

# Katy Bar the Door<sup>1</sup>—2006 New Developments in Fourth Amendment Search and Seizure Law

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*The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.*<sup>2</sup>

## Introduction

Search and seizure law's history is a struggle for clarity in an atmosphere of ambiguity.<sup>3</sup> The U.S. Supreme Court further clarified Fourth Amendment law in the October 2005 term<sup>4</sup> by addressing exceptions to the warrant requirement,<sup>5</sup> probable cause,<sup>6</sup> and the application of the exclusionary rule.<sup>7</sup> The 2006 Term of the Court of Appeals for the Armed Forces (CAAF)<sup>8</sup> addressed two cases anticipated to be significant in the search and seizure concepts surrounding computers and other electronic media.<sup>9</sup> Therefore, Part I of this article discusses two of the five search and seizure cases decided by the Supreme Court, and Part II discusses the two CAAF cases which "analyze the threshold expectation of privacy requirement within the context of computers and other digital media."<sup>10</sup>

### I. 2005 Term U.S. Supreme Court Cases—Addressing Significant Splits Among Judicial Circuits

In the October 2005 term, the Court sought to settle Fourth Amendment jurisprudence where previous Court precedent or state court interpretation of Court precedent has created a difference of opinion, and therefore ripened into justiciability. For example, the Court had ruled that warrantless search is permissible with the consent of one co-occupant in the other's

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<sup>1</sup> World Wide Words, *Katy bar the door*, <http://www.worldwidewords.org/qa/qa-kat1.htm> (last visited Sept. 24, 2007). An American expression, more common in the South than elsewhere meaning: "watch out," "get ready for trouble," and, "a desperate situation at hand." This idiom is intended to warn the reader not to ignore these new developments in search and seizure law.

<sup>2</sup> U.S. CONST. amend. IV.

<sup>3</sup> "The Fourth Amendment, it has been aptly noted, has 'both the virtue of brevity and the vice of ambiguity.'" WAYNE R. LAFAYE, SEARCH AND SEIZURE 8 (4th ed. 2004) (quoting J. LANDYSKI, SEARCH AND SEIZURE AND THE SUPREME COURT 42 (1966)). See also LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 117 (2nd ed. 1985). "The federal Constitution was marvelously supple . . . [i]t turned out to be neither too tight nor too loose. It was in essence a frame, a skeleton, an outline for the form of government; on specifics, it mostly held its tongue." *Id.*

<sup>4</sup> The U.S. Supreme Court's October 2005 term began on 3 October 2005 and ended 1 October 2006. See Supreme Court of the United States, 2005 Term Opinions of the Court, <http://www.supremecourtus.gov/opinions/05slipopinion.html> (last visited Sept. 24, 2007).

<sup>5</sup> See *infra* sec. I.A, Georgia v. Randolph (*Randolph II*), 547 U.S. 103 (2006) (addressing the warrantless search of a shared dwelling pursuant to consent granted by one tenant over the express refusal by a physically present co-tenant); and, Brigham City v. Stuart, 126 S. Ct. 1943 (2006) (addressing the Emergency Aid Doctrine and considers whether police may enter a home without a warrant when they have an objectively reasonable basis for believing that an occupant is seriously injured or imminently threatened with such injury).

<sup>6</sup> See United States v. Grubbs, 547 U.S. 90 (2006) (addressing whether "anticipatory search warrants" are constitutionally permissible); Samson v. California, 126 S. Ct. 2193 (2006) (addressing whether suspicionless search was a reasonable condition of parole which advanced state interests and severely diminished the inmate's expectation of privacy while on parole. The State of California had substantial legitimate interests in reducing recidivism and thereby promoting reintegration and positive citizenship, and requiring individualized suspicion to support the search of the inmate would undermine those interests. Further, the constitutional requirement that the search be reasonable did not preclude the suspicionless search, and the inmate's limited privacy rights were protected by the prohibition of searches which were arbitrary, capricious, or harassing.).

<sup>7</sup> See Hudson v. Michigan, 126 S. Ct. 2159 (2006)

<sup>8</sup> The CAAF 2006 term began on 1 October 2005 and ended 30 September 2006. See U.S. Court of Appeals for the Armed Forces, Opinions & Digest, <http://www.armfor.uscourts.gov/2006Term.htm> (last visited Sept. 24, 2007).

<sup>9</sup> See *infra* sec. II, United States v. Conklin, 63 M.J. 333 (2006) (addressing whether consent to a subsequent search is the antidote to the poison of an earlier unlawful search), and sec. II.A, United States v. Long (*Long II*), 64 M.J. 57 (2006) (addressing whether a service member had a reasonable expectation of privacy in the e-mail communications sent and received via the Headquarters Marine Corps computer network server).

<sup>10</sup> See Lieutenant Colonel M. K. Jamison, USMC, *New Developments in Search & Seizure Law*, ARMY LAW., Apr. 2006, at 9 (identifying these four emerging cases as significant in furthering the body of Fourth Amendment law). This article may be viewed as an addendum or continuation of Lieutenant Colonel Jamison's article.

absence,<sup>11</sup> but left unsettled whether the consent is valid “in the face of the refusal of another physically present occupant.”<sup>12</sup> Additionally, left unsettled, is whether every Fourth Amendment violation results in application of the exclusionary rule.<sup>13</sup> In 2006 the Supreme Court led the way in two important cases: first, by defining the scope of consent by co-tenants when they are both physically present,<sup>14</sup> and second, whether to apply the exclusionary rule for a violation of a “knock and announce” warrant.<sup>15</sup>

#### A. Scope of Consent by Co-Tenants

The Supreme Court in *Georgia v. Randolph (Randolph II)* demonstrates judicial agility in assessing Fourth Amendment reasonableness in warrantless searches based on consent.<sup>16</sup> “The Fourth Amendment recognizes a valid warrantless entry and search of a premises when the police obtain the voluntary consent of an occupant who shares, or is reasonably believed to share, common authority over the property, and no present co-tenant objects.”<sup>17</sup> In assessing reasonableness, the Court gives “great significance to widely shared social expectations” to establish the authority over the property.<sup>18</sup> Hence, the issue becomes whether such an evidentiary seizure is likewise lawful with the permission of one occupant over the express refusal of the other who is present at the scene.<sup>19</sup>

In May 2001, Scott Randolph and his wife, Janet, separated due to marital problems.<sup>20</sup> Mrs. Randolph returned to Canada with her son, but came to visit Mr. Randolph two months later.<sup>21</sup> On the morning of 6 July, after a domestic dispute, Mr. Randolph left with their son.<sup>22</sup> Mrs. Randolph called the police complaining that her husband had taken her son away.<sup>23</sup> When the police arrived Mrs. Randolph “told them that her husband was a cocaine user whose habit had caused financial troubles.”<sup>24</sup> Mr. Randolph explained that he had taken the child to a neighbor’s house out of concern his wife would again leave the country with him.<sup>25</sup> Mr. Randolph also denied cocaine use.<sup>26</sup>

Officer Murray went with Mrs. Randolph to collect her son from the neighbors.<sup>27</sup> Upon their return, Mrs. Randolph renewed her complaint about her husband’s drug use to the police, and “volunteered that there were ‘items of drug evidence’ in the house.”<sup>28</sup> Police Sergeant Murray asked Mr. Randolph for permission to search the house, which he unequivocally refused.<sup>29</sup> Next, the police officer turned to Mrs. Randolph and asked her consent to search, which she gave.<sup>30</sup> Officer Murray was then led upstairs where he observed, “a section of a drinking straw with a powdery residue he suspected to be

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<sup>11</sup> *United States v. Matlock*, 415 U.S. 164 (1974).

<sup>12</sup> *See Randolph II*, 547 U.S. 103 (2006).

<sup>13</sup> *Hudson v. Michigan*, 126 S. Ct. 2159 (2006).

<sup>14</sup> *Randolph II*, 547 U.S. at 103.

<sup>15</sup> *Hudson*, 126 S. Ct. at 2159.

<sup>16</sup> *Randolph II*, 547 U.S. at 103.

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

<sup>20</sup> *Id.* at 106.

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

<sup>22</sup> *Id.* at 107.

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

<sup>30</sup> *Id.*

cocaine.”<sup>31</sup> After leaving the house and consulting with the district attorney (who advised him to stop the search and obtain a warrant), Officer Murray returned to the house at which time Mrs. Randolph withdrew her consent to search.<sup>32</sup> Upon securing a search warrant, the police returned to the home and seized additional evidence of drug use, which was used as the basis to indict Mr. Randolph for possession of cocaine.<sup>33</sup>

Mr. Randolph moved to suppress the evidence “as products of a warrantless search of his house unauthorized by his wife’s consent over his express refusal.”<sup>34</sup> The Georgia Superior Court (trial court) denied his motion and ruled that Mrs. Randolph had common authority to consent to the search.<sup>35</sup> The Court of Appeals of Georgia reversed the Superior Court, and was affirmed by the State Supreme Court, finding that “the consent to conduct a warrantless search of a residence given by one occupant is not valid in the face of the refusal of another occupant who is physically present at the scene to permit a warrantless search.”<sup>36</sup> The Supreme Court of Georgia distinguished the Court’s holding in *United States v. Matlock*, which held that “the consent of one who possesses common authority over premises or effects is valid as against the absent, non-consenting person with whom the authority is shared,”<sup>37</sup> because Mr. Randolph was not “absent” from the conversation or the “colloquy” on which the police relied for consent.<sup>38</sup> The Supreme Court granted certiorari to resolve “whether one occupant may give law enforcement effective consent to search shared premises, as against a co-tenant who is present and states a refusal to permit a search.”<sup>39</sup>

The Supreme Court addresses consent in terms of reasonableness. “The constant element in assessing Fourth Amendment reasonableness in the consent cases, then, is the great significance given to widely shared social expectations, which are naturally enough influenced by the law of property, but not controlled by its rules.”<sup>40</sup> Citing precedent, the Court further supported this proposition by explaining that a reasonable expectation of privacy is “reasonable if it has ‘a source outside of the Fourth Amendment, either by reference to concepts of real or personal property law or to understandings that are recognized and permitted by society.’”<sup>41</sup> Although having not previously dealt with the reasonableness of a police entry upon reliance of a co-tenant subject to challenge by the other present co-tenant, the Court took a step forward in an earlier case.<sup>42</sup> In *Minnesota v. Olsen*, the Court found that overnight guests “have a legitimate expectation of privacy in their temporary quarters.”<sup>43</sup> So, utilizing this previous reasoning the court recognizes if “customary expectation of courtesy or deference is a foundation of Fourth Amendment rights of a houseguest, it presumably should follow that an inhabitant of shared premises may claim at least as much, and it turns out that the co-inhabitant naturally has an even stronger claim.”<sup>44</sup> The Court subsequently affirmed the Supreme Court of Georgia and held that “a physically present co-occupant’s stated refusal to permit entry renders warrantless entry and search unreasonable and invalid to him.”<sup>45</sup>

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<sup>31</sup> *Id.*

<sup>32</sup> *Id.* In fact, the police took the drinking straw and the Randolphs to the police station. *Id.*

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

<sup>34</sup> *Id.*

<sup>35</sup> *Id.* at 107-08.

<sup>36</sup> *Id.* (citing *Georgia v. Randolph (Randolph I)*, 604 S.E.2d 835, 836 (2004)).

<sup>37</sup> *Id.* (citing *United States v. Matlock*, 415 U.S. 164, 170 (1974)).

<sup>38</sup> *Id.* at 108-10. “The state supreme court stressed that the officers in *Matlock* had not been ‘faced with the physical presence of joint occupants, with one consenting to the search and the other objecting.’” *Id.* at 108 (citing *Randolph I*, 604 S.E.2d at 837).

<sup>39</sup> *Id.* at 108. The Court wanted to resolve this split of authority on this issue. Four courts of appeal have considered this question and concluded that consent remains effective in the face of an express objection. *Id.* at n.1. See *United States v. Morning*, 64 F.3d 531, 533-36 (9th Cir. 1995); *United States v. Donlin*, 982 F.2d 31, 33 (1st Cir. 1992); *United States v. Hendrix*, 595 F.2d 883, 885 (D.C. Cir. 1979); *United States v. Sumlin*, 567 F.2d 684, 687-88 (6th Cir. 1977). *Randolph II*, 547 U.S. at 108 n.1. Many state courts addressing this issue have reached that same conclusion. See, e.g., *Love v. State*, 138 S.W.3d 676, 680 (2003); *Laramie v. Hysong*, 808 P.2d 199, 203-05 (Wyo. 1991); but cf. *State v. Leach*, 782 P.2d 1035, 1040 (1989) (en banc) (requiring consent of all present co-occupants). *Randolph II*, 547 U.S. at 108 n.1.

<sup>40</sup> *Randolph II*, 547 U.S. at 110-11.

<sup>41</sup> *Id.* (citing *Rakas v. Illinois*, 439 U.S. 128, 144 n.12 (1978)).

<sup>42</sup> *Id.* at 111-13.

<sup>43</sup> *Id.* (citing *Minnesota v. Olsen*, 495 U.S. 91, 99 (1990)).

<sup>44</sup> *Id.*

<sup>45</sup> *Id.* at 103-05.

The Court draws a fine line in its holding in *Randolph II* and makes a pragmatic decision.<sup>46</sup> It recognizes the “simple clarity of complementary rules, one recognizing the co-tenant’s permission when there is no fellow occupant on hand, the other according dispositive weight to the fellow occupant’s contrary indication when he expresses it.”<sup>47</sup> The majority also clearly identifies the holding’s limitations too.<sup>48</sup> For example, the holding only applies where an objecting tenant is physically present—the police may not sequester or physically remove a potentially objecting co-tenant from the scene, nor do the police need to seek out other non-present tenants.<sup>49</sup> And in an effort to blunt the dissent’s point that the decision will prevent police from assisting abused spouses who seek to authorize police entry into a home they share with a non-consenting abuser, the majority emphasize that the exigent circumstances<sup>50</sup> exception to a warrant requirement still exists.<sup>51</sup> Furthermore, they counter the dissent by saying that the cooperative spouse can still tell all she knows to the police to present to a magistrate to get a warrant.<sup>52</sup> This also reminds us that “[t]he informed and deliberate determinations of magistrates empowered to issue warrants as to what searches and seizures are permissible under the Constitution are to be preferred over the hurried action of officers.”<sup>53</sup>

In sum, *Randolph II* addresses a narrowly framed issue and holding which upholds a co-tenant’s privacy right.<sup>54</sup> Despite the dissent’s perception the court has created constitutional law in this case, the majority has simply and logically defined an ambiguity and split of authority of the Court’s previous precedents.<sup>55</sup>

## B. The Scope of the Exclusionary Rule in Fourth Amendment “Knock and Announce” Violations

The second significant case from the Supreme Court regarding Fourth Amendment law is *Hudson v. Michigan* for its refinement of the exclusionary rule.<sup>56</sup> The exclusionary rule is a rule that excludes or suppresses evidence obtained in violation of an accused person’s constitutional rights.<sup>57</sup> This case addresses the issue of remedy; that is, whether the exclusionary rule is to universally apply in response to all constitutional rights violations, specifically a violation of the knock and announce rule.<sup>58</sup>

The facts are not in dispute. The police executed a warrant against Booker Hudson for drugs and firearms at his home and found both rock cocaine and a loaded gun hidden in his furniture.<sup>59</sup> He was “charged under Michigan law with unlawful drug and firearm possession.”<sup>60</sup>

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<sup>46</sup> *Id.* at 121-22.

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

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

<sup>49</sup> *Id.*

<sup>50</sup> “While a search warrant must necessarily rest upon previously obtained information, unannounced entry is excused only on the basis of exigent circumstances existing at the time an officer approaches a sit to make an arres or execute a warrant.” LAFAVE, *supra* note 3, at 695 (citing Parsley v. Superior Court, 513 P.2d 611 (Cal. 1973)).

<sup>51</sup> *Randolph II*, 547 U.S. at 118. Chief Justice Roberts and Justice Scalia make several pointed comments in their dissent; e.g. co-occupants have “assumed the risk that one of their number might permit a common area to be searched”; voluntary consent is “reasonable”; and, shifting social expectations is not a promising foundation on which to ground a constitutional rule. *Id.* at 127-29.

<sup>52</sup> *Id.* at 116.

<sup>53</sup> *Id.* (citing *United States v. Lefkowitz*, 285 U.S. 452, 464 (1932)).

<sup>54</sup> *Randolph II*, 547 U.S. 103.

<sup>55</sup> See *United States v. Matlock*, 415 U.S. 164 (1974) (recognizing the permissibility of an entry made with the consent of one co-occupant in the other’s absence); *Minnesota v. Olson*, 495 U.S. 91 (1990) (holding that overnight houseguests have a legitimate expectation of privacy in their temporary quarters); *Illinois v. Rodriguez*, 497 U.S. 177 (1990) (recognizing the permissibility of an entry made with the consent of one co-occupant in the other’s absence, in this case, where the defendant was asleep in the apartment).

<sup>56</sup> *Hudson v. Michigan*, 126 S. Ct. 2159 (2006).

<sup>57</sup> BLACK’S LAW DICTIONARY 587 (7th ed. 1999).

<sup>58</sup> In criminal procedure, “[t]he requirement that the police knock at the door and announce their identity, authority, and purpose before entering a residence to execute an arrest or search warrant.” *Id.* at 876. A violation of the knock and announce rule is analyzed under the Fourth Amendment reasonableness requirement. The exclusionary rule is designed to prevent police misconduct. *Cf.* *United States v. Calandra*, 414 U.S. 338, 351 (1974). “[I]t does not follow that the Fourth Amendment requires adoption of every proposal that might deter police misconduct.” *Id.*

<sup>59</sup> *Hudson*, 126 S. Ct. at 2163.

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

What is in contention is the effect of the fact the police only waited “three to five seconds” after announcing their presence, entering Hudson’s home, and executing the valid warrant.<sup>61</sup> Michigan has “conceded that the entry was a knock-and-announce violation.”<sup>62</sup> Hudson moved to suppress all the inculpatory evidence discovered, arguing that the premature police entry violated his Fourth Amendment rights.<sup>63</sup> The Michigan trial court agreed with Hudson and granted his motion.<sup>64</sup> The Michigan Court of Appeals, on interlocutory appeal,<sup>65</sup> did not agree and reversed.<sup>66</sup> The Michigan Supreme Court refused to hear the case and “denied leave to appeal.”<sup>67</sup> Hudson was consequently convicted of drug possession.<sup>68</sup> The Michigan court of appeals and supreme court rejected his Fourth Amendment claim on appeal and affirmed the conviction.<sup>69</sup> The U.S. Supreme Court granted certiorari to decide whether the exclusionary rule is appropriate for violation of the knock-and-announce requirement.<sup>70</sup>

The knock and announce rule is steeped in common law and provides the cornerstone for reasonable searches and seizures under the Fourth Amendment.<sup>71</sup> The Supreme Court case of *Wilson v. Arkansas*, observes “[a]n examination of the common law of search and seizure leaves no doubt that the reasonableness of a search of a dwelling may depend in part on whether law enforcement officers announced their presence and authority prior to entering.”<sup>72</sup> Although acknowledging this common law privilege, but yet not having held so before, the Court holds that the “common law ‘knock and announce’ principle forms a part of the reasonableness inquiry under the Fourth Amendment.”<sup>73</sup>

The purpose of the knock-and-announce rule is three fold. First, the rule is designed to protect life and limb.<sup>74</sup> For example, an unannounced entry may provoke violence in supposed self-defense by the surprised residence.<sup>75</sup> Second, the rule gives individuals “opportunity to comply with the law and to avoid destruction of property occasioned by a forcible entry.”<sup>76</sup> And lastly, the knock-and-announce rule protects privacy and dignity. It “assures the opportunity to collect oneself before answering the door.”<sup>77</sup> These three purposes make tangible the Court’s holding that the knock-and-announce rule as the cornerstone of Fourth Amendment reasonableness violations.

In case of a Fourth Amendment violation, the federal exclusionary rule is applied.<sup>78</sup> Evidence that is unlawfully seized from home without a warrant in violation of the Fourth Amendment is suppressed.<sup>79</sup> Suppression is meant to deter police

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<sup>61</sup> *Id.* at 2162.

<sup>62</sup> *Id.* at 2163. *See supra* note 58.

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

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

<sup>65</sup> An interlocutory appeal is an appeal that occurs before the trial court’s final ruling on the entire case. BLACK’S LAW DICTIONARY, *supra* note 57, at 96.

<sup>66</sup> The court of appeals cites *People v. Vasquez*, and *People v. Stevens*, which both held that “suppression is inappropriate when entry is made pursuant to warrant but with proper ‘knock and announce.’” *Hudson*, 126 S. Ct. at 2162 (citing *People v. Vasquez*, 602 N.W.2d. 376, 379 (Mich. 1999) (per curiam); *People v. Stevens*, 597 N.W.2d 53, 57 (Mich. 1999)).

<sup>67</sup> *Id.*

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

<sup>69</sup> *Id.*

<sup>70</sup> *Id.* (citing *Wilson v. Arkansas*, 514 U.S. 927, 937 (1995) which specifically declined to decide whether the exclusionary rule is appropriate for violation of the knock-and-announce requirement). *Id.*

<sup>71</sup> *Hudson*, 126 S. Ct. at 2172 (citing *Wilson*, 514 U.S. at 932. *Wilson* traces the lineage of the knock-and-announce rule back to the 13th Century). *Id.*

<sup>72</sup> *Id.* (citing *Wilson*, 514 U.S. at 931).

<sup>73</sup> The court has “little doubt that the Framers of the Fourth Amendment thought that the method of an officer’s entry into a dwelling was among the factors to be considered in assessing the reasonableness of a search or seizure.” *Id.*

<sup>74</sup> *Hudson*, 126 S. Ct. at 2165 (citing *McDonald v. United States*, 335 U.S. 451, 460-61 (1948)).

<sup>75</sup> *Id.*

<sup>76</sup> *Id.* (citing *Richards v Wisconsin*, 520 U.S. 385, 393 (1997)).

<sup>77</sup> *Id.* (citing *Richards*, 520 U.S. at 393 n.5. The knock-and-announce rule protects against sudden entrances and permits residents to prepare for the entry of the police. As *Richards* notes: “The brief interlude between announcement and entry with a warrant may be the opportunity that an individual has to pull on clothes or get out of bed.”). *Id.*

<sup>78</sup> *Weeks v. United States*, 232 U.S. 383 (1914). The exclusionary rule for Fourth Amendment violations was applied to the states through the Fourteenth Amendment. *See Mapp v. Ohio*, 367 U.S. 643 (1961).

<sup>79</sup> *Weeks*, 232 U.S. at 391-92.

misconduct. In fact, the Court has said that “[t]he driving legal purpose underlying the exclusionary rule, namely, the deterrence of unlawful government behavior, argues strongly for suppression.”<sup>80</sup>

The majority begins its analysis in Mr. Hudson’s case by declaring suppression is not warranted.<sup>81</sup> Justice Scalia, writing for the majority, immediately identifies the controversial nature of the exclusionary rule and rejects its “[i]ndiscriminate application”<sup>82</sup> and seeks to hold it to be applicable only “where its remedial objectives are thought most efficaciously served”;<sup>83</sup> that is where its deterrence benefits outweigh its “substantial social costs.”<sup>84</sup> The Court is therefore reluctant to expand it,<sup>85</sup> and have placed a high burden on those urging its application due to its “costly toll.”<sup>86</sup>

The “cost” to use the exclusionary rule in Mr. Hudson’s case does not outweigh its deterrence benefits. Mr. Hudson argues that “without suppression there will be no deterrence of knock-and-announce violations at all.”<sup>87</sup> The Court counters by observing that the knock-and-announce rule does not protect “one’s interest in preventing the government from seeing or taking evidence described in a warrant.”<sup>88</sup> The greater deterrence for violators of the knock-and-announce rule is the threat of civil litigation<sup>89</sup> and the “increasing professionalism of police forces, including a new emphasis on internal police discipline.”<sup>90</sup> In fact, the Court demonstrates little sympathy for Mr. Hudson’s case by identifying precedent where greater egregious conduct has produced evidence which the Court has not excluded, and therefore the majority openly wonders why the Court should take a more generous approach in this case.<sup>91</sup>

In sum, the Court holds that the “[r]esort to the massive remedy of suppressing evidence of guilt is unjustified” in the case of a knock-and-announce violation.<sup>92</sup> The Court, balancing the “social costs” and the deterrence effect, sees no benefit in excluding evidence that they believe would be inevitably discovered due to the lawful warrant to search Mr. Hudson’s home.<sup>93</sup>

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The effect of the Fourth Amendment is to put the courts of the United States and Federal officials, in the exercise of their power and authority, under limitations and restraints as to the exercise of such power and authority, and to forever secure the people, their persons, houses, papers and effects against all unreasonable searches and seizures under the guise of law. This protection reaches all alike, whether accused of crime or not, and the duty of giving to it force and effect is obligatory upon all entrusted under our Federal system with the enforcement of the laws. The tendency of those who execute the criminal laws of the country to obtain conviction by means of unlawful seizures and enforced confessions, the latter often obtained after subjecting accused persons to unwarranted practices destructive of rights secured by the Federal Constitution, should find no sanction in the judgments of the courts which are charged at all times with the support of the Constitution and to which people of all conditions have a right to appeal for the maintenance of such fundamental rights.

*Id.*

<sup>80</sup> *Hudson*, 126 S. Ct. at 2173. The court cites *Elkins v. United States*, which states the purpose of the exclusionary rule is “to deter-to compel respect for the constitutional guaranty . . . by removing the incentive to disregard it.” *Elkins v. United States*, 364 U.S. 206, 217 (1960).

<sup>81</sup> *Hudson*, 126 S. Ct. at 2165.

<sup>82</sup> *Id.* at 2162 (quoting *United States v. Leon*, 468 U.S. 897, 908 (1984)).

<sup>83</sup> *Id.* at 2163. See *United States v. Calandra*, 414 U.S. 338, 348 (1974).

<sup>84</sup> *Hudson*, 126 S. Ct. at 2163 (quoting *Leon*, 468 U.S. at 907. Substantial social costs refer to setting the guilty free and the dangerous at large). *Id.* (citations omitted).

<sup>85</sup> *Id.* See *Colorado v. Connelly*, 479 U.S. 157, 166 (1986).

<sup>86</sup> *Hudson*, 126 S. Ct. at 2163. See *Pennsylvania Bd. of Prob. and Parole v. Scott*, 524 U.S. 357, 364-65 (1998).

<sup>87</sup> *Hudson*, 126 S. Ct. at 2166.

<sup>88</sup> *Id.* at 2165.

<sup>89</sup> *Id.* See, e.g., *Correctional Servs. Corp. v. Malesko*, 534 U.S. 61, 70 (2001). “The threat of litigation and liability will adequately deter federal officers . . .” *Id.*

<sup>90</sup> *Hudson*, 126 S. Ct. at 2165.

<sup>91</sup> *Id.* at 2167. See also *Segura v. United States*, 468 U.S. 796 (1984); *New York v. Harris*, 495 U.S. 14 (1990); *United States v. Ramirez*, 523 U.S. 65 (1998). But see the dissent which says “the driving legal purpose underlying the exclusionary rule, namely, the deterrence of unlawful government behavior, argues strong for suppression.” *Hudson*, 126 S. Ct. at 2173.

<sup>92</sup> *Hudson*, 126 S. Ct. at 2168.

<sup>93</sup> The dissent finds the majority’s opinion a miscarriage of justice and a misapplication of the law. First, Justice Breyer, writing for the minority, is unconvinced by the majority’s argument that deterrence of future knock-and-announce violations is met by the fear of civil lawsuits and a more professional police force. Furthermore, Breyer sees court precedent supporting suppression of evidence in Mr. Hudson’s case. There are only a number of instances where the Court has declined to apply the exclusionary rule: where there is a specific reason to believe that application of the rule would “not result in appreciable deterrence, for example in instances of executing a defective search warrant in “good faith”; or, where admissibility in proceedings other than

The Court's holding is very narrow, but indicative of a conservative approach in applying the exclusionary rule. The application of this holding for judge advocates is equally narrow, but useful in evaluating the reasonableness analysis of such situations. A violation of the Fourth Amendment knock-and-announce rule, without more, will not result in suppression of evidence at trial.<sup>94</sup>

## II. 2006 Term CAAF Cases—Computers and Digital Media

The applicability of the Fourth Amendment to digital media, computers and e-mail, continues to be shaped whereas it is relatively well-established for investigations involving physical evidence.<sup>95</sup> For example, police entering a home or opening one's private packages constitute a "search," and taking physical property is "seizing" it.<sup>96</sup> The question is how does the Fourth Amendment apply to computers and digital evidence?<sup>97</sup> Specifically, do we have an expectation of privacy in e-mail not only in our personal e-mail accounts, but in our work or government e-mails?

In the 2006 Term, CAAF cases continue to explore Fourth Amendment treatment of computers and digital media.<sup>98</sup> Last year the Navy-Marine Corps Court of Criminal Appeals (NMCCA) courageously addressed computers and digital media in *United States v. Ohnesorge*<sup>99</sup> and *United States v. Long (Long II)*.<sup>100</sup> Additionally, the Air Force Court of Criminal Appeals does their part in setting the stage for 2006 CAAF term of court by addressing the scope of voluntary consent in a computer search following an illegal search in *United States v. Conklin*.<sup>101</sup> This article will address CAAF's analysis and decision in *Long II* and *United States v. Conklin* and their impact within the military justice system.

### A. Expectation of Privacy in Government E-Mail Communications

The CAAF's decision in *Long II* is bold within the context of search and seizure law. The court addressed the NMCCA decision upon the Navy Judge Advocate General certification of two issues, and one issue submitted by the Appellee and Cross-Appellant:

#### I. WHETHER THE NAVY-MARINE CORPS COURT OF CRIMINAL APPEALS ERRED WHEN [IT] DETERMINED THAT, BASED ON THE EVIDENCE ADDUCED AT TRIAL, APPELLEE HELD A

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criminal trials was at issue. Moreover, the minority take issue with Justice Scalia's application of the inevitable discovery exception in his assertion that "the police would have executed the warrant they had obtained, and would have discovered the gun and drugs inside the house." Breyer cites *Murray v. United States*, 487 U.S. 533, 542 (1988) which states that "[t]he inevitable discovery exception rests upon the principle that the remedial purposes of the exclusionary rule are not served by suppressing evidence discovered through a "later, lawful seizure" that is "genuinely independent of an earlier, tainted one." *Id.*

<sup>94</sup> Stephanie Francis Ward, *Court Backs Evidence Found in 'Knock-Announce' Case*, <http://www.abanet.org/journal/ereport/jn16hudson.html> (last visited June 16, 2006). Prosecutors say Justice Scalia's opinion represents a common sense approach to executing warrants. Defense counsels say they fear more violent searches, more paramilitary type raids. *Id.*

<sup>95</sup> ORIN S. KERR, *COMPUTER CRIME LAW* 298 (2006).

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

<sup>97</sup> *Id.*

<sup>98</sup> See *United States v. Long (Long II)*, 64 M.J. 57 (2006); *United States v. Conklin*, No. 35217, 2004 CCA LEXIS 290 (A.F. Ct. Crim. App. Dec. 30, 2004) (unpublished).

<sup>99</sup> *United States v. Ohnesorge*, 60 M.J. 946 (N-M. Ct. Crim. App. 2005). The NMCCA broke new ground in military jurisprudence when it considered Fourth Amendment applicability to non-content digital information. The court held that a service member has not reasonable expectation of privacy in subscriber information that has been provided to a commercial Internet site. *Id.* at 948. See Jamison, *supra* note 10, at 9.

<sup>100</sup> *United States v. Long (Long I)*, 61 M.J. 539 (N-M. Ct. Crim. App. 2005). The NMCCA held that a naval servicemember has a reasonable expectation of privacy in government e-mail stored on a government server. Lieutenant Colonel Jamison identified this as the most significant case in 2005. Jamison, *supra* note 10, at 9. Likewise, it is the most significant case in 2006 as CAAF decides to affirm NMCCA reasonable expectation of privacy in government e-mail. *Id.* at 13.

<sup>101</sup> *Conklin*, 2004 CCA LEXIS at \*290. The CAAF granted Conklin's appeal on the following two issues:

I. WHETHER THE MILITARY JUDGE ERRED IN ADMITTING EVIDENCE AT TRIAL THAT WAS OBTAINED AS A DIRECT RESULT OF AN ILLEGAL SEARCH OF APPELLANT'S PERSONAL COMPUTER.

II. WHETHER THE EVIDENCE PRESENTED BY THE PROSECUTION AT TRIAL WAS LEGALLY INSUFFICIENT TO SUPPORT APPELLANT'S CONVICTION FOR POSSESSING CHILD PORNOGRAPHY.

*Id.*

SUBJECTIVE EXPECTATION OF PRIVACY IN HER E-MAIL ACCOUNT AS TO ALL OTHERS BUT THE NETWORK ADMINISTRATOR.

II. WHETHER THE NAVY-MARINE CORPS COURT OF CRIMINAL APPEALS ERRED WHEN [IT] DETERMINED THAT IT IS REASONABLE, UNDER THE CIRCUMSTANCES PRESENTED IN THIS CASE, FOR AN AUTHORIZED USER OF THE GOVERNMENT COMPUTER NETWORK TO HAVE A LIMITED EXPECTATION OF PRIVACY IN THEIR E-MAIL COMMUNICATIONS SENT AND RECEIVED VIA THE COMPUTER NETWORK SERVER.<sup>102</sup>

III. WHETHER THE LOWER COURT ERRED IN FINDING THAT THE MILITARY JUDGE'S ERROR IN ADMITTING E-MAILS SENT AND RECEIVED BY LANCE CORPORAL LONG ON HER GOVERNMENT COMPUTER WAS HARMLESS BEYOND A REASONABLE DOUBT.<sup>103</sup>

The CAAF upheld the NMCCA holding that a naval servicemember has a reasonable expectation of privacy in government e-mail stored on a government server, making it binding upon all service courts.<sup>104</sup>

The facts in *Long (II)*<sup>105</sup> are particularly dramatic for a case of drug use in military. Lance Corporal (LCpl) (E-3) Long, U.S. Marine Corps, was charged with using ecstasy,<sup>106</sup> ketamine,<sup>107</sup> and marijuana<sup>108</sup> with fellow Marines in the barracks.<sup>109</sup> The evidence against LCpl Long consisted of eyewitness testimony<sup>110</sup> and e-mails that she had sent to her friends in which she discussed her fear of urinalysis testing and efforts to mask her drug use.<sup>111</sup> Officials investigating the case requested that the senior network administrator<sup>112</sup> retrieve LCpl Long's e-mails from the government server.<sup>113</sup> "No search warrant or authorization accompanied the request."<sup>114</sup> At trial, LCpl Long moved to suppress her e-mails as an unreasonable search and seizure and therefore in violation of her Fourth Amendment rights.<sup>115</sup>

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<sup>102</sup> *Long II*, 64 M.J. at 59.

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

<sup>104</sup> *Long I*, 61 M.J. 539.

<sup>105</sup> *Long II*, 64 M.J. 57.

<sup>106</sup> Ecstasy, or MDMA (methylenedioxymethamphetamine) "is a synthetic, psychoactive drug chemically similar to the stimulant methamphetamine and the hallucinogen mescaline. [Ecstasy] is an illegal drug that acts as both a stimulant and psychedelic, producing an energizing effect, as well as distortions in time and perception and enhanced enjoyment from tactile experiences." U.S. Drug Enforcement Administration, *MDMA (Ecstasy)*, <http://www.dea.gov/concern/mdmap.html> (last visited Sept. 24, 2007).

<sup>107</sup> Ketamine is an anesthetic (predominate legitimate use is as a veterinary anaesthetic) that is abused for its hallucinogenic properties. It produces effects similar to those associated with phencyclidine (PCP). *Ketamine Fast Facts*, <http://www.usdoj.gov/ndic/pubs4/4769/4769p.pdf> (last visited Sept. 24, 2007).

<sup>108</sup> Marijuana is the dry, shredded green/brown mix of flowers, stems, seeds, and leaves of the plant *Cannabis Sativa*. The main active chemical in marijuana is delta-9-tetrahydrocannabinol (THC) which produces a series of cellular reactions in the brain that lead to the high that users attribute to smoking marijuana. U.S. Drug Enforcement Administration, *Marijuana*, <http://www.dea.gov/concern/marijuana.html> (last visited Sept. 24, 2007).

<sup>109</sup> *Long I*, 61 M.J. at 540.

<sup>110</sup> Three enlisted Marines testified for the prosecution regarding the appellant's use of ecstasy, ketamine, and marijuana. *Id.* at 542. All three testified that LCpl Long had used ecstasy in their presence and two of them testified that they had observed the appellant using ketamine and marijuana in their presence. *Id.* The witnesses testified that they used ecstasy, ketamine, and marijuana, described the drugs and the effects they felt from using the drugs. *Id.*

<sup>111</sup> Three e-mail strings discussed LCpl Long's attempts to mask her drug use. *Id.* at 539. Testimony came from a fellow-Marine, Corporal "U" who had been friends with LCpl Long since 1998:

He testified that they kept in contact with each other primarily by e-mail. Cpl U testified that he had a face-to-face conversation with the appellant in August of 2000 in which she told him that there was a urinalysis upcoming, and at the time, [Long] appeared to be worried about it. Cpl U also stated that the appellant admitted to him during their conversation that she had used marijuana and ecstasy. He stated that the conversation continued thereafter by exchange of e-mails, copies of which were contained in pages 10 through 17 of Prosecution Exhibit 1.

*Id.*

<sup>112</sup> The network administrator, Headquarters, Marine Corps, was Mr. Flor Asesor. *Id.*

<sup>113</sup> The e-mails in question were retrieved as the result of a specific request by law enforcement officials to provide any e-mails related to LCpl Long's drug use. *Id.*

<sup>114</sup> *Id.* at 541.

<sup>115</sup> *Id.*

The senior network administrator for Headquarters, Marine Corps (HQMC) was the only witness to testify at the motion hearing.<sup>116</sup> He authenticated the login banner, which was displayed when a user logged onto his government office computer:

This is a Department of Defense computer system. This computer system, including all related equipment, networks and network devices (specifically including Internet access), are provided only for authorized U.S. Government use. DoD computer systems may be monitored for all lawful purposes, including to ensure that their use is authorized, for management of the system, to facilitate protection against unauthorized access, and to verify security procedures, survivability and operational security. Monitoring includes active attacks by authorized DoD entities to test or verify the security of this system. During monitoring, information may be examined, recorded, copied and used for authorized purposes. All information, including personal information, placed on or sent over this system may be monitored. Use of this DoD computer system, authorized or unauthorized, constitutes consent to monitoring of this system. Unauthorized use may subject you to criminal prosecution. Evidence of unauthorized use collected during monitoring may be used for administrative, criminal, or other adverse action. Use of this system constitutes consent to monitoring for these purposes.<sup>117</sup>

Mr. Asesor, the network administrator, explained the computer user requirements and his ability to monitor and access these individual accounts. For instance, he testified that each individual user of the computer system had a unique password known only to them—users were required to change their password every ninety days.<sup>118</sup> “Although issued for official use, personal use of Government computers and e-mail accounts was permissible as long as such use did not interfere with official business or constitute a prohibited use under departmental regulations.”<sup>119</sup>

Additionally, Mr. Asesor testified that he did not have access to user passwords, and could only access these accounts when he locked the user from the account.<sup>120</sup> As the network administrator, however, he was able to access the entire network or any part of it, including personal e-mails sent by individual users.<sup>121</sup> Despite the permissible monitoring as described in the Department of Defense (DOD) banner, he described a general policy to avoid examining e-mails and their respective content because of “privacy issues.”<sup>122</sup>

In response to her motion, the military judge found that the “network administrator’s actions constituted a search for evidence and that there was not actual consent by [LCpl Long] to this search.”<sup>123</sup> Additionally, he found there was “no search authorization issued based on probable cause.”<sup>124</sup> He denied the motion to suppress, finding that LCpl Long had no reasonable expectation of privacy in her e-mail that she had been sent on her government-issued computer and that had been “electronically stored” on the government’s server.<sup>125</sup>

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<sup>116</sup> *Id.*

<sup>117</sup> *Id.*

<sup>118</sup> *Id.*

<sup>119</sup> *Id.*

<sup>120</sup> *Id.*

<sup>121</sup> *Id.*

E-mails originating from or being received by a Government computer within the network went to a central Government system domain server for delivery to their intended recipients via the domain server network or the internet. Copies of sent e-mails remained on the domain server unless the user specifically set up their e-mail account to not save outgoing messages. Even e-mails thereafter deleted by the user could be retrieved using a “restore” function. A system administrator could access all e-mail accounts serviced by the domain server.

*Id.*

<sup>122</sup> *Long II*, 64 M.J. 57, 60 (2006).

<sup>123</sup> *Long I*, 61 M.J. at 541.

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

<sup>125</sup> *Id.* at 542. Under a Fourth Amendment analysis there first has to be a government intrusion, and if so, then the individual has to have a reasonable expectation of privacy. See generally Military Rules of Evidence 311(c) and 311(a)(2) respectively. MANUAL FOR COURTS-MARTIAL, UNITED STATES, MIL. R. EVID. 311(a)(2), 311(c) (2005) [hereinafter MCM].

The NMCCA reviewed the military judge's ruling using an abuse of discretion standard.<sup>126</sup> The court found no error regarding the military judge's findings of fact, and, therefore adopted them as their own.<sup>127</sup> But, the court took issue with the military judge's conclusion as to whether LCpl Long had a reasonable expectation of privacy in her government e-mail account.

The NMCCA concluded that the military judge should have suppressed the e-mails. "The court held that [LCpl Long] had a reasonable expectation of privacy in the e-mails sent and received on her government computer."<sup>128</sup> The court applied the two-part Supreme Court *Katz* test<sup>129</sup> adopted in *United States v. Monroe*<sup>130</sup> in examining LCpl Long's expectation of privacy as it relates to e-mail messages.<sup>131</sup> First, the court found that LCpl Long had a subjective expectation of privacy by implication of her use of the required password system.<sup>132</sup> Second the court found this expectation objectively reasonable vis-à-vis the law enforcement search.<sup>133</sup> Or, rather, she did not have an objectively reasonable expectation of privacy as towards networking monitoring for systems maintenance.<sup>134</sup>

The NMCAA conflated their analysis of LCpl Long's reasonable expectation of privacy regarding her government e-mail account.<sup>135</sup> For instance, the court relies on cases where there has been government intrusion or police participation to conclude an objectively reasonable expectation of privacy.<sup>136</sup> Their intrusion analysis is separate from the reasonable expectation of privacy analysis as established by *Katz v. United States*.<sup>137</sup> Instead, the NMCAA relies on "situational" reasonable expectation of privacy; that is, a reasonable expectation of privacy in relation to the network administrator, and, separately, law enforcement.<sup>138</sup>

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<sup>126</sup> *Long I*, 61 M.J. at 543 (citing *United States v. Ayala*, 43 M.J. 296, 298 (1995)). The court must determine whether the military judge's findings of fact are clearly erroneous or the conclusions of law are incorrect. The court reviews the question of whether the military judge correctly applied the law *de novo*. *Id.*

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

<sup>128</sup> *Id.* at 546.

<sup>129</sup> *Katz v. United States*, 389 U.S. 347 (1967). Justice Harlan's concurring opinion explains that a person's "reasonable expectation of privacy" has a subjective and objective component. *Id.* at 361. First, the individual must have "exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as 'reasonable.'" *Id.*

<sup>130</sup> *United States v. Monroe*, 52 M.J. 326 (2000) (holding that where a government owned system in which users login and consent to monitoring, under a totality of circumstances the user has no reasonable expectation of privacy in his e-mail messages or e-mail box at least from the personnel charged with the maintaining the system).

<sup>131</sup> *Long I*, 61 M.J. at 544 (citing *O'Connor*, the court does not see "[a]n expectation of privacy does not have to be an 'all-or-nothing' idea." *O'Connor v. Ortega*, 480 U.S. 709, 721 (1987). In fact they look to other factors to determine whether an expectation of privacy exists, e.g. "the amount of control the employee has over the area in question or the evidence seized; whether the employee took precautions to safeguard the privacy; and whether the employee could exclude others from the area or items of evidence." *Id.* at 543 (citing *United States v. Mendoza*, 281 F.3d 712, 715 (8th Cir.)).

<sup>132</sup> *Id.* at 544.

<sup>133</sup> *Id.* "Nowhere does the banner mention search and seizure of evidence of crimes unrelated to unauthorized use of a Government computer." *Id.*

<sup>134</sup> *Id.* The banner informs the user that the government computer system can be monitored for unauthorized use and protection of the system. *Id.*

<sup>135</sup> See generally Jamison, *supra* note 10, at 15. Lieutenant Colonel Jamison expertly dissects the NMCAA's analysis in *Long*'s case.

<sup>136</sup> See *Picha v. Wielgos*, 410 F. Supp. 1214 (N.D. Ill. 1976) "Where the police have significant participation, Fourth Amendment rights cannot leak out the hole of presumed consent to a search by an ordinarily non-governmental party." *Id.* at 1219. Basically there is a great expectation of privacy when police are involved; when the searches of students by law enforcement in instigating the search was critical in determining the students' limited expectation of privacy. *United States v. Pryba*, 502 F.2d 391 (D.C. Cir. 1974).

<sup>137</sup> *Katz v. United States*, 389 U.S. 347 (1967).

<sup>138</sup> The court compares the facts in *Monroe* with that of *Pryba*. In *Monroe*, system administrators discovered pornography while monitoring the system for the cause of a system slowdown. The court found the administrators properly turned over the evidence to law enforcement pursuant to the stored electronic communications, 18 U.S.C. § 2702 (2000). The stored electronic communications act offers statutory protection for system administrators who turn over electronic evidence of a crime to law enforcement when they inadvertently discover it in the course of their duties maintaining or operating the network computer system. *Long I*, 61 M.J. at 545 (citing *United States v. Monroe*, 52 M.J. 326, 328, 331 (2000)). In *Pryba*, which involved "the discovery of pornographic material by a commercial carrier as a result of [their] employee conducting a search of a package based on the suspicious actions of the sender, . . ."

Where the search is made at the behest of or with the assistance of law enforcement officers, there must be probable cause, and in appropriate instances an authorizing warrant, if the search is to pass constitutional muster. But where the search is made on the carrier's own initiative for its own purposes, Fourth Amendment protections do not obtain for the reason that only the activities of individuals or nongovernmental entities are involved. So frequently and so emphatically have the courts enunciated and applied these principles that, at least for the time being they must be regarded as settled law.

*Id.* at 545-46 (quoting *Pryba*, 502 F.2d at 398).

Therefore the court finds that once the administrator

becomes the agent of law enforcement, . . . either through conducting a search for criminal activity at their request or by permitting

The *Katz* test for when a reasonable expectation of privacy is violated is predicated on the person searched.<sup>139</sup> The two-prong test analyzes: (1) the actual expectation of privacy (subjective); and (2) whether that expectation of privacy is one that society is prepared to recognize as reasonable (objective).<sup>140</sup> In LCpl Long's case, the NMCAA finds no reasonable expectation of privacy vis-à-vis the network administrator because of the login banner warning of monitoring by the network administrator.<sup>141</sup> But, the court finds that LCpl Long possesses a reasonable expectation of privacy vis-à-vis law enforcement due to the lack of a warning regarding law enforcement monitoring of the e-mail network.<sup>142</sup> The court supports their assessment of LCpl Long's reasonable expectation of privacy by citing a greater expectation of privacy when law enforcement is involved in a search.<sup>143</sup>

The Navy Judge Advocate General disagreed, and certified two issues for review by CAAF.<sup>144</sup> The CAAF focused their analysis on the ultimate question of whether LCpl Long had a reasonable expectation of privacy in the e-mail communications sent and received via the Headquarters Marine Corps (HQMC) computer network server.<sup>145</sup> They held that LCpl Long did have a subjective expectation of privacy in these e-mails; that this expectation of privacy was objectively reasonable; and that NMCCA erred in admitting these e-mails as the trial court's error was not harmless beyond a reasonable doubt.<sup>146</sup>

The CAAF relied on the Supreme Court's holding in *O'Connor v. Ortega* in evaluating privacy expectations in the workplace.<sup>147</sup> *O'Connor* recognized the existence of privacy in the workplace where privacy expectations may be reduced by virtue of office practices, procedures, or regulation.<sup>148</sup> Here, CAAF finds that the policies and practices of Headquarters, Marine Corps reaffirmed, rather than reduced LCpl Long's expectation of privacy in her e-mails.<sup>149</sup>

The court considered a number of policy and practices in assessing LCpl Long's expectation of privacy in her government e-mail. First, CAAF gave significant weight to the network administrator's testimony in which he "repeatedly emphasized the agency practice of recognizing the privacy interests of users in their e-mails."<sup>150</sup> He supports his position by discussing the limited network access available to him for monitoring e-mails, and the fact that there was no monitoring of

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them to participate actively in his monitoring and administering function, he loses that special status afforded him under the law and becomes equally subject to the requirements of the 4th Amendment regarding probable cause and proper search authorization.

*Id.*

<sup>139</sup> *Katz*, 389 U.S. at 347, 361. ("[T]he Fourth Amendment protects people, not places.").

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

<sup>141</sup> *Long I*, 61 M.J. at 546.

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

<sup>143</sup> *Id.* See *supra* note 129.

<sup>144</sup> See *supra* sec. IA:

WHETHER THE NAVY-MARINE CORPS COURT OF CRIMINAL APPEALS ERRED WHEN THEY DETERMINED THAT, BASED ON THE EVIDENCE ADDUCED AT TRIAL, APPELLEE HELD A SUBJECTIVE EXPECTATION OF PRIVACY IN HER E-MAIL ACCOUNT AS TO ALL OTHERS BUT THE NETWORK ADMINISTRATOR.

WHETHER THE NAVY-MARINE CORPS COURT OF CRIMINAL APPEALS ERRED WHEN THEY DETERMINED THAT IT IS REASONABLE, UNDER THE CIRCUMSTANCES PRESENTED IN THIS CASE, FOR AN AUTHORIZED USER OF THE GOVERNMENT COMPUTER NETWORK TO HAVE A LIMITED EXPECTATION OF PRIVACY IN THEIR E-MAIL COMMUNICATIONS SENT AND RECEIVED VIA THE GOVERNMENT NETWORK SERVER.

*Long II*, 64 M.J. 57, 59 (2006).

<sup>145</sup> *Id.* at 62.

<sup>146</sup> *Id.* at 66 (In reviewing de novo whether admitting the e-mails was harmless error beyond a reasonable doubt, CAAF found it could not conclude that the erroneous admission of the e-mails was harmless beyond a reasonable doubt. "Perhaps most important to our determination of the harmless error is trial counsel's reliance on the e-mails in his presentation to the court members."). *Id.*

<sup>147</sup> *O'Connor v. Ortega*, 480 U.S. 709 (1987).

<sup>148</sup> *Long II*, 64 M.J. at 61. *O'Connor v. Ortega* holds that the need for a search warrant based on probable cause was not required for legitimate workplace searches conducted by supervisors. There are two situations where employer searches into zones of privacy are legitimate even if not supported by normal Fourth Amendment warrant and probable cause requirements: (1) where the search is for noninvestigatory, work related purposes; (2) search by the employer is investigatory, but involves matters of workplace misconduct. *Id.* (citing *O'Connor*, 480 U.S. at 715).

<sup>149</sup> *Id.* at 64.

<sup>150</sup> *Id.* at 63.

individual e-mail accounts because it is “a privacy issue.”<sup>151</sup> The CAAF found that this privacy issue was further supported by the fact that LCpl Long had a password known only to her.<sup>152</sup>

In fact, CAAF viewed the password requirements for e-mail as not only indicative of Long’s privacy expectation, but as a business practice that reinforces this expectation. Specifically, passwords are needed to access individual e-mail accounts and users need to change them periodically to ensure “privacy.”<sup>153</sup> This practice, in addition to the lenient HQMC policy for using government e-mail and e-mail servers for personal use, provides a foundation for CAAF’s “totality of the circumstances” analysis.<sup>154</sup>

The CAAF concluded their analysis by focusing on the importance of the login banner. Simply, the court agreed with NMCCA that LCpl Long consented to monitoring for systems maintenance, not for law enforcement purposes. By recognizing the specificity within a login banner’s language, CAAF creates a qualified expectation of privacy in government e-mails. The court therefore, found LCpl Long’s expectation of privacy in government e-mail as objectively reasonable by virtue of the rules, regulations, practices and procedures at HQMC.

Judge Crawford provided a vociferous dissent to the majority’s assessment of LCpl Long’s reasonable expectation of privacy.<sup>155</sup> She wrote that a reasonable expectation of privacy is not divisible: “Once frustration of the original expectation of privacy occurs, the Fourth Amendment does not prohibit governmental use of the . . . information . . . .”<sup>156</sup> Therefore, the fact that the communication was obtained for law enforcement purposes has no bearing on LCpl Long’s expectation of privacy.<sup>157</sup> Additionally, Judge Crawford was unpersuaded by the use of passwords for accessing her e-mail account.<sup>158</sup> Instead, the personal account was her work account and communication fell within the scope of work-related communications. Perhaps her most damning criticism was reserved for the network administrator and the majority’s reliance on his testimony. “The perception of one administrator in a department as large as the Department of Defense . . . is not binding on the Department itself. The belief of an administrator is even more attenuated considering how computers are used on the job.”<sup>159</sup>

The *Long II* decision is fundamentally a fact specific case. It can be distinguished from other CAAF cases in which the court did not find an objectively reasonable expectation of privacy in government e-mails. For instance, in *United States v. Monroe*, CAAF decided that there was no reasonable expectation of privacy from system administrators when the login banner warned that administrators could monitor usage.<sup>160</sup> The search in *Long II* went beyond monitoring by administrators and was a quest for evidence at the direction of law enforcement and therefore subject to Fourth Amendment probable cause requirements.<sup>161</sup>

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<sup>151</sup> *Id.*

<sup>152</sup> *Id.* at 64.

<sup>153</sup> *Id.* “The e-mails retrieved in this case were from Appellee’s account on an unclassified government computer system on which she was authorized limited personal use and were not obtained for maintenance or monitoring purposes.” *Id.*

<sup>154</sup> *Id.*

<sup>155</sup> *Id.* at 67 (Crawford, J., dissenting).

<sup>156</sup> *Id.* (citing *Randolph II*, 547 U.S. 103, 132 (2006) (quoting *United States v. Jacobsen*, 466 U.S. 109, 117 (1984))). *See supra* sec. I.A.

<sup>157</sup> *Id.* at 67-68.

[Long] in the present case was aware of and consented to the monitoring and archiving of electronic communications originating from her government computer. She therefore could not have a reasonable expectation of privacy in those communications. That the communications were obtained specifically for law enforcement purposes has no bearing on her expectation of privacy.

*Id.*

<sup>158</sup> *Id.* at 69.

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

<sup>160</sup> *Id.* (citing *United States v. Monroe*, 52 M.J. 326, 330 (2000)).

<sup>161</sup> *Id.* at 65.

## 1. Search Authorizations for Computer Files in Light of *United States v. Long*

The question then becomes: Does the *Long II* case require a search authorization in every instance where user e-mail is sought from a government computer or network? What framework should the judge advocate in the field or fleet follow? The United States Navy Deputy Assistant Judge Advocate General (Navy Deputy AJAG-Criminal Law) has made sage recommendations in this regard.<sup>162</sup>

The Navy Deputy AJAG-Criminal Law recommends the following five factor Fourth Amendment analysis. First, the most important factor is “the purpose of the search.”<sup>163</sup> Citing the Supreme Court’s decision in *O’Connor v. Ortega*, he reminds us that “the traditional Fourth Amendment and probable cause requirements are not necessary: (1) when the search is for non-investigatory, work-related purposes; and (2) when the search is investigatory but the individual is suspected for workplace misconduct.”<sup>164</sup> Searches for “work-related purposes” and “workplace misconduct” are distinguished from searches for law enforcement purposes.<sup>165</sup> In *United States v. Simons*, for example, the Fourth Circuit, “upheld investigatory workplace misconduct searches, often for child pornography, of government computers conducted without a warrant even if a criminal investigation is ongoing provided that the search is conducted by a supervisor.”<sup>166</sup>

Second, the language of the login banner is crucial in assisting courts in determining whether there is a reasonable expectation of privacy.<sup>167</sup> This was certainly the issue in the *Long II* case, which determined a reasonable expectation of privacy as it related to law enforcement searches “when the banner warned that only administrators could monitor usage.”<sup>168</sup> The memorandum also notes the 11th Circuit case of *United States v. Angevine* “stating no expectation of privacy when banner warned ‘all electronic mail messages are presumed to be public records and contain no right to privacy.’”<sup>169</sup> Currently, the Department of Defense (DOD) is revising the login banner to accommodate the *Long II* holding and provide uniformity across all service branches.<sup>170</sup>

Third, the courts look at user contracts.<sup>171</sup> For example, in *United States v. Maxwell*, the CAAF found that the servicemember had a reasonable expectation of privacy in his American Online subscriber information because the AOL user agreement “stated that privacy protection was provided as part of the service.”<sup>172</sup>

Fourth, the courts evaluate the network administrator’s practices, policies, and procedures.<sup>173</sup> In *Long II*, the court devoted a substantial amount of their analysis emphasizing the administrator’s recognition of the user’s privacy interest in e-mail.<sup>174</sup> Of note is CAAF’s reliance on only one of many DOD network administrators in making their decision.<sup>175</sup> If an

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<sup>162</sup> E-mail Memorandum, Deputy Assistant Judge Advocate General (Criminal Law), to All Navy and Marine Corps Judge Advocates, subject: Search Authorizations for Computer Files in Light of *United States v. Long*, 64 M.J. 57 (C.A.A.F. 2006), Part II (1 June 07) [hereinafter E-mail Memorandum] (on file with author), available at <https://wwwa.nko.navy.mil/portal/splash/index.jsp>.

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

<sup>164</sup> *Id.* (citing *O’Connor v. Ortega*, 480 U.S. 709, 725-26 (1987)).

<sup>165</sup> *Id.* (citing *Monroe*, 52 M.J. at 328).

<sup>166</sup> *Id.* (citing *United States v. Simons*, 206 F.3d 392, 400 (4th Cir. 2000)). The memorandum also notes the holding in *United States v. Slanina*, 283 F.3d 670, 679 (5th Cir. 2002), where “the Fifth Circuit agreed that such a workplace misconduct search for child pornography was proper even when the supervisor was a law enforcement agent.”)

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

<sup>168</sup> *Id.* (citing *Long II*, 64 M.J. 59, 63 (2006)).

<sup>169</sup> *Id.* (citing *United States v. Angevine*, 281 F.3d 1130, 1134 (10th Cir. 2002)).

<sup>170</sup> E-mail from Richard Aldrich, Contractor, Office of the Assistant Secretary of Defense, Networks and Information Integration, Defense-wide Information Assurance Program, to Major Stephen Stewart, USMC, Professor, The Judge Advocate General’s Legal Center and School, U.S. Army (21 June 2007, 05:08 PM) (on file with author). Revisions continue in regards to the banner. Concerns have been made regarding the professional responsibility considerations; to wit: attorney-client privilege in regard to a reasonable expectation of privacy and the privacy of communications. *Id.*

<sup>171</sup> E-mail Memorandum, *supra* note 162.

<sup>172</sup> *Id.* (citing *United States v. Maxwell*, 45 M.J. 406, 417 (1996)).

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

<sup>174</sup> *Id.* (citing *Long II*, 64 M.J. 57, 64 (2006)).

<sup>175</sup> *Long II*, 64 M.J. at 64.

administrator testifies consistent with DOD information system policy,<sup>176</sup> then a warrant prior to looking at e-mails is less probable.<sup>177</sup>

Fifth, federal courts have looked to the employee's relationship to the item seized in assessing privacy interests. In *United States v. Angevine*, the 11th Circuit observed that by deleting computer files, the employee "suggested he did not intend to keep the items private."<sup>178</sup> Therefore, a service member who keeps items on a shared drive where others may view it, vice one who keeps items on an individual drive and labels the materials "private" would have a lesser expectation of privacy.<sup>179</sup>

The type of stored information, especially contraband, is another factor to consider.<sup>180</sup> The court in *Angevine* notes that it "had never stated the Fourth Amendment protects an employee who downloads child pornography in violation of the employer's computer policy." In this case the employee was admonished not to download material in violation of federal law. Contrarily, the *Long II* case "centered on e-mail admissions unrelated to a violation of the employer's policy"—her personal messages sent via e-mail were authorized.<sup>181</sup>

Fourth Amendment search and seizure law is fact dependent, and instances involving stored electronic communications are not exceptions. The greater concern for government lawyers is creating an expectation of privacy in e-mail when none is intended. Therefore evaluating these situations with the above listed factors will facilitate a decision as to whether a search authorization is indeed necessary.

## B. Scope of Voluntary Consent in Computer Search Following Illegal Search

In *United States v. Conklin*, the CAAF looks beyond the question of whether a servicemember has a reasonable expectation of privacy in government e-mail, to the scope of consent following an initial illegal search.<sup>182</sup> What Conklin's case challenges is the perception that consent cures all prior improper searches and seizures.

Airman First Class (A1C) Conklin was a student at Keesler Air Force Base (AFB) as part of a five-week training program.<sup>183</sup> He was assigned to an on-base dormitory room.<sup>184</sup> As part of a routine and random inspection, A1C Conklin's military training leader (MTL) inspected A1C Conklin's room.<sup>185</sup> After having inspected A1C Conklin's dresser, A1C Conklin's computer monitor powered up automatically and the display had a picture of an actress's exposed breasts.<sup>186</sup> This image was a violation of Keesler AFB dormitory regulations that prohibited the open display of nude or partially nude persons.<sup>187</sup> Once the image display came up, the MTL contacted a senior MTL who started searching A1C Conklin's computer.<sup>188</sup>

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<sup>176</sup> E-mail Memorandum, *supra* note 162. Department of Defense policy that users have no right of privacy in any information that is transmitted, received, or stored by a DOD information system. *Id.*

<sup>177</sup> *Id.*

<sup>178</sup> *Id.* (citing *United States v. Angevine*, 281 F.3d 1130, 1134 (11th Cir. 2002)).

<sup>179</sup> *Id.* (Pay attention to "(1) the employee's relationship to the items seized; (2) whether the item was in the immediate control of the employee when it was seized; and (3) whether the employee took actions to maintain his privacy in the item."). *Angevine*, 281 F.3d at 1134.

<sup>180</sup> E-mail Memorandum, *supra* note 162.

<sup>181</sup> *Id.* (citing *Long II*, 64 M.J. 57, 64 (2006)).

<sup>182</sup> *United States v. Conklin*, 63 M.J. 333 (2006).

<sup>183</sup> Steven L. Conklin was a nineteen-year-old Airman First Class. *Id.* at 334.

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

<sup>185</sup> *Id.*

<sup>186</sup> *Id.*

<sup>187</sup> *Id.* at 335. KEESLER AIR FORCE BASE INSTR. 32-6003, DORMITORY SECURITY AND LIVING STANDARDS FOR NON-PRIOR SERVICE AIRMEN 4.2.3 (30 Aug. 2003).

<sup>188</sup> *Conklin*, 63 M.J. at 335.

The senior MTL found a folder titled “porn” and a subfolder titled “teen.”<sup>189</sup> He opened six to eight joint photographic experts group (JPEG) files, each containing images of young nude females.<sup>190</sup> At this time, the senior MTL secured the room and notified the Air Force Office of Special Investigations (OSI).<sup>191</sup>

Two OSI agents contacted A1C Conklin at the chow hall and asked for his consent to search his room and computer.<sup>192</sup> The agents did not tell A1C Conklin about the earlier inspection.<sup>193</sup> He consented to the search of his room and of his computer for evidence of child pornography.<sup>194</sup> The OSI agents found a large number of images of child pornography and A1C Conklin subsequently confessed to the agents that he had borrowed some compact discs containing adult and child pornography from a friend and had copied those discs onto his computer.<sup>195</sup>

At trial, A1C Conklin moved to suppress the evidence based on the theory that the derivative evidence was seized as a result of an illegal search of his computer.<sup>196</sup> Conklin unsuccessfully argued that the OSI agents went beyond the bounds of an inspection and that the actions of the senior MTL were actually a subterfuge for a search.<sup>197</sup> The military judge denied his motion and held that the unique training environment at Keesler AFB justified more intrusive inspections than would normally be permitted in a non-training environment.<sup>198</sup> Conklin was convicted of possession of child pornography in violation of the Child Pornography Prevention Act of 1996,<sup>199</sup> and received a bad conduct discharge, reduction to the lowest enlisted pay grade, and confinement for six months.<sup>200</sup>

As a threshold matter, the Air Force Court of Criminal Appeals (AFCCA) held that A1C Conklin had a reasonable expectation of privacy in his personal computer, even though the computer was located in his government dormitory room.<sup>201</sup> With regard to the open display of the partially nude actress, the AFCCA concluded that A1C Conklin had forfeited his right to privacy under the “plain view” doctrine.<sup>202</sup> However, the court held that he maintained his right to privacy as to the other non-displayed content on his personal computer.<sup>203</sup> The stated purpose of the Keesler AFB dormitory instruction, which authorized random inspections, was to ensure “standards of cleanliness, order, décor, safety, and security.”<sup>204</sup> Since the searching of the computer had nothing to do with “cleanliness, décor, safety, or security,” the AFCCA held that the senior MTL violated the scope of the inspection under Military Rule of Evidence 313<sup>205</sup> because the search of the computer was unrelated to the purpose of the instruction.<sup>206</sup>

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<sup>189</sup> *Id.*

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

<sup>191</sup> *Id.*

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

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

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

<sup>195</sup> Airman First Class Conklin explained that he had copied several discs which he had received from another airman. *Id.* The disc contained images of mostly adults, but some appeared to be of girls between the ages of thirteen and seventeen. He stated that he intended, but failed, to delete those images. *Id.*

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

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

<sup>198</sup> *Id.*

<sup>199</sup> 18 U.S.C. § 2252A (2000).

<sup>200</sup> *Conklin*, 63 M.J. at 335. “The convening authority remitted the punitive discharge pursuant to a decision of the Air Force Clemency and Parole Board.” *Id.*

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

<sup>202</sup> *Id.* “The rule permitting a police officer’s warrantless seizure and use as evidence of an item observed in plain view from a lawful position or during a legal search when the officer has probable cause to believe that the item is evidence of a crime.” BLACKS LAW DICTIONARY, *supra* note 57, at 1171. *See, e.g., Arizona v. Hicks*, 480 U.S. 321 (1987).

<sup>203</sup> *Conklin*, 63 M.J. at 335.

<sup>204</sup> *Id.*

<sup>205</sup> MCM, *supra* note 125, MIL. R. EVID. 313.

<sup>206</sup> *Conklin*, 63 M.J. at 335.

Consequently, AFCCA held that the senior MTL violated A1C Conklin's rights under the Fourth Amendment by searching his computer.<sup>207</sup> Nevertheless, the court concluded that Conklin's consent was voluntary and his voluntary consent effectively waived any expectation of privacy that A1C Conklin had in his computer.<sup>208</sup>

The CAAF acknowledged A1C Conklin's privacy interest in his personally owned computer, located on a military installation, in a military dormitory room shared with another servicemember.<sup>209</sup> While recognizing the limited expectation of privacy in a barracks room,<sup>210</sup> the CAAF acknowledged that an individual has a reasonable expectation of privacy in files kept on a personally owned computer.<sup>211</sup> Therefore, the court rejected the analogy that the search of the computer files is like searching a desk drawer in a "neat and orderly" military inspection.<sup>212</sup> Instead, CAAF treated computer files as if they are contents of a non-transparent container.<sup>213</sup> Therefore, opening of the computer files by the senior MTL went beyond the scope of an authorized inspection.<sup>214</sup>

But CAAF granted review, and focused their attention, as to whether consent to a subsequent search is the antidote to the poison created by the earlier unlawful search.<sup>215</sup> In other words, did A1C Conklin's consent to search cure the earlier Fourth Amendment violation?<sup>216</sup> The court held, in quite understated fashion, that consent to a search does not cure all ills.<sup>217</sup> In fact, "[i]f appellant's consent, albeit voluntary, is determined to have been obtained through exploitation of the illegal entry, it cannot be said to be sufficiently attenuated from the taint of that entry."<sup>218</sup>

The court used *Brown v. Illinois* factors to determine if consent was an independent act of free will, not voluntariness, to remove the taint of the illegal search.<sup>219</sup> The Supreme Court in *Brown* held that the question of free will must be answered on the facts of each case looking at (1) the temporal proximity of the unlawful police activity and the subsequent act (consent); (2) the presence of intervening circumstances; and (3) the purpose and flagrancy of the official misconduct.<sup>220</sup>

Applying this three-prong test, the CAAF determined that all three favor A1C Conklin.<sup>221</sup> First, the court identified the three hour time delay between the time that the Senior MTL, Technical Sergeant Schlegel (TSgt) "began opening files on [A1C Conklin's] computer and the time [Conklin] consented to the search" as the temporal proximity between the illegal conduct and the consent.<sup>222</sup> The court opines, "it appears that everything happened before lunch."<sup>223</sup>

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<sup>207</sup> *Id.*

<sup>208</sup> *Id.* at 337.

<sup>209</sup> *Id.*

<sup>210</sup> *Id.* The CAAF reminds us that "the threshold of a barracks/dormitory room does not provide the same sanctuary as the threshold of a private room." (citing *United States v. McCarthy*, 38 M.J. 398, 403 (C.M.A. 1993) (holding that "barracks room does not afford the same protections from arrest as a private room.")). *Id.*

<sup>211</sup> *Id.*

<sup>212</sup> *Id.*

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

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

<sup>215</sup> *Id.* at 334. "Evidence derivative of an unlawful search, seizure, or interrogation is commonly referred to as the 'fruit of the poisonous tree' and is generally not admissible at trial." *Id.* (citing *Nardone v. United States*, 308 U.S. 338, 341 (1939)).

<sup>216</sup> *Id.* at 338.

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

<sup>218</sup> *Id.* (quoting *United States v. Khamsook*, 57 M.J. 282, 290 (2002)).

<sup>219</sup> *Brown v. Illinois*, 422 U.S. 590 (1975).

<sup>220</sup> *Id.* at 603. The CAAF also cites a Fifth Circuit case as almost identical to the Conklin fact pattern which states:

To determine whether the defendant's consent was an independent act of free will, breaking the causal chain between the consent and the constitutional violation, we must consider three factors: (1) the temporal proximity of the illegal conduct and the consent; (2) the presence of intervening circumstances; and (3) the purpose and the flagrancy of the initial misconduct.

*Conklin*, 63 M.J. at 338-39 (citing *United States v. Hernandez*, 279 F.3d 302, 307 (5th Cir. 2002)).

<sup>221</sup> *Conklin*, 63 M.J. at 339.

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

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

Second, the CAAF found no intervening circumstances sufficient to remove the taint of the initial illegal search.<sup>224</sup> The court relies on a but-for analysis. The OSI agents would not have been interested in talking to AIC Conklin but for “the information relayed to them as a direct result of the unlawful search that had just taken place.”<sup>225</sup> “There were no intervening circumstances that would sever the causal connection between the two searches.”<sup>226</sup> In other words, the two searches were not independent.

Finally, the court examined the government’s conduct and admitted it was a close call as to whether the action of TSgt Schlegel was flagrant. The CAAF found Schlegel’s conduct unnecessary and unwise.<sup>227</sup> Although finding no bad motive or intent,<sup>228</sup> TSgt Schlegel had several legitimate options available to him to which he failed to avail himself.<sup>229</sup> For example, instead of expanding the scope of a legitimate inspection into private files on a personal computer, he could have secured the computer and charged the AIC Conklin for the open display of the nude image, presented the evidence to the commanding officer for a search authorization, then consulted with the staff judge advocate.<sup>230</sup>

Thus, seeking guidance, the court looked to the similar fact pattern of *United States v. Hernandez*.<sup>231</sup> In *Hernandez* the Fifth Circuit held that the police officer’s conduct was not flagrant, but the drug seizure was still inadmissible because “the causal connection between the violation and the consent was not broken.”<sup>232</sup> The CAAF, likewise, saw Conklin’s situation in the same light where they concluded there was a causal connection between the illegal search and the act of obtaining consent.<sup>233</sup> Furthermore, the court concluded that the illegal search is the only factor that led to the request for consent, and therefore the “exploitation of the information obtained from the illegal search was flagrant even if the search itself was not.”<sup>234</sup> Therefore, [AIC Conklin’s] “consent was not ‘an independent act of free will’<sup>235</sup> sufficient to cure the poisonous effects of the unlawful search.”<sup>236</sup>

In sum, a divided CAAF concluded, “that the military judge erred in not granting [Conklin’s] motion to suppress.”<sup>237</sup> It further reaffirmed the fundamental purpose of the exclusionary rule as to deter improper law enforcement conduct—citing the request for Conklin’s consent as a direct result of, and immediately following, an unlawful search.<sup>238</sup>

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

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

<sup>226</sup> *Id.*

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

<sup>228</sup> *Id.* at 335. Technical Sergeant Schlegel had previously sought legal advice from AFOSI in a similar incident, and relied upon the advice in Conklin’s case. Unfortunately, the advice was erroneous. *Id.*

<sup>229</sup> *Id.*

<sup>230</sup> *Id.*

<sup>231</sup> *Id.* at 340 (citing *United States v. Hernandez*, 279 F.3d 302 (5th Cir. 2002)).

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

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

<sup>234</sup> *Id.*

<sup>235</sup> *Id.* (citing *Hernandez*, 279 F.3d at 307).

<sup>236</sup> *Id.*

<sup>237</sup> *Id.* Judges Baker and Crawford provide a robust dissent. Both jurists identify flaws in the majority’s interpretation of the *Brown* factors. Specifically, in regard to the temporal proximity prong, the dissent identifies three factors the majority failed to consider in assessing whether Conklin consented of his own free will. First, that Conklin was not in custody when he was asked for consent. Second, he did not know of the prior unlawful act, and therefore consented out of a “sense of futility.” (citing *Commonwealth v. Pileeki*, 818 N.E.2d 596, 600 (2004) (quoting *Darwin v. Connecticut*, 391 U.S. 346, 351 (1968))). Third, Conklin was apprised that the search was to look for child pornography, and thus aware of the request context. Next, the dissent argues that the majority misapplies the exclusionary rule because the illegal search was not intentional and flagrant. Additionally, the dissent cites *Stone v. Powell*, which states the exclusionary rule has “never been interpreted to proscribe the introduction of illegally seized evidence in all proceedings or against all persons.” *Id.* at 341 (citing *Stone v. Powell*, 428 U.S. 465, 488 (1976)). Hence, “applying the concepts of proportionality essential to justice embodied in the exclusionary rule, the legal policy purposes of the exclusionary rule would not otherwise be served through application of the rule in this case.” *Id.* at 342.

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

### III. Looking Ahead for 2007

The 2006 symposium article insightfully saw that judicial term as one of culmination and decision where the previous year was one of incubation.<sup>239</sup> The decisions were indeed bold in terms of consent, reasonable expectation of privacy, and the scope of suppression in “knock and announce” rule violations.<sup>240</sup> The upcoming term of court does not have the excitement or pregnancy that last year’s term possessed. Nonetheless, the Supreme Court granted certiorari on a California Fourth Amendment case which addresses the issue of standing. Specifically, whether a passenger in a car, when the car was momentarily stopped by a police officer for a traffic stop, was seized for Fourth Amendment purposes when additional facts do not indicate he was the subject of the officer’s investigation.

In *People v. Brendlin (Brendlin I)*,<sup>241</sup> officers stopped a car to check its registration, and asked the driver and passenger for their identification.<sup>242</sup> One of the officers recognized the passenger as one of the Brendlin brothers, Scott or Bruce, who had absconded from parole supervision. During the inquiry, the passenger falsely identified himself as “Bruce Brown.”<sup>243</sup> The officer returned to his police vehicle and verified that Bruce Brendlin was a parolee at large and had an outstanding no-bail warrant for his arrest.<sup>244</sup> The police then placed Brendlin under arrest. Afterwards, the police found drug paraphernalia.<sup>245</sup>

Brendlin moved to suppress the drug evidence seized from the Buick.<sup>246</sup> The trial court determined that he had not been seized within the meaning of the Fourth Amendment until the police officer took him into custody, and therefore, “lacked standing to suppress the items seized from the Buick.”<sup>247</sup> The California Court of Appeal reversed and held that a traffic stop necessarily results in a detention, and hence a seizure.<sup>248</sup> The California Supreme Court reversed and emphasized that unless the passenger of a vehicle was the subject of the traffic stop investigation or show of authority, he is not seized.<sup>249</sup>

As Brendlin argued before the California Supreme Court, the Supreme Court has not decided whether a passenger is necessarily seized by virtue of a traffic stop (although dicta from the Court has “strongly hinted” in that direction).<sup>250</sup> The Supreme Court moved towards deciding this issue. The Court granted certiorari to decide whether a traffic stop subjects a passenger, as well as a driver, to Fourth Amendment seizure.<sup>251</sup>

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<sup>239</sup> Jamison, *supra* note 10, at 25.

<sup>240</sup> See *Randolph II*, 547 U.S. 103 (2006), *Long II*, 64 M.J. 57 (2006), and *Hudson v. Michigan*, 126 S. Ct. 2159 (2006), respectively.

<sup>241</sup> *People v. Brendlin (Brendlin I)*, 136 P.3d 845 (Cal. 2006), *cert. granted*, *Brendlin v. California (Brendlin II)*, 127 S. Ct. 1145 (2007).

<sup>242</sup> *Id.* at 847.

<sup>243</sup> *Id.*

<sup>244</sup> *Id.*

<sup>245</sup> *Id.*

Police found an orange syringe cap on defendant’s person during a search incident to arrest. They found two hypodermic needles (one of which was missing a syringe cap), two baggies containing a total of 12.43 grams of marijuana, and a baggie containing 0.46 grams of methamphetamine on [the driver’s] person during a patsearch and a subsequent search incident to her arrest. Materials used in manufacturing methamphetamine were found in the back seat of the Buick.

*Id.*

<sup>246</sup> *Id.*

<sup>247</sup> *Id.*

<sup>248</sup> *Id.*

<sup>249</sup> *Id.* at 855.

<sup>250</sup> *Id.* at 850. The court cites *Delaware v. Prouse* as an example where the Supreme Court “observed that ‘stopping an automobile and detaining its occupants constitute a ‘seizure’ within the meaning of [the Fourth Amendment], even though the purpose of the stop is limited and the resulting detention quite brief.’” 440 U.S. 648, 653 (1979).

<sup>251</sup> *Brendlin II*, 127 S. Ct. 1145 (2007). Since submitting this article for publication, the Supreme Court decided *Brendlin v. California (Brendlin III)* and held that when a “police officer makes a traffic stop . . . a passenger is seized [in addition to the driver] as well and so may challenge the constitutionality of the stop.” *Brendlin v. California (Brendlin III)*, 127 S. Ct. 2400, 2403 (2007).

#### IV. Conclusion

The jurists continue to seek clarity in the verbiage of ambiguity that is the Fourth Amendment. This past term was no exception, and indeed yielded additional case law to assist citizens, police officers, and lawyers alike for interpreting our Fourth Amendment protections. As has been noted before, search and seizure law is “largely one of defense, retrenchment, counterattack.”<sup>252</sup> This year the law did not disappoint. The issues of consent, reasonableness, and use of the exclusionary rule dominated the Supreme Court and CAAF’s Fourth Amendment docket. Likewise, next year’s docket will provide a new offensive for Fourth Amendment clarity.

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<sup>252</sup> Lieutenant Colonel Ernest Harper, USMC, *Defending the Citadel of Reasonableness: Search and Seizure in 2004*, ARMY LAW., Apr. 2005, at 1.