

Justice and Discipline: Recent Developments in Substantive Criminal Law

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Introduction

*The difference between a military organization and a mob is the role of command and control in channeling, directing, and restraining human behavior.*¹

The purpose of military law, as stated in the *Manual for Courts-Martial*, is “to promote justice, to assist in maintaining good order and discipline in the armed forces, to promote efficiency and effectiveness in the military establishment, and thereby to strengthen the national security of the United States.”² There has been an ongoing debate whether the military justice system is a system of justice or a system of discipline.³ Many commentators, however, see the dual purposes of justice and military discipline as complementary.

Insofar as our fundamental goal is concerned, it is clear that military criminal law in the United States is justice-based. This is not, however, incompatible with discipline. Congress has, at least implicitly, determined that discipline within an American fighting force requires that personnel believe that justice will be done. In short, the United States uses a justice-oriented system to ensure discipline; in our case, justice is essential to discipline.⁴

The Court of Appeals for the Armed Forces (CAAF) has often faced the problem of striking the proper balance between justice and military discipline, and last year was no exception.

The decisions of the CAAF during the 2000 term⁵ reflect trends in three different areas. First, the court scrutinized four cases involving improper relationships between male noncommissioned officers (NCOs) and female subordinates, where the NCOs were charged with nonconsensual crimes against the

subordinates. The CAAF reversed the convictions in all four cases. The victim's lack of consent must be manifest. Unless the accused used his position to create a situation of dominance and control, rank is not enough.

Second, the court recognized the importance of military discipline in the military justice system. It rejected a rule that would have prohibited courts from considering deportment when determining whether alleged language was disrespectful. Also, on factual issues concerning military discipline, it was reluctant to overturn the decision of the court-martial members.

Third, the CAAF added clarity to conspiracy law in the military. It defined the crime of conspiracy strictly, but it allowed the prosecution the full advantage of the traditional special rules that come with the crime of conspiracy. When interpreting conspiracy under the Uniform Code of Military Justice (UCMJ), the court adhered to its role of interpreting, and not creating, the law. The CAAF focused on the intent of Congress and federal common law.

This article discusses each of these three trends in detail. The opinions of the CAAF show that the court was attempting to strike the proper balance by both ensuring justice and promoting military discipline; a challenging and contentious task. In most of the cases this article discusses, one or two of the court's judges wrote dissenting opinions. The most contentious area was the one involving NCOs having improper relationships with subordinates and being charged with nonconsensual crimes against those subordinates.

Rank Is Not Enough To Prove Nonconsensual Sexual Offenses Against a Subordinate

The senior-subordinate relationship is critical to the accomplishment of the military mission. Congress protects this special relationship by specifically proscribing disrespect to,⁶

1. United States v. Rockwood, 52 M.J. 98, 107 (1999).

2. MANUAL FOR COURTS-MARTIAL, UNITED STATES, pt. I, ¶ 3 (2000) [hereinafter MCM].

3. DAVID A. SCHLUETER, MILITARY CRIMINAL JUSTICE: PRACTICE AND PROCEDURE § 1-1 (5th ed. 1999).

4. FRANCIS A. GILLIGAN & FREDRIC I. LEDERER, COURT-MARTIAL PROCEDURE § 1-30.00 (2nd ed. 1999) (footnote omitted).

5. The 2000 term began 1 October 1999 and ended 30 September 2000.

6. UCMJ arts. 89 (proscribing disrespect toward a superior commissioned officer), 91(3) (proscribing disrespect in language or deportment toward a warrant, non-commissioned, or petty officer) (2000).

disobedience of,⁷ and assault on superior commissioned officers and NCOs.⁸ Military superiors must necessarily be in a position of control. Unfortunately, some officers and NCOs abuse their positions. Some officers and NCOs engage in sexual relationships with their subordinates. This conduct is detrimental to the good order and discipline of a unit and is punishable as fraternization.⁹ Furthermore, in some cases, the subordinate may not be a willing participant. The subordinate, as well as the unit, may be a victim. In such a case, the accused may be guilty of more than just fraternization or violation of a general regulation. If so, the accused should be charged with the appropriate crimes, such as rape, indecent assault, battery, extortion, indecent language, indecent exposure, and maltreatment. The line between consensual and nonconsensual, however, is often blurred, especially in cases where the subordinate may not feel as free to protest to the military superior as she would another person. In a series of four opinions issued in September 2000, the CAAF sent a clear message: for nonconsensual sexual offenses against a subordinate, rank is not enough. Unless the accused exercises dominance and control, the victim's lack of consent must be manifest, especially where there has been prior consensual physical contact between the accused and victim.

The four CAAF opinions share many similarities. They all involve male NCOs who engaged in inappropriate relationships with female subordinates. In *United States v. Johnson*,¹⁰ Staff Sergeant (SSG) Benjiman Johnson was convicted of assault consummated by a battery upon Specialist (SPC) C by rubbing her back. In *United States v. Tollinchi*,¹¹ Marine Sergeant Pedro Tollinchi was convicted of raping EH, the seventeen year-old girlfriend of a sixteen year-old recruit. In *United States v. Ayers*,¹² SSG Jeffrey Ayers was convicted of two specifications of indecent assault upon a trainee, Private First Class (PFC) TH. In *United States v. Fuller*,¹³ Sergeant (SGT) Paul Fuller was convicted of maltreatment of PFC M by "having sexual

relations with her after she became extremely intoxicated and by sexually harassing her in that he made a deliberate offensive comment of a sexual nature."¹⁴ In all four cases, general courts-martial composed of officer and enlisted members found the accused NCOs guilty. In September 2000, the CAAF reversed all of these convictions because the evidence was legally insufficient to prove the elements of the offenses. The message from CAAF is that it will closely scrutinize this type of case, and will not tolerate overcharging.

United States v. Johnson:
Backrubs in the Office Not Battery

In *Johnson*, the accused and SPC C were both assigned to the 10th Mountain Division Band at Fort Drum, New York. According to SPC C, she was "friends" with SSG Johnson, who had been her squad leader. There was consensual hugging, tickling, and "punch fights."¹⁵ Also, the accused rubbed her back on several occasions, when she was typing or doing other work in the office. She did not like the backrubs because they interrupted her work, and they made her feel uncomfortable. She did not tell him to stop because there were other people around, and she did not want to draw attention to herself. She would try to shrug him off. After the shrugging, sometimes he stopped and sometimes he would rub a little more.¹⁶ She did not report the incident until she was questioned about unrelated carnal knowledge allegations against the accused.¹⁷

The accused was charged with indecent assault for the hugging and the rubbing of the back. After the victim testified that the hugging was consensual and the defense counsel made a motion for a finding of not guilty, the military judge excepted "hugging" from the specification. A panel of officers and enlisted members found the accused guilty of the lesser-

7. *Id.* arts. 90(2) (proscribing disobedience of a superior commissioned officer), 91(2) (proscribing disobedience of a warrant, noncommissioned, or petty officer).

8. *Id.* arts. 90(1) (proscribing striking or assaulting a superior commissioned officer), 91(1) (proscribing striking or assaulting a warrant, noncommissioned, or petty officer).

9. See MCM, *supra* note 2, pt. IV, ¶ 83. Practitioners in the Army should be aware that the new Army regulation's provisions on fraternization are punitive. U.S. DEP'T OF ARMY, REG. 600-20, ARMY COMMAND POLICY, paras. 4-14 through 4-16 (15 July 1999) [hereinafter AR 600-20]. It may be easier for trial counsel to charge and prosecute fraternization as a violation of a general regulation, under Article 92, rather than fraternization, under Article 134.

10. 54 M.J. 67 (2000).

11. 54 M.J. 80 (2000).

12. 54 M.J. 85 (2000).

13. 54 M.J. 107 (2000).

14. *Id.* at 110.

15. *Johnson*, 54 M.J. at 68.

16. *Id.*

17. *Id.*

included offense of assault consummated by a battery for the backrubs.¹⁸

The Army Court of Criminal Appeals (ACCA) affirmed the conviction for battery. It found that failing to verbally protest to a superior in the office did not equate to consent and did not create an honest and reasonable mistake by the accused that SPC C consented.¹⁹ The CAAF disagreed with the Army court and reversed the conviction for battery.

The issue was consent. The offense of battery consists of bodily harm done with unlawful force or violence.²⁰ As the *Manual for Courts-Martial* states, bodily harm is “any offensive touching of another, however slight.”²¹ The CAAF pointed out that consent can turn otherwise offensive touching into non-offensive touching.²² The bodily harm must be without the lawful consent of the victim,²³ and the prosecution has the burden to prove lack of consent.²⁴ Also, a reasonable and honest mistake of fact as to consent is a defense.²⁵

The CAAF acknowledged that under certain circumstances a backrub could constitute an offensive touching.²⁶ The court also stated that it was “sensitive” to the fact that the accused was a NCO and that a relationship between a NCO and a subordinate enlisted soldier could create a situation of “dominance and control.” It found that this was not such a situation.²⁷

Two important factors in the court’s analysis were the physical contact that was part of the friendly relationship and SPC C’s failure to express lack of consent. The CAAF found that the facts in the record did not establish that SPC C felt unable to protest the accused’s actions.²⁸ The court noted that she felt comfortable enough to try to shrug him off. It also noted that the only problem SPC C had with the backrubs was the accused’s bad judgment. “She was uncomfortable because the backrubs were open and notorious in the work environment, but she did not provide any evidence that they were offensive.”²⁹ According to the court, this conclusion was supported by the fact that she did not report the touching until she heard about the unrelated carnal knowledge allegation.³⁰ Furthermore, the court found that, even if there was sufficient evidence of lack of consent, the accused was not on notice that SPC C did not consent to the backrubs.³¹

In a dissenting opinion, Judge Sullivan wrote, “The majority today takes the law relating to sexual harassment in the work place back a few steps from the progress our modern armed forces have made along the path of true protection for subordinate members.”³² Judge Sullivan found the evidence to be legally sufficient. The victim showed the accused that she did not want to be massaged by her obvious evasive conduct on a number of occasions, but the accused continued the unwanted touching.³³ Judge Sullivan would have, viewing the evidence in the light most favorable to the government as required by the

18. *Id.* The accused had pled guilty to carnal knowledge with S, a fourteen year old baby-sitter. In addition to battery the members also found the accused guilty of maltreatment of SPC C. The members adjudged a sentence of a bad-conduct discharge (BCD), confinement for five years, forfeiture of \$874 per month for sixty months, and reduction to the grade of E1. The Army Court of Criminal Appeals set aside the conviction for maltreatment and otherwise affirmed the findings and sentence. *Id.* at 67-68.

19. *Id.* at 69.

20. UCMJ art. 128 (2000) (proscribing assault).

21. MCM, *supra* note 2, pt. IV, ¶ 54c(1)(a).

22. *Johnson*, 54 M.J. at 69. The law, however, does not generally recognize consent as a valid defense to aggravated assault. *United States v. Bygrave*, 46 M.J. 491, 493 (1997).

23. MCM, *supra* note 2, pt. IV, ¶ 54c(1)(a).

24. *Johnson*, 54 M.J. at 69 n.3.

25. *Id.* at 69.

26. *Id.*

27. *Id.*

28. *Id.*

29. *Id.*

30. *Id.*

31. *Id.* at 70.

32. *Id.* at 73 (Sullivan, J., dissenting).

33. *Id.*

well-established standard for legal sufficiency, affirmed the conviction for battery.³⁴

The dissenting opinion has merit. During the trial, the members observed SPC C testify about the senior-subordinate relationship, the shrugs and the continued backrubs. There was some evidence on which the members could base a finding that SPC C did not consent and that the accused was aware of this. Even the majority opinion states “there is no indication that SPC C felt unable to protest appellant’s actions and in fact felt comfortable enough to shrug him off.”³⁵ The court acknowledged that the shrugs were an expression of protest. The CAAF, however, appears to be applying a higher level of review than the law requires for legal sufficiency.

United States v. Tollinchi:
Sex with Recruit’s Girlfriend Not Rape

Sergeant Tollinchi was a Marine recruiter. He persuaded a sixteen year-old high school student to enlist. The recruit and his seventeen year-old girlfriend, EH, went to the recruiting office. Sergeant Tollinchi took out a bottle of Dewars whiskey and began to toast the enlistment and continued until the recruit and his girlfriend were intoxicated.³⁶ The accused encouraged the other two to kiss, undress each other, and engage in sexual acts. The accused then moved close to EH and touched her breasts and vaginal area. This was eventually charged as an indecent assault. The recruit and his girlfriend lay on the floor. The recruit performed oral sex on her, but she pulled him up next to her, because the accused tried to put his penis in her mouth.³⁷ This became a charge of attempted sodomy. The accused then performed oral sex on EH, which became a charge of sodomy. He then penetrated her with his penis. She gasped and whispered to the recruit, “Stop him, he’s inside me.” The recruit told her not to worry and it would be over soon.³⁸ This became a charge of rape, which is the offense at issue. The

recruit moved the accused and feigned sexual intercourse with EH. The accused masturbated and ejaculated on EH’s breasts. This became another specification of indecent assault. EH became hysterical and ran to the bathroom. The accused dressed, gave the recruit \$20 for a taxi, and left.³⁹

At trial, the girlfriend testified that she was drunk and afraid, but she never said “no.” The accused testified and denied that the incident happened.⁴⁰ The members found the accused guilty of all of the above-mentioned offenses, as well as adultery and two specifications of violating a general order.⁴¹ The Navy-Marine Corps Court of Criminal Appeals affirmed. Because of EH’s ability to remember with “ringing clarity,” it did not base its decision on her intoxication. It found she was capable of manifesting her non-consent. It found, however, that it was dark, she was under her boyfriend, and she was unaware of any attempt to penetrate until it already occurred.⁴²

The CAAF found the evidence to be legally insufficient, because the prosecution failed to prove lack of consent. The court quoted the *Manual for Courts-Martial* on the inference of consent from lack of resistance: “If a victim in possession of his or her mental faculties fails to make lack of consent reasonably manifest by taking such measures of resistance as are called for by the circumstances, the inference may be drawn that the victim did consent.”⁴³

The CAAF will not overturn findings of fact by a service court, unless they are clearly erroneous or unsupported by the record.⁴⁴ It found the lower court’s conclusion that the victim was capable of manifesting her lack of consent amply supported by the record, because of the “ringing clarity” of her memory and her ability to demonstrate lack of consent when the accused attempted to place his penis in her mouth.⁴⁵ The CAAF, however, found the lower court’s conclusion that EH was unaware of any attempt to penetrate until it had already occurred was unsupported by the record. Although the room

34. *Id.* at 70 (Sullivan, J., dissenting).

35. *Id.* at 69.

36. United States v. Tollinchi, 54 M.J. 80, 81 (2000).

37. *Id.*

38. *Id.*

39. *Id.*

40. *Id.*

41. The members adjudged a sentence of a dishonorable discharge (DD), confinement for five years, total forfeitures, and reduction to the lowest enlisted grade. *Id.* at 80-81.

42. *Id.* at 82. Failure to resist is immaterial when the victim was unaware that the accused was going to penetrate her, because rape is complete upon the penetration without her consent. See United States v. Traylor, 40 M.J. 248, 249 (C.M.A. 1994).

43. *Id.* at 82 (quoting MANUAL FOR COURTS-MARTIAL, UNITED STATES, pt. IV, ¶ 45c(1)(b) (1995)).

44. *Id.*

was darkened, there was enough light for her to see what was happening and describe it in detail. She testified that she could see the accused when he performed oral sex on her and when he moved into position to penetrate her. Also, she testified that her boyfriend was lying beside her, not on top of her. The court found that EH saw what the accused was about to do and did not express her lack of consent to sexual intercourse.⁴⁶ Furthermore, the court stated, “Even if she did not actually consent, there was no way for appellant to know that she did not consent.”⁴⁷

Two factors that were important in *Johnson* were also present in this case: prior sexual activity and failure to express a lack of consent. The court emphasized that EH undressed in front of the accused, “allowed” him to touch her breasts and vaginal area,⁴⁸ allowed him to perform oral sex on her, and said nothing when she saw him move into position for sexual intercourse. The court reversed the conviction for rape.⁴⁹

Chief Judge Crawford dissented. She thought that a different factual conclusion by the lower court was clearly erroneous. She thought that there was ample evidence that EH was not able to consent because of intoxication.⁵⁰ According to her dissent, the evidence was clear that EH was intoxicated and the accused had good reason to believe that she was too intoxicated to con-

sent to sexual intercourse with him. The military judge gave the members an instruction on intoxication’s impact on a person’s capacity to consent, and the members found the accused guilty of rape based on all the evidence.⁵¹ Chief Judge Crawford stated that “it will be a sad day for all victims of sexual crimes if their ability to recall the criminal acts perpetrated upon them is used against them in this fashion.”⁵²

United States v. Ayers:⁵³

Sexual Contact with Trainee Not Indecent Assault

Staff Sergeant Ayers was an Initial Entry Training (IET) instructor at Fort Lee, Virginia. One night when he was on duty as the Charge of Quarters (CQ), he engaged in a conversation with a female trainee, PFC TH. He told her that there would be a movie in the day room after bed check, and she asked if she could come. He told her it was her choice, but it would be her responsibility if she got in trouble.⁵⁴ After bed check, she went to the day room to watch the movie. The accused asked her to meet him in the operations room. She went back to her room, told her “battle buddy” what she was doing,⁵⁵ and climbed out the window to meet the accused. The accused led her into a conference room, so nobody would see them. The accused asked PFC TH if she was nervous and afraid, and she said,

45. *Id.*

46. *Id.* at 82-83.

47. *Id.* at 83.

48. *Id.* One factor the court relied on was that EH “allowed him to touch her breasts and vaginal area.” *Id.* (emphasis added). However, as stated above in the text, the accused was convicted of indecent assault for that offensive touching. Consent is a defense to indecent assault, but the CAAF affirmed the conviction of indecent assault. *Id.* Perhaps the court was relying on the fact that, after the indecent assault had been committed, EH did not protest to the accused.

49. *Id.* The court affirmed the lesser-included offenses of indecent act by having sexual intercourse in the presence of a third person, her boyfriend, and authorized a rehearing on sentence. *Id.* at 83.

50. *Id.* at 83-84 (Crawford, C.J., dissenting).

51. *Id.* at 84 (Crawford, C.J., dissenting). In her dissenting opinion, Chief Judge Crawford quoted the following provisions from the military judge’s instructions:

When a victim is incapable of consenting because she is intoxicated to the extent that she lacks the mental capacity to consent, no greater force is required than that necessary to achieve penetration.

* * *

In deciding whether [EH] had consented to the sexual intercourse you should consider all the evidence in this case, including, but not limited to [EH’s] age, her experience with alcohol, the degree of Miss [H’s] intoxication, if any, her mental alertness, the ability of Miss [H] to walk, to communicate coherently, and other circumstances surrounding the sexual intercourse.

If Miss [H] was incapable of giving consent, and if the accused knew or had reasonable cause to know that Miss [H] was incapable of giving consent because she was intoxicated, the act of sexual intercourse was done by force and without consent

52. *Id.* at 84 (Crawford, C.J., dissenting).

53. 54 M.J. 85 (2000).

54. *Id.* at 87-88.

55. In IET, the “battle buddy” system requires trainees to report to those in leadership positions with a fellow trainee assigned as a constant companion. See United States v. Lloyd, No. 9801781, at 2 (Army Ct. Crim. App. Oct. 24, 2000) (unpublished); *Ayers*, 54 M.J. at 88 n.1.

“Hell yeah.” He told her not to be nervous. He touched her face, breasts, and buttocks, and he kissed her. The accused had to leave to check on his CQ duties, and she waited for him.⁵⁶ When he returned, he massaged her and asked her to lie “belly down” on a table. He straddled her, continued to massage her, moved her shorts and panties aside, and touched her vagina with his penis. She told him that she did not want to have sex with him. He kept telling her to relax and kept touching her with his penis. She told him to stop, and he did and left the room. When he returned, he asked her to come back later, but she declined and told him she was tired and going to bed.⁵⁷

The accused had given PFC TH his pager number. She called him several times over the next week. One week after the incident in the conference room, they ran into each other during a break in training. She agreed to meet him in a second-floor latrine that was under repair. PFC TH had her “battle buddy” wait in a nearby janitor’s closet, and she waited for the accused in the latrine for twenty to thirty minutes.⁵⁸ When he arrived, he criticized her for speaking to him in a familiar way in front of other people. He touched her face and tried to kiss her and touch her buttocks. She did not want him to touch her, so she backed away. He stopped and left the latrine.⁵⁹

The accused was charged with several offenses involving PFC TH and another female trainee. He was charged with two specifications of indecent assault for the incidents in the conference room and the latrine. At trial, PFC TH testified that, in the conference room, she was a willing participant. She was infatuated with the accused. In explaining why she was not upset about it, she said that it was a situation where “a guy tries to see how far he can get, but then it doesn’t go anywhere. I really didn’t consider it an assault or rape or nothing like that.”⁶⁰ She testified that her feelings about the accused had changed between the incident in the conference room and the incident in

the latrine. The incidents were not important to her, and she did not tell anyone in her command until her senior drill sergeant and commander questioned her about it.⁶¹ The defense theory at trial was that neither incident happened, and PFC TH’s testimony was “total lurid fiction.”⁶² An instruction on mistake of fact was neither requested nor given.⁶³ The members found the accused guilty of both specifications of indecent assault, as well as several other offenses.⁶⁴

In a three to two opinion,⁶⁵ the CAAF found the evidence to be legally insufficient to support either specification of indecent assault. As for the incident in the conference room, the majority found that the accused indicated that he wanted to have sexual intercourse with PFC TH by touching her vagina with his penis. She told him to stop. He tried to persuade her to go further, but she continued to refuse. The accused then stopped and left. According to the majority, “TH drew the line at sexual intercourse, and appellant did not cross the line.”⁶⁶

As for the incident in the latrine, the majority found that the prosecution failed to prove lack of consent. After the incident in the conference room, PFC TH continued the relationship by calling the accused. She readily agreed to meet him alone and waited twenty to thirty minutes for him. As soon as she indicated she no longer consented, the accused stopped.⁶⁷

The court reversed the convictions for the two specifications of indecent assault. The majority opinion, however, stated:

Our holding on the issue of consent does not affect the legal sufficiency of appellant’s conviction of multiple violations of the regulation proscribing inappropriate contact with trainees, nor does it condone his behavior. While the appellant’s conduct with a trainee

56. *Ayers*, 54 M.J. at 88.

57. *Id.*

58. *Id.*

59. *Id.*

60. *Id.*

61. *Id.* at 89.

62. *Id.*

63. *Id.*

64. Based on his conduct with PFC TH and another female trainee, PVT BD, the members convicted the accused of attempted adultery, attempted violation of a lawful general regulation, violation of a lawful general regulation (five specifications), adultery, and indecent assault (two specifications). The members adjudged a sentence of a DD, confinement for four years, total forfeitures, and reduction to the grade of E1. *Id.* at 87.

65. Chief Judge Crawford and Judge Sullivan dissented. *Id.* at 95-99.

66. *Id.* at 89-90.

67. *Id.* at 90.

fell short of an indecent assault, his conviction of the regulatory violation clearly reflects that it was unacceptable.⁶⁸

The majority made it clear that it did not approve of the accused's behavior, even if it was consensual.

Chief Judge Crawford wrote an interesting dissenting opinion. In the beginning of the opinion, she stated:

The majority appears to equate TH with Ado Annie Carnes, the character in Rodgers and Hammerstein's hit musical Oklahoma, who sings "I Cain't Say No!" Since I believe that "no" means "no," I, like country music singer Lorrie Morgan, ask the majority, "What part of no don't you understand?"⁶⁹

Chief Judge Crawford viewed the facts differently from the majority, pointing out that they were not as clear as the majority painted them. The members were properly focusing on the issue of consent. A member even requested to hear PFC TH testify again about the assault in the conference room. The subsequent testimony confirmed the fact that the accused continued to rub his penis against PFC TH's vagina three to five times after she told him to stop.⁷⁰ Chief Judge Crawford disagreed with the majority's conclusion that PFC TH drew the line at sexual intercourse. According to Chief Judge Crawford, she also told him to stop doing what he was doing—touching her vagina with his penis. When he failed to do so, he committed an assault. "When a woman tells a would-be paramour to stop touching her body improperly, she draws the line! When the paramour persists in engaging in the same conduct that has been explicitly rejected, the paramour has crossed that line!"⁷¹

Chief Judge Crawford's argument makes sense. The majority and dissent, however, disagreed on the factual issue of where PFC TH drew the line. In a review for legal sufficiency, the appellate court must view the evidence in the light most favorable to the government, which is what Chief Judge Crawford did.

The dissenting opinion, however, lost credibility when it discussed the incident in the latrine. It stated that "there was no evidence that TH had led appellant to believe that she wished to have any type of romantic relationship with him."⁷² Her actions could have led the accused to reasonably believe that she wanted such a relationship. She called him, agreed to meet him alone, and did not tell him or otherwise indicate that she did not want to be touched until after it had already occurred. Once she so indicated, the accused stopped and left. Even if one was to conclude that the incident in the conference room should have been affirmed as an indecent assault, the incident in the latrine was not an indecent assault.

United States v. Fuller:
Consensual Sex with Subordinate Not Maltreatment

Sergeant Fuller was a platoon sergeant at the Inprocessing Training Center (ITC) in Darmstadt, Germany. As a cadre member, he assisted soldiers and their families transition into Europe. Over a period of two to three weeks, the ITC provides orientation activities, such as German language training, driver training, and unit inprocessing.⁷³ Sergeant Fuller spoke to PFC M, a female ITC soldier, who planned to go to an on-post club with her friend, Private (PVT) I. The accused suggested that he and another ITC platoon sergeant, Sergeant First Class (SFC) Davis, would meet them at the club. Private First Class M was drinking all night in celebration of PVT I's birthday.⁷⁴ At the club, the accused suggested that the four of them go to an off-post club to further celebrate the birthday. The privates talked about it in the bathroom and decided to go. They lied to their friends by telling them that they were going back to the barracks to use the telephone. The privates left the club first, and they waited at the accused's car for twenty minutes.⁷⁵ In the car, the sergeants suggested going to the accused's apartment to avoid being seen by other cadre members. The privates agreed, and they stopped on the way so SFC Davis could buy some liquor. While he was in the gas station, PFC M moved into the passenger seat to sit next to the accused.⁷⁶

When they got to the accused's apartment, all four drank a double shot of tequila. After the accused left the room, the pri-

68. *Id.*

69. *Id.* at 96 (Crawford, C.J., dissenting) (citing <http://www.countrycool.com>).

70. *Id.* at 97 (Crawford, C.J., dissenting).

71. *Id.*

72. *Id.*

73. United States v. Fuller, 54 M.J. 107, 108 (2000).

74. *Id.*

75. *Id.*

76. *Id.*

vates each had four to six more double shots of tequila. While PFC M sat on a sofa, SFC Davis and PVT I danced, undressed each other, and engaged in sexual intercourse.⁷⁷ When the accused returned to the room, he and PFC M drank some brandy and then engaged in sexual intercourse. After a few minutes, the accused told SFC Davis, “You’ve gotta get some of this.” SFC Davis then had sexual intercourse with PFC M, while the accused had sexual intercourse with PVT I. The accused engaged in further sexual acts with PFC M. The next day, on the way back to post, all four joked in the car and stopped to eat lunch together.⁷⁸

The accused was charged with several offenses, including maltreatment by “having sexual relations with [PFC M] after she became extremely intoxicated and sexually harassing her in that he made a deliberate offensive comment of a sexual nature.” At trial, PFC M testified that nobody forced her to drink that night.⁷⁹ She also testified that she willingly engaged in sexual intercourse with the accused and that he had her permission.⁸⁰ After the accused made the comment and SFC Davis started to have sexual intercourse with her, she thought to herself: “[O]h my gosh, I can’t believe I am having sex with him too.”⁸¹ She did not actually want to have sexual intercourse with the accused or SFC Davis, but she did not indicate that to them. She testified that she did not say “no” or try to resist.⁸² The members found the accused guilty of the maltreatment charge and other charges.⁸³

The CAAF unanimously found the evidence to be legally insufficient to support the conviction for maltreatment. The court began by discussing the nature of the offense of maltreatment. The two elements of maltreatment are: (1) a certain per-

son was subject to the accused’s orders; and (2) the accused was cruel toward, or oppressed, or maltreated that person.⁸⁴ The second element is measured objectively, and sexual harassment may constitute maltreatment.⁸⁵

The charge of maltreatment in this case was based on consensual sexual relations. The court pointed out that Article 93 does not cover all improper relationships between superiors and subordinates.⁸⁶ The court stated that, although the evidence clearly supported the charge of fraternization,⁸⁷ it was not sufficient to support a conviction for maltreatment. Once again, the court acknowledged that the relationship between a NCO and a subordinate may create a “unique situation of dominance and control,” but the facts did not indicate such a situation in this case. The inherently coercive nature of the typical training environment was not present and was not a factor in PFC M’s decision to engage in consensual sexual relations.⁸⁸

The court dealt with the two allegations in the maltreatment specification, the sexual relations with an extremely intoxicated soldier and the offensive comment, separately. As for the intoxication, the court held that the prosecution failed to prove that the accused knew that PFC M was extremely intoxicated when they had sexual relations. According to the testimony of PFC M, she was acting normal before getting to the accused’s apartment. Also, the accused was not present when she drank several shots of tequila. There was no evidence that she showed any visible signs of intoxication.⁸⁹ The court required the prosecution to prove that the accused knew or should have known of the “extreme intoxication,” and the prosecution failed to do so.

77. *Id.*

78. *Id.*

79. *Id.* at 109.

80. *Id.* at 110.

81. *Id.* at 109.

82. *Id.* at 110.

83. Based on this incident and other incidents involving female soldiers, the members found the accused guilty of maltreatment (three specifications), rape, sodomy (three specifications), indecent assault, unlawful entry, fraternization, and kidnapping, and they adjudged a sentence of a DD, confinement for five years, and reduction to the grade of E1. *Id.* at 108.

84. MCM, *supra* note 2, pt. IV, ¶ 17b.

85. *Id.* ¶ 17c(2).

86. *Fuller*, 54 M.J. at 110-11.

87. The accused was charged with fraternization. Although it was not in effect at the time of the offense, Judge Effron mentioned in a footnote that “[t]he Army’s most recent fraternization regulation punitively prohibits a wide range of inappropriate relationships between superiors and subordinates.” *Id.* at 111 n.3 (citing AR 600-20, *supra* note 9, para. 4-14).

88. *Id.* at 111.

89. *Id.*

As for the sexual harassment allegation, the CAAF concluded that the statement did not constitute maltreatment, because the prosecution failed to prove that it was offensive. The testimony of PFC M established that she was embarrassed, “but embarrassment does not support a finding of maltreatment.”⁹⁰ The court acknowledged that, in a different situation, such a comment would constitute maltreatment. Under these facts and circumstances, however, the evidence was legally insufficient.⁹¹

Judge Sullivan wrote a concurring opinion to expound on a few points. The problem was not whether the allegations in the specification constituted maltreatment. The problem was that the prosecution failed to prove what was alleged in the specification.⁹² Also, this case involved consensual sexual relations between a NCO and a subordinate. According to Judge Sullivan, “[t]he absence of coercion on the basis of rank remove[d] this case from the scope of Article 93.”⁹³

Trends

Although the four CAAF opinions involved four different offenses, they have similarities that signal a trend. The CAAF will closely scrutinize this type of case to ensure the evidence supports all the elements of the offenses. As Judge Sullivan argued in his dissenting opinion in *Johnson*, it appears that the court is using a higher standard than the law provides for legal sufficiency.⁹⁴

The factual issues in these cases were close calls. By deciding these cases together and reversing all four, the court sent a clear message: it will not tolerate overcharging in this type of case. If, beyond fraternization or violation of a regulation, a nonconsensual crime against the subordinate is charged, then rank is not enough. Even when a senior-subordinate relationship is involved, all the elements of the offense must be proven. There may be situations where the evidence supports a finding of lack of consent and no mistake of fact, even though the victim does not physically or verbally indicate a lack of consent. Those situations, however, are limited to cases where the accused used his position of dominance and control to coerce

the victim. According to the CAAF, none of these four cases involved such a situation.

One could walk away from these four cases with a couple of different perceptions. Some may think that the court is misogynistic—distrustful of women. The court should not deny women the power to clearly make certain touching of their bodies off-limits by shrugging off physical contact or by saying “stop.” However, at the same time, the court must ensure justice in courts-martial.⁹⁵ Some have used the term “predator” to describe an officer or NCO who embarks on a campaign of sexually suggestive remarks and physically assaultive overtures in hopes of engaging subordinates in romantic adventures.⁹⁶ A predator is detrimental to the good order and discipline of a unit. Commanders may be incensed at the possibility of predators in their units, and they might charge misconduct as nonconsensual when it is not.

In these four cases, the court made it clear that it did not condone the accuseds’ conduct. However, the court can affirm convictions only when the evidence supports all the elements of the offenses. For nonconsensual offenses, the prosecution has the burden to prove lack of consent beyond a reasonable doubt. The CAAF will hold the prosecution to that burden. Unless the accused used his superior position to create a situation of dominance and control to coerce the victim, rank is not enough.

Promoting Military Discipline

The intangible concept of “military discipline” is as difficult to define as the concept of justice. Military discipline is based on self-discipline and respect for properly constituted authority, and it has as its goal proper conduct and prompt obedience to lawful military authority by all military personnel.⁹⁷ Some of the offenses Congress has proscribed in the Uniform Code of Military Justice (UCMJ) are primarily focused on promoting military discipline, such as disrespect toward,⁹⁸ disobedience of,⁹⁹ and assaulting officers and noncommissioned officers.¹⁰⁰ The CAAF opinions that addressed offenses against military order also signal a trend. In *United States v. Najera*,¹⁰¹ the CAAF held that a court can consider the manner in which

90. *Id.* at 112.

91. *Id.* The court affirmed the lesser-included offenses of indecent act by having sexual intercourse in the presence of a third person, as the court had done in *Tollinchi*. *Id.* See *supra* note 49 and accompanying text. The court affirmed the sentence. *Fuller*, 54 M.J. at 112.

92. *Fuller*, 54 M.J. at 112-13 (Sullivan, J., concurring).

93. *Id.* at 113 (Sullivan, J., concurring).

94. See *supra* text accompanying note 34.

95. See *supra* text accompanying note 2.

96. This description of the predator’s *modus operandi* comes from the concurring opinion by Judge Squires at the ACCA, which Judge Sullivan quoted in his dissenting opinion in *Johnson*. *United States v. Johnson*, 54 M.J. 67, 72 (2000) (Sullivan, J., dissenting).

97. AR 600-20, *supra* note 9, para. 4-1.

words are spoken to determine if the words constitute disrespect under the UCMJ. In *United States v. Diggs*,¹⁰² the CAAF showed deference to the court-martial members' decisions on factual issues involving military discipline and held that the evidence was legally sufficient to support convictions for assaulting a NCO and resisting apprehension. These cases demonstrate that the CAAF is well aware of the importance of military discipline in the military justice system.

United States v. Najera:

Taking Off the Blinders To Consider Evidence of Demeanor and Context in "Language-Only" Disrespect Cases

The superior-subordinate relationship is crucial to military discipline. One way in which the UCMJ attempts to deter and punish insubordination is by proscribing, in Article 89, disrespect toward superior commissioned officers.¹⁰³ It also proscribes, in Article 91, disrespect toward warrant officers and noncommissioned officers.¹⁰⁴ The courts have held that words¹⁰⁵ and acts¹⁰⁶ may constitute disrespect.

For the past decade, new judge advocates have been taught that language and deportment were distinct bases for disrespect under Articles 89 and 91 of the UCMJ. The guidance was that, if a specification alleged disrespect in language but did not mention deportment, then the court could not consider the manner in which the accused spoke the words.¹⁰⁷ Professor Schlueter even stated this rule in his treatise, *Military Criminal*

Justice: Practice and Procedure.¹⁰⁸ He accurately cited the Air Force Court of Military Review's (AFCMR) opinion in the 1988 case of *United States v. Wasson*¹⁰⁹ as the basis for the rule. In language-only disrespect cases, this rule was like a set of blinders that allowed the court to look at the alleged language but not the circumstances surrounding the language. In *Najera*, the CAAF pointed out that it had never adhered to such a rule, and it specifically overruled *Wasson*. The CAAF held that courts can consider all the circumstances, including demeanor and context, when determining whether the alleged language was disrespectful behavior under Article 89, even if deportment was not alleged in the specification. In *Najera*, the CAAF clarified the offense of disrespect.

The Old Rule for "Language-Only" Disrespect Specifications from United States v. Wasson

In 1988, the AFCMR considered, in *United States v. Wasson*, the legal sufficiency of a specification that alleged that the accused "was disrespectful in language toward [two non-commissioned officers] . . . by saying to them, 'If you are going to separate me, I wish you would hurry it up because I'm tired of this crap,' or words to that effect."¹¹⁰ According to the AFCMR, the drafter of the specification identified this as a "language-only" case by not including deportment in the specification. The court interpreted the *Manual for Courts-Martial* as requiring the words in a language-only case to contain abusive epithets or contemptuous or denunciatory language.¹¹¹ It

98. UCMJ arts. 89 (proscribing disrespect toward a superior commissioned officer), 91(3) (proscribing disrespect toward a warrant, noncommissioned, or petty officer) (2000).

99. *Id.* arts. 90(2) (proscribing disobedience of a superior commissioned officer), 91(2) (proscribing disobedience of a warrant, noncommissioned, or petty officer).

100. *Id.* arts. 90(1) (proscribing striking or assaulting a superior commissioned officer), 91(1) (proscribing striking or assaulting a warrant, noncommissioned, or petty officer).

101. 52 M.J. 247 (2000).

102. 52 M.J. 251 (2000).

103. UCMJ art. 89. The statute provides that "[a]ny person subject to this chapter who behaves with disrespect toward his superior commissioned officer shall be punished as a court-martial may direct." *Id.*

104. *Id.* art. 91(3). Under this subparagraph of the statute, a court-martial may punish a warrant officer or enlisted member who "treats with contempt or is disrespectful in language or deportment toward a warrant officer, noncommissioned officer, or petty officer while that officer is in the execution of his office." *Id.*

105. *See, e.g., United States v. Montgomery*, 11 C.M.R. 308 (A.B.R. 1953) (holding that "Keep your Goddamn mouth shut, you field grade son-of-a-bitch or I'll tear you apart; I'll beat you to death you . . . ; I'll bite your . . . off, you punk you" constituted disrespect).

106. *See, e.g., United States v. Ferenczi*, 27 C.M.R. 77 (C.M.A. 1958) (holding that turning from and leaving the presence of an officer while the officer was talking to the accused constituted disrespect).

107. Instructors at The Judge Advocate General's School, U.S. Army, Charlottesville, Virginia, including the author, taught this rule to students for over a decade. It was such a trap for the unwary that the author made a special effort to highlight it.

108. SCHLUETER, *supra* note 3, § 2-3(B). After *Najera*, Professor Schlueter amended his treatise to reflect that the CAAF overruled *Wasson*. *Id.* § 2-3(B) (Supp. 2000).

109. 26 M.J. 894 (A.F.C.M.R. 1988).

110. *Id.* at 896.

held that, in language-only cases, courts cannot consider evidence of the manner in which the words were spoken.¹¹² The court found that the word “crap” was not inherently disrespectful, so it held that the words as alleged failed to state an offense.¹¹³

Wasson was not a well-reasoned opinion. For example, the AFCMR interpreted the *MCM* provision stating that “disrespect by words may be conveyed by abusive epithets or other contemptuous or denunciatory language” as meaning “the words *must* contain abusive epithets, or contemptuous or denunciatory language in order to constitute an offense.”¹¹⁴ The court gave no explanation of how it read “may” as meaning “must.” That interpretation contributed to the court’s determination that, in a language-only case, the alleged words must be inherently disrespectful.

In *Wasson*, the Air Force court stated that “[b]y using the words ‘was disrespectful in language toward . . .’ in the specification, the drafter identified this as a language case, rather than one involving deportment.” That assumed too much. The model specification for Article 89, in the *MCM*, does not contain the word “language” or “deportment.”¹¹⁵ The drafter of the specification in *Najera* very likely just followed the model specification and alleged the words *Najera* spoke to his commander.

The *Wasson* limitation on prosecution evidence in language-only disrespect cases was not necessary. In cases involving other offenses, the prosecution is not barred from presenting evidence of the circumstances surrounding words. For example, the fact-finder can consider the circumstances in determin-

ing whether language constitutes a solicitation¹¹⁶ or is indecent.¹¹⁷ If the concern is that the accused is misled as to the exact conduct he must defend against, adequate protections already exist. If the prosecutor presents evidence of disrespectful behavior that is not fairly implied in the specification, then the accused could object on the grounds of a fatal variance between the pleadings and the evidence presented at trial.¹¹⁸ In most cases, however, an accused and his counsel should be on notice that the fact-finder will consider the context and manner in which the accused used the language alleged in the specification.

Many military justice practitioners, even those not in the Air Force and not bound by the holding in *Wasson*, have followed the rule set out in *Wasson*. Therefore, when disrespectful behavior included words and the way in which they were said, cautious judge advocates have alleged that the accused “was disrespectful in language and deportment.” The CAAF never addressed this rule until it decided *Najera* last year.

The CAAF Overrules Wasson and Puts the Law of Disrespect Back on Track in Najera

Private *Najera*, U.S. Marine Corps, was serving confinement in the brig after a previous court-martial. He requested early release, so he could return to training. His company commander supported the request, and the convening authority released *Najera*.¹¹⁹ After his release, *Najera* told his first sergeant that he would not participate in the training with the rest of the company. Unable to persuade *Najera* to train, the first sergeant told him to talk to the company commander. The com-

111. The AFCMR quoted the *MCM*’s explanation of disrespect under Article 89:

Disrespectful behavior is that which detracts from the respect due the authority and person of a superior commissioned officer. It may consist of acts or language, however expressed, and it is immaterial whether they refer to the superior as an officer or as a private individual. Disrespect by words may be conveyed by abusive epithets or other contemptuous or denunciatory language. Truth is no defense. Disrespect by acts includes neglecting the customary salute, or showing a marked disdain, indifference, insolence, impertinence, undue familiarity, or other rudeness in the presence of the superior officer.

Id. (quoting MANUAL FOR COURTS-MARTIAL, UNITED STATES, pt. IV, ¶ 13c(3) (1984)).

112. *Id.* at 897.

113. *Id.* at 897-98.

114. *Id.* at 896 (emphasis added). Also, when explaining why the word “crap” was not inherently disrespectful, the AFCMR acknowledged that “[t]he conditions surrounding the use of the word are important.” *Id.* at 897.

115. See MANUAL FOR COURTS-MARTIAL, UNITED STATES, pt. IV, ¶ 13f (1998) [hereinafter 1998 MCM]. The same is true for the model specification in the Army’s *Military Judges’ Benchbook*. U.S. DEP’T OF ARMY, PAM. 27-9, LEGAL SERVICES: MILITARY JUDGES’ BENCHBOOK, para. 3-13-1b (30 Sept. 1996) [hereinafter DA PAM. 27-9].

116. See, e.g., *United States v. Williams*, 52 M.J. 218, 220-21 (2000) (holding that an implicit invitation to join in the accused’s international drug smuggling operation, when considering the context of the statement, constituted solicitation).

117. See, e.g., *United States v. French*, 31 M.J. 57, 59-61 (1990) (holding that asking a fifteen year-old stepdaughter for permission to climb into bed with her constituted indecent language).

118. The test for whether a variance is fatal focuses on prejudice to the accused: “(1) has the accused been misled to the extent that he has been unable adequately to prepare for trial; and (2) is the accused fully protected against another prosecution for the same offense.” *United States v. Lee*, 1 M.J. 15, 16 (C.M.A. 1975).

mander ordered him to return to training and explained that, otherwise, he could get a bad-conduct discharge at a special court-martial. In the presence of two non-commissioned officers and while smirking, Najera said he wanted a dishonorable discharge and out of the Marine Corps. He told the commander that he refused to train and “you can’t make me go.”¹²⁰

Private Najera was charged with absence without leave, willful disobedience of a superior commissioned officer, and disrespect toward the same superior commissioned officer. He pled guilty to the unauthorized absence and disobedience charges, but he pled not guilty to a specification alleging, under Article 89, that he “did . . . behave himself with disrespect towards [the commander] . . . by saying to him, ‘you can’t make me, you can give me any type of discharge you want, you can give me a dishonorable discharge, I would rather have a dishonorable discharge than return to training, I refuse,’ or words to that effect.”¹²¹ The commander and first sergeant testified that Private Najera was smirking while making the statement, and his demeanor was cocky and sarcastic.¹²² Private Najera made the statement in the presence of two non-commissioned officers. A military judge sitting alone convicted Najera of disrespect.¹²³

On appeal, the accused argued that the evidence was factually and legally insufficient to support the disrespect charge. The Navy-Marine Court of Criminal Appeals (NMCCA) began by commenting that, because of the “curious declination by the Government to charge disrespect in both language *and* deportment,”¹²⁴ the court would limit the evidence it considered. In adherence to the rule set out in *Wasson*, the court did not consider evidence of the smirking, or cocky and sarcastic manner

in which the words were spoken, because it fell under the rubric of deportment and was thus not useable in a language-only case.¹²⁵ The Navy court did consider, however, the context in which the words were used. The court pointed out that it is impossible to remove the utterance from its context.¹²⁶ The true nature of words can only be determined in the context of the circumstances of their utterance. The Navy court found that these words, spoken in the presence of two non-commissioned officers, conveyed more than a refusal to obey. They reflected a “total disdain for that officer’s ability to compel him to comply with the order and to hold appellant accountable for his misconduct.”¹²⁷ The court was convinced beyond a reasonable doubt that Najera was guilty of disrespect toward a superior commissioned officer.¹²⁸

The CAAF considered the legal sufficiency of the evidence of disrespect.¹²⁹ The accused argued that because the specification alleged disrespect in “language” rather than “language and deportment,” the prosecution was required to show the language was disrespectful on its face. He further argued that the NMCCA could not affirm the conviction based on the context or manner in which the words were used.¹³⁰ The CAAF rejected these arguments.

The CAAF held that a language-only specification did not bar the prosecution from showing the circumstances surrounding the language that contribute to its disrespectful nature.¹³¹ The court supported its holding with three points. First, it pointed out that Article 89 makes no distinction between language and deportment.¹³² Second, the court pointed out that it had generally held in past cases that “all the circumstances of a case can be considered in determining whether disrespectful

119. *United States v. Najera*, 52 M.J. 247, 248 (2000).

120. *Id.*

121. *Id.*

122. *Id.* at 250.

123. *Id.* at 248. The military judge sentenced him to a bad-conduct discharge, confinement for one hundred days, and forfeiture of \$200 per month for three months. Pursuant to a pretrial agreement, the convening authority suspended the confinement in excess of sixty days. *Id.*

124. No. 9800155, 1998 CCA LEXIS 451, at *3 (N-M. Ct. Crim. App. Nov. 19, 1998) (unpublished) (emphasis in original).

125. *Id.* at *3 n.2.

126. *Id.* at *5.

127. *Id.* at *5-6.

128. *Id.* at *6.

129. *United States v. Najera*, 52 M.J. 247, 248-49 (2000).

130. *Id.* at 249. As stated above, the NMCCA considered the context of the words, but it intentionally did not consider the manner in which the words were spoken. *See supra* notes 121-23 and accompanying text.

131. *Najera*, 52 M.J. at 250.

132. *Id.* at 249.

behavior in violation of Article 89 had occurred.”¹³³ Third, the CAAF noted that the *MCM* does not limit the offense of disrespect toward a superior commissioned officer, because it merely says that “disrespect by words *may* be conveyed by abusive epithets or other contemptuous or denunciatory language.”¹³⁴ The court further noted that the *MCM* lists one of the elements of the offense as, “*under the circumstances*, the behavior or language was disrespectful to that commissioned officer.”¹³⁵ Thus, the *MCM*’s list of the types of disrespectful words is not exclusive, and the circumstances surrounding the words may be considered.

The CAAF specifically addressed the AFCMR’s holding in *Wasson* that an appellate court cannot consider evidence of the manner in which words are spoken unless the specification alleged disrespect in language and deportment. The court stated that it had never held that *Wasson* was good law. For the reasons stated above, the CAAF specifically overruled *Wasson*.¹³⁶ The Navy court felt constrained by *Wasson* from considering the manner in which the words were spoken, but it did consider the context of the words. The CAAF freely considered evidence of both the context and the manner in which Najera spoke the words. The CAAF had no problem finding that the evidence was legally sufficient to support the conviction for disrespect toward a superior commissioned officer.¹³⁷

In *Najera*, the CAAF moved the law of disrespect back on the right path. *Wasson* led practitioners down a path that held traps for the unwary. Words have some inherent meaning, but the context and manner in which words are used can be as important as the words themselves in conveying a message. In disrespect cases, the ultimate question is whether the conduct of the accused “detracts from the respect due the authority and person of a superior commissioned officer.” When making this determination, a court should consider all the circumstances surrounding the statement. In *Najera*, the CAAF took the blinders off courts, allowing the them to consider the true meaning of alleged language.

Open Question: Application of Najera to Article 91(3)

One may wonder whether *Najera* applies to Article 91(3). The opinion stated that Article 89 does not distinguish between “disrespect in language or deportment,” but it indicated that Article 91 might make such a distinction.¹³⁸ Article 91(3) punishes a service member who “treats with contempt or is disrespectful in *language or deportment* toward a warrant officer, noncommissioned officer, or petty officer while that officer is in the execution of his office.”¹³⁹ It is also worth noting that the model specification for Article 91(3), unlike that for Article 89, does suggest that the drafter allege whether the accused was disrespectful in language or deportment.¹⁴⁰

Despite these differences, the CAAF’s holding in *Najera* should apply to Article 91 for two reasons. First, the *MCM* does not define “disrespect” in its explanation of Article 91. It instead specifically refers to the definition of “disrespect” in the paragraph explaining Article 89, which is the *MCM* provision the CAAF analyzed in *Najera*. Therefore, the CAAF’s interpretation of that provision would apply to Article 91. Second, *Wasson* involved a violation of Article 91(3). Although *Najera* involved a violation of Article 89, the CAAF specifically overruled *Wasson*.¹⁴¹ The CAAF obviously sees the rationale in *Najera* as applying to Article 91 cases.

Advice for Practitioners

The holding in *Najera* enables the government to get all the relevant evidence to the decision-maker. Reliance on *Najera*, however, should remain a last resort. When drafting charges, trial counsel should continue to allege, when appropriate, that the accused was disrespectful in both language and deportment. This practice gives full notice to the defense of the conduct against which it must defend. It avoids unnecessary litigation over whether a variance is fatal. It also allows the specification on the flyer that the members of the panel see to truly reflect the disrespectful nature of the accused’s behavior. Also, and perhaps most importantly, this practice reminds the trial counsel to present evidence of the context and demeanor.

133. *Id.*

134. *Id.* (emphasis in original) (quoting 1998 MCM, *supra* note 115, pt. IV, ¶ 13c(3) (emphasis added)). The language in the current *MCM* is identical to the language in the 1984 edition, which the AFCMR relied on in *Wasson*. See *supra* note 111 and accompanying text.

135. *Najera*, 52 M.J. at 249 (emphasis in original) (quoting 1998 MCM, *supra* note 115, pt. IV, ¶ 13b(5) (emphasis added)).

136. *Id.* at 250.

137. *Id.*

138. *Id.* at 249 (“[Article 89] makes no distinction between ‘disrespect in language or deportment’ (*but cf.* Art. 91(3), UCMJ, 10 USC § 891(3)) . . .”). The introductory signal “*But cf.*” is used to cite authority that “*supports a proposition analogous to the contrary of the main proposition.*” THE BLUEBOOK: A UNIFORM SYSTEM OF CITATION 23 (17th ed. 2000) (emphasis in original).

139. UCMJ art. 89 (2000) (emphasis added).

140. See MCM, *supra* note 2, pt. IV, ¶ 15f(3); DA PAM. 27-9, *supra* note 115, para. 3-15-3b.

United States v. Diggs:

Multiple Issues Involving Offenses Against Military Order

While *Najera* discussed a single issue, *Diggs* raised three different issues involving offenses against military order. Staff Sergeant (SSG) Diggs was stationed at Rose Barracks in Vilseck, Germany. Some soldiers from Rose Barracks, including Sergeant (SGT) Vaden, deployed to Bosnia. Sergeant Vaden's unit returned from Bosnia unexpectedly.¹⁴² Sergeant Vaden had been in the Army for eight years, and he had been married to Chung Sun Vaden for six years. When SGT Vaden, who was in his battle dress uniform (BDUs), arrived home, he unlocked the door and went inside. He went upstairs and saw his wife come out of the bedroom in a teddy. She was surprised and said, "What are you doing home?"¹⁴³ Sergeant Vaden went into the bedroom, turned on the light, looked around, and opened the closet door. He saw SSG Diggs naked and crouched down on the floor of the closet. Staff Sergeant Diggs said, "Oh my God," and SGT Vaden hit SSG Diggs three or four times in the side and on the arm. Sergeant Vaden's wife got between them. Staff Sergeant Diggs came out of the closet and told SGT Vaden to calm down, he had been caught, and he would turn himself in. Sergeant Vaden said, "Yes, you're caught and you're going to turn yourself in. You are coming with me and we are both going to go to the MP station together."¹⁴⁴ After SSG Diggs put his BDUs on, they both went down the stairs and out the door. Staff Sergeant Diggs pushed SGT Vaden to the ground and ran away.¹⁴⁵

A special court-martial composed of officer and enlisted members convicted SSG Diggs of an unenumerated service disorder under Article 134 by being naked in a fellow NCO's bedroom with the other NCO's wife, resisting apprehension under Article 95, and assaulting a NCO under Article 91.¹⁴⁶ On appeal, the CAAF considered the legal sufficiency of the evidence to support resisting apprehension and assaulting a NCO,¹⁴⁷ and it affirmed the convictions.¹⁴⁸

The CAAF first addressed resisting apprehension. The *MCM* lists the elements of the offense as: (1) a certain person attempted to apprehend the accused; (2) that person was authorized to apprehend the accused; and (3) the accused actively resisted the apprehension.¹⁴⁹ The issue before the court concerned the state of mind of the accused. The court stated that "[t]here was no dispute that the prosecution was required to prove that appellant had clear notice of the apprehension which he was charged with resisting."¹⁵⁰ The notice does not have to be oral or written; it may be implied by the circumstances.¹⁵¹

The accused argued that there was insufficient evidence that he had "clear notice" that SGT Vaden was attempting to place him in custody, before he pushed SGT Vaden and ran away. This was a question of fact. The majority opinion, written by Judge Sullivan, called the facts of this case an "extraordinary situation." The majority relied on three facts in finding "clear notice" of apprehension: (1) the accused's being caught during an offense (the service disorder under Article 134 by being naked in a fellow NCO's bedroom with the other NCO's wife); (2) the accused's admission of wrongdoing and statement of

141. Overruling *Wasson* was a sound decision. Although Article 91(3) states that disrespect can be in "language or deportment," Congress's use of the disjunctive does not indicate an intent to make them distinct bases of disrespect, which the specification must specifically allege.

142. *United States v. Diggs*, 52 M.J. 251, 252 (2000).

143. *Id.*

144. *Id.* at 252-53.

145. *Id.* at 253-54.

146. *Id.* at 252. The members adjudged a sentence of a bad-conduct discharge, confinement for three months, forfeiture of \$600 per month for three months, and reduction to the grade of E1.

147. The CAAF did not consider the Article 134 offense. It is a good example of using Clause 1 of Article 134 for misconduct that the President did not specifically enumerate in the *MCM* as an offense under Article 134. Having a sexual relationship with a deployed soldier's wife is directly and palpably "to the prejudice of good order and discipline in the armed forces." UCMJ art. 134 (2000).

148. *Diggs*, 52 M.J. at 257.

149. *MCM*, *supra* note 2, pt. IV, ¶ 19b(1).

150. *Diggs*, 52 M.J. at 255.

151. *Id.* The court discussed three prior cases where the circumstances did not constitute clear notice of apprehension. In *United States v. Garcia-Lopez*, 16 M.J. 229 (C.M.A. 1983), military authorities entering the accused's barracks room and announcing they were going to search his room and ordering him to stay in that room did not constitute clear notice of apprehension under Article 95. *Id.* at 231-32. In *United States v. Sanford*, 12 M.J. 170 (C.M.A. 1981), a sergeant's statement to an enlisted soldier, "Lieutenant Young wants to see you[.]" and following the soldier to the commander's office was not an apprehension for purpose of the Fourth Amendment. *Id.* at 173-74. Also, in *United States v. Kinane*, 1 M.J. 309 (C.M.A. 1976), the court affirmed a lower court's finding that bringing a service member to the crime scene, reading him his rights, and questioning him was not an apprehension for purposes of determining whether a search incident to custodial arrest was authorized. *Id.* at 311-14.

intent to turn himself in; and (3) SGT Vaden's insistence that the senior NCO subject himself to the junior NCO's control. According to Judge Sullivan "[t]his was not a routine military practice or operation in any way."¹⁵² The court held that the evidence was sufficient for a rational fact-finder to find beyond a reasonable doubt that SSG Diggs had "clear notice" of apprehension by SGT Vaden.

The court next addressed two issues involving the offense of assaulting a NCO. Article 91(1) of the UCMJ prohibits any enlisted member from striking or assaulting a NCO "while that officer is *in the execution of his office*."¹⁵³ On appeal, the accused argued that SGT Vaden was not protected by Article 91 for two different reasons—SGT Vaden was not in the execution of his office, and SGT Vaden divested himself of the protection of his office.¹⁵⁴

According to the *MCM*, a NCO is in the execution of his office "when engaged in any act or service required or authorized by treaty, statute, regulation, the order of a superior, or military usage."¹⁵⁵ Noncommissioned officers have the authority to take corrective actions, including apprehension, when another soldier's conduct violates good order and discipline.¹⁵⁶ The accused argued on appeal that SGT Vaden was acting as an "avenging cuckold" rather than as a NCO executing his office. This was a question of fact. The court held that the members had a sufficient evidentiary basis to find that SGT Vaden was in the execution of his office and not on a personal "frolic" of revenge.¹⁵⁷

The last issue was "divestiture." An officer or NCO whose actions depart substantially from the required standards appropriate to his rank or position loses his protected status.¹⁵⁸ In *Diggs*, the CAAF addressed a new issue of whether an officer

or NCO, after divesting himself, can regain his protected status. The court acknowledged that SGT Vaden committed a battery against SSG Diggs, and he could have been prosecuted under Article 128 for that crime. The court found that such misconduct divested SGT Vaden of his authority as a NCO for purposes of immediate physical responses by the accused. The court found, however, that SGT Vaden regained his protected status after he "desisted in his illegal conduct and, thereafter, attempted to resolve this matter within appropriate military channels."¹⁵⁹ The concept of regaining protected status after misconduct serves two purposes. First, it encourages officers to stop their misconduct. Also, it avoids unnecessarily narrowing the broad protections afforded officers in the execution of their legitimate duties.¹⁶⁰ As Judge Sullivan pointed out in a footnote, the military judge gave an appropriate divestiture instruction. After considering all the evidence, however, the members still found the accused guilty of assault on a NCO. The CAAF found the evidence to be legally sufficient.

Judges Gierke and Effron disagreed with the majority's holding that the evidence was legally sufficient to support resisting apprehension and assault on a NCO. First, no rational fact-finder could find beyond a reasonable doubt that SSG Diggs knew that SGT Vaden was exercising his authority as a NCO to apprehend him.¹⁶¹ The accused was attacked by an enraged husband, who was a junior NCO, and stopped only when his wife intervened. The accused assured SGT Vaden he would turn himself in. Sergeant Vaden agreed to the offer and stated he would go along to ensure it happened. The dissent found that SGT Vaden never said or did anything to indicate he was exercising his authority as a NCO to apprehend SSG Diggs.¹⁶²

152. *Diggs*, 52 M.J. at 255.

153. UCMJ art. 91(1) (2000) (emphasis added).

154. Note that under Article 91 the victim does not have to be superior in rank to the accused. *MCM*, *supra* note 2, pt. IV, ¶ 15b(1). If the victim is a superior NCO of the accused, then it is an aggravating factor that increases the maximum confinement from one year to five years. *Id.* pt. IV, ¶ 15e(2), (3). By contrast, superior status is an element of the offense of assaulting a superior commissioned officer under Article 90(1). *Id.* pt. IV, ¶ 14b(1).

155. *Id.* pt. IV, ¶ 14c(1)(b) (explaining "execution of office" for assaulting a superior commissioned officer under Article 90). The *MCM* cross-references to that provision to explain the meaning of "in the execution of office" under Article 91(1). *Id.* pt. IV, ¶ 15b(3).

156. UCMJ art. 7(c) (2000) (authorizing officers and NCOs to "quell quarrels, frays, and disorders among persons subject to this chapter and to apprehend persons subject to this chapter who take part therein"). The Army policy is that "leaders in the Army, *whether on or off duty or in a leave status*, will [t]ake action consistent with Army regulation in any case where a soldier's conduct violates good order and military discipline." AR 600-20, *supra* note 9, para. 4-4a (emphasis added).

157. *Diggs*, 52 M.J. at 256.

158. See *United States v. Richardson*, 43 C.M.R. 333 (C.M.A. 1971) (reversing conviction of assaulting a superior commissioned officer because the officer victim challenged the accused to fight); see also *MCM*, *supra* note 2, pt. IV, ¶¶ 13c(5), 14c(1)(d).

159. *Diggs*, 52 M.J. at 257.

160. *Id.*

161. *Id.* (Gierke, J., dissenting).

162. *Id.* at 257-58 (Gierke, J., dissenting).

The dissent offered another basis for reversing the conviction for resisting apprehension. If SGT Vaden did exercise his authority as a NCO to apprehend SSG Diggs, then the apprehension was completed when SSG Diggs submitted to SGT Vaden's control, which would have been in the bedroom. After that point, SSG Diggs was in custody. As quoted by the dissent, the *MCM* states that "attempts to escape from custody after the apprehension is complete do not constitute the offense of resisting apprehension."¹⁶³ Therefore, under the reasoning of the majority, the accused would not be guilty of resisting apprehension.

The dissent also found the evidence legally insufficient to support assault on a NCO. The evidence was that SGT Vaden was acting in a personal capacity rather than an official capacity.¹⁶⁴ This was demonstrated by his physical assault on SSG Diggs. After he committed a battery upon SSG Diggs, SGT Vaden did nothing to invoke his status as a NCO.¹⁶⁵ The dissent stated that divestiture was not an issue, because SGT Vaden neither held nor invoked any position of authority over SSG Diggs, of which he could divest himself.¹⁶⁶ The two dissenting judges agreed with the majority opinion only as far as it affirmed the conviction of conduct prejudicial to good order and discipline under Article 134.¹⁶⁷

The CAAF affirmed the convictions in *Diggs* by a vote of three to two. Considering the facts, the dissenting opinion appears to present the more compelling argument. Judge Sullivan even stated, in a footnote, that he found merit in the dissent's arguments.¹⁶⁸ He pointed out, however, the difference between being on the jury at trial and reviewing a case for legal sufficiency as an appellate court. Judge Sullivan expressed trust in the American jury system, especially the court-martial panel, stating that "[t]he jury in the United States military justice system is one of the best in the world."¹⁶⁹ The court appears to be even more deferential to the court-martial members' verdict in a case involving military issues, stating:

More importantly, the jury in the military is expert at sorting out military issues such as the functioning between the rank structure (sergeant E-5 and staff sergeant E-6) and the responsibilities of noncommissioned officers, even in the extraordinary circumstances of the present case – a soldier unexpectedly returns home from a deployment to Bosnia and finds his wife with a naked man in his own bedroom.¹⁷⁰

The members have the responsibility to judge credibility, draw inferences, and to weigh all the evidence. Unless the appellate court finds that, after viewing the evidence in the light most favorable to the prosecution, no rational factfinder could have found the elements of the offense beyond a reasonable doubt, the appellate court has no legal basis to overturn the members' decision.¹⁷¹ While the dissent presented a persuasive argument that evidence in this case did not meet that low standard for legal sufficiency, the majority apparently is reluctant to second-guess the decision of the court-martial members when it comes to military issues.

Trends

Military discipline is vital to mission accomplishment, and the *MCM* lists it as one of the purposes of military law. It distinguishes a military unit from an armed mob.¹⁷² Over the last year, the CAAF demonstrated that it is mindful of the importance of military discipline. In *Najera*, the CAAF turned the law of disrespect in the right direction. Courts can consider the manner in which the accused spoke the words alleged in a language-only disrespect specification to determine whether the accused's behavior was disrespectful under Article 89. In *Diggs*, a majority of the court was reluctant to overturn the members' factual findings on military issues. As long as the evidence, viewed in the light most favorable to the government, is sufficient for *some* rational factfinder to find the accused

163. *Id.* at 258 (Gierke, J., dissenting) (quoting 1998 *MCM*, *supra* note 115, pt. IV, ¶ 19c(1)(c)).

164. *Id.*

165. *Id.*

166. *Id.*

167. *Id.* at 257 (Gierke, J., dissenting). Although not stated, the dissent would apparently also affirm a conviction for assault consummated by a battery, in violation of Article 128, as a lesser-included offense to assault on a NCO.

168. *Id.* at 256 n.2.

169. *Id.*

170. *Id.*

171. *See Jackson v. Virginia*, 443 U.S. 307, 319 (1979).

172. *See supra* note 1 and accompanying text.

guilty, the verdict must stand. As the court strives to ensure justice in military law, it has not forgotten the importance of military discipline.

Defining the Bounds of the “Darling of the Prosecutor’s Nursery”

*O conspiracy!
Sham’st thou to show thy dangerous brow by
night,
When evils are most free?*¹⁷³

The criminalization of conspiracy serves two different purposes in the criminal law. First, it protects society from the danger of concerted criminal activity.¹⁷⁴ As Julius Caesar understood, the concerted activity of a conspiracy is much more dangerous than the acts of individuals. The criminal enterprise is more difficult to detect because of its secrecy, is more likely to succeed because of the combination of strengths and resources of its members, and may continue to exist even after the initial object of the conspiracy has been achieved.¹⁷⁵ Second, the criminal law punishes the agreement to engage in a criminal venture as an anticipatory or inchoate offense, because the likelihood of the commission of a crime is sufficiently great and the criminal intent is sufficiently well-formed.¹⁷⁶ The grave dangers of a conspiracy justify punishing conduct at an earlier stage on the spectrum from mere preparation to consummation of the underlying offense. The inchoate offense of attempt requires an act that is more than mere preparation and must be a direct movement toward the commission of the offense.¹⁷⁷ However, the offense of conspiracy requires merely that, while

the agreement is in existence, one of the co-conspirators does an act to effect the object of the conspiracy, no matter how preliminary or preparatory in nature.¹⁷⁸

Besides proscribing conspiracy as a criminal offense, the criminal law has recognized special substantive, procedural, and evidentiary rules for cases involving conspiracy. For example, under the Military Rules of Evidence, a statement made by a co-conspirator “during the course and in furtherance of the conspiracy” is exempted from the definition of hearsay.¹⁷⁹ Also, the accused can be convicted and punished separately for both the conspiracy and the underlying offense that is the object of the conspiracy.¹⁸⁰ Furthermore, courts have held each co-conspirator criminally liable for the acts of the others in furtherance of the conspiracy.¹⁸¹ In 1925, Judge Learned Hand referred to conspiracy as “the darling of the modern prosecutor’s nursery.”¹⁸² Conspiracy is adored by prosecutors no less today, and commentators have questioned whether all these different rules give an undue advantage to the prosecutor and unfairly burden the conspiracy defendant.¹⁸³

It is important for the law to clearly define the offense of conspiracy and the parameters of the special rules it brings with it. Over the last year, the CAAF addressed the nature of the crime of conspiracy in *United States v. Valigura*¹⁸⁴ and *United States v. Pereira*.¹⁸⁵ It also addressed, in *United States v. Browning*,¹⁸⁶ the issue of whether vicarious liability of co-conspirators applied in military law. In *Valigura*, the court refused to depart from the traditional “bilateral theory” of conspiracy, which requires a meeting of the minds between at least two culpable parties. In *Pereira*, the court reiterated the longstanding rule that a single conspiracy to commit multiple crimes is but a

173. WILLIAM SHAKESPEARE, JULIUS CAESAR act 2, sc. 1.

174. *United States v. Feola*, 420 U.S. 671, 693 (1975).

175. *United States v. Rabinowich*, 238 U.S. 78, 88 (1915).

176. *Feola*, 420 U.S. at 694.

177. MCM, *supra* note 2, pt. IV, ¶ 4c(2).

178. *Id.* ¶ 5c(4).

179. *Id.* MIL. R. EVID. 801(d)(2)(E).

180. *Id.* pt. IV, ¶ 5c(8). See ROLLIN M. PERKINS & RONALD N. BOYCE, CRIMINAL LAW 687-88 (3d ed. 1982) [hereinafter PERKINS & BOYCE].

181. The applicability of this common law rule to military law will be addressed in the discussion of *United States v. Browning*. See *infra* text accompanying notes 231-45; MCM, *supra* note 2, pt. IV, ¶ 5c(5); *United States v. Pinkerton*, 328 U.S. 640 (1946).

182. *Harrison v. United States*, 7 F.2d 259, 263 (2d Cir. 1925) (questioning the appropriateness of cumulative sentences when it appeared that the prosecutor used crafty draftsmanship, including adding a count for conspiracy, to increase the sentence in a cocaine distribution case).

183. 2 WAYNE R. LAFAVE & AUSTIN W. SCOTT, SUBSTANTIVE CRIMINAL LAW § 6.4(b) (1986) [hereinafter 2 LAFAVE & SCOTT].

184. 54 M.J. 187 (2000).

185. 53 M.J. 183 (2000).

186. 54 M.J. 1 (2000).

single conspiracy. In *Browning*, the court, even in the absence of specific language in the UCMJ, held that vicarious liability of co-conspirators does apply in military law. This article discusses each of these three cases individually to explain how the CAAF looked at the intent of Congress, and the federal common law upon which it relied, to define the boundaries of the offense of conspiracy and its special rules.

United States v. Valigura:
“Bilateral Theory” of Conspiracy

The first case, *Valigura*, had a very common fact pattern. Private (PV2) Audrey Valigura encountered an undercover military police investigator. Private Valigura agreed to sell marijuana to the undercover agent. Pursuant to the agreement, she did transfer marijuana to the agent and received payment.¹⁸⁷ Private Valigura was charged not only with distribution of marijuana, but also with conspiracy to do so. The only two co-conspirators listed in the conspiracy specification were the accused and the undercover agent. The accused was convicted of, *inter alia*, the distribution and conspiracy charges.¹⁸⁸

The issue on appeal was whether PV2 Valigura’s transactions with the undercover agent constituted a conspiracy. Before analyzing that issue, some background discussion is necessary. Congress has prohibited criminal conspiracy in Article 81 of the UCMJ: “Any person subject to this chapter who conspires with any other person to commit an offense under this chapter shall, if one or more of the conspirators does an act to effect the object of the conspiracy, be punished as a court-martial may direct.”¹⁸⁹ According to the *Manual for Courts-Martial*, there are two elements of conspiracy: (1)

agreement with one or more persons to commit an offense under the UCMJ and (2) an overt act by any co-conspirator in furtherance of the conspiracy.¹⁹⁰ The gravamen of the offense of conspiracy is the agreement.¹⁹¹ The agreement is the required *actus reus*.¹⁹² The agreement is also part of the *mens rea*, which is the intent to both enter into an agreement with another and to accomplish the substantive offense.¹⁹³

Traditionally, under the “bilateral theory” of conspiracy, the co-conspirators must share in the criminal purpose of the conspiracy. At least one other person must have a culpable mind.¹⁹⁴ As part of a recent trend, the Model Penal Code and a number of states have adopted a “unilateral theory” of conspiracy, in which the culpability of the other parties to the “agreement” is immaterial.¹⁹⁵ As long as the accused believed that he had agreed with another person to commit a crime, then he is guilty of conspiracy, even if the other person did not share in the criminal purpose.¹⁹⁶ The issue in *Valigura* was whether the military followed the traditional “bilateral theory” or the modern “unilateral theory” of conspiracy. Under a “bilateral theory,” PV2 Valigura was clearly not guilty of conspiracy; but, under a “unilateral theory,” she was.

The ACCA held that the offense of conspiracy in military law requires an actual agreement to commit an offense between the accused and another person who shares the requisite criminal intent.¹⁹⁷ The Army court set aside the conspiracy conviction but upheld the lesser-included offense of attempted conspiracy.¹⁹⁸ At the encouragement of the dissenting opinion,¹⁹⁹ The Judge Advocate General for the Army certified the issue for CAAF’s review.²⁰⁰ The CAAF held that the Army court correctly applied the “bilateral theory” of conspiracy and upheld its ruling.²⁰¹

187. *Valigura*, 54 M.J. at 188.

188. *Id.* The accused was also charged with the unrelated offenses of failure to go to her appointed place of duty and failure to obey a lawful order. She pled guilty to the distribution and disobedience charges, and she pled not guilty to the conspiracy and failure to repair charges. After being found guilty of all the charges, she received a sentence of a bad-conduct discharge (BCD), confinement for six months, total forfeitures, and reduction to the grade of E1.

189. UCMJ art. 81 (2000).

190. MCM, *supra* note 2, pt. IV, ¶ 5b.

191. *Iannelli v. United States*, 420 U.S. 770, 777 n.10 (1975).

192. *See, e.g., United States v. Shabani*, 513 U.S. 10, 16 (1994) (“the criminal agreement itself is the *actus reus*”).

193. 2 LAFAVE & SCOTT, *supra* note 183, § 6.4(e)(1).

194. *Id.* § 6.5; PERKINS & BOYCE, *supra* note 180, at 694.

195. 2 LAFAVE & SCOTT, *supra* note 183, § 6.5; PERKINS & BOYCE, *supra* note 180, at 694.

196. MODEL PENAL CODE § 5.04(1) (1985).

197. *United States v. Valigura*, 50 M.J. 844, 848 (Army Ct. Crim. App. 1999). The Army court overruled its opinion of ten years prior in *United States v. Tuck*, 28 M.J. 520 (A.C.M.R. 1989), that the military followed the “unilateral theory” of conspiracy and the culpability of the other alleged co-conspirators is of no consequence. Staff Sergeant Tuck had argued that, because his co-conspirator was insane and incapable of entering into an agreement, his plea of guilty to conspiracy was improvident. In *Tuck*, the Army court had held that you need two persons, but not two criminals, to conspire. *Id.* at 521.

198. *Valigura*, 50 M.J. at 848. The Army court affirmed the sentence. *Id.* at 849.

Unfortunately, two previous CAAF opinions caused confusion over whether the military followed the “unilateral theory” or the “bilateral theory” of conspiracy. In 1983, in *United States v. Garcia*,²⁰² the Court of Military Appeals (CMA)²⁰³ refused to adhere to the “consistency of verdicts” doctrine. A month after Garcia was convicted of conspiracy to commit larceny and several other offenses, his only co-conspirator was acquitted of the same conspiracy charge. Under the common law doctrine of “consistency of verdicts,” the acquittal of one of two co-conspirators required the acquittal of the other.²⁰⁴ The CMA found that under the present system, logic and the law do not require such “foolish consistency.”²⁰⁵ It held that the military does not follow the “consistency of verdicts” doctrine.²⁰⁶ The opinion caused confusion because it discussed the trend from the “bilateral theory” to the “unilateral theory” of conspiracy,²⁰⁷ which was not necessary for the rationale of its holding.

In 1995, in *United States v. Anzalone*,²⁰⁸ the CAAF held that an agreement with an undercover agent to commit espionage could constitute the offense of *attempted conspiracy*.²⁰⁹ In the majority opinion, Judge Crawford stated that “[i]n *Garcia* we adopted the American Law Institute’s Model Penal Code ‘Unilateral Approach’ to conspiracy.”²¹⁰ That pronouncement was unnecessary, because the issue before the court was attempted conspiracy and not conspiracy. A majority of the judges took

issue with Judge Crawford’s pronouncement. Judge Wiss stated that it was wrong, because a meeting of the minds was required for a conspiracy.²¹¹ Judge Gierke, joined by Judge Cox, indicated that he would not invalidate the “bilateral theory” of conspiracy, especially when the issue had not yet been briefed and argued before the court.²¹²

In *Valigura*, the CAAF rejected the “unilateral theory” and adhered to the “bilateral theory” of conspiracy. Central to the CAAF’s holding was the recognition of its proper role:

For this Court retroactively to introduce an entirely new theory of conspiracy that was not contemporaneously in the minds of the legislators or discussed by them would seem to cross the line between judicial interpretation and improper judicial lawmaking and cannot be justified by the “public policy” considerations advanced in Chief Judge Crawford’s dissent.²¹³

The CAAF did not engage in a discussion of which one of the two competing theories was more sound.²¹⁴ It stated it would not be proper for the court to engage in “the policy-making prerogative that belongs to Congress.”²¹⁵

199. *Id.* (Squires, S.J., dissenting).

200. *Id.* at 188.

201. *Id.*

202. 16 M.J. 52 (C.M.A. 1983).

203. The United States Court of Military Appeals was renamed the Court of Appeals for the Armed Forces on 5 October 1994.

204. LAFAVE & SCOTT, *supra* note 183, § 6.5(g)(1); PERKINS & BOYCE, *supra* note 180, at 693-94.

205. *Garcia*, 16 M.J. at 57.

206. *Id.*

207. *Id.* at 54-55.

208. 43 M.J. 322 (1995).

209. *Id.* at 323.

210. *Id.* at 325.

211. *Id.* at 328 (Wiss, J., concurring).

212. *Id.* at 326 (Gierke, J., concurring).

213. *United States v. Valigura*, 54 M.J. 187, 190 (2000).

214. The lower court also recognized that “[t]he power to define criminal offenses is entirely legislative.” *United States v. Valigura*, 50 M.J. 884, 847 (Army Ct. Crim. App. 1999). The decision of whether to adopt a “unilateral theory” of conspiracy is a decision for Congress to make. The Army court, unlike the CAAF, did briefly discuss the merits of the “unilateral theory.” The Army court stated that it was not necessary to further the purposes of the offense of conspiracy. With a “solo conspirator” there is no “group” criminal activity, so there is no increased danger in a feigned conspiracy. Also, other inchoate offenses, such as attempted conspiracy and solicitation, will usually cover such misconduct. *Id.* at 848.

215. *Id.* at 191.

In fulfilling its role of interpreting the Code, the court looked at the statutory text, legislative intent, and precedent. While the Model Penal Code uses the word “agrees” in its definition of conspiracy,²¹⁶ Congress used the word “conspires” in Article 81 of the UCMJ. Congress also used the word “conspire” in the federal conspiracy statute, 18 U.S.C. § 371.²¹⁷ When Congress used that word when drafting the UCMJ fifty years ago, its meaning in common law was well-established. In 1934, Justice Cardozo stated, “In California as elsewhere conspiracy imports a corrupt agreement between not less than two with guilty knowledge on the part of each.”²¹⁸ That clear meaning continued for decades. In 1964, the CMA stated that “it is well settled that there can be no conspiracy when a supposed participant merely feigns acquiescence with another’s criminal proposal in order to secure his detection.”²¹⁹ Also, Senior Judge Everett pointed out in the majority opinion that “[i]n the federal courts, a conspiracy conviction still requires at least two persons who genuinely wish to accomplish the ostensible goal of the purported conspiracy.”²²⁰

The CAAF did not abandon the “bilateral theory” of conspiracy in its previous opinions. *Garcia* was based on the established principle that inconsistent results may be reached in different trials. The judges’ separate opinions in *Anzalone* demonstrated that four of the five judges did not think that the “bilateral theory” had been abandoned.²²¹ Lastly, the majority pointed out that, even under the “bilateral theory,” the accused’s misconduct does not go unpunished. A person who attempts to agree with an undercover agent to commit a crime is guilty of attempted conspiracy, and the court affirmed a conviction of that offense.²²²

As alluded to by the majority, Chief Judge Crawford’s main argument in the dissenting opinion is public policy. The height-

ened danger of conspiracies for military society, particularly in drug cases and classified cases, needs to be addressed.²²³ What the majority calls “improper judicial lawmaking,” the dissent calls “an attempt to account for ‘changing conditions in military society.’”²²⁴ The dissenting opinion is surprisingly open about the extent of its reliance on public policy to engage in judicial lawmaking. “[T]here is case law that supports the unilateral theory. But even if this point is not conceded, public policy does justify implementation of a unilateral approach to conspiracy.”²²⁵ According to the dissent, as times change, judicial interpretation of legal documents should shift accordingly.²²⁶ In support of this concept, the dissent cited cases calling the United States Constitution and Article 31 of the UCMJ “living documents.”²²⁷ The problem with the argument is that those documents are not criminal statutes defining the definition of substantive crimes. Even in the dissent’s quotation from the 1819 *McCulloch v. Maryland* opinion, Chief Justice Marshall stated: “In considering this question, we must never forget that it is a *constitution* we are expounding.”²²⁸ The dissent’s liberal interpretation of Article 81 based on public policy would appear to be improper judicial lawmaking.

United States v. Pereira:
Conspiracy To Commit Multiple Offenses

The next case, *Pereira*, also discussed the nature of the offense of conspiracy. Lance Corporal (LCpl) Pereira and three other marines formed an agreement to assault, kidnap, rob, and kill another marine. Lance Corporal Pereira pled guilty to conspiracy to commit premeditated murder, conspiracy to commit robbery, conspiracy to commit aggravated assault, conspiracy to commit kidnapping, premeditated murder, robbery, aggravated assault, kidnapping, and carrying a concealed weapon.²²⁹

216. MODEL PENAL CODE § 5.03(1) (1985).

217. Under the United States Code, a conspiracy exists “[i]f two or more persons conspire . . . to commit any offense against the United States . . . and one or more of such persons do any act to effect the object of the conspiracy.” 18 U.S.C. § 371 (2000).

218. *Morrison v. California*, 291 U.S. 82, 92 (1934).

219. *United States v. LaBossiere*, 32 C.M.R. 337, 340 (C.M.A. 1962).

220. *Valigura*, 54 M.J. at 189.

221. *Id.* at 190.

222. *Id.* at 191-92.

223. *Id.* at 196-98 (Crawford, C.J., dissenting).

224. *Id.* at 199 (Crawford, C.J., dissenting).

225. *Id.*

226. *Id.*

227. *Id.* at 198-99 (Crawford, C.J., dissenting).

228. *Id.* at 198 (Crawford, C.J., dissenting) (emphasis in original).

In the stipulation of fact and during the providence inquiry, LCpl Pereira consistently stated that he and his co-conspirators formed only one agreement to commit all of the underlying offenses. The CAAF considered the issue of whether, under these facts, the accused was guilty of one or more than one conspiracy.²³⁰

The court looked at the nature of the offense of conspiracy. “[T]he critical aspect of conspiracy is the agreement, not the object of the conspiracy.”²³¹ The law punishes the agreement, regardless of whether the object of the conspiracy is achieved and regardless of whether there are one or several objects of the conspiracy. The CAAF held that, because there was only one agreement between LCpl Pereira and his co-conspirators, there was only one conspiracy. It merged the separate specifications of conspiracy into a single specification.²³²

United States v. Browning:
Vicarious Liability of Co-Conspirators

The next case, *Browning*, touches on a different aspect of conspiracy. The CAAF looked at whether or not vicarious liability of co-conspirators applies in the military. Staff Sergeant Browning was the noncommissioned officer-in-charge of the 3d Armored Cavalry Regiment Comptroller’s Office. The prosecution’s theory was that SSG Browning and other soldiers participated in a travel fraud scheme. The accused or one of his subordinates would authorize bogus travel orders or create bogus travel receipts. As part of the scheme, several soldiers used the bogus documents to claim reimbursement for travel expenses.²³³

The accused was charged with twelve specifications of larceny and ten specifications of filing fraudulent claims. He was not charged with conspiracy. The prosecution presented evidence that SSG Browning was part of a conspiracy, that he personally committed some of the larcenies and fraudulent claims,

and that the other larcenies and false claims were committed by other members of the conspiracy.²³⁴ The defense theory was that the accused was being framed by one of the alleged co-conspirators, who testified for the prosecution.²³⁵ After the presentation of the evidence and before deliberation on findings, the military judge instructed the members that the accused could be found guilty if he personally committed the crimes, aided and abetted another to commit the crimes, or was a member of a conspiracy and a co-conspirator committed the crime in furtherance of the conspiracy. The military judge provided the following instruction:

If you’re satisfied, beyond a reasonable doubt, that at the time this offense was committed, Staff Sergeant Browning entered into and continued to be a member of an unlawful conspiracy, as I’ve defined that for you, and if you find, beyond a reasonable doubt, that this offense was committed while the conspiracy continued to exist and in furtherance of an unlawful conspiracy, or was an object of that conspiracy, then you may find Staff Sergeant Browning guilty of this offense, as a co-conspirator, even though he was not the person who actually committed the criminal offense.²³⁶

The members found the accused guilty of the several specifications of larceny and filing fraudulent claims.²³⁷

On appeal, the accused asserted that the military judge improperly amended the charges by admitting evidence of an uncharged conspiracy and instructing the members that they could find him guilty based on vicarious liability.²³⁸ There are really two parts to the issue: (1) does military law recognize vicarious liability of co-conspirators, and (2) whether the conspiracy must be charged for the prosecution to rely on that theory of criminal liability.

229. *United States v. Pereira*, 53 M.J. 183 (2000). The military judge sentenced the accused to confinement for life, reduction to the grade of E-1, and a dishonorable discharge. The Navy-Marine Corps Court of Criminal Appeals dismissed the conspiracy to commit aggravated assault based on the military judge’s finding that it was multiplicitous for sentencing with the conspiracy to commit murder. The Navy-Marine Corps court affirmed the rest of the findings and sentence. *Id.*

230. *Id.* at 183-84.

231. *Id.* at 184.

232. *Id.*

233. *United States v. Browning*, 54 M.J. 1, 3 (2000).

234. *Id.* at 4.

235. *Id.* at 3.

236. *Id.* at 6.

237. *Id.* at 3. The general court-martial, composed of officer and enlisted members, adjudged a sentence of a dishonorable discharge, confinement for ten years, total forfeitures, and reduction to the grade of E1. *Id.*

238. *Id.* at 6-7.

The UCMJ does not specifically state that co-conspirators are vicariously liable. It is not mentioned in either Article 81, which proscribes conspiracy, nor in Article 77,²³⁹ which provides the different theories by which an accused can be criminally liable as a principal. Article 77 states:

Any person punishable under this chapter who
 (1) commits an offense punishable by this chapter, or aids, abets, counsels, commands, or procures its commission; or
 (2) causes an act to be done which if directly performed by him would be punishable by this chapter; is a principal.²⁴⁰

The CAAF held, without much discussion, that military law recognizes vicarious liability, citing its 1986 opinion in *United States v. Jefferson*: “Although Article 77 does not specifically deal with the vicarious liability of a coconspirator, we believe that the language of Article 77(1) is broad enough to encompass it.”²⁴¹

The CAAF held that the prosecution could prove some of the offenses on a theory of vicarious liability, even though conspiracy was not specifically alleged on the charge sheet.²⁴² In support of its holding, the court cited federal cases in which the defendant was not charged with conspiracy but the judge instructed the members on vicarious liability under the conspiracy theory.²⁴³ This is consistent with the military practice of charging principals. All principals are charged as if they were the actual perpetrator.²⁴⁴ Thus, an accused who is vicariously liable for larcenies and fraudulent claims committed by co-conspirators should be charged, under Articles 121 and 132, as if he personally committed the crimes. Also, military law does not require the prosecution to elect a specific theory of liability, and the case may be presented to the members on multiple theories.²⁴⁵ The court found that there was no error,²⁴⁶ and affirmed the convictions.²⁴⁷

Over the last year, the CAAF clarified the nature of the offense of conspiracy and the concept of vicarious liability. On one hand, in *Valigura*, the court refused to adopt the “unilateral theory” of conspiracy, which would broaden the scope of the offense of conspiracy. It adhered to the “bilateral theory” of conspiracy, which requires at least two persons with the necessary mental state—genuine intent to accomplish the object of the purported conspiracy. Also, as the court held in *Pereira*, the number of conspiracy convictions cannot be multiplied based on the number of crimes that are the object of the conspiracy. The conspiracy is defined by the agreement, and a single agreement will only support one conspiracy conviction. On the other hand, in *Browning*, the court interpreted Article 77(1) broadly and allowed the prosecution to rely on vicarious liability of co-conspirators, even though conspiracy was not alleged on the charge sheet. In these different cases, the court appears to be strictly defining the crime of conspiracy but allowing the prosecution to take full advantage of the traditional special rules that come with conspiracy. The common thread in these apparently divergent holdings is the court’s reliance on the intent of Congress and federal common law when interpreting conspiracy under the UCMJ. Practitioners researching future issues involving the “darling of the prosecutor’s nursery” can expect the CAAF to follow this trend.

Conclusion

In the last term, the CAAF sought to both ensure justice and promote military discipline. In some cases, achieving both goals was challenging. As a result of the balance struck by the court, we see trends in three areas. First, if an accused NCO, in an improper relationship with a subordinate, is charged with a nonconsensual crime against the subordinate, the court will closely scrutinize the case. It will ensure the evidence proves all the elements, especially lack of consent. Second, the court recognizes the importance of military discipline. It will interpret the UCMJ to give full effect to Congress’s intent to protect

239. UCMJ art. 77 (2000).

240. *Id.*

241. 22 M.J. 315, 324 (C.M.A. 1986). In *Jefferson*, the accused asked another soldier’s assistance in robbing a cab driver and handed the other soldier a loaded handgun. Although no mention was made of the handgun, the other soldier shot and killed the cab driver during the robbery. The CMA affirmed the accused’s conviction for felony-murder. *Id.*

242. *Browning*, 54 M.J. at 8.

243. *Id.* at 7.

244. MCM, *supra* note 2, R.C.M. 307(c)(3) discussion (H)(i).

245. *See United States v. Vidal*, 23 M.J. 319, 324-25 (C.M.A. 1987).

246. *Browning*, 54 M.J. at 8.

247. *Id.* at 10.

military discipline. It also will not overturn the members' decisions on factual issues involving military discipline, unless the evidence fails to meet the low standard required for legal sufficiency. Third, the CAAF clarified conspiracy under the UCMJ. It defined the crime narrowly, but it gave the prosecution the full benefit of the broad special rules that come with the crime

of conspiracy. The court based its different interpretations of conspiracy law on the intent of Congress. Although one may disagree with the court's decisions in particular cases, the CAAF is serving the military justice system well by striving to achieve both justice and military discipline, without unnecessarily sacrificing one for the sake of the other.