

On Freedom's Frontier: Significant Developments in Pretrial and Trial Procedure

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Introduction

The debate has raged on for many years—is military justice fair? Specific parts of the debate¹ criticize the manner in which court members are selected,² the paternalism in negotiating and approving pretrial agreements,³ the lack of independence of military judges,⁴ and the potentially inappropriate prosecutorial

role of a convening authority and staff judge advocate in the court-martial process.⁵

The legislature, and for that matter, the United States Court of Appeals for the Armed Forces (CAAF) and the intermediate service courts, are at a special place in military legal history—on *Freedom's Frontier*.⁶ Like no other time, except for the 1968

1. The debate is wide ranging, focusing on the fundamental structure of the military system. This article focuses on just three areas of pretrial and trial procedure (court-martial personnel, pleas and pretrial agreements, and voir dire and challenges). Practitioners who are interested in other associated areas or a more comprehensive analysis of the entire system may consult any of the following references. See, e.g., Major James Kevin Lovejoy, *Abolition of Court Member Sentencing in the Military*, 142 MIL. L. REV. 1 (1994); Dwight W. Sullivan, *Playing The Numbers: Court-Martial Panel Size and the Military Death Penalty*, 158 MIL. L. REV. 1 (1998); David A. Schlueter, *The Twentieth Annual Kenneth J. Hodson Lecture: Military Justice for the 1990's—A Legal System Looking for Respect*, 133 MIL. L. REV. 1 (1991); Jonathan Lurie, *Military Justice 50 Years After Nuremberg: Some Reflections on Appearance v. Reality*, 149 MIL. L. REV. 189 (1995); Dwight Sullivan, *A Matter of Life and Death: Examining the Military Death Penalty's Fairness*, THE FED. LAW., June 1998, at 38; Kathleen A. Duignan, *Military Justice: Not an Oxymoron*, THE FED. LAW., Feb. 1996, at 22; Keith M. Harrison, *Be All You Can Be (Without the Protection of the Constitution)*, 8 HARV. BLACKLETTER J. 221 (1991); Brigadier General John S. Cooke, *The Twenty-Sixth Annual Kenneth J. Hodson Lecture: Manual for Courts-Martial 20X*, 156 MIL. L. REV. 1 (1998); Stephen Cox, *The Military Death Penalty: Implications for Indigent Service Members*, 3 LOY. POV. L. J. 165 (1997); Comment, *Military Justice: Removing the Probability of Unfairness*, 63 U. CINN. L. REV. 439 (1994); Note, *Military Justice and the Supreme Court's Outdated Standard of Deference: Weiss v. United States*, 70 CHI. KENT. L. REV. 265 (1994); Note, *Military Justice and Article III*, 103 HARV. L. REV. 1909 (1990); Note, *The "Good Soldier" Defense: Character Evidence and Military Rank at Courts-Martial*, 108 YALE L. J. 879 (1999).

2. See generally Major Guy Glazier, *He Called for His Pipe, and He Called for His Bowl, and He Called for His Members Three—Selection of Military Juries By the Sovereign: Impediment to Military Justice*, 157 MIL. L. REV. 1 (1998). Major Glazier's review of the court member selection process and proposal for instituting a random selection system in the military justice system also includes an excellent discussion of some of the primary arguments for and against the fairness of the present structure of justice in the court-martial process.

3. See generally Major Michael E. Klein, *United States v. Weasler and the Bargained Waiver of Unlawful Command Influence Motions: Common Sense or Heresy?*, ARMY LAW., Feb. 1998, at 3. Major Klein discusses the evolution of pretrial agreements in the context of the landmark decision of *United States v. Weasler*. See *United States v. Weasler*, 43 M.J. 15 (1995) (holding that the government and defense may negotiate a pretrial agreement term which waives an accusatory stage unlawful command influence motion). Major Klein also makes a general observation regarding the appropriateness of restricting an accused, and the government, to certain bargainable terms in the pretrial agreement negotiation and approval processes. See also Major Ralph H. Kohlmann, *Saving the Best Laid Plans: Rules of the Road for Dealing with Uncharged Misconduct Revealed During Providence Inquiries*, ARMY LAW., Aug. 1996, at 3 n.70 (acknowledging that the Court of Appeals for the Armed Forces recognized the "free-market approach to pretrial negotiations" when it decided *Weasler*).

4. See Frederic Lederer & Barbara Hundley, *Needed: An Independent Military Judiciary—A Proposal to Amend the Uniform Code of Military Justice*, 3 WM. & MARY BILL OF RTS. J. 629 (1994); Kevin Barry, *Reinventing Military Justice*, PROCEEDINGS, July 1994, at 54 (*Proceedings* is a Naval Review published by the U.S. Naval Institute). See also Eugene R. Fidell, *Going on Fifty: Evolution and Devolution in Military Justice*, 32 WAKE FOREST L. REV. 1213 (1997) (proposing that legal power in the military justice system has devolved from the military commander to the "legal apparatus," and that part of the legal apparatus that should be the center of power is the military judge). This change in the power "center of gravity" is consistent with what is occurring in the civilian federal courts of appeals and district courts.

5. See Glazier, *supra* note 2. See also Major Stephen A. Lamb, *The Court-Martial Panel Selection Process: A Critical Analysis*, 137 MIL. L. REV. 103 (1992). See *United States v. Bradley*, 47 M.J. 715 (A.F. Ct. Crim. App. 1997) (holding that there was no unlawful command influence when the acting staff judge advocate made a recommendation to refer charges, inconsistent with investigating officer's recommendation, and convening authority followed acting staff judge advocate's advice).

6. "Freedom's Frontier" does not refer to the Demilitarized Zone (DMZ), the boundary between North and South Korea created after the armistice ending the Korean War in 1953—although that is more than a worthy analogy. Soldiers who were assigned to protect the DMZ designated it the "DMZ-Freedom's Frontier." See U.S. Forces Korea (visited 23 Apr. 1999) <<http://www.korea.army.mil>>. "Freedom's Frontier," in the context of this article, is more analogous to the expansion of the United States during the 1700s and 1800s by American settlers. A great deal was involved in the decision to expand, such as: whether to stay in the eastern states where it was comfortable and safe, whether supplies and economic resources were available, the difficulty of traversing undeveloped land, weather, the search for a better way of life. The CAAF and the intermediate service courts face similar but different issues on the eve of emergence into the Twenty-First Century—advancing a military justice system that is fair to all, determining the degree that civilian case law and statutes will influence military criminal jurisprudence, allocating the proper amount of power to the parties in pretrial agreement negotiations, determining when an accused can prevail on an appeal that is based on a technical argument in court-martial personnel cases; and determining the appropriate place for the military judge in the military justice system.

Military Justice Act approval process,⁷ have the appellate courts and legislature had the opportunity to answer the debate and determine the structure that will carry the military justice system into the Twenty-First Century. During 1998, the CAAF and the intermediate service courts grappled with some of the issues of the debate regarding fairness and the structure of the military justice system.

This article reviews recent developments in the law relating to pleas and pretrial agreements, court-martial personnel, and voir dire and challenges. The article does not discuss every recent case. Rather, it reviews only those that establish a significant trend or change in the law. Additionally, the article identifies and discusses practical ramifications for the practitioner.

Court-Martial Personnel

Changing the Face of the Military Justice System: Panel Selection

The National Defense Authorization Act for 1999 (NDAA)⁸ requires the Secretary of Defense to develop and to report on a random selection method of choosing individuals to serve on courts-martial panels.⁹ The method for selecting members has drawn much attention over the years, and also has been the focus of much of the attack aimed at revising the court-martial process to make it consistent with the fundamental objective of

creating fairness for the military accused.¹⁰ The NDAA report requirement appears to be a serious step toward making changes to the selection process.¹¹

In many cases, the CAAF and the intermediate appellate courts have ventured to set clear guidance for practitioners and convening authorities in this area. Nevertheless, at least one improper selection case is decided each year, at either the intermediate appellate court or the CAAF. Last year was no different—but the two 1998 decisions may have greater impact for the system because of the coincidence of the NDAA requirement.

Commanders, Senior NCOs, and the Pursuit of Justice: White and Benson¹²

Clearly, convening authorities must not improperly use the Article 25, UCMJ, criteria when selecting members. Does a convening authority improperly use the Article 25 criteria when he decides that commanders, based on their status as such, are better suited for panel membership than other officers in the command? Before 1998, two cases indicated that the answer to this question was a qualified no. Selection by duty position alone, without considering the Article 25, UCMJ, criteria, is a violation of the law.¹³ In *United States v. White*,¹⁴ the CAAF had another opportunity to answer this question.

7. See generally THE ARMY LAWYER: A HISTORY OF THE JUDGE ADVOCATE GENERAL'S CORPS, 1771-1975 245-49 (1975). The Act made several important changes, it: (1) redesignated the law officer as a military judge and assigned the new position powers comparable to a civilian judge, (2) created a field judiciary independent of the staff judge advocate, (3) required that counsel at special courts-martial be lawyers except in situations of military exigency, (4) designated the boards of review as Courts of Military Review, (5) gave an accused the right to petition for a new trial on the basis of newly discovered evidence or fraud, (6) gave the convening authority power to defer the serving of confinement until completion of an appeal, and (7) gave The Judge Advocates General authority to vacate or modify the findings of any court-martial because of newly discovered evidence. See also Brigadier General John S. Cooke, *The Twenty-Sixth Annual Kenneth J. Hodson Lecture: Manual for Courts-Martial 20X*, 156 MIL. L. REV. 1, 2 (1998) (describing the radical nature of the changes under the 1968 Act, which the 1969 Manual implemented); Major General Michael J. Nardotti, *The Twenty-Fifth Annual Kenneth J. Hodson Lecture: General Ken Hodson—A Thoroughly Remarkable Man*, 151 MIL. L. REV. 202 (1996).

8. See The Strom Thurmond National Defense Authorization Act for Fiscal Year 1999, Pub. L. No. 105-261, § 1, 112 Stat. 1920 (1998).

9. Convening authorities must use the Article 25, UCMJ, criteria to select members. UCMJ art. 25 (West 1999). The specific criteria listed are age, education, training, experience, length of service, and judicial temperament. In addition, the convening authority must select those who, in his opinion, are best qualified for the duty after applying the criteria. The bill, originally introduced into the House of Representatives by Congressmen Skelton and Spence, requires the Secretary of Defense to report to the Senate Armed Services Committee on the plan during Spring 1999.

10. See Major Craig P. Schwender, *One Potato, Two Potato . . . A Method of Selecting Court Members*, ARMY LAW., Oct. 1990, at 10 (criticizing the process). Major Schwender, however, also proposes meaningful ways to ensure that the selection process is executed consistent with the criteria in Article 25(d), UCMJ.

11. No one knows the real intent underlying the NDAA report requirement—it could be a serious move to change the member selection process or a simple collection of information for comparison and contrast. The importance and seriousness of the issue has been elevated simply because it is before a congressional subcommittee.

12. The two cases discussed in this section also raise issues regarding unlawful command influence. These issues are beyond the scope of this article. This article only discusses the two cases in the context of the mechanics of panel selection.

13. See *United States v. Cunningham*, 21 M.J. 585 (A.C.M.R. 1985) (holding that preference for those in leadership positions is permissible where the convening authority selected six commanders and three executive officers who were one colonel, three lieutenant colonels, two majors, two captains, and one first lieutenant where the convening authority indicated that his preference was based on the fact that commanders “were much more in touch and concerned about caring for soldiers” and had a better feel of what was going on in the command. See also *United States v. Lynch*, 35 M.J. 579 (C.G.C.M.R. 1993), *rev'd on other grounds*, 39 M.J. 223 (C.M.A. 1994) (holding that a selection process which produces a senior officer panel with many commanders is permissible where the convening authority was attempting to create a panel of commanders that had seagoing experience in a case involving a commander who ran a ship aground in the Great Lakes).

14. 48 M.J. 251 (1998).

In *White*, the accused was charged with a *potpourri* of offenses relating to his attempt to obtain Air Force testing materials before sitting for an examination.¹⁵ Before trial, the convening authority sent a letter to his subordinate commanders soliciting nominations for court member duty. In the letter, the convening authority asked subordinate commanders to nominate their “best and brightest staff officers to serve as court members.”¹⁶ The convening authority prefaced this request by observing that, during the most recent selection process, some twenty percent of officers that subordinate commanders nominated were not available because of leave, temporary duty commitments, or reassignment.¹⁷ After indicating that the Air Force deserved a “system composed of the very best officers we have to decide the issues in our courts,”¹⁸ the convening authority further stated that “all my commanders, deputies, and first sergeants [are] available to serve as members on any court-martial at Kadena.”¹⁹ Finally, the convening authority closed the memorandum by requesting that subordinate commands nominate their “best and brightest . . . noncommissioned officers to serve as members”²⁰

The ten-person venire for the accused’s court-martial consisted of eight commanders. The convening authority selected nine persons for the accused’s court-martial.²¹ Seven of the nine were commanders.²² The defense moved to dismiss based

on improper selection. Specifically, the defense argued that the virtual exclusion of non-commanders violated the requirement to employ only Article 25, UCMJ, considerations in the selection process.²³

The CAAF held that the defense’s statistical evidence was not of the quality to raise an issue of court packing.²⁴ The decision is significant for many reasons. First, it raises the question whether the defense can ever prevail, in the modern era, on an improper selection motion without very strong independent evidence of wrongful intent. Last year, in *United States v. Lewis*,²⁵ the CAAF confronted an issue similar to *White*. The CAAF held that a panel consisting of five females and four males in a case of attempted voluntary manslaughter, assault, and aggravated assault on the accused’s wife did not raise an issue of court stacking where the defense motion based its challenge only on statistical evidence.²⁶ While the defense was able to show a disproportionate number of females on panels in cases involving sexual and assault offenses against female victims, the defense was unable to show the percentage of officer and enlisted personnel who were disqualified and unavailable for court member duty.²⁷ Moreover, the CAAF held that the presence of females on panels over the six months before the accused’s trial only showed that females routinely sat on panels.²⁸

15. *Id.* at 252. The accused was charged with conspiring to wrongfully appropriate Air Force promotion-testing materials and violating a lawful general regulation by unlawfully obtaining access to and reviewing Air Force testing materials in violation of Articles 81 (conspiracy) and 92 (failure to obey order or regulation), UCMJ. He was sentenced to a bad-conduct discharge, a fine of \$3000, confinement until the fine was paid but not to exceed two months, and reduction to pay grade E-4. *Id.*

16. *Id.* at 253.

17. *Id.*

18. *Id.*

19. *Id.*

20. *Id.* The actual closing language in the memorandum was: “each group is tasked on a quarterly basis to nominate staff officers and NCOs [noncommissioned officers] to serve as court members. I expect you to work closely with my legal office to ensure that the lists of personnel nominated to serve as court members are your best and brightest.” *Id.*

21. *Id.*

22. *Id.*

23. *Id.* at 253. The defense appeared to have a very good motion—there was strong statistical evidence supporting the defense argument. The defense offer of proof indicated that: (1) in the last six months before the accused’s trial, a high percentage of commanders were selected to sit on panels (6 of 9, 7 of 9, and 8 of 9 members); (2) the selection of a high percentage of commanders was improper, as a direct matter, because such selection pattern was inconsistent when compared to the officer population on the installation (of 737 officers at Kadena Air Base only 58 were commanders; (3) commanders only comprised 7.8% of the officer population at Kadena but accounted for 80% of the membership on the panels). *Id.*

24. *Id.* at 255. *Cf.* *United States v. Upshaw*, 49 M.J. 111 (1998). In *Upshaw*, the CAAF ruled on an issue that was almost identical to *White*. The CAAF held that an administrative mistake of excluding soldiers below the rank of E-7 did not raise an issue of improper selection where the defense conceded at trial that such action was “just simply a mistake.” *Id.* at 115. *Upshaw* is more a case of defense concession than improper selection, but conveys the CAAF’s understanding that the selection process, as a matter of mechanics, must not institute the systematic exclusion of the lower eligible grades.

25. 46 M.J. 338 (1997).

26. *Id.* at 342-43. The original convening order consisted of ten members, five of whom were females. In response to the defense counsel’s request for enlisted members, the convening authority relieved two female members and added one female enlisted member. *Id.* at 339.

27. *Id.* at 340.

White is further evidence of the firmly established trend to place a very high standard of proof on the defense in improper selection motions.²⁹ The difference between *White* and *Lewis*, however, is that the defense was able to show, through *the convening authority's memorandum*, the pool of officers who were available to sit as court members.³⁰ Although *all* officers on the installation were available to sit as members, an extremely high percentage of commanders were selected to sit on the accused's panel. *White* appears to present the percentage evidence, as required by *Lewis*, that would lead an appellate court to hold that the issue of improper selection was *at least* raised by the statistical evidence.³¹

What is most important about *White*, however, is the CAAF's apparently new interpretation of the Article 25(d), UCMJ, selection criteria. The CAAF's new construction of Article 25, UCMJ, now permits convening authorities to use the "best and brightest" standard³² to select those who are "best qualified" to sit as panel members. It *appears* to reverse black letter law in that, except for specific types of cases that require special competence, a convening authority must not go outside the criteria, spirit, and intent of Article 25(d), UCMJ, in selecting members.

Before *White*, the spirit and intent of Article 25(d), UCMJ, was to exclude the use of criteria which equated selection for panel membership with selection for command or leadership positions.³³ Noting this distinction, Judge Effron stated in a concurring opinion:

28. *Id.* at 342.

29. *See generally* United States v. Hilow, 32 M.J. 439 (C.M.A. 1991) (holding that the government is held to a "clear and positive" or strict liability standard of proof to show that there was no improper action in the selection process); United States v. Lewis, 46 M.J. 338 (1997) (appearing to assign the same standard to the defense). *But see* United States v. Nixon, 33 M.J. 433 (C.M.A. 1991) (holding that a panel consisting of only master sergeants and sergeants major creates an appearance of evil and is probably contrary to congressional intent, but also stressing that the convening authority's testimony established that rank was not used as a selection criteria).

30. United States v. White, 48 M.J. 251, 253 (1998).

31. In concurrence, Judge Effron notes and agrees with the majority's conclusion that the statistical evidence did not raise the issue of court stacking. The majority's decision is based on the apparent lack of ill-motive in the convening authority's memorandum requesting commanders and noncommissioned officers as nominees. Judge Effron's concurrence, however, appears to indicate the true basis of the majority opinion. He states that in order for the defense to prevail on an improper selection motion evidence must show:

(1) direct evidence of improper intent on the part of the convening authority to appoint commanders qua commanders as an improper shortcut application of the criteria under Article 25; or a stronger statistical history of practice (e.g., a greater number of courts-martial in a short period or a consistent practice over a longer period), from which an inference of such improper intent could be drawn and which would negate the inference drawn from the convening authority's memorandum that the high number of commanders was due to a pendulum effect (i.e., over-correcting the shortage of commander-members on prior panels).

Id. at 259 (Effron, J., concurring).

The high standard imposed on the defense, in the face of excellent percentage evidence that the defense made in consideration of the CAAF's decision in *Lewis*, will never support an improper selection motion if there is a lack of ill-intent on the part of the convening authority. Given the small possibility that the defense will be able to make such a showing, it might be time for the CAAF to create a *per se* rule for improper selection motions similar to the *United States v. Moore*. *See* United States v. Moore, 28 M.J. 366 (1988) (creating a *per se* rule for preemptory challenges).

32. The majority opinion language is quite clear. The court stated:

[L]ike selection for promotion, selection for command is competitive. We agree with the observation of the then Army Court of Military Review (now Army Court of Criminal Appeals), that 'officers selected for highly competitive command positions . . . have been chosen on the best qualified basis,' and that the qualities required for exercising command 'are totally compatible' with the statutory requirements for selection as a court member.

White, 48 M.J. 251, 255 (quoting United States v. Carman, 19 M.J. 932, 936 (A.C.M.R. 1985)). One could view the CAAF's action regarding the "best and brightest" standard as the creation of an additional criterion or, equally plausible, a statement of what was already part of the law but not affirmatively acknowledged until now.

33. *See generally* United States v. Cunningham, 21 M.J. 585 (A.C.M.R. 1989) (holding that preference for those in leadership positions is permissible where the convening authority articulates some relationship to the Article 25(d) criteria—thus, a panel of six commanders and three executive officers who were one colonel, three lieutenant colonels, two majors, two captains, and one first lieutenant did not constitute improper selection where convening authority indicated that he selected commanders because he believed they were "more in touch" with what was happening in the command and would treat accused's more fairly); United States v. Lynch, 35 M.J. 579 (C.G.C.M.R. 1993), *rev'd on other grounds*, 39 M.J. 223 (C.M.A. 1994). *See also* United States v. McClain, 22 M.J. 124 (C.M.A. 1986) (holding that convening authority improperly excluded junior enlisted personnel and officers in a intentional design to exclude those more likely to adjudge light sentences). In a partial concurrence in the result, Judge Effron noted this problem, in the majority opinion, of equating selection for command with selection for court member duty. *White*, 48 M.J. at 259.

[A]lthough command experience may be an appropriate factor for consideration in determining whether a particular individual is ‘best qualified’ to serve on a court-martial panel, it would be inappropriate to infer that, as a general matter, commanders as a class are ‘best qualified’ to serve on court-martial panels simply because selection for command is competitive.³⁴

While *White*’s meaning, in terms of the relationship between the “best qualified” and “best and brightest” standards, is open to interpretation, what is clear is that it changes the potential “face” of courts-martial panels. After *White*, convening authorities may believe that they have the added option of lawfully including more commanders on panels.

Similarly, another case potentially changes the face of courts-martial panels. Unlike *White*, however, the Air Force Court of Criminal Appeals’ (AFCCA) decision in *United States v. Benson*³⁵ appears more consistent with a long line of precedents and projects a greater perception of fairness in the military justice system. In *Benson*, the AFCCA considered whether a convening authority violated Article 25, UCMJ, by sending a letter to subordinate commands that directed them to nominate “officers in all grades and NCO’s in the grade of master sergeant or above for service as court members.”³⁶ After the selection process was complete, the convening authority failed to select members below the grade of master sergeant (an E-7 in the Air Force).³⁷ At trial, the convening authority testified that “in general a master sergeant has been around long enough in the Air Force, [and] has that additional education level, maturity level experienced with the Air Force. So, it is a general guideline, I guess you might say[,]” to support why he did not

choose soldiers below the rank of E-7.³⁸ The convening authority also testified that he had never selected an individual below the rank of E-7 to sit for court member duty.³⁹

In holding that the convening authority violated congressional intent by systematically excluding persons below the rank of master sergeant (E-7) from the selection process, the AFCCA formally established new guidelines for the selection of enlisted personnel based on statistical evidence.⁴⁰ After reviewing case law supporting the notion that a convening authority may first look to senior grades to select members,⁴¹ the court noted that one case set a clear line of demarcation regarding the classes of soldiers that possess the requisite qualities to sit as court members. In *United States v. Yager*,⁴² the Court of Military Appeals held that the exclusion of persons below the grade of E-3 was permissible where there was a demonstrable relationship between the exclusion and selection criteria embodied in Article 25(d), UCMJ. The court also noted that the disqualification of privates was an “embodiment of the Article 25 statutory criteria”—they simply did not have enough time and experience to exercise the proper degree of responsibility required of court members.”⁴³

The Court of Military Appeals, however, indicated that “if circumstances should arise where servicemen are serving in the grades of E-1 and E-2 as a result of more rigorous requirements for promotion, the requisite relationship could be wanting.”⁴⁴ While the law is clear that grades E-4 to E-6 cannot be systematically excluded based on a lack of requisite qualifications under Article 25(d), it is not a common occurrence to see lower ranking enlisted personnel as court members.

The AFCCA took this opportunity to formerly implement the *Yager* holding regarding grades E-4 to E-6. The AFCCA holding is based on the changing demographics and promotion

34. *White*, 48 M.J. at 259.

35. 48 M.J. 734 (A.F. Ct. Crim. App. 1998).

36. *Id.* at 738.

37. *Id.*

38. *Id.* The text of the convening authority’s testimony is worth mentioning, as it indicates his intent. His intent was an important factor in the Court’s holding. The convening authority indicated that the memorandum was intended to “disallow any capability to take anybody of a, let’s say, a staff sergeant [E-5] or tech sergeant [E-6].” *Id.* In addition, on cross-examination the convening authority stated:

I feel like, and still feel like, in most cases, again, it’s not excluded that I couldn’t find a tech sergeant or staff sergeant that would meet the proper qualifications. But in general a master sergeant has been around long enough in the Air Force, has that additional education level, maturity level experienced with the Air Force. So, it is a general guideline, I guess you might say.

Id. at 738.

39. *Id.*

40. The new guidelines pertain to the Air Force only. Other services that do not employ this type of statistical evidence to support an actual wider array for court member selection might consider doing so.

41. *See generally* *United States v. Crawford*, 35 C.M.R. 3 (C.M.A. 1964).

42. 7 M.J. 171 (C.M.A. 1979). *See* *United States v. Delp*, 11 M.J. 836 (A.C.M.R. 1981) (holding that a convening authority did not violate Article 25(d) when he failed to select soldiers below the rank of E-4 because the criteria are such as to make selection of persons in that grade a rare occurrence).

requirements of the military. The AFCCA took judicial notice that a substantially higher number of soldiers in grades E-4 to E-6 possess secondary education, post-secondary education, associate's or higher degrees, and have substantially more time on active duty than ever before.⁴⁵ A convening authority who excludes soldiers in these grades, therefore, violates Article 25(d), UCMJ.

Practitioner Tips and Considerations

White and *Benson* are very significant cases for practitioners, especially at this watershed time characterized by the change of personnel on the CAAF,⁴⁶ congressional interest in the panel member selection process, and preparation of the mil-

itary justice system for a Twenty-First Century military. Both cases indicate the tension that exists in the application of Article 25(d). Under *White*, at one end of the spectrum, convening authorities who are entrusted with the responsibility for good order and discipline must also have the authority to lawfully engineer the military justice process. An expansion of the Article 25(d), UCMJ, selection process—that is, including the authority to equate selection for command with selection for court-member duty—might appear to grant commanders too much authority. At the other end of the spectrum, *Benson* defines the appropriate line of demarcation between those who are eligible and ineligible to sit as members, while also elevating the role of enlisted soldiers in the military justice system. Practitioners should look for these cases to have pivotal impact in the debate concerning random selection.⁴⁷

43. Regarding the specific basis for the systematic disqualification, the court stated:

[T]he disqualification of privates is an embodiment of the application of the statutory criteria—age, education, training, experience, length of service, and judicial temperament. Persons in the grade of private are normally in one of the following categories: they have only a few months service; or although having sufficient service they have failed promotion because they have shown no ability, aptitude, or intelligence; or they have been reduced in grade for misconduct or inefficiency. Privates are in the initial training cycle of their military service, preparing themselves to become useful, productive soldiers. They are in a strange environment, many away from home for the first time, and subject to the pressures inherent in a stressful, strict disciplinary situation.

Yager, 7 M.J. at 172 (quoting *United States v. Yager*, 2 M.J. 484, 486-87 (A.C.M.R. 1975)). The Court of Military Appeals noted that the prevailing statistics and regulations supported this interpretation. *Id.* at 173.

44. *Id.* at 173.

45. In *United States v. Benson*, the AFCCA stated:

[T]he majority of E-4s have served 5 or more years on active duty, the majority of E-5s have served 10 or more years on active duty, and the majority of E-6s have served 15 or more years on active duty (citations omitted). Likewise, we take judicial notice that 88 % of E-4s have some amount of post secondary education, 18 % of E-5s have an associate's or higher degree, and 33 % of E-6s have an associate's or higher degree (citations omitted).

United States v. Benson, 48 M.J. 734, 739 (1998).

The day is soon approaching when all grades might potentially be considered for court member duty. A recent article noted that 99 % of soldiers coming on active duty have a high school diploma, and that 50 % of recruits cannot get into the service, presumably based on higher entrance standards. Recruiting figures indicate that soldiers coming on active duty are older, married, and have experience dealing with responsibility. Young soldiers are coming onto active duty with more educational and "life" experience. See Thomas E. Ricks, *U.S. Infantry Surprise: It's Now Mostly White; Blacks Hold Office Jobs—A Better-Educated Military Bears Little Resemblance to Civilian Perceptions—Half Who Try Don't Get In*, WALL ST. J., Jan. 6, 1997, at A1.

46. Judge Cox will leave the CAAF in September—another judge will be appointed to fill the vacancy. Judge Crawford will be the Chief Judge.

47. Practitioners must keep in mind that *White* and *Benson* are Air Force cases. It appears that the Air Force and Coast Guard do not use, as a matter of course, standing panels. Thus, members are selected for each court-martial, although there may be a "standing pool" of individuals available. The issue, therefore, may be whether *one of the systems* for selection, currently in use under the present statutory scheme, is best suited to effect congressional intent under Article 25(d), UCMJ. See UCMJ art. 25(d) (West 1998).

White and *Benson*⁴⁸ provide, however, three more practical lessons for the practitioner. First, as indicated last year in *Lewis*, to succeed on an improper selection motion, the defense must show evidence of systematic exclusion based on more than statistical evidence.⁴⁹ Second, counsel must be aware of the impact of convening authority testimony. The primary difference in *White* and *Benson* is the character of the convening authority's testimony. In *White* there was no convening authority testimony supporting improper selection. In *Benson*, however, the convening authority provided ample support for reversal. Finally, counsel should be aggressive in eliminating the line of demarcation between soldiers who are eligible and ineligible for court member selection under Article 25(d), UCMJ. New statistics and demographics of new recruits, as indicated in *Benson*, suggests that younger service members are more experienced and sophisticated.

A Reaffirmation of Power and Respect: The Judge in the Military Justice System

Over the last three years, the CAAF has elevated, and rightly so, the position of the military judge. Regarding pretrial and trial jurisprudence, this elevation of position and authority is most notable in the areas of voir dire and challenges. Two years ago, this review noted the CAAF's great deference accorded to a military judge's decision to determine the scope of and procedure for voir dire.⁵⁰ In 1997, one scholar of military jurisprudence commented that the military trial bench is experiencing a

new level of power that neither the Congress nor the Executive Branch understands.⁵¹ The reaffirmation of power and respect is a major theme in three cases, one from the CAAF, and two from intermediate service courts.

United States v. Acosta,⁵² *United States v. Miller*,⁵³ and *United States v. Robbins*⁵⁴ are three examples of the breadth of military judge authority.

Jeopardy and the Military Judge: Acosta

In *Acosta*, the accused sought reversal of his conviction for wrongful distribution and use of methamphetamine.⁵⁵ On appeal, the accused argued that the military judge abandoned his impartial role during the trial by asking a prosecution witness numerous questions that greatly assisted the prosecution.⁵⁶ Previous to the military judge's questions, the defense obtained a ruling that suppressed evidence of the accused's prior sale of drugs to a prosecution witness, an undercover informant for the military police.⁵⁷ The defense's purpose in obtaining the ruling was to ensure that this uncharged misconduct evidence would not be presented to the members.⁵⁸ During cross examination of the undercover informant, the defense created the impression that the undercover informant, "was under great pressure from the [military police] to set up a buy,"⁵⁹ and "placed undue pressure on the [accused] to commit a crime he would otherwise not have done."⁶⁰ The defense counsel adeptly avoided any direct impression that he was pursuing an entrapment defense to pre-

48. See *United States v. Upshaw*, 49 M.J. 111 (1998) (indicating that counsel should be aggressive in pursuing correction of any "administrative error" in the selection process).

49. See generally *United States v. Lewis*, 46 M.J. 338 (1997). It appears that the CAAF has, *sub silentio*, reversed or modified those cases that hold the issue of improper selection is raised by the presence of high rank or many commanders on a panel.

50. See Major Gregory B. Coe, *Restating Some Old rules and Limiting Some Landmarks: Recent Developments in Pretrial and Trial Procedure*, ARMY LAW., at 25, 43, Apr. 1997 (discussing *United States v. Williams*, 44 M.J. 482 (1996), *United States v. DeNoyer*, 44 M.J. 619 (Army Ct. Crim. App. 1996), and *United States v. Jefferson*, 44 M.J. 312 (1996)). *Williams*, *DeNoyer*, and *Jefferson* signify the CAAF's and the Army Court of Criminal Appeals' (ACCA) expansive interpretation of Rule for Courts-Martial 912, which grants general authority for the military judge to control voir dire. See MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 912 (1998) [hereinafter MCM].

51. See Fidell, *Going on Fifty: Evolution and Devolution in Military Justice*, 32 WAKE FOREST L. REV. 1213 (1997).

52. 49 M.J. 14 (1998).

53. 48 M.J. 790 (N.M. Ct. Crim. App. 1998).

54. 48 M.J. 745 (A.F. Ct. Crim. App. 1998).

55. *Acosta*, 49 M.J. at 15. The accused was charged with two specifications of wrongful distribution and two specifications of wrongful use of methamphetamine. He was sentenced to a dishonorable discharge, 10 years confinement, total forfeitures, and reduction to E-1. *Id.*

56. *Id.*

57. *Id.* The accused, as the evidence indicated, sold drugs to the undercover informant on three occasions. Two occasions were charged. The uncharged misconduct occurred five months before the first charged offense. *Id.* at 17.

58. *Id.* at 15.

59. *Id.* at 16.

60. *Id.*

serve his gains from the granted motion *in limine*.⁶¹ The trial counsel recognized the impact of the defense counsel's cross-examination, but failed to focus on the issue of entrapment or request that the judge reconsider the motion *in limine*.⁶²

The military judge then proceeded to ask the undercover informant "a series of 89 questions"⁶³ some of which were "housekeeping questions"⁶⁴ but many of which focused or "nail[ed] down why the witness believed in late December 1994 that the appellant would be willing to sell him crystal methamphetamine."⁶⁵ When the defense counsel objected and requested a "short 39(a),"⁶⁶ the military judge curtly responded, "No. Sit down . . . You raised an issue of entrapment."⁶⁷

In reversing the Navy-Marine Court of Criminal Appeals (NMCCA), the CAAF held that the military judge did not abandon his impartial role by asking the undercover informant eighty-nine questions on the issue of entrapment. In doing so, the CAAF noted that Article 46, UCMJ⁶⁸ provides wide latitude to a military judge to ask questions of witnesses called by the parties.⁶⁹ The Court further noted that Military Rule of Evidence (MRE) 614⁷⁰ does not limit the number of questions that a military judge may ask. Specifically, MRE 614 provides that the military judge is not prohibited from asking questions to which he may "know the answer";⁷¹ and the military judge has an "equal opportunity" to obtain witnesses and other evidence.⁷² The CAAF also held that, a reasonable person would not view the military judge's questions as casting doubt on the "legality, fairness, and impartiality of the proceeding or the military judge."⁷³

61. The defense was attempting to straddle the fence. The CAAF notes that the defense only mentioned the word "entrapment" once.

62. The trial counsel, as the CAAF framed it, "appeared concerned primarily with damage control as to his witness' credibility; he did not deal with entrapment at all." The defense counsel then continued exploring the witness's credibility and his theme that the undercover informant was under pressure from military police authorities to produce a controlled drug purchase. *Id.* at 16.

63. *Id.*

64. *Id.*

65. *Id.*

66. *Id.*

67. *Id.*

68. Article 46, UCMJ, provides:

The trial counsel, the defense counsel, and the court-martial shall have equal opportunity to obtain witnesses and other evidence in accordance with such regulations as the President may prescribe. Process issued in court-martial cases to compel witnesses to appear and testify and to compel the production of other evidence shall be similar to that which courts of the United States having criminal jurisdiction may lawfully issue and shall run to any part of the United States, or Territories, Commonwealths, and possessions.

UCMJ art. 46 (West 1999).

69. *Acosta*, 49 M.J. at 17.

70. Military Rule of Evidence 614, provides:

Calling by the court-martial. The military judge may, *sua sponte*, or at the request of the members or the suggestion of a party, call witnesses, and all parties are entitled to cross-examine witnesses thus called. When the members wish to call or recall a witness, the military judge shall determine whether it is appropriate to do so under these rules or this Manual.

Interrogation by the court-martial. The military judge or members may interrogate witnesses, whether called by the military judge, the members, or a party. Members shall submit their questions to the military judge in writing so that a ruling may be made on the propriety of the questions of the course of questioning and so that questions may be asked on behalf of the court by the military judge in a form acceptable to the military judge. When a witness who has not testified previously is called by the military judge or the members, the military judge may conduct the direct examination or may assign the responsibility to counsel for any party.

Objections. Objection to the calling of witnesses by the military judge or the members or to the interrogation by the military judge or the members may be made at the time or at the next available opportunity when the members are not present.

MCM, *supra* note 50, MIL. R. EVID. 614.

71. *Acosta*, 49 M.J. at 18.

72. *Id.*

What is most interesting about *Acosta*, though unstated in the opinion, is the CAAF's implicit practical interpretation of what constitutes judicial advocacy—in the modern military justice system military judges are given wide, but fair latitude to preside over trials without the fear of “second guessing”⁷⁴ reversal. The NMCCA opinion, that held to the contrary, was based on case law that took a very strict view of what constitutes judicial advocacy. In *United States v. Carper*,⁷⁵ *United States v. Reynolds*,⁷⁶ and *United States v. Schakleford*,⁷⁷ the Court of Military Appeals opined that a military judge must scrupulously avoid even the slightest appearance of partiality. These cases led the NMCCA to strictly apply the rule on impartiality.⁷⁸

Last year, the CAAF expanded the military judge's role to decrease the zone of situations subject to an allegation of military judge partiality. In *United States v. Figura*,⁷⁹ the CAAF held that a military judge would not be partial to the government if, after the parties' agreement, the military judge summarized the accused's providence inquiry and then delivered that summary to the panel. Additionally, language in the opinion suggested, that even without agreement of the parties, the military judge is in the best position to execute this action based on his impartial position in a court-martial.⁸⁰

The *Acosta* opinion takes the same liberal view toward impartiality as the *Figura* opinion. The majority of questions the military judge asked were directly related to the evidentiary matter and concerned issues that the defense and the government previously explored.⁸¹ *Acosta* also indicates that an issue involving the military judge's impartiality and the alleged over questioning of a key witness must be viewed in terms of waiver, the impact of questioning, and the particular evidence or information that the military judge seeks to clarify or complete with the questioning.⁸² While recognizing the military judge's equal access to information and witnesses,⁸³ the CAAF cautioned military judges that when they question the government's principal witness, they must have a heightened awareness of the concern for the “appearance of fairness at court-martial and judicial impartiality.”⁸⁴

*Drugs, Intemperate Remarks, and “Real-Life Experienced”
Judges: Cornett, Miller, and Robbin*

In *United States v. Cornett*,⁸⁵ the CAAF also solidified the position of the judge in the military justice system. In *Cornett*, the CAAF held that R.C.M. 902(a) does not require recusal in a situation that involves a military judge's intemperate remarks, as long as the military judge complies with the requirements of that rule. Under R.C.M. 902(a),⁸⁶ when the military judge is

73. *Id.*

74. See *United States v. Youngblood*, 47 M.J. 338 (1997) (Crawford, J., dissenting).

75. 45 C.M.R. 809 (N.M.C.R. 1972) (holding that it is improper for the military judge to praise a prosecution witness' testimony by reading a passage from *Profiles in Courage* to describe the witness after his testimony).

76. 24 M.J. 261 (C.M.A. 1987) (holding that the military judge did not show a lack of impartiality by reacting harshly to a defense objection and by questioning the accused when the accused appeared to change his testimony).

77. 2 M.J. 17 (C.M.A. 1976) (holding that the military judge abandoned his impartiality by using information gained from the accused's providence inquiry to question the accused before a panel after it appeared that the accused modified his testimony).

78. The NMCCA noted: “Before the trial judge examines a witness . . . he should determine whether that witness's testimony need clarification or completion. If the bench believes it does, questioning should be conducted with the greatest restraint. The military judge . . . must continue to appear and must in fact be neutral . . .” STEPHEN A. SALTZBURG ET. AL., *MILITARY RULES OF EVIDENCE MANUAL* 709 (3d ed. 1991).

79. 44 M.J. 308 (1996). *Figura* appears to be a culmination of a mixed bag of cases dealing with judicial activism, but primarily a recognition that one must not view these cases in a vacuum. See *United States v. Zaccheus*, 31 M.J. 766 (A.C.M.R. 1990) (holding that military judge's assistance in laying the foundation for the admission of evidence was not error); *United States v. Bouie*, 18 M.J. 529 A.F.C.M.R. 1984) (holding that it was not error for military judge to ask 370 question of accused since the issues were complex, dealing with state of mind and were somewhat of a “gordian knot”); *United State v. Morgan*, 22 M.J. 959 (C.G.C.M.R. 1986) (holding that the military judge overstepped his bounds in cross-examining the accused to obtain admission of a knife, which trial counsel unsuccessfully sought to obtain in evidence).

80. *Figura*, 44 M.J. at 310. Judge Sullivan suggested, in concurrence, that this procedure is akin to the English system and “In this way, the jury views the law and the facts through the eye of the experienced judge.”

81. *Acosta*, 49 M.J. at 18.

82. See *id.* at 18-19 (indicating that defense counsel failed to challenge the military judge for cause after the questioning, and the questions were designed to negate the defense theory of entrapment only after the defense obtained suppression of information which would have negated its own case theory).

83. See Major Francis A. Delzompo, *When the Military Judge is No Longer Impartial: A Survey of the Law and Suggestions for Counsel*, *ARMY LAW.*, June 1995, at 3.

84. *Acosta*, 49 M.J. at 19. In addition, the CAAF held that the “curt” denial of the defense request for a “short 39(a)” was appropriate, based on the entire record, because there was no possibility for the defense to obtain a favorable ruling on the evidentiary ruling regarding the uncharged misconduct. *Id.*

confronted with a recusal situation, especially one involving intemperate remarks, he must fully disclose the matter on the record and invite voir dire concerning any predisposition toward the parties. In turn, the CAAF's construction of R.C.M. 902 requires counsel to establish strong evidence in support of a recusal motion. One service court case⁸⁷ implements the *Cornett* construction of R.C.M. 902 and, in the process, is instructive on the appropriate degree of bench decorum in courts-martial.

In *United States v. Miller*,⁸⁸ the military judge stated, upon hearing that the accused suffered a drug overdose and was medically evacuated to a hospital, that the accused was a "cocaine addict and a manipulator of the system."⁸⁹ The military judge also stated that "[p]erhaps he [the accused] will OD and die, and then we won't have to worry about this case."⁹⁰ Taking a liberal interpretation of the case law, the NMCCA held that the military judge's comments indicated that he was impatient and frustrated with an unplanned delay in a scheduled court-martial proceeding. The court stated that these "comments alone do not reasonably suggest that the military judge held such "deep-

seated and unequivocal antagonism" towards the appellant as to make fair judgment impossible."⁹¹

Miller is worth mention because, as stated above, it continues the *Cornett* trend of requiring counsel to provide very strong evidence to support recusal of a military judge. Indeed, it appears that appellate courts are inclined to carefully search the record to determine the character of the military judge's statements, rather than imply some pernicious or sinister plan on the part of the military judge.⁹²

One other service court recognized the power and authority of the military judge in this era of "evolution and devolution,"⁹³ and established an expanded test to resolve situations when a military judge is the victim of an offense similar to the case he is trying.⁹⁴ In *United States v. Robbins*,⁹⁵ the accused was convicted of committing a battery and intentionally inflicting grievous bodily harm on his wife, and committing involuntary manslaughter by unlawfully causing the termination of his wife's pregnancy.⁹⁶ During the initial stages of the trial, the military judge, *sua sponte*, informed the parties that thirteen years ago she had been the victim of spousal abuse.⁹⁷ After providing

85. 47 M.J. 128 (1997) (holding that a military judge did not abuse his discretion when he denied a defense challenge for cause against the military judge based on an *ex parte* conversation between the military judge and trial counsel). During the conversation, the military judge stated "Well, why would you need that evidence in aggravation, because I've never seen so many drug offenses." Why don't you consider holding that evidence in rebuttal and presenting it, if necessary, in rebuttal?" *Id.* at 130.

86. MCM, *supra* note 50, R.C.M. 902(a). This rule states:

In general. Except as provided in subsection (e) of this rule, a military judge shall disqualify himself or herself in any proceeding in which that military judge's impartiality might reasonably be questioned.

....

(c)(2) Each party shall be permitted to question the military judge and to present evidence regarding a possible ground for disqualification before the military judge decides the matter.

Id.

87. See *United States v. Bray*, 48 M.J. 300 (1998) (holding that the military judge is not required to recuse himself when he has conducted a providence inquiry, reviewed a stipulation of fact, and entered findings of guilty to initial pleas in a co-accused's case).

88. 48 M.J. 790 (N.M. Ct. Crim. App. 1998).

89. *Id.* at 793.

90. *Id.* at 792.

91. *Id.* at 793.

92. The NMCCA stated that "[m]oreover, the record of trial itself reflects no overt hostility by the military judge towards the appellant and the sentence which he awarded was neither excessive nor inappropriate for these offenses and this offender." *Id.*

93. See *Fidell*, *supra* note 51.

94. This new test applies to Air Force courts-martial. The new test, however, may be instructive for military judges of all services.

95. 48 M.J. 745 (A.F. Ct. Crim. App. 1998).

96. *Id.* at 747. The involuntary manslaughter was charged under the Assimilative Crimes Act. See 18 U.S.C. § 13 (1994). The Act assimilated the Ohio fetal homicide statute. The military judge sentenced the accused to a dishonorable discharge, confinement for eight years, and reduction to E-1. The convening authority waived \$900.90 per month, for a period of six months, of the appellant's mandatory forfeitures for the benefit of his wife. *Id.*

97. *Id.* at 753.

both parties a copy of a voir dire from a previous trial on the matter and permitting extensive questions, she denied a defense motion that she recuse herself.⁹⁸ In denying the defense motion, the military judge appeared to apply a subjective test, stating that:

I don't believe that my ability to be fair and impartial has reasonably been questioned. To suggest that a military judge, who more than ten years ago was the victim of any offense would be unable to serve, would perhaps disqualify many judges across the nation from being able to serve As I indicated in voir dire, and I believe in the manner in which I've dealt with this entire issue, I believe I can be fair and impartial, and I will do so.⁹⁹

The AFCCA held that the military judge did not abuse her discretion by denying the motion for recusal. The AFCCA noted that the R.C.M. 902(a) test for a recusal motion, however, is objective. Therefore, the test applied here, based on the military judge's personal belief, was improper.¹⁰⁰ In the process, the AFCCA expanded the R.C.M. 902(a) objective test by adding three factors to balance and consider: (1) whether the military judge was victimized in the very recent past or the distant past, (2) whether the facts and the surrounding circumstances of the crime were so egregious as to inflame one's emotions at the expense of one's judicial instincts when recalling the event, and (3) if the answer to the second questions is yes, whether a reasonable person with knowledge of all of the relevant facts would conclude that sufficient time had passed whereby the

military judge's judicial instincts and temperament are no longer compromised.¹⁰¹ The AFCCA's application of this test to the military judge's spousal abuse that occurred thirteen years prior "[fell] way short" of a situation requiring recusal.

Practitioner Tips and Considerations

While an intermediate service court case, *Robbins* is noteworthy—not only for military judges but also for all military criminal justice practitioners. *Robbins* adds factors to R.C.M. 902(a) which give the military judge and counsel concrete rules to determine whether to raise and how to resolve recusal motions. In addition, the AFCCA also noted, consistent with *Cornett* and *Miller*, that significantly more is required to recuse a military judge in a modern court-martial system. This is so because our system, as well as the state and federal systems, recognize that the “average citizen, civilian or military, prefers judges with real-life experiences.”¹⁰² Counsel should continue proceeding on motions to recuse a military judge when the situation arises. Counsel, should, however, realize that the courts recognize a new stature for military judge—implicit in the reasonable person standard is an understanding “that judges are not grown in, and harvested from, a sterile, idyllic existence frequently referred to as the ‘ivory tower.’”¹⁰³

Expanding the Frontier of Military Justice: United States v. Price and United States v. Reynold

Over the past three years, with the exception of *United States v. Turner*¹⁰⁴ and *United States v. Mayfield*,¹⁰⁵ no two cases

98. *Id.*

99. *Id.* In addition, the military judge further commented on the issue, adding more “[fuel] to the uncertainty” that she used a subjective test to rule on the issue. *Id.* The following short colloquy occurred between defense counsel and the military judge: “[MJ:] I think reasonable people might differ.” *Id.* at 753. [DC:] [Do you believe] those reasonable people [having heard all facts] might disagree to an impropriety [sic] of a judge with a history of spouse abuse sitting in a judge alone court-martial, in a case involving assault on a spouse[?]

100. See generally *United States v. Sherrod*, 22 M.J. 920 (A.C.M.R. 1986). The court noted that the military judge's actions (resolving the recusal motion on the basis on a subjective test rather than an objective, reasonable person test) were identical to the military judge's action in *Sherrod*. In *Sherrod*, the military judge erroneously held that he could sit on a case of an accused charged with burglary and assault of his next door neighbor (whose child, a best friend of the military judges daughter, was assaulted by the accused).

101. *Robbins*, 48 M.J. at 754.

102. *Id.*

103. *Id.*

104. 47 M.J. 348 (1996) (holding that a military judge-alone court-martial is not deprived of jurisdiction simply because the request for trial by judge alone was obtain at a post-trial corrective session).

105. 45 M.J. 176 (1996) (holding that a military judge alone court-martial is not deprived of jurisdiction when counsel, in the presence of a silent accused, makes the request for forum). Although this article does not discuss *Mayfield* and *Turner*, practitioners should note that the NMCCA extended *Mayfield* to permit a post-assembly acceptance of a military-judge alone request. See *United States v. Jungbluth*, 48 M.J. 953 (N.M. Ct. Crim. App. 1998). See also *United States v. Seward*, 29 M.J. 369 (1998) (holding that while it was improper for a military judge to incorporate by reference a forum request made at a trial prior to a mistrial, case law did not operate to deprive the court-martial of jurisdiction where the forum request was part of the new pretrial agreement). Both of these cases continue the trend to review court-martial personnel issues on a substance over form basis. In addition, they also provide lessons learned—a military judge should normally begin a session of court, especially one that has been previously held and terminated by mistrial and also those that have been characterized by multiple sessions, by reviewing everything that has been done thus far in the proceeding to ensure that all necessary documents and rights acknowledgments are part of the record.

have caused as much calm and consternation in court-martial personnel jurisprudence than the Army Court of Criminal Appeals' (ACCA) decisions in *United States v. Price*¹⁰⁶ and *United States v. Reynolds*.¹⁰⁷ The CAAF opinions in these two cases had the same impact on military criminal law.

Bob Barker at the CAAF: United States v. Price

In *Price*, the accused was absent for trial after being informed of the date trial would commence.¹⁰⁸ The accused also participated in the litigation of substantive pretrial motions at three Article 39(a)¹⁰⁹ sessions. Because the court-martial had to resolve the substantive motions, the military judge decided to forego the "calling upon the accused to plead" step of arraignment.¹¹⁰ The arraignment was, therefore, defective.¹¹¹ The ACCA caused a quiet calm over the prosecution by holding that, when an arraignment is procedurally defective and an accused voluntarily absents himself from a court-martial after participating in the litigation of motions and being informed of the date that the trial will commence, the court-martial will not be deprived of jurisdiction to try the accused *in absentia*. A cornerstone of the ACCA opinion was the observation that a long line of precedent, apparently dating from Colonel William Winthrop, supported the view that an accused could waive by conduct either the reading or "calling upon to plead" components of an arraignment.¹¹²

106. 43 M.J. 823 (Army Ct. Crim. App. 1996).

107. 44 M.J. 726 (Army Ct. Crim. App. 1996).

108. *Price*, 43 M.J. at 824. The accused in *Price* was charged and convicted of conspiracy to commit robbery, robbery, and aggravated assault. He was sentenced by an officer and enlisted panel, *in absentia*, to a dishonorable discharge, confinement for 8 years, and forfeiture of all pay and allowances. *Id.*

109. UCMJ art. 39(a) (West 1999).

110. *Price*, 43 M.J. at 824.

111. MCM, *supra* note 50, R.C.M. 904. This Rule provides: "Arraignment. Arraignment shall be conducted in a court-martial session and shall consist of reading of charges and specifications to the accused and calling on the accused to plead. The accused may waive the reading. The entry of plea is not part of the arraignment." *Id.*

In conjunction, R.C.M. 804, provides:

(a) Presence required. The accused shall be present at the arraignment, the time of the plea, every stage of the trial including sessions conducted under Article 39(a), voir dire and challenges of members, the return of the findings, sentencing proceedings, and post-trial sessions, if any, except as otherwise provided by this rule.

(b) Continued presence not required. The further progress of the trial to and including the return of the findings and, if necessary, determination of a sentence shall not be prevented and the accused shall be considered to have waived the right to be present whenever an accused, initially present:

(1) Is voluntarily absent after arraignment (whether or not informed by the military judge of the obligation to remain during the trial; or After being warned by the military judge that disruptive conduct will cause the accused to be removed from the courtroom, persists in conduct which is such as to justify exclusion from the courtroom.

Id. R.C.M. 804.

112. *Price*, 43 M.J. 826-27. See COLONEL WILLIAM WINTHROP, MILITARY LAW AND PRECEDENTS (1920). The ACCA opined that Colonel Winthrop would probably be of the opinion that the accused could waive either part of the arraignment. See also *United State v. Houghtaling*, 2 C.M.R. 229 (A.B.R. 1951); *United States v. Napier*, 43 C.M.R. 262 (C.M.A. 1971); *United States v. Lichtsinn*, 32 M.J. 898 (A.F.C.M.R. 1991); *United States v. Stevens*, 25 M.J. 805 (A.C.M.R. 1988); *United States v. Wolff*, 5 M.J. 923 (N.M.C.M.R. 1978); *United States v. Cozad*, 6 M.J. 958 (N.M.C.M.R. 1979).

113. Judge Sullivan and Judge Crawford dissented from the majority opinion.

In a well-reasoned majority opinion and over strong, equally persuasive dissent,¹¹³ Chief Judge Cox wrote a majority opinion for the CAAF that reversed the ACCA. The CAAF held that R.C.M. 904 contemplates trial *in absentia* only after an effective arraignment. Therefore, an accused by his conduct, cannot waive any part of an arraignment when that arraignment is defective.

The CAAF's route to that holding is very important. First, the CAAF compared R.C.M. 904 with its civilian counterpart, Federal Rule of Criminal Procedure (FRCP) 43(b).¹¹⁴ The CAAF posited that there was a difference between the two rules in terms of the time after which trial *in absentia* is permissible.¹¹⁵ According to the CAAF, FRCP 43(b) sets this time after the commencement of trial, while R.C.M. 904 sets this time after an effective arraignment. There was no demonstrable difference in both rules, however, concerning whether a particular time had been set.¹¹⁶ The CAAF also noted that R.C.M. 904 was based on FRCP 43(b). A plausible construction of R.C.M. 904 must, therefore, be consistent with the Supreme Court's interpretation of the federal rule.¹¹⁷

In two cases, *Taylor v. United States*¹¹⁸ and *Crosby v. United States*,¹¹⁹ the CAAF reasoned that the Supreme Court strictly interpreted the federal rule. *Taylor* acknowledged that an accused who absents himself *after* trial on the merits has commenced is foreclosed from making an argument that the court

failed to specifically advise him that trial would proceed in his absence. In *Crosby*, however, the CAAF determined that the Court “set *Taylor* in sharp relief.”¹²⁰ On facts very similar to *Price*, except for the defective arraignment, the Court held that trial *in absentia* was not authorized and reversed Crosby’s conviction.¹²¹ The Court based its holding on the rational distinction between absences that occur before and after trial on the merits start. Additionally, the Supreme Court implied that, in both circumstances, the trial could only occur if the accused was specifically or constructively warned that the trial would proceed in his absence.¹²² While military case law extended the rule where trial *in absentia* attached back to arraignment, there was nothing in the record indicating that the accused was on notice that trial would *proceed* in his absence. The Supreme Court’s strict application of the *in absentia* rule in *Crosby* operated to reverse *Price*’s conviction.¹²³

Judge Sullivan wrote a short, but strong, dissent indicating that an “incomplete arraignment”¹²⁴ never operates to deprive a

court of jurisdiction. Judge Sullivan theorized that the arraignment was incomplete because the accused absented himself—the accused was responsible for the incomplete arraignment. In a more extensive dissent, Judge Crawford adopted the ACCA’s waiver theory.¹²⁵

Practitioner Tips and Considerations

Price is one of the most important opinions of the last three years in court-martial personnel jurisprudence—especially for the government. First, Judge Crawford’s dissent intimates that the majority opinion is inconsistent with the recent trend to apply procedural statutes based on “substance over form.”¹²⁶ The trend, starting with *United States v. Algood*¹²⁷ and coming to fruition in *United States v. Turner*,¹²⁸ predictably resulted in the CAAF’s refusal to grant technical appeals in court-martial personnel cases.¹²⁹ *Price* may allow appellate and trial defense

114. FED. R. CRIM. P. 43 (a), (b). These rules provide:

- (a) Presence required. The defendant shall be present at the arraignment, at the time of the plea, at every stage of the trial including the impaneling of the jury and the return of the verdict, and at the imposition of sentence, except as otherwise provided by this rule.
- (b) Continued Presence Not Required. The further progress of the trial to and including the return of the verdict shall not be prevented and the defendant shall be considered to have waived his right to be present whenever a defendant, initially present,
 - (1) voluntarily absents himself after the trial has commenced (whether or not he has been informed by the court of his obligation to remain during the trial); or
 - after being warned by the court that disruptive conduct will cause him to be removed from the courtroom, persist in conduct which is such as to justify his being excluded from the courtroom.

Id.

115. 48 M.J. at 182.

116. The CAAF focused on the “*after the trial has commenced*” language in Federal Rule of Criminal Procedure 43(b).

117. *Price*, 48 M.J. 181, 183.

118. 414 U.S. 17 (1973) (holding that trial *in absentia* is permissible when an accused absents himself after trial on the merits had commenced, thereby neutralizing appellant’s argument that he could not have waived his rights to testify and confront witness after being absent). The Court reasoned that it was “incredible that a defendant who flees from a courtroom in the midst of a trial . . . would not know that as a consequence the trial would continue in his absence.” *Id.* at 20.

119. 506 U.S. 255 (1993).

120. *Price*, 48 M.J. at 183.

121. In *Crosby*, the accused was convicted of mail fraud by conspiring with codefendants to sell military veteran commemorative medallions to fund the alleged construction of a theme park. He appeared before a magistrate on 15 June 1988, and was released after posting a \$100,000 bond. Like the accused in *Price*, Crosby appeared for pretrial conferences and hearings with his attorney. The court advised Crosby that his trial would be on 12 October 1988. Crosby failed to appear for trial and the trial judge proceeded to judgment *in absentia* over defense objection. *Crosby*, 506 U.S. at 256-57.

122. 48 M.J. at 183.

123. *Id.*

124. *Id.* at 184.

125. *Id.* at 184-86.

126. 48 M.J. at 184.

127. 41 M.J. 492 (1995) (dismissing a technical reading of the UCMJ and refusing to reverse a conviction in a case where charges were referred to trial using members selected by a previous commander of an installation that was deactivated under the Base Realignment and Closure Program).

counsel to again pursue, with some sense of hope, relief based on a technical issue in court-martial personnel cases.

Second, the CAAF's resolution of *Price* is not based on military precedent. Rather, it is based on an interpretation of constitutional law that the ACCA said was in direct conflict with military legal precedent. Implicit in this manner of analysis is Article 36, UCMJ, which directly permits the President, and indirectly permits the courts, to align military procedures with civilian federal procedures, where practicable.¹³⁰ Framing the issue in constitutional terms permitted the majority to imply that the military and the federal rule on trial *in absentia* embody the same procedural rights. The CAAF was able to downplay the impact of cases that both set the *in absentia* attachment at arraignment for service members and indicated that an accused can waive arraignment by conduct.¹³¹

Reviewing *Price* through a constitutional magnifying glass appears to cast a parochial light on the entire issue of ensuring that an accused is present for trial. Applying civilian *in absentia* cases to the military does not appear to take into account that courts-martial almost never occur in the accused's county or state. The accused may be assigned overseas or in the continental United States without his immediate family. Additionally, bail does not exist in the military justice system. Simply put, a military accused is more apt to flee because he does not have the same ties to the court-martial community as a civilian does to his county or state of residence. These factors were implicit

in the ACCA opinion. *Price* may be a good example of a case where the CAAF should have affirmed the ACCA based on the rule of *Parker v. Levy*.¹³²

What is certain, however, is that *Price* requires a change to the *Military Judge's Benchbook*.¹³³ The law requires military judges to call upon the accused to plead, but there is no requirement to instruct the accused about the impact of being absent from trial. The *Benchbook* should be amended to require the trial *in absentia* advisement in all courts-martial. Until a change is made, a smart trial counsel will not only ensure that arraignment is complete, but will also specifically request that the military judge read the advisement to the accused on the record.¹³⁴

*All Wrapped Up in Reynolds: Presence, Parties,
and Constitutional Structures*

*United States v. Reynolds*¹³⁵ is equally important to court-martial personnel jurisprudence. In *Reynolds*, the military judge conducted the preliminary phase of a trial, up to and including arraignment, by speakerphone.¹³⁶ All other phases of the trial were conducted with the military judge, counsel, and the accused in the same courtroom. The CAAF affirmed the ACCA's determination that the military judge violated R.C.M. 804,¹³⁷ 805,¹³⁸ Article 39(a), UCMJ,¹³⁹ and Article 26, UCMJ.¹⁴⁰ These provisions require that all parties must be present in one

128. 47 M.J. 348 (1997) (refusing to technically read and apply the Article 16, UCMJ, requirement that the accused make a military judge-alone forum request and holding that an accused who silently sits at the counsel table, while counsel makes same forum request, assented to choice by conduct).

129. See *United States v. Sargent*, 47 M.J. 367 (1997) (holding that a court-martial was not deprived of jurisdiction because of court member's absence); see also *United States v. Jungbluth*, 48 M.J. 953 (N.M. Ct. Crim. App. 1998).

130. UCMJ art. 36 (West 1998).

131. See *supra* note 112.

132. 417 U.S. 733 (1974) (noting that the military is a special separate society and military law is a jurisprudence that exists separate and apart from the law that governs the federal judicial establishment, necessitating different rules, depending on the situation). Two years ago, Chief Judge Cox wrote a concurring opinion that reminded practitioners of the importance of *Parker* to the military justice system. See *United States v. Eberle*, 44 M.J. 374 (1996) (Cox, C.J., concurring). Last year, the CAAF implicitly applied the rules of *Parker* in two cases. See *United States v. Tulloch*, 47 M.J. 283 (1997); *United States v. Witham*, 47 M.J. 297 (1997). The *Price* majority may have missed the opportunity to point out that the military accused and the civilian accused are not in the same position with regard to trial *in absentia*.

133. See U.S. DEP'T OF ARMY, PAM 27-9, LEGAL SERVICES: MILITARY JUDGES' BENCHBOOK, ch. 2, § VIII, at 148 (30 Sept. 1996) [hereinafter BENCHBOOK]. The current trial *in absentia* advisement is optional "when the accused is arraigned but trial on the merits is postponed to a later date." *Id.*

134. One can see the problem associated with reading an accused the trial *in absentia* advisement, especially in a situation where the thought of fleeing before the merits and sentencing phases may never have occurred to an accused. Having heard the advisement, the accused may now plan to flee. Trial counsel probably do not want to execute responsibilities all the way to sentencing only to have punishment meted out to an absent accused. Ensuring that the trial will proceed without jurisdictional impediments, even at the risk of having an accused flee after hearing the trial *in absentia* advisement, is preferable—especially in light of *Price*.

135. 49 M.J. 260 (1998).

136. Reynolds was charged with attempted larceny and housebreaking. The military judge called the initial session of the court-martial to order with the accused and counsel for both parties located in a courtroom at Fort Jackson, South Carolina, and the military judge located in a courtroom at Fort Stewart, Georgia. The courtrooms were about 150 miles apart. See *United States v. Reynolds*, 44 M.J. 726, 729 (Army Ct. Crim. App. 1996). Each courtroom contained a speakerphone. The military judge obtained the accused consent to the procedure. The military judge told the accused that he was not required to proceed by speakerphone, indicating that "my not being present only saves the court some time and the United States some TDY and travel money." *Reynolds*, 49 M.J. at 261.

137. MCM, *supra* note 50, R.C.M. 804.

location for a valid court-martial to occur. The ACCA communicated that video teleconferencing, electronic, or telephonic means could not be used for the formal stages of a court-martial.¹⁴¹

The CAAF also held that the partial absence of the accused or military judge from a formal stage of trial may not always operate to deprive the court of jurisdiction. In doing so, the CAAF reasoned that the military judge's absence from the trial was not extensive,¹⁴² and the accused consented to the procedure.¹⁴³ Significantly, the court stated that absence, under these circumstances, did not fall within the class of "structural rights," the deprivation of which would entitle an accused to reversal.¹⁴⁴ This permitted the court to apply a harmless error standard to the error—similar to the ACCA opinion.

Most important, however, the CAAF reasoned that the accused did not suffer any material prejudice to his substantial rights under Article 59(a), UCMJ.¹⁴⁵ The court quickly dismissed the accused's argument that he was deprived of his opportunity to make an "informed" decision regarding forum and other rights. The CAAF stated at all times counsel repre-

sented the accused and the military judge appears to have reviewed selection of forum and made the accused enter pleas on the record. The CAAF not only applied the rule of *Mayfield*¹⁴⁶ and *Turner*¹⁴⁷ to *Reynolds*, but also continued a trend of using Article 59(a), UCMJ, to resolve claims in this area of the law. The standard for success on an Article 59(a), UCMJ, claim is difficult for the defense to establish.

Practitioner Tips and Considerations

While *Price* may be a departure from the *Algood-Mayfield-Turner* standard of review, *Reynolds* is more indicative of the manner in which the CAAF will review court-martial personnel issues.¹⁴⁸ The important lesson in *Reynolds* for practitioners is that the accused must object *at trial* if the issue might even remotely concern a "technical appeal."¹⁴⁹ Except for *Price*,¹⁵⁰ in the past three years the CAAF has refused to grant an accused relief based on technical court-martial personnel legal arguments.

138. *Id.* R.C.M. 805.

139. UCMJ art. 39(a) (West 1999).

140. *Id.* art. 26.

141. *See* *Coe*, *supra* note 50 (providing a complete discussion of this aspect of the case). In fact, the CAAF's decision specifically adopts this aspect of the ACCA's opinion. *See Reynolds*, 49 M.J. at 262.

142. The speakerphone proceeding only lasted for 12 minutes of a seven-hour trial. *Reynolds*, 49 M.J. at 261.

143. *Id.* at 263.

144. *Id.* at 262. The structural rights that would entitle an accused to substantial relief, if a court determined that an accused was deprived of such a right, include certain basic protections like the right to counsel, the right to an impartial judge, the right to a jury composed of persons that were not unlawfully discriminated against based on race or gender, or the right to self-representation at trial. *See id.*

145. UCMJ art. 59(a) (West 1999).

146. 45 M.J. 176 (1996).

147. 47 M.J. 348 (1997).

148. The CAAF engages in a search for information indicating that there was really no material prejudice to the accused. Usually, this is information indicating that the accused waived advantage of the alleged deprived right. In *Reynolds*, consent to the speakerphone procedure constituted waiver. There was no defense objection. These cases give credence to the CAAF's employment of the harmless error and non-technical statutory review rules. Implicit in these rules is a recognition that the CAAF and intermediate service courts must be mindful that an accused is given advantage of all procedural rights. The military justice system, however, has matured to the point where the appellate courts can imply a general presumption of regularity that the accused's rights were not materially prejudiced when a technical appeal is raised.

149. The CAAF stated: "Thus, as we noted by the reviewing court below, 'appellant would receive an undeserved windfall' if his findings of guilty and sentence were set aside in these circumstances Such an obvious technical appeal cannot prevail." *Reynolds*, 49 M.J. at 264 (citing *United States v. Jette*, 25 M.J. 16 (C.M.A. 1987)).

150. *See* *United States v. Mayfield*, 45 M.J. 176 (1996); *United States v. Turner*, 47 M.J. 348 (1997); *United States v. Sargent*, 47 M.J. 367 (1997); *United States v. Cook*, 48 M.J. 434 (1998) (holding that violation of the R.C.M. 505 prohibition against excusing more than one-third of members prior to trial does not involve a matter of fundamental fairness that would deprive court-martial of jurisdiction). The CAAF may find an error, but will most likely be disposed of the matter with the harmless error rule or the "no prejudice" rule under Article 59(a), UCMJ.

Pleas and Pretrial Agreements

It was a quiet year in the areas of pleas and pretrial agreements.¹⁵¹ Except for *United States v. Singleton*,¹⁵² appellate courts spent their time reaffirming rules of law and public policy. The 1998 cases provide a greater foundation for the key concepts that were developed in 1995. Two concepts prevailed in the 1998 cases: (1) the government and the defense must exercise a high degree of care in the formation and organization of pretrial agreements, and (2) a recognition of the free-market, *laissez faire* approach to negotiating pretrial agreements.

Formation: A Pretrial Agreement Is Worth the Paper It's Written On

In *United States v. Mooney*,¹⁵³ the CAAF reviewed a case involving an oral pretrial agreement term. The accused was charged with wrongful use of marijuana and lysergic acid dieth-

ylamide.¹⁵⁴ During the trial, the accused and the government entered into an oral agreement that required him to plead guilty to two specifications of the charge.¹⁵⁵ The government agreed to withdraw a third specification of the charge.¹⁵⁶ Both sides agreed to the oral term on the record. Each side complied with the oral term, and the accused “concede[d] that he received the benefit of the bargain.”¹⁵⁷

In a specified issue appeal, the CAAF held that there was a technical violation of R.C.M. 705(d)(2),¹⁵⁸ which requires that all pretrial agreements be in writing. Because the matter was “set out on the record,” however, there was no prejudice to the accused under Article 59(a). Just last year, in *United States v. Bartley*,¹⁵⁹ the CAAF reminded practitioners of the importance of following the R.C.M. 705(d)(2) writing requirement. Citing to the seminal cases of *United States v. King*¹⁶⁰ and *United States v. Green*,¹⁶¹ the CAAF “stressed the constitutional and statutory significance of pretrial agreements that reflect the accused’s voluntary and knowing acceptance of terms.”¹⁶²

151. The CAAF and intermediate service courts decided a plethora of cases involving the substantial conflict test and the necessary elements of a valid providence inquiry. See, e.g., *United States v. Biscoe*, 47 M.J. 398 (1998); *United States v. McQuinn*, 47 M.J. 736 (N.M. Ct. Crim. App. 1997); *United States v. Kolly*, 48 M.J. 797 (N.M. Ct. Crim. App. 1998); *United States v. Handy*, 48 M.J. 590 (A.F. Ct. Crim. App. 1998); *United States v. Keith*, 48 M.J. 563 (C.G. Ct. Crim. App. 1998); *United States v. Lark*, 47 M.J. 435 (1998); *United States v. Boddie*, 49 M.J. 310 (1998); *United States v. Crutcher*, 49 M.J. 236 (1998).

152. 144 F.3d 1343, *rev'd*, 165 F.3d 1297 (10th Cir. 1998) (en banc) (holding that 18 U.S.C. § 201(c) does not apply to the United States and does not include assistant United States attorneys acting as alter ego of the United States—U.S. attorneys can offer an accomplice or other witness leniency in exchange for truthful testimony). Most courts that considered the issue did not follow the panel decision in *Singleton*. See 165 F.3d at 1301 and cases cited therein. As the en banc 10th Circuit reversed itself, *Singleton* has virtually no vitality in the military justice system from the defense perspective. Three federal circuits followed the en banc 10th Circuit’s reasoning. See *United States v. Lowery*, 166 F.3d 1119 (11th Cir. 1999); *United States v. Ramsey*, 165 F.3d 980 (D.C. Cir. 1999); *United States v. Johnson*, 169 F.3d 1092 (8th Cir. 1999). The latest federal circuit opinion also follows the en banc reasoning. See *United States v. Condon*, 170 F.3d 687, 1999, (7th Cir. 1999) (holding that 18 U.S.C. § 201(c) does not apply to the government, foregoing criminal prosecution or securing a lower sentence is not a “thing of value” within the meaning of the statute, and relying on *United States v. Barrett*, 505 F.2d 1091 (7th Cir. 1974) for its reasoning). Defense counsel who still desire to pursue a *Singleton* motion may review the concurrence to the *en banc* opinion, which indicates that the statute is applicable to the Government, but Congress carved out specific exceptions authorizing a thing of value in exchange for truthful testimony or the like in certain statutes. See *Singleton*, 165 F.3d at 1297, 1303-08 (Lucero, J. (concurring)). See also *State v. Elie*, LaDistCt 9th Dist., Rapides Parish, Crim. Docket No. 240,890, Metoyer, J., *cited in* 12 Crim. Prac. Rep. (BNA) No. 24, at 491 (Dec. 2, 1998).

153. 47 M.J. 496 (1998).

154. The accused pleaded guilty and was sentenced to a bad-conduct discharge, confinement for 12 months, and reduction to the lowest enlisted grade.

155. 47 M.J. at 496.

156. *Id.*

157. *Id.*

158. MCM, *supra* note 50, R.C.M. 705(d)(2). This rule provides:

Formal submission. After negotiation, if any, under subsection (d)(1) of this rule, if the accused elects to propose a pretrial agreement, the defense shall submit a written offer, all terms, conditions, and promises between the parties shall be written. The proposed agreement shall be signed by the accused and the defense counsel, if any. If the agreement contains any specific action on the adjudged sentence, such action shall be set forth on a page separate from the other portions of the agreement.

Id.

159. 47 M.J. 182 (1997).

160. 3 M.J. 458 (C.M.A. 1977).

161. 1 M.J. 453 (C.M.A. 1976).

162. See Major Gregory B. Coe, “*Something Old, Something New, Something Borrowed, and Something Blue*”: *New Developments in Pretrial and Trial Procedure*, ARMY LAW., Apr. 1998, at 44.

While the CAAF was not willing to reverse *Mooney* based on a technical violation,¹⁶³ it chided the government and the defense, stating that “we do not condone the parties’ disregard for the Rules for Courts-Martial”¹⁶⁴

Organization: Placement is Also Important

Similarly, in *United States v. Forester*¹⁶⁵ the CAAF dealt with another specified issue involving the formation and organization of pretrial agreements. In *Forester*, the accused was charged with attempted housebreaking, attempted larceny, violation of a general regulation, false official statement, robbery, and aggravated assault.¹⁶⁶ The parties entered into a pretrial agreement that required the accused to “waive any and all defenses that he may present regarding any of the agreed-upon facts during all phases of trial, including the providency inquiry and the case-in-chief.”¹⁶⁷ The term was placed in the stipulation of fact rather than in the offer to plead portion of the agreement.¹⁶⁸

The CAAF reviewed the appropriateness of inserting a term in a place other than in the offer to plead by implicitly asking whether the government was attempting to avoid the requirements of R.C.M. 705(c)(1)(B).¹⁶⁹ That provision recognizes that the government may “encourage”¹⁷⁰ an accused to plead by “offering a favorable pretrial agreement.”¹⁷¹ The provision also

cautions the government that it cannot attempt to deprive the accused of a Constitutional Due Process right during the negotiation and the approval of a pretrial agreement. The CAAF intimates that when a term, especially one setting forth a disfavored general waiver of “any and all defenses,”¹⁷² is placed in a document other than the offer to plead, it indicates that the government specifically intended to avoid the R.C.M. 705(c)(1)(B) restriction.¹⁷³ The CAAF refused, however, to grant the accused any relief on appeal. After applying the rules of *United States v. Rivera*,¹⁷⁴ the CAAF determined that the accused was not entitled to relief based on the “overly broad”¹⁷⁵ nature of the waiver. The record did not indicate that the accused was prevented from asserting any defense.¹⁷⁶

Practitioner Tips and Considerations

Practitioners should take special note of *Mooney* and *Forester*. First, the CAAF continues to be very careful in the area of pretrial agreements in the wake of the late Judge Wiss’ criticism of the majority opinion in *United States v. Weasler*.¹⁷⁷ The *Weasler* majority promised that it would carefully review cases involving pretrial agreements containing unlawful command influence terms.¹⁷⁸ This trend has migrated to cases involving novel pretrial agreement terms, and now appears to have been

163. The CAAF stated that the record clearly supported that the accused was not prejudiced under Article 59, UCMJ.

164. *United States v. Mooney*, 47 M.J. at 496 (1998).

165. 48 M.J. 1 (1998).

166. *Id.*

167. *Id.* at 2.

168. *Id.* at 3.

169. MCM, *supra* note 50, R.C.M. 705(c)(1)(B). This rule generally provides that the government may not obtain a pretrial agreement by gaining the waiver of an accused’s substantial constitutional due process rights. These constitutional due process rights include the right to counsel, due process, the right to challenge jurisdiction, the right to a speedy trial, complete sentencing proceedings, and the effective exercise of post-trial and appellate rights. This is a nonexclusive list. *Id.*

170. *Forester*, 48 M.J. at 3.

171. *Id.*

172. See generally *United States v. Rivera*, 46 M.J. 52 (1997). See also *United States v. Jennings*, 22 M.J. 837 (N.M.C.M.R. 1986).

173. The CAAF stated that “the government may not avoid these provisions by setting forth prohibited terms, as in this case, in the stipulation of fact. The terms of a pretrial agreement should not be in the stipulation but in the agreement itself for acceptance or rejection by the convening authority.” *Forester*, 48 M.J. at 3.

174. 46 M.J. 52 (1997) (holding invalid a pretrial agreement term that required the accused to waive “all pretrial motions,” but ruling that no relief is appropriate where the record indicated that the accused had no viable motions to make).

175. *Forester*, 48 M.J. at 4.

176. *Forester* continues the *Rivera* application of *United States v. Weasler*. See *United States v. Weasler*, 43 M.J. 15 (1995). Courts will allow the parties to bargain and, if there is an offending term (statutorily or inconsistent with public policy), look to the record to see whether the accused received the benefit of the bargain before finding prejudice under Article 59, UCMJ.

177. *Id.* The CAAF held that accusatory stage unlawful command influence is waivable when proposed by the defense. Judge Wiss concurred in the result, but stated that the majority would “[regret] the message that this majority opinion implicitly sends to commanders.” *Id.* at 21 (Wiss, J., concurring). Practitioners may have attached more impact to *Weasler*—many believe that it opens the door to negotiation of terms previously prohibited.

extended to pretrial agreement cases in general.¹⁷⁹ Practitioners must be careful during the negotiation phase to ensure that pretrial agreements are organized consistent with R.C.M. 705.

Second, there is no substitute for a writing. Although the CAAF did not grant relief in *Mooney*, it voiced its dislike for oral pretrial agreements. It appears that the *Mooney* terms were created in the midst of trial and the parties decided to proceed without taking a recess to secure a written pretrial agreement. It may be expedient to proceed without taking a recess to secure a written pretrial agreement, but the parties risk having an appellate court chide counsel or grant the accused relief for doing so. Practitioners must remember that noncompliance with the procedural rules in this sensitive area causes significant concern at the CAAF.¹⁸⁰

*Alcohol, Bug Spray, and the Free Market of
Pretrial Agreements: Perlman and Bray*

One of the unfortunate by-products of the CAAF's earth shattering opinion in *United States v. Weasler*¹⁸¹ is the idea that R.C.M. 705 now permits the government and the defense to negotiate, agree to, and approve any and all terms imaginable in

pretrial agreements. This is not the interpretation of the law that the CAAF intended in *Weasler*. Further the CAAF has reminded practitioners that the medium for negotiation is a "qualified free market" with both sides standing on a level playing field. Two 1998 cases signify this trend.¹⁸²

In *United States v. Perlman*,¹⁸³ the CAAF reviewed a pretrial agreement term that appeared to release the government from the obligation to forward a vacation of suspension action to the general court-martial convening authority for review and action.¹⁸⁴ In exchange for his guilty pleas at a special court-martial, the accused secured a pretrial agreement that required the convening authority to suspend all confinement in excess of thirty days.¹⁸⁵ If the accused committed post-trial misconduct, the agreement appeared to release the convening authority from the sentence limitation.¹⁸⁶ The agreement also provided that the hearing provisions of R.C.M. 1109 would apply to any action contemplated that resulted from post-trial misconduct.¹⁸⁷

The court-martial sentenced the accused to reduction to E-1, forfeitures, a Bad-Conduct Discharge, and confinement for fourteen weeks.¹⁸⁸ The accused served the thirty days, and after returning to the base, committed additional misconduct by consuming alcohol in his barracks. The special court-martial con-

178. See *United States v. Bartley*, 47 M.J. 182 (1997). See also *Coe*, *supra* note 162, at 50.

179. See *United States v. Benitez*, 49 M.J. 538 (N.M. Ct. Crim. App. 1998) (holding that the government may not propose a term that requires the accused to waive statutory or constitutional speedy trial rights). It was clear from the record that the accused had a viable Article 10 motion. See UCMJ art. 10 (West 1999) (requiring the government to exercise due diligence, upon arresting or imposing pretrial confinement, to "inform him of the specific wrong of which he is accused and to try him or to dismiss the charges and release him"). See also *United States v. Williams*, 49 M.J. 542 (N.M. Ct. Crim. App. 1998) (holding that a pretrial agreement was valid wherein the government agreed to suspend forfeitures and waive automatic forfeitures when the accused was not entitled to pay and allowances upon conviction). The fact that *neither* side was aware of a new Department of Defense Regulation, which mandated forfeiture of pay and allowances of service members on legal hold who are later convicted, was important. Because the government was not aware of the regulation, it could not unlawfully induce the accused into acceptance. While both cases may eventually end up at the CAAF, the NMCCA opinions are indicative of the exacting reviews in the wake of *Weasler* and *Rivera*. See also *United States v. Acevedo*, 46 M.J. 830 (C.G. Ct. Crim. App. 1997) (holding that term in pretrial agreement requiring the government to suspend for 12 months and then remit a dishonorable discharge did not preclude approval of an adjudged bad-conduct discharge).

180. Practitioners should also remember that the *Mooney* and *Forrester* involved *specified issues*. The CAAF thought them important enough to raise *sua sponte*.

181. 43 M.J. 15 (1997). See Major Ralph H. Kohlmann, *Saving the Best Laid Plans: Rules of the Road for Dealing with Uncharged Misconduct Revealed During Providence Inquiries*, ARMY LAW., Aug. 1996, at 3 n.70 (pointing out the beginning of the trend, but not adopting the view that everything is subject to negotiation).

182. One other case has "fair market" implications, however, it is an intermediate service court case and its impact cannot be truly assessed until the CAAF has an opportunity to review it. *United States v. Pilkington*, 48 M.J. 523 (N.M. Ct. Crim. App. 1998) (holding that an accused has the right to enter into an enforceable post-trial agreement with the convening authority when the parties decide that such an agreement is mutually beneficial).

183. 48 M.J. 353 (1998) (sum. disp.).

184. See *United States v. Perlman*, 44 M.J. 615 (N.M. Ct. Crim. App. 1996). See also UCMJ art. 72(b) (providing the substantive and procedural law for vacating of suspensions). In conjunction, R.C.M. 1109(d)(2)(D) establishes a two-step process for vacation actions. Vacation actions involving a general court-martial sentence or a suspended special court-martial sentence including a bad-conduct discharge must be forwarded to the general court-martial convening authority after a hearing on whether the probationer violated the conditions of suspensions. The general court-martial convening authority will determine whether to vacate the suspension after reviewing the hearing officer's recommendation. The hearing officer is usually the special court-martial convening authority. See *MCM*, *supra* note 50, R.C.M. 1109(d)(2)(D).

185. *United States v. Perlman*, 44 M.J. at 615, 616 (N.M. Ct. Crim. App. 1996).

186. *Id.*

187. *Id.* at 616.

188. *Id.*

vening authority (SPCMCA) vacated the suspension and the accused served the remainder of the confinement. Obviously, the government and the defense had different interpretations of the meaning and the intent of the term. On appeal, the NMCCA held that the provision purporting to release the SPCMCA from the two-step R.C.M. 1109 vacation process was invalid. The court held that Article 72, UCMJ, and R.C.M. 1109 contain a congressionally mandated procedural right that has the same impact as a constitutionally protected procedural right.¹⁸⁹ Moreover, the NMCCA held that this congressionally mandated right was one that the accused did not have the authority to waive.¹⁹⁰

The CAAF's summary disposition affirmed the NMCCA result, applying the new rule of *United States v. Smith*.¹⁹¹ The summary disposition, however, nudged open the door to another test case on whether a waiver of the right to a complete vacation proceeding might be an appropriate term in a pretrial agreement. Employing equivocal language, the CAAF noted that the NMCCA "did not err in holding [that] the special court-martial convening authority wrongfully repudiated the pretrial agreement."¹⁹² The CAAF further noted that it expressed "no opinion as to whether such a procedure might be waived on an appropriate record,"¹⁹³ citing *United States v. Rivera*¹⁹⁴ to support its rationale.

Previously, *Perlman* was interpreted as a case that indicated that an accused could not introduce a term "where there is a strong indication that Congress created a nonwaivable substantive right, no matter what great benefit accrues to the

accused."¹⁹⁵ The NMCCA took a very paternal view of the facts and the term in *Perlman*. The CAAF appears to take an expansive or "qualified free market" view of the case. The summary disposition ostensibly permits an accused to bargain away R.C.M. 1009 rights as long as the record indicates that there are no violations of the *Rivera* Rule.¹⁹⁶ While the CAAF's determination is less paternal, practitioners should be cautious about including vacation proceeding waivers in pretrial agreements. At a minimum, the government should ensure that all parties fully understand the meaning and effect of the term in light of the NMCCA's opinion in *Perlman*. The government might decrease the potential for adverse appellate court review by including language in the pretrial agreement that fully explains the effect of the term.

*United States v. Bray*¹⁹⁷ also illustrates the CAAF's "qualified free market" approach to the negotiation of pretrial agreements. In *Bray*, the accused was charged, *inter alia*, with assault and battery on a five-year-old child, kidnapping that child, and committing indecent acts on the child.¹⁹⁸ He negotiated a pretrial agreement that limited the potential confinement to twenty years.¹⁹⁹ The accused completed the providence inquiry. During the sentencing proceeding, a defense witness, who was a psychiatric social worker, testified that "it was possible that appellant was not responsible for his actions because of having sprayed insecticide at some unspecified earlier period of time, thus precipitating, she ventured, a psychotic reaction akin to a similar one he had experienced in 1987."²⁰⁰ The military judge, noting the possibility of a defense, informed the accused of the potential defense to the charge.²⁰¹ The military

189. *Id.* This is the authors reading of the opinion.

190. *Perlman*, 44 M.J. at 617.

191. 46 M.J. 263 (1997) (holding that a pretrial agreement term that provides for vacation proceedings and processing under Article 72, UCMJ, and R.C.M. 1109 in the event of future misconduct cannot be interpreted as waiver of the general court-martial convening authority's responsibility to review and act on a vacation).

192. 48 M.J. 353 (1998).

193. *Id.*

194. 46 M.J. 52 (1997).

195. *See* *Coe*, *supra* note 50, at 25, 28.

196. *See generally* *Coe*, *supra* note 162, at 44, 52. The *Rivera* rule, which the CAAF applied to a pretrial agreement involving a term which required to accused to waive" all pretrial motions, is as follows: an accused will not be entitled to relief from a potentially invalid or expansive term in a pretrial agreement if the accused proposed the term, benefited from the term, he or the record fails to identify a right deprived, and the record or the accused fails to show that a viable motion could have been made but for inclusion of the term in the pretrial agreement. The CAAF appears to view the two-step vacation process as falling outside the rule of *United States v. Mezzanato*. *See* *United States v. Mezzanato*, 513 U.S. 196 (1995) (holding that some rights are not subject to bargaining, as they involve rights are "so fundamental to the reliability of the fact-finding process that they may never be waived without irreparably discrediting the system").

197. 49 M.J. 300 (1998). While the article does not review ineffective assistance, practitioners should review *Bray* to ascertain how the CAAF reviews ineffective assistance of counsel in the context of pretrial agreement negotiations.

198. *Id.* at 301.

199. *Id.* at 307.

200. *Id.* at 302. The majority opinion notes that the witness testified "undismayed by a lack of education, training, or credentials in the realm of toxicology or psychiatry . . ." *Id.*

judge also informed the accused of his right to withdraw his plea and the meaning and effect of that action.²⁰² After a short recess and receipt of counsel's advice, the accused withdrew his plea.²⁰³ Shortly thereafter, the accused negotiated a new pretrial agreement with the convening authority—but this time the agreement only limited the accused's confinement to thirty years.²⁰⁴ The military judge sentenced the accused to thirty-seven years of confinement.²⁰⁵ On appeal, the CAAF considered whether the accused was prejudiced when the convening authority increased the quantum portion by ten years.

The CAAF held that when an accused withdraws from a pretrial agreement, especially after receiving the benefit of counsel's tactical advice, he is left to the unpredictable forces of the market in negotiating a second pretrial agreement.²⁰⁶ A convening authority can increase the sentence cap without violating the spirit and intent of R.C.M. 705,²⁰⁷ absent any defense reliance on the original pretrial agreement. In holding that the accused was not prejudiced, the CAAF noted that this rule was neither new nor unique to the military.²⁰⁸

In addition, the CAAF noted the disparity of authority between an accused and a convening authority to withdraw from a pretrial agreement. Rule for Courts-Martial 705(d)(4)

grants an accused almost unlimited authority to withdraw from a pretrial agreement.²⁰⁹ Conversely, R.C.M. 705 (d)(4)(B)²¹⁰ provides that a convening authority can only withdraw from a pretrial agreement in certain circumstances. The relative positions of the parties, as specified in the *Manual*, give an accused the advantage by severely restricting a convening authority's right to withdraw from a pretrial agreement—the government and the defense are on a level playing field.

The CAAF easily resolved the issue. In doing so, the Court noted that the accused: (1) had the benefit of a level playing field regarding withdrawal under the *Manual*, (2) decided to forego the military judge's offer to reopen the providence inquiry, (3) had the benefit of informed counsel's advice, (4) received two explanations of his rights from the military judge based on a term in the pretrial agreement that dealt specifically with withdrawal of his pleas, and (5) still received a substantial benefit from the second pretrial agreement.²¹¹

Practitioner Tips and Considerations

Regarding practice considerations, *Bray* reminds defense counsel to be careful when introducing evidence during the sen-

201. *Id.*

202. *Id.*

203. *Id.* at 303.

204. *Id.*

205. *Id.*

206. *Id.* at 308.

207. MCM, *supra* note 50, R.C.M. 705.

208. *Bray*, 49 M.J. at 308 (citing American Bar Association Standard for Criminal Justice 3-4.2(c); *United States v. Penister*, 25 M.J. 148 (C.M.A. 1987)).

209. MCM, *supra* note 50, R.C.M. 705 (d)(4). This rule provides that an accused "may withdraw from a pretrial agreement at any time; however, the accused may withdraw a plea of guilty or a confessional stipulation entered pursuant to a pretrial agreement only as provided in R.C.M. 910(h) or 811(d), respectively." *Id.* Pleas are normally entered in connection with a pretrial agreement in courts-martial.

210. *Id.* R.C.M. 705(d)(4)(B). This rule provides:

[A convening authority can withdraw from a pretrial agreement] at any time before the accused begins performance of promises contained in the agreement, upon failure by the accused to fulfill any material promise or condition in the agreement, when inquiry by the military judge discloses a disagreement as to a material term in the agreement, or if findings are set aside because a plea of guilty entered pursuant to the agreement is held improvident on appellate review.

Id.

211. *Bray*, 48 M.J. at 308. The CAAF noted that the accused received a seven-year sentence reduction under the second pretrial agreement. One may note the importance of knowledge—the CAAF acknowledged that the accused was fully apprised of the impact of withdrawal and was well informed about the "bug spray" defense after counsel had an opportunity to investigate it. Having full knowledge of his rights led the CAAF to conclude:

We perceive no fundamental unfairness or inequity in these circumstances which would reasonably justify relieving appellant of his own voluntary decisions (citations omitted). A criminal accused may face many difficult choices in the criminal justice system, but that does not render that process constitutionally unfair (citations omitted). Finally, the accused has not shown that he relied to his detriment on the first agreement

Id.

tencing hearing. While the defense sought to introduce the psychiatric social worker's testimony for mitigation purposes only, it still raised a defense. Better witness preparation may have produced better results. Here, the accused was deprived of a ten-year reduction of his confinement because of a sentencing witness' testimony.

Finally, *Bray* and *Perlman* indicate, and apparently resolve, the CAAF's position on "Freedom's Frontier" regarding the application of *Weasler* and the free market approach to pretrial agreements. *Perlman* appears to revive the view that the door is open to waiver of almost anything²¹² if the parties do not violate *Rivera*. *Bray* reiterates that an accused's decisions in the area of pretrial agreements, done with the benefit of counsel, will foreclose an accused from an appellate argument that he was somehow prejudiced by that decision. Practitioners, therefore, have a clear picture of the CAAF's position in this area of the law.

Peremptory Challenges: A Complete Circle

While the CAAF was relatively quiet in the areas of voir dire and challenges,²¹³ it delivered a significant decision in the area of peremptory challenges. In doing so, it aligned itself with the present civilian federal court application of *United States v. Batson*.²¹⁴ In *United States v. Ruiz*,²¹⁵ the CAAF completed the circle²¹⁶ of *Batson's* application to courts-martial. At the same

time, it opened a Pandora's box regarding the appropriate procedure to resolve *Batson* issues involving post-trial affidavits.

In *Ruiz*, the accused was convicted of adultery and fraternization.²¹⁷ After voir dire and causal challenges, the trial counsel exercised his peremptory challenge against the only female member of the panel.²¹⁸ The defense objected under *Batson*, "asserting that the challenge was sexually motivated to eliminate the prospect of a female."²¹⁹ While the Supreme Court had delivered *J.E.B. v. Alabama ex rel. T.B.*,²²⁰ the CAAF had not addressed the application of *Batson* to gender, nor could either counsel obtain a copy of the case for the military judge to review before ruling on the *Batson* objection.²²¹ The military judge ruled that *Batson* only applied to race-based peremptory challenges and refused to require the trial counsel to state a gender-neutral reason supporting the peremptory challenge.²²²

The AFCCA refused to grant relief, holding that when a military judge considers a *Batson* objection based on gender, the *per se* rule of *United States v. Moore*²²³ does not apply. The rationale was that *Batson* is based on racial discrimination, not gender discrimination. In addition, while gender might be a pretext for racial discrimination, the court noted that there are a small percentage of females in the military and serving on a panel indicates that the government peremptory challenge against a female in a rape case was exercised in good faith.²²⁴

In 1988, the CAAF widened the frontier of military justice—it began to apply *Batson* incrementally to the military justice

212. Practitioners must remember that the appellate court will ask whether the term is in conflict with R.C.M. 705, public policy, and *United States v. Mezzanato*.

213. The big issue in causal challenges last year involved the appropriate application of the implied bias doctrine to the military justice system. See generally *supra* note 162, at 74.

214. 476 U.S. 479 (1986). The CAAF aligned itself with federal civilian court application of *Batson* but retained prior military case law establishing restrictions on the application of *Batson* to courts-martial. See *infra* note 230 and accompanying text.

215. 49 M.J. 340 (1998).

216. See *Coe, supra*, note 162, at 25 (discussing military cases and rationale involving the application of *Batson* to the military justice system).

217. The accused was a captain. He was sentenced to a dismissal and a reprimand. *Ruiz*, 49 M.J. at 340, 341.

218. *Id.* at 342.

219. *Id.*

220. 511 U.S. 127 (1994) (holding that gender is a suspect classification under *Batson*).

221. 49 M.J. at 343.

222. *Id.* at 342. The military judge agreed to reconsider his ruling pending receipt of a copy of the case. Because the case was tried in an overseas jurisdiction, counsel could not obtain a copy of the case. The "matter was never mentioned again" and the trial proceeded to completion. *Id.*

223. 28 M.J. 366, 368 (C.M.A. 1989) (holding there is no requirement for an objecting party in a *Batson* scenario to provide extrinsic evidence of intentional discrimination in courts-martial).

224. See *United States v. Ruiz*, 46 M.J. 503, 508 (A.F. Ct. Crim. App. 1997). According to the AFCCA, females make up less than 20 percent of the military population. This produces less female membership on a panel. In a rape case, therefore, one would logically conclude that the government would want a female member on the panel. This led the court to conclude that there are situations (for example, a government peremptory challenge against a female in a rape case) where the application of *Batson* would yield "absurd results." *Id.*

system.²²⁵ In 1989, it fashioned the *per se* “automatic trigger” rule of *United States v. Moore*,²²⁶ which eliminated the requirement for the party making a *Batson* objection to produce evidence of discrimination. Last year, in *United States v. Witham*,²²⁷ the CAAF applied *Batson* to the defense and to situations involving gender when the military judge called on the party making a peremptory challenge to provide a supporting reason for that challenge. In *Ruiz*, the CAAF completed the *Batson* circle²²⁸ in the military justice system—it set aside the AFCCA’s determination and held that *Batson* applies in all gender situations, whether the military judge requests a reason supporting the peremptory challenge or not.²²⁹ Counsel making a peremptory challenge against a female court member must now be prepared to give a gender-neutral reason supporting the challenge under *Batson*.²³⁰

While *Ruiz* appears to complete the circle of *Batson*’s application to courts-martial, it caused two judges to vigorously dissent. Judge Sullivan noted that the majority’s retroactive application of the *Moore per se* rule diverged from specific wording in *Moore*. He stressed that the *Moore per se* rule itself departs from *Batson* and was to be applied, according to the

Moore majority, “after today”—meaning the date of the *Moore* decision (10 August 1989).²³¹ Consistent with the incremental and conservative approach that the CAAF has taken in *Batson* jurisprudence, Judge Sullivan opined that the *Witham* rule should also be applied to cases occurring after the date of the *Witham* decision (30 September 1997).²³² In addition, Judge Sullivan disagreed with the majority’s decision to remand the case for a *DuBay*²³³ hearing to determine the essential findings of fact that support the peremptory challenge. He noted that there was no dispute that the trial counsel exercised his peremptory challenge because the member was a contracting officer whom he believed would hold the government to a higher standard of proof than normally required.²³⁴ Judge Sullivan intimates that the majority’s *DuBay* approach is inconsistent with recent case law permitting an appellate court to resolve issues when there are noncompeting affidavits concerning what occurred at a court-martial.²³⁵ Although not specifically stated in his dissent, Judge Sullivan’s view can also be seen as criticism of the majority for departing from a practice that is generally accepted in the civilian federal courts. Specifically, some federal circuits permit the parties to file competing affidavits in *Batson* challenge situations for appellate resolution.²³⁶

225. See *United States v. Santiago-Davila*, 26 M.J. 380 (1988) (holding that an accused has an Equal Protection and Due Process right to be tried by a jury from which no racial group has been excluded).

226. 28 M.J. 366 (1989).

227. 47 M.J. 297 (1997).

228. See *Coe*, *supra* note 162, at 72-74. The other important case involving application of *Batson* is *United States v. Tulloch*. *United States v. Tulloch*, 47 M.J. 283 (1997) (holding that a trial counsel who make a peremptory challenge must provide a reason that is plausible, reasonable, and sensible upon a *Batson* objection). By “completing the circle” this article suggests that the CAAF has placed military justice on the same plane as the civilian federal courts in the application of *Batson*, taking into account that *Batson* is applied differently in the military justice system. One could argue that this is not true with regard to religion. According to the CAAF, *Batson* does not prohibit religion based peremptory challenges. See *United States v. Williams*, 44 M.J. 482 (1996). There are no reported cases in which a military judge has ruled otherwise. In the federal district courts, however, there are a few cases indicating that if religion has been “sufficiently intertwined with the criminal charges” then religion would be a sufficient basis for a *Batson* inquiry. See *United States v. Sommerstein*, 959 F. Supp. 592 (E.D.N.Y. 1997); *United States v. Stafford*, 136 F.3d 1109 (7th Cir. 1998); *United States v. Greer*, 939 F.2d 1076 (5th Cir. 1991). Some states have recently dealt with the issue. See *Thorson v. State*, 721 So. 2d 590 (Miss. 1998); *People v. Martin*, 75 Cal. Rptr. 2d 147 (Cal. Ct. App. 1998). It appears that the CAAF has not had a meritorious opportunity to explore this issue—or may not have fully appreciated the impact of religion to the African American Mason organization when it decided *Williams*.

229. In *United States v. Witham* the military judge called on defense counsel to provide a gender-neutral reason to support its challenge against the only female member of the panel. See *United States v. Witham*, 47 M.J. 297 (1997). The defense failed to provide the gender-neutral reason and the military judge denied the peremptory challenge. In *Ruiz*, the CAAF reasoned that “[b]ecause the military judge in *Witham* required the explanation at trial, we had no occasion to formally to reach the question of whether the *Moore per se* rule extended to cases of potential gender-based discrimination. For the very same reasons as articulated in *Moore*, however, we now hold that it does.” *Ruiz*, 49 M.J. at 344.

230. *Id.*

231. 49 M.J. 348.

232. *Id.*

233. *United States v. DuBay*, 37 C.M.R. 411 (C.M.A. 1967) (providing for post-appellate consideration of cases by a trial judge to resolve factual issues).

234. *Ruiz*, 49 M.J. at 348-49. The majority indicated that a *DuBay* hearing was required because a “post-trial affidavit is invariably an inferior substitute for resolving factual controversies.” *Id.* at 344. The majority noted that the *DuBay* judge would be “better equipped than the trial judge” to deal with: (1) the fact that the voir dire did not deal with the contracting officer issue; (2) the AFCCA’s erroneous implication that the only reason for the peremptory challenge was the contracting officer-higher standard of proof issue; and (3) the AFCCA’s failure to consider the trial counsel’s first reason (“that the court member box is very small and, especially if there is a large panel, gives the members minimal space to properly hear a case”). *Id.* at 344. According to the CAAF, these facts and the failure to properly assess them, according to the CAAF, “beclud[ed] the AFCCA’s conclusions that the government gave a non-gender basis for the peremptory challenges.” *Id.* at 345.

235. See generally *United States v. Ginn*, 47 M.J. 236 (1997) (holding that an appellate court is not authorized to determine questions of fact concerning a post-trial claim solely on the basis of conflicting affidavits submitted by the parties).

Judge Crawford also strongly dissented, writing that the extension of *Moore* was unnecessary. She stressed that there was no “historical basis” for application of the *Moore per se* rule in the first place because the “[p]attern of using peremptory challenges to prevent minorities from sitting on juries . . . could not exist in the military because each side is limited to a single peremptory challenge.”²³⁷ She also concluded that the majority opinion would require that the issue of gender discrimination be litigated at every trial.²³⁸

Practitioner Tips and Considerations

Ruiz provides clear guidance for counsel in *Batson* situations and is consistent with previous decisions in this area of the law. Meticulous preparation is essential to execute effective voir dire and challenges. Counsel must be prepared to provide a sensible, plausible, and clear reason for peremptory challenges—one that is both race and gender neutral. In addition, *Ruiz* indicates the CAAF’s willingness to be a “leader in eradicating racial discrimination”²³⁹ and other forms of unlawful discrimination. There is no reason why *Batson* should not apply to the military justice system through the *Moore per se* rule. By requiring an explanation of all peremptory challenges upon a *Batson* objection, the CAAF assures that there are no violations, consistent with the Supreme Court’s 1986 mandate. The maturation of *Batson* jurisprudence since 1986 in courts-martial, and especially over the last three years, has expanded the rights for all who are involved in the military justice system.

Conclusion

*“If we want to talk about freedom . . . we must mean freedom for others as well as ourselves, and we must mean freedom for everyone inside our frontiers”*²⁴⁰

The last three years at the CAAF and the intermediate service courts have been significant regarding pretrial and trial procedure. In 1996, the courts recognized the military judge’s authority to control voir dire²⁴¹ and the *qualified sacrosanct nature* of the providence inquiry by prohibiting its use to convict an accused of a greater offense in a mixed plea case.²⁴² In 1997, the courts broke new ground by giving an accused a qualified right to an open Article 32 investigation,²⁴³ and modifying and extending the application of *Batson* to the government²⁴⁴ and the defense.²⁴⁵

Most recently, the courts have changed the face of the court member panel by holding that the criteria for court member duty is identical with the criteria that is used to select commanders. Additionally, only soldiers in grades E-2 and below may be systematically excluded from panel membership. The CAAF reaffirmed the “qualified free market” approach to the negotiation of pretrial agreements. It expanded the impact of military jurisprudence by applying a constitutional analysis to a problem that appeared to be military in nature. Finally, it completed the circle of *Batson*’s application by extending the *Moore per se* rule to gender.

Most, if not all, of these decisions have resulted in significant expansion of the government’s or the accused’s rights, not just a restatement of existing law. All of the decisions have provided practitioners with good guidance to execute their missions. On a structural or fundamental level, CAAF opinions appear to establish the boundaries on the frontier of military justice. The decisions in the last three years have shaped the basic foundation of the Twenty-First Century military justice system by indicating that the source of procedural and substantive rights will not only have a purely military genesis. Rather, the courts will more readily adopt and apply civilian federal procedures and jurisprudence, and interpret the law expansively where statutes permit.²⁴⁶ The impact of those decisions

236. Judge Crawford raised this point in her dissent. Currently, the Second, Fourth, Fifth, Sixth, and Seventh Circuits permit this practice. See *Ruiz*, 48 M.J. at 350 (Crawford, J., dissenting). See also *United States v. Vasquez-Lopes*, 100 F.3d 996 (9th Cir. 1996) (unpub.); *United States v. Tipton*, 90 F.3d 861 (4th Cir. 1994).

237. *Ruiz*, 49 M.J. at 351. Also, Judge Crawford provides an interesting opinion to her dissent—she opines that *Batson* should never have been applied to the military justice system in the first place. She concludes that Article 25, UCMJ, contains criteria for court member selection and is part of a system of checks and balances to ensure that a member is not excluded from panel membership on the basis of unlawful discrimination. *Id.* at 352 (Crawford, J., dissenting).

238. *Id.* Essentially, Judge Crawford indicates that the majority opinion requires that the issue be litigated at every trial. One should note, however, that the majority indicated there must still be an objection to the peremptory challenge and “[c]ertainly it is no more difficult for counsel to explain a challenge involving gender that it is for one involving race.” *Id.* at 344.

239. *United States v. Santiago-Davila*, 26 M.J. 380, 390 (1988).

240. WENDELL L. WILKIE, *ONE WORLD*, quoted in, GEORGE SELDES, *THE GREAT QUOTATIONS* at 385 (1967).

241. See *United States v. Williams*, 44 M.J. 482 (1996); *United States v. Jefferson*, 44 M.J. 312 (1996).

242. *United States v. Ramelb*, 44 M.J. 625 (Army Ct. Crim. App. 1996).

243. See *ABC, Inc. v. Powell*, 47 M.J. 363 (1997).

244. See *United States v. Tulloch*, 47 M.J. 283 (1997).

245. See *United States v. Witham*, 47 M.J. 297 (1997).

adopting this course of action,²⁴⁷ especially the 1998 cases of *United States v. White*,²⁴⁸ *United States v. Price*,²⁴⁹ *United States*

v. Reynolds,²⁵⁰ and *United States v. Ruiz*,²⁵¹ will be felt for years to come.

246. The CAAF does this to ensure that a statute is not applied with form elevated over substance. Unfortunately, many times this results in the accused losing the ability, on appeal, to prevail based on a technical argument. *See generally, supra* note 162, at 44,. *See also* *United States v. Reynolds*, 49 M.J. 260, 264 (1998).

247. *See* *United States v. Mayfield*, 45 M.J. 176 (1996); *United States v. Turner*, 47 M.J. 348 (1997) (discussing court-martial personnel). *See also* *United States v. Rivera*, 46 M.J. 52 (1997) (discussing the area of pleas and pretrial agreements).

248. 48 M.J. 251 (1998).

249. 48 M.J. 181 (1998).

250. 49 M.J. 260 (1998).

251. 49 M.J. 340 (1998).