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Military Justice Symposium I

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Foreword

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Welcome to the twelfth annual *Military Justice Symposium*, where the criminal law faculty discuss important cases and trends from the 2006 term of court. This month's issue of *The Army Lawyer* contains Volume I of the symposium, covering crimes and defenses, the Fifth Amendment, and evidence. This issue also contains an article on instructions co-authored by two sitting Army trial judges. Volume II of the symposium will appear in the next edition of *The Army Lawyer*, and will contain articles on the Fourth Amendment, the Sixth Amendment, pleas and pretrial procedures, sentencing and post-trial, professional responsibility, speedy trial and pretrial restraint, and unlawful command influence.

As in past *symposia*, the faculty identifies the most significant cases from the Supreme Court, the Court of Appeals for the Armed Forces, and the service courts, rather than providing a complete review of every case in a particular subject area. Practitioners can find a complete review of each subject area by accessing our New Developments outlines on JAGCNET.[1] The publications offered at this site do not require a password and are available to all services. We hope that you find these materials and our articles helpful in your practice and, as always, welcome your questions and comments.

Of special note, this *symposia* marks the final appearance of two fine officers. Our Vice Chair, Major (MAJ) John Rothwell, and our Senior Instructor, MAJ De Fleming, are both leaving this summer to attend ILE/AOWC at Fort Leavenworth, Kansas. I know that practitioners everywhere join me in recognizing their significant contributions to the *symposium* and the practice of criminal law throughout the Department of Defense.

[1] *See* CRIMINAL LAW DEP'T, THE JUDGE ADVOCATE GENERAL'S SCHOOL, U.S. ARMY, 30TH CRIMINAL LAW NEW DEVELOPMENTS COURSE DESKBOOK (Oct. 2006), *available at* https://www.jagcnet.army.mil/JAGCNETINTERNET/HOMEPAGES/AC/TJAGSAWEB.NSF/Main?OpenFrameset (follow "TJAGLCS Publications" hyperlink; then follow "Criminal Law" hyperlink).

"Overshift"[1]

The Unconstitutional Double Burden-Shift on Affirmative Defenses in the New Article 120

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The Fiscal Year (FY) 2006 National Defense Authorization Act employed an unprecedented strategy to combat the threatening problem of sexual assault in the military.[3] Congress completely overhauled Article 120 of the Uniform Code of Military Justice (UCMJ),[4] removing "without consent" as an element of rape and other sexual assaults and opting instead to make consent and mistake of fact as to consent affirmative defenses.[5] As an added measure, Congress took the rare step of shifting the burden of proof to the accused to prove the existence of all affirmative defenses by a preponderance of the evidence.[6] In a final, unprecedented step, Congress shifted the burden *back* to the government to disprove, beyond a reasonable doubt, the existence of a defense after the accused meets his burden on the initial burden shift.[7]

This article contends, however, that depending on how the trial court implements the new Article 120's burden-shift, it will violate either the Fifth Amendment's guarantee of due process or the Sixth Amendment's promise of an absolute right to trial by jury. As a necessary starting point in its analysis, this article uses Part I to articulate the precise statutory language of the new Article 120's burden-shifting scheme. Part I also highlights the silence of legislative history and the absence of similar schemes in other jurisdictions that could guide the application of the new Article 120. Part II considers the constitutionality of burden-shifting schemes generally, concluding that some of these schemes are constitutional.

The analysis in Part III shows how the new Article 120's burden-shifting scheme is unconstitutional. Because the new rape statute provides no legislative history or other clues as to how the burden-shift will operate, Part III examines several possible ways in which the burden-shift could unfold at trial. Each of these possibilities raises substantial constitutional concerns. In conclusion, Part IV briefly discusses how military judges, trial counsel, and defense counsel might resolve these significant constitutional problems at trial.

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[1] The "overshift" is an unconventional and controversial defense employed in the game of baseball. *See* Chris Vining, *Athletes Kill My Braincells*, http://www.thesportscritics.com/listingsEntry.asp?ID=363634&PT=Chris+Vining&fc=18&ic=All (last visited Aug. 16, 2007).

[2] The author thanks Lieutenant Colonel (LTC) Mark Johnson, Chair, Criminal Law Department, The Judge Advocate General's Legal Center & School (TJAGLCS), for the invaluable insight and discussion that have shaped many of the arguments detailed in this article.

[3] *See* TASK FORCE REPORT ON CARE FOR VICTIMS OF SEXUAL ASSAULT: EXECUTIVE SUMMARY vii-xi (Apr. 2004), *available at* http://www.defenselink.mil/News/May2004/d20040513SATFReport.pdf (citing numerous problems within the DOD systemic response to sexual assaults from incomplete and nonintegrated data to a general inability to properly investigate and prosecute cases in a deployed setting). *See also* SEX CRIMES AND THE UCMJ: A REPORT FOR THE JOINT SERVICE COMMITTEE ON MILITARY JUSTICE (Feb. 2005), http://www.defenselink.mil/dodgc/php/docs/subcommittee_reportMarkHarvey1-13-05.doc, at 2-3 [hereinafter SEX CRIMES AND THE UCMJ]. In the Ronald W. Reagan National Defense Authorization Act for FY 2005, Congress directed the Secretary of Defense to review and make recommendations for change to, among other things, the Uniform Code of Military Justice (UCMJ) to better address sexual assault problems in the military. *Id*. at 1. The Sex Crimes and the UCMJ Report meets the congressional requirement. The report concludes that sexual assault offenses "negatively affect morale, good order and discipline and the unit cohesion and combat effectiveness of military personnel and units." *Id*. at 2-3. *See also* Major Jennifer S. Knies, *Two Steps Forward, One Step Back: Why the New UCMJ's Rape Law Missed the Mark, and How an Affirmative Consent Statute Will Put it Back on Target*, ARMY LAW. (forthcoming Sept. 2007) (surveying the field of studies conducted on the prevalence of sexual assault in the military and concluding that sexual assaults have an adverse impact on military readiness and morale in the military).

[4] Some of the most dramatic changes include: (1) changing the title of Article 120 from "Rape" to "Rape, Sexual Assault, and Other Sexual Misconduct," (2) increasing the number of Article 120 offenses from two—rape and carnal knowledge—to fourteen, and (3) expanding the nature of the physical act punished by Article 120 from narrowly-defined sexual intercourse to broadly-defined "sexual act" and "sexual contact." *See generally* National Defense Authorization Act for Fiscal Year 2006, Pub. L. No. 109-163, § 552, 119 Stat. 3256 (2006). The new Article 120 goes into effect on 1 October 2007. *Id.* § 552, 119 Stat. at 3263.

[5] *Id*. § 552, 119 Stat. at 3262.

[6] *Id.* Only two other affirmative defenses available in the military justice system—as established by the UCMJ, recognized by the *Manual for Courts-Martial* (*MCM*), or developed by caselaw—shift the burden of proof to the accused. First, the *MCM* requires the accused to prove mistake of fact as to the victim's age in a carnal knowledge case by a preponderance of the evidence. *See* MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 916(j)(2) (2005) [hereinafter MCM]. Second, the *MCM* requires the accused to prove a lack of mental responsibility in any case by clear and convincing evidence. *See* MCM, *supra*, R.C.M. 916(k)(3)(A).

[7] § 552, 119 Stat. at 3262. See the discussion in Part II *infra* for an argument as to why this second burden shift is unprecedented in criminal law in any jurisdiction.

Part I: The New Article 120—Affirmative Defenses and Burden-Shifting

As stated above, the new Article 120 no longer requires the government to prove, as an element of rape and other forms of sexual assault, that the accused committed the offense "without the consent"[8] of the victim. Instead, the new Article 120 makes consent, and mistake of fact as to consent, affirmative defenses to some of the statute's sexual assault offenses.[9] The statute's language describes how these affirmative defenses should operate:

> The term 'affirmative defense' means any special defense which, although not denying that the accused committed the objective acts constituting the offense charged, denies, wholly, or partially, criminal responsibility for those acts. The accused has the burden of proving the affirmative defense by a preponderance of evidence. After the accused meets this burden, the prosecution shall have the burden of proving beyond a reasonable doubt that the affirmative defense did not exist.[10]

With these three short sentences, the new Article 120 turns decades of military jurisprudence on affirmative defenses on its head.[11] An examination of the brief passage above prompts at least two immediate questions. First, who decides when the accused has met his initial burden: the military judge or the panel? Second, when does the military judge or the panel decide the accused has met his initial burden: as an interlocutory matter or upon conclusion of the trial on the merits? The analysis of these questions guides the remainder of this article.

Does Legislative History Guide the Application of Article 120's Burden-Shifting Scheme?

Unfortunately, Congress has not explained how this burden-shifting scheme should work. Congressional reports on the FY2006 National Defense Authorization Act do little more than acknowledge the new sexual assault statute as part of the larger Act.[12] A review of the Congressional Record reveals no debate on affirmative defenses under the new Article 120.

Digging deeper into the new Article 120's legislative history reveals that the statute's burden-shifting scheme originated within the Department of Defense (DOD). In 2004, Congress directed DOD to review the military justice system's handling of sexual assault offenses.[13] Congress required a report from DOD with recommendations to: (1) modernize the military's sexual assault scheme, and (2) align the military's sexual assault scheme more closely with federal law prohibiting sexual assaults.[14] In 2005, DOD issued its report to Congress offering six options to address concerns with sexual assault in the military.[15] Congress ultimately drafted the new Article 120, basing substantial portions of the new statute—including the new statute's burden-shifting scheme—on Option 5 of the DOD report.[16]

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[8] "By force and without consent" is an element of rape in the current Article 120. *See* MCM, *supra* note 6, pt. IV, ¶ 45b(1)(b).

[9] Specifically, the new Article 120 establishes consent or mistake of fact as to consent as affirmative defenses to rape, aggravated sexual assault, aggravated sexual contact, and abusive sexual contact. *See* § 552, 119 Stat. at 3259.

[10] *See id.* § 552, 119 Stat. at 3262.

[11] Congress enacted the UCMJ in 1950. *See* INDEX AND LEGISLATIVE HISTORY: UNIFORM CODE OF MILITARY JUSTICE preface (William S. Hein & Co. Books) (2000). As will be discussed in Part III *infra*, the new Article 120's burden-shifting scheme is not only novel to military practice, but departs substantially from decades of rules and principles guiding military case law and even U.S. Supreme Court jurisprudence.

[12] *See* H.R. REP. NO. 109-089, at 332 (2005) (devoting only one paragraph to summarize the change to Article 120 without mentioning the new Article 120's burden-shifting scheme); H.R. REP. NO. 109-360, at 703 (2005) (Conf. Rep.) (noting that the Senate did not include a revision of Article 120 in its bill and is otherwise silent on the new Article 120's burden-shifting scheme).

[13] *See* National Defense Authorization Act for Fiscal Year 2005, Pub. L. No. 108-375, § 571, 118 Stat. 1920-1 (2004).

[14] *See* SEX CRIMES AND THE UCMJ, *supra* note 3, at 1; § 571, 118 Stat. at 1920-1.

[15] *See* SEX CRIMES AND THE UCMJ, *supra* note 3, at 3-5.

[16] *See* LTC Mark L. Johnson, *Forks in the Road: Recent Developments in Substantive Criminal Law*, ARMY LAW., June 2006, at 27 (identifying Option 5 as the basis for the new Article 120). Additionally, the DOD report offered a primary and secondary recommendation. The report strongly recommended no change to either the UCMJ or the *MCM*, arguing that case law had developed the UCMJ and the *MCM* to a point where any form of sexual assault could be prosecuted under the UCMJ. *See* SEX CRIMES AND THE UCMJ, *supra* note 3, at 1. The report recommended, however, that Congress use Option 5 as the basis for any statutory changes to the UCMJ in the event Congress deemed change necessary. *See* SEX CRIMES AND THE UCMJ, *supra* note 3, at 1, 3.

The DOD report is equally silent on how the new Article 120's burden-shifting scheme should operate. Option 5, in a section titled "Source and Rationale for Each Subsection," simply memorializes the burden-shift:

> Once these two affirmative defenses are established by a preponderance of the evidence, the Government is required to prove beyond a reasonable doubt that the victim did not consent, and/or that the accused was not reasonably mistaken as to consent.[17]

Option 5 suggests that it borrowed this burden-shift from the District of Columbia (D.C.) Code, citing two cases as authority.[18] The D.C. Code, however, stops after shifting the burden to the criminal defendant to prove consent by a preponderance of the evidence.[19] Option 5, as stated earlier, takes the additional step of shifting the burden back to the government to prove the affirmative defense did not exist beyond a reasonable doubt. Neither the *Russell* decision nor the *Hicks* decision cited by Option 5 expands the D.C. Code to incorporate a second shift back to the government after a criminal defendant meets his burden.[20]

The *Russell* and *Hicks* opinions do, however, give us some insight into where this new Article 120 burden shift originated. Consider the jury instructions from *Russell*:

> Consent by the victim is a defense to the charge of first degree sexual abuse which the defendants must establish by a preponderance of the evidence . . . . If you find that Mr. Russell has proven by a preponderance of the evidence that [the complainant] consented to the sexual act, then the government must prove beyond a reasonable doubt that the complainant's consent was not voluntary.[21]

Consider also the jury instructions from *Hicks*:

> Now, consent by the victim is a defense to the charge of first degree sexual abuse which the defendant must establish by a preponderance of the evidence . . . . If you find that Mr. Hicks has proven by a preponderance of the evidence that S.H. agreed to the sexual act, then the Government must prove beyond a reasonable doubt that the complainant's consent was not voluntary.[22]

These two sets of trial court instructions, of course, are virtually identical to the burden-shifting scheme proposed by Option 5 and ultimately adopted by the drafters of the new Article 120. Facially, then, it may appear that D.C. Circuit case law has, in fact, expanded the D.C. Code to include a second burden-shift back to the government. Option 5—and as a result, the new Article 120—however, fails to account for the fact that the D.C. Circuit Court of Appeals held both of these sets of trial instructions to be constitutionally inadequate, reversing the convictions in each case.[23]

While both the *Russell* and *Hicks* opinions based their holdings on the separate issue of the extent to which the given instructions limited the juries' consideration of evidence of consent, one should not conclude that the above instructions constitute the state of the law on burden-shifting in the D.C. Circuit. The *Russell* opinion never discusses whether the above excerpt of the trial judge's instructions on burden-shifting passes constitutional muster. Instead, the opinion concludes that the D.C. Code's statutory provision of a single burden-shift to the criminal defendant to prove consent by a preponderance of

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[17] *See* SEX CRIMES AND THE UCMJ, *supra* note 3, at 249.

[18] *See id.* Specifically, Option 5 relies on *Hicks v. United States*, 707 A.2d 1301 (D.C. App. 1998) and *Russell v. United States*, 698 A.2d 1007 (D.C. App. 1997).

[19] *See* D.C. CODE § 22-3007 (2007). The *Russell* Court applied the D.C. Code's predecessor, D.C. Code § 22-4107. *See Russell*, 698 A.2d at 1009. The statute was merely renumbered, however, and the substance of the statute has remained the same from the *Russell* decision in 1997 through the drafting of Option 5 and the writing of this article. Other commentators have noted that the D.C. Code stops short of making the second shift back to the government. *See* Johnson, *supra* note 16, at 28; Captain Gregory Marchand, Information Paper: Affirmative Defenses Under the Revised Article 120, at 5 (Nov. 5, 2006) [hereinafter Marchand Information Paper] (on file with author).

[20] *See Russell*, 698 A.2d at 1007 (conviction reversed and new trial ordered because of faulty instructions); *Hicks*, 707 A.2d at 1301 (conviction reversed and new trial ordered because of faulty instructions).

[21] *Russell*, 698 A.2d at 1011.

[22] *Hicks*, 707 A.2d at 1303.

[23] *Russell*, 698 A.2d at 1016. *Hicks*, 707 A.2d at 1303.

the evidence is constitutional.[24] Likewise, the *Hicks* opinion does not discuss the constitutionality of the above excerpt of the trial judge's instructions. D.C. Form Instruction 4.61, which post-dates *Russell* and *Hicks*, supports the ultimate conclusion that the D.C. Circuit has no second burden-shift to the government following the criminal defendant's successful showing that the affirmative defense exists by a preponderance of the evidence:

> If the defendant has met his/her burden of proving consent by a preponderance of the evidence (that is, that it is more likely than not that [name the complainant] consented), then you must find him/her not guilty of [name the charge(s)]. If s/he has not met that burden, then it is your duty to find the defendant guilty of [name the charge(s)].[25]

At best, Option 5 and the legislative history to the new Article 120 offer shaky footing for the new Article 120's burden-shifting scheme. At worst, each is completely silent on both the origin and the application of the novel scheme. Without guidance from the documents supporting and establishing the new Article 120, this article looks next to other jurisdictions to draw persuasive authority for direction on implementing the new Article 120's burden-shift.

Do Any Similar Civilian Statutory Burden-Shifting Schemes Inform the Military's Application of Article 120's Burden-Shifting Scheme?

Put simply, the new Article 120's statutory burden-shifting scheme is unparalleled in any U.S. criminal law jurisdiction or system, civilian or military. While other jurisdictions place the burden of demonstrating the existence of an affirmative defense on a criminal defendant,[26] none give the government a "second bite at the apple."[27] In other words, no other jurisdiction provides the government with the opportunity to disprove the existence of a defense after a criminal defendant successfully proves its existence, albeit by a lesser standard. To find any analogous procedural burden-shift, one has to turn to civil statutes such as Title VII of the Civil Rights Act of 1964.[28]

The Supreme Court's landmark decision, *McDonnell Douglas Corp. v. Green*,[29] details the shifting burdens in a Title VII discrimination case. To start, the employee carries the initial burden to establish a *prima facie* case of discrimination.[30] Upon the employee's successful demonstration of a *prima facie* case of discrimination, the burden shifts to the government to articulate a legitimate, nondiscriminatory purpose for the corporate or government action giving rise to the Title VII claim.[31] Once the government has stated its legitimate purpose for a given action, the burden shifts back to the employee to show that the government's stated purpose was actually a pretext for illegal discrimination.[32]

At first blush, the *McDonnell Douglas* procedure looks like a promising analogy to help guide the military justice system's navigation through the new Article 120's burden-shifting scheme. The employee's burden to establish a *prima facie* case loosely parallels the "some evidence" standard for raising a special, or affirmative, defense pursuant to Rule for Courts-Martial (RCM) 920.[33] Like the Title VII burden-shift from the employee to the government following the *prima facie* case,

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[24] *Russell*, 698 A.2d at 1016.

[25] *See* Instruction 4.61, Consent Defense to Sexual Abuse, *available at* http://www.pdsdc.org/calendar/summerseries/ss06222006/JuryInstruction4.61.pdf (last visited June 4, 2007). Captain Marchand makes the same observation in his information paper on the new Article 120's burden-shifting scheme. Marchand Information Paper *supra* note 19, at 5. Lieutenant Colonel Johnson also highlights the problematic approach of relying on faulty instructions as the basis of the new Article 120's burden-shifting scheme. Johnson, *supra* note 16, at 27.

[26] *See* the discussion of the constitutionality of burden-shifting in Part II, *infra*.

[27] Marchand Information Paper, *supra* note 19, at 5 (referring to the second shift in the new Article 120's burden-shifting scheme as "another bite at the apple").

[28] 42 U.S.C.S. § 2000-3 (LEXIS 2007).

[29] 411 U.S. 792, 802 (1973).

[30] *Id.*

[31] *Id.*

[32] *Id.* at 804-05.

[33] *See* MCM, *supra* note 6, R.C.M. 920(e) discussion (stating, "A matter is 'in issue' when some evidence, without regard to its source or credibility, has been admitted upon which members might rely if they choose.").

the new Article 120 shifts the burden to the accused after "some evidence" raises the affirmative defense. Back in the Title VII case, once the government articulates a legitimate, nondiscriminatory purpose for a given action, the burden shifts back to the employee to show the stated purpose was merely a pretext. Similarly, in a new Article 120 case, once the accused establishes the existence of the affirmative defense, the burden shifts back to the government to disprove the existence of that affirmative defense.

Upon closer examination, however, the analogy between Title VII and the new Article 120 does not survive. First, the obvious problems of importing civil law principles into criminal law prosecutions prevent serious use of Title VII to guide the way forward in the application of the new Article 120. Civil law, of course, requires a lower ultimate standard of proof than the criminal law "beyond a reasonable doubt" standard.[34]

Second, Title VII cases begin with both parties agreeing that the underlying act—a refusal to hire, for example—has, in fact, occurred.[35] The subsequent litigation focuses solely on the question of why the underlying act occurred, which is resolved by navigating the burden-shifting scheme. In a new Article 120 prosecution, the parties must both litigate whether the underlying act occurred—and also resolve the narrower question of whether the affirmative defense exists, using the new Article 120's burden-shifting scheme. The subtle procedural difference between a Title VII case and a new Article 120 prosecution is that the parties in a Title VII case need only juggle one task at trial, while the parties in a new Article 120 prosecution must juggle two. Figuring out which task comes before the other, or whether the two tasks in a new Article 120 prosecution are handled simultaneously compounds, rather than resolves, the problem analyzed below. Analogizing to Title VII, a single-task proceeding, helps little in applying the new Article 120 burden-shifting scheme.

Finally, the distinction between a burden of persuasion and a burden of production eliminates Title VII as a viable analogy on which to rely. The Supreme Court revisited its decision in *McDonnell Douglas* eight years later in its *Burdine* decision.[36] In *Burdine*, the Supreme Court applied *McDonnell Douglas* to a woman's claim of gender discrimination.[37] In particular, the Supreme Court considered whether or not the Court of Appeals for the Fifth Circuit was correct when it held that the initial shift to the government to articulate a legitimate, non-discriminatory purpose for a given employment action required the government to prove that purpose by a preponderance of the evidence.[38]

In *Burdine*, the Supreme Court decided that the progressive burden shifts in *McDonnell Douglas* merely shifted burdens of production, not burdens of persuasion.[39] Two rationales support the *Burdine* opinion: (1) the burden of persuasion on a particular issue, as an established principle of evidence, never shifts,[40] and (2) the *McDonnell Douglas* progressive burden shifts should "bring the litigants and the court expeditiously and fairly to [the] ultimate question."[41] Note that the Court references the "ultimate question" in the singular – the goal is not to answer two ultimate questions.

The new Article 120's burden-shifting scheme operates contrary to *Burdine*'s interpretation of *McDonnell Douglas*. As stated above, the new Article 120's burden-shifting scheme compels the finder of fact to first ask, based on the accused's case, whether or not the affirmative defense exists. If the fact finder's answer is "yes," then the new Article 120 would ask a second time, based on the government's case, the identical ultimate question. *Burdine*, as an extension of *McDonnell Douglas*, then, offers little insight as to how the new Article 120's burden-shifting scheme will operate.[42]

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[34] *See* PAUL H. ROBINSON, CRIMINAL LAW DEFENSES 145 (1984) (acknowledging the lower burden of persuasion in civil trials); MCM, *supra* note 6, R.C.M. 918(c) (memorializing the "beyond a reasonable doubt" standard in the military justice system).

[35] *See McDonnell Douglas*, 411 U.S. at 802.

[36] Texas Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248 (1981).

[37] *See id.* at 252-53.

[38] *See id.* at 249.

[39] *See id.* at 254-55.

[40] *See id.* at 253 (citing 9 J. WIGMORE, EVIDENCE § 2489 (3d ed. 1940) (stating, "the burden of persuasion 'never shifts.'")).

[41] *See id.*

[42] Some may yet argue that the accused's initial burden under the new Article 120 operates merely as a burden of production. The plain statutory language of the new Article 120 does not permit this reading. The language itself requires that the accused prove the existence of the affirmative defense "by a preponderance of the evidence." *See* National Defense Authorization Act for Fiscal Year 2006, Pub. L. No. 109-163, § 552, 119 Stat. 3262 (2006). By articulating a burden of persuasion standard ("by a preponderance of the evidence"), the statute leaves no room for the debate that occurred in the context of Title VII and the *Burdine* opinion. *See* ROBINSON, *supra* note 34, at 145 (defining a burden of persuasion as, "The degree to which the trier of fact must be

Indeed, nothing in the legislative history of the new Article 120; nothing in the criminal law, civilian or military; and nothing in civil law hints at the application of the new Article 120's novel burden-shifting scheme.[43] Absent any internal or external guidance, this article turns first to analyzing the constitutionality of burden-shifting schemes generally.

Part II: The Constitutionality of Burden-Shifting Schemes Generally

The Supreme Court Decisions on Burden-Shifting in the Context of Affirmative Defenses

As recently as last term, the Supreme Court considered and upheld the constitutionality of shifting the burden onto a criminal defendant to prove at trial the existence of an affirmative defense.[44] Indeed, since the late nineteenth century, the Supreme Court has repeatedly addressed the question of when a jurisdiction may require the criminal defendant to assume a burden of persuasion at trial.[45] Supreme Court jurisprudence has established some relatively clear principles to guide shifting the burden to a criminal defendant.

Generally speaking, the government may never reduce its own burden of proof in a case by requiring the defense to disprove an element of a charged offense. In *U.S. v. Davis*, for example, the Supreme Court considered the propriety of the trial court's requirement that Davis bear the burden of proving his insanity as a defense to his murder charge.[46] In *Davis*, the Supreme Court found that the federal definition of murder necessarily included, as an element of the offense, that a criminal defendant was of "sound memory and discretion," and that "he had sufficient mind to comprehend the criminality of right and wrong."[47]

To the *Davis* Court, the question of insanity, as a defense, and mental capacity, as an element, were inseparable.[48] Placing the burden on Davis to prove his insanity was the effective equivalent of requiring him "to establish his innocence, by proving that he is not guilty of the crime charged."[49] Furthermore, "The burden of proof, as those words are understood in criminal law, is never upon the accused to establish his innocence or to disprove the facts necessary to establish the crime for which he is indicted."[50]

Following the principle established in *Davis*, the Supreme Court has subsequently upheld only those instances of shifting the burden to a criminal defendant where the affirmative defense does not require the defendant to disprove an element of the offense charged. Revisiting the insanity defense to a murder prosecution, the Court in *Leland v. Oregon* upheld a state law requiring the defendant to prove his insanity beyond a reasonable doubt.[51] For the *Leland* Court, the elements were

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persuaded in order to decide an issue in favor of the burdened party.") The burden of production, in contrast, is usually articulated in terms of quantities of evidence: "some evidence" or "more than a scintilla." *See* ROBINSON, *supra* note 34, at 136. *Burdine* proved necessary because neither Title VII nor *McDonnell Douglas* expressly assigned a burden of persuasion standard—or any evidentiary standard, for that matter—to the government's responsibility to show a legitimate, nondiscriminatory purpose for a given employment practice.

[43] Curiously, one of Congress's stated objectives of the new Article 120 was to align "the statutory language of sexual assault law under the UCMJ with federal law under sections 2241 through 2247 of Title 18, United States Code." H.R. REP. NO. 109-89, at 332 (2005). Congress failed to align the new Article 120's burden-shifting scheme with federal law on defenses, as no federal defense contains the new Article 120's double burden shift.

[44] *See generally* Dixon v. United States, 126 S. Ct. 2437, 2447-48 (2006).

[45] *See* Davis v. United States, 160 U.S. 469 (1895) (holding that the criminal defendant did not have the burden to prove lack of mental capacity in a premeditated murder prosecution); Leland v. Oregon, 343 U.S. 790 (1952) (holding that the criminal defendant did have the burden to prove insanity in a premeditated murder prosecution where state statute assigned the burden to the defendant); Martin v Ohio, 480 U.S. 228 (1987) (holding that the criminal defendant did have the burden to prove self-defense in an aggravated murder prosecution where state statute assigned the burden to the defendant).

[46] *See Davis*, 160 U.S. at 478-79.

[47] *See id.* at 484-85.

[48] *See id.* at 488.

[49] *See id.* at 487.

[50] *See id.*

[51] *See* Leland v. Oregon, 343 U.S. 790, 802 (1952). The Supreme Court declined to apply *Davis*, which the Court viewed as a federal rule, not a constitutional one. *Id.* at 797.

sufficiently distinct from the defense, and the instructions were sufficiently clear, that the government never relinquished the burden of proving the defendant's guilt beyond a reasonable doubt.[52]

The permissibility of shifting the burden to a criminal defendant extends beyond the insanity defense to other defenses, provided the defendant is not required to disprove an element of the offense. In *Martin v. Ohio*, the Supreme Court upheld a burden-shift to the criminal defendant to prove self-defense in a murder prosecution.[53] The Court held that the *Martin* burden-shift avoided constitutional due process concerns because the affirmative defense did not "seek to shift to Martin the burden of proving any of [the offense's] elements."[54] Using identical reasoning, the Supreme Court upheld a federal burden-shift on the affirmative defense of duress raised to challenge a firearm prosecution.[55] The Court remains vigilant, however, ready to halt any government tendency to unconstitutionally transfer its burden to prove all elements of an offense to a criminal defendant.[56]

Military Jurisprudence on Burden-Shifting in the Context of Affirmative Defenses

Shifting the burden to the accused to prove an affirmative defense is not unprecedented in the military justice system. As noted earlier, two defenses require the accused to shoulder the burden of proof: mistake of fact as to age in a carnal knowledge prosecution, and lack of mental responsibility.[57] The accused must prove mistake of fact as to age in a carnal knowledge case by a preponderance of the evidence.[58] The accused must prove lack of mental responsibility by clear and convincing evidence.[59] A survey of military appellate cases reveals no constitutional challenges to the two existing burden-shifting schemes in the military justice system.[60]

While the Supreme Court has upheld the government's ability to shift the burden to criminal defendants in certain prescribed ways against constitutional attack, and while the current military burden-shifting schemes have received no rigorous appellate scrutiny, the new Article 120's burden-shifting scheme nonetheless faces serious constitutional challenges. Part III will now consider a handful of ways in which a trial court could potentially implement the new Article 120's burden-shifting scheme. Each option, however, fails constitutional muster.

Part III: Why the New Article 120's Burden-Shifting Scheme is Unconstitutional

This article has established some important benchmarks that dictate how Part III should proceed. First, the new Article 120 is silent on how, procedurally, the statute's double burden-shift should transpire. Second, no legislative history discusses or explains how the trial court should proceed through the statute's burden-shifting scheme. Third, no civilian jurisdiction, criminal or civil, employs an analogous double burden-shift to guide the application of the new Article 120's burden-shifting scheme. These three benchmarks raise concerns about whether the new Article 120's burden-shifting scheme enjoys the

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[52] *See id.* at 795-96.

[53] *See* Martin v Ohio, 480 U.S. 228, 233 (1987).

[54] *See id.* at 233.

[55] *See* Dixon v. United States, 126 S. Ct. 2437, 2447-48 (2006).

[56] *See* Ashcroft v. Free Speech Coalition, 535 U.S. 234, 255 (2002). The Child Pornography Prevention Act (CPPA) contained an affirmative defense requiring the criminal defendant to disprove an element of the offense. *Id*. While the Court did not decide the constitutionality of the burden-shift contained in the CPPA, the Court nonetheless fired a salvo at the government: "The Government raises serious constitutional difficulties by seeking to impose on the defendant the burden of proving his speech is not unlawful." *Id*.

[57] *See* MCM, *supra* note 6, R.C.M. 916(b).

[58] *See id.* R.C.M. 916(j)(2).

[59] *See id.* R.C.M. 916(k)(3)(A).

[60] Instead, appellate challenges to these two affirmative defenses focus, without constitutional protest, almost exclusively on whether the accused did, in fact, carry his burden at trial. *See generally* United States v. Martin, 56 M.J. 97 (2001) (holding accused had not met his burden of clear and convincing evidence to prove lack of mental responsibility); United States v. Magee, ACM S 29513, 2000 CCA LEXIS 267 (A.F. Ct. Crim. App. Nov. 27, 2000) (unpublished) (holding accused had not met his burden of a preponderance of the evidence to prove mistake of fact as to age); United States v. Jones, No. 200001846, 2004 CCA LEXIS 190 (N-M. Ct. Crim. App. Aug. 20, 2004) (unpublished) (holding accused had not met his burden of a preponderance of the evidence to prove mistake of fact as to age).

protection of the general principle that burden-shifting schemes are constitutional when they do not require an accused to disprove an element of the offense with which he is charged.

In the absence of any procedure to analyze, Part III discusses both the potential ways to navigate the double burden-shift and the problems with each. Two questions will illuminate each alternative path through the new Article 120's burden-shifting scheme. First, who makes the initial finding that the accused has met his burden by a preponderance of the evidence: the military judge or the panel? Second, when will the fact-finder make the initial finding: as an interlocutory matter or on findings?

The Military Judge as Fact-Finder on the Accused's Initial Burden

The military judge could make the finding that the accused has met his initial burden in one of two contexts: either as the military judge sitting alone, or as the military judge with a panel.[61] Consider first the scenario wherein the military judge sitting with a panel finds, as an interlocutory matter, that the accused has met his burden of persuasion. The burden then shifts to the government to prove beyond a reasonable doubt that the affirmative defense does not exist. The panel, as the chosen fact-finder in the case, would then have to find whether or not the government carried its burden. Setting aside questions about making the initial finding as an interlocutory matter for the moment, the notion of splitting the fact-finding responsibilities on the ultimate question of guilt between the military judge and the panel violates the Sixth Amendment right to trial by jury[62] or, in the alternative, the due process clause of the Fifth Amendment.

Beginning with the proposition that the accused has a Sixth Amendment right to a trial by members,[63] Supreme Court jurisprudence presents the logical place to launch analysis of that right. Few reported Supreme Court cases, however, deal with the Sixth Amendment in the context of an outright denial of trial by jury.[64] Instead, the Supreme Court considers Sixth

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[61] The accused may elect the composition of the court-martial. *See generally* MCM, *supra* note 6, R.C.M. 903. If the accused does not elect to be tried by a panel composed of enlisted members or a military judge alone, then the default composition is a court-martial composed of officers. *See id.* R.C.M. 903(c)(3).

[62] A Sixth Amendment analysis of the new Article 120's burden-shifting scheme starts at a counterintuitive point: military jurisprudence suggests that servicemembers do not enjoy a Sixth Amendment right to trial by jury. *See* U.S. v. Witham, 47 M.J. 297, 301 (1997) (stating, "We note that a military accused has no right to a trial by jury under the Sixth Amendment."); FRANCIS A. GILLIGAN & FREDERIC I. LEDERER, COURT-MARTIAL PROCEDURE § 15-11.00 (3rd ed. 2006). U.S. v. Lambert, 55 M.J. 293, 295 (2001) (stating, "A military accused has no *Sixth Amendment* right to a trial by jury.").

Witham, however, does acknowledge an alternative source for the military accused's right to jury trial: "He does, however, have a right to due process of law under the Fifth Amendment, and Congress has provided for trial by members at a court-martial." *See Witham*, 47 M.J. at 301 (citing UCMJ art. 16 (2005)). The servicemember's right to a jury trial, then, becomes a procedural due process concern. *See* discussion at "*Specific Problems with Treating the Initial Finding as an Interlocutory Matter," infra*.

Several factors nonetheless suggest that the current state of the military's Sixth Amendment jurisprudence does not foreclose a Sixth Amendment attack on the new Article 120's burden-shifting scheme. The first military case to consider the Sixth Amendment's applicability to courts-martial generally dealt with the Sixth Amendment right to counsel and analyzed the Sixth Amendment right to jury trial in dicta merely to draw a distinction between the two. *See* U.S. v. Culp, 33 C.M.R. 411, 417-20 (C.M.A. 1963). Virtually all cases since *Culp* that have declared that the Sixth Amendment right to trial by jury does not apply to the military have: (1) done so in dicta, and (2) dealt with the panel selection process, an issue the Supreme Court, in contrast, has held was an equal protection right, not a Sixth Amendment right. *See, e.g.*, U.S. v. Tulloch, 47 M.J. 283, 285 (1997) (citing U.S. v. Santiago-Davila, 26 M.J. 380 (C.M.A. 1988)). No decision has squarely held that the Sixth Amendment right to trial by jury does not apply to the military.

Furthermore, the two Supreme Court cases most heavily relied upon by military courts for the proposition that the Sixth Amendment right to jury trial does not apply to the military are holdings that have nothing to do with courts-martial or U.S. servicemembers. *See generally Ex parte Milligan*, 71 U.S. 2 (1866) (holding no Sixth Amendment right to trial by jury at a military commission established in a state of martial law for an individual who was not, nor had ever been, in the U.S. military); *Ex parte Quirin*, 317 U.S. 1 (1942) (holding no Sixth Amendment right to trial by jury at a military commission established to try German "unlawful belligerents").

As a general proposition, "The protections in the Bill of Rights, except those which are expressly or by necessary implication inapplicable, are available to members of our armed forces." U.S. v. Jacoby, 29 C.M.R. 244, 246-47 (C.M.A. 1960). In this spirit, the Court of Appeals for the Armed Forces and its predecessor, the Court of Military Appeals, have demonstrated willingness over time to adopt into military jurisprudence previously unrecognized constitutional rights. *See generally Culp*, 33 C.M.R. 411 (recognizing the Sixth Amendment right to counsel in courts-martial); U.S. v. Tempia, 37 C.M.R. 249 (1967) (recognizing the Fifth Amendment privilege against self-incrimination established in *Miranda v. Arizona*, 384 U.S. 436 (1966)); U.S. v. Marcum, 60 M.J. 198 (2004) (recognizing the liberty interest established by Lawrence v. Texas, 539 U.S. 558 (2003)).

Finally, the Supreme Court itself has intimated that the question of the full application of the Sixth Amendment to the military is unsettled. In holding that the Sixth Amendment right to counsel did not require representation at a summary court-martial, the Supreme Court briefly mentioned divergent views on the application of the Sixth Amendment generally—including the right to trial by jury—declining to "resolve the broader aspects of this question." *See* Middendorf v. Henry, 425 U.S. 25, 33-34 (1976). The door for litigation is cracked open.

[63] *See* U.S. CONST. amend. VI. The default rule favoring trial by members in the military is implicitly captured in Article 16, UCMJ and expressly captured in RCM 903 (note 61, *supra*), permitting trials by military judge alone only when the accused meets specific request criteria. *See* UCMJ art. 16 (2005).

[64] The Supreme Court has dealt with an outright refusal of the right to a trial by jury in the context of determining whether or not the Fourteenth Amendment required the states to give a trial by jury in compliance with the Sixth Amendment. *See* Duncan v. Louisiana, 391 U.S. 145, 149-50 (1968) (holding that the Fourteenth Amendment requires the states to give a trial by jury in criminal prosecutions). In *Duncan*, the defendant demanded a jury trial in a simple

Amendment challenges in the context of some procedural matter arising out of a jury trial.[65] Importantly, the Supreme Court has fielded Sixth Amendment questions also in the context of delineating the judge's role vis-à-vis the jury within the jury trial.[66]

The most illuminating pair of Supreme Court cases to consider the role of the judge in a jury trial is *Blakely v. Washington*[67] and *U.S. v. Booker*.[68] These two cases explore the judge's fact-finding authority to determine sentence enhancers. *Blakely* considered a Washington state sentencing law that permitted a judge to increase a sentence beyond a statutory standard range if he made factual findings to support the increase.[69] In *Blakely*, the trial judge substantially increased a kidnapping sentence based on his determination of facts that were "neither admitted by petitioner nor found by a jury."[70] Holding that the right to a jury trial is "no mere procedural formality," the *Blakely* Court struck down the Washington state law that encroached upon the province of the jury.[71]

In *Booker*, the Supreme Court applied *Blakely* and its Sixth Amendment analysis to the Federal Sentencing Guidelines.[72] Again in *Booker*, the trial judge conducted an independent, post-trial sentencing hearing without jurors in which he found both that Booker possessed substantially more crack cocaine than had been proved at trial and that Booker was guilty of obstructing justice.[73] As a result, the judge sentenced Booker to approximately nine additional years of confinement.[74] In a split opinion evidencing frustration at the Sentencing Guidelines' effect of increasing judges' power to the detriment of juries' power,[75] the Supreme Court held that the jury must determine any fact supportive of a sentence enhancement.[76]

In order to fully understand how cases like *Blakely* and *Booker* drive the conclusion that the new Article 120's double-burden shift violates the Sixth Amendment right to jury trial, consider the principle underlying the Court's analysis:

> The Court was faced with the issue of preserving an ancient guarantee under a new set of circumstances. The new sentencing practice forced the Court to address the question how the right of jury trial could be preserved, in a meaningful way guaranteeing that the jury would still stand between the individual and the power of the government under the new sentencing regime.[77]

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battery case and was refused by the state of Louisiana. *Id*. at 146. While the *Duncan* Court extended the Sixth Amendment right to trial by jury to state prosecutions, it still permitted judge-alone trials for petty offenses or in cases where the defendant waived his right to trial by jury. *Id*. at 158. *See also* Baldwin v. New York, 399 U.S. 66, 68 (1970) (applying *Duncan* and "determining the line between "petty" and "serious" for purposes of the Sixth Amendment right to jury trial."). The Supreme Court has long held that federal law permits some petty offenses to be tried without a jury. *See* Callan v. Wilson, 127 U.S. 540, 555 (1888) (conceding some petty offenses may be tried without a jury).

[65] *See, e.g.*, Apodaca v. Oregon, 406 U.S. 404, 405 (1972) (holding that the Sixth Amendment right to jury trial does not require unanimous verdicts to convict a criminal defendant); Burch v. Louisiana, 441 U.S. 130, 134 (1979) (holding that a "conviction by a nonunanimous six-member jury in a state criminal trial for a non-petty offense deprives an accused of his constitutional right to trial by jury.").

[66] *See, e.g.*, Lego v. Twomey, 404 U.S. 477, 490 (1972) (announcing that the Sixth Amendment right to jury trial did not disturb "the normal rule that the admissibility of evidence is a question for the court rather than the jury.").

[67] Blakely v. Washington, 542 U.S. 296 (2004).

[68] U.S. v. Booker, 543 U.S. 220 (2005). Colonel John P. Moran suggested the analogy to *Booker* to the author following a presentation by the author on the new Article 120 on 5 June 2007.

[69] *Blakely*, 542 U.S. at 299.

[70] *Id.* at 303.

[71] *Id.* at 305-06.

[72] *Booker*, 543 U.S. at 226 (Stevens, J., plurality).

[73] *Id.* at 227.

[74] *Id.*

[75] *Id.* at 236.

[76] *Id.* at 244.

[77] *Id.* at 237.

The Supreme Court's approach of treating the delineation between a trial judge's role and a jury's role in terms of the Sixth Amendment compels military courts to question the constitutionality of permitting a military judge to make a finding of fact—that the accused has proved the existence of an affirmative defense—when the accused has elected to be tried by a panel of members. How would a panel of members "stand between" the servicemember and the government if the military judge would make a finding on essentially the ultimate question in the case? Military jurisprudence also zealously guards the province of the panel at trials by court-martial.

While military appellate courts have not fielded questions about the role of military judges or panels as Sixth Amendment challenges, the issues and language of the opinions mirror those of the Supreme Court's Sixth Amendment jurisprudence. So, while the Supreme Court, in *Lego v. Twomey*,[78] reached a discussion of the respective roles of judges and juries via a Sixth Amendment challenge in the context of an evidentiary ruling, the Navy-Marine Court of Military Review reached the same discussion on a similar issue using virtually identical language. In *U.S. v. Coleman*,[79] the Navy-Marine Court considered a case wherein the military judge held a hearing to evaluate evidence that the accused intended to offer in support of an insanity defense.[80] The military judge determined the evidence would be insufficient to raise the defense and prohibited the defense from offering it at trial.[81] The Navy-Marine Court set aside Coleman's conviction, holding that:

> An accused is entitled to have the factual issues decided by the trier of fact. The military judge has no authority to hear the evidence before it is presented to the triers of fact, weigh it, and exclude it because he determines it is too weak to raise a defense requiring instruction. The weight of the evidence is a matter within the province of the fact finders. The judge here usurped the function of fact finders and *deprived the accused of his right to a trial of the facts before the members*.[82]

Again in *U.S. v. Tulin*,[83] the Navy-Marine Court set aside a conviction when the military judge attempted to perform fact-finding duties in a trial before a panel of members. In *Tulin*, the military judge, outside of the presence of the members, previewed and weighed evidence of duress, ultimately finding that the "defense [did] not exist in the case."[84] Thereafter, the military judge precluded the defense from offering any evidence of duress in the case.[85] Relying on its opinion in *Coleman*, the Navy-Marine Court held that, "Such prelitigation of controverted issues deprives court-members of their legitimate functions and subverts the purpose for which they are assembled as a court-martial."[86] Ultimately, the Navy-Marine Court held that the military judge violated both the accused's constitutional due process right and his right to a jury trial.[87]

As indicated above, the Sixth Amendment does not provide the only instrument with which to attack the new Article 120's double burden-shift. *U.S. v. Witham* and *U.S. v. Tulloch*[88] both provide that while the accused's right to trial by a panel of members does not grow out of the Sixth Amendment, Congress has nonetheless granted servicemembers the right to trial by members via UCMJ, Article 16.[89] As such, any intrusion on this statutory right creates a Fifth Amendment Due Process challenge for the accused to wield.[90] An accused could simply recast the previous Sixth Amendment analysis, then, as a Due

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[78] Lego v. Twomey, 404 U.S. 477 (1972).

[79] U.S. v. Coleman, 11 M.J. 856 (N.M.C.M.R. 1980).

[80] *Id.* at 857.

[81] *Id*.

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

[83] U.S. v. Tulin, 14 M.J. 695 (N.M.C.M.R. 1982).

[84] *Id.* at 698.

[85] *Id.*

[86] *Id.*

[87] *Id.* at 699.

[88] U.S. v. Witham, 47 M.J. 297, 301 (1997); U.S. v. Tulloch, 47 M.J. 283, 285 (1997) (citing U.S. v. Santiago-Davila, 26 M.J. 380 (C.M.A. 1988)).

[89] UCMJ art. 16 (2005).

[90] *See Witham*, 47 M.J. at 301 (citing UCMJ art. 16).

Process claim with an apparently similar conclusion: the new Article 120's double burden-shift cannot withstand constitutional muster if the military judge makes the initial finding in a trial before members.

The Court of Appeals for the Armed Forces (CAAF) has not published an opinion exploring the impact of splitting fact-finder responsibilities between the military judge and a panel of members.[91] Undoubtedly, based on the full weight of Supreme Court jurisprudence and of the persuasive authority of the service courts, the CAAF would adopt the same approach if asked to consider the constitutionality of the new Article 120's double burden shift. In fact, a survey of CAAF and service court opinions yields no holdings that endorse splitting fact-finder responsibilities between a military judge and a panel of members.[92] The analysis of legal authority on this question simply cannot permit the conclusion that an accused who invokes his right to trial by jury must suffer the military judge making the initial finding of fact as to whether or not the accused has proved the existence of an affirmative defense to his prosecution under the new Article 120.[93]

Of course, the military judge sitting alone does not encounter this split-fact-finding problem. The scenario involving the military judge sitting alone, however, raises its own procedural and constitutional problems. This article will now consider the constitutionality of a military judge—or any fact-finder—making, as an interlocutory matter, the initial finding that the accused has met his burden of proving an affirmative defense by a preponderance of the evidence.

Specific Problems with Treating the Initial Finding as an Interlocutory Matter

In the case of a single fact-finder, the question remains: when to decide whether the accused has met his initial burden? The new Article 120's plain statutory language describes a second shift back to the government, implying the finding on the accused's initial burden must be determined as an interlocutory matter.[94] Whether a military judge or a panel, the fact-finder must make an initial finding in order to effectuate the second shift back to the government. Theoretically, the government should have an opportunity to present more evidence *after* the accused has met his burden and *before* the fact-finder decides the government's final burden. Otherwise, the second shift back to the government is nonsensical, as the fact-finder would be asked to consider whether or not reasonable doubt exists in the identical evidence the fact-finder just used to conclude that, more likely than not, the defense exists.

In the context of the single fact-finder, the new Article 120's double burden-shift not only defies explanation, it creates procedural due process problems. The Supreme Court explains procedural due process in *Mathews v. Eldridge*:

> Procedural due process imposes constraints on governmental decisions which deprive individuals of 'liberty' or 'property' interests within the meaning of the Due Process Clause of the Fifth or Fourteenth

[91] The CAAF has decided Sixth Amendment right to trial by jury challenges in other contexts. *See, e.g.*, U.S. v. Gray, 51 M.J. 1 (1999) (Sixth Amendment challenge to racial bias in panel selection process); U.S. v. Belflower, 50 M.J. 306 (1999) (Sixth Amendment challenge to military judge's denial of individual voir dire during panel selection); U.S. v. Mead, 16 M.J. 270 (C.M.A. 1983) (analyzing the propriety of taking judicial notice of adjudicative facts in Sixth Amendment terms).

[92] Some might suggest that the accused's initial burden under the new Article 120, proving the existence of the defense by a preponderance of the evidence, really is a question of law for the military judge, not a question of fact. *See* Johnson, *supra* note 16, at 27-28 (suggesting—not advocating—that one potentially viable way of navigating the new Article 120's double burden shift would be to treat the accused's initial burden as a question of law). Proponents of this approach might seek to analogize the military judge's finding on the accused's initial burden to the finding on the lawfulness of an order, for example. As the author has presented lectures and classes on the new Article 120, occasionally an audience member will offer this analogy as a comment for discussion. The analogy fails, however, for a few reasons. First, the statutory standard for the initial burden is "by a preponderance of the evidence," a burden of persuasion standard associated with a finding of fact—not a question of law. *See* ROBINSON, *supra* note 34, at 145 (defining a burden of persuasion as, "The degree to which the trier of fact must be persuaded in order to decide an issue in favor of the burdened party."). Second, the existence of a defense is never considered as a question of law. *See* MCM, *supra* note 6, R.C.M. 916(b) (establishing the burden of proof for affirmative defenses, leaving no allowance for any defense to be settled as a matter of law). Finally, the RCM do not define "questions of law" in a way that fairly contemplates whether or not a defense, in fact, exists. *See* MCM, *supra* note 6, R.C.M. 801(e)(5) discussion.

It is important, too, to remember both *Coleman* and *Tulin* when evaluating whether or not the existence of a defense can ever be a matter of law. In both cases, the appellate court set aside convictions because the military judge determined the defenses did not exist. U.S. v. Coleman, 11 M.J. 856 (N.M.C.M.R. 1980); U.S. v. Tulin, 14 M.J. 695 (N.M.C.M.R. 1982). Had the existence of a defense been a question of law, the results in *Coleman* and *Tulin* would have been arguably different, as settling matters of law are exclusively in the purview of the military judge. *See* MCM, *supra* note 6, R.C.M. 801(a)(4).

[93] There remain other procedural issues that make splitting fact-finder responsibilities in this case untenable. How would the military judge inform the panel that he had made his finding without prejudicing the panel in its ultimate deliberations? Would the panel vote on the elements of the offense itself before or after the military judge made his finding on the existence of the defense? If before, how might that prejudice the military judge?

[94] *See* National Defense Authorization Act for Fiscal Year 2006, Pub. L. No. 109-163, § 552, 119 Stat. 3262 (2006).

> Amendment. . . . The fundamental requirement of due process is the opportunity to be heard 'at a meaningful time and in a meaningful manner.'[95]

The *Mathews v. Eldridge* holding sets out three factors by which courts should assess whether or not government action complies with procedural due process requirements:

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.[96]

While *Mathews v. Eldridge* was a civil case, the Supreme Court has also used its three factors to examine procedural due process challenges in criminal cases.[97] To start the analysis of treating the existence of an affirmative defense as an interlocutory matter, consider the scope of interlocutory questions described in the discussion to RCM 801(e)(5): "A question is interlocutory unless the ruling on it would finally decide whether the accused is guilty. Questions which may determine the ultimate issue of guilt are not interlocutory."[98]

The CAAF has never decided if the existence of a defense is a "question which may determine the ultimate issue of guilt." By definition, a defense goes directly to the ultimate issue of guilt.[99] Immediately, then, the notion of handling the accused's initial burden as an interlocutory matter collides with the RCM prohibition on answering the ultimate issue of guilt as an interlocutory matter.

Rule for Courts-Martial 801(e)(5) does not articulate the rationale behind its prohibition, but some ready observations surely inform the rule. First, if the new Article 120 does, in fact, require the accused to prove the existence of an affirmative defense as an interlocutory matter, it inexplicably places on the accused the burden of proving the existence of a defense *before* he knows whether or not the government has proven the elements of the offense. Surely such an inversion of the sequence of trial places the procedural cart before the horse and partially explains RCM 801(e)(5).[100] More importantly, this procedural anomaly would surely foreclose the accused's opportunity to be heard at trial "in a meaningful time and in a meaningful manner,"[101] raising a procedural due process challenge.

Additionally, RCM 801(e)(5) surely accounts for Article 51(b), UCMJ, which directs that, "The military judge . . . shall rule upon all questions of law and all interlocutory questions arising during the proceedings."[102] Rule for Courts-Martial 801(e)(5) is necessary in light of Article 51(b) to protect the accused's right to a jury trial from the military judge's exclusive, statutory authority to decide interlocutory matters. If RCM 801(e)(5) did not prohibit questions on the ultimate issue to be considered as interlocutory matters, then the military judge could inadvertently become the fact-finder in a trial before members. Doing so would violate the accused's Sixth Amendment right to a trial by jury, as discussed above, or his Fifth Amendment Due Process rights.[103]

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[95] Mathews v. Eldridge, 424 U.S. 319, 332-33 (1976).

[96] *Id.* at 335.

[97] *See, e.g.*, Hamdi v. Rumsfeld, 542 U.S. 507, 528-29 (2004) (applying *Mathews v. Eldridge* factors in a criminal case).

[98] MCM, *supra* note 6, R.C.M. 801(e)(5) discussion.

[99] *See id.* R.C.M. 916(a) (defining "defenses" as, "Any special defense which, although not denying that the accused committed the objective acts constituting the offense charged, denies, wholly or partially, criminal responsibility for those acts.").

[100] While not making this exact point, RCM 916(k)(3)(c) nonetheless provide additional insight on the appropriate sequence of considering the existence of an affirmative defense. Consider, by analogy, its direction on the timing of the findings on lack of mental responsibility: "The issue of mental responsibility shall not be considered as an interlocutory question." *Id.* R.C.M. 916(k)(3)(c).

[101] *Mathews*, 424 U.S. at 332-23.

[102] UCMJ art. 51(b) (2005).

[103] *See* discussion *supra* Part III. The express language of Article 51(b) would apparently foreclose the potential procedure of having the panel treat the accused's initial burden as an interlocutory matter. The remaining analysis, however, will continue to include the panel, as there is some precedent in military jurisprudence for sending the panel into deliberations on an interlocutory matter. *See* U.S. v. Laws, 11 M.J. 475 (C.M.A. 1981) (upholding a

Whatever the rationale for RCM 801(e)(5), one might argue that to avoid a potential "cart-before-the-horse" problem, the fact-finder could simply determine, in one interlocutory finding, both the government's proof on the elements of the offense and the accused's proof on his initial burden. After the fact-finder's determination on both, then the government would seemingly have the opportunity to reopen its case to offer additional evidence aimed at disproving the existence of the defense.[104] Following additional evidence, the case would return to the fact-finder to finally determine whether the government disproved the defense beyond a reasonable doubt. Again, the procedure of lumping these two findings together does not resolve the Article 51(b) problem of allowing the panel to resolve an interlocutory question.[105]

While the preceding few paragraphs describe some procedural challenges, no clear analogy informs an ultimate conclusion as to whether the challenges present constitutional concerns in either military or Supreme Court jurisprudence. It is equally difficult to articulate the constitutional propriety of re-opening a case after the accused successfully carries his burden. Comparing current military practice on shifting the burden to the accused regarding lack of mental responsibility and the new Article 120's double burden shift reveals this particular problem.

When lack of mental responsibility is an issue in a case, the fact-finder first determines whether or not the government has proven each element of the underlying offense.[106] If the fact-finder determines the government has proven each element, then the fact-finder considers whether or not the accused has proven lack of mental responsibility by clear and convincing evidence.[107] If the accused carries his burden, then the fact-finder returns a finding of not guilty by reason of lack of mental responsibility and the court-martial is essentially done.[108] The new Article 120 could launch the parties into one more round of accepting evidence and one additional finding if the accused's initial burden is treated as an interlocutory matter.

Perhaps two military holdings inch closer to the conclusion that determining the accused's initial burden as an interlocutory question for a single fact-finder presents Due Process concerns. In *U.S. v. Cooper*, the Court of Military Appeals (COMA) reviewed the accused's conviction for attempting to assault a superior commissioned officer.[109] Upon Cooper's request, the law officer agreed to instruct the panel on the accused's good character.[110] Unfortunately, the law officer forgot to give the instruction.[111] After the announcement of a guilty verdict and while the panel was deliberating on a sentence, the law officer recalled the panel.[112] He advised the panel to revoke its findings of guilty and re-vote following his correct instructions on Cooper's good character.[113] The panel ultimately revoked its findings of guilty, then deliberated and re-voted to convict Cooper.[114] Explaining the inherent dangers of asking the members to reconsider, with open minds, "an issue which they have already settled to their own satisfaction," the COMA set aside the conviction.[115]

Again in *U.S. v. Jones*, a military judge failed to instruct the members on an available defense.[116] After the panel reached a finding, the military judge recalled the members, instructed them, and dispatched them to deliberate again.[117] The

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conviction for unauthorized absence in a case where there was a substantial question as to the court-martial's jurisdiction over the accused. The panel decided the validity of the accused's enlistment, and therefore jurisdiction, prior to deliberating on findings.).

[104] *See* discussion *infra* concerning one final potential procedure: requiring the fact-finder to resolve the elements of the offense and both burden shifts all at once upon the conclusion of the trial on the merits.

[105] UCMJ art. 51(b).

[106] U.S. DEP'T OF ARMY, PAM. 27-9, MILITARY JUDGES' BENCHBOOK 826 (15 Sept. 2002) [hereinafter BENCHBOOK].

[107] *Id.*

[108] *Id.* at 828.

[109] U.S. v. Cooper, 35 C.M.R. 294, 295 (C.M.A. 1965).

[110] *Id.*

[111] *Id.*

[112] *Id.*

[113] *Id.*

[114] *Id.*

[115] *Id.* at 298.

[116] U.S. v. Jones, 7 M.J. 441, 442 (C.M.A. 1979).

COMA, citing *Cooper*, expressed concern about "whether the members could consider the question of guilt with open minds after having resolved the issue."[118] While neither *Cooper* nor *Jones* resolved constitutional challenges, they nonetheless raise a legitimate concern about a single fact-finder's ability to return to the same question twice over, at least as far as the panel is concerned.

The sum of the analyses of treating the accused's initial burden as an interlocutory matter leaves little doubt that applying the *Mathews v. Eldridge* factors calls for a procedural due process challenge to the new Article 120's double burden-shift. Specifically, risk of the erroneous deprivation of the accused's liberty right through the procedure of handling the accused's initial burden as an interlocutory matter is easily mitigated by simply following the UCMJ's existing procedure for affirmative defenses, whether shifting the burden to the accused or not. The analysis shifts finally to the potential scenario wherein a single fact-finder navigates the entire burden-shifting scheme at the conclusion of the trial on the merits. As expected, this final course of action presents its own procedural due process concerns.

Specific Problems with Navigating the Entire Burden-Shifting Scheme at End of Trial on the Merits

Analogies do not readily surface to guide an understanding of the particular challenges inherent in handling the entirety of the new Article 120's double burden-shift at the conclusion of the trial on the merits. Despite the absence of a ready analogy, one perceives two potential problems with instructing the panel all at once on the whole burden-shifting scheme.

A legal fiction, if not a procedural due process challenge, lies in the belief that the government could prove a defense does not exist beyond a reasonable doubt after the accused has proved that it is "more likely than not"[119] that the defense exists. A finding by a preponderance of the evidence would surely cement reasonable doubt in the mind of the fact-finder. For the government, realizing the futility of attempting to overcome the initial finding renders the apparent safety net of the new Article 120's "second bite at the apple" virtually useless. For the defense, a guilty verdict after the accused has met his burden should raise an appellate question as to how, legally, a finding by a preponderance of the evidence could leave open the possibility of a subsequent finding of beyond a reasonable doubt. As a corollary to this first observation, it is difficult to imagine a set of panel instructions that would successfully describe how and when the panel could consider each question and each bit of evidence through the progressive steps of this double burden-shift.

The second potential problem with handling the entirety of the new Article 120's burden-shifting scheme at the end of the trial on the merits relates to ambiguous findings. The discussion to RCM 922 directs the military judge to clarify ambiguous findings.[120] The RCM directive takes on particular importance in the context of the new Article 120's double burden-shift. If the panel simply returns a guilty verdict, how can the defense determine whether grounds for appeal exist? A finding of guilt could mean either that the accused did not carry his burden after the government proved the elements of the underlying offense, or that the accused did carry his burden, but the government subsequently carried its burden on the defense. The distinction matters to the defense, as it will guide the choice of a specific ground for appeal.

Perhaps the most obvious procedural challenge to the idea of handling the entire double-burden shift at the conclusion of the trial on the merits is simply that this option presents the greatest stretch to the plain statutory language. Assigning first the burden of persuasion to the accused and second to the government makes no sense without the intervening opportunity to bring more evidence to bear on the question of the existence of the affirmative defense.

Conclusion: Final Thoughts on the New Article 120's "Overshift"

In the end, the new Article 120's double burden-shift, for all of its procedural uncertainty, could cause an inability to convict or sustain the convictions of sexual assault perpetrators. Furthermore, the burden-shifting scheme could have farther-reaching ramifications than the scope of this article could fairly explore.

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[117] *Id.* at 442.

[118] *Id.* at 444.

[119] BENCHBOOK, *supra* note 106, at 444 (defining a preponderance of the evidence as "more likely than not that a fact exists").

[120] MCM, *supra* note 6, R.C.M. 922(b)(2) discussion.

To facilitate the progression into the subject of the new Article 120, this article rather narrowly used consent and its changing role from an element of an old Article 120 offense to an affirmative defense to some new Article 120 offenses. Importantly, however, the new Article 120's burden-shifting scheme applies to more than just the two defenses of consent and mistake of fact as to consent. In fact, after establishing consent and mistake of fact as to consent as affirmative defenses and discussing mistake of fact as to age for some of the new Article 120's child offenses, the statute expressly states: "The enumeration in this section of some affirmative defenses shall not be construed as excluding the existence of others."[121] The availability of the full range of affirmative defenses raises even more questions about the full impact of the new Article 120's burden-shifting scheme.

Recall that the new Article 120's double burden-shift does not exclusively invoke consent and mistake of fact as to consent. The burden shift applies to all affirmative defenses generally, which the statute defines as, "Any special defense which, although not denying that the accused committed the objective acts constituting the offense charged, denies, wholly, or partially, criminal responsibility for those acts."[122] By tying this definition to the double burden-shift, the new Article 120 apparently creates a whole new defenses scheme operative only in the context of new Article 120 offenses. So, for example, the new Article 120 makes no exception for the defense of lack of mental responsibility, applying the double burden-shift to that defense, as well. What about the Article 50a requirement that the accused prove a lack of mental responsibility by clear and convincing evidence?[123] Did the new Article 120 really mean to deconstruct Article 50a in the context of Article 120 prosecutions?

Persuading Congress to amend the new Article 120 would be the cleanest way to correct the problems identified by this article. Congress could either remove the single sentence establishing the accused's initial burden or remove the single line creating the government's second burden. Eliminating either the accused's initial burden or the government's second burden would restore the statute to a constitutionally viable defense scheme. By eliminating the accused's initial burden, the statutory language would allow practitioners at trial to handle the affirmative defenses exactly as the bulk of affirmative defenses are currently handled in the military justice system. Specifically, once the defense is raised by some evidence,[124] the military judge instructs the panel[125] that the government retains the burden of disproving the existence of the defense beyond a reasonable doubt.[126]

The approach of eliminating the accused's initial burden departs from the statute's apparent desire to afford greater protection for the sexual assault victim. By removing "without consent" as an element of sexual assault and forcing the accused to prove consent by a preponderance of the evidence, the statute presumably makes the victim's conduct relevant only if the accused stands ready to take on the statute's heightened burden. By eliminating the accused's burden, the accused arguably has an easier time of attacking the victim during cross examination, as he merely has to raise "some evidence" of consent to set in motion the government's effort to disprove the defense. Without legislative history explaining the new Article 120's affirmative defenses scheme, the observer is left to wonder whether Congress was motivated by this particular concern.

In the alternative, eliminating the government's second burden would allow practitioners at trial to handle the affirmative defenses exactly like lack of mental responsibility, where the accused has the burden of proving the defense. Adopting this construct would address the victim concerns discussed above, but it would certainly require much of the accused. In particular, requiring the accused to prove an honest and reasonable mistake of fact as to consent would seem to compel the accused to testify at trial.[127]

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[121] *See* National Defense Authorization Act for Fiscal Year 2006, Pub. L. No. 109-163, § 552, 119 Stat. 3259 (2006).

[122] *See id.* § 552, 119 Stat. at 3262.

[123] UCMJ art. 50a(b) (2005).

[124] MCM, *supra* note 6, R.C.M. 916(b) discussion.

[125] *Id.* R.C.M. 920(e)(3).

[126] *Id.* R.C.M. 916(b).

[127] This assertion makes sense intuitively, but at least one military court has commented on the dilemma. *See* U.S. v. Briggs, 46 M.J. 699, 701-02 (A.F. Ct. Crim. App. 1996) *overruled in part by* U.S. v. Stewart, 62 M.J. 668 (A.F. Ct. Crim. App. 2006) ("Certainly, without the accused taking the stand, putting on a 'mistake' offense [sic] is a steep climb.").

Until Congress corrects the statute, military practitioners are left in the unenviable position of trying to apply the statutory language. Trial counsel and defense counsel should race one another to file a motion for appropriate relief with the military judge in cases under the new Article 120.[128] The motion for appropriate relief could articulate the arguments put forth in this article to establish not only the unworkability of the double burden-shift, but also the burden-shift's unconstitutionality. Such a motion could ask the military judge to find the double burden-shift to be unconstitutional and to disregard one or the other burden as a remedy.

The trial judiciary's draft benchbook instructions on the new Article 120's double burden-shift warrants the admittedly novel motion for appropriate relief described above. To start, the draft instructions concede that, "The use of the term of art 'preponderance of the evidence' and the burden shifting may cause confusion."[129] The draft instructions then direct military practitioners to treat the various affirmative defenses "like any other defense" and place a single burden on the government to prove the absence of the defense beyond a reasonable doubt once "some evidence" has raised the defense.[130] The draft instructions' approach to affirmative defenses tacitly acknowledges that the express statutory burden-shifting scheme is at the very least unworkable.

Furthermore, the draft instructions' departure from the new Article 120's specific statutory language creates an opportunity for trial counsel and defense counsel to provide justification for that departure to the military judge. The military judge is not bound by model instructions.[131] The absence of interpretive caselaw and legislative history discussed in this article gives the military judge no rationale for choosing the draft instructions' approach to defenses over the statutory approach to defenses. A motion for appropriate relief could provide that rationale to the military judge.

In short, the constitutional risks are simply too great when compared to the minimal, if any, benefit of the statute's double shift. The military judge, the defense counsel, and the trial counsel have no interest in attempting to save this burden-shifting scheme from constitutional attack. Following the burden-shift, as written, runs the risk of an improper conviction at trial for the defense counsel, of a guaranteed issue on appeal for the trial counsel, and an almost certain reversible error in instruction for the military judge.

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[128] *See* MCM, *supra* note 6, R.C.M. 906(a) (defining motions for appropriate relief).

[129] *See* Formal Proposal to Modify DA PAM 27-9, 3-45-1, note 9, 27 August 2007 (on file with author).

[130] *Id*.

[131] *See* BENCHBOOK, *supra* note 106 at 3. The military judge's benchbook explains:

> The pattern instructions are intended only as guides from which the actual instructions are to be drafted. In addition, this publication is designed to suggest workable solutions for many specific problems which may arise at a trial and to guide the military judge past certain pitfalls which might otherwise result in error…Special circumstances will invariably be presented, requiring instructions not dealt with in this benchbook, or adaptation of one or more of these instructions to the facts of a case. *Id*.

Uncharged Misconduct: The Edge is Never Dull

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Introduction

The Court of Appeals for the Armed Forces (CAAF), during the last few terms, has taken the opportunity to closely scrutinize the admission of evidence under Military Rule of Evidence (MRE) 404(b).[1] Traditionally the darling of every trial counsel, MRE 404(b) provides for the admission of evidence of other crimes, wrongs, or acts (uncharged acts) as long as the evidence is admitted for some purpose other than to prove propensity.[2] Until recently, it seemed that counsel were able to take advantage of MRE 404(b) by simply performing a talismanic chant involving any one of the noncharacter purposes provided under the rule.[3] The CAAF's crackdown on the admission of uncharged misconduct at courts-martial coincides with the opening of the propensity flood gates in cases involving sexual assault and child molestation under MRE 413 and 414.[4] This article discusses five cases of significance from the 2006 term. Three of the cases deal with the admission of uncharged misconduct under MRE 404(b), and the other two discuss the ongoing expansion and clarification of MRE 413 and 414.

Uncharged Misconduct and the *Reynolds* Three-Prong-Test

Military Rule of Evidence 404(b) begins by stating "evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith."[5] The prohibition is a reflection of common sense. Propensity evidence is not excluded because it lacks relevance, but because it is too relevant in the minds of panel members.[6] In everyday associations, we judge others based upon their actions. Past actions of a person are generally considered to be a good indicator of their future conduct. This common sense approach to judging the character of a person does not change for a panel member just because they are now part of a court-martial. However, a person does not always act in conformity with their past actions. As such, admission of this evidence in a court-martial may lead to a wrong outcome. Additionally, this type of propensity evidence almost always caries a risk of unfair prejudice since the panel member may give undue weight to it. Military Rule of Evidence 404(b) seeks to avoid these dangers, especially on behalf of an accused,[7] by repeating the propensity prohibition of MRE 404(a).[8]

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[1] MANUAL FOR COURTS-MARTIAL, UNITED STATES, MIL. R. EVID. 404(b) (2005) [hereinafter MCM].

[2] *Id*. Military Rule of Evidence 404(b) states:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, provided that upon request by the accused, the prosecution shall provide reasonable notice in advance of trial or during trial if the military judge excuses pretrial notice on good cause shown, of the general nature of any such evidence it intends to introduce at trial.

Id.

[3] *See* United States v. Diaz, 59 M.J. 79 (2003) (holding the military judge abused his discretion in admitting evidence of several other injuries the appellant had allegedly inflicted on his daughter to establish a "pattern of abuse" that would help establish that the death of his daughter was a homicide and appellant was the perpetrator); United States v. McDonald, 59 M.J. 426, 429-30 (2004) (holding that a military judge abused his discretion in admitting twenty-year-old acts of uncharged misconduct committed when the appellant was thirteen years old to establish a common plan to commit charged acts of sexual misconduct against the appellant's daughter); United States v. Rhodes, 61 M.J. 445, 453 (2005) (holding the military judge abused his discretion in admitting evidence of a meeting between a key government witness and the appellant to show the appellant's consciousness of guilt); United States v. Bresnahan, 62 M.J. 137 (2005) (military judge abused his discretion by admitting uncharged misconduct evidence).

[4] MCM, *supra* note 1, MIL. R. EVID. 413, 414.

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

[6] *Id.* Military Rule of Evidence 404(b) determinations are amongst the most frequently appealed of all evidentiary rulings, and erroneous admission of other acts evidence is one of the largest causes of reversal. *See* IMWINKELRIED, UNCHARGED MISCONDUCT EVIDENCE § 1:04, at 20 (2006).

[7] This article discusses MRE 404(b) as it relates to admission of uncharged acts against the accused. It is important to understand that MRE 404(b) is not limited to use against the accused. Instead, it applies equally to the government and defense. Defense use of MRE 404(b) is commonly referred to as "reverse 404(b)" evidence. The accused, as the government, would have to satisfy the requirements of the rule before being permitted to admit evidence of uncharged acts against another person. The most common example is that of co-conspirator. In such an example, the accused is seeking to admit evidence of past actions by a co-conspirator to suggest that co-conspirator acted alone or without the accused.

Despite the general prohibition, MRE 404(b) does allow for the admission of uncharged misconduct as a means to prove the accused's knowledge, intent, plan, preparation, opportunity, motive, identity, or absence of mistake.[9] The examples provided under MRE 404(b), however, are not intended to be an exhaustive list.[10] Instead, it is important to understand that as long as the proponent can show that the evidence is being offered for some purpose "other than to demonstrate the accused's predisposition to crime and thereby to suggest that the factfinder infer that he is guilty, as charged, because he is predisposed to commit similar offenses" the prohibition on the uncharged acts will not apply.[11]

To determine whether the proponent is truly offering the uncharged acts for a proper purpose, military courts use the three-part test announced by *United States v. Reynolds*.[12] The first prong of the *Reynolds* test asks whether the evidence reasonably supports a determination by the factfinder that the accused committed the prior crimes, wrongs, or acts.[13] This question is one of conditional relevancy. Such questions are governed by MRE 104(b).[14] Under MRE 104(b), the military judge neither weighs credibility nor makes a finding that the government has proven the conditional fact by a preponderance of the evidence. Instead, the court simply examines all the evidence in the case and decides whether the panel members could reasonably find the conditional fact.[15] The second prong asks whether the evidence makes a fact of consequence in the case more or less probable.[16] This prong is a standard question of logical relevancy under MRE 401.[17] Under this part of the *Reynolds* test, the court should examine what inferences and conclusions can be drawn from the evidence. If the inference intended includes the accused's character as a necessary link, the uncharged act should be excluded. The final prong of the *Reynolds* test calls for balancing under MRE 403.[18] Here, the court asks whether the evidence's probative value is substantially outweighed by the danger of unfair prejudice.[19]

Although the *Reynolds* test dates back to 1989, it was not until relatively recently that it became a hurdle for the government.[20] Starting in 2003, the CAAF began to focus more intensely upon the admission of uncharged acts under MRE 404(b).[21] The 2006 term of the court continues this trend. The CAAF decided two cases during this term concerning the admission of uncharged misconduct.[22] In both, the CAAF found error.

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[8] MCM, *supra* note 1, MIL. R. EVID. 404(a).

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

[10] United States v. Castillo, 29 M.J. 145, 150 (C.M.A. 1989) (holding that "[i]t is unnecessary . . . that relevant evidence fit snugly into a pigeon hole provided by . . . 404(b)).

[11] *Id.*

[12] 29 M.J. 105, 109 (C.M.A. 1989). The CAAF decided *Reynolds* after the Supreme Court decided *Huddleston v. United States*, 485 U.S. 681 (1988). Although the *Reynolds* three-part test is identical in all material respects to the three-part test announced in *Huddleston*, CAAF did not cite *Huddleston*.

[13] *Reynolds*, 29 M.J. at 109.

[14] MCM, *supra* note 1, MIL. R EVID. 104(b). This Rule states:

> When the relevancy of evidence depends upon the fulfillment of a condition of fact, the military judge shall admit it upon, or subject to, the introduction of evidence sufficient to support a finding of the fulfillment of the condition. A ruling on the sufficiency of evidence to support a finding of fulfillment of a condition of fact is the sole responsibility of the military judge.

Id.

[15] *See Huddleston*, 485 U.S. at 689 (preliminary finding by the court that the government has proven the act by a preponderance of the evidence is not required by Federal Rule of Evidence (FRE) 104(a)); *Castillo*, 29 M.J. at 151.

[16] *Reynolds*, 29 M.J. at 109.

[17] MCM, *supra* note 1, MIL. R. EVID. 401 (stating: "'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.").

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

[19] *Reynolds*, 29 M.J. at 109.

[20] *See* Major Bruce D. Landrum, *Military Rule of Evidence 404(b): Toothless Giant of the Evidence World*, 150 MIL. L. REV. 271 (Fall 1995).

[21] *See, e.g.*, cases cited *supra* note 3.

[22] United States v. Barnett, 63 M.J. 388 (2006); United States v. Thompson, 63 M.J. 228 (2006).

United States v. Barnett[23]

In the first, *United States v. Barnett*, the CAAF held that the military judge abused his discretion by admitting evidence of uncharged misconduct involving an incident of previous sexual misconduct.[24] Sergeant (SGT) Ronald Barnett Jr. was an instructor at Aberdeen Proving Ground (APG), Maryland.[25] The charges in his case stemmed from alleged incidents of unwanted physical and verbal advances by him toward four female Army trainees at APG.[26] At trial, SGT Barnett proceeded on a theory that the physical interactions between him and the four trainees were consensual.[27] During pretrial motions, the government sought to introduce the testimony of RB, a former Marine Lance Corporal, as well as a discrimination/sexual harassment incident report detailing the investigation of RB's allegations and the actions taken against SGT Barnett as a result.[28] The government offered both pieces of evidence under MRE 404(b) to show intent[29] and plan,[30] and to rebut appellant's mistake of fact defense.[31] The defense objected to the introduction of the evidence on multiple grounds.[32] After considering the perspective of both sides, the military judge overruled the defense objection as to the testimony of RB.[33] Although the military judge admitted the testimony of RB under MRE 404(b) to rebut SGT Barnett's claim that the four trainees consented to his advances, he did rule that the sexual harassment report was not admissible because it was cumulative and unfairly prejudicial.[34]

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[23] 63 M.J. 388 (2006).

[24] *Id.* at 397. Although MRE 413 permits evidence is similar crimes in sexual assault cases, the CAAF did not apply MRE 413 for two reasons: "First, M.R.E. 413 was not in effect at the time of Appellant's court-martial. Second, Appellant's uncharged misconduct does not qualify as sexual assault under M.R.E. 413." *Id*. at 394 n.2 (citation omitted).

[25] *Id*. at 390.

[26] *Id*.

[27] *Id*.

[28] *Id*.

[29] When pressed by the military judge, the trial counsel offered the following explanation on the theory of intent:

> [C]ertainly we do believe that it impacts on his intent to gratify his sexual desire. The acts that [RB] will testify, the statements that he made, the repeated nature of the statements, the complete ignorance of [his] comments, please stop, leave me alone, just the complete roll over and you'll see how that and what has happened in the instance with these four victims, how that segues and we'll be able to show the members the intent of the accused here.

Id. at 394.

[30] The trial counsel offered the following explanation on the theory of plan: "[A]nd third to show the accused's plan, if you will, to sexually harass, dominate and touch subordinate females that he's able to separate from the pack . . . ." *Id.*

[31] The military judge admitted the evidence over the defense counsel's objection as relevant to rebut SGT Barnett's claim that the four trainees consented to his advances. The military judge stated that RB's testimony was "relevant in that it shows that on a prior occasion . . . the accused was informed in what appear to be very clear terms that his conduct wasn't welcomed, and, hence, not consented to under similar circumstances." *Id*.

[32] The defense counsel succinctly stated his objection as follows:

> I would ask how the government is going to link up [RB]'s testimony with Sergeant Barnett's intent? He's made -- Major Bowe has made some general propositions but there's a total lack of specificity here as to how whatever she says is going to prove either intent, plan, or defeat the claim of consent to Sergeant Barnett. I would state that these things are so temporally removed that there is no logical nexus in either times, place, or space between what happened in 1994 and what happened in 1997. . . . I believe what you're going to hear is no allegations of an indecent assault by [RB] at all. Basically they are the nature of repeated comments. She's going to say that she told him to stop a bunch of times and he didn't, whereas the allegations from Aberdeen once told to stop, Sergeant Barnett apparently did stop. In Aberdeen the allegations involved being [sic] one on one contact, being alone and trying to ensure that they're alone and in a closed space. Whereas, [RB] is going to say whenever one instance of touching occurred, occurred [sic] with a couple of other Marines in the room. There was no actual one on one contact with him, just a series of phone calls and comments . . . .
>
> That being said . . . this is definitely going to fail the 403 legal relevancy test, definitely a substantial risk of unfair prejudice to the accused, confusion of the issues, and a great propensity to mislead the members, sir.

Id. at 391.

[33] *Id*.

[34] *Id*. at 392.

Sergeant Barnett was subsequently convicted at a general court-martial by an enlisted panel of violating a lawful order, maltreatment, indecent assault, and indecent acts. The panel sentenced him to a bad-conduct discharge, confinement for two years, forfeiture of all pay and allowances, and reduction to E-1.[35] The convening authority approved the sentence.[36] The Navy-Marine Court of Criminal Appeals (NMCCA), after setting aside the guilty findings of violating a lawful order and maltreatment as an unreasonable multiplication of charges, affirmed the remaining findings and the sentence in an unpublished opinion.[37]

The CAAF, determining that the military judge abused his discretion in admitting the uncharged misconduct, found error.[38] In evaluating whether the military judge should have admitted the uncharged misconduct, the court conducted a detailed three-prong *Reynolds* analysis.[39]

There was no dispute as to the first prong of the *Reynolds* test that the evidence reasonably supported a determination by the factfinder that the accused committed the prior crimes, wrongs, or acts.[40] The evidence was sufficient for the military judge to conclude SGT Barnett committed the prior uncharged acts involving RB given RB's testimony and the documentation of the subsequent investigation into her allegations.[41]

The court's resolution of this case, instead, centered on the second and third prongs of the *Reynolds* test.[42] As the court noted, the second prong was a question of logical relevance (whether the evidence makes a fact of consequence in the case more or less probable), and the third prong was a question of legal relevance (whether any unfair prejudice created by the evidence outweighed its probative value).[43] The court took the two issues in turn.

Initially, the court addressed the logical relevance of the prior uncharged misconduct involving RB. The CAAF concluded that the military judge admitted the evidence based upon two related implicit findings. First, that since RB did not consent to SGT Barnett's advances, he should have realized that the four trainees also did not consent to his advances. Second, that SGT Barnett should have realized that the four trainees did not consent to his advances because the circumstances were very similar to that of RB.[44]

With regard to the first implicit finding, the CAAF stated that "consent, as a legal matter, and in the context of adult relations, is a fact-specific inquiry that must be made on a case-by-case basis."[45] The CAAF noted that the situation with RB was different factually from that with the four trainees. The primary difference between the four trainees and RB was that the four trainees were subordinates of SGT Barnett and, unlike RB, had never explicitly told SGT Barnett to stop.[46] Ultimately, the CAAF concluded that "[r]egardless of whether Appellant should have known that his advances toward subordinate female trainees were inappropriate, RB's requests that Appellant stop calling her and stop making sexual comments does not show that Appellant could not have mistakenly believed that any of the four trainees consented to his later actions."[47]

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[35] *Id*. at 389.

[36] *Id*.

[37] United States v. Barnett, No. NMCCA 9901313, 2004 CCA LEXIS 285 (N-M. Ct. Crim. App. Dec. 30, 2004) (unpublished).

[38] *Barnett*, 63 M.J. at 390.

[39] *Id*. at 394-97.

[40] *Id*. at 394.

[41] *Id*. at 391.

[42] *Id*. at 394.

[43] *Id*.

[44] *Id*. at 395.

[45] *Id*. (citing United States v. Hibbard, 58 M.J. 71, 75-76 (2003); *see also* MCM, *supra* note 1, pt. IV, ¶ 45.b.(1)(b)).

[46] *Id.*

[47] *Id*.

Turning to the second implicit finding for logical relevance, SGT Barnett should have known the four trainees did not consent because the situation was similar to that involving RB, the court conducted a persnickety[48] comparison by applying the six-part test set forth in *United States v. Morrison*.[49] Applying all but the second criterion of the *Morrison* test, the court found that "RB's explicit instructions to Appellant to stop are not probative of whether Appellant reasonably could have mistaken the four trainees' silence as consent."[50]

The court emphasized that "[u]nlike the four trainees, who were students under Appellant's supervision, RB testified that she had only an administrative relationship with Appellant in which she was not subject to his supervision."[51] This, in the court's opinion, cut against a favorable comparison of the relationship between the victims and SGT Barnett. The court also believed the nature of the acts were dissimilar due to the fact that the only physical contact RB testified to was when SGT Barnett rubbed his arm against hers while they were both seated at the computer in his office.[52] By contrast, the court stated "three of the four trainees testified to repeated overt sexual acts that included kissing and fondling. The fourth trainee testified that Appellant mentioned wanting to kiss her during class one morning and also attempted to tickle her on another occasion."[53]

Additionally, the court pointed out that the situs of the acts were dissimilar.[54] Unlike with RB, where the actions primarily took place over the telephone or in-person when SGT Barnett would stop by her office, SGT Barnett's statements to the four trainees were always in-person.[55] The court placed importance on the fact that SGT Barnett's "comments and actions did not occur in an office setting, but rather, in the context of his teaching duties, in a tank, for example, or in a classroom."[56] Next, with regards to the circumstances of the acts, the court stated "[w]hile there are multiple, notable similarities between the circumstances of Appellant's acts towards the four trainees, as compared to the circumstances of Appellant's largely verbal conduct toward RB, the similarities are few."[57]

Finally, the court felt the need to point out as somehow significant, the fact that the charges against SGT Barnett "stem from incidents occurring in late October 1997 through early November 1997. By contrast, RB testified that her encounters with Appellant were from April 1994 until August of 1994."[58]

The court concluded that SGT Barnett's prior misconduct with RB was of only "marginal logical relevance to the present charged conduct."[59] Additionally, the CAAF did not believe that RB's explicit instructions to SGT Barnett were probative of whether he should have known the four trainees did not consent.[60] The CAAF similarly believed the evidence was only marginally relevant under intent and plan, the other two theories offered by the government.[61] In one sense, this result does not come as a surprise given

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[48] The author chose this word for no other reason than the fact he asked himself how often in life can you use the word "persnickety" in a legal writing. Perhaps, in hindsight, the author will reconsider the decision to do so. "Persnickety 1 a : fussy about small details : FASTIDIOUS <a *persnickety* teacher> b : having the characteristics of a snob. 2 : requiring great precision <a *persnickety* job>." MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY (10th ed. 1993).

[49] *Barnett*, 63 M.J. at 395 (citing United States v. Morrison, 52 M.J. 117, 122-23 (1999); United States v. Munoz, 32 M.J. 359, 363 (C.M.A. 1991)). The CAAF identified the following six-part test as relevant to its analysis: (1) the "[r]elationship between victims and appellant"; (2) the "[a]ges of the victims"; (3) the "[n]ature of the acts"; (4) the "[s]itus of the acts"; (5) the "[c]ircumstances of the acts"; and (6) the "[t]ime span." *Id.*

[50] *Id.* at 396

[51] *Id.* at 395.

[52] *Id*.

[53] *Id*.

[54] *Id.*

[55] *Id*.

[56] *Id*.

[57] *Id*. at 395-96.

[58] *Id*. at 396.

[59] *Id*.

[60] *Id*.

[61] *Id*.

the court's detailed factual analysis. However, the fact the court is conducting such a detailed analysis is a surprise since the second prong of *Reynolds* is supposedly based upon MRE 401 and the "any tendency" standard.[62]

Despite concluding the evidence failed the second prong of *Reynolds*, the CAAF assumed the logical relevance of the evidence for purposes of its analysis.[63] The court next considered whether the evidence would pass the test of legal relevance under the third prong of *Reynolds*.[64] In accessing whether the military judge correctly determined that the evidence was legally relevant under MRE 403,[65] the CAAF used the criteria outlined in *United States v. Berry*.[66]

In the opinion of the CAAF, RB's testimony "was, at best, marginally probative" on the issue of whether the four trainees consented to his advances.[67] Additionally, in order to counter RB's testimony, the court pointed out that it was necessary for the defense to call several witness.[68] This undoubtedly raised confusion of the issues and the wasting of time concerns for CAAF. Just as importantly to the court, RB's testimony "portrayed Appellant to the members as not just a noncommissioned officer who abused his authority over trainees, but as a sergeant who made advances toward the Marine wife of another Marine."[69] Furthermore, the CAAF expressed concerns that some of SGT Barnett's comments included racial overtones.[70]

In view of the marginal relevance of RB's testimony, the CAAF concluded that the danger of unfair prejudice from RB's testimony substantially outweighed its probative value.[71] The court discounted the significance of the military judge's limiting instruction in light of the low probative value of the evidence as compared to its prejudicial effect.[72] Therefore, the CAAF held that

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[62] Standard of "Any Tendency"—is the lowest possible standard for relevancy. This standard shifts the emphasis from admissibility to weight. The test for logical relevance is whether the item of evidence has any tendency whatsoever to affect the balance of probabilities of the existence of a fact of consequence. *See* United States v. Schlamer, 52 M.J. 80, 96 (1999) (holding that MRE 401 is a low standard and since the defense was trying to portray the accused as a docile person, this evidence had some tendency to show the darker side that was consistent with his confession); *see also* United States v. Berry, 61 M.J. 91, 95 (2005) (holding relevant evidence under MRE 401 is evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence).

[63] *Barnett*, 63 M.J. at 396.

[64] *Id*.

[65] *See* MCM, *supra* note 1, MIL. R. EVID. 403. The military judge failed to conduct a proper MRE 403 balancing inquiry when ruling on the defense motion in *Barnett*. *Barnett*, 63 M.J. at 396. In such a situation, the military judge does not receive the benefit of the abuse of discretion standard. *Barnett*, 63 M.J. at 396 (citing *Berry*, 61 M.J. at 96) ("Where the military judge is required to do a balancing test under M.R.E. 403 and does not sufficiently articulate his balancing on the record, his evidentiary ruling will receive less deference from this court.").

[66] *Berry*, 61 M.J. 91, 95-96 (2005) (citing United States v. Wright, 53 M.J. 476, 482 (2000)). Under *Berry*, a military judge should consider the following factors when conducting a MRE 403 balancing test: "the strength of the proof of the prior act; the probative weight of the evidence; the potential to present less prejudicial evidence; the possible distraction of the fact-finder; the time needed to prove the prior conduct; the temporal proximity of the prior event; the frequency of the acts; the presence of any intervening circumstances; and the relationship between the parties." *Id*.

[67] *Barnett*, 63 M.J. at 396-97.

[68] *Id*. at 396.

[69] *Id*.

[70] *Id*. at 396-97.

[71] *Id*.

[72] *Id*. The military judge gave the following instruction to the members:

> Evidence that the accused may have made sexually provocative comments to [RB] and may have touched her in a purportedly provocative manner may be considered by you for the limited purpose of its tendency, if any, to rebut the contention of the defense evidence that the accused's participation in the offenses of indecent assault under Charge IV with [PVT SD], [PFC LT], and [PVT SK], and the offenses of maltreatment in the specifications under Charge II with [PVT SD] and [PFC LT], [PVT SK], and [PFC BL] as the result of mistake on the accused's part as to consent on the part of the persons who were in Charge II and IV, which are before you, the object of the accused's alleged sexual touchings and/or comments. You may not consider this evidence for any other purpose and you may not conclude from this evidence that the accused is a bad person or has criminal tendencies and that he therefore committed the offenses which are charged and which are before the court.

Id. at 392.

the evidence failed to fulfill not only the second, but also the third prong of *Reynolds*.[73] *Barnett* is an important decision because it demonstrates that the CAAF is prepared to closely scrutinize the military judge's decision to admit MRE 404(b) evidence.[74]

United States v. Thompson[75]

The case of *United States v. Thompson* is another case that higlights the difficulty of the government in meeting the second prong of *Reynolds*. Airman Basic Benjamin Thompson was operating as a confidential informant (CI) for the Air Force Office of Special Investigations (AFOSI).[76] During the four months that he operated as a CI, Airman Thompson provided information only three times in response to over thirty requests to do so by the AFOSI.[77] Due to Airman Thompson's track record, AFOSI called him into its offices to interview him.[78]

During the interview, Airman Thompson admitted that he had inhaled marijuana on two occasions and simulated inhalation on approximately twenty-five other occasions.[79] At his subsequent court-martial, the government offered testimony from a number of witnesses concerning pre-service drug use by Airman Thompson to prove knowledge of marijuana use as well as absence of mistake.[80] The defense objected to the admission of this evidence as inadmissible uncharged misconduct, and claimed that the prejudicial impact of the evidence substantially outweighed its probative value.[81] The military judge admitted the evidence over the defense objection.[82] Subsequently, Airman Thompson was convicted of wrongful use, possession, and distribution of marijuana.[83] The members sentenced him to a bad-conduct discharge and twelve months of confinement.[84] The convening authority approved and the Air Force Court of Criminal Appeals (AFCCA) affirmed the findings and sentence.[85]

The CAAF, after conducting its own *Reynolds* analysis, also believed that the evidence was erroneously admitted.[86] The evidence, according to the CAAF, met the first prong of *Reynolds* since the uncharged misconduct reasonably supported a finding that Airman Thompson used marijuana before he entered the Air Force.[87] However, the evidence failed the second prong of *Reynolds* because the court believed the uncharged misconduct was not relevant to a fact in issue.[88] The military judge erroneously admitted the uncharged misconduct to prove "knowledge of marijuana use" as well as absence of mistake.[89] Airman Thompson did not raise

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[73] *Id.* at 397. Having found error, the court evaluated whether the error materially prejudiced SSG Barnett. *Id*. To conduct the inquiry, the court used the four-part *Kerr* test. *Id*. "We evaluate prejudice from an erroneous evidentiary ruling by weighing (1) the strength of the Government's case, (2) the strength of the defense case, (3) the materiality of the evidence in question, and (4) the quality of the evidence in question." *Id*. (citing United States v. Kerr, 51 M.J. 401, 405 (1999)).

[74] MCM, *supra* note 1, MIL. R. EVID. 404(b).

[75] 63 M.J. 228 (2006).

[76] *Id*. at 229.

[77] *Id*.

[78] *Id*.

[79] *Id*.

[80] *Id*. Specifically, the defense objected to the admissibility of three pretrial statements: "(1) admissions to Airman JB about Thompson's use of marijuana 'all the time back home'; (2) a statement to a military dependent, DG, about Thompson's preservice practice of selling marijuana; and (3) a statement to DG about Thompson's use of marijuana in high school." *Id*.

[81] *Id*.

[82] *Id*. at 230.

[83] *Id*. at 229.

[84] *Id*. (holding that the military judge erred in admitting the uncharged misconduct, but that this error was harmless).

[85] United States v. Thompson, No. ACM 35274, 2005 CCA LEXIS 145 (A.F. Ct. Crim. App. Apr. 29, 2005) (unpublished).

[86] *Thompson*, 63 M.J. at 231.

[87] *Id*. The court based this finding on the admissions by Airman Thompson to DG and Airman JB.

[88] *Id*.

[89] *Id*.

the issues of lack of knowledge or mistake of fact.[90] Although the defense counsel did refer to Airman Thompson as "young" and "naïve" in his opening statement, that description was never tied to marijuana use or knowledge of marijuana by the defense.[91] Instead, the defense focused on the credibility of those who testified against the appellant.[92] "Because the matters to which the military judge admitted the uncharged acts evidence were not in issue, the evidence served no relevant purpose and fails the second prong of the *Reynolds* test."[93] As such, the military judge erred in admitting the evidence. As in *Barnett*, the CAAF concluded the error was harmless.[94]

United States v. Harrow[95]

The final case under this section is *United States v. Harrow*.[96] The potential significance of this cases lies in its dicta rather than its *Reynolds* analysis. The AFCCA, not so subtly, invited the CAAF to specifically acknowledge that MRE 404(b) is more restrictive than its federal counterpart.[97]

In *Harrow*, a panel of officer and enlisted members convicted Airman Basic Ashontia Harrow of unpremeditated murder of her daughter.[98] The approved sentence included a dishonorable discharge, confinement for twenty-five years, and forfeiture of all pay and allowances.[99] At trial, the cause of death was uncontested. Airman Harrow's five-month-old daughter passed away from injuries consistent with shaken baby syndrome.[100] The central evidentiary issue was whether the injuries were caused by Airman Harrow or the child's biological father.[101] The military judge denied a defense motion in limine and permitted three witnesses to testify about previous incidents where Airman Harrow was abusive to her daughter.[102] The AFCCA determined that the military judge correctly applied the *Reynolds* test to determine admissibility of the uncharged misconduct under MRE 404(b).[103] In doing so, AFCCA stated:

> [G]enerally speaking, Mil. R. Evid. 404(b) is interpreted more restrictively in military jurisprudence than its counterpart in other federal courts. In applying this jurisprudence, it is clear that military decisions are very fact specific, often based upon the totality of the circumstances, rather than granting the military judge broad discretion.[104]

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[90] *Id*.

[91] *Id*.

[92] *Id*.

[93] *Id*.

[94] *Compare id*. *with* United States v. Barnett, 63 M.J. 388, 397 (2006). In each case, the main reason the CAAF found that the error was harmless was the fact the government's case was otherwise very strong without the uncharged misconduct. Had the government's case not been so strong, it is likely the CAAF would have found prejudicial error and reversed the findings and sentence. *See generally* United States v. Rhodes, 61 M.J. 445 (2005) (finding prejudical error in the admission of uncharged misconduct due in part to the weakness of the government's case).

[95] 62 M.J. 649 (A.F. Ct. Crim. App. 2006).

[96] *Id.*

[97] *Id*. at 660.

[98] *Id*. at 651.

[99] *Id*.

[100] *Id*. at 652.

[101] *Id.*

[102] *Id*. at 658-59. The first incident involved Airman Harrow biting the hand of her daughter to punish her for doing the same to her. *Id.* at 658. The second incident involved Airman Harrow striking her daughter on the thigh to get her to stop misbehaving. *Id.* In the final incident, Airman Harrow "jerked [the daughter's] arm real tightly and grabbed her face real tightly and squeezed her cheeks and called her stupid and ugly." *Id*. at 658-59.

[103] *Id*. at 660.

[104] *Id*.

On 14 February 2007, the CAAF heard oral argument in the *Harrow* case.[105] Interestingly, the dictum of the AFCCA opinion was not addressed in oral argument.[106] It is unlikely that the CAAF will agree that MRE 404(b) is more restrictive than Federal Rule of Evidence (FRE) 404(b).[107] However, regardless of what the CAAF does, it appears that the AFCCA may be correct when it states, as it did in *Harrow*,[108] that the military judge is given less discretion in MRE 404(b) determinations than in other evidentiary rulings.[109]

A recent case which highlights the lack of discretion given to the military judge is *United States v. Rhodes*.[110] In *Rhodes*, the CAAF set aside the findings and sentence with respect to wrongful use and possession of a psilocin (commonly known as the hallucinogen - magic mushroom).[111] The CAAF held that the military judge clearly abused his discretion in applying the third part of the *Reynolds* test, and did not feel the need to address the other two prongs.[112]

The MRE 404(b) issue in *Rhodes* was whether the government should have been permitted to introduce evidence of alleged witness tampering by Staff Sergeant (SSG) Bradley Rhodes.[113] The government believed SSG Rhodes intimidated Senior Airman (SrA) Daugherty into recanting a previously made hand-written statement to Office of Special Investigations (OSI) implicating SSG Rhodes in illegal drug use and possession.[114] Four-and-a-half months after giving the hand-written statement to OSI, SSG Rhodes personally approached SrA Daugherty at his quarters to supposedly request that SrA Daugherty speak to his defense counsel.[115] On the following day, SrA Daugherty met with SSG Rhodes's defense counsel[116] and claimed to be suffering from memory loss, stating he could no longer attest to the accuracy of his original confession.[117]

In a new affidavit prepared by defense counsel, SrA Daugherty recanted his earlier hand-written statement by stating "[i]t was likely that Brad [SSG Rhodes] never did go with me" to purchase drugs.[118] In response, the government moved to introduce evidence that SSG Rhodes intimidated SrA Daugherty into changing his testimony and that this fact was evidence of a consciousness of guilt.[119] Ultimately, the military judge admitted this evidence pursuant to MRE 404(b).[120] Staff Sergeant Rhodes was subsequently convicted of drug use and possession. The AFCCA, in an unpublished opinion, affirmed the findings and sentence.[121] The CAAF reversed.

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[105] United States v. Harrow, 65 M.J. 190 (2007).

[106] *Id*.

[107] MCM, *supra* note 1, MIL. R. EVID. 404(b) analysis, at A22-34 (stating that MRE 404(b) is "taken without change from the Federal Rule"). Since the two rules are identicial, "*Reynolds* [MRE 404(b)] should not be applied in a manner inconsistent with *Huddleston* [FRE 404(b)]." United States v. Diaz, 59 M.J. 79, 109 n.3 (2003) (Crawford, J., dissenting).

[108] *Harrow*, 62 M.J. at 660.

[109] United States v. Harrow, 65 M.J. 190 (2007) (avoiding the issue of whether it was error to admit the uncharged misconduct under MRE 404(b), the CAAF determined that the question of prejudice was easily decided against the appellant).

[110] 61 M.J. 445 (2005).

[111] *Id*. at 453. The CAAF affirmed the findings of guilty to the offenses involving larceny and disorderly conduct. *Id.* However, due to reversing the findings and sentence with regards to the wrongful use and possession of psilocyn, the court returned the case to the Judge Advocate General of the Air Force. *Id.* The court authorized a rehearing on the reversed findings and sentence. *Id.*

[112] *Id*. at 452.

[113] *Id.* at 451-52.

[114] *Id*. at 447.

[115] *Id*.

[116] *Id.*

[117] *Id*.

[118] *Id*.

[119] *Id*. at 448.

[120] *Id*. at 447-48.

[121] United States v. Rhodes, No. ACM 34697, 2004 CCA LEXIS 42 (A.F. Ct. Crim. App. Feb. 24, 2004) (unpublished).

Judge Crawford dissented, arguing that the majority misapplied the *Reynolds* test. In order to indicate why she dissented, Judge Crawford believed it was necessary to reconsider the *Reynolds* test in full.[122] Judge Crawford began her reassessment by looking at the first prong of the *Reynolds* test, whether the evidence reasonably supported a finding that SSG Rhodes met with SrA Daugherty.[123] Her discussion of the first prong of *Reynolds* quickly became a discussion of the second prong, the logical relevance of the evidence.[124] For Judge Crawford, the coincidental meeting was relevant because of its timing to SrA Daugherty's recantation: "Arguing that such facts are insufficient to support a finding that Appellant influenced SrA Daugherty to recant tests the bounds of coincidence when one considers the details of the events, the timing of the visit, and the subsequent lapse of memory."[125] Judge Crawford chastised the majority for posing alternate explanations for the memory loss other than improper influence by SSG Rhodes.[126] Pointing to MRE 104(b),[127] she argued that the possibility of other alternatives were irrelevant since the trial court is not charged with weighing the credibility of a witness or making a finding regarding whether the government proved a conditional fact by a preponderance of the evidence.[128] Judge Crawford believed that "it is not the place of this court to second-guess the members' findings."[129]

Judge Crawford quickly disposed of the second prong of *Reynolds*. She determined that SSG Rhodes's consciousness of guilt made in more likely that he committed the alleged drug offenses.[130] Judge Crawford pointed out that unlike general propensity evidence, consciousness of guilt is directly related to the charged offenses and it is therefore unlikely "that the members would believe that Appellant used or possessed drugs simply due to a general propensity to obstruct justice."[131] Instead, she believed that the members "would believe that Appellant is guilty of these offenses because influencing SrA Daugherty to recant his original statement is directly indicative of guilt in this particular case."[132] This justification supports not only the logical relevance of the evidence under the second prong of *Reynolds*, but also the fact the evidence was not unfair prejudicial under the third prong of *Reynolds*.

Under the third prong of *Reynolds*, Judge Crawford took the majority to task for second guessing the military judge's MRE 403 decision.[133] She began by pointing out that a military judge's ruling on the admissibility of evidence should not be overturned on appeal absent a clear abuse of discretion.[134] In Judge Crawford's view the issue came down to this: "This Court's split on this issue indicates that reasonable minds can disagree on whether to allow such evidence under these circumstances."[135] Judge Crawford was of the view that a simple disagreement was not sufficient to find that the military judge abused his discretion:

> An abuse of discretion involves far more than a difference in judicial opinion . . . The challenged action must . . . be found to be "arbitrary, fanciful, clearly unreasonable," or "clearly erroneous" in order to be

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[122] *Rhodes*, 61 M.J. at 455 (Crawford, J., dissenting).

[123] *Id*.

[124] *Id*. Judge Crawford seems to mix the analysis of prong one and prong two together. Prong one is concerned with only whether the evidence reasonably supports a determination by the factfinder that the accused committed the prior crimes, wrongs, or acts. United States v. Reynolds, 29 M.J. 105, 109 (C.M.A. 1989). Whereas, under prong two the court asks whether the evidence makes a fact of consequence in the case more or less probable. *Id*.

[125] *Rhodes*, 61 M.J. at 455 (Crawford, J., dissenting).

[126] "The majority posits an alternate explanation for the memory loss, noting that the meeting might have induced SrA Daugherty to recant 'due to feelings of remorse over betraying a friend.'" *Id*.

[127] MCM, *supra* note 1, MIL. R. EVID. 104(b) (noting "When the relevancy of evidence depends upon the fulfillment of a condition of fact, the military judge shall admit it upon, or subject to, the introduction of evidence sufficient to support a finding of the fulfillment of the condition.").

[128] *Rhodes*, 61 M.J. at 455.

[129] *Id*.

[130] *Id*. at 456.

[131] *Id*. at 457.

[132] *Id*.

[133] *Id*.

[134] *Id*.

[135] *Id*.

> invalidated on appeal. If, on the other hand, reasonable [minds] could differ as to its propriety, then it cannot be said that the trial judge abused his discretion.[136]

Moreover, Judge Crawford believed the military judge applied the correct legal standard to an undisputed set of facts, determined the evidence passed all three *Reynolds* prongs, and gave an appropriate limiting instruction.[137] As such, "[w]hile the conclusion drawn by the military judge may differ from that of the majority, this is not a basis for overturning the result" according to Judge Crawford.[138]

Although Judge Crawford's dissent might carry the day under other circumstances, it is plain that the majority was bothered by the fact that the entire case against SSG Rhodes rested on the testimony of SrA Dougherty.[139] However, this fact, as Judge Crawford effectively pointed out, was also an important factor in concluding SSG Rhodes's visit to SrA Dougherty was for some purpose other than to arrange a meeting with his defense counsel.[140]

In the end, it is hard to dispute Judge Crawford's argument. The majority simply disagreed with the military judge, and thus concluded that the military judge abused his discretion in admitting the uncharged misconduct.[141] This result lends credence to the dicta of the AFCCA in *Harrow*.[142] It does appear that the military judge is given something less than an abuse of discretion standard in MRE 404(b) rulings.

Accordingly, Government counsel would be well advised to consider whether the "value added" of uncharged misconduct admitted under MRE 404(b) at trial is worth the risk it imposes upon an otherwise valid conviction when it is scrutinized on appeal. Although the *Reynolds* test may appear to set forth a low standard for admissibility, the CAAF has clearly raised the bar.[143] The raising of the bar in uncharged misconduct cases seems to coincide somewhat with the opening of the propensity floodgates in sexual assault and child molestation cases.[144] Given the higher standard applied by the CAAF, practitioners would be wise to avoid relying upon uncharged misconduct unless absolutely necessary. Any decision, however, to do so must ultimately survive a detailed *Reynolds* analysis, a task that is anything but assured on appeal.

Sexual Misconduct

Military Rule of Evidence 413 states that "evidence of the accused's commission of one or more offenses of sexual assault is admissible."[145] Military Rule of Evidence 414 has similar language for child molestation.[146] These rules were based upon the FRE 413 and 414.[147] The federal rules were written[148] to overcome perceived restrictive aspects of FRE 404(a) and (b).[149] Federal Rule of Evidence 413 and 414 represent a rejection of the traditional prohibitions on propensity evidence.[150]

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[136] *Id*. (citing United States v. Glenn, 473 F.2d 191, 196 (D.C. Cir. 1972)) (citations omitted).

[137] *Id*. at 457-58.

[138] *Id*. at 458.

[139] *Id*. at 453. "Additionally, the Government's case concerning the psilocyn mushroom offenses rested almost solely on SrA Daugherty's pretrial statement. So the Government's case was certainly not overwhelming." *Id*.

[140] *Id*. at 456. "Given the convenient and coincidental nature of the memory loss, evidence suggesting that Appellant spoiled SrA Daugherty's statement is very probative and central to the Government's ability to prove guilt." *Id*.

[141] *Id*. at 458. "While the conclusion drawn by the military judge may differ from that of the majority, this is not a basis for overturning the result." *Id*.

[142] United States v. Harrow, 62 M.J. 649, 660 (A.F. Ct. Crim. App. 2006) (stating that the military judge is not given broad discretion in MRE 404(b) rulings).

[143] *See, e.g.*, cases cited *supra* notes 3 and 23.

[144] The majority of the cases involving a detailed *Reynolds* analysis by the CAAF of uncharged misconduct, come within a relatively short time period after the addition of MRE 413 and 414. *See, e.g.*, cases cited *supra* note 3. Military Rules of Evidence 413 and 414 became applicable to military practice in 1996, and were formally adopted in the 1998 amendment to the MCM. *See infra* note 143.

[145] MCM, *supra* note 1, MIL. R. EVID. 413 (stating, "In a court-martial in which the accused is charged with an offense of sexual assault, evidence of the accused's commission of one or more offense of sexual assault is admissible and may be considered for its bearing on any matter to which it is relevant.").

[146] *Id*. MIL. R. EVID. 414 (stating, "In a court-martial in which the accused is charged with an offense of child molestation, evidence of the accused's commission of one or more offense of child molestation is admissible and may be considered for its bearing on any matter to which it is relevant.").

[147] *See infra* at note 143.

This rejection resulted from three main criticisms of FRE 404(b) in sex offense cases: first, FRE 404(b) requires trial counsel to articulate a nonpropensity purpose; second, the military judge always has discretion under FRE 403 to exclude the evidence; and third, the limiting instruction from the military judge prohibited the government from using the evidence to show a propensity to commit sexual offenses.[151] These same concerns support the logic behind the addition of MRE 413 and 414.

In order to admit evidence under either MRE 413 or 414, three threshold requirements must be met.[152] First, the accused must be charged with an offense of sexual assault/child molestation.[153] Second, the evidence proffered must be evidence of the accused's commission of another offense of sexual assault/child molestation.[154] Finally, the proffered evidence must be relevant under MRE 401.[155]

Once the evidence meets the threshold requirements, a military judge must apply the balancing test of MRE 403.[156] Under MRE 403, the evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the members.[157] A military judge must consider several nonexclusive factors in performing the required balancing of probative value and prejudicial effect.[158] These nonexclusive factors include: "Strength of proof of the prior act--conviction versus gossip; probative weight of the evidence; potential for less prejudicial evidence; distraction of the factfinder; . . . time needed for proof of prior conduct; . . . temporal proximity; frequency of the acts; presence or lack of intervening circumstances; and relationship between the parties."[159]

Two cases from the last term introduce additional wrinkles to this developing area of evidentiary law. The first case is from the Army Court of Criminal Appeals (ACCA) and reviews whether the military judge has a sua sponte duty to instruct the members regarding the appropriate uses of evidence admitted under MRE 413 and 414. In *United States v. Dacosta*,[160] Specialist (SPC) Wagner Dacosta was charged with burglary, based upon breaking into and entering the barracks room of SPC L in the nighttime with the intent to commit rape, and also with the rape of SPC L.[161] Prior to trial on the merits, the defense counsel moved to admit "prior sexually suggestive encounters by the alleged victim" with the appellant pursuant to MRE 412.[162] The government did not object to

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[148] The rules were enacted by Congress on 13 September 1994. *See* Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, § 329035, 108 Stat. 2136. Federal Rule of Evidence 413 and 414 became a part of the MRE eighteen months after they were enacted. *See* MCM, *supra* note 1, MIL. R. EVID. 1102(a). The rules were formally included in the *MCM* by way of the 1998 amendment to the MRE. *See* MCM, *supra* note 1, app. 25, at A25-40 to A25-42 (historical executive orders).

[149] *See* STEPHEN A. SALTZBURG ET AL., MILITARY RULES OF EVIDENCE MANUAL § IV, at 4-212 (6th ed. 2006).

> Rule 413 [Rule 414] was written to overcome the restrictive aspects of Rule 404(a) and (b) that generally ban character evidence from being used to show that the accused had a propensity to commit the charged offense. This new Rule authorizes Government counsel to use evidence of the accused's uncharged past sexual assault [child molestations] for the purpose of demonstrating his propensity to commit the charged sexual assault [child molestation].

Id.

[150] *Id*. at 4-213.

[151] *Id*.

[152] United States v. Berry, 61 M.J. 91, 95 (2005).

[153] *Id.*

[154] *Id.*

[155] *Id.*

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

[157] *Id*.

[158] United States v. Wright, 53 M.J. 476, 482 (2000); *Berry*, 61 M.J. at 95-97.

[159] *Wright*, 53 M.J. at 482 (citation omitted).

[160] 63 M.J. 575 (Army Ct. Crim. App. 2006).

[161] *Id*. at 577.

[162] *Id*.

the admissibility of this information, and in fact, wanted to admit the evidence as prior sexual misconduct under MRE 413.[163] The prior sexual activity between SPC L and the appellant was either consensual sexual activity or evidence of prior sexual misconduct depending upon which version of the story the panel chose to believe.[164] At the conclusion of the merits, the military judge inquired whether the defense wanted an instruction on the uncharged misconduct (assuming the panel chose to believe the previous incident was nonconsensual).[165] The defense counsel told the military judge that he did not want the instruction.[166] Despite the defense counsel's request, the military judge chose to instruct on the uncharged misconduct.[167]

The issue on appeal was whether the military judge was correct when she instructed the panel members, over defense objection, regarding evidence of an uncharged sexual assault admitted pursuant to MRE 413.[168] The ACCA answered this question in the affirmative: "[O]nce a military judge properly admits MRE 413 evidence of other sexual assaults, she should provide panel members with findings instructions to guide them regarding the issues in the case, and explain legal standards and procedural requirements which members must use to determine findings."[169]

The ACCA placed a limited sua sponte duty on military judges in all cases to instruct the panel appropriately when MRE 413 evidence is admitted.[170] The decision requires military judges to inform members of the following:

> (1) the accused is not charged with this other sexual assault offense; (2) the Rule 413 evidence should have no bearing on their deliberations unless they determine the other offense occurred; (3) if they make that determination, they may consider the evidence for its bearing on any matter to which it is relevant in relation to the sexual assault offenses charged; (4) the Rule 413 evidence has no bearing on any other offense charged; (5) they may not convict the accused solely because they may believe the accused committed other sexual assault offenses or has a propensity or predisposition to commit sexual assault offenses; (6) they may not use Rule 413 evidenced as substitute evidence to support findings of guilt or to overcome a failure of proof in the government's case, if any; (7) each offense must stand on its own and they must keep the evidence of each offense separate; and (8) the burden is on the prosecution to prove the accused's guilt beyond a reasonable doubt as to each and every element of the offense(s) charged.[171]

The *Dacosta* instruction is now mandatory in the Army.[172] The CAAF denial of the request for review[173] could be read as the CAAF's endorsement of the ACCA's treatment of this issue. However, if the CAAF wanted to send such a message, they could have simply affirmed without opinion. At worst, this opinion should be persuasive authority for the other services. Additionally, although the ACCA did not discuss whether such an instruction would be mandatory when evidence is admitted under MRE 414, there is no reason to think that such an instruction would not be required. Based upon *Dacosta*, counsel should fashion an instruction for the military judge in all cases involving MRE 413 and 414 evidence.[174]

The second opinion is from the CAAF and reviews whether MRE 414 authorizes admission of an accused's child molestation offenses committed after the charged offense of child molestation. In *United States v. James*,[175] Airman Basic Daniel James, a

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[163] *Id*.

[164] *Id* at 577-78.

[165] *Id*. at 578.

[166] *Id*.

[167] *Id*.

[168] *Id*. at 577.

[169] *Id*. at 580-81.

[170] *Id*. at 583.

[171] *Id*.

[172] *Id*. (stating the instruction is mandatory in all cases tried ninety days from the date of the court's opinion).

[173] United States v. Dacosta, 64 M.J. 172 (2006) (denying petition for review).

[174] This instruction should be consistent with the model instruction provided by ACCA in its opinion at *Dacosta*, 63 M.J. at 584, app.

[175] 63 M.J. 217 (2006)

twenty-year-old, met a fifteen-year-old girl while serving as an advisor to her church youth group.[176] Their relationship initially began as a casual friendship, but developed into a dating relationship where they hugged, held hands, and kissed.[177] On two occasions, the hugging and kissing led to Airman James removing the young girl's bra and kissing and touching her exposed breasts.[178] Additionally, at Airman James's suggestion, they engaged in "clothes sex" by rubbing their genital areas against each other with their clothes still on.[179] This conduct resulted in Airman James being charged with engaging in indecent acts with a female under the age of sixteen.[180] The government, over the defense objection, sought to introduce evidence under MRE 414 of a civilian conviction for attempted first degree sexual assault of a child.[181]

The basis of the defense objection was the fact that the civilian conviction occurred after the conduct charged at their client's court-martial.[182] The government argued, and the military judge agreed, that there was no temporal limitation on MRE 414 evidence.[183] As such, the fact the uncharged misconduct occurred after the charged offense was of no import. A general court-martial comprised of officers subsequently convicted Airman James of child molestation and sentenced him to confinement for four months and a bad-conduct discharge.[184] The convening authority approved and AFCCA affirmed the findings and sentence.[185]

The CAAF granted review over the question of whether Airman James's uncharged sexual misconduct should have been admissible.[186] Nothing within the legislative history to the federal rule led the CAAF to believe there was a temporal limitation on the admissibility of evidence under FRE 414.[187] The court also noted that "[a]lthough the historical discussion [to either FRE 413 or 414] speaks in terms of past acts it does not expressly exclude any acts occurring prior to trial."[188] Instead, the CAAF noted, FRE 414 addresses "evidence of the accused's commission of one or more offenses" with absolutely no mention of when the offense(s) might have occurred.[189] Relying upon a fundamental rule of statutory interpretation that "courts must presume that a legislature says in a statue what it means and means in a statute what is says there" the CAAF could find no reason to believe that Congress intended prior misconduct to be probative and subsequent misconduct not under FRE 414.[190] Finally, the CAAF found persuasive the fact that a large body of law interpreting a very similar provision contained in FRE 404(b) held that FRE 404(b) applies to both prior and subsequent bad acts.[191]

These cases also held that the reference to other crimes as "priors" is more a matter of customary usage than a term of art.[192] The CAAF concluded that the "one or more offenses" language of MRE 413 and 414 is no more temporally restrictive than the "other crimes" language of MRE 404(b).[193] Accordingly, practitioners need to be aware that since MRE 413 and 414 is not "temporally

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[176] *Id*. at 218.

[177] *Id*.

[178] *Id*.

[179] *Id*.

[180] *Id*.

[181] *Id*. The uncharged misconduct involved another 15-year-old girl, SB. *Id*. SB was also a member of Airman James's church youth group. United States v. James, 60 M.J. 870, 871 (A.F. Ct. Crim. App. 2005).

[182] *James*, 63 M.J. at 218.

[183] *Id*.

[184] *Id.* at 219.

[185] *Id*.

[186] *Id*.

[187] *Id*. at 220.

[188] *Id*.

[189] *Id*.

[190] *Id*. at 221.

[191] *Id*. at 221-22.

[192] *Id*.

[193] *Id*. at 222.

restrictive" any conduct by the accused prior to trial is potentially admissible. As such, trial counsel might want to conduct a criminal background check on an accused just before trial, especially if there has been a lengthy time period between the charged offense and the date of trial. Likewise, defense counsel need to advise their client that anything they do between the charged offense and trial may come back to haunt them at trial.

Conclusion

The allure of uncharged misconduct is a sweet siren song to the ears of most trial counsel. Even military judges are not immune to its hypnotic sound. However, the rude awaking for those lured into the use of uncharged misconduct usually comes as the case is considered on appeal. Recognizing the significant hurdle presented under the rules of evidence to the use of uncharged misconduct, Congress gave the government a free pass in cases involving sexual misconduct or child molestation. In the military, this free pass seems to have come at a cost. The CAAF is now even more closely scrutinizing the admission of uncharged misconduct under MRE 404(b). What once was a low hurdle to admission is now the steeplechase known as the *Reynolds* test.

"A little bird told me": *U.S. v. Finch* and the Death of the *McOmber* Rule

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The procedural protections of the Constitution protect the guilty as well as the innocent, but it is not their objective to set the guilty free.[1]

Introduction

During the past court term, the Court of Appeals for the Armed Forces (CAAF) expressly overturned the *McOmber* [2] notification of counsel rule in *United States v. Finch*.[3] In 1976, the Court of Military Appeals (COMA) created the *McOmber* rule which required law enforcement or disciplinary authorities to notify a represented suspect's counsel before questioning him at any point in an investigation or criminal prosecution.[4] Later Supreme Court and CAAF decisions interpreting a suspect's right to counsel under the Fifth and Sixth Amendments cast a great deal of doubt on whether the *McOmber* notification of counsel rule was still good law.[5] The *Finch* case has put that question to rest. This article traces the rise and fall of the *McOmber* notification of counsel rule by following the cases and changes to the Rules for Courts-Martial (RCM) that led to its extinguishment.

In addition to discussing the *McOmber* rule, this article reviews three other CAAF cases and one service court opinion. The first two cases, *United States v. Cohen*[6] and *United States v. Brisbane*,[7] examine the circumstances in which a civilian social worker and a uniformed inspector general must advise soldiers of their rights under Article 31, UCMJ. The final two cases examined in this article involve remediation efforts by trial judges in cases involving grants of de facto immunity. The first is the CAAF case of *United States v. McKeel*.[8] In *McKeel*, the CAAF approved remedial measures taken by a military judge at trial which preserved the results of a successful prosecution. In contrast, the Air Force Court of Criminal Appeals (AFCCA) in *United States v. LeBaron*[9] determined that the remedial measures taken by a judge at trial were insufficient and overturned the case.

The Birth, Diminishment, and Death of the *McOmber* Rule

The Birth of the McOmber *Rule*

Airman James E. McOmber was escorted to the security police office at Dover Air Force Base, Delaware, after implicating himself in the theft of a tape deck while being questioned at his residence.[10] When he arrived at the security

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[1] Minnick v. Mississippi, 498 U.S. 146, 166 (1990) (6-2 decision) (Scalia, J., dissenting).

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

[3] 64 M.J. 118 (2006).

[4] *McOmber*, 1 M.J. at 383.

[5] *See* Edwards v. Arizona, 451 U.S. 477, 484-85 (1981) (holding that the Fifth Amendment requires government officials to cease questioning once a suspect has requested counsel and not reinitiate questioning "until counsel has been made available" to him); *Minnick*, 498 U.S. at 152-55 (holding that once an accused who is in custodial interrogation requests counsel, all further interrogation must cease until counsel is present regardless of whether the accused has consulted with counsel); McNeil v. Wisconsin, 501 U.S. 171, 178-82 (1991) (holding that an accused's post-indictment invocation of the offense-specific Sixth Amendment right to counsel is not an automatic assertion of the non-offense-specific right to counsel under the Fifth Amendment); and United States v. LeMasters, 39 M.J. 490, 492-93 (C.M.A. 1994) (when a represented suspect initiates contact with military investigators and, with knowledge of his rights under Article 31, waives those rights, there is no duty to notify his counsel prior to taking his statement).

[6] 63 M.J. 45 (2006).

[7] 63 M.J. 106 (2006).

[8] 63 M.J. 81 (2006).

[9] ACM 35299, 2005 CCA LEXIS 422 (A.F. Ct. Crim. App. Dec. 23, 2005).

[10] United States v. McOmber, 1 M.J. 380, 381 (C.M.A. 1976).

police office, Agent Caloway advised McOmber of his Article 31, UCMJ, and *Miranda* rights.[11] After being advised of his rights, McOmber immediately requested counsel and the interview terminated.[12] Before McOmber left, Agent Caloway helpfully provided him with the name and telephone number of the area defense counsel.[13]

After this initial interview, McOmber's defense counsel contacted Agent Caloway to discuss the case.[14] Two months after this conversation with McOmber's defense counsel, Agent Caloway contacted McOmber and set up another interview.[15] At this interview, which was conducted without notice to McOmber's defense counsel, Agent Caloway again advised McOmber of his Article 31, UCMJ, and *Miranda* rights.[16] This time, McOmber not only waived his rights but also provided a written statement which was later offered at trial to prove his guilt.[17]

At trial, defense counsel objected to the admission of McOmber's statement to Agent Caloway on the grounds that the second interview "infringed upon [McOmber's] Sixth Amendment right to counsel in that Agent Caloway proceeded with the interview without first notifying his attorney and affording him an opportunity to be present."[18] On appeal, as at trial, McOmber objected to the admission of his statement to Agent Caloway.[19] In response to the defense allegation of error, the government appellate counsel stated "that where a criminal investigator knows of [an accused's] exercise of [his] right to counsel in defense of criminal charges, he should deal directly with counsel, not the accused on the same basis applicable to trial counsel under paragraph 44*h*, Manual for Courts-Martial, United States, 1969 (Rev)."[20] The government appellate counsel also "concede[d] that any other approach could all too easily deprive the accused of his Sixth Amendment right as enunciated in" *Massiah v. United States*.[21] Despite conceding that Agent Caloway erred by interviewing McOmber without first notifying his counsel, the Government requested that this error be viewed as harmless because McOmber voluntarily waived his counsel's presence in response to a rights advisement that preceded the interview.[22]

Despite this invitation to find harmless error, the COMA ruled that the Government had ample notice of the standard of conduct expected and that:

> If the right to counsel is to retain any vitality, the focus in testing for prejudice must be readjusted where an investigator questions an accused known to be represented by counsel. We therefore hold that once an investigator is on notice that an attorney has undertaken to represent an individual in a military criminal investigation, further questioning of the accused without affording counsel reasonable opportunity to be present renders any statement obtained involuntary under Article 31(d) of the Uniform Code. This includes questioning with regard to the accused's future desires with respect to counsel as well as his right to remain silent, for a lawyer's counseling on these two matters in many instances may be the most important advice ever given his client. To permit an investigator, through whatever device, to persuade the accused to forfeit the assistance of his appointed attorney outside the presence of counsel would utterly defeat the congressional purpose of assuring military defendants effective legal representation without expense.

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[11] *Id.*

[12] *Id.*

[13] *Id.*

[14] *Id.*

[15] *Id.*

[16] *Id.*

[17] *Id.*

[18] *Id.*

[19] *Id.*

[20] *Id.* In pertinent part, paragraph 44*h* provided: "[The trial counsel's] dealings with the defense should be through any counsel the accused may have." MANUAL FOR COURTS-MARTIAL, UNITED STATES ch. IX, ¶ 44*h* (1969) (Rev.).

[21] *McOmber*, 1 M.J. at 381-82 (citing Massiah v. United States, 377 U.S. 201 (1964)). In *Massiah*, the Supreme Court reviewed the admissibility of an incriminating statements provided by a post-indictment accused to an undercover informant for the Government. The Supreme Court held that the specific guarantees of the Sixth Amendment prohibit the Government from surreptitiously and deliberately eliciting incriminating statements from a post-indictment accused in the absence of counsel. *Massiah*, 377 U.S. at 206.

[22] *McOmber*, 1 M.J. at 382.

Article 27, Uniform Code of Military Justice, 10 U.S.C. § 827.[23]

By tying the notification to counsel requirement (i.e., the *McOmber* rule) to Article 27, UCMJ, the COMA announced that a servicemember's right to counsel extended to the right to have his counsel present at *any* interview related to a military investigation for which the counsel has undertaken representation.[24]

The *McOmber* rule was codified into the Military Rules of Evidence (MRE) in 1994 under a "Notice to Counsel" provision in MRE 305(e).[25] The new MRE 305(e) stated:

> When a person subject to the code who is required to give warnings under subdivision (c) intends to question an accused or person suspected of an offense and knows or reasonably should know that counsel either has been appointed for or retained by the accused or suspect with respect to that offense, the counsel must be notified of the intended interrogation and given a reasonable time in which to attend before the interrogation may proceed.[26]

The Diminishment of the McOmber *Rule*

No sooner had the *McOmber* rule been written into the MRE than the case of *United States v. LeMasters*[27] narrowed its application. In *LeMasters*, the CAAF reviewed the application of the *McOmber* rule to a situation where a represented suspect initiates contact with law enforcement, affirmatively waives his rights against self-incrimination after an otherwise valid rights warning, and provides a statement in the absence of his detailed counsel.[28]

On 12 May 1989, Senior Airman Stephen M. LeMasters, who was stationed in the Philippines, waived his rights and made a statement to an Air Force Office of Special Investigations (AFOSI) investigator.[29] Three days later, LeMasters was required to report to an Office of Special Investigations (OSI) office and speak to a special investigations agent.[30] Upon being advised of his Article 31, UCMJ, and *Miranda* rights, LeMasters requested an attorney and the interview terminated. Over the next several weeks, LeMasters established an attorney-client relationship with military defense counsel.[31]

On 12 July 1989, Philippine police arrested LeMasters during a "buy-bust" operation at his off-base residence which was completely independent of AFOSI's investigation.[32] Upon his release from Philippine custody, an AFOSI agent instructed him to contact his attorney and, if he desired, to return to the OSI office to make a statement.[33] Beginning the next day, and at three more meetings over the next two months, LeMasters returned to the OSI office, waived his right to counsel and made statements that were later used at his court martial over defense objection.[34]

In evaluating LeMasters's claim that his MRE 305(e) rights were violated when the police questioned him without the notification or presence of his counsel, the court reviewed both the Supreme Court case of *Edwards v. Arizona*[35] and the

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[23] *Id.* at 383.

[24] *Id.* at 382-83 ("Although the question presented has certain constitutional overtones, our disposition of the matter on statutory grounds makes it unnecessary to resolve the Sixth Amendment claim." *Id.* at 382 (citations omitted)).

[25] MANUAL FOR COURTS-MARTIAL, UNITED STATES, MIL. R. EVID. 305(e) analysis, at A22-15 (1994) (stating that Rule 305(e) "is taken from *United States v. McOmber*, 1 M.J. 380 (C.M.A. 1976)").

[26] *Id.* MIL R. EVID. 305(e).

[27] 39 M.J. 490 (1994).

[28] *Id.* at 490-91.

[29] *Id.* at 491.

[30] *Id.*

[31] *Id.*

[32] *Id.*

[33] *Id.*

[34] *Id.*

[35] Edwards v. Arizona, 451 U.S. 477 (1981).

language of MRE 305.[36] In *Edwards*, the Supreme Court ruled that an accused who invoked his right to counsel under *Miranda* could not, while in continuous police custody, be subjected to further police-initiated interrogation without his counsel being present.[37] The court emphasized that *Edwards* was decided five years after the *McOmber* decision and, like *McOmber*, was "designed to prevent police badgering . . . and overreaching."[38]

The court then turned to the text of MRE 305(e) and noted that the trigger for its protections arose when a person subject to the Code "intend[ed] to question" someone:

> This language was designed to protect the right to counsel when the police initiate the interrogation. If Mil. R. Evid. 305(e) is applicable, the suspect has a right to have his counsel notified, and his counsel must be given a reasonable period of time to attend the interrogation. Here there is no evidence of police overreaching or badgering or attempting to "surreptitiously" deprive appellant of the right to counsel.[39]

Based on the Supreme Court's decision in *Edwards* and the wording of MRE 305(e), the court determined that notification of LeMasters's counsel was not required because LeMasters himself initiated contact with the police and affirmatively waived his right of notice to counsel.[40] In short, the court determined that "[l]ike other Constitutional rights, a suspect may make a knowing and intelligent waiver."[41] In a footnote foreshadowing the decision in *Finch*, the *LeMasters* court stated that:

> *McOmber* cannot reasonably be based on Article 27, Uniform Code of Military Justice, 10 USC § 827, which concerns assignment of counsel for special and general courts-martial. In *United States v. Clark*, 22 USCMA 570, 48 CMR 77 (1973), the Court held that there was no right to counsel at interrogations other than those specified in *Miranda v. Arizona* . . . . Article 27 has not changed since that decision.[42]

In 1994, only months after the *LeMasters* decision, MRE 305(e) was rewritten and retitled "Presence of Counsel."[43] This revised (and current) version of MRE 305(e) provides for only two situations in which counsel must be present, absent valid waiver: (1) custodial interrogations where the accused or suspect has already requested counsel and remained in continuous custody, and (2) post-preferral interrogation of a represented accused where the questions concern the offense or matters that were subject of the preferral of charges.[44] As the 2005 analysis of the MRE states, the 1994 Amendment "conform[ed] military practice with the Supreme Court's decision" in questions concerning the offense or matters that were the subject of the preferral of the charges.[45] In effect, this change brought military practice into conformity with the Supreme Court's decisions in *Minnick v. Mississippi* and *McNeil v. Wisconsin*.[46]

The Death of the McOmber *Rule*

In the aftermath of *LeMasters* and the revised MRE 305(e), it was clear that if a represented suspect approached law enforcement and made a knowing and intelligent waiver of his right to counsel, law enforcement could interview him without first notifying his counsel. What was not entirely clear was whether the *McOmber* rule requiring notification of counsel was

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[36] *LeMasters*, 39 M.J. at 492.

[37] *Edwards*, 451 U.S. at 487.

[38] *LeMasters*, 39 M.J. at 492 (citations omitted).

[39] *Id.*

[40] *Id.* at 492-93.

[41] *Id.* at 493.

[42] *Id.* at 492 n.*.

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

[44] *Id.* MIL. R. EVID. 305(e).

[45] *Id.* MIL. R. EVID. 305(d) analysis, at A22-15 (citations omitted).

[46] *Id.* MIL. R. EVID. 305(e) analysis, at A22-15 (citing Minnick v. Mississippi, 458 U.S. 146 (1990); McNeil v. Wisconsin, 501 U.S. 171 (1991)).

still valid in cases in which law enforcement *initiated* questioning of a represented suspect. This question was answered by the CAAF during the past court term in *United States v. Finch*.[47]

In the spring of 1997, Staff Sergeant James E. Finch, a United States Marine Corps recruiter, was prosecuted for a number of offenses arising from the death of a female recruit in a traffic accident.[48] The recruit was killed when her car, with Finch inside, slid off a road near a lake where they had been drinking together.[49] Prior to the day of the accident, Finch had received an order to remain away from the recruit by a superior noncommissioned officer.[50]

Two months after the recruit's death, an investigating officer from Finch's higher headquarters advised Finch of his rights, which Finch waived, and obtained several statements from him regarding the circumstances surrounding the recruit's death.[51] Prior to conducting this interview, the investigating officer had been informed by civilian police investigating the accident that a "hot shot lawyer" represented Finch.[52] The investigating officer had also reviewed a litigation report that noted that Finch was represented.[53] In fact, not only was Finch represented by civilian defense counsel, his counsel had told the civilian police that all contact with Finch should be made through him.[54]

At trial, Finch's defense counsel moved to suppress Finch's statements to the investigating officer.[55] The trial judge denied this motion.[56] Finch was subsequently convicted by a military judge of conspiracy to violate a general order, failure to obey a general order, failure to obey a lawful order, making a false official statement, and being drunk on duty. Finch was found not guilty of involuntary manslaughter.[57] On appeal, Finch claimed that the judge's failure to suppress his statements violated his right to counsel under the precedent of *United States v. McOmber*.[58]

In reviewing the continued applicability of the *McOmber* rule, Judge Crawford, writing for the majority, wrote that *McOmber* "sought to fulfill the statutory purpose of Article 27 . . . in a manner consistent with parallel developments in the Supreme Court's constitutional analysis of the right to counsel . . . ."[59] The CAAF reviewed the evolution of MRE 305 in response to the Supreme Court's decisions in *Minnick*[60] and *McNeil*,[61]and its own decision in *LeMasters*.[62] The court also noted that while the President had changed the MRE since the announcement of the *McOmber* decision, "a change in a rule cannot supplant a statute including a statutorily based judicial decision."[63] After noting that Article 27, UCMJ, had not changed since the announcement of the *McOmber* decision, the majority declared that "*McOmber* represented an attempt to ensure that the statutory right to counsel under Article 27, UCMJ, was administered in a manner consistent with the then-current Supreme Court constitutional precedent regarding the right to counsel."[64] The majority stated that *Minnick* and *McNeil* had changed the constitutional landscape surrounding an accused's pre-preferral right to counsel and that neither the

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[47] 64 M.J. 118 (2006).

[48] *Id.* at 120.

[49] *Id.*

[50] *Id.*

[51] *Id.* at 123.

[52] *Id.*

[53] United States v. Finch, No 200000056, 2005 CCA LEXIS 77, *24-*25 (N-M. Ct. Crim. App. Mar. 10, 2005) (unpublished).

[54] *Finch*, 64 M.J. at 123.

[55] *Id.*

[56] *Id.*

[57] *Id.* at 119. The military judge sentenced Finch to five years confinement, reduction to pay grade E-1, and a bad-conduct discharge. *Id.*

[58] *Id.* at 123.

[59] *Id.*

[60] Minnick v. Mississippi, 498 U.S. 146 (1990).

[61] McNeil v. Wisconsin, 501 U.S. 171 (1991)

[62] United States v. LeMasters, 39 M.J. 490 (1994).

[63] United States v. Finch, 64 M.J. 118, 124 (2006).

[64] *Id.*

McOmber notification rule nor subsequent codification of that rule in MRE 305 was required by the Constitution.[65] Finally, the CAAF held the *McOmber* rule was essentially a windfall to the accused that was not required nor justified by the Constitution or Article 27, UCMJ.[66] With that, the *McOmber* rule died.

Pointers for Practitioners

For both government and defense counsel, the *Finch* case clarifies when a suspect or an accused is entitled to counsel under the Fifth and Sixth Amendments. In future investigations, there are only two situations in which an accused is entitled to the notification and presence of his counsel prior to law enforcement-initiated interrogations. First, absent a valid waiver, if an accused or person who is suspected of an offense is subjected to custodial interrogation and requests counsel, counsel must be present before any subsequent law enforcement-initiated custodial interrogation can continue.[67] Second, absent a valid waiver, if an accused requests counsel or has appointed or retained counsel, that counsel must be present prior to any post-preferral interrogation by a person subject to the Code who initiates an interrogation for a law enforcement or disciplinary purpose *and* asks a question that concerns the offenses or matters that were the subject of the preferred charges.[68]

Unfortunately for government counsel, the *Finch* decision and MRE 305(e) create some unanswered ethical dilemmas when dealing with law enforcement officials who are investigating represented suspects. What happens if law enforcement asks a government counsel, for instance a trial counsel or chief of military justice, whether it is legal for them to initiate an interrogation of a represented pre-preferral suspect? Taking that example one step further, can a government trial counsel or chief of military justice advise law enforcement to engage in that activity?

Rule 4.2 (Communication with Person Represented by Counsel) of Army Regulation (AR) 27-26, *Rules of Professional Conduct for Lawyers*, states that "in representing a client, a lawyer shall not communicate about the subject of the representation with a party a lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so."[69] Likewise, Rule 5.3 (Responsibilities Regarding Nonlawyer Assistants) prohibits lawyers with direct supervisory authority over a nonlawyer from ordering or ratifying conduct that the lawyer himself could not engage in under the Rules of Professional Conduct.[70] In a footnote toward the end of their opinion, the *Finch* majority noted that MRE 305(e) "does not address the ethical implications of dealing with accuseds or suspects who are represented by counsel."[71]

Who Must Give Article 31 Rights Warnings?

In April 2006, the CAAF released two new opinions that explore the question of a servicemember's rights under Article 31, UCMJ during questioning by individuals whose duties are not normally associated with military law enforcement. In *United States v. Cohen*,[72] the court determined whether an officer performing duties as an inspector general (IG) was required to read a servicemember his Article 31, UCMJ rights when questioning him about the circumstances surrounding his complaints. In *United States v. Brisbane*,[73] the court examined whether a suspect's statements to a Department of Defense (DOD) Family Advocacy treatment manager should have been preceded by an Article 31 rights advisement.

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[65] *Id.* at 125.

[66] *Id.*

[67] 2005 MCM, *supra* note 43, MIL. R. EVID. 305(e)(1). *See also* Edwards v. Arizona, 451 U.S. 477 (1981); Arizona v. Roberson, 486 U.S. 675 (1988). Both of these cases stand for the proposition that once a suspect in custody requests counsel, interrogation may not proceed unless counsel is present. Government officials may not reinitiate custodial interrogation in the absence of counsel whether or not the accused has consulted with his attorney. Minnick v. Mississippi, 498 U.S. 146, 150-52 (1990). However, this rule does not forbid further interrogation if the suspect or accused initiates questioning, regardless of whether the he is in custody. *Minnick*, 498 U.S. at 154-55.

[68] 2005 MCM, *supra* note 43, MIL. R. EVID. 305(e)(2).

[69] U.S. DEP'T OF ARMY, REG. 27-26, RULES OF PROFESSIONAL CONDUCT FOR LAWYERS R. 4.2 (1 May 1992) [hereinafter AR 27-26].

[70] *Id.* R. 5.3.

[71] *Finch*, 64 M.J. at 125 n.12.

[72] 63 M.J. 45 (2006).

[73] 63 M.J. 106 (2006).

United States v. Cohen[74]

During the spring of 2000, Lieutenant Colonel (LtCol) Kluck, United States Air Force, was assigned as an IG for the 17th Training Wing at Goodfellow Air Force Base, Texas.[75] Prior to becoming an IG, LtCol Kluck had served over eighteen years as an investigator with the AFOSI.[76] On 31 May 2000, Airman First Class Alexander L. Cohen visited LtCol Kluck's office to file a complaint about the length of time it was taking to process his security clearance and the fact that he had been denied leave to visit his ill father.[77] When Cohen spoke to LtCol Kluck, he explained that he had previously been charged with rape, but that the charge had been "dropped [until] further notice."[78] Cohen told LtCol Kluck that the base staff judge advocate (SJA) office had notified him that he was a witness for an Article 32, UCMJ hearing in June, but that Cohen's defense attorney told him he would not be needed to testify. In a later meeting with LtCol Kluck, Cohen revealed that his attorney said he would not be needed for a trial until mid- to late July.[79]

At some point during the course of several meetings with Cohen, LtCol Kluck asked Cohen to describe the incident that led to the "dropped" rape charge.[80] During that meeting Cohen described how he and four other trainees from Goodfellow Air Force Base, two male and two female, went to a concert in Abilene, Texas.[81] After the concert, all five airmen became heavily intoxicated and checked into a hotel room.[82] Cohen told LtCol Kluck that during the course of the evening he had photographed another male airman having intercourse with an unconscious female airman.[83] When LtCol Kluck asked, Cohen denied participating in any sexual acts with the female airman.[84]

At trial, LtCol Kluck was allowed to testify, over defense objection and his own protestations, that Cohen had told him that he had been present during the rape of one female airman and that he had photographed the rape and helped clean the victim's clothing after the rape.[85] During the motion to suppress, LtCol Kluck explained that he had not read Cohen his Article 31 rights because Cohen had told him "he was simply a witness [to] this incident, by taking photographs."[86] Ultimately, the trial judge determined that LtCol Kluck "had no criminal investigator or disciplinary duties" and was not required to advise Cohen of his rights under Article 31.[87]

The AFCCA agreed with the trial judge's assessment and held that LtCol Kluck was not required to read Cohen his Article 31 rights because, in his capacity as an IG, he "was not acting in a law enforcement or disciplinary capacity."[88] The service court also concluded that there was "no basis to conclude that the IG made promises of confidentiality such as would render [Cohen's] statements to him involuntary."[89] Finally, the service court concluded that Cohen suffered no material prejudice even if the trial judge erred because the evidence was strong enough to convict him even without using his statements to LtCol Kluck.[90]

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[74] 63 M.J. 45.

[75] *Id.* at 47.

[76] *Id.*

[77] *Id.*

[78] *Id.*

[79] *Id.*

[80] *Id.*

[81] *Id.*

[82] *Id.*

[83] *Id.*

[84] *Id.*

[85] *Id.* Lieutenant Colonel Kluck initially refused to testify at Cohen's trial because he believed the contents of their conversation fell within the IG privilege of confidentiality. He later testified only after he was ordered to do so by the Inspector General of the Air Force. *Id.* at n.5.

[86] *Id.*

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

[88] *Id.* at 49 (quoting United States v. Cohen, No. 200000133, 2003 CCA LEXIS 130, at *19).

[89] *Id.*

[90] *Id.*

The CAAF began its review of Cohen's case by announcing what it described as the four textual predicates of Article 31(b): "First, the article applies to persons subject to the UCMJ. Second and third, the article applies to interrogation or requests for any statements from 'an accused or a person suspected of an offense.' Fourth, the right extends to statements regarding the offense(s) of which the person is accused or suspected."[91]

Since LtCol Kluck, an active duty Air Force officer with eighteen years of service, was clearly a person subject to the UCMJ, the court immediately took up the second and third textual predicates.[92] The court observed that if Article 31(b) were "applied literally, [it could] potentially have a comprehensive and unintended reach into all aspects of military life and mission."[93] The court then stated "this Court has interpreted the second textual predicates—interrogation and the taking of 'any' statement—in context, and in a manner consistent with Congress' intent that the article protect the constitutional right against self-incrimination."[94] Finally, the court pointed to the importance of analyzing "the questioner's status and the military context in which the questioning occurs."[95]

The court observed that "when a questioner is performing a law enforcement or disciplinary investigation . . . and the person questioned is suspected of an offense, then Article 31 warnings are required."[96] Whether a questioner is performing a law enforcement or disciplinary investigation "is determined by assessing all the facts and circumstances at the time of the interview to determine whether the military questioner was acting . . . in an official law-enforcement or disciplinary capacity."[97] If the questioner was not acting in a law enforcement or disciplinary capacity, no warnings are generally required because "military persons not assigned to investigate offenses, do not ordinarily interrogate nor do they request statements from others accused or suspected of a crime."[98] Likewise, that court stated that "where the questioner is acting in an unofficial capacity and the person questioned does not perceive the questioning as more than a casual conversation, [Article 31] warnings are not required."[99]

Applying the law to the facts in Cohen's case, the court determined that the military judge erred when he allowed Cohen's statements to LtCol Kluck to be admitted at trial.[100] The court found that in addition to being a person subject to the UCMJ, LtCol Kluck's responsibilities as an IG were not exclusively administrative.[101] Looking to the applicable Air Force instructions, the court pointed to provisions that created an express criminal exception to the standard confidentiality promised to IG complainants.[102] The court also noted that the Air Force instruction "contemplates the possibility that IG investigations could transition into law enforcement or disciplinary investigations," and that IGs were directed to consult with the SJA concerning "the need for and substance of Article 31 rights advisement."[103]

Having determined that LtCol Kluck was a person subject to the code and that he was acting in a law enforcement or disciplinary capacity, the court looked at whether LtCol Kluck should have suspected that Cohen had committed an offense.[104] While the court allowed that LtCol Kluck may have been entitled to consider Cohen a witness and not a suspect during their first meeting, the court stated that as soon as LtCol Kluck was aware that Cohen had previously been charged with rape, and that the charge might be reinstated, he should have reasonably suspected that Cohen may have committed an

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[91] *Id.*

[92] *Id.* at 50-51.

[93] *Id.* at 49 (quoting United States v. Gibson, 14 C.M.R. 164, 170 (C.M.A. 1954)).

[94] *Id.*

[95] *Id.*

[96] *Id.* (quoting United States v. Swift, 53 M.J. 439, 446-47 (2000)).

[97] *Id.* (quoting *Swift*, 53 M.J. at 446).

[98] *Id.* at 50 (quoting United States v. Loukas, 29 M.J. 385, 388 (C.M.A. 1990)).

[99] *Id.* *See* United States v. Duga, 10 M.J. 206, 210 (C.M.A. 1981) and United States v. Loukas, 29 M.J. 385, 388 (C.M.A. 1990).

[100] *Id.* at 54.

[101] *Id.*

[102] *Id.* at 51 (reviewing U.S. DEP'T OF AIR FORCE, INSTR. 90-301, INSPECTOR GENERAL COMPLAINTS para. 1.37.5.1.2 (Aug. 12, 1999) [hereinafter 1999 AFI 90-301]).

[103] *Id.* at 52 (quoting 1999 AFI 90-301, *supra* note 101, para. 2.34.6).

[104] *Id.* at 52-53.

offense.[105] In any case, the court determined that once Cohen revealed that he took photographs of the alleged rape he "should have reasonably suspected [Cohen] of the offense of indecent acts, if not complicity in the rape itself."[106]

Despite this finding, the court concluded that the judge's error in admitting Cohen's unwarned statements to LtCol Kluck did not prejudice Cohen's trial.[107] The court pointed to the fact that Cohen pleaded guilty to the indecent act of photographing the rape, and that his conviction of the indecent act and indecent assault of the other victim was based upon overwhelming evidence of guilt in the form of eyewitnesses and photographic evidence.[108] Finally, the court noted that none of the unwarned statements that Cohen had given to LtCol Kluck implicated him in the crimes he committed against the female airmen.[109]

Pointers for Practitioners

For practitioners, the *Cohen* case emphasizes the broad scope of Article 31's protections for servicemembers who are, or should reasonably be, suspected of offenses. *Cohen* also demonstrates the narrowness of exceptions permitted for persons "subject to the Code" who may have "a mixed purpose" when asking servicemembers questions that may result in an incriminating response.

United States v. Brisbane[110]

In the late spring of 2001, United States Air Force Staff Sergeant Mark S. Brisbane's eight-year-old stepdaughter asked him what she would look like when she was older.[111] The stepdaughter later testified that she intended her question to mean what she would wear when she graduated.[112] Brisbane later told others that he misunderstood his stepdaughter's question as an inquiry into how his stepdaughter would physically develop.[113] In response to her question, Brisbane showed her naked pictures of adult women on his home computer.[114]

The stepdaughter, whose mother was on vacation in Hawaii, told a neighbor about the photos Brisbane had shown her.[115] The neighbor called the base Family Advocacy office to report Brisbane's conduct.[116] In response to this referral, the base Child Sexual Maltreatment Response Team (CSMRT) convened.[117] The CSMRT, operating under the authority of appropriate Air Force instructions,[118] consisted of a Family Advocacy Officer (FAO), an Air Force Office of Special Investigations (AFOSI) agent, a judge advocate (JA), and other agency representatives with child protection responsibilities.[119] At this meeting, it was decided that Ms. Lynch, a Family Advocacy treatment manager and civilian DOD

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[105] *Id.* at 53-54.

[106] *Id.* at 53.

[107] *Id.* at 54.

[108] *Id.*

[109] *Id.*

[110] United States v. Brisbane, 63 M.J. 106 (2006).

[111] *Id.* at 108.

[112] *Id.*

[113] *Id.*

[114] *Id.*

[115] *Id.*

[116] *Id.*

[117] *Id.*

[118] U.S. DEP'T OF AIR FORCE, INSTR. 40-301, MEDICAL COMMAND, FAMILY ADVOCACY para. 3.2.1 (July 22, 1994) [hereinafter AFI 40-301].

[119] *Brisbane*, 63 M.J. at 109 n.2.

Defense employee, should conduct the initial interview of Brisbane "to determine whether they had enough information to proceed."[120]

Subsequent to this meeting, Ms. Lynch interviewed the stepdaughter and Brisbane, who was directed by his command to see Ms. Lynch.[121] Ms. Lynch told Brisbane that he had "limited confidentiality" during the interview but did not advise him of his Article 31 rights.[122] Her first question to Brisbane was, "Did you do it?"[123] In response, Brisbane explained that he downloaded some pictures from an adult pornography site on the Internet and showed them to his stepdaughter so she would know what her physical appearance would be when she grew up.[124] At trial, Ms. Lynch informed the military judge that she did not provide Brisbane, nor anyone else that she had ever talked to, Article 31 rights advice because it was "just not part of [her] job."[125]

Ms. Lynch completed her interviews and forwarded a report to the base Family Maltreatment Case Management Team (FMCMT).[126] At about the same time, the AFOSI closed their case on Brisbane because it "lacked credible information to open a substantive investigation."[127] In accordance with appropriate AFOSI procedures, Brisbane's investigative file was forwarded to a "forensic science consultant" for further examination.[128] After reviewing the file, the forensic science consultant recommended that AFOSI launch a full investigation into Brisbane's alleged misconduct.[129]

Several weeks later, the FCMCT met and, according to an e-mail from the AFOSI detachment commander that was admitted at trial, additional information was provided during this meeting that "raised some concerns" with the AFOSI commander.[130] During this period of time, the AFOSI opened a criminal investigation into Brisbane's conduct.[131] Despite efforts by the defense at trial, the AFOSI detachment commander refused to admit that it was Ms. Lynch's report that caused her to open an investigation and maintained that the investigation was opened in response to the advice of their forensic consultant.[132]

When AFOSI agents spoke to Brisbane, approximately six weeks after Ms. Lynch's conversation with him, he was advised of his Article 31 rights, waived them, and gave a statement.[133] In that statement, Brisbane calmly told investigators the same story he had previously related to Ms. Lynch.[134] At the conclusion of the interview, Brisbane agreed to take the investigators back to his on-post quarters and show them the images he had shown his daughter.[135]

The investigators requested, and received, consent from Brisbane to seize his computer.[136] However, prior to seizing the computer, Brisbane accidentally opened one of the computer's files in front of the investigators that appeared to show

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[120] *Id.* at 109 & 112.

[121] *Id.*

[122] *Id.* at 109.

[123] *Id.*

[124] *Id.*

[125] *Id.*

[126] *Id.* "The FMCMT consists of medical, investigative, and other appropriate base and community agency representatives as determined by the FAC [Family Advocacy Committee]." AFI 40-301, *supra* note 116, para. 2.2.3.

[127] *Brisbane*, 63 M.J. at 109.

[128] *Id.*

[129] *Id.*

[130] *Id.*

[131] *Id.*

[132] *Id.* at 115.

[133] *Id.* at 109.

[134] *Id.*

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

[136] *Id.* at 110.

"thumbnail pictures of naked children."[137] The investigators testified at trial that once the thumbnail pictures appeared, Brisbane's demeanor changed from calm to very nervous.[138] Brisbane began shaking, sweating, and stammering.[139] At one point he blurted out that he "thought it was okay to have pictures of child pornography as long as it was for educational purposes."[140] Later that day, Brisbane signed a confession admitting that he had child pornography on his computer.[141]

On appeal, Brisbane argued that the trial judge abused his discretion when he admitted Brisbane's statements to Ms. Lynch in the absence of a prior warning under Article 31.[142] Brisbane also argued that his subsequent statements to AFOSI investigators should have been suppressed because they were tainted by Brisbane's earlier unwarned statement to Ms. Lynch.[143] The Government responded that Ms. Lynch was not acting as a law enforcement officer when she interviewed Brisbane, and therefore was not subject to the UCMJ's Article 31 requirement.[144] The Government further argued that Brisbane's confession to law enforcement was voluntary under all the circumstances of the case.[145]

In examining whether Ms. Lynch was "a person subject to the code" for purposes of Article 31, the court referred to MRE 305(b)(1)'s declaration that such a person "includes a person acting as a knowing agent of a military unit or of a person subject to the code."[146] The court then noted that in previous cases the court had recognized that a civilian investigator was required to comply with Article 31 only when "(1) the scope and character of the cooperative efforts demonstrate that 'that the two investigations merged into an indivisible entity,' and (2) when the civilian investigator acts in furtherance of any military investigation, or in any sense as an instrument of the military."[147]

Looking at recent cases involving applicability of Article 31 to social workers, the court turned to the cases of *United States v. Moreno*[148] and *United States v. Raymond*.[149] In *Moreno*, the court concluded that a state social worker's investigation neither merged with the ongoing military investigation nor was the social worker acting as an agent of the military investigation.[150] The court based this determination on the following factors: "(1) lack of 'communication or coordination between the two camps'; (2) the social worker 'remained in the mode of social worker' and (3) the social worker pursued her own 'limited state objectives' and cooperated with military authorities 'only where necessary to effectuate her own goals.'"[151]

In reviewing *Raymond*, the court noted that a psychiatric social worker was found not to have acted as an instrument of law enforcement when she interviewed the appellant after he walked into her clinic without a command referral document and when she had no contact with the command either before or after the appellant's walk-in appointment.[152] The *Brisbane* court also emphasized the *Raymond* opinion's declaration that the Army regulation dealing with child abuse, requiring cooperative effort between the military community and law enforcement, did not transform a community services program into a law enforcement program. Furthermore, it did not "render every member of the military community a criminal

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[137] *Id.*

[138] *Id.*

[139] *Id.*

[140] *Id.*

[141] *Id.*

[142] *Id.*

[143] *Id.*

[144] *Id.*

[145] *Id.*

[146] *Id.* at 111.

[147] *Id.* (quoting United States v. Rodriguez, 60 M.J. 239, 252 (2004)); *see also* United States v. Lonetree, 35 M.J. 396 (C.M.A. 1992); United States v. Quillen, 27 M.J. 312, 314 (C.M.A. 1988).

[148] 36 M.J. 107 (C.M.A. 1992).

[149] 38 M.J. 136 (C.M.A. 1993).

[150] *Moreno*, 36 M.J. at 115.

[151] *Brisbane*, 63 M.J. at 111 (quoting *Moreno*, 36 M.J. at 115).

[152] *Id.*

investigator or investigative agent . . . ."[153] Finally, the court pointed to *Raymond*'s announcement that "there is no historical duty of health professionals engaged in treatment to warn based on the purpose behind Article 31(b)."[154]

Contrasting the facts of *Brisbane* with *Moreno* and *Raymond*, the court concluded that Ms. Lynch acted in furtherance of a military investigation and was a "person subject to the code" for purposes of Article 31.[155] Unlike *Moreno* and *Raymond*, Ms. Lynch was in contact with military law enforcement before and after her interview with Brisbane, and Brisbane only presented himself to Ms. Lynch's office for an interview after he had been ordered to do so by his chain of command.[156] After identifying that Ms. Lynch was a person subject to the code, the court quickly determined that she had reasonably suspected Brisbane of an offense based on her trial testimony (during which she admitted that she had suspected him of an offense), and should have read Brisbane his Article 31 rights before questioning him.[157]

After determining that Brisbane's statements to Ms. Lynch should have been preceded by an Article 31 rights warning, the court turned to whether his subsequent statements to AFOSI were voluntary in the absence of a cleansing warning.[158] To evaluate the admissibility of a confession obtained from a suspect subsequent to an illegally obtained confession, the court looks to the totality of the circumstances.[159] To evaluate the admissibility of a confession obtained from a suspect who had not been properly warned of his rights, the court looked to the totality of circumstances test announced in the Supreme Court case of *Oregon v. Elstad*[160] and applied to the military by the COMA in *United States v. Phillips*.[161]

After affirming that the absence of a cleansing warning was not fatal, the court looked at the "classic listing of the other factors used in a voluntariness analysis":

> In determining whether a defendant's will was overborne in a particular case, the Court has assessed the totality of all the surrounding circumstances—both the characteristics of the accused and the details of the interrogation. Some of the factors taken into account have included the youth of the accused, his lack of education, or his low intelligence, the lack of any advice to the accused of his constitutional right, the length of detention, the repeated and prolonged nature of the questioning, and the use of physical punishment such as the deprivation of food or sleep.[162]

Looking at the facts of this case, the CAAF found that Brisbane's statements to AFOSI were voluntary under the totality of the circumstances.[163] First, Brisbane's interview with AFOSI occurred almost six weeks after his initial interview with Ms. Lynch.[164] Second, Brisbane was a mature, twenty-eight-year-old staff sergeant with ten years of service in the military.[165] Third, the conditions of his interview were not inhumane.[166] The court also pointed out that at the time of his interview with AFOSI, Brisbane did not believe he had done anything criminal in showing pictures of naked adult women to

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[153] *Id.* (quoting *Raymond*, 38 M.J. at 138-39).

[154] *Id.* (quoting *Raymond*, 38 M.J. at 140).

[155] *Id.* at 112-13.

[156] *Id.* at 113.

[157] *Id*.

[158] *Id.* at 114. A cleansing warning is a warning in which the "accused [is] warned that a previous statement cannot be used against him." United States v. Cuento, 60 M.J. 106, 109 (2004) (quoting United States v. Wimberly, 36 C.M.R. 159, 165 (C.M.A. 1966)).

[159] *Brisbane*, 63 M.J. at 114.

[160] 470 U.S. 298 (1985).

[161] United States v. Phillips, 32 M.J. 76, 79 (C.M.A. 1991) (holding that, "Where the earlier confession was 'involuntary' only because the suspect had not been properly warned of his panoply of rights to silence and counsel, the voluntariness of the second confession is determined by the totality of the circumstances. The earlier, unwarned statement is a factor in this total picture, but it does not presumptively taint the subsequent confession.").

[162] *Brisbane*, 63 M.J. at 114 (quoting Schneckloth v. Bustamonte, 412 U.S. 218, 226 (1973)).

[163] *Id.* at 115-16.

[164] *Id.* at 115.

[165] *Id.*

[166] *Id.*

his stepdaughter.[167] Finally, the court noted that the trial testimony indicated that Brisbane was calm until he inadvertently brought up naked pictures of children on his computer.[168] In the end, the CAAF determined that the admission of the statements to Ms. Lynch, while error, was harmless error beyond a reasonable doubt and that the military judge did not err by admitting evidence obtained from Brisbane's computer.[169]

Pointers for Practitioners

The *Brisbane* decision addresses the dangers of close coordination between social service officials, such as Ms. Lynch, and representatives of law enforcement and other disciplinary authorities. In recent years, the DOD has created or enhanced a number of programs designed to support victims that either require or encourage the creation of multi-disciplinary committees or interaction among social service providers and representatives of the chain of command, military law enforcement, and judge advocates.[170] The holding in *Brisbane* is a warning to social service providers, and their legal advisors, that they must either avoid *Brisbane*-like coordination with law enforcement and command representatives or begin giving suspected or accused servicemembers their Article 31 rights before speaking to them.

"You did what?": De Facto Immunity and Judicial Remedial Action

In *United States v. McKeel*[171] the CAAF determined that a purported grant of immunity relied upon by an accused may be remedied by judicial action at trial that falls short of requiring specific performance by the government. The facts of *McKeel* reveal that during an interview with an AFOSI investigator, Seaman Joshua R. McKeel admitted to various sexual acts, to include sexual intercourse, with an intoxicated female shipmate.[172] During that interview, McKeel admitted that he believed the female shipmate was too intoxicated to consent to the sexual activity.[173] The AFOSI agent recorded McKeel's admissions in his notes and forwarded his investigative report to McKeel's special court-martial convening authority (SPCMCA).[174]

The investigation landed on the desk of a chief petty officer (CPO) who served as the ship's senior enlisted person responsible for military justice matters.[175] The CPO contacted McKeel and proposed an agreement whereby McKeel would plead guilty to various charges, including rape, at an Article 15 proceeding and, if he waived his right to an administrative discharge board, there would be no court-martial for his misconduct.[176]

McKeel accepted the CPO's offer, accepted Article 15 proceedings from his SPCMCA, and waived his right to an administrative discharge board.[177] When the SPCMCA forwarded McKeel's separation packet to the general court-martial convening authority (GCMCA), who was unaware of McKeel's "agreement" with the CPO, he disapproved the administrative separation and ordered an Article 32 investigation that ultimately led to McKeel's court-martial.[178]

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[167] *Id.*

[168] *Id.* at 115-16.

[169] *Id.*

[170] Examples of these programs include the Family Advocacy Program (U.S. DEP'T OF ARMY, REG. 608-18, THE FAMILY ADVOCACY PROGRAM (30 May 2006)) and the Sexual Assault Prevention and Response Program (U.S. DEP'T OF ARMY, REG. 600-20, ARMY COMMAND POLICY ch. 8 (7 June 2007)).

[171] 63 M.J. 81 (2006).

[172] *Id.* at 83.

[173] *Id.*

[174] *Id.*

[175] *Id.*

[176] *Id.* at 83-84.

[177] *Id.* at 84. Remarkably, the SPCMCA found McKeel guilty of rape during the Article 15 proceedings and sentenced him to forty-five days restriction, forty-five days of extra duty, forfeiture of one-half pay per month for two months, and reduction from E3 *to E2*. *Id.*

[178] *Id.*

In its analysis of the *McKeel* case, the CAAF reviewed RCM 704[179] and the President's empowerment of GCMCAs to grant immunity.[180] The court also noted that RCM 704(c)(3) forbids GCMCAs from delegating the authority to grant immunity in any form.[181] The court also stated that purported grants of immunity by unauthorized individuals are invalid, and that military judges are empowered to tailor relief to the circumstances of a particular case if: "(1) a promise of immunity was made; (2) the accused reasonably believed that a person with apparent authority to do so made the promise; and (3) the accused relied upon the promise to his or her detriment."[182]

The court reiterated that the relief for promises of immunity from those having apparent, but not actual authority, to grant immunity was tied to the extent of accused's detrimental reliance upon the purported grant of immunity.[183] The court stated that "[n]ormally, detrimental reliance upon apparent authority can be remedied by measures short of a bar to prosecution, such as exclusion of evidence obtained directly or indirectly from the servicemember's reliance or precluding nonevidentiary uses of immunized statements in the decision whether to prosecute."[184]

At trial, the defense moved to dismiss the charges because of McKeel's detrimental reliance upon the CPO's offer and McKeel's subsequent acts in compliance with the offer.[185] The judge declined to dismiss the charges and instead ruled that: (1) the statements McKeel made at his Article 15 proceeding could not be admitted against him at trial; (2) the trial counsel could not admit evidence of McKeel's waiver of his administrative separation board; and (3) McKeel would be entitled to *Pierce* credit for the punishment he had received at the Article 15 proceedings.[186]

Reviewing the facts, the law, and the trial judge's remedial action, the court concluded that the trial judge took appropriate remedial actions at trial and that McKeel had not demonstrated detrimental reliance.[187] The court pointed out that the most damning evidence against McKeel were his admissions to the AFOSI agent whose interview with McKeel predated the purported offer of immunity by the CPO.[188] The court also noted that the accused's admissions to the AFOSI investigator were sufficient in themselves to cause the GCMCA to reject the proposed administrative separation and order a pretrial investigation under Article 32, UCMJ.[189] Finally, the court agreed with the trial counsel's argument that the Government learned nothing from McKeel's statements at his Article 15 proceeding or administrative separation paperwork that they did not already know based upon his admissions to the AFOSI agent.[190]

In a vigorous dissent, Judge Erdmann stated that the remedial actions taken by the trial judge were not and should not have been a proper element within the court's de facto immunity analysis.[191] In Justice Erdmann's opinion, McKeel was entitled to enforcement of the promise, and the Government was barred from bringing a subsequent prosecution against him.[192] What follows in his dissent is an enlightening review of military immunity law and support for his position on de

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[179] MCM, *supra* note 43, R.C.M. 704.

[180] *McKeel*, 63 M.J. at 82-83.

[181] *Id.* at 83. Rule for Courts-Martial 704(c)(3) states the following: "The authority to grant immunity under this rule may not be delegated. The authority to grant immunity may be limited by superior authority." 2005 MCM, *supra* note 43, R.C.M. 704(c)(3).

[182] *McKeel*, 63 M.J. at 83. *See, e.g.*, Shepardson v. Roberts, 14 M.J. 354, 358 (C.M.A. 1983); United States v. Caliendo, 32 C.M.R. 405, 409 (C.M.A. 1962); United States v. Thompsen, 29 C.M.R. 68, 71 (C.M.A. 1960).

[183] *McKeel*, 63 M.J. at 83.

[184] *Id. See* United States v. Jones, 52 M.J. 60, 65 (1999); United States v. Olivero, 39 M.J. 245, 249 (C.M.A. 1994).

[185] *McKeel*, 63 M.J. at 82.

[186] *Id.* at 84. The trial counsel voluntarily agreed not to introduce evidence of McKeel's waiver and to provide him full sentencing credit for punishment received as a result of his Article 15. *Id.*

[187] *Id.* at 84-85.

[188] *Id.* at 84.

[189] *Id.*

[190] *Id.*

[191] *Id.* at 85 (Erdmann, J., dissenting).

[192] *Id.*

facto immunity analysis. Unfortunately for McKeel and other de facto immunity grantees to come, Justice Erdmann was a minority of one.[193]

Pointers for Practitioners

The *McKeel* case is notable because it outlines steps, short of dismissing the case, that a military judge can take to protect an accused's rights when he receives an invalid grant of immunity from an unauthorized individual. By way of contrast, practitioners interested in reading a case about the failure of a military judge to effectively remedy a purported grant of immunity may look to the AFCCA case of *United States v. LeBaron*.[194]

In *LeBaron*, the appellant was suspected of abusing his thirteen-year-old daughter.[195] Despite substantial evidence against the accused, the chain of command was still uncertain how to proceed.[196] Prior to making a disposition decision, the chain of command directed the appellant to a certified sex therapist. The appellant went to the sex therapist with what the trial judge determined was a misunderstanding, not amounting to de facto immunity, that he would receive no worse than Article 15 punishment if he cooperated in the interview.[197] When charges were later referred to court-martial, based in large measure on what the appellant revealed to the sex therapist, the trial defense counsel requested the case be dismissed.[198] The trial judge excluded the statements the appellant had made to the sex therapist, apparently as a matter of due process.[199]

The service court determined that the appellant had been granted de facto immunity by his chain of command and that the trial judge's remedy of excluding the statements to the sex therapist was insufficient to remove the taint.[200] The AFCCA determined that because the information that the accused had revealed to the sex therapist under the de facto grant of immunity "caused or played a substantial role in the preferral and referral decisions," the trial judge's remedy of simply excluding his actual statements at trial still resulted in a due process violation.[201] Accordingly, the appellant's findings and sentence were set aside.[202]

Conclusion

The 2006 term of the CAAF was an informative and satisfying one for practitioners interested in self-incrimination law. Thirty years after its birth, and after at least a decade of uncertainty, the notice to counsel rule first announced in *United States v. McOmber* was officially overruled. The *Finch* ruling clarified when a suspect or accused soldier has a right to counsel, and brought military practice into greater—or at least clearer—conformity with federal practice.

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[193] *Id.*

[194] ACM 35299, 2005 CCA LEXIS 422 (A.F. Ct. Crim. App. Dec. 23, 2005).

[195] *Id.* at *3-*4.

[196] *Id.* at *4.

[197] *Id.* at *15.

[198] *Id.*

[199] *Id.*

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

[201] *Id.*

[202] *Id.* at *23.

Annual Review of Developments in Instructions—2006

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Introduction

> *It is a basic rule that instructions must be sufficient to provide necessary guideposts for an "informed deliberation" on the guilt or innocence of the accused.*[1]

This annual installment of developments on instructions covers cases decided by military appellate courts during the Court of Appeals for the Armed Forces (CAAF) 2006 term.[2] As with earlier reviews, this article addresses instructional issues involving crimes, defenses, evidence, and sentencing. This article is written primarily for military trial practitioners, and will frequently refer to the relevant paragraphs in the *Military Judges' Benchbook* (*Benchbook*),[3] the primary resource for drafting instructions.

Crimes

Deliberate Avoidance and Article 86 Offenses

Although *United States v. Adams*[4] involved a guilty plea before a military judge alone,[5] the CAAF's holding is significant for properly instructing court members on the elements of certain offenses under Article 86.[6] The CAAF considered whether the deliberate avoidance theory, which has been used in drug offenses,[7] could be applied to the offense of failing to go to an appointed place of duty.[8]

Private Adams pled guilty to and was convicted of failing to go at the time prescribed to his appointed place of duty, the company armory.[9] During the providence inquiry, the accused stated that it was his duty to be at the armory at 0630 hours.[10] When asked by the military judge if he knew that he was required to be present at that appointed time and place of duty, the accused said, "I did not know, sir; and I didn't find out during the day. I deliberately avoided my duties, sir."[11] When the military judge later asked the accused how he deliberately avoided finding out where the rest of the unit was located, he said, "I stayed in my room, sir, instead of, like, trying to find anyone from my platoon or squad or asking the duty if they would have known the whereabouts."[12]

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[1] United States v. Dearing, 63 M.J 478, 479 (2006) (quoting United States v. Anderson, 32 C.M.R. 258, 259 (C.M.A. 1962)).

[2] The 2006 term began on 1 October 2005 and ended on 30 September 2006.

[3] U.S. DEP'T OF ARMY, PAM. 27-9, MILITARY JUDGES' BENCHBOOK (15 Sept. 2002) [hereinafter BENCHBOOK].

[4] 63 M.J. 223 (2006).

[5] *Id*.

[6] UCMJ art. 86 (2005).

[7] *See, e.g*., United States v. Brown, 50 M.J. 262 (1999); United States v. Newman, 14 M.J. 474 (C.M.A. 1983).

[8] *Adams*, 63 M.J. at 225.

[9] *Id*. at 224.

[10] *Id.*

[11] *Id*.

[12] *Id*.

On appeal, the accused argued that his guilty plea was improvident because the offense of failing to go to place of duty requires actual knowledge and deliberate avoidance is insufficient.[13] The CAAF disagreed. Although the offense does require actual knowledge of the appointed time and place of duty,[14] the court held that "deliberate avoidance can create the same criminal liability as actual knowledge for all Article 86, UCMJ, offenses."[15]

Unlike the *Manual for Courts-Martial* (*Manual*) explanation of knowledge for Article 112a offenses,[16] the *Manual*'s explanation of actual knowledge for Article 86[17] does not mention deliberate avoidance.[18] The CAAF, however, reasoned that applying the deliberate avoidance theory to Article 86 would be a logical extension of its prior holding on deliberate avoidance; that it would be consistent with the position of a majority of the federal circuits that proof of deliberate ignorance is sufficient for actual knowledge; and that a literal application of actual knowledge to Article 86 offenses would result in absurd results in the military environment.[19] Otherwise, servicemembers could evade criminal responsibility by hiding in their barracks rooms or quarters to avoid learning of their appointed time and place of duty.[20]

Trial practitioners are reminded, however, that the evidentiary standard to raise deliberate avoidance is high. The evidence must allow a rational finder of fact to conclude, beyond a reasonable doubt, that the accused was subjectively aware of a high probability of the existence of illegal conduct and that the accused purposely contrived to avoid learning of the illegal conduct.[21] Applying this standard to the facts in *Adams*, the CAAF held that the accused's guilty plea to failing to go to his appointed place of duty was provident.[22]

If raised by the evidence, the military judge should instruct the court members on the theory of deliberate avoidance for the offenses of failing to go to appointed place of duty; going from appointed place of duty; and absence from unit, organization, or place of duty with intent to avoid maneuvers or field exercises. The *Benchbook* does not currently include a model instruction on deliberate avoidance,[23] but a proposal is being circulated for review and comment. Until approved, if raised by the evidence, trial practitioners should draft an instruction tailored for the appropriate Article 86 offense.

Definition of "Lascivious Exhibition"

In child pornography cases, instructions on the elements include numerous definitions. Congress has provided some statutory definitions in 18 U.S.C. section 2256, but other terms are often defined to assist the members in correctly applying the law to the facts. For example, the statutory definition of "sexually explicit conduct" includes the phrase "lascivious exhibition of the genitals or pubic area of any person."[24] The CAAF considered the meaning of the term "lascivious exhibition" in *United States v. Roderick*.[25] Although *Roderick* involved mixed pleas before a military judge alone, the

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[13] *Id*. at 225.

[14] *Id*.

[15] *Id*. at 226. In a footnote, the court stated that its holding reached all Article 86 offenses because the logic of the analysis applies to all five Article 86 "failure to go" offenses, and the court wanted to avoid confusion and uneven treatment. *Id*. at 226 n.3. However, actual knowledge is not required for the offenses of absence from unit, organization, or place of duty; and abandoning watch or guard. Actual knowledge is required for the offenses of failing to go to appointed place of duty; going from appointed place of duty; and absence from unit, organization, or place of duty with intent to avoid maneuvers or field exercises. MANUAL FOR COURTS-MARTIAL, UNITED STATES pt. IV, ¶ 10b (2005) [hereinafter MCM]. Therefore, this holding would appear to apply only to the three Article 86 offenses that require actual knowledge.

[16] MCM, *supra* note 15, pt. IV, ¶ 37c(5)(C).

[17] *Id*. pt. IV, ¶ 10c(2).

[18] *Adams*, 63 M.J. at 225.

[19] *Id*. at 226.

[20] *Id*.

[21] United States v. Brown, 50 M.J. 262, 266 (1999) (citations omitted) (holding that the military judge erred in giving deliberate avoidance instruction, because the evidence in the case did not reach the "high plateau" required to permit an inference that the accused was subjectively aware of a high probability that he was ingesting a controlled substance and there was no evidence that the accused contrived to avoid knowledge).

[22] *Adams*, 63 M.J. at 227.

[23] BENCHBOOK, *supra* note 3, ¶¶ 3-10-1, 3-10-3.

[24] 18 U.S.C. § 2256(2)(A)(v) (2000).

[25] 62 M.J. 425, 429 (2006).

CAAF's adoption of a definition for lascivious exhibition will assist in properly instructing court members in child pornography cases.

Air Force Staff Sergeant Roderick, a single father of two young girls,[26] pled guilty to receiving and possessing child pornography in violation of 18 U.S.C. section 2252A; one specification of using a minor to create depictions of sexually explicit conduct in violation of 18 U.S.C. section 2251(a); and one specification of indecent acts upon a child, all charged under Article 134.[27] He was also found guilty, contrary to his pleas, by a military judge sitting alone, of two more specifications of using a minor to create depictions of sexually explicit conduct in violation of 18 U.S.C. section 2251(a) and three specifications of taking indecent liberties with a child.[28]

On appeal to the CAAF, Roderick argued that the evidence was legally insufficient to convict him of the two specifications of using a minor to create depictions of sexually explicit conduct,[29] because the photographs of his two young daughters did not depict "sexually explicit conduct."[30] Congress statutorily defined "sexually explicit conduct" as actual or simulated sexual intercourse, bestiality, masturbation, sadistic or masochistic abuse, or "lascivious exhibition of the genitals or pubic area of any person."[31] Congress has not specifically defined the term lascivious exhibition, so the federal courts have had to interpret it, and this was an issue of first impression for the CAAF.[32] The federal courts use six factors from *United States v. Dost* to interpret lascivious exhibition:

> (1) whether the focal point of the visual depiction is on the child's genitalia or pubic area;
> (2) whether the setting of the visual depiction is sexually suggestive, i.e. in a place or pose generally associated with sexual activity;
> (3) whether the child is depicted in an unnatural pose, or in inappropriate attire, considering the age of the child;
> (4) whether the child is fully or partially clothed, or nude;
> (5) whether the visual depiction suggests sexual coyness or a willingness to engage in sexual activity;
> (6) whether the visual depiction is intended or designed to elicit a sexual response in the viewer.[33]

Also, because there may be other important factors in determining if a visual depiction contains a lascivious exhibition, several of the federal circuit courts consider the overall totality of the circumstances along with the six, specific *Dost* factors.[34] The CAAF adopted this approach.[35]

Applying this definition, the CAAF set aside the findings for one of the specifications of using a minor to create depictions of sexually explicit conduct.[36] Although the accused's daughter was fully or partially nude in the three photographs, none of them depicted her genitals or pubic area.[37] Before applying the *Dost* factors, the definition of sexually explicit conduct requires a "lascivious exhibition of the genitals or pubic area of any person."[38]

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[26] *Id*. at 428.

[27] *Id*. at 427.

[28] *Id*. The Air Force Court of Criminal Appeals affirmed the child pornography offenses as convictions of the lesser included offense of conduct of a nature to bring discredit upon the armed forces under clause 2 of Article 134 because of *Ashcroft v. Free Speech Coalition*, 535 U.S. 234 (2002). *Roderick*, 62 M.J. at 427.

[29] *Roderick*, 62 M.J. at 429.

[30] *Id.*

[31] 18 U.S.C. § 2256(2)(A)(v) (2000). There is a slightly different definition when the visual depiction is a digital image, computer image, or computer-generated image that is, or is indistinguishable from, that of a minor engaging in sexually explicit conduct. *Id.* § 2256(2)(B).

[32] *Roderick*, 62 M.J. at 429.

[33] *Id.* (citing United States v. Dost, 636 F. Supp. 828, 832 (S.D. Cal. 1986), *aff'd sub nom*., United States v. Wiegand, 812 F.2d 1239 (9th Cir. 1987)).

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

[35] *Id.* at 430.

[36] *Id.*

[37] *Id.*

[38] 18 U.S.C. § 2256(2) (emphasis added).

Thus, *Roderick* will assist the military judge in properly defining lascivious exhibition. Although military judges have been using the six *Dost* factors, the CAAF did not formally adopt them until *Roderick*. Based on *Roderick*, the military judge also should instruct the court members that the six *Dost* factors are non-exclusive, and according the military judge should also instruct the members to consider the overall content of the material in determining whether the visual depiction contains a lascivious exhibition of the genitals or the pubic area.

Lesser Included Offenses & Dangerous Weapons

In *United States v. Bean*,[39] the CAAF addressed whether the military judge erred by refusing to instruct on simple assault as a lesser included offense of aggravated assault with a dangerous weapon.[40]

After drinking in a bar, Senior Airman Bean's friends tried to persuade him not to drive.[41] He pulled out a knife, and three of his friends wrestled him to the ground and took the knife and his keys.[42] After his friends released him, he got a .45 caliber handgun from his car and pointed it at each of his three friends. He told them, "Get out of my face or I'll kill you."[43] One of the three friends grabbed the gun.[44] At trial, that friend testified that, at the time he grabbed the gun, the hammer was all the way back and the safety was off.[45] The friend also testified that, when he later pulled the slide to the rear, he noticed that there was a round in the chamber and several rounds in the magazine.[46]

During the trial, *Bean* admitted that the weapon was loaded, but he testified that the safety was engaged.[47] He also testified that he was intoxicated and did not remember some of the events from that night.[48] Based on the accused's testimony, the defense counsel requested an instruction on the lesser included offense of simple assault.[49] The defense counsel argued that, if the court members found that the safety was engaged, the members might also find that the weapon could not fire.[50] The military judge denied the requested instruction.[51] The judge's rationale was that, with an offer type of aggravated assault with a loaded firearm, it does not even matter if the firearm is functional.[52]

On appeal, the CAAF agreed with the appellant that the firearm must be functional for the offense of aggravated assault with a loaded firearm.[53] The CAAF agreed that the issue of whether the loaded firearm was used in a manner likely to produce death or grievous bodily harm was a question for the members.[54] The CAAF found, however, that under the facts of the case, the evidence did not "reasonably" raise the lesser included offense of simple assault.[55] As a matter of common sense, even if the safety is engaged, if an intoxicated person points a loaded, operable firearm at others after threatening them

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[39] 62 M.J. 264 (2005).

[40] A military judge must instruct on all lesser included offenses reasonably raised by the evidence. A lesser included offense is reasonably raised if there is "some" evidence to which the members may attach credit or rely upon it, if they so choose. MCM, *supra* note 15, R.C.M. 920(e) discussion.

[41] *Bean*, 62 M.J. at 265.

[42] *Id.*

[43] *Id.*

[44] *Id.*

[45] *Id.*

[46] *Id.*

[47] *Id.*

[48] *Id.* at 265-66.

[49] *Id.* at 266.

[50] *Id.*

[51] *Id.*

[52] *Id.*

[53] *Id.*

[54] *Id.*

[55] *Id.* at 267.

verbally and physically with a knife, the victim could reasonably be placed in fear of losing his life.[56] Therefore, the accused was not entitled to an instruction on the lesser included offense of simple assault.[57]

The broader lesson from *Bean* is that engaging the safety of a loaded, operable firearm that is pointed at another does not, as a matter of law, change its character as a dangerous weapon.[58] In *United States v. Davis*,[59] the CAAF held that, as a matter of law under the President's narrowing interpretation of Article 128 in the *Manual*, an unloaded firearm is not a dangerous weapon.[60] In *Bean*, the accused tried to extend the court's holding in *Davis*.[61] However, the CAAF refused to do so, because the holding in *Davis* was based on the explicit provision in the *Manual* that excluded an unloaded firearm, when used as a firearm and not a bludgeon, from the definition of dangerous weapon.[62]

Lesser Included Offenses & Defense of Accident

As just discussed, determining whether a lesser included offense is in issue can be challenging. Determining whether an affirmative or special defense is in issue can likewise be challenging. When a lesser included offense is interrelated with a special defense, it is even more challenging. In *United States v. Brown*,[63] the Army Court of Criminal Appeals (ACCA) set aside convictions for, among other offenses, premeditated murder and a sentence of life without eligibility for parole because the military judge failed to instruct on a special defense and lesser included offenses.[64]

The accused, Specialist (SPC) Brown, was charged with the premeditated murder of another soldier, SPC JK. During the trial, the military judge admitted into evidence two sworn statements that Brown made to CID agents.[65] The statements were ambiguous in some details, but generally asserted that Brown and SPC JK were target shooting at a remote site on Fort Lewis when Brown accidentally shot SPC JK.[66] Brown asserted that they "were always safe when shooting."[67] Brown was shooting at a can with SPC JK next to him.[68] On Brown's third shot, SPC JK "must have moved down range."[69] Specialist JK fell and Brown saw blood coming out of his neck.[70] Brown tried to talk to SPC JK, but he didn't respond.[71] Brown was scared and just wanted to drive away.[72] He could tell that SPC JK was suffering and he did not want him to suffer.[73] The accused knew that, if he put SPC JK in the truck, SPC JK would die.[74] Brown was afraid that no one would believe him.[75] The accused had no more ammunition, so he grabbed SPC JK's gun, backed up, closed his eyes, and shot SPC JK two times

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[56] *Id.*

[57] *Id.*

[58] *Id.*

[59] 47 M.J. 484 (1998).

[60] *Id.* at 486.

[61] *Bean*, 62 M.J. at 266.

[62] *Id.* at 267. The CAAF opinion does not discuss this issue at length. It merely quotes its holding in *Davis*, which explicitly stated that it was based on the President's interpretation of Article 128. The rationale for this holding is articulated clearly in *Davis*. *Davis*, 47 M.J. at 486-87 (finding that paragraph 54c(4)(a)(ii) of Part IV of the *Manual* was an "Executive branch limitation on the conduct subject to prosecution").

[63] 63 M.J. 735 (Army Ct. Crim. App. 2006).

[64] *Id.* at 736, 741.

[65] *Id.* at 737.

[66] *Id.* at 736.

[67] *Id.*

[68] *Id.*

[69] *Id.*

[70] *Id.*

[71] *Id.*

[72] *Id.*

[73] *Id.* at 736-37.

[74] *Id.* at 736.

[75] *Id.*

in the head.[76] Specialist JK's tongue and eyes stopped moving.[77] The second sworn statement, which was made later the same night and videotaped, was consistent with the first statement, and it also offered a theory that the first shot might have ricocheted off of an old washing machine or dryer.[78]

A forensic pathologist, who conducted an autopsy, testified at trial. In his opinion, the first bullet caused the fatal injury.[79] He testified that the bullet entered at the back of the neck, passed through the spinal cord, and exited through the nose.[80] He stated that such an injury would cause a fatal shock of vital breathing and heart centers,[81] although breathing and heart rate may continue in a fading fashion for seconds or minutes.[82] He also testified that, because a different part of the brain controls eye and mouth movement, there might or might not be involuntary, uncontrolled movement.[83]

The defense requested an instruction for the special defense of accident.[84] The military judge denied the request for two reasons. First, the military judge stated that the act was certainly a negligent act, and the accused even admitted that in the confession.[85] Second, when the defense counsel disputed that the confession admitted the act was negligent, the military judge stated, "Well, I'll take judicial notice that [S]oldiers are not allowed to go out in the back forty and shoot off rounds."[86] The military judge instructed on the lesser included offenses of intentional murder, voluntary manslaughter, involuntary manslaughter, and negligent homicide.[87] The defense did not request, and the military judge did not give instructions on the lesser included offenses of attempted premeditated murder, attempted intentional murder, or attempted voluntary manslaughter.[88]

The ACCA concluded that the special defense of accident was "in issue."[89] "A matter is in issue when some evidence, without regard to its source or credibility, has been admitted upon which members might rely if they choose."[90] An accident is an "unintentional and unexpected result of doing a lawful act in a lawful manner."[91] The ACCA listed three elements for the defense of accident: (1) the accused was engaged in an act not prohibited by law, regulation, or order; (2) this act was performed in a lawful manner, meaning with due care and without simple negligence; and (3) this act was done without any unlawful intent.[92]

The court did not consider itself bound by the judicial notice that Soldiers are not allowed to shoot off rounds in the back forty, because the military judge did not identify, and the Army court could not find, any such law.[93] Therefore, the Army court could not conclude that the act was per se unlawful under the circumstances.[94] Also, there was some evidence, such as assertions in the accused's confessions of always being safe and SPC JK being to the accused's side, that the accused was target shooting in a lawful manner.[95] Lastly, there was some evidence that the accused did not initially intend to shoot SPC

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[76] *Id.*

[77] *Id.*

[78] *Id.* at 737.

[79] *Id.*

[80] *Id.*

[81] *Id.*

[82] *Id.*

[83] *Id.*

[84] *Id.*

[85] *Id.*

[86] *Id.*

[87] *Id.*

[88] *Id.*

[89] *Id.* at 739.

[90] *Id.* at 738 (quoting MCM, *supra* note 15, R.C.M. 920(e) discussion).

[91] MCM, *supra* note 15, R.C.M. 916(f).

[92] *Brown*, 63 M.J. at 738.

[93] *Id.* at 739.

[94] *Id.*

[95] *Id.*

JK.[96] Therefore, because there was some evidence of each element of the defense of accident, the ACCA concluded that the military judge erred by not instructing the members on that defense.[97]

The ACCA also found that the testimony of the forensic pathologist about the possible speed of death placed attempted murder and attempted voluntary manslaughter at issue.[98] It was possible that SPC JK was already dead at the time of the second and third shots.[99] Apparently, all the parties overlooked that possibility, because neither party requested instructions on those lesser included offenses. The ACCA concluded that the military judge erred by not sua sponte instructing on those lesser included offenses.[100]

In analyzing whether the errors were harmless beyond a reasonable doubt, the Army court assessed the evidence as extremely complicated.[101] The evidence raised several possibilities, and the errors resulted in the instructions not addressing various possible factual scenarios: accidental homicide, negligent homicide, or involuntary manslaughter, followed by an attempted murder or attempted voluntary manslaughter.[102] The ACCA concluded that the errors were not harmless.

The *Brown* case provides two valuable lessons for trial practitioners, both of which are not new lessons but rather reminders of black letter law on instructions. First, the standard for when a special defense is "in issue" is when there is *some* evidence of each element of the defense, regardless of its source or credibility.[103] In the *Brown* case, the military judge may have found that the act was negligent, but that is not the standard. The findings and sentence might indicate that the court members did not believe the accused's version of what occurred.[104] However, because there was *some* evidence, even if its credibility was questionable, the instruction on the defense of accident should have been given.

The second lesson is a reminder that the military judge has a sua sponte duty to instruct on special defenses and lesser included offenses raised by the evidence.[105] In the *Brown* case, the lesser included offenses of attempted premeditated murder, attempted intentional murder, and attempted voluntary manslaughter were not obvious.[106] The victim was alive before any of the shots, the accused fired the three shots, and the victim died as a result of those shots. However, when analyzing the shots separately, the victim may have already been dead after the first shot and before the accused fired the last two shots.[107] Determining appropriate instructions for special defenses and lesser included offenses can be challenging, but all scenarios for which there is *some* evidence must be carefully considered, even if neither party is requesting such instructions.

Defenses

Escalation of the Conflict and the Right to Self-Defense

Although not mentioned in the provision on self-defense in RCM 916(e),[108] the concept that an aggressor or mutual combatant is still entitled to act in self-defense when the adversary escalates the level of the conflict has been recognized by

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[96] *Id.*

[97] *Id.* at 739-40.

[98] *Id.* at 740.

[99] *Id.*

[100] *Id.*

[101] *Id.*

[102] *Id.* at 740-41.

[103] MCM, *supra* note 15, R.C.M. 920(e) discussion.

[104] The court members adjudged a "sentence to a dishonorable discharge, confinement for life without eligibility for parole, forfeiture of all pay and allowances, and reduction to the grade of E-1." *Brown*, 63 M.J. at 736.

[105] Although citing this case technically may be poaching from next year's subject matter, *see United States v. Gutierrez*, 64 M.J. 374, 376 (2007) (military judge has a duty to instruct on reasonably raised affirmative defenses (and lesser included offenses) unless affirmatively waived by the accused).

[106] *Brown*, 63 M.J. at 737. It is possible that the defense was aware of these possible lesser included offenses, but did not want instructions on them for tactical reasons. However, there was no discussion of the issue on the record, and the defense did not affirmatively waive instructions on these lesser included offenses.

[107] *Id.* at 740.

[108] MCM, *supra* note 15, R.C.M. 916(e).

military appellate courts in the past.[109] In *United States v. Dearing*,[110] the CAAF again recognized this concept. Because the military judge erred by refusing to give a requested instruction addressing the issue of escalation of the conflict, the CAAF reversed convictions for murder and aggravated assault.[111]

Operations Specialist Seaman Dearing was involved in a "road rage" fight.[112] He, his girlfriend, another sailor, and that sailor's girlfriend went to see a movie at the Norfolk Naval Base theater. Another group of sailors and their friends went to the same movie.[113] Several of the individuals had been drinking alcohol that evening.[114] After the movie, they left the theater in several vehicles. After a brief "road rage" incident, the two groups were engaged in a verbal confrontation that led to a fight in the Navy Exchange parking lot near the movie theater.[115] At the end of the fight, one of the accused's adversaries had been stabbed to death and two others had been seriously wounded.[116] The accused was charged with unpremeditated murder, assault with intent to inflict grievous bodily harm, assault with a dangerous weapon, and obstruction of justice.[117]

At trial, the court members heard extensive and conflicting testimony on the involvement of several participants in the affray.[118] Prosecution witnesses depicted the accused as the aggressor and assailant.[119] Defense witnesses, including the accused, testified that the accused got involved in an attempt to protect his girlfriend.[120] The accused testified that, after his girlfriend got involved in a verbal dispute with men from the other group, he pushed the men away with his hands to protect her.[121] He testified that, as he raised his hands, an unknown person hit him in the back of the head.[122] He also testified that he heard someone ask, "Do you have a gun?"[123] This made him concerned for his safety.[124] The accused testified that he saw that one of the adversaries' car trunk was open, and he thought someone had obtained a weapon.[125]

According to the accused's testimony, at this point he began to fight his way out of the bad situation.[126] As he fought with one person, another person hit him in the side, and yet another person kicked him. He testified that he was pushed to the ground and grabbed around the neck, as another person hit him in the chest.[127] According to the accused, he then remembered the knife he had in his pocket. He pulled out the knife and stuck it out twice in an upward thrust.[128] The accused claimed that he acted in self-defense to save his own life.[129]

After the evidence, the civilian defense counsel requested that the military judge instruct the panel on the issue of escalation of the conflict as it related to self-defense.[130] The defense counsel cited *United States v. Cardwell* as authority.[131]

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[109] *See, e.g.*, United States v. Cardwell, 15 M.J. 124 (C.M.A. 1983).

[110] 63 M.J. 478 (2006).

[111] *Id*. at 479.

[112] *Id*. at 480.

[113] *Id*.

[114] *Id*.

[115] *Id*.

[116] *Id*.

[117] *Id*.

[118] *Id*.

[119] *Id*.

[120] *Id*.

[121] *Id*. at 481.

[122] *Id*.

[123] *Id*.

[124] *Id*.

[125] *Id*.

[126] *Id*.

[127] *Id*.

[128] *Id*.

[129] *Id*.

[130] *Id*.

After a brief discussion, the military judge told the defense counsel to draft a proposed instruction. The civilian defense counsel submitted the following:

> Even if the accused was an aggressor, the accused is entitled to use self-defense, if the opposing party escalated the level of the conflict. Accordingly, even if the accused was the aggressor, if the opposing party escalated the conflict by placing the accused in reasonable fear that he was at risk of death or grievous bodily harm, the accused would then be entitled to use deadly force in self-defense.[132]

The military judge refused to give the requested instruction, holding that his instructions already adequately covered the issue, with the key explanation in the definition of aggressor.[133] When the military judge instructed the court members on the defense of self-defense, he defined "an aggressor" as follows:

> There exists evidence in this case that the accused may have been an aggressor. An "aggressor" is one who uses force in excess of that believed by him to be necessary for defense. There also exists evidence that the accused may have voluntarily engaged in mutual fighting. An aggressor, or one who voluntarily engaged in mutual fighting, is not entitled to self-defense unless he previously withdrew in good faith.[134]

After the instructions and deliberations, the members found the accused guilty as charged.[135] The Navy-Marine Corps Court of Criminal Appeals held that the military judge's instructions substantially covered the issues raised in the defense request. The court also concluded that, even if it did not, the error did not deny the accused a fair trial, because it did not deprive him of a defense nor seriously impair the effective presentation of the defense.[136]

The CAAF disagreed with the lower court on both points, holding that if self-defense was at issue in the case, then the military judge was obligated to give a correct instruction.[137] Based on the accused's testimony, self-defense was at issue in the case.[138] The CAAF found that the instructions were erroneous and incomplete. In *United States v. Cardwell*, the court had stated that it was a well settled principle of the law of self-defense that "[e]ven a person who starts an affray is entitled to use self-defense when the opposing party escalates the level of the conflict."[139] In order to explain the concept of escalation of the conflict, the CAAF quoted the following illustration from its opinion in *Cardwell*: "Thus, if A strikes B a light blow with his fist and B retaliates with a knife thrust, A is entitled to use reasonable force in defending himself against such an attack, even though he was originally the aggressor."[140]

The instruction provided by the military judge did not address the concept of escalation of the conflict.[141] In fact, the instructions incorrectly limited the defense of self-defense.[142] The instructions erroneously stated that an aggressor or mutual combatant is not entitled to self-defense, unless he previously withdrew in good faith.[143] This instruction precluded the members from considering whether the accused was still entitled to self-defense because the adversaries escalated the level of the conflict.[144]

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[131] *Id*. *See* United States v. Cardwell, 15 M.J. 124 (C.M.A. 1983).

[132] *Dearing*, 63 M.J. at 481.

[133] *Id*.

[134] *Id*.

[135] *Id*. The members adjudged a sentence of a dishonorable discharge, confinement for twenty-five years, forfeiture of all pay and allowances, and reduction to the grade of E-1. *Id*. at 481-82.

[136] *Id*. at 482.

[137] *Id*.

[138] *Id*.

[139] 15 M.J. 124, 126 (C.M.A. 1983).

[140] *Dearing*, 63 M.J. at 483 (quoting *Cardwell*, 15 M.J. at 126).

[141] *Id*.

[142] *Id*.

[143] *Id*.

[144] *Id*. at 483-84.

The court acknowledged that the requested instruction was not completely inaccurate.[145] It was accurate on the concept of escalation of the conflict. However, instead of stating "the accused would then be entitled to use deadly force in self-defense," the proposed instruction should have stated "the accused would then be entitled to use force the accused believed was necessary for protection against death or grievous bodily harm."[146] But this deficiency did not excuse the failure to instruct the members on the concept of escalation of the conflict.[147]

The CAAF found that the instructional error was not harmless beyond a reasonable doubt.[148] Escalation of the conflict was an essential theory for the defense, and a vital part of their case.[149] The accused was denied the opportunity to argue that, because of the escalating violence against him, he had the right of self-defense.[150] Also, without a correct instruction, the members did not have the guideposts for an informed decision.[151] The court set aside the findings for the murder and aggravated assault offenses and the sentence.[152]

Because affrays are not uncommon in the military environment, this is an important case for trial practitioners. If there is some evidence that the accused is an aggressor or mutual combatant, and if there is also some evidence that the adversary escalated the level of the conflict, then defense counsel may request a *Dearing* type instruction. Regardless, the military judge should be prepared to give such an instruction, even if not requested. The current model instructions on self-defense in the *Benchbook* do not adequately cover the issue of escalation of the conflict.[153] There is a *Benchbook* proposal currently being staffed that would add an instruction on escalation of the conflict. In the meantime, trial practitioners should closely read *Dearing* and be prepared to assist the court in drafting an appropriate instruction.

Mistake of Fact as to Age for Indecent Acts with a Child

Although *United States v. Zachary*[154] involved a guilty plea, the case is significant for providing correct instructions in cases involving the offense of indecent acts with a child. The ACCA's holding in *Zachary*, which the CAAF affirmed, clarifies an issue that has confused trial practitioners; holding that an honest and reasonable mistake as to the age of the victim is a valid defense to the offense of indecent acts with a child.[155]

Sergeant (SGT) Zachary pled guilty to one specification of indecent acts with a child (BA) and one specification of indecent acts with another (RL).[156] During the providence inquiry, SGT Zachary admitted, under oath, that he performed oral sodomy on both females while all three of them were in a friend's room.[157] He admitted that he was married to neither of the females, the acts were done with the intent to arouse the lust and sexual desires of BA, the acts were indecent, and the acts were prejudicial to good order and discipline and service discrediting.[158] Sergeant Zachary further admitted, in regards to the indecent nature of the acts, that the acts were open and notorious because a third person was present.[159] He also asserted that both females told him that they were seventeen years old and about to turn eighteen years old.[160] In fact, RL was seventeen

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[145] *Id*. at 484.

[146] *Id*.

[147] *Id*.

[148] *Id*.

[149] *Id*. at 484-85.

[150] *Id*. at 485.

[151] *Id*.

[152] *Id*. at 489.

[153] The instruction that the military judge provided in the *Dearing* case were similar to the model instructions in Note 5, paragraph 5-2-6 of the *Benchbook*. BENCHBOOK, *supra* note 3, ¶ 5-2-6.

[154] 63 M.J. 438 (2006).

[155] *Id*. at 444.

[156] *Id*. at 439.

[157] *Id*.

[158] *Id*. at 439-40.

[159] *Id*. at 440.

[160] *Id*.

years old, and BA was fourteen years old. He did not discover the true age of BA until a CID agent told him two weeks later.[161]

The military judge conducted an extensive providence inquiry, especially in regards to the offense of indecent acts with a child.[162] The defense counsel and the accused agreed that, because of the open and notorious nature of the act, the act was indecent, prejudicial to good order and discipline, and service discrediting.[163] They all agreed that BA's age was not connected to those elements.[164] They also agreed that mistake of fact as to age was, therefore, not a defense to the offense of indecent acts with a child.[165] The military judge accepted the guilty plea.[166] During the presentencing phase of the trial, SGT Zachary made an unsworn statement to the panel members, in which he explained that he believed that both of the females were seventeen years old and almost eighteen years old.[167] He also explained the circumstances that gave him reason to believe that they were seventeen years old.[168] The members adjudged a sentence of a bad-conduct discharge, forfeiture of all pay and allowances, and reduction to the grade of E-1.[169]

The ACCA determined that the victim's age was an element of the offense of indecent acts with a minor.[170] Therefore, an honest and reasonable mistake of fact as to age was a valid defense.[171] The issue of whether the age of the child is a sentence enhancer or an element was an issue of first impression for the ACCA.[172] The court, in general terms, first discussed the distinction between elements and aggravating factors.[173] In the *Manual*, the President has specified some offenses that fall within the conduct proscribed by Article 134, and the President provided elements for those offenses.[174] The courts have generally accepted the President's explanation of the elements as defining those offenses, and the courts look at both the statute and the President's explanation in the *Manual* to determine the elements of those offenses.[175] Aggravating factors, on the other hand, are facts or situations that increase the permissible punishment for an offense.[176] Aggravating factors must be proven beyond a reasonable doubt, but they are not required for a conviction of the offense.[177] Therefore, aggravating factors do not contain a mens rea component and mistake of fact as to aggravating factors does not ordinarily affect the maximum punishment.[178]

The ACCA also discussed the determination of the mens rea component of elements. Under RCM 916(j)(1), the standard for, or the availability of, the defense of mistake of fact depends on whether the particular element is a specific intent element, a general intent element, or a strict liability element.[179] Determining whether it is a strict liability element,

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[161] *Id*.

[162] *Id.*

[163] *Id*.

[164] *Id*.

[165] *Id*.

[166] *Id*.

[167] *Id*. at 440-41.

[168] *Id*. at 441.

[169] *Id*.

[170] United States v. Zachary, 61 M.J. 814, 823 (Army Ct. Crim. App. 2005).

[171] *Id*. at 825.

[172] *Id*. at 822.

[173] *Id*. at 818-19.

[174] *See* MCM, *supra* note 15, pt. IV, ¶¶ 61-113.

[175] *Zachary*, 61 M.J. at 818-19.

[176] *Id*. at 819.

[177] *Id*.

[178] *Id*.

[179] *Id*. at 819-20.

which is not favored in the criminal law, is an issue of statutory construction.[180] There must usually be some indication that Congress, or the President in the case of a specified Article 134 offense, intended strict liability.[181]

The ACCA then analyzed the offense of indecent acts with a child, which the President specified as an offense under Article 134. In the *Manual*, the President outlined the elements, including the element "[t]hat the person was under 16 years of age and not the spouse of the accused."[182] Neither Article 134 nor the President's explanation in the *Manual* indicates that the age element was intended to be a strict liability element.[183] Also, although the offense of indecent acts with a child, which first appeared in the *Manual* in 1951, was modeled after an offense in the District of Columbia Code, which provided that mistake as to age was not a defense, the President did not adopt that provision in the *Manual*.[184] The Army court concluded that the age of the victim is not a strict liability element.[185]

With the issue squarely in front of the ACCA in *Zachary*, it found that indecent acts with a child is a distinct offense from indecent acts with another, rather than an aggravated version of the same offense.[186] In the *Manual*, the President designated indecent acts with a child as a distinct offense.[187] Also, indecent acts with a child has another unique element of intent to arouse, appeal to, or gratify the lust, passions, or sexual desires of the accused, the victim, or both.[188] The ACCA then held that, because the age of the victim is a general intent element, an honest and reasonable belief that the person was at least sixteen years old is a defense to indecent acts with a child.[189] The ACCA finished with a discussion of precedents involving strict liability and sex offenses, and it interpreted them as consistent with its holding.[190]

The ACCA concluded that the accused's guilty plea to the charge of indecent acts with a minor was improvident because the accused set forth matters inconsistent with his guilty plea.[191] The ACCA affirmed a finding of guilty to the lesser included offense of indecent acts with another and affirmed only so much of the sentence as provided for reduction to the grade of E-1.[192] When the government appealed, the CAAF agreed with the ACCA, embracing its excellent analysis on the law of mistake of fact as it applies to indecent acts with a child.[193]

For trial practitioners, *Zachary* is a significant instructions case because, if there is some evidence that the accused reasonably believed that the victim was at least sixteen years old, the military judge must instruct the members that an honest and reasonable mistake of fact is a defense to the offense of indecent acts with a child.[194] The Army court's opinion resolved an issue that had confused trial practitioners for over a decade. The holding in *Zachary* is legally sound and it is especially critical today, when Department of Defense Instruction 1325.7 lists indecent acts with a child as an offense whose conviction triggers the sex offender reporting and registration requirements.[195] For trial practitioners, the black letter law is now clear that the age of the victim is an element of the offense of indecent acts with a child, and an honest and reasonable mistake as to the victim's age is a defense.

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[180] *Id*. at 820.

[181] *Id*.

[182] MCM, *supra* note 15, pt. IV, ¶ 87(b)(1).

[183] *Zachary*, 61 M.J. at 821.

[184] *Id*.

[185] *Id*.

[186] *Id.* at 823.

[187] *Id*.

[188] *Id*.

[189] *Id*.

[190] *Id*. at 823-25.

[191] *Id*.

[192] *Id*. at 826.

[193] *Zachary*, 63 M.J. at 441.

[194] In tailoring the instruction, the military judge should use the model instruction for a general intent element found at paragraph 5-11-2 of the *Benchbook*. BENCHBOOK, *supra* note 3, ¶ 5-11-2.

[195] U.S. DEP'T OF DEFENSE, INSTR. 1325.7, ADMINISTRATION OF MILITARY CORRECTIONAL FACILITIES AND CLEMENCY AND PAROLE AUTHORITY encl. 27 (17 July 2001).

Military Rule of Evidence 413: United States v. Dacosta[196]

After a contested trial, a panel of officer and enlisted members convicted SPC Dacosta of the unlawful entry into SPC L's room and subsequent rape in April 2002.[197]Prior to trial, the military judge litigated a Military Rule of Evidence (MRE) 412 motion regarding the admissibility of conduct between SPC L and the accused in January 2002.[198] The military judge determined that the conduct was both admissible under MRE 412 and MRE 413.[199]

Prior to instructing the members on findings, the military judge asked counsel for their views on proper instructions and the defense counsel objected to the instruction on uncharged sexual misconduct.[200] The defense counsel had referred to the January 2002 sexual encounter but only to lay the foundation for mistake of fact as to consent.[201] The government made no reference to the January 2002 sexual encounter during their argument,[202] nor did they request the uncharged sexual misconduct instruction.

After considering the issue, the military judge instructed the members regarding the January 2002 event both as to mistake of fact as to consent and uncharged sexual misconduct under MRE 413.[203]

On appeal, appellate defense counsel focused their efforts on persuading the ACCA that the uncharged sexual misconduct instruction was not warranted.[204] The ACCA distinguished the military judge's responsibility regarding evidentiary instructions from her responsibility regarding affirmative defense instructions.[205] Finding no precedent for a sua sponte duty to instruct on the MRE 413 issue, the ACCA created one—effective for all cases tried on or after 26 July 2006.[206] The ACCA set out an eight-part instruction which the military judge must include in all cases in which MRE 413 evidence is properly admitted:

> (1) the accused is not charged with this other sexual assault offense;
> (2) the Rule 413 evidence should have no bearing on their deliberations unless they determine the other offense occurred;[207]

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[196] 63 M.J. 575 (Army Ct. Crim. App. 2006), *review denied*, 64 M.J. 172 (2006).

[197] *Id.* at 577.

[198] Essentially, the evidence involved the accused and SPC L alone in the same bed for the night. Specialist L testified at the hearing that during that night, the accused touched her sexually and attempted to have sexual intercourse with her, but was unsuccessful. *Dacosta*, 63 M.J. at 577-78.

[199] *Id.* at 577.

[200] *Id.* The government did not request the instruction. Although not specifically mentioned by the military judge, it is clear from the opinion that she was referring to *Benchbook* instr. 7-13-1, Other Crimes, Wrongs or Acts Evidence, Note 3, as this is the instruction she provided the members. BENCHBOOK *supra* note 3, instr. 7-13-1.

[201] *Id.*

[202] *Dacosta*, 63 M.J. at 579.

[203] *Id.* at 578.

[204] "Appellate defense counsel concede, '[I]f the [MIL. R. EVID.] 413 instruction is warranted, then the correct instruction was given." *Id.* at 581.

[205] *Id.* at 583. Summarizing, the ACCA said the military judge has a sua sponte duty to instruct on all affirmative defenses reasonably raised by the evidence in the case, but that the military judge's obligation to instruct on evidentiary matters clearly raised depends on counsel first requesting the instruction. (For greater detail on the military judge's responsibility regarding affirmative defenses and lesser included offenses, see generally *United States v. Gutierrez*, 64 M.J. 374 (2007)). The Army court continued this theme, albeit indirectly, in *United States v. Brown*. 63 M.J. 735 (Army Ct. Crim. App. 2006). In *Brown*, the ACCA discussed the military judge's obligations regarding instructions thus: "The military judge bears the primary responsibility for ensuring that mandatory [that is, required] instructions . . . are given and given accurately." *Id.* at 738 (citation omitted.). Required instructions include the elements of the offenses, lesser included offenses and special, or affirmative, defenses reasonably raised by the evidence. *Id.*

Thus, as a general statement for evidentiary instructions, they are not required and there is no sua sponte duty to give them (although IAW R.C.M. 920(c) and (e)(7), counsel should be given the opportunity to request any evidentiary instructions they believe appropriate). Failure to object to an instruction or to the omission of an instruction before the members close to deliberate on findings—except the above noted required instructions—constitutes waiver. MCM, *supra* note 15, R.C.M. 902(f); United States v. Davis, 53 M.J. 202, 205 (2000).

[206] *Dacosta*, 63 M.J. at 583.

[207] The level of proof is by a preponderance of the evidence, according to the proposed instruction contained in the appendix to the opinion in *Dacosta*. *Id.* at 584.

(3) if they make that determination, they may consider the evidence for its bearing on any matter to which it is relevant in relation to the sexual assault offenses charged;
(4) the Rule 413 evidence has no bearing on any other offense charged;
(5) [the members] may not convict the accused solely because they may believe the accused committed other sexual assault offenses or has a propensity or predisposition to commit sexual assault offenses;
(6) they may not use the Rule 413 evidence as substitute evidence to support findings of guilty or to overcome a failure of proof in the government's case, if any;
(7) each offense must stand on its own and they must keep the evidence of each offense separate; and
(8) the burden is on the prosecution to prove the accused's guilt beyond a reasonable doubt as to each and every element of the offenses charged.[208]

Beyond the above sua sponte instruction, the ACCA held that "military judges should not unnecessarily highlight to panel members—absent a specific request from counsel—that Rule 413 evidence may be properly used to show a 'propensity to engage in sexual assault.'"[209]

Most (but not all) of the information in the ACCA instruction was already explicit in the then-existing *Benchbook* Instruction 7-13-1, Note 3 and Instruction 7-17.[210] To address this case, however, the *Benchbook* Committee[211] staffed a new instruction, approved for use on 6 January 2007.[212] This new instruction replaces former Notes 3 and 4 of Instruction 7-13-1.

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[208] *Id.* at 583. The ACCA included as an appendix to this decision a suggested amendment to the *Benchbook*.

[209] *Id.* A restriction on "highlighting" that MRE 413 evidence can be used to show propensity to commit a sexual assault seems inconsistent with the very purpose of MRE 413 itself. As an exception to MRE 404(b)'s prohibition on propensity evidence, it is a rule of inclusion, rather than exclusion. United States v. Parker, 2005 CCA LEXIS 340 (A.F. Ct. Crim. App. 18 Oct. 2005), *review denied*, 63 M.J. 282 (2006). The legislative history of Federal Rule Evidence (FRE) 413 (from which MRE 413 is drawn) shows a recognition that those who engage in sexual assault likely reoffend and thus propensity is important information for the members. Senator Robert Dole, a co-sponsor with Representative Susan Molinari of the legislation that ultimately led to FRE 413, said: "The courts should liberally construe the rules so that the defendant's propensities . . . can be properly assessed." 140 CONG. REC. S12990 (daily ed. Sept. 20, 1994) (statement of Sen. Dole) (referring to what ultimately became Pub. L. No. 103-322, tit. 32, subtit. § 329035 (1994) Representative Molinari apparently made similar comments. 140 Cong. Rec. H8992 (daily ed. Sept. 20, 1994) (statement of Rep. Molinari). STEPHEN A. SALTZBURG, ET AL., MILITARY RULES OF EVIDENCE MANUAL sec. 413.02(2), at 4-204 (5th ed. 2003).

Likewise, the U.S. Supreme Court has characterized the potential for recidivism for those committing sexual offenses as "frightening and high." Smith v. Doe, 538 U.S. 84, 103 (2003) (citing McKune v. Lile, 536 U.S. 24, 34 (2002)); *see also id.* (citing U.S. Dept. of Justice, Bureau of Justice Statistics, Sex Offenses and Offenders 27 (1997); U.S. Dept. of Justice, Bureau of Justice Statistics, Recidivism of Prisoners Released in 1983, at 6, 33 (1997)) ("When convicted sex offenders reenter society, they are much more likely than any other type of offender to be rearrested for a new rape or sexual assault."). *Id.* at 33.

Although neither *Smith* nor *McKune* addressed FRE 413 (*Smith* addressed Alaska's sex offender registration law and *McKune* addressed Kansas' sex offender treatment program), the conclusions they both draw about sex offender recidivism clearly support the intent behind FRE 413, as expressed by both Senator Dole and Representative Molinari. Military Rule of Evidence 413 thus appears to be primarily concerned with propensity, and getting that information to the members.

Id.

[210] The information contained in paragraphs 5, 7 and 8 were explicitly contained in the *Benchbook*. BENCHBOOK, *supra* note 3, instrs. 7-13-1 n.3 and 7-17, as they existed at that time. The other paragraphs were arguably implicit in either those current instructions or the trial process itself. For example, the members have already seen the flyer by the time MRE 413 evidence is admitted during trial; they therefore know the accused is not charged with the sexual assault shown by the MRE 413 evidence. Regarding paragraph 2 of the ACCA instruction, although the military judge will address on the record the strength of the evidence supporting the MRE 413 evidence as a *Wright*/*Berry* factor when determining admissibility, the ACCA's instruction makes it clear the members must also find the prior acts occurred. *See* United States v. Wright, 53 M.J. 476 (2000) and United States v. Berry, 61 M.J. 91 (2005). Paragraph 3 comes directly from MRE 413(a), although it did not explicitly exist in any *Benchbook* instruction at the time. Paragraph 4 was implied in then-existing instructions, as the military judge tells the members they may use the MRE 413 evidence in relation to sexual assault. *See* BENCHBOOK, *supra* note 2, instr. 7-13-1 n.3 as it existed before the recent change. Finally, paragraph 6 was implicit in paragraphs 5 and 8, and in the then-existing *Benchbook*. BENCHBOOK, *supra* note 3, instr. 7-13-1 n.3.

[211] The *Benchbook* Committee consists of members of the U.S. Army Trial Judiciary, in consultation with the Navy and Marine Corps, Air Force and Coast Guard Trial Judiciaries. The *Benchbook* Committee staffs suggested changes to the *Benchbook* and submits those changes to the Chief Trial Judge, U.S. Army Trial Judiciary, for final approval and inclusion in the *Benchbook*.

[212] That instruction is as follows:

Replace the current note 3 and Note 4, instruction 7-13-1 (PAGES 871 and 871.1) with the following:

NOTE 3: Sexual assault and child molestation offenses – MRE 413 or 414 evidence. In cases in which the accused is charged with a sexual assault or child molestation offense, Military Rules of Evidence 413 and 414 permit the prosecution to offer, and the court to admit, *subject to an MRE 403 balancing*, evidence of the accused's commission of other sexual assault or child molestation offenses on any matter to which relevant. Unlike misconduct evidence that is not within the ambit of MRE 413 or 414, the members may consider this evidence on any matter to which it is relevant, to include the issue of the accused's propensity or predisposition to commit these types of crimes. The government is required to disclose to the accused the MRE 413 or 414 evidence that is expected to be offered, at least 5 days before trial, or at such later time as the military judge may find for good cause. When evidence of the accused's commission of other offenses of sexual assault under MRE 413, or of child molestation under MRE 414, is properly admitted prior to findings as an exception to the general rule excluding such evidence, the military judge must give the following appropriately tailored instruction based on the evidence admitted (the optional portions of the instruction should be given when requested by counsel or when otherwise raised by the evidence).

You heard evidence that the accused may have committed (another) (other) offense(s) of (sexual assault) (child molestation). The accused is not charged with (this) (these) other offense(s). This evidence may have no bearing on your deliberations unless you first determine by a preponderance of the evidence, that is more likely than not, (this) (these) uncharged offense(s) occurred. If you determine by a preponderance of the evidence (this) (these) other uncharged offense(s) occurred, you may then consider the evidence of (that) (those) offense(s) for its bearing on any matter to which it is relevant only in relation to (list the specification(s) for which the members may consider the evidence).

(You may consider the evidence of such other act(s) of (sexual assault) (child molestation) for its tendency, if any, to show the accused's propensity or predisposition to engage in (sexual assault) (child molestation)(,)) (as well as its tendency, if any, to:

(identify the accused as the person who committed the offense(s) alleged in _____)

(prove a plan or design of the accused to_____)

(prove knowledge on the part of the accused that_____)

(prove that the accused intended to _____)

(show the accused's awareness of (his) (her) guilt of the offense(s) charged)

(determine whether the accused had a motive to commit the offense(s))

(show that the accused had the opportunity to commit the offense(s))

(rebut the contention of the accused that (his) (her) participation in the offense(s) charged was the result of (accident) (mistake) (entrapment))

(rebut the issue of _____ raised by the defense); (and)

(_____).

You may not, however, convict the accused solely because you believe (she) (he) committed (this) (these) other offense(s) or solely because you believe the accused has a propensity or predisposition to engage in (sexual assault) (child molestation). In other words, you cannot use this evidence to overcome a failure of proof in the government's case, if you perceive any to exist. The accused may be convicted of an alleged offense only if the prosecution has proven each element beyond a reasonable doubt. (However, by pleading to a lesser included offense, the accused has relieved the government of its burden of proof with respect to the elements of that offense.)

Each offense must stand on its own and you must keep the evidence of each offense separate. The prosecution's burden of proof to establish the accused's guilt beyond a reasonable doubt remains as to each and every element of (each) (the) offense(s) charged. Proof of one charged offense carries with it no inference that the accused is guilty of any other charged offense.

NOTE 4: Use of Charged MRE 413 or 414 Evidence. There will be circumstances where evidence relating to one charged sexual assault or child molestation offense is relevant to another charged sexual assault or child molestation offense. If so, the following instruction may be used, in conjunction with NOTE 3, as applicable.

(Further), evidence that the accused committed the (sexual assault) (act of child molestation) alleged in (state the appropriate specification(s) and Charge(s)) may have no bearing on your deliberations in relation to (state the appropriate specification(s) and Charge(s)) unless you first determine by a preponderance of the evidence, that is more likely than not, the offense(s) alleged in (state the appropriate specification(s) and Charge(s)) occurred. If you determine by a preponderance of the evidence the offense(s) alleged in (state the appropriate specification(s) and Charge(s)) occurred, even if you are not convinced beyond a reasonable doubt that the accused is guilty of (that) (those) offense(s), you may nonetheless then consider the evidence of (that) (those) offense(s) for its bearing on any matter to which it is relevant in relation to (list the offense(s) for which the members may consider the evidence). (You may also consider the evidence of such other act(s) of (sexual assault) (child molestation) for its tendency, if any, to show the accused's propensity or predisposition to engage in (sexual assault) (child molestation).)

You may not, however, convict the accused solely because you believe (she) (he) committed (this) (these) other offense(s) or solely because you believe the accused has a propensity or predisposition to engage in (sexual assault) (child molestation). In other words, you cannot use this evidence to overcome a failure of proof in the government's case, if you perceive any to exist. The accused may be convicted of an alleged offense only if the prosecution has proven each element beyond a reasonable doubt. (By pleading to a lesser included offense, the accused has relieved the government of its burden of proof with respect to the elements of that offense.)

Each offense must stand on its own and proof of one offense carries no inference that the accused is guilty of any other offense. In other words, proof of one (sexual assault) (act of child molestation) creates no inference that the accused is guilty of any other (sexual assault) (act of child molestation). (However, it may demonstrate that the accused has a propensity to commit that type of offense.) The prosecution's burden of proof to establish the accused's guilt beyond a reasonable doubt remains as to each and every element of each offense charged. Proof of one charged offense carries with it no inference that the accused is guilty of any other charged offense.

Findings Arguments Run Amok: Comment on Constitutional Rights—The Sequel:
United States v. Haney[213]

Again this term, the CAAF reviewed a government findings argument that arguably commented on one of the accused's constitutional rights—this time, the accused's right to counsel.[214] Under the unique facts of *Haney*, the CAAF did not find plain error.[215] However, the CAAF voiced disapproval of the argument—and implicitly the military judge's failure to sua sponte correct it.[216]

Lance Corporal (LCpl) Haney was suspected of abusing controlled substances.[217] When initially questioned about it by law enforcement, he denied any such abuse. Eventually, LCpl Haney invoked his rights to silence and to counsel. However, he later returned and, after another rights advice, confessed to his crimes.

At trial, the accused argued his confession was coerced.[218] The accused took the stand for that purpose and during his direct examination, disclosed that he had invoked his rights to silence and to counsel before returning to confess.

> During findings argument, the trial counsel made the following argument:
>
> [The accused] says he gave a statement to avoid confinement. Well, let's look at that. I mean I think that's an interesting statement. Let's -- this is an important analysis that I think needs to be considered. *He gets his first rights warning from Master Sergeant Crecilius and he invokes his right, he says, I want to see an attorney.* And he leaves the premises and what does he do? He doesn't see an attorney, he goes to the barracks. *What would most people do in that situation if an individual was truly innocent? Wouldn't they go see a lawyer and get some sort of legal protection? Would they come back and admit to guilt without the benefit of legal advice?* What is more reasonable is that if he knows he's guilty, he understands that there may be witnesses out there who can prove he's guilty, he has an incentive to come back and try to minimize things by being as cooperative as possible and hope that he gets some sort of leniency. *If he was innocent, the government is arguing, he would have gone and seen a lawyer, and used that shield.*[219]

There was no objection to any of this argument by the trial defense counsel. Likewise, the military judge did not sua sponte instruct the officer and enlisted members of the accused's panel regarding the comments in italics above. The members convicted the accused of three violations of Article 112a and one of Article 107.[220]

On appeal, LCpl Haney argued that the trial counsel's argument in italics above was an impermissible comment on his invoking his right to counsel.[221] Because there was no defense objection, the CAAF applied a plain error analysis.[222]

The CAAF avoided deciding whether error existed, holding that if there was error, it was harmless beyond a reasonable doubt given the unique facts of this case.[223] However, the CAAF specifically disapproved of the trial counsel's argument.

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[213] 64 M.J. 101 (2006).

[214] Last term, the CAAF reviewed trial counsel's implied comment on the accused's right to silence in *United States v. Carter*, finding plain error and affirming the Air Force Court of Criminal Appeals' (AFCCA) reversal of Airman Carter's conviction for indecent acts. United States v. Carter, 61 M.J. 30, 31 (2005).

[215] *Haney*, 64 M.J. at 102.

[216] *Id*.

[217] *Id.*

[218] *Id.* at 103.

[219] *Id.* at 104 (court's emphasis).

[220] *Id.* at 102.

[221] MCM, *supra* note 15, MIL. R. EVID. 301(f)(3) (stating that such evidence is inadmissible against the accused).

[222] *Haney*, 64 M.J. at 105.

[223] *Id*.

Such a statement, in conjunction with the CAAF's focus on findings arguments and the military judge's responsibility therein from last term, could be read as an implication that the military judge should have given a curative instruction.[224]

Avoiding Appellate Litigation: United States v. Washington[225]

Staff Sergeant Washington's conviction by members of carnal knowledge and indecent acts is not significant from an instructional perspective, other than an illustration of the obvious[226]—following the *Benchbook* helps avoid potential error (and appellate litigation).

During the accused's contested trial, the accused's eight year old daughter, C.B., testified for the government.[227] After the trial counsel discussed with C.B. the difference between the truth and a lie, and the importance of telling the truth, he began his direct examination without actually administering an oath to C.B.[228] However, at the conclusion of her testimony, recognizing his failure to swear her before she testified, the trial counsel engaged in the following colloquy:

> Q. [C.B.], your testimony today, was it the truth?
> A. Yes.
> Q. Was it the whole truth?
> A. Yes.
> A. Was it nothing but the truth?
> Q. Yes.
> A. So help you God?
> Q. Yes.[229]

At no point did the defense object to the failure to swear C.B.

Because the defense did not object, the CAAF applied plain error analysis.[230] Although the CAAF found obvious error,[231] it determined that the error was harmless and did not prejudice the accussed's substantial rights.[232] However, reinforcing the judicial mantra of "follow the *Benchbook*," the CAAF said "adherence to the [B]enchbook formula will minimize dispute."[233]

Although the *Benchbook* does not specify the oath or affirmation for witnesses,[234] it does remind the military judge that the trial counsel administers oaths *before* the witnesses testify,[235] consistent with the requirement of MRE 603.[236] While

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[224] BENCHBOOK, *supra* note 3, instr. 2-7-20 (Comment on Rights to Silence or Counsel addresses this issue). The note at the beginning of this instruction advises the military judge to determine whether such evidence is admissible if presented to the members, and if not admissible, to "fashion an appropriate remedy." Although it does not appear from the opinion that the military judge followed that note and affirmatively determined admissibility, it would be unfair to say the trial judge here did not recognize the issue just because such analysis does not appear in the opinion. To avoid (or at least expedite) potential appellate litigation on this issue, military judges should follow the guidance from the Note and include their analysis on the record.

[225] 63 M.J. 418 (2006), *cert. denied*, 127 S. Ct. 842 (2006).

[226] "Follow the *Benchbook* and avoid error" is an old saw. *See* United States v. Llewellyn, 32 M.J. 803, 805 n.3 (A.C.M.R. 1991):

> Our holding should not be construed as approval for not following the time tested provisions of the Benchbook. Although we believe the omission of the instruction in this case was inadvertent, military judges are cautioned that failure to follow the Benchbook at worst may result in reversal and at best result in needless litigation at the appellate level.

Id.

[227] *Washington*, 63 M. J. at 421.

[228] *Id.* at 423.

[229] *Id.*

[230] "Under our plain error analysis, Appellant must show that there was error, the error was plain or obvious, and that the error materially prejudiced his substantial rights." *Id.* at 424 (citing United States v. Powell, 49 M.J. 460, 463-65 (1998)).

[231] "There is no doubt that the failure to administer the oath before C.B.'s testimony was error, and that the error was obvious. The plain text of MRE 603 required C.B., by oath or affirmation, to declare that she would testify truthfully 'before testifying.'" *Id.*

[232] *Id.* at 425.

[233] *Id.*

[234] *See* MCM, *supra* note 15, R.C.M. 807(b)(2) discussion, subpara. (F) (oath/affirmation for witnesses).

novel situations may require deviation from the *Benchbook*, those situations are generally few and far between. The advice from the Army Court of Military Review in *Llewellyn*[237] rings true today as well: To avoid negative consequences later, all trial participants should—except in those novel situations—follow the *Benchbook*.[238]

Sentencing

Insufficient Curative Instructions: United States v. Grover[239]

Last term, the CAAF examined government findings arguments for error—and the military judge's failure to correct them.[240] This term, the Air Force Court of Criminal Appeals (AFCCA) followed that theme as it relates to a sentencing argument.

In *Grover*, after the military judge accepted Senior Airman Grover's guilty pleas to violations of Articles 86, 107 and 112a, officer members sentenced him to confinement for nine months, reduction to E-1 and a bad conduct discharge.[241]

During the sentencing argument, the trial counsel relied heavily on evidence that the AFCCA later determined was inadmissible under RCM 1001(b).[242] The trial counsel told the members that the accused's ex-spouse "didn't trust him,"[243] that, because he was a husband and a father, he should be "held to a higher standard,"[244] that the accused had left his child with a stripper (not supported by any evidence—proper or otherwise),[245] and that the sentence imposed should force him to take responsibility—not for the offenses of which he stood convicted—but for his children.[246]

While the military judge did tell the members to disregard the comment about the accused leaving his child with a stripper, with regard to the trial counsel's other arguments, he merely stated that they may have been "on the borderline."[247]

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[235] For example, see the first Note in *Benchbook* sec. V, para. 2-5-5.

[236] As the CAAF discussed at length in this case, MRE 603 requires the witness be administered the oath or affirmation "[b]efore testifying." *Washington*, 63 M.J. at 424 (citations omitted).

[237] United States v. Llewellyn, 32 M.J. 803, 806 n.3 (A.C.M.R. 1991).

[238] The difficulty for practitioners is in determining, under the stress of trial, what is and is not a "novel" situation.

[239] 63 M.J. 653 (A.F. Ct. Crim. App. 2006).

[240] In *United States v. Fletcher*, 62 M.J. 175, 177 (2005), the CAAF found prejudicial error in the military judge's failure to correct the government's improper findings argument, over minimal defense objection. This term, the CAAF addressed findings arguments again in *Haney* finding no plain error under the unique facts of that case, absent any defense objection. United States v. Haney, 64 M.J. 101, 105-06 (2006). Contrast both those cases with *United States v. Hill*, 62 M.J. 271 (2006), where the CAAF praised sua sponte action by the military judge in correcting improper questioning on sentencing: "When the witness extended his answer to suggest what he might have done as a panel member, the trial judge promptly cut him off and said that the witness was not allowed to make such a comment. The prompt and decisive action by the trial judge reflected his awareness that the defense had not opened the door to unlimited remarks about retention of Appellant." *Hill*, 62 M.J. at 275.

[241] *Grover*, 63 M.J. at 653.

[242] A good portion of the AFCCA's opinion in this case is devoted to the inappropriate evidence admitted by the government, over defense objections the AFCCA characterized as both "frequent" and "to no avail." *Id.* at 656. While the purpose of citing this case is to reinforce the military judge's sua sponte obligation to stop improper argument by counsel and appropriately instruct the members, the entire opinion is a good reminder of what is – and is not – admissible on sentencing. The AFCCA generally reminds us that to be admissible, evidence offered in the government's sentencing case in chief must fall within one of the five RCM 1001(b) categories. Here, the government offered evidence of a "no contact order issued to the appellant; about his problems maintaining control of his emotions when dealing with issues relating to divorce, child custody, and child visitation matters; and about [the accused's] financial difficulties, including issues with car payments, insurance, and rent. The trial counsel even went to so far as to offer [the accused's] traffic tickets. Indeed, there was, apparently, no limit to the prosecution's determination to explore every one of [the accused's] flaws [including his failure to keep his boots shined]." *Id.* at 655. Because the accused was convicted of failure to repair under Article 86, false official statement under Article 107 and two use offenses under Article 112a, the AFCCA had no difficulty in determining the government's evidence above did not fall into any permissible category under RCM 1001(b). Particularly under RCM 1001(b)(4) ("aggravating circumstances directly relating to or resulting from the offenses of which the accused has been found guilty") and RCM 1001(b)(5) ("opinions concerning the accused's previous performance as a servicemember and potential for rehabilitation"). As the AFCCA noted dryly, "At no point did [the trial counsel] make even a token effort to link the condition of [the accused's] footgear to his drug use or other misconduct." *Id.* at 656.

[243] *Id.*

[244] *Id.*

[245] *Id.* at 657.

[246] *Id.*

[247] *Id.*

In setting aside the accused's sentence, the AFCCA found that the sentencing phase of this trial had "devolve[d] . . . into a no-holds-barred trashing of the accused."[248] During argument, the defense counsel objected to trial counsel's argument, and the military judge made sua sponte efforts to control the tone and substance of the trial counsel's argument. The AFFCA found that the efforts of the military judge were "at best weak."[249]

Although not expressly stated by the AFCCA, the tone of the opinion is clear—the military judge is more than a "mere referee"[250] and has a sua sponte obligation to control excesses by counsel during argument. When counsel stray, the military judge has an obligation to stop the argument and appropriately instruct the members—regardless of the number of times it must be done.[251]

The Duration of Total Forfeitures: United States v. Stewart[252]

At his contested general court-martial before members, Airman First Class Stewart was convicted of unlawful entry, indecent assault and indecent acts.[253] The members imposed the following sentence: "'reduction to the grade of Airman Basic (E-1), 15 months confinement and forfeiture of all pay and allowances.'"[254] The members did not adjudge a discharge. The convening authority approved the sentence as adjudged.

Following his confinement, the accused was returned to active duty. However, the accused was initially subjected to total forfeitures after his return to duty status. Eventually, the forfeitures were reduced to two thirds forfeitures, until the convening authority remitted all uncollected forfeitures, some eight months after the accused returned to duty status.

On appeal, the accused argued that he should not have been subject to any forfeitures after his return to duty status. Specifically, the accused argued that, "because the members did not specify imposition of partial forfeitures as an additional punishment following total forfeitures, his sentence to forfeiture of all pay and allowances was intended to run only through his period of confinement."[255] Additionally, the accused asserted that DFAS' continued imposition of forfeitures subjected him to a sentence more severe than that adjudged by the members."[256]

Unable to clearly divine the members' intent, the CAAF agreed with the accused and limited his total forfeitures to the period he was in confinement.[257] The CAAF then held:

> [W]here a sentence to forfeiture of all pay and allowances is adjudged, such sentence shall run until such time as the servicemember is discharged or returns to a duty status, whichever comes first, unless the sentencing authority expressly provides for partial forfeitures post-confinement. The sentencing authority shall specify the duration and the amount of such partial forfeitures, subject to R.C.M. 1103 [sic 1003] (b)(2), the discussion accompanying R.C.M. 1107(d)(2), and *Warner*.[258]

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[248] *Id.*

[249] *Id.*

[250] United States v. Graves, 1 M.J. 50, 53 (C.M.A. 1975).

[251] As it relates to counsel's continued improper argument after correction by the military judge, the facts in this case are reminiscent of the CAAF opinion in *United States v. Carter*, 61 M.J. 30 (2005). There, as here, the military judge corrected improper argument by counsel by means of instructions to the members. *Id*. at 32. However, in both cases, the improper argument continued after the military judge's correction, thus "vitiat[ing] any curative effect" of the military judge's prior correction. *Id*. at 35. The appellate courts demand that when counsel persist with improper argument, the military judge must be similarly persistent with corrections.

[252] 62 M.J. 291 (2006).

[253] *Id*. at 292.

[254] *Id*.

[255] *Id.*

[256] *Id.* at 292-93.

[257] *Id.* at 294.

[258] *Id.* Practically speaking, this total forfeiture/partial forfeiture dichotomy becomes important when the accused returns to a duty status after some confinement. This likely would only occur after:

(1) The accused is sentenced to confinement without a discharge and completes his confinement; or

The *Benchbook* currently does not have an instruction to cover this particular situation.[259] For the members to accurately apply the holding from this case, they would need to be instructed that:

> (1) Although they may adjudge total forfeiture of all pay and allowances, that forfeiture is effective only until the accused either is discharged, reaches the end of his enlistment,[260] or returns to active duty, whichever occurs first.
> (2) Should the accused return to active duty, he may be subject only to a maximum of 2/3 forfeitures of pay.[261]
> (3) Should the members wish to adjudge a forfeiture that would be effective after the accused returns to active duty, they would need to "include an express statement of a whole dollar amount to be forfeited each month and the number of months the forfeiture is to continue"[262] after the accused returns to active duty.

In theory, to apply any such instruction, the members would need to know when the accused would be released from confinement. Instructing the members how to calculate when the accused would be released from confinement would be an impossible task, as that date depends in part on the accused's conduct while in confinement; that is, whether and how much "good time" credit he receives.[263] Thus, while a *Stewart* instruction including the above information might conceptually seem easy; practically, it is impossible to implement because the members would have to guess at the actual start time for any partial forfeitures.[264]

Conclusion

The cases from the 2006 term provide many lessons on instructions for military justice practitioners. The *Benchbook* is the primary resource for instructions, and varying from the standard *Benchbook* instructions should only be done for good reason and upon careful deliberation. However, the *Benchbook* is only the first step because it might not adequately reflect

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> (2) The accused is sentenced to confinement and a discharge, and the convening authority has not taken initial action prior to the accused completing the confinement.

In the latter case, the accused would return to a duty status unless he requests voluntary excess leave, which is a no-pay status after accrued leave is exhausted. *See* DEP'T OF DEFENSE FINANCIAL MANAGEMENT REG. 7000.14-R, vol. 7A, para. 010301.E & F (Sept. 2006) [hereinafter FMR]. After the convening authority takes initial action on an accused's sentence which includes confinement and a discharge, the accused is routinely notified of the command's intent to place him on involuntary excess leave (rather than return him to a duty status). *See* U.S. DEP'T OF ARMY, REG. 600-8-10, LEAVES AND PASSES para. 5-19 (15 Feb. 2006). While the Soldier is given a reasonable time to respond that he would like to remain on duty, Soldiers facing this excess leave are rarely occurs retained on duty. Like voluntary excess leave, involuntary excess leave is a no pay status after accrued leave is exhausted. *See* FMR, *supra*, paras. 010301.E & F.

[259] The *Benchbook* Committee is currently considering an instruction to address this issue.

[260] If a servicemember is confined pursuant to a court-martial sentence and reaches the end of his enlistment while so confined, his pay stops. The *Benchbook* currently addresses this impact of DOD Fin. Mgmt. Reg. 7000.14-R, vol. 7A, para. 010302.G5. *See* BENCHBOOK, *supra* note 3, sec. II, para. 2-2-6.

[261] This instruction could arguably run afoul of *United States v. Jobe* where the Court of Military Appeals disapproved an instruction that told the members the accused could not be sentenced to "forfeiture of more than two-thirds pay per month without also awarding a punitive discharge." United States v. Jobe, 27 C.M.R. 350, 352 (C.M.A. 1959). While such a sentence was not prohibited by the UCMJ, the *Jobe* court determined such a sentence would likely run afoul of the Eighth Amendment prohibition on cruel and unusual punishment. *Id.* at 353. While the CMA said "some cautionary instruction on the imposition of total forfeitures might be legally desirable and practically beneficial to the accused" the instruction actually given was inappropriate because it could have been interpreted as a direction to give a punitive discharge. *Id.* A similar problem arguably exists here. The line between a "legally desirable and practically beneficial" instruction as mentioned in *Jobe* and an impermissible one is unclear. This is yet another practical obstacle to crafting an instruction to meet the issue set forth in this case.

[262] *See* BENCHBOOK, *supra* note 3, sec. V, para. 2-5-22.

[263] Additionally, consider the following additional factors as examples of the practical impossibility of drafting an instruction implementing this opinion:

> (1) If the accused elects to be sentenced by members and is pleading guilty pursuant to a pretrial agreement (PTA), the PTA will impact his release date if the members' sentence to confinement exceeds the PTA limitation. The members do not know the existence – or the terms – of any PTA.
>
> (2) The members are not told of collateral consequences of their sentence, including good time and parole, which also impact the accused's release date.

[264] *Stewart* would appear to allow the members to impose a sentence that would include the following: "forfeiture of all pay and allowances during the period the accused remains in confinement and forfeiture of _____ pay per month for ___ months upon return to active duty after release from confinement." However, such a sentence would require the members, when crafting their sentence, to determine the accused's release date. As mentioned above, this determination would be speculation on the members' part. Also as mentioned above, providing them with enough information to avoid this speculation would be impossible.

new case law or cover the law in a unique situation. Military judges must pay careful attention to detail in order to provide clear, accurate and complete instructions to the members. Also, military judges must be ready to stop improper argument and provide curative instructions when necessary, often on a sua sponte basis. Instructions to the members are critical to a fair trial because they provide the necessary guideposts for an "informed deliberation."[265]

[265] United States v. Dearing, 63 M.J 478, 479 (2006).

Office of the Judge Advocate General
International and Operational Law Division

International and Operational Law Practice Note

Common Article 3 and Its Application to Detention and Interrogation

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On 20 July 2007, President Bush signed Executive Order 13,440.[1] The Order, attached as an appendix to this note, "interprets the meaning and application of the text of Common Article 3 with respect to certain detentions and interrogations."[2] The Order goes on to state that "Common Article 3 shall apply to a program of detention and interrogation operated by the Central Intelligence Agency."[3] Given the various government documents and statements concerning Common Article 3 (CA3) and its application to detention and interrogation, including the new executive order, it is important for judge advocates to be clear on the standard for detention and interrogation in the U.S. Army.

The Department of Defense (DOD) and the Army are committed to applying the domestic and international law standards outlined in the Detainee Treatment Act (DTA),[4] the War Crimes Act (WCA),[5] and the Military Commissions Act (MCA),[6] including provisions of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment[7] and CA3 to the Geneva Conventions in DOD Detention and Interrogation Operations. Both the DOD and the Army have demonstrated this commitment by issuing a series of publications that make clear the standard of treatment for interrogations and detainees. These publications include the Army's Field Manual (FM) 2-22.3,[8] and DOD Directives 2310.01E[9] and 2311.01E.[10]

The Human Intelligence FM, FM 2-22.3, as well as the draft Army Regulation (AR) on Detention Operations, AR 190-8, apply CA3 as the minimum acceptable humane treatment standard. In addition, both documents adopt, as a matter of DOD policy, the treatment standards contained in the Geneva Convention Relative to the Treatment of Prisoners of War (GPW)[11] and the Geneva Convention Relative to the Protection of Civilians (GCC)[12] for the vast majority of issues which arise in the context of detainee operations.

This policy is reinforced by the publication of DOD Directive 2311.01E, and its companion Chairman of the Joint Chiefs of Staff Instruction,[13] on the DOD Law of War Program. Both policy documents require "[m]embers of DoD Components [to] comply with the law of war during all armed conflicts, however such conflicts are characterized, and in all other military operations."[14] This is essential, so that Soldiers can train to and apply one standard, throughout the spectrum of conflict, no matter how the conflict is characterized. The endorsement of a single standard that does not change from one conflict to

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[1] Exec. Order No. 13,440, 72 Fed. Reg. 40,707 (July 24 2007).

[2] *Id*. sec. 3(a).

[3] *Id.*

[4] Detainee Treatment Act of 2005, Pub. L. No. 109-148, § 1005(e), 119 Stat. 2680, 2741.

[5] War Crimes Act, 18 U.S.C. § 2441 (2006).

[6] Military Commissions Act of 2006 § 3, 10 U.S.C. § 948a – 950w (2006).

[7] Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Res. 39/46, U.N. GAOR, 39th Sess., 93rd plen. mtg., U.N. Doc. A/RES/39/46 (Dec. 10, 1984), *available at* http://www.un.org/documents/ga/res/39/a39r046.htm (last visited Aug. 25, 2007).

[8] *See* U.S. DEP'T OF ARMY, FIELD MANUAL 2-22.3 (FM 34-52), HUMAN INTELLIGENCE COLLECTOR OPERATIONS (Sept. 2006) [hereinafter FM 2-22.3].

[9] U.S. DEP'T OF DEFENSE, DIR. 2310.01E, THE DEPARTMENT OF DEFENSE DETAINEE PROGRAM (5 Sept.. 2006) [hereinafter DOD DIR. 2310.01E].

[10] *See* U.S. DEP'T OF DEFENSE, DIR. 2311.01E, DOD LAW OF WAR PROGRAM (9 May 2006) [hereinafter DOD DIR. 2311.01E].

[11] Convention (III) Relative to the Treatment of Prisoners of War, opened for signature Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135, *reprinted in* DIETRICH SCHINDLER & JIRI TOMAN, THE LAWS OF ARMED CONFLICTS 429-30 (2d ed. 1981).

[12] Convention (IV) Relative to the Protection of Civilian Persons in Time of War, opened for signature Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S 287, *reprinted in* SCHINDLER & TOMAN, *supra* note 11, at 501.

[13] CHAIRMAN, JOINT CHIEFS OF STAFF INSTR. 5810.01C, IMPLEMENTATION OF THE DOD LAW OF WAR PROGRAM (31 Jan. 2007) [hereinafter CJCSI 5810.01C].

[14] DOD DIR. 2311.01E, *supra* note 10, para 4.1; CJCSI 5810.01C, *supra* note 13, para. 4. 4.a(1).

another will allow the inclusion of training scenarios not only at home station, but throughout the entire training environment, including the combat training centers.

Department of Defense Directive 2310.01E, "The DOD Detainee Program" adopts the provisions of Common Article 3, preventing assaults, hostage taking, outrages upon personal dignity (including humiliating and degrading treatment of all kinds), and sleep deprivation.[15] Further, para's. 2.2, 4.1 and 4.2 provide that during all armed conflict, however characterized, DOD policy is to apply CA3, without regard to the detainee's legal status.

In relation to the current conflict, as a result of *Rumsfeld v. Hamdan*,[16] the treaty provisions of CA3 are now binding, as a matter of law, on the U.S. government in this conflict against Al Qaeda. That reinforces a long-held view of the U.S. military and the DOD that, as a matter of policy, the minimum standards articulated in CA3 would apply to all individuals captured on the battlefield. This standard was solidified by Deputy Secretary of Defense Gordon England's policy memo of 7 July 2006 which confirmed that CA3 applies to treatment of detainees in DOD and requires all DOD personnel to "promptly review all relevant directives, regulations, policies, practices, and procedures under [their] purview to ensure they comply with the standards of Common Article 3."[17]

Executive Order 13,440 is not applicable to the DOD and the Army for detention and interrogations; it does not provide the DOD standard. The DTA specifically prohibits the use of techniques other than those contained in FM 2-22.3.[18] Further, in reviewing FM 2-22.3, Congress instructed the DOD to return to Congress before making any changes to the standards and procedures contained in that publication. Because current DOD directives prohibit use of non-DOD methods in DOD facilities,[19] the DOD and the Army will continue to be able to take all measures necessary to prevent violations of the Geneva Conventions by DOD personnel or in DOD facilities, as required by domestic law and our treaty obligations.

Therefore, the standard remains clear for DOD and Army personnel. As a matter of law, CA3 is the minimum standard for all interrogations and treatment of detainees. As a matter of policy, the standards contained in GPW and GCC will be applied unless a specific demonstrated need to depart from that standard is approved by the appropriate commander. Judge advocates must play an important role in ensuring these standards are not only comprehensively taught, but clearly and effectively trained.

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[15] DOD DIR. 2310.01E, *supra* note 9.

[16] Hamdan v. Rumsfeld, 126 S. Ct. 2749 (2006).

[17] Memorandum, Gordon England, Deputy, Office of the Secretary of Defense, to Secretaries of the Military Departments et al., subject: Application of Common Article 3 of the Geneva Conventions to the Treatment of Detainees in the Department of Defense (July 7, 2006), *available at* http://www.fas.org/sgp/othergov/dod/geneva070606.pdf.

[18] FM 2-22.3, *supra* note 8.

[19] U.S. DEP'T OF DEFENSE, DIR. 3115.09, DOD INTELLIGENCE INTERROGATIONS, DETAINEE DEBRIEFINGS, AND TACTICAL QUESTIONING para. 3.4.4.3 (3 Nov. 2005).

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)	174th JAOBC/BOLC III	9-Nov 07 – 6-Feb 08
5-27-C20 (Ph 2)	175th JAOBC/BOLC III	22 Feb – 7 May 08
5-27-C20 (Ph 2)	176th JAOBC/BOLC III	18 Jul – 1 Oct 08
5F-F1	198th Senior Officers Legal Orientation Course	10 – 14 Sep 07
5F-F1	199th Senior Officers Legal Orientation Course	22 – 26 Oct 07
5F-F1	200th Senior Officers Legal Orientation Course	28 Jan – 1 Feb 08
5F-F1	201st Senior Officers Legal Orientation Course	24 – 28 Mar 08
5F-F1	202d Senior Officers Legal Orientation Course	9 – 13 Jun 08
5F-F1	203d Senior Officers Legal Orientation Course	8 – 12 Sep 08
5F-F3	14th RC General Officer Legal Orientation Course	13 – 15 Feb 08
5F-F52	38th Staff Judge Advocate Course	2 – 6 Jun 08
5F-F52S	11th SJA Team Leadership Course	2 – 4 Jun 08

5F-F55	2008 JAOAC (Phase II)	7 – 18 Jan 08
5F-JAG	2007 JAG Annual CLE Conference	1 – 5 Oct 07
JARC-181	2008 JA Professional Recruiting Conference	15 – 18 Jul 08

NCO ACADEMY COURSES		
600-BNCOC	2d BNCOC Common Core	4 – 25 Jan 08
600-BNCOC	3d BNCOC Common Core	10 – 28 Mar 08
600-BNCOC	4th BNCOC Common Core	8 – 29 May 08
600-BNCOC	5th BNCOC Common Core	4 – 22 Aug 08
512-27D30 (Ph 2)	6th Paralegal Specialist BNCOC	13 Aug – 14 Sep 07
512-27D30 (Ph 2)	1st Paralegal Specialist BNCOC	2 Nov – 7 Dec 07
512-27D30 (Ph 2)	2d Paralegal Specialist BNCOC	29 Jan – 29 Feb 08
512-27D30 (Ph 2)	3d Paralegal Specialist BNCOC	2 Apr – 2 May 08
512-27D30 (Ph 2)	4th Paralegal Specialist BNCOC	3 Jun – 3 Jul 08
512-27D30 (Ph 2)	5th Paralegal Specialist BNCOC	26 Aug – 26 Sep 08
512-27D40 (Ph 2)	4th Paralegal Specialist ANCOC	13 Aug – 14 Sep 07
512-27D40 (Ph 2)	1st Paralegal Specialist ANCOC	2 Nov – 7 Dec 07
512-27D40 (Ph 2)	2d Paralegal Specialist ANCOC	29 Jan – 29 Feb 08
512-27D40 (Ph 2)	3d Paralegal Specialist ANCOC	2 Apr – 2 May 08
512-27D40 (Ph 2)	4th Paralegal Specialist ANCOC	3 Jun – 3 Jul 08
512-27D40 (Ph 2)	5th Paralegal Specialist ANCOC	26 Aug – 26 Sep 08
WARRANT OFFICER COURSES		
7A-270A2	9th JA Warrant Officer Advanced Course	7 Jul – 1 Aug 08
7A-270A0	15th JA Warrant Officer Basic Course	27 May – 20 Jun 08
7A-270A1	19th Legal Administrators Course	16 – 20 Jun 08
7A270A3	2008 Senior Warrant Officer Symposium	4 – 8 Feb 08
ENLISTED COURSES		
512-27D/20/30	19th Law for Paralegal Course	24 – 28 Mar 08
512-27DC5	24th Court Reporter Course	30 Jul – 28 Sep 07
512-27DC5	25th Court Reporter Course	28 Jan – 28 Mar 08
512-27DC5	26th Court Reporter Course	21 Apr – 20 Jun 08
512-27DC5	27th Court Reporter Course	28 Jul – 26 Sep 08
512-27DC6	8th Court Reporting Symposium	29 Oct – 2 Nov 07
512-27DC7	3d Redictation Course	7 – 18 Jan 08
512-27DC7	4th Redictation Course	31 Mar – 11 Apr 08
512-27D-CLNCO	10th BCT NCOIC Course	16 – 20 Jun 08
512-27DCSP	17th Senior Paralegal Course	16 – 20 Jun 08

5F-F58	2008 BCT Symposium	4 – 8 Feb 08
ADMINISTRATIVE AND CIVIL LAW		
5F-F21	6th Advanced Law of Federal Employment Course	17 – 19 Oct 07
5F-F22	61st Law of Federal Employment Course	15 – 19 Oct 07
5F-F23	61st Legal Assistance Course	29 Oct – 2 Nov 07
5F-F23	62d Legal Assistance Course	5 – 9 May 08
5F-F202	6th Ethics Counselors Course	14 – 18 Apr 08
5F-F23E	2007 USAREUR Legal Assistance CLE	5 – 8 Nov 07
5F-F24	32d Administrative Law for Installations Course	17 – 21 Mar 08
5F-F24E	2007 USAREUR Administrative Law CLE	17 – 21 Sep 07
5F-F24E	2008 USAREUR Administrative Law CLE	15 – 19 Sep 08
5F-F26E	2007 USAREUR Claims Course	15 – 19 Oct 07
5F-F28	2007 Income Tax Law Course	10 – 14 Dec 07
5F-F28E	7th USAREUR Income Tax CLE	3 – 7 Dec 07
5F-28H	8th Hawaii Income Tax CLE	14 – 18 Jan 08
5F-F28P	8th PACOM Income Tax CLE	7 – 11 Jan 08
5F-F29	26th Federal Litigation Course	6 – 10 Aug 08
CONTRACT AND FISCAL LAW		
5F-F10	159th Contract Attorneys Course	3 – 11 Mar 08
5F-F10	160th Contract Attorneys Course	23 Jul – 1 Aug 08
5F-F101	8th Procurement Fraud Course	26 – 30 May 08
5F-F103	8th Advanced Contract Law Course	7 – 11 Apr 08
5F-F11	2007 Government Contract Law Symposium	4 – 7 Dec 07
5F-F12	77th Fiscal Law Course	22 – 26 Oct 07
5F-F12	78th Fiscal Law Course	28 Apr – 2 May 08
5F-F13	4th Operational Contracting	12 – 14 Mar 08
5F-F14	26th Comptrollers Accreditation Fiscal Law Course	15 – 18 Jan 08
5F-F15E	2008 USAREUR Contract Law CLE	12 – 15 Feb 08
8F-DL12	2d Distance Learning Fiscal Law Course	4 – 8 Feb 08

CRIMINAL LAW		
5F-F31	13th Military Justice Managers Course	15 – 19 Oct 07
5F-F33	51st Military Judge Course	21 Apr – 9 May 08
5F-F34	28th Criminal Law Advocacy Course	10 – 21 Sep 07
5F-F34	29th Criminal Law Advocacy Course	4 – 15 Feb 08
5F-F34	30th Criminal Law Advocacy Course	8 – 19 Sep 08
5F-F35	31st Criminal Law New Developments Course	5 – 8 Nov 07
5F-F35E	2008 USAREUR Criminal Law CLE	15 – 18 Jan 08
INTERNATIONAL AND OPERATIONAL LAW		
5F-F41	4th Intelligence Law Course	23 – 27 Jun 08
5F-F42	89th Law of War Course	28 Jan – 1 Feb 08
5F-F42	90th Law of War Course	7 – 11 Jul 08
5F-F43	4th Advanced Intelligence Law Course	25 – 27 Jun 08
5F-F44	3d Legal Issues Across the IO Spectrum	14 – 18 Jul 08
5F-F45	7th Domestic Operational Law Course	29 Oct – 2 Nov 07
5F-F47	49th Operational Law Course	25 Feb – 7 Mar 08
5F-F47	50th Operational Law Course	28 Jul – 8 Aug 08
5F-F47E	2008 USAREUR Operational Law CLE	28 Apr – 2 May 08

3. Naval Justice School and FY 2008 Course Schedule

Please contact Jerry Gallant, Registrar, Naval Justice School, 360 Elliot Street, Newport, RI 02841 at (401) 841-3807, extension 131, for information about the courses.

Naval Justice School Newport, RI		
CDP	**Course Title**	**Dates**
0257	Lawyer Course (040) Lawyer Course (010) Lawyer Course (020) Lawyer Course (030) Lawyer Course (040)	13 Aug – 12 Oct 07 15 Oct – 14 Dec 07 22 Jan – 21 Mar 08 2 Jun – 1 Aug 08 4 Aug – 3 Oct 08
BOLT	BOLT (010) BOLT (010) BOLT (020) BOLT (020) BOLT (030) BOLT (030)	9 – 12 Oct 07 (USN) 9 – 12 Oct 07 USMC) 24 – 28 Mar 08 (USMC) 24 – 28 Mar 08 (USN 4 – 8 Aug 08 (USMC) 4 – 8 Aug 08 (USN)
961F	Coast Guard Judge Advocate Course (010)	9 – 12 Oct 07

900B	Reserve Lawyer Course (020) Reserve Lawyer Course (010) Reserve Lawyer Course (020)	10 – 14 Sep 07 10 – 14 Mar 08 22 – 26 Sep 08
850T	SJA/E-Law Course (010) SJA/E-Law Course (020)	12 – 23 May 08 28 Jul – 8 Aug 08
786R	Advanced SJA/Ethics (010) Advanced SJA/Ethics (020)	24 – 28 Mar 08 (San Diego) 14 – 18 Apr (Norfolk)
850V	Law of Military Operations (010)	16 – 27 Jun 08
4044	Joint Operationals Law Training (010)	21 – 24 Jul 08
0258	Senior Officer (Fleet) (060) Senior Officer (010) Senior Officer (020) Senior Officer (030) Senior Officer (040) Senior Officer (050) Senior Officer (060) Senior Officer (070)	24 – 28 Sep 07 (New Port) 22 – 26 Oct 07 (Newport) 10 – 14 Mar 08 (Newport) 5 – 9 May 08 (Newport) 9 – 13 Jun 08 (Newport) 21 – 25 Jul 08 (Newport) 18 – 22 Aug 08 (Newport) 22– 26 Sep 08 (Newport)
4048	Estate Planning (010)	21 – 25 Jul 08
961M	Effective Courtroom Communications (010) Effective Courtroom Communications (020)	29 Oct – 2 Nov 07 (Norfolk) 28 Jan – 1 Feb 08 (Bremerton)
748A	Law of Naval Operations (010) Law of Naval Operations (020)	3 – 7 Mar 08 15 – 19 Sep 08
7485	Litigating National Security (010)	29 Apr – 1 May 08 (Andrews AFB)
748K	USMC Trial Advocacy Training (010) USMC Trial Advocacy Training (020) USMC Trial Advocacy Training (030) USMC Trial Advocacy Training (040)	22 – 26 Oct 07 (Camp Lejeune) 12 – 16 May 08 (Okinawa) 19 – 23 May 08 (Pearl Harbor) 15 – 19 Sep 08 (San Diego)
2205	Defense Trial Enhancement (010)	12 – 16 May 08
3938	Computer Crimes (010)	19 – 23 May 08 (Newport)
961D	Military Law Update Workshop (Officer) (010) Military Law Update Workshop (Officer) (020)	TBD TBD
961J	Defending Complex Cases (010)	18 – 22 Aug 08
525N	Prosecuting Complex Cases (010)	11 – 15 Aug 08
2622	Senior Officer (Fleet) (010) Senior Officer (Fleet) (020) Senior Officer (Fleet) (030) Senior Officer (Fleet) (040) Senior Officer (Fleet) (050) Senior Officer (Fleet) (060) Senior Officer (Fleet) (070) Senior Officer (Fleet) (080)	5 – 9 Nov 07 (Pensacola) 14 – 18 Jan 08 (Pensacola) 14 Jan – 18 Feb 08 (Bahrain) 3 – 7 Mar 08 (Pensacola) 14 – 18 Apr 08 (Pensacola) 28 Apr – 2 May 08 (Naples, Italy) 9 – 13 Jun 08 (Pensacola) 16 – 20 Jun 08 (Quantico)

	Senior Officer (Fleet) (090) Senior Officer (Fleet) (100) Senior Officer (Fleet) (110)	23 – 27 Jun 08 (Camp Lejeune) 14 – 18 Jul 08 (Pensacola) 11 – 15 Aug 08 (Pensacola)
961A (PACOM)	Continuing Legal Education (010) Continuing Legal Education (020)	4 – 5 Feb 08 (Yokosuka) 1 – 2 May 08 (Naples)
7878	Legal Assistance Paralegal Course (010)	31 Mar – 5 Apr 08
03RF	Legalman Accession Course (010) Legalman Accession Course (020) Legalman Accession Course (030)	1 Oct – 14 Dec 07 22 Jan – 4 Apr 08 9 Jun – 22 Aug 08
932V	Coast Guard Legal Technician Course (010)	8 – 19 Sep 08
846L	Senior Legalman Leadership Course (010) Senior Legalman Leadership Course (010)	18 – 22 Aug 08
049N	Reserve Legalman Course (Phase I) (010)	21 Apr – 2 May 08
056L	Reserve Legalman Course (Phase II) (010)	5 – 16 May 08
846M	Reserve Legalman Course (Phase III) (010)	19 – 30 May 08
5764	LN/Legal Specialist Mid-Career Course (010) LN/Legal Specialist Mid-Career Course (020)	15 – 26 Oct 07 5 – 16 May 08
961G	Military Law Update Workshop (Enlisted) (010) Military Law Update Workshop (Enlisted) (020)	TBD TBD
4040	Paralegal Research & Writing (010) Paralegal Research & Writing (020) Paralegal Research & Writing (030)	21 Apr – 2 May 08 16 – 27 Jun 08 (Norfolk) 14 – 25 Jul 08 (San Diego)
4046	SJA Legalman (010) SJA Legalman (020)	25 Feb – 7 Mar 08 (San Diego) 12 – 23 May 08 (Norfolk)
Pending	Prosecution Trial Enhancement (010)	4 – 8 Feb 08
7487	Family Law/Consumer Law (010)	31 Mar – 4 Apr 08
627S	Senior Enlisted Leadership Course (Fleet) (010) Senior Enlisted Leadership Course (Fleet) (020) Senior Enlisted Leadership Course (Fleet) (030) Senior Enlisted Leadership Course (Fleet) (040) Senior Enlisted Leadership Course (Fleet) (050) Senior Enlisted Leadership Course (Fleet) (060) Senior Enlisted Leadership Course (Fleet) (070) Senior Enlisted Leadership Course (Fleet) (080) Senior Enlisted Leadership Course (Fleet) (090) Senior Enlisted Leadership Course (Fleet) (100) Senior Enlisted Leadership Course (Fleet) (110) Senior Enlisted Leadership Course (Fleet) (120) Senior Enlisted Leadership Course (Fleet) (130) Senior Enlisted Leadership Course (Fleet) (140) Senior Enlisted Leadership Course (Fleet) (150) Senior Enlisted Leadership Course (Fleet) (160) Senior Enlisted Leadership Course (Fleet) (170)	5 – 7 Oct 07 (Norfolk) 6 – 8 Nov 08 (San Diego) 7 – 9 Jan 08 (Jacksonville) 14 – 16 Jan 08 (Bahrain) 4 – 6 Feb 08 (Yokosuka 11 – 13 Feb 08 (Okinawa 20 – 22 Feb 08 (Norfolk) 18 – 20 Mar 08 (San Diego) 31 Mar – 2 Apr 08 (Norfolk) 14 – 16 Apr 08 (Bremerton) 22 – 24 Apr 08 (San Diego) 28 – 30 Apr 08 (Naples) 19 – 21 May 08 (Norfolk) 8 – 10 Jul 08 (San Diego) 4 – 6 Aug 08 (Millington) 25 – 27 Aug 08 (Pendleton) 2 – 4 Sep 08 (Norfolk)

Naval Justice School Detachment Norfolk, VA		
0376	Legal Officer Course (080) Legal Officer Course (010) Legal Officer Course (020) Legal Officer Course (030) Legal Officer Course (040) Legal Officer Course (050) Legal Officer Course (060) Legal Officer Course (070) Legal Officer Course (080)	10 – 28 Sep 07 15 Oct – 2 Nov 07 26 Nov – 14 Dec 07 28 Jan – 15 Feb 08 10 – 28 Mar 08 28 Apr – 16 May 08 2 – 20 Jun 08 7 – 25 Jul 08 8 – 26 Sep 08
0379	Legal Clerk Course (080) Legal Clerk Course (010) Legal Clerk Course (020) Legal Clerk Course (030) Legal Clerk Course (040) Legal Clerk Course (050) Legal Clerk Course (060) Legal Clerk Course (070)	10 – 21 Sep 07 22 Oct – 2 Nov 07 26 Nov – 7 Dec 07 4 – 15 Feb 08 10 – 21 Mar 08 21 Apr – 2 May 08 7 – 18 Jul 08 8 – 19 Sep 08
3760	Senior Officer Course (010) Senior Officer Course (020) Senior Officer Course (030) Senior Officer Course (040) Senior Officer Course (050) Senior Officer Course (060) Senior Officer Course (070)	5 – 9 Nov 07 7 – 11 Jan 08 (Jacksonville) 25 – 29 Feb 08 7 – 11 Apr 08 23 – 27 Jun 08 4 – 8 Aug 08 (Millington) 25 – 29 Aug 08
4046	Military Justice Course for SJA/Convening Authority/Shipboard Legalman (020)	16 – 27 Jun 08

Naval Justice School Detachment San Diego, CA		
947H	Legal Officer Course (080) Legal Officer Course (010) Legal Officer Course (020) Legal Officer Course (030) Legal Officer Course (040) Legal Officer Course (050) Legal Officer Course (060) Legal Officer Course (070) Legal Officer Course (080)	10 – 28 Sep 07 1 – 19 Oct 07 26 Nov – 14 Dec 07 7 – 25 Jan 08 25 Feb – 14 Mar 08 5 – 23 May 08 9 – 27 Jun 08 28 Jul – 15 Aug 08 8 – 26 Sep 08

947J	Legal Clerk Course (010) Legal Clerk Course (020) Legal Clerk Course (030) Legal Clerk Course (040) Legal Clerk Course (050) Legal Clerk Course (060) Legal Clerk Course (070) Legal Clerk Course (080)	15 – 26 Oct 07 26 Nov – 7 Dec 07 7 Jan – 18 Jan 08 31 Mar – 11 Apr 08 5 – 16 May 08 9 – 20 Jun 08 28 Jul – 8 Aug 08 8 – 18 Sep 08
3759	Senior Officer Course (010) Senior Officer Course (020)	29 Oct – 2 Nov 07 (San Diego) 4 – 8 Feb 08 (Yokosuka)

	Senior Officer Course (030) Senior Officer Course (040) Senior Officer Course (050) Senior Officer Course (060) Senior Officer Course (070) Senior Officer Course (080)	11 – 15 Feb 08 (Okinawa) 31 Mar – 4 Apr 08 (San Diego) 14 – 18 Apr 08 (Bremerton) 28 Apr – 2 May 08 (San Diego) 2 – 6 Jun 08 (San Diego) 25 – 29 Aug 08 (Pendleton)
2205	CA Legal Assistance Course (010)	TBD
4046	Military Justice Course for Staff Judge Advocate/ Convening Authority/Shipboard Legalmen (010)	25 Feb – 7 Mar 08

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

Please contact Jim Whitaker, Air Force Judge Advocate General School, 150 Chennault Circle, Maxwell AFB, AL 36112-5712, commercial telephone (334) 953-2802, DSN 493-2802, fax (334) 953-4445, for information about attending the listed courses.

Air Force Judge Advocate General School, Maxwell AFB, AL	
Course Title	**Dates**
Judge Advocate Staff Officer Course, Class 07-C	16 Jul – 14 Sep 07
Paralegal Craftsman Course, Class 07-04	7 Aug – 11 Sep 07
Paralegal Apprentice Course, Class 07-06	13 Aug – 25 Sep 07
Trial & Defense Advocacy Course, Class 07-B	17 – 28 Sep 07
Legal Aspects of Sexual Assault Workshop, Class 07-A	25 – 27 Sep 07
Judge Advocate Staff Officer Course, Class 08-A	9 Oct – 13 Dec 2007
Paralegal Apprentice Course, Class 08-01	10 Oct – 30 Nov 2007
Area Defense Counsel Orientation Course, Class 08-A	15 – 19 Oct 2007
Defense Paralegal Orientation Course, Class 08-A	15 – 19 Oct 2007
Paralegal Craftsman Course, Class 08-01	24 Oct – 7 Dec 2007
Advanced Environmental Law Course, Class 08-A (Off-Site Wash DC Location)	29 – 30 Oct 2007
Reserve Forces Judge Advocate Course, Class 08-A	3 – 4 Nov 2007
Deployed Fiscal Law & Contingency Contracting Course, Class 08-A	27 – 30 Nov 2007
Computer Legal Issues Course, Class 08-A	3 – 4 Dec 2007
Legal Aspects of Information Operations Law Course, Class 08-A	5 – 7 Dec 2007
Federal Employee Labor Law Course, Class 08-A	10 – 14 Dec 2007

Paralegal Apprentice Course, Class 08-02	3 Jan – 22 Feb 2008
Trial & Defense Advocacy Course, Class 08-A	7 – 18 Jan 2008
Air National Guard Annual Survey of the Law, Class 08-A & B (Off-Site)	25 – 26 Jan 2008
Air Force Reserve Annual Survey of the Law, Class 08-A & B (Off-Site)	25 – 26 Jan 2008
Military Justice Administration Course, Class 08-A	28 Jan – 1 Feb 2008
Legal & Administrative Investigations Course, Class 08-A	4 – 8 Feb 2008
Total Air Force Operations Law Course, Class 08-A	8 – 10 Feb 2008
Homeland Defense/Homeland Security Course, Class 08-A	11 – 14 Feb 2008
Judge Advocate Staff Officer Course, Class 08-B	19 Feb – 18 Apr 2008
Paralegal Apprentice Course, Class 08-03	25 Feb – 11 Apr 2008
Paralegal Craftsman Course, Class 08-02	3 Mar – 11 Apr 2008
Interservice Military Judges' Seminar,Class 08-A	1 – 4 Apr 2008
Senior Defense Counsel Course , Class 08-A	14 – 18 Apr 2008
Paralegal Apprentice Course, Class 08-04	15 Apr – 3 Jun 2008
Environmental Law Course , Class 08-A	21 – 25 Apr 2008
Area Defense Counsel Orientation Course, Class 08-B	21 – 25 Apr 2008
Defense Paralegal Orientation Course, Class 08-B	21 – 25 Apr 2008
Advanced Trial Advocacy Course, Class 08-A	29 Apr – 2 May 2008
Reserve Forces Judge Advocate Course, Class 08-A	3 – 4 May 2008
Advanced Labor & Employment Law Course, Class 08-A	5 – 9 May 2008
Operations Law Course, Class 08-A	12 – 22 May 2008
Negotiation and Appropriate Dispute Resolution Course, Class 08-A	19 – 23 May 2008
Environmental Law Update Course (DL), Class 08-A	28 – 30 May 2008
Reserve Forces Paralegal Course, Class 08-B	2 – 13 Jun 2008
Paralegal Apprentice Course, Class 08-05	4 Jun – 23 Jul 2008
Senior Reserve Forces Paralegal Course, Class 08-A	9 – 13 Jun 2008
Staff Judge Advocate Course, Class 08-A	16 – 27 Jun 2008
Law Office Management Course, Class 08-A	16 – 27 Jun 2008
Judge Advocate Staff Officer Course, Class 08-C	14 Jul – 12 Sep 2008
Paralegal Apprentice Course, Class 08-06	29 Jul – 16 Sep 2008
Paralegal Craftsman Course, Class 08-03	31 Jul – 11 Sep 2008
Trial & Defense Advocacy Course, Class 08-B	15 – 26 Sep 2008

5. Civilian-Sponsored CLE Courses

For addresses and detailed information, see the March 2007 issue of *The Army Lawyer*.

6. Phase I (Correspondence Phase), Deadline for RC-JAOAC 2008

The suspense for submission of all RC-JAOAC Phase I (Correspondence Phase) materials is ***NLT 2400, 1 November 2007***, for those judge advocates who desire to attend Phase II (Resident Phase) at TJAGLCS in January 2008. This requirement includes submission of all JA 151, Fundamentals of Military Writing, exercises.

This requirement is particularly critical for some officers. The 2008 JAOAC will be held in January 2008 and is a prerequisite for most judge advocate captains to be promoted to major.

A judge advocate who is required to retake any subcourse examinations or "re-do" any writing exercises must submit the examination or writing exercise to the Non-Resident Instruction Branch, TJAGLCS, for grading by the same deadline (1 November 2007). If the student receives notice of the need to re-do any examination or exercise after 1 October 2007, the notice will contain a suspense date for completion of the work.

Judge advocates who fail to complete Phase I correspondence courses and writing exercises by 1 November 2007 will not be cleared to attend the 2008 JAOAC. If you have not received written notification of completion of Phase I of JAOAC, you are not eligible to attend the resident phase.

If you have any additional questions regarding attendance at Phase II (Residence Phase) or completion of Phase I writing exercises, contact LTC Jeff Sexton, commercial telephone (434) 971-3357, or e-mail jeffrey.sexton@hqda.army.mil.

For system or help desk issues regarding JAOAC or any on-line or correspondence course material, please contact the Distance Learning Department at jagc.training@hqda.army.mil or commercial telephone (434) 971-3153.

7. Mandatory Continuing Legal Education Jurisdiction and Reporting Dates

Jurisdiction	**Reporting Month**
Alabama**	31 December annually
Arizona	15 September annually
Arkansas	30 June annually
California*	1 February annually
Colorado	Anytime within three-year period
Delaware	Period ends 31 December; confirmation required by 1 February if compliance required; if attorney is admitted in even-numbered year, period ends in even-numbered year, etc.
Florida**	Assigned month every three years
Georgia	31 January annually
Idaho	31 December, every third year, depending on year of admission
Indiana	31 December annually

Iowa	1 March annually
Kansas	Thirty days after program, hours must be completed in compliance period 1 July to June 30
Kentucky	10 August; completion required by 30 June
Louisiana**	31 January annually; credits must be earned by 31 December
Maine**	31 July annually
Minnesota	30 August annually
Mississippi**	15 August annually; 1 August to 31 July reporting period
Missouri	31 July annually; reporting year from 1 July to 30 June
Montana	1 April annually
Nevada	1 March annually
New Hampshire**	1 August annually; 1 July to 30 June reporting year
New Mexico	30 April annually; 1 January to 31 December reporting year
New York*	Every two years within thirty days after the attorney's birthday
North Carolina**	28 February annually
North Dakota	31 July annually for year ending 30 June
Ohio*	31 January biennially
Oklahoma**	15 February annually
Oregon	Period end 31 December; due 31 January
Pennsylvania**	Group 1: 30 April Group 2: 31 August Group 3: 31 December
Rhode Island	30 June annually
South Carolina**	1 January annually
Tennessee*	1 March annually

Texas	Minimum credits must be completed and reported by last day of birth month each year
Utah	31 January annually
Vermont	2 July annually
Virginia	31 October Completion Deadline; 15 December reporting deadline
Washington	31 January triennially
West Virginia	31 July biennially; reporting period ends 30 June
Wisconsin*	1 February biennially; period ends 31 December
Wyoming	30 January annually

* Military exempt (exemption must be declared with state).
**Must declare exemption.

Current Materials of Interest

1. The Judge Advocate General's On-Site Continuing Legal Education Training and Workshop Schedule (2007-2008).

Date	Unit/Location	ATTRS Course Number	Topic	POC
13-14 Oct 07	Kansas National Guard Washburn Univ. School of Law Topeka, KS		Trial Defense Service, Ethics and Emergency Response Issues	MAJ Matt Oleen (785) 274-1337/1027 Matt.oleen@us.army.mil

The consolidated list of the on-sites for Fiscal Year 2008 will be published in the next issue of The Army Lawyer.

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

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

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

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

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

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

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

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

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

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

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

b. Access to the JAGCNet:

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

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

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c. How to log on to JAGCNet:

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

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

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

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

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

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

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

4. TJAGSA Publications Available Through the LAAWS XXI JAGCNet

For detailed information of TJAGLCS Publications available through the LAAWS XXI JAGCNet, see the March 2007, issue of *The Army Lawyer*.

5. TJAGLCS Legal Technology Management Office (LTMO)

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

The TJAGLCS faculty and staff are available through the Internet. Addresses for TJAGLCS personnel are available by e-mail at jagsch@hqda.army.mil or by accessing the JAGC directory via JAGCNET. If you have any problems, please contact LTMO at (434) 971-3257. Phone numbers and e-mail addresses for TJAGLCS personnel are available on TJAGLCS Web page at http://www.jagcnet.army.mil/tjagsa. Click on "directory" for the listings.

For students who wish to access their office e-mail while attending TJAGLCS classes, please ensure that your office e-mail is available via the web. Please bring the address with you when attending classes at TJAGLCS. If your office does not have web accessible e-mail, forward your office e-mail to your AKO account. It is mandatory that you have an AKO account. You can sign up for an account at the Army Portal, http://www.jagcnet.army.mil/tjagsa. Click on "directory" for the listings.

Personnel desiring to call TJAGLCS can dial via DSN 521-7115 or, provided the telephone call is for official business only, use the toll free number, (800) 552-3978; the receptionist will connect you with the appropriate department or directorate. For additional information, please contact the LTMO at (434) 971-3264 or DSN 521-3264.

6. The Army Law Library Service

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

Point of contact is Mrs. Dottie Evans, The Judge Advocate General's School, U.S. Army, ATTN: CTR-MO, 600 Massie Road, Charlottesville, Virginia 22903-1781. Telephone DSN: 521-3278, commercial: (434) 971-3278, or e-mail at Dottie.Evans@hqda.army.mil.

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