

Foreword

*Lieutenant Colonel Patricia A. Ham
Professor and Chair, Criminal Law Department
The Judge Advocate General's School, U.S. Army
Charlottesville, Virginia*

Welcome to the tenth annual *Military Justice Symposium* covering developments in military criminal law and procedure.¹ In this *Symposium*, faculty of the Criminal Law Department and a member of the U.S. Army Trial Judiciary analyze significant case law in military justice from the last year. Our goal is not to cover every case the service courts of criminal appeals and the Court of Appeals for the Armed Forces (CAAF) decided in the last twelve months. Rather, we seek to discuss significant issues raised in this year's cases, identify emerging trends, place these latest decisions in legal and, where relevant, historical context, and provide useful tips to military practitioners who employ the courts' decisions in practice, whether representing the government or the accused, at trial or appeal.

As in most past years, the *Symposium* is divided into two issues. This first volume covers developments in Evidence, Instructions, Fourth Amendment, and Sixth Amendment law. The second volume, set for publication next month, covers developments in Unlawful Command Influence, Pretrial Procedures (including court-martial personnel, *voir dire* and challenges, and pleas and pretrial agreements), Substantive Crimes and Defenses, Professional Responsibility, Sentencing, and Fifth Amendment law. The second volume also contains a primer in post-trial processing by a former criminal law faculty member.

As a preview to this year's *Symposium*, the following outlines the highlights of the articles in the faculty's respective areas:

Major (MAJ) Chris Behan writes on developments in Evidence in Volume I of the Symposium. The 2004 term of court presented several interesting evidentiary issues. The CAAF demonstrated continued difficulty in applying the corroboration rule for confessions of Military Rule of Evidence (MRE) 304(g) in *United States v. Seay*,² stretching the rule to permit corroboration of an offense for which no actual extrinsic evidence was admitted. In *United States v. McDonald*,³ the CAAF continued its trend of strictly construing uncharged misconduct evidence, reversing and setting aside the findings in an uncharged misconduct case for the second year in a row. The CAAF clarified the scope of MRE 412's coverage in *United States v. Banker*, holding that the key to MRE 412 is the presence and status of the victim and not whether the alleged sexual misconduct can be characterized as consensual or nonconsensual.⁴ In *United States v. Schmidt*, a case made relevant to contemporary practice because of the Global War on Terror's potential for courts-martial involving classified evidence, the CAAF harmonized MRE 505's disclosure requirements with the needs of the attorney-client relationship.⁵ In addition to these cases, the CAAF faced an evidentiary issue of first impression in *United States v. Byrd*, ruling on the foundational requirements for the use of lay opinion testimony under MRE 701 to interpret statements made by others.⁶

Also in Volume I is Lieutenant Colonel (Lt.Col.) Ernie Harper's final article for the *Symposium* prior to departing the Judge Advocate General's School for other duties. Lieutenant Colonel Harper (USMC) discusses developments in Fourth Amendment law, addressing seven Supreme Court opinions and ten military cases. At least two cases from the Supreme Court have reasonably widespread effect—*Devenpeck v. Alford*⁷ and *Thornton v. United States*⁸—in which the Court deals with warrantless arrests and searches incident to arrest and automobiles, respectively. The Court also upheld Nevada's "Stop

¹ Colonel Larry Morris, Chair of the Criminal Law Department from 1995-98, originated these *Symposia* in March 1996. In his *Foreword* to the second consecutive Military Justice Symposium in April 1997, Lieutenant Colonel Morris hesitated to affix the label "annual" to this endeavor. Lieutenant Colonel Lawrence J. Morris, *Foreword - Military Justice Symposium*, ARMY LAW., Apr. 1997, at 4. After a decade, we no longer harbor his hesitation.

² 60 M.J. 73 (2004).

³ 59 M.J. 426 (2004).

⁴ 60 M.J. 216 (2004).

⁵ 60 M.J. 1 (2004).

⁶ 60 M.J. 4 (2004).

⁷ 125 S. Ct. 88 (2004).

⁸ 541 U.S. 615 (2004).

and Identification” statute in *Hiibel v. Sixth Judicial Circuit*.⁹ *Illinois v. Caballes*,¹⁰ another Supreme Court case, addresses traffic stops and dog sniffs. As to CAAF, the most significant case is *United States v. Daniels*, in which the court reverses the Navy-Marine Court of Criminal Appeals (N-MCCA) regarding the official status of a search, holding that the motivation of the person performing the search is not the relevant inquiry.¹¹

Last term, the Supreme Court issued a bomb-shell decision concerning the Sixth Amendment Confrontation Clause in *Crawford v. Washington*.¹² Overruling twenty-five years of law in the area, the Court prohibited the use of a witness’ “testimonial” hearsay statements against a criminal defendant in the absence of the witness’ availability at trial or, if the witness is deemed unavailable, the defendant’s prior ability to confront the witness.¹³ Major Rob Best discusses state and federal courts’ interpretations of this seminal case, along with scholarly views of the decision. According to Major Best, the text of the Confrontation Clause supports a broader definition of “testimonial” than offered by the *Crawford* majority. Specifically, the *Crawford* majority’s definition of “testimonial” seems to require some element of officiality. In Major Best’s view, however, “testimonial” includes any accusatory statement and the Court’s limitation on the reach of the Confrontation Clause to formalized, official statements made for judicial purposes, is without support in the text of the Clause.

Next month in Volume II, I discuss developments in Unlawful Command Influence.. The most important decision of the year is undoubtedly *United States v. Gore*,¹⁴ a CAAF opinion upholding the military judge’s dismissal of the charges and specifications with prejudice due to witness intimidation by the chain of command. By its decision, the CAAF reinvigorates the role of the Military Judge as the “last sentinel to protect the court-martial from unlawful command influence.”¹⁵

Major Deidra Fleming addresses developments in pretrial procedures. The most notable decision in the area of court-martial personnel involves the CAAF’s refusal to use its supervisory powers to overhaul panel member selection under Article 25, Uniform Code of Military Justice,¹⁶ if the selection process is inclusive, the convening authority’s motive is proper, and the selection complies with Article 25’s “best qualified” criteria.¹⁷ In the area of *voir dire* and challenges, the CAAF and the N-MCCA, which usually review the propriety of a denied defense challenge for cause, focused on a new factual twist—whether a military judge abused his discretion by granting a government challenge for cause based on a member’s sentencing philosophy.¹⁸ In the pleas and pre-trial agreements arena, the appellate courts continued to reverse numerous findings and sentences because of lack of attention to detail by military judges and counsel. Prevalent guilty plea errors include: the failure to advise the accused of his rights, failure to advise the accused of the elements of the offense, failure to establish a factual predicate for the accused’s plea, and failure to clarify a potential defense raised by the accused’s statements.¹⁹

Also in Volume II, MAJ Jeff Hagler addresses developments in the substantive law of crimes and defenses: MAJ Hagler reviews the CAAF and service courts’ responses to *Lawrence v. Texas*,²⁰ and suggests trends to assist counsel in prosecuting and defending sodomy cases after *Lawrence*. Similarly, MAJ Hagler reviews recent CAAF decisions on child pornography and suggests appropriate ways to charge such offenses. Next, MAJ Hagler covers the practical implications of military appellate courts’ recent treatment of absence offenses in a quartet of cases from the last year. Finally, he addresses

⁹ 124 S. Ct. 2451 (2004).

¹⁰ 125 S. Ct. 834 (2005).

¹¹ 60 M.J. 69 (2005).

¹² 541 U.S. 36 (2004).

¹³ *Id.*

¹⁴ 60 M.J. 178 (2004).

¹⁵ *Id.* at 186 (citation omitted).

¹⁶ *See* UCMJ art. 25 (2002).

¹⁷ *See* *United States v. Dowty*, 60 M.J. 163 (2004).

¹⁸ *See* *United States v. Quintanilla*, 60 M.J. 852 (N-M. Ct. Crim. App. 2005).

¹⁹ *See, e.g.,* *United States v. Hansen*, 59 M.J. 410 (2004) (setting aside plea and sentence where military judge neglected to warn appellant that by pleading guilty he gives up the right to confront and cross-examine witnesses against him, the right against self-incrimination, and the right to trial of the facts by court-martial).

²⁰ 539 U.S. 558 (2003).

cases involving kidnapping, involuntary manslaughter, obscene mail material, pleadings, and defenses. Since there is only one notable case in each of these areas, it is difficult to spot trends, so MAJ Hagler instead points out practical tips for military practitioners in these areas.

Volume II of this year's *Symposium* also includes a return of an article devoted to developments in professional responsibility. Major Jon Jackson's article examines cases in the areas of ineffective assistance of counsel, confidentiality, and prosecutorial misconduct. Specifically, the article compares and contrasts the ineffective assistance of counsel issues presented by the Supreme Court in *Florida v. Nixon*²¹ and the CAAF in *United States v. Garcia*.²²

Major Chris Fredrikson discusses Fifth Amendment cases of note. He provides a general framework for analyzing self-incrimination law, and then addresses last term's decisions within this framework. The Supreme Court had a relatively busy year in the area of self-incrimination law, deciding five cases, only one by unanimous vote. Two of these cases, *Missouri v. Siebert*²³ and *United States v. Patane*²⁴ are particularly important for practitioners. The plurality in *Siebert* held that a police tactic of intentionally withholding *Miranda*²⁵ warnings during initial interrogation and then administering the warning after the suspect confessed, rendered the warnings ineffective and the subsequent statement inadmissible.²⁶ In *Patane*, a plurality of the Court held that the "fruit of the poisonous tree" doctrine does not apply to *Miranda* violations.²⁷ The plurality also reminded practitioners that the police's mere failure to warn does not violate either the Fifth Amendment or *Miranda*.²⁸ Major Fredrikson discusses Fifth Amendment cases from the military courts as well, paying particular attention to the issue of the admissibility of evidence derived from unwarned, yet voluntary, statements.

Finally, pulling double duty as he did this last twelve months due to a shortage of professors in the Criminal Law Department, MAJ Best closes out this year's *Symposium* by writing about significant decisions in the sentencing area. His article covers a potpourri of sentencing issues: sentencing schemes; sentencing evidence; sentencing argument; fines and contingent confinement; and the effective date of life without the possibility of parole.

We who write these articles do so with the ultimate goal of assisting you, the practitioners, and to further your knowledge, understanding, and expertise in the law. We welcome your comments, questions, and suggestions to better enable us to reach that goal.

²¹ 125 S. Ct. 551 (2004).

²² 59 M.J. 447 (2004).

²³ 124 S. Ct. 2601 (2004).

²⁴ 124 S. Ct. 2620 (2004).

²⁵ 384 U.S. 436 (1966).

²⁶ *Siebert*, 124 S.Ct. at 2605

²⁷ *Patane*, 124 S. Ct. at 2624, 2626.

²⁸ *Id.* (the self-incrimination clause primarily focuses on the criminal trial, as does *Miranda*). *See also* *Chavez v. Martinez*, 538 U.S. 760 (2003) (holding that the Fifth Amendment cannot be violated where no prosecution is sought and no compelled statements were ever used against the petitioner).