

## Forks in the Road: Recent Developments in Substantive Criminal Law

Lieutenant Colonel Mark L. Johnson  
Professor, Criminal Law Department  
The Judge Advocate General's Legal Center and School, U.S. Army  
Charlottesville, Virginia

### Introduction

*"When you come to a fork in the road, take it."*<sup>1</sup>

The past year brought substantial changes to the *Manual for Courts-Martial (MCM)*,<sup>2</sup> both by executive order<sup>3</sup> and the 2006 National Defense Authorization Act (NDAA).<sup>4</sup> These changes significantly impact the present and future practice of military justice, especially in the area of sexual misconduct. In addition, the past term brought several decisions from the Court of Appeals for the Armed Forces (CAAF) interpreting federal statutes and examining their scope under General Article 134, Uniform Code of Military Justice (UCMJ).<sup>5</sup> Of these decisions, the most important signal a fundamental change in regulating child pornography overseas. The CAAF also issued several decisions reinforcing trends from past terms, most notably in the area of pleadings and modification. This article discusses all of these changes and important decisions and also highlights opinions from the past term concerning solicitation, indecent acts, drug offenses, and obstruction of justice.

### Amendments to the MCM

The first section of this article discusses the new statute of limitations provisions contained in Executive Order 13,387<sup>6</sup> and the 2006 NDAA.<sup>7</sup> Next, this article summarizes other executive order changes dealing with lawfulness of orders, drunken or reckless operation of a vehicle, patronizing a prostitute, threat or hoax, and unreasonable multiplication of charges. Finally, the article focuses on recent changes to the UCMJ, including a new offense for stalking<sup>8</sup> and greatly expanded treatment for sexual misconduct under Article 120, UCMJ.<sup>9</sup>

#### *Statute of Limitations, Article 43 UCMJ*

*It ain't over till it's over.*<sup>10</sup>

On 24 November 2003, Congress passed the 2004 NDAA.<sup>11</sup> That legislation expanded the statute of limitations for certain child abuse offenses to the victim's twenty-fifth birthday.<sup>12</sup> As noted in a previous symposium article, those changes to the statute of limitations left two unanswered questions.<sup>13</sup> First, did Congress really intend to create a more lenient posture for those who raped a child rather than an adult?<sup>14</sup> Second, is the legislation retroactive?<sup>15</sup>

<sup>1</sup> Yogi Berra Quotes, <http://www.digitaldreamdoor.com/pages/quotes/yogiberra.html> (last visited July 13, 2006) [hereinafter Yogi Berra Quotes].

<sup>2</sup> MANUAL FOR COURTS-MARTIAL, UNITED STATES (2005) [hereinafter MCM].

<sup>3</sup> See Exec. Order No. 13,387, 70 Fed. Reg. 60697 (Oct. 18, 2005).

<sup>4</sup> See National Defense Authorization Act for Fiscal Year 2006, Pub. L. No. 109-163, §§ 551-553, 119 Stat. 3136 (2006).

<sup>5</sup> MCM, *supra* note 2, pt. IV, ¶ 60.

<sup>6</sup> 70 Fed. Reg. 60697 (the executive order is effective thirty days after signing).

<sup>7</sup> National Defense Authorization Act for Fiscal Year 2006 § 553.

<sup>8</sup> *Id.* § 551.

<sup>9</sup> *Id.* § 552.

<sup>10</sup> Yogi Berra Quotes, *supra* note 1.

<sup>11</sup> National Defense Authorization Act for Fiscal Year 2004, Pub. L. No. 108-136, 119 Stat. 3257 (2003).

<sup>12</sup> See *id.*

<sup>13</sup> Major Jeffrey C. Hagler, *Duck Soup: Recent Developments in Substantive Criminal Law*, ARMY LAW., July 2004, at 81.

<sup>14</sup> See *id.* Rape is a capital crime with no statute of limitations; therefore, the new legislation effectively modified that rule in the case of child rape.

<sup>15</sup> See *id.*

The 2006 NDAA addressed the first question by making it clear that there is no statute of limitations for murder, rape, or any other offense punishable by death.<sup>16</sup> The special rules for child abuse offenses now also extend to the life of the child or within five years after the date the offense was committed, whichever is longer.<sup>17</sup> The 2006 NDAA amended Article 43, subparagraph (B), UCMJ, to include any offense committed in connection with child abuse offenses and not merely those offenses committed in conjunction with sexual or physical abuse.<sup>18</sup> In addition, “any offense” punishable by Article 120 replaces “rape or carnal knowledge” in subsection (i), most likely in anticipation of the new sexual misconduct scheme discussed later in this article.<sup>19</sup> Finally, child abuse offenses now specifically include kidnapping<sup>20</sup> and acts that involve abuse of a person who has not attained the age of eighteen years and would constitute an offense under the following provisions of title 18 of the U.S. Code: chapter 110, sexual exploitation and other abuse of children; chapter 117, transportation for illegal sexual activity and related crimes; or section 1591, sex trafficking of children by force, fraud, or coercion.<sup>21</sup>

The discussion accompanying Rule for Courts-Martial (RCM) 907(b)(2) was amended to address retroactivity by limiting RCM 907(b)(2) applicability to those offenses committed on or after 24 November 1998.<sup>22</sup> The analysis added for this change further indicates that although the expired period (on or before 23 November 1998) is beyond reach, the period from 24 November 1998 to 23 November 2003 may be extended.<sup>23</sup> Although the Court in *United States v. Stogner* specifically avoided that issue, the drafters are arguably on solid ground.<sup>24</sup>

#### *Lawfulness of Orders, Article 90 UCMJ*

Part IV, paragraph 14c(2)(a), was amended to clarify that lawfulness of an order should be determined by the military judge, not the trier of fact.<sup>25</sup> The analysis accompanying Article 90 cites *United States v. New*<sup>26</sup> as the basis for this change.

#### *Drunken or Reckless Operation of Vehicle, Aircraft, or Vessel, Article 111 UCMJ*<sup>27</sup>

Article 111, UCMJ, was last amended by the 2004 NDAA.<sup>28</sup> The portion of Executive Order 13,387 addressing changes to Part IV, paragraph 35 should be ignored.<sup>29</sup> The correct statutory and implementing provisions for Article 111, UCMJ, are included in the *MCM* 2005 edition.<sup>30</sup>

---

<sup>16</sup> See National Defense Authorization Act for Fiscal Year 2006, Pub. L. No. 109-163, § 553, 119 Stat. 3136 (2006).

<sup>17</sup> See *id.*

<sup>18</sup> See *id.*

<sup>19</sup> See *id.*; see *infra* pages 9-15.

<sup>20</sup> National Defense Authorization Act for Fiscal Year 2006 § 553.

<sup>21</sup> *Id.*

<sup>22</sup> See Exec. Order No. 13,387, 70 Fed. Reg. 60697, 60707-60708 (Oct. 18, 2005).

<sup>23</sup> *Id.* at 60708 (citing *Stogner v. California*, 539 U.S. 607, 609 (2003)).

<sup>24</sup> See *Stogner*, 539 U.S. at 607, 618 (“Even where courts have upheld extensions of unexpired statutes of limitations (extensions that our holding today does not affect), they have consistently distinguished situations where limitations periods have *expired*.” (citation omitted)).

<sup>25</sup> 70 Fed. Reg. at 60712.

<sup>26</sup> See *id.* (citing *United States v. New*, 55 M.J. 95, 100-01 (2001); see also Colonel Michael J. Hargis & Lieutenant Colonel Timothy Grammel, *Annual Review of Developments in Instructions—2005*, ARMY LAW., Apr. 2006, at 80 (discussing the recent case of *United States v. Deisher*, 61 M.J. 313 (2005), which reinforced the military judge’s role in determining the lawfulness of an order).

<sup>27</sup> UCMJ art. 111 (2005). Although not a change to the *MCM* per se, practitioners should review *United States v. Scheurer*, 62 M.J. 100, 109-110 (2005) (holding that Article 111 includes both the operation, and the physical control of a vehicle while impaired. “Physical control” could include the following possible actions: sitting behind and leaning against the steering wheel; sitting in the driver’s seat of a parked car with one’s hands on the wheel and the key in the ignition but without the engine running; and sitting behind the wheel with the key in the ignition. Unless the government proves beyond a reasonable doubt that the accused was in the driver’s seat, rather than the front passenger’s seat, the government has not proven an Article 111 offense (citing *United States v. Barnes*, 24 M.J. 534, 535 (A.C.M.R. 1987))).

<sup>28</sup> National Defense Authorization Act for Fiscal Year 2004, Pub. L. No. 108-136, 117 Stat. 1392 (2003).

<sup>29</sup> See Lieutenant Colonel Michele Shields, *The National Defense Authorization Act for Fiscal Year 2006, Amendments to the Uniform Code of Military Justice*, Joint Service Committee on Military Justice Report, Criminal Law Division, Office of the Judge Advocate General (stating that changes to correct the error in EO 13,387 concerning Article 111 are included in the draft EO currently being reviewed at the Office of Management and Budget (OMB)); E-mail with attachment from LTC Michele Shields, Chief, Policy Branch, Criminal Law Division, Office of the Judge Advocate General, U.S. Army, to LTC

### *Pandering and Prostitution, Article 134 UCMJ*

Part IV, paragraph 97, was amended by adding the offense of patronizing a prostitute.<sup>31</sup> The elements of this new offense include the following: (a) that the accused had sexual intercourse with another person, not the accused's spouse; (b) that the accused compelled, induced, enticed, or procured such person to engage in an act of sexual intercourse in exchange for money or other compensation; (c) that this act was wrongful; and (d) that, under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the Armed Forces or was of a nature to bring discredit upon the Armed Forces.<sup>32</sup> The maximum punishment chart, Appendix 12, was amended by designating the same maximum punishment for patronizing a prostitute as for prostitution,<sup>33</sup> which currently includes a dishonorable discharge, forfeiture of all pay and allowances, and confinement for one year.<sup>34</sup>

### *Threat or Hoax, Article 134 UCMJ*

Executive Order 13,387 brought several changes to Part IV, paragraph 109, of the MCM.<sup>35</sup> The title was changed from "Threat or Hoax: Bomb" to "Threat or hoax designed or intended to cause panic or public fear."<sup>36</sup> The word "bomb" was removed from both the threat and hoax categories, and the offense was amended to include threats or hoaxes involving weapons of mass destruction; biological or chemical agents, substances or weapons; or hazardous materials.<sup>37</sup> Finally, paragraph 109e and the maximum punishment chart, Appendix 12, were amended by increasing the maximum confinement from five to ten years.<sup>38</sup>

### *Preferral of Charges, R.C.M. 307*

Rule for Court-Martial 307(c)(4) was amended by making the first sentence of the discussion, which concerns unreasonable multiplication of charges, part of the rule.<sup>39</sup> That sentence reads, "What is substantially one transaction should not be made the basis for an unreasonable multiplication of charges against one person."<sup>40</sup> The analysis accompanying RCM 307(c)(4) reflects *United States v. Quiroz*,<sup>41</sup> which identifies the prohibition against the unreasonable multiplication of charges as "a long-standing principal" of military law.<sup>42</sup>

### *New UCMJ Article 120a—Stalking*

The 2006 NDAA implemented dramatic changes to Article 120 of the UCMJ.<sup>43</sup> The first of those changes is the new Article 120a for stalking, effective 6 July 2006.<sup>44</sup> The new offense includes any person subject to the code who:

---

Mark Johnson, Professor, Criminal Law Department, The Judge Advocate General's Legal Center and School, U.S. Army (28 Mar. 2006) (on file with author) [hereinafter OTJAG Email].

<sup>30</sup> OTJAG Email, *supra* note 29.

<sup>31</sup> 70 Fed. Reg. at 60701.

<sup>32</sup> *Id.*

<sup>33</sup> *Id.* at 60714.

<sup>34</sup> MCM, *supra* note 2, app. 12.

<sup>35</sup> *See* 70 Fed. Reg. at 60701-60702.

<sup>36</sup> *Id.*

<sup>37</sup> *Id.*

<sup>38</sup> *See id.* at 60714; MCM, *supra* note 2, app. 12.

<sup>39</sup> *See* 70 Fed. Reg. at 60697.

<sup>40</sup> *Id.*

<sup>41</sup> *See* 55 M.J. 334 (2001).

<sup>42</sup> *See* 70 Fed. Reg. at 60707; *see also* *United States v. Roderick*, 62 M.J. 425 (2006) (holding that military judge may dismiss charges and specifications as an unreasonable multiplication of charges at findings).

<sup>43</sup> *See* National Defense Authorization Act for Fiscal Year 2006, Pub. L. No. 109-163, §§ 551-552, 119 Stat. 3136 (2006).

<sup>44</sup> *See id.* § 551.

(1) wrongfully engages in a course of conduct directed at a specific person that would cause a reasonable person to fear death or bodily harm, including sexual assault, to himself or herself or a member of his or her immediate family; (2) who has knowledge, or should have knowledge, that the specific person will be placed in reasonable fear of death or bodily harm, including sexual assault, to himself or herself or a member of his or her immediate family; and (3) whose acts induce reasonable fear in the specific person of death or bodily harm, including sexual assault, to himself or herself or to a member of his or her immediate family.<sup>45</sup>

“Course of conduct” is defined as “repeated maintenance of visual or physical proximity to a specific person” or “repeated conveyance of verbal threats, written threats, or threats implied by conduct, or a combination of such threats, directed at or toward a certain person.”<sup>46</sup> “Repeated conduct” is defined as two or more occasions, and “immediate family” is defined as a

spouse, parent, child, or sibling of the person, or any other family member, relative, or intimate partner of the person who regularly resides in the household of the person or who within the six months preceding the commencement of the course of conduct regularly resided in the household of the person.<sup>47</sup>

This new provision is loosely based on the federal statute used as a guideline for state stalking legislation.<sup>48</sup> The provision also codifies the practice of charging this offense under General Article 134, UCMJ.<sup>49</sup> The new legislation provides more uniform application and better notice to servicemembers of the prohibited conduct.<sup>50</sup> The U.S. Army’s Office of the Judge Advocate General, Criminal Law Division, recently published an information paper with proposed implementation guidance, including elements, maximum punishment (three years confinement), and a sample specification.<sup>51</sup> Although the statute was effective 6 July 2006, the executive order implementing these provisions is not yet signed.<sup>52</sup> To determine the maximum punishment before the executive order is signed, practitioners are urged to argue that stalking is closely related to the UCMJ offenses of communicating a threat or offering a type of assault with an unloaded firearm.<sup>53</sup> In the alternative, counsel could argue that stalking is closely related to the analogous federal crime, which has a maximum period of five years confinement.<sup>54</sup>

#### *New UCMJ Article 120—Rape, Sexual Assault, and Other Sexual Misconduct*

Effective 1 October 2007, the UCMJ will greatly expand the provisions for charging sexual offenses under Article 120, including far more detailed definitions for rape and sexual assault.<sup>55</sup> These changes are the result of recent efforts by Congress to examine and update the UCMJ’s sexual offense provisions. The Ronald W. Reagan National Defense Authorization Act for Fiscal Year 2005 required the Secretary of Defense to propose changes regarding sexual offenses in the UCMJ “to conform more closely to other Federal Laws and regulations that address sexual assault.”<sup>56</sup> As a result, the Joint Service Committee on Military Justice created a subcommittee to review the federal statutes and all the state statutes.<sup>57</sup>

---

<sup>45</sup> *Id.*

<sup>46</sup> *Id.*

<sup>47</sup> *Id.*

<sup>48</sup> See H.R. REP. NO. 109-089 (2006); see also 18 U.S.C.S. § 2261A (LEXIS 2006).

<sup>49</sup> See *United States v. Saunders*, 59 M.J. 1, 17-18 (2003) (charging under General Article 134 justified in part on the prevalence of state statutes, albeit in many different forms).

<sup>50</sup> See National Defense Authorization Act for Fiscal Year 2006, Pub. L. No. 109-163, §§ 551, 119 Stat. 3136 (2006).

<sup>51</sup> E-mail from COL Flora Darpino, Chief, Criminal Law Division, Office of The Judge Advocate General, U.S. Army, to LTC Patricia Ham., Professor and Chair, Criminal Law Department, The Judge Advocate General’s Legal Center and School, U.S. Army (12 June 2006) (e-mail with attachment on file with author).

<sup>52</sup> *Id.*

<sup>53</sup> *Id.*

<sup>54</sup> *Id.*

<sup>55</sup> National Defense Authorization Act for Fiscal Year 2006, § 552.

<sup>56</sup> H.R. REP. NO. 109-89 (2006) (citing The Ronald W. Reagan National Defense Authorization Act for Fiscal Year 2005, Pub. L. No. 108-375, 118 Stat. 1811 (2004)).

<sup>57</sup> SEX CRIMES AND THE UCMJ: A REPORT FOR THE JOINT SERVICE COMMITTEE ON MILITARY JUSTICE (Feb 2005), <http://www.defenselink.mil/dodgc/php/>

Although the subcommittee concluded that no changes were necessary, it did include several options for changing the UCMJ.<sup>58</sup> It is generally accepted that “Option 5” of the six options contained in the report is the basis for the new legislation.<sup>59</sup>

The new sexual assault provision provides a “series of graded offenses relating to rape, sexual assault and other sexual misconduct, based on the presence or absence of aggravating factors.”<sup>60</sup> The categories for rape, sexual assault, and other sexual misconduct under the new Article 120 include: (a) rape; (b) rape of a child; (c) aggravated sexual assault; (d) aggravated sexual assault of a child; (e) aggravated sexual contact; (f) aggravated sexual abuse of a child; (g) aggravated sexual contact with a child; (h) abusive sexual contact; (i) abusive sexual contact with a child; (j) indecent liberty with a child; (k) indecent act; (l) forcible pandering; (m) wrongful sexual contact; and (n) indecent exposure.<sup>61</sup>

There are numerous and detailed definitions that the practitioner will have to master including, but not limited to, the following: (1) sexual act; (2) sexual contact; (3) grievous bodily harm; (4) dangerous weapon or object; (5) force; (6) threatening or placing another in fear under (a) rape or (e) aggravated sexual contact; (7) threatening or placing another in fear under (c) aggravated sexual assault or (h) abusive sexual contact; (8) bodily harm; (9) child; (10) lewd act; (11) indecent liberty; and (12) indecent conduct.<sup>62</sup> The two most important of these definitions are “sexual act” and “sexual contact.” Sexual act is defined as contact between the penis and vulva; or penetration of a genital opening by hand, finger, or other object with intent to abuse, humiliate, harass, or degrade, or to arouse or gratify sexual desire.<sup>63</sup> Sexual contact is defined as intentional touching, directly or through clothing, of the genitalia, anus, groin, breast, inner thigh, or buttocks, or causing another to do the same, with an intent to abuse, humiliate, or degrade, or to arouse or gratify sexual desire.<sup>64</sup> Most of the offenses are best understood by applying these two definitions in different contexts, from most to least aggravating.<sup>65</sup>

Also effective on 1 October 2007 are expanded aggravating factors under Article 118(4), felony murder, and an expanded statute of limitations under Article 43, UCMJ.<sup>66</sup> Under the new felony murder, “Rape” is replaced with rape, rape of a child, aggravated sexual assault, aggravated sexual assault of a child, aggravated sexual contact, aggravated sexual abuse of a child, and aggravated sexual contact with a child.<sup>67</sup> Under the new statute of limitations, Article 43(a), “rape,” is replaced with “rape, or rape of a child.”<sup>68</sup>

One of the most significant changes under the new statute is that “without consent” will no longer be an element for rape.<sup>69</sup> Under the new provision, consent and mistake of fact as to consent are affirmative defenses for rape, aggravated sexual assault, aggravated sexual contact, and abusive sexual contact.<sup>70</sup> Another major difference is that unlike the current provision, the burden is on the accused to prove the affirmative defenses of consent and mistake of fact by a preponderance of the evidence.<sup>71</sup> After this burden is met, the prosecution must disprove the defense beyond a reasonable doubt.<sup>72</sup>

---

docs/subcommittee\_reportMarkHarvey1-13-05.doc [hereinafter SEX CRIMES AND THE UCMJ]; see also U.S. DEP’T OF DEFENSE, DIR. 5500.17, ROLE AND RESPONSIBILITIES OF THE JOINT SERVICE COMMITTEE ON MILITARY JUSTICE (May 2003).

<sup>58</sup> SEX CRIMES AND THE UCMJ, *supra* note 57.

<sup>59</sup> E-mail from House Armed Services Committee attorney (and member of drafting committee for new sexual assault legislation), to LTC Mark Johnson, Professor, Criminal Law Department, The Judge Advocate General’s Legal Center and School, U.S. Army (9 Mar. 2006) [hereinafter Option 5 Email] (on file with the author).

<sup>60</sup> H.R. REP. NO. 109-89 (2006).

<sup>61</sup> National Defense Authorization Act for Fiscal Year 2006, Pub. L. No. 109-163, § 552(a), 119 Stat. 3136 (2006).

<sup>62</sup> *Id.*

<sup>63</sup> *Id.*

<sup>64</sup> *Id.*

<sup>65</sup> *Id.*

<sup>66</sup> *Id.* § 552(d), (e).

<sup>67</sup> *Id.* § 552(d).

<sup>68</sup> *Id.* § 552(e).

<sup>69</sup> *Id.* § 552(a). The current elements for rape under UCMJ art. 120(a) are: that the accused committed the act of sexual intercourse; and that the act of sexual intercourse was done by force and without consent. UCMJ art. 120(a) (2005).

<sup>70</sup> National Defense Authorization Act for Fiscal Year 2006 § 552(a).

<sup>71</sup> *Id.*

<sup>72</sup> *Id.*

The provisions concerning consent and mistake of fact as to consent raise several specific concerns. First, is the question of whether the accused has satisfied the preponderance of the evidence standard a question of law or fact? The statute does not specify, and arguments are apparent for either approach. For example, the affirmative defense of mistake of fact as to age in carnal knowledge also shifts the burden of proof by a preponderance of the evidence to the defense and is ultimately for the panel to decide.<sup>73</sup> In those cases, however, the instruction provides an absolute defense, and the instructor is only given after the military judge determines that the defense is “in issue.”<sup>74</sup> Because the initial defense burden under the new statute acts only to shift the burden back to the government, the question of whether the initial burden has been met is arguably best framed as one of law for the military judge. Additionally, it would seem difficult (as a matter of law and fact) for a panel to find by a preponderance of the evidence that the victim consented or that there was mistake of fact as to consent and then find beyond a reasonable doubt that the victim did not consent or that there was no mistake of fact.

Problems in practical application are joined by constitutional concerns. Although a similar District of Columbia statute, which was cited as the basis for this new rule, also places the initial burden on the accused, it does not shift the burden back to the government.<sup>75</sup> As noted in the cases cited for this new provision, even that approach is not without danger.<sup>76</sup> One of the main concerns here is the availability of consent (or affirmative defense) evidence on the issue of force, which the government must still prove beyond a reasonable doubt.<sup>77</sup> Several jurisdictions shift the burden of affirmative defenses, requiring varied levels of proof to do so.<sup>78</sup> However, shifting the burden from the accused at a preponderance of the evidence standard back to the government at a beyond a reasonable doubt standard (by statute) charts new waters for the UCMJ, and the cited authority in “Option 5” does not provide a clearly supported basis for the journey.

Several challenges also lie ahead in implementing the new rape and sexual misconduct scheme. First, it may be difficult for military courts to determine the precedent upon which they should rely on when interpreting the new statute. “Option 5” cites various sources of law, including federal, state, and military law.<sup>79</sup> While most sections cite fairly specific bases for a particular provision, that is not always the case. For example, when discussing consent and mistake of fact as to consent, “Option 5” references caselaw from two different federal circuits and the CAAF.<sup>80</sup> This is further complicated by two other factors. First, the legislative history and committee notes do not specifically cite “Option 5” as the source for the legislation, although this is generally accepted to be the case.<sup>81</sup> Second, Congress did not adopt several recommendations contained within “Option 5,” including the recommendation that forcible sodomy be addressed under rape or that consensual sodomy be placed within a category of sexual misconduct punishable if prejudicial to good order and discipline or service discrediting.<sup>82</sup> Clearly, certain portions of “Option 5” do not represent the intent of Congress.

The second major challenge is interpreting the relationship between the new statute and existing Article 134 offenses that specifically address the same conduct. Several existing UCMJ provisions directly conflict with the new statute, including indecent acts and liberties with a child, indecent acts with another, and indecent exposure.<sup>83</sup> Other offenses may also conflict; for example, are the offenses of indecent assault and assault with intent to commit rape now preempted in certain cases?<sup>84</sup> Practitioners will need clear guidance on how to proceed in this area.

---

<sup>73</sup> MCM, *supra* note 2, R.C.M. 916(j)(2); U.S. DEP’T OF ARMY, PAM. 27-9, LEGAL SERVICES: MILITARY JUDGE’S BENCHBOOK para. 3-45-2 n.3 (15 Sept. 2002) [hereinafter BENCHBOOK].

<sup>74</sup> MCM, *supra* note 2, R.C.M. 920(e)(3). A defense is “in issue” when “some evidence” has been admitted upon which members might rely. *Id.* R.C.M. 920(e)(3) discussion.

<sup>75</sup> SEX CRIMES AND THE UCMJ, *supra* note 57, at 247 (citing D.C. CODE ANN. § 22-3007 (2004)).

<sup>76</sup> *Id.* at 249 (citing *Hicks v. United States*, 707 A.2d 1301, 1303-1304 (D.C. App. 1998) and *Russell v. United States*, 698 A.2d 1007, 1016-1017 (D.C. App. 1997) (both cases were reversed because instructions improperly limited consideration of constitutionally relevant evidence)).

<sup>77</sup> *Id.* See generally *Martin v. Ohio*, 480 U.S. 228 (1987) (cited by both *Hicks*, *supra* note 76 and *Russell*, *supra* note 76).

<sup>78</sup> Marlene A. Attardo, *Defense of Mistake of Fact as to Victim’s Consent in Rape Prosecution*, 102 A.L.R. 5th 447 (2006).

<sup>79</sup> SEX CRIMES AND THE UCMJ, *supra* note 57, at Option 5.

<sup>80</sup> *Id.* at 249.

<sup>81</sup> Option 5 Email, *supra* note 59.

<sup>82</sup> SEX CRIMES AND THE UCMJ, *supra* note 57, Option 5, at 233 and 293-99.

<sup>83</sup> See National Defense Authorization Act for Fiscal Year 2006, Pub. L. No. 109-163, § 552, 119 Stat. 3136 (2006); UCMJ art. 134 (Indecent acts or liberties with a child, Indecent acts with another, and Indecent exposure).

<sup>84</sup> See National Defense Authorization Act for Fiscal Year 2006 § 552; MCM, *supra* note 2, pt. IV, ¶¶ 63, 64, and 60c.(5).

Finally, counsel and military judges will need elements, procedural rules, and instructions for the *Military Judge's Benchbook (Benchbook)* by the effective date of the statute. This will be difficult, given the extremely complex nature of the legislation. The new scheme specifically applies to offenses occurring on or after 1 October 2007.<sup>85</sup> Given the statute of limitations for rape and child abuse offenses,<sup>86</sup> military practitioners will operate under the old and new system for quite some time. Keeping counsel and military judges versed in both systems and using the correct formats when trying cases will require vigilance by everyone practicing and teaching military justice.

### The General Article

During the past term, the CAAF issued several important decisions interpreting the parameters of General Article 134, UCMJ, especially in the area of applying and interpreting federal statutes under Clause 3, Crimes and offenses not capital. This section of the article examines the scope of the General Article within a diverse range of offenses covering child pornography, explosives, soliciting a minor, and use of unlawful substances.

#### *Child Pornography—Martinelli,<sup>87</sup> Reeves,<sup>88</sup> and Hays<sup>89</sup>*

*United States v. Martinelli* was a watershed case in Article 134 jurisprudence, and the first of three cases to examine the Child Pornography Protection Act (CPPA) during the 2005 term.<sup>90</sup> While stationed in Germany, Specialist (SPC) Martinelli visited an off-post Internet café to view and download child pornography.<sup>91</sup> While there, he searched Internet websites and chat rooms to communicate with those willing to send him the images.<sup>92</sup> Martinelli received these images through electronic mail on personal *Hotmail* or *Yahoo!* accounts or by accessing websites containing the images.<sup>93</sup> Martinelli downloaded the images to the hard drive of the Internet café computer.<sup>94</sup> He attached and transmitted some of the images to others via his *Yahoo!* or *Hotmail* accounts and copied still more images to a separate disk.<sup>95</sup> Martinelli took the disk back to his barracks room on Cambrai Fritsch Kaserne, a U.S. Army installation, where he loaded some of the images onto the hard drive of his personal computer.<sup>96</sup> Martinelli pleaded guilty to obstructing justice in violation of Article 134 and to sending, receiving, reproducing, and possessing child pornography under Article 134, Clause 3, in violation of section 2252A of the CPPA.<sup>97</sup>

In a three-to-two decision, the CAAF held that the CPPA has no extraterritorial application.<sup>98</sup> The court harmonized the seminal cases of *Equal Opportunity Commission v. Arabian American Oil Co.*<sup>99</sup> and *United States v. Bowman*<sup>100</sup> by holding that the only classes of criminal statutes exempt from the presumption against extraterritoriality are those statutes aimed at obstructions and frauds against the government.<sup>101</sup> The CAAF held that child pornography does not fall in this category but

---

<sup>85</sup> See National Defense Authorization Act for Fiscal Year 2006 § 552.

<sup>86</sup> See *id.* § 553 (codified at 10 U.S.C.S. § 843 (LEXIS 2006)).

<sup>87</sup> *United States v. Martinelli*, 62 M.J. 52 (2005).

<sup>88</sup> *United States v. Reeves*, 62 M.J. 88 (2005).

<sup>89</sup> *United States v. Hays*, 62 M.J. 158 (2005).

<sup>90</sup> *Martinelli*, 62 M.J. at 52. The CPPA consists of 18 U.S.C. §§ 2251, 2252, 2252A, and 2260(b) (2000).

<sup>91</sup> *Id.* at 55.

<sup>92</sup> *Id.*

<sup>93</sup> *Id.*

<sup>94</sup> *Id.*

<sup>95</sup> *Id.*

<sup>96</sup> *Id.*

<sup>97</sup> *Id.* Article 134, UCMJ, has three clauses. Clause I includes conduct prejudicial to good order and discipline, Clause 2 includes service discrediting conduct, and Clause 3 incorporates non-capital federal crimes or assimilates state statutes under 18 U.S.C. § 13 (2000). See MCM, *supra* note 2, pt. IV, para. 60c.

<sup>98</sup> *Martinelli*, 62 M.J. at 54.

<sup>99</sup> 499 U.S. 244 (1991).

<sup>100</sup> 260 U.S. 94 (1922).

<sup>101</sup> *Martinelli*, 62 M.J. at 57.

is a crime that “affects the peace and good order of the community,” generally applicable only within territorial boundaries.<sup>102</sup>

The CAAF’s inquiry then turned to whether the CPPA gave any indication of congressional intent to extend its coverage extraterritorially.<sup>103</sup> The first three categories of section 2252A involve the movement of child pornography in “interstate or foreign commerce,” while the final two categories can involve either “interstate or foreign commerce” or the “situs” of the accused.<sup>104</sup> The court was not persuaded that using interstate or foreign commerce was anything more than a straightforward reference to the Commerce Clause and certainly was not the “clear expression” required to overcome the presumption against extraterritoriality.<sup>105</sup> The CAAF then examined the situs definitions referenced in the statute and dismissed each in turn.<sup>106</sup> First, the CAAF held that references to “Indian country” reflect the “unique, and inherently domestic, relationship between the United States Government and American Indians.”<sup>107</sup> Second, the CAAF held that “[t]he special maritime and territorial jurisdiction of the United States” provision as applied extraterritorially was the subject of complex litigation that inherently demonstrated “something less than a ‘clear expression’ of congressional intention” to extend its reach to the boundaries of a foreign nation.<sup>108</sup> Finally, the CAAF held that “any land or building owned by, leased to, or otherwise used by or under control of the United States Government” did not “provide clear evidence of a congressional intent that the statute should apply outside the boundaries of the United States.”<sup>109</sup> Rather, this language could just as easily apply to “national parks, federal office buildings, and domestic military installations.”<sup>110</sup>

After determining that there was no extraterritorial application, the CAAF held that domestic application was possible under a “continuing offense” theory for material that flowed through servers in the United States (specifications one through three).<sup>111</sup> The only specification that had domestic application in *Martinelli*, however, involved sending pornographic material into the United States through email servers (specification 1).<sup>112</sup> The CAAF then held that Martinelli’s plea to that specification was improvident under *Ashcroft v. Free Speech Coalition*<sup>113</sup> and *United States v. O’Connor*,<sup>114</sup> because of the focus on the unconstitutional definition of child pornography and the lack of focus on “actual” versus “virtual” images.<sup>115</sup>

While holding that the pleas to specifications one through four were deficient under the CPPA,<sup>116</sup> the CAAF noted that lesser included offenses under Clause 1 or Clause 2 of Article 134<sup>117</sup> were still possible.<sup>118</sup> The CAAF distinguished its holdings in *United States v. Sapp* and *United States v. Augustine* because those cases did not involve the constitutional dimension present in *O’Connor*.<sup>119</sup> The difference between the CAAF’s inquiry under the higher *O’Connor* standard and the

---

<sup>102</sup> *Id.* at 58.

<sup>103</sup> *Id.* at 59.

<sup>104</sup> *Id.*

<sup>105</sup> *Id.* at 60.

<sup>106</sup> *Id.*

<sup>107</sup> *Id.*

<sup>108</sup> *Id.* (citing *United States v. Corey*, 232 F.3d 1166 (9th Cir. 2000) (holding that special maritime and territorial jurisdiction applies to property inside U.S. Air Bases in Japan) and *United States v. Gatlin*, 216 F. 3d 207 (2d Cir. 2000) (holding that special maritime and territorial jurisdiction does not include housing complexes inside U.S Army installations in Germany)).

<sup>109</sup> *Martinelli*, 62 M.J. at 61.

<sup>110</sup> *Id.*

<sup>111</sup> *Id.* at 62-64 (citing *United States v. Moncini*, 882 F.2d 401 (9th Cir. 1989)).

<sup>112</sup> *Id.* at 63-64 (noting that nothing in the record indicated U.S. connection with reproducing or receiving child pornography).

<sup>113</sup> 535 U.S. 234 (2002).

<sup>114</sup> 58 M.J. 450, 452-53 (2003) (holding *Ashcroft* requires “actual” character of visual depictions as a factual predicate to guilty plea under the CPPA).

<sup>115</sup> *Martinelli*, 62 M.J. at 65-66.

<sup>116</sup> *Id.* at 66 (holding specification one deficient under *O’Connor* and specifications two through four deficient because the CPPA did not apply to Martinelli’s conduct in the first place).

<sup>117</sup> MCM, *supra* note 2, pt. IV. ¶ 60c(2) and (3).

<sup>118</sup> See *O’Connor*, 58 M.J. at 454-55 (holding that although improvident in this case, lesser included offenses under Clause 1 or 2 of Article 134 are possible if servicemembers demonstrate a clear understanding of which acts were prohibited and why those acts were prejudicial to good order and discipline or service discrediting). Cf. *United States v. Sapp*, 53 M.J. 90 (2000); *United States v. Augustine*, 53 M.J. 95 (2000) (holding that lesser included offenses to the CPPA based specifications under Clause 2 (service discrediting conduct) were provident).

<sup>119</sup> *Martinelli*, 62 M.J. at 66.

“review under the less strict *Augustine/Sapp* standard is a qualitative difference.”<sup>120</sup> The court stated that “[t]he critical inquiry here is whether the record reflects an appropriate discussion of and focus on the character of the conduct at issue as service-discrediting or prejudicial to good order and discipline.”<sup>121</sup> When constitutionally protected language is implicated, the record must “conspicuously reflect” the clear understanding of the prohibited conduct required under *O’Connor*.<sup>122</sup> In this case, there was no discussion of service discrediting conduct or prejudice to good order and discipline in connection with the CPPA specifications, precluding lesser included offenses under the “stricter scrutiny” of *O’Connor* and *Mason*.<sup>123</sup> Specifications one through four, which were based on the CPPA, and the sentence were set aside.<sup>124</sup> Chief Judge Gierke and Judge Crawford both registered strong dissents.<sup>125</sup>

In *United States v. Reeves*, the CAAF again considered the CPPA in an overseas environment.<sup>126</sup> Sergeant (SGT) Reeves was stationed in Germany where all of his misconduct occurred.<sup>127</sup> He used the on-post library computers to receive and download child pornography, and he printed the images using library printers.<sup>128</sup> Various pornographic images were also found in his vehicle and quarters.<sup>129</sup> In addition, SGT Reeves engaged in filming (from about 200 feet) the genital areas of young German girls near Hanau, Germany, particularly focusing on one of the girls to see into her shorts.<sup>130</sup>

Reeves pleaded guilty to possessing and receiving child pornography and using a minor to engage in sexually explicit conduct for the purpose of producing a visual depiction of such conduct under Article 134, Clause 3, in violation of the CPPA.<sup>131</sup> The CAAF held that under the *Martinelli* analysis, the CPPA, including section 2251, was not extraterritorial.<sup>132</sup> Further, because none of Reeves’s conduct continued into the United States, his conduct did not have domestic application.<sup>133</sup> Finally, although the language in the specifications did not raise “constitutional concerns” as outlined in *O’Connor*, *Mason*, and *Martinelli*, there was no discussion of whether Reeves’s conduct was service discrediting or prejudicial to good order and discipline.<sup>134</sup> Therefore, the CAAF was also precluded from affirming lesser included offenses under *Sapp* and *Augustine*.<sup>135</sup> The CAAF set aside the CPPA based specifications and the sentence.<sup>136</sup> As in *Martinelli*, both Chief Judge Gierke and Judge Crawford registered strong dissents.<sup>137</sup>

In *United States v. Hays*, the CAAF once again addressed CPPA applicability and the possibility of lesser included offenses under Clauses 1 and 2 of Article 134, UCMJ.<sup>138</sup> Specialist Hays pleaded guilty to distributing, receiving, possessing, and soliciting others to distribute and receive child pornography under Article 134, Clause 3, in violation of the

---

<sup>120</sup> *Id.* at 66-67 (“Although the understanding required of the servicemember remains the same, we require a clearer more precise articulation of the servicemember’s understanding under *O’Connor* than we require in the cases where the accused’s First Amendment rights are not implicated”).

<sup>121</sup> *Id.* at 67; see *United States v. Mason*, 60 M.J. 15 (2004). In *Mason*, the military judge also used unconstitutional language but *sua sponte* discussed Clauses 1 and 2 of Article 134 with the accused. “The difference between *Mason* and *O’Connor* was that the military judge in *Mason* specifically discussed the character of the underlying conduct and *Mason* agreed that his conduct was both service discrediting and prejudicial to good order and discipline.” *Martinelli*, 62 M.J. at 67.

<sup>122</sup> *Martinelli*, 62 M.J. at 67.

<sup>123</sup> *Id.* at 66-67 (under the facts of this case, *Martinelli*’s pleas would have been improvident even under the less strict *Sapp/Augustine* standard due to the lack of any discussion concerning prejudice to good order and discipline or service discrediting conduct).

<sup>124</sup> *Id.* at 68.

<sup>125</sup> *Id.* at 68 and 77 (Gierke, C.J., concurring in part and dissenting in part, and Crawford, J., dissenting).

<sup>126</sup> 62 M.J. 88 (2005).

<sup>127</sup> *Id.* at 91.

<sup>128</sup> *Id.*

<sup>129</sup> *Id.*

<sup>130</sup> *Id.*

<sup>131</sup> *Id.* at 90.

<sup>132</sup> *Id.* at 92-93.

<sup>133</sup> *Id.* at 94.

<sup>134</sup> *Id.* at 96.

<sup>135</sup> *Id.*

<sup>136</sup> *Id.*

<sup>137</sup> *Id.* at 96 and 97 (Gierke, C.J., concurring in part and dissenting in part, and Crawford, J., dissenting).

<sup>138</sup> 62 M.J. 158 (2005).

CPPA.<sup>139</sup> The government charged these offenses as occurring solely in Germany.<sup>140</sup> The CAAF held that under the *Martinelli* analysis, the CPPA-based specifications were not extraterritorial.<sup>141</sup> Further, the CAAF assumed that the plea inquiry did not implicate Hays's First Amendment rights,<sup>142</sup> thus placing the lesser included analysis under *Sapp* and *Augustine*, rather than *Mason* and *Martinelli*.<sup>143</sup> Although the military judge did not discuss with Hays whether his conduct was service discrediting or prejudicial to good order and discipline with regard to the first three CPPA specifications, he was clearly aware of the impact of his conduct on the image of the armed forces.<sup>144</sup> The CAAF affirmed the CPPA based specifications after replacing references to the CPPA with service discrediting conduct.<sup>145</sup>

The implications of *Martinelli*, *Reeves*, and *Hays* are potentially far reaching. As Judge Crawford noted in her *Martinelli* dissent, the application of other federal statutes extraterritorially may be in question.<sup>146</sup> Ironically, spouses and contractors may now be held to a higher standard under the Military Extraterritorial Jurisdiction Act than servicemembers.<sup>147</sup> As discussed in last year's symposium, convictions under Article 134 for child pornography may not accomplish the ultimate goals of the statute, and in some cases it is foreseeable that Clause 1 and 2 will not apply to certain conduct now included within the CPPA.<sup>148</sup> Of course, it is still possible to charge child pornography offenses under the CPPA overseas if the government can prove the "domestic" relationship as defined by the CAAF in *Martinelli*.<sup>149</sup> Unless domestic relationship evidence is introduced in a stipulation of fact, however, it may be difficult for the government to establish the required nexus. Whatever the implications may be, trial counsel should include service discrediting or prejudicial to good order and discipline language in CPPA-based specifications regardless of location<sup>150</sup> or charge these offenses under Clause 1 or Clause 2 of Article 134 in the first instance.<sup>151</sup> Defense counsel must be vigilant to ensure that the government is charging child pornography properly in light of CAAF precedent and the facts of each case, exploiting the difficulties of proof or charging to the benefit of their clients.

#### *Storing Stolen Explosives—United States v. Disney*<sup>152</sup>

In *Disney*, the CAAF considered the applicability and reach of the Commerce Clause<sup>153</sup> to a federal statute under Clause 3 of Article 134, UCMJ.<sup>154</sup> Hospital Corpsman First Class Walter Disney, a Navy SEAL, was accused of stealing ordnance from several military training events.<sup>155</sup> Contrary to his pleas, he was convicted of one specification of larceny of military

---

<sup>139</sup> *Id.* at 166.

<sup>140</sup> *Id.* at 167.

<sup>141</sup> *Id.*

<sup>142</sup> *Id.*

<sup>143</sup> *Id.* at 168.

<sup>144</sup> *Id.* When discussing the final CPPA based specification, Hays admitted that it "was bringing discredit upon the Armed Forces," and that it might tend to make those outside the military think less of Soldiers. *Id.*

<sup>145</sup> *Id.* at 169.

<sup>146</sup> *United States v. Martinelli*, 62 M.J. 52, 83 (2005) (citing as an example the Espionage Act of 1900, 18 U.S.C. § 792-99 (2000)).

<sup>147</sup> Military Extraterritorial Jurisdiction Act of 2000 (MEJA), Pub. L. No. 106-523, 114 Stat. 2488 (codified at 18 U.S.C. §§ 3261-67 (2000) (extending extraterritoriality of certain federal statutes to those employed by or accompanying the force).

<sup>148</sup> Major Jeffrey C. Hagler, *Measure for Measure: Recent Developments in Substantive Criminal Law*, ARMY LAW., May 2005, at 75-77. In addition, the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001 (USA PATRIOT ACT), Pub. L. No. 107-56, 115 Stat. 272 (2001), may not solve this problem overseas. See 18 U.S.C. § 7(3), (9) (2000); 18 U.S.C.S. § 3261 (LEXIS 2004); see also *United States v. Dewitt*, Army No. 20031281 (May 25, 2006).

<sup>149</sup> *Martinelli*, 62 M.J. at 62-64.

<sup>150</sup> See *United States v. Mason*, 60 M.J. 15 (2004); see Hagler, *supra* note 148.

<sup>151</sup> See *United States v. Irvin*, 60 M.J. 23 (2004) (holding that child pornography may be charged directly under Clause 1 or Clause 2 of Article 134 whether "virtual" or "actual"); see Hagler, *supra* note 148.

<sup>152</sup> 62 M.J. 46 (2005).

<sup>153</sup> U.S. CONST. art 1, § 8, cl. 3.

<sup>154</sup> *Disney*, 62 M.J. at 46.

<sup>155</sup> *Id.* at 47.

property and, pursuant to his pleas, he was convicted of one specification of storing stolen explosives in violation of 18 U.S.C. § 842 (h)<sup>156</sup> under Articles 121 and 134, Clause 3.<sup>157</sup>

Disney challenged the constitutionality of the statute as applied to his offense because his conduct lacked a substantial nexus to interstate commerce.<sup>158</sup> The CAAF held that 18 U.S.C. § 842 (h) is a constitutional exercise of Congress's authority under the Commerce Clause and is constitutional as applied to Disney.<sup>159</sup> As a threshold matter, the CAAF held that Disney has standing to contest the constitutionality of the statute on Commerce Clause grounds.<sup>160</sup> Congress, however, clearly has the authority to legislate an activity if the activity exerts a substantial economic effect on interstate commerce.<sup>161</sup> In this case, the statute in question is a constitutional exercise of the congressional commerce power.<sup>162</sup>

The CAAF also held that 18 U.S.C. § 842 is constitutional as applied to Disney's conduct.<sup>163</sup> First, the statute regulates economic activity and Disney's conduct fell within the scope of that regulation.<sup>164</sup> Second, the statute includes an express jurisdictional element.<sup>165</sup> Third, the statute's history demonstrates "that Congress found the illegal use and unsafe storage of contraband explosives to be a substantial hazard to interstate commerce."<sup>166</sup> Fourth, there is a rational basis for concluding that Disney's conduct has substantial direct implications for commerce.<sup>167</sup> Finally, the Court noted that their decision was in accord with every other court that has considered this issue after *United States v. Lopez*.<sup>168</sup>

*Disney* represents the CAAF's willingness to extend constitutional protections to servicemembers absent contrary legislative intent from Congress.<sup>169</sup> On the other hand, *Disney* stands for the proposition that the CAAF will extend deference to Congress when interpreting the effect of prohibited conduct on interstate commerce. The ability to incorporate federal statutes under Clause 3 of Article 134 remains a useful tool when the incorporated statutes more accurately capture misconduct than existing UCMJ provisions.

---

<sup>156</sup> 18 U.S.C. § 842(h) (2000).

<sup>157</sup> *Disney*, 62 M.J. at 47.

<sup>158</sup> *Id.* at 48.

<sup>159</sup> *Id.* at 50.

<sup>160</sup> *Id.* at 49. We would anticipate an express legislative statement were Congress to deprive servicemembers of the procedural right to challenge the constitutionality of statutes under which they were convicted pursuant to Article 134, Clause 3, a right heretofore recognized in military law and practice. *Id.* at 49; see, e.g., *United States v. O'Connor*, 58 M.J. 450 (2003) (reversing Article 134, Clause 3 conviction for violation of federal child pornography statute on First Amendment grounds).

<sup>161</sup> *Disney*, 62 M.J. 46, at 49.

Congress may regulate three broad categories of conduct pursuant to its commerce power: the channels of interstate commerce, such as highways and rail lines; the instrumentalities of interstate commerce, or persons or things in interstate commerce, such as vehicles and goods; and those activities that substantially affect interstate commerce, such as intrastate coal mining or hotels catering to interstate guests.

*Id.* at 49 (citing *United States v. Lopez*, 514 U.S. 549, 558, which held that the statute criminalizing possession of a handgun on school property did not regulate economic activity).

<sup>162</sup> *Id.* at 50.

<sup>163</sup> *Id.*

<sup>164</sup> *Id.*

<sup>165</sup> *Id.*

<sup>166</sup> *Id.* at 51 (citing Pub. L. No. 91-452, § 1102, 84 Stat. 922 (1970)).

<sup>167</sup> *Id.* Disney diverted explosives away from regulated interstate market to "his garage where federal regulations no longer applied regarding their storage or possible reentry into the marketplace." *Id.* at 51.

<sup>168</sup> *Id.*

<sup>169</sup> See H.F. "Sparky" Gierke, *The Use of Article III Case Law in Military Jurisprudence*, ARMY LAW., Aug. 2005, at 25 (providing an excellent discussion of the CAAF's considerations when addressing constitutional and federal statutory questions).

In *United States v. Brooks*, the CAAF once again interpreted the meaning of a federal statute as applied to a servicemember.<sup>172</sup> Specialist Brooks exchanged emails with an online acquaintance, Mrs. N, eventually requesting that she arrange a sexual encounter for him with a fictitious eight-year-old girl.<sup>173</sup> Brooks subsequently went to a hotel to meet Mrs. N's sister instead and was apprehended by CID agents.<sup>174</sup> He never communicated directly with a minor or a person he believed was a minor.<sup>175</sup> Brooks was convicted of violating 18 U.S.C. § 2422(b)<sup>176</sup> under Article 134, Clause 3, for attempting to commit the offense of carnal knowledge with a victim under the age of twelve and wrongfully soliciting an individual under the age of eighteen to engage in a criminal sexual act.<sup>177</sup> After noting that this was an issue of first impression,<sup>178</sup> the CAAF held that a conviction under § 2422(b) does not require direct inducement of a minor nor does it require an actual minor.<sup>179</sup> The court noted *United States v. Bailey*, where the Sixth Circuit held that the relevant intent is the intent to persuade or to attempt to persuade, not the intent to commit the actual sexual act.<sup>180</sup> In this case, Brooks acted with the intent to induce a minor to engage in unlawful sexual activity and then completed the attempt with actions that strongly corroborated the required culpability.<sup>181</sup>

In *United States v. Amador*, the Air Force Court of Criminal Appeals addressed the same statute.<sup>182</sup> Airman Basic Amador sent several messages over the Internet to “krystall,” believing she was thirteen years old.<sup>183</sup> They planned a sexual encounter and agreed to meet at a mall; however, krystall was actually a state patrol officer who apprehended him at the rendezvous point.<sup>184</sup> Amador pleaded guilty to using a facility or means of interstate commerce to attempt to knowingly entice a child under eighteen years of age to engage in sexual activity in violation of 18 U.S.C. § 2422(b),<sup>185</sup> under Article 134, Clause 3.<sup>186</sup> The Air Force Court held that the military judge did not abuse his discretion in accepting Amador's plea.<sup>187</sup> An actual minor is not required for an attempt conviction under § 2422(b).<sup>188</sup> Further, Amador took substantial steps toward enticing krystall to have sex with him in violation of the statute.<sup>189</sup>

Taken together, cases like *Brooks* and *Amador* stand for the proposition that law enforcement personnel are acting well within the statute by posing as underage victims of sexual predators. In fact, they need not even pose as minors in arranging for the sexual act. Trial counsel are well advised, however, to ensure that the kinds of “substantial steps” taken towards

---

<sup>170</sup> 60 M.J. 495 (2005).

<sup>171</sup> 61 M.J. 619 (A.F. Ct. Crim. App. 2005).

<sup>172</sup> *Brooks*, 60 M.J. at 495.

<sup>173</sup> *Id.* at 496.

<sup>174</sup> *Id.*

<sup>175</sup> *Id.* at 498.

<sup>176</sup> 18 U.S.C. § 2422(b) (2000) (coercion and enticement).

<sup>177</sup> *Brooks*, 60 M.J. at 496.

<sup>178</sup> *Id.* at 497.

<sup>179</sup> *Id.* at 498. The CAAF noted this case was almost indistinguishable from *United States v. Murrell*. *United States v. Murrell*, 368 F.3d 1283 (11th Cir. 2004).

<sup>180</sup> *Brooks*, 60 M.J. at 498 (citing *United States v. Bailey*, 228 F.3d 637 (6th Cir. 2000), *cert. denied*, 532 U.S. 1009).

<sup>181</sup> *Id.* at 498-99 (Brooks arrived at the designated hotel meeting place with a stuffed tiger, a musical water globe, a light source with artificial flowers, and a knife). *Id.* at 496.

<sup>182</sup> 61 M.J. 619 (A.F. Ct. Crim. App. 2005).

<sup>183</sup> *Id.* at 621.

<sup>184</sup> *Id.*

<sup>185</sup> 18 U.S.C. § 2422(b) (2000) (coercion and enticement).

<sup>186</sup> *Amador*, 61 M.J. at 624.

<sup>187</sup> *Id.*

<sup>188</sup> *Id.* at 622 (citing *United States v. Brooks*, 60 M.J. 495, 498 (2005)).

<sup>189</sup> *Id.* (Amador acknowledged during his providence inquiry that the only reason he did not have sex with the thirteen-year-old girl is that she turned out to be a law enforcement officer).

completing the crime in *Brooks* and *Amador* are presented on findings, whether through witnesses in a contested case or through the stipulation of fact in a guilty plea setting.

*The General Article, Unlawful Substances, and Preemption—United States v. Erickson*<sup>190</sup>

In *Erickson*, the CAAF examined the use of unlawful substances not directly covered by Article 112a, UCMJ.<sup>191</sup> Airman First Class Erickson pleaded guilty to several drug related charges and specifications, including wrongful inhalation of nitrous oxide, in violation of Article 134, Clause 1.<sup>192</sup> During the plea inquiry, he admitted that inhaling nitrous oxide impaired his thinking and could damage his brain.<sup>193</sup> The CAAF held his plea provident based on these admissions.<sup>194</sup> The CAAF noted that he understood this impairment would undermine his capabilities and readiness to perform military duties, thus creating a direct and palpable effect on good order and discipline.<sup>195</sup> The CAAF also took judicial notice that many states have recognized the harmful effects of nitrous oxide by criminalizing this conduct.<sup>196</sup> The CAAF emphasized that such state action is not necessary to sustain a conviction under Article 134; however, it underscores the absence of a basis to question the factual sufficiency of Erickson's plea.<sup>197</sup>

The CAAF also held that this charge was not preempted by Article 112a.<sup>198</sup> For preemption to apply, it must be shown that Congress intended the other punitive article to cover a class of offenses in a complete way. Simply because the offense charged under Article 134 embraces all but one element of an offense under another article does not trigger the preemption doctrine.<sup>199</sup> In this case, the history of Article 112a reflects congressional intent not to cover every drug related offense in a complete way.<sup>200</sup> Therefore, Article 112a does not preclude the Armed Forces from using Article 134 to cover substances capable of producing a mind-altered state and not covered by Article 112a.<sup>201</sup>

Practitioners can take several lessons from *Erickson*. First, trial counsel do not have to find a violation of Article 112a to charge an abuse of mind-altering substances. When servicemembers engage in activity that is prejudicial to good order and discipline or service discrediting, government counsel are free to charge it as just that, rather than searching for a specific drug under Article 112a.<sup>202</sup> The CAAF also strongly suggested that government counsel would not be prohibited from assimilating applicable state statutes covering certain controlled substances not covered under Article 112a.<sup>203</sup> Finally, defense counsel are reminded that *Erickson* was a guilty plea. The government may have a much tougher time proving prejudice to good order and discipline when facing other mind altering substances without the kind of evidence present in this case.<sup>204</sup>

---

<sup>190</sup> 61 M.J. 230 (2005); see *United States v. Glover*, 50 M.J. 476 (1999) (wrongful inhalation of Dust-Off).

<sup>191</sup> *Erickson*, 61 M.J. 230; UCMJ art. 112(a) (2005) (wrongful use, possession, etc., of controlled substances).

<sup>192</sup> *Erickson*, 61 M.J. at 231.

<sup>193</sup> *Id.* at 232.

<sup>194</sup> *Id.* at 233.

<sup>195</sup> *Id.* at 232.

<sup>196</sup> *Id.* at 233.

<sup>197</sup> *Id.*

<sup>198</sup> *Id.*; see MCM, *supra* note 2, pt. IV, ¶ 60c(5) (providing that the preemption doctrine prohibits application of Article 134 to conduct covered by Articles 80 through 132).

<sup>199</sup> *Erickson*, 61 M.J. at 233 (citing *United States v. Kick*, 7 M.J. 82 (C.M.A. 1979)).

<sup>200</sup> *Id.* (“Article 112a ‘is intended to apply solely to offenses within its express terms. It does not preempt prosecution of drug-related offenses under Article 92, 133, or 134 of the UCMJ.’”). *Id.* (citing S. Rep. No. 98-53, at 29 (1983)).

<sup>201</sup> *Id.*

<sup>202</sup> See UCMJ art. 112a(b)(1)-(3) (2005).

<sup>203</sup> See MCM, *supra* note 2, pt. IV, ¶60c(4)(c).

<sup>204</sup> *Erickson*, 61 M.J. at 233 (“Likewise, we note that our decision does not preclude an accused, in the future, from challenging the propriety of a similar inhalation charge under Article 134 in terms of the sufficiency of the impact on good order and discipline.”).

“This is like déjà vu all over again.”<sup>205</sup>

*Pleadings and Modification*—United States v. Augspurger,<sup>206</sup> United States v. Rollins,<sup>207</sup>  
and United States v. Scheurer<sup>208</sup>

In a series of cases, the CAAF again visited the area of pleadings modification, emphasizing the safeguards necessary when deleting “divers” occasions by exceptions and substitutions. This section of the article examines three principal cases in that area and offers practical advice on how to limit appellate error. This article also alerts practitioners to several potential problems in applying these standards.

*United States v. Augspurger* was the first case in the 2005 term to discuss the issues created when panels delete the word “divers” by exceptions and substitutions without clarifying which conduct formed the basis for their findings.<sup>209</sup> The CAAF, however, has consistently voiced its concern and described procedures to eliminate this problem.<sup>210</sup> The CAAF is unwilling to assume that a service court of appeals can determine the basis for a finding of guilt in this situation, absent clear evidence from the record.<sup>211</sup>

Airman Basic Augspurger was charged, inter alia, with use of marijuana on divers occasions.<sup>212</sup> Evidence was presented for three separate uses between on or about October 2001 and February 2002.<sup>213</sup> The panel found Augspurger guilty but excepted the words “on divers occasions” with no clarification.<sup>214</sup> Adding to the confusion were issues associated with instructing the members concerning prior Article 15 punishment that was administered for the drug use described in Augspurger’s confession.<sup>215</sup> The CAAF reversed the Air Force Court, setting aside the sentence and dismissing the specification,<sup>216</sup> emphasizing that the military judge should have instructed the panel members on the need to clarify their findings if they struck “divers occasions.”<sup>217</sup> In this case there was no basis for the Air Force Court to review and affirm the conviction.<sup>218</sup>

*United States v. Rollins* was the next case to address the area of pleadings modification, where the issues were the role of the convening authority at action and the effect of the statute of limitations.<sup>219</sup> Senior Master Sergeant Rollins was charged with numerous offenses, including attempted rape on divers occasions and indecent acts on divers occasions.<sup>220</sup> The panel found him not guilty of attempted rape, but guilty of indecent assault and indecent acts on divers occasions.<sup>221</sup> Both of the specifications for which Rollins was found guilty included periods that would later be time-barred by the holding in *United States v. McElhaney*.<sup>222</sup> The convening authority modified the findings to include only the dates not affected by the statute of

---

<sup>205</sup> Yogi Berra Quotes, *supra* note 1.

<sup>206</sup> 61 M.J. 189 (2005).

<sup>207</sup> 61 M.J. 338 (2005).

<sup>208</sup> 62 M.J. 100 (2005).

<sup>209</sup> *Augspurger*, 61 M.J. 189.

<sup>210</sup> See *United States v. Seider*, 60 M.J. 36 (2004); *United States v. Walters*, 58 M.J. 392 (2003).

<sup>211</sup> *Augspurger*, 61 M.J. at 192.

<sup>212</sup> *Id.* at 189-90.

<sup>213</sup> *Id.* at 190.

<sup>214</sup> *Id.*

<sup>215</sup> *Id.* The military judge instructed the members that if they found the accused guilty based on the incident connected to the previous Article 15, this would constitute evidence in mitigation. The trial counsel later argued that this was proper evidence in aggravation. *Id.* at 191.

<sup>216</sup> *Id.* at 193.

<sup>217</sup> *Id.* at 192.

<sup>218</sup> *Id.* (citing *United States v. Walters*, 58 M.J. 392 (2003) and *United States v. Seider*, 60 M.J. 36 (2004)).

<sup>219</sup> 61 M.J. 338 (2005).

<sup>220</sup> *Id.* at 339-40.

<sup>221</sup> *Id.* 341.

<sup>222</sup> *Id.* (citing *United States v. McElhaney*, 54 M.J. 120, 126 (2000)) (holding that the federal statute of limitations applicable under 18 U.S.C. § 3283 did not supplant UCMJ art. 43).

limitations.<sup>223</sup> The CAAF held that the military judge erred by not providing the panel with instructions that focused their attention on the period not barred by the statute of limitations.<sup>224</sup> The convening authority's action did not cure this prejudice and the affected findings were set aside.<sup>225</sup>

The CAAF's decision in *United States v. Scheurer*<sup>226</sup> was the final case to address the problem of ambiguous findings. In this case, however, the record was clear as to the conduct substantiating at least one of the specifications.<sup>227</sup> Senior Airman Scheurer was charged with numerous offenses, including two specifications of drug use on divers occasions (Specifications 3 and 5).<sup>228</sup> The military judge excepted out divers occasions for both specifications; however, there was more than one use for each specification and no clarification of which incident resulted in the finding of guilt.<sup>229</sup> The CAAF held that Specification 5 was based on only two possible uses, and the record was clear upon which incident the military judge based his findings.<sup>230</sup> Conversely, the finding of guilty as to specification 3 was set aside because the court could not determine upon which incident the conviction was based.<sup>231</sup>

As the CAAF has noted in several successive cases, language in specifications should clearly put the accused and reviewing courts on notice of what conduct served as the basis for the findings. In addition, trial counsel should strongly consider breaking out separate incidents into separate specifications to avoid problems of determining upon which incident a conviction was based. In the most serious cases (i.e., child sexual abuse) where the evidence may be confusing, separate specifications will make it clear for the military judge and panel members which allegations form the basis for findings of guilty or not guilty on the findings worksheet. If confronted with divers occasions specifications, the military judge should instruct the members that if they except out "divers occasions," they should refer to the specific allegation by using a specific date or other relevant facts.<sup>232</sup>

While the CAAF addressed several issues in this area, two interesting questions remain. First, for purposes of appellate review, what is the real difference between a finding of guilt "excepting out divers occasions" and a finding of guilt based on two out of three incidents comprising a divers occasions specification? The CAAF addressed this question in *Walters* by citing the fundamental difference between findings of guilty and not guilty.<sup>233</sup> However, if the real concern is the service court's obligation to affirm the factual basis for each specification under Article 66, UCMJ, that rationale is not entirely persuasive.<sup>234</sup> Will these cases force the government to abandon divers occasions pleading, leading to the inevitable problems with unreasonable multiplication of charges? The second question concerns the level of detail in findings that certain cases may require. Could these instructions at some point be equated with the requirement for special findings?<sup>235</sup> Would this in turn cause more or less certainty in appellate litigation? Confronting these issues may be necessary as this area of law continues to develop.

#### *Drug Offenses and Multiplicity—United States v. Dillon*<sup>236</sup>

In *United States v. Dillon*, the accused pleaded guilty, inter alia, to two separate specifications for the simultaneous use of ecstasy and methamphetamine.<sup>237</sup> At the time of ingestion, Dillon believed he was only consuming ecstasy; however, the

---

<sup>223</sup> *Id.* at 342.

<sup>224</sup> *Id.* at 342-43 (citing *United States v. Thompson*, 59 M.J. 432 (2004)).

<sup>225</sup> *Id.* at 343.

<sup>226</sup> 62 M.J. 100 (2005).

<sup>227</sup> *Id.* at 112.

<sup>228</sup> *Id.* at 110.

<sup>229</sup> *Id.* at 110-11.

<sup>230</sup> *Id.* at 111-12.

<sup>231</sup> *Id.* at 112; see *United States v. Augspurger*, 61 M.J. 189 (2005); *United States v. Walters*, 58 M.J. 391 (2003).

<sup>232</sup> See Hargis & Grammel, *supra* note 26 (discussing *Augspurger* and approved interim changes to the *Benchbook* for model instructions in this area).

<sup>233</sup> *Walters*, 58 M.J. at 396.

<sup>234</sup> *Id.* at 394-95.

<sup>235</sup> MCM, *supra* note 2, R.C.M. 918a(2)(b); see *id.* at discussion (stating that members may not make special findings).

<sup>236</sup> 61 M.J. 221 (2005).

<sup>237</sup> *Id.* at 224.

pills also contained methamphetamine.<sup>238</sup> In a unanimous opinion, the CAAF affirmed the Air Force Court of Criminal Appeals (AFCCA).<sup>239</sup> Possession or use may be wrongful even though an accused does not know the precise identity of the substance at the time of possession or ingestion, as long as he knows it is a controlled substance.<sup>240</sup> This case is distinguishable from *United States v. Stringfellow* because Dillon pleaded guilty to two separate specifications rather than one duplicitous specification.<sup>241</sup>

The CAAF also held that the specifications were not multiplicitous.<sup>242</sup> Relying on the Army Court's holding in *United States v. Inthavong*,<sup>243</sup> the CAAF held that Article 112a is modeled on 21 U.S.C. § 841(a).<sup>244</sup> The purpose of the new 112a was to give commanders greater tools to combat drug abuse, stop unnecessary litigation caused by charging under the general regulations, incorporate the flexibility of the Comprehensive Drug Abuse and Control Act,<sup>245</sup> and better align with federal practice.<sup>246</sup> The use of the phrases "a controlled substance" and "a substance described in subsection (b)" were intended to permit separate specifications for each substance and satisfy the requirements of *United States v. Teters*<sup>247</sup> and *Blockburger v. United States*.<sup>248</sup> "The conduct that Congress prohibited and that the government sought to punish is the use of two controlled substances at the same time and place."<sup>249</sup> Each drug may involve different producers and distributors and should be treated separately.<sup>250</sup> Although government counsel can now clearly charge separate specifications for simultaneous use of different controlled substances, defense counsel are reminded that some cases may require motions concerning unreasonable multiplication of charges<sup>251</sup> or consolidation for sentencing.<sup>252</sup>

#### *Solicitation—United States v. Hays*<sup>253</sup>

In *United States v. Hays*, the accused was convicted of multiple charges, including soliciting another to rape a child.<sup>254</sup> This charge was based on Hays's request to an Internet acquaintance, JD, that he share pictures of a sexual encounter between JD and a nine-year-old girl.<sup>255</sup> The Army Court of Criminal Appeals (ACCA) disapproved the finding of guilty for soliciting the rape of a child, but approved the lesser offense of soliciting another person to commit carnal knowledge.<sup>256</sup> The CAAF agreed with the ACCA's analysis,<sup>257</sup> finding that the court did not broaden the definition of solicitation and that the evidence supported a finding of legal sufficiency.<sup>258</sup> Hays's inquiry into whether JD had engaged in sexual intercourse with

---

<sup>238</sup> *Id.* at 222.

<sup>239</sup> *Id.* at 224.

<sup>240</sup> *Id.* at 222 (citing *United States v. Mance*, 26 M.J. 244, 254 (C.M.A. 1988)).

<sup>241</sup> *Id.* (citing *United States v. Stringfellow*, 32 M.J. 335 (C.M.A. 1991)) (*Stringfellow* pleaded guilty to a single use of cocaine and amphetamine/methamphetamine).

<sup>242</sup> *Id.* at 223.

<sup>243</sup> 48 M.J. 628 (Army Ct. Crim. App. 1998) (holding that simultaneous distribution of different drugs can legally be charged as separate specifications of distribution under art. 112a); *see also* *United States v. Ray*, 51 M.J. 511 (N-M. Ct. Crim. App. 1999) (holding that intentional simultaneous use of two different controlled substances may be charged separately as two specifications of wrongful use under art 112a).

<sup>244</sup> *Dillon*, 61 M.J. at 223.

<sup>245</sup> 21 U.S.C.S. § 841(a) (LEXIS 2006).

<sup>246</sup> *Dillon*, 61 M.J. at 223.

<sup>247</sup> 37 M.J. 370 (C.M.A. 1993).

<sup>248</sup> 284 U.S. 304 (1932).

<sup>249</sup> *Dillon*, 61 M.J. at 224.

<sup>250</sup> *Id.*

<sup>251</sup> *See* *United States v. Quiroz*, 55 M.J. 334 (2001).

<sup>252</sup> *See* *MCM*, *supra* note 2, R.C.M. 906 (b)(12) and R.C.M. 1003(c)(1)(C).

<sup>253</sup> 62 M.J. 158 (2005).

<sup>254</sup> *Id.* at 160.

<sup>255</sup> *Id.* at 161.

<sup>256</sup> *Id.* at 160.

<sup>257</sup> *Id.* at 162.

<sup>258</sup> *Id.* at 163.

the nine-year-old girl was followed immediately by requests for pictures and promises of a quid pro quo.<sup>259</sup> Under all the circumstances, a reasonable factfinder could have found Hays's inquiry was a serious request to commit carnal knowledge.<sup>260</sup> Finally, the CAAF held that neither the *MCM* nor the UCMJ precludes a conviction for solicitation merely because the object is predisposed towards the crime (rejecting the requirement set forth in *United States v. Dean*, 44 M.J. 683 (Army Ct. Crim. App. 1996)).<sup>261</sup>

*Indecent Acts—United States v. Rollins*<sup>262</sup> and *United States v. Johnson*<sup>263</sup>

Senior Master Sergeant Rollins was convicted of several Article 134 offenses, including an indecent act with a minor, JG, "by giving him a pornographic magazine and suggesting that they masturbate together."<sup>264</sup> Rollins claimed that this specification was deficient because there was no active participation by JG and because Rollins's activities were protected under the First Amendment.<sup>265</sup> The conviction for the indecent act specification was affirmed by the CAAF.<sup>266</sup> The court found that a reasonable factfinder could conclude that Rollins committed a service discrediting indecent act with another by giving a person under the age of eighteen a pornographic magazine to stimulate mutual masturbation while in a parking lot open to the public.<sup>267</sup> Further, the court noted this case does not involve the exchange of constitutionally protected material; however, even if it did, "[T]he military has a legitimate interest in deterring and punishing sexual exploitation of young persons by members of the armed forces because such conduct can be prejudicial to good order and discipline, service discrediting, or both."<sup>268</sup> The First Amendment does not protect this conduct.<sup>269</sup>

In *United States v. Johnson*, the accused pleaded guilty to several UCMJ Article 134 offenses, including indecent acts with another.<sup>270</sup> The indecent act specification was based on Johnson's actions while in Hobart, Australia.<sup>271</sup> Johnson and two other Marines took two local females to a hotel, where all drank alcohol.<sup>272</sup> At some point, Johnson stopped in a hotel room for a few minutes to observe one of the Marine's having sex with one of the females.<sup>273</sup> During that time Johnson said, "that's my dog," to which the Marine replied, "I'm handling my business."<sup>274</sup> In his first assignment of error, Johnson claimed that his plea to indecent acts with another was improvident because he was merely an observer and not a participant in the act.<sup>275</sup> The NMCCA affirmed the indecent act specification,<sup>276</sup> holding that Johnson's conduct in watching and encouraging his friend's sexual encounter constituted active participation and was sufficient to support the charge and its specification.<sup>277</sup>

---

<sup>259</sup> *Id.* at 162.

<sup>260</sup> *Id.* at 163.

<sup>261</sup> *Id.*; see Major Christopher Behan, "The Future Ain't What It Used to Be": *New Developments in Evidence for the 2005 Term of Court*, ARMY LAW., Apr. 2006, at 67-68 (discussing *Hays* for purposes of propensity evidence).

<sup>262</sup> 61 M.J. 338 (2005).

<sup>263</sup> 60 M.J. 988 (N-M. Ct. Crim. App. 2005).

<sup>264</sup> *Rollins*, 61 M.J. at 343.

<sup>265</sup> *Id.*

<sup>266</sup> *Id.* at 345.

<sup>267</sup> *Id.* at 344.

<sup>268</sup> *Id.* at 344-45.

<sup>269</sup> *Id.* (citing *Parker v. Levy*, 417 U.S. 733, 743-52 (1974)).

<sup>270</sup> 60 M.J. 988, 989 (2005).

<sup>271</sup> *Id.*

<sup>272</sup> *Id.*

<sup>273</sup> *Id.*

<sup>274</sup> *Id.*

<sup>275</sup> *Id.*

<sup>276</sup> *Id.* at 990.

<sup>277</sup> *Id.* (citing *United States v. McDaniel*, 39 M.J. 173, 175 (C.M.A. 1994) (*McDaniel* was an Air Force recruiter who instructed applicants to disrobe, change positions, and bounce up and down while being secretly videotaped)).

Staff Sergeant Andrea Reeves, a technical school instructor, engaged in relationships with trainees in violation of applicable lawful regulations.<sup>279</sup> She was ultimately convicted of disobeying a general regulation, violating two additional orders, and obstructing justice for telling a trainee not to speak to investigators and to seek counsel.<sup>280</sup> Although not alleged in the specification, Reeves also gave the trainee money to offset financial difficulties.<sup>281</sup> The specified and granted issues before the CAAF were whether as a matter of law Reeve's conduct was obstruction of justice,<sup>282</sup> and whether, under the facts of this case, the evidence was legally sufficient.<sup>283</sup> The CAAF held as a matter of law that Reeves could be convicted of obstructing justice.<sup>284</sup> She was not a disinterested party, and one who advises, with a corrupt motive, that a witness exercise a constitutional right may obstruct the administration of justice.<sup>285</sup> Under the facts of this case, a rational trier of fact could have found beyond a reasonable doubt that Reeves's actions were wrongful.<sup>286</sup>

Although this case may serve to dissuade potential interference with government witnesses, trial counsel should be cautious in prosecuting under this theory. Truly disinterested parties should not normally be singled out for prosecution after advising servicemembers of their basic rights.<sup>287</sup>

### Conclusion

The past term brought substantial changes to the *MCM* and the UCMJ, most notably in the area of sexual offenses. Many challenges lie ahead in implementing these changes and coming to terms with the implications for our present framework. The past term also brought significant decisions from the CAAF interpreting the scope and reach of federal statutes under the UCMJ and the use of General Article 134. These decisions greatly affect the rights of servicemembers in the United States and the ability to prosecute some offenses overseas. The CAAF also reinforced trends from past terms and brought clarification to several open questions presented by the service courts. Whether or not the reader agrees with these developments, it is certainly clear that Congress and the CAAF came to several forks in the road and took them.<sup>288</sup>

---

<sup>278</sup> 61 M.J. 108 (2005).

<sup>279</sup> *Id.* at 109.

<sup>280</sup> *Id.* (Reeves called the trainee "pretty frequently" at home and "a few times at work" to tell her not to speak with investigators and to get a defense counsel). *Id.*

<sup>281</sup> *Id.* at 109-10.

<sup>282</sup> *Id.* (Reeves argued that one who advises a witness to invoke a constitutional right is not engaged in a wrongful act). *Id.* at 110.

<sup>283</sup> *Id.* at 109.

<sup>284</sup> *Id.* at 110-11.

<sup>285</sup> *Id.* at 111.

<sup>286</sup> *Id.* ("[T]he tone, frequency, and background of Appellant's calls raised legitimate questions of fact for the members regarding the wrongfulness and intent of the calls.").

<sup>287</sup> *Id.* at 110 ("Without more, a person's advice to another to invoke certain rights, where the advice given is honest and uncorrupt, should not as a matter of law sustain a conviction.").

<sup>288</sup> Yogi Berra Quotes, *supra* note 1.