. Louis, MO 63132-5200.

c. Questions regarding courses should be directed first through the local ATRRS Quota Manager or the ATRRS School Manager, Academic Department at 1 (800) 552-3978, extension 3307.

d. The ATTRS Individual Student Record is available on-line. To verify a confirmed reservation, log into your individual AKO account and follow these instructions:

> Go to Self Service, My Education. Scroll to Globe Icon (not the AARTS Transcript Services). Go to ATTRS On-line, Student Menu, Individual Training Record. The training record with reservations and completions will be visible.
>
> If you do not see a particular entry for a course that you are registered for or have completed, see your local ATTRS Quota Manager or Training Coordinator for an update or correction.

e. The Judge Advocate General's School, U.S. Army, is an approved sponsor of CLE courses in all states that require mandatory continuing legal education. These states include: AL, AR, AZ, CA, CO, CT, DE, FL, GA, ID, IN, IA, KS, KY, LA, ME, MN, MS, MO, MT, NV, NH, NM, NY, NC, ND, OH, OK, OR, PA, RI, SC, TN, TX, UT, VT, VA, WA, WV, WI, and WY.

2. TJAGLCS CLE Course Schedule (June 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)	176th JAOBC/BOLC III	18 Jul – 1 Oct 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-F52	38th Staff Judge Advocate Course	2 – 6 Jun 08
5F-F52S	11th SJA Team Leadership Course	2 – 4 Jun 08
JARC-181	2008 JA Professional Recruiting Conference	15 – 18 Jul 08

	NCO ACADEMY COURSES	
600-BNCOC	4th BNCOC Common Core	8 – 29 May 08

600-BNCOC	5th BNCOC Common Core	4 – 22 Aug 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)	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
ENLISTED COURSES		
512-27DC5	26th Court Reporter Course	21 Apr – 20 Jun 08
512-27DC5	27th Court Reporter Course	28 Jul – 26 Sep 08
512-27DCSP	17th Senior Paralegal Course	16 – 20 Jun 08

ADMINISTRATIVE AND CIVIL LAW		
5F-F24E	2008 USAREUR Administrative Law CLE	15 – 19 Sep 08
5F-F29	26th Federal Litigation Course	4 – 8 Aug 08
CONTRACT AND FISCAL LAW		
5F-F10	160th Contract Attorneys Course	21 Jul – 1 Aug 08
5F-F101	2008 Procurement Fraud Course	26 – 30 May 08
5F-F12	78th Fiscal Law Course	28 Apr – 2 May 08
CRIMINAL LAW		
5F-F33	51st Military Judge Course	21 Apr – 9 May 08
5F-F34	30th Criminal Law Advocacy Course	8 – 19 Sep 08

INTERNATIONAL AND OPERATIONAL LAW		
5F-F41	4th Intelligence Law Course	23 – 27 Jun 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-F47	50th Operational Law Course	28 Jul – 8 Aug 08
5F-F48	1st Rule of Law Course	9 – 13 Jun 08

3. Naval Justice School and FY 2008 Course Schedule

For information on the following courses, please contact Jerry Gallant, Registrar, Naval Justice School, 360 Elliot Street, Newport, RI 02841 at (401) 841-3807, extension 131.

Naval Justice School Newport, RI		
CDP	**Course Title**	**Dates**
BOLT	BOLT (030) BOLT (030)	4 – 8 Aug 08 (USMC) 4 – 8 Aug 08 (USN)
900B	Reserve Lawyer Course (020)	22 – 26 Sep 08
850T	SJA/E-Law Course (010) SJA/E-Law Course (020)	12 – 23 May 08 28 Jul – 8 Aug 08
850V	Law of Military Operations (010)	16 – 27 Jun 08
4044	Joint Operational Law Training (010)	21 – 24 Jul 08
0258	Senior Officer (040) Senior Officer (050) Senior Officer (060) Senior Officer (070)	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
748A	Law of Naval Operations (020)	15 – 19 Sep 08
748K	USMC Trial Advocacy Training (020) USMC Trial Advocacy Training (030) USMC Trial Advocacy Training (040)	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)
961J	Defending Complex Cases (010)	18 – 22 Aug 08
525N	Prosecuting Complex Cases (010)	11 – 15 Aug 08
2622	Senior Officer (Fleet) (070) Senior Officer (Fleet) (080) Senior Officer (Fleet) (090) Senior Officer (Fleet) (100) Senior Officer (Fleet) (110)	9 – 13 Jun 08 (Pensacola) 16 – 20 Jun 08 (Quantico) 23 – 27 Jun 08 (Camp Lejeune) 14 – 18 Jul 08 (Pensacola) 11 – 15 Aug 08 (Pensacola)
03RF	Legalman Accession Course (030)	9 Jun – 22 Aug 08
846L	Senior Legalman Leadership Course (010)	18 – 22 Aug 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 (020)	5 – 16 May 08
4040	Paralegal Research & Writing (020) Paralegal Research & Writing (030)	16 – 27 Jun 08 (Norfolk) 14 – 25 Jul 08 (San Diego)
4046	SJA Legalman (020)	12 – 23 May 08 (Norfolk)
627S	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)	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 (050) Legal Officer Course (060) Legal Officer Course (070) Legal Officer Course (080)	28 Apr – 16 May 08 2 – 20 Jun 08 7 – 25 Jul 08 8 – 26 Sep 08
	Legal Clerk Course (060) Legal Clerk Course (070)	7 – 18 Jul 08 8 – 19 Sep 08
3760	Senior Officer Course (050) Senior Officer Course (060) Senior Officer Course (070)	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 (050) Legal Officer Course (060) Legal Officer Course (070) Legal Officer Course (080)	5 – 23 May 08 9 – 27 Jun 08 28 Jul – 15 Aug 08 8 – 26 Sep 08

947J	Legal Clerk Course (050) Legal Clerk Course (060) Legal Clerk Course (070) Legal Clerk Course (080)	5 – 16 May 08 9 – 20 Jun 08 28 Jul – 8 Aug 08 8 – 18 Sep 08

3759	Senior Officer Course (070) Senior Officer Course (080)	2 – 6 Jun 08 (San Diego) 25 – 29 Aug 08 (Pendleton)

4. Air Force Judge Advocate General School Fiscal Year 2008 Course Schedule

For information about attending the following courses, 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.

Air Force Judge Advocate General School, Maxwell AFB, AL	
Course Title	**Dates**
Paralegal Apprentice Course, Class 08-04	15 Apr – 3 Jun 08
Operations Law Course, Class 08-A	12 – 22 May 08
Negotiation and Appropriate Dispute Resolution Course, Class 08-A	19 – 23 May 08
Environmental Law Update Course (DL), Class 08-A	28 – 30 May 08
Reserve Forces Paralegal Course, Class 08-B	2 – 13 Jun 08
Paralegal Apprentice Course, Class 08-05	4 Jun – 23 Jul 08
Legal Assistance Course 2 (Estate Planning) (Dayton, OH)	9 – 13 Jun 08
Senior Reserve Forces Paralegal Course, Class 08-A	9 – 13 Jun 08
Staff Judge Advocate Course, Class 08-A	16 – 27 Jun 08
Law Office Management Course, Class 08-A	16 – 27 Jun 08
Legal Assistance Course 3 (Family Law), Class 08-C (Montgomery, AL)	7 – 11 Jul 08
Judge Advocate Staff Officer Course, Class 08-C	14 Jul – 12 Sep 08
Legal Assistance 4 (Family Law), Class 08-D (Dayton, OH)	21 – 25 Jul 08
Paralegal Apprentice Course, Class 08-06	29 Jul – 16 Sep 08
Paralegal Craftsman Course, Class 08-03	31 Jul – 11 Sep 08
Trial & Defense Advocacy Course, Class 08-B	15 – 26 Sep 08

5. Civilian-Sponsored CLE Courses

For additional information on civilian courses in your area, please contact one of the institutions listed below:

AAJE: American Academy of Judicial Education
P.O. Box 728
University, MS 38677-0728
(662) 915-1225

ABA: American Bar Association
750 North Lake Shore Drive
Chicago, IL 60611
(312) 988-6200

AGACL:	Association of Government Attorneys in Capital Litigation Arizona Attorney General's Office ATTN: Jan Dyer 1275 West Washington Phoenix, AZ 85007 (602) 542-8552
ALIABA:	American Law Institute-American Bar Association Committee on Continuing Professional Education 4025 Chestnut Street Philadelphia, PA 19104-3099 (800) CLE-NEWS or (215) 243-1600
APRI	American Prosecutors Research Institute 99 Canal Center Plaza, Suite 510 Alexandria, VA 22313 (703) 549-9222
ASLM:	American Society of Law and Medicine Boston University School of Law 765 Commonwealth Avenue Boston, MA 02215 (617) 262-4990
CCEB:	Continuing Education of the Bar University of California Extension 2300 Shattuck Avenue Berkeley, CA 94704 (510) 642-3973
CLA:	Computer Law Association, Inc. 3028 Javier Road, Suite 500E Fairfax, VA 22031 (703) 560-7747
CLESN:	CLE Satellite Network 920 Spring Street Springfield, IL 62704 (217) 525-0744 (800) 521-8662
ESI:	Educational Services Institute 5201 Leesburg Pike, Suite 600 Falls Church, VA 22041-3202 (703) 379-2900
FBA:	Federal Bar Association 1815 H Street, NW, Suite 408 Washington, DC 20006-3697 (202) 638-0252
FB:	Florida Bar 650 Apalachee Parkway Tallahassee, FL 32399-2300 (850) 561-5600

GICLE:	The Institute of Continuing Legal Education P.O. Box 1885 Athens, GA 30603 (706) 369-5664
GII:	Government Institutes, Inc. 966 Hungerford Drive, Suite 24 Rockville, MD 20850 (301) 251-9250
GWU:	Government Contracts Program The George Washington University National Law Center 2020 K Street, NW, Room 2107 Washington, DC 20052 (202) 994-5272
IICLE:	Illinois Institute for CLE 2395 W. Jefferson Street Springfield, IL 62702 (217) 787-2080
LRP:	LRP Publications 1555 King Street, Suite 200 Alexandria, VA 22314 (703) 684-0510 (800) 727-1227
LSU:	Louisiana State University Center on Continuing Professional Development Paul M. Herbert Law Center Baton Rouge, LA 70803-1000 (504) 388-5837
MLI:	Medi-Legal Institute 15301 Ventura Boulevard, Suite 300 Sherman Oaks, CA 91403 (800) 443-0100
NCDA:	National College of District Attorneys University of South Carolina 1600 Hampton Street, Suite 414 Columbia, SC 29208 (803) 705-5095
NDAA	National District Attorneys Association National Advocacy Center 1620 Pendleton Street Columbia, SC 29201 ((703) 549-9222
NITA:	National Institute for Trial Advocacy 1507 Energy Park Drive St. Paul, MN 55108 (612) 644-0323 in (MN and AK) (800) 225-6482

NJC:	National Judicial College Judicial College Building University of Nevada Reno, NV 89557
NMTLA:	New Mexico Trial Lawyers' Association P.O. Box 301 Albuquerque, NM 87103 (505) 243-6003
PBI:	Pennsylvania Bar Institute 104 South Street P.O. Box 1027 Harrisburg, PA 17108-1027 (717) 233-5774 (800) 932-4637
PLI:	Practicing Law Institute 810 Seventh Avenue New York, NY 10019 (212) 765-5700
TBA:	Tennessee Bar Association 3622 West End Avenue Nashville, TN 37205 (615) 383-7421
TLS:	Tulane Law School Tulane University CLE 8200 Hampson Avenue, Suite 300 New Orleans, LA 70118 (504) 865-5900
UMLC:	University of Miami Law Center P.O. Box 248087 Coral Gables, FL 33124 (305) 284-4762
UT:	The University of Texas School of Law Office of Continuing Legal Education 727 East 26th Street Austin, TX 78705-9968
VCLE:	University of Virginia School of Law Trial Advocacy Institute P.O. Box 4468 Charlottesville, VA 22905

6. Phase I (Non-Resident Phase), Deadline for RC-JAOAC 2009

The suspense for submission of all RC-JAOAC Phase I (Non-Resident Phase) materials is ***NLT 2400, 1 November 2008***, for those Judge Advocates who desire to attend Phase II (Resident Phase) at TJAGLCS in January 2009. This requirement includes submission of all writing exercises, whether completed under the old JA 151, Fundamentals of Military Writing subcourse, or under the new JAOAC Distributed Learning military writing subcourse. Please note that registration for Phase I through the Army Institute for Professional Development (AIPD) is now *closed* to facilitate transition to the new JAOAC (Phase I) on JAG University, the online home of TJAGLCS located at https://jag.learn.army.mil. The new course is expected to be open for registration on 1 April 2008.

The suspense for submission of all RC-JAOAC Phase I (Non-Resident Phase) materials is ***NLT 2400, 1 November 2008***, for those Judge Advocates who desire to attend Phase II (Resident Phase) at TJAGLCS in January 2009. Please note that registration for Phase I through the Army Institute for Professional Development (AIPD) is now *closed* to facilitate transition to the new JAOAC (Phase I) on JAG Universiry. The new course is expected to be open for registration on 1 April 2008. This requirement includes submission of all writing exercises, whether completed under the old JA 151, Fundamentals of Military Writing subcourse, or under the new JAOAC Distributed Learning military writing subcourse.

This requirement is particularly critical for some officers. The 2009 JAOAC will be held in January 2009, and is a prerequisite for most Judge Advocate captains to be promoted to major, and, ultimately, to be eligible to enroll in Intermediate-Level Education (ILE).

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 Distributed Learning Department, TJAGLCS for grading by the same deadline (1 November 2008). If the student receives notice of the need to re-do any examination or exercise after 1 October 2008, the notice will contain a suspense date for completion of the work.

Judge Advocates who fail to complete Phase I Non-Resident courses and writing exercises by 1 November 2008 will not be cleared to attend the 2009 JAOAC resident phase. If you have not received written notification of completion of Phase I of JAOAC, you are not eligible to attend the resident phase.

If you have any additional questions, contact LTC Jeff Sexton, commercial telephone (434) 971-3357, or e-mail jeffrey.sexton@hqda.army.mil

7. Mandatory Continuing Legal Education

Judge Advocates must remain in good standing with the state attorney licensing authority (i.e., bar or court) in at least one state in order to remain certified to perform the duties of an Army Judge Advocate. This individual responsibility may include requirements the licensing state has regarding continuing legal education (CLE).

To assist attorneys in understanding and meeting individual state requirements regarding CLE, the Continuing Legal Education Regulators Association (formerly the Organization of Regulatory Administrators) provides an exceptional website at www.clereg.org (formerly www.cleusa.org) that links to all state rules, regulations and requirements for Mandatory Continuing Legal Education.

The Judge Advocate General's Legal Center and School (TJAGLCS) seeks approval of all courses taught in Charlottesville, VA, from states that require prior approval as a condition of granting CLE. For states that require attendance to be reported directly by providers/sponsors, TJAGLCS will report student attendance at those courses. For states that require attorneys to self-report, TJAGLCS provides the appropriate documentation of course attendance directly to students. Attendance at courses taught by TJAGLCS faculty at locations other than Charlottesville, VA, must be self-reported by attendees to the extent and manner provided by their individual state CLE program offices.

Regardless of how course attendance is documented, it is the personal responsibility of each Judge Advocate to ensure that their attendance at TJAGLCS courses is accounted for and credited to them and that state CLE attendance and reporting requirements are being met. While TJAGLCS endeavors to assist Judge Advocates in meeting their CLE requirements, the ultimate responsibility remains with individual attorneys. This policy is consistent with state licensing authorities and CLE administrators who hold individual attorneys licensed in their jurisdiction responsible for meeting licensing requirements, including attendance at and reporting of any CLE obligation.

Please contact the TJAGLCS CLE Administrator at (434) 971-3309 if you have questions or require additional information.

1. The Judge Advocate General's School, U.S. Army (TJAGLCS) Materials Available Through The Defense Technical Information Center (DTIC).

Each year, TJAGSA publishes deskbooks and materials to support resident course instruction. Much of this material is useful to judge advocates and government civilian attorneys who are unable to attend courses in their practice areas, and TJAGSA receives many requests each year for these materials. Because the distribution of these materials is not in its mission, TJAGSA does not have the resources to provide these publications.

To provide another avenue of availability, some of this material is available through the Defense Technical Information Center (DTIC). An office may obtain this material through the installation library. Most libraries are DTIC users and would be happy to identify and order requested material. If the library is not registered with the DTIC, the requesting person's office/organization may register for the DTIC's services.

If only unclassified information is required, simply call the DTIC Registration Branch and register over the phone at (703) 767-8273, DSN 427-8273. If access to classified information is needed, then a registration form must be obtained, completed, and sent to the Defense Technical Information Center, 8725 John J. Kingman Road, Suite 0944, Fort Belvoir, Virginia 22060-6218; telephone (commercial) (703) 767-8273, (DSN) 427-8273, toll-free 1-800-225-DTIC, menu selection 2, option 1; fax (commercial) (703) 767-8228; fax (DSN) 426-8228; or e-mail to reghelp@dtic.mil.

If there is a recurring need for information on a particular subject, the requesting person may want to subscribe to the Current Awareness Bibliography (CAB) Service. The CAB is a profile-based product, which will alert the requestor, on a biweekly basis, to the documents that have been entered into the Technical Reports Database which meet his profile parameters. This bibliography is available electronically via e-mail at no cost or in hard copy at an annual cost of $25 per profile. Contact DTIC at www.dtic.mil/dtic/current.html.

Prices for the reports fall into one of the following four categories, depending on the number of pages: $7, $12, $42, and $122. The DTIC also supplies reports in electronic formats. Prices may be subject to change at any time. Lawyers, however, who need specific documents for a case may obtain them at no cost.

For the products and services requested, one may pay either by establishing a DTIC deposit account with the National Technical Information Service (NTIS) or by using a VISA, MasterCard, or American Express credit card. Information on establishing an NTIS credit card will be included in the user packet.

There is also a DTIC Home Page at http://www.dtic.mil to browse through the listing of citations to unclassified/unlimited documents that have been entered into the Technical Reports Database within the last twenty-five years to get a better idea of the type of information that is available. The complete collection includes limited and classified documents as well, but those are not available on the web.

Those who wish to receive more information about the DTIC or have any questions should call the Product and Services Branch at (703)767-8267, (DSN) 427-8267, or toll-free 1-800-225-DTIC, menu selection 6, option 1; or send an e-mail to bcorders@dtic.mil.

Contract Law

AD A301096	Government Contract Law Deskbook, vol. 1, JA-501-1-95.
AD A301095	Government Contract Law Desk book, vol. 2, JA-501-2-95.
AD A265777	Fiscal Law Course Deskbook, JA-506-93.

Legal Assistance

A384333	Servicemembers Civil Relief Act Guide, JA-260 (2006).
AD A333321	Real Property Guide—Legal Assistance, JA-261 (1997).
AD A326002	Wills Guide, JA-262 (1997).
AD A346757	Family Law Guide, JA 263 (1998).
AD A384376	Consumer Law Deskbook, JA 265 (2004).
AD A372624	Legal Assistance Worldwide Directory, JA-267 (1999).
AD A360700	Tax Information Series, JA 269 (2002).
AD A350513	Uniformed Services Employment and Reemployment Rights Act (USAERRA), JA 270, Vol. I (2006).

AD A350514 Uniformed Services Employment and Reemployment Rights Act (USAERRA), JA 270, Vol. II (2006).

AD A329216 Legal Assistance Office Administration Guide, JA 271 (1997).

AD A276984 Legal Assistance Deployment Guide, JA-272 (1994).

AD A452505 Uniformed Services Former Spouses' Protection Act, JA 274 (2005).

AD A326316 Model Income Tax Assistance Guide, JA 275 (2001).

AD A282033 Preventive Law, JA-276 (1994).

Administrative and Civil Law

AD A351829 Defensive Federal Litigation, JA-200 (2000).

AD A327379 Military Personnel Law, JA 215 (1997).

AD A255346 Financial Liability Investigations and Line of Duty Determinations, JA-231 (2005).

AD A452516 Environmental Law Deskbook, JA-234 (2006).

AD A377491 Government Information Practices, JA-235 (2000).

AD A377563 Federal Tort Claims Act, JA 241 (2000).

AD A332865 AR 15-6 Investigations, JA-281 (1998).

Labor Law

AD A360707 The Law of Federal Employment, JA-210 (2000).

AD A360707 The Law of Federal Labor-Management Relations, JA-211 (2001).

Criminal Law

AD A302672 Unauthorized Absences Programmed Text, JA-301 (2003).

AD A302674 Crimes and Defenses Deskbook, JA-337 (2005).

AD A274413 United States Attorney Prosecutions, JA-338 (1994).

International and Operational Law

AD A377522 Operational Law Handbook, JA-422 (2005).

* Indicates new publication or revised edition.
** Indicates new publication or revised edition pending inclusion in the DTIC database.

2. The Legal Automation Army-Wide Systems XXI—JAGCNet

a. The Legal Automation Army-Wide Systems XXI (LAAWS XXI) operates a knowledge management and information service called JAGCNet primarily dedicated to servicing the Army legal community, but also provides for Department of Defense (DOD) access in some cases. Whether you have Army access or DOD-wide access, all users will be able to download TJAGSA publications that are available through the JAGCNet.

b. Access to the JAGCNet:

(1) Access to JAGCNet is restricted to registered users who have been approved by the LAAWS XXI Office and senior OTJAG staff:

(a) Active U.S. Army JAG Corps personnel;

(b) Reserve and National Guard U.S. Army JAG Corps personnel;

(c) Civilian employees (U.S. Army) JAG Corps personnel;

(d) FLEP students;

(e) Affiliated (U.S. Navy, U.S. Marine Corps, U.S. Air Force, U.S. Coast Guard) DOD personnel assigned to a branch of the JAG Corps; and, other personnel within the DOD legal community.

(2) Requests for exceptions to the access policy should be e-mailed to:

LAAWSXXI@jagc-smtp.army.mil

c. How to log on to JAGCNet:

(1) Using a Web browser (Internet Explorer 6 or higher recommended) go to the following site: http://jagcnet.army.mil.

(2) Follow the link that reads "Enter JAGCNet."

(3) If you already have a JAGCNet account, and know your user name and password, select "Enter" from the next menu, then enter your "User Name" and "Password" in the appropriate fields.

(4) If you have a JAGCNet account, *but do not know your user name and/or Internet password*, contact the LAAWS XXI HelpDesk at LAAWSXXI@jagc-smtp.army.mil.

(5) If you do not have a JAGCNet account, select "Register" from the JAGCNet Intranet menu.

(6) Follow the link "Request a New Account" at the bottom of the page, and fill out the registration form completely. Allow seventy-two hours for your request to process. Once your request is processed, you will receive an e-mail telling you that your request has been approved or denied.

(7) Once granted access to JAGCNet, follow step (c), above.

3. TJAGSA Publications Available Through the LAAWS XXI JAGCNet

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. t 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.

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4. TJAGLCS Legal Technology Management Office (LTMO)

The TJAGLCS, U.S. Army, Charlottesville, Virginia continues to improve capabilities for faculty and staff. We have installed new computers throughout TJAGLCS, all of which are compatible with Microsoft Windows XP Professional and Microsoft Office 2003 Professional.

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5. The Army Law Library Service

Per *Army Regulation 27-1*, paragraph 12-11, the Army Law Library Service (ALLS) must be notified before any redistribution of ALLS-purchased law library materials. Posting such a notification in the ALLS FORUM of JAGCNet satisfies this regulatory requirement as well as alerting other librarians that excess materials are available.

Point of contact is Mr. Daniel C. Lavering, The Judge Advocate General's Legal Center and School, U.S. Army, ATTN: ALCS-ADD-LB, 600 Massie Road, Charlottesville, Virginia 22903-1781. Telephone DSN: 521-3306, commercial: (434) 971-3306, or e-mail at Daniel.C.Lavering@us.army.mil.

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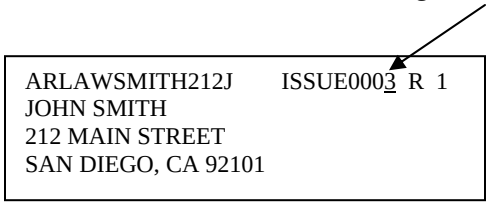

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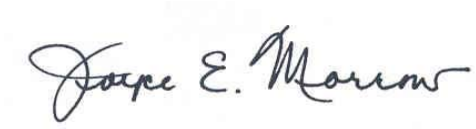

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