

Foreword

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Welcome to the eleventh annual *Military Justice Symposium*. In two volumes of *The Army Lawyer*, the faculty of the U.S. Army Judge Advocate General's School's Criminal Law Department and two military judges endeavor to explain and explore the most significant military criminal law and procedure decisions of the 2005 term of court. Our goal is not to discuss every case from the last term that the service courts of criminal appeals, the Court of Appeals for the Armed Forces, and the Supreme Court of the United States issued, but instead to identify the most significant cases from those courts, explain their importance to military justice practice, and identify applicable trends.

This first volume of the *Military Justice Symposium* discusses cases involving the Fourth and Fifth Amendments, Instructions, Pretrial Procedures, and Evidence. The second volume will address cases involving the Sixth Amendment, as well as Crimes and Defenses, Sentencing and Post-Trial, and Unlawful Command Influence. In addition, in the second volume Major (MAJ) Jon Jackson will discuss new regulatory requirements for Army practitioners in the area of improper senior-subordinate relationships.

As a preview to the outstanding articles found in this year's *Symposium*, I will briefly summarize the highlights of each article. Lieutenant Colonel (LtCol) Mark Jamison, the department's Marine representative, discusses cases involving the Fourth Amendment in his first article as a Professor in the Criminal Law Department. According to LtCol Jamison, to outward appearances all was seemingly quiet on the Fourth Amendment front for the Court of Appeals for the Armed Forces (CAAF) 2005 term. The court decided only one Fourth Amendment case. Though *United States v. Bethea*¹ broke new ground in refining further the quantum of evidence needed to establish probable cause for a search authorization, the CAAF's 2005 term represents a Fourth Amendment incubation period for two potentially groundbreaking cases in 2006 as the CAAF continues to tackle search and seizure issues surrounding computers. The most important case pending decision in the 2006 term may be *United States v. Long*.² In *Long*, the Navy Judge Advocate General certified to the CAAF the question of whether a servicemember has a reasonable expectation of privacy in government e-mail. The CAAF will also consider in *United States v. Conklin*³ whether a servicemember's consent is truly voluntary if he is not informed about an earlier constitutional violation prior to giving his consent to search his computer.

The U.S. Supreme Court did not significantly expand Fourth Amendment jurisprudence during its 2005 Term. The Court decided two cases early in the 2004 Term, and LtCol Ernie Harper addressed those cases in last year's *Symposium*.⁴ In addition to those cases, the Court decided in *Muehler v. Mena*⁵ whether law enforcement officials armed with a search warrant may detain the occupant of a residence by using handcuffs during the search's execution. The Fourth Amendment cases on the horizon for the Court's 2006 Term promise to break new ground and reconcile significant splits among the various judicial circuits. First, the Supreme Court will decide in *Georgia v. Randolph*⁶ whether an occupant may give lawful consent to search a home if another occupant who is also present objects to the search. Second, the Court will consider in *Michigan v. Hudson*⁷ whether the inevitable discovery doctrine creates a per se exception to the exclusionary rule in the event of a "knock and announce" warrant violation.

Lieutenant Colonel (LTC) Chris Fredrikson writes about the most significant cases involving the Fifth Amendment. Noting that last year was a relatively uneventful year in the area of self-incrimination law, LTC Fredrikson's article reviews two cases in which the military courts applied the basic principles of self-incrimination law: first, in *United States v.*

¹ 61 M.J. 184 (2005).

² 61 M.J. 539 (N-M. Ct. Crim. App. 2005).

³ ACM 35217, 2004 CCA LEXIS 290 (A.F. Ct. Crim. App. Dec. 30, 2004) (unpublished), *rev. granted*, 2005 CAAF LEXIS 758 (July 13, 2005).

⁴ *Devenpeck v. Alford*, 543 U.S. 146 (2004) (articulating an objective probable cause test for a warrantless arrest); *Illinois v. Caballes*, 543 U.S. 405 (2005) (holding that a dog sniff during an otherwise lawful traffic stop does not implicate the Fourth Amendment).

⁵ 125 S. Ct. 1465 (2005).

⁶ 125 S. Ct. 1840 (2005).

⁷ 125 S. Ct. 2964 (2005).

Bresnahan,⁸ the CAAF looked at the totality of the circumstances in determining that the statements at issue were voluntary; and second, in *United States v. Rittenhouse*,⁹ the Army Court of Criminal Appeals (ACCA) applied clearly established law in holding that, following a valid waiver, law enforcement agents have no duty to clarify a suspect's ambiguous invocation of his right to remain silent and may continue questioning the subject. Finally, LTC Fredrikson discusses *United States v. Finch*,¹⁰ a case in which the CAAF granted review of an issue of utmost importance to the military practitioner: whether the thirty-year-old ruling in *United States v. McOmber*,¹¹ establishing a notification to counsel requirement, continues to properly state the law in light of subsequent Supreme Court jurisprudence and changes to Military Rule of Evidence (MRE) 305(e).¹²

Major De Fleming turns in her second article in the pretrial procedures area, which covers pleas and pretrial agreements, voir dire and challenges, and court-martial personnel. According to MAJ Fleming, the CAAF's most important and controversial decision this term in the area of court-martial personnel set limitations on a military judge's consideration of collateral matters in crafting a sentence.¹³ In the area of voir dire and challenges, the CAAF issued a ground-breaking decision that the mandate of military judges to liberally grant challenges for cause applies only to defense challenges.¹⁴ Likewise, the President, by executive order, drastically altered the voir dire landscape by amending Rule for Courts-Martial (RCM) 912(f)(4), the "But For Rule," to "preclude further consideration of the challenge of [an] excused member upon later review" if that panel member is peremptorily excused by either party.¹⁵ In the pleas and pre-trial agreements arena, the appellate courts, as in years past, continue to reverse findings, sentences, or both, because the record of trial lacks a sufficient factual predicate outlining the accused's criminal misconduct. Additionally, the CAAF expanded the scope of legal issues deemed not waived by an accused's unconditional guilty plea.¹⁶

Major Chris Behan discusses and analyzes significant military appellate cases from the CAAF and the service appellate courts, proceeding sequentially through the MRE. This year's term features cases concerning the proper preservation of objections under MRE 103,¹⁷ the independent source rule for the corroboration of a confession under MRE 304(g),¹⁸ logical and legal relevance under MREs 401¹⁹ and 403,²⁰ uncharged misconduct under MRE 404(b),²¹ sexual propensity evidence under MRE 413,²² the joint-participant exception to the marital communications privilege of MRE 504,²³ impeachment under MRE 613,²⁴ expert testimony under MREs 702²⁵ and 704,²⁶ adoptive admissions and MRE 801(d)(2)(B),²⁷ the public records

⁸ 62 M.J. 137 (2005).

⁹ 62 M.J. 509 (Army Ct. Crim. App. 2005).

¹⁰ No. 200000056, 2005 CCA LEXIS 77 (N-M Ct. Crim. App. March 10, 2005) (unpublished), *rev. granted*, 2005 CAAF LEXIS 1345 (Nov. 14, 2005).

¹¹ 1 M.J. 380 (C.M.A. 1976).

¹² MANUAL FOR COURTS-MARTIAL, UNITED STATES, MIL. R. EVID. 305(e) (2005) [hereinafter MCM].

¹³ *United States v. McNutt*, 62 M.J. 16 (2005).

¹⁴ *United States v. James*, 61 M.J. 132 (2005).

¹⁵ *See* Exec. Order No. 13,387, 70 Fed. Reg. 60697 (Oct. 18, 2005); MCM, *supra* note 12, R.C.M. 912(f)(4).

¹⁶ *United States v. Farley*, 60 M.J. 492 (2005) (suppression motion); *United States v. Mizgala*, 61 M.J. 122 (2005) (litigated Article 10 motion).

¹⁷ MCM, *supra* note 12, MIL. R. EVID. 103.

¹⁸ *Id.* MIL. R. EVID. 304(g).

¹⁹ *Id.* MIL. R. EVID. 401.

²⁰ *Id.* MIL. R. EVID. 403.

²¹ *Id.* MIL. R. EVID. 404(b).

²² *Id.* MIL. R. EVID. 413.

²³ *Id.* MIL. R. EVID. 504.

²⁴ *Id.* MIL. R. EVID. 613.

²⁵ *Id.* MIL. R. EVID. 702.

²⁶ *Id.* MIL. R. EVID. 704.

²⁷ *Id.* MIL. R. EVID. 801(d)(2)(B).

exception to the hearsay rule of MRE 803(8),²⁸ and statements against interest under MRE 804.²⁹

According to MAJ Behan, the strongest evidentiary trend in the 2005 term of court was the CAAF's struggle to establish the boundaries of logical and legal relevance in trials by court-martial. The CAAF wrestled with issues involving the basic definition of logical relevance,³⁰ the limits of legal relevance,³¹ and whether specific evidentiary prohibitions should prevent logically relevant evidence from being admitted at trial.³² The CAAF appears ideologically fractured and inconsistent on issues of relevance, making it very difficult for practitioners and military judges to apply the plain language of the MRE in making admissibility determinations.

Rounding out Volume I of this year's *Symposium*, two members of the U.S. Army Trial Judiciary, Colonel Michael Hargis and LTC Timothy Grammel, both former Criminal Law faculty members, provide an update on developments in instructions from the 2005 term. Colonel Hargis and LTC Grammel address instructional issues, including the lawfulness of military orders, conspiracy cases involving a lesser-included offense, the continuing issue of charges on divers occasions, mental responsibility, commenting on the accused's right to remain silent, and others.

The past term saw substantial changes to the *Manual for Courts-Martial*, both through executive order changes³³ and legislative amendments to the Uniform Code of Military Justice (UCMJ).³⁴ Lieutenant Colonel Mark Johnson addresses these changes and other significant developments in substantive crimes and defenses in the second volume of this year's *Symposium*. These developments include a much different treatment of rape and sexual assault under the UCMJ, significant changes to the statute of limitations, and several changes or additions to the enumerated Article 134 offenses. The CAAF delivered several important holdings this term interpreting the limits of the general article—Article 134—and applicable federal statutes, most notably in the area of child pornography. These decisions have an enormous impact on charging child pornography offenses overseas and arguably impact the use of other federal statutes under clause 3 of Article 134. The CAAF continued its trend in the area of modification, setting aside specifications after findings by exceptions and substitutions left no basis for appellate review; once again, the CAAF sent clear guidance of the need for certainty as to which single act of misconduct forms the basis of a modified “divers” occasions specification. Lieutenant Colonel Johnson also addresses the CAAF and service court opinions concerning inchoate crimes, indecent acts, sodomy, homicide, drug offenses, obstruction of justice, and military offenses.

Major Mike Holley addresses a host of developments in Sixth Amendment law over the course of the last year with an emphasis on the Confrontation Clause. The article begins with an examination of when an accused may waive or forfeit his right to confrontation. *United States v. Mayhew*³⁵ and *United States v. Jordan*³⁶ serve as starting points for a discussion of forfeiture. *United States v. Campbell*³⁷ looks at the issue of physical production of witnesses while *United States v. Rhodes*³⁸

²⁸ *Id.* MIL. R. EVID. 803(8).

²⁹ *Id.* MIL. R. EVID. 804.

³⁰ For example, in *United States v. Berry*, a majority of the CAAF found the appellant's uncharged acts of sexual misconduct logically relevant under MREs 401 and 402 but not legally relevant for the purposes of MRE 403 and 413. A concurring opinion argued, however, that the evidence could not be logically relevant unless it was also legally relevant. *Berry*, 61 M.J. 91, 98-99 (2005) (Crawford, J., concurring).

³¹ Compare *United States v. Rhodes*, 61 M.J. 445 (2005) (holding that evidence that a key government witness suddenly forgot his testimony shortly after meeting with appellant and his attorney was more prejudicial than probative when admitted as uncharged misconduct evidence to show appellant's consciousness of guilt), with *United States v. Hays*, 62 M.J. 158 (2005) (affirming the admission of numerous pornographic pictures and e-mails against the appellant in a solicitation case and asserting that the evidence, while highly prejudicial, was extremely probative on the issue of intent to solicit another person to have sex with a child in order to create pornographic images of it).

³² In *United States v. Brewer*, the majority held (and a blistering dissent excoriated them for so holding) that logical relevance and the Due Process Clause of the Fifth Amendment trumped the plain language of MREs 404 and 405 in drug cases involving the permissive inference of wrongful use. 61 M.J. 425 (2005).

³³ See Exec. Order No. 13,387, 70 Fed. Reg. 60697 (Oct. 18, 2005).

³⁴ Department of Defense Authorization Act, 2006, Pub. L. No. 109-163, 119 Stat. 3136 (2006).

³⁵ 380 F. Supp. 2d 961 (S.D. Ohio 2005).

³⁶ 2005 U.S. Dist. LEXIS 3289 (D. Colo. 2005).

³⁷ No. 200020190 (Army Ct. Crim. App. 28 June 2005) (unpublished).

³⁸ 61 M.J. 445 (2005).

examines the concept of legal availability of government witnesses. In *United States v. Yates*,³⁹ the Eleventh Circuit addressed the important topic of the appropriate use of producing adult witnesses by remote means. Major Holley discusses *Yates* and provides some suggestions on the use of remote testimony at various stages of trial. In *United States v. Israel*⁴⁰ and *United States v. James*,⁴¹ the CAAF analyzes the appropriate limits that may be placed upon cross-examination within the context of the Confrontation Clause.

Major Holley's article also discusses the recurrent and thorny issue of hearsay and the Confrontation Clause. Courts throughout the country continue to struggle mightily to answer the fundamental question posed by *Crawford v. Washington*⁴²—how does one define “testimonial”? Fortunately, military courts provided some answers to this question this past term, as have several other jurisdictions. In *United States v. Scheurer*,⁴³ the CAAF took up *Crawford's* question directly, providing the military practitioner valuable clues as to how to answer the “testimonial” question as well as an analytical framework for addressing *Crawford* issues generally. In *United States v. Coulter*,⁴⁴ the Navy Marine-Corps Court of Criminal Appeals addressed the *Crawford* question in the context of child sex abuse and the unavailable child witness. Major Holley's article examines these decisions as well as other military cases. Additionally, MAJ Holley considers important state court opinions dealing with interesting attempts to answer the fundamental *Crawford* question.⁴⁵ Finally, with regard to *Crawford* jurisprudence, MAJ Holley briefly examines two cases pending before the U.S. Supreme Court, cases that hopefully will address the difficulties inherent in the *Crawford* opinion.⁴⁶ Based upon these cases and others, MAJ Holley provides a suggested analytical framework for practitioners wrestling with these issues.

Major John Rothwell addresses new decisions in sentencing and post-trial in his first article for the *Symposium*. In the area of sentencing, the CAAF clarified that evidence of rehabilitative potential under RCM 1001(b)(5)(D) does not apply to defense mitigation evidence and specifically does not preclude testimony that a witness would willingly serve with an accused again.⁴⁷ In the post-trial arena, the CAAF set aside a bad-conduct discharge where an appellant was able to demonstrate on-going actual prejudice by showing that his ability to have his employment application considered was hindered due to the lengthy post-trial delay, and in so doing, the court found a denial of due process resulted from the delay, an area where CAAF can actively participate in the post-trial delay arena under its jurisdiction as proscribed by Article 67.⁴⁸

Finally, I will discuss cases from the last term in the unlawful command influence (UCI) areas. Although the CAAF did not decide any UCI cases in its 2005 term of court, the service courts issued interesting and potentially significant opinions involving UCI by a staff judge advocate⁴⁹ and trial counsel.⁵⁰ In addition, the Navy-Marine Court of Criminal Appeals noted a disturbing trend of intemperate remarks by commanders, which the court addressed in a series of unpublished opinions. These opinions have no precedential value, but do serve as a warning and reminder to judge advocates to be proactive in this critical area of military justice practice.

On a personal note, four fine officers depart the Criminal Law Department this summer. Lieutenant Colonel Fredrikson moves to V Corps as the Chief of Criminal Law and will soon deploy to Iraq in support of Operation Iraqi Freedom; MAJ Jackson moves to the District of Columbia area; and two officers, MAJ Behan and MAJ Holley, made the difficult decision to leave the Army. Major Behan is departing to be a full-time Professor of Law at Southern Illinois University School of Law, and MAJ Mike Holley joins a litigation law firm in Texas. All four of these officers leave the Department, and the

³⁹ 438 F.3d 1307 (11th Cir. 2006).

⁴⁰ 60 M.J. 485 (2005).

⁴¹ 61 M.J. 132 (2005).

⁴² 541 U.S. 36 (2004).

⁴³ 62 M.J. 100 (2005).

⁴⁴ 62 M.J. 520 (N-M Ct. Crim. App. 2005).

⁴⁵ *State v. Siler*, 843 N.E.2d 863 (Ohio Ct. App. 2005); *State v. Bobadilla*, 709 N.W.2d 243 (Minn. 2006).

⁴⁶ *Hammon v. Indiana*, 126 S. Ct. 1133 (2006); *Davis v. Washington*, 126 S. Ct. 1457 (2006).

⁴⁷ *United States v. Griggs*, 61 M.J. 402 (2005).

⁴⁸ *United States v. Jones*, 61 M.J. 80 (2005); see UCMJ art. 67 (2005).

⁴⁹ *United States v. Lewis*, 61 M.J. 512 (N-M. Ct. Crim. App. 2005), *rev. granted*, 2006 CAAF LEXIS 117 (Jan. 19, 2006).

⁵⁰ *United States v. Mallett*, 61 M.J. 761 (A.F. Ct. Crim. App. 2005).

practice of military justice throughout the Department of Defense, better for their efforts. It was a pleasure and honor to serve with them.