

Driving 'Naked'; Privacy in Cyberspace; and Expansive 'Primary Purpose' Developments in Search, Seizure, and Urinalysis

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Introduction

The judicial shepherding of the Fourth Amendment this year was marked by interesting contrasts. While on the one hand, the courts reemphasized the Fourth Amendment's protective vitality, they also expanded the authority and discretion of law enforcement personnel and military commanders. Three of the four Supreme Court Fourth Amendment opinions issued this past year involved police authority over automobiles and their drivers. Taken together, the cases clearly recognize greater police authority and discretion over motorists, leaving one to ponder whether drivers are, in effect, "constitutionally naked" in an automobile. The Court of Appeals for the Armed Forces (CAAF)¹ and the service courts were slightly more active in the Fourth Amendment arena and reflect some of the more striking contrasts. With vigor and zest, the CAAF resuscitated the protective spirit of the Fourth Amendment in the area of expectations of privacy and in its refusal to apply the good faith exception. In contrast, however, the CAAF continued its deference to commanders in the inspection context by adopting an expansive view of acceptable primary purpose.²

Unfortunately, in many of the CAAF opinions, there is a remarkable absence of analysis and explanation. The impact of such omissions is enormous and is highlighted throughout this article. Without providing an analytical atlas to the trial lawyer, the court's opinions are vulnerable on a number of levels. First, the court is open to attacks by the dissenters who "take the high road" and persuasively paint the "rest of the story." When the court fails to respond to such attacks, coupled with its conclusory analysis, the critiques of result-oriented jurisprudence are

inevitable and seemingly well-founded. Finally, in many of its opinions, the CAAF misses an opportunity to improve the trial bar's general understanding of military law.

This article will highlight the more significant cases, and provide analysis and critique to aid the practitioner in assessing the impact of these cases on life "in the trenches."

Coverage: Expectations of Privacy

The CAAF Finds Privacy Surfing the Net

*United States v. Maxwell*³ is one of the first bold judicial steps into "cyberspace." Whether traditional Fourth Amendment analysis is adaptable to law enforcement activity on the information superhighway is an issue of great concern to all criminal law practitioners. In one of the first reported cases on this issue, the court comfortably applies traditional Fourth Amendment rules to "the virtual reality of cyberspace."⁴

"[T]he Fourth Amendment protects people, not places."⁵ The central question, therefore, is whether a person has a reasonable expectation of privacy in the invaded place. This is answered through a two-part test: first, whether the person has a subjective expectation of privacy in the location, and second, whether society recognizes the expectation as reasonable.⁶ Only when both are present is there Fourth Amendment protection.

In *Maxwell*, the CAAF concluded that a person generally has a reasonable expectation of privacy in electronic mail (e-mail)

1. On 5 October 1994, the National Defense Authorization Act for Fiscal Year 1995, Pub. L. No. 103-337, 108 Stat. 2663 (1994), changed the names of the United States Courts of Military Review and the United States Court of Military Appeals. The new names are the United States Courts of Criminal Appeals and the United States Court of Appeals for the Armed Forces, respectively. For the purpose of this article, the name of the court at the time that a particular case was decided is the name that will be used in referring to that decision.

2. MANUAL FOR COURTS-MARTIAL, United States (1995 ed.), Mil. R. Evid. 313(b) [hereinafter MCM]. The "subterfuge" rule grants the commander broad authority to conduct preemptive strikes on drugs and contraband without probable cause. Using his inspection authority the commander may order, for example, an "examination of the whole or part of a unit . . . as an incident of command . . ." *Id.* When the inspection is conducted immediately after the report of an offense and was not previously scheduled, or personnel are targeted differently or are subjected to substantially different intrusions, the examination is presumed to be an unlawful search. If such is the case, the government must prove by clear and convincing evidence that the commander's primary purpose was administrative, not disciplinary.

3. 45 M.J. 406 (1996).

4. *Id.* at 410.

5. *Katz v. United States*, 389 U.S. 347, 347 (1967).

6. *Smith v. Maryland*, 442 U.S. 735, 740 (1979)

sent, received, or stored in on-line services.⁷ Colonel Maxwell was a subscriber to America On-line (AOL) through his personally purchased home computer system. Although he had only one account with AOL, he created four separate screen names (Redde1 [as in Ready One], Zirloc, and two others) through which he could access AOL and then send and receive e-mail.⁸ His account was accessed through a password. The Federal Bureau of Investigation (FBI) began investigating the illegal transmission of pornography on the Internet after it received a list of “participating” screen names from a concerned AOL user. The accused’s Redde1 screen name was on the list provided to the FBI.⁹

Apparently, this concerned user had also sent his list via e-mail to AOL management. In response to a FBI query, AOL refused to release any information without a search warrant. Unbeknownst to the FBI while it sought the warrant, AOL began writing a software program to extract the anticipated requested information. This was accomplished based on information gleaned through its meeting with the FBI and the list of screen names provided already to AOL by the concerned user. AOL then began extracting transmissions from the various screen names.¹⁰ Significantly, AOL’s extraction program included all screen names used by a subscriber. Thus, all four of Colonel Maxwell’s screen names were searched. The FBI then executed the warrant and discovered that one of the screen names belonged to Colonel Maxwell.¹¹ The FBI then released the evidence from Colonel Maxwell’s account to the Air Force Office of Special Investigations (AFOSI).¹²

Charged with two specifications of communicating indecent language in violation of Article 134, Uniform Code of Military

Justice and two specifications of transmitting obscene material,¹³ the accused moved to suppress based on a variety of Fourth Amendment grounds. The central issue facing the court was whether there is a reasonable expectation of privacy in one’s e-mail. The court clearly held that there is a reasonable expectation of privacy, at least with respect to e-mail accessed by a user password and stored or sent to or received from another user.¹⁴ Given the subjective and objectively reasonable expectation of privacy, the interception or seizure of e-mail requires probable cause and a warrant.

After finding a reasonable expectation of privacy in AOL e-mail, the court then examined the warrant. It found the FBI had probable cause with respect to the “Redde1” screen name, because it was part of the initial evidence provided to the FBI.¹⁵ The court, however, found there was no probable cause as to the “Zirloc” screen name, from which incriminating evidence was seized. There being no probable cause and no warrant for “Zirloc,” the court found it quite easy to rule that the seizure of evidence from this screen name was illegal and must be suppressed.¹⁶ Consequently, the first two specifications of communicating indecent language were dismissed and a rehearing on sentence suggested.

Maxwell’s treatment of the expectation of privacy tracks that of the Air Force Court of Criminal Appeals opinion. It also comports comfortably with the historical development of the Fourth Amendment, expectations of privacy, and the guiding principle that it “protects people, not places.”¹⁷

Remaining unresolved is the nature of Fourth Amendment protection in the military office environment, where govern-

7. *Maxwell*, 45 M.J. at 417. The court made clear that “AOL differs from other systems, specifically the Internet . . . in that e-mail messages are afforded more privacy than similar messages on the Internet, because they are privately stored for retrieval on AOL’s centralized and privately-owned computer bank. . . .” *Id.*

8. *Id.* at 413.

9. *Id.*

10. Some confusion exists over whether AOL ran its extraction before or after service of the warrant. The court concluded the extraction was completed before service of the warrant. *Id.* at 421-22.

11. *Id.* at 414.

12. *Id.* “Many of the e-mail transmissions made by appellant as ‘Zirloc’ were to another junior Air Force officer known as ‘Launchboy.’ The [e-mail to ‘Launchboy’] discussed appellant’s feelings regarding his sexual orientation and desires, and appellant answered questions regarding his sexual preferences.” *Id.* These transmissions were the basis for the indecent language specifications. *Id.*

13. The two specifications charged assimilated offenses under 18 U.S.C. §§ 1465 (obscene materials) and 2252 (child pornography), respectively. *Maxwell*, 45 M.J. at 410.

14. *Id.* at 417. The court acknowledged that, like conventional mail, once the e-mail is transmitted, the sender’s privacy expectations may be incrementally diminished because the receiver may choose to send it to others. *Id.* at 417-18.

15. Interestingly, when the FBI transcribed the list of suspected screen names to the warrant application, the accused’s screen name “Redde1” was capitalized and mistakenly written as “REDDEL.” In cyberspace terms, this represents a fundamental change. Indeed, had AOL worked off the actual warrant, “REDDEL” would not be a valid screen name for Colonel Maxwell and no information from his “Redde1” account would have been discovered. *Id.* at 413. In one of its many holdings in *Maxwell*, the CAAF found this “scrivener’s” error “a minor and honest mistake” that did not invalidate the warrant. *Id.* at 420, citing *United States v. Arenal*, 768 F.2d 263 (8th Cir. 1985) (upholding search despite transposed address numbers in search warrant) (citations omitted).

16. *Id.* at 422. For an examination of the court’s treatment of the good faith exception to the “Zirloc” seizure, see *infra* notes 149-65 and accompanying text.

ment computers are routinely accessed by military personnel with single or multiple passwords. In many offices, computer systems, e-mail networks, and Internet connections provide servicemembers potentially unlimited communication opportunities. To what extent traditional views of “government property issued for official business” give way to the reality of personal communications tacitly authorized remains an open question. It seems clear that system administrators can control the degree to which local users possess a subjective and objective expectation of privacy. Indeed, whether user passwords are seen as security mechanisms or privacy screens may be a matter of local office practice. Counsel must assess their own environments and their units to determine the nature of expectations.¹⁸

Privacy in the In-Law’s “Castle”

In *United States v. Salazar*,¹⁹ the CAAF ordered even more sweeping relief, reversing the service appellate court and applying a generous view of expectations of privacy. Apparently in search of marital tranquillity, Private First Class (PFC) Salazar opted for a peculiar remedy. He moved his family into his sister-in-law’s apartment. Unfortunately, the accused was ordered by his commander into the barracks after only a few days. He was reportedly beating his wife.²⁰

During his short stay in the home, the accused and his wife had exclusive use of the bedroom, nursery, and hall closet. The sister-in-law and her husband shared the common areas such as the living room, dining room, and kitchen. After the accused’s departure to the barracks, the wife continued to live in her sister’s home.²¹

At some point, Military Police Investigations (MPI) interviewed PFC Salazar regarding the theft of electronic equip-

ment.²² The MPI agent then called Mrs. Salazar and stated PFC Salazar “wanted her to bring all the electronic equipment that was at the house”²³ to the military police station. Reluctantly, Mrs. Salazar complied with the request, which she later discovered was an outright fabrication.²⁴

At trial, the accused moved to suppress the equipment, arguing it was an unreasonable search and seizure. The trial judge found no reasonable expectation of privacy and therefore no standing; because the owners had right of access to the entire house and the accused no longer lived there, he was not expected to return and therefore had no control over who came and went from the house.²⁵ The Army Court of Criminal Appeals affirmed.

The CAAF, palpably disturbed by the police fabrication tactics, set aside the conviction finding that indeed PFC Salazar had an expectation of privacy that was both subjectively held and reasonable;²⁶ he therefore had standing to contest the seizure of the equipment. “The temporary departure of PFC Salazar because of military orders does not convert the marital home into an abandoned guest house or a former residence.”²⁷

Although the court found the commander’s order to enter the barracks lawful, it was only temporary in their view. He was expected to return to the apartment after his pending administrative separation.²⁸ The CAAF then equated the order to enter the barracks with an order to deploy or even go on leave. Such orders do not divest one of an expectation of privacy in the home. In a disturbingly cynical passage, the court observed “it would be illogical if the existence of a servicemember’s expectation of privacy in his . . . private residence depended solely on military orders. *The issuance of orders would then be the predicate event to every search.* We will not create a policy whereby

17. *Katz v. United States*, 389 U.S. 347, 351 (1967). In *Katz*, the Supreme Court first established the role of expectations of privacy in Fourth Amendment jurisprudence.

18. Although the Army has not yet issued overall guidance on personal use of government computers, the TJAG of the Army recently issued a permissive use policy letter applicable to personnel in OTJAG. After authorizing very limited personal use of e-mail on government computers, the policy letter closes with the following admonition: “You should be aware that any use of Government communications resources is with the understanding that such use is generally not secure, not anonymous, and serves as consent to monitoring.” (emphasis added).

19. 44 M.J. 464 (1996).

20. *Id.* at 465.

21. *Id.* at 466 n.2.

22. *Id.* at 468.

23. *Id.*

24. Upon learning of the deception, she broke down at the police station and threatened to kill her unborn child.

25. *Salazar*, 44 M.J. at 466 n.2.

26. *Id.* at 476.

27. *Id.* at 467.

28. *Id.*

the existence of standing turns upon the command's wishes, rather than the [soldier's] legitimate privacy expectations."²⁹ The court then highlighted that the unique familial relationship³⁰ allowed PFC Salazar to retain his expectation of privacy in the home while away.³¹

Staleness

In *United States v. Agosto*,³² the Air Force Court of Criminal Appeals (AFCCA) provided excellent guidance to the military justice practitioner on the importance of a staleness analysis in probable cause determinations. Airman Agosto was charged with a number of crimes involving sex with underage females at Dyess Air Force Base, Texas. Approximately three months after his encounter with one of the girls, a report of the crime was made to authorities.³³ The girls explained that during the encounter the accused had taken photos. The accused had since moved to a new dormitory on Dyess AFB. In an effort to corroborate the girl's story, the investigators obtained a search authorization from a military magistrate for the photos in his new living area. The photos were found, and, at trial, the accused moved to suppress on the ground that there was no probable cause because the information was stale (almost three and a half months elapsed between the offense and the search).³⁴

The AFCCA upheld the trial judge and reminded practitioners of the importance of staleness in probable cause determinations. The court highlighted four factors which assist in the staleness assessment: (1) the nature of the article sought; (2) the location involved; (3) the type of crime; and (4) the length of time the crime continued.³⁵ In this case, the photos "were not necessarily incriminating in themselves, were not consumable over time, like drugs; and were of a nature . . . [to] be kept indefinitely."³⁶ Therefore, under a totality of the circumstances test,

a reasonable person might conclude the accused moved the photos to his new dormitory.

Agosto is a classic application of Fourth Amendment doctrine. It is noteworthy not because it breaks new ground, but because it reemphasizes for the practitioner the fundamental elements of the staleness analysis in probable cause assessments. Counsel should use *Agosto's* four staleness factors in every probable cause assessment. This will aid both trial and defense counsel in clarifying and refining their positions both in the investigation and trial phases. The factors are particularly important in the training and education of commanders and investigators. Trial counsel should routinely include training emphasis on the staleness prong of the probable cause inquiry.

Automobile Exception

Time is Not on Your Side

In *Pennsylvania v. Labron*,³⁷ the Supreme Court reemphasized fundamental Fourth Amendment law regarding the automobile exception, as well as warrantless searches based on probable cause and exigent circumstances.

In *Labron*, Philadelphia police officers observed Labron and others complete a drug sale from the trunk of Labron's car. The police arrested Labron and immediately conducted a warrantless search of his car, finding bags of cocaine in the trunk.³⁸

The Pennsylvania Supreme Court reversed, however, holding that "the automobile exception has long required both the existence of probable cause and the presence of exigent circumstances to justify a warrantless search."³⁹ Because the police had time to secure a warrant, the evidence is inadmissible.

29. *Id.* (emphasis added).

30. No further explanation of this reference is provided by the court. Presumably, the court was referring to his wife's remaining in the apartment with certain of his possessions. *Id.*

31. *Id.* It is interesting to contrast the court's view of a soldier's expectation of privacy in *Salazar* with those views expressed in *United States v. McCarthy*, 38 M.J. 398 (C.M.A. 1994). *Salazar* has a reasonable expectation of privacy in a place where it is a crime for him to be present (the commander ordered him to stay out of the home), where he had no control over who entered the home or any particular room therein, where the police never entered, searched, or seized anything, and in which he lived for no more than eight days. In *McCarthy*, the court found that McCarthy, who, at 0400 hours was sleeping behind a locked barracks room door, had no reasonable expectation of privacy. *Id.* at 403. Obviously, distinctions and rationalizations are abundant if one wishes to distinguish the two, but nevertheless the incongruity is striking. The court's effort to find an expectation of privacy in *Salazar* is arguably strained and is possibly explained by its abhorrence of shady police tactics.

32. 43 M.J. 745 (A.F. Ct. Crim. App. 1995).

33. *Id.* at 745.

34. Members sentenced Airman Agosto to a bad conduct discharge, confinement for 18 months and reduction to E1. *Id.* at 747.

35. *Id.* at 749.

36. *Id.*

37. 116 S. Ct. 2485 (1996).

The United States Supreme Court reversed, stating “[i]f a car is readily mobile and probable cause exists to believe it contains contraband, the Fourth Amendment . . . permits police to search the vehicle without more.”⁴⁰ The court recalled the long history of the automobile exception beginning with *Carroll v. United States*⁴¹ and more recent caselaw focusing on a reduced expectation of privacy in automobiles.⁴² Whether police have time to secure a warrant is irrelevant for Fourth Amendment analysis.⁴³

Pretexual Stops and the Great Beyond

The Supreme Court issued its most significant Fourth Amendment case this year in *Whren v. United States*.⁴⁴ In *Whren*, the Supreme Court resolved disagreement among the circuits by permitting police to use the pretext of a de minimis offense to pursue mere suspicion of a more serious offense.

In *Whren*, District of Columbia police were patrolling a known high drug crime area at night. They observed a car whose driver was looking into the lap of his passenger. When the officers made a U-turn to return to the car, the suspect’s car immediately made a right turn without a signal and sped away. The officers made a stop based on the failure to signal and immediately observed cocaine in plain view in the passenger’s lap.⁴⁵

At trial and on appeal, the defendant argued that the stop for a traffic violation was merely a pretext for investigating their

hunch about a more serious drug crime. Given the potential for abuse, defendants argued, the test for whether a stop is constitutional is whether a reasonable officer *would have* made the stop, absent the improper purpose or pretext.⁴⁶

A unanimous Court rejected this test, stating it is “plainly and indisputably driven by subjective considerations.”⁴⁷ Justice Scalia, who authored the opinion of the Court, continued, “the Fourth Amendment’s concern with ‘reasonableness’ allows certain actions to be taken in certain circumstances, *whatever* the subjective intent.”⁴⁸ “[R]egardless of whether a police officer subjectively believes that the occupants of an automobile may be engaging in some other illegal behavior, a traffic stop is permissible as long as a reasonable officer in the same circumstances *could have* stopped the car for the suspected traffic violation.”⁴⁹ Adopting the “could have” test and rejecting the “would have” test, the court flatly dismissed the idea that an ulterior motive might operate to strip the agent of legal justification.⁵⁰

Given that “subjective intentions play no role in ordinary, probable-cause Fourth Amendment analysis,”⁵¹ courts must use a purely objective test for evaluating the reasonableness of a stop. Thus, so long as probable cause exists for a traffic stop, police may stop a car to pursue other more serious suspicions.

Whren leaves unresolved the methods by which police may pursue these hunches. *Whren* was arrested based on an immediate plain view observation of evidence of crime, drugs on the

38. The Supreme Court granted certiorari in two related cases decided by the Pennsylvania Supreme Court, *Labron* and *Pennsylvania v. Kilgore*. *Kilgore* involved the search of a truck parked outside a home where drug transactions were taking place. The defendants were seen walking to and from the truck around the time of the transactions. After their arrest, the truck was searched and more drugs were found. As in *Labron*, the Pennsylvania Supreme Court found that, although there was probable cause, there were no exigent circumstances to justify the lack of a warrant. Applying the same analysis as in *Labron*, the United States Supreme Court reversed *Kilgore*.

39. *Labron*, 116 S. Ct. at 2486.

40. *Id.* at 2487.

41. 267 U.S. 132 (1925).

42. *California v. Carney*, 471 U.S. 386, 391-92 (1985) (owing to its pervasive regulation, citizens have a reduced expectation of privacy).

43. Interestingly, on 26 February 1997, despite the Supreme Court reversal, a plurality of the Pennsylvania Supreme Court reinstated the suppression order in *Labron*. The court stated explicitly that its prior decision, 669 A.2d 917 (Pa. 1995), “was, in fact, decided upon independent grounds,” that is, the Pennsylvania Constitution, not the United States Constitution. 60 CRIM. L. RPT. 1543 (Mar. 19, 1997).

44. 116 S. Ct. 1769 (1996).

45. *Id.* at 1772.

46. *Id.* at 1773.

47. *Id.* at 1774.

48. *Id.* at 1775 (emphasis in original).

49. *Id.* at 1772 (quoting *United States v. Whren*, 53 F.3d 371, 374-75 (D.C. Cir. 1995) (emphasis in original)).

50. *Id.* at 1774 (citing *United States v. Villamonte-Marquez*, 462 U.S. 579, 584 n.3 (1983)).

51. *Id.* at 1774.

passenger's lap. Practitioners must note, however, that *Whren* does not appear to create additional authority outside of that granted by the initial stop. In *Whren*, plain view allowed the officers to pursue their actual intent. For the average traffic stop, unless probable cause develops as in *Whren* or, for example, consent is obtained, further pursuit of a hunch will be problematic. Counsel must be vigilant to this issue. The issues are indeed difficult, as some of the newest cases interpreting *Whren* make clear.⁵²

Whren Applied to the Military

The Gun-Running Sailor

*United States v. Rodriguez*⁵³ is the first military case to apply *Whren*. The Bureau of Alcohol, Tobacco and Firearms (ATF) and Naval Investigative Service (NIS) suspected Rodriguez of gun-running from his home in Northern Virginia to New York City. On a weekend trip to New York City, ATF and NIS followed Rodriguez. Apparently overzealous in the tail of the accused, a Maryland State Trooper stopped the ATF vehicle for speeding.⁵⁴ Like a scene from an old Western, ATF successfully enlisted the aid of the trooper, and the posse⁵⁵ set off after Rodriguez. At some point the trooper stopped Rodriguez for "following too closely."⁵⁶ The trooper later admitted his primary purpose was to stop the accused's car to allow ATF agents to search it for guns.⁵⁷ Ultimately, the accused consented to a search of his car and then made incriminating statements. At

trial he objected to the stop as a pretext used to pursue their gun-running investigation and sought to suppress his statements as the product of an unreasonable seizure.⁵⁸

The Navy-Marine Court, expressly invoking *Whren*, found the stop, "even if pretextual, . . . constitutionally sound because there was probable cause to stop appellant's car based on the traffic infraction which Trooper Pearce observed."⁵⁹ Applying the *Whren* "could have" test, the stop was reasonable.

The court added some guidance regarding the extent of authority in such a pretextual stop. During a routine traffic stop an officer "may take the time necessary to review the driver's license and . . . registration, run a computer check on the car and driver, and issue a citation."⁶⁰ Once produced, the officer "must allow him to continue without delay."⁶¹ Additional questioning unrelated to the initial stop requires "an objectively reasonable articulable suspicion that illegality has occurred or is occurring."⁶²

The duration of the stop in *Rodriguez* was "hardly temporary."⁶³ The court concluded that Rodriguez' consent to search, which it concluded was voluntary, gave the police the necessary authority to continue the stop beyond the initial detention.⁶⁴ This result confirms the concept that the pretext only gets the police "through the door," so to speak. Other bases of search authority, *i.e.* consent or plain view, must arise to permit the officer to lawfully pursue his suspicion.⁶⁵

52. In *Illinois v. Thompson*, 670 N.E. 2d 1129 (Ill. App. 1996), on the pretext of a broken tail light, officers stopped a car suspected of containing guns and drugs. The driver was asked to exit the vehicle and, after a fruitless frisk, the passenger was also asked to come out. The court ruled the pretextual nature of a stop is "not . . . totally irrelevant to questions that accompany" such a stop. *Id.* at 1135. Once a stop's pretextual nature is established, the true objective is to find a legal excuse to accomplish a warrantless search. Ensuing events are therefore subject to careful scrutiny. An officer's failure to immediately remove and frisk the passenger undercut his alleged fear and the legal basis for the safety frisk. The court ordered further hearings to determine what the officers reasonably believed. *Id.* at 1135.

53. 44 M.J. 766 (N.M.Ct.Crim.App. 1996).

54. *Id.* at 769.

55. "[A] body or force armed with legal authority." RANDOM HOUSE COLLEGE DICTIONARY (1975).

56. *Rodriguez*, 44 M.J. at 771.

57. *Id.*

58. *Id.* at 770.

59. *Id.* at 772.

60. *Id.* (citing *United States v. Soto*, 988 F.2d 1548, 1554 (10th Cir. 1993)).

61. *Id.* (citing *United States v. Pena*, 920 F.2d 1509, 1514 (10th Cir. 1990), *cert. denied*, 501 U.S. 1207 (1991)).

62. *Id.* (citing *Soto*, 988 F.2d at 1554).

63. *Rodriguez*, 44 M.J. at 772.

64. *See id.* at 773.

65. The NMCCA also noted another independent basis "on which the detention of appellant and his car and the ensuing search and interrogation were appropriate." *Id.* Based on their surveillance, evidence of gun purchases and an informant's tip, NIS and ATF had reasonable suspicion, supported by articulable facts, that criminal activity was afoot. *Id.* This would permit the police to conduct a forcible *Terry*-type stop. *Id.* (citing *United States v. Sokolow*, 490 U.S. 1, 10-11 (1989), and *Alabama v. White*, 496 U.S. 325, 330-31 (1990)).

For practitioners, *Whren* and *Rodriguez* are instructive. It is safe to conclude *Whren* applies to military practice. Second, *Rodriguez* clarifies the extent of authority in the context of a traffic stop. It seems clear that police have no additional authority beyond that already inherent in a traffic stop. The stop, however, creates an opportunity to interact and to act upon any information or evidence thereby obtained.

The Great Beyond--Whren to Arrest, Whren Not to Arrest

Equally troubling and unanswered in *Whren* is its potential use in areas unrelated to traffic infractions, such as the arrest and search arenas. When officers lack probable cause to arrest or search in more serious offenses, can they use the *Whren* analysis to justify an arrest or search warrant for a minor offense for which there may be no prosecutorial interest, in order to pursue their more serious suspicions? While it seems clear that a pretextual stop must stay within its pre-established legal framework, it also seems clear the pretext imprimatur might encourage more aggressive use of such a technique. Although it is “mere sniveling” to complain about “aggressive use of the law,” the judicial acceptance of “pretext” will no doubt push its use to new frontiers.

For criminal law practitioners, *United States v. Hudson*⁶⁶ is just such an example of the “pushed envelope” and expansion of the *Whren* doctrine to the arrest context. Hudson, a member of the Hessian Outlaw Motorcycle Gang, was suspected by the ATF of manufacturing methamphetamine. ATF agents had purchased 1/16th of an ounce of methamphetamine from Hudson for sixty dollars four months earlier.⁶⁷ Federal prosecutors, however, were not interested in Hudson. Not to be denied pursuit of their manufacturing suspicions, and aware they had insufficient information to obtain a search warrant, ATF agents

succeeded in securing an arrest warrant for the four month old sale from a state prosecutor.⁶⁸ ATF hoped that an arrest in the home would reveal evidence of the greater crime.

Hudson was arrested in his bedroom,⁶⁹ where police found drug paraphernalia (glassware) and a rifle.⁷⁰ The Ninth Circuit, acknowledging *Whren*'s traffic context, began by stating “we have long followed identical principles in both the traffic stop context and the arrest context.”⁷¹ In this court's view, *Whren*'s rationale applies to arrests. “Where police conduct . . . is justifiable on the basis of probable cause . . . we may not inquire into whether the officer . . . had improper motives or deviated from the typical practice of reasonable officers.”⁷²

The court found that the arrest was supported by probable cause, based on the felony drug sale (albeit four months earlier) and the evidence seized in plain view. *Hudson* legitimizes pretext in the arrest context. Once again, plain view is the method by which investigators capitalize on the opportunity created by the pretext.

Practitioners can expect state, federal, and military courts to wrestle with the meaning and impact of *Whren*. Most interesting will be its role in the arrest and search context. Trial counsel may want to test these waters with investigators. Defense counsel must aggressively litigate pretextual actions and be aware of the potential for government abuse.

“Driving with the Justices” Naked!

Fanning the flames of those who argue the average motorist is well-nigh constitutionally naked,⁷³ the Supreme Court continued to enhance the tools of the police when dealing with automobiles in its first Fourth Amendment case of the 1997 term. According to the Supreme Court in *Ohio v. Robinette*,⁷⁴ a

66. 100 F.3d 1409 (9th Cir. 1996).

67. *Id.* at 1425 (J. Reinhardt, dissenting).

68. *Id.* at 1413.

69. *Id.* *Hudson* also illustrates the continued wrestling with the role of the knock and announce rule. In one of the major new developments two years ago, the Supreme Court, in *Wilson v. Arkansas*, 115 S. Ct. 1914 (1995), reinvigorated the knock and announce rule, making it a part of the reasonableness prong of Fourth Amendment jurisprudence. Although already statutorily required under Federal law for many years in 18 U.S.C. § 3109, the Supreme Court made the knock and announce rule a constitutional imperative. “[W]e have never squarely held that this principle is an element of the reasonableness inquiry under the Fourth Amendment. We now so hold.” *Wilson*, 115 S. Ct. at 1918. When and under what circumstances it can be avoided is the subject of frequent litigation. *Hudson* involved a “mild exigency,” *i.e.*, a weapon and potential for escape, which justified a knock and announce, but required no pause for a response. *See, e.g.*, *Richards v. Wisconsin*, No. 96-5955, 1997 WL 202007 (U.S. Apr. 28, 1997). In *Richards*, the Wisconsin Supreme Court, in spite of *Wilson*, approved a blanket exception to the knock and announce rule in felony drug cases. The potential for violence or destruction of evidence is so likely in drug cases that officers can dispense with the knock and announce requirement, the court ruled. The Supreme Court rejected the blanket exception to the knock and announce requirement but affirmed the Wisconsin Supreme Court judgment on the facts of *Richards*. *Id.*

70. *Hudson*, 100 F.3d at 1413. Federal prosecutors ultimately decided to prosecute Hudson on federal firearms and drug trafficking charges. *Id.* at 1414.

71. *Id.* at 1415.

72. *Id.* at 1416. The court also held that *Hudson* does not present one of the “rare exceptions” contemplated in *Whren* where “extraordinary” police conduct, otherwise supported by probable cause should, nevertheless, be subjected to a balancing analysis to determine its reasonableness. *Id.*

73. Kathryn Urbonya, *The Fishing Gets Easier*, *Supreme Court Report*, 46 A.B.A. J. (Jan 1997).

request to search a car following a lawful traffic stop does not require a bright-line “you are free to go” warning for subsequent consent to be voluntary. The test, as with any consent issue, is the totality of the circumstances.⁷⁵

Robinette was stopped for speeding in Ohio. After a clean license check, officer Newsome asked Robinette to exit his car.⁷⁶ Newsome started his video camera, issued an oral warning, then returned the license. Newsome then asked, “one question before you get gone: [A]re you carrying any illegal contraband . . . weapons . . . drugs?” Robinette answered, “no.”⁷⁷ Newsome then asked if he could search the car and Robinette consented. Newsome discovered a small amount of amphetamine.⁷⁸

At trial the defense moved to suppress the evidence, arguing, in part, that the detention became unlawful after Newsome decided to give only a warning⁷⁹ and that this occurred before Robinette was asked to exit the car. Therefore, the defense argued that anything found after he stepped out of the car was the product of an unlawful seizure, which also tainted the consent to search.⁸⁰ The Ohio Supreme Court agreed and also established a bright line rule requiring a “you are free to go” warning prior to such a request to search.⁸¹

Chief Justice Rehnquist began his discussion of the Fourth Amendment with the predicate issue of whether the “continued detention” was unlawful. He thereupon rejected the Ohio Supreme Court’s analysis, citing with approval *Whren*, saying “the subjective intentions of the officer did not make the continued detention . . . illegal”⁸² Although it is not necessary to issue a warning, asking Robinette to exit the car is something the officer “could have” done under the Fourth Amendment. Thus, the continued detention was not outside the scope of the initial stop.⁸³ Following *Whren*’s analysis, Officer Newsome’s motives were irrelevant.

The Chief Justice then took on the “free to go” warning and not surprisingly assailed any notion of a bright line rule in the Fourth Amendment area. The test for whether one has consented to a search is whether it was voluntary under the totality of the circumstances.⁸⁴ He recalled how, in *Schneekloth v. Bustamonte*,⁸⁵ the argument that consent could be valid only if the person knew he had a right to refuse was similarly dismissed. “While knowledge of the right to refuse consent is one factor to be taken into account, the government need not establish such knowledge as the *sine qua non* of an effective consent.”⁸⁶ Chief Justice Rehnquist concludes with this rationale for rejection of a bright line rule: “[J]ust as it ‘would be thoroughly impractical

74. 117 S. Ct. 417 (1996). At the time this article went to press, the court had just issued its opinion in *Maryland v. Wilson*, 117 S.Ct. 882 (1997), the second Fourth Amendment case of the term. In *Wilson*, a vehicle was stopped for speeding, and noting passenger Wilson’s nervousness, the officer ordered him out of the car. As Wilson stepped out, an amount of crack cocaine fell to the ground. *Id.* at 884. Wilson successfully suppressed the evidence at trial on the theory that ordering a passenger out of a car is an unreasonable search since probable cause to stop goes only to the driver. The trial court found that *Pennsylvania v. Mims*, 434 U.S. 106 (1977), permits an officer to order only the *driver* out of a car during a routine traffic stop.

The Supreme Court reversed, holding the *Mims* principle also extends to passengers. Finding, as in *Mims*, an overriding officer safety concern, coupled with the *de minimis* intrusion of ordering an already stopped passenger out of the car, the court held that an officer making a traffic stop may order passengers out of a car pending completion of a stop. *Wilson*, 117 S. Ct. at 886.

Wilson raises a number of interesting questions for practitioners. Will police departments now require officers to order passengers out of cars? Further, in light of *Whren*, is there any objection to police stopping a driver for a traffic violation, solely because they wish to pursue more serious suspicions regarding the passenger for whom there is no original probable cause to stop at all?

75. *Robinette*, 117 S. Ct. at 421.

76. *Id.* at 419.

77. *Id.*

78. *Id.*

79. If Officer Newsome decided to give a warning, so the argument goes, he did not intend to further detain Robinette for the purpose of ticketing; therefore, any detention beyond what was required to issue the warning was without authority and unlawful. *Id.* at 420.

80. *See generally id.* at 419-20.

81. *Id.*

82. *Id.* at 420.

83. *Id.* at 421.

84. *Id.*

85. 412 U.S. 218 (1973).

86. *Id.* at 227.

to impose on the normal consent search the detailed requirements of an effective warning,⁸⁷ so too would it be unrealistic to require police officers to always inform detainees that they are free to go before a consent to search may be deemed voluntary.”⁸⁸

Taken together, the Court’s Fourth Amendment jurisprudence for the last year has involved almost exclusively automobiles. In *Labron*, *Whren* and now *Robinette*, the Court has upheld and expanded the authority of police to deal with motorists. And while *Labron* may be straightforward to many--and *Whren* troubling to some--*Robinette* is certainly perplexing to most. Why is it unrealistic to expect police to inform a motorist he is free to leave? It takes only seconds, and if it is too much to expect the officer to know when to alert the motorist to this moment, how can the untrained and nervous motorist know when he is free to leave? Arguably, because there is no requirement to affirmatively arm a citizen with his constitutional rights when “asked” to come to the station for non-custodial interrogation, there should be no difference with a traffic stop. In most cases of requests for consensual interrogation at a police station, however, one has not already been seized by a government agent in uniform, as in a traffic stop. This reality and its influence on drivers cannot be underestimated.

In any event, the Fourth Amendment rulings of the Supreme Court must be understood by counsel on both sides of the bar, incorporated into daily practice and highlighted in training to law enforcement personnel.

Plain View and Exigent Circumstances

“Smoking Weed” and Spontaneous Combustion

In *United States v. Dufour*,⁸⁹ Navy security police received an anonymous tip of drug use in on-base quarters. Two police

officers went to the quarters and from the front sidewalk, 15-20 yards from the quarters, looked through a six to twelve inch opening in the window curtains to observe people leaning over a light or flame. One officer then approached to within two feet of the window, onto the home’s curtilage⁹⁰ and, peering through the opening, observed two people smoking a glass pipe.⁹¹ The officer returned to the sidewalk, and backup arrived shortly thereafter.⁹² Just then, a person left the home and, as he approached the officers, he spontaneously “combusted,” announcing “we’ve been smoking weed!”⁹³ The police immediately entered the home, apprehended the participants and seized the drugs.

At trial and on appeal the accused moved to suppress the evidence as an unreasonable search and seizure. The Navy-Marine court affirmed, stating it need not consider whether the “view from the curtilage”⁹⁴ was an unreasonable search. There was more than sufficient probable cause, even without the curtilage view, to justify the search. The anonymous tip, combined with the observations from the sidewalk and the corroborative statement from the departing guest more than provided sufficient probable cause.⁹⁵ The view or search from the curtilage was not needed to establish probable cause and does not vitiate the authority created from the remaining observations.

Furthermore, the court concluded, no warrant was required because there is “no greater exigency requiring immediate action than the . . . present active use of debilitating drugs,”⁹⁶ *Dufour* is classic, garden variety application of plain view and exigent circumstances.⁹⁷

Search Incident to Apprehension

“Out Damn Spot!”

87. *Robinette*, 117 S. Ct. at 421 (citing *Schnecko*, 412 U.S. at 231).

88. *Id.*

89. 43 M.J. 772 (N.M.Ct.Crim.App. 1995), *rev. denied*, 45 M.J. 16 (1996).

90. “The inclosed space of ground and buildings immediately surrounding a dwellinghouse . . . [It] includes those outbuildings which are directly and intimately connected with the habitation and in proximity thereto and the land or grounds surrounding the dwelling which are necessary and convenient and habitually used for family purposes and carrying on domestic employment.” BLACK’S LAW DICTIONARY 346 (5th ed. 1979).

91. *Dufour*, 43 M.J. at 775.

92. *Id.*

93. *Id.*

94. Practitioners must always remember that the viewing, by itself, may constitute a search. Thus, a viewing from a place one is not authorized to be, i.e., the curtilage, is a warrantless search.

95. *Dufour*, 43 M.J. at 776.

96. *Id.* at 777 (citing *United States v. Acosta*, 11 M.J. 307, 313 (C.M.A. 1981)).

97. Practitioners should also emphasize that the use, or burning and thus destruction of drugs, also creates a legitimate exigency.

In *United States v. Curtis*,⁹⁸ the CAAF, as in any capital case, reviewed virtually every conceivable issue. In this process, the court provided some helpful guidance to trial practitioners regarding a search incident to apprehension.

Curtis was convicted of murder and sentenced to death. His contact with police began when he overturned a car after the slaying of a lieutenant and his wife. Following arrest and processing at the scene, questioning, a confession at the police station and incarceration, the police finally noticed blood on his clothing.⁹⁹ His clothing was seized after he was placed in confinement. The actual period of delay from arrest to seizure is not stated in the court's opinion.

A "full search" of a person incident to a "lawful custodial arrest" is permitted as an exception to the warrant requirement.¹⁰⁰ Although acknowledging there are, indeed, temporal and spatial limitations on a search incident to arrest, the court upheld the seizure of Curtis' clothing, holding that even a "substantial delay will not invalidate a search."¹⁰¹ Relying on *United States v. Edwards*,¹⁰² the court emphasized by comparison the more lengthy ten hour delay in *Edwards*, which the Supreme Court approved.¹⁰³ Again, although not specified in *Curtis*, something less than ten hours from arrest is permissible.

Although *Curtis* does not specifically create an outer limit on the timing of a search incident to arrest, by incorporating *Edwards* the CAAF has effectively given trial advocates a useful ten hour benchmark.

Exceptions to the Probable Cause Requirement

Consent: The Pen is Often More Destructive Than the Sword

The CAAF was active in the consent to search arena, examining not only the nature and scope of the consent, but also pro-

viding insights on the permissible use of deception in obtaining consent.

In *United States v. Reister*,¹⁰⁴ the court examined the doctrine of actual authority to consent in the context of a house-sitter/paramour. First Lieutenant (1LT) Reister invited Hospitalman Apprentice N to house-sit his apartment for three weeks while he was away. He gave her full use of the apartment during his absence. According to N, there were "no restrictions as far as what I could or couldn't do."¹⁰⁵ The night before he went on leave, he invited N to his apartment for dinner. Following dinner, they had sexual intercourse.¹⁰⁶

Troubled and ruminating on her actions the next day, N began to look around the apartment. Out of curiosity, she opened a green, cloth-covered military record book she found on a bookshelf. In the book she found information regarding his flight experiences as a pilot. She then flipped to the back of the book. Her eyes widened as she read the word "Conquests" at the top of the page. Below "Conquests," she found explicit descriptions of sexual encounters with other women.¹⁰⁷ Her anxiety likely piqued, she next looked in a bedside table and found a slip of paper with the word Zovirax written on it. To her dismay, she soon discovered Zovirax is used to treat herpes.¹⁰⁸

Following her discoveries, she discontinued living in the accused's apartment, but was unsuccessful in reaching 1LT Reister to terminate their arrangement. Until his return, she kept the key and continued to feed "Spike," the cat.¹⁰⁹

Shortly after her discoveries, she reported to NIS that she was raped and forcibly sodomized. She then consented in writing to a search of the apartment.¹¹⁰ She returned with two NIS agents, trial counsel, and her supervisor. NIS then took photos

98. 44 M.J. 106 (1996).

99. *Id.* at 142.

100. *Id.* at 143 (citing *United States v. Robinson*, 414 U.S. 218, 235 (1973)).

101. *Id.*

102. 415 U.S. 800 (1974).

103. *Curtis*, 44 M.J. at 143 (citing *Edwards*, 415 U.S. at 807).

104. 44 M.J. 409 (1996).

105. *Id.* at 411.

106. *Id.*

107. *Id.* at 412.

108. *Id.*

109. *Id.*

110. *Id.* at 413. NIS conducted the search to corroborate her story.

of the apartment, including the logbook, and contacted the listed women. A motion to suppress the photographs based on lack of authority to consent was denied at trial.¹¹¹

The CAAF affirmed, holding that N had actual authority to consent to the search and seizure of evidence in the apartment.¹¹² Alternatively, the court held that, even if her authority did not include opening the logbook or the nightstand, any invasion was a private search and, therefore, outside the scope of the Fourth Amendment.¹¹³ The court stated that, in general, a person with “common authority over the premises” may consent to a search,¹¹⁴ and a person who “exercises control over property” may grant consent to search.¹¹⁵ Given N’s “unrestricted access to the apartment,” the court had little trouble finding actual authority. Additionally, the court paid close attention to the opening of the logbook, which itself was a search. Examining the book’s placement, appearance and location, and significantly, the accused’s failure to secure the book, the court upheld the trial court’s finding that the accused had no subjective expectation of privacy and, therefore, no standing to object.¹¹⁶

In the alternative, the court held that, even if N had no actual authority to show NIS the logbook and Zovirax note, any invasion of accused’s privacy was the product of a private search. The exclusionary rules only apply to government searches. N’s exploration of the apartment was motivated by curiosity and confusion resulting from the unwanted sexual encounter.¹¹⁷ Because N had authority to invite others into the apartment, there is no constitutional difference between bringing the evidence to NIS or bringing NIS to the evidence.¹¹⁸

Consent Urinalysis: “What If I Refuse?”

In *United States v. Radvansky*,¹¹⁹ the CAAF put a fresh and slightly different colored stain on its approach to voluntariness and consent for a command requested urinalysis.

Airman Radvansky’s supervisor, MSgt D suspected Radvansky of using drugs. MSgt D took him to the First Sergeant to discuss the matter.¹²⁰ The accused met for the first time MSgt I, the First Sergeant trainee, who just happened to be a security policeman wearing his security police badge and beret. Following pleasantries, MSgt I asked Radvansky for his consent to a urinalysis.¹²¹ The accused, a 20 year old, had been an airman for 14 months. According to MSgt I, Radvansky consented to the test and signed the standard consent form. Prior to signing the form, however, the accused asked, “what would we do next”¹²² if he refused. MSgt I then explained “we would have to go in and approach the commander . . . [b]ut at this point there was no reason to do that . . . it was strictly up to him if he wanted to make the decision or not.”¹²³ According to MSgt D, MSgt I told the accused “that he can give a sample of his own free will or we could have the commander direct you to do so.”¹²⁴ Both MSgts I and D emphasized they asked for consent, did not demand it and made no threats.¹²⁵

Radvansky said he believed the First Sergeant trainee was there to apprehend him and that he was either to consent or the commander was going to order the urinalysis.¹²⁶ No explanation was given to Radvansky as to the difference between con-

111. *Id.*

112. *Id.*

113. *Id.*

114. *Id.* at 414 (citing *United States v. Matlock*, 415 U.S. 164 (1974)).

115. MCM, *supra* note 2, Mil.R.Evid. 314(e)(2).

116. *Reister*, 44 M.J. at 414.

117. *Id.* at 416.

118. *Id.*

119. 45 M.J. 226 (1996).

120. *Id.* at 228.

121. *Id.*

122. *Id.*

123. *Id.* at 229.

124. *Id.*

125. *Id.*

126. *Id.* at 228.

sent and an order. Radvansky testified that he believed he had no option.

On appeal, the defense requested a bright line rule requiring a full explanation of options anytime the possibility of a commander-directed search is mentioned to a servicemember as part of a request for consent to a urinalysis. In response, the CAAF dismissed any possibility of a bright line rule in the command-requested urinalysis context, adhering instead to the long-standing totality of the circumstances test with its clear and convincing burden.¹²⁷

The court first considered its precedent in the area of consent urinalysis. In *United States v. White*,¹²⁸ it held that mere acquiescence is not consent. “Failure to advise an accused” in a meaningful manner “of the critical difference between a consent and a command-directed urinalysis, once the subject is raised, can convert what purports to be consent to mere acquiescence.”¹²⁹ Finally, in *United States v. McClain*,¹³⁰ Judge Cox set out the rules in a chart to assist practitioners in this area.¹³¹ In addition, he wrote, “[a]n official seeking consent from a servicemember may explain that he will attempt to obtain from an appropriate commander or military judge a search authorization based upon probable cause if consent is not forthcoming, but it must be done in an appropriate manner so as to make the result-

ing consent truly voluntary.”¹³² The *Radvansky* court looks to this last point and emphasizes that voluntariness is a question of fact.¹³³ Knowledge of the right to refuse is one factor among many. “The mere remark that a commander can authorize a search does not render all subsequent consent involuntary.”¹³⁴

The court reiterated its preference for a totality of the circumstances test for voluntariness and rejected Radvansky’s request for a bright line rule requiring a “precise” explanation of the consequences of command alternatives. Viewing the totality of circumstances, the accused “was not forced or coerced into giving consent to furnish a sample of his urine . . . [He] was not intimidated or misled into giving consent . . . He was not threatened or made any promises.”¹³⁵ Further, the accused read, understood and signed a consent to search form.¹³⁶ Under a totality of the circumstances, the court found that the accused voluntarily consented.¹³⁷

Radvansky clearly represents at least a modest departure from the traditionally paternalistic approach the court has previously taken in consent urinalysis cases. While the court’s leanings may motivate some counsel and depress others, its most significant teaching point may lie in the importance of a clear factual predicate. Well-prepared witnesses win the day in almost any case. When it involves issues of consent and higher

127. *Id.* at 230-31.

128. 27 M.J. 264 (C.M.A. 1988).

129. *Radvansky*, 45 M.J. at 230 (citing *United States v. Cook*, 27 M.J. 858, 859 (A.F.C.M.R. 1989)).

130. 31 M.J. 130 (C.M.A. 1990).

131. *Id.* at 133. See chart below:

Consent to Search

Circumstances of Consent

1. Consent obtained without threat of “command-directed” urinalysis or search warrant under Mil. R. Evid. 315(e).
2. Consent obtained with threat of “command-directed” urinalysis *United States v. White*, *supra*.
3. Consent obtained with threat of potential search warrant or search authorization. *United States v. Salvador*, 740 F.2d 752 (9th Cir. 1984), *cert. denied*, 469 U.S. 1196 (1985).
4. Consent obtained with threat of actual search warrant or search authorization. *Bumper v. North Carolina*, 391 U.S. 543 (1968).

Result

- Admissible.
- Not Admissible.
- Possibly Admissible; depends on circumstances.
- Not admissible by virtue of consent; Admissible by virtue of warrant.

132. *Id.* at 133.

133. *Radvansky*, 45 M.J. at 231. “‘Voluntariness’ has long been ‘a question of fact to be determined from all the circumstances, and while the subject’s knowledge of a right to refuse’ consent ‘is a factor to be taken into account, the prosecution is not required to demonstrate such knowledge as a prerequisite to establishing a voluntary consent.’” (citing *Schneckloth v. Bustamonte*, 412 U.S. 218, 249 (1973)). *Id.* at 231.

134. *Id.*

135. *Id.* at 231-32.

burdens of proof, preparation, a command of the facts and witness credibility are at a premium.

When training commanders and NCOs, it is also important to stress the use of consent forms. This played a significant role in the court's opinion. This is especially true when, as here, the form explains the consent option about which the accused originally inquired.¹³⁸

The courts will also look to the command representative's ability to "explain" the consequences of a refusal. Although the court rejects in *Radvansky* the requirement of a "precise" explanation of consequences, something of an explanation is expected, and inaccuracy will likely not be tolerated. Practitioners must anticipate and train commanders and NCO's in this regard.

Finally, *Radvansky* is significant for what it does not say. Indeed, Judge Sullivan's strongly worded lone dissent posits that *Radvansky* effectively overrules *White* and *McClain*. In what are, indeed, troubling excerpts from the record, Judge Sullivan highlights a picture of the First Sergeant's conversation that is somewhat different from that painted by the majority:

MJ: Okay, at what point was there a comment about the command could order a sample?

MSgt D: Well, it was, to the best of my knowledge, in between the time Airman Radvansky had become resistant to consenting on his own free will and between the time when he signed the form. He--gosh . . . he

was resistant to signing the form. Sergeant Isley then mentioned that if he did not give a sample of his own free will that we could always have the commander direct him to do so.¹³⁹

Admittedly, Sullivan quotes only a portion of the record, but his view that *Radvansky* represents an "impromptu jettisoning"¹⁴⁰ may find a sympathetic audience among trial judges. The quoted language and "atmosphere" is very similar to the language and "atmosphere" the court found objectionable in *White*.¹⁴¹ Defense counsel may find success arguing *Radvansky* as an aberration.

Salazar and "The Tissue of a Lie" Revisited

As discussed above,¹⁴² PFC Salazar's theft of stereo equipment caused MPI to contact Mrs. Salazar at her home and say that PFC Salazar "wanted her to bring all the electronic equipment that was at the house to the station."¹⁴³ She ultimately took the equipment to the station and then learned the police had lied to her. PFC Salazar never asked that she bring in the equipment. Mrs. Salazar, who was then eight months pregnant, became extremely upset and threatened to kill her unborn child. No consent form was ever signed.

Following its discussion of standing, the court recognized that the issue of consent was not ripe, because the trial court found no standing.¹⁴⁴ Consent, therefore, was not litigated. Nevertheless, the CAAF felt compelled to expound on the propriety of deliberate misrepresentation by government authorities to gain consent. The court first reminded practitioners that voluntary consent is examined under the totality of the circumstances.¹⁴⁵ The court also recognized the government's ability

136. *Id.* at 232. The consent form read in part:

I know that I have the legal right to either consent to a search, or to refuse to give my consent. I understand that, if I do consent to a search, anything found in the search can be used against me in a criminal trial or in any other disciplinary or administrative procedure. I also understand that, if I do not consent, a search cannot be made without a warrant or other authorization recognized in law Before deciding to give my consent, I carefully considered this matter. I am giving my consent voluntarily and of my own free will, without having been subjected to any coercion, unlawful influence or benefit, or immunity having been made to me . . . I have read and understand this entire acknowledgment of my rights and grant my consent for search and seizure.

Id. at 228 n.5

137. *Id.* at 232.

138. *Radvansky*, 45 M.J. at 228 n.5. "I also understand that, if I do not consent, a search cannot be made without a warrant or other authorization recognized in law." *Id.*

139. *Id.* at 233.

140. *Id.* at 232.

141. In *White*, the accused was brought by her supervisor to her commander for questioning about a confidential informant's tip of drug use. Airman White asked what would happen if she did not consent. [T]he commander replied that he would then 'command direct' it; that he would "order her to provide the sample." *White*, 27 M.J. at 264.

142. *See supra* notes 19-31 and accompanying text.

143. *United States v. Salazar*, 44 M.J. 464, 468 (1996).

144. *Id.* at 467.

to use sting operations and informants to obtain consent or to induce criminals to bring stolen goods into plain view.¹⁴⁶

The court then equated the officer's misrepresentation of "I have consent," with "I have a warrant."¹⁴⁷ In the court's view, the result is acquiescence, not lawful consent. The court finds no meaningful distinction between "I have consent" and "I have a warrant," and suggests that on remand, the court below analyze the issue in this light.

Finally, after citing fairly obscure Pennsylvania Supreme Court precedent, the court frames the "question" as whether a soldier's "spouse . . . may 'depend' upon military authorities to tell the truth in official matters."¹⁴⁸ The court's intense disapproval of such tactics is unmistakable. In fact, its desire to write on this issue combined with the tenor may cause the cynical reader to conclude the earlier resolution of the standing issue was, in reality, driven by the court's outrage over the police tactics. The chivalrous gauntlet having been thrown by the court, it seems clear even to the casual observer that while the court's logic and analysis may be flawed and result-driven,¹⁴⁹ such investigative tactics are forever "beyond the pale."¹⁵⁰ Agents and investigators must be so advised.

The Good Faith Exception

Maxwell Revisited: Applying the Brakes to Good Faith

In an unexpected twist, the CAAF refused to apply the good faith doctrine in *Maxwell*, resulting in the dismissal of two specifications.¹⁵¹

Although Colonel Maxwell had one AOL account in his name, he had subdivided his account into four distinct screen names, which the court analogized to separate mailboxes. The two relevant screen names were "Redde1" and "Zirloc." The

FBI's first request for access to transmissions was denied by AOL which required a search warrant. AOL, anticipating the warrant, began extracting all e-mail from a list of screen names. Evidently, AOL did this based on a list provided originally by the person who later became the FBI source. While "Redde1" was on the list, "Zirloc" was not. AOL, however, expanded the extraction to all screen names owned by each subscriber. Thus, AOL extracted e-mail from all of Colonel Maxwell's screen names. When the FBI returned to execute the warrant, it contained only the "Redde1" screen name, not "Zirloc." Nonetheless, AOL having already preset its extraction procedure based on the initial list, released to the FBI e-mail from all of Colonel Maxwell's screen names. The CAAF found no evidence that AOL acted in bad faith or that it intentionally maneuvered "beyond the scope" of the warrant in extracting mail from both accounts.

Since incriminating evidence was seized from the "Zirloc" account, for which there was no probable cause, the court ruled this evidence inadmissible unless an exception was present. The government ultimately argued good faith, and the AFCCA upheld the search of "Zirloc" on this ground.¹⁵²

The CAAF rejected the good faith exception. AOL's anticipatory compilation of e-mail from all of Colonel Maxwell's screen names shows "no reliance on the language of the warrant for the scope of the search."¹⁵³ "In order for the 'good faith' exception . . . to apply . . . it must be clear that the agents doing the search were relying on a defective warrant."¹⁵⁴ The "seizure of the e-mail in the 'Zirloc' mailbox was not authorized by the warrant and . . . AOL did not rely on the language of the warrant to formulate its search."¹⁵⁵ It is clear AOL really relied on the list of names already in its possession--albeit the identical list provided in the warrant--and their conversations with the FBI prior to the search. Having rejected good faith and there being

145. *Id.* at 468.

146. *Id.* (citing *Lewis v. United States*, 385 U.S. 206, 209 (1966) (federal undercover agent who misrepresented identity on the telephone and was invited to petitioner's home to execute narcotics transactions could properly seize illegal narcotics in petitioner's home as legitimate invitee); *Hoffa v. United States*, 385 U.S. 293, 302 (1966) (no rights violated under Fourth Amendment by failure of government informant to disclose identity to petitioner; Hoffa relied not on 'security of the hotel room' to make incriminating statements, but on 'misplaced confidence' that informant 'would not reveal' statements).

147. *Id.* at 469.

148. *Id.* at 469 (citing *Commonwealth v. Wright*, 411 Pa. 81, 190 A.2d 709 (1963)).

149. *See, e.g., id.* at 470-74 (Everett, J., concurring in part and dissenting in part, and Crawford, J., dissenting).

150. "[B]eyond the limits of propriety, courtesy, protection, safety . . ." RANDOM HOUSE COLLEGE DICTIONARY (1980).

151. This will necessitate a rehearing on sentence.

152. *United States v. Maxwell*, 45 M.J. 406, 414 (1996).

153. *Id.*

154. *Id.*

155. *Id.* at 420.

no other basis for admission, the CAAF dismissed the two specifications based on the “Zirloc” screen name.¹⁵⁶

What is most troubling about the court’s reluctance to apply good faith is its failure to distinguish this case from other applications of the good faith doctrine. The court appears to concede there is no evidence of bad faith by either AOL or the FBI.¹⁵⁷ Indeed, AOL in large measure used and responded to information it had received from a private citizen, acting in his private capacity and expressing his concern about the improper use of the on-line service. Why exclude evidence from the Zirloc screen name?

Indeed, this appears to be the first CAAF good faith case that fails to include the standard mantra discussion of the purpose of the exclusionary rule and the good faith exception. In previous opinions, the court has routinely explained that the exclusionary rule is designed to “deter police misconduct rather than punish . . .” judges, magistrates or the police.¹⁵⁸ In the absence of bad faith, the court has repeatedly told us that the exclusionary rule is not appropriate. This discussion is oddly and noticeably missing from *Maxwell*.

Perhaps more significant is the court’s failure to explain, beyond the conclusory, “they didn’t rely on the warrant.” This failure can be explained by the fact that despite the absence of bad faith or misconduct, the CAAF was simply not inclined to further expand the perceived “Mack Truck” quality of the good faith exception. Excusing a well-meaning commander in the scope of his authority,¹⁵⁹ in the probable cause determination itself,¹⁶⁰ or in cases where officers reasonably rely on defective warrants, is appropriate.¹⁶¹ To now excuse a “pre-warrant” search, albeit by well-meaning “agents of the government,” is

“a bridge too far.”¹⁶² Still, if the purpose of the exclusionary rule is not met, that is, to deter bad behavior, what is the reason for the exclusion?

More surprising still, however, is the Court’s insistence on narrowing the scope of the warrant to a subscriber’s single screen name, here “Redde1.” The language of the warrant arguably contemplated a much broader search.

As the dissent points out, “[t]he terms of the warrant authorized a search of the e-mail of ‘the below listed customers/subscribers’ known by the listed screen names.”¹⁶³ The court “erroneously treats each screen name as a separate user.”¹⁶⁴ “The warrant authorized a search of the e-mail of the ‘customer/subscriber’ using the screen name Redde1, but the warrant was not limited to e-mail using that screen name.”¹⁶⁵

The majority says itself that *Maxwell* “takes us into the new and developing area of the law addressing the virtual reality of cyberspace.”¹⁶⁶ The dissent, latching onto this, highlights the essential element of the problem and the role of the good faith exception:

The long analysis set forth by the majority dramatically demonstrates the difficulty of the issues in this case and the likelihood that reasonable minds would interpret the terms and limitations of the warrant differently. [T]he FBI agents and AOL reasonably interpreted the warrant to authorize the search of the e-mail of customers, not screen names, and they did so in good faith. Hence, even if the warrant was intended to authorize

156. *Id.* at 423.

157. *Id.* at 422.

158. *United States v. Chapple*, 36 M.J. 410, 413 (1993) (citing *United States v. Leon*, 468 U.S. 897, 916 (1984), and *United States v. Mix*, 35 M.J. 283 (C.M.A. 1992)).

159. *Id.*

160. *See, e.g., United States v. Lopez*, 35 M.J. 35 (C.M.A. 1992).

161. *Arizona v. Evans*, 115 S. Ct. 1185 (1995).

162. Again, although not articulated by CAAF, one commentator has likely expressed the CAAF’s unspoken concern as follows:

[A] broader good faith exception . . . would be perceived and treated by the police as a license to engage in the same conduct in the future. That is, the risk in such tampering with the exclusionary rule ‘is that police officers may feel that they have been unleashed’ and consequently may govern their future conduct by what passed the good faith test in court . . . rather than on the traditional Fourth Amendment standards of probable cause, exigent circumstances and the like . . . [I]t fosters ‘a careless attitude toward detail on the part of law enforcement officials’ . . .

WAYNE R. LAFAVE, *SEARCH AND SEIZURE, A TREATISE ON THE FOURTH AMENDMENT* 95-96 (1996) (citations omitted).

163. *Maxwell*, 45 M.J. at 434 (Gierke, J., and Crawford, J., dissenting).

164. *Id.*

165. *Id.*

166. *Id.*

searches only of the listed screen names, the search of the Zirloc e-mail was lawful because it was conducted in good faith.¹⁶⁷

While the dissent is much more helpful to counsel in understanding the nuances of the good faith issue, we must, in the end, look to the majority. The primary lesson of *Maxwell* is that good faith is not applicable simply in the absence of bad faith. The exception and requisite analysis is far more rigorous than it might first appear. Unfortunately, the CAAF fails to provide counsel even a glimpse of the “rigor” required, and we are all left to speculate.

Developments in Urinalysis

Although a relatively slow year for urinalysis in the courts,¹⁶⁸ it was not without significant precedent. The most significant case, *United States v. Shover*,¹⁶⁹ continued the CAAF’s trend of deference to the commander’s inspection authority. Remarkably, the court approved a commander’s “inspection” for drug use during an active investigation of drugs in the same unit. In another important case, the Air Force Court of Criminal Appeals, in a case of first impression, pro-

vided valuable guidance in the effective use of hair analysis as the sole evidence of drug use.

Subterfuge

The Problem of Euphemisms

In *Shover*, the CAAF upheld a urinalysis inspection intended to “either clear or not clear” personnel of drug “planting” during an intimately linked criminal investigation which also sought to find the “planter.”¹⁷⁰ One day, Major Adams found marijuana in her briefcase and reported the discovery. OSI cleared her and then widened the investigation to the unit. Three people were identified as potential “planters.” Shover was not among them. As OSI conducted its investigation, the Chief of Justice in the Office of the Staff Judge Advocate asked OSI if a urinalysis of the unit¹⁷¹ would help the investigation.¹⁷² As OSI conducted its investigation, the acting commander accepted the suggestion from “the Judge Advocate’s office”¹⁷³ to conduct a urinalysis. The commander did so, and the accused tested positive for methamphetamine. At the suppression hearing, the commander said he ordered the building-wide inspection primarily to end the “finger pointing, hard feelings,”

167. *Id.* (Gierke, J., dissenting).

168. Recently released national statistics indicate a disturbing increase in the use of drugs, particularly more sophisticated, harder to detect drugs, among teenagers. This represents a potential threat to the Army’s recruiting pool:

| | | |
|------------|---------|--------------------------------|
| Cocaine: | 1994-95 | 166% increase |
| Marijuana: | 1992-95 | 141% increase (37% in 1995) |
| LSD: | 1992-95 | 183% increase (54% in 1995) |

Source: The Washington Times, 21 August 1996

The Army has also seen a modest rise in the use of certain drugs, although this is primarily attributable to improvements in technology that allow the routine testing of four to six drugs per sample. The totals below represent Active Army positive specimens:

| <u>1995</u> | <u>1996</u> |
|--------------|---|
| Opiates/7 | Opiates/421 (includes prescribed drugs) |
| PCP/0 | PCP/5 |
| Amph/339 | Amph/157 |
| Cocaine/1294 | Cocaine/1262 |
| THC/4058 | THC/4111 |
| LSD/40 | LSD/13 |

Source: United States Army Drug & Alcohol Operations Agency

169. 45 M.J. 119 (1996).

170. For a complete discussion of *Shover* and its consequences, see Major Charles N. Pede, *Subterfuge, Commander’s Intent and Judicial Deference*, ARMY LAW., Feb. 1997, at 41.

171. The propriety of ordering a unit wide urinalysis during an investigation for drug misconduct is certainly questionable. This case is a good illustration of the dangers inherent in such a course of action.

172. The agent testified he did not think it would help identify who tried to frame Major Adams, but it might indicate drug problems in the unit. *Shover*, 45 M.J. at 120.

173. *Id.* Apparently, the SJA’s office conveyed the same message not only to OSI but also to the commander.

and “tension, . . . [and] to get people either cleared or not cleared.”¹⁷⁴

In a disturbingly conclusory discussion, CAAF affirmed. It first reminded practitioners that, when deciding whether a urinalysis is a valid inspection, the focus is on the commander.¹⁷⁵ It then found the commander’s primary purpose was unequivocal and that no person was targeted.¹⁷⁶

Shover demonstrates the court’s expansive view of a proper primary purpose in the subterfuge arena. This merely continues a trend, of which *United States v. Taylor*¹⁷⁷ is a significant recent example. In upholding a urinalysis inspection in *Taylor*, the court focused on the commander who ordered the urinalysis and what he knew when he ordered it. The court refused to impute compromising “subterfuge knowledge” of subordinates to the commander.¹⁷⁸ Indeed, the court has recently questioned the scope of the subterfuge rule, observing that “Mil. R. Evid. 313(b), which makes a distinction between administrative inspections and inspections for prosecutorial purposes, is probably more restrictive than it need be.”¹⁷⁹ The CAAF is not alone in its dislike of Military Rule of Evidence 313(b). The service courts have similar views. In *Shover*, Chief Judge Dixon echoed this concern when he said, “[w]e interpret Mil.R.Evid. 313(b) as we find it, not as we might like it to be.”¹⁸⁰

Most troubling about *Shover* is the absence of any meaningful discussion confronting the likely critiques, to include some sharp dissents. The court simply fails to address the obvious argument that the commander’s statement “to either clear or not clear” individuals was merely a euphemism to identify a perpetrator and prosecute. The majority ignores the dissent’s excel-

lent argument that “the urinalysis was ordered to assist an investigation of . . . [OSI], not out of some general concern for the well-being of the unit.”¹⁸¹ Judge Sullivan pushed even more, saying “[a]ny other construction of [the commander’s] words ignores their plain meaning and renders Mil.R.Evid. 313(b) meaningless.”¹⁸² The omission of any response only lends credibility to the criticism that *Shover* is simply result-oriented distaste of Military Rule of Evidence 313(b).

In addition to CAAF’s apparent dislike of Military Rule of Evidence 313(b), *Shover* demonstrates the importance of witness preparation. Regardless of whether one is a trial counsel or defense counsel, early discussions with the commander may be the key to success. Word choice in such a motion is at a premium, and locking the commander in early may guarantee the success of one side or the other.

Hairnetting Drugs

In *United States v. Bush*,¹⁸³ a case of first impression, the Air Force court upheld the use of hair analysis to prove drug use. Previous judicial encounters with hair analysis were problematic.¹⁸⁴ *Bush* is the first time that hair analysis was not only admitted to prove drug use, but where it was the only evidence produced on the issue of drug use.

During a normal unit inspection, the accused provided a urine sample. Months later, the lab determined that the sample was saline.¹⁸⁵ Aware that drug use is only detectable for a short period of time in urine, the command opted for hair analysis, as evidence of drug use may be present in hair for months. The commander then granted a search authorization for Bush’s hair.

174. *Id.* at 122.

175. *Id.* (citing *United States v. Taylor*, 41 M.J. 168, 172 (C.M.A. 1994)).

176. *Id.*

177. 41 M.J. 168 (C.M.A. 1994).

178. *Id.* at 172.

179. *Id.* at 171-72.

180. *United States v. Shover*, 42 M.J. 753, 758 (A.F. Ct. Crim. App. 1995) (Dixon, C.J., dissenting) (quoting *United States v. Parker*, 27 M.J. 522, 528 (A.F.C.M.R. 1988)).

181. *Shover*, 45 M.J. at 123 (Everett, S.J., concurring in part and dissenting in part).

182. *Id.* at 124 (Sullivan, J., dissenting).

183. 44 M.J. 646 (A.F. Ct. Crim. App. 1996). See also Stephen R. Henley, *Postcards from the Edge: Privileges, Profiles, Polygraphs, and Other Developments in the Military Rules of Evidence*, ARMY LAW., April 1997, at 92.

184. *United States v. Nimmer*, 43 M.J. 252, *recon. denied*, 43 M.J. 409 (1995). In *Nimmer*, the defense attempted to introduce the negative results of hair analysis. The court rejected the evidence because the test would not rule out a one-time use of the drug.

185. At trial the government introduced evidence that the accused was capable of “reverse catheterization,” replacing the urine in his bladder with a saline solution! *Bush*, 44 M.J. at 647. Such an effort demonstrates just how committed some drug users are not only to their drugs, but to beating the test. The importance of “smart” testing cannot be exaggerated. Serious attention must be paid to selecting conscientious Drug and Alcohol Coordinators, and attentive and serious observers. Further, counsel must encourage clever testing patterns at units that will enhance the ability to detect drugs with shorter detection times.

The evidence was plucked and sent to the lab, where it tested positive for cocaine.

At trial, Bush was convicted of dereliction of duty for his original failure to provide a urine specimen and of use of cocaine based on the hair test results.¹⁸⁶ Hair analysis was the sole basis for the finding of use. The Air Force Court began with the very important lesson for practitioners that a commander's ability to simply reissue an inspection order, even months later, is unquestioned.¹⁸⁷ Although this was not done, the court reminded practitioners that a servicemember "facing a valid, random inspection . . . may [not] by his own misconduct frustrate that inspection and require the government to produce probable cause for any subsequent search or seizure."¹⁸⁸ The accused must not profit by the "delayed discovery of his subterfuge."¹⁸⁹

The court wasted little time finding probable cause to support the seizure of hair.¹⁹⁰ All parties conceded that the substitution of saline provided probable cause to authorize a search. The court then took up its lengthy, instructive and thorough review of the admissibility of hair analysis. Using the framework recently announced by the Supreme Court,¹⁹¹ the Air Force Court found the tests performed were scientifically reliable and valid and, therefore, affirmed Bush's conviction.

Bush is significant for many reasons, not least of which is the lesson that efforts to avoid a urinalysis inspection should first be met with the re-issuance of the original lawful order. *Bush* is also significant because of the potential use by both trial counsel and defense counsel of hair testing. Whether it serves as corroboration or rebuttal evidence for government counsel, or as exculpatory or client control evidence for defense counsel, it will certainly become a fixture of our practice. The availability of commercial labs willing and able to do such testing is also noteworthy.¹⁹²

Also of interest to both trial and defense is the issue of charging. To what extent could or should trial counsel charge long-term use of drugs revealed in the hair follicle testing? Because hair analysis shows historical use, should trial counsel charge use on "divers occasions" or construct multiple specifications for artificially divided periods of time? The latter practice almost certainly would run afoul of the rule against unreasonable multiplication of charges. In the end, *Bush* will provide many new areas for counsel and the courts to explore the limits of the law on hair analysis.

186. *Id.* at 648.

187. *Id.* at 649.

188. *Id.*

189. *Id.*

190. *Id.*

191. *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), *aff'd on remand*, 43 F.3d 1311 (9th Cir. 1995). *Daubert* rejected the old *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923), "general acceptance within the scientific community" standard and replaced it with a non-exclusive five factor test. The trial judge acts as evidentiary gatekeeper when it comes to novel scientific techniques. The focus of this initial judicial inquiry shifts from acceptance of the scientific proposition itself to acceptability of the methodology used to reach it. The factors the trial judge uses in making this determination include: (1) whether the technique or theory can be tested; (2) whether the technique or theory has been subjected to publication or peer review; (3) the error rate of the scientific method; (4) the existence of any control standards; and (5) the degree to which the technique or theory has been accepted within the scientific community.

192. See Sam Rob, *Drug Detection by Hair Analysis*, ARMY LAW., Jan. 1991, at 10.

Command Direct

In *United States v. Streetman*,¹⁹³ the accused was initially reluctant to submit to a routine random urinalysis inspection. The commander, who was stationed in another state, faxed a memorandum to the accused restating the order to provide a sample. Unfortunately, the commander styled the subject line of the memo, "Commander Directed Urinalysis Test."¹⁹⁴ In the Air Force, this phrase is a term of art whose equivalent in the Army is "fitness for duty." Thus, at trial, the accused argued this urinalysis was transformed into a limited use test and therefore not the proper subject of a court-martial.

The court rejected this contention on the fairly simple ground that an inartfully worded order and inadvertent mistake by a commander does not operate to transform an order that merely reinforced the accused's obligation to comply with the original random inspection order into a fitness for duty order. Furthermore, the commander provided convincing testimony that it was not her intent to transform the order.

The accused also argued that his refusal to give a sample and his comment, "I've done something stupid" following the first order and before the second, invalidated the subsequent inspection order because clearly he was a suspect at this point.¹⁹⁵ Any

order at this point required a probable cause determination. The court makes similar short work of this clever argument that "two wrongs (drug use and disobedience) don't make a right." Citing two cases,¹⁹⁶ the court simply found unworkable an approach whereby a soldier's admission or confession and disobedience of an order divests a commander of the ability to continue an ongoing inspection. Much like limited use and self-referral under AR 600-85, soldiers cannot successfully self-refer as they enter the latrine with bottle in hand in the hope of avoiding the ongoing inspection.¹⁹⁷

Conclusion

There are many lessons in this year's Fourth Amendment jurisprudence for criminal law practitioners. Counsel must devote time to understanding not only the "new" rule regarding pretextual stops, but also the nature of expectations of privacy and the limits of good faith. Counsel must also decide for themselves to what extent they will push or risk the subterfuge envelope. It is also clear that defense counsel must be even more vigilant in these new and expanding areas of the law. Issues of privacy, standing, pretext, and euphemisms should be litigated vigorously.

193. 43 M.J. 752 (A.F. Ct. Crim. App. 1995), *review denied*, 44 M.J. 270 (1996).

194. *Id.* at 754.

195. *Id.*

196. *United States v. Moeller*, 30 M.J. 676 (A.F.C.M.R. 1990); *United States v. Nand*, 17 M.J. 936 (A.F.C.M.R. 1984).

197. DEP'T OF ARMY, REG. 600-85, ALCOHOL AND DRUG ABUSE PREVENTION AND CONTROL PROGRAM, para. 6-3 (21 Oct. 1988).