

# Hunting for Snarks: Recent Developments in the Pretrial Arena

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*This is the dead land  
This is the cactus land  
Here the stone images  
Are raised, here they receive  
The supplication of a dead man's hand  
Under the twinkle of a fading star.*<sup>1</sup>

*To love is to suffer. To avoid suffering, one must not love. But then, one suffers from not loving. Therefore, to love is to suffer, not to love is to suffer, to suffer is to suffer. To be happy is to love. To be happy, then, is to suffer, but suffering makes one unhappy. Therefore, to be happy, one must love, or love to suffer, or suffer from too much happiness.*<sup>2</sup>

*It was in order to accustom us to the legitimacy of pain that Nietzsche spent so much time talking about mountains.*<sup>3</sup>

## Introduction

The title of this article refers to the Snark, a mythical animal mentioned in Lewis Carroll's epic poem, *The Hunting of the Snark*.<sup>4</sup> The poem describes the hunting of this beast, although

it never actually describes the beast itself. The poem has been construed to mean many things, and has been described as "a poem about being and non-being, an existential poem, a poem of existential agony."<sup>5</sup> Of his own words, Lewis Carroll said, "words mean more than we mean to express when we use them: so a whole book ought to mean a great deal more than the writer meant."<sup>6</sup> Applying this tenet to a review of recent cases from the Court of Appeals for the Armed Forces (CAAF), we can see that the business of assessing the significance of a case, and trying to identify it within the rather fanciful context of a "trend" or "development," is endlessly fascinating, occasionally painful, and unfailingly subjective.

## The Convening Authority

To begin at the beginning, so to speak, we must look to the evolving way in which the CAAF treats the convening authority, particularly on the issue of convening authority disqualification.

Congress, in passing the Military Justice Act,<sup>7</sup> made it clear that convening authorities who are involved in the prosecution function of particular cases become disqualified, that is, that they lose their right to be convening authorities.<sup>8</sup> Thus, where a convening authority is said to become an "accuser," a convening authority may not refer a case to trial by special or general court-martial but must forward the case to a superior authority.<sup>9</sup>

1. T.S. ELIOT, *THE WASTE LAND AND OTHER POEMS* 62 (Helen Vendler ed., 1998) (1936).

2. *LOVE AND DEATH* (MGM 1975).

3. ALAIN DE BOTTON, *THE CONSOLATIONS OF PHILOSOPHY* 217 (2000).

4. LEWIS CARROLL, *THE HUNTING OF THE SNARK* 28 (Martin Gardiner ed., 1995).

5. *Id.* at 22.

6. *Id.*

7. Act of Aug. 10, 1956, ch. 1041, § 1, 70A Stat. 44 (enacting Title 10, United States Code). This provision traces its origin back to 1830, when Congress enacted legislation to bar a convening authority from "selecting the court . . . and . . . passing upon the proceedings of such trial . . . where, by reason of having preferred the charge or undertaken personally to pursue it, he might be biased against the accused." *United States v. Gordon*, 2 C.M.R. 161,164 (C.M.A. 1952) (quoting WILLIAM WINTHROP, *MILITARY LAW AND PRECEDENTS* 61 (2d ed. 1920)).

8. The Uniform Code of Military Justice (UCMJ) effectively prohibits a general or special court-martial convening authority from convening a court if he is an "accuser." UCMJ arts. 22(b), 23(b) (2000). In such cases, "the court shall be convened by superior competent authority." *Id.* Article 1(9), UCMJ states that an "accuser" is "a person who signs and swears to charges, any person who directs that charges nominally be signed and sworn to by another, and any other person who has an interest other than an official interest in the prosecution of the accused."

9. *MANUAL FOR COURTS-MARTIAL, UNITED STATES*, R.C.M. 601(c) (2000) [hereinafter MCM]. *See also id.* R.C.M. 504(c)(2) ("When a commander who would otherwise convene a general or special court-martial is disqualified in a case, the charges shall be forwarded to a superior competent authority for disposition.")

Over the years, the CAAF and the service courts of appeals have wrestled with the issue of when a convening authority becomes an accuser and when he is disqualified from serving as the convening authority for a particular case. The Court of Military Appeals (CMA) initially appeared to take a hard line, declaring that anyone with an other than official interest in the case was prohibited from making decisions regarding the case.<sup>10</sup> The CMA held that “the right to an impartial review is an important right which must be recognized in the military judicial system and an accused is entitled to have the record reviewed and the limits of his sentence fixed by one who is free from any connection with the controversy.”<sup>11</sup>

The debate over how much involvement the convening authority may have in a particular case before he is declared an accuser continues today. Indeed, many years after *Gordon*, in *United States v. Nix*,<sup>12</sup> the CAAF reinforced the notion that an accused is entitled to have his case considered by an impartial convening authority when it remanded the case for a hearing on the extent to which the accused’s personal contact with the convening authority’s fiancée may have affected the referral of charges.

Nevertheless, the years following *Gordon* have been marked by an apparent willingness by the CAAF and the service courts to broaden the scope of what is acceptable “official” behavior by convening authorities. While still accepting that a convening authority should not have a personal interest in a particular case, the courts have found convening authorities sufficiently impartial to convene courts-martial where, for example: a convening authority had behaved in a manner that suggested his mind was made up;<sup>13</sup> and a convening authority threatened to “burn” the accused if he refused to enter into a pretrial agreement (PTA).<sup>14</sup> The courts have further found that a convening authority’s “misguided zeal” in prosecuting the accused is not enough, by itself, to disqualify him.<sup>15</sup> Thus, the extent to which

the convening authority’s involvement in a case will cross the line from official action to personal disqualification remains a case-by-case determination, and the issue continues to be litigated in our case law.

The courts have largely settled the issue of whether a convening authority is disqualified if he is a victim in the case (a *Gordon*).<sup>16</sup> They continue to be confronted, however, by the claim that a convening authority whose orders are violated is a victim and therefore disqualified. The scenario is fairly predictable: A convening authority, acting in his capacity as a commander, issues an order to a soldier which the soldier violates. The issue arises whether the convening authority has become a victim and thus has other than an official interest in the case and is, therefore, precluded from acting.

This was essentially the situation in *United States v. Byers*.<sup>17</sup> In *Byers*, the accused engaged in some misconduct and, per the terms of a local regulation, a written order was issued revoking his privilege to drive on post for two years. The order was signed “For the Commander” and communicated to him by a member of the staff judge advocate’s (SJA’s) office. He was later caught violating this proscription. Charges were preferred, and the accused was convicted of willfully disobeying the order in violation of Article 90, UCMJ, along with other unrelated drug offenses.<sup>18</sup> On appeal, the Army court found that the convening authority had not referred the case based on an improper motive, but stated: “We are convinced, however, that an officer who seeks to enforce his own order by convening a court-martial for an offense charged under Article 90, UCMJ, is so closely connected to the offense that a reasonable person could conclude that he has a personal interest in the matter.”<sup>19</sup> The Army court found that the convening authority’s attempt to convene the court was without force and effect.

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10. *Gordon*, 2 C.M.R. at 161 (convening authority whose house the accused was charged with attempting to burglarize, although that charge was later dismissed, was disqualified from convening the court that tried the accused). Personal interests relate to matters affecting the convening authority’s ego, family, and personal property. *United States v. Voorhees*, 50 M.J. 494 (1999).

11. *Gordon*, 2 C.M.R. at 168 (emphasis added).

12. 40 M.J. 6 (C.M.A. 1994).

13. *United States v. Wojciechowski*, 19 M.J. 577 (N.M.C.M.R. 1984).

14. *Voorhees*, 50 M.J. at 498.

15. *United States v. Thomas*, 22 M.J. 388 (C.M.A. 1986) (convening authority’s comments to subordinates in which he appeared to discourage members of the command from testifying on behalf of soldiers constituted command influence, but despite his “misguided zeal” the convening authority’s initial interest in the various prosecutions was official, rather than personal); *see also* *United States v. Jackson*, 3 M.J. 153, 154 (C.M.A. 1977) (convening authority’s angry outburst indicated an other than official interest in the case that disqualified him).

16. *See supra* note 10.

17. 34 M.J. 923 (A.C.M.R. 1992), *vacated and remanded by* 37 M.J. 73 (C.M.A. 1992).

18. *United States v. Byers*, 40 M.J. 321, 322 (C.M.A. 1994).

19. *Byers*, 34 M.J. at 924.

The CMA, disagreeing that the convening authority's status as an accuser constituted jurisdictional error, overturned the Army court and remanded the case.<sup>20</sup> In a subsequent unpublished opinion, the Army court upheld the findings and sentence against the accused.<sup>21</sup> On appeal, again to the CMA, the accused argued that since the CMA had determined that the commander did not have sufficient personal involvement in the case to become an accuser, his order was not a personal one and the violation should not have been charged under Article 90, UCMJ. Rather, the order should have been charged under Article 92, UCMJ.<sup>22</sup>

The CMA agreed with the accused's theory on appeal.<sup>23</sup> The convening authority had done nothing "to lift his routine order 'above the common ruck' to make disobeying it properly punishable under Article 90, UCMJ."<sup>24</sup> The order was a "routine administrative sanction for a traffic offense" and "issued by a staff officer on behalf" of the convening authority.<sup>25</sup> The CMA reversed that portion of the Army court decision that "affirm[ed] findings of guilty of an offense greater than a violation of Article 92(2)," and remanded for reassessment of the sentence.<sup>26</sup>

The *Byers* series of cases left practitioners with the impression that there was a symmetry between a violation of orders and accuser status: The convening authority whose order has been violated would not be an accuser unless the order was charged as a violation of a personal order under Article 90, UCMJ, rather than a routine order or regulation charged under Article 92, UCMJ.<sup>27</sup>

This past term the CAAF dispelled this suggestion in *United States v. Tittel*.<sup>28</sup> Specialist Third Class Tittel, while assigned in Japan, was convicted of shoplifting and several other offenses and processed for administrative elimination. The day before he was to be discharged, he was again caught shoplifting from the post exchange (PX). At this time, the Commanding Officer, Fleet Activities, the special court-martial convening authority (SPCMCA), issued an order barring the accused from entering any Navy PX. The accused then violated that order by entering a PX. The accused pleaded guilty to larceny and to violation of a lawful order under Article 90, UCMJ. The SPCMCA approved the sentence.<sup>29</sup>

On appeal, the accused argued that the convening authority, who must be neutral, cannot be where he is the victim of the willful disobedience of his personal order. Here, the convening authority's personal directive to the accused was violated, and this made the convening authority a victim in the case, which gave him more than an official interest in the case. The CAAF disagreed, quoting at length from the Navy Court of Criminal Appeals' analysis in which the Navy court found no evidence that the SPCMCA had become "personally involved" with the accused to such an extent that he became an accuser.<sup>30</sup> Further, even assuming arguendo that he had become an accuser, his failure to forward the case to a higher authority was a non-jurisdictional error that was waived by the accused. Considering the serious nature of the charges in this case, the Navy court found "it unlikely that any competent authority would not have referred this case to" a special court-martial. Thus, there was no fair risk of prejudice to the accused from the error.<sup>31</sup>

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20. *United States v. Byers*, 37 M.J. 73 (C.M.A. 1992) (summary disposition).

21. *See Byers*, 40 M.J. at 322.

22. At trial the military judge found that the convening authority was not personally involved in the case because the order suspending the accused's driving privileges was issued to the accused through the SJA office, per a local regulation, and there was no evidence the convening authority evenknew of the issuance of the order or of the driving infraction. *Id.* at 322.

23. The CMA did not address the accuser issue specifically because the accused did not challenge the military judge's findings in that regard during the later appeal. *Id.* at 323 n.3.

24. *Id.* at 323.

25. *Id.*

26. *Id.* at 324.

27. *Cf. id.* at 323 ("Article 90 contemplates a personal order 'directed specifically to the subordinate.'" (citations omitted)); *see also* *United States v. Shiner*, 40 M.J. 155 (C.M.A. 1994) (stating that the court was unable to determine on the sparse record whether ship's commander who gave the accused a liberty-risk order prohibiting him from leaving the ship, became an accuser when the accused was later charged with violating that order); *United States v. Cox*, 37 M.J. 543 (N.M.C.M.R. 1993) (imposition of pretrial restriction is an "official act" which does not connect the convening authority so closely with the offense that a reasonable person would conclude he had anything other than an official interest in the matter).

28. 53 M.J. 313 (2000).

29. *Id.* at 313-14.

30. *Id.* at 314.

31. *Id.*

Concurring in the result, Judge Effron and Judge Sullivan were troubled with the suggestion that the issue of the convening authority's status as an accuser could be passively waived, and would have required instead a knowing and intelligent waiver.<sup>32</sup> They agreed, however, that the record did not establish that the SPCMCA became an accuser. The order that the accused disobeyed "was a routine, administrative type of order that virtually automatically flowed from the fact of appellant's arrest for shoplifting."<sup>33</sup>

While the reviewing courts seemed satisfied that the SPCMCA was acting in a sufficiently official capacity, the case should arouse concern. Had the charges been contested, the convening authority could, conceivably, have been called to testify against the accused.<sup>34</sup> The convening authority may have been the best witness on the issue of the terms of the order he issued to the accused. Further, the accused was charged with a violation of Article 90, UCMJ, suggesting that the order was one more personal to the accused than a routine issuance. The finding that the convening authority was not an accuser seemingly puts to rest the impression left by the *Byers* cases: That a convening authority whose personal order is violated may yet remain sufficiently impartial to convene the court so long as that order has an appropriately routine quality to it. Perhaps equally significant is the emergence of a notion of prejudice precluded: even if the convening authority was an accuser, the accused could not be found to have suffered prejudice because any reasonable convening authority would have referred the case to trial.<sup>35</sup> It might not be too much of a stretch to say that the CAAF is signaling that the door of appellate relief is closing on the issue of convening authority disqualification.

At the very least, *Tittel* is a potent reminder for defense counsel that issues such as the convening authority's impartiality and possible disqualification will not fare well when raised and litigated for the first time on appeal.<sup>36</sup> As for government representatives, SJAs and military justice managers must remain vigilant to ensure that their convening authorities do not stray over the line that separates official from personal involve-

ment. Indeed, it may enhance the integrity of the system for local SJA's to impose a more demanding standard than the one used by the courts. One can only speculate about the potential impact on panel members (hand-picked, after all, by the convening authority to sit as finders of fact) of seeing the convening authority's name in a specification alleging disobedience of an order.

The issue of the forwarding commander's disqualification was raised in another case this term, this time from the opposite side, with the defense claiming prejudice where the forwarding commander *failed* to make a recommendation. The case was *United States v. Norfleet*,<sup>37</sup> and it is a case that is instructive on many levels, perhaps primarily because it highlights differences in the way the Army and the Air Force configure their legal personnel (and the ramifications that can flow from that configuration). In the Army, attorneys and legal specialists are generally assigned to the organization to which they provide support. Thus, for example, trial counsel and legal specialists supporting the 1st Infantry Division in Europe are, generally, assigned to the 1st Infantry Division for administrative support, for disciplinary matters, for everything. In contrast, judge advocates assigned to the Trial Defense Service (TDS) typically report directly to TDS and, although they may be attached for support purposes to a local unit, they remain for virtually all purposes assigned to the TDS headquarters in Virginia.<sup>38</sup> The TDS legal specialists, however, remain assigned to local units, and are rarely, if ever, assigned directly to TDS.

In the Air Force the structure is slightly different, as staff sergeant (SSgt) (E5) Norfleet learned during the processing of her court-martial. She was a paralegal who worked for the Area Defense Counsel Office at RAF Lakenheath, England. She was assigned for administrative purposes (to include UCMJ matters) to the Air Force Legal Services Agency (AFLSA), based at Bolling Air Force Base, Washington, D.C. The AFLSA, in turn, fell under the 11th Wing, for UCMJ purposes, and the Commander, 11th Wing, was the convening authority for courts-martial involving AFLSA personnel.<sup>39</sup> This was the

32. *Id.* at 315 (Effron, J., and Sullivan, J., concurring).

33. *Id.*

34. The order was communicated to the accused by a written Class C liberty risk order personally signed by the SPCMCA. *United States v. Tittel*, No. NMCM 97 01224, 1999 CCA LEXIS 39 (N-M. Ct. Crim. App. 18 Feb. 1999).

35. *Tittel*, 53 M.J. at 314 ("[W]e find it unlikely that any competent authority would not have referred this case to a special court-martial." (citations omitted)); *see also* *United States v. Kroop*, 34 M.J. 628 (A.F.C.M.R. 1992) (stating that the court can examine the advice of the staff judge advocate under Article 34 to determine whether the evidence warranted trial by court-martial and, if it did, conclude that the case would have been referred to trial by any convening authority, regardless of any psychological baggage), *aff'd* 36 M.J. 470 (C.M.A. 1993).

36. *Cf.* *United States v. Voorhees*, 50 M.J. 494 (1999) (stating that the accused waived issue of whether commander who threatened to "turn" him if he did not sign pretrial agreement (PTA) thereby became an accuser).

37. 53 M.J. 262 (2000).

38. *See* U.S. DEP'T OF ARMY, REG. 27-10, LEGAL SERVICES: MILITARY JUSTICE, para. 6-3 (20 Aug. 99) (placing TDS under U.S. Army Legal Services Agency), para. 6-4 (requiring local SJA offices to provide clerical support), para. 6-8(b) (requiring TDS counsel to wear distinctive insignia).

39. *Norfleet*, 53 M.J. at 263.

chain through which SSgt Norfleet's court-martial charges were forwarded after her urine sample tested positive for marijuana. A charge was preferred and forwarded through the Commander, AFLSA. The AFLSA commander did not render a recommendation, noting that SSgt Norfleet's duty performance was "excellent," but that it was "inappropriate" for him to make a recommendation as to disposition. The 11th Wing Commander then referred the case to a special court-martial.<sup>40</sup> At the outset of the proceedings, the defense requested that the military judge recuse himself under RCM 902(a),<sup>41</sup> arguing that the defense intended to call into question the processing of the accused's court-martial case by the military judge's superiors at AFLSA. In particular, the defense noted that the AFLSA commander had, presumably, written a recommendation concerning the accused's request for discharge in lieu of court-martial. Further, the defense pointed out that the Commander, AFLSA, had violated his responsibility under the *MCM* to render a recommendation in the case.<sup>42</sup> Finally, the defense concluded, the AFLSA commanders' actions constituted an abuse of discretion because they failed in their obligations as SSgt Norfleet's commanders.<sup>43</sup>

While the military judge acknowledged that the Commander, AFLSA reviewed his officer efficiency reports, he noted that he was required by oath to render justice impartially, and that he had never received any criticism of his rulings from his commanders. He then reviewed the actions of the superior commanders, noting that the act of forwarding the charges and disapproving the request for discharge in lieu of court-martial did not represent a conclusion that the accused was guilty but "rather an expression that that the issue should be resolved by a court."<sup>44</sup> Stating that he felt absolutely no pressure to resolve the case in a manner inconsistent with his understanding of the law or his conscience, the military judge denied the motion.<sup>45</sup>

The CAAF agreed that the presence of the military judge's superiors in the convening authority's chain of command did not require the military judge's recusal under RCM 902. The CAAF reviewed the evolution of the position of military judge, and wrote that Congress "established the position of military judge within the context of the military establishment, rather than as a separate entity."<sup>46</sup> Thus, military judges are subject to the same personnel practices that apply to military officers in general. In addition, military judges are often called on by the nature of their work to render decisions adverse to superior officers, but this does not impinge upon their exercising independence in judicial rulings.<sup>47</sup> In addition, the CAAF noted that prior courts have held that the preparation of fitness reports for the appellate military judges by senior judge advocates does not create a circumstance in which the impartiality of the judge might reasonably be questioned under RCM 902(a).<sup>48</sup>

Ultimately, the CAAF found that the military judge was not *per se* disqualified, despite the fact that the military judge and the accused were assigned to the same organization, and that both shared a similar professional affiliation with each other and their superiors who had processed the charges.<sup>49</sup> Further, the CAAF noted there was no risk that the forwarding of the charges through the accused's chain of command would cause the military judge to fail in the performance of his judicial duties. Those superiors, the CAAF noted, had taken themselves out of the case processing, and the military judge's ruling on the propriety of their doing so did not "raise an issue so controversial that an adverse decision would have had a lasting impact on their professional reputations for competence and integrity."<sup>50</sup> The issues presented in the case were similar to those which military judges decide routinely without regard for the impact of such rulings on their careers. The nature of the issues at stake, the full disclosure of the military judge, and the opportunity provided to *voir dire* the military judge left the

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40. *Id.* at 264-65.

41. *MCM*, *supra* note 9, R.C.M. 902(a) states that a military judge "shall disqualify himself or herself in any proceeding in which the military judge's impartiality might reasonably be questioned."

42. The defense cited RCM 306(c)(5) and RCM 401(c)(2)(A). Rule for Courts-Martial 306(c)(5) states that a commander who lacks authority to take action on a case should forward the case to a superior officer with a recommendation as to disposition. Rule for Courts-Martial 401(c)(2)(A) requires that "[w]hen charges are forwarded to a superior commander for disposition, the forwarding commander shall make a personal recommendation as to disposition. If the forwarding commander is disqualified from acting as convening authority in the case, the basis for the disqualification shall be noted."

43. *Norfleet*, 53 M.J. at 264-65.

44. *Id.* at 265.

45. *Id.*

46. *Id.* at 268.

47. *Id.*

48. *Id.* at 269 (citations omitted).

49. *Id.* at 260.

50. *Id.* at 270.

CAAF with little doubt that the accused received a fair trial presided over by an impartial military judge, and that a reasonable observer would not question the judge's impartiality.<sup>51</sup>

The CAAF's decision seems reasonable under the circumstances, for few would doubt the military judge's declaration that he would apply the law as his conscience and oath dictated. The CAAF's decision also seems in line with other recent decisions tending to defer to the military judge's declarations of impartiality.<sup>52</sup> Nevertheless, it is vaguely unsettling that the CAAF appeared to give short shrift to two issues raised by the accused. First, the CAAF tacitly endorsed the Air Force Court of Criminal Appeals resolution of the claimed violation of RCM 401, citing to the Air Force court's reasoning that there was no requirement to include a recommendation since the case was being forwarded to a parallel, not a superior commander.<sup>53</sup> This is disconcerting, for under this holding the Commander, AFLSA, had *no discretion* to make a recommendation because the Commander, 11th Wing, was not a "superior" commander. This reading would no doubt surprise the AFLSA chain of command, some of them Air Force judges, who evidently felt that they had discretion whether to render a recommendation under RCM 401. Indeed, it appears that the AFLSA commander did not make a recommendation because of his knowledge of the

accused, not because he felt he was barred by RCM 401(c)(2)(B).<sup>54</sup> Moreover, the value of requiring a commander to make a recommendation is that the commander, it is believed, knows the soldier well and should, therefore, advise on an appropriate disposition.<sup>55</sup> Thus, if RCM 401(c)(2)(B) truly governs here, then every commander of the AFLSA is precluded from making a recommendation any time an AFLSA member is prosecuted, so long as AFLSA is assigned to 11th Wing for UCMJ purposes. And more importantly, every AFLSA counsel<sup>56</sup> and airman who is court-martialed will be denied the potential benefit of a recommendation merely because of the arbitrary unit configuration.<sup>57</sup> This result seems contrary to the purpose of RCM 401 and simply cannot be what the President intended in drafting this rule.

The accused also claimed that she should have a judge from another service appointed to hear her case. This claim was based on a prior case in which an Army judge was made available to the Air Force for a trial of an Air Force defense counsel.<sup>58</sup> The Air Force court noted that the AFLSA commander had been the accuser in the prior case, having preferred charges, so there were greater concerns about the perceptions of the military judge's impartiality. Here, the AFLSA commander had expressed no sentiment at all concerning the court-martial,

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51. *Id.*

52. *See, e.g.,* United States v. Rivers, 49 M.J. 434 (1998) (stating that where military judge makes full disclosure on the record and affirmatively disclaims any impact on him, where the defense has full opportunity to voir dire the military judge and to present evidence on the question, and where such record demonstrates that appellant obviously was not prejudiced by the military judge's not recusing himself, the concerns of RCM 902(a) are fully met); *see also* United States v. Thompson, 54 M.J. 26 (2000) (stating that military judge did not abuse his discretion in failing to recuse himself despite intemperate exchanges with defense counsel which defense counsel maintained rendered her unable to continue the trial).

53. Rule for Courts-Martial 401(c)(2)(A) requires a recommendation when a case is forwarded to a superior commander for disposition. Rule for Courts-Martial 401(c)(2)(B) states that "When charges are forwarded to a commander who is not a superior of the forwarding commander, no recommendation as to disposition may be made." In its opinion, the Air Force court wrote:

It is not unusual in the Air Force for a general court-martial convening authority to be a wing commander with several tenant units attached to his organization. The commanders of these tenant units are often superior in grade to the convening authority. R.C.M. 401(c)(2)(B) helps prevent the appearance of a senior officer commander exercising undue influence on the independence of a convening authority who is junior to him.

AFLSA/CC reports directly to The Judge Advocate General of the Air Force and is not in the 11th Wing chain of command. The commanders of both AFLSA and the 11th Wing held the grade of O-6 at the time in question. The 11th Wing commander was not senior in grade or chain of command to AFLSA/CC. Therefore, AFLSA/CC acted properly and was complying with R.C.M. 401(c)(2)(B), which directed that he make no recommendation when he forwarded appellant's charges to a convening authority who was not his superior.

United States v. Norfleet, No. ACM S29280, 1998 CCA LEXIS 301, \*4-\*7 (A.F. Ct. Crim. App. 1998).

54. "I also decline to make a recommendation as to rehabilitation potential . . ." *Norfleet*, 53 M.J. at 264.

55. *Cf.* United States v. Snowden, 50 C.M.R. 799 (A.C.M.R. 1975) (stating that implicit in the commander's recommendation as to disposition is an evaluation of the accused's past soldierly qualities and conduct).

56. Air Force trial defense counsel are assigned to AFLSA. United States v. Nichols, 42 M.J. 715 (A.F. Ct. Crim. App. 1995).

57. Our courts have long acknowledged the importance of having the convening authority receive subordinate commander recommendations on disposition of court-martial charges. *Cf.* United States v. Ginn, 46 C.M.R. 811 (A.C.M.R. 1972) (stating that an error occurred where SJA failed to notify convening authority of subordinate commander's recommendation for alternate disposition; in view of the subordinate commander's recommendations in accused's favor, court could not discount reasonable possibility that subordinate commander's recommendation might have tipped the scales to the accused's favor had it been weighed in the balance by convening authority).

58. United States v. Nichols, 42 M.J. 715 (1995).

so there was less of a need to seek a military judge from another service. Moreover, the Air Force court held there was no right to a military judge from another service merely because the accused was assigned to AFLSA.<sup>59</sup>

The combined effect of *Nichols* and *Norfleet* will be to preclude the AFLSA commander from making recommendations in court-martial cases arising from AFLSA while generally ensuring that AFLSA accused are tried by judges whose efficiency reports are written, at least in part, or reviewed by the AFLSA commander. While it is indeed a testament to how far the military has come that this prospect does not offend the CAAF or the service courts, such a practice should disturb the spirit, if not the letter, of Article 26, UCMJ.

### *Panel Selection*

The process by which the services nominate and select panel members has been the subject of significant litigation for decades. Over the years, however, the CAAF has made it increasingly difficult for the defense to successfully attack the panel selected by the convening authority. As a possible result of this trend, the defense attacks on panel selection have shifted from the array chosen by the convening authority to the nomination process that produced the list from which the convening authority made his initial selection. A review of two cases from the past two years will set the stage for a recent case that brings this trend more into focus, and will demonstrate that the CAAF's analysis of these issues appears, after one or two rather tortuous detours, to be back on track.

In 1999 and 2000, the CAAF issued two opinions on panel selection, *United States v. Upshaw*<sup>60</sup> and *United States v. Roland*.<sup>61</sup> In both cases, the defense argued that the convening authority had violated Article 25, UCMJ, by using rank as a criterion in selecting members. The CAAF found, instead, that the defense had failed in its burden to show court stacking, a species of command influence.<sup>62</sup> In other words, the CAAF appeared to be holding that the defense had to show command influence in order to prevail on challenges to panel selection.

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59. *Norfleet*, 1998 CCA LEXIS 301, at \*4-\*7.

60. 49 M.J. 111 (1998).

61. 50 M.J. 66 (1999).

62. *Cf. Upshaw*, 49 M.J. at 113 (holding that court stacking is a form of unlawful command influence; here, the court held the issue of unlawful court stacking was not raised by the defense.); *Roland*, 50 M.J. at 69 ("the defense has not carried its burden to show there was unlawful command influence").

63. The CAAF has consistently held that deliberate and systematic exclusion of lower grades and ranks from court-martial panels is not permissible. *See United States v. Nixon*, 33 M.J. 433, 434-35 (C.M.A. 1991); *United States v. Hilow*, 32 M.J. 439 (C.M.A. 1991); *United States v. Greene*, 43 C.M.R. 72 (C.M.A. 1970); *United States v. Crawford*, 35 C.M.R. 3 (C.M.A. 1964).

64. *Roland*, 50 M.J. at 69.

65. *Id.* at 67-68.

66. *Id.* at 70.

In *Upshaw*, the SJA, mistakenly believing the accused was an E6 (he was an E5), sent out a memorandum seeking nominees in the grade of E7 and above from the SPCMCAs. While this was clearly an error (because the nomination process subsequently excluded all E6s from consideration for panel selection)<sup>63</sup> the CAAF did not set the case aside. Instead, the CAAF held that, though erroneous, the SJA's belief was not prompted by bad faith or by a desire to stack the court. The defense conceded that the exclusion of technical sergeants (E6) was simply a mistake, and the CAAF agreed, holding that the evidence did not raise the issue of court stacking. The error was simply administrative and not jurisdictional, and the court found no prejudice to the accused.

In *Roland*, again, the controversy grew out of the SJA's panel nomination documents. Here, the SJA asked for nominees in the grades of E5 to O6. While this would appear to arbitrarily and unilaterally exclude grades below E5, the CAAF held that there was no error. The SJA's memorandum had not excluded any groups. It had merely identified certain groups for consideration.<sup>64</sup> The CAAF looked to the evidence that showed: (1) the SPCMCA knew he was not bound by the list of nominees and could nominate anyone for selection; and (2) the GCMCA was apparently advised about Article 25, UCMJ, and the fact that he could select anyone in his command. Thus it appeared that neither the convening authority nor his subordinate commanders felt constrained by the E5 to O6 language used by the SJA.<sup>65</sup> The CAAF saw no evidence of command influence and, noting that the defense had not met its burden of proving command influence, affirmed the conviction.<sup>66</sup>

Both *Upshaw* and *Roland* cause concern because the CAAF appeared to be changing the defense's burden of proof. Rather than requiring the defense to show that the convening authority had used a criteria in violation of Article 25, UCMJ, the decision appeared to foist on to the defense the burden of showing command influence in every panel selection case. And this, in turn, appeared to be a departure from established case law.<sup>67</sup> So, one might ask how the CAAF came to require a showing of command influence in every challenge to panel selection under Article 25, UCMJ. Arguably, the CAAF

reached that conclusion by expanding the criteria that a convening authority may consider when selecting panel members.

Over the years, the CAAF has been called upon to determine whether the convening authority may use race,<sup>68</sup> gender,<sup>69</sup> and command position<sup>70</sup> as criteria in panel selection. Perhaps reluctant—understandably—to unilaterally dismiss the use of such criteria, the CAAF’s response was to ask *why* the convening authority was using these criteria not mentioned in Article 25. The theory would be that if the convening authority used the new criteria in a fair manner not inconsistent with Article 25 (for example, to ensure a representative cross-section of the military community),<sup>71</sup> then there would be no error. On the other hand, if the convening authority used the criteria in a manner inconsistent with Article 25 (for example, to ensure a conviction or a harsh sentence), then the convening authority would violate Article 25 as well as Article 37 and its prohibition on command influence. It would appear that every alleged violation of Article 25 requires consideration of the convening authority’s intent, which necessarily raises command influence concerns under Article 37, UCMJ.<sup>72</sup> The difficulty with this approach, however, is that not every violation of Article 25, UCMJ, occurs because of command influence, or because of a bad motive on the part of the convening authority. The best example of this is rank, which stands alone as the one criterion that is anathema,<sup>73</sup> the one criterion that simply may not be used as the sole criterion in panel selection, regardless of the convening authority’s intent. This was the conclusion to which the CAAF obligingly returned in *United States v. Kirkland*.<sup>74</sup>

In *Kirkland*, the SJA solicited nominees from subordinate commanders via a memorandum signed by the SPCMCA. The memo sought nominees in various grades, and included a chart on which the commanders could nominate individuals with a separate block for each rank. The chart had sections for listing nominees in the grades of E9, E8, and E7, but no place to list a nominee in a lower grade. To nominate someone E6 or below, a nominating officer would have had to modify the form.<sup>75</sup> The defense challenged the documents, claiming they implicitly excluded all ranks below E7. The CAAF agreed with the defense. Citing to *United States v. McClain*,<sup>76</sup> the CAAF held that where there is an “unresolved appearance” of exclusion of ranks (here, E6s and below), “reversal of the sentence is appropriate to uphold the essential fairness . . . of the military justice system.”<sup>77</sup>

The CAAF’s holding in *Kirkland* is interesting, and a bit perplexing, because the facts in *Kirkland* were not terribly different from those in *Roland*.<sup>78</sup> In both cases, the evidence showed that although the SJAs’ memoranda ostensibly limited the pool of potential members, the convening authorities applied Article 25 criteria, knew they were not bound by the list of nominees, and knew they could select anyone in their commands. Nevertheless, the CAAF found in *Kirkland* that the government had not overcome its burden of showing no impropriety occurred, as the appearance of exclusion was “unresolved.”<sup>79</sup>

With *Kirkland*, the good ship *USS CAAF*, having listed in the ocean of panel selection these past two years, appears to have

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67. Cf. *United States v. Nixon*, 33 M.J. 433 (C.M.A. 1991) (stating that the court affirmed based on convening authority’s statement that he complied with Article 25; court emphasized that military grade by itself is not a permissible criterion for selection of court-martial members, with no reference to a requirement to show command influence).

68. *United States v. Smith*, 27 M.J. 242, 249 (C.M.A. 1988) (convening authority free to require representativeness on court-martial panels and to insist that no important segment of military community such as African-Americans, Hispanics, or women, be excluded).

69. *Id.*

70. *United States v. White*, 48 M.J. 251 (1998) (stating that the commander who ensured preponderance of commanders on panel did not violate Article 25, UCMJ).

71. See *supra* note 68.

72. The intent or purpose of the convening authority in executing the panel selection procedure is “an essential factor in determining compliance with Article 25.” *United States v. Bertie*, 50 M.J. 489, 491 (1999) (citing *United States v. Daigle*, 1 M.J. 139, 141 (C.M.A. 1975) (observing a “fixed policy” to exclude certain members)) (additional citations omitted).

73. In virtually all the cases preceding *Roland*, the military courts of appeal have never required that the defense show command influence to prevail on an argument that the convening authority violated Article 25, UCMJ. See, e.g., *supra* note 67 and case cited therein.

74. 53 M.J. 22 (2000).

75. *Id.* at 23-24.

76. 22 M.J. 124 (C.M.A. 1986).

77. *Kirkland*, 53 M.J. at 25 (citing *McClain*, 22 M.J. at 133 (Cox, J., concurring)).

78. See *United States v. Kirkland*, No. 99-0651/AF, 2000 CAAF LEXIS 574 (June 1, 2000) (Petition for Clarification) (citing *Kirkland*, 53 M.J. at 25 (Sullivan, J., dissenting) (“I fail to understand why the majority is departing from *United States v. Roland*, 50 M.J. 66 (1999), which was decided only a year ago.”)).

79. *Kirkland*, 53 M.J. at 25.

valiantly righted itself. The CAAF seems to have abandoned, thankfully, the hybrid, overly burdensome analysis evinced in *Roland* and *Upshaw*; that is, the requirement that the defense show command influence or “court stacking” in violation of Article 37, UCMJ, in order to prevail on every challenge to the panel selection. This fact is probably welcome news to Judge Gierke, who dissented in *Roland*, claiming that the majority had increased the burden on the defense by requiring them to show command influence in mounting a challenge to the panel under Article 25, UCMJ.<sup>80</sup>

Moreover, the CAAF’s citation to *McClain* and the “unresolved appearance” language tacitly resurrects the line of cases that include such precedents as *United States v. Nixon* and *United States v. Daigle*, precedents rendered passé by the rulings in *Upshaw* and *Roland*. In revitalizing the notion of an *appearance* of an improper panel selection, the CAAF sends a strong signal to the government and to the defense: the government must scrupulously avoid language in its panel selection documents that appears to exclude certain classes of service members from nomination, while the defense must continue to scour panel selection documents to reap the potential harvest that lies therein. While defense challenges based on the appearance of the *array* will continue to be—usually—unsuccessful,<sup>81</sup> challenges that can establish an appearance of deliberate (as opposed to accidental)<sup>82</sup> exclusion of certain ranks have a brighter prospect for success.

From challenges to the panel as a whole we move to challenges to individual panel members. As in the civilian legal world, the military uses *voir dire* to question members and explore bases for potential challenges. Trial and defense counsel may challenge any member for cause, and there is no numerical limit on challenges for cause. In addition, trial and defense counsel are both allowed to strike one member without any justification, that is, “peremptorily.”<sup>83</sup>

*Voir dire* should be used to obtain information for the intelligent exercise of challenges.<sup>84</sup> The grounds for challenge are set out in the *MCM*, and they require excusal of a member who has, for example, served as investigating officer on the case, or has forwarded the case with a recommendation for disposition.<sup>85</sup> There is, in addition, a broad prohibition that bars a member from serving “in the interest of having the court-martial free from substantial doubt as to legality, fairness, and impartiality.”<sup>86</sup> In exploring potential bases for challenging a panel member under this provision, defense counsel may ask the member whether the member has already made up his mind about the accused’s guilt, or whether the member has already decided what the sentence should be based solely on the charges. The purpose of this questioning is to find out whether the member has an inflexible attitude toward guilt or toward the sentence that is unlikely to yield to the judge’s instructions. Such members should be excused because their failure to follow the judge’s instructions and their unwillingness to listen to evidence from the defense, either on the merits or on sentencing, will render the proceedings unfair to the accused.<sup>87</sup>

Over the years, the CAAF has been sensitive to what is often seen as artful or tricky questioning by the defense—efforts to get the panel members to commit to a particular sentence before any evidence is introduced. The CAAF seems concerned that counsel will ask ostensibly ludicrous questions such as (in a brutal premeditated murder case), “Could you ever vote for ‘no punishment’ in this case?”<sup>88</sup>

This concern was evident last year in *United States v. Schlamer*<sup>89</sup> and it appeared again this past year in another case, *United States v. Rolle*.<sup>90</sup> In *Schlamer*, one of the panel members had expressed strong sentiments about the criminal justice system and about criminals, adding that certain crimes should carry specific punishments (fore example, rape deserves castration).<sup>91</sup> Nevertheless, through exhaustive examination by the military judge and counsel, the member maintained that she

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80. *Roland*, 50 M.J. at 71 (Gierke, J., dissenting).

81. *See, e.g.*, *United States v. Bertie*, 50 M.J. 489, 492 (1999) (stating that the court expressed unwillingness to accept accused’s claim of improper selection based on the appearance of the array).

82. The issue still simmering on the back burner of the CAAF’s stove, however, remains the sleight of hand in *Upshaw*. The CAAF majority simply got it wrong in *Upshaw* where the convening authority erroneously excluded an entire class of service members (E6s) from consideration. The CAAF appeared to hold that such “administrative errors” do not warrant relief because the convening authority only mistakenly failed to consider E6s. This is a sleight of hand because the fact remains that the convening authority *deliberately* excluded a group of otherwise qualified members (E6s), thus violating Article 25, UCMJ. The fact that the convening authority did so based upon the mistaken advice of his staff judge advocate in no way cleanses the record of the error. The accused was deprived of the opportunity to have his case considered by a panel that was properly constituted under Article 25, UCMJ, which is the minimal due process that our system requires, and the CAAF’s lasting error lay in the failure to afford him this right.

83. UCMJ art. 41 (2000).

84. *MCM*, *supra* note 9, R.C.M. 912(d) discussion.

85. *Id.* R.C.M. 912(f)(1)(F), (I).

86. *Id.* R.C.M. 912(f)(1)(N).

87. *Cf.* *United States v. Heriot*, 21 M.J. 11, 13 (C.M.A 1985) (“[W]e are convinced that an accused is entitled to be tried by court members whose minds are open as to what is an appropriate sentence; and *voir dire* of the members is the accepted way to ascertain whether this openness is present.”).

had not made up her mind concerning an appropriate sentence, that she would follow the judge's instructions, and that she would listen to all the evidence before making her decision. In light of this testimony, the military judge's denial of a challenge for cause was upheld by the CAAF. The majority noted that "an inflexible member is disqualified, a tough member is not."<sup>92</sup>

The CAAF had another chance to probe the distinction between inflexibility and toughness in *Rolle*. In *Rolle*, the accused, a staff sergeant (E6), pleaded guilty to wrongful use of cocaine. Much of the voir dire focused on whether the panel members could consider seriously the option of no punishment, or whether they felt a particular punishment, such as a punitive discharge, was appropriate for the accused. One member, Command Sergeant Major (CSM) L, stated: "I wouldn't" let the accused stay in the military. He further stated that, "[a]n individual that admits guilt through some—some criminal act cannot be going unpunished although he may have a lot of mitigating circumstances, et cetera, he already admitted guilt . . . you know I would take in consideration all the mitigating circumstances, but when somebody has admitted guilt, I am inclined to believe that probably there is some punishment in order there . . . I very seriously doubt that he will go without punishment" (although CSM L did note that there was a difference between a discharge and an administrative elimination from the Army).<sup>93</sup> Another member, SFC W, stated "I can't [give a sentence of no punishment] . . . because basically it seems like facts have been presented to me because he evidentially said that he was guilty."<sup>94</sup> The military judge denied the challenges for cause against CSM L and SFC W.

In affirming the military judge's decision denying the two challenges for cause, the CAAF noted that "the notion of 'no punishment' has bedeviled this Court for most of its history. A punishment of no punishment appears to be an oxymoron, but it is a valid punishment."<sup>95</sup> The concept "no punishment" is especially problematic in voir dire, where questions are "propounded to the members in a vacuum, before they heard any evidence or received instructions from the military judge."<sup>96</sup> Thus, the courts have long been sympathetic to the plight of members who "on voir dire are asked hypothetical questions about the sentence they would adjudge in the event of conviction."<sup>97</sup> The CAAF, therefore, restated its reluctance "to hold that a prospective member who is not evasive and admits to harboring an opinion that many others would share—such as that a convicted drug dealer should not remain a non-commissioned officer or should be separated from the armed services—must automatically be excluded if challenged for cause."<sup>98</sup> As the court identified, "[T]he test is whether the member's attitude is of such a nature that he will not yield to the evidence presented and the judge's instructions."<sup>99</sup> Applying this test to the two members in *Rolle*, the CAAF concluded that the military judge had not abused his discretion.

The CAAF reasoned that CSM L, "along with the other members, expressed no predisposition to impose a punitive discharge, confinement, or reduction in grade based on the nature of the offense."<sup>100</sup> While he did express an *inclination* toward some punishment, he agreed that he would follow the military judge's instructions and would never exclude the possibility of

88. See *United States v. McLaren*, 38 M.J. 112 (C.M.A. 1993), where Judge Gierke, writing for the court, noted:

I would have substantial misgivings about holding that a military judge abused his discretion by refusing to excuse a court member who could not in good conscience consider a sentence to no punishment in a case where all parties agree that a sentence to no punishment would have been well outside the range of reasonable and even remotely probable sentences.

*Id.* at 119 n.\*.

89. 52 M.J. 80 (1999).

90. 53 M.J. 187 (2000).

91. *Schlamer*, 52 M.J. at 86.

92. *Id.* at 93.

93. *Rolle*, 53 M.J. at 189.

94. *Id.* at 190.

95. *Id.* at 191.

96. *Id.*

97. *Id.* (quoting *United States v. Heriot*, 21 M.J. 11, 13 (C.M.A. 1985)).

98. *Id.*

99. *Id.* (quoting *United States v. McGowan*, 7 M.J. 205, 206 (C.M.A. 1979)).

100. *Id.* at 192.

no punishment.<sup>101</sup> In other words, although perhaps predisposed to punishment, he was not inflexible.

The CAAF then addressed the challenge to SFC W. Conceding that SFC W had said he could not give “no punishment,” the CAAF noted it was not clear whether SFC W meant no conviction, no collateral consequences of a conviction, or no administrative separation. This, said the CAAF, is “another case of responses to ‘artful, sometimes ambiguous inquiries’ that do not require the military judge to grant a challenge for cause.”<sup>102</sup> The CAAF went on to note that even if SFC W truly meant that he could not vote for a sentence of “no punishment” under any circumstances, the conclusion about the denial of the challenge for cause would not change. This is because, in the CAAF’s estimation, both sides virtually conceded that “no punishment” was never a reasonable likelihood in this case. The CAAF noted that: (1) the accused pleaded guilty pursuant to a PTA that permitted imposition of a bad conduct discharge; (2) in his unsworn statement, the accused expressed doubt about his worthiness to wear the uniform; and (3) defense counsel’s sentencing argument did not ask for “no punishment;” rather, he asked for no discharge and no confinement. Thus, the parties evidently considered a sentence of “no punishment” to be outside the range of reasonable and even remotely probable sentences.<sup>103</sup>

Clearly, *Schlamer* and *Rolle* illustrate CAAF’s increasing sympathy toward members who are dragged through the minefield of punishment hypotheticals on voir dire. *Rolle*, however, may signal a further departure for the CAAF. Having expressed frustration over the “artful” defense questioning, and being presented with a case where a member specifically stated he could not vote for “no punishment,” the CAAF’s decision was seemingly predetermined by *United States v. Giles*.<sup>104</sup> At issue in *Giles* was whether the accused should receive a punitive discharge. One of the members had stated he would vote for a punitive discharge regardless of the evidence presented, and the Court of Military Appeals found that the military judge had abused his discretion in denying the challenge for cause. The CAAF distinguished *Giles* from *Rolle*, noting that SFC W had an inelastic attitude about “no punishment.” Unlike *Giles* (where the member’s inflexibility concerned a punitive discharge), in *Rolle*, “no punishment” was beyond the realm of reasonable sentences, as tacitly conceded by the parties. In

other words, SFC W expressed no predisposition regarding the real sentencing issues in *Rolle* (that is, whether the accused should receive a punitive discharge and confinement). SFC W’s attitude regarding “no punishment” had no bearing on the real sentencing issues because the defense virtually conceded in the sentencing argument that “no punishment” was “outside the range of reasonable and even remotely probable sentences.”<sup>105</sup>

The CAAF’s effort to distinguish *Rolle* and *Giles* (which was disparaged by the concurring opinion in *Rolle* as an unsupported distinction)<sup>106</sup> may simply be another expression of the CAAF’s frustration with “artful” voir dire questioning. Alternatively it may be a signal of the lengths to which the CAAF will go to foster a voir dire environment in which members’ honest comments about crime and punishment cannot be used against them unless they show a true inflexibility to what are the “real” issues in a particular case. The danger of this approach lies in the fact that identifying the “real” issues can only be done in retrospect, after the trial is ended, evidence introduced, and arguments made. It is, therefore, an intensely problematic, speculative standard for trial judges to use in ruling on challenges for cause.

The CAAF’s apparent willingness to defer to members on the issue of inflexibility seems to translate into a broad deference to military judges in the area of challenges for cause. In both *Schlamer* and *Rolle* the CAAF was clearly loath to reverse the military judges’ findings that the members remained unbiased concerning the important issues of their cases. This impression was perpetuated in *United States v. Napolitano*.<sup>107</sup> The court in *Napolitano* faced the issue that has probably dogged anyone who has served as a civilian defense counsel at court-martial: The lingering disapproval by court members of civilian counsel.

In *Napolitano*, Captain Malankowski was appointed to serve on the accused’s court-martial. During voir dire, Captain Malankowski disclosed that he felt that the accused’s civilian lawyer, and civilian lawyers generally, were “freelance guns for hire.”<sup>108</sup> His opinion was based on his impression of famous civilian lawyers, such as Johnny Cochran, and on his assessment of some friends of his who were practicing criminal law in Florida. He also felt that civilian attorneys would set aside their moral beliefs to represent someone they believed was

101. *Id.*

102. *Id.* (citing *United States v. Bannwarth*, 36 M.J. 265, 267 (C.M.A. 1993) (quoting *United States v. Tippit*, 9 M.J. 106, 108 (C.M.A. 1980))).

103. *Id.* at 193.

104. 48 M.J. 60 (1998).

105. *Rolle*, 53 M.J. at 193.

106. *Id.* (Sullivan, J., concurring in the result) (disputing the majority’s “vain” effort to distinguish *Rolle* and *Giles*).

107. 53 M.J. 162 (2000).

108. *Id.* at 164 (stating that on his member questionnaire, CPT Malankowski used the example of Johnny Cochran, of the O.J. Simpson trial).

guilty, and this was repugnant. The military judge explained the duty of defense counsel to zealously represent their clients, and the member conceded that “that’s the only way [the system] could really work.”<sup>109</sup> Captain Malankowski assured the military judge that he could keep an open mind, that he believed the accused was, at the start of the trial, innocent, and that he would not hold against the accused the fact that his family had hired civilian defense counsel.<sup>110</sup>

In reviewing the denied challenge for cause, the CAAF began by noting that the military appellate courts will overturn a military judge’s denial of a challenge for cause only where there is a clear abuse of discretion by the judge in applying the liberal grant mandate.<sup>111</sup> In evaluating virtually any challenge for cause, the reviewing court will test for actual bias and for implied bias. Actual bias is a question of fact, and the military judge is given greater deference in deciding whether actual bias exists because he has observed the demeanor of the member.<sup>112</sup> Implied bias involves less deference to the military judge because the court is reviewing the denied challenge based on an objective standard. Implied bias exists when regardless of an individual member’s disclaimer of bias, “most people in the same position would be prejudiced.”<sup>113</sup>

Testing first for actual bias, the CAAF found none, noting that CPT Malankowski made it clear that he did not have an actual bias against the accused’s civilian counsel. Turning to the question of implied bias, the CAAF also found none, pointing out that Captain Malankowski’s member questionnaire reflected his disapproval of one civilian attorney, but not the accused’s attorney, and he later reconsidered his opinion during voir dire. The CAAF also noted the member stated he had no bias against civilian defense counsel in general or the accused as the result of his choice of civilian counsel. Finally, the court

noted that, “most people . . . would not consider themselves bound by their initial comments suggesting a bias,” thus Captain Malankowski’s presence on the panel did not give rise to a reasonable appearance of unfairness.<sup>114</sup>

The discretion the CAAF seems to be affording military judges in the area of challenges for cause is not so generous, however, that the CAAF is prepared to cease its vigilance where law enforcement personnel enter the court-martial milieu.

The military courts have often expressed a strong preference against permitting local law enforcement personnel to sit on courts-martial panels.<sup>115</sup> Nevertheless, no per se exclusions have been handed down because courts have recognized that not all law enforcement personnel will necessarily be involved in criminal investigation of the accused.<sup>116</sup> Still, it remains relatively clear that where a member has a considerable law enforcement connection and, perhaps more importantly, is acquainted with the law enforcement witnesses, the military judge should err on the side of granting a challenge for cause.<sup>117</sup> *United States v. Armstrong*<sup>118</sup> presented the CAAF with an opportunity to reaffirm this perspective for practitioners.

In *Armstrong*, the accused was tried for several offenses involving larceny, forgery, violation of a general order, making a false claim against the United States, and a number of other offenses. The accused entered mixed pleas and was convicted of several offenses. He was sentenced to reduction from E7 to E6, to pay a fine, and to be confined for one year. The Coast Guard Court of Criminal Appeals set aside the findings of guilty and the sentence on the ground that the military judge erred in failing to grant a challenge for cause against one of the members.<sup>119</sup> The CAAF affirmed.

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109. *Id.* at 165.

110. *Id.*

111. *Id.* at 166.

112. *Id.*

113. *Id.* at 167 (citations omitted).

114. *Id.*

115. *United States v. Swagger*, 16 M.J. 759, 760 (A.C.M.R. 1983) (holding that the military judge erred in allowing local provost marshal to serve on panel, stating: “At the risk of being redundant—we say again—individuals assigned to military police duties should not be appointed as members of courts-martial. Those who are the principal law enforcement officers at an installation must not be.”); *see also* *United States v. Dale*, 42 M.J. 384 (1995) (stating that it was error to deny challenge for cause against deputy chief of security police who had sat in on criminal activity briefings with base commander).

116. *Cf.* *United States v. Fulton*, 44 M.J. 100 (1996) (stating that the military judge did not abuse discretion in denying challenge for cause against member who was chief of security police but had no knowledge of accused’s case).

117. *See, e.g., United States v. Berry*, 34 M.J. 83 (C.M.A. 1992) (stating that it was error to deny challenge against member who was member of base security office and knew and worked with key government witnesses).

118. 54 M.J. 51 (2000).

119. *United States v. Armstrong*, 51 M.J. 612 (C.G. Ct. Crim. App. 1999).

The lead investigator in the accused's case was Special Agent (SA) Cannon. Special Agent Cannon actively assisted the trial counsel at the trial, sitting at counsel table as a member of the prosecution team and also testifying as a prosecution witness. One of the panel members, a Lieutenant Commander (LCDR) T, disclosed during voir dire that he knew SA Cannon and that he worked in the same office with him. Special Agent Cannon was one of fourteen people assigned to LCDR T's office. They all shared a common workspace and had daily meetings, at which, according to LCDR T, he had heard the accused's case discussed, and the agents investigating the case make "disparaging comments."<sup>120</sup>

Lieutenant Commander T had been involved in law enforcement all his career, but he worked more in intelligence and counter-terrorism than in criminal investigation, and had not worked on the accused's case. The military judge inquired whether LCDR T could be impartial, to which he replied "absolutely," and that he could set aside what he had heard at the daily briefings.<sup>121</sup> Further, he denied that the daily meetings might have some impact on his judgment, and averred that he had "no doubt" that he could be impartial. In denying the defense's challenge for cause, the military judge observed that LCDR T was "quite candid," "very earnest," "somebody that has some self-knowledge," and "quite credible."<sup>122</sup>

The Coast Guard Court of Criminal Appeals agreed with the military judge that LCDR T was not actually biased against the accused.<sup>123</sup> The court was unable to determine, however, whether the military judge had even considered implied bias.<sup>124</sup> The court found that "the facts in this case warranted granting a challenge for cause for implied bias." In language eerily reminiscent of the cases cited at the beginning of this discussion, the court noted the challenged member: (1) was part of the law enforcement branch on the staff of the convening authority; (2) was associated with those who investigated the accused; (3) had regularly attended briefings on the accused's case; and (4) was

part of the same branch as the lead investigative agent, who was both a witness for the prosecution and part of the prosecution team.<sup>125</sup> The court concluded that the member's disclaimers simply could not dispel the perception of unfairness and prejudice created by the facts of the case.

Before the CAAF, the government challenged the service court's conclusion, arguing that the Coast Guard Court of Criminal Appeals' decision should be tested only for plain error, and that the issue of implied bias should not have been addressed by the lower court because the defense did not specifically articulate a challenge based upon implied bias. The CAAF rejected this argument, noting that (1) appellate courts were not bound to apply the plain error doctrine, and (2) RCM 912(f)(1)(N) encompasses both actual and implied bias. The CAAF stated definitively that "[a]ctual bias and implied bias are separate legal tests, not separate grounds for challenge."<sup>126</sup>

The CAAF's decision was based, in part, on its deference to the service court's "'awesome, plenary, de novo power of review' to substitute its judgment for that of the military judge."<sup>127</sup> "[T]he court below was empowered, indeed obligated, to make its own judgment if it believed that implied bias warranted granting the challenge for cause."<sup>128</sup> The CAAF held that the Coast Guard Court of Criminal Appeals did not make findings that were clearly erroneous nor did it base its decision on an erroneous view of the law.

The *Armstrong* decision should be welcomed by trial defense counsel in the field and at the appellate level. The government's argument that the defense should have articulated a challenge based upon actual and implied bias at trial, rather than simply lodging a more general challenge for cause, would have elevated pedantry in trial practice to new heights and, as suggested by the CAAF, was contrary to established case law.<sup>129</sup> Thus, defense may rest assured that so long as a challenge is fully explored on the record, the military appellate courts will

120. *Armstrong*, 54 M.J. at 52.

121. *Id.* at 53.

122. *Id.*

123. *Armstrong*, 51 M.J. at 614.

124. MCM, *supra* note 9, R.C.M. 912(f)(1)(N) provides that a member shall be excused for cause whenever it appears that the member "should not sit as a member in the interest of having the court-martial free from substantial doubt as to legality, fairness, and impartiality." Rule for Courts-Martial 912(f)(1)(N) encompasses "both actual bias and implied bias." *United States v. Warden*, 51 M.J. 78, 81-82 (1999) (citations omitted). The test for actual bias is whether any bias is such that it will not yield to the evidence presented and the judge's instructions. Actual bias is a question of fact, and the military judge is given great deference on issues of actual bias, recognizing that he or she "has observed the demeanor" of the challenged party. Implied bias, on the other hand, is viewed through the eyes of the public, with the focus on the perception or appearance of fairness of the military justice system." *Id.* The military judge is given less deference on questions of implied bias.

125. *Armstrong*, 51 M.J. at 615.

126. *Armstrong*, 54 M.J. at 53 (citing *Warden*, 51 M.J. 78 (1999); *United States v. Napoleon*, 46 M.J. 279, 283 (1997); *United States v. Minyard*, 46 M.J. 229, 231 (1997); *United States v. Daulton*, 45 M.J. 279, 283 (1997)).

127. *Id.* (quoting UCMJ art. 66 (2000)).

128. *Id.* at 54.

review the military judge's conclusions under both an actual and implied bias template. *Armstrong* is a reminder that military judges should routinely make findings with respect to actual and implied bias when judging any challenge under RCM 912(f)(1)(N).

*Armstrong* is also welcome news because it resolved the issue of whether the Supreme Court's recent resolution of a split in the federal circuits applies to the military. In *United States v. Martinez-Salazar*,<sup>130</sup> the defendant challenged a juror for cause. The challenge was denied, and the defendant used one of his peremptory challenges to strike the juror. On appeal, he argued that the district court improperly denied the challenge for cause and this error forced the defense to use one of its peremptory challenges against that juror. The Supreme Court noted that there is no constitutional right to a peremptory challenge; that the entitlement to peremptory challenges comes from Federal Rule of Criminal Procedure 24(b) (which gives the prosecution six peremptory challenges and the defense ten peremptory challenges in a non-capital case involving an offense punishable by more than one year). Thus, the Court held that the defendant's exercise of his peremptory challenge was not denied or impaired when he chose to use it against a member who should have been excused for cause. In other words, the defendant is not required to use his peremptory challenge against the juror to preserve his challenge for appeal, but if he does, he has effectively alleviated the issue by ensuring he was not tried by a jury on which a biased juror sat. This decision resolved a split in the federal circuits,<sup>131</sup> and was the basis for the government's argument in *Armstrong* that the accused's use of his peremptory challenge against LCDR T meant that he suffered no prejudice because he effectively removed the potentially biased member from the panel.

The CAAF disagreed with this argument, refusing to apply *Martinez-Salazar* to Article 41, UCMJ. The CAAF acknowl-

edged that Article 41 bestows on counsel for the defense and the government only one peremptory challenge each, and RCM 912(f)(4)<sup>132</sup> establishes unique procedural rules for preserving a challenge issue for later appellate review. The Rules for Court-Martial, the CAAF reasoned, gave to the accused in *Armstrong*

the right to use his peremptory challenge against any member of the panel, even if his challenge of LCDR T was erroneously denied. It also preserved [his] right to appellate review of the military judge's ruling on the challenge for cause, even though the challenged member was removed by a peremptory challenge. Those rights are not mandated by the Constitution or statute and are not available in a civilian criminal trial.<sup>133</sup>

Thus, the CAAF held that Article 41, UCMJ and RCM 912(f)(4) confer a right greater than the Constitution, and the accused is entitled to that protection. *Martinez-Salazar* "does not preclude the President from promulgating a rule saving an accused from the hard choice faced by defendants in federal district courts—to let the challenged juror sit on the case and challenge the ruling on appeal or to use a peremptory challenge to remove the juror and ensure an impartial jury."<sup>134</sup>

Ultimately, the CAAF majority held that the Coast Guard Court of Criminal Appeals did not abuse its discretion. "Unable to discern the military judge's conclusions regarding implied bias, it exercised its 'awesome, plenary, de novo power of review.'"<sup>135</sup> The service court properly interpreted the cases on implied bias, used its knowledge and experience to evaluate how the service community would perceive LCDR T's presence on the court panel, and it applied the liberal-grant mandate and RCM 912(f)(1)(N).<sup>136</sup>

129. *But see id.* at 55 (Sullivan, J., dissenting) (citing *United States v. Ai*, 49 M.J. 1 (1998) (stating that where accused challenged member at trial based upon actual but not implied bias, implied bias claim on appeal was reviewed under a plain error standard)).

130. 528 U.S. 304 (2000).

131. *Id.* at 310. Several circuits were split over the question of "whether a defendant's peremptory challenge right is impaired when he peremptorily challenges a potential juror whom the district court erroneously refused to excuse for cause, and the defendant thereafter exhausts his peremptory challenges." *United States v. Martinez-Salazar*, 120 S. Ct. 774, 779 (1995).

132. RCM 912(f)(4) states:

When a challenge for cause has been denied, failure by the challenging party to exercise a peremptory challenge against any member shall constitute waiver of further consideration of the challenge upon later review. However, when a challenge for cause is denied, a peremptory challenge by the challenging party against any member shall preserve the issue for later review, provided that when the member who was unsuccessfully challenged for cause is peremptorily challenged by the same party, that party must state that it would have exercised its peremptory challenge against another member if the challenge for cause had been granted.

MCM, *supra* note 9, R.C.M. 912(f)(4).

133. *Armstrong*, 54 M.J. at 55.

134. *Id.* (citation omitted).

135. *Id.*

Needless to say, the dissent strongly disagreed with the majority's holding, arguing that if an accused does "not expressly challenge a member on an implied-bias basis at trial, a post-trial claim of this issue is only reviewed for plain error."<sup>137</sup> Here, the dissent argued, the accused did not specify an implied bias challenge at trial, so the judge's ruling should be tested for plain error. Applying that standard, "it cannot be said that the military judge committed plain error when she did not sua sponte excuse LCDR T on the basis of implied bias."<sup>138</sup>

In light of the CAAF's holding in *United States v. Warden*,<sup>139</sup> it could be argued that the majority has the better argument. In any event, however, trial and defense counsel can at least take consolation in the fact that the CAAF has clearly set out that actual and implied bias are tests for assessing a potential member's bias, and need not be stated as distinct grounds for challenge at trial. In an ideal world, counsel would be prepared to articulate grounds supporting both actual and implied bias when making a challenge. Given the stressful reality of life in the courtroom, however, this would be a daunting task indeed. Counsel should, at the very least, keep both the subjective and objective standards in mind when exploring bases for challenge to best articulate those challenges to the military judge.

From the hurly burly world of challenges for cause, we turn now to the somewhat more settled realm of peremptory challenges and, more particularly, justifications for peremptory challenges under the progeny of *Batson v. Kentucky*.<sup>140</sup> Virtually all trial practitioners in the military are familiar with the evolution of *Batson* in the military, but a brief review will help give context to a new case that appears poised to sweep away at least some of the military precedent in this area.

In *Batson*, the Supreme Court condemned the prosecution's use of the peremptory challenge to remove all African American members of the accused's jury. The Court required the government, after defense objection, to explain the reason for the

use of the peremptory. The prosecutor was required to provide a race-neutral reason to support the challenge. In *United States v. Moore*,<sup>141</sup> the CMA adopted a *per se* rule that "every peremptory challenge by the Government of a member of an accused's race, upon objection, must be explained by trial counsel." This rule was later extended to challenges ostensibly based upon gender.<sup>142</sup>

The Supreme Court later had to address the issue of the sufficiency of the race—or gender—neutral reason. In other words, what constitutes a sufficiently race—or gender—neutral explanation? The Supreme Court ruled that it would not second-guess counsel, permitting prosecutors' "hunches" to suffice, so long as they were "genuine."<sup>143</sup> In *United States v. Tulloch*,<sup>144</sup> the CAAF refined this requirement in the military, imposing on trial counsel a more demanding standard when responding to a *Batson* challenge. Rather than merely requiring a genuine race or gender neutral explanation, the military courts, after *Tulloch*, require a trial counsel to give a race or gender neutral reason that is not implausible or unreasonable.

The CAAF imposed this rule, in part, because of a perceived tension between Articles 25 and 41, UCMJ. Article 25 directs that the convening authority personally pick members who are, in his "personal opinion," best qualified under Article 25, UCMJ. It is contradictory, therefore, for the trial counsel, exercising his peremptory challenge under Article 41 to be able to willy-nilly remove a member merely because he or she has a "hunch" that the member is not qualified or not impartial. The trial counsel, the court felt, had to be able to articulate something more concrete, something demonstrable on the record, than a mere hunch that the member should not serve.<sup>145</sup>

Against this backdrop, two cases were decided by the CAAF this year that addressed the adequacy of trial counsel's explanations for the exercise of their peremptory challenges. First, in

136. *Id.*

137. *Id.* (Sullivan, J., dissenting); see also *supra* note 129.

138. *Id.* (citations omitted).

139. 51 M.J. 78 (1999). In *Warden*, the panel president said that he "trusted" a prosecution witness who had been his personal secretary, yet claimed he could set that aside and be impartial. The defense challenged the member for cause, stating he would not be able to properly evaluate the witness' testimony. While the CAAF ultimately affirmed, it did so only after noting that RCM 912(f)(1)(N) encompasses both actual and implied bias, and applying both tests against the challenged member. *Id.* at 81-82.

140. 476 U.S. 79 (1986).

141. 28 M.J. 366 (C.M.A. 1989).

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

143. *Purkett v. Elm*, 514 U.S. 765 (1995).

144. 47 M.J. 283 (1997).

145. In *Tulloch*, trial counsel proffered the explanation that the member blinked and looked nervous. Because this observation was not reasonably or plausibly linked to any perceived deficiency on the part of the member, the CAAF held that the trial counsel's explanation was insufficient to support the peremptory challenge. *Tulloch*, 47 M.J. at 288-89.

*United States v. Norfleet*,<sup>146</sup> the trial counsel challenged the sole female member of the court. In response to the defense counsel's objection and request for a gender-neutral explanation, trial counsel stated that the member "had far greater court-martial experience than any other member," implying that she would dominate the panel. This would not bode well for the government because this member had potential "animosity" toward the SJA office because of "disputes" she had had with that office. The military judge did not require trial counsel to further explain these disputes, nor did defense object or ask for further information. The CAAF found that the military judge did not abuse his discretion in approving the peremptory challenge. The CAAF stated that when a proponent of a peremptory challenge responds to a *Batson* objection with (1) a valid reason, and (2) a separate reason that is not inherently discriminatory and on which the opposing party cannot demonstrate a pretext, the denial of a *Batson* objection may be upheld on appeal.<sup>147</sup>

The second *Batson* case to emerge this year has even greater implications for military practice and, as suggested earlier, may signal a retrenchment on the *Tulloch* decision. In *United States v. Chaney*,<sup>148</sup> the government used its peremptory challenge against the sole female member. After a defense objection based upon *Batson*, the trial counsel explained that the member was "a nurse." The trial counsel offered no further explanation. The military judge then stated that he was aware that counsel often challenged members of the medical profession.<sup>149</sup> Defense counsel did not object to this contention or request further explanation from the trial counsel. Interestingly, it was the Air Force Court of Criminal Appeals, on review, that supplied the missing logical link in the syllogism: The Air Force court wrote that the trial counsel "rightly or wrongly" felt members of the medical profession were sympathetic to accused, but that it was not a gender issue.<sup>150</sup>

The CAAF upheld the military judge's ruling permitting the peremptory challenge, noting that the military judge's determination is given great deference. The CAAF noted it would have

been preferable for the military judge to require a more detailed clarification by trial counsel, but here the defense counsel failed to show that the trial counsel's occupation-based peremptory challenge was unreasonable, implausible or made no sense.<sup>151</sup>

One message from *Norfleet* and *Chaney* to defense counsel is to object to trial counsel's proffered explanation and request findings from the military judge on the record. Clearly the CAAF will continue to find such minimalist explanations from trial counsel to be sufficient where it appears from the record that the defense is satisfied with the explanation as well.

The *Chaney* decision is more subtly invidious, however. In recognizing occupation-based peremptory challenges, this decision erodes the heretofore-firm ground underlying *Tulloch* in three clear ways.

First, the CAAF's recognition of occupation-based challenges administers the intellectual coup-de-grace to Judge Cox's warning that occupation-based challenges may be inherently pretextual.<sup>152</sup> Judge Cox made this claim in obvious recognition of the fact that certain occupations are predominantly populated by women, and have been for years.

Second, by permitting occupation-based challenges, the CAAF undermines *Tulloch*'s requirement that the trial counsel articulate the reasonable relationship between a member's statements or behavior and some perceived deficiency that suggests the member should not sit. Put another way, the CAAF majority in *Tulloch* was skeptical of "hunches" as a basis for a peremptory challenge because they are incapable of being substantiated by anything on the record. Yet occupation-based challenges are just that: they are challenges based not on anything identifiable that the member has done or said during voir dire. Rather, such challenges are simply based on the trial counsel's "hunch" or guess that a member of the medical corps is going to be more favorably disposed toward the accused or, to use another potential example, a quartermaster officer is going to be less "hardcore" than a combat arms officer.<sup>153</sup>

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146. 53 M.J. 262 (2000).

147. *Id.* at 272.

148. 53 M.J. 383 (2000).

149. *United States v. Chaney*, 51 M.J. 536, 541 (A.F. Ct. Crim. App. 1999).

150. *Id.*

151. *Chaney*, 53 M.J. at 385.

152. Judge Cox has written that "a peremptory challenge based on a juror's occupation has been presumed by some to be pretextual on its face." *United States v. Ruiz*, 49 M.J. 340, 344 (1998) (citing *De Raggi, Appellate Court Guidance on Batson Challenges*, 215 N.Y.L.J. 48 (1996)). Judge Cox further noted that the "disfavor of occupation-based challenges may be more powerful in the military, where the court members have been selected by the convening authority precisely because they are 'best qualified for the duty by reason of their age, education, training, experience, length of service, and judicial temperament.'" *Id.* at 344-45 (citations omitted).

153. Indeed, given that women are *excluded* from certain military branches (for example, combat arms), is not the quartermaster example almost *inherently* pretextual? Herein lies the danger of occupation-based challenges in the military service, a danger far more acute than that likely to be experienced by our colleagues in the civilian world.

These are exactly the sort of unverifiable gut reactions that the *Tulloch* majority was trying to guard against to ensure effective implementation of *Batson* and minimize the opportunity for racially—or gender—discriminatory uses of peremptory challenges.

Third, and finally, the recognition of occupation-based challenges, and the implicit vindication of trial counsel's completely unverifiable "hunches," deals a palpable blow to the convening authority's responsibility to personally select panel members under Article 25, UCMJ. Presumably, the convening authority is well aware of all panel members' branches when he selects them. Indeed, he may select a particular member precisely because of his or her particular branch.<sup>154</sup> Is it then appropriate for the trial counsel to effectively *overrule* the convening authority and remove a member precisely because of a factor that may very well have played a part in the convening authority's selection under Article 25? This is this height of prosecutorial hubris.

Notwithstanding the trend discussed above, all is not lost. While CAAF may be retrograding over the ground gained in *Tulloch*, that decision remains good law, and the service courts continue to enforce it with some vigor.<sup>155</sup>

#### *The Article 32 Investigation*

It is generally well known that the government has no power to subpoena witnesses to Article 32, UCMJ investigative hearings.<sup>156</sup> The question raised by this issue is whether the accused

can successfully challenge testimony obtained through the use of an illegally issued subpoena. The CAAF set out to answer this question in *United States v. Johnson*.<sup>157</sup> In *Johnson*, the accused was convicted of charges relating to various assaults committed on his eight month-old daughter. The most damning testimony came from the accused's wife. She testified against him at the Article 32 investigative hearing, and later at trial. She appeared at the Article 32 hearing pursuant to a German subpoena, which threatened criminal penalties if she did not comply. The military judge found that the subpoena was unlawful and issued without apparent legal authority, but found that the accused was not prejudiced by having a witness illegally produced at the hearing.<sup>158</sup>

The CAAF agreed with the military judge that the subpoena was unlawful, and that the accused suffered no prejudice to his substantial rights as a result of the improper production of the witness. Intriguingly, the CAAF concluded that the accused did not have standing to object to the use of the Article 32 testimony against him at trial because the evidence presented was "reliable."<sup>159</sup> The CAAF examined Supreme Court precedent permitting third parties to quash grand jury subpoenas, and stated its belief that the accused could have challenged the issuance of the subpoena at the Article 32 hearing if he could have established standing. Standing, said the CAAF, may be found:

when the actions of the government impact upon the reliability of the evidence presented against [the accused] at trial, for example, coerced confessions, unlawful command

154. Arguably, it would be perfectly appropriate for a convening authority to consider the panel members' branches if her motivation was otherwise in accord with Article 25, UCMJ, if, for example, it was her desire to obtain a fairly representative cross-section of the military community. See, e.g., *United States v. Smith*, 27 M.J. 242, 249 (1988) ("[A] commander is free to require representativeness in his court-martial panels and to insist that no important segment of the military community—such as blacks, Hispanics, or women—be excluded from service on court-martial panels."). In *Smith*, the CMA tacitly accepted as valid the convening authority's rationale during panel selection:

My philosophy regarding selection of court panels involves striking several balances. I look at age because I believe that it is associated with rank and experience. I look for a spread of units on the panel to include division units, non-division units, and tenant activities. I look at the types of jobs and positions of individuals in an effort to have a mix of court members with command or staff experience. I also look for some female representation on the panel. At no time have I had a concern for minority representation based upon race. *In sex cases, however, I have a predilection toward insuring that females sit on the court.* I did not generally articulate nor did I state this preference to Colonel Jack Hug [the SJA] regarding the *Smith* case.

*Smith*, 27 M.J. at 247-48 (emphasis in original); see also *United States v. White*, 48 M.J. 251, 255 (1998) ("Selection of more commanders than non-commanders on a court-martial panel, absent evidence of improper motives or systemic exclusion of a class or group of eligible candidates, does not by itself raise an issue of court packing.").

A member's branch is also inextricably part of the member's background, affecting—and affected by—her assignment pattern, supervisory responsibilities, and understanding of the military, humanity, and the ways of the world (in other words, a vital component of her "experience, education, training," and other matters.).

155. See, e.g., *United States v. Robinson*, 53 M.J. 749 (Army Ct. Crim. App. 2000) (trial counsel's proffered reason for striking minority member, that he was new to the unit and that his commander was also a panel member, was unreasonable; counsel did not articulate any connection between the stated basis for challenge and the member's ability to faithfully execute the duties of a court-martial member).

156. "[M]ilitary authorities have consistently held that there is no legal authority to compel a civilian witness to appear at a pretrial investigation, nor any funds to pay these witness fees." *United States v. Roberts*, 10 M.J. 308, 308 n.1 (C.M.A. 1981) (citations omitted).

157. 53 M.J. 459 (2000).

158. *Id.* at 461.

159. *Id.*

influence, interference with the rights of confrontation or cross-examination, and interference with the right to present evidence.<sup>160</sup>

The CAAF looked to a 1963 case, *United States v. Smelley*,<sup>161</sup> for the proposition that a defect in the pretrial investigation which erroneously permits evidence to be adduced against the accused is not a violation of a substantial right. Moreover, the discussion to RCM 405(a) states that “[f]ailure to comply substantially with the requirements of Article 32, which failure prejudices the accused, may result in delay in disposition of the case or disapproval of the proceedings.”<sup>162</sup> Here, the CAAF noted, the accused was present at the Article 32 proceeding, the witness testified without objection, and the testimony was reliable (that is, it was not the result of coerced confessions, unlawful command influence, interference with the rights of confrontation or cross-examination, or interference with the right to present evidence). Thus, he was neither deprived of a substantial right nor hindered in presenting his case.<sup>163</sup>

The *Johnson* opinion further expands the “standing” concept discussed last year in *United States v. Jones*,<sup>164</sup> a case in which the staff judge advocate allegedly coerced three of the accused’s accomplices to testify against him. There, the CAAF held that the accused had no standing to argue the violation of the accomplices’ rights under Article 31 or the 5th Amendment. The CAAF further held, however, that the accused did have standing to challenge alleged violations of military due process through coercive government tactics. Nevertheless, the CAAF found that the accused was not prejudiced by those tactics.

After *Jones* and *Johnson*, the issue of standing seems somewhat murky. As noted, the *Jones* opinion conceded the accused had standing to attack the reliability of his accomplice’s testimony, but that he was not prejudiced by the SJA’s actions (that is, the testimony of the accomplices was deemed reliable). In *Johnson*, the accused was denied standing because the court found there was no coercive action on the part of the governmental authorities that prejudiced the accused’s substantial rights (that is, the testimony of the accused’s wife was deemed reliable). The issue of standing remains a tricky one, therefore,

because it is not clear whether a showing of prejudice is required to establish standing, whether it is required to warrant granting relief once standing is found, or both. We can distinguish the outcomes, perhaps, in the following way: The CAAF evidently found some sort of coercive conduct on the part of the SJA in *Jones*, for, after entertaining the accused’s challenge, the CAAF found that the SJA’s conduct conferred *de facto* immunity on the three accomplices. The CAAF found, nevertheless, that the accused suffered no prejudice.<sup>165</sup> In *Johnson*, the CAAF agreed the government illegally summoned a witness into an Article 32 hearing, but nevertheless refused to find that this was a coercive practice that would impinge upon the potential reliability of the testimony so as to grant the accused standing.

Since this distinction is less than satisfactory, however, counsel are encouraged to turn to Judge Gierke’s concurrence in *Johnson*, which may provide some illumination. Judge Gierke found two separate standing issues in the *Johnson* case: the first relating to the accused’s standing to assert a violation of his wife’s rights; the second relating to his standing to assert that the illegal subpoena affected the reliability of the evidence or the fairness of his trial.<sup>166</sup> The lack of standing on the first issue would not preclude standing on the second, but, in any event, the issue was moot and waived. The issue was moot because the accused’s wife’s Article 32 testimony was never offered at trial. It was waived because the testimony was used only to refresh her recollection and impeach her, and the defense did not object to this. Judge Gierke was satisfied, therefore, that there was no plain error.<sup>167</sup>

It has long been recognized that trial counsel may issue what might be termed ineffectual or illegal subpoenas without sanction.<sup>168</sup> While the use of such subpoenas may not trigger the striking of testimony obtained via the subpoenas, they do give the unsettling impression that the government can illegally compel witness testimony with impunity. It is, perhaps, because of this lingering unease that neither the majority opinion nor the concurrences in *Johnson* provide a satisfactory resolution of the issue.

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160. *Id.* (citations omitted).

161. 33 C.M.R. 516 (A.B.R. 1963).

162. MCM, *supra* note 9, R.C.M. 405(a) discussion.

163. *Johnson*, 53 M.J. at 462.

164. 50 M.J. 60 (1999).

165. *Cf.* *United States v. Jones*, 52 M.J. 60, 68 (1999) (“The Government did not *improperly* coerce the testimony of the accomplices.” (emphasis added)).

166. *Johnson*, 53 M.J. at 464 (Gierke, J., concurring).

167. *Id.*

168. *Cf.* *United States v. Wooten*, 34 M.J. 141 (C.M.A. 1992) (holding that trial counsel’s alleged violations of federal law in issuing and serving subpoenas *duces tecum* would not warrant exclusion of the challenged evidence).

### *Pleas and Pretrial Agreements.*

If a trend could be identified in the area of pleas, guilty plea proceedings, and pre-trial agreements (PTA), it would be that the CAAF has continued its relentless pursuit of substance over form. And it could also be said that this is one area where the accused appear to have gained more ground than they have lost, which is not always the case in the apocalyptic struggle between the government and the accused.

An example of this trend can be seen in the capital arena. The UCMJ technically precludes a military judge from accepting a guilty plea in a case that has been referred capital.<sup>169</sup> These statutes could, arguably, have precluded the military judge's acceptance of the accused's plea of guilty in *United States v. Fricke*.<sup>170</sup> Lieutenant Commander Fricke was charged with the premeditated murder of his wife. His case was referred capital, meaning that the death penalty would be an authorized punishment if he were found guilty. He initially pleaded not guilty but, at the conclusion of the government's case, he pleaded guilty pursuant to a PTA. In the agreement the convening authority agreed to refer the case non-capital if the accused's plea was accepted. Before the plea was entered, the trial counsel announced that the general court-martial has "*now been referred non-capital . . . conditioned upon [the military judge's] acceptance of a plea of guilty . . .*"<sup>171</sup> The military judge declared that "*because the Government has withdrawn the capital referral at this time, that gives you a different option regarding forum selection . . .*"<sup>172</sup>

On appeal, the accused argued that because his case had been referred capital at the time his plea of guilty to premeditated murder was proffered and accepted by the military judge, his guilty plea was void under Article 45(b) and that the military judge had no jurisdiction to accept the plea under Article 18, UCMJ. The accused argued there was no record of the convening authority actually withdrawing and re-referring the accused's case, so the case remained a capital case throughout the proceedings. The CAAF was not persuaded by this rather

formalistic argument, however, noting: (1) that there is no express requirement that a non-capital referral be stated in a written instruction; (2) the military judge acknowledged the non-capital referral prior to the acceptance of the plea; and (3) the failure to reduce the re-referral to writing was technical in nature and did not deprive the accused of the protections set out in Articles 45 and 18, UCMJ.<sup>173</sup> Clearly, the courts seem willing to effect the convening authority's intent, even if such procedural niceties as a written re-referral are not provided to the accused. The *Fricke* holding reminds us that referral need not always be a perfectly choreographed ballet, but even a jurisprudential mosh pit will suffice so long as "common sense" prevails.<sup>174</sup>

As is well known, once a guilty plea is entered the military judge must conduct a providence inquiry.<sup>175</sup> This consists largely of placing the accused under oath and then having him explain why he believes he is guilty of the offense to which he has pleaded guilty. A question arises, however, if there are witnesses present in the courtroom who will be testifying against the accused on the merits of other charges or on sentencing. Must a court sequester these merits and sentencing witnesses from the accused's providence inquiry? This was the question posed in *United States v. Langston*.<sup>176</sup> During a tour of duty on the staff at the Mannheim Confinement Facility in Germany, Sergeant First Class (SFC) Langston allegedly maltreated several female prison staff members. He was charged with making offensive sexual remarks and advances, committing indecent assaults, and exposing himself to these women. At his court-martial, after entering pleas of guilty to some of the offenses, the accused, through counsel, requested that the three victims, Specialist (SPC) T, Private First Class (PFC) W, and Staff Sergeant (SSG) C, be removed from the courtroom during the providence inquiry. The military judge denied the motion, holding that the sequestration provision of Military Rule of Evidence (MRE) 615 did not apply because the providence inquiry did not constitute the taking of "testimony."<sup>177</sup> After the accused's providence inquiry, two of the victims, SPC T and PFC W, testified on the merits of the contested charges. The accused was convicted of the charges to which he had pleaded

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169. Article 45 states in part: "(b) A plea of guilty by the accused may not be received to any charge or specification alleging an offense for which the death penalty may be adjudged." UCMJ art. 45 (2000). Article 18 states: "However, a general court-martial of the kind specified in section 816(1)(B) of this title (Article 16(1)(B)) shall not have jurisdiction to try any person for any offense for which the death penalty may be adjudged unless the case has been previously referred to trial as a noncapital case." *Id.* art. 18.

170. 53 M.J. 149 (2000).

171. *Id.* at 151 (emphasis in original).

172. *Id.* (emphasis in original).

173. *Id.* at 154.

174. *Id.*

175. MCM, *supra* note 9, R.C.M. 910(d), (e) (stating that military judge must ensure plea of guilty is made voluntarily and knowingly, and question the accused under oath about the circumstances of the offenses to ensure there exists a factual basis for the plea).

176. 53 M.J. 335 (2000).

guilty, and he was also found guilty of additional specifications of the offenses to which he had pleaded guilty. Private First Class W and SSG C testified on sentencing.

The CAAF disagreed with the military judge's ruling on MRE 615's applicability, noting that the "purpose of the sequestration rule is to prevent witnesses from shaping their testimony to match another's and to discourage fabrication and collusion."<sup>178</sup> The CAAF pointed out that the three victims were present during the taking of the accused's sworn testimony on providency, "the strongest form of proof in our legal system,"<sup>179</sup> that he entered mixed pleas (necessitating a trial on the merits), and that the sentencing phase of the trial "still had to occur, where a concern for shaped or false testimony remained."<sup>180</sup> Having found that the military judge erroneously failed to sequester the three victim-witnesses, the CAAF then addressed whether the military judge's error prejudiced the accused's trial. The CAAF held that the failure to remove the three witnesses did not materially prejudice the accused's substantial rights. Applying a harmless error analysis, the CAAF noted that, while PFC W testified on the merits of the contested offenses and sentencing, her pretrial statements were available to the defense for impeachment, and her testimony at sentencing related only to the effect of the crimes upon her. Thus, there was "no reasonable possibility that her testimony was altered by what she heard" of the providence inquiry.<sup>181</sup> Similarly, SPC T, who also testified on the merits, adhered to her version of the events (which conflicted slightly with the accused's) even after hearing his providence inquiry, and, in any event, the defense had the ability to disclose any alteration of her testimony. As to

SSG C, she did not testify on the merits because the accused stipulated to his acts involving her. Her testimony on sentencing concerned victim impact only. The court concluded that there was no reasonable possibility that the failure to remove the witnesses prejudiced the accused.<sup>182</sup>

The court left open the question of whether MRE 615 *always* applies to providence inquiries, or only "in these circumstances"<sup>183</sup> (for example, mixed plea cases). Clearly, the safer approach is for counsel and military judges to err on the side of applying MRE 615 to all providence inquiries and exclude merits and sentencing witnesses, if only because the sentencing phase of the trial will always follow, with its attendant concerns for shaped testimony.

Military Rule of Evidence 615 is a powerful sequestration tool that permits the military judge no discretion so long as the witness in the gallery does not fall into one of the exceptions listed in the rule. Counsel must also bear in mind, however, that if a victim-witness present is to be called for sentencing only, that person should be allowed to remain in the courtroom.<sup>184</sup>

The issue of whether the accused's providence inquiry constitutes "testimony" raises a related issue of the *uses* which can be made, by either side, of the accused's providence inquiry admissions, especially in mixed plea cases. Just how vulnerable is the accused to having his providence inquiry admissions turned against him on the merits of other charges? The Army Court of Criminal Appeals recently addressed this issue, and that holding is relevant to "new developments" because the ser-

177. *Id.* at 336. The then-current version of MRE 615 stated:

At the request of the prosecution or defense the military judge shall order witnesses excluded so that they cannot hear the testimony of other witnesses, and the military judge may make the order *sua sponte*. This rule does not authorize exclusion of (1) the accused, or (2) a member of an armed service or an employee of the United States designated as representative of the United States by the trial counsel, or (3) a person whose presence is shown by a party to be essential to the prosecution of the party's case.

MANUAL FOR COURTS-MARTIAL, UNITED STATES, MIL. R. EVID. 615 (1995).

178. *Langston*, 53 M.J. at 336 (citations omitted).

179. *Id.* at 337.

180. *Id.*

181. *Id.* at 338.

182. *Id.* at 337.

183. *Id.*

184. Military Rule of Evidence 615 was amended by a recent change to Federal Rule of Evidence 615. The "Supreme Court, approved an amendment, effective 1 December 1998, to Federal Rule of Evidence 615 which would allow crime victims to hear the testimony of other witnesses if 'authorized by statute.'" *United States v. Langston*, 50 M.J. at 516; *see* MCM, *supra* note 9, MIL. R. EVID. 615(4). Congress has authorized victims to be present in court at all times so long as they are only to testify on sentencing. See 18 U.S.C. § 3510, concerning rights of victims to attend and observe trial, which states:

Non-capital cases. Notwithstanding any statute, rule, or other provision of law, a United States district court shall not order any victim of an offense excluded from the trial of a defendant accused of that offense because such victim may, during the sentencing hearing, make a statement or present any information in relation to the sentence.

18 U.S.C. § 3510 (2000).

vice courts seem to be split on the issue, and the CAAF may—or should be—on the verge of stepping into the fray.

We begin with the premise that, in mixed plea cases, the accused's *plea* to one offense may, generally, not be used to prove up the offense or offenses that are to be contested.<sup>185</sup> There are, of course, exceptions to this rule. The military judge should inform the members of the accused's prior plea of guilty when the accused specifically requests, or when the "plea of guilty was to a lesser included offense within the contested offense charged in the specification."<sup>186</sup>

So this answers the question of what use can be made of the accused's guilty plea in a mixed plea case. The more complicated issue concerns the use that can be made of the accused's providence inquiry *admissions* (that is, the substance of the accused's sworn testimony to the military judge). It is well-settled that the accused's providence inquiry admissions may be introduced against the accused during the *sentencing* portion of the trial,<sup>187</sup> but it is not entirely clear whether his providence inquiry admissions may be admitted on the *merits* of other charges. This was the issue posed to the Army court a few years ago in *United States v. Ramelb*.<sup>188</sup> In *Ramelb*, the accused, charged with larceny of over \$20,000 from the government, pleaded guilty to the lesser included offense of wrongful appropriation under the theory that he did not have the intent to permanently deprive the government of the money he had taken (he was a finance clerk, and he testified that he took money to test the system to determine whether the finance system was

fraud-proof). During his providence inquiry, he told the military judge he had spent some of the money. The prosecution then went forward on the contested charge, the greater offense of larceny. In trying to prove the accused had the intent to permanently deprive the owner of the money, the government called to the stand a witness who had been present in the gallery during the accused's providence inquiry. The defense did not object, and the military judge permitted the witness to testify as to the accused's providence inquiry admission.<sup>189</sup>

On appeal, the Army court held that the military judge erred, although the error was harmless. The Army court focused on the fact that the military judge advised the accused, prior to the providence inquiry, that he gave up his right against self-incrimination "solely with respect to the issue of guilt or innocence, and only with respect to the offenses to which [he] pled guilty."<sup>190</sup> Thus, the use of his providence inquiry admissions in contravention of this limited waiver would violate the accused's right to remain silent.<sup>191</sup> Moreover, the court found that there is "no authority for the proposition that the accused's answers during a guilty plea inquiry on one offense may be used as evidence by the government to prove a greater or separate offense to which the accused has pleaded not guilty."<sup>192</sup> The Army court concluded that "the elements of a lesser offense established by an accused's plea of guilty but not the accused's admissions made in support of that plea can be used as proof to establish the common *elements* of a greater offense to which an accused has pleaded not guilty."<sup>193</sup>

185. "If mixed pleas have been entered, the military judge should ordinarily defer informing the members of the offenses to which the accused pleaded guilty until after the findings on the remaining contested offenses have been entered." MCM, *supra* note 9, R.C.M. 913(a); *see also id.* R.C.M. 910(g) discussion ("If the accused has pleaded guilty to some offenses but not to others, the military judge should ordinarily defer informing the members of the offenses to which the accused has pleaded guilty until after findings on the remaining offenses have been entered.").

186. MCM, *supra* note 9, R.C.M. 913(a) discussion (citations omitted); *see also* U.S. DEP'T OF ARMY, PAM. 27-9, LEGAL SERVICES: MILITARY JUDGE'S BENCHBOOK 46-47 (1 Apr. 2001) [hereinafter BENCHBOOK] (setting out the military judge's instructions on pleas to lesser included offenses).

187. According to *United States v. Holt*, 27 M.J. 57 (C.M.A. 1988), an accused's oral statements made during the guilty plea providence inquiry may be used during the trial for determining the providence of the plea and for sentencing. Indeed, in *Holt*, the CMA essentially presumed the entire providence inquiry would be relevant to sentencing. *Id.* at 60. ("Unless the military judge has ranged far afield during the providence inquiry, the accused's sworn testimony will provide evidence "directly relating to" the offenses to which he has pleaded guilty").

188. 44 M.J. 625 (Army Ct. Crim. App. 1996).

189. In fact, the witness speculated beyond the providence inquiry admissions. He was asked if the accused had used the money for personal expenses, he answered "Yes" although the accused never stated the purpose of the expenditure. *Id.* at 627.

190. *Ramelb*, 44 M.J. at 626.

191. *Id.* at 629.

192. *Id.* The court noted:

The government cites *United States v. Thomas*, 39 M.J. 1094 (A.C.M.R. 1994), for the proposition that the appellant's admissions during a guilty plea inquiry can be used to establish *facts* relevant to both a lesser offense to which an accused pleads guilty and to a greater offense to which an accused pleads not guilty. We disagree. In *Thomas*, this court held that a military judge, as a finder of fact, could consider an accused's admissions during a guilty plea inquiry concerning consensual sodomy as *proof of one element* of the offense of forcible sodomy to which he pleaded not guilty. Although *Thomas* asserted on appeal that the military judge improperly considered the *content* of his admissions during the guilty plea inquiry as *evidence* to convict him of forcible sodomy, as well as to convict him on the other contested charges of rape and burglary, this court found no basis for that assertion.

*Id.* (emphasis in original).

This past year, the Air Force Court of Criminal Appeals was presented with a similar situation but came to a very different conclusion. In *United States v. Grijalva*,<sup>194</sup> the Air Force court held that neither *Ramelb* nor the *MCM* prohibited the use of all providency admissions by the accused. Thus, the court held

that statements made during a providence inquiry on a lesser included offense may be considered by the fact finder as those admitted facts relate to an admitted element of the greater offense.

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193. *Id.* (emphasis in original) (citations omitted).

194. 53 M.J. 501 (A.F. Ct. Crim. App. 2000).

The facts of *Grijalva* are important to this discussion. There the accused was charged with attempted premeditated murder and desertion for shooting his wife in the back and then fleeing. He attempted to plead guilty to both charges but after the military judge rejected his plea, he pleaded guilty to aggravated assault (intentional infliction of grievous bodily harm). During the providence inquiry, the accused stated that he went to the house where his wife was staying with the intent to shoot her. After a contested trial on the merits of the attempted murder charge before a military judge alone, the accused was convicted of attempted premeditated murder. During announcement of special findings, the military judge referred to the accused's providence inquiry admission of his intent to shoot his wife. The accused challenged this use of his providence inquiry by the military judge before the Air Force court, arguing that the Army court's decision in *Ramelb* precluded the use of his providence inquiry admissions against him. The Air Force court, however, found the military judge did not err.

First (and perhaps most importantly) the Air Force court noted that, immediately preceding the providence inquiry, the military judge informed the accused—and the accused agreed—that his admissions during the providence inquiry could be used against him on the merits of the contested offense.<sup>195</sup> The Air Force went beyond this important distinction, however, and pointed out that, contrary to the accused's argument (and contrary, apparently, to the plain language of *Ramelb*), the Army court did not intend to announce a complete ban on the use of the accused's providence inquiry admissions on the merits of contested offenses. The Air Force court noted that the elements of a lesser included offense established during a guilty plea inquiry may be used to establish the common elements of a greater offense to which the appellant pleads not

guilty.<sup>196</sup> Thus, the Army court in *Ramelb* actually held only that the accused's providence inquiry admissions were inadmissible unless they were *relevant* to the plea. In *Ramelb*, the Air Force court reasoned, the accused's statements about what he did with the appropriated money were irrelevant to whether he had the intent to permanently deprive the government of its funds, so the *Ramelb* court properly held that statements that were not relevant to the plea could not be used during findings on the greater offense. This interpretation, said the Air Force court, has support in precedent.<sup>197</sup> In *Grijalva*, on the other hand, the "members could have been instructed [on the contested attempted murder charge] that the appellant admitted shooting Lisa with the specific intent to cause grievous bodily harm."<sup>198</sup> The military judge also "could have instructed that the appellant admitted that he held this intent when he entered the house . . . [t]herefore . . . the military judge did not err when he accepted as proven that the appellant intended to shoot his wife."<sup>199</sup>

The *Grijalva* decision is an intriguing puzzle for several reasons. Its apparent gainsaying of the Army court's categorical language in *Ramelb* seems unsupportable.<sup>200</sup> Perhaps more significantly, however, the decision ostensibly endorses a practice that is contrary to the Army's guilty plea format.<sup>201</sup> Army practitioners can appreciate the symmetry of the *Ramelb* reasoning, for it fits squarely within the parameters of the Army's guilty plea format. To the extent that *Grijalva* endorses a departure from that script (for example, by encouraging military judges to advise the accused that his privilege against self-incrimination is also waived with respect to the merits of greater offenses; and by encouraging military judges to admit and consider testimony taken during the providence inquiry), it should be eschewed by Army counsel.

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195. The military judge informed the accused that "some of what you tell me, *the Government may use that in their argument or in their case to prove the charged offense . . .* So you understand that some of what you tell me, or anything that you tell me that applies to the elements of attempted premeditated murder, *I may also consider that in deciding whether you are guilty of that charged offense . . .*" *Id.* at 502 (emphasis in original).

196. *Id.* at 503.

197. The Air Force court cited *United States v. Glover*, 7 C.M.R. 40 (C.M.A. 1953) in support of its position. In *Glover*, the accused pleaded guilty to wrongful appropriation of a vehicle. The government went forward on the larceny charge and the accused testified in his own defense, stating he intended to return the vehicle. The law officer instructed the members on the offense of larceny but failed to instruct on the lesser included offense of wrongful appropriation. The accused was convicted of larceny. The Army Board of Review reduced the conviction to one of wrongful appropriation, based on the perceived instructional error. The Court of Military Appeals held that no relief was required because the accused was not prejudiced. Thus, the citation to *Glover* appears somewhat inapposite since (1) *Glover* dealt with an issue of instructional error and (2) it predates the rigorous guilty plea system we know today. See *United States v. Care*, 40 C.M.R. 247 (C.M.A. 1969). *Care*, the landmark decision requiring an extensive providence inquiry, was still thirteen years away when *Glover* was decided. It is not at all clear that providence inquiry admissions, or their equivalent, were deemed admissible on the merits of the greater charge.

198. *Grijalva*, 53 M.J. at 503.

199. *Id.*

200. "[T]he elements of a lesser offense established by an accused's plea of guilty but not the accused's admissions made in support of that plea can be used as proof to establish the common *elements* of a greater offense to which an accused has pleaded not guilty." *United States v. Ramelb*, 44 M.J. 625, 627 (Army Ct. Crim. App. 1996) (emphasis in original).

201. The *Military Judge's Benchbook* prescription for the taking of a guilty plea presumes, at least tacitly, that the accused's privilege against self-incrimination is waived only with respect to the offense to which he is pleading guilty. See *BENCHBOOK*, *supra* note 186, at 14-15 (stating that the accused is to be advised that the plea of guilty means that he waives the right to say nothing at all, that anything he says during the providence inquiry may be used against him "in the *sentencing* portion of the trial," and that his "plea of guilty to a lesser included offense may also be used to establish certain *elements* of the charged offense, in the event the government decides to proceed on the charged offense . . ." (emphasis added)).

Finally, in a tactical sense, *Grijalva* seems somewhat at odds with the CAAF's holding in *United States v. Langston*.<sup>202</sup> Recall that in that case, the CAAF applied MRE 615 to the providence inquiry and held that the military judge must, at the request of a party, sequester a merits witness during the accused's testimony. Thus, where the trial counsel seeks to call, as in *Ramelb*, a witness to testify about the accused's providency on the merits of the greater offense, the defense can object and the military judge has, generally, no choice but to exclude the witness. This raises the question that, if the prosecution can be barred from calling a witness to testify about the accused's providence inquiry admissions, should the military judge simply inform the panel of those admissions?

Thus, the *Grijalva* case left rather unanswered the question of the manner in which providence inquiry admissions are to be presented to the court, assuming they are admissible. The Air Force court implied the military judge could simply *instruct* the members concerning the accused's statements, raising the inference that the prosecution would not have to introduce the statements. This can only mean that it is the military judge's responsibility to determine which providence inquiry admissions are relevant on the contested charge, and then to instruct the members that they can take such statements as *proof* to be considered on the contested element of the charged offense. Not only does this ruling completely contradict *Ramelb*, as suggested previously, it is contrary to the extensive case law that permits introduction of providence inquiry statements during sentencing.<sup>203</sup> It can only be hoped that *Grijalva*, if affirmed, will be limited to its particular facts. In the meantime, however, defense counsel should be alert to government attempts to ~~introduce the accused's~~ providence inquiry on the merits, and be prepared to: (1) sequester government witnesses under *Langston*; (2) argue that the providence inquiry admissions are categorically inadmissible under *Ramelb*, (3) argue that, even if technically admissible, such providency admissions are, in a particular case, irrelevant to the plea under *Grijalva*, and (4)

object to any reference in trial counsel's closing argument to the accused's providence inquiry admissions.

Ironically, the CAAF had an opportunity to resolve this issue in a case last year, *United States v. Nelson*.<sup>204</sup> There, the accused, charged with several offenses, sought to enter a plea of guilty to a charge of absence without leave. He intended to plead not guilty to the remaining offenses, and moved to preclude the use of his statements during the providence inquiry on the merits of the other offenses. The military judge denied the motion, the accused entered pleas of not guilty, and he was convicted of all charges. The Army Court of Criminal Appeals affirmed the findings and sentence without opinion. The CAAF ruled the accused had not preserved for appeal the issue of whether the military judge erred in ruling that the accused's providence inquiry admissions could be used against him on the merits of the other offenses. The CAAF then set aside the Army court's decision on unrelated grounds.

The CAAF has granted review of *Grijalva*, so they may shortly clarify this issue for all service courts and military judges.<sup>205</sup>

Having discussed pleas and providence inquiries, we move inevitably into the realm of PTAs. Each year brings new cases litigating the propriety of terms before the CAAF.<sup>206</sup> This year was no different.

We begin with the understanding that both the government and the defense may propose terms in PTAs, and that there is relatively little limitation on the terms that may be proposed.<sup>207</sup> An agreement to enter into a stipulation of fact has become an accepted part of our PTA practice (indeed, it is virtually presumed that there will be a stipulation of fact in support of each PTA). The stipulation is often used by the government as a vehicle to bring before the court evidence that might be otherwise inadmissible, assuming it can leverage the accused into agreeing.<sup>208</sup> Over the years, few limits have been placed on the type of evidence that can be recited in the stipulation. This past

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202. 53 M.J. 335 (2000).

203. The holding of *Holt*, which permits the introduction of providence inquiry admissions on sentencing, requires that the admissions be relevant and be presented in an admissible form. *United States v. Holt*, 27 M.J. 57 (C.M.A. 1988); *see also* *United States v. Irwin*, 42 M.J. 479 (1995) (stating that the admissibility of the statement for sentencing purposes must satisfy the Military Rules of Evidence); *United States v. Johnson*, No. ACM 27954, 1990 CMR LEXIS 177 (A.F.C.M.R. 1990) ("An authenticated transcript of the providence inquiry could have been introduced by trial counsel as evidence in aggravation during the Government's sentencing case in chief.").

204. 51 M.J. 399 (1999).

205. *Grijalva*, No. 00-0558/AF, 2000 CAAF LEXIS 1303 (Nov. 16, 2000).

206. *See, e.g.*, *United States v. Davis*, 50 M.J. 426 (1999) (stating that the accused offered a PTA in which he agreed to plead not guilty and, in exchange for a sentence limitation, to enter into a confessional stipulation and to present no evidence; the CAAF found the provision violated the prohibition against accepting a confessional stipulation as part of a PTA promising not to raise any defense, but found that the accused's due process rights were not prejudiced); *see also* *United States v. Bertelson*, 3 M.J. 314 (C.M.A. 1977)

207. *See* MCM, *supra* note 9, R.C.M. 705(d)(1) (stating that either the government or the defense may propose any term or condition not prohibited by law or public policy).

208. *Cf.* *United States v. Glazier*, 26 M.J. 268 (C.M.A. 1988) (stating that parties may stipulate to admissibility of otherwise inadmissible evidence).

term, however, the CAAF showed that this license is not unlimited.

The accused in *United States v. Clark*<sup>209</sup> filed a false claim for the loss of some stereo speakers during his household goods move. The accused did not attribute the theft to the movers, however, believing that the speakers had been stolen before his household goods were packed by the movers. Suspicions were aroused, and investigators were contacted. The investigators spoke to the accused who agreed to take a polygraph to support the truthfulness of his claim. The polygraph result indicated deception and, when confronted by this news, the accused confessed to filing a false claim and lying to the investigator. Shortly thereafter, he entered into a PTA. The agreement had as one of its terms that the accused would enter into “reasonable stipulations concerning the facts and circumstances of the case.”<sup>210</sup> At trial, after entering his pleas and discussing his offenses with the military judge, the military judge reviewed the accused’s stipulation. The stipulation showed that the accused had agreed to take a polygraph and that the test results indicated deception. The military judge admitted the stipulation into evidence.

In reviewing the portion of the stipulation that mentioned the polygraph, the CAAF noted that inadmissible evidence may be admitted at trial through a stipulation, provided there is no overreaching by the government in obtaining the PTA, and provided the military judge finds no reason to reject the stipulation “in the interest of justice.”<sup>211</sup> The CAAF then pointed out that MRE 707<sup>212</sup> prohibits the use of polygraph evidence at trial. The analysis to the rule prohibits polygraph evidence based on a concern that such evidence is unreliable. Thus, the rule adopts a bright-line rule that polygraph evidence “is not admissible by any party to a court-martial even if stipulated to by the parties.”<sup>213</sup> The CAAF noted further that the Supreme Court recently upheld this per se prohibition in *United States v. Scheffer*.<sup>214</sup>

The CAAF found the military judge had erred in admitting the stipulation of fact with its reference to the polygraph examination, holding that the military judge’s error was “plain and obvious.”<sup>215</sup> However, the CAAF found the accused suffered no prejudice. In reaching this conclusion, the CAAF focused on the fact that the providence inquiry was substantially complete before the military judge admitted the stipulation. In fact, it appeared the military judge maintained a healthy skepticism toward the stipulation, for when the trial counsel initially offered the exhibit, the military judge stated “I like to look at that only after I’ve completed the inquiry, so I don’t get confused by the lawyers’ version of events.”<sup>216</sup> Thus, it did not appear that the military judge had relied on the offending language in finding the accused’s plea provident.

In addition, the CAAF was guided by the Supreme Court’s concern in *Scheffer* with the “widespread uncertainty” about polygraphs, as well as the Supreme Court’s declaration that the accused has no constitutional right to present polygraph evidence.<sup>217</sup>

Returning to the PTA, the CAAF held that the document did not specifically require the stipulation to include a reference to the polygraph. Even if the terms of the agreement called for such a stipulation, however, the appropriate remedy would be for the military judge to hold the impermissible term unenforceable and to strike the reference to the polygraph in the stipulation.

While the result of the case seems relatively straightforward, it is clear that the members of the court are divided on the extent to which MRE 707 poses a complete ban on polygraph evidence, and the concurring opinions suggest this is an area that remains ripe for litigation. Chief Judge Crawford wrote that she would have permitted the accused to waive the admissibility bar presented by MRE 707, and noted that polygraph evidence may be admissible under a number of different theories.<sup>218</sup>

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209. 53 M.J. 280 (2000).

210. *Id.* at 281.

211. *Id.* at 282 (quoting *United States v. Glazier* 26 M.J. 268, 270 (C.M.A. 1988)).

212. MRE 707(a) states:

Notwithstanding any other provision of the law, the results of a polygraph examination, the opinion of a polygraph examiner, or any reference to an offer to take, failure to take, or taking of a polygraph examination, shall not be admitted into evidence.

MCM, *supra* note 9, MIL. R. EVID. 707 (a).

213. *Clark*, 53 M.J. at 282.

214. 523 U.S. 303 (1998).

215. *Clark*, 53 M.J. at 282.

216. *Id.*

217. *Id.* at 282-83.

Senior Judge Everett, also concurring, cautioned against the sweeping reading which the lead opinion gave to MRE 707, stating that the absolute bar is not supported by the plain language of the rule. Moreover, Judge Everett questioned whether the ban even applied to sentencing, and suggested the President did not intend to exclude all references to polygraphs, particularly where the taking of a polygraph would be relevant to determining whether a suspect's subsequent statements to investigators was voluntary.<sup>219</sup> Perhaps anticipating *United States v. Clark*, Justice Stevens noted in his dissent in *Scheffer* that "Indeed, even if the parties stipulate in advance that the results of a lie detector test may be admitted, the Rule requires exclusion."<sup>220</sup> Only time will tell whether the CAAF's finding of error in *Clark* will come back to haunt it.

### *Unintended Consequences*

The past two years have seen a mild revolution in the area of post-trial relief to accused whose PTAs are trumped by Department of Defense (DOD) or service regulations that nullify particular provisions of PTAs. Generally, a misunderstanding concerning the impact of a service regulation on a PTA's terms will not result in relief for the accused unless the understanding

relates to a material term of the agreement.<sup>221</sup> Where the misunderstanding is collateral, or where collateral consequences of a court-martial conviction are relied upon as the basis for contesting the providence of guilty pleas, the accused is entitled to succeed only when the collateral consequences are major, and the accused's misunderstanding: (1) results foreseeably and almost inexorably from the language of the pretrial agreement; (2) is induced by the trial judge's comments during the providence inquiry; or (3) is made readily apparent to the judge, who nonetheless fails to correct the misunderstanding.<sup>222</sup>

With these rules as the backdrop, the CAAF has shone the beam of its concern most recently on DOD and service regulations that cut off the accused's entitlement to pay after trial, thus nullifying terms of pretrial agreements that purport to grant the accused some relief on forfeiture of pay and allowances.<sup>223</sup> Prior to 1999, the CAAF treated similar issues as collateral to the pretrial agreement.<sup>224</sup> The CAAF has signaled a sea-change in its decisions in this area, starting with *United States v. Mitchell*.<sup>225</sup>

In *Mitchell*, the CAAF was concerned with the impact of DOD and Air Force regulations on the convening authority's promise that the accused would get some relief on forfeiture of pay and allowances so that he could continue to support his

218. *Id.* at 283-84 (Crawford, J., concurring).

219. *Id.* at 284-85 (Everett, J., concurring).

220. 523 U.S. at 321.

221. *United States v. Olson*, 25 M.J. 79 (C.M.A. 1987).

222. *United States v. Bedania*, 12 M.J. 373, 376 (C.M.A. 1982).

223. In the author's experience, such terms are *de riguer* in trial practice. Many accuseds who have family members to support often include a provision in their pretrial agreements by which the convening authority promises to reduce the forfeiture of pay and allowances to the extent permitted by law (or some lesser amount) so that the accused can ensure that some money goes to his family.

The catalyst for this practice must surely be the recent congressional amendments to the UCMJ that mandated automatic forfeiture of pay for more severe sentences in the military. In April 1996, congressional amendments to the UCMJ became effective. As the Air Force Court of Criminal Appeals has explained:

Article 57, UCMJ, was amended to change the effective date for forfeitures and grade reduction to the earlier of 14 days after sentence is adjudged or the convening authority's action. Under the previous version of Article 57, forfeitures did not commence until the convening authority took action on the sentence. Congress also added a new section to the UCMJ, codified as Article 58b, which states, in pertinent part, that one sentenced to confinement for more than six months, or to any period of confinement and a punitive discharge, shall forfeit all pay and allowances in the case of a general court-martial during the period of confinement.

*United States v. Hester*, No. ACM 32364, 1997 CCA LEXIS 163 (A.F. Ct. Crim. App. 1997).

Congress allowed the convening authority to defer automatic forfeitures until action, and, at action, waive the forfeitures for six months on condition that the funds are paid to the service members' dependents. UCMJ art. 58b(b) (2000).

It is, perhaps, because of the advent of these somewhat draconian conditions, and the concomitant confusion they have inspired, that the CAAF has entered the lists on behalf of accused who seek to have the convening authority blunt the harshness of the impact of these measures on our service members' families.

224. *See, e.g.*, *United States v. Albert*, 30 M.J. 331 (1990). In *Albert*, the accused entered into a pretrial agreement which included a provision for suspension of forfeitures for one year. His enlistment had expired previously, however, and he was involuntarily extended for trial. After trial, he was confined, and his entitlement to receive pay terminated. The forfeiture suspension provision was of no practical benefit because he could no longer receive pay and allowances. The CMA, relying on *United States v. Bedania*, 12 M.J. 373 (C.M.A. 1982), affirmed that the accused's entitlement to pay was beyond the purview of the court-martial. The court was also satisfied that the accused had been more interested in limiting confinement than in suspending forfeitures. *Albert*, 30 M.J. at 331.

225. 50 M.J. 79 (1999).

family after trial. There was no provision pertaining to confinement. The adjudged sentence included confinement, however. Under Air Force regulations, the accused's requested extension of his enlistment could not be granted. Thus, the accused went into a no-pay status. The CAAF, concerned that the DOD regulations and the Air Force regulations had effectively deprived the accused of the benefit of his bargain, remanded the case to the Air Force court with the guidance that, if the accused had not received the benefit of his bargain, the plea would be treated as improvident, and the findings set aside.<sup>226</sup>

After *Mitchell*, the writing was on the wall, so to speak, for the government and the service courts, and this was clearly demonstrated in two cases following closely on the heels of *Mitchell* during this term.

*United States Williams*<sup>227</sup> and *United States v. Hardcastle*<sup>228</sup> both involved service members whose expiration of term of service nullified the forfeiture provisions of their PTAs. Both cases also involved government concessions that resulted in the cases being set aside. In *Williams*, the accused pleaded guilty to two specifications of writing bad checks (twenty-nine checks over \$20,000). He entered into a PTA that would limit his punishment to a bad conduct discharge, twelve months' confinement, and total forfeitures. The agreement also sought to provide support to the accused's family. In return for the plea of guilty, the convening authority agreed to suspend a portion of adjudged forfeitures and to waive automatic forfeitures. At

trial, the military judge recited the terms of the PTA on the record to ensure the accused understood them.

Unfortunately, the accused had been placed on legal hold owing to the expiration of his term of service two weeks prior to trial.<sup>229</sup> Neither his defense counsel nor the government was aware of a DOD regulation that required service members on legal hold, who are later convicted of an offense and confined, to forfeit their right to pay and allowances after conviction. The accused went into confinement after trial and then learned that his pay and allowances were terminated. On appeal, he argued that the only reason he entered into the PTA was to waive forfeitures and provide for his dependents.<sup>230</sup>

The government conceded that the accused did not receive the benefit of his bargain and, therefore, his pleas were improvident. The government based its concession on a methodology stemming from *United States v. Bedania*<sup>231</sup> and *United States v. Olson*,<sup>232</sup> noting that the waiver of forfeitures provision was material because it was interjected into the terms of the PTA, and that, therefore, the misunderstanding of that material term (that is, that it was a nullity) permitted the accused to cancel the agreement. The government further conceded that, even if the nullity of the forfeiture provision was a collateral issue, the accused would still be able to rescind the agreement. Collateral consequences may result in rescinding the agreement where they are major and the accused's misunderstanding of the consequences is induced by the military judge.<sup>233</sup>

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226. The Air Force court subsequently determined that the accused had been allowed to retire and, therefore, granting the accused relief would be inappropriate. *United States v. Mitchell*, No. ACM 31421, 2000 CCA LEXIS 150 (A.F. Ct. Crim. App., May 26, 2000).

227. 53 M.J. 293 (2000).

228. 53 M.J. 299 (2000).

229. "Legal Hold" is one way of describing a procedure by which an accused is involuntarily extended on active duty to complete the processing of court-martial proceedings against him. See, e.g., U.S. DEP'T OF ARMY, REG. 635-200, PERSONNEL SEPARATIONS: ENLISTED PERSONNEL, para. 1-22(a) (1 Nov. 2000) (stating that a soldier may be retained after his term of service has expired when an investigation of his conduct has been started with a view to trial by court-martial, charges have been preferred, or the soldier has been apprehended, arrested, confined, or otherwise restricted by the appropriate military authority).

230. *Williams*, 53 M.J. at 295. The accused's defense counsel took issue with this claim, stating that the accused and his family were most concerned with limiting confinement.

231. 12 M.J. 373, 376 (C.M.A. 1982). In *Bedania*, the court set out a test for assessing whether a misunderstanding of some provision of the agreement—or a failure to perceive collateral consequences might cause a misunderstanding about a provision of the agreement—would warrant relief for an accused:

When collateral consequences of a court-martial conviction—such as administrative discharge . . . are relied upon as the basis for contesting the providence of a guilty plea, the appellant is entitled to succeed only when the collateral consequences are major and the appellant's misunderstanding of the consequences (a) results foreseeably and almost inexorably from the language of the pretrial agreement; (b) is induced by the trial judge's comments during the providence inquiry; or (c) is made readily apparent to the judge, who nonetheless fails to correct that misunderstanding. In short, chief reliance must be placed on defense counsel to inform an accused about the consequences of a court-martial conviction and to ascertain his willingness to accept those consequences.

*Id.* at 376.

232. 25 M.J. 293 (1987). In *Olson*, the accused's plea was based on a pretrial agreement where he promised to make restitution. At trial, the government stated the accused had made restitution, yet the finance office later recouped a similar amount from the accused's pay. The accused argued on appeal that he had not received the benefit of his bargain. The government argued that the finance action was collateral, and the court agreed that unforeseen collateral consequences do not justify cancellation of the pretrial agreement. Nevertheless, the court held that restitution was a material term of the pretrial agreement. The term was material because it was interjected into the terms of pretrial agreement. The accused's misunderstanding of this material term gave him the right to rescind the agreement.

233. *Williams*, 53 M.J. at 296 (quoting *Bedania*, 12 M.J. 373, 376 (C.M.A. 1982)).

In *Hardcastle*, the accused entered into a PTA in which the convening authority agreed to suspend adjudged forfeitures in excess of \$400, and to waive all forfeitures in excess of \$400 for six months. The adjudged sentence included a bad conduct discharge, total forfeiture of pay and allowances, and confinement for thirty months. After trial, while confined, the accused's term of service expired, placing him in a no-pay status. On appeal, the government conceded, and the CAAF accepted the concession, that the accused had not received the benefit of his bargain, that his pleas were improvident, and the case should be set aside. The government conceded that, under *Olson*, the term was material because it was interjected into the terms of the PTA. The accused's misunderstanding of this material term meant that he had a right to rescind the agreement. The government further acknowledged that, even if the issue of pay entitlement was collateral, the accused was entitled to relief, because (1) "the collateral consequences are major," and (2) the "appellant's misunderstanding of the consequences" was "induced by the trial judge's comments during the providence inquiry."<sup>234</sup>

As noted, these cases involved concessions by the government that resulted in the decisions being set aside. Nevertheless, the government's apparent willingness to make these concessions, and the CAAF's willingness to accept these concessions, serve as a reminder to all counsel that what were hitherto considered collateral consequences are no longer to be treated as such. Counsel for both sides are reminded that the simplest way to protect the accused and the record in such cases is to review the charge sheet, and be ever mindful of the fact that an accused approaching the end of his enlistment should think twice about the efficacy of a PTA provision that limits forfeitures.<sup>235</sup>

### Conclusion

Any effort to divine a unifying theme from the preceding cases is likely to be a botched job at best, so perhaps the most worthwhile thing to do is try to review the dominant themes that have been discussed here. The CAAF, arguably, pursued substance over form in the technical world of voir dire and pleas and pretrial agreements,<sup>236</sup> clarified that MRE 615 applies to providence inquiries, and continued to show a strong interest in ensuring that accused service members get the benefit of the bargain of their pretrial agreement. The CAAF also reaffirmed the necessity that the accused show prejudice (and, implicitly, the difficulty of meeting that standard) in order to challenge allegedly illegal pretrial actions by the government. Meanwhile, the CAAF appeared to retrench on the military's application of *Batson v. Kentucky*, which may be part of a broader trend of deference toward military judges and convening authorities. Perhaps most significantly, though, the CAAF tacitly renounced its requirement that the defense show command influence in order to sustain a challenge to panel selection procedures under Article 25, UCMJ.

Only time will tell whether these cases will prove to be part of a continuing trend. Their immediate import is to remind all judge advocates of the necessity to review the new case law and understand the occasionally subtle distinctions within the *Manual for Courts-Martial*. Without such an understanding, counsel for either side risk being placed in the mode of the gladiator who is disarmed the moment the challenger enters the pit. Thus, counsel could hardly heed better cautionary advice than that of the poet with whom we began this article:

*Beware the Jabberwock, my son!  
The jaws that bite, the claws that catch!  
Beware the Jubjub bird, and shun  
The frumious Bandersnatch!*<sup>237</sup>

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234. *Id.* at 295.

235. *Id.* at 296 n.\* (stating the CAAF noted the charge sheet showed the accused enlisted for six years in February 1991; the date of trial was February 1997).

236. The CAAF did, however, affirm a complete ban on polygraph evidence under M.R.E. 707.

237. LEWIS CARROLL, JABBERWOCKY, at <http://www76.pair.com/keithlim/jabberwocky/poem/jabberwocky.html> (last visited 18 Feb. 2001).