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Lore of the Corps

Theft of Crown Jewels Led to High Profile Courts-Martial

Fred L. Borch III

Regimental Historian & Archivist

In the aftermath of World War II, the theft of gold, silver and jewels belonging to the German aristocratic House of Hesse triggered an intensive criminal investigation and resulted in three high profile courts-martial. When it was all over, Colonel (COL) Jack W. Durant, Major (MAJ) David Watson and Captain (CPT) Kathleen Burke Nash were all in jail.¹

In February 1946, less than a year after war had ended in Germany, Princess Sophie of Greece was preparing to marry Prince George Wilhelm of Hanover. The bride was to wear the Hesse family jewels during the ceremony but, when a servant was sent to retrieve the jewels from their hiding place in the Hesse family castle, Schloss Friedrichshof at Kronberg, they were gone—and presumed stolen.

Countess Margaretha, the reigning matriarch of the Hesse family, knew that all property in Kronberg castle was personal family property and so could not be seized like the assets of defeated Nazi Germany. Consequently, she went to the provost marshal in Frankfurt, and shortly thereafter the Army's Criminal Investigation Division launched an investigation. It soon discovered that a year before, when General George S. Patton's 3rd Army had been in the area, a Women's Army Corps officer, CPT Kathleen Burke "Katie" Nash, had been assigned to manage the castle as an officers' club. In November 1945, while exploring the massive structure, Nash saw a fresh patch of concrete on the floor of the wine cellar. Apparently she also had heard a rumor that jewels, gold and silver were buried in a secret place in the castle. In any event, when Nash and two members of her staff chipped through the concrete, Nash discovered a zinc-lined box filled with small, neatly wrapped packets containing gold, silver and jewels. It was literally a discovery of buried treasure—worth more than \$ 2.5 million.

Nash retrieved some of the loot. She also shared her secret with "J.W." Durant and Watson. Together the three officers then conspired to steal the remainder of the tiaras, bracelets and other valuables. Realizing that they would likely be caught if they tried to smuggle the treasure back to the United States in its present form, the three conspirators removed the precious stones from their settings and set them aside to be sold later; they sold or pawned the gold and silver mountings. Watson travelled to Northern Ireland in

November and December 1945, where he "pawned a large quantity of gold; he also gave a few baubles to a former girlfriend in Belfast."² Durant and Nash did their part in January 1946 by journeying to Switzerland and selling gold and jewels in Bern, Basel and Zurich.

As for what they had decided to keep for themselves, the trio used the Army post office system. Watson mailed a sterling silver pitcher home to his parents in California. Nash sent a thirty-six-piece solid-gold table service—as well as a large number of jewels—to her sister in Wisconsin. Durant sent jewels and other valuables using envelopes stamped "Official" and by diplomatic pouch; most went to his brother in Falls Church, Virginia. All in all, some thirty boxes of treasure were sent to the United States.³

By May 1946, the Criminal Investigation Division agents had caught up with the three culprits. Watson was apprehended in Germany. Durant and Nash, who had married on 28 May, were arrested at the luxury La Salle hotel in Chicago on 2 June. The timing of their marriage was not a coincidence: both Durant and Nash understood that a husband and wife could refuse to testify against each other in court-martial proceedings. But Nash also hoped to escape trial because she was expecting to be honorably discharged. Unbeknownst to Nash, however, the Army had cancelled her separation orders and so she remained on active duty and subject to court-martial jurisdiction.

A few days later, nearly a million dollars in recovered Hesse family treasure—which the Army insisted was "a mere pittance" compared to the total value of the missing property—was displayed at the Pentagon. Shortly thereafter, the Durants were flown to Frankfurt, Germany, where they both faced trial by general court-martial.

Katie Nash Durant was the first to stand trial. Charged with being absent without leave, larceny, fraud against the government, conduct unbecoming an officer and gentleman, and bringing discredit upon the military service, she appeared before the court panel in a uniform without any insignia, and refused to enter a plea. Her defense counsel, CPT Glenn Brumbaugh, insisted that the court lacked *in personam* jurisdiction because the Army had rescinded her

¹ United States v. Kathleen Nash Durant, CM 317327; United States v. David F. Watson, CM 319747; United States v. Jack W. Durant, CM 324235 (on file with Records of the Office of the Judge Advocate General, Record Group (RG) 153, M1899).

² Stephen Harding, *Soldiers of Fortune: The Hesse Jewel Heist*, WORLD WAR II (March 2009), <http://www.historynet.com/soldiers-of-fortune.htm> (last visited July 19, 2011).

³ JUDGE ADVOCATE GENERAL'S CORPS, THE ARMY LAWYER 172 (1975).

separation orders solely to maintain jurisdiction over her. He also argued that, even if the court-martial had jurisdiction over her person, Nash was not guilty of any offenses involving the Hesse crown jewels because the Hesse family had abandoned the treasures or, alternatively, that the jewels were legitimate spoils of war. Major Joseph S. Robinson, the trial counsel, countered:

It is our obligation to see to it that private property in enemy territory we occupy be respected, and that any interference with such private property for personal gains be justly punished.⁴

The court agreed. It found Nash guilty and sentenced her to five years in jail and a dismissal.

Watson was next. His defense was that looting was common in Germany and that, as the treasure belonged either to dead Nazis or S.S. members, the property could not be returned to them. In any event, argued Watson, he lacked the criminal intent to steal anything. In his summary to the panel, CPT Abraham Hyman, the trial counsel, reminded the court that it could not blind itself to the fact there were people who took advantage of abnormal conditions in occupied Germany. However, there is also the precedent of millions of Soldiers who went through the war without yielding to the temptation to take things which did not belong to them.⁵

The court of ten colonels agreed with Watson, at least in part. But, while they found him not guilty of larceny, the panel members convicted him of the remaining offenses, including receiving stolen property. He was sentenced to three years in jail and a dismissal.

“J.W.” Durant was the last to go to trial. In a court-martial convened in Frankfurt but concluded in Washington, D.C., COL Durant was found guilty of all charges. He was sentenced to fifteen years confinement at hard labor and a dismissal.

On 1 August 1951, Headquarters, European Command Army, announced that:

The Department of the Army, in cooperation with the Department of the Treasury, today returned to their owners the Hesse jewels, which have been in the custody of the United States since 1946 . . . Involved in the turnover were jewels filling 22 cubic foot Army safes and consisting of more than 270 items. Among the jewels were: a platinum bracelet encrusted with 405 diamonds, a platinum watch and bracelet with 606 diamonds, a sapphire weighing 116.20 carats, a group of diamonds weighing 282.77 carats, a gold bracelet with 27 diamonds, 54 rubies and 67 emeralds. . . .⁶

Despite this press release, more than half the Hesse crown jewels, and most of the gold and silver that had been hidden in the wine cellar, were never recovered. To this day, no one knows what happened to this missing treasure.

As for Nash, Watson and Durant, they served their sentences at the Disciplinary Barracks, Fort Leavenworth, Kansas, and were then released. Watson was the first to be freed; he was paroled in 1947. When he died in 1984, he was “still petitioning for a presidential pardon.”⁷ Nash and Durant were both released in 1952; they spent their remaining days together before dying in the mid-1980s.

*More historical information can be found at
The Judge Advocate General's Corps
Regimental History Website
Dedicated to the brave men and women who have served our Corps with honor, dedication, and
distinction.
<https://www.jagcnet.army.mil/8525736A005BE1BE>*

⁴ *Id.* at 173.

⁵ *Id.*

⁶ Court-Martial Case Files Relating to the “Hesse Crown Jewels Case,” 1944–1952 (on file with Records of the Office of the Judge Advocate General (Army), Record Group 153, Pub. No. M1899, Nat’l Archives, Washington, D.C.).

⁷ Harding, *supra* note 2.

“A Camel is a Horse Designed by Committee”¹: Resolving Constitutional Defects in Uniform Code of Military Justice Article 120’s Consent and Mistake of Fact as to Consent Defenses

James G. Clark*

Sex crimes are different than other crimes. In this one area of criminal activity, both society and statutes historically have focused first on the behavior of the victim when considering whether a sexual assault has occurred. In almost every other area of criminal law, the inquiry looks first and primarily at the acts committed by the accused.

Congress recognized the illogic of this unusual treatment, and in 2007 dramatically altered the landscape of military sexual assault offenses. In a complete rewrite of Article 120, Uniform Code of Military Justice (UCMJ), Congress created a complex and supposedly comprehensive scheme of crimes and procedures. The 2007 legislation redesigned Article 120 to reflect an offender-centered concept. The new statute eliminated lack of consent as an element of sexual offenses because the traditional consent inquiry was focused squarely on the behavior of the victim.²

Unfortunately, like many congressional compromises, the new Article 120 contains contradictory provisions that cannot be reconciled.³ The most glaring flaw in the statute stems from the apparent inability of the drafters fully to abandon the concept of “consent.” This inability led to an unnecessarily complex statute which included “affirmative defenses” of consent and mistake of fact as to consent. By including these defenses, failing to differentiate between them, and using strange language to define them, Article 120 contains both practical and constitutional problems. In 2011, the Court of Appeals for the Armed Forces (CAAF) declared crucial portions of the statute relating to defenses to be unconstitutional and illogical.

This article analyzes CAAF cases interpreting consent defenses in Article 120. It concludes that what remains of the statute is fatally flawed, but suggests ways in which the present statute can be constitutionally applied. Part I briefly describes how the consent and mistake of fact defenses operate, and discusses the legal and philosophical differences between the two. Part II explores recent CAAF cases which have criticized or abolished parts of the

affirmative defense provisions of Article 120. Parts III and IV describe the current state of consent and mistake of fact as to consent defenses. Part V discusses model instructions that comply with the current state of the law.

I. Article 120’s Consent Defenses: “She said ‘Yes’” and “I thought she said ‘Yes’”

Congress rewrote UCMJ Article 120 in large part to shift the focus in sexual crimes from the victim to the offender. A centerpiece of the revisions was the elimination of “lack of consent” as an element of sexual assault crimes which the prosecution must prove beyond a reasonable doubt.⁴ It appears, however, that some drafters of the statute had difficulty taking the simplest approach: that evidence of consent should be treated like any other relevant evidence, without any statutory label. The drafters chose instead to create an “affirmative defense” of consent and linked it to a mistake of fact defense without recognizing that these two defenses have little in common except the word “consent.”

Consent is a mental state of the alleged victim. In advancing a consent defense, the accused is asserting that the victim freely agreed to engage in a sexual act with him. His factual claim is that “She said ‘Yes’” in words or actions. In a truly offender-focused statute, evidence indicating consent is simply evidence that could raise a doubt concerning whether the Government has proven the crime charged. Consent often is relevant to the element of force, but need not be considered a “defense” to the crime.⁵

Mistake of fact as to consent, by contrast, is entirely offender-focused: it looks at what was in the brain of the accused at the time of the sexual act. In asserting the mistake of fact defense, the accused declares, “I [reasonably] believed she said ‘Yes.’” Neither objective fact (what actually happened) nor the mental state of the victim (actual consent) are crucial concepts in a mistake of fact defense. Because mistake of fact inquires into the thoughts of the accused, it is a paradigm of an affirmative defense which the accused should have to prove. Offender-centered affirmative defenses of this kind involve “an excuse or justification peculiarly within the knowledge of the accused, on which the accused can fairly be required to adduce

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¹ Attributed to Sir Alec Issigonis, architect and designer of the Mini automobile. Design Museum, British Council, <http://designmuseum.org/design/alec-issigonis> (last visited June 14, 2011).

² See *United States v. Neal*, 68 M.J. 289, 301 (C.A.A.F. 2010) (noting that the District of Columbia Court of Appeals attributed this rationale to a similar civilian statute).

³ Major Howard H. Hoege III, “Oversight”: *The Unconstitutional Double Burden Shift on Affirmative Defenses in the New Article 120*, ARMY LAW., May 2007, at 2, 4.

⁴ *United States v. Neal*, 67 M.J. 675, 678–79 (N-M. Ct. Crim. App. 2009), *aff’d* 68 M.J. 289 (C.A.A.F. 2010). The exception to this rule is Article 120(m), Uniform Code of Military Justice (UCMJ), wrongful sexual contact, which includes as an element “without that person’s permission.” See UCMJ art. 120(r) (2008).

⁵ *Neal*, 68 M.J. at 302.

supporting evidence.”⁶ Military law recognizes mistake of fact as a general defense to criminal charges, but usually requires the Government to disprove it, when it applies, beyond a reasonable doubt.⁷

Unfortunately, the drafters failed to recognize the theoretical and evidentiary differences between consent and mistake of fact as to consent and treated them identically in the revised Article 120. One result of this homogenized approach was to re-inject the issue of “consent” into the trial of sexual crimes in the following ill-considered language: “Consent and mistake of fact as to consent are not an issue, or an affirmative defense in a prosecution under any . . . subsection, *except they are an affirmative defense for the sexual conduct in issue in a prosecution*” for rape, aggravated sexual assault, aggravated sexual contact and abusive sexual contact.⁸

The first portion of this sentence is a straightforward statement of the philosophy behind the reworking of Article 120. That clear declaration, however, is immediately contradicted in the “except” clause, which applies to the four most serious sex offenses. Although legislative history for Article 120 is sparse,⁹ the awkward language concerning the consent defenses reads far more like a last-minute compromise in the Joint Services Committee than like a reasoned part of a comprehensive legislative scheme.¹⁰ Apparently unwilling to leave consent out of Article 120, the drafters resurrected it as an “affirmative defense,” for which the accused bears an initial burden of proof.¹¹ The CAAF confirmed in *United States v. Neal* that Congress was free to require the accused to prove this defense in cases charging aggravated sexual assault by force.¹²

⁶ OHIO CODE REVISED, 2901.05 (D)(1)(b) (2010). See also *Russell v. United States*, 698 A.2d 1007, 1017 (D.C. 1997), cited in *United States v. Neal*, 68 M.J. 289, 300 (C.A.A.F. 2010),

⁷ MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 916(b) (2008) [hereinafter MCM].

⁸ UCMJ art. 120(r) (emphasis added); see *id.* art. 120(t)(14), (15), (16). See also *Neal*, 68 M.J. at 300.

⁹ Hoegel, *supra* note 3, at 3.

¹⁰ The inference of compromise is circumstantially supported by the placement of these defenses within the final statute. The consent provisions are the last two sections of the substantive crimes portion Article 120; Article 120(r) & (s); and the final three entries in the definitions section. UCMJ art. 120(t)(14), (15) & (16). The awkward language was not created by Congress, as it was contained within proposal #5 submitted to Congress by the Department of Defense. Hoegel, *supra* note 3, at 4.

¹¹ *Id.* art. 120(r).

¹² *Neal*, 68 M.J. at 304. *Neal* did not address mistake of fact, but the reasoning would apply even more strongly to that defense. See *supra* note 6 and accompanying text. *United States v. Prather*, 69 M.J. 338, 344–45 (C.A.A.F. 2011) (deciding that the accused could not be assigned any burden of proving consent in “substantial incapacity” cases charged pursuant to Article 120(c)(2)). See *infra* Part II.C.

The drafters’ fatal mistake, however, was the creation of a “double burden-shifting”¹³ arrangement for these sex-crime-specific affirmative defenses. Under this arrangement, the accused must first prove the defense by a preponderance of the evidence; then the prosecution must disprove the defense beyond a reasonable doubt. The apparent purpose of this arrangement was to increase the quantum of evidence an accused must present to inject the defenses into a case, and to obtain an instruction on the defense. The assigned burdens, however, created an impossible situation: if the accused proves consent by a preponderance of the evidence, the prosecution can never thereafter eliminate all reasonable doubt about consent. In *United States v. Prather*, the CAAF declared this unique¹⁴ formulation “a legal impossibility.”¹⁵ The *Prather* majority avoided labeling the double burden-shift facially “unconstitutional” deciding the case on a related issue¹⁶ without formally reaching that one—a choice criticized by the dissent in that case.¹⁷

II. The Affirmative Defense Controversy—*Neal*, *Prather*, *Medina*, RCM 916, and the *Military Judges’ Benchbook*

An affirmative defense is “any special defense that, although not denying that the accused committed the objective acts constituting the offense charged, denies, wholly, or partially, criminal responsibility for those acts.”¹⁸

¹³ Article 120(t)(16) states in part: “The accused has the burden of proving the affirmative defense by a preponderance of the evidence. After the defense meets this burden, the prosecution shall have the burden of proving beyond a reasonable doubt that the affirmative defense did not exist.” UCMJ art. 120(t)(16). For a thorough legal deconstruction of the affirmative defenses in Article 120, see Hoegel, *supra* note 3, *passim*.

¹⁴ Hoegel, *supra* note 3, at 5.

¹⁵ *Prather*, 69 M.J. at 344–45. See *infra* Part II (providing a detailed discussion of *Prather* and other constitutional decisions).

¹⁶ *Prather* held that in a case charging “substantial incapacity” under Article 120(c)(2), it was unconstitutional to require the defense to prove consent. The “legal impossibility” language was contained in dicta.

¹⁷ *Prather*, 69 M.J. at 348 (Baker, J., dissenting in part and concurring in the result). Mistake of fact was not discussed in any of the recent burden-shifting decisions even though the military judge instructed on mistake of fact in *Prather*. See *infra* note 23. Because the court did not address the issue, Part II of this article does not do so. Mistake of fact is discussed in Part IV.

¹⁸ UCMJ art. 120 (t)(16). The “old” Article 120 placed the burden on the accused to prove a reasonable belief that the victim of carnal knowledge was at least sixteen years of age. UCMJ art. 120(d)(2) (2005). The MCM uses “affirmative defense” and “special defense” interchangeably. MCM, *supra* note 7, R.C.M. 916(a) and Discussion, R.C.M. 916(k)(2); *id.* MIL. R. EVID. 412(e); UCMJ art. 113(b)(6); *id.* art. 120(o), (q)(1), (t)(16); *id.* pt. IV ¶¶ 13(c)(5), 76(c)(3). The label has no consistent relationship to the burden of proof. Most defenses require the prosecution to disprove the defense beyond a reasonable doubt. MCM, *supra* note 7, R.C.M. 916(b)(1). The accused is assigned the burden to prove lack of mental responsibility by clear and convincing evidence. *Id.* R.C.M. 916(b)(2). Of the remaining defenses listed in Rule for Court-Martial (RCM) 916, mistake of fact as to age in child sexual cases and mistake of fact as to consent each place the

The *Manual for Courts-Martial (MCM)*, unlike some state statutes, does not use “affirmative defense” as shorthand for requiring the accused to bear the burden of proof.¹⁹ Article 120(r) states that both consent and mistake of fact as to consent are affirmative defenses, and Article 120(t)(16) places the initial burden of proving each on the accused.²⁰ Rule for Courts-Martial (RCM) 916, entitled “Defenses,” however, contains no defense of consent. Only mistake of fact as to consent is an enumerated defense.²¹

In three recent cases,²² the CAAF addressed Article 120’s affirmative defense structure, finding serious constitutional flaws in the statutory scheme.²³ These cases demonstrate that Article 120’s consent provisions are badly, perhaps irretrievably, flawed. The trio of cases answers some questions clearly, and leaves others remarkably vague. These cases clearly establish that the double burden-shift of Article 120(t)(16) is unconstitutional, and that the accused cannot be required to prove consent in “substantial incapacitation” cases. The unanswered questions include: Is there a way constitutionally to charge Article 120(c)(2) in cases involving substantial incapacitation? Does treatment of consent or mistake of fact differ in “force” cases and “substantial incapacitation” cases? Are there instructions that

burden of proof on the accused and contain the double burden-shift language. *Id.* R.C.M. 916(b)(3) and (b)(4).

¹⁹ Several states define an “affirmative defense” as one on which the defendant bear the burden of proof, usually by a preponderance of the evidence. ALASKA STAT. § 11.81.900 (2) (2011); CONN. GEN. STAT. ANN. § 53a-12 (2011) (annotations list eleven statutes with affirmative defenses); HAWAII REV. STAT. § 701-115 (2)(b) (2011); N.Y. PENAL LAW § 25.00 (Consol. 2011); TEX. PENAL CODE ANN. § 2.04(d) (West 2010); 2011 Mo. Legis. Serv. H.B. 111 (West) (amending MISSOURI REV. STAT. § 568.040 2(4) to include language assigning the accused the burden of proof of an affirmative defense by preponderance of the evidence in child nonsupport cases).

²⁰ The only other “affirmative defenses” in the *MCM* which require the accused to prove the defense are lack of mental responsibility, RCM 916(k)(1), and age in child sexual offenses, RCM 916(j)(2).

²¹ *MCM*, *supra* note 7, R.C.M. 916 (b)(4) (burden of proof); *id.* R.C.M. 916(j)(3) (ignorance or mistake of fact, sexual offenses). Although the “Discussion” falling in the middle of RCM 916(j) specifically refers to Article 120(r), there is no reference to consent being a defense, affirmative or ordinary. Rule for Court-Martial 916(j)(3) quotes Article 120(t)(15) (definition of mistake of fact as to consent) essentially verbatim, but makes no reference to Article 120(t)(14) (consent). *See also id.* R.C.M. 920(e)(5)(D) (requiring instructions in accordance with RCM 916, but not referring to UCMJ article 120(t)(14), (15) or (16)).

²² *United States v. Neal*, 68 M.J. 289 (C.A.A.F. 2010); *United States v. Prather*, 69 M.J. 338 (C.A.A.F. 2011); *United States v. Medina*, 69 M.J. 462 (C.A.A.F. 2011). Note that mistake of fact was not raised as a defense in any of these trials. *See infra* Parts II and IV.

²³ Significantly, only the defense of consent was raised in these three cases. While the CAAF opinions address the affirmative defense provisions which include both consent and mistake of fact, the holdings directly apply only to the defense of consent. This article contends that the defense of mistake of fact can and should be considered both differently than and separately from consent. *See discussion infra* Parts III and IV.

can “save” Article 120 where the case contains “some evidence” of consent or mistake of fact as to consent?

The answer to each of these questions is “yes.” Getting to “yes,” however, requires inquiry into the interplay of the CAAF decisions, the Army Trial Judiciary’s solutions to the defects in the statute, and consideration of the defenses set out in RCM 916.

A. Prescient But Overbroad: The Army Trial Judiciary Solution—Saving Convictions, Eliminating Burdens, Creating Elements

A brief historical note is necessary before the recent CAAF decisions can be put in proper context. As the new Article 120 approached its effective date of 1 October 2007,²⁴ senior members of the Army Trial Judiciary were concerned. These judges noted that the affirmative defense provisions of the law contained a strange double burden-shifting arrangement that raised questions both about congressional intent and also about the legal viability of the statute.²⁵

In an unprecedented abrogation of clear pronouncements of both Congress and the President, the Army Trial Judiciary unilaterally eliminated the affirmative defenses defined in Article 120(r) before they ever took effect.²⁶ Their solution, placing the burden on the Government to disprove consent and mistake of fact as to consent, was prescient and simple. It also drastically shifted the balance of Article 120 cases against the Government. The magnitude of that shift was unnecessary.

Without briefing, argument, or even a case before it, “[t]he Army Trial Judiciary [took] the approach that consent is treated like many existing affirmative defenses; if raised by some evidence, the military judge must advise the members that the prosecution has the burden of proving beyond a reasonable doubt that consent did not exist.”²⁷

The explanation for this instructional “note” correctly recognized the “illogic” of the double burden-shift. The Trial Judiciary interpreted the affirmative defense provisions to imply that Congress must have intended something for

²⁴ National Defense Authorization Act for Fiscal Year 2006, Pub. L. No. 109-163, § 552(c), 119 Stat. 3136, 3263 (2006).

²⁵ Major Harold Hoega, then a professor in the Criminal Law Department at The Judge Advocate General’s Legal Center & School, alerted readers to the same problem, analyzing the new Article 120 in great detail. Hoega, *supra* note 3.

²⁶ U.S. DEP’T OF ARMY, PAM. 27-9, MILITARY JUDGES’ BENCHBOOK para. 3-45-3 n.10.1 (1 Jan. 2010) [hereinafter BENCHBOOK] (approved interim update).. Hoega, *supra* note 3, at 17 (citing a draft version with identical language in an article published in May 2007).

²⁷ *Id.* Para. 3-45-3 n.10.1

both of the burdens.²⁸ The Trial Judiciary's solution inferred that the accused's burden was intended to be a burden of production, and the Government's burden was intended to be the burden of proof once the defense was raised. This solution, however, is not as logical as it might appear.

The *Military Judges' Benchbook* (*Benchbook*) provides no guidance on how to treat the textual burden placed on the accused as a burden of production. Does a judge make a preliminary determination of whether the accused has met his burden, as the phrase "burden of production" would suggest? What is the burden of proof? The *Benchbook* suggests no answer. If the accused produces evidence of consent or mistake of fact by that standard, how could the government ever disprove consent beyond a reasonable doubt?²⁹ In practice, Army military judges have ignored the stated burden of production, and the *Benchbook* contains neither procedures nor notes about using it. The recommended instructions rely solely on the general rule that if a defense is raised by some evidence the Government must disprove the defense beyond a reasonable doubt.³⁰

The practical effect of the *Benchbook* instruction is to re-impose on the Government the burden to prove the congressionally-abandoned element of lack of consent.³¹ The *post hoc* reason given for this choice was the "rule of lenity," the principle that criminal statutes are to be construed in favor of the accused.³² Relying on that rule of

statutory construction, while logical and legally sound, was not the only possible choice, as will be shown in Part III.

The *Benchbook* solution was in place when criminal trials charging the new Article 120 first reached military courtrooms. While most Army judges delivered the *Benchbook* instruction concerning consent and mistake of fact, sister service courts frequently instructed in the language of the statute. Constitutional challenges to Article 120's affirmative defenses reached CAAF in late 2010. The opinions which followed confirmed that the statutory affirmative defense provisions were legally unsustainable.

B. *United States v. Neal*—Consent and the "Force" Provisions of Article 120

Airman Raymond Neal was charged with a violation of Article 120(e), aggravated sexual contact by use of force.³³ The defense moved to dismiss that specification, claiming that the statute unconstitutionally required the accused to disprove an "implied" element of the crime. "At trial, the military judge interpreted Article 120(e) as requiring the defense to disprove an implied element—lack of consent—and dismissed the charge on the ground that the statute unconstitutionally shifted the burden of proof on an element from the Government to the defense."³⁴ The Navy-Marine Court of Criminal Appeals (N-MCCA) disagreed, and the case was certified to CAAF.

The CAAF rejected the concept of an implied element of consent,³⁵ confirming that the legislature has broad powers to determine the elements of crimes. Article 120 states that "consent and mistake of fact as to consent are not an issue" in the revised Article 120. In *Neal*, CAAF interpreted "an issue" narrowly to avoid constitutional error. If Article 120 were interpreted to preclude presentation of any evidence of consent, the court held, the statute would be depriving the accused of evidence relevant to rebut the Government's proof. The *Neal* court determined that "the provision could be interpreted as providing that consent is not 'an issue'—a discrete matter—that must be proved beyond a reasonable doubt as an element of the offense,"

²⁸ *Id.* Paragraph 3-45-5 note 10.1 states

Because this burden shifting provision appears illogical, it raises questions ascertaining Congressional intent. In an attempt to reconcile this apparent inconsistency, the Army Trial Judiciary is treating the former as a burden of production and the latter as a burden of persuasion and taking the approach that consent is treated like many existing affirmative defenses.

Id. para. 3-45 n.10.1.

²⁹ The CAAF's answer to this question is: "that could never happen." See Part II.C, *infra* (discussing *United States v. Prather*, 69 M.J. 338 (C.A.A.F. 2011)) and text accompanying note 44.

³⁰ See *United States v. DiPaola*, 67 M.J. 98, 99 (C.A.A.F. 2008) (illustrating the general rule before the 2007 changes; the original case was tried under the prior statute. *Id.* at 101 n.5).

³¹ Ironically, this usurpation of congressional and Executive intent may have saved the convictions in Army "substantial incapacity" cases. As will be seen below *United States v. Medina*, 69 M.J. 462, 465 (C.A.A.F. 2011) held that requiring the accused to prove consent was unconstitutional in cases charged under Article 120(c)(2). Because most Army judges have followed the *Benchbook* instruction placing the burden on the Government to disprove consent, Army panels have not received the unconstitutional instruction. See Part III.D, *infra* (discussing *Medina*).

³² BENCHBOOK, *supra* note 26, para. 3-45-3 (approved Change 11-02A) (citing rule of lenity as suggested on-the-record justification for judges following the *Benchbook* instruction). See *United States v. Williams*, 458 U.S. 279, 290 (1982) (briefly discussing the rule of lenity). The 2007 *Benchbook* explanation for giving an instruction that ignored the statutory preponderance language did not cite the rule of lenity (and, indeed, did not

provide trial judges with any legal justification to cite for the change). That principle was invoked first in approved Change 11-02 to the *Benchbook*, which adds the explanation issued to enable judges to comply with the holding of *Medina* that "without legal explanation" it was error to use the 2007 *Benchbook* instruction. *Medina*, 69 M.J. at 465.. See *infra* note 94 (quoting the new *Benchbook* instruction).

³³ *United States v. Neal*, 68 M.J. 289, 292 (C.A.A.F. 2010). The elements of Article 120(e) are defined by reference to Article 120(a). Airman Neal was charged with the equivalent of subsection (c)(1)(B).

³⁴ *Id.* at 291.

³⁵ *Id.* at 302–03.

and upheld the power of Congress to remove the element of consent from the statute.³⁶

After confirming the constitutionality of the changes to Article 120, the court then explained why eliminating “lack of consent” as an element was a reasonable exercise of congressional authority.

Article 120 focuses on the force applied by an accused, not on the mental state of the alleged victim. . . . The statute describes the prohibited act in terms of the degree of force applied to the alleged victim by the accused. Although the statute describes the degree of force in terms of the relative actions of the accused and the alleged victim, the prosecution is not required to prove whether the alleged victim was, in fact, willing or “not willing.” If the evidence demonstrates that the degree of force applied by an accused constitutes “action to compel” another person, the statute does not require further proof that the alleged victim, in fact, did not consent.³⁷

Turning to the affirmative defense of consent, the CAAF approved the statutory affirmative defense framework³⁸ as applied to “force” cases in which consent was raised by the evidence.³⁹ The court also affirmed that Congress can require an accused to prove affirmative

³⁶ *Id.* at 301–02.

³⁷ *Id.* at 302 (citing *Russell v. United States*, 698 A.2d 1007, 1009 (D.C. 1997), describing a similar civilian statute, D.C. CODE § 22-3007). While CAAF relied heavily on the parallel sexual assault statute discussed in *Russell*, that statute had been amended to retain a defense of consent to sexual crimes, but to eliminate the defendant’s burden to prove the defense, even before CAAF announced its decision in *Neal*. D.C. Law 18-88, 56 D.C. Reg. 7413 (Dec. 10, 2009) states in part, “Sec. 213. Section 206 of the Anti-Sexual Abuse Act of 1994, effective May 25, 1995 (D.C. Law 10-257; D.C. Official Code § 22-3007), is amended by striking the phrase, ‘which the defendant must establish by a preponderance of the evidence.’”

³⁸ *Neal* addresses only consent, not mistake of fact as to consent, because that was the only defense at issue in the appeal. *Neal*, 68 M.J. at 297. *Neal* appears to validate the defense provisions of Article 120, and raises no concerns about the double burden-shifting arrangement later declared to be “a legal impossibility” in *United States v. Prather*. 69 M.J. 338, 345 (C.A.A.F. 2011). The double burden-shift was not raised on appeal, but the military judge may have applied it, finding that the accused’s testimony concerning the encounter raised an issue of consent. The judge dismissed the charge before there was an opportunity to apply the second burden of proof. The *Neal* court therefore did not address the issue of whether the double burden shift is generally “illogical and unusable” as claimed in the *Benchbook*. The court was careful to note that it was analyzing the specific trial court finding that consent was an “implied element.”

³⁹ As will be seen, below, Part II.C, *United States v. Prather*, 69 M.J. 338 (C.A.A.F. 2011) declared the affirmative defense arrangement unconstitutional in relation to the “substantially incapable” sections of the statute, Articles 120(c)(2) and 120(h). By reasonable analogy, Article 120(a)(5) should be equally affected by *Prather*.

defenses, but also pointedly warned that a statute cannot oblige the accused to disprove an element of a crime.⁴⁰ The court then explained that proper instructions could avoid improperly shifting the burden of proof to the accused.

[T]he statute does not preclude consideration of consent evidence by a court-martial panel when determining whether the prosecution has proven the elements of the offense beyond a reasonable doubt, and it permits consideration of such evidence with respect to the affirmative defense of consent. If such evidence is introduced, the military judge must instruct the members to consider all of the evidence, including the evidence of consent, when determining whether the government has proven guilt beyond a reasonable doubt. See [*Martin v. Ohio*], 480 U.S. [228] at 232-36 [(1987)]. In doing so, the military judge must be mindful of both the content and sequential structure of the instructions.⁴¹

Thus, while the court said almost nothing that would guide a military judge in ruling on the admissibility of consent evidence, it did include some direction concerning instructions.

C. *United States v. Prather*—Consent and the “Substantial Incapacity” Provisions of Article 120

Airman Stephen Prather was charged with violation of Article 120(c)(2), aggravated sexual assault of “[SH], who was substantially incapacitated.”⁴² After the Air Force Court of Criminal Appeals affirmed his conviction,⁴³ the case was certified to CAAF. In *United States v. Prather*, CAAF held that the accused could not be required to prove consent in cases presented under the “substantially incapacitated” section of Article 120(c)(2).⁴⁴ Because an *element* of Article

⁴⁰ *Neal*, 68 M.J. at 298 (citing *Patterson v. New York*, 432 U.S. 197, 205–06 (1977)).

⁴¹ *Id.* at 303.

⁴² *Prather*, 69 M.J. 341 n.4.

⁴³ *Id.* at 339.

⁴⁴ Article 120(c) states, in part:

Any person subject to this chapter who . . . (2) engages in a sexual act with another person of any age if that other person is substantially incapacitated or substantially incapable of—

- (A) appraising the nature of the sexual act;
- (B) declining participation in the sexual act; or

120(c)(2) is the inability of the alleged victim to consent, the court stated, it is unconstitutional to require the accused to prove, or even to claim, consent. “If an accused proves that the victim consented, he has necessarily proven that the victim had the capacity to consent, which logically results in the accused having disproven an element of the offense of aggravated sexual assault—that the victim was substantially incapacitated.”⁴⁵

While *Prather* directly addressed the consent defense only in substantial incapacity cases and did not address mistake of fact at all, the decision also invalidated one aspect of the affirmative defense provisions for both defenses in any case. After declaring the issue of the second burden shift “moot,” the court stated in dicta that the double burden-shifting scheme of Article 120(r)⁴⁶ creates a “legal impossibility” because if an accused proves consent by a preponderance of the evidence, the Government could never thereafter disprove consent beyond a reasonable doubt.⁴⁷ The *Prather* majority did not use the word “unconstitutional” to describe this “legal impossibility.” The dissent in the case was not so reluctant, chastising the majority for avoiding the label “unconstitutional” when it so clearly applies.⁴⁸ The following analysis presumes that the double burden-shift is both illogical and unconstitutional.

Given that the double burden-shift is unconstitutional, judges and judge advocates are left with several possible approaches for future cases, which may be different for force cases and substantial incapacity cases. Is the entire affirmative defense unconstitutional, or only one or the other burden? If so, should a court sever the entire affirmative defense provisions, or only sever one or the other burden of proof? Congress expressed two incompatible burdens in Article 120’s affirmative defense provisions: (1) that the defense bears a burden to prove consent by a preponderance of the evidence; and (2) that the Government

must disprove consent, when raised by evidence, beyond a reasonable doubt. *Prather* declared the first of these choices unconstitutional when the charge alleges substantial incapacity. But in substantial incapacity cases, the Government cannot have an independent duty to disprove a “defense” of consent, because if the Government proves substantial incapacity, by definition it has proven that the victim *could not* consent to sexual activity.⁴⁹ This reasoning supports an argument that the entire consent provision of Article 120 is meaningless in substantial incapacity cases. Part III further develops this conclusion.

The legal status of force cases is facially quite different. *Neal* validated placing the burden on the accused to prove consent, but failed to address the double burden-shift. Can a court legally require the accused to prove consent, but sever the Government’s second burden? Must the court impose the burden on the Government to disprove consent, severing only the burden placed on the accused? Or can the court sever all of the consent defense provisions and treat the issue of consent merely as evidence relevant to the issue of force, as suggested in *Neal*?⁵⁰ Part III explores each of these possibilities.

Prather holds that the defense does not have to prove consent in substantial incapacity cases, and that instructing the panel on the second shift does not cure the constitutional defect created by the first shift. (It further states, in dicta, that the double burden-shift can never be applied in any case, and that no instructions can save it.⁵¹) Thus, *Prather* implies that, in substantial incapacity cases, the military judge must instruct the panel that the Government has the burden to prove “substantial incapacity” beyond a reasonable doubt, without imposing any burden on the defense. It is prudent, however, to incorporate *Neal*’s suggestion that if evidence of consent is adduced at trial, the judge must instruct the panel to consider that evidence in deciding whether the Government has met its burden of proof.⁵²

A broader argument can be made, however, that if the military judge instructs on consent, the instruction should require the Government to disprove consent beyond a reasonable doubt. *Prather* states that proof of substantial incapacity is sufficiently akin to proof of lack of consent that the accused cannot be required to prove consent. Thus, lack of consent arguably is an implicit element of “substantially

(C) communicating unwillingness to engage in the sexual act; is guilty of aggravated sexual assault. . . .

The CAAF’s *Prather* holding applies equally to Article 120(h) “substantial incapacity” cases by direct reference (since 120(h) is defined by reference to 120(c)). By inescapable inference, the holding also applies to Article 120(a)(5) (“thereby substantially impairs the ability of that other person to appraise or control conduct. . . .”), and its coordinate charge under Article 120(e).

⁴⁵ *Prather*, 69 M.J. at 343.

⁴⁶ Article 120(t)(16) states in part: “The accused has the burden of proving the affirmative defense by a preponderance of evidence. After the defense meets this burden, the prosecution shall have the burden of proving beyond a reasonable doubt that the affirmative defense did not exist.” UCMJ art. 120(t)(6). Article 120(r) defines consent and mistake of fact as to consent as affirmative defenses. *Id.* art. 120(r).

⁴⁷ *Prather*, 69 M.J. at 344-45.

⁴⁸ *Id.* at 348 (Baker, J., dissenting as to Part A and concurring in the result) (the dissent, following *Neal*, would have upheld the initial burden shift but reversed the case based on the second shift).

⁴⁹ UCMJ art. 120(t)(14) (“A person cannot consent to sexual activity if . . . substantially incapable of . . . appraising the nature of the sexual conduct at issue . . . physically declining participation in the sexual conduct . . . or . . . physically communicating unwillingness to engage in the sexual conduct at issue.”)

⁵⁰ *United States v. Neal*, 68 M.J. 289, 303, 304 (C.A.A.F. 2010).

⁵¹ *Prather*, 69 M.J. at 344-45.

⁵² *Neal*, 68 M.J. at 303. Suggested model instructions are presented in Part V, *infra*.

incapable,” which the Government must prove.⁵³ This argument is undercut by *Neal*’s refusal to apply implicit elements to Article 120, but it has greater traction in a substantial capacity context than in a force case.

Mistake of fact as to consent is largely unaffected by the central holding of *Prather*. Mistake of fact does not address the actual consent of the victim, but only the perception of the accused. Asserting the defense therefore does not require the accused to disprove the victim’s ability to consent, which was the basis for *Prather*’s finding of unconstitutionality. The double burden-shift language in Article 120, on the other hand, is impossible to apply under any circumstances, whether applied to mistake of fact or consent.

D. *United States v. Medina*—Can an Illegal Instruction Be Acceptable?

Staff Sergeant (SSgt) Jose Medina was convicted of, among other charges, violation of Article 120(c)(2), aggravated sexual assault of a person who was substantially incapacitated. The accused raised defenses of consent and mistake of fact as to consent. Although the facts were different, the charge and the consent defense presented at trial were basically the same as those in *Prather*. The crucial difference between the cases, however, lies with the instructions given by the military judge concerning the burden of proof for the defenses.

In *Prather*, the instructions tracked Article 120(t)(14), (t)(15) and (t)(16), placing on the defense the burden to prove both the consent and mistake of fact defenses by a preponderance of the evidence. Those instructions also contained the double burden-shifting provisions of Article 120(t)(16).⁵⁴ In *Medina*, the trial judge delivered instructions on the defenses which had been devised by the Army Trial Judiciary and published in the *Military Judges’ Benchbook*. Those instructions state, in relevant part:

The evidence has raised the issue of whether [the victim] consented to the sexual acts concerning the offense of aggravated sexual assault

Consent is a defense to that charged offense

The prosecution has the burden to prove beyond a reasonable doubt that consent did not exist. Therefore, to find the accused guilty of the offense of aggravated sexual assault . . . you must be convinced beyond a reasonable doubt that, at the time of the

sexual acts alleged, [the victim] did not consent.⁵⁵

Thus, *Medina*’s instructions required the Government to prove, not only all elements, but the non-element of lack of consent, beyond reasonable doubt. By so doing, these instructions increased the Government’s burden beyond that required by Article 120. In so doing, they ignored both the language and intent of the amendments to Article 120, but also avoided the constitutional infirmity identified in *Prather*.

Medina claimed on appeal that failure to instruct in the language of Article 120 was a systemic error requiring reversal. The N-MCCA agreed that the military judge erred by ignoring the text of the statute, but held that the error was harmless because it favored Medina by increasing the government’s burden of proof.⁵⁶

United States v. Medina was certified to CAAF, and was argued on the same day as *Prather*. In a decision released thirty days after *Prather*, the CAAF stated the following

In *Prather* we noted that the Article 120, UCMJ, statutory scheme in these circumstances placed military judges in an impossible position and, ‘in order to provide an instruction that accurately informed the panel of the Government’s burden (as recommended by the Military Judges’ Benchbook), the military judge would have to ignore the plain language of Article 120, UCMJ.’ [*Prather*] at 343 n. 8. That appears to be exactly what occurred in this case. The military judge did not employ the terms of the statute with respect to the affirmative defense in his instructions, but set forth no reasons in the record for his deviation from the statutory

⁵³ See *Prather*, 69 M.J. at 343.

⁵⁴ *Id.* at 340, 345-46.

⁵⁵ *United States v. Medina*, 69 M.J. 462, 464 (C.A.A.F. 2011). The trial judge also instructed on mistake of fact as to consent using an instruction from the *Benchbook*. *Id.* at 464 n.2. The *Benchbook*’s “solutions” to the ills of Article 120 are discussed in Part II.A, *infra*.

⁵⁶ *United States v. Medina*, 68 M.J. 587, 593 (N-M. Ct. Crim. App. 2009). A simple statement of that decision understates the interesting legal debate waged in the concurring and dissenting opinions. Judge Booker’s concurrence cleverly harmonizes the difficult language and procedures of article 120, but his reasoning was later rejected by *Prather*. Judge Maksym also concurred in the result, but scathingly criticized the “poorly written, confusing and arguably absurdly structured and articulated act of Congress” that is Article 120. He concluded that the *Benchbook* instruction is the only way to save the constitutionality of Article 120, and that its use saved the conviction in this case. Judge Beal, dissenting in part, argued that Article 120 as currently written is facially unconstitutional. More significantly, he explained that the “radically unauthorized” use of the *Benchbook* instruction to avoid the pitfalls of the affirmative defense scheme has had the unintended consequence of making sexual offenses harder to prosecute under the revised Article 120 than under the former version. *Id.* at 593–602.

scheme. It is not apparent from the record whether the military judge interpreted the statute, misinterpreted the statute, affirmatively severed a portion of the statute on constitutional grounds, or simply overlooked a portion of the statute.⁵⁷

The court held that “in the absence of a legally sufficient explanation, it was error for the military judge to provide an instruction inconsistent with the statute.” Because the error benefitted the accused, however, it was harmless.⁵⁸ Yet the court also held that “[t]he instruction that was given was clear and correctly conveyed to the members the Government’s burden.”⁵⁹

Medina effectively holds that cases can be prosecuted pursuant to Article 120(c)(2) by instructing in accordance with the *Benchbook*, as long as judges provide a legal reason for deviation from the statutory language of Article 120.⁶⁰ *Medina* does not hold, however, that the *Benchbook* provides the only acceptable approach. Unfortunately, the court’s silence on other acceptable solutions leaves practitioners and judges in an uncertain legal position. An alternative solution is proposed in Part III.

Medina establishes that giving the *Benchbook* instruction, with a legally sufficient explanation, will likely avoid reversible error on appeal. The *Benchbook* instruction, however, makes an appeal less likely, because it increases the likelihood of acquittal. “[A]pplication of the statute in such a manner actually makes prosecution of these sorts of sexual offenses more difficult.”⁶¹ These instructions graft an additional element onto the Government case whenever consent is raised by the evidence. The instructions effectively require the Government to focus on both the actions of the perpetrator and on the mental state of the victim. Article 120 intended to eliminate lack of consent as an element, but the *Benchbook* instructions reinsert that element of proof into the statute. The result is a confusing hybrid of instructions that first imply that consent is not an element of proof, then state directly that it is. A jury that is confused by the instructions is more likely to find a reasonable doubt.

⁵⁷ *Medina*, 69 M.J. at 464 .

⁵⁸ *Id.* at 465–66.

⁵⁹ *Id.* at 465. What the Court means by “correctly conveyed” is unclear, but the language together with the court’s ruling strongly suggest that the Court has approved the *Benchbook* instruction.

⁶⁰ The Army Trial Judiciary has adopted exactly this interpretation, and the approved changes to the *Benchbook* now provide language to supply such a reason on the record. *BENCHBOOK*, *supra* note 26, para. 3-45-3.

⁶¹ *United States v. Medina*, 68 M.J. 587, 602 (N-M. Ct. Crim. App. 2009). (Beal, J., dissenting in part).

E. Maybe the President Got It Right—RCM 916 Defenses

Parts III and IV present practical solutions to overcome the defects CAAF has identified in Article 120 by keeping mistake of fact as to consent as a defense and eliminating actual consent as a defense. Rule for Court-Martial 916, is already written this way—mistake of fact as to consent is listed as a defense, but consent is not.

The treatment of consent and mistake of fact in RCM 916 is more consistent with the theoretical underpinnings of Article 120 than is the punitive article itself. Consent was not, prior to 2007, an RCM defense, while mistake of fact has long been a defense to any crime.⁶² A simple resolution to the holdings of *Neal* and *Prather* lies in following the overall philosophy of defenses contained in RCM 916, by treating mistake of fact as a defense, but treating consent as mere evidence.⁶³

The common element of defenses defined in RCM 916 is that each is based on a factual predicate that allegedly affects the behavior of the accused or his participation in acts which would otherwise be criminal. Nearly all of those defenses involve a mental state or mental belief held by the accused.⁶⁴

Rule for Court-Martial 916’s focus on the accused directly parallels Article 120’s philosophical shift of focus from the victim to the offender. Moreover, the rule’s omission of a defense of “consent” also is more consistent with the structure of military justice defenses than is the inclusion of consent as a defense in the text of Article 120. Consent relates to the mental state of the alleged victim. Mistake of fact, like other RCM 916 defenses, focuses primarily on the mental state of the accused. Mistake of fact as to consent is “something within the knowledge of the accused that he may fairly be required to prove.”⁶⁵

⁶² Mistake of fact was included as a defense in the first edition of the *MCM*. *MCM*, *supra* note 8, R.C.M. 916(j)(1984), 49 Fed. Reg. 17,152 (Apr. 23, 1984).

⁶³ There are limits, however, to the direct applicability of RCM 916. The mistake of fact as to consent defense in RCM 916(j)(3) did incorporate the unconstitutional double burden-shift contained in Article 120 (t)(16) and declared “a legal impossibility” in *United States v. Prather*. 69 M.J. 338, 345 (C.A.A.F.). Because RCM 916(j)(1) is also a mistake of fact defense, section (j)(3) need not be applied, and can be severed from the RCM on the same reasoning that the affirmative defenses can be severed from Article 120. *See infra* note 90 and accompanying text.

⁶⁴ Rule for Court-Martial 916(f) (accident) and RCM 916(i) (inability) are not directly the result of the mental process of the accused, but are still information most available to the accused.

⁶⁵ *Russell v. United States*, 698 A.2d 1007, 1017 (D.C. 1997), *cited with approval* in *United States v. Neal*, 68 M.J. 289, 300 (C.A.A.F. 2010). *Russell* referred to “consent” as the “something” that the accused could be required to prove. Mistake of fact is much more “within the knowledge of the accused” than is consent.

III. Where Are We?—The Consent Defense

A “she said ‘yes’” consent case is commonly a pure credibility contest.⁶⁶ The victim usually testifies to facts showing force, threat, or bodily harm,⁶⁷ and the defense attacks those facts by cross-examination and testimony, often including that of the accused. As a practical matter, the factfinder’s credibility determinations will decide the case. Evidence relevant to actual consent, if credited, may raise a reasonable doubt of the accused’s guilt.⁶⁸

If the accused elects to testify, labeling that testimony as a “defense” of consent is unnecessary, as the fact-finder’s resolution of the classic “swearing contest” will likely determine the outcome. Consent is inevitably tied to the question of force,⁶⁹ and therefore in this scenario, need be neither a defense nor an element. *Neal* established that consent can be treated constitutionally as a simple factual question.⁷⁰ Appropriate instructions can guide the factfinder to consider the evidence of consent as part of the overall factual determination of guilt, just one fact among many to be considered in determining whether the Government has proven the accused guilty beyond a reasonable doubt.⁷¹

Medina requires a “legally sufficient explanation” if a military judge is to ignore the affirmative defense provisions of Article 120. Fortunately, a simple and elegant solution grows naturally out of *Prather*. Requiring the accused to prove consent in these cases was ruled unconstitutional. Because of that unconstitutionality, a military judge can reasonably sever the affirmative defense provisions from the statute, and apply “*Neal* instructions” that the Government must prove elements beyond a reasonable doubt, and that evidence of consent may raise a reasonable doubt.⁷² This approach is consistent with severability theory that seeks to “retain those portions of the Act that are (1) constitutionally valid, (2) capable of ‘functioning independently,’ and (3)

consistent with Congress’ basic objectives in enacting the statute.”⁷³

The first factor of the severance theory is easy to apply. Severing the affirmative defense sections from the remainder of the statute eliminates both provisions shown to be unconstitutional in *Prather*. Moreover, *Neal* has already held that the statute would be constitutional without any mention of consent, whether as an element or a defense.

As for the second factor, as noted in *Neal*, the statute can function perfectly well without the affirmative defense sections. With respect to *independent* functioning, “[t]he more relevant inquiry in evaluating severability is whether a statute will function in a *manner* consistent with the intent of Congress”⁷⁴ without the excised sections. As a practical matter, criminal liability and trial practice would remain the same without the affirmative defense sections. Only nonconsensual activity would be punished under the statute. If the defense had evidence of consent, it would raise that evidence, and if that evidence raised reasonable doubt as to force, the factfinder would acquit. Congress’s apparent intent of removing consent as an element, while leaving it as an issue that the defense could raise, would be preserved. The only loss would be the confusion created by the impossible burden shift.

Furthermore, the remainder of the statute can function perfectly well without the defense sections. If those sections are eliminated, the general defenses of RCM 916, including the long-standing mistake of fact defense, are still available to an accused.⁷⁵ The Government loses the requirement that the accused must prove consent, but the Government is not saddled with proving lack of consent beyond a reasonable doubt, as the *Benchbook* instructions require. The accused retains the ability to elicit evidence of consent, but without any burden of proof on that factual question.

The third severance factor, whether severance of the affirmative defense sections is “consistent with Congress’s basic objectives in enacting the statute,”⁷⁶ presents a more difficult analysis. The double burden-shift expresses two separate principles: (1) to make the accused meet some threshold greater than “some evidence” to raise the defense, and (2) to make the Government disprove the defense, once raised, beyond a reasonable doubt. While *Prather* declared that it is “impossible” to effectuate both intents as written in Article 120,⁷⁷ the legal import of the holding is that the

⁶⁶ A discussion of general trial techniques for supporting or attacking the credibility of witnesses is beyond the scope of this article. Aspects related specifically to consent defenses are addressed below.

⁶⁷ Rape or abusive sexual contact can be charged based on “render[ing] another person unconscious” and by forced administering of a drug. UCMJ art. 120(a)(4) and (5) (2008). These methods of committing rape, however, have sufficient similarity to the “substantially unconscious” language addressed in *United States v. Prather*, such that it is likely they suffer from the same flaws in relation to consent.

⁶⁸ *Neal*, 68 M.J. at 304.

⁶⁹ *See id.* at 301–02.

⁷⁰ *Id.* at 304.

⁷¹ *Id.* at 303.

⁷² *Id.*

⁷³ *United States v. Booker*, 543 U.S. 220, 258–59 (2005) (citations omitted).

⁷⁴ *Alaska Airlines v. Brock*, 480 U.S. 678, 685 (U.S. 1987) (emphasis in original). *See Regan v. Time, Inc.* 468 U.S. 641, 653 (1984) (presumption in favor of severability of unconstitutional provisions).

⁷⁵ *Booker*, 543 U.S. at 258–59.

⁷⁷ *United States v. Prather*, 69 M.J. 338, 345 (C.A.A.F. 2011).

double burden-shift is unconstitutional,⁷⁸ and the following discussion begins with this premise.

The Army Trial Judiciary has chosen the simplest accommodation of the conflicting burdens in (t)(16): ignore the burden on the accused and apply the burden on the Government based on the “rule of lenity.” Although simple, this solution is far more radical a revision of Article 120 than is either legally supportable or legally required. In effect, the Army Trial Judiciary solution repealed all key aspects of the Article 120 revisions, not just an unconstitutional one, by re-concentrating the required proof on victim behavior, and re-assigning the burden to the Government to disprove lack of consent. Nothing in *Neal*, *Prather*, or the rules of statutory construction requires this major rewriting of the law.⁷⁹

The post-*Medina* justification for the Army Trial Judiciary approach is the “rule of lenity.”⁸⁰ The rule of lenity was never intended to abrogate major portions of a statute. That “rule” simply encourages courts, where the

principal intent of the lawmaker is ambiguous, to adopt a statutory construction that favors the accused.⁸¹

The primary purpose of the Article 120 revision, however, is clear. Congress intended to eliminate lack of consent as an element of sexual crimes, and to shift the focus of the statute to the behavior of the offender rather than the victim.⁸² This major change was a reasonable exercise of legislative power.⁸³ “[Whenever] an act of Congress contains unobjectionable provisions separable from those found to be unconstitutional, it is the duty of this court to so declare, and to maintain the act in so far as it is valid.”⁸⁴ The resulting statute should function in a manner consistent with Congressional intent.⁸⁵

Severing the entirety of the affirmative defense provisions preserves legislative intent to focus sexual offenses on the offender. Applying the rule of lenity to reinstate lack of consent, an element Congress consciously acted to eliminate from consideration in sexual offenses contradicts the primary legislative purpose behind the reformulation of Article 120.

Although certainly some members of Congress would object to severing the affirmative defense provisions, that solution retains the most basic purposes of the new statute, without shifting the balance of the statute between the prosecution and the defense. Severance avoids the serious disadvantage that the *Benchbook* solution imposes on the Government to prove an element (lack of consent) which Congress clearly intended to eliminate. At the same time, severance also allows the accused to present evidence of consent pursuant to a lower burden of proof than the affirmative defense provisions placed on the defense. While this approach does not assure the accused of an instruction that proof of consent by a preponderance of the evidence requires acquittal, severance still guarantees an instruction that consent evidence may raise a reasonable doubt as to force. Severance effectively maintains a balance between the prosecution and the accused similar to that which motivated the creation of the double burden-shift.

Overall, the uncomplicated solution of severing all references to affirmative defenses retains the basic intent of Congress, while solving the instructional difficulties exposed in *Prather* and *Medina*. Although any severance decision carries with it some uncertainty, instructions in line with the suggestions in *United States v. Neal*⁸⁶ are the most balanced

⁷⁸ See *id.* at 348 (Baker, J., dissenting) (“I agree with the majority that the burden shifting creates a legal impossibility. However, there is another word for what the statute does here and that is ‘unconstitutional.’ On this question of law, the Court should not shy away from stating so.”).

⁷⁹ The *Benchbook* instruction states that it should be used once “some evidence” of consent is elicited during trial. The “some evidence” standard is extremely low, and does not require the accused to testify. *United States v. DiPaola*, 67 M.J. 98, 99 (C.A.A.F. 2008). *United States v. Jones*, 49 M.J. 85, 90-91 (C.A.A.F. 1998). Thus, the instruction is likely to be extremely common.

⁸⁰ In response to *United States v. Medina*, the following *Benchbook* update was issued in February 2011: “Insert the following new NOTE 1.1 immediately following the current NOTE 1 in Instructions 3-45-3, 3-45-4, 3-45-5, 3-45-6, 3-45-7, 3-45-8 and 3-45-11:

“NOTE 1.1: Article 120 Affirmative Defenses. When applying an affirmative defense to an Article 120 offense—whether instructing members or judge alone—the military judge MUST include the following statement on the record:

“This court is aware of the Court of Appeals for the Armed Forces cases interpreting the statutory burden shift for Article 120, UCMJ, affirmative defenses. Although Article 120(t)(16) places an initial burden on the accused to raise these affirmative defenses, Congress also placed the ultimate burden on the Government to disprove them beyond a reasonable doubt. The C.A.A.F. has determined the Article 120(t)(16) burden shift to be a legal impossibility. Therefore, to constitutionally interpret Congressional intent while avoiding prejudicial error, and applying the rule of lenity, this court severs the language “The accused has the burden of proving the affirmative defense by a preponderance of evidence. After the defense meets this burden,” in Article 120(t)(16) and will apply the burden of proof in accordance with the recommended instructions in the Military Judge’s *Benchbook*, DA Pam 27-9.”

BENCHBOOK, *supra* note 26.

⁸¹ *United States v. Bass*, 404 U.S. 336, 347 (1971).

⁸² *United States v. Neal*, 68 M.J. 289, 299, 302 (C.A.A.F. 2010).

⁸³ *Id.* at 304.

⁸⁴ *Alaska Airlines v. Brock*, 480 U.S. 678, 684 (1987).

⁸⁵ *Id.* at 685.

⁸⁶ *Neal*, 68 M.J. at 304.

approach to cases in which consent evidence is presented. Treating consent as evidence relevant to force, but with no special burden of proof is an equitable solution that most closely effects congressional intent.

IV. Where Are We?—The Mistake of Fact Defense

A. Parameters of the Mistake of Fact Defense

As discussed earlier, the mistake of fact defense differs significantly from the defense of actual consent, because it looks primarily to the beliefs of the accused. Actual consent is no part of the defense, and the defense does not require proof of the victim's capacity to consent. For this reason, mistake of fact does not require the accused to disprove an element of the Government's case, as was held unconstitutional in *Prather*.

Article 120 states that

The term "mistake of fact as to consent" means the accused held, as a result of ignorance or mistake, an incorrect belief that the other person engaging in the sexual conduct consented. The ignorance or mistake must have existed in the mind of the accused and must have been reasonable under all the circumstances. To be reasonable, the ignorance or mistake must have been based on information, or lack of it, that would indicate to a reasonable person that the other person consented.⁸⁷

The statute does, unfortunately, include the double burden-shift, with attendant instructional difficulties.

B. Burden of Proof

Mistake of fact as to consent is the essence of an affirmative defense because it concerns primarily the beliefs of the accused, not the victim's physical or mental state. Proving the accused's own actual belief is the epitome of "something within the knowledge of the accused that he may fairly be required to prove."⁸⁸

While it would make complete sense to place the burden of proof on the accused to prove mistake of fact, the current state of the law, after *Neal*, *Prather* and *Medina*, appears to forbid that approach. Congress unquestionably had the power to place the burden of proof on the accused, and it did so.⁸⁹ But Congress also created the impossible double burden-shift as part of the affirmative defense package, rendering the mistake of fact defense just as "legally impossible," and therefore unconstitutional, as the consent defense.

The inclusion of a mistake of fact defense in Article 120 was consistent with its long-established history in military justice.⁹⁰ Prior to the revisions to Article 120, mistake of fact, once raised in any case, had to be disproven by the Government beyond a reasonable doubt.⁹¹ While Congress attempted to increase the burden of production of mistake of fact evidence in sexual assault cases, there is no evidence that Congress intended to change the overall philosophical approach to the defense. In Part III, the argument for allowing judges to ignore the statutory consent defense was based on Congress's intent to eliminate consent as an element of the crime, and on the unconstitutionality of the interplay between actual consent and proof of substantial incapacity to consent. While this same argument severance of the mistake of fact provisions, further support for severance is found in the history of the mistake of fact defense.

Mistake of fact has long been a defense to criminal activity.⁹² Congress apparently intended to retain it as a defense by including it in the new Article 120. With two burden of proof choices in Article 120(t)(15), it is consistent with the history of the mistake of fact defense in RCM 916 to enforce the burden placed on the Government to disprove the mistake of fact defense beyond a reasonable doubt.

Military judges still need to supply a "reasonable legal explanation" for failing to use the double burden-shift language of the statute. That explanation should include the historical argument suggested here.

If Congress were to remove the affirmative defenses from Article 120 and leave the courts to rely on the mistake of fact defense in RCM 916, that would retain the bulk of Article 120 while maintaining a reasonable balance between the prosecution and the defense. Although mistake of fact is

⁸⁷ UCMJ art. 120(t)(15) (2008). The mistake of fact also cannot be the result either of "negligent failure to discover the true facts," or of intoxication. *Id.* The wording was copied verbatim into RCM 916(j)(3), the mistake of fact in sexual offenses. The pre-existing general mistake of fact instruction, RCM 916(j)(1), differs slightly in its wording.

⁸⁸ *Russell v. United States*, 698 A.2d 1007, 1009 (D.C. 1997), *quoted in Neal*, 68 M.J. at 300.

⁸⁹ *Neal*, 68 M.J. at 299–300; UCMJ art. 120(t)(16) (2008).

⁹⁰ *See United States v. Short*, 16 C.M.R. 11, 18 (C.M.A. 1954), *United States v. Graham*, 23 C.M.R. 627, 628 (A.B.R. 1957).

⁹¹ *Manual for Courts-Martial, United States*, R.C.M. 916(b)(1); R.C.M. 916(j)(1) (2005).

⁹² Mistake of fact in the current RCM was taken from the 1969 edition of the *MCM. MANUAL FOR COURTS-MARTIAL, UNITED STATES*, R.C.M. 916(j) analysis, at A21-65 (2008).

a defense which the accused can reasonably be required to prove,⁹³ the current state of the law strongly suggests that the Government must, and should have to, disprove mistake of fact beyond a reasonable doubt.

V. What Are Courts to Do? —Constitutional Instructions

Theory aside, military judges will need to instruct panels considering Article 120 cases. The Army Judiciary, consistent with its approach since 2007, has recommended using instructions that place the burden on the Government to prove that the defenses of consent and mistake of fact do not exist. This “*Medina* charge” is erroneous in the absence of a “legally sufficient explanation” for ignoring the statutory language. The trial judiciary has issued an approved statement which purports to be that “legally sufficient explanation.”⁹⁴ Under *Medina*, this approach is probably constitutional. It definitely will avoid reversal for instructional error.⁹⁵

The *Benchbook* approach, however, places an additional burden on the Government, which makes it less likely that the Government can prove sexual crimes. Instructional solutions consistent with the argument in Parts III and IV should pass constitutional muster, while better maintaining the balance between the Government and the accused.

⁹³ The President might be well advised to consider making RCM 916’s mistake of fact defense into a true affirmative defense, with a burden on the accused to prove it to a preponderance of the evidence. That change is unlikely to happen prior by corrective legislation for all of Article 120.

⁹⁴ BENCHBOOK, *supra* note 26, art. 120 (affirmative defenses) states:

NOTE 1.1: Article 120 Affirmative Defenses. When applying an affirmative defense to an Article 120 offense—whether instructing members or judge alone—the military judge MUST include the following statement on the record:

This court is aware of the Court of Appeals for the Armed Forces cases interpreting the statutory burden shift for Article 120, UCMJ, affirmative defenses. Although Article 120(t)(16) places an initial burden on the accused to raise these affirmative defenses, Congress also placed the ultimate burden on the Government to disprove them beyond a reasonable doubt. The C.A.A.F. has determined the Article 120(t)(16) burden shift to be a legal impossibility. Therefore, to constitutionally interpret Congressional intent while avoiding prejudicial error, and applying the rule of lenity, this court severs the language “The accused has the burden of proving the affirmative defense by a preponderance of evidence. After the defense meets this burden,” in Article 120(t)(16) and will apply the burden of proof in accordance with the recommended instructions in the Military Judge’s *Benchbook*, DA Pam 27-9.

Id.

⁹⁵ *United States v. Medina*, 69 M.J. 462, 466 (C.A.A.F. 2011).

A. Consent cases

If no evidence of consent has been presented—as in a case in which the only issue is identification⁹⁶—then no instruction is necessary on consent. In many Article 120 prosecutions, however, “some evidence” of consent⁹⁷ will be presented, triggering instructions on consent. Consistent with the argument in Part III that consent be abandoned both as an element and an affirmative defense, courts can deliver simple instructions that would be the same in both force cases and substantial incapacity cases.

Instruction 1: “I have told you that the government bears the burden to prove every element of each offense beyond a reasonable doubt. To the extent that you find that credible evidence concerning consent by the alleged victim exists in this case, you must consider that evidence, along with all the other evidence in the case, in deciding whether the government has proven the elements of the crime(s) charged beyond a reasonable doubt.”⁹⁸

Instruction #2: “‘Consent’ means words or overt acts indicating a freely given agreement to the sexual conduct by a competent person. An expression of lack of consent through words or conduct means there is no consent. Lack of verbal or physical resistance or submission resulting from the accused’s use of force, threat of force, or placing another person in fear does not constitute consent. A current or previous dating relationship by itself or the manner of dress of the person involved with the accused in the sexual conduct at issue shall not constitute consent.”⁹⁹

By treating consent as neither an element nor a defense, the concept becomes, for a panel, just another definition of a kind of evidence.¹⁰⁰ By not referring to consent as a “defense,” it is unlikely that the panel will expect the accused to prove consent.

⁹⁶ Identification cases are rare in the military, where most sexual offenses involve Soldiers in the same or nearby units.

⁹⁷ A defense is raised in most cases by presentation of “some evidence,” a very low standard. *United States v. DiPaola*, 67 M.J. 98, 99 (C.A.A.F. 2008).

⁹⁸ *United States v. Neal*, 68 M.J. 289, 300 (C.A.A.F. 2010). The solution suggested here and in Part III, *supra*, eliminates consent as an affirmative defense, so the second permissible instruction identified in *Neal* is omitted. The *Benchbook* instruction 3-45-3, note 8.1 could reasonably be substituted for the suggestion here.

⁹⁹ This is the language of Article 120(t)(14), and of the definitional portion of *Benchbook* 3-45-3 note 10.1. BENCHBOOK, *supra* note 26, para. 3-45-3 n.10.1.

¹⁰⁰ Because the word “defense” is not used, the potential problem with order of instructions delineated in *Neal*, 68 M.J. at 299, is avoided. See *supra* Part III.

B. Mistake of Fact as to Consent Cases

Mistake of fact cases as analyzed above already have pattern instructions: those in the *Benchbook*. Those instructions¹⁰¹ place the burden on the Government to disprove the defense, once evidence of mistake of fact is in the case,¹⁰² consistent with the historical approach to the defense, and acceptable after *Prather*.

C. The *Medina* Statement

In both consent and mistake of fact cases, this article advocates severing the entirety of the affirmative defenses from the remainder of Article 120. The following on-the-record statement responding to *Medina*¹⁰³ should be given, to insulate that action, and the jury instructions, from error.

Medina instruction: “This court is aware of the Court of Appeals for the Armed Forces cases interpreting the statutory burden shift for Article 120, UCMJ, affirmative defenses. The C.A.A.F. has determined the Article 120(t)(16) burden shift to be a legal “impossibility.” This court interprets that statement to be a finding that the affirmative defense provisions of Article 120 (t)(14), (t)(15) and (t)(16) to be unconstitutional, because they contain a double burden-shift. To preserve the constitutionality of Article 120 in this case, to effectuate the central aspects of the 2007 Congressional revision to Article 120, and to balance the interests of the government and the accused, this court will sever the affirmative defense provisions from the remainder of Article 120. The following instructions are constitutionally valid, capable of functioning independently, consistent with Congress’ basic objectives in enacting the statute. See *United States v. Booker*, 543 U.S. 220, 258-59 (2005). I have carefully considered the effect on both the prosecution and the defense of severing those provisions, and conclude that these instructions are consistent with fairness to both parties.”

VI. Conclusion

Article 120 was passed with two laudable goals: to shift the focus of military sex crimes statutes from the victim to the offender, and to eliminate lack of consent as an element of those crimes. Apparent compromises in the legislative process contradicted those aims. The final statute inartfully re-injected victim focus into the statute in the definitions of

some elements of the new offenses. The further inclusion of an unconstitutional burden-shifting arrangement for defenses threatened the viability of the entire statute.

The constitutional and theoretical flaws in Article 120 were highlighted in three recent CAAF cases which upheld the facial constitutionality of Article 120, but declared the consent framework unconstitutional in “substantially incapacitated” cases.¹⁰⁴ The same cases found the double burden-shift contained in both consent and mistake of fact as to consent defenses to be “illogical” and unenforceable.

Although the court provided little guidance to practitioners on how to adjust for the upheaval these decisions caused in the application of the statute, it did endorse the possibility of “saving” the sexual crimes structure by judicious use of instructions that effectively rewrote problematic sections of the law. Military judges have done so, but have unnecessarily increased the government’s burden in proving major sex crimes. Instead, they should treat consent merely as evidence capable of disproving the elements of the crimes charged, whether force, threat, or substantial incapacity to consent. To accomplish this, military judges must sever the provisions of Article 120 that create consent as an affirmative defense. As part of that severance, the military judge should place on the record a legally sufficient explanation of why that severance is necessary to preserve the constitutionality of the statute. No burden of proof concerning the non-element of consent should be assigned to either the accused or the Government.

This solution would leave mistake of fact as to consent as a valid defense codified in RCM 916. If the evidence raises the issue, the Government would still bear the burden to disprove the mistake of fact defense beyond a reasonable doubt. This would properly recognize the long history of mistake of fact in military justice. Because that defense does not focus primarily on the victim’s state of mind, leaving it in place in RCM 916 would not defeat Congress’s original purpose in amending the statute

Looking to the future, it is clear that Congress needs to amend Article 120. The statute should use elemental definitions which are exclusively offender-centric, seen from the viewpoint of a reasonable person, rather than through the eyes of the victim of the sexual act. The new statute should avoid sex-crime-specific defenses, leaving defenses to those defined in RCM 916.

¹⁰¹ BENCHBOOK, *supra* note 26, paras. 3-45-3 n.11.1; 3-45-4 n.9.1; 3-45-5 n.10.1; 3-45-6 n.7.1; 3-45-11 n.4.

¹⁰² Whether there is “some evidence” of both subjective and objective mistake of fact is a preliminary judicial determination. *United States v. Willis*, 41 M.J. 435, 438 (C.A.A.F. 1995).

¹⁰³ *United States v. Medina*, 69 M.J. 462, 465 (C.A.A.F. 2011).

¹⁰⁴ *United States v. Neal*, 68 M.J. 289 (C.A.A.F. 2010); *United States v. Prather*, 69 M.J. 338 (C.A.A.F. 2011); *United States v. Medina*, 69 M.J. 462 (C.A.A.F. 2011).

An Overview of the Capital Jury Project for Military Justice Practitioners: Aggravation, Mitigation, and Admission Defenses

Lieutenant Colonel Eric R. Carpenter

Introduction

What themes drive a juror's decision to vote for life or death in a capital case? For a judge advocate assigned to a capital case, the answer to that question should serve as the foundation for her case development. If she builds a case based on what *attorneys* traditionally think is aggravating and mitigating, she might build the wrong case. What is important is what *jurors* actually think, and then constructing arguments to match those belief patterns. Fortunately, modern research provides insight on what influences jurors to vote for life or for death. Jurors tend to focus on three aggravating themes: fear, loathing, and lack of remorse.¹ Jurors also tend to find a few mitigating themes persuasive: residual doubt, shared culpability, reduced culpability, family testimony, and remorse.²

Even if the judge advocate gets the theme right, if she waits too long to present the evidence that supports that theme, she may have missed her chance to influence the panel members. Modern research has also shown that jurors make up their minds early about the appropriate penalty in the case. Although jurors are supposed to wait until the conclusion of the sentencing hearing before deliberating and then deciding on punishment, research has shown that one-half of jurors choose the punishment for the crime during the presentation of evidence on the merits and during merits deliberation.³ Almost all of these jurors were absolutely convinced or pretty certain of their decision,⁴ and six in ten of these jurors held fast to that belief through the sentencing phase.⁵

Further, even though jurors are prohibited from discussing the sentence until all the evidence is presented

during the penalty phase, jurors talk about their positions well before then: "Three to four of every ten jurors (33.6% to 45.7%) indicated [their preference] during guilt deliberations."⁶ More importantly, some jurors start actively and explicitly negotiating the death penalty vote during the merits deliberations:

For some jurors, guilt deliberations became the place for negotiating or for forcing a trade off between guilt and punishment. One or more jurors with some doubts, possibly reasonable doubts, about a capital murder verdict nevertheless may have agreed to vote guilty of capital murder in exchange for an agreement with pro-death jurors to abandon the death penalty.⁷

The critical lesson is that if an attorney waits until the penalty phase to present certain evidence, then that attorney may be too late.

These findings are among many uncovered by the Capital Jury Project (CJP).⁸ Started in 1991, the CJP is a research project supported by the National Science Foundation and headquartered at the University of Albany's School of Criminal Justice.⁹ The CJP is comprised of "a consortium of university-based investigators—chiefly criminologists, social psychologists, and law faculty members—utilizing common data-gathering instruments and procedures."¹⁰

The CJP investigators conduct in-depth interviews with people who have served on juries in capital cases "randomly selected from a random sample of cases, half of which resulted in a final verdict of death, and half of which resulted

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¹ See *infra* notes 18–26.

² See *infra* notes 38–44.

³ William J. Bowers, *The Capital Jury Project: Rationale, Design, and Preview of Early Findings*, 70 IND. L.J. 1043, 1089–90 (1995).

⁴ *Id.* at 1089–90; Marla Sandys, *Cross Overs—Capital Jurors Who Change Their Minds About the Punishment: A Litmus Test for Sentencing Guidelines*, 70 IND. L.J. 1183, 1191–95 (1995).

⁵ William J. Bowers et al., *Foreclosed Impartiality in Capital Sentencing: Juror's Predispositions, Guilt-Trial Experience, and Premature Decision Making*, 83 CORNELL L. REV. 1476, 1491–92 (1998).

⁶ *Id.* at 1519.

⁷ *Id.* at 1527; Sandys, *supra* note 4.

⁸ For an excellent introduction to the Capital Jury Project (CJP) findings along with a list of articles and books related to the CJP, see SCOTT E. SUNDBY, *A LIFE AND DEATH DECISION: A JURY WEIGHS THE DEATH PENALTY* (2005). Sundby introduces the broad themes of the CJP within the study of a single jury. See also SCH. OF CRIMINAL JUSTICE, UNIV. AT ALBANY, STATE UNIV. OF N.Y., *Publications*, <http://www.albany.edu/scj/13194.php> (last visited June 8, 2011); CORNELL UNIV. LAW SCH., *Articles*, cornell.edu/research/death-penalty-project/Articles.project/Articles.cfm (last visited June 7, 2011) (providing lists of articles and book related to the CJP).

⁹ STATE UNIV. OF N.Y. AT ALBANY SCH. OF CRIM. JUST., *What is the Capital Jury Project?*, <http://www.albany.edu/scj/CJPwhat.htm> (last visited May 15, 2011) [hereinafter, *What is the CJP?*].

¹⁰ Bowers, *supra* note 3, at 1043.

in a final verdict of life imprisonment.”¹¹ Trained interviewers administer a fifty-one page survey and then conduct a three to four hour interview.¹² The interviews “chronicle the jurors’ experiences and decision-making over the course of the trial, identify points at which various influences come into play, and reveal the ways in which jurors reach their final sentencing decisions.”¹³ To support their findings, the researchers draw upon the statistical data that results from the surveys and interviews as well as the narrative accounts given by the jurors.¹⁴ So far, the CJP has conducted interviews with 1198 jurors from 353 capital trials in 14 states.¹⁵

The CJP’s findings related to aggravation, mitigation, and to when jurors make their decisions have important implications for theme development. We will see that jurors approach aggravation and mitigation based on certain fundamental beliefs about human behavior (free will versus environmental shaping) and punishment (eye-for-an-eye versus redemption). Counsel should shape the aggravating and mitigating evidence to address those beliefs.

The findings are also important because they validate an important defense strategy known as the admission defense.¹⁶ Admission defenses “admit that the defendant committed the acts charged, but also assert that she lacked the requisite intent to be held criminally liable for the offense charged. Provocation, self-defense, insanity, diminished capacity, and lack of specific intent are all examples of admission defenses.”¹⁷ We will see that if a defense counsel uses an admission defense, she will address many of the issues related to theme development. The admission defense helps jurors focus on two key mitigators: reduced culpability and lingering doubt. The admission defense allows the accused to accept some responsibility for the crime and appear remorseful. Importantly, the admission defense addresses the timing of juror decision-making by ensuring that the jurors know about some of the mitigating evidence before they might become foreclosed to it. With an

admission defense, the jurors learn about the mitigating evidence in the *merits* phase of trial. By using the admission defense, defense counsel can approach the merits phase and the sentencing phase as one, or what John Blume calls the integration of the guilt and penalty phase stories.¹⁸ The admission defense allows for a consistent, integrated, and comprehensive defense case that spans both the guilt *and* penalty phases.

Military attorneys may have heard of a defense counsel strategy in capital cases called “frontloading mitigation.”¹⁹ However, “frontloading mitigation” is not the actual trial strategy. The trial strategy is the admission defense. One of the benefits of an admission defense is that it allows the defense counsel to introduce mitigating evidence during the merits phase of the trial. We will see that simply frontloading mitigating factors into the merits phase without then tying the evidence back to a broader defense explanation on why the accused committed the offense—an explanation that spans the guilt and penalty phases—may not be effective.

This article will cover these themes in aggravation and mitigation and will discuss the underlying juror beliefs that drive those themes. Throughout, the article will explore how counsel on both sides of a capital case can use these findings to improve their trial practice but will pay special attention to how admission defenses address these themes. Finally, the article will conclude by looking at how some of the lessons learned from the CJP research can be applied to non-capital cases.

Aggravation Themes

The CJP research shows that jurors make the death penalty decision based on three main aggravating circumstances: fear, loathing, and lack of remorse.²⁰

Fear is the degree to which the defendant poses a risk of future danger if he were to be released from prison. In close cases, jurors err on the side of public safety: jurors would

¹¹ John H. Blume et al., *Lessons from the Capital Jury Project*, in BEYOND REPAIR? AMERICA’S DEATH PENALTY 144, 147 (Stephen P. Garvey ed., 2003).

¹² *Id.*

¹³ *What is the CJP?*, *supra* note 9.

¹⁴ *Id.* For an in-depth discussion of the sampling design and data collection methods, see Bowers, *supra* note 3, at 1077–84.

¹⁵ *What is the CJP?*, *supra* note 9.

¹⁶ Scott E. Sundby, *The Intersection of Trial Strategy, Remorse, and the Death Penalty*, 88 CORNELL L. REV. 1557, 1584 (1998).

¹⁷ Gary Goodpaster, *The Trial for Life: Effective Assistance of Counsel in Death Penalty Cases*, 58 N.Y.U. L. REV. 299 (1983). See generally John H. Blume et al., *Competent Capital Representation: The Necessity of Knowing and Heeding What Jurors Tell Us About Mitigation*, 36 HOFSTRA L. REV. 1035, 1039 (2008).

¹⁸ Blume et al., *supra* note 17, at 1043.

¹⁹ The Army Court of Criminal Appeals has recognized that frontloading mitigation evidence into the merits case is a legitimate trial tactic. *United States v. Kreutzer*, 59 M.J. 773, 781 n.9 (A. Ct. Crim. App. 2004).

²⁰ See Blume et al., *supra* note 11, at 162; Blume, *supra* note 17, at 1046–50 (using the terms, “vileness,” “future dangerousness” and “lack of remorse”); SUNDBY, *supra* note 8, at 31. See generally Stephen P. Garvey, *The Emotional Economy of Capital Sentencing*, 75 N.Y.U. L. REV. 26 (2000) [hereinafter Garvey, *Emotional Economy*]; Stephen P. Garvey, *Aggravation and Mitigation in Capital Cases: What do Jurors Think?*, 98 COLUM. L. REV. 1538 (1998) [hereinafter Garvey, *Aggravation and Mitigation*]. These aggravating circumstances may or may not be the same as the legal aggravating factors that a jurisdiction uses to limit the arbitrary application of the death penalty.

rather have the defendant's blood on their hands than the blood of a future victim. Interestingly, jurors are not just concerned about the safety of the public, but their own *personal* safety. Jurors express fear that the defendant might somehow get out of jail after conviction, either through parole or escape, and come after them.²¹ Evidence related to future dangerousness includes the facts surrounding the apprehension (i.e., Did the defendant submit peacefully to law enforcement or violently resist?), escape attempts, and how the defendant has adjusted to incarceration (i.e., Has he followed the rules or has he committed disciplinary violations?).²²

Loathing is how much the jurors hate the defendant for the crime he has committed or are otherwise disgusted by him. Jurors were more likely to vote for death when the killing was brutal (involving torture or physical abuse), was bloody or gory, or when the defendant mutilated the dead body.²³ If the victim was a child, jurors found this to be a highly aggravating factor. If the victim was a woman or had high social standing, jurors found this to be a somewhat aggravating factor.²⁴

Lack of remorse in this context does not mean that a defendant has failed to say he is sorry for what he has done. Jurors do not make their decisions based on whether the defendant gets up in court and says he is sorry—first, because it rarely happens (particularly when the defendant is claiming factual innocence) and second, because jurors do not believe the defendant when he does make an in-court apology.²⁵ Rather, jurors look to the moment of the crime and the period immediately following the crime for indications of a lack of remorse—factors such as whether the defendant shouted obscenities at the victim as he killed her, or bragged about it to his friends.²⁶ The more cold-blooded and vicious the crime, the less likely jurors are to believe that the defendant is remorseful,²⁷ believing the brutality of

the crime shows the defendant's lack of remorse. Jurors do give credit to expressions of remorse that are not associated with the trial, such as statements made and actions taken when the defendant did not have a self-serving reason to make them.²⁸

Jurors further assess remorse based on whether the defendant has accepted responsibility for the crime and has owned up to his actions.²⁹ If the defendant denies involvement in the crime, the jurors may perceive that the defendant is saying to everyone, "Oh, yeah? Prove it," and therefore is unremorseful. As Scott Sundby explains, "[A] death penalty trial is no ordinary criminal trial and invoking one's presumption of innocence can prove deadly."³⁰ And when the evidence shows that the defendant did commit the crime, the defense loses credibility and looks hypocritical and inconsistent in the penalty phase, particularly when the defense then presents mitigation evidence to explain why the defendant may have done the crime that he earlier denied committing.³¹

Presenting an admission defense does not involve those inconsistencies. Under an admission defense, the defendant is not saying he did not do the underlying act; rather, he is saying he is not as culpable as the government is trying to portray him to be.³² With an admission defense, the defendant accepts some responsibility for the underlying crime; the jurors perceive the defendant as remorseful; and the jurors are therefore more likely to vote for life instead of the death penalty.

Further, the CJP research shows that the more a crime looks like it was driven by the circumstances that surrounded the defendant—circumstances that suggest accident or mistake, self-defense, provocation, lack of intent, or mental illness—the jurors are more likely to find remorse.³³ Note that these circumstances describe the different types of admission defenses.

²¹ SUNDBY, *supra* note 8, at 36. See generally John H. Blume et al., *Future Dangerousness in Capital Cases: Always "At Issue,"* 86 CORNELL L. REV. 397 (2001).

²² Positive prison behavior is referred to as *Skipper* evidence. In *Skipper v. South Carolina*, 476 U.S. 1, 4–5 (1986), the Court held that a capital defendant's right to present mitigating evidence includes evidence of positive prison behavior.

²³ Garvey, *Aggravation and Mitigation*, *supra* note 20, at 1555–56.

²⁴ *Id.* Some of this data was collected before the Supreme Court explicitly allowed victim impact evidence to be introduced at trial. *Payne v. Tennessee*, 501 U.S. 808 (1991). See also Garvey, *Emotional Economy*, *supra* note 20, at 46–50.

²⁵ Sundby, *supra* note 16, at 1568–69. If a military accused takes the stand, a military prosecutor may comment on the accused's lack of remorse if certain conditions are met. *United States v. Edwards*, 35 M.J. 351 (C.M.A. 1992); *United States v. Paxton*, 64 M.J. 484 (C.A.A.F. 2007).

²⁶ Garvey, *Aggravation and Mitigation*, *supra* note 20, at 1561.

²⁷ Theodore Eisenberg et al., *But Was He Sorry? The Role of Remorse in Capital Sentencing*, 83 CORNELL L. REV. 1599, 1609–15 (1998).

²⁸ Sundby, *supra* note 16, at 1586.

²⁹ *Id.* at 1573–74.

³⁰ SUNDBY, *supra* note 8, at 33.

³¹ *Id.* at 33–35.

³² Granted, some defendants will not want to pursue any admission defenses, either because he did not do the crime, or, when faced with two unpleasant options—life without parole or death—he would rather pursue the chance of an acquittal, however small.

³³ Eisenberg et al, *supra* note 27, at 1609–15.

Jurors also assess remorse by looking at the defendant's relationship with his family: "Jurors perhaps think that defendants who are capable of showing love to their families also have the capacity to experience remorse."³⁴ This type of evidence includes how the defendant has helped—or hurt—the lives of the people around him who were not the direct victims of the crime.

Further, jurors look to in-court demeanor to decide whether the defendant is remorseful. Jurors often pay more attention to the defendant's demeanor than they do to the evidence being presented.³⁵ Jurors described that when the defendant looked clean-cut in court, he seemed to be trying to manipulate them, particularly when they compare that clean-cut image to the street image captured in his post-arrest mug shot.³⁶ If the defendant appears nonchalant or arrogant or tries to smile at or make eye contact with jurors, the jurors regard that as showing no remorse.³⁷ Jurors expect the defendant to show emotion at the emotionally tense portions of the trial; if the defendant does not, jurors believe he has no remorse.³⁸

Generally, military prosecutors may not comment on the accused's in-court demeanor unless certain rigorous conditions are met.³⁹ However, the panel members will likely determine whether the accused is remorseful based on the accused's in-court demeanor, regardless of whether the attorneys comment on it. The panel members' reliance on in-court demeanor may present a serious challenge to the defense counsel representing an accused who has a mental condition that causes him to have a restricted or flat affect, or who has low intelligence and so might not have a full grasp of the complex issues going on around him. Military defense counsel need to find a way to inform the jurors that the accused looks the way he does because of his illness or impairment and not due to a lack of remorse. The defense counsel can do this through the testimony of a mental health professional, or by asking for an instruction.

These major themes—fear, loathing, and lack of remorse—push jurors toward choosing the death penalty. Prosecutors should focus their evidence on these themes and defense counsel should work to rebut them. Defense counsel should also work to affirmatively present mitigating evidence to support themes that are important to jurors. We turn to those now.

³⁴ *Id.* at 1621.

³⁵ *Id.*

³⁶ SUNDBY, *supra* note 8, at 31.

³⁷ *Id.* at 32.

³⁸ *Id.*; Sundby, *supra* note 16, at 1561–64.

³⁹ *United States v. Edwards*, 35 M.J. 351, 354–56 (C.M.A. 1992); *United States v. Paxton*, 64 M.J. 484, 487–88 (C.A.A.F. 2007).

Mitigation Themes

The CJP's findings related to mitigation are extraordinary because most of the factors that attorneys think of as mitigating turn out not to be very mitigating. Shown below is a table⁴⁰ of classically mitigating factors detailing the percentage of jurors who *do not* think that factor is mitigating:

Percentages of Jurors Who Do Not See Classically Mitigating Factors as Mitigating

Defendant Was a Drug Addict	90.3%
Defendant Was an Alcoholic	86.3%
Defendant Had a Background of Extreme Poverty	85.0%
Defendant's Accomplice Received Lesser Punishment in Exchange for Testimony	82.9%
Defendant Had No Previous Criminal Record	80.0%
Defendant Would be a Well-Behaved Inmate	73.8%
Defendant Had Been Seriously Abused as a Child	63.0%
Defendant Was Under 18 at the Time of the Crime	58.5%
Defendant Had Been in Institutions But Was Never Given Any Real Help	51.8%
Defendant Had a History of Mental Illness	43.9%
Defendant Was Mentally Retarded	26.2%

A defense counsel might think that she has a great case in mitigation because her client was a drug-addicted alcoholic who grew up in the projects and whose buddy in the same killing got a life sentence, but this chart suggests that many jurors would not agree. Defense counsel should still investigate and pursue this type of evidence, but these statistics suggest that this evidence standing alone may not be persuasive to many jurors or panel members.

Note that while most jurors think mental illness and mental retardation are mitigating factors, a significant minority think these impairments are not. This significant minority may think that this impairment makes the defendant an *even greater* danger to the public if he were ever released.⁴¹

While the CJP has shown that many jurors do not find the classically mitigating factors to be very mitigating,⁴² the

⁴⁰ This table is taken directly from John H. Blume et al., *Probing "Life Qualification" Through Expanded Voir Dire*, 29 HOFSTRA L. REV. 1209, 1229 (2001).

⁴¹ Ellen Fels Berkman, Note, *Mental Illness as an Aggravating Circumstance in Capital Sentencing*, 89 COLOM. L. REV. 291, 299 (1989); see generally HARRY KALVEN, JR. & HANS ZEISEL, *THE AMERICAN JURY* 405 (1966).

⁴² The findings reflected in this table are important for other reasons as well. Potential jurors cannot be "mitigation impaired"; they must still be able to consider mitigating evidence. Blume et al., *supra* note 40, at 1229; see also *Morgan v. Illinois*, 504 U.S. 719 (1992). Counsel can ask panel members questions during voir dire to determine if the panel members are mitigation impaired.

CJP has shown that jurors do find certain mitigating factors to be persuasive.⁴³ The best mitigating factor is *residual* or *lingering doubt* about the defendant's guilt, defined as doubt about the defendant's factual guilt or legal guilt.⁴⁴ For example, a juror might not have any doubt that the defendant committed the crime (factual guilt), but might have lingering doubts about whether the defendant had the full intent required for the capital offense (legal guilt).

Another proven mitigating factor is *shared culpability*. Under shared culpability, the defendant is blameworthy for the crime, but someone else also has unclean hands. The victim can share culpability based on his role in the crime (e.g., a drug dealer killed in a deal gone bad). Society can share blame because someone in an official position might have been able to prevent the crime but failed to act on signals or failed to give the defendant help when he sought it out before the crime.

Further, *reduced culpability* is also a mitigating factor. Reduced culpability arises when an impairment or circumstance out of the defendant's control is a significant reason why the crime occurred, such as mental health problems or diminished intelligence that may not rise to the level of a defense or provide an exclusion from the death penalty. Here, mental illness and mental retardation are mitigating factors not simply because the defendant suffers from one or the other, but because the impairment played a direct role in the crime. Note again that admission

The CJP has influenced one of the major revolutions in capital trial work: the development of the Colorado *voir dire* method. One of the CJP findings is that most juries start deliberations with at least some jurors who support a life sentence. Bowers et al., *supra* note 3, at 1491–96; Sandys, *supra* note 4. David Wymore recognized that the key for defense counsel was to find a way to preserve those potential votes. Videotape: Selecting a Colorado Jury—One Vote for Life (Wild Berry Prods. 2004), available at <http://www.thelifepenalty.com>. Called the Colorado *voir dire* method (Wymore was practicing in Colorado when he developed this method), the method has two basic parts. The first part is designed to get jurors to accurately express their views on capital punishment and mitigation in order for the defense to rationally exercise their peremptory challenges and to build grounds for challenges for cause. The second part is designed to address jury dynamics. See Lieutenant Colonel Eric R. Carpenter, *An Overview of the Capital Jury Project for Military Justice Practitioners: Jury Dynamics, Juror Confusion, and Juror Responsibility*, ARMY LAW., May 2011, at 6. The method is grounded in constitutional law. See Blume et al., *supra* note 40.

For the military defense counsel who is detailed to a capital case, training in the Colorado method is the most important capital-specific training to receive. The method is generally taught over a three or four day hands-on seminar. The National Association of Criminal Defense Lawyers generally offers one training seminar on the Colorado Method every year. See <http://www.nacdl.org>. One of these seminars has been captured on video and is available for training. Videotape: Selecting a Colorado Jury—One Vote for Life (Wild Berry Productions 2004), available at <http://www.thelifepenalty.com>. See generally Richard S. Jaffe, *Capital Cases: Ten Principles for Individualized Voir Dire on the Death Penalty*, THE CHAMPION, Jan. 2001, at 35; Blume et al, *supra* note 17, at 1039.

⁴³ Garvey, *Aggravation and Mitigation*, *supra* note 20, at 1561–67.

⁴⁴ Sundby, *supra* note 16, at 1585.

defenses—accident or mistake, self-defense, provocation, lack of intent, or mental illness—all work to reduce the accused's culpability.

Testimony from family members is also mitigating for several reasons. One reason, as shown above, is that the testimony can help jurors assess remorse. Another reason is that jurors find the impact of a possible execution on the defendant's family members to be mitigating. Further, testimony from a family member might be the only evidence by which jurors can conclude that the defendant "might have some good in him as well as evil."⁴⁵ This combination of mitigating effects leads to "the dark humor saying of capital defense attorneys that . . . learning that the defendant has a mother reduces the chances of a death sentence by half."⁴⁶

The Relationship Between Aggravation, Mitigation, and Juror Belief Systems

By looking at both aggravating and mitigating factors, we can see that in capital cases certain fundamental beliefs about human nature and punishment regularly come into conflict: free will versus environment, and an-eye-for-an-eye versus redemption. When we view the findings on aggravation and mitigation through these belief lenses, we can make some sense of why some circumstances are aggravating and some are mitigating—and find ways to develop cases to properly address those beliefs.

The first conflict is between the belief that the defendant is solely responsible for committing the crime through the exercise of free will, and the belief that people are complex and can be shaped by their environments in ways they cannot control. Jurors tend to view tales of hardship as running counter to their understanding of free will. Even if an offender came from a life of extreme hardship, many jurors will conclude, "Okay, but he still had a choice, and he chose to do this crime." This type of mitigation is viewed as a sneaky excuse: "There he goes again, placing blame on everyone but himself."⁴⁷ These jurors "very much shared the belief that individuals control their own destiny and generally should be seen as capable of making their own choices even under adverse circumstances."⁴⁸ This runs counter to the belief that people are shaped by their environment. Jurors who are influenced by this belief see people as "human supercolliders, their personalities buffeted and shaped in unseen ways by the numerous events, people, and influences that they come in contact with."⁴⁹

⁴⁵ SUNDBY, *supra* note 8, at 46.

⁴⁶ *Id.* at 47.

⁴⁷ *Id.* at 35.

⁴⁸ *Id.* at 43.

⁴⁹ *Id.* at 70.

The second conflict of beliefs is between the axiom belief in an-eye-for-an-eye (“[Y]ou take somebody’s life, you pay with yours”)⁵⁰ versus the belief in “the power of redemption and [the] essential hope that people could become better.”⁵¹ These beliefs are often deeply rooted in the juror’s religious tradition. The eye-for-an-eye beliefs are generally found in the Old Testament, to include, “Anyone who strikes a person with a fatal blow is to be put to death,”⁵² or, “Whoever sheds human blood, by humans shall their blood be shed,”⁵³ or, “If anyone strikes someone a fatal blow with an iron object, that person is a murderer; the murderer is to be put to death.”⁵⁴ However, the New Testament contains passages that call for forgiveness and acknowledge the power of redemption. The author of John describes how Jesus came upon a crowd that had caught a woman who had committed adultery and were preparing to stone her according to the laws described above.⁵⁵ Jesus said, “Let any one of you who is without sin be the first to throw a stone at her.”⁵⁶ The crowd began to dissipate until only Jesus was standing with the woman.⁵⁷ Jesus then told her he did not condemn her and told her to live the rest of her life without sin.⁵⁸ These are two sets of powerful and deeply-rooted belief systems that jurors will rely upon when making one of the most significant decisions of their lives—the decision to sentence someone to death or to life in prison.

With this understanding of juror belief systems, we can make some sense of the surprising findings about classically mitigating factors. We saw that evidence of a life of abuse, standing alone, does not help much. We can call this “freestanding mitigation.” This mitigation does not explain why the accused did what he did, or address any of the underlying beliefs. Rather, defense counsel need to go beyond the fact that something bad happened to the accused in order to reach the juror’s underlying beliefs. If the underlying belief is that a person acts according to his own free will, then the mitigation evidence needs to show that the person was constrained in exercising free will in a way that

regular people are not.⁵⁹ The mitigation evidence also needs to show that the accused was not in control of the situation. We can call this “connected mitigation.” As John Blume puts it, “[T]he devil is in the details.”⁶⁰ Defense counsel need to connect “a truly compelling case of [a mitigating factor] tied to events in the defendant’s life and *its role in the crime.*”⁶¹ When the impairment or condition is directly related to the commission of this crime, then jurors can reconcile the case before them with their deeply-held beliefs about free will.

The military uses the words *extenuation* and *mitigation*. Matters in extenuation are those things that “explain the circumstances surrounding the commission of the offense, including those reasons for committing the offense which do not constitute a legal justification or excuse.”⁶² Matters in mitigation are those things that “lessen the punishment to be adjudged by the court-martial.”⁶³ From our discussion above, we can see that extenuation is really just a subset of mitigation: extenuating matters are those that show *why* the accused committed the crime and therefore will mitigate or lessen the punishment. Extenuation is *connected* mitigation and therefore more powerful.

For example, an accused may have grown up suffering from severe abuse and neglect. With nothing more, that would be freestanding mitigation. If, however, the attorney does the work to show that because of the abuse and neglect, the accused’s brain development was interrupted or his brain was otherwise damaged, then the attorney may be able to show that the accused became hard-wired to respond to certain situations with certain behavior. The attorney can use that information to then argue that the abuse and neglect explains why the accused behaved the way he did on this

⁵⁰ *Id.* at 17.

⁵¹ *Id.* at 73. For a detailed look at how religious themes impact death penalty decisions, see John H. Blume & Sheri Lynn Johnson, *Don’t Take His Eye, Don’t Take His Tooth, and Don’t Cast the First Stone: Limiting Religious Arguments in Capital Cases*, 9 WM. & MARY BILL OF RTS. J. 61 (2000).

⁵² *Exodus* 21:12 (New International Version).

⁵³ *Genesis* 9:6 (New International Version).

⁵⁴ *Numbers* 35:16 (New International Version).

⁵⁵ *John* 8:3-5 (New International Version).

⁵⁶ *Id.* at 8:7.

⁵⁷ *Id.* at 8:9.

⁵⁸ *Id.* at 8:10–11.

⁵⁹ An interesting finding related to these conflicts in beliefs (and that is contrary to the belief of many trial attorneys) is that jurors who personally identify with the defendant (e.g., similar troubled background) generally *will not* side with the defendant. SUNDBY, *supra* note 8, at 14. If the juror came from that same background and overcame his circumstances to succeed in life, then that juror will not be sympathetic to claims that the defendant’s background is mitigating: “If I could do it, then so could he.” *Id.* However, someone who recognizes that one of his family members is like the defendant—a brother, son, or father—is more likely to be sympathetic to these claims: “The reaction often is a shared sense of helplessness with the defendant’s family members who had tried so hard to keep the defendant from slipping into a life of crime.” *Id.* at 114. This lesson is not limited to capital cases: prosecutors should try to keep jurors who identify closely with the defendant, whereas defense counsel should try to keep jurors who identify closely with the defendant’s family members. A counsel defending a drug addict does not necessarily want the reformed drug addict to sit on the jury, but would want the mother of a drug addict on a jury.

⁶⁰ Blume et al., *supra* note 17, 1039.

⁶¹ *Id.* (emphasis added).

⁶² MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 1001(c)(1)(A) (2008) [hereinafter MCM].

⁶³ *Id.* R.C.M. 1001(c)(1)(B).

certain occasion. The attorney will have converted mitigation into extenuation.

Note again the power of the admission defense. By using an admission defense (provocation, self-defense, insanity, diminished capacity, lack of specific intent, accident, or mistake), the defense counsel can connect the mitigation directly to the commission of the crime. Someone with impaired executive functioning, a mental illness, very low intelligence, or who finds himself in a precarious situation is limited in how he can exercise free will in a way that a person with a normal brain, or average mental health, or normal intelligence, or enough time and space to think is not otherwise limited.

The defense counsel might argue for the lack of mental responsibility defense, understanding those findings are extremely rare because the accused has to have a severe mental disease or defect, and that defect had to have caused the accused to be unable to appreciate the nature and quality or wrongfulness of his acts.⁶⁴ The defense counsel will not likely get that finding, but by giving notice of the defense,⁶⁵ presenting some evidence that tends to show the accused lacked mental responsibility,⁶⁶ and then seeking the instructions for the defense,⁶⁷ the defense counsel forces the panel to focus on and discuss the issue of the accused's mental health in the context of why the crime was committed. The key is to ensure that the mitigating factor is not freestanding, but is instead connected directly to the crime.

Other mitigation evidence must then supplement this by addressing the eye-for-an-eye versus redemption conflict. Defense counsel will have to address the eye-for-an-eye belief by reducing the jury's perception of the accused's vileness and dangerousness. Defense counsel must address the panel members' fears that the accused might one day be released from prison and be a potential future danger to society.⁶⁸ Defense counsel can mitigate the loathing generated by the crime by showing that the victim or society shared culpability. Defense counsel can also present evidence that the accused is genuinely remorseful or has accepted responsibility for his crimes.⁶⁹ Defense counsel will also need to introduce mitigation that works to increase the accused's redemptive value. Defense counsel can do this by showing the accused's genuine remorse and acceptance

of responsibility and through the testimony of family members, to include the impact that an execution would have on them. Those themes—free will versus environment, and an-eye-for-an-eye versus redemption—drive the jurors' reasoning processes, and therefore counsel should address them.

Admission Defenses and Residual Doubt

We have seen that an admission defense focuses the jurors on reduced culpability (a known mitigator), and allows the accused to appear remorseful (another known mitigator) by allowing him to accept some responsibility for his actions in the merits phase of the trial. Another benefit of the admission defense is that it allows the defense counsel to focus the panel on legitimate concerns about legal guilt, thereby implicating the most compelling capital mitigator: residual doubt.

For example, in a premeditated murder case, the defense counsel might introduce mental health evidence, fully knowing that in the end, every panel member will be convinced beyond a reasonable doubt of the accused's guilt. However, for the defense counsel, the real target is not reasonable doubt, but lingering doubt. The defense counsel is trying to take the certainty of legal guilt off of 100 percent, even if only to 99 or 98 percent.

In some cases, the accused might have believed that what he was doing was right. First, note that the test for lack of mental responsibility in the military is not "unable to know the wrongfulness of the acts." The test is "unable to appreciate the wrongfulness of the acts."⁷⁰ There is a big difference between *know* and *appreciate*. According to Joshua Dressler, jurisdictions that choose *know* have adopted a formalistic approach:

[T]he word "know" used . . . in the test may be defined narrowly or broadly. Some courts apply the word narrowly: a person may be found sane if she can describe what she was doing ("I was strangling her") and can acknowledge the forbidden nature of her conduct ("I knew I was doing something wrong"). This may be referred to as "formal cognitive knowledge."⁷¹

Under this test, if an accused knows that the conduct is against the law, then he will not satisfy the defense.

⁶⁴ UCMJ art. 50a(a) (2008); MCM, *supra* note 62, R.C.M. 916(k)(1).

⁶⁵ MCM, *supra* note 62, R.C.M. (701)(b)(2).

⁶⁶ U.S. DEP'T OF ARMY, PAM. 27-9, MILITARY JUDGES' BENCHBOOK para. 6-1 (1 Jan. 2010) [hereinafter MILITARY JUDGES' BENCHBOOK].

⁶⁷ *Id.* paras. 6-4, 6-7.

⁶⁸ Carpenter, *supra* note 42, at 6.

⁶⁹ See generally Blume et al., *supra* note 17, at 1046-50.

⁷⁰ UCMJ art. 50a(a) (2008).

⁷¹ JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW § 25.04(C)(1)(a), at 350-52 (5th ed. 2009).

However, Congress and military appellate courts have rejected this approach and instead have used the word “appreciate.” This other approach is called the “affective” approach. According to Joshua Dressler:

Some courts, however, require a deeper meaning of “knowledge” (“affective knowledge”), which is absent unless the actor can evaluate her conduct in terms of its impact on others and appreciate the total setting in which she acts . . .

[S]uppose that *D*, due to mental illness, believes that God has instructed her to kill *V*, an act that *D* knows violates the secular law. In view of God’s edict, however, *D* believes that it is morally right to kill *V*. On these facts, *D* is sane if the right-and-wrong test is based on awareness of the *illegality* of an act; she should be found not guilty by reason of insanity, however, if [the test] requires knowledge of the *immorality* of her actions. . . . American law is sharply divided. In jurisdictions that apply a “moral right-and-wrong” standard, however, the issue is not whether the defendant personally and subjectively believed that her conduct was morally proper; the question is whether she knowingly violated *societal* standards of morality. Therefore, *D* is sane under this prong of [the test] if she commits an offense that she knows society will condemn, but which she is convinced is morally proper . . .

. . . [However, a] person who believes that God had decreed her act is likely to believe that society would approve of her conduct.⁷²

Military appellate courts, noting that Congress chose the word “appreciate,” have rejected the formalistic approach and have adopted the affective approach. In *United States v. Martin*,⁷³ the Court of Appeals for the Armed Forces discussed the meaning of “appreciate”:

The word “appreciate” was chosen with legislative care . . . The choice of the word “appreciate,” rather than “know” . . . is significant; mere intellectual awareness that conduct is wrongful, when divorced from appreciation of the moral or legal

import of behavior, can have little significance . . . This construct mirrors that contained in the legislative history. While Congress otherwise chose to adopt the [M’Naghten rule], in this word choice, Congress adopted the language of the Model Penal Code rather than the M’Naghten rule (“appreciate” vs. “know”) and thereby broadened the inquiry. (“Know” leads to an excessively narrow focus on “a largely detached or abstract awareness that does not penetrate to the affective level.”)⁷⁴

We see that the *Martin* court believed that “wrongful” means more than just knowledge that the act was illegal. The accused must be able to appreciate the wrongfulness of the act.

The accused must be able to evaluate his conduct in terms of its impact on others, appreciate the total setting in which he acts, and understand the consequences of his acts: “[A] defendant who is unable to appreciate the nature and quality of his acts is one that does not have *mens rea* because *he cannot comprehend his crimes, including their consequences.*”⁷⁵ The court also stated, “Other federal circuits recognize that a defendant’s delusional belief that his criminal conduct is morally or legally justified may establish an insanity defense under federal law.”⁷⁶ The court also offered this example: “He knew what he was doing, he knew that he was crushing the skull of a human being with an iron bar. However, because of mental disease, he did not know that what he was doing was wrong. He believed, for example, that he was carrying out a command from God.”⁷⁷ The accused might know that what he is doing is illegal under the laws of man, but because of a severe mental disease or defect, he might believe that God is telling him to do the act or approves of the act and so may believe that the act is morally right, and therefore be unable to appreciate the wrongfulness of the act.

With that understanding of the meaning of the word “appreciate,” defense counsel can put on a case that might cause some panel members to have some residual doubt about the accused’s legal guilt. For example, the accused is a Muslim deployed to a Muslim country and is involved in conducting combat operations. His unit is going to go out on patrol the next day and he attacks his unit, killing some Soldiers. The defense theory could be that members in the unit continually joked that they were going to rape Muslim women and pillage mosques while out on the patrol.

⁷² *Id.* (emphasis in original).

⁷³ 56 M.J. 97 (C.A.A.F. 2001).

⁷⁴ *Id.* at 107–08 (internal citations omitted).

⁷⁵ *Id.* at 109 (emphasis added).

⁷⁶ *Id.*

⁷⁷ *Id.* at 108.

Because of the accused's mental illness (delusional and paranoid features), he is unable to understand that they were joking and actually believed that they would do these things. He already felt isolated and distrustful of members of the unit, to include law enforcement personnel. He therefore decided to take action against those members of his unit before they do what he believed would be a terrible thing. Further, he might have believed that he was the only person who could stop this terrible thing from happening.

Based on that theory, the defense counsel could argue that the accused was not able to appreciate the wrongfulness of his conduct. He might have known that the conduct was illegal, but not have appreciated the wrongfulness of his conduct because he had a mental illness that caused him to believe that he was doing the morally right thing. He might have even believed that society at large would be thankful that he prevented this other (delusional) tragedy. The defense counsel would recognize that she will still lose on this theory, but maybe one or two panel members will have some doubt about the accused's legal guilt (his mental responsibility) and so not vote for death later in the proceeding. And by pursuing this admission defense, the defense is able to frontload mitigation into the guilt phase. The panel members would see that the accused's reason for committing the offense, while twisted, was not as awful as it could have been. The panel members will see a fully-developed case about the accused's mental health. The panel members will hear about the accused's family history and upbringing and how that shaped his mental health. The panel members might further hear about how people in his unit missed the signs of his deteriorating mental health. Importantly, the panel will hear all of this during the merits.

Defense counsel can also argue for partial mental responsibility as a fallback position from the defense of lack of mental responsibility. The goal is to have at least one panel member experience residual doubt about the accused's legal guilt by casting the accused's intent in some way that is different than that required by the capital offense, even if the accused could appreciate the nature and quality or wrongfulness of his acts.

Partial mental responsibility falls into two main categories. The first is partial mental responsibility as a true defense, whereby if the defendant proves to a sufficient standard that he has the right degree of mental illness, then the fact finder can reduce culpability from first-degree murder to manslaughter, much like the way the defense of heat of passion operates to reduce culpability from first-degree murder to manslaughter.⁷⁸ The second is partial mental responsibility as an evidentiary rule, where evidence of mental illness may be admitted to explain that the defendant could not or did not form the specific intent that is required for any specific intent crime. In some jurisdictions,

⁷⁸ DRESSLER, *supra* note 71, § 26.03, at 373–76.

that evidence is admissible in any case; in some, that evidence is admissible in murder cases only; in others, that evidence is never admissible.⁷⁹ The military uses partial mental responsibility as an evidentiary rule. In the military, the evidentiary rule is broad, as evidence of mental illness may be admitted in any case to show that the accused could not form the required intent,⁸⁰ or to otherwise explain that he formed some other intent than the one charged.⁸¹

In a premeditated murder case, the defense counsel might use mental health evidence to argue that the accused could not premeditate. Note that “to premeditate” does not equal “to plan.” Premeditation requires more than just planning to do the murder or thinking about it for some short period of time before the act. The Court of Military Appeals has described what thought process is required: “The deliberation part of the crime requires a thought like, ‘Wait, what about the consequences? Well, I’ll do it anyway.’”⁸² Look at the actual word *premeditate* and note the root: *meditate*. The accused needs to *meditate* about the crime before doing it. And, premeditation requires a cooling-off period or “reflection by a cool mind.”⁸³ If someone is in such a rage that he cannot meditate or consider the consequences of his actions, then he did not premeditate. Again, this is much like the heat-of-passion defense. If someone catches his spouse in bed with another man and then goes to the car, grabs a gun, and kills the adulterers, then he has essentially not premeditated, even though he hatched a short-lived plan to kill the adulterers. Society has decided that because he acted in a rage, his culpability is lower and so his crime is reduced to a lower form of homicide. Once he has the time to cool off, the defense becomes unavailable.

Many trial advocates, military judges, and appellate judges tend to focus on whether an accused's mental health problem made him unable to plan the murder.⁸⁴ Yet an accused's mental health problem, even if extraordinarily severe, may not affect his ability to plan at all. People with severe mental health problems may have no problem with planning events. A paranoid schizophrenic could wake up and plan to go to the grocery store, or plan to go to his parents' house, or plan to go to the park. A person who is fully psychotic, who believes that God is telling him to murder his wife and children to save their souls, can still

⁷⁹ *Id.* § 26.02(B), at 369–73.

⁸⁰ MILITARY JUDGES' BENCHBOOK, *supra* note 66, para. 6-5.

⁸¹ *Id.* para. 5-17.

⁸² *United States v. Hoskins*, 36 M.J. 343, 346 (C.M.A. 1993).

⁸³ *United States v. Viola*, 26 M.J. 822, 829 (A.C.M.R. 1988); *United States v. Loving*, 41 M.J. 213, 279 (C.A.A.F. 1994).

⁸⁴ *See, e.g., United States v. Murphy*, 67 M.J. 514, 529–30 (A. Ct. Crim. App. 2008); *United States v. Dock*, 26 M.J. 620, 629 (A.C.M.R. 1988) (De Giulio, S.J., dissenting).

plan the murders: he could write down what he plans to do, then get a gun from a storage unit, load it, drive to his home, walk through the door, and kill his family. Someone with a severe mental disease or defect may fully satisfy the lack of mental responsibility defense (be unable to appreciate the nature and quality or wrongfulness of his acts) and still be able to plan.⁸⁵

The issue is not the ability to *plan*, but the ability to *premeditate*. Defense counsel should focus on how the accused's mental illness impacts that accused's ability to reflect with a cool mind or to meditate on the offense, not on whether the accused could plan. For example, the defense counsel might argue that because of the mental disease or defect (for example, something that impacts impulse control or executive functioning) the accused did not have the ability to calm down and contemplate the impact of his actions before he took them. If the accused becomes enraged and because of his mental disorder stays enraged for the ten minutes that it takes him to get his gun from the barracks room and return to the day room to kill the victim, then he has not reflected on the crime with a cool mind and so has not premeditated. If his mental disorder prevented him from thinking through the fallout or consequences of his act, then he has not premeditated.

The mental health condition can also provide evidence that the accused's intent was something other than what the government charged. The accused's mental disorder may provide the context for the panel member to see that he was engaged in a "suicide by cop," where he was trying to set in motion events that would lead to his death. He may have shot at police officers fully knowing that he was likely to hit and kill some of them, but because of his depression he may not have actually cared if he *did* kill any of them. In that case, he would not have had the specific intent to kill required for premeditated murder.⁸⁶ Instead, a panel member could vote to find him guilty of a lesser murder charge, like wanton disregard murder, where the specific intent required matches what he was thinking: "That the accused knew that death or great bodily harm was a probable consequence of the act."⁸⁷

In both instances, if the defense counsel has presented a complete case on the issue and has clearly made those distinctions before the panel, then some of the panel members may have a lingering doubt about the accused's guilt on the capital offense. The panel members may still

vote for guilt and be completely sure of factual guilt—but may retain a lingering doubt about legal guilt.

Conclusion and Lessons for Non-Capital Practice

Using an admission defense in the ways described above has many benefits for the defense counsel. The CJP findings tell us that many jurors make up their minds about life or death during the merits portion of trial—and even actively negotiate those positions during the merits deliberation. If a defense counsel uses an admission defense, she has an opportunity to help shape the sentencing negotiations that may be going on during the merits phase. When presenting this mitigating mental health evidence, the defense counsel's goal is to have a single panel member agree with her and either hold on to that vote for not guilty, or to negotiate off of that vote by committing to a vote for life early in the process, perhaps even in the merits deliberation.

Further, even if a panel member completely rejects the defense theory on intent, that panel member might still believe that the accused has reduced culpability when compared to a murderer who does not have that impairment, and this perception of reduced culpability is a known mitigator. If the military or other agencies could have taken action before the incident that may have prevented the accused from murdering someone, such as providing him mental health care or separating him from the military, then the panel member might find that the military or another agency shares some culpability, and this perception of shared culpability is a known mitigator. Finally, if the defense counsel brings in family members to testify on the merits about how they observed the accused's mental health or cognitive impairments throughout the accused's life, then the defense counsel can frontload family member testimony (a known mitigator) into the merits of the case while also helping to prove that the underlying mental health or cognitive problems exist.

Defense counsel should look at the merits phase and the sentencing phase as one, and admission defenses allow defense counsel to do this. Critically, if the defense counsel or military prosecutor waits until the presentencing hearing to put on sentencing evidence, she may have missed the opportunity to persuade more than half of the panel members with her mitigation (or aggravation) evidence because jurors often make up their minds about punishment while still in the merits phase of trial.

These broad lessons from the CJP can be applied to non-capital military justice practice. From our discussion above, we see that extenuation should be more powerful than freestanding mitigation because this evidence directly relates to the commission of the crime. If panel members think that the accused's free will could not be fully exercised or was overcome, then the panel members will be more likely to accept that the environment played a role in the

⁸⁵ See generally John H. Blume & Pamela Blume Leonard, *Principles in Developing and Presenting Mental Health Evidence in Criminal Cases*, THE CHAMPION, Nov. 2000, at 63.

⁸⁶ UCMJ art. 118(1) (2008); MILITARY JUDGES' BENCHBOOK, *supra* note 66, para. 3-43-1.

⁸⁷ UCMJ art. 118(3) (2008); MILITARY JUDGES' BENCHBOOK, *supra* note 66, para. 3-43-3.

crime and find the accused is not as blameworthy as someone who could fully exercise his free will.

However, many defense counsel focus on the freestanding mitigating factors without connecting those mitigators to the commission of the crime. Defense counsel present the life problems of the accused, but might not show the relationship between those problems and why the accused committed the crime. Rather, defense counsel should work to convert the freestanding classically mitigating factors (e.g., that he grew up in a certain environment) into connected extenuating factors by tying them into the reasons why the accused committed the offense. Classically mitigating factors that do not otherwise address free will may not do much on their own. Defense counsel should also concentrate on rebutting the proven aggravators (fear, loathing, and lack of remorse) and bolstering the proven mitigators (extenuation, reduced and shared culpability, acceptance of responsibility, impact on the family of the sentence, and evidence of “good” in the accused).

Defense counsel should consider using the admission defense much more often, and not just in capital cases. In the military, defense counsel tend to be conservative with guilty pleas. If a client has a mental health problem that does not rise to the defense of lack of mental responsibility, and if the client is facing a high likelihood of conviction, then the defense counsel understandably tries to plead the case. Under these circumstances, the mental health evidence often becomes a *liability* for a guilty plea inquiry. The defense counsel now becomes afraid that the military judge will reject the plea because of the client’s problem, or that the military judge might reopen the plea inquiry if the defense counsel introduces extenuating or mitigating evidence during the presentencing proceeding that might somehow raise the lack of mental responsibility defense.⁸⁸

Because of this, defense counsel often have the client minimize these problems when going through the plea inquiry with the military judge: “I was depressed, your honor, but I could still form the intent to do the crime; I meant to do the terrible thing I did; my depression played no role in this crime.”

When the defense counsel does that, she deflates what would have been a great extenuation and mitigation case. The defense case is now inconsistent—the defense has told the judge that mental health problems had nothing to do with anything, but now wants to come in during the presentencing proceeding and say how extenuating and mitigating the mental health problems are, if she even risks introducing the evidence at all.

This is not the only option available to defense counsel. Consider using an admission defense in an average case. Put on the merits case and show where the client’s actions were caused by his mental illness. Overtly, the defense counsel will argue lack of mental responsibility or partial mental responsibility. In the background, the counsel knows she will not win on the defense but hopes that the panel will instinctively apply the irresistible impulse⁸⁹ or product⁹⁰ tests—both of which are intuitive and help to frame mitigating evidence—during their deliberations on the sentence. The defense may lose on the merits, but now has a fully developed extenuation and mitigation case, and the defense counsel does not have to worry about the judge rejecting the plea inquiry. This strategy involves risk, but may be the right strategy for certain clients. At the very least, this discussion illustrates that by understanding the CJP’s findings, military justice practitioners can gain insight and new perspectives on other areas of their practice.

⁸⁸ This is an area that receives much attention from appellate courts. *See generally* United States v. Riddle, 67 M.J. 335 (C.A.A.F. 2009); United States v. Shaw, 64 M.J. 460 (C.A.A.F. 2007); United States v. Estes, 62 M.J. 544 (A. Ct. Crim. App. 2005).

⁸⁹ Under the irresistible impulse test, the insanity defense can apply if the defendant, because of a mental illness, had an impulse that he could not overcome and so lost the ability to avoid doing the criminal act. *See generally* DRESSLER, *supra* note 71, § 25.04(C)(2), at 353–54.

⁹⁰ Under the product or Durham test, the insanity defense can apply if the person’s conduct was caused by, or was the product of, a mental illness. *See generally id.* § 25.04(C)(4), at 355–56.

A View from the Bench: The Proper Use of Prior Statements

*Colonel Jeffery R. Nance**

Introduction

When a witness testifies at trial and has made a statement prior to trial, two Military Rules of Evidence (MRE)—MRE 801 and MRE 613—intersect to determine when and how the prior statement may be used to impeach. Together, these rules also tell us when a prior statement may be used as substantive evidence—that is, as proof of the matter asserted. Trial attorneys must also consider the law regarding when a prior statement is inconsistent or consistent so that they know when to request appropriate instructions be given the members.¹ Many interrelated considerations determine the proper use of prior statements. This article seeks to assist military justice practitioners in making proper use of prior statements.

The framework within the rules is fairly compact. Under MRE 801(d), certain prior statements are *excluded* from the hearsay definition in MRE 801(c). These statements are: admissions by a party-opponent² and certain prior statements by a witness.³ There are two types of prior statements: prior consistent statements⁴ and prior inconsistent statements.⁵ Military Rule of Evidence 613 details the rules for examining a witness on a prior statement and when extrinsic evidence of a prior inconsistent statement may be admitted. Military Rule of Evidence 801(d)(1) and MRE 613(b) control the use of prior consistent and inconsistent statements as substantive evidence. Let's look first at admissions by a party-opponent.

Admissions by a Party-Opponent

Under MRE 801(d)(2), a statement offered *against* the party who made it is not hearsay and admissible for any purpose as long as it is relevant and properly obtained.⁶

Admissions covered by this rule include: the party's own statement in either an individual or representative capacity, a statement adopted by a party, a statement by a person authorized by the party to make the statement, a statement by a party's agent made within the scope of agency,⁷ and a statement made by a co-conspirator during the course and in furtherance of the conspiracy.⁸ The two admissions most frequently encountered are a party's own statement and a statement by a co-conspirator.

These statements are not hearsay and are admissible as long as not otherwise excluded by some other rule. Thus, for example, if the statement is written, authenticity must be established before it can be admitted.⁹ If the statement is that of the accused, trial and defense counsel, in addition to the military judge, should consider whether to redact irrelevant or substantially prejudicial evidence, such as uncharged misconduct.¹⁰

If the statement is that of a co-conspirator, there are a number of additional requirements to consider before the statement may be admitted. First, the statement must have been made while the conspiracy existed or made in the establishment of the conspiracy.¹¹ Second, the person who made the statement must be part of the conspiracy at the time the statement was made.¹² Third, the accused must be part of the conspiracy at the time the statement is made or thereafter.¹³ Finally, the statement must be made in

provided to the defense prior to arraignment. *Id.* MIL. R. EVID. 304(d)(1) (emphasis added).

⁷ Defense counsel is such an agent. *But see id.* MIL. R. EVID. 410.

⁸ *Id.* MIL. R. EVID. 801(d)(2).

⁹ *See id.* MIL. R. EVID. 901.

¹⁰ *See id.* MIL. R. EVID. 404(b).

¹¹ *United States v. Evans*, 31 M.J. 927, 934 (A.C.M.R. 1990) (citing *United States v. Herrero*, 893 F.2d 1521, 1527 (7th Cir.1990)). So, for example, if Private Brown says to Private Green, "Do you want to rob the property book office and take some of those new computers that just arrived?" and Private Green agrees to the robbery, then the statement(s) by Private Green agreeing to the conspiracy would be admissible against Private Brown in his trial for robbery. *Id.* (citing *United States v. Overshon*, 494 F.2d 894, 899 (8th Cir), *cert. denied*, 419 U.S. 853 (1974)).

¹² *Bourjaily v. United States*, 483 U.S. 171 (1987).

¹³ *Id.* Although the accused must be a part of the conspiracy, he need not be charged with conspiracy for the statements to be admissible against him at trial.

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¹ *See* U.S. DEP'T OF ARMY, PAM. 27-9, MILITARY JUDGES' BENCHBOOK paras. 7-11-1 and 7-11-2 (1 Jan. 2010) [hereinafter BENCHBOOK].

² MANUAL FOR COURTS-MARTIAL, UNITED STATES, MIL. R. EVID. 801(d)(2) (2008) [hereinafter MCM].

³ *Id.* MIL. R. EVID. 801(d)(1).

⁴ *Id.* MIL. R. EVID. 801(d)(1)(B).

⁵ *Id.* MIL. R. EVID. 801(d)(1)(A).

⁶ Remember, "Section III" disclosure requirements mandate that all statements by the accused in possession of the government must be

furtherance of the conspiracy.¹⁴ Statements made by one party to a conspiracy after the criminal enterprise has ended are not admissible against co-conspirators, but only against the declarant.¹⁵

Use of prior statements under MRE 801(d)(2) most often comes in the form of seeking admission of the accused's "confession" to Criminal Investigation Division (CID). Since this is an out-of-court statement offered for the truth of the matter asserted, it meets the definition of hearsay in MRE 401. However, because it is the statement of the accused (a party-opponent), under MRE 801(d)(2), it is excluded from the hearsay rule when the statement is offered against the accused. The practical effect of this exclusion from the hearsay rule is that only the trial counsel can admit the accused's confession. When the trial counsel, for tactical reasons, does not seek to admit the accused's confession, the defense counsel cannot then offer the accused's statement into evidence. It is a common mistake for defense counsel to attempt to admit the accused's statement because it supports their theory of the case and they would like the members to hear or read it. When the inevitable hearsay objection is raised by the government, the defense counsel often claims the statement is that of a party-opponent excluded from the hearsay rule and, thus, should be admitted. This mistake results from misunderstanding that the opposing party must be opposed to the party offering the statement. Since the accused is not opposed to himself, his statement to CID is not that of a "party-opponent."

Prior Statements by a Witness

We will now examine the different considerations governing the use of prior statements by a witness who is not a party-opponent. Such statements fall into two categories—prior consistent statements and prior inconsistent statements. Let us begin with prior consistent statements.

Prior Consistent Statements—MRE 801(d)(1)

At first blush, admitting a witness's prior consistent statement just sounds wrong. It feels like hearsay; however, it is proper to offer such statements when the opposing side has tried to make the witness's in-court testimony seem like a recent fabrication, or the product of improper influence or improper motive.¹⁶ This is how this rule works: first, the witness testifies and is subject to cross-examination.¹⁷ Usually, during the cross-examination, the opposing side will expressly, or by implication, submit that the witness is

¹⁴ See generally *Evans*, 31 M.J. at 934.

¹⁵ *United States v. Stroup*, 29 M.J. 224 (C.M.A. 1989).

¹⁶ MCM, *supra* note 2, MIL. R. EVID. 801(d)(1)(B).

¹⁷ *Id.* MIL. R. EVID. 801(d)(1).

not telling the truth and that her story in-court has been recently fabricated, or that her testimony has been improperly influenced (like by a bribe), or that she has an improper motive to testify in a certain way (like to keep herself or someone close to her out of trouble). If the witness made a statement prior to the time that the alleged motive to fabricate arose,¹⁸ then that statement is excluded from the hearsay prohibition. In other words, it is hearsay but it is admissible as substantive evidence. Additionally, the statement does not have to have been made under oath and subject to penalty of perjury¹⁹—even prior consistent statements made to law enforcement officers can be admissible under MRE 801(d)(1)(B).²⁰

Remember, the prior statement must be consistent with the in-court testimony; the alleged motive to lie must have been formed after the prior consistent statement was made; and, the opposing side must have made at least an implied charge of recent fabrication, or improper influence or motive.²¹ It is insufficient if the other side merely contradicts a witness's in-court testimony with testimony from another witness or other evidence; there must be at least an implication raised that the witness to whom the prior consistent statement belongs recently fabricated her in-court testimony or was subject to improper inducement or motive.²²

An interesting twist to this rule occurs when the witness is charged with multiple motives to fabricate or multiple improper influences are asserted and the prior consistent statement occurred before one, but not all, of those motives or influences. In such a circumstance, it is sufficient that the prior consistent statement precede the motive or influence it is designed to rebut. It is not necessary that it precede all such motives or influences.²³ Judges should carefully tailor their instructions to ensure the members know for which motive or influence they may consider the prior consistent statement.

¹⁸ *Tome v. United States*, 513 U.S. 150 (1995); *United States v. Faison*, 49 M.J. 59 (C.A.A.F. 1998).

¹⁹ See *infra* note 22. Prior inconsistent statements must have been made under oath and the declarant subject to penalty of perjury to be admissible as substantive evidence.

²⁰ See, e.g., *United States v. Morgan*, 31 M.J. 43 (C.M.A. 1990) (holding that the videotaped interview of a child sexual assault victim made to a child psychologist was admitted under MRE 801(d)(1)(B)).

²¹ *United States v. Hughes*, 48 M.J. 700 (A.F. Ct. Crim. App. 1998), *aff'd on other grounds*, 52 M.J. 278 (C.A.A.F. 2000); *United States v. Jones*, 26 M.J. 197 (C.M.A. 1988) (Retarded victim of child sexual abuse extensively cross-examined about her lack of memory and inability to identify the accused. Prior consistent statement to social worker properly admitted as substantive evidence.); *United States v. Meyers*, 18 M.J. 347 (C.M.A. 1986).

²² *United States v. Browder*, 19 M.J. 988 (A.F.C.M.R. 1985).

²³ *United States v. Allison*, 49 M.J. 54 (C.A.A.F. 1998).

Prior Inconsistent Statements—MRE 801(d)(1)

Broadly stated, prior inconsistent statements are those made by a witness prior to trial which are inconsistent with their testimony at trial.²⁴ Sometimes prior inconsistent statements may be used as substantive evidence. Other times, they may be used only to impeach the witness's credibility. If the prior inconsistent statement was made while the witness was under oath and subject to the penalty of perjury at a trial, hearing, or deposition, then the prior statement is not hearsay.²⁵ This means that the inconsistent statement is admissible as substantive evidence on the merits, as well as to impeach. Even though admitted substantively, the statement should be read to the members, not given to them in written form.²⁶ If the prior inconsistent statement was not made while the witness was under oath and subject to the penalty of perjury, then the statement may not be admitted as substantive evidence. This type of prior inconsistent statement may only be used to impeach the witness.

The effect of MRE 801(d)(1) at trial depends on the type of statement offered. For example, assuming they are inconsistent, statements made at an Article 32, UCMJ, hearing usually can qualify under this rule for admission on the merits.²⁷ Statements made to police, even when sworn to by the witness, do not qualify for this exemption from the hearsay rule.²⁸ However, when statements made to police are adopted by the witness at a subsequent Article 32, UCMJ hearing under oath and subject to perjury, they are admissible on the merits.²⁹ Thus, when the victim of an assault testifies at trial and says the accused was wearing a red baseball cap on the night in question but had previously testified under oath at an Article 32 hearing that the assailant was not wearing any kind³⁰ of hat when he assaulted her, the victim's Article 32 testimony is admissible not only to impeach, but also as substantive evidence.³¹ If she adopted

²⁴ The rule states that the witness must be "subject to cross examination." This is usually not an issue. If the witness is testifying and there is an effort to use a prior inconsistent statement for either substantive evidence or to impeach, one cannot imagine a scenario where that effort is not being made on cross-examination.

²⁵ MCM, *supra* note 2, MIL. R. EVID. 801(d)(1).

²⁶ *United States v. Austin*, 35 M.J. 271 (C.M.A. 1992).

²⁷ *Id.*

²⁸ *United States v. Powell*, 17 M.J. 975 (A.C.M.R. 1984).

²⁹ *United States v. Rudolph*, 35 M.J. 622 (A.C.M.R. 1992).

³⁰ This example assumes that the perpetrators dress was important to determining identity and not simply a collateral matter.

³¹ Difficulties with admitting Article 32 testimony are frequently encountered by counsel because the Article 32 transcript is rarely verbatim nor do many Article 32 IOs require witnesses to read, sign and swear to their summarized testimony. See U.S. DEP'T OF ARMY, PAM. 27-17, PROCEDURAL GUIDE FOR ARTICLE 32(B) INVESTIGATING OFFICERS (16 Sept. 1990). When there is no verbatim record nor sworn signed summarized testimony, counsel will need to call the Article 32 investigating officer or the recorder in order to lay the proper foundation. See Colonel

her statements to CID in that Article 32 testimony, those also are admissible. Once again though, the Article 32 testimony should be read to the members, but not given to them to take back with them for their consideration during deliberations.³²

The question of whether a prior statement is inconsistent often becomes hotly contested at trial. It is a rare circumstance that a witness's in-court testimony directly contradicts a prior statement, for example by testifying that the light was red when they said in their prior statement that it was green. Usually there is some form of explanation or equivocation. The law does not require that the prior statement be diametrically opposed to the testimony at trial; inconsistency may be established by the witness's inability to recall or equivocation.³³

Prior Statements of Witnesses—MRE 613

Military Rule of Evidence 613 is a rule of procedure controlling the method for using prior statements. Military Rule of Evidence 613(a) applies to statements used to impeach as well as those that come in substantively under MRE 801.³⁴ Military Rule of Evidence 613(b) applies to prior statements used for impeachment only, since MRE 801(d) already requires that there be an opportunity to cross-examine the witness if the prior inconsistent statement is used as substantive evidence. Statements by a party-opponent are specifically excluded from MRE 613's procedural rules.

Military Rule of Evidence 613(a) provides that counsel need not show nor disclose the contents of a prior statement to a witness prior to examining the witness about the prior statement. For example, counsel may ask, without showing the statement to the witness, "You just testified that the light was green, but on 1 May 2009, when you were interviewed by CID about this matter, didn't you tell them that the light was red?" This method allows opposing counsel to more effectively set up the inconsistency and potentially get extrinsic evidence admitted on the matter. While it is true that, when dealing with a statement offered only to impeach, MRE 613(b) requires that the witness be given an opportunity to explain the inconsistency and be examined by sponsoring counsel about the prior statement before it can be admitted, opposing counsel need not give the witness that opportunity themselves. Military Rule of Evidence 613(a)

David L. Conn, A View from the Bench, *Using a Witness's Prior Statements and Testimony at Trial*, ARMY LAW., Mar. 2007, at 39.

³² See *supra* note 23.

³³ *United States v. Harrow*, 65 M.J. 190, 199-200 (2007).

³⁴ See STEPHEN A. SALTZBURG ET AL., MILITARY RULES OF EVIDENCE MANUAL, editorial cmt., at 6-148 to -149 (6th ed. 2006).

allows them to control the timing of that opportunity to some extent.³⁵

Military Rule of Evidence 613(b) controls the use of extrinsic evidence of a prior inconsistent statement. This rule provides that extrinsic evidence of a prior inconsistent statement is not admissible unless the witness is given an opportunity to explain or deny and opposing counsel is given an opportunity to question the witness about the prior statement.³⁶ The cold language of the rule, however, does not tell the whole story. Case law fills in the detail—extrinsic evidence of a prior inconsistent statement is not admissible when: “(1) the declarant is available and testifies; (2) the declarant admits making the prior statement; and (3) the declarant acknowledges the specific inconsistencies between the prior statement and his or her in-court testimony.”³⁷ It is critical to the proper use of prior inconsistent statements not to confuse this procedural rule in MRE 613(b) regarding extrinsic evidence with the rules in MRE 801(d) regarding admission of statements as substantive evidence. The use, under the limited circumstances described above, of extrinsic evidence to prove a prior inconsistent statement, is allowed only to establish impeachment. Such extrinsic evidence is not admitted as substantive evidence.

Remember, if the witness does not deny the prior statement or acknowledges the specific inconsistencies, extrinsic evidence is not allowed. When, however, opposing counsel confronts the witness with his prior statement and the witness either says he did not make the statement or denies that the prior statement was inconsistent with his in-court testimony, counsel may then offer extrinsic evidence of the prior statement by admitting the statement or calling a witness who can testify about the prior statement. Once again, the evidence, if it is a document, is published to the members by reading it to them but does not go back with the members when they deliberate.³⁸ It is only admitted to attack the witness’s credibility.

A confusing, seemingly anomalous, situation can occur when the extrinsic evidence is an Article 32 transcript and the witness admits the inconsistency of the prior statement.

³⁵ Some military judges require the counsel proffering the extrinsic evidence to have confronted the witness with the statement before they left the stand initially. Although seemingly contrary to Rule for Court-Martial 613, Schinasi et al. support the military judge’s authority to do so. *See id.* editorial cmt. at 6-148 to 6-152.

³⁶ Military Rule of Evidence 613(b) also allows the impeaching party to offer the extrinsic evidence after the witness has left the stand so that sponsoring counsel must recall the witness at a later time in order to give the witness the opportunity to talk about and explain the prior statement. *See id.* editorial cmt. at 6-150 to -151.

³⁷ *United States v. Button*, 34 M.J. 139 (C.M.A. 1992); *United States v. Gibson*, 39 M.J. 319, 324 (C.M.A. 1994); *United States v. Ureta*, 44 M.J. 290, 298 (1996).

³⁸ *See United States v. Austin*, 35 M.J. 271, 276 (C.M.A. 1992).

Under MRE 613, extrinsic evidence does not come in to impeach because there is no need. The witness has already self-impeached. However, under MRE 801(d)(1)(A), because the witness was under oath and subject to penalty of perjury and the statement was, in fact, inconsistent (remember, the witness has admitted it was), then the statement comes in as substantive evidence. Nevertheless, it still may not go back with the members in deliberation.³⁹ Counsel frequently confuse these circumstances and either try to admit evidence when they should not, or fail to admit substantive evidence when they could.

Another important thing to remember about the use of prior inconsistent statements, whether offered as substantive evidence or as extrinsic evidence for impeachment purposes, is that the inconsistency must be relevant and material.⁴⁰ Furthermore, if the inconsistency concerns a collateral or minor point, opposing counsel may successfully object under MRE 403.⁴¹ Finally, counsel should not use these rules to smuggle in evidence that would be inadmissible under other rules.⁴²

Instructions

Given the different uses of prior statements, it is not surprising that there are different instructions depending on what type of statement was admitted and for what purpose.⁴³ The prior consistent statement instruction is given when a prior consistent statement is admitted to refute the implied or express charge of recent fabrication or improper influence or motive.⁴⁴ The members are instructed that they may consider this evidence in deciding whether there was a recent fabrication or improper influence or motive and that they may consider it as substantive evidence.

With respect to prior inconsistent statements, when the witness denies his prior statement and/or the inconsistency and extrinsic evidence is admitted to impeach, the members should be instructed that they may only consider such evidence for the purpose of deciding whether to believe the witness. They are specifically instructed that they may not consider the evidence for the truth of the matter(s) contained therein.

On the other hand, when the evidence is admitted substantively, as when the requirements of MRE 801 are met or the statement was a voluntary admission by the accused offered by the government against the accused, the members

³⁹ *United States v. Ureta*, 44 M.J. 290, 298 (C.A.A.F. 1996).

⁴⁰ *Conn*, *supra* note 31, at 39.

⁴¹ *Id.*

⁴² *Id.*

⁴³ BENCHBOOK, *supra* note 1, para. 7-11-1.

⁴⁴ *Id.* para. 7-11-2.

receive a different instruction. They are instructed that not only may they consider the evidence in deciding whether to believe the witness,⁴⁵ but also that they may consider it as substantive evidence—for the truth of the matter(s) asserted in the statement.

Conclusion

The interplay between MRE 801 and MRE 613 is often confusing and can lead to errors at trial. If all parties thoroughly understand both rules, they will be less likely to make such errors. Remember, there are three types of prior statements—prior statements of a party-opponent, prior consistent statements, and prior inconsistent statements. Prior statements of a party-opponent (usually the accused when offered by the government) are not hearsay and are

admissible as substantive evidence. Prior consistent statements are also not hearsay and come in as substantive evidence when offered to refute a charge of recent fabrication or improper influence or motive. Prior inconsistent statements are not hearsay and come in substantively when made under oath at a prior trial or similar proceeding. When the requirements of MRE 801(d)(1)(A) are not met, the prior statement may still be proved, either through cross-examination of the witness, or by extrinsic evidence (MRE 613(b)) if the witness does not admit making the statement or the inconsistency. Such extrinsic evidence does not come in substantively. MRE 613(a) controls when a witness must be shown a prior statement. Finally, even when a written or taped prior statement is admitted substantively as evidence under any rule, it does not go back with the members.

⁴⁵ This is not likely to apply to the accused unless he testifies and has made a statement prior to trial that is inconsistent with his in-court testimony.

The Godfather: Seven Lessons on Providing Effective Counsel¹

Major Candace M. Besherse*

*Never hate your enemies. It affects your judgment.*²

I. Introduction

It's your first day as a Brigade Judge Advocate. What do you do? How do you interact with the commander and staff? Interestingly, the basic rules for success as a judge advocate can be found by watching *The Godfather*.³ Through the lens of Tom Hagen, the consigliere to the Corleone family, we see seven lessons for success as an advisor and counselor to any leader. After discussing the background of *The Godfather* movie, we'll look at those seven lessons and see not only how they are applicable to all judge advocates, but how following them can produce an effective legal advisor.

II. Background

The Godfather is arguably one of the best-known and most popular movies of all time, as demonstrated by its #2 ranking on the American Film Institute's top 100 movies.⁴ Directed by Francis Ford Coppola⁵ and based on the book

and screenplay by Mario Puzo and Francis Ford Coppola, *The Godfather* is a story of a family, their mafia "family," and the business that intertwines the two.

In *The Godfather*, the Corleone family is headed by Don Vito Corleone⁶ and focuses on his four children and the roles they play within the family and business. Don Vito's oldest child Santino,⁷ commonly referred to as Sonny, is in line to take over the family business but has a troublesome temper. Son Fredo⁸ is next and is revealed as a weak-willed man who seems lost in the shadows of his dominant older brother Sonny and his quietly powerful younger brother Michael. Michael,⁹ as the third son, could easily have been lost in the family dynamic, but he is always shown as the reasonable, intelligent son who acts not out of emotion but with thoughtful and deliberate reason. The youngest child and only daughter, Connie,¹⁰ is loved and protected by all the men. The viewer sees throughout the film that although she is aware of the criminal nature of her family's business, she is not brought into the business to the same degree as her brothers. Tom Hagen is the "adopted" son of Vito Corleone and considered a brother by Sonny, Fredo, Michael, and Connie. Tom is an attorney, and although he can never fully be considered part of the family because he is not Sicilian, he is the trusted advisor of Don Vito and subsequently Michael. Called a "consigliere," Tom serves as attorney, counselor, and advisor to the family and the business.

Although Sonny is the dominant personality initially, we quickly recognize that Michael is the quiet leader in the family. We first meet Michael as the returning war-hero¹¹

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¹ THE GODFATHER (Paramount Pictures 1972). Nominated for eleven Academy Awards, the film eventually won three. Marlon Brando won for Best Actor in a Leading Role, and the film took home the awards for Best Writing, Screenplay Based on Material from Another Medium and for Best Picture. See <http://imdb.com/title/tt0068646/awards> (last visited Dec. 12, 2010).

² Stated by Al Pacino as Michael Corleone in THE GODFATHER, PART III (Paramount Pictures 1990).

³ The author in no way intends to suggest that any U.S. military commander or leader acts as a mafia boss or criminal through any comparisons made in this article. Rather, this is an attempt to elucidate seven principles through a popular movie that, if followed, create an effective legal counselor.

⁴ American Film Institute, *AFI's 100 Years . . . 100 Movies 10th Anniversary Edition*, <http://www.afi.com/100Years/movies10.aspx> (last visited Dec. 11, 2010). (According to the AFI rankings, *The Godfather* was topped only by *Citizen Kane* and followed by *Casablanca*.)

⁵ A prolific writer, producer, and director, Francis Ford Coppola has won five Academy Awards and has been involved with a vast array of movies, including *American Graffiti*, *The Godfather* series, *Apocalypse Now*, *Black Stallion*, *The Outsiders* and *The Good Shepherd*, to name but a few. See

Internet Movie Database, <http://www.imdb.com/name/nm0000338/> (last visited Dec. 11, 2010).

⁶ Played by Marlon Brando Jr. Although legally a "junior," Brando dropped the suffix for his professional name. Interestingly, Paramount Pictures strongly objected to casting Brando in the role as Vito Corleone due to his previous disruptions on movie productions. Francis Ford Coppola argued stridently for Brando to play the role, and he eventually won the role and an Academy Award. See Wikipedia, http://en.wikipedia.org/wiki/The_Godfather (last visited Dec. 11, 2010).

⁷ Played by James Caan.

⁸ Played by John Cazale. In *The Godfather, Part II*, we learn that in a moment of bravado or sheer stupidity Fredo betrays the family and Michael for another mafia family. When Michael learns of the betrayal, he orders the death of his brother Fredo. See THE GODFATHER, PART II (Paramount Pictures 1974).

⁹ Played by Al Pacino.

¹⁰ Played by Talia Shire. Talia Shire is the sister of Francis Ford Coppola.

¹¹ Michael returns as a Captain in the Marine Corps.

and it is clear from both Don Vito and Sonny's actions that Michael is not to have a role in the family's criminal enterprises. Both Don Vito and Sonny are immensely proud that Michael is on a legitimate career path, with his father even envisioning Michael becoming a future senator. Michael himself seems to have no interest in the family business when he initially expresses to his girlfriend, "That's my family, Kay. Not me," after revealing the violent nature of the family business. Whatever the intended role for Michael in the family, it changes after his father, Don Vito, is shot.¹² While Sonny reacts to the shooting by irrationally charging forward with his temper ablaze seeking retribution, Michael quietly reasons out a plan of action. From this moment on, Michael is clearly the successor to Don Vito.

Although Michael becomes the leader of the family after Sonny is killed in an attempt to topple the Corleone family, Tom Hagen is the thread that is woven throughout the story. Often quietly in the background, he is always present. At times offering advice and at other times acting as the messenger, Tom is the trusted advisor to all the Corleone men. Because of this relationship, he speaks honestly and candidly. It is through his actions throughout the movie that judge advocates can glean lessons and implement them to become effective advisors and counselors.

III. Lessons for Judge Advocates

A. Lesson #1: Be in the room.

The opening scenes of *The Godfather* show Don Vito in his office receiving requests for assistance from wedding guests. Under Sicilian rules, Don Vito cannot refuse any request brought to him on the day of his daughter's wedding. As a result, guests bring requests for everything from assistance in immigrating a daughter's betrothed to the United States to killing the men who disfigured another man's daughter. Throughout these scenes we see Tom Hagen sitting in the room, listening. At all important decision points, the consigliere Tom Hagen is in the room, always paying attention and often participating in the debate and offering advice. Throughout the movie, we see this visual continuously repeated.

These actions are not only expressed in *The Godfather*, but also articulated by Judge James E. Baker.¹³ Specifically, Baker advises that "[a] lawyer engaged at the advent of policy development is more likely to influence and guide than one that clears the final memorandum to the decision-

¹² The conversation between Michael and Kay occurs at Connie's wedding reception. Michael is explaining to Kay why so many people are meeting privately with Michael's father.

¹³ JAMES E. BAKER, IN THE COMMON DEFENSE: NATIONAL SECURITY LAW FOR PERILOUS TIMES (2007).

maker, where policy advisors have already committed to both the substance of decision and means of execution."¹⁴

Both Tom Hagen's example throughout *The Godfather* and Judge Baker's thoughts on the attorney having a seat from the beginning of the discussion illustrate that the judge advocate must remember to be present in the room, listen, and speak when necessary. It is too easy for the judge advocate to discount a meeting or discussion as having no legal issues and either excuse themselves or fail to listen to the discussion. In practice, it is in these meetings that the critical (and usually unforeseen) issues arise, rather than during a formal consultation with the judge advocate.¹⁵ If the judge advocate is present, he can be relevant.¹⁶ The true cause for a judge advocate's concern is not in being invited to too many meetings, but rather to too few.¹⁷

¹⁴ *Id.* at 315.

¹⁵ Major Keirsten Kennedy deployed as the BJA with the 8th Military Police Brigade to Camp Liberty, Iraq, 2008–2009. Her schedule seemed quite empty as she trained to take over from Major Bonnie Dunlap, BJA, 18th Military Police Brigade. Then she started attending what seemed to be hundreds of meetings every day. Major Kennedy noted, "Had I not been invited and encouraged to attend many, if not most, of those meetings, it would have created twice as much work in the long run." Instead of being asked legal questions by memorandum, e-mail, or phone call after the fact, Major Kennedy was able to spot the issue as she listened, and deliver prompt and well-informed legal advice instantly (notes on file with author).

¹⁶ Captain Laura O'Donnell, former trial counsel for 3d Brigade Combat Team, 25th Infantry Division, and currently a defense counsel at Fort Carson, Colorado states, "Individuals in the meeting develop a habit of looking to the judge advocate for answers" and [the judge advocate] integrates himself as part of the overall team. She continues that "Just like Tom wasn't actually part of the family, they viewed him as such because he was integrated" (notes on file with author). Additionally, based on the author's experience as a BJA with the 2d Stryker Brigade, 25th Infantry Division, 94th Army Air Missile Defense Command, and the 130th Engineer Brigade, issues arise in a meeting and the attendees do not recognize that a legal issue exists. One example is for a unit to be tasked to accomplish a mission with fiscal implications, but the existing legal framework does not allow the mission to be executed in the manner in which the unit was directed to act. Most staff members receive a mission and want to execute. By being in the room, you can identify the issue and work to resolve the problem. If the judge advocate is not in the room, she is relying on the commander or staff members to identify the issue and coordinate with the unit judge advocate after the meeting concludes.

¹⁷ Judge advocates providing rule of law services deployed to Iraq caution other attorneys on the advisability of building coalition interoperability and interacting with multinational personnel: "It is worthwhile to integrate yourself with [coalition partners]. Their different experience and perspective are valuable. . . . You have to take the initiative and seek them out." TIP OF THE SPEAR: AFTER ACTION REPORTS FROM JULY 2008–AUGUST 2009 (2009 SUPPLEMENT TO FORGED IN THE FIRE—LEGAL LESSONS LEARNED DURING MILITARY OPERATIONS 1994–2008), THE JUDGE ADVOCATE GENERAL'S LEGAL CENTER AND SCHOOL, CENTER FOR LAW AND MILITARY OPERATIONS 419 (Sept. 2009) [hereinafter TIP OF THE SPEAR].

B. Lesson #2: If you do not create your own reputation, you will be known by the reputation of those you represent.

“I know almost every big lawyer in New York; who the hell are you?”¹⁸

When Tom Hagen is sent to talk to Los Angeles-based movie director Jack Woltze, Jack does not recognize Tom’s name. Only after some investigation does Jack recognize Tom’s boss as Don Vito Corleone. But Jack still does not know *Tom*. Any assumptions, beliefs, or methods Jack has for interacting, persuading, or negotiating with Tom are solely based on his knowledge of Don Vito. How much more effectively could Tom have advocated for Don Vito if Jack also knew Tom’s reputation as an honest broker?

The same is true for judge advocates. Whether serving in a courtroom or in a brigade, you must build your own reputation. If the commander is hot-tempered, but the judge advocate is reasonable, the judge advocate may use this difference to the benefit of the command as a whole. Additionally, if a judge advocate’s positive reputation is already known, even if a commander acts unethically, or possibly illegally, these traits will not be imputed to the judge advocate.¹⁹ But if an independent reputation is not built, others may view the judge advocate as acquiescing to those acts of a commander which may otherwise be legally and ethically objectionable.²⁰

¹⁸ In the movie, character Jack Woltze’s question to Tom Hagen when Tom visits Jack in Los Angeles to ask on behalf of Vito Corleone that Jonny Fontane, Vito Corleone’s godson, be given a part in a movie.

¹⁹ A clear example of this is shown by Captain Sasha Rutizer, former defense counsel with Trial Defense Service and current instructor with the Trial Advocacy Program. Captain Rutizer states that if a chief of justice or staff judge advocate (SJA) is viewed as unreasonable, and the trial counsel does nothing to distinguish his own reputation, agreeing on adequate disposition of cases becomes difficult. At the same time, if a defense counsel does nothing to distinguish his reputation from that of his client, or is viewed as a “slickster” and engages in “gamesmanship,” then the client may suffer in the form of a negative disposition of the case. Based on personal experience, in the case of a BJA, if a commander is unreasonable, hot-headed, or tends to “go rouge,” and the BJA does nothing to distinguish himself from the commander, a SJA may view that BJA as unreasonable or unmanageable.

²⁰ Major Keirsten Kennedy, former BJA and currently assigned as the Director and Professor, Professional Communications Program, The Judge Advocate General’s Legal Center and School, emphasizes the importance of building your own reputation, independent of that of your supervisor, SJA, or commander:

In my two years as a Brigade Judge Advocate, I advised over twenty battalion commanders, all of whom had varying judicial temperaments, leadership styles, and—of course—reputations. Some were known to be hot-headed and passionate or emotional, others might be considered unapproachable or unable to relate to their Soldiers. No matter their reputation in or beyond the unit, I worked hard to ensure their behavior or decisions did not represent me or who I was. Of course I gave them advice and guided their legal decisions, but it was very important to me to be my own person, my own type of officer, with my

C. Lesson #3: Watch out for others’ agendas. Are they helping the cause, or using your access to the boss for their own purpose?

“Now, it’s up to you to make the peace between Sonny and me.”²¹ “Tom, you’re the consigliere. You can talk to the Don.”²²

Tom Hagen, as consigliere to Don Vito and Michael, not only had access to these two men, but also had their trust and confidence. Tom was privy to all levels of the business and was routinely sought out for his advice and counsel. If a relationship is properly established in the beginning, a judge advocate may find that he also has this same level of access to the commander.²³ Similarly, a judge advocate should have the ear of the commander. If he does, a judge advocate may be more successful than other leaders in getting onto the boss’s calendar. The commander will also trust his judge advocate to not only be aware of facts that few others are privy to, but also to provide thoughtful and reasonable advice on all manner of decisions, legal and otherwise.²⁴

Because of this relationship, the judge advocate must always be mindful of other staff members seeking to manipulate this access for their own purposes. Often, staff members may bring an issue to the judge advocate in lieu of, or in addition to, the commander. The staff member may seek support for his position and knows a positive reaction from the judge advocate may be persuasive with the boss.²⁵

distinct actions dictating others’ opinions of me, along with my reputation.

(notes on file with author).

²¹ Said to Tom Hagen by Sollozzo after Sollozzo abducts Tom Hagen and tries to use him to reason with Sonny after Vito Corleone is shot (and believed to be dead). Sollozzo wanted to create a business between himself and Vito Corleone to sell drugs, but Vito turned him down. Sollozzo believed by killing Vito, he could force the Corleone family to go into business with him.

²² Said by Fredo to Tom Hagen when trying to overturn Michael’s decision to buy out Mo Green, a wealthy casino owner, in Las Vegas.

²³ Some command leadership may seek to limit the judge advocate’s access to the commander, such as the executive officer who is used to all staff actions being routed through him. According to published after action reports, “[Judge Advocates] need direct, unfiltered access to the commander so they can properly advise on all areas of the law. Some issues require the strictest confidence, excluding all unnecessary parties from hearing.” TIP OF THE SPEAR, *supra* note 17, at 524.

²⁴ Based on the author’s experience as a trial counsel and BJA, the author often found herself privy to information of which only the commander and command sergeant major were aware. During this deliberative period by the commander, the author’s counsel was sought both because of an established reputation of reasonableness and sound judgment, but also for her discretion and sensitivity to ancillary issues such as rank, nature of the issue, and impact to the unit.

²⁵ In some units, a commander may require a judge advocate to review specified (or all) issues before bringing the issue to the commander for action. The level of involvement will depend on both the personality of the commander and judge advocate, and also the relationship between the two.

Alternatively, the staff member may seek to evoke a reaction from the judge advocate and use this reaction to influence the boss subversively. In either event, when a staff member seeks not merely legal review but also action (or reaction) on the part of the judge advocate, the prudent judge advocate must independently analyze why the staff member is bringing the information forward and why the staff member is not raising the issue to the commander himself.²⁶

D. Lesson #4: If you cannot adapt and stay relevant, you'll be replaced.

“Mike, why am I out?” “You’re not a wartime consigliere, Tom.”²⁷ “If I had a wartime consigliere, a Sicilian, I wouldn’t be in this shape. Pop had Genco, look what I got.”²⁸

When the Corleone family was about to go to war with the other mafia families, the first thing both Sonny and then Michael did was to exclude Tom Hagen from the decision-making process. Some may view this cynically as a way to “protect” Tom so he would not be put in an ethical quandary, but the reality is that if the judge advocate proves that he can be an effective counselor in garrison and in the field, the commander will continue to look to the judge advocate for advice and counsel. Alternatively, if the judge advocate cannot adapt his perspective to the challenges and concerns of a forward commander, the commander will look elsewhere. The risk is that the commander looks to other staff members for this advice and counsel because far too often, other advisors to the commander who are not judge advocates are reluctant to advise that a prospective course of action may be imprudent.²⁹ An effective judge advocate

²⁶ I noticed a pattern of peers and at times superiors bringing issues to my attention rather than taking them directly to the commander. I began to question why this was happening, and checked my own initial reaction to the issue. Was this person hoping I would align myself with the issue, and then make recommendations to the commander based on this reaction? Was this person seeking to distance himself from any fallout that might result? Did he want to share needed information but avoid the appearance of disloyalty to his teammate? While there are legitimate reasons for bringing an issue directly to the JA and having the JA introduce the issue to the commander, the prudent JA should take a step back and ask why it's happening.

²⁷ Asked by Tom Hagen to Michael when Michael was planning to start a war with the other families. Michael planned to look to his father Vito for counsel during this time, because Vito had personal experience in these matters.

²⁸ Said by Sonny to Tom Hagen when deciding how to respond to the other families after Michael killed a corrupt police captain and was subsequently “hiding” in Sicily.

²⁹ Based on her experience, Captain Laura O'Donnell states that commanders dislike a legal advisor who always says “no.” “Learning to adapt means finding the correct and legal path to yes. If the legal advisor is always coming up with creative ideas to get to yes and make things work, then when she says no, the commander will know that that is a legitimate response [rather than] just an easy answer.” (notes on file with author).

considers not only the law, but the cultural, political, and emotional dynamics of an issue.³⁰

E. Lesson #5: Sometimes it is your job to bring the vitriol, panic or unreasonableness down and keep the emotion out.

“This is business, not personal.” “Well then, business is going to have to suffer.”³¹

For Sonny, the family business was personal. When Don Vito was shot, it was personal to Sonny and he could not see the business aspect of the shooting. As a result, Sonny reacted emotionally and wanted to retaliate purely as an emotional response. Tom Hagen reminded Sonny that the actions were business, and the response had to be rational, focusing on what was best for business. During another critical scene when Don Vito is deciding whether to go into the drug business, Sonny emotionally advocates adding this enterprise to the family repertoire. Although Tom is also advocating to venture into the drug business, he does so unemotionally and lays out the positives and negatives of going down this path. In both instances, Tom lowers the emotion in the room, focuses the group on the core issues, creates logical options for the boss to choose, and discusses the positives and negatives of each course of action.

So too must the judge advocate ratchet down the rhetoric at times, and restore reasonableness to the debate.³²

³⁰ According to a judge advocate working with coalition partners while deployed, “Not all officers have the personality to work successfully with coalition partners. It takes a certain degree of patience, objectivity, a willingness to listen carefully. . . . Senior JAs must consider very carefully who they send to fill this role.” TIP OF THE SPEAR, *supra* note 17, at 419.

In addition to being in the room, a judge advocate needs to be on the team. It is important for a judge advocate to not only build a strong relationship with the commander, but also with the staff. Based on the author's experience, if a judge advocate does not maintain a positive relationship with the staff, the staff may seek to exclude or even discredit the judge advocate. However, a positive relationship with the commander and staff will ensure that the staff seeks the judge advocate “buy-in” before presenting the commander with a plan and that the commander, upon presentation of a plan, will ask the staff “legal” has commented on the plan. See generally TIP OF THE SPEAR, *supra* note 17, at 525 (“Relationship Building”).

³¹ When deciding how to respond to the shooting of Vito Corleone, Tom Hagen reminds everyone that “this is business, not personal.” Sonny responds that business will suffer, showing he cannot make decisions from a rationale perspective. To him, business is personal. Contrast this with Michael's decision to kill the police captain in response to his role in shooting Michael's father. Michael lays out the reasons his course of action makes rational sense, and is sound from a business perspective. Michael removes his emotion from the decision and still ends up with a proportionate (and palatable) response.

³² Rudyard Kipling's poem, “If” captures this sentiment with the words, “If you can keep your head when all about you are losing theirs and blaming it on you; . . . Yours is the Earth and everything that's in it. . . .” Complete Collection of Poems by Rudyard Kipling, http://www.poetryloverspage.com/poets/kipling/kipling_ind.html (last visited Aug. 24, 2011).

It is understandable for individuals to want to react emotionally, especially when a loss has occurred or they are invested in a particular plan. The judge advocate must exercise thoughtfulness and demonstrate prudence in order to focus individuals.³³ This requires the judge advocate to determine the basic issue at hand; gather options; and then build an answer highlighting the positives and negatives of each option.³⁴ Through this deliberate action, a judge advocate can restore focus to the group and ensure the response is not emotional, but rational under the circumstances.

F. Lesson #6: If legally and ethically possible, get your boss to “yes,” even if the means are different from what the boss envisioned.

“And please, do me a favor, Tom. No more advice on how to patch things up—just help me win, please.”³⁵

After Don Vito was shot, Sonny wanted to go to war with the other families in retaliation. Tom Hagen attempted to reason with Sonny and continued to state reasons why going to war with the other families was bad for the Corleone family. This response left Sonny dissatisfied and frustrated with Tom. In this instance, it was Michael who thought of a response that would give Sonny the emotional satisfaction he desired while still protecting the family’s interests. This was a weak moment for Tom Hagen as consigliere because he did not focus on the realities of what each party needed. Without Michael’s reasoned course of action, a dissatisfied Sonny may have ignored Tom’s counsel altogether and continued on his imprudent path of retribution.

Too often, judge advocates earn a reputation as the “no” person. While there are times when “no” is the correct answer, there may be alternate means for achieving the same result. Instead of asking a commander, “What do you want to do?” and then providing the legal answer, ask the commander, “Where do you want to end up?” If the judge advocate knows the end goal, she can think of unexplored ways of achieving that same end. This strategy requires not

³³ Based on personal experience, a commander or staff may push for an immediate and emotional response to a particular event, especially if a unit loss occurs. At times, a particular plan may even appear to meet the goals of the overall mission. But if the plan is not legal or prudent, the burden may rest on the JA to restore calm and focus to the discussions.

³⁴ Although this scenario is witnessed in a variety of ways, one such way involves a commander’s reaction to a Soldier’s indiscipline. Based on experience, a commander can react out of emotion rather than reason when a Soldier repeatedly seeks to test the commander’s authority. This reaction can actually work against the commander if the commander’s actions are limited or result in disciplinary credit to the misbehaving Soldier.

³⁵ Said by Sonny to Tom Hagen after Vito is shot.

only creative thinking³⁶ on the part of the judge advocate but also knowledge of the unit, its capabilities, and personalities. In order to do this effectively, the judge advocate should ensure he is integrated within the unit in order to have a proper understanding of the unit’s needs in advance of rendering legal advice.³⁷

G. Lesson #7: Use the boss’s name judiciously.

*“Why didn’t you say you worked for the Corleones?”
“I don’t like to use his name unless it’s absolutely
necessary.”³⁸*

The judge advocate that seeks to bolster his position, thoughts, or advice based on using the commander or staff judge advocate’s name commits a critical error. Not only is this not persuasive, but it can have a negative effect in that it tends to anger or irritate other commanders’ staff members and is generally viewed as weak. If the judge advocate’s advice is solid, it should stand on its own. Only as a last resort should the judge advocate resort to using the commander or staff judge advocate’s name, and even only then with permission from the commander.³⁹

³⁶ This term is not utilized as a euphemism for illegal or unethical means of achieving the end result. It is merely used to say that a judge advocate may have to work a little harder or think outside the proverbial box to come up with a workable solution that satisfies the legal and ethical requirements while achieving the commander’s end objective.

³⁷ A deployed judge advocate working in the area of contract and fiscal law points out that academic instruction and what is actually happening in the field many times does not marry up:

Academic instruction does not always complement the actual situation on the ground in a deployed environment. . . . Attorneys deploying to overseas contingency operations should understand meeting the mission may sometimes require lawyers to ‘think creatively.’ Contract and fiscal law lawyers should work hard to get to ‘yes’ without violating the law. If possible, avoid giving answers of ‘why something cannot be done.’

TIP OF THE SPEAR:, *supra* note 17, at 277 (internal citation omitted).

³⁸ Jack Woltze’s question to Tom Hagen and Tom Hagen’s response after Jack realizes who Tom works for.

³⁹ Another aspect to cautiously using the boss’s name concerns the delicate balance SJAs must find when mentoring BJAs. Brigadier General Thomas E. Ayres states that the SJA must educate and mentor the BJA generally without unduly influencing the BJA or communicating a higher convening authority’s direct observations on a specific case, creating an unlawful command influence scenario. Regarding effectively using a commander’s influence to support your position, a deployed judge advocate reported,

The [Brigade Judge Advocate (BJA)] accompanied the brigade commander, with whom he had a long-standing relationship, to initial meetings with senior provincial officials. . . . If he required the brigade commander’s influence after an initial meeting, he asked him to attend a subsequent one. . . . JAs who develop a good relationship with their commanders have a better chance of leveraging this relationship to

IV. Conclusion

The Godfather is a classic movie that is not only beloved by many, but also continues to have a profound influence on other movies, television, and pop culture.⁴⁰ But beyond its cinematic achievements, *The Godfather* offers the judge advocate a visual lesson on how to be an effective

counselor and advisor, even when faced with an emotional, and sometimes irrational, client. If followed, the seven lessons discussed above will provide the new brigade judge advocate a solid path to follow when assimilating into the brigade staff and providing effective counsel to the boss.⁴¹

increase their status and influence when dealing with Iraqi officials.

TIP OF THE SPEAR, *supra* note 17, at 419.

⁴⁰ *The Godfather* was referenced in *Analyze This*, *You've Got Mail*, *Arrested Development*, and *Seinfeld*, to name but a few classic media, and contains the second most quoted line, "I'll make him an offer he can't refuse," as nominated by AFI. See http://en.wikipedia.org/wiki/The_Godfather (last visited Dec. 12, 2010).

⁴¹ The judge advocate who follows the aforementioned sentiments will find himself not merely the legal advisor, but a trusted advisor. It is in this relationship that victory is achieved. When the commander seeks your counsel not only on legal matters, but for issues not necessarily in the legal field (e.g., writing a position paper for . . . , or where to move personnel, or how to improve morale), then a judge advocate has added value to the commander.

CLE News

1. Resident Course Quotas

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

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

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

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

Go to Self Service, My Education. Scroll to Globe Icon (not the AARTS Transcript Services).

Go to ATRRS On-line, Student Menu, Individual Training Record. The training record with reservations and completions will be visible.

If you do not see a particular entry for a course that you are registered for or have completed, see your local ATRRS Quota Manager or Training Coordinator for an update or correction.

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

2. TJAGLCS CLE Course Schedule (June 2010–September 2011) (<http://www.jagcnet.army.mil/JAGCNETINTERNET/HOMEPAGES/AC/TJAGSAWEB.NSF/Main?OpenFrameset> (click on Courses, Course Schedule))

ATRRS. No.	Course Title	Dates
GENERAL		
5-27-C20	185th JAOBC/BOLC III (Ph 2)	15 Jul – 28 Sep 11
5-27-C20	186th JAOBC/BOLC III (Ph 2)	4 – 1 Feb 12
5-27-C20	187th JAOBC/BOLC III (Ph 2)	17 Feb – 2 May 12
5-27-C20	188th JAOBC/BOLC III (Ph 2)	20 Jul – 3 Oct 12
5-27-C22	60th Judge Advocate Officer Graduate Course	15 Aug – 25 May 12
	61st Judge Advocate Officer Graduate Course	13 Aug – 23 May 13
5F-F1	219th Senior Officer Legal Orientation Course	17 – 21 Oct 11
5F-F1	220th Senior Officer Legal Orientation Course	23 – 27 Jan 12
5F-F1	221st Senior Officer Legal Orientation Course	19 – 23 Mar 12
5F-F1	222th Senior Officer Legal Orientation Course	11 – 15 Jun 12
5F-F1	223d Senior Officer Legal Orientation Course	27 – 31 Aug 12
5F-F3	18th RC General Officer Legal Orientation Course	30 May – 1 Jun 12
5F-F5	2012 Congressional Staff Legal Orientation (COLO)	23 – 24Feb 12

5F-F52	42d Staff Judge Advocate Course	4 – 8 Jun 12
5F-F52-S	15th SJA Team Leadership Course	4 – 6 Jun 12
5F-F55	2012 JAOAC	9 – 20 Jan 12
5F-F70	43d Methods of Instruction	5 – 6 Jul 12
5F-JAG	2011 JAG Annual CLE Workshop	3 – 7 Oct 11

NCO ACADEMY COURSES

512-27D30	1st Advanced Leaders Course (Ph 2)	17 Oct – 22 Nov 11
512-27D30	2d Advanced Leaders Course (Ph 2)	9 Jan – 14 Feb 12
512-27D30	3d Advanced Leaders Course (Ph 2)	9 Jan – 14 Feb 12
512-27D30	4th Advanced Leaders Course (Ph 2)	12 Mar – 17 Apr 12
512-27D30	5th Advanced Leaders Course (Ph 2)	7 May – 12 Jun 12
512-27D30	6th Advanced Leaders Course (Ph 2)	9 Jul – 14 Aug 12
512-27D40	1st Senior Leaders Course (Ph 2)	17 Oct – 22 Nov 11
512-27D40	2d Senior Leaders Course (Ph 2)	12 Mar – 17 Apr 12
512-27D40	3d Senior Leaders Course (Ph 2)	7 May – 12 Jun 12
512-27D40	4th Senior Leaders Course (Ph 2)	9 Jul – 14 Aug 12

WARRANT OFFICER COURSES

7A-270A0	19th JA Warrant Officer Basic Course	20 May – 15 Jun 12
7A-270A1	23d Legal Administrator Course	11 – 15 Jun 12
7A-270A2	13th JA Warrant Officer Advanced Course	26 Mar – 20 Apr 12
7A-270A3	2012 Senior Legal Administrator Symposium	31 Oct – 4 Nov 11

ENLISTED COURSES

512-27D/20/30	23d Law for Paralegal NCO Course	19 – 23 Mar 12
512-27D/DCSP	21st Senior Paralegal Course	18 – 22 Jun 12
512-27D-BCT	BCT NCOIC Course	7 – 11 May 12
512-27DC5	37th Court Reporter Course	23 Jan – 23 Mar 12
512-27DC5	38th Court Reporter Course	16 Apr – 15 Jun 12
512-27DC5	39th Court Reporter Course	23 Jul – 21 Sep 12
512-27DC6	12th Senior Court Reporter Course	9 – 13 Jul 12

512-27DC7	16th Redictation Course	9 – 13 Jan 12
	17th Redictation Course	26 – 30 Mar 12
5F-F58	2012 27D Command Paralegal Course	31 Oct – 4 Nov 11
ADMINISTRATIVE AND CIVIL LAW		
5F-F22	65th Law of Federal Employment Course	20 – 24 Aug 12
5F-F23	67th Legal Assistance Course	24 – 28 Oct 11
5F-F23E	2011 USAREUR Legal Assistance CLE Course	17 – 21 Oct 11
5F-F24	36th Administrative Law for Military Installations & Operations	13 – 17 Feb 12
5F-F24E	2011 USAREUR Administrative Law CLE	12 – 16 Sep 11
5F-F24E	2012 USAREUR Administrative Law CLE	10 – 14 Sep 12
5F-F26E	2011 USAREUR Claims CLE	14 – 18 Nov 11
5F-F28	2011 Income Tax Law Course	5 – 9 Dec 11
5F-F28E	2011 USAREUR Tax CLE Course	28 Nov – 2 Dec 11
5F-F28H	2012 Hawaii Income Tax CLE Course	19 – 13 Jan 12
5F-F28P	2012 PACOM Income Tax CLE Course	2 – 6 Jan 12
5F-F202	10th Ethics Counselors Course	9 – 13 Apr 12

CONTRACT AND FISCAL LAW		
5F-F10	165th Contract Attorneys Course	16 – 27 Jul 12
5F-F11	2011 Contract & Fiscal Law Symposium	15 – 18 Nov 11
5F-F12	83d Fiscal Law Course	12 – 16 Mar 12
5F-F14	30th Comptrollers Accreditation Fiscal Law Course	5 – 9 Mar 12
5F-F101	12th Procurement Fraud Course	15 – 17 Aug 12
5F-F103	2011 Advanced Contract Law Course	31 Aug – 2 Sep 11

CRIMINAL LAW		
5F-F31	18th Military Justice Managers Course	20 – 24 Aug 12
5F-F33	55th Military Judge Course	16 Apr – 5 May 12
5F-F34	38th Criminal Law Advocacy Course	12 – 16 Sep 11
5F-F34	39th Criminal Law Advocacy Course	19 – 23 Oct 11
5F-F34	40th Criminal Law Advocacy Course	30 Jan – 3 Feb 12
5F-F34	41st Criminal Law Advocacy Course	6 – 10 Feb 12
5F-F34	42d Criminal Law Advocacy Course	10 – 14 Sep 12
5F-F34	43d Criminal Law Advocacy Course	17 – 21 Sep 12
5F-F35	35th Criminal Law New Developments Course	1 – 4 Nov 11
5F-F35E	2012 USAREUR Criminal Law Advocacy Course	9 – 12 Jan 12

INTERNATIONAL AND OPERATIONAL LAW		
5F-F40	2012 Brigade Judge Advocate Symposium	7 – 11 May 12
5F-F41	8th Intelligence Law Course	13 – 17 Aug 12
5F-F45	11th Domestic Operational Law	17 – 21 Oct 11
5F-F47	57th Operational Law of War Course	27 Feb – 9 Mar 12
5F-F47	58th Operational Law of War Course	30 Jul – 10 Aug 12
5F-F47E	2011 USAREUR Operational Law CLE	19 – 23 Sep 11
5F-F47E	2012 USAREUR Operational Law CLE	17 – 21 Sep 12
5F-F48	5th Rule of Law Course	9 – 13 Jul 12

3. Naval Justice School and FY 2010–2011 Course Schedule

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

Naval Justice School Newport, RI		
CDP	Course Title	Dates
0257	Lawyer Course (030)	1 Aug – 7 Oct 11
0258 (Newport)	Senior Officer (080)	6 – 9 Sep 11 (Newport)
07HN	Legalman Paralegal Core (030)	31 Aug – 20 Dec 11
627S	Senior Enlisted Leadership Course (Fleet) (160) Senior Enlisted Leadership Course (Fleet) (170)	20 – 22 Sep 11 ((Pendleton) 21 – 23 Sep 11 (Norfolk)

748A	Law of Naval Operations (020)	19 – 23 Sep 11 (Norfolk)
900B	Reserve Lawyer Course (020)	26 – 30 Sep 11
3759	Legal Clerk Course (080)	19 – 23 Sep 11 (Pendleton)
NA	Legal Service Court Reporter (030)	22 July – 7 Oct 11

Naval Justice School Detachment Norfolk, VA		
3760	Senior Officer Course (070)	12 – 16 Sep 11

4. Air Force Judge Advocate General School Fiscal Year 2012 Course Schedule

For information about attending the following courses, please contact Jim Whitaker, Air Force Judge Advocate General School, 150 Chennault Circle, Maxwell AFB, AL 36112-5712, commercial telephone (334) 953-2802, DSN 493-2802, fax (334) 953-4445.

Air Force Judge Advocate General School, Maxwell AFB, AL	
Course Title	Dates
Paralegal Apprentice Course, Class 11-06	15 Aug – 21 Sep 11
Trial & Defense Advocacy Course, Class 11-B	12 – 23 Sep 11
Accident Investigation Course, Class 11-A	12 – 16 Sep 11
Defense Orientation Course, Class 12-A	3 – 7 Oct 2011
Federal Employee Labor Law Course, Class 12-A	3 – 7 Oct 2011
Paralegal Apprentice Course, Class 12-01	3 Oct – 22 Nov 2011
Judge Advocate Staff Officer Course, Class 12-A	11 Oct – 15 Dec 2011
Paralegal Craftsman Course, Class 12-01	3 Oct – 18 Nov 2011
Civilian Attorney Orientation, Class 12-A	11 – 12 Oct 2011
Advanced Environmental Law Course, Class 12-A (Off-Site Wash DC Location)	12 – 14 Oct 2011
Medical Law Mini Course, Class 12-A	15 – 18 Nov 2011
Article 32 Investigating Officer Course, Class 12-A	18 – 19 Nov 2011
Deployed Fiscal Law & Contingency Contracting Course, Class 12-A	5 – 9 Dec 2011
Pacific Trial Advocacy Course, Class 12-A (Off-Site, Japan)	12 – 16 Dec 2011
Trial & Defense Advocacy Course, Class 12-A	9 – 21 Jan 2012
Gateway, Class 12-A	9 – 20 Jan 2012

Paralegal Apprentice Course, Class 11-02	10 Jan – 2 Mar 2012
Homeland Defense/Homeland Security Course, Class 12-A	23 – 27 Jan 2012
CONUS Trial Advocacy Course, Class 12-A (Off-Site)	30 Jan – 3 Feb 2012
Legal & Administrative Investigations Course, Class 12-A	6 – 10 Feb 2012
European Trial Advocacy Course, Class 12-A (Off-Site, Kapaun AS, Germany)	13 – 17 Feb 2012
Judge Advocate Staff Officer Course, Class 12-B	13 Feb – 13 Apr 2012
Paralegal Craftsman Course, Class 12-02	13 Feb – 29 Mar 2012
Paralegal Apprentice Course, Class 12-03	5 Mar – 24 Apr 2012
Environmental Law Update Course-DL, Class 12-A	27 – 29 Mar 2012
Defense Orientation Course, Class 12-B	2 – 6 Apr 2012
Advanced Labor & Employment Law Course, Class 12-A (Off-Site DC location)	11 – 13 Apr 2012
Air Force Reserve and Air National Guard Annual Survey of the Law, Class 12-A (Off-Site Atlanta, GA)	13 – 14 Apr 2012
Military Justice Administration Course, Class 12-A	16 – 20 Apr 2012
Paralegal Craftsman Course, Class 12-03	16 Apr – 1 Jun 2012
Will Preparation Paralegal Course, Class 12-A	23 – 25 Apr 2012
Paralegal Apprentice Course, Class 12-04	30 Apr – 20 Jun 2012
Cyber Law Course, Class 12-A	24 – 26 Apr 2012
Negotiation and Appropriate Dispute Resolution Course, Class 12-A	30 Apr – 4 May 2012
Advanced Trial Advocacy Course, Class 12-A	7 – 11 May 2012
Operations Law Course, Class 12-A	14 – 25 May 2012
CONUS Trial Advocacy Course, Class 12-B (Off-Site)	14 – 18 May 2012
CONUS Trial Advocacy Course, Class 12-C (Off-Site)	21 – 25 May 2012
Reserve Forces Paralegal Course, Class 12-A	4 – 8 Jun 2012
Staff Judge Advocate Course, Class 12-A	11 – 22 Jun 2012
Law Office Management Course, Class 12-A	11 – 22 Jun 2012
Paralegal Apprentice Course, Class 12-05	25 Jun – 15 Aug 2012
Will Preparation Paralegal Course, Class 12-B	25 – 27 Jun 2012
Judge Advocate Staff Officer Course, Class 12-C	9 Jul – 7 Sep 2012

Paralegal Craftsman Course, Class 12-04	9 Jul – 22 Aug 2012
Environmental Law Course, Class 12-A	20 – 24 Aug 2012
Trial & Defense Advocacy Course, Class 12-B	10 – 21 Sep 2012
Accident Investigation Course, Class 12-A	11 – 14 Sep 2012

5. Civilian-Sponsored CLE Courses

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

- AAJE: American Academy of Judicial Education
P.O. Box 728
University, MS 38677-0728
(662) 915-1225
- ABA: American Bar Association
750 North Lake Shore Drive
Chicago, IL 60611
(312) 988-6200
- AGACL: Association of Government Attorneys in Capital Litigation
Arizona Attorney General's Office
ATTN: Jan Dyer
1275 West Washington
Phoenix, AZ 85007
(602) 542-8552
- ALIABA: American Law Institute-American Bar Association
Committee on Continuing Professional Education
4025 Chestnut Street
Philadelphia, PA 19104-3099
(800) CLE-NEWS or (215) 243-1600
- ASLM: American Society of Law and Medicine
Boston University School of Law
765 Commonwealth Avenue
Boston, MA 02215
(617) 262-4990
- CCEB: Continuing Education of the Bar
University of California Extension
2300 Shattuck Avenue
Berkeley, CA 94704
(510) 642-3973
- CLA: Computer Law Association, Inc.
3028 Javier Road, Suite 500E
Fairfax, VA 22031
(703) 560-7747

CLESN: CLE Satellite Network
920 Spring Street
Springfield, IL 62704
(217) 525-0744
(800) 521-8662

ESI: Educational Services Institute
5201 Leesburg Pike, Suite 600
Falls Church, VA 22041-3202
(703) 379-2900

FBA: Federal Bar Association
1815 H Street, NW, Suite 408
Washington, DC 20006-3697
(202) 638-0252

FB: Florida Bar
650 Apalachee Parkway
Tallahassee, FL 32399-2300
(850) 561-5600

GICLE: The Institute of Continuing Legal Education
P.O. Box 1885
Athens, GA 30603
(706) 369-5664

GII: Government Institutes, Inc.
966 Hungerford Drive, Suite 24
Rockville, MD 20850
(301) 251-9250

GWU: Government Contracts Program
The George Washington University Law School
2020 K Street, NW, Room 2107
Washington, DC 20052
(202) 994-5272

IICLE: Illinois Institute for CLE
2395 W. Jefferson Street
Springfield, IL 62702
(217) 787-2080

LRP: LRP Publications
1555 King Street, Suite 200
Alexandria, VA 22314
(703) 684-0510
(800) 727-1227

LSU: Louisiana State University
Center on Continuing Professional Development
Paul M. Herbert Law Center
Baton Rouge, LA 70803-1000
(504) 388-5837

MLI: Medi-Legal Institute
15301 Ventura Boulevard, Suite 300
Sherman Oaks, CA 91403
(800) 443-0100

MC Law: Mississippi College School of Law
151 East Griffith Street
Jackson, MS 39201
(601) 925-7107, fax (601) 925-7115

NAC National Advocacy Center
1620 Pendleton Street
Columbia, SC 29201
(803) 705-5000

NDAA: National District Attorneys Association
44 Canal Center Plaza, Suite 110
Alexandria, VA 22314
(703) 549-9222

NDAED: National District Attorneys Education Division
1600 Hampton Street
Columbia, SC 29208
(803) 705-5095

NITA: National Institute for Trial Advocacy
1507 Energy Park Drive
St. Paul, MN 55108
(612) 644-0323 (in MN and AK)
(800) 225-6482

NJC: National Judicial College
Judicial College Building
University of Nevada
Reno, NV 89557

NMTLA: New Mexico Trial Lawyers' Association
P.O. Box 301
Albuquerque, NM 87103
(505) 243-6003

PBI: Pennsylvania Bar Institute
104 South Street
P.O. Box 1027
Harrisburg, PA 17108-1027
(717) 233-5774
(800) 932-4637

PLI: Practicing Law Institute
810 Seventh Avenue
New York, NY 10019
(212) 765-5700

TBA: Tennessee Bar Association
3622 West End Avenue
Nashville, TN 37205
(615) 383-7421

TLS: Tulane Law School
Tulane University CLE
8200 Hampson Avenue, Suite 300
New Orleans, LA 70118
(504) 865-5900

UMLC: University of Miami Law Center
P.O. Box 248087
Coral Gables, FL 33124
(305) 284-4762

UT: The University of Texas School of Law
Office of Continuing Legal Education
727 East 26th Street
Austin, TX 78705-9968

VCLE: University of Virginia School of Law
Trial Advocacy Institute
P.O. Box 4468
Charlottesville, VA 22905

6. Information Regarding the Judge Advocate Officer Advanced Course (JAOAC)

a. The JAOAC is mandatory for an RC company grade JA's career progression and promotion eligibility. It is a blended course divided into two phases. Phase I is an online nonresident course administered by the Distributed Learning Division (DLD) of the Training Developments Directorate (TDD), at TJAGLCS. Phase II is a two-week resident course at TJAGLCS each January.

b. Phase I (nonresident online): Phase I is limited to USAR and Army NG JAs who have successfully completed the Judge Advocate Officer's Basic Course (JAIBC) and the Judge Advocate Tactical Staff Officer Course (JATSOC) prior to enrollment in Phase I. Prior to enrollment in Phase I, a student must have obtained at least the rank of CPT and must have completed two years of service since completion of JAIBC, unless, at the time of their accession into the JAGC they were transferred into the JAGC from prior commissioned service. Other cases are reviewed on a case-by-case basis. Phase I is a prerequisite for Phase II. For further information regarding enrolling in Phase I, please contact the Judge Advocate General's University Helpdesk accessible at <https://jag.learn.army.mil>.

c. Phase II (resident): Phase II is offered each January at TJAGLCS. Students must have submitted all Phase I subcourses for grading, to include all writing exercises, by 1 November in order to be eligible to attend the two-week resident Phase II in January of the following year.

d. Regarding the January 2011 Phase II resident JAOAC, students who fail to submit all Phase I non-resident subcourses by 2400 1 November 2010 will not be allowed to attend the resident course.

e. If you have additional questions regarding JAOAC, contact LTC Baucum Fulk, commercial telephone (434) 971-3357, or e-mail baucum.fulk@us.army.mil.

7. Mandatory Continuing Legal Education

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

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

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

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

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

Current Materials of Interest

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

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

b. Access to the JAGCNet:

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

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

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

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

(d) FLEP students;

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

(2) Requests for exceptions to the access policy should be e-mailed to: LAAWSXXI@jagc-smtp.army.mil

c. How to log on to JAGCNet:

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

(2) Follow the link that reads “Enter JAGCNet.”

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

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

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

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

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

2. TJAGSA Publications Available Through the LAAWS XXI JAGCNet

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

The TJAGSA faculty and staff are available through the Internet. Addresses for TJAGSA personnel are available by e-mail at jagsch@hqda.army.mil or by accessing the JAGC directory via JAGCNET. If you have any problems, please contact Legal Technology Management Office at (434) 971-3257. Phone numbers and e-mail addresses for TJAGSA personnel are available on TJAGSA Web page at <http://www.jagcnet.army.mil/tjagsa>. Click on “directory” for the listings.

For students who wish to access their office e-mail while attending TJAGSA classes, please ensure that your office e-mail is available via the web. Please bring the address with you when attending classes at TJAGSA. If your office does not have web accessible e-mail, forward your office e-mail to your AKO account. It is mandatory that you have an AKO account. You can sign up for an account at the Army Portal, <http://www.jagcnet.army.mil/tjagsa>. Click on "directory" for the listings.

Personnel desiring to call TJAGSA can dial via DSN 521-7115 or, provided the telephone call is for official business only, use the toll free number, (800) 552-3978; the receptionist will connect you with the appropriate department or directorate. For additional information, please contact the LTMO at (434) 971-3264 or DSN 521-3264.

3. The Army Law Library Service

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

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